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RESEARCH ARTICLE

THE LEGAL ENVIRONMENT OF THE POLISH STATE-OWNED DEVELOPMENT BANK (THE BANK GOSPODARSTWA KRAJOWEGO) IN THE SCOPE OF THE PUBLIC PROCUREMENT AND THE FINANCIAL MARKET. THE AUHTOR'S PROPOSAL OF CHANGES

Sebastian Skuza

Department of the Financial Systems of the Economy, University of Warsaw, Poland

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ABSTRACT

In view of the changes in the financial market environment taking into account the public interest expressed in the statutory purpose of the operation of the Polish state-owned bank (the Bank GospodarstwaKrajowego), the Author proposes changes in the following areas:
1) in terms of the investment policy of insurance companies;
2) in terms of clarifying the legal subjectivity of the Bank;
3) in terms of applying procedures of public procurement law.

Key words:

Bank Gospodarstwa Krajowego,
investment policy of insurance
companies, the public procuremer
act, state organizational entity.

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INTRODUCTION

The Author shall attempt to prepare proposed amendments enabling the application of solutions concerning the Polish state-owned development bank, which are more beneficial than those proposed by the government.

On 14 March 2003, the Parliament of the Republic of Poland passed the Bank Gospodarstwa Krajowego("the BGK", "the Bank") Act (Journal of Laws No. 65, item 594). The Statue entered into force 45 days after the date of publication (i.e., on 1 June 2003). The bill of the Act was drafted by the government in furtherance of the "Entrepreneurship - Growth - Work" economic strategy programme. Due to the character of the activities assigned to the BGK (the Polish state-owned development bank), which consist of performing public tasks, the Bank occupies a special, expressly distinct position among other banks operating in the market. Regulating the basic rules and scope of BGK activities became necessary both because of formal and legal considerations and the pending integration with the European Union [Olszówka, Skuza, 2003].

The Bank has been established by the state to realize a public

mission, in particular by financially supporting the government's economic policy, which provides a link to the institution's prewar traditions. According to Article 4 of the BGK Act, the main activity objectives of the Bank, in the scope specified in the Act and separate provisions, include support for governmental social and economic programmes as well as local government and regional development programmes, which include in particular the following projects [Skuza, 2015, Skuza 2015a]:

1. projects realized with the use of means obtained from funds of the European Union and international financial institutions;
2. infrastructural projects;
3. projects related to the development of the SME sector

Including projects realized with the use of public means

Apart from its main activity objectives, BGK may also conduct market activities more typical of other banks. Both the reference to the Banking Law Act contained in the BGK Act and the provisions of BGK Statute (enacted by an order of the Minister of Treasury) allow BGK to perform banking

*Corresponding author: **Sebastian Skuza**

Department of the Financial Systems of the Economy, University of Warsaw, Poland

operations and other specific activities typical of the banking sector.

The main activity objectives of BGK are also reflected in tasks realized by the Bank Gospodarstwa Krajowego and listed in Article 5 of the BGK Act, which include among others [Skuza, 2015; Skuza, 2015a]:

1. carrying out the actions set forth in the Banking Law Act of 29 August 1997;
2. providing services related to funds established, entrusted or transferred to the BGK under separate statutes;
3. providing services related to export transactions with the use of export support instruments and support for exporting Polish goods and services, pursuant to separate regulations or in the course of realizing government programmes;
4. conducting direct or indirect guarantee or surety activities in the course of realizing governmental programmes or in the name and on behalf of the Treasury under the Act on Sureties and Guarantees Granted by the Treasury and Certain Legal Persons 8 May 1997, in particular for the small and medium enterprises sector;
5. supporting the development of residential housing, in particular efforts aimed at constructing residential premises for rental, according to separate provisions or in the course of realizing governmental programmes.

The BGK Act enables the Bank to maintain solvency standards, provide means to increase BGK's statutory fund, transfer securities to increase BGK's statutory fund, and be granted loan from state budget means to increase basic or supplementary funds. In order to ensure that BGK complies with liquidity standards specified in provisions of the Banking Law Act of 29 August 1997, the minister responsible for public finances may guarantee, in the name of the Treasury, the payment of credits and credit lines granted to BGK by domestic or foreign bank or credit institution, and the performance of pecuniary considerations from debentures issued by the BGK, in particular bonds or banking securities.

The objectives stated in the BGK Act expressly determine its public mission and the specific character of its activities in the banking market. The basic objectives of BGK activities include supporting governmental economic and social programmes, as well as local government and regional development programmes realized with the use of public funds. Currently, BGK combines domestic and foreign trading activities in the market with financial support for economic and social undertakings of the state. Market mission activities are, however, meant to increase the effectiveness of carrying out commissioned tasks and to expand and reinforce the BGK infrastructure and assets used to carry out tasks commissioned by public administration authorities. In view of the ongoing changes in the financial market environment taking into account the public interest expressed in the statutory purpose of the operation of the Bank Gospodarstwa Krajowego, the Author proposes changes in the following areas:

1. in terms of the investment policy of insurance companies.
2. in terms of clarifying the legal subjectivity of the Bank;
3. in terms of applying procedures of public procurement law.

In connection with the ongoing parliamentary work on the draft bill on insurance and reinsurance activity (No. 3644), it is necessary to consider the possibility of solutions to initiate changes in the investment policy of insurance companies.

Article 275 of the bill introduces a rule that insurance and reinsurance companies invest their financial resources in accordance with the principle of prudent investment. Article 275, item 4, point 6 of the draft of the insurance and reinsurance business stipulates that insurance and reinsurance companies are required to differentiate in order to invest the assets, with the exception of the securities issued, guaranteed or covered by sureties by the State Treasury. The above solution (i.e. no limitation) should also apply to entities whose credit risk remains at the risk of the State Treasury, through a system of guarantees or counter-guarantees granted by the Treasury for the commitments of the business of such entities. Currently, the proposed wording of Article 275 item 4, point 6 of the draft provides no concentration limit on the issue of bonds by third parties, guaranteed by the Treasury, so there is no substantive justification in the opinion of the Bank in terms of taking up the issue of securities of entities, in which all commitments are subject to credit protection (in the form of guarantees or counter-guarantees) on the part of the Treasury.

The introduction of these solutions would be beneficial also for insurance companies, among other, by making reference to higher benefits due to discount or interest without the need to increase the level of risk. That which is proposed in the amendment to the Act on the Bank Gospodarstwa Krajowego (package CRDIV/CRR) directly relates to the Bank as the entity to which the exposure risk weight will be applied, is that corresponding to the risk weight of the Treasury. It should also be pointed out that investments in debt securities of the Bank made by pension funds operating on the basis of the current solutions of the Act of 28 August 1997 on the organization and operation of pension funds, are not subject to the statutory limits of the commitment.

In accordance with Article 2 of the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego, the Bank is a state-owned bank within the meaning of the Act of 29 August 1997 in respect of banking Law pursuant to Article 4 of the Act of 14 March 2003 on the Bank GospodarstwaKrajowego, relating to the basic objectives of the Bank to the extent specified by law and other regulations, social and economic government programmes as well as programmes for local government and regional development should be supported.

The Bank provides services for task funds and governmental programmes (including the National Road Fund, the Government Export Support Programme), as well as supporting other socially useful purposes (e.g. local government projects and regional development). As part of its own activities, the

Bank also conducts tasks not covered by statutory law, but fits within the general direction and objectives of measures undertaken by the government and local authorities.

In order to implement government programmes, referred to in Article 5, items 1, 3, 5 and 7 of the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego, as well as in the development of its activities, the Bank can raise funds, among other, from the issue of debt securities. The need to direct the Bank's issuance of debt securities stems from a desire to change the structure of liabilities of the Bank, i.e. reducing the share of deposits and increasing the share of debt securities, which is a characteristic feature of the balance sheets of most state-owned development banks. Cooperation between the insurance companies and the Bank Gospodarstwo Krajowego could provide a positive contribution to the development of the financial market in Poland, as well as to promote the implementation of the economic policies of the state. Uniformity of treatment by insurance companies of securities issued by the Bank to the securities issued by the Treasury is important in the context of assessing the significant purchasing potential of these institutions. An extension for insurance companies access to debt instruments issued by the Bank will increase the capacity of these institutions to purchase bonds of equivalent risk to the risk of the Treasury, which in turn means that the wider range of investment instruments will not increase the risk of activities of insurance companies. The increase in the investor base will help increase the liquidity of these securities, thus contributing to the further development of the domestic debt securities market [The Letter of 31 July 2015].

The proposal of provision is as follows

Article 275, item 4. An insurance and reinsurance company invests in accordance with the following rules:

6) the company shall diversify the assets in an appropriate manner so as to avoid excessive reliance on one particular asset, issuer or group of issuers related to each other, or geographical area and excessive accumulations of risk across the portfolio; Investments in assets issued by the same issuer or group of issuers related to each other, shall not expose the insurance or reinsurance company to excessive risk concentration. These reservations do not apply to securities issued, guaranteed or sureties covered by the State Treasury or entities in respect of liabilities or activities which the obligations of the State Treasury, granted on the basis of separate regulations, meet the requirements of credit protection within the meaning of Article 213-215, Regulation no. 575/2013.

Example 2

The issue of the Bank as an institution subject to public procurement procedure following the entry of the Act of 29 January 2004 on the Public Procurement Law, caused controversy and doubts concerning the interpretation. The Author takes the liberty to express the opinion that both on the interpretation of national law and community law, there are no grounds, in the Bank's opinion, to accept the claim that the Bank's activities do not constitute a commercial activity, which is decisive in accordance with Article 3, item 1, point 3 of the

Act on Public Procurement Law recognizing the Bank as a public law entity and thus the need to use public procurement procedures as an entity by controlled the state [Lasecki, Skuza, 2014]. On the contrary, the Bank operates to make a profit, at the same time incurring the risks involved. It is not without significance that the activities conducted by the Bank in the scope of operating government and EU programmes has the character of profit, which can be defined as a reasonable profit obtained for their implementation. The issue of its own activities and that ordered to the Bank was the subject of analyzes carried out by the Office of Competition and Consumer Protection and the European Commission. These institutions, after taking into consideration the relevant explanations of the Bank, took no further action to recognize the Bank both as a beneficiary of public aid as well as an entity granting unauthorized public aid. The above mentioned fact therefore confirms my view that the Bank, in all areas of its involvement, operates its activities under appropriate conditions to a market operator [The Letter of 21 May 2015].

In view of the above, the author allows to submit a proposal to place, as *lex specialis*, into the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego, the provisions constituting the Bank's procedures for public procurement in terms of taking into account the specific nature of banking activities and enabling proper and efficient execution of the tasks entrusted to the Bank, in particular banking activities specified in Article 5 of the Act of 29 August 1997 on Banking Law. The Author wishes to note that the suggestions in the following proposals excluding the subject are a repetition of the current exclusions, on the basis of Article 4, item 2a of the Act on Public Procurement Law. In the scope of the so-called "Subliminal orders" the classic directive is not covered and the Author wishes to submit a proposal for the Bank Gospodarstwa Krajowego to apply rules similar to the current Article 5a of the Public Procurement Law, ensuring the conduct of procurement in a transparent, objective and non-discriminatory manner [The Letter of 21 May 2015].

The following are proposals for the amendment of the Act on the Bank GospodarstwaKrajowego

„Art. 1. In the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego (Journal of Laws of 2014, item 510, as amended) Article Y and Z are added as follows:

- 1. Article Y. 1. For granting orders and contests by the BGK within the meaning of the Act on Public Procurement Law, the provisions of this act shall apply, unless the provisions of this act stipulate otherwise.*
- 2. The Act on the Public Procurement Law, subject to item 3, applies to orders and contests granted by BGK:*

- supplies or services whose value is at least equal to the amounts threshold for the supplies or services specified in Article 4, letter c) and d) of Directive 2014/24/EU of the European Parliament and Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Official Journal EU L 94 of 28.3.2014, pg. 65), hereinafter known as the "classic directive",*

- works contracts whose value is at least equal to the amounts threshold for the supplies or services specified in Article 4, letter c) of the classic directive.
3. The provisions of Article 4 relating to public procurement law do not apply.
 4. The provisions of the Act on the Public Procurement Law do not apply to BGK orders and contracts:
 1. related to the activities regarding the operation of funds created, entrusted or transferred to BGK under separate laws and the implementation of government programmes in the relevant part:
 - keeping bank accounts, conducting banking cash settlements and activities on the interbanking market,
 - obtaining financial resources to ensure financial liquidity, financing activities of supported funds and programmes as well as refinancing lending.
 2. related to operations on the interbanking market for the management of Treasury debt and state budget liquidity;
 3. related to the performance of banking activities by BGK, in the part related to:
 - A. pening and maintaining bank accounts, conducting banking cash settlements and activities on the interbanking market,
 - B. obtaining financial resources to ensure financial liquidity and refinancing lending.

Article Z.

1. Whereby the value of the orders/contracts and contests does not exceed the thresholds referred to in Article Y, item 2, BGK awards the contract in a transparent, objective and non-discriminatory manner.
2. If the value of the contract exceeds the amount referred to in Article 4 of the Public Procurement Law, BGK publishes the contract notice on the site of the Public Information Bulletin, which contains the necessary information due to circumstances in which it was granted, in particular:

Management		State-owned bank	
Ownership structure		Defined by the Act of March 14 2003 on the Bank Gospodarstwa Krajowego	
BGK Mission		Long term Development Programme of the Bank Gospodarstwa Krajowego, strategy for 2014-2017	
BGK strategy			
Financial results		2013	2014
Results from banking operations		1 174,25 m. PLN	795,07 m. PLN
Operating expenses and depreciation		248,3 m. PLN	267,5 m. PLN
Difference between provisions and revaluation		85,99 m. PLN	70,55 m. PLN
Gross result		841,65 m. PLN	472,24 m. PLN
Net result		740,3 m. PLN	434,61 m. PLN
Gross loans		13 636,0 m. PLN	17 971,5 m. PLN
Customer deposits		26 348,1 m. PLN	30 238,0 m. PLN
Primary funds		7 269,8 m. PLN	8 376,1 m. PLN
Balances sheet total		43 848,8 m. PLN	51 231,4 m. PLN
Workplace			
Headcount at December 31,		1 275,9 -time	1 288,4 -time
Business development and entrepreneurship			
The value of repayable assistance granted under the JEREMIE initiative		1 269 m. PLN	1 050 m. PLN
The value of guarantees granted by BGK within OP DEP for SMEs		133,9 m. PLN	184 m. PLN
The value of loans granted under OP DEP for SMEs		114,8 m. PLN	229 m. PLN
The amount of investment agreements concluded under the JESSICA initiative		372,5 m. PLN	156 m. PLN
The value of export credits covered by DOKE contracts		144,0 mln EUR i 590,0 mln NOK	630 mln DKK i 1 345 mln NOK
The value of guarantees / warranties on an individual basis granted under the Plan for Entrepreneurship Support		24,9 m. PLN	0,2 m. PLN
The value of the portfolio of guarantees granted under the Programme for Entrepreneurship Support		7 277,5 m. PLN	9 744,6 m. PLN
The amount of subsidies to interest on student loans		59,2 m. PLN	42,6 m. PLN
Financing infrastructure projects			
The total amount of transactions within the Polish Investment Program		5 346,7 m. PLN	14 876,8 m. PLN
Environmental protection			
The number of thermo-modernization, repairs and compensation bonuses awarded		1 348	3 398
The value of thermo-modernization, renovation and compensation bonuses		85,0 m. PLN	185,5 m. PLN
Housing infrastructure			
The amount of paid out support under the social housing programme		56,9 m. PLN	62,3 m. PLN
Social commitment			
Donation to the BGK Foundation of JK Steczkowski, which implements programmes of social engagement in areas such as equal educational opportunities, the development of social capital and volunteering		1,3 m. PLN	3,5 m. PLN

Source: The Bank Gospodarstwa Krajowego.

1. *the deadline for submission of tenders/bids taking into account the time required to prepare and submit an offer;*
2. *description of the subject and determining the size or scope of the contract;*
3. *tender evaluation criteria.*

Immediately upon contract award, BGK publishes information about the contract award on site of the Public Information Bulletin, stating the name (company) or the name of the entity with which it signed an agreement in the contract. If no contract is granted, BGK immediately publishes information of not awarding the contract on the site of the Public Information Bulletin."

Example3.

In the author's opinion it would be appropriate to consider the possibility of clarifying the arrangements for the operation of such entities. In view of the doubts as to interpretation in the assessment of the Bank Gospodarstwa Krajowego, it is necessary to clarify whether the provisions of applicable law will be applied to state-owned banks only in cases where a relevant legal general norms refers to banks (e.g. the Act of 23 October 2014 on the reverse loan mortgage) or directly to state-owned banks (e.g. the Act of 21 August 1997 on the limitation of carrying out business activities by persons performing public functions). The issue is of particular importance for the Bank Gospodarstwa Krajowego which, as a state-owned bank, operates on the basis of provisions of the Act of 14 March 2003 on the Bank Gospodarstwa Krajowego (*lex specialis* to the Act of August 29 1997 on the Banking Law). Although currently the Bank exclusively operates as a state-owned bank on the Polish banking market, however, Article 14, item 1 of the Act on Banking Law provides for the establishment of a state-owned bank on the basis of an ordinance of the Council of Ministers.

The proposal for provisions is as follows

Article X. In the Act of 29 August 1997 on the Banking Law (Journal of Laws of 2015, item 128, as amended) Article 14, item 3 reads as follows:

„3. A state-owned bank is neither publicly owned, nor is it a state organizational entity and a unit of public finance sector as defined by separate legislation and is not subject to entry in the National Court Register."

Alternatively, an amendment can be proposed instead of Banking Law, only on the proposed scope of the Act on the Bank Gospodarstwa Krajowego.

The proposal for provisions is as follows:

Art. X. In the Act 14 March 2003 on the Bank Gospodarstwa Krajowego (Journal of Laws of 2014 item 510, as amended) in Article 2, after item 1 the following item 1a is inserted:

„Article 14. 1. BGK is neither publicly owned, nor is it a state organizational entity and a unit of public finance sector as

defined by separate legislation and is not subject to entry in the National Court Register."

These regulations would have a specifying character. The solution of this nature has been used for example in Article 2, item 2 of the Act of 29 August 1997 on the Polish National Bank ("NBP"), namely that NBP is not subject to entry in the register of state enterprises, in Article 3, item 2 of the Act on the Bank Gospodarstwa Krajowego, i.e. that the bank provisions of Article 6, item 4 of the Act of 28 February 2003 on bankruptcy and reorganization law or in Article 17a of the Act of 14 December 1994 on the Banking Guarantee Fund ("BGF"), namely that the BGF is not a state legal entity and not a unit of the public finance sector.

It is necessary to also pay attention to the possibility of introducing statutory provisions conferring the status of the Bank Gospodarstwa Krajowego as a subject of particular importance to the state. Having regard to the statutory purpose of the activity, engagement in the implementation of individual tasks and the scale of this commitment seems to be indisputable by a bank of such status.

The primary objective of the Bank is to support the social and economic development of the country, using services mainly in the scope of banking activities. Currently, the Bank's activities is the main pillar of the Polish Investment Programme where, through the financing of key infrastructure investments, the Bank stimulates economic development. In addition to the activities of investment financing, the Bank also provides an important function as an entity involved in the implementation of government programmes and statutory tasks in the area of public finances. Examples of the above activities are, among other, successfully implemented programmes assisting small and medium enterprises through a system of *de minimis* guarantees or tasks in the area of public finance consolidation undertaken by the Bank.

The scale of the Bank's activities are reflected in the financial data for 2014, i.e. the balance sheet total of 51,231.4 m. PLN, interest income of 1,594.2 m. PLN, and the number of employees (in FTEs) at 1264.5. The Bank's strategy for the years 2014-2017 adopted by the Supervisory Board, envisages further increases the involvement of the country in key investment projects emphasizing that the same nature of the Bank as a state-owned development bank, thereby inspired by the pre-war tradition.

The Act adopted by the Parliament relating to macro-prudential supervision of the financial system and crisis management in the financial system, amends the Act on the Bank Gospodarstwa Krajowego in Article 70, point 3 setting out the Bank's mission, providing that the basic purpose of its activities is to support the economic policy of the Council of Ministers, government social and economic programmes and local government and regional development programmes. With a view to the state and pro-development character of the institution as well as the scale of operations, I express firm belief of the full legitimacy of granting the Bank the status of an entity of special significance for the state.

The proposal for provisions is as follows

„Article X

1. BGK is an entity of particular importance to the state as defined by separate regulations.
2. Under this Act BGK has all the rights of an entity referred to in item 1, defined in separate regulations.”.

The Author has conducted an economic analysis of the legal in order to find and propose an optimal solution, which would improve the condition of at least one subject (the BGK) without hindering the condition of other subjects (Pareto).

1. Lasecki P., Skuza S (2014), *Issues of Using the Public Contract Procedure by the Bank GospodarstwaKrajowego in the Context of the Notion of “Body Governed by Public Law”*. *Current State and Authors' Proposals of Changes*. [in:] Chodnicka P. (eds.), Karkowska R., Olszak M., *Towards*

contemporary issues in the financial system, Wydawnictwo Wydziału Zarządzania Uniwersytetu Warszawskiego, Warsaw, Poland.

2. Olszówka T., Skuza S. (2003), *Ustawa o Banku Gospodarstwa Krajowego*, Prawo Bankowe, No. 9/2003, Poland.
3. Skuza S. (2015), *The Bank Gospodarstwa Krajowego as a public financial institution in the domestic systemic environment*, Difin, Warsaw, Poland.
4. Skuza S. (2015a), *Brand of the Polish state-owned development bank (“the Bank Gospodarstwa Krajowego”)*, *International Journal of Information Technology and Business Management* 29 May 2013, Vol.13 No. 1, Pakistan.
5. The Letter of the Bank Gospodarstwa Krajowego of 21 May 2015 No. BZP.064.322.SS.2015, Poland.
6. The Letter of the Bank Gospodarstwa Krajowego of 31 July 2015 No. DP.023.4.SS.2015, Poland.

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