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National Fund for the Protection of Monuments: legal and financial issues

Narodowy Fundusz Ochrony Zabytków – problematyka prawno-finansowa

Abstract. This study deals with the legal and financial issues of the National Fund for the Protection of Monuments (NFOZ), which has been operating since 1 January 2018 as a special purpose fund. The Fund has statutorily assigned revenues that come from fines paid by violators of regulations related to the protection of monuments. The study analyses the fund's receipts and expenditures listed in its annual financial plans and concludes that, due to its relatively small revenues, the NFOZ contributes only minimally to the financing of the monument protection system in Poland.

Keywords: National Fund for the Protection of Monuments; special purpose fund; monument protection.

Streszczenie. Opracowanie dotyczy prawnofinansowej problematyki Narodowego Funduszu Ochrony Zabytków (NFOZ). Podmiot ten funkcjonuje od 1 stycznia 2018 r. jako fundusz celowy. Posiada on ustawowo przypisane przychody, które

pochodzą z kar pieniężnych opłacanych przez podmioty naruszające przepisy związane z ochroną zabytków. Autor przeanalizował wpływy i wydatki funduszu wynikające z corocznych planów finansowych i doszedł do wniosku, że z uwagi na stosunkowo niewielkie przychody Narodowy Fundusz Ochrony Zabytków w minimalnym tylko stopniu przyczynia się do finansowania systemu ochrony zabytków w Polsce.

Słowa kluczowe: Narodowy Fundusz Ochrony Zabytków; fundusz celowy; ochrona zabytków.

1. Introduction

The preservation of the historic value of tangible cultural assets is one of the most important obligation of the state, based on both the general principles of the Constitution of the Republic of Poland of 2 April 1997¹ and on its specific provisions. The text of the preamble to the Constitution contains an obligation of the whole nation to “pass on to future generations all that is valuable from over a thousand years of heritage”². It should also be noted that the beginnings of historical monument protection in Poland date back to the 19th century, with the first legal regulations appearing in 1918³.

The regulations in force in Poland (primarily the provisions of the Constitution and ordinary laws) are in line with international obligations concerning cultural heritage in its broadest sense, including provisions of the Faro Convention – the Council of Europe Framework Agreement on the Value of Cultural Heritage for Society – which the President of the Republic of Poland was empowered to ratify by an Act of the Parliament on 12 May 2022⁴. The aim of the Convention is to protect cultural heritage, strengthen its role in building identity and diversity and foster peaceful

¹ Dz.U. [Polish Journal of Laws] of 1997 Nr [No] 78, poz. [item] 483 with subsequent amendments.

² R. Płaszowska, *Organizacja organów ochrony zabytków*, “Przegląd Prawa Publicznego” 2016, No 6, p. 97.

³ K. Sikora, *Administracyjnoprawne formy ochrony zabytków właściwe dla organów administracji rządowej. Zarys*, “Studia Administracyjne” 2016, No 8, p. 99.

⁴ Dz.U. of 2022, poz. 1288.

dialogue between the communities that make up the heritage of the European cultural-civilisational circle. The Convention also aims to highlight the importance of activities related to the dissemination of cultural heritage for the growth of a shared sense of European identity.

The protection and care of historical monuments is extremely important, as it is an essential element of national heritage, and while the legal regulations in Poland are fit for their purpose, the real problem is connected with financing the necessary tasks. One of the elements of this funding is the National Fund for the Protection of Monuments (NFOZ), which is a state special purpose fund that has been in operation since 2018, and the aim of this article is to analyse the legal, organisational and financial issues related to this Fund. As is the case with any such special purpose fund, the question of the sense and legitimacy of its establishment and operation is commonly posed, and a further aim of the study is, therefore, to examine whether the NFOZ should continue to function or be abolished.

An analysis and an evaluation of the normative material, court jurisprudence and body of legal doctrine concerning the legal status of the NFOZ and the basis of its financial management was previously undertaken by M. Ofiarska⁵ in an insightful article written in 2018, when the revenues and expenditures of the NFOZ over the long term were not yet known. It is, therefore, reasonable to now examine the financial issues of the NFOZ using empirical data. The current article is based on an analysis of the current legislation, so a dogmatic–legal method has been used, supported by empirical (quantitative, economic) data.

2. Establishment of the NFOZ

Article 83b regulating the NFOZ was added to the Act on the Protection and Care of Historical Monuments of 23 July 2003⁶ by Article 1(11) of

⁵ M. Ofiarska, *National Fund for the Protection of Heritage Monuments – principles for the establishment and operation*, “Prawo Budżetowe Państwa i Samorządu” 2018, No 4, pp. 11–33, DOI:10.12775/PBPS.2018.020.

⁶ Consolidated text: Dz.U. of 2022, poz. 840.

the Act of 22 June 2017 amending the Act on the Protection and Care of Historical Monuments and Certain Other Acts⁷. The fund became operational on 1 January 2018.

The bill leading to the Act of 22 June 2017⁸ did not actually provide for the establishment of the NFOZ, and it was only in the auto-amendment to the bill⁹ that the provision appeared. The explanatory memorandum to the bill states that “The creation of the Fund makes good on the demands that have been formulated for years to strengthen the financing of historic preservation. The idea of creating a National Fund for the Protection of Monuments, which has been formulated for many years, indicates the need to create additional financial mechanisms of support for owners of monuments. Proceeds from fines for violating the regulations on the protection of monuments would be used to subsidise outlays necessary to carry out conservation or restoration work on a monument entered on the Heritage Treasures List and outlays necessary to carry out conservation, restoration or construction work on a monument entered in the register”. The treatment of the NFOZ as an entity to subsidise (rather than finance) historic preservation activities is due to the fact that grants provided mainly from the state budget should be the primary means of financing these activities¹⁰.

3. Legal status of the NFOZ

The NFOZ is a state special purpose fund administered by the minister responsible for culture and national heritage protection. Special purpose funds are regulated by Article 29 of the Act of 27 August 2009 on Public Finance¹¹. They are created by separate Acts, their revenues come from

⁷ Dz.U. of 2017, poz. 1595.

⁸ Parliamentary Paper No VIII.1403.

⁹ Parliamentary Paper No VIII.1403-A.

¹⁰ For more detail on budget funding for historic preservation in Poland, see: P. Sołtyk, *Transfery finansowane z budżetu państwa na ochronę zabytków w Polsce*, “Nierówności Społeczne a Wzrost Gospodarczy” 2018, No 54, pp. 324–335, DOI: 10.15584/nsawg.2018.2.23.

¹¹ Consolidated text: Dz.U. of 2022, poz. 1634.

public funds and they incur costs to implement separate state tasks (Article 29(2)). A state special purpose fund has no legal personality; *de facto* it is simply a separate bank account that is managed by a minister or by any other body indicated in the law that created the fund. Pursuant to Article 29(6), state special purpose funds are managed through annual financial plans that lay out a plan of income and expenditures recognised on the date they are drawn up.

The essence of an earmarked fund is that a dedicated public task, which is considered essential by the legislature, is financed from revenues defined by law. Linking a specific expenditure to a specific source of financing makes sense if the source is financially sufficient¹².

B. Kucia-Guściora pointed out that the basis for establishing earmarked funds is the need to allocate money in order to spend it in a targeted manner on specific tasks, so that it is not “lost” in the budget among other important tasks. In order for such funding to be effective, specific public revenues must be assigned to specific expenditures¹³.

The analysis presented in this article of the NFOZ’s types of revenue suggests that the statutory revenue sources for the fund are not sufficient. Without sufficient revenue, the fund ceases to make sense because it becomes impossible to meet the expenditures provided for by law and by the fund’s financial plan without depending on financial help from other sources¹⁴.

4. Report of the Supreme Audit Office

In December 2021, the results of an audit carried out by the Supreme Chamber of Control was published in a publication entitled “System of

¹² J. Wantoch-Rekowski, W. Morawski, *Podstawy prawa finansów publicznych. Podręcznik akademicki*, Toruń 2019, p. 64; J. Wantoch-Rekowski, W. Morawski, P. Majka, *Podstawy prawa finansów publicznych*, Warszawa 2022, p. 48.

¹³ B. Kucia-Guściora, *Zmiany w charakterze prawnym funduszy celowych*, “Ruch Prawniczy, Socjologiczny i Ekonomiczny” 2007, No 1, p. 124.

¹⁴ J. Szohno-Koguc, *Fundusz celowy w świetle prawa finansów publicznych*, “Gdańskie Studia Prawnicze” 2007, vol. XVI, p. 26.

Monument Protection in Poland”¹⁵, which indicated, among other things, that the annual revenues of the NFOZ constituted only a small percentage of planned revenues. The publication remarked on the need to re-examine the assumptions made when the NFOZ was established with regard to its sources of financing and the possible revenues that would allow the fulfilment of its statutory tasks (p. 60).

In response to the audit, the Minister of Culture and National Heritage formulated his position in a letter dated 12 January 2022¹⁶, indicating, among other things, that “With regard to the comment on the low revenues of the National Fund for the Protection of Monuments (NFOZ), it should be clarified that the *Information on the results of the audit* ignores the fact that on the basis of the Act of 1 October 2021 amending the Budget Act for 2021 (Annex No 14) and the Act of 14 October 2021 amending the Act on special solutions for the implementation of the Budget Act for 2021 and the Act on revenues of local government units, the NFOZ was supplied with a payment from the state budget in the amount of PLN 88,000 thousand. The aforementioned amount more than compensates for the low revenues of previous years and will allow the objectives of the NFOZ to be met in 2022.”. Nevertheless, the audit findings are accurate, and the response of the Minister of Culture and National Heritage does not address the real revenue problems of the NFOZ: a one-off grant does not change the fact that the sources of funding are insufficient.

5. The NFOZ finances 2018–2022

The legal regulations concerning the finances of the NFOZ are very laconic. Article 83b(3) of the Act on the Protection and Care of Monuments indicates that the income of the NFOZ is the proceeds from fines referred to in Articles 107a–107e of the same Act:

- 1) Article 107a concerns the breach of information obligations by the owner or holder of a monument included on the Heritage Treasures

¹⁵ Supreme Audit Office, Department of Science, Education and National Heritage, *System of Monument Protection in Poland*, KNO.430.004.2021, p. 108.

¹⁶ Minister of Culture and National Heritage, BAK.0800.7.2021.

List or entered in the register or another monument included in the provincial register of monuments;

- 2) Article 107b relates to the infringement of the provisions on the importation of a monument into the territory of the Republic of Poland;
- 3) Article 107c concerns preventing or obstructing an access to a monument;
- 4) Article 107d concerns taking an action without the permission or against the permission of the provincial conservation officer;
- 5) Article 107e relates to a failure to implement audit recommendations.

The attribution to the special purpose fund of revenue from fines is controversial because it means that the legislature assumes that entities related to monuments (mainly owners and keepers) will violate the regulations in a manner resulting in fines. There is, thus, an incentive for the minister in charge of culture and national heritage, local government units, the General Conservator of Monuments, the voivodeship conservator of monuments and other entities conducting tasks related to the protection of monuments to, rather than educate the owners and keepers of monuments and raise awareness, instead do the opposite. After all, the more inappropriate behaviour by the owners and keepers of monuments, the more fines will be imposed. Thus, the only revenue for the NFOZ is morally questionable.

Previous commentaries have noted that one of the advantages of an earmarked fund is that it stimulates an activity and an initiative to raise revenues for the fund¹⁷. However, this view does not hold true in the case of the NFOZ because it is difficult to imagine an activity or an initiative that would increase the proceeds from fines.

The expenditure of the NFOZ is regulated in Article 83b(4), which indicates that its funds are intended for co-financing

- 1) expenditure necessary to carry out conservation or restoration work on a monument included on the Heritage Treasures List and
- 2) outlays necessary to carry out conservation, restoration or construction works on a monument entered in the register.

¹⁷ W. Bożek, P. Mańczyk, *Commentary to Article 29* [in:] Z. Ofiarski (ed.), *Ustawa o finansach publicznych. Komentarz*, Warszawa 2019, p. 213.

These are referred to below as “basic tasks”. It should be noted that Article 83b(5) states that the costs of servicing the NFOZ are covered by the NFOZ itself.

As the NFOZ is an earmarked fund, its financial plan is part of the Budget Act; the financial plans of earmarked funds are included in the annexes to the annual Budget Acts – in 2018–2022, this was Annex No 13. The financial plan for the NFOZ for 2018 is presented in Table 5 (Annex No 13 to the Budget Act 2018 of 11 January 2018¹⁸). Expenditure on basic tasks was forecast to be PLN 15,475,000, while revenues for the NFOZ from administrative fines and restitutions were expected to be PLN 16,315,000.

The financial plan of the NFOZ for 2019 is presented in Table 5 (Annex No 13 to the Budget Act 2019 of 16 January 2019¹⁹). Expenditure on basic tasks was forecast to be PLN 2,591,000, while revenues for the NFOZ from administrative fines and restitutions were expected to be PLN 2,000,000. The planned expenditure for 2019 represented only 16% of that for the previous year, and the planned revenue represented only 12% of that for the previous year.

The financial plan of the NFOZ for 2020 is presented in Table 5 (Annex No 13 to the Budget Act for 2020 of 14 February 2020²⁰). Expenditure on basic tasks was forecast to be PLN 1,708,000, while revenues from administrative fines and restitutions were expected to be PLN 2,000,000. Thus, 2020 was another year in which planned expenditure decreased, accounting for only 66% of that planned for the previous year. Expected revenue was the same as in the previous year.

The financial plan of the NFOZ for 2021 is presented in Table 5 (Annex No 13 to the Budget Act for 2021 of 20 January 2021²¹). Expenditure on basic tasks was forecast to be PLN 725,000, and revenues for the NFOZ from administrative fines and references were expected to be PLN 700,000; the downward trend in both expenditures and revenues was,

¹⁸ Dz.U. of 2018, poz. 291.

¹⁹ Dz.U. of 2019, poz. 198.

²⁰ Dz.U. of 2020, poz. 571.

²¹ Dz.U. of 2021, poz. 190.

thus, maintained. Comparing the NFOZ's expenditure and revenue in 2021 to those of 2018 – the first year of operation – one notes that the planned expenditure for 2021 is only 5% that of 2018, and revenue is only 4%.

The financial plan of the NFOZ for 2022 is presented in Table 5 (Annex 13 to the Budget Act for 2022 of 17 December 2021²²), but the data contained therein are incomprehensible. Planned expenditures on basic tasks are in the amount of PLN 88,601,000, which is a massive increase from the expenditure planned for 2019–2021. This is to be paid from expected revenues for 2022 of PLN 88,700,000. The obvious question then arises: why is there such a huge increase from previous years?

The revenues from administrative fines and restitutions were expected to be the same as in previous years (PLN 700,000), but a new source of revenue for the NFOZ has emerged: a subsidy from the state budget. This type of a revenue is problematic for the fund because it is simply not provided for by the regulations governing its types of a revenue. As Malinowska-Misiąg aptly points out: “State funds may be subsidised from the state budget if the law which is the legal basis for the fund's activity provides for such a source of its revenue.”²³. The financing of historic preservation from budgetary funds is, of course, reasonable and even desirable, but the provision of a subsidy to an earmarked fund of a size that makes it the overwhelmingly dominant source of revenue distorts the purpose of that fund.

The financial plans of the NFOZ clearly indicate that the revenues for the first year of the fund's operation – 2018 – were grossly overestimated, and the plans for 2019–2021 appear to be realistic yet modest to the point of negating the legitimacy of the establishment and operation of the fund. The financial plan for 2022, in contrast, which is dominated by financial mechanisms related to the subsidy from the state budget, seems to be an attempt to save the idea of the NFOZ.

²² Dz.U. of 2022, poz. 270.

²³ E. Malinowska-Misiąg, *Commentary to Article 29* [in:] W. Misiąg (ed.), *Ustawa o finansach publicznych. Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych. Komentarz*, Warszawa 2019, p. 117.

It is indisputable that the current financial outlay for historic preservation is insufficient, but this is not a new phenomenon. In 2008, a report commissioned by the Ministry of Culture and National Heritage stated that “Low expenditures on the renovation of monuments in Poland are a chronic phenomenon. Its main consequences are the poor technical condition and the constantly decreasing level of preservation of the original historic substance.”²⁴ The same report also indicated that “The total amount of all outlays from all financial sources is not known. It can be estimated at 25–33% of the needs. In all likelihood, this assessment reflects well the trend of the last twenty years, although it is worth pointing out that in recent years it is possible that the situation has improved due to better economic conditions in the country, in spite of the price increase of materials and services for monuments, which is impeding the dynamics of improvement.”²⁵ In the nearly fifteen years since the publication of the report, it is certain that the inadequate financial expenditures for historic preservation have not increased noticeably relative to needs.

6. Summary

The establishment of the NFOZ on 1 January 2018 could have been a good way to subsidise the protection of monuments in Poland, but the legislature assigned to the fund specific revenues from the fines for violations of the regulations on monuments. These revenues turned out to be limited and many times lower than assumed in the first year of the NFOZ’s operation.

The subsidy from the state budget to the NFOZ in 2022 was, according to the Minister of Culture and National Heritage, intended to “more than compensate for the low revenues of previous years and [...] allow the objectives of the NFOZ to be met in 2022”. However, this measure should be regarded negatively; spending budget funds for the protection of monuments by transferring them to the NFOZ is not a good solution – the

²⁴ J. Purchla (ed.), *Report on the functioning of the system of cultural heritage protection in Poland after 1989*, Kraków 2008, p. 25.

²⁵ *Ibidem*, p. 29.

NFOZ should have its own, sufficient sources of revenue that come from outside the state budget.

The continued operation of the NFOZ without a change in its statutory sources of revenue makes no sense. The fund cannot realise the purpose of establishment, and although it is an additional financial support for owners of historic monuments, that support is effectively symbolic.

In 2018, M. Ofiarska formulated the thesis that the NFOZ is only a supplementary source in the system of financing the care of monuments, as determined by the legal construction of its revenues²⁶. In 2022, this thesis remains, in principle, valid, and it should be further emphasised that the NFOZ is a supplementary source only to a symbolic degree. If the fund were to be liquidated, the absence of its resources from the system of financing the care of monuments would be practically unnoticed.

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²⁶ M. Ofiarska, *National Fund for the Protection of Heritage Monuments – principles for the establishment and operation*, "Prawo Budżetowe Państwa i Samorządu" 2018, No 4, p. 14, DOI:10.12775/PBPS.2018.020.

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