

MAŁGORZATA OFIARSKA

University of Szczecin

*malgorzata.ofiarska@wpiaus.pl*

ORCID: 0000-0001-5311-0201

## **National Fund for the Protection of Heritage Monuments – principles for the establishment and operation**

**Narodowy Fundusz Ochrony Zabytków –  
zasady tworzenia i funkcjonowania**

**Abstract.** The paper presents the legal status, sources of income, and directions of expenditure of the National Fund for the Protection of Heritage Monuments, which is a state purpose-specific fund included in the public finance sector of the Republic of Poland. The rules for establishing and making use of this fund are regulated by the provisions of the act on the protection and guardianship of monuments and the Public Finance Act. The only source of income of the fund are administrative pecuniary penalties for non-compliance with the regulations on the protection and guardianship of heritage monuments. Tasks that can be financed from this fund include conservation and restoration works, as well as construction works carried out directly at the monument. The hypothesis that the National Fund for the Protection of Heritage Monuments, owing to its inconsiderable fi-

nancial resources, will constitute only a complementary source for financing such works, has been positively verified. The main sources of financing are the state budget and budgets of local government units.

**Keywords:** heritage monument; protection of monuments; special-purpose fund; pecuniary penalty.

**Streszczenie.** W opracowaniu przedstawiono status prawny, źródła przychodów oraz kierunki wydatków Narodowego Funduszu Ochrony Zabytków, który jest państwowym funduszem celowym wchodzącym w skład sektora finansów publicznych w Rzeczypospolitej Polskiej. Zasady tworzenia i wykorzystywania tego funduszu regulują przepisy ustawy o ochronie zabytków i opiece nad zabytkami oraz ustawy o finansach publicznych. Jedynym źródłem przychodów funduszu są administracyjne kary pieniężne za nieprzestrzeganie przepisów o ochronie zabytków i opiece nad zabytkami. Zadania, które mogą być finansowane ze środków tego funduszu to prace konserwatorskie i restauratorskie oraz roboty budowlane realizowane bezpośrednio przy zabytku. Pozytywnie zweryfikowano hipotezę, że Narodowy Fundusz Ochrony Zabytków, z uwagi na skromne zasoby finansowe, będzie stanowił tylko uzupełniające źródło finansowania takich prac. Głównym źródłem ich finansowania są środki budżetu państwa oraz budżetów jednostek samorządu terytorialnego.

**Słowa kluczowe:** zabytek; ochrona zabytków; fundusz celowy; kara pieniężna.

## 1. Introduction

As a result of an amendment introduced on 1 January 2018, a new provision of Article 83b was added to the Act of 23 July 2003 on the protection and guardianship of monuments<sup>1</sup>, under which the National Fund for the Protection of Heritage Monuments (hereinafter: NFOZ)<sup>2</sup> was established. In the original version of the draft act amending the act on the protection and guardianship of monuments, the creation of the National Fund for the

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<sup>1</sup> Consolidated version, Dz.U. [Polish Journal of Laws] of 2017, item 2187, with subsequent amendments, hereinafter: Act on Monuments.

<sup>2</sup> Act of 22 June 2017 on the amendment of the act on the protection and guardianship of monuments and some of the other acts (Dz.U., item 1595).

Protection of Heritage Monuments was not planned<sup>3</sup>. Such a proposal was submitted only in the self-amendment, which was justified by the need to enhance the system of financing the protection of monuments<sup>4</sup>. It was agreed that the establishment of the National Fund for the Protection of Heritage Monuments might improve the effectiveness of the implementation of tasks related to the state policy in the area of monument protection, defined in the National Programme for the Protection and Guardianship of Heritage Monuments<sup>5</sup>. The establishment of the NFOZ was not the only change to the Act within the amendment. Changes were also made to the competencies of the General Inspector of Monuments concerning the staffing of provincial monument conservators, whose supervisory functions were supplemented with the authorization to rule on administrative pecuniary penalties for the violation of duties related to the guardianship of monuments. The changes as regards the possibility of imposing pecuniary penalties are particularly important, as the income from this source has been indicated as the only source of the NFOZ income.

The motives for the creation of special-purpose state funds can vary. In this context, the doctrine of public finance mentions political<sup>6</sup> and economic motives, which express a desire to increase the burden of various entities with the costs of public services, e.g. by introducing a special purpose fee or other financial burden that will be assigned to a given special-purpose fund<sup>7</sup>. Such a motive can be attributed to the legislator establishing the NFOZ, and this assumption in particular justifies the legal na-

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<sup>3</sup> The government bill of 14 March 2017 on the amendment of the act on the protection and guardianship of monuments and some of the other acts – print No 1403 of the Sejm of the eighth term of office.

<sup>4</sup> Self-amendment of 6 June 2017 to the government bill of 14 March 2017 on the amendment of the act on the protection and guardianship of monuments and some of the other acts – print No 1403-A of the Sejm of the eighth term of office.

<sup>5</sup> Resolution No 125/2014 of the Council of Ministers of 24 June 2014 on the National Programme for the Protection and Guardianship of Heritage Monuments; <http://bip.mkidn.gov.pl/pages/legislacja/programy-wieloletnie/krajowy-program-ochrony-zabytkow-i-opieki-nad-zabytkami.php> (access on-line: 22.07.2018).

<sup>6</sup> J. Stankiewicz, *Problem funduszy celowych w systemie finansów państwa*, „Gdańskie Studia Prawnicze” 2007, vol. XVI, pp. 34–35.

<sup>7</sup> J. Szolno-Koguc, *Funkcjonowanie funduszy celowych w Polsce w świetle zasad racjonalnego gospodarowania środkami publicznymi*, Lublin 2007, p. 78.

ture of the only source of income for this fund, namely the financial penalties for non-compliance with the provisions of the Act on the Protection and Guardianship of Heritage Monuments. They are financial sanctions addressed to a specific entity, which will be obliged to bear the burden of payment.

The aim of the study is to analyse and evaluate normative material, court rulings, and the acquis of the legal doctrine concerning the legal status and the foundations of the financial management of the National Fund for the Protection of Heritage Monuments. For this purpose, the dogmatic and legal method and, additionally, the empirical and analytical method were applied. The hypothesis that the NFOZ constitutes only a complementary source in the system of financing the guardianship of the monuments, which is predetermined by the legal structure of the fund's revenues, has been verified. At the same time, it is the first extra-budgetary source of financing specific expenditures related to the guardianship of monuments from public funds.

## **2. The legal status of the National Fund for the Protection of Heritage Monuments**

The National Fund for the Protection of Heritage Monuments is a state special-purpose fund, which is explicitly defined by the legislator in Article 83b(2) of the Act on Monuments. According to the legal status in force as of 1 January 2018, the NFOZ is one of the 27 state special-purpose funds<sup>8</sup>. The establishment of another state special-purpose fund by the legislator should be viewed as an enhancement of the so-called “debudgeting” of state finances, understood as separating from the budget the public revenues and expenditures which formally remain outside the budget<sup>9</sup>, but

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<sup>8</sup> Cf. Annex No 13 of the Budget Act for 2018 of 11 January 2018 (Dz.U., item 291), in which the financial plans of 27 state special-purpose funds were published.

<sup>9</sup> See J. Szołno-Koguc, *Pozabudżetowe fundusze celowe w Polsce (ewolucja problemu)* [in:] J. Głuchowski, C. Kosikowski, J. Szołno-Koguc (eds), *Nauka finansów publicznych i prawa finansowego w Polsce. Księga Jubileuszowa Profesor Alicji Pomorskiej*, Lublin 2008, p. 229.

constitute a component of public finance<sup>10</sup>. The legal status of state special-purpose funds is defined by the provisions of the Public Finance Act of 27 August 2009<sup>11</sup>. This means that pursuant to Article 9(7) of the Public Finance Act, the NFOZ is classified as part of the public finance sector and its financial management should be operated by the rules set out in the Public Finance Act, provided for in Article 10(1) of the Public Finance Act. However, these rules have not been exhaustively regulated under the Public Finance Act. Therefore, the provisions of the Act on Monuments also apply to the financial management of the NFOZ, in particular to those provisions regulating the sources of revenue and the tasks financed from this revenue, as well as those concerning the settlement of costs related to the functioning of this fund.

Established on 1 January 2018, the NFOZ meets the statutory standards set out in Article 29 of the Public Finance Act for state special-purpose funds. It was created by way of a separate act other than the Public Finance Act or the Budget Act. According to the provisions of Article 29 of the Public Finance Act, the legislator may freely create other state special-purpose funds, thus making certain expenditures independent of the budget<sup>12</sup>. A state special-purpose fund has no legal personality and there is a separate bank account assigned to it, which is held by the minister, or another body, designated in the act under which the fund was established. In accordance with Article 83b(1) of the Act on Monuments, the administrator of the NFOZ shall be the competent minister of culture and national heritage protection, who may thereby exercise supervision over the activities of the fund<sup>13</sup>. According to the organizational regulations of the Ministry of Culture and National Heritage<sup>14</sup>, the scope of general tasks

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<sup>10</sup> J. Stankiewicz, *Debudżetyzacja finansów państwa*, Białystok 2007, p. 13.

<sup>11</sup> Consolidated version, Dz.U. of 2017, item 2077 with subsequent amendments, hereinafter: Public Finance Act.

<sup>12</sup> See B. Kucia-Guściora, *Zmiany w charakterze prawnym funduszy celowych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2007, No 1, p. 119.

<sup>13</sup> D. Maśniak, *Fundusze publiczne* [in:] A. Drwiłło (ed.), *Podstawy finansów i prawa finansowego*, Warszawa 2018, p. 494.

<sup>14</sup> Ordinance of the Minister of Culture and National Heritage of 14 November 2017 on establishing organizational regulations of the Ministry of Culture and National

of the organizational unit of this Ministry (department) includes the establishment of amounts receivable in connection with the management of the NFOZ. The Agency for the Protection of Monuments is a competent unit in this respect. It executes the rights and duties of the NFOZ administrator and recovers the receivables adjudged for the benefit of the NFOZ as exemplary damages. The Office of the Director General of the Ministry plays the role of the chief accountant for the NFOZ. Planning principles regulated in the Public Finance Act are applied to this fund, and the annual financial plan of the NFOZ is a component of the Budget Act adopted for a given financial year, included in an annex to this Act, just like the annual financial plans of other state special-purpose funds. This means that the financial plan of the National Health Fund has the same legal force as the main part of the Budget Act<sup>15</sup>. The method of financial planning in state special-purpose funds is consistent with the standards of legislative technique<sup>16</sup> allowing the use of annexes to the Act, which particularly include lists, charts, templates, tables, and specialist descriptions. References to appendices shall be included in the substantive provisions of the Act. The annex to the normative act constitutes an integral part of the main act<sup>17</sup>. It may be concluded that the current methods of financial planning also have an impact on the legal status of the NFOZ as a state special-purpose fund. The NFOZ financial plan is an annual plan, but the arrangements adopted in it may go beyond this period, as the resources that were not made use of in a given calendar year remain at the disposal of the fund administrator and are included in the NFOZ financial plan for the following year. The legislator does not impose an obligation to pay back such funds to the state budget. Under Art 32 of the Public Finance Act, the NFOZ administrator should draw up a task-based financial plan

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Heritage (Dz.Urz. [Official Journal] of the Ministry of Culture and National Heritage, item 75 with subsequent amendments).

<sup>15</sup> J. Szołno-Koguc, *Fundusz celowy w świetle prawa finansów publicznych*, „Gdańskie Studia Prawnicze” 2007, vol. XVI, p. 25.

<sup>16</sup> Ordinance of the Prime Minister of 20 June 2002 on “The Principles of Legislative Technique” (consolidated version, Dz.U. of 2016, item 283).

<sup>17</sup> T. Bąkowski, G. Wierczyński, *Glosa do wyroku NSA z dnia 14 listopada 2003 r., II SA/Wr 1389/03 oraz do wyroku WSA z 20 października 2004 r., IV SA/Wr 505/04*, „Samorząd Terytorialny” 2005, No 11, p. 59.

for the fund for this financial year and the following two years. The effect of this solution is to consolidate the expenditure included in this plan with the expenditure of the state budget<sup>18</sup>.

### **3. The sources of revenue for the National Fund for the Protection of Heritage Monuments**

Article 29(2) of the Public Finance Act contains a principle according to which revenues of the state special-purpose fund come from public funds, and costs are incurred in connection with the performance of state tasks. This way the sources of income for each state special-purpose fund were left to be regulated in a separate act. The only limitation in this respect is the stipulation that revenues must come from public funds. However, this is a very broad category, defined in Article 5 of the Public Finance Act, and not all types of public funds listed in Article 5 of the Public Finance Act may be used for funding the state special purpose fund. In particular, they must not include public revenue which is also listed in Article 5 of the Public Finance Act, since both Article 29(2) of the Public Finance Act and Article 83b(3) of the Act on Monuments use a different conceptual category, i.e. revenue. The Public Finance Act does not exhaustively list the types of revenue, as it is the case with expenditure (Article 6(2) of the Public Finance Act). Some types of revenue are listed, for example, in Article 5(1)(4) of the Public Finance Act or in Article 113(2) of the Public Finance Act.

The open nature of the list of revenues under the Public Finance Act is determined by such provisions as Article 5(1)(5) of the Public Finance Act, according to which public funds are those revenues of public finance sector entities “which come from other sources”, which may be understood as the legislator’s right to create specific categories of revenue in separate acts. None of the provisions of the Public Finance Act lists

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<sup>18</sup> T. Lubińska (ed.), *Kierunki modernizacji zarządzania w jednostkach samorządu terytorialnego*, Warszawa 2011, p. 63.

pecuniary penalties in the context of public revenue. It needs to be emphasized that Article 111 of the Public Finance Act lists pecuniary penalties, but they are in the list of “tax and non-tax income of the budget”. The term “income” is then used rather than “revenue”. In the doctrine of public finance law, the pecuniary penalty payments are generally classified under “other government income”<sup>19</sup>. The adoption of the statement “the revenues of the NFOZ are the pecuniary penalty payments” in Article 83b(3) of the Public Finance Act should be adjudged critically, as it lacks precision in the light of the provisions of the Public Finance Act. The provisions of Article 29(2) of the Public Finance Act, which only generally state that the revenues of the state special-purpose fund come from public funds, cannot justify the legislator’s actions in this respect, so the types of such revenue have not been determined. It has been assumed in the doctrine that the statutory phrase “revenues of the state special-purpose fund” should be understood broadly, i.e. equated with public funds<sup>20</sup>. In the case at hand, the term “income of the NFOZ”, in conjunction with the pecuniary penalties referred to in Article 83b(3) and Articles 107a–107e of the Act on Monuments may also be understood as a “source of funding” or “source of income” of this fund.

According to article 83b(3) of the Act on Monuments, the income of the NFOZ shall be the pecuniary penalty payments, whose principles of amount and collection are specified under Articles 107a–107e of this Act. It is the only source of funding the NFOZ which is mentioned by the legislator. The rules as regards the amount of administrative fines are regulated in Chapter 10a of the Act on Monuments, which was added to this Act as of 1 January 2018. The analysis of the provisions contained in Chapter 10a of the Act on Monuments reveals that several separate fines were introduced for specific acts or omissions in the area of protection and guardianship of monuments. In addition, the maximum amount of pecuniary penalties was differentiated, while the minimum amounts were established at the same level. Administrative pecuniary penalties shall be im-

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<sup>19</sup> E. Chojna-Duch, *Prawo finansowe. Finanse publiczne*, Warszawa 2017, p. 333.

<sup>20</sup> Tak B. Kucia-Guściora, *Zmiany w charakterze prawnym funduszy celowych*, „Roczniki Nauk Prawnych” 2007, No 1, p. 17.



posed in the amount not less than PLN 500 and not higher than PLN 2,000 for the following:

1. failure to notify the competent minister responsible for culture and national heritage protection or the provincial monument conservator by the owner or holder of a monument entered in the Cultural Heritage List or entered in the register, or other monument located in the provincial register of monuments about:
  - a) damage, destruction, disappearance, or theft of the monument, not later than within 14 days of the date of becoming aware of the occurrence of the incident,
  - b) threat to the monument, not later than within 14 days of the date of becoming aware of the threat,
  - c) change of the place of storage of a movable monument, within one month of the date of this change,
  - d) changes regarding the legal status of a monument, not later than within one month from the date of their occurrence or becoming aware of them;
2. failure to notify a competent authority about the arrival of a monument in the territory of the Republic of Poland by the entity which received a permit for a temporary transfer abroad (the notification should be performed within 14 days of the permit expiry date),
3. preventing or hindering an authority responsible for monument protection, which executes the rights under the act, from accessing a monument.

Failure to implement the follow-up recommendations of the provincial monument conservator as regards the removal of the irregularities found at a monument within a specified period of time is punishable by a pecuniary penalty of no less than PLN 500 and no more than PLN 50,000. Pecuniary penalties in the amount of no less than PLN 500 to no more than PLN 500,000 are imposed for undertaking specific activities without the permission of the provincial monument conservator or when the conditions or scope of this permission are not complied with (illegal activities may include: execution of conservation, restoration, or construction works at a monument entered in the register; execution of construc-

tion works in the vicinity of a monument; execution of conservation or architectural research at a monument entered in the register; conducting archaeological research). Penalties in the same amount are imposed for carrying out conservation or restoration work or conservation research at a monument entered in the Cultural Heritage List without the permission of the minister responsible for culture and national heritage protection or when the scope or terms of this permission are not complied with.

Pecuniary penalties are imposed by way of a decision issued by the competent authority responsible for the protection of monuments which, under Article 107h of the Act on Monuments, is a creditor of receivables from pecuniary penalties. In Article 107h of the Monument Act a reference is made to Article 1a(3) of the Act on Enforcement Proceedings in Administration of 17 June 1966<sup>21</sup>, which defines a creditor as an entity entitled to demand the performance of an obligation or its security in an administrative enforcement or securing proceedings. Pursuant to Article 107f of the Act on Monuments, the pecuniary penalty must be paid within 14 days of the date on which the decision to impose it became final.

In the provisions of the Act on Monuments only minimum and maximum amounts of administrative pecuniary penalties were defined, so that the competent authorities responsible for the protection of heritage monuments could differentiate the amount of these penalties in specific cases. The Act on Monuments does not regulate the premises for differentiating the amount of these penalties or applying reductions in their payment. A reference to the provisions of Section IVa of the Act of 14 June 1960, Administrative Procedure Code<sup>22</sup>, which was added to the Act as of 1 June 2017, contained in Article 107g of the Act on Monuments, is fully justified in this respect. As a result of this amendment of the Administrative Procedure Code, for the first time in Polish legislation, general principles of imposing administrative pecuniary penalties were formulated<sup>23</sup>. A legal

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<sup>21</sup> Consolidated version, Dz.U. of 2018, item 1314 with subsequent amendments.

<sup>22</sup> Consolidated version, Dz.U. of 2017, item 1257, with subsequent amendments, hereinafter: Administrative Procedure Code.

<sup>23</sup> Justification of the draft Act amending the Act – Administrative Procedure Code and some other acts – print No 1183 of the Sejm of the eighth term of office.

definition of an administrative pecuniary penalty was also adopted, which is defined in the Act as a pecuniary sanction imposed by a public administration body by way of a decision, following a breach of law consisting in a failure to comply with an obligation, or a violation of a prohibition imposed on a natural person, a legal person, or an organizational unit without legal personality. Administrative pecuniary penalties, imposed pursuant to the provisions of the Act on Monuments and constituting a source of income of the NFOZ, bear the abovementioned features of penalties defined in Article 189b of the Administrative Procedure Code.

Article 189d of the Administrative Procedure Code lists the premises which should be taken into account by a public administration body when imposing an administrative pecuniary penalty. Referring them to monument protection, it can be assumed that when determining the amount of administrative pecuniary penalty for actions or omissions listed in Articles 107a–107e of the Act on Monuments by way of a decision, the following premises should be taken into account:

- the gravity and circumstances of the infringement, particularly the need to protect property of a considerable size or to protect an important public interest, as well as the duration of the infringement;
- the frequency of past non-compliance with the obligation or prohibition of the same type as the non-compliance with the obligation or the prohibition that the penalty refers to;
- prior punishment for the same offence;
- the extent to which the party on whom the administrative pecuniary penalty is imposed contributes to the infringement;
- actions taken by a party voluntarily in order to avoid the effects of the infringement;
- the amount of the benefit that the party obtained or the loss that it avoided;
- in the case of a natural person, the personal conditions of the party on which the administrative pecuniary penalty is imposed.

In cases referred to in Articles 189e–189g of the Administrative Procedure Code, notwithstanding the infringement of the law, an administrative pecuniary penalty will not be imposed by the authority responsible for

the protection of heritage monuments. The justification in such situations shall be: force majeure; negligibility of the infringement and the cessation of the infringement by the party; an administrative pecuniary penalty imposed earlier on the party by another competent public administration body, which fulfils the purposes for which another administrative pecuniary penalty would be imposed; limitation period for the penalty due to the lapse of five years from the date of the infringement or the occurrence of the consequences of the infringement. An administrative pecuniary penalty shall not be enforceable if five years have elapsed from the date on which the penalty should have been enforced.

It is possible to provide the NFOZ with additional income, as pursuant to Article 189i of the Administrative Procedure Code: interest on the outstanding administrative pecuniary penalty, i.e. not paid on time, is charged in the amount specified as for outstanding tax, unless otherwise provided for in separate regulations. The Act on the protection and guardianship of monuments in this respect does not provide otherwise, so the pecuniary penalties imposed by the authorities responsible for the protection of monuments and outstanding penalties are subject to interest for late payment in accordance with the provisions of the Act of 29 August 1997 – General Tax Regulations Act<sup>24</sup>. Pursuant to Article 56(1) of the General Tax Regulation Act, the interest rate for late payment amounts to the sum of 200% of the base interest rate on a lombard loan<sup>25</sup>, determined in accordance with the provisions on the National Bank of Poland<sup>26</sup>, and 2%, with the reservation that this rate may not be lower than 8%<sup>27</sup>. Article 58 of the General Tax Regulation Act authorizes the Minister of Finance to

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<sup>24</sup> Consolidated version, Dz.U. of 2018, item 800, with subsequent amendments, hereinafter: General Tax Regulation Act.

<sup>25</sup> A lombard loan is granted to banks by the National Bank of Poland against a pledge of securities up to a specified part of the nominal value of these securities.

<sup>26</sup> The Law of 29 August 1997 on the National Bank of Poland (consolidated version, Dz.U. of 2017, item 1373 with subsequent amendments).

<sup>27</sup> Since 1 January 2016, the rate of interest on tax arrears has been 8% of the amount of arrears on an annual basis in accordance with the announcement of the Minister of Finance of 4 January 2016 on the rate of interest on tax arrears, a reduced rate of interest on tax arrears and an increased rate of interest on tax arrears (M.P. [Polish Monitor] item 20).

determine, by way of a regulation, detailed rules for the calculation of interest on arrears<sup>28</sup>. When translating these rules into the Act on Monuments, it should be stated that the amount of interest on arrears is the product of the outstanding administrative pecuniary penalty, the number of days of delay and the rate of interest on arrears divided by 365 days of the tax year. Pursuant to Article 63(1) of the General Tax Regulation Act, the calculated amount of interest on the outstanding administrative pecuniary penalty is to be rounded to the full Polish złoty (PLN) in such a way that the fraction of the amount of less than 50 grosz is disregarded, and the fraction of the amount of 50 grosz and more is rounded up to the full PLN.

According to Article 189 of the Administrative Procedure Code, the public administration body which imposed the administrative pecuniary penalty, at the party's request, in cases justified by an important public interest or an important interest of a party, may grant reliefs in the execution of this pecuniary penalty in the form of: a postponement of the date of its execution or division into instalments; postponement of the date of execution of the outstanding penalty or its division into instalments; write-off of the penalty in whole or in part; write-off of interest for late payment in whole or in part. In the case of a write-off of the outstanding administrative pecuniary penalty, the write-off also covers the interest on the arrears in full or in such part as the outstanding penalty was written off.

10-year financial effects related to the functioning of the NFOZ have been estimated, with the assumption that incomes to this fund in this period should amount to 184,970,000 PLN (assuming a 60% collection effectiveness of financial penalties). It was assumed that in subsequent years (2018–2027) the incomes to the NFOZ should systematically increase, i.e. from PLN 16,820,000 in 2018 to PLN 20,550,000 in 2027<sup>29</sup>. It should

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<sup>28</sup> Ordinance of the Minister of Finance of 22 August 2005 on the calculation of interest on arrears and the extension fee, as well as the scope of information that must be included in the accounts (Dz.U. No 165, item 1373 with subsequent amendments).

<sup>29</sup> Assessment of the regulation results included in the self-amendment of 6 June 2017 to the government bill of 14 March 2017 on the amendment of the act on the protection and guardianship of monuments and some of the other acts – print No 1403-A of the Sejm of the eighth term of office.

be stressed, however, that planning incomes to the NFOZ is subject to high risk. This conclusion can be justified by the following arguments:

- the legislator has set minimum and maximum amounts of pecuniary penalties for particular types of violations of the provisions of the Act on the protection and guardianship of monuments, and the range between the amounts of these penalties is relatively large, and therefore it will be difficult to plan the amount of income for each year;
- the rules of imposing pecuniary penalties, specified in the provisions of the Administrative Procedure Code, require the application of particular premises for determining the amount of these penalties in specific cases, which will make their differentiation possible;
- it is not possible to plan precisely the number of infringements of the provisions of the Act on Monuments, which would be associated with the obligation to impose financial penalties, for each year;
- imposing pecuniary penalties is not tantamount to obtaining incomes for the NFOZ, as the penalty should be payable, and the legislator assumed the collection of penalty payments at a relatively low level of 60%.

#### **4. Allocation of funds collected in the NFOZ**

Article 83b(4) of the Act on Monuments lists the objectives (tasks) for which the funds accumulated on the NFOZ account may be allocated. In accordance with the aforementioned provision of the Act, the NFOZ funds are allocated to subsidize expenditure necessary to carry out the following works:

- a) conservation or restoration works on a monument entered in the Cultural Heritage List<sup>30</sup>,
- b) conservation, restoration or construction works on a monument entered in the register<sup>31</sup>.

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<sup>30</sup> The Cultural Heritage List under Art 14a of the Act on Monuments is maintained by the minister responsible for culture and national heritage protection. Movable monuments of particular value for the cultural heritage are entered in the list.

An entry in the Cultural Heritage List and an entry in the register of monuments are forms of heritage monument protection. The funds accumulated on the NFOZ account may be earmarked for the works carried out on both movable and immovable monuments. Within the meaning of Article 3(1) of the Act on Monuments, the term “monument” means immovable or movable property, parts or complexes thereof, which are the work of man or related to his activity and which are a testimony to a former era or event, the preservation of which is in the public interest because of their historical, artistic, or scientific value. As far as the legal definition of a “monument” is concerned, the authority responsible for the protection of monuments assesses its value, while such concepts as “historical, artistic or scientific value” are of an evaluative nature and are subject to clarification in the process of applying the law<sup>32</sup>. Monuments are divided into immovable (real estate, parts thereof, or groups of real estate) and movable (movable property, parts thereof, or groups of movable property). A special type of monument is constituted by an archaeological monument that is a surface, subterranean, or submarine remnant of human existence or activity, composed of cultural layers, with products of culture or their traces contained therein, or a movable monument which is such a product.

Article 83b(4) of The Act on Monuments stipulates certain limitations as regards expenditures in the NFOZ. The legislator allows the possibility of subsidizing only certain works, i.e. their partial financing. The remaining costs of the above mentioned works must be covered from other sources, e.g. from the investor’s own funds, from a loan, or from public funds other than the NFOZ funds. Yet another limitation that results from the aforementioned provision is the possibility of subsidizing only the “necessary expenditures”. This term has been used many times in the Act of Monuments, but it has not been defined by the legislator. An interpreta-

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<sup>31</sup> Under Article 8 of the Act on Monuments, the register of monuments for the monuments located in the territory of the province, is maintained by the provincial monument conservator. The register is maintained in the form of separate books for immovable, movable and archaeological monuments.

<sup>32</sup> Judgment of the Polish Supreme Administrative Court of 24 January 2017, II OSK 105215, Legalis No 1578479.

tion guideline relevant in this respect is contained in the provision of Article 83b(4) of the Act on Monuments (*in fine*), according to which subsidizing expenditures necessary for the execution of works mentioned in this provision takes place with respect to the principles specified in the seventh chapter of this Act titled “Principles of financing the guardianship of monuments”.

Article 77 of the Act on Monuments lists as many as 17 types of necessary expenditures which may be subsidized with a grant obtainable by a natural person, a local government unit, or other organizational unit which is the owner or holder of a monument entered in the register, or which is permanently in charge of such a monument, or which is the owner or holder of a monument entered in the Cultural Heritage List. The catalogue of necessary expenditures included in this provision is closed and may not be extended by other necessary expenditures<sup>33</sup>. The list of necessary expenditures may be applied accordingly to the works that are subsidized by the NFOZ (e.g. necessary expenditures for preparing technical and conservation expert opinions, carrying out conservation or architectural research, preparing conservation documentation, preparing a programme of conservation and restoration works).

The necessary expenditures referred to in Article 83b(4) of the Act on Monuments may refer only to the works listed in this provision, and which are conservation, restoration, and construction works on the monument. The manner of understanding these notions is regulated in Article 3 points 6–8 of the Act on Monuments. Conservation works are activities aimed at securing and preserving the substance of the monument, inhibiting the processes of its destruction and documenting these activities. Restoration works are measures to enhance the artistic and aesthetic value of a historic monument, including, if necessary, supplementing or restoring its part and the documentation of these activities. When defining conservation and restoration works, the legislator defines their purpose, but does

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<sup>33</sup> Resolution of the Regional Accounting Chamber in Lublin of 6 May 2014, 85/2014 (Dz.Urz. of Lublin Voivodeship item 1964); Resolution of the Regional Accounting Chamber in Wrocław of 11 April 2012, 37/2012 (Dz.Urz. of Lower Silesian Voivodeship item 1597).



not characterize or describe what the works involve<sup>34</sup>. They are mainly replacement or repair works<sup>35</sup>.

The Act on the protection and guardianship of monuments does not define the notion of “construction works”, but Article 3(8) of the Act on Monuments refers to the provisions of the Construction Law<sup>36</sup>, stipulating only that they are limited to construction works undertaken at a monument or in the surroundings of a monument. It may be stated that the term “construction works”, specified in Article 3(7) of the Construction Law, is a certain collective category that covers construction, as well as works consisting in reconstruction, assembly, renovation, or demolition of a construction facility. Not all of the above terms have been defined in Article 3 of the Construction Law. Construction consists in the execution of a construction facility in a specified place, but also in the reconstruction, extension, and adding a superstructure to a construction facility. Reconstruction consists in the execution of construction works which results in the change of the functional or technical parameters of an existing construction facility, with the exception of specific parameters, such as: volume, surface of the body, height, length, width, or number of storeys. Comparing the definitions of “reconstruction” and “construction”, it can be stated that the difference between both concepts is that in the case of construction there is no pre-existing construction facility, and in the case of reconstruction, there must be an existing facility which will be the subject of reconstruction<sup>37</sup>.

“Renovation” means performing construction works in an existing building consisting in the restoration of the original condition, which are not ongoing maintenance, allowing the use of construction materials other than those used in the original condition. Only works which are carried

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<sup>34</sup> Judgment of the Voivodeship Administrative Court in Bydgoszcz of 22 December 2014, I SA/Bd 1174/14, Legalis No 1191864; judgment of the Supreme Administrative Court of 5 December 2013, I FSK 1750/12, LEX No 1404055.

<sup>35</sup> Judgment of the Voivodeship Administrative Court in Gliwice of 24 March 2015, III SA/GI 58/15, Legalis No 1260810.

<sup>36</sup> Act of 7 July 1994, Construction Law (consolidated version, Dz.U. of 2018, item 1202 with subsequent amendments).

<sup>37</sup> Judgment of the Voivodeship Administrative Court in Poznań of 5 June 2014, IV SA/Po 384/14, LEX No 1479888.

out in an existing construction facility, the purpose of which is to restore the condition which had formerly existed in it, are considered to be renovation. Renovation is not construction work consisting in the demolition of an entire construction facility or a construction of a new work, even using construction materials obtained from a facility demolished in the same place which, would correspond to the original facility with its dimensions<sup>38</sup>. Renovation should be distinguished from ongoing maintenance, which consists in replacing one element with another (new), without the need to restore the original condition, which is a necessary condition for classifying construction works as renovation. During renovation, the damaged structure is reconstructed, while during ongoing maintenance, the existing structure of the facility is renewed or refreshed<sup>39</sup>.

The term “assembly” was not defined in the construction law. Attempts to define it were made in court decisions. It was indicated that assembly consists in assembling ready-made parts, mounting, installing technical devices, linking separate parts into a whole<sup>40</sup>. Assembly consists in all works that involve the technical supplementation of existing buildings or structures or, in exceptional cases, in the construction of stand-alone equipment<sup>41</sup>. Neither did the legislator define the notion of “demolition” of a construction facility. Court decisions indicate that the purpose of demolition is to eliminate the effects of the construction process, i.e. a structure constructed in a specific place. Demolition of a facility constructed in a given place should be considered as a removal of this facility from the place where it had been constructed<sup>42</sup>.

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<sup>38</sup> Judgment of the Voivodeship Administrative Court in Kraków of 12 October 2017, II SA/Kr 688/17, Legalis No 1690993.

<sup>39</sup> M. Janiszewska-Michalska, *Podstawowe pojęcia prawa budowlanego w orzecznictwie sądów administracyjnych*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2013, No 5, p. 51.

<sup>40</sup> Judgment of the Voivodeship Administrative Court in Opole of 23 April 2013, II SA/Op 71/13, LEX No 1316872.

<sup>41</sup> Judgment of the Supreme Administrative Court of 21 March 2017, II OSK 2898/15, Legalis No 1605631.

<sup>42</sup> Judgment of the Voivodeship Administrative Court in Gliwice of 9 January 2013, II SA/GI 803/12, Legalis No 767142.

The provision of Article 83b(4) of the Act on Monuments allows subsidizing construction works from the NFOZ funds only at the monument. This means that in relation to the provisions of Article 3(8) of the Act on Monuments it introduces a significant limitation, as construction works can be carried out both near the monument and “in the surroundings of the monument”, which according to Article 3(15) of the Act on Monuments is the area around or near the monument designated in the decision to enter this area in the register of monuments to protect its scenic values and protect it against harmful influence of external factors. According to the court’s assessment, owing to the extent of interference in the citizens’ rights, great caution should be exercised when entering the surroundings of a monument into the register, basic directives of the administrative procedure should be complied with, and the application of an extended interpretation should be prohibited<sup>43</sup>. Therefore, certain construction works in the vicinity of the monument cannot be subsidized by the NFOZ, but their financing and subsidizing is permitted from other sources, e.g. budget allocations.

According to Article 83b(5) of Act on Monuments, the costs of maintaining NFOZ are covered from this fund. The introduction of such a general rule and, at the same time, the legislator’s resignation from calculating the types of costs that can be covered by NFOZ funds, lead to allowing the possibility of financing all costs (regardless of their amount). The only limitation, formulated in the aforementioned provision of the Act, is the relation between the cost (expenditure) and the “maintenance” of the NFOZ. According to the employer’s declaration, no more than 5% of NFOZ income may be allocated to cover the operating costs of this fund<sup>44</sup>. However, the above declaration is devoid of legal force. This problem cannot be solved under the general rule formulated in Article 29(8) of the Public Finance Act, by which the costs of the state special-purpose fund

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<sup>43</sup> Judgment of the Voivodeship Administrative Court in Warszawa of 9 November 2015, VII SA/Wa 220/15, *Legalis* No 1364542.

<sup>44</sup> Assessment of the regulation results included in the self-amendment of 6 June 2017 to the government bill of 14 March 2017 on the amendment of the act on the protection and guardianship of monuments and some of the other acts – print No 1403-A of the Sejm of the eighth term of office.

may be covered only within the fund's available financial resources. This means that all costs of the state special-purpose fund can be covered, and the necessary condition for their financing is an adequate balance in the fund's account.

The analysis of the arrangements adopted in the NFOZ financial plan for 2018 shows that the fund's revenues are planned in the amount of PLN 16,820,000, while expenditures related to the implementation of ongoing tasks will amount to PLN 16,315,000, including PLN 13,154,000 in the form of subsidies granted for the implementation of the ongoing tasks. Own expenditures were planned to amount to PLN 840,000 (including PLN 330,000 for salaries with obligatory contributions and PLN 510,000 for opinions, expert opinions etc.). Investment expenditures (grants) were planned to amount to PLN 2,321,000. Spare funds at the end of the year, according to the financial plan, will amount to PLN 505,000 (they will be transferred to be managed by Minister of Finance or as a deposit under Article 78d of the Public Finance Act)<sup>45</sup>.

## 5. Final remarks

The analysis of the normative material and the achievements of the doctrine and court rulings as regards state purpose-specific funds has led to a positive verification of the hypothesis that the NFOZ is and will remain only a complementary source in the system of financing the guardianship of heritage monuments in the years to come. Compared to the planned expenditure in the state budget for 2018 (part 24, section 921 – culture and national heritage protection, chapter 92120 – protection and guardianship of monuments) in the amount of PLN 51,301,000<sup>46</sup> the amount of PLN 13,154,000 allocated in the NFOZ for the implementation of ongoing tasks constitutes an additional source of financing (at the level of 25.64% in relation to the state budget funds). This relationship is in line with the view, established in the doctrine, about the complementary function of

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<sup>45</sup> Table 5 in the Annex No 13 to the Budget Law for 2018.

<sup>46</sup> Annex No 2 (state budget expenditure for 2018) to the Budget Law for 2018.

state purpose-specific funds in relation to the state budget<sup>47</sup>. Yet another view is appropriate in this context, according to which the justification for the creation of some state special purpose funds may be the legislator's intention to emphasize certain expenditures, for tactical and political reasons, as priority expenditures for the state<sup>48</sup>.

Funds that originate from the state budget and from the NFOZ are not the only public funds allocated to tasks related to the protection and guardianship of monuments. Public funds spent from the budgets of local government units are also of significant importance (in 2016 all local government units allocated about PLN 665,000,000 for the protection of monuments, and they received part of these funds from the state budget in the form of subsidies regulated in the Act on Monuments).

As a source of funding the protection and guardianship of heritage monuments, The National Fund for the Protection of Heritage Monuments is limited by the statutory objectives of its operation. The possibility of subsidizing only conservation and restoration works and construction works exclusively at the monument was allowed, whereas the possibility of subsidizing such works in the area surrounding the monument was omitted. Basing the NFOZ funding on only one source of income may marginalize the significance of this fund, and yet it is a source burdened with a specific planning risk. In the years to come, obtaining income only from pecuniary penalties may lead to certain disruptions in financing ongoing tasks of the fund in question. The number of violations of the law that regulates protection and guardianship of monuments may have a tendency to decrease, e.g. due to an increase in legal awareness of the owners of monuments.

Taking into account the high costs of works and construction works at monuments, including the increase in the prices of building materials and the cost of hired labour in subsequent years, one may assume a gradu-

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<sup>47</sup> M. Koziel, *Rola funduszy celowych w procesie racjonalizacji wydatków publicznych* [in:] A. Dobaczewska, E. Juchiewicz, T. Sowiński (eds), *System finansów publicznych. Prawo finansowe wobec wyzwań XXI wieku*, Warszawa 2010, p. 168.

<sup>48</sup> J. Szolno-Koguc, *Miejsce funduszy celowych w systemie finansów publicznych*, „Annales Universitatis Mariae Curie-Skłodowska”, Sectio H, Oeconomia, Lublin 2004, No 38, p. 104.

al marginalization of this source of funding. The legislator has not specified the minimum share of the NFOZ subsidy in the cost of implementing a specific task. The annual amount of approximately PLN 13,000,000 allocated from the NFOZ for subsidizing the implementation of tasks will enable the acceptance of several dozen applications at most. The share of subsidies from the NFOZ will decrease in the total expenses of implementing a specific task, while the share of funds from different sources, e.g. the budget, will systematically increase. The state special-purpose fund, as exemplified by the NFOZ, may become a fund for financing a very narrow category of tasks due to limited financial resources<sup>49</sup>. In conclusion, both the limitations of the tasks, which may be subsidized by the NFOZ, and the nature of the incomes which contribute to this fund, reduce it to the role of a complementary source in the system of financing the protection and guardianship of heritage monuments.

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<sup>49</sup> Z. Ofiarski, *Prawo finansowe*, Warszawa 2010, p. 77.

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