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RESEARCH ARTICLE

NATIONAL LEGISLATION BARRIERS IN THE AREA OF THE POSSIBILITY OF RECAPITALISATION OF NON-MONETARY ASSET COMPONENTS OF THE PUBLIC DEVELOPMENT BANK BASED ON THE EXAMPLE OF THE BANK GOSPODARSTWA KRAJOWEGO. THE CURRENT STATUS AND AUTHORS PROPOSALS FOR CHANGES.

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Abstract

In the developed market economies a trend of undertaking public tasks with the use of state-owned development bank institutions can be observed. For this reason, in the authors' opinion, it is reasonable to consider the possibility of wider use of public resources of non-cash form to increase the capitalization of public development banks. The proposed changes would allow authors to facilitate the recapitalization of the Polish state-owned development bank (the Bank Gospodarstwa Krajowego), whose business objectives can be described as public purposes. The entry of the proposed regulations into force would not reduce third party rights, would not privilege the situation of the state-owned development bank in so much in order to even assert about the potential effect of removing private entities. The amendment proposals that the authors wishes to introduce in the current normative economic analysis of law is based on the principle enhancements (improvements).

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INTRODUCTION

The purpose of this publication is to examine the possibility of free non-cash transfer of public resources of the Polish development bank ("the Bank Gospodarstwa Krajowego") in order to increase its own funds. The authors' research on the above subject will focus mainly on the issue of economic analysis of law (Law & Economics) in the area of public finances and the financial market. The authors shall attempt to prepare his own proposals for amendments to regulations governing the possibility of recapitalization of the Bank Gospodarstwa Krajowego in kind based on the so-called optimum Pareto principle. To quote, V. Pareto „We will talk about members of society that enjoy maximum satisfaction in a particular position, if the possibility of fine shift cannot be found from such a position, in such a way that the satisfaction experienced by members of the public will increase or decrease. This means that any slightest precipitation from this position invariably brings the effect of increasing the level of satisfaction of certain individuals and a reduction to others, a pleasure for some and distress to others.” [Pareto, 1927]. The amendment proposals that the authors wishes to introduce in the current normative economic analysis of law is based on the principle enhancements (improvements), i.e. the improvement of the economic position of at least one entity, while retaining the status of the others [Chrupczalski, 2008].

Main objectives of operations and tasks of the Bank Gospodarstwa Krajowego

In the developed market economies a trend of undertaking public tasks with the use of state-owned development bank institutions (e.g. KfW in Germany, CDC in France, or CDP in Italy) can be observed. For this reason, in the authors' opinion, it is reasonable to consider the possibility of wider use of public resources of non-cash (contribution in-kind in the form of real estate or financial instruments) to increase the capitalization of public development banks.

The Bank Gospodarstwa Krajowego (the "Bank", the "BGK") fulfills the function of a public development bank in the Polish economy. In accordance with the Article 2 of the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego is a state-owned bank within the meaning of the Act of 29 August 1997 - Banking Law. According to the Article 4 of the Act on the Bank Gospodarstwa Krajowego supporting the economic policy of the Council of Ministers, government social and economic programmes as well as local government and regional development programmes, including particular projects, are all part of fundamental objectives of the Bank:

- 1) implemented using the resources derived from European Union and international financial institutions funds,
 - 2) infrastructural,
 - 3) related to the development of small and medium-sized enterprises
- including those implemented financed from public funds.

The Bank Gospodarstwa Krajowego manages the task funds and governmental programmes (including the National Road and the Government Export Support Programme), and supports the remaining socially useful activities (e.g. Local government and regional development projects). As part of its own activities, the Bank also conducts tasks fit within the general direction and objectives of activities undertaken by the Council of Ministers and local authorities.

According to the Article 4 of the Act on the Bank Gospodarstwa Krajowego the tasks of the Bank include:

- 1) the implementation of actions specified in the Act of 29 August 1997 - Banking Law;
- 2) servicing the funds established, entrusted or turned over to the BGK pursuant to separate acts;
- 3) the handling of export transactions with the use of export-promotion tools and promotion of exports of Polish goods and services, in compliance with separate regulations or as a part of implementation of government programmes;
- 4) the performance of activities related to credit institutions which have been liquidated or pronounced as such pursuant to:
 - a) the decree of 25 October 1948 on the principles and mode of liquidation of certain banking enterprises,
 - b) the decree of 25 October 1948 on the principles and mode of liquidation of certain long-term credit institutions,
 - c) the decree of 25 October 1948 on the banking reform,
- 5) conducting, directly or indirectly, the guarantee activity in respect of the implementation of the governmental programmes or on behalf or on the account of the Treasury, on the basis of the Act of 8 May 1997 on warranties and guarantees granted by the Treasury and certain legal persons, in particular for the sector of small and medium enterprises;
- 6) making statements which are considered official documents, within the meaning of Article 95 item 1 of the Act of 29 August 1997 - the Banking Law, which allow for the deletion of entries made into sections III and IV of the land and mortgage registers or collections of documents, made in favour of:
 - a) the credit institutions liquidated or considered liquidated on the basis of the decrees referred to in point 4,
 - b) the Treasury in respect of:
 - purchase of the land and inventory from the State Land Fund, as established by the decree of 6 September 1944 on the agricultural reform,
 - credits and loans granted during the years 1945-1990 for the demolition and repair, completing the construction process, superstructure, renovation and redevelopment of buildings, for the sale of land for development and the State's sale of family and multi-family houses,

c) the Treasury or the entities whose the Treasury is a successor, made prior to 1 September 1939;

7) supporting the development of residential construction, in particular the construction whose aim is to construct residential premises for rent, in compliance with separate regulations or in connection with the implementation of governmental programmes.

The Bank Gospodarstwa Krajowego may also perform a role of an entity implementing the financial instrument or the funds referred to in the Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

Non-cash contribution in the form of real estate

An example of the Bank Gospodarstwa Krajowego's own activities in the scope of implementing the primary objective may be the project for creating a closed-end private equity investment the Fund for Rental Housing. This initiative, undertaken by the Bank, aims to extend the offer of attractive and affordable quality apartments for rent in the biggest Polish agglomerations, which can contribute to the increased job mobility of Poles, as well as to develop a real alternative for a mortgage loan.

The Towarzystwo Funduszy Inwestycyjnych BGK S.A. (investment funds) and the BGK Nieruchomości S.A. (managing company) companies involved in the implementation of the initiative which is to establish the Fund for Rental Housing - Closed Investment Fund of Non-Public Assets, whose investor is the Bank Gospodarstwa Krajowego. The Fund for Rental Housing operates as a closed-end investment fund in accordance with the Act of 27 May 2004 on respect of investment funds. The Fund's strategy is to invest in real estate investments related to residential buildings. The primary activity of the Fund is to administer the real estate and rental apartments. The aim of the project is to stimulate the real estate market in the area of apartments for rent. The Polish market for rental apartments is in fact six times lower than the European average (23% in Europe, 4% in Poland) [www.bgk.com.pl, 2015].

The main objective of the Fund for Rental Housing is to increase the value of its assets. Additional activities are carried out in addition to its main purpose, for example:

- 1) increasing the mobility of workers or job seekers,
- 2) institutionalizing the rental housing market,
- 3) introducing benchmarks to the housing market which are not of a purely economic dimension, but also a structural dimension (e.g. institutional rental rules, the standard of housing for rent).

The Fund for Rental Housing is a market tool supporting the economic growth. The development of the rental market means a greater availability of housing, increased mobility of people seeking employment and indirectly, additional jobs in the construction of houses and their facilities. This initiative also aims to raise real estate standards and provide tenants with higher comfort of the stability and predictability of the apartment owners' decisions, as well as the product offered.

The planned capital issue target for the Fund for Rental Housing amounts to 5 billion PLN. This amount will enable the purchase of approx. 500 apartments within the Fund's portfolio. The accumulated income generated by fund's portfolio will increase by another 500-600 homes per year in the subsequent years, which will enable the construction of a targeted portfolio of approx. 20,000 apartments. The above example of the commitment of the Bank Gospodarstwa Krajowego can act as a catalyst for other institutional investors, which will positively affect the availability of apartments for rent on the Polish market [www.bgk.com.pl, 2015].

Certain properties owned by the Bank Gospodarstwa Krajowego could prove extremely helpful in achieving the specific objectives of its activities with the objectives and tasks carried out using the Fund for Rental Housing (the construction of its buildings in its own scope). It should be noted that the Act of 21 August 1997 on real estate economy regulates the transfer of the subject of property for public purposes, as well as defining the very concept of a public purpose. Public purposes in the meaning of this Act are:

- 1) assigning land for public roads, bicycle paths and waterways, construction, maintenance and construction of these roads, buildings and public transport facilities as well as public communications and signaling;
- 2) assigning land for railway lines and their construction and maintenance;
- 3) assigning land for airports, features and facilities to handle air traffic in the approach areas, and the construction and operation of airports and facilities;
- 4) construction and maintenance of drainage systems, wires and equipment for transmission or distribution of liquids, steam, gas and electricity, as well as other facilities and equipment necessary for using these cables and equipment;
- 5) construction and maintenance of the carbon dioxide transportation network;
- 6) construction and maintenance of public facilities for the public water supply, accumulating, transmitting, treatment and disposal of sewage and waste recovery and disposal, including their storage;
- 7) construction and maintenance of facilities and equipment for the environmental protection, reservoirs and other water facilities providing the supply of water, regulating flows and protection against flooding, as well as control and maintenance of water and water management facilities owned by the Treasury or local government units;
- 8) care for real property monuments under the provisions of the protection and conservation of monuments;
- 9) protection of Holocaust Memorials under the provisions on the protection of former Nazi death camps and places and memorials to the victims of communist terror;
- 10) construction and maintenance of premises for offices of authorities, administration, courts and prosecutors' offices, state universities, public schools, public health care facilities, kindergartens, social care homes, care and educational facilities and sports facilities;
- 11) construction and maintenance of buildings and premises necessary for the fulfillment of the obligations in the provision of universal services by the designated operator within the meaning of the Act of 23 November 2012 - Postal Law, as well as other facilities and premises connected with the provision of these services;
- 12) construction and maintenance of facilities and equipment necessary for defense of the state and protection of the state border, as well as to ensure public security, including the construction and maintenance of remand centres, prisons and youth detention centres;
- 13) prospecting, exploration, mining of mineral deposits covered by mining property;
- 14) prospecting or exploration of the complex underground carbon dioxide storage and underground storage of carbon dioxide;
- 15) the establishment and maintenance of cemeteries;
- 16) the establishment and protection of places of national remembrance;
- 17) protection of endangered plant and animal species or natural habitats;
- 18) other public purposes laid down in separate acts.

The authors' wishes to draw attention to consider the possibility of amending the Article 6 of the Act on the real estate economy by defining statutory obligations of the Bank Gospodarstwa Krajowego as a public purpose.

The proposition of entries is as follows:

Article 6 of the Act of 21 August 1997 on the real estate economy (Journal of Law of 2015, item 1774). In the Article 6 after point 1b the following point 1c is inserted:

„1c) implementation by the Bank Gospodarstwa Krajowego of statutory purposes of the activities referred to in the Article 4 of the Act of 14 March 2003 relating to the Bank Gospodarstwa Krajowego (Journal of Law of 2014, item 510, as amended).”.

Moreover, the provisions of the Act on the real estate economy to equip state or local government legal persons/organizational units (e.g. state-owned enterprises or state-owned banks), which are not commercial law companies, may be brought before the real estate property, but only once they have been established. In the opinion

of the authors it should be also possible to transfer the specified property to such entities in the case of the already existing legal entities (e.g. the Bank Gospodarstwa Krajowego). It should be noted that this law allows bringing in-kind contributions to the limited liability or joint stock companies, both at the time of their creation, as well as at later stages of their business.

Therefore, in the authors' opinion, it is reasonable to consider the possibility of amendment of that law in order to create legal solutions for bringing the property to the state or local government legal persons/ organizational units at any time these entities carry out activities [The Letter of Bank Gospodarstwa Krajowego, 2015].

The proposition of entries is as follows:

In the Act of 21 August 1997 on the real estate economy (Journal of Law of 2015, item 1774, as amended) after the Article 56, the following shall be added to the Article 56a:

„Article 56a. Facilities at the property, referred to in the Article 51, may also occur after the day of the establishment of state or local government corporations or state or local government units. The provisions of the Article 51-56 apply accordingly.”.

Non-cash contribution in the form of financial instruments

The Article 33 of the Act of 30 August 1996 on the commercialization and the privatization determines the possible ways to dispose of shares held by the Treasury. In accordance with the Article 33 item 1 of the Act on the commercialization and the privatization of the shares owned by the Treasury are sold as follows:

- 1) public offering;
- 2) public tender;
- 3) negotiations on the basis of a public call;
- 4) accepting the offer in response to tender offer pursuant to the Articles 72-74 or the Article 91 item 6 of the Act of 29 July 2005 on public offering and conditions governing the introduction of financial instruments for organized trading and public companies;
- 5) publicly announced auction;
- 6) the sale of shares in the organized market within the meaning of the Act of 29 July 2005 on trading in financial instruments;
- 7) sales on the basis of a public offering of shares covered by the prospectus or information memorandum within the meaning of the Act of 29 July 2005 on public offering and conditions governing the introduction of financial instruments for organized trading, and public companies, prepared in connection with the offer or the admission of these shares to trading on the regulated market;
- 8) ancillary stabilization on the conditions laid down in the provisions of the Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council regarding exemptions for buy-back programmes and stabilization of financial instruments and by granting share loans for the purpose of the auxiliary stabilization;
- 9) sale of shares outside the regulated market within the meaning of the Act on trading in financial instruments, using system associating offers to buy and sell, organized and conducted by the company operating the regulated market.

The Article 33 item 3 of the Act on the commercialization and the privatization states that the Council of Ministers can agree on, other than as provided for in the Article 33 item 1 of the Act relating to procedures for disposal of shares (i.e. in a mode other than those mentioned in points 1-9). Accordingly, there is the possibility of bringing the shares of the Treasury for investment funds in exchange for investment certificates issued by these funds - based on the resolution of the Council of Ministers.

As an example of the above decision-making process of the Council of Ministers could be used the Polish Investments Programme. On 12 October 2012, the Chairman of the Council of Ministers presented to the Polish Parliament an action plan to stimulate economic growth in Poland. One element of that plan is the Polish Investments Programme. The realization of the Programme is intended to accelerate the process of privatization and to allow the resulting funds to be used for infrastructural investments. The Polish Investments Programme is

designed to support the realization of selected infrastructural investments in an economically reasonable way that does not increase public debt but involves the long-term private equity [The Motion, 2012].

The Programme focuses particularly on providing conditions for the long-term financing of profitable investment projects in energy and gas infrastructure, development of hydrocarbon deposits, as well as transport, local government, industrial and telecommunications infrastructure. The Programme is oriented to potential growth undertakings and relies on long-term financing of investments important for Poland's national economy and strategic interests [http://www.bgk.com.pl, 2015].

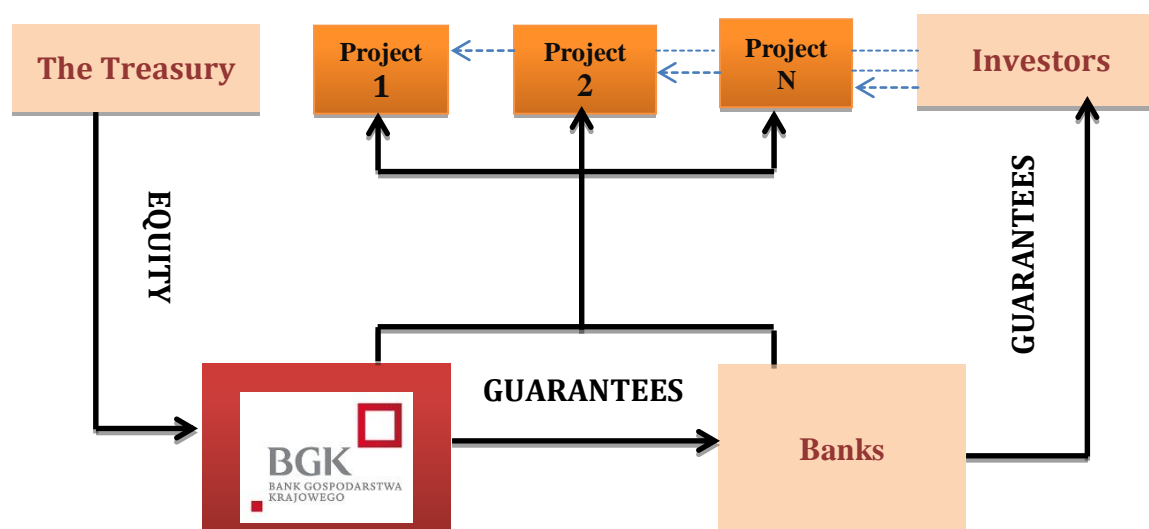
Table 1. The Bank Gospodarstwa Krajowego in the Polish Investment Programme

Details	The involvement of the Bank Gospodarstwa Krajowego
Offered products to be used jointly or independently	Credits, guaranteed taking up of bonds, guarantees, investment certificates
Projects	Solely profitable projects related to the energy (distribution and production) and gas (transmission network, extraction and storage) infrastructure, development of hydrocarbon deposits (including shale gas), transport infrastructure, local government infrastructure (waste disposal, transport), and industrial and telecommunications infrastructure
Value of involvement	Up to the concentration limits specified in the Act on the BGK and in the Banking Law Act (up to 25% of own funds for capital affiliates or up to 50% affiliate groups, bank or investment fund)
Duration of involvement	As per the project's financial model

Source: [www.bgk.com.pl, www.msp.gov.pl and own study].

The activities of the Bank Gospodarstwa Krajowego consists in particular by serving as an entity offering complementary services on market conditions to other commercial entities (providing the "last penny" needed to finance a project).

Figure 1. Instruments used by the Bank Gospodarstwa Krajowego in the Polish Investments Programme.



Source: [www.bgk.com.pl, www.msp.gov.pl and own study].

The Bank Gospodarstwa Krajowego may ultimately be recapitalized with the Treasury companies' stock worth up to PLN 10 billion. Recapitalization of the Bank Gospodarstwa Krajowego will enable a stepping up of the credit and guarantee efforts related to the long-term financing needs of these investments. The means for recapitalizing will be obtained from the sale of blocks of shares of PGE S.A., PKO BP S.A., PZU S.A. and Ciech S.A. [<http://www.bgk.com.pl>, 2015].

On 27 December 2012, the Council of Ministers consented to contribute the shares of the following companies to the Polish Investments Programme [The Motion, 2012]:

- 1) up to 213,048,534 ordinary bearer shares of a company acting under the name PGE Polska Grupa Energetyczna S.A. with its seat in Warsaw, with the nominal value of PLN 10 each, constituting 11.39% of the share capital;
- 2) up to 104,473,620 ordinary bearer shares of a company acting under the name Powszechna Kasa Oszczędności Bank Polski S.A. with its seat in Warsaw, with the nominal value of PLN 1 each, constituting 8.36% of the share capital;
- 3) up to 8,721,857 ordinary bearer shares of a company acting under the name Powszechny Zakład Ubezpieczeń S.A. with its seat in Warsaw, with the nominal value of PLN 1 each, constituting 11.39% of the share capital;
- 4) up to 19,972,900 ordinary bearer shares of a company acting under the name Ciech S.A. with its seat in Warsaw, with the nominal value of PLN 5 each, constituting 37.90% of the share capital.

In August 2015 the Ministry of the Treasury handed over a package of 24,487,297 shares to the Bank Gospodarstwa Krajowego representing 1.96% of capital of PKO BP SA. The recapitalization is associated with the need to support the Bank's activities under the Polish Investments Programme of strategic financing for national projects under the Local Government Investment Fund, the Capital Infrastructure Investment Fund, the Debt Infrastructure Investment Fund and the Polish Enterprise Investment Fund. As a result, the Bank will be able to cover subsequent certificates of these funds, which will support profitable investments important for the economic development of the country and could provide financial gain due to an increase in the value of acquired certificates.

In the opinion of authors, the Bank Gospodarstwa Krajowego, being an established public entity, should be able to raise capital on the basis of the decision of the competent minister on a statutory basis. It should be noted for instance that the Minister of Finance, pursuant to the Article 5a of the Act on the Bank Gospodarstwa Krajowego has the statutory possibility to recapitalize the Bank with Treasury securities.

The proposition of entries is as follows:

In the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego (Journal of Law of 2014, item 510, as amended) after the Article 5a, the following is added to the Article 5a¹:

„Article 5a¹. 1. The minister responsible for the Treasury or the appropriate minister responsible for financial institutions on behalf of the Treasury, may transfer stocks, shares, investment certificates or participation unit owned by the Treasury free to the BGK, to increase the statutory fund of the BGK with a view to the effective implementation of the fundamental objectives of activities referred to in the Article 4.

2. In order to transfer the financial instruments referred to in the item 1, the Act of 30 August 1996 relating to the commercialization and the privatization (Journal of Law of 2015, item 747, as amended) does not apply”.

or (alternate version)

„Article 5a¹. 1. The minister responsible for:

- 1) the financial institutions,
- 2) the Treasury,
- 3) the economy,
- 4) construction, local planning, spatial management, and housing,
- 5) transport,
- 6) regional development

- on behalf of the Treasury, BGK stocks, shares, investment certificates or units owned by the Treasury may be transferred free to increase the statutory fund of the BGK, with a view to the effective implementation of the fundamental objectives of the activities referred to in the Article 4.

2. In order to transfer the financial instruments referred to in the item 1, the Act of 30 August 1996 on the commercialization and the privatization (Journal of Law of 2015, item 747, as amended) does not apply.”.

Conclusion

The proposed changes would allow authors to facilitate the recapitalization of the Bank Gospodarstwa Krajowego, whose business objectives can undoubtedly be described as public purposes. The entry of the proposed regulations into force would not reduce third party rights, would not privilege the situation of the Bank in so much in order to even assert about the potential effect of removing private entities. Authors proposals presented in this article are restricted solely to eliminate excessive barriers set up by national legislature.

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The Act of 14 March 2003 on the Bank Gospodarstwa Krajowego, Journal of Law of 2014 item 510, as amended, Poland.

The Act of 29 August 1997 - Banking Law, Journal of Law of 2015 item 128, as amended, Poland.

The Act of 21 August 1997 on the real estate economy, Journal of Law of 2015 item 1774, as amended, Poland.

The Act of 27 May 2004 on investment funds, Journal of Law of 2014 item 157, as amended, Poland.

The Act of 30 August 1996 on the commercialization and the privatization, Journal of Law of 2015 item 747, as amended, Poland.

The Letter of Bank Gospodarstwa Krajowego of 28 July 2015, No. DP.064.2.SS.2015, Poland.

The Motion of the Minister of Treasury and Minister of Finance of 17 December 2012, No. DRK-MM-424-1/12 MSP/DRK/1085/12, concerning the manner, different from that specified in Article 33, item 1 of the Act on Commercialization and Privatization, of disposing of participation units owned by the Treasury in the following companies: PGE Polska Grupa Energetyczna SA, Powszechna Kasa Oszczędności Bank Polski SA, Powszechny Zakład Ubezpieczeń SA and Ciech SA, for the purpose of contributing them to a Special Purpose Vehicle to cover its share capital and to the Bank Gospodarstwa Krajowego to increase its statutory fund, Poland.