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The Application of the Legal Structure of an Agreement in Public Administration

Zastosowanie konstrukcji prawnej umowy w administracji publicznej

SUMMARY

The aim of the article is the presentation of the agreement as the form of activity of public administration. These forms are being defined as the predicted type determined by the law of the specific activity of the administrative body. The attempts of systematization of forms of action of public administration take into account various criteria. Among others to these forms are numbered administrative acts, normative acts, forms of factual activities and agreements. The last years brought special interest in the problems of bilateral forms of the activity of public administration, above all agreements in the nearly administrative. The agreements as the legal form of the activity of administration are divided into two fundamental groups. The first group contains agreements of civil law. In the second group there are public legal agreements. Based on the more detailed division, double-sided forms of action of administration include civil agreements, administrative agreements, administrative arrangements and settlements. The use of construction of legal agreement in the sphere of actions of public administration has its own specific. The doctrine of public law indicates the characteristic features of used agreement at the level of public law.

Keywords: agreement; public administration

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INTRODUCTION

Over the recent years, the boundaries between the different branches of law have not only begun to blur but even overlap. In parallel, we are witnessing a profound specialisation of selected and the emergence of new fields of law. The divisions of the legal system follow from a convention which depends upon their ultimate purpose. Anything but a relatively flexible approach to this trend seems inadvisable. The structure of the legal system is made clearer owing to its division into branches (of fields)[1].

The administrative supremacy of governmental bodies is increasingly giving way to different forms of cooperation with external entities, e.g. non-governmental organisations, which manifests itself in the outsourcing of the execution of specific public tasks. Public administration seems to be departing from forced or authoritative action towards partnership and agreement in order to enhance and facilitate processes and win acceptance and recognition of its public objectives[2].

One of the key issues in the science of administrative is the legal forms of activities of public administration. However, such forms lack a legal definition in the Polish legal system. The literature on the subject traditionally explains that they are a lawful type of a specific action carried out by an administration body[3]. The legal form of activities of public administration is defined as an identifiable or separately identifiable type of conventional or factual action, or a set of actions, established by the law and exhibiting some fixed attributes, performed by an entity (of a group of entities) appointed to fulfil public administration tasks[4]. Any manifestation of intent and any action of any administrative body, regardless of its nature and character, may be referred to as administrative action.

Attempts to systematise the forms of action of public administration usually rely upon varied criteria. Based, for example, on the criterion of the purpose of action, there are legal actions aimed to cause a direct legal effect. In other words, by taking certain conventional action, the administrative subject intends to produce legal effects and, actually, produces such effects directly. The other group is

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[1] J. Zimmermann, *Jedność prawa administracyjnego*, [in:] *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa Profesora Jana Bocia*, red. J. Supernat, Wrocław 2009, pp. 811–812.

[2] R. Godlewski, H. Kisilowska, *Przenikanie się prawa administracyjnego i prawa cywilnego na przykładzie gospodarki nieruchomościami i prawa budowlanego*, [in:] *Wypieranie prawa administracyjnego przez prawo cywilne*, red. A. Doliwa, S. Prutis, Warszawa 2012, pp. 33–57.

[3] S. Kasznica, *Polskie prawo administracyjne. Pojęcia i instytucje zasadnicze*, Poznań 1947, p. 112.

[4] K. Ziemski, *Określenie pojęcia formy prawnej działania administracji*, [in:] *System Prawa Administracyjnego*, t. 5: *Prawne formy działania administracji*, red. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, p. 4.

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factual actions that are not intended to produce legal effects directly but to cause certain facts[5].

The forms of action of public administration include: a) laying down generally applicable regulations, b) issuing administrative deeds, c) concluding agreements, d) entering into administrative arrangements, e) social and organisational activities, f) material and technical activities[6]. Among the forms listed above, A. Błaś points to administrative deeds, normative acts, forms of factual action, and agreements. Based on the specific criteria, J. Zimmermann proposed a universal list of forms of action of public administration. Relying upon the administrative supremacy criterion, this list contained authoritative (administrative deed) and non-authoritative (administrative arrangement, administrative agreement) forms of action of public administration. The former set includes unilateral administrative performance. The latter set covers bilateral activities in which the two legal subjects have a relatively similar degree of influence over the content of a given administrative act or action[7].

Taking into account the foregoing, it should be noted that the public administration in Poland, as in all other countries of the world and in international organisations with countries as members, has only three options or possible responses: it may impose certain action authoritatively, it may seek agreement or negotiate certain action, or it may encourage certain action. All these approaches can be adopted by an administrative body when dealing with another administrative body or with an entity from outside the administration sector. If, therefore, in a given system the administration apparatus is empowered to make laws (of prescriptive nature), certain action or conduct may be achieved (1) through the creation of a legal situation by the operation of the law itself, (2) through imposing certain action or conduct by an authoritative and individualised statement, (3) by an arrangement with another entity which is expected to act in a specific (arranged) manner, and (4) through a promotion or campaign intended to induce or strengthen in another entity a conviction that a particular action or conduct needs to be followed[8].

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[5] *Idem*, *Podstawowe kryteria podziału form prawnych działania administracji przyjmowane w nauce prawa administracyjnego. Próba usystematyzowania*, [in:] *System Prawa Administracyjnego*, t. 5, pp. 45–46.

[6] J. Starościak, *Prawne formy i metody działania administracji*, [in:] *System prawa administracyjnego*, red. T. Rabska, J. Łętowski, Wrocław 1978, p. 45.

[7] M. Czuryk, M. Karpiuk, J. Kostrubiec, M. Bożek, *Służby specjalne w strukturze władz publicznych. Zagadnienia prawnoustrojowe*, Warszawa 2014, p. 106.

[8] J. Boć, [in:] A. Błaś, J. Boć, M. Stahl, K. Ziemski, *Ustalenia sumujące*, [in:] *System Prawa Administracyjnego*, t. 5, p. 277.

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AGREEMENT AS A LEGAL FORM OF ACTION OF PUBLIC ADMINISTRATION

The idea of bilateral forms of action by public administration has always been present in the doctrine of administrative law, though to a lesser degree than in the present day. Recent years have seen a revival of this kind of administrative action, primarily when it comes to agreements in administrative law[9]. The literature on the subject underlines that public administration may act as a party to agreements governing relations under civil law, involving the administrating subject and entities governed by private law in the dominium sphere, or as a party to agreements regulating relations under administrative law, involving the administrating and the administered in the imperium sphere, and finally as a party to agreements regulating relations under administrative law aimed to define the mutual rights and obligations of the collaborating administrating subjects or leading to a modification of the statutory division of competence[10].

The doctrine of administrative law is unanimous with regard to the division of agreements, as the legal form of administrative action, into two main groups. One includes civil-law agreements and the other public-law agreements. Civil-law agreements in public administration are employed in, for example, the transfer of property, transfer of rights, or the use of another person's property. Agreements under administrative law (public law) are concluded, in principle, by public administration bodies and cover the performance or the entrustment of performance of public tasks. Looking at a more detailed division, the bilateral forms of administrative action include: civil-law agreements, administrative (public law) agreements, administrative arrangements, and administrative settlements. However, the doctrine is not unanimous on this matter. A dissenting opinion in this respect points out that that administrative arrangements are regarded as administrative agreements[11].

A civil-law agreement concluded both by the parties from outside public administration and by the administration and an external entity goes with certain

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[9] See: B. Jaworska-Dębska, *Umowy we współczesnej administracji*, [in:] *Umowy w administracji*, red. J. Boć, L. Dziewięcka-Bokun, Wrocław 2008, p. 16ff. The author is aware of the different views on the nature and status of agreements in administrative law, which may be seen as a consequence of denying, by some authors, the existence in administrative law of agreements other than civil law agreements. Another questionable issue in the doctrine is also whether an administrative agreement is a form of action reserved to the administration proper or of a civil-law agreement that the administration uses in pursuing its tasks and objectives.

[10] E. Stefańska, *Umowy zawierane w sferze administracji publicznej – wybrane zagadnienia*, [in:] *Umowy w administracji*, pp. 145–146.

[11] M. Możdżeń-Marcinkowski, *Umowy w administracji publicznej – głos w dyskusji*, [in:] *Umowy w administracji*, p. 117; P. Stec, *Umowy w administracji. Studium cywilnoprawne*, Warszawa 2013, p. 18.

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rights and obligations. Such an agreement sets out mutual rights and obligations, combined together and establishing a system of reciprocal behaviours to be exhibited by the parties for the benefit of their own interests. Once using this consensual form, a public body acts exclusively to satisfy and safeguard the public interest[12].

An administrative-law agreement is intended for the organisation of cooperation of administrative bodies, as follows from the general obligation for all state authorities to collaborate. Once concluded, it imposes on certain administrative bodies the obligation of cooperate in a specific form and around specific matters that are not governed by any legislation. This agreement falls within a broader collection of legal acts. Their content and social function revolve around the central point which is cooperation between public bodies[13].

An administrative arrangement is defined as an organised form of cooperation between administrative bodies, as follows from the general obligation for all state authorities to collaborate[14]. The administrative-law character of administrative arrangement is primarily determined by the nature of the rules governing the arrangement under administrative law and defining its subject matter (instruction on administrative tasks), the parties thereto, the system of penalties and guarantees ensuring the proper execution; in other words, the legal relationship between the parties to administrative arrangement is, in fact, governed by the provisions of administrative law[15].

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[12] J. Boć, *Umowa cywilnoprawna*, [in:] *System Prawa Administracyjnego*, t. 5, p. 253.

[13] Characteristic of an administrative agreement is the guarantee that the entity involved in some public task performs it for the benefit of the general public, that such performance is permanent and uninterrupted, and that any interruption to it requires the consent of the administration. In the case of administrative-law agreements, the subject matter is generally closely related to the administration as such, so these agreements could not actually operate outside the administrative context. An administrative body contracts private entities to perform public tasks, and such entities assume the obligation to do so. If the relations created, transformed or repealed by an agreement fall under public law, then the contract should also be regarded as an administrative agreement. When discussing the views on a public-law agreement, A. Panasiuk indicates that such an agreement "should embody the following attributes: 1) one or both parties to such an agreement are public entities, 2) the subject matter of the agreement should address a public task, 3) the public tasks covered by the agreement should serve some public interest, 4) it should embody the principle of contractual freedom, only limited by the competition and elimination procedures employed in partner selection, 5) it should clearly define and assign the tasks and activities of the private entity and the responsibilities of the public entity, or do the same if two public entities act as parties to the agreement, 6) it should clearly define the responsibilities for the contractual activities and the final result, 7) it should define the control and supervision procedures for the entrusted public tasks". See: J. Lemańska, *Umowa administracyjna a umowa cywilna*, [in:] *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa Profesora zw. dra hab. Józefa Filipka*, red. I. Skrzydło-Niżnik, P. Dobosz, D. Dąbek, M. Smaga, Kraków 2001, p. 424ff; J. Boć, *Umowa cywilnoprawna*, p. 257; A. Panasiuk, *Umowa publicznoprawna*, „Państwo i Prawo" 2008, z. 2, p. 30.

[14] J. Starościak, *Studia z teorii prawa administracyjnego*, Wrocław 1960, p. 74.

[15] The literature highlights a number of apparent similarities between the administrative ar-

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The institution of administrative settlement as the legal form of administrative action has been regulated in the Code of Administrative Procedure[16]. This is one of the legal forms of administrative activities pursued by an administration body in the resolution of an administrative case in terms of the substance. It helps reconcile the conflicting interests of at least two parties to the administrative procedure in an individual case. The rules governing the administrative settlement implement the principle of persuasion – one of the general principles of administrative procedure. Settlement as a procedural form of handling an administrative matter offers the parties a chance to actively seek an amicable solution to the dispute[17].

THE SPECIFIC CHARACTER OF APPLICATION OF THE STRUCTURE OF AN AGREEMENT IN PUBLIC ADMINISTRATION

The use of the legal structure of an agreement in the activities of public administration has its specific, though by far permissible, nature. The constitutional rule of law principle, which requires public authorities to act only in compliance with and within the boundaries of the law, necessitates the search for new ways to reconcile both legal orders, as public authorities need to operate at the intersection of the public and private law regulations. This seems impossible without at least partial resignation from or gradual modification of some of their foundations, which is evident in the application of the legal structure of an agreement in the activities of authority bodies.

Recognising the characteristic attributes of agreement used in the domain of public law, the doctrine of public law points to its basic distinctive features, such as the selection of potential parties, the specific subject matter and purpose, or the normative foundations influencing the actual shape of agreement[18].

First, one of the specific features of agreements used in the administration is the group of contracting parties. At least one of the parties is an entity representing the public authority, concluding the agreement in connection with the perfor-

rangement and, for example, civil-law agreements, other agreements, different types of arrangements, or cooperation deeds having no legal effects. These similarities include: the freedom of decision on cooperation and its content, the equality of the cooperating parties, the consistency of the elementary interests and objectives. Administrative agreement is one of the recognised forms of administrative action. The similarity between administrative arrangement and a civil-law agreement is somewhat "external", that is, it does not ensue from the legal nature of the two actions and does not reveal such characteristic features of cooperation as the equality of the parties and a joint declaration of will to enter into cooperation. See: J. Boć, *Porozumienie administracyjne*, [in:] *System Prawa Administracyjnego*, t. 5, p. 260.

[16] See: Articles 114–126 of the Act of 14 June 1960 – Code of Administrative Procedure, Journal of Laws of 2017, item 1257.

[17] See: Articles 114–122 of the Code of Administrative Procedure.

[18] See, among others: J. Boć, *Umowa cywilnoprawna*, pp. 252–260.

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mance of its statutory tasks[19]. Public administration bodies also include entities appointed to perform public tasks by law or under separate agreements. The other party to the agreement can be a natural person or other public entity.

Another characteristic of agreements adopted for the needs of public administration is the potential subject matter and the purpose of this instrument. The literature on the subject emphasises that when establishing a contractual relationship a public entity may be guided, for example, by the need to provide the necessary quantity of resources required for the continuity of the administrative apparatus and social benefits in kind. It may also seek to furnish various basic social benefits and services, including an uninterrupted water supply, sewage collection, energy or gas supply, municipal waste disposal[20]. The significance of the structure of a civil-law agreement is particularly evident in the so-called benefit administration and in the performance of the organisational (the use of services and benefits necessary for the operation of the administrative apparatus) and regulatory (e.g. in the so-called property privatisation) function of public administration[21]. In any case, it is the establishment and the shape of a contractual relationship that, to a certain extent, determines the effectiveness and efficiency of activities of public authorities, and the value of the structure of the agreement is specifically confirmed in the adoption of the so-called privatisation of public tasks as the subject matter. Moreover, such agreements may perform various functions, for example, "they can (1) underline the relations established between bodies performing public tasks and citizens with a view to creating entities that take over the fulfilment of public tasks and (2) they can be used as a form of delegation of public tasks from the state or municipal bodies (companies) to non-state actors"[22].

Finally, the impact exerted by the civil code-external regulations on agreements in public administration is their another distinguishing feature. Although the legal structure of an agreement and the circumstances of its valid and effective conclusion are set out in civil law, regulating, for example, the legal capacity and capacity to act, the form, substance and the method of conclusion[23], it is public law, including the administrative and financial provisions, that alter the method of conclusion of an agreement, parties' rights and obligations or liability for the non-performance or improper performance, that determines the degree of admissibility of the agreement and the conditions for its application by the public authorities

[19] See: P. Stec, *Umowy w administracji. Studium cywilnoprawne*, p. 21.

[20] See: P. Bieś-Srokosz, *Umowa cywilnoprawna jako podstawowa forma działania agencji rządowych w Polsce*, „Kwartalnik Prawa Publicznego" 2012, nr 3, p. 30.

[21] See: R. Stasikowski, *Umowa cywilna jako instrument działania administracji regulacyjnej*, „Samorząd Terytorialny" 2009, nr 11, p. 9.

[22] M. Ofiarska, *Formy publicznoprawne współdziałania jednostek samorządu terytorialnego*, Warszawa 2008, p. 130.

[23] See: Book I of the Act of 23 April 1964 – the Civil Code, consolidated text: Journal of Laws of 2017, item 459 as amended.

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in the performance of public tasks[24]. This aforementioned influence of public-law regulations on the freedom of contract is visible both directly – when public law explicitly sets forth the requirements for establishing or shaping a specific legal relation – and indirectly: although without formal interference, still by referring the negative legal effects to their origin or improper evolution[25].

The ensuing far-reaching differences can be easily identified, in particular, when looking at the cardinal – from the private-law viewpoint – rules of parties autonomy and the freedom of contract. The analysis of the existing normative material furnishes numerous examples when the Polish legislator rations the freedom of shaping the contractual relationship on the basis of public law regulations.

This is already palpable at the stage of determination of the will to enter into a contractual relationship when a public administration body (or an entity performing its function), if the statutory requirements are met, is obliged to conclude an agreement with a contractor[26] while the private contractor is less often so obliged[27]. Further limitations of the parties' autonomy, due to the principle of legality and the establishment of formal procedures for the disbursement of public funds and the conclusion of agreements[28], pertain to the freedom of choice of the procedure and the initiative to conclude an agreement. In most cases, this choice is made by the public entities; less frequently, it depends on the decision of a private contractor. Moreover, the freedom of contract is subject to specific restrictions, such as when the legislator unilaterally imposes the type of agreement[29], prescribes the time limits for the admissibility of contracting[30], limits the

[24] See: A. Błaś, T. Kuta, *Prawo administracyjne. Podstawowe zagadnienia terminologiczno-pojęciowe*, Poznań–Wrocław 1998, p. 98.

[25] See: J. Niesiołowski, P. Sut, *Prawo publiczne a zasada swobody umów*, [in:] *Zmiany społeczne a zmiany w prawie. Aksjologia, konstytucja, integracja europejska*, red. L. Leszczyński, Lublin 1999, pp. 197–198.

[26] A rare obligation to enter into an agreement usually concerns contracts concluded in business transactions, as in the case of an agreement for connection to the transmission network (Article 791 *in principio* of the Act of 10 April 1997 – Energy Law, consolidated text: Journal of Laws of 2012, item 1059 as amended).

[27] According to Article 82(1)(1) of the Act of 30 June 2000 – Industrial Property Law, consolidated text: Journal of Laws of 2013, item 1410 as amended, if so required due to environmental protection, the Patent Office may, by way of an administrative decision, oblige the patentee to conclude licence agreements under the terms and conditions set out in the act.

[28] Act of 29 January 2004 – Public Procurement Law, consolidated text: Journal of Laws of 2015, item 2164 as amended.

[29] For example, an agreement for donation for public purposes (Article 1392) *in fine* of the Act of 21 August 1997 on Property Management, consolidated text: Journal of Laws of 2015, item 1774 as amended).

[30] In accordance with Article 91(1) of the Act of 13 September 1996 on Maintaining Order and Cleanliness in Municipalities (consolidated text: Journal of Laws of 2016, item 250 as amended), the administrator of a regional waste treatment facility is obliged, within the existing capacity of the facility, to conclude an agreement for the management of mixed municipal refuse and green

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choice of contractors[31] or indicates the form of agreement[32]. The most obvious example of reduction of the parties' autonomy when entering into an agreement under public law is the legislator's influence on the content of the potential contractual relationship. This is mostly done by the statutory indication of elements relevant for the subject matter – if absent, the legal transaction will be deemed invalid[33]. Sometimes, this influence is visible in the attempts to shape other contractual components[34].

In this context, some limitations are also imposed on the independent functioning of an agreement in legal transactions. This is because whether an agreement is effective and in full force may depend on the prior or subsequent adoption of an administrative act, which the literature on the subject regards as another distinguishing feature of its legal structure[35].

CONCLUSIONS

Based on the foregoing discussion, it is evident that the activities of public administration are intertwined with those governed by private law. Consequently, authority bodies take advantage of the solutions borrowed from civil law, particularly when it comes to contracting which is gaining in importance as one of the legal forms of operation of public administration.

Nevertheless, it should be stressed that neither the contemporary doctrine of administrative law nor the national legislation has been able to develop the idea

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waste with all entities collecting municipal waste from property owners; such entities should operate within the boundaries of the municipal waste management region. This agreement may also be concluded with a municipality that organises the collection of municipal waste and located in the municipal waste management region.

[31] A much-telling example is the statutory indication of the parties to the so-called voivodeship contract concluded under civil law between public entities, i.e. the Council of Ministers and the voivodeship self-government (Article 34 of the Act of 20 April 2004 on the National Development Plan, From 2014, item 1448 as amended).

[32] It concerns, for example, a mining usufruct agreement (Article 13ff of the Act of 9 June 2011 – Geological and Mining Law, consolidated text: Journal of Laws of 2016, item 1131 as amended) concluded in writing under pain of nullity.

[33] An example of this trend is the regulations covering most agreements under Energy Law, including, in particular: agreements for connection to the transmission network, energy sales agreements, agreements for transmission or distribution of fuels or energy, gas transportation services agreements, gaseous fuel storage agreements, natural gas liquefaction agreements, or comprehensive agreements.

[34] This concerns, for example, the mandatory provisions of *accidentalia negotii* or indication of other clauses that significantly shape the content of an agreement (e.g. pre-emption clause reserved to the State Treasury or the parties' liability clause). See: S. Biernat, *Prywatyzacja zadań publicznych. Problematyka prawna*, Warszawa 1994, p. 126ff.

[35] See: J. Zimmermann, *Prawo administracyjne*, Warszawa 2016, p. 231.

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of bilateral, consensual forms of action to such an extent so as to be able to offer their uniform, comprehensive and exhaustive description and classification or clarify the significance of an agreement as a tool employed to achieve public administration goals. The modest attempts by the representatives of the science of Polish administrative law focus on drawing a dividing line, through a scientific description, between, first, administrative arrangements and, second, administrative agreements and civil-law agreements through the identification of indisputable differences and distinctive attributes of agreements applicable only in the field of public law[36]. Regrettably, these attempts are not endorsed in the current activity of the Polish legislator. Moreover, they seem not to discern some obvious dangers, including the loss of the possibility of benefiting from the legislative and case-law output of contract law. Without any substantial support from the legislator[37], such attempts are rendered worthless; therefore, it seems more justified to make some room – within the branch of civil law – for a specialised segment of administrative contract law[38], which, by building on the legacy of civil law as the archetype of universal law, will allow any doubts concerning the legal nature of agreements used in public administration to be ultimately dispelled.

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[36] As J. Boć points out, most of the doctrine adopts such a position, though in a variety of views and based on different motivation. See: J. Boć, *Ustalenia sumujące*, [in:] *System Prawa Administracyjnego*, t. 5, pp. 277–278.

[37] This could have also been reflected in the Act on the General Provisions of Administrative Law which, when drafted, included the precise assumptions and content of provisions on agreements used in public administration. See: D. Kijowski, *Umowa administracyjna w części ogólnej polskiego prawa administracyjnego*, [in:] *Nowe problemy badawcze w teorii prawa administracyjnego*, red. J. Boć, A. Chajbowicz, Wrocław 2009, p. 273.

[38] See: P. Stec, *Umowy w administracji publicznej a zasada autonomii woli*, [in:] *W kierunku sprawnego państwa. Publicznoprawne instrumenty kształtowania polityki społecznej i gospodarczej*, red. M. Thorz, E. Halavach, Częstochowa 2008, p. 124.

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STRESZCZENIE

Artykuł ma na celu przedstawienie umowy jako formy działania administracji publicznej. Formy te definiowane są jako przewidziany prawem określony typ konkretnej czynności organu administracji. Próby usystematyzowania form działania administracji publicznej uwzględniają rozmaite kryteria. Do form tych zaliczane są m.in. akty administracyjne, akty normatywne, formy działań faktycznych i umowy. Ostatnie lata przyniosły szczególne zainteresowanie problematyką dwustronnych form działania administracji publicznej, przede wszystkim umów w prawie administracyjnym. Przyjmuje się pogląd na temat podziału umów jako prawnych form działania administracji na dwie zasadnicze grupy. Do pierwszej zaliczają się umowy prawa cywilnego, do drugiej zaś umowy o charakterze publicznoprawnym. Na podstawie bardziej szczegółowego podziału dwustronne formy działania administracji obejmują umowy cywilne, umowy administracyjne (publicznoprawne), porozumienia administracyjne i ugody. Wykorzystanie konstrukcji prawnej umowy w sferze działań administracji publicznej ma swoją specyfikę. Doktryna prawa publicznego wskazuje na charakterystyczne cechy umowy wykorzystywanej w płaszczyźnie prawa publicznego.

Słowa kluczowe: umowa; administracja publiczna