

THE LEGAL STATUS OF THE POLISH
DEVELOPMENT FUND AND ITS CONSEQUENCES
FOR THE PROTECTION OF ENTREPRENEURS.
GLOSS TO THE JUDGMENT OF THE SUPREME
ADMINISTRATIVE COURT OF 15 NOVEMBER 2024
I GSK 595/23

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Abstract. The present commentary concerns the ruling of the Supreme Administrative Court in a case regarding the conditions for granting a liquidity loan to an entrepreneur by the Polish Development Fund (PDF). The significance of this issue results from the need to answer questions related to the legal protection of entrepreneurs receiving public funds redistributed by a private entity (PDF). This gloss is a scientific commentary on the position of the Supreme Administrative Court, which found that the actions of the PDF were of a civil law nature, arising from a contract and not from the provisions of administrative law. After analysing the legal and financial status of the PDF in the context of the Public Finance Act, the method of implementing public tasks and the phenomenon of their privatisation, and also the legal form of implementing the “Financial Shield” programme, the author came to the conclusion that the Court’s position was correct. The findings that the PDF does not belong to the public finance sector, does not meet the criteria of being an administrative authority, and does not have the competence to act in authoritative forms confirmed that the Funds’ activities had an obligational rather than administrative-legal character. Consequently, the present gloss supports the argumentation presented in the commented judgment that, in the legal situation under review, the Fund’s activities were not subject to the jurisdiction of administrative courts, but possibly civil courts. The study was conducted using the dogmatic-legal and analytical methods.

Keywords: State Development Fund; privatisation of public tasks; government programmes during the COVID pandemic; court competence.

1. ARGUMENT

At this point, it should be concluded that the Council of Ministers, i.e. a public administration authority, has entrusted the Polish Development Fund (PDF) with the implementation of specific public administration tasks.

In this respect, we are dealing with the privatisation of public tasks, as public administration tasks are executed by an entity that operates outside administration structures. This observation, however, does not mean that the PDF has also been granted the power of taking administrative decisions. Moreover, it should be concluded that this entity has not been endowed with any form of authoritative agency in the sphere of administrative-legal relations.

2. FACTS OF THE CASE

The case in which the commented ruling was issued regarded factual circumstances in which a company filed an appeal against a letter they received from the PDF, dated 16 May 2022, concerning the conditions of a liquidity loan agreement concluded under the “Financial Shield of the Polish Development Fund for Large Companies” programme, constituting an annex to the resolution of the Council of Ministers of 27 April 2020, No. 51/2020. The appellant requested that the administrative court invalidate the contested letter in its entirety. The issues raised in the appeal included, among others, failure on the part of the PDF to provide a legal basis and justification for their “decision” and to inform the recipient of their right to appeal to the Supreme Administrative Court.

The court of first instance found that both the disbursement and settlement of the liquidity loan, including the disputed information from the Fund (referred to by the party as the “decision”) regarding the waiver by the appellant of the fulfilment of the conditions precedent to the disbursement of the loan and the extension of the deadline for the fulfilment of the conditions precedent, essentially results from the liquidity loan agreement concluded with the entrepreneur. The Provincial Administrative Court, citing previous judicial decisions of administrative courts, pointed out in its justification that the actions of the PDF regarding the payment or settlement of subsidies had been taken under the civil law regime, related to the contractual regulation of relations between the entrepreneur applying for the subsidy and the Fund, and not on the basis of provisions of the administrative law. The essence of this view was based on the finding that the beneficiary’s rights and obligations arose from the civil law liquidity loan agreement. At the same time, the Provincial Administrative Court pointed out that the circumstance raised in the appeal that the PDF had provided support as part of a government programme was immaterial to determining the competence of the administrative court since it did not change the fact that the relationship between the PDF and the entrepreneur was obligational (governed by civil law), and so it lacked the fundamental component of an administrative-law relationship, namely the authoritative (sovereign) character of the Fund’s activity.

The appealing company did not agree with the decision of the court of first instance. In the cassation appeal, it requested that the contested decision be set aside in its entirety and the case be referred back for reconsideration to the Provincial Administrative Court in Warsaw, as well as that the PDF be ordered to cover the costs of the court proceedings in accordance with the prescribed standards. The entire ruling was contested on the grounds of violating procedural provisions, which could have had a significant impact on the outcome of the case, as it erroneously assumed that the case being the subject of the appeal did not fall within the competence of the administrative court, and therefore was not subject to review by the administrative court, as it was not a public administration act or measure concerning the rights or obligations arising from the provisions of law, which resulted in the dismissal of the appeal. According to the appealing company, the measure implemented by PDF SA met all the requirements to be considered “a public administration measure, other than a decision or resolution, concerning rights arising from legal provisions.”¹ The appellant took the position that the measure in question, implemented under the concluded civil law contract, was adopted by PDF S.A. as part of the unilateral and authoritative public administration tasks assigned to the Fund by the Council of Ministers, which should result in the recognition that the entrepreneur’s appeal was subject to the jurisdiction of the administrative court (Article 58(1) point 1 in connection with Article 3(2) point 4 of the PAC). The appellant also claimed that the court of first instance did not fulfil its adjudicative obligations by failing to thoroughly review the appeal in order to assess its admissibility, failing to consider the position expressed in the appeal, and omitting the appellant’s extensive arguments contained in the appeal justifying the admissibility of legal action in the case in question.

In the appeal, the appellant alleged that the provisions of substantive law had been violated through their incorrect interpretation. As a result, the PDF was found to have acted under civil law rather than administrative law when carrying out activities related to the implementation of the “Financial Shield” programme. In the appellant’s view, however, the PDF, when granting subsidies, functionally acted as a public administration authority performing public tasks on the basis of separate legal provisions. Specifically, as a result of the deconcentration of tasks and powers of the Council of Ministers, the PDF implemented tasks entrusted to it in matters related to crisis situations – including the spread of COVID-19 – such as crisis management and the prevention and mitigation of crisis effects, which are public administration tasks within the competence of the Council of Ministers.² The party

¹ Article 3(2) point 4 of the Act of 30 August 2002 on Proceedings Before Administrative Courts (Journal of Laws of 2024, item 935 as amended) [hereinafter: PAC].

² Articles 2 and 7 of the Act of 26 April 2007 on Crisis Management (Journal of Laws of 2023, item 122 as amended).

emphasised that the implementation of the government programme as an assigned public administration task involved the use of public funds and the management of these funds. The appellant alleged that the provisions of the Act on the System of Development Institutions³ in connection with the Regulations for applying for participation in the government programme “Financial Shield of the Polish Development Fund for Large Companies”⁴ had been violated through misinterpretation and non-application, which resulted in the incorrect recognition that no legal provision constituting a source of law granted the right to obtain funding under the government programme “Financial Shield of the Polish Development Fund for Large Companies.” The party argued that the government programme referred to in the Act on the System of Development Institutions (Article 21a(1-2) of the SDI Act), adopted by Resolution No. 51/2020 of the Council of Ministers on 27 April 2020, directly confers on entrepreneurs the right to obtain financial support and as such it should be regarded as a source of administrative law, since it forms part of the system for implementing a government programme involving the expenditure of public funds, and therefore qualifies as a source of administrative law in the broader sense.

Finally, it was pointed out in the appeal that the ruling violated the Constitution of the Republic of Poland⁵ and the International Covenant on Civil and Political Rights⁶ and the Convention for the Protection of Human Rights and Fundamental Freedoms⁷ through their incorrect application, which, as a consequence, deprived the appellant of their constitutional right to a court, since it was concluded that the civil court was competent to hear the case. The appellant argued that no claim could be brought against the PDF for payment of funds, since the financial subsidy agreement had expired upon the PDF’s decision refusing to grant the subsidy. Consequently, there was no longer a civil-law relationship between the PDF and the appellant that could impose on the PDF an enforceable obligation under the agreement or entitle the appellant to pursue and enforce a corresponding

³ Article 12(1) and (1a) point 7, Article 21a(1-7) of the Act of 4 July 2019 on the System of Development Institutions (Journal of Laws of 2019, item 1572 as amended) [hereinafter: SDI Act].

⁴ Para. 1(1-4) of the Regulations for applying for participation in the government programme “Financial Shield of the Polish Development Fund for Large Companies,” <https://PDF.pl/document/50> [accessed: 25.10.2025].

⁵ Article 45(1) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 133, item 483 as amended).

⁶ Article 14 of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 167).

⁷ Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284 as amended).

claim. Moreover, the appellant questioned the effectiveness of judicial control of the PDF's activities by civil courts.

In response to the cassation appeal, the PDF requested that the appeal be dismissed and that the applicant be ordered to pay the costs of the cassation proceedings. The Supreme Administrative Court considered the cassation appeal against the decision of the Provincial Administrative Court, concluding the proceedings in the case at a closed session, within the limits of the cassation appeal (Article 183(1) of the PAC), stating that within the limits thus set, there are no grounds for the cassation appeal and it must therefore be dismissed.

3. DISCUSSION OF THE POSITION OF THE SUPREME ADMINISTRATIVE COURT

In its argumentation contained in the statement of reasons for the commented judgment, the Supreme Administrative Court considered several interdependent aspects of the case, the resolution of which was to confirm that the case was outside the competence of the administrative court. The highlighting of these correlated issues provides an impulse for scientific commentary. The starting point for these considerations is the financial and legal status of the PDF with regard to the implementation of public tasks and then the qualification of the funds obtained from the PDF by the entrepreneur (here: the appealing company) and the mechanism of their distribution. These issues will allow us to answer the question about the formal-legal aspect of obtaining funds, which then determines the potential appeal procedure and the limits of judicial review. These issues are important for the practice of applying the law not only because of the issue of privatisation of public tasks, but above all because of the legal situation and protection of the rights of the entity obtaining funds from the PDF.

The extensive scope of the problem invites a number of more detailed research questions. Firstly, can the PDF be viewed as a public finance sector entity because it implements public tasks, and should its activities be considered as activities of a public administration authority with regard to the implementation of the "Financial Shield" programme, or should they rather be viewed as civil law activities?

Secondly, based on the analysis of the legal nature of the PDF's actions, especially its refusal to pay out funds, can a "letter" ("decision") sent by the PDF be considered an administrative act subject to control by an administrative court as an instance of "other public administration measures" within the meaning of Article 3(2) point 4 of the PAC?

Thirdly, one has to consider the question of the PDF having no formal competence to issue administrative decisions and the consequences of this fact for determining the court's competence.

At the outset, it should be noted that the PDF operates as a joint-stock company with the registered office in Warsaw (Article 1 point 2 of the SDI Act). The validity of the question whether the PDF is part of the public finance sector is connected with the use of the term "fund" in the name of this entity, which may be associated with a unit of the public finance sector called a state special-purpose fund. Despite the terminological similarity [Kucia-Guściora and Münnich 2024, 369-70], the PDF cannot be considered a special-purpose fund within the meaning of the Public Finance Act for several interrelated reasons. Since its inception in 2016, when the Ministry of the Treasury transformed the company "Polskie Inwestycje Rozwojowe SA" (Polish Development Investments plc) into the Polish Development Fund, the Fund has operated as a joint-stock company. This means that it was not, by definition, intended to be a special-purpose fund as it was not established by a separate act granting it this status.⁸ Moreover, having legal personality as a joint-stock company, it does not have one of the typical features of a fund, which is the lack of legal personality. This institutional aspect allows for further diagnosis of the PDF in terms of its affiliation to the public finance sector. The fact that it operates as a commercial company means that, although it can implement public goals (tasks), it is subject to exclusion from the public finance sector pursuant to the PFA (Article 9, point 14 of the PFA). However, the fact that the PDF operates outside the public finance sector does not mean that its activities are not subject to the regime of the Public Finance Act.

Since the PDF can obtain various types of money transfers in the form of targeted subsidies from various parts of the budget, as well as guarantees and sureties granted by the Council of Ministers, it is subject to the PFA to the extent to which it uses or manages public funds, even though it does not belong to the public finance sector (Article 1(2) of the PFA). Pursuant to the Act on the System of Development Institutions, the revenues of the Fund may include other targeted subsidies from the state budget and funds from the European Union budget, as well as other non-repayable funds from foreign sources, and interest on them, unless separate provisions or agreements concerning the transfer or use of these funds provide otherwise. These subsidies, in turn, may be used to finance or subsidise the administrative costs of financing entrepreneurs (Article 18 of the SDI Act) using public funds within the meaning of the PFA (Article 5 of the PFA).

⁸ Articles 2 and 29 of the Public Finance Act of 27 August 2009 (Journal of Laws of 2024, item 1530 as amended) [hereinafter: PFA].

Therefore, in accordance with its current legal status, in managing public funds, the PDF may provide financing to entrepreneurs under the terms specified in the Act. It is worth noting that the PDF is obliged to execute tasks entrusted to it by government administration authorities, other entities performing public tasks or local government units, in particular in connection with crisis situations, including the spread of the infectious disease caused by the SARS-CoV-2 virus (COVID-19) (Article 11 of the SDI Act).

Financial support is provided in various forms [Kowalski 2024, 149-58] The PDF provides financing by acquiring or purchasing shares, stocks, subscription warrants, bonds, receivables and joining partnerships, as well as granting promises, loans, guarantees and sureties. The Fund may provide financing directly or through legal persons or organisational units without legal personality or through capital funds.

Pursuant to the SDI Act, the Council of Ministers had the authority to entrust the PDF with the implementation of a government programme for providing financial support, in particular in the forms specified above or in non-repayable forms, including provision of support to entrepreneurs in connection with the consequences of COVID-19 (Article 21 of the SDI Act). Public funds to cover employee remuneration and costs incurred by the PDF in implementing the government programme were transferred by the minister responsible for economic affairs, based on an agreement with the Fund, acting in this respect in consultation with the minister of finance. The PDF, as a company, implemented some of the largest and most important government programmes in the post-COVID era, such as The Financial Shield of the Polish Development Fund for Small and Medium-sized Companies or the Financial Shield of the Polish Development Fund for Large Companies.⁹ These are not the only public tasks that the PDF has executed using public funds; other tasks may also be implemented for various purposes based on various grounds.

The challenge in evaluating the functioning of the PDF stems from its position at the intersection between private and public finance activities, particularly those involving the implementation of public tasks financed from public funds – for instance, the provision of aid within the framework of the Financial Shield programme. The PDF receives public revenues in the form of direct transfers from the state budget, transferred to it as earmarked

⁹ Resolution of the Council of Ministers No. 50/2020 of 27 April 2020 on the government programme “Financial Shield of the Polish Development Fund for Small and Medium-sized Companies” (Shield 1.0); Resolution of the Council of Ministers No. 51/2020 of 27 April 2020 on the government programme “Financial Shield of the Polish Development Fund for Large Companies” (Shield LC) and Resolution of 5 January 2021 No. 2/2021 on the government programme “Financial Shield 2.0 of the Polish Development Fund for Micro, Small and Medium-sized Companies” (Shield 2.0).

subsidies, funds from the issue of securities, and guarantees and sureties granted by the Council of Ministers. In this respect, however, the fact that the PDF is not part of the public finance sector, requires treating its activities as privatisation of public tasks. At the same time, the PDF is obliged to generate its own revenues. The SDI Act indicates explicitly that the PDF conducts business activities in its own name and on its own account, in accordance with the principles of good commercial practice, striving to achieve a market rate of return on invested capital in the long term (Article 11 of the SDI Act).

The commented judgment of the Supreme Administrative Court did not refer to the above-mentioned legal-financial aspect, as the dispute concerned an activity regarding the terms of a liquidity loan agreement under the programme “Financial Shield of the Polish Development Fund for Large Companies.” However, this activity did involve the use of public funds. It is worth noting that the Act uses the term “provision of financing”, which indicates that structures typical of this type of transfer of public funds were not used; however, in the regulations developed for the purposes of providing financial assistance to entrepreneurs, the terms “financial subsidy” or “financial subsidy agreement” had already been used. This inconsistency of terms does not facilitate determining the status of the transfer in question. Additionally, it is worth recalling that providing financial support to small and medium-sized enterprises requires verification of their compliance with the conditions for receiving public aid (Article 12 of the SDI Act).

In the commented judgment, the court considered whether the PDF acted as a public administration authority when implementing the indicated government programme. This gives rise to the fundamental question of whether an entity outside the public finance sector and outside the structure of public administration which implements public tasks involving the use of public funds can be viewed as a public administration authority?

It is worth noting that the formal conditions for providing financial support under the Shields were laid down by the Council of Ministers in resolutions establishing the individual government programmes. These principles were then implemented in the Shield Programme Documents developed by PDF SA. In line with the intention of the Council of Ministers, as set out in the cooperation agreements, the role of PDF SA was to apply the most automatic, simplified and accelerated procedures for granting support, including the distribution of financial support via electronic channels. PDF SA was also, under resolutions of the Council of Ministers, authorised to assess compliance of applicants with the criteria for granting support based on declarations submitted by them. However, verification of beneficiaries was limited and based on data obtained from the Social Insurance Institution and the National Tax Administration. Seventeen banks were involved in the

verification and transfer of funds. The description of the process of providing support indicates that the activities conducted by the PDF had a technical character.¹⁰ At the same time, the PDF could refuse to provide support without justifying its refusal, also in connection with the technical solutions it used in the process of distributing funds.

The court found that although the Council of Ministers entrusted the PDF with the implementation of public administration tasks, the Fund was not granted the competence to issue administrative decisions, nor did it act in the forms of authority that are typical of public administration. This phenomenon was referred to as the privatisation of public tasks in the judgment.

The literature on the subject draws attention to the complexity of the term mentioned and, consequently, the diverse views of it, resulting from the lack of a legal definition or an inconsistent normative structure. One can find numerous remarks by representatives of the doctrine on the privatisation of public tasks, all of which point to a common core, which is the transfer of the implementation of a public task by a public entity to a private entity [Biernat 1994, 28]. The variety of approaches to the effects of this action – concerning both the extent of responsibility and the shift of a task's status from public to private – indicate that this issue is not uniformly interpreted in the doctrine, which classifies forms of privatisation in diverse ways. [ibid., 30, Cwalińska 2020, 24-37; Habuda 2002, 392]. In a classical approach, privatisation is divided into privatisation *sensu stricte* and *sensu largo* [Biernat 1994, 30]. The former assumes that the state withdraws completely from the execution of specific public tasks in a given area [Strzycki 2023, 138]. According to the latter, the implementation of public tasks is merely transferred to non-public entities, without changing the organisational and legal form of the implementation of a given public task and without interfering with its legal nature [Cendrowicz 2020]. It cannot be overlooked that in a sense, when tasks are privatised, they are actually carried out by a private entity, despite the conviction that they are implemented by the state. What is very important in the context of the commented judgment is that the literature on the privatisation of public tasks (privatisation of their implementation) emphasises that such privatisation may have a negative impact on legal certainty and civil rights and freedoms, due to the difficult access to legal remedies (a private entity is not a state authority, yet, at the same time, it is bound by a contract with a public

¹⁰ See the Post-audit statement amended in accordance with the content of resolution No. KPK-KPO.441.80.2023 of the Adjudicating Panel of the Adjudication Committee of the Supreme Audit Office of 25 July 2023, P/21/018 Effects of selected actions undertaken by the State to mitigate the effects of the epidemic on the economy, https://www.nik.gov.pl/kontrola/wyniki-kontroli-nik/pobierz,kgp~p_21_018_202108251057271629881847~id1~02,typ,kj.pdf [accessed: 25.10.2025].

entity, not the citizen); hence any appeal against a decision of a private entity would have to be made through a state authority [Serafin 2017, 137-53]. It is worth noting not only the terminological but also the semantic distinction between the concepts of privatisation of public tasks and privatisation of the implementation of public tasks [Cwalińska 2020, 29]. The heart of the matter here is the dispute as to whether a public task entrusted to a private entity by a public entity loses or retains the legal character of a public task. Unfortunately, legal scholarship presents divergent views on this matter. According to some authors, such a task remains public, despite the change of the entity implementing it [Łągowska 2002, 393]. A different view indicates that privatisation means a reduction in the public tasks performed by the administration – the privatised task is transformed into a service provided by private entities (corporations, commercial law companies, non-governmental organisations, or natural persons) [Błaś 2002, 65-66]. It is emphasised that the privatisation of a public task leads to a change in its legal character and a weakening of the individual's legal position [Idem 2000, 30; Cwalińska 2020, 24-37].

Privatisation is therefore understood as a process in which a public-law entity cedes the performance of tasks to private-law entities. As a result of this process, the performance of a task may shift from a public-law form to a private-law form, meaning that it is no longer confined to the authoritative instruments available to public administration authorities, but may also take the form of civil-law arrangements. In this context, it is also worth recalling the scientific position that entities operating outside the public sector execute public tasks, thus complementing government (local government) activities carried out in the public interest. Therefore, all activities entrusted to private law entities should be subject to appropriate statutory regulations and they ought to guarantee protection to the final recipients of services, and their implementation by entities outside the public sector must be in accordance with the public interest [Łągowska 2002, 440; Blicharz 2005, 55]. Moreover, the state must supervise the proper implementation of these tasks and is responsible for the proper exercise of this supervision. The privatisation of public tasks should not worsen the situation of citizens who are beneficiaries of these tasks, and the level of their protection should not be lower than that guaranteed by the state if the state were to execute those tasks.

Applying the above considerations to the commented judgment, the court rightly noted that the Council of Ministers, i.e. a public administration authority, entrusted the PDF with the implementation of specific public administration tasks. And indeed, in this respect, we are dealing with the privatisation of public tasks, as public administration tasks are executed by an entity that operates outside administration structures. This, however, does not mean that the PDF has been provided with the competence

to take administrative decisions. It can be stated by analysing the factual circumstances in accordance with the Court's assessment that the PDF has not been endowed with any form of authoritative agency in the sphere of administrative law relations. Statutory provisions have not given the PDF the authority to undertake authoritative tasks, nor have they authorised it to conclude an agreement in this respect. The court did not find that the provisions of the resolution of the Council of Ministers and the provisions of the regulations of the government programmes could be viewed as providing the PDF (directly or indirectly) with administrative powers. The PDF therefore had no competence in this respect and, consequently, was not an administrative authority within the meaning of the Code of Administrative Procedure. An element that allows one to distinguish private from public law actions is *imperium* authority¹¹ [Ofiarski 2016, 1464]. Although public entities may also exist in the private law sphere (*dominium*), only public law actions can be characterised by authority, and therefore it is this element that determines the public law nature of an action. Moreover, it should be added that the Supreme Audit Office (NIK) emphasised during its audit that support for entrepreneurs was granted under government programmes approved by the European Commission as a form of permissible state aid within the meaning of EU law. At the same time, during the audit, following the finding that the PDF had modified the rules for granting support, among others, by changing the definitions and methods of calculating employment, the Supreme Audit Office clearly indicated that the PDF had had no authority to independently modify these rules, which attests to the technical role of this fund. Also, the Supreme Audit Office, when examining the process of spending funds under the "Shields" programmes, found that the "financial subsidy agreement" was a bilateral civil law agreement concluded electronically via e-banking. It included the entrepreneur's declarations, the terms of payment and return of funds, the rules for remission, and, if applicable, the repayment schedule in cases where remission was not granted. The entire process was automated and simplified, but was based on declarations of intent, typical of civil law. In this light, it did not have the character of an administrative decision because PDF SA did not act as a public administration authority, but as a commercial law company. This is also confirmed by the position of the Management Board of PDF SA, which argued during the audit by the Supreme Audit Office that decisions related to PDF SA having been entrusted with the implementation of government programmes, similarly to all other decisions regarding individual components of the anti-crisis shields, had been taken by the Council of Ministers, and therefore the Management Board of PDF SA was not responsible for

¹¹ *Imperium*, on the other hand, refers to the financial aspect of collecting and spending public funds.

their content. PDF SA was responsible and liable towards the beneficiaries as a commercial law company.¹² Hence, in the event of claims or disputes, entrepreneurs could pursue their rights in civil courts, but not administrative courts. In the context of the analysis of the legal nature of the PDF's refusal to pay out funds to entrepreneurs, it is crucial to determine whether this action was a public law action and therefore subject to the jurisdiction of administrative courts (Article 3(2) of the PAC).

It follows from the case law of the Supreme Administrative Court, supported by arguments from the doctrine, that the PDF cannot be assumed to have been endowed – by law or on the basis of agreements concluded under the provisions of law – with the competence to undertake authoritative actions, in particular to issue administrative decisions. Consequently, the Fund's actions, including the refusal to pay out funds, cannot be categorised as “other public administration acts or measures within the meaning of Article 3(2) item 4 of the PAC.”

Given the fact that the relationship between the PDF and the entrepreneur was a civil law relationship based on a contract, the PDF's action cannot be classified as a decision or resolution. In light of the above, it should be assumed that the PDF's actions related to the refusal to pay out funds to entrepreneurs are civil law actions, and any disputes arising from these actions cannot be resolved by administrative courts. In other rulings, the Supreme Administrative Court also indicates that disputes related to the implementation of a subsidy agreement are resolved by common courts. Although its subject matter involves the transfer of public funds, it is concluded through declarations of intent expressed in a reciprocal (bilateral) agreement; however, it does not take the form of an administrative contract as known in other legal systems, which also complicates the analysis of the obligations arising from such a contract.¹³

The correctness of the Court's decision is also supported by the analysis of the conditions for appeal to the administrative court. The literature and case law indicate that the acts and measures that can be appealed to an administrative court are those that (1) do not have the character of a decision or a resolution, because these are appealable under Article 3(2) points 1 and 2 of the PAC, (2) are undertaken in individual cases, because acts of a general nature are listed in Article 3(2) points 5 and 6 of the PAC,

¹² Post-audit statement amended in accordance with the content of resolution no. KPK-KPO.441.80.2023 of the Adjudicating Panel of the Adjudication Committee of the Supreme Audit Office of 25 July 2023 P/21/018 Effects of selected actions undertaken by the State to mitigate the effects of the epidemic on the economy, https://www.nik.gov.pl/kontrola/wyniki-kontroli-nik/pobierz,kgp~p_21_018_202108251057271629881847~id1~02,typ,kj.pdf [accessed: 25.10.2025].

¹³ Decision of the Supreme Court of 08.05.2024, ref. no. I GSK 539/24, Lex no. 3723961.

and (3) have a public law character as they concern rights or obligations arising from legal provisions [Adamiak 2006, 18-19; Tarno 2025, 379; Drachal, Jagielski, and Stankiewicz 2025, 54; Stankiewicz 2010, 41].

CONCLUSIONS

The judgment of the Supreme Administrative Court is an important voice in the discussion on the confines of public administration and judicial control of its actions. This confirms that the delegation of public tasks to private entities does not, by itself, imply that such entities are vested with administrative competences.

While agreeing with the position of the Court, which, when adjudicating on the presented factual situation, based its assessment on the applicable provisions of law, one cannot but have doubts about the existing legal situation. Is it sound to remove the implementation of a government programme financed from public funds from the control of an administrative court? In the event of a refusal to pay out funds, does an entrepreneur have a real possibility of pursuing their rights; do there exist any protective mechanisms other than those provided by civil law?

These doubts are not easy to resolve, since, as indicated above, the procedure for obtaining state aid under the so-called Financial Shields has a specific, hybrid nature. From a procedural perspective, it was established at the boundary between structures specific to public and private law. The position of the President of the Supreme Audit Office cannot be overlooked here. Following the audit entitled “Effects of selected state actions undertaken to mitigate the effects of the epidemic on the economy,” he submitted a motion to the Constitutional Tribunal to examine the compliance with the Constitution and the provisions of the Act of 4 July 2019 on the System of Development Institutions of the provisions contained in the government programmes adopted by the Council of Ministers. The Supreme Audit Office took the position that Article 21a(1) of the SDI Act did not grant the Council of Ministers the authority to “transfer” or “delegate” rights and obligations arising from the government programmes to PDF SA, including the authority to lay down the principles of granting public aid. However, in breach of the enabling legislation, the Council of Ministers transferred to the PDF a broader range of competences than those arising from Article 21a(1) of the SDI Act, including competences whose transfer was impermissible, as they involved the exercise of authoritative powers towards citizens – namely, the unilateral establishment of the principles for granting aid governed by public law, which should be exercised exclusively by public authorities. This demonstrates that even at the stage of the audit conducted by the Supreme Audit Office, doubts were raised as to the nature of the competences transferred to the PDF.

Objectively, it is difficult to disagree that when the aid programmes were being executed during the COVID-19 pandemic, entrepreneurs were in fact deprived of the constitutionally guaranteed right to a court. Financial support instruments were implemented by PDF SA, which did not have the status of a public administration authority. Since, as confirmed by the court's position in the commented judgment, decisions on granting or refusing aid were civil law decisions, they were excluded from the jurisdiction of administrative courts.

It is worth mentioning that an entrepreneur who was refused payment of a subsidy or remission of repayment thereof did not have a real opportunity to seek protection of their rights before an administrative court. Moreover, the government programme regulations did not impose on PDF S.A. any obligation to provide reasons for its decisions or establish an appeal procedure, thereby depriving beneficiaries of the opportunity to learn the grounds for refusals and to avail themselves of legal remedies, should the need arise. Leaving only the civil law path, which is not appropriate for examining the legality of public law activities, made this protection largely illusory as the common court does not have the instruments to control the legality of an authoritative act, but only resolves disputes of an equivalent nature between parties. According to the Supreme Audit Office, such a structure of the public aid mechanism also led to a breach of constitutional guarantees (Article 45(1), Article 77(2) and Article 78 of the Constitution of the Republic of Poland) providing everyone with the right to a court and an effective remedy, as well as violating the principle of legality, according to which public authorities act on the basis and within the confines of the law (Article 7 of the Constitution of the Republic of Poland). Delegating the competences of a public authority to a private entity – PDF SA – led to a situation in which decisions regarding the use of public funds were made outside the constitutional system of control and accountability.

In light of the arguments presented above, serious doubts arise as to whether the exclusion of the implementation of a government programme financed from public funds from the jurisdiction of administrative courts is consistent with the constitutional standards of control over the activities of public administration. It is worth noting the opinion expressed in the doctrine that this type of legal structure leads to a significant limitation of entrepreneurs' access to effective legal remedies, which applies not only to financial and legal issues but also to access to public information [Hetko and Możdżeń-Marcinkowski 2023, 96-117]. Given the implications for public finances arising from the PDF's exclusion from the public finance sector, it can also be argued that the chosen approach is inconsistent with the nature and purpose of public aid, which serves as a means of carrying out public authority functions within the *imperium* sphere. However, the

fact that the PDF operates outside the public finance sector does not mean that its activities are not subject to the regime of the Public Finance Act. While protective mechanisms governing the flow of public funds are safeguarded from the State's perspective, the same cannot be said when analysing the position of entrepreneurs who are beneficiaries of those funds.

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