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ADMINISTRATIVE ECONOMIC LAW AND PUBLIC ECONOMIC LAW – PERSPECTIVE OF THE POLISH SCIENCE OF LAW

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After the transformation of the political and economic system at the end of the 1980s and the beginning of the 1990s, Polish science of law has developed two concepts for capturing legal norms reflecting the state interference with economic activities – administrative economic law and public economic law. Administrative economic law is defined as a set of norms governing the position and situation of public administration bodies, established to define the status of economic entities, it focuses mainly on relations between public administration bodies and private economic operators (entrepreneurs), where the former are (in principle) empowered to define the legal position of economic operators. Public economic law is a set of legal norms governing how the state and its bodies influence the economy. It deploys both «hard» and «soft» strategies to influence the economy. The fundamental differences between administrative economic law and public economic law refer to issues such as the scope of both sets of legal norms and their status within the legal system. After 1989, the concepts of administrative economic law and public economic law in Polish science of law have been competing. Nowadays, public economic has prevailed, as it better fits the Polish economic system defined in Art. 20 of the Polish Constitution.
Keywords: administrative economic law; public economic law; economic law; economic activity; Polish law; branch of law.

АДМІНІСТРАТИВНЕ ГОСПОДАРСЬКЕ ПРАВО ТА ПУБЛІЧНЕ ГОСПОДАРСЬКЕ ПРАВО – ПЕРСПЕКТИВА ПОЛЬСЬКОЇ НАУКИ ПРО ПРАВО

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Досліджено процес трансформації політичної та економічної систем Польщі наприкінці 1980-х – на початку 1990-х рр. Виявлено, що в цей період сформувались дві наукові концепції для фіксації правових норм, що відображають втручання держави в економічну діяльність – адміністративне господарське право та публічне господарське право. Адміністративне економічне право визначається як сукупність норм, що регулюють становище органів державного управління, створених для визначення статусу суб'єктів господарювання, воно зосереджується головним чином на відносинах між органами державного управління та приватними економічними операторами (підприємцями). Публічне господарське право – це сукупність правових норм, що регулюють вплив держави та її органів на економіку. Обґрунтовано, що принципові відмінності між адміністративним господарським правом та публічним господарським правом стосуються таких питань, як сфера дії обох сукупностей правових норм та їх статус у системі права. Досліджено особливості нормативно-правового забезпечення адміністративного господарського права та публічного господарського права в Польщі.
Ключові слова: адміністративне економічне право; публічне економічне право; господарське право; господарська діяльність; польське право; галузь права.

Transformation of the political and economic system in Central and Eastern Europe at the end of the 1980s and the beginning of the 1990s and the related far-reaching legal changes necessitated a new approach to the legal system structure, particular to its division into branches. While the traditional division to civil, criminal and administrative law remained unaffected; the adoption of a new economic system – the free market economy – required remodelling of some areas of the legal system comprising legal norms which govern the functioning of the country's economy.

Before 1989, the Polish science of law approach to economic issues was principally dualistic, based on the distinction (most commonly) between the administrative law of economic relations (later replaced by the law of the national economy management) and the law of transactions in the socialised economy. The administrative law of economic relations (prawo administracyjne stosunków gospodarczych) governed the organisation of the state's economic institutions and the purposes of this organisation, including economic planning. Although the administrative law of economic relations was a branch of administrative law, its distinctive features, setting it apart from the administrative law as a whole, were often highlighted in the scholarly papers (Rabska, 1970, p. 24–27). In the 1970s and

1980s, the concept of the law of national economy management (prawo zarządzania gospodarką narodową) gained popularity (Jaśkiewicz, 1980). It went beyond the limits of administrative law. Yet, its core purpose was still to provide a legal framework for the functioning of the national economy, taking into account the role of the economy management institutions (Kosikowski, 1990, p. 82). While the administrative law of economic relations and the law of the national economy management focused on the structure and management of the national economy, the law of transactions in a socialised economy (prawo obrotu uspołecznionego) governed the internal economic relations among socialised economy entities (Buczkowski, Nowakowski, 1979), including, *inter alia*, regulations on contracts involved in economic transactions (Włodyka, 2009, p. 21). Since the relations among socialised economy entities were governed by the Civil Code, the law of transactions in the socialised economy was perceived as a field of civil law, despite certain autonomy in terms of research and didactics (Frąckowiak, 2015, p. 53). The idea of approaching all legal regulations concerning the economy as a separate branch of law called economic law (prawo gospodarcze) has not been accepted in Poland. In the socialist block, the concept of economic law was found in the legislation of Czechoslovakia, after the Economic Code (Hospodářský zákoník, 1964) was adopted in 1964. Economic law was also broadly discussed in the Soviet doctrine.

Dualism in the legal approach to governing economic relations prevailed in Polish science of law after the political transformation started in 1989. On 1st January 1989, the Act on Economic Activity of 23rd December 1988 came into force. Article 1 of the Act defined the economic freedom principle – «everyone is allowed to and can freely engage in and conduct economic activity on equal terms, in compliance with applicable provisions of law« (Ustawa o działalności gospodarczej, 1988). The economic system with a centralised control based on state economic institutions was replaced with the market economy, reflected in Art. 20 of the Polish Constitution adopted in 1997, stating that the economic system of the Republic of Poland is based on the social market economy founded on freedom of economic activity, private ownership, and solidarity, dialogue, and cooperation among social partners (Konstytucja, 1997). In new economic conditions, the role of the law of transactions in the socialised economy was taken over by commercial law (prawo handlowe), drawing on the tradition of commercial law functioning in Poland in the years 1918–1939 (Frąckowiak, 2018, p. 20), based on the Commercial Code of 1934 (Kodeks handlowy, 1934). Commercial law focuses on the regulations governing the structure and operation of entities engaging in business activities (mainly commercial companies) and on their horizontal relations, generally based on contracts. Following the principle of unity of the civil law, commercial law is considered a branch of civil law and – consequently – also of the private law (Kidyba, 2013, p. 4–5). A much more complicated issue is the «continuity», after 1989, of the administrative law of economic relations/ the law of the national economy management. Polish science of law has developed two concepts for capturing legal norms reflecting the state interference with economic activities – administrative economic law and public economic law. The present article discusses the basics of both concepts and the differences between them.

The concept of administrative economic law (administracyjne prawo gospodarcze) is aligned with the pluralist perspective on economic law. From a pluralistic perspective, economic law comprises sets of legal norms concerning specific thematic areas, governing economic activity, distinguished within the basic, traditional branches of law (Grabowski, 2018, p. 19). A pioneer of pluralistic perspective on economic law was a German author, E. R. Huber, who distinguished five branches of economic law: private economic law, criminal economic law, procedural economic law, administrative economic law and constitutional economic law (Huber, 1953, p. 12–19). In this context, administrative economic law should be considered a component of administrative law pertaining to economic issues. Administrative economic law is, therefore, defined as a set of norms governing the position and situation of public administration bodies, established to define the status of economic entities – hence, it focuses mainly on relations between public administration bodies and private economic operators (entrepreneurs), where the former are (in principle) empowered to define the legal position of economic operators (Kieres, 2009, p. 33).

Public economic law (publiczne prawo gospodarcze) is distinguished in a dualistic perspective on economic law (Grabowski, 2018, p. 19). The perspective transposes the traditional dichotomy between public law and private law into the realm of economic law. Hence, economic law would be comprised of a public law component (public economic law) and a private law component (private economic law). The division into public law and private law is not a very sharp one and based

on diversified criteria. Consequently, the science of law does not provide a consistent definition of public economic law. Definitions of public economic law centre around the notion of the state's «intervention» in the economy and the state's «influence» on the economy. According to J. Grabowski, public economic law encompasses legal regulations defining the subject-matter scope, legal norms and form of intervention (interventionism) of the state in economic (business) relations as well as legal and constitutional aspects of the basic principles on which the social and economic system is founded (Grabowski, 2018, p. 20). To T. Demendecki, public economic law is a set of legal norms governing how the state and its bodies influence the economy (Demendecki, 2011, p. 11).

The fundamental differences between administrative economic law and public economic law boil down to two issues – the scope of both sets of legal norms and their status within the legal system. Regarding the first difference, it should be noted that public economic law covers a broader set of legal norms than administrative economic law. Some authors point out that public economic law comprises two principal components (sub-sets): administrative economic law and constitutional economic law (Strzyczkowski, 2011, p. 52; Snażyk, Szafrański, 2018, p. 4). Constitutional economic law pertains mainly to the basic principle of the public economic law – the freedom of economic activity principle already mentioned above, provided for in Art. 20 and in Art. 22 of the Polish Constitution, stating that any restriction of freedom of economic activity may be imposed only via the legislative procedure and only when justified by legitimate public interest (Konstytucja, 1997).

Constitutional economic law, focusing on the freedom of economic activity principle, obviously cannot be perceived as an element of administrative economic law. The addressees of the above-mentioned Art. 22, fundamental for defining the legal framework of freedom of economic activity, are rather legislative bodies than public administration ones, evidenced by the provision of Art. 22 of the Constitution explicitly requiring a legislative procedure to be applied to restrict the freedom of economic activity. Hence, the regulation seems to apply mainly to legislative and not administrative activities. As a result of certain legislative activities, certain limitations of freedom of economic activity are imposed, which are not always related to legal relations based on authority and subordination relationship (characteristic of administrative law regulations). For example, limitations of freedom of economic activity are connected with civil law issues. They include, in particular, limitations as to freedom of contract, which forms an essential element of the freedom of economic activity (Kołacz, 2008, p. 80). The freedom of contract is fundamental for the actual degree of freedom of economic activity. In the market economy, civil law contracts come as the core and indispensable element of any economic activity, while the limits of the freedom of contract defined by law are among the indicators of freedom to decide of economic operators (Walaszek-Pyzioł, 1994, p. 46–47). Constitutional economic law, being the law that, most importantly, shapes the legal framework of the freedom of economic activity, affects various spheres of legal regulations and the ones far outside the scope of administrative law.

There is yet another substantiation of the claim as to the broader scope of public economic law. However, it is still related to the circumstances discussed above. As already mentioned, public economic law is sometimes perceived as prevailing legal norms governing how the state influences the economy, which take various legal forms. It should be clarified that what is meant here is the influence on the economy, which is justified by legitimate public interest. For this reason, public economic law can be categorised as «public». On the other hand, administrative economic law refers only to the influence exercised via public administration bodies. Thus, it focuses on defining the tasks and powers of public administration bodies vis-à-vis private economic operators (Strzyczkowski, 2011, p. 53). Legal norms which fall within the scope of public economic law but cannot be, by any means, considered administrative economic law norms are, e.g., obligations or bans imposed on economic operators, which stem directly from the provisions of law and in the case of which no public administration body is empowered to enforce the economic operators' compliance with such norms. Moreover, the so-called norms of recommendation should be mentioned, through which the legislator «suggests« to specific behaviours of economic operators desirable from the point of view of the public interest; but does not provide for any consequences when an economic operator fails to follow such a norm (Małecki, 2020, p. 189–193).

The other fundamental difference between administrative and public economic law consists in their respective status within the legal system. There is no doubt about the status of administrative economic law – it is a part of administrative law, as clearly indicated in its very name (Kieres, 2009, p. 11). Hence, administrative economic law must not be perceived as a branch of law or a separate and

autonomous set of legal norms distinguished within a legal system. In contrast, administrative law, of which administrative economic law forms a part – definitely is a branch of law. The status of the public economic law is much more complicated. Some scholars treat public economic law as a separate branch of law, referring, *inter alia*, to the specific nature of its sources, its characteristic principles, special procedures and the existence of specific legal means and forms of operation of public bodies vis-à-vis economic operators (Popowska, 2010, p. 216). Others view public economic law as a complex branch of law encompassing legal norms governing how the state influences the economy, scattered throughout various primary branches of law (Demendecki, 2011, p. 12). Another group perceives public economic law as a public law component of economic law, treated as a separate branch (Małecki, 2019, p. 51–58). Under this approach, it is hard to assume that public economic law has any distinctive object and regulation method, which are decisive criteria when distinguishing a separate branch of law. On the other hand, economic law does have a separate subject and method of regulation. The subject of regulation is an economic activity which is a separate sphere of human activity. It is also possible to distinguish a specific method of regulation of economic law, which is a combination of mandatory and non-mandatory regulations. An in-depth discussion on the method of regulation of economic law was presented by a Ukrainian scholar, G.L. Znamenskij (Znamenskij, 2002, p. 29–32). Despite the discrepancies discussed above, note that, in all the approaches, public economic law is seen as more prominent than administrative economic law within the legal system. It is a separate branch of law in its own right, a complex branch of law or a semi-separate branch of law (a public law component of economic law, as distinguished from a private law component). In contrast, administrative economic law is simply one of many components of a more extensive branch of law – namely, the administrative law (Kiczka, 2007, p. 68–69).

Undoubtedly, the concepts of administrative economic law and public economic law are competitive – as they deal with similar subject-matter, they cannot be treated as separate research or teaching disciplines. Hence, after 1989, the concepts of administrative economic law and public economic law in Polish science of law have been competing. Initially, administrative economic law dominated, but with time public economic law has risen in popularity. Presently, it can be firmly stated that the concept of public economic law has prevailed. In Polish universities, there are currently over a dozen chairs and departments of public economic law in faculties of law. In contrast, the term «administrative economic law» appears only in the name of one department – the Department of Administrative Economic Law and Banking Law of the Faculty of Law and Administration of the University of Warsaw. Note that many universities changed the names of their chairs/departments in the last ten or so years from administrative public law to public economic law chairs/departments, e.g., at the University of Wrocław this change was introduced in 2010, and most recently, in 2019, saw it the Catholic University of Lublin. Furthermore, since 2007, on a biannual basis, an all-Poland conference of chairs and departments of public economic law is held, attended by representatives of all chairs and departments of Polish universities.

Why, then, has the concept of public economic law gained dominating position? It should be said that the concept of public economic law better fits the overall Polish economic system defined in Art. 20 of the Polish Constitution than the administrative economic law (Rabska, 2009, p. 587). Worth reminding is that, under the said provision, the social market economy constituting the foundation of the Polish economic system is based, among other things, on the freedom of economic activity and solidarity, dialogue and cooperation among social partners. Within the economic system so defined in the Constitution, the state does not treat economic operators as entities wholly subordinate to public bodies' authority, the state treats economic operators as social partners who participate in shaping the economic system. Hence, the law which governs the way the state influences the economy exceeds the traditional limits of the administrative law based on authority and subordination relationship (Rabska, 1993, p. 22). Public economic law deploys both hard and soft strategies to influence the economy. Hard strategies, characteristic of administrative law regulation, include obligations and bans imposed or enforced via public administration bodies (Kocowski, 2011, p. 57–64). In contrast, soft strategies do not prescribe specific actions but use certain stimuli to cause the addressees to behave or not to behave in a specific way (Morawski, 2003, p. 95–96). Soft strategies are deployed with an increasing frequency by the state to influence the economy, through the norms of recommendation and promotion (Małecki, 2017, p. 255–259). When deploying soft and hard strategies, public economic law, as a legal

framework where economic operators are treated as partners, is based on new assumptions different from the administrative economic law, which uses the traditional model of the state exercising authority over undertakings (Rabska, 2011, p. 268–269).

Although the administrative economic law has been supplanted by public economic law, one should remember that public economic law had evolved from administrative law. Many public economic law institutions are deeply rooted in well-established administrative law structures. An essential task of the science of public economic law is to develop its own, original perspective on legal institutions that – although originating from administrative law – should be adapted to the underlying assumptions of the public economic law (Kieres, 2011, p. 290). This task is presently the core research area for scholars representing the science of public economic law.

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