

ENSURING THE CONTINUITY OF THE EXECUTIVE BRANCH OF THE COMMUNE SELF-GOVERNMENT FOLLOWING THE EXPIRY OF THE MAYOR'S MANDATE

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ABSTRACT

The present study focuses on issues relating to continuity of the executive branch of commune self-government following expiry of the mayor's mandate. It is an original scientific article that aims to answer the question of whether the regulations currently in force sufficiently safeguard the principle of continuity of the executive branch of commune self-government. It is hypothesised that, unfortunately, the legislature has not ensured preservation of this principle in every case. To confirm this hypothesis, it was necessary to thoroughly analyse the provisions not only of the Act on the Commune Self-Government but also of the Constitution and the other two acts governing the local self-government system (the legal-dogmatic method). Since, in practice, this gap creates very serious difficulties in the functioning of communes, the study does not merely answer the above question but also proposes and discusses possible legislative amendments to guarantee continuity of the executive branch of commune self-government in every case.

Key words: mayor, term of office, continuity of government, expiry of mandate, person designated by the Prime Minister

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INTRODUCTION

The principle of continuity in the operations of the executive branch ensures that the executive authority can continue to perform its duties without interruption. As regards the Council of Ministers, this principle is expressed in Article 162(3) of the Constitution of the Republic of Poland,¹ which provides that, in the event that the Prime Minister submits the Council of Ministers' resignation (regardless of the reason), the President of the Republic of Poland, when accepting the resignation, shall oblige the Council of Ministers to continue performing its duties until a new Council is appointed.²

Since 1990, when local self-government was restored in Poland, the need to ensure this principle of continuity (non-interruption) has also been discussed in relation to local authorities.³ Although, under Article 169(1) of the Constitution of the Republic of Poland, local self-government units carry out their tasks through legislative and executive authorities, the aforementioned principle applies only to the executive ones, following the example of the Council of Ministers. Indeed, while a local self-government unit can function for some time without a legislative authority,⁴ which in any case meets in sessions usually convened once a month or less frequently,⁵ the primary role of the executive authorities is to perform public tasks on a continuous basis. The destabilisation of their operations may thus adversely affect the proper functioning of a local self-government unit.⁶ Hence, to ensure continuity, Article 29 of the Act on the Commune Self-Government⁷ provides that, after the end of the term of office for which the mayor (*wójt* – in certain communes, the equivalent authority is referred to as *burmistrz* or *prezydent miasta*) has been elected, they shall perform the mayor's functions until a newly elected mayor takes over (paragraph 1).

¹ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended.

² This situation is referred to in the literature as an 'atypical' Council of Ministers and, among others, prevents the passing of a vote of no confidence or a vote of confidence in the Council, as such a decision would be pointless. It is further noted that, in such a situation, the Council of Ministers and its individual members should limit themselves to performing their duties only to the necessary (strictly necessary) extent. This is, of course, an argument that needs to be treated rather as an element of political culture – see P. Czarny, 'Komentarz do art. 162 Konstytucji Rzeczypospolitej Polskiej', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd edn, Warszawa, 2023, electronic version: <https://sip.lex.pl/#/commentary/587939419/736859/tuleja-piotr-red-konstytucja-rzeczypospolitej-polskiej-komentarz-wyd-ii?pit=2023-12-23&cm=URELATIONS> [accessed on 30 December 2023].

³ See M. Kasiński, 'Ciągłość funkcji wykonawczej a zakończenie działalności zarządu gminy', *Samorząd Terytorialny*, 1996, No. 7–8, pp. 20–34.

⁴ See P. Kubalski, 'Komentarz do art. 28 ustawy o samorządzie powiatowym', in: Drembowski P. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2019, electronic version: <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrrg4ztomzoobqxalrugmydkojwgq2q&refSource=toc#tabs-metrical-info> [accessed on 29 December 2023].

⁵ As per the applicable regulations, but at least once a quarter.

⁶ Cz. Martysz, 'Komentarz do art. 31b ustawy o samorządzie powiatowym', in: Dolnicki B. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2020, electronic version: <https://sip.lex.pl/#/commentary/587821156/618596/dolnicki-bogdan-red-ustawa-o-samorządzie-powiatowym-komentarz?pit=2023-12-23&cm=URELATIONS> [accessed on 28 December 2023].

⁷ The Act of 8 March 1990 on the Commune Self-Government, Journal of Laws of 2023, item 40; hereinafter 'the Commune Act'.

At the same time, in this scenario, a deputy mayor shall perform their duties until a newly appointed deputy mayor takes over (paragraph 2). In turn, under Article 28 of the Act on the District Self-Government⁸ and, accordingly, Article 42 of the Act on the Province Self-Government,⁹ the district/province executive board (*zarząd powiatu / zarząd województwa*) shall operate until a new one is elected. As can be seen, the above provisions ensure continuity in the operations of the executive branch of local self-government where a given authority has functioned uninterruptedly throughout the entire period for which it was elected.¹⁰

However, this is not always the case. In certain circumstances, when specific grounds are met, persons elected to perform a particular authority's functions (referred to as 'office holders') perform their duties for a shorter period than that for which they were originally elected. This is because – as in the case of the Council of Ministers – their election is not irrevocable. If certain circumstances arise, they lose office earlier. Interestingly, in the case of the Council of Ministers, Article 162(3) of the Constitution stipulates that, irrespective of the reason for the Council's resignation – which is not necessarily submitted at the end of the Sejm's term of office (i.e. the period for which the Council was appointed), but may also be due to a failure to receive a vote of confidence from the Sejm, a vote of no confidence being passed by the Sejm, or the Prime Minister's resignation – the President of the Republic of Poland, when accepting the Council's resignation, shall oblige the Council to continue its duties until a new Council of Ministers is appointed. Therefore, as regards the Council of Ministers, the principle of continuity of the executive branch applies in every case, even if the Council has lost the Sejm's confidence. Then, until a new Council is chosen, the departing one is obliged to continue performing its previous duties. Notably, the legislature has not provided for the Council to be immediately precluded from performing its functions. These matters are thus regulated jointly in a single provision, regardless of the circumstances leading to the Council's resignation.

Meanwhile, in the case of local self-government authorities, the legislature has established distinct regulations for situations where office is lost before the end of the period for which a particular authority was elected. As far as mayors are concerned, the legislature has specified the circumstances resulting in a mayor's early loss of office in Article 492(1) of the Election Code.¹¹ If these grounds are met,

⁸ The Act of 5 June 1998 on the District Self-Government, Journal of Laws of 2022, item 1526, as amended; hereinafter 'the District Act'.

⁹ The Act of 5 June 1998 on the Province Self-Government, Journal of Laws of 2022, item 2094; hereinafter 'the Province Act'.

¹⁰ The same opinion expressed by Cz. Martysz, 'Komentarz do art. 28 ustawy o samorządzie powiatowym', in: Dolnicki B. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2020, electronic version: <https://sip.lex.pl/#/commentary/587821150/618590/dolnicki-bogdan-red-ustawa-o-samorzadz-powiatowym-komentarz?pit=2023-12-23&cm=URELATIONS> [accessed on 25 December 2023]; and P. Chmielnicki, 'Komentarz do art. 28 ustawy o samorządzie powiatowym', in: Chmielnicki P. (ed.), *Ustawa o samorządzie powiatowym. Komentarz*, LexisNexis, 2005, electronic version: <https://sip.lex.pl/#/commentary/587524603/322043/chmielnicki-pawel-red-ustawa-o-samorzadz-powiatowym-komentarz?pit=2023-12-23&cm=URELATIONS> [accessed on 25 December 2023].

¹¹ The Act of 5 January 2011 – the Election Code, Journal of Laws of 2023, item 2408, as amended.

they result in the expiry of the mayor's mandate before the end of the mayor's term of office. This, in turn, under Article 28f(1) of the Commune Act, immediately (automatically) precludes the mayor from performing their functions – as these functions are assumed by a person designated by the Prime Minister until a newly elected mayor takes over. As can be seen, theoretically, this provision is also intended to ensure continuity of government. Indeed, the legislature does not leave the commune (*gmina*) without an executive branch after its mayor is removed – but the executive power is no longer exercised by the previous mayor. Moreover, and most importantly, the legislature has not indicated when a person to take over the mayor's functions should be designated. All this raises doubts as to whether the principle in question is actually guaranteed.

There are no corresponding provisions on the expiry of mandates in the District and Province Acts. This is because the executive board members are not directly elected and thus are not granted a mandate, so there is no question of its expiry. However, these Acts contain other provisions which state that if circumstances resulting in an early loss of office arise (e.g. in the case of dismissal or resignation), the departing executive boards – like the Council of Ministers – shall continue their duties until a new executive board is elected. This effectively prevents the principle of continuity of the executive branch from being compromised.

The present study, firstly, seeks to answer the question of whether the regulations currently in force sufficiently safeguard the principle of continuity of the executive branch of the commune self-government. Secondly, the main point of the discussion in this study is an attempt to propose amendments to the existing regulations to guarantee the continuity of the executive branch of the commune self-government even if the mayor's mandate expires before the end of their term of office. To this end, the analysis will cover not only the applicable provisions of all three acts governing the local self-government system but also the provisions of draft regulations recently submitted to the Sejm.

THE PRINCIPLE OF CONTINUITY OF THE EXECUTIVE BRANCH IN THE REGULATIONS IN FORCE UNTIL 2002

When local self-government was reinstated at the commune level in 1990 and then extended to the other self-government units, i.e. the district (*powiat*) and the province (*województwo*), the executive authorities (executive boards) of all three units were indirectly elected by their legislative bodies. The latter were first directly elected by a particular self-government unit's local community. These executive boards were collective bodies without an explicitly defined term of office and were, by definition, elected for the duration of the term of office of the legislative bodies that elected them. Accordingly, each newly elected commune and district council (*rada*) and province assembly (*sejmik*) was obliged to elect its executive authority. This solution guaranteed continuity of the executive branch since, under Article 29 of the Commune Act, Article 29 of the District Act, and Article 42 of the Province Act, the departing executive board was supposed to continue its duties until a new

one was elected. However, the Commune Act and the Province Act explicitly stated that these provisions applied only to the election of a new executive board by a new council or assembly following the end of the previous one's term of office. Yet the need to elect an executive board could arise not only when the term of office of the council/assembly that had elected the former executive board ended, but also earlier. The council/assembly could, for instance, dismiss the executive board, in which case it would be expected to elect a new one. A similar situation would arise if the executive board resigned during the ongoing term of office of the council/assembly.¹² In the legal situation at that time, the issues of maintaining the continuity of the executive branch in such cases were regulated by the legislature in different ways. With regard to districts, Article 28 of the District Act was the sole regulation relating to the continued performance of the executive board's duties. However, as this provision did not stipulate that it applied only to the election of a new executive board after the end of the council's term of office, it was, in practice, the basis on which – whenever it became necessary to elect a new executive board – the departing one continued its duties until a new one was elected. Over time, however, objections began to be raised that, given the placement of Article 28 in the structure of the District Act, it was not supposed to apply to situations where the executive board was dismissed or had resigned. It was therefore argued that new regulations directly addressing such cases were necessary.

Conversely, as regards the commune and province self-government, while the legislature established – in addition to Article 29 of the Commune Act and Article 42 of the Province Act, applicable only to the election of a new executive board by a new council or assembly following the end of the former one's term of office – other provisions, these concerned merely the executive board's dismissal. Namely, under Article 28e(3) of the Commune Act, if a commune's executive board was dismissed, it continued its duties until the election of a new one. Pursuant to Article 39(2) of the Province Act, the dismissed province executive board or its individual members continued their previous duties until the election of a new province executive board or its individual members. The province assembly could release a member of the province executive board from this obligation.

Notably, no regulations in the Commune and Province Acts referred to the executive board's resignation. Moreover, there were differences between their provisions governing the executive board's dismissal. Hence, the legislature decided to harmonise these provisions and introduce identical regulations, covering both dismissals and resignations, in all three acts governing the local self-government system. This was accomplished by the Act of 11 April 2001.¹³ The new provisions

¹² As a side note, it should be mentioned that the composition of a collective executive authority was personally designed by its chairperson. This means that councillors first elected the chairperson, and only then, upon the chairperson's motion, the remaining members. This interdependence had far-reaching consequences. Namely, the dismissal of the chairperson entailed the dismissal of the entire executive board. Likewise, their resignation was tantamount to the resignation of the entire executive board.

¹³ The Act of 11 April 2001 amending the Acts on the Commune Self-Government, on the District Self-Government, on the Province Self-Government, and on the Government Administration in the Province and Certain Other Acts, Journal of Laws of 2001, No. 45, item 497.

explicitly ensured continuity of the executive branch both after the end of a legislative body's term of office and during this term. Indeed, under the newly added Article 28e(3) and (4) of the Commune Act, Article 31b(3) and (4) of the District Act, and Article 39(3) and (4) of the Province Act, the dismissed executive board was supposed to continue its duties until a new one was elected.¹⁴ The same rules applied if the entire executive board resigned.

THE PRINCIPLE OF CONTINUITY OF THE EXECUTIVE BRANCH IN REGULATIONS IN FORCE AFTER 2002

In 2002, fundamental systemic changes were made to the basic self-government unit, that is, the commune. In the other self-government units, i.e. districts and provinces, the existing regulations have not changed and are still in force. In turn, in communes, the aforementioned amendment replaced the collective, indirectly elected executive board with the mayor as a single-person, directly elected executive authority. As a result of this change, the mayor (as opposed to the members of executive boards, who remain the executive authorities of districts and provinces) is granted a mandate upon election. By definition, the mandate is granted for the entire term of office. To ensure the continuity of the executive branch, Article 29 of the Commune Act provides that, after the end of the mayor's term of office, they shall perform the mayor's functions until a newly elected mayor takes over. Accordingly, a deputy mayor shall continue with their duties until a newly appointed deputy mayor takes over.¹⁵

¹⁴ The same principle applies to individual dismissed members of the executive board, although the council could release an executive board member from this obligation. However, this concerned the release of a single member rather than all members in the event that the whole executive board was dismissed, as that would prevent its operation. According to Cz. Martysz, 'all dismissed members of the executive board may submit a request for release, but the wording of Article 31b(3) *in fine* indicates that the release in question may apply to one or more members of the executive board, therefore, releasing the entire board from these duties does not seem possible' – Cz. Martysz, 'Komentarz do art. 31b...', op. cit. Nonetheless, doubts may arise regarding the executive board's obligation to continue performing its duties, given that Article 65 of the Constitution guarantees the freedom to choose and to pursue one's occupation and to choose one's place of work. Still, the legislator did not specify in any way – even by providing some examples – what reasons could justify a decision to release an executive board member; for more on this issue, see P. Dańczak, 'Komentarz do art. 31b ustawy o samorządzie powiatowym', in: Gajewski S., Jakubowski A. (eds), *Ustawa o samorządzie powiatowym. Komentarz*, Warszawa, 2019, electronic version: <https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogi3damrtga2damjoobqxa rug44tgnzuha4a&refSource=guide1#tabs-metrical-info> [accessed on 31 December 2023].

¹⁵ For more on the subject, see J. Czerw, 'Komentarz do art. 29 ustawy o samorządzie gminnym', in: Chmielnicki P. (ed.), *Ustawa o samorządzie gminnym*, Warszawa, 2022, electronic version: <https://sip.lex.pl/#/commentary/587896956/694396/chmielnicki-pawel-red-ustawa-o-samorządzie-gminnym?pit=2023-12-23&cm=URELATIONS> [accessed on 22 December 2023]. The Provincial Administrative Court in Szczecin, in its judgment of 12 December 2012 (II SA/Sz 1016/12, LEX No. 1340452), stated that 'Article 29(2) of the Commune Act does not so much guarantee that a deputy mayor will perform their functions until a newly appointed deputy mayor takes over, as it obliges a deputy mayor to continue with their duties unless the mayor decides otherwise.' It is, therefore, their obligation, just as it is the

Yet, the mayor does not always serve the entire term of office, just as it was (and still is) the case with executive board members. As already mentioned above, this is because there are a number of grounds relating to executive authorities which, if met, result in an early loss of office. However, in the case of mayors – elected directly since 2002 – these grounds result in an earlier expiry of the mayor's mandate (before the end of the mayor's term of office), which permanently and effectively precludes them from performing previous functions. Under Article 28f(1) of the Commune Act, if the mayor's mandate expires before the end of their term of office, the mayor's functions shall be performed by a person designated by the Prime Minister until a newly elected mayor takes over. In turn, Article 28e of the Commune Act clearly states that the expiry of the mayor's mandate before the end of their term of office shall be tantamount to the dismissal of their deputy or deputies.¹⁶ This stems from the fact that the mayor personally designs their team of collaborators.¹⁷ Since the mayor chooses the deputy (or deputies), they must also share the consequences of the expiry of the mayor's mandate. Therefore, both the mayor and the deputy mayor are simultaneously removed from office and no longer perform their duties until a new mayor and their deputy are elected. Meanwhile, as mentioned earlier, in the case of executive board members – who are not granted a mandate due to their indirect election – these grounds (though not all of them)¹⁸ are set out in various regulations: some result in losing membership in the district/province executive board (such as prohibitions on holding multiple offices or employment positions), while others result in dismissal. It is also possible to resign from membership in an executive board. However, under the provisions of the Act on the District Self-Government and the Act on the Province Self-Government, none of these circumstances immediately preclude the executive board from performing its previous duties, and in each of these cases, in order to maintain the continuity of the executive branch, the legislature obliges the executive board to continue with its duties until a new one is elected.

The above analysis clearly shows a fundamental difference between the regulations applicable to communes and those applicable to districts and provinces. The legislature expressly differentiates the legal position of executive board members from that of a mayor where the same circumstances occur – e.g. election as an MP,

obligation of the departing mayor. This raises the same doubts as those mentioned in the previous footnote.

¹⁶ Under Article 26a(2) of the Commune Act, up to four deputy mayors may be appointed in a commune, depending on the number of its inhabitants.

¹⁷ Cz. Martysz, 'Komentarz do art. 28e ustawy o samorządzie gminnym', in: Dolnicki B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa, 2021, electronic version: <https://sip.lex.pl/#/commentary/587718880/645584/dolnicki-bogdan-red-ustawa-o-samorzadzcie-gminnym-komentarz-wyd-iii?pit=2023-12-23&cm=URELATIONS> [accessed on 28 December 2023].

¹⁸ For instance, the Acts on the District Self-Government and on the Province Self-Government do not contain provisions that would determine the effects of the death of a district executive (*starosta* – the chairperson of the district executive board) or a province executive (*marszałek* – the chairperson of the province executive board) and its impact on the executive board's further operations. In the case of communes, this is one of the grounds for the expiry of the mayor's mandate.

violation of the prohibition on holding multiple offices, or even relinquishing the membership/mandate. However, I cannot find any reasonable explanation why, for example, a dismissed executive board can continue with its duties, whereas a dismissed mayor cannot do so. Indeed, both cases involve a loss of trust¹⁹ from voters. The time it takes to elect a new executive board or mayor is no justification either. If this time were significantly shorter in the case of electing an executive board than in the case of holding an early election of a mayor, it would be an argument in favour of allowing the dismissed executive board to remain in power for a short period, as opposed to the mayor. Yet both a new executive board and a new mayor are to be elected within an almost identical period.²⁰

As can be seen, in the case of communes, the legislature has sought to ensure the principle of continuity of the executive branch in a completely different way. In such situations, the mayor's functions are to be performed not by the departing mayor but by a person appointed by the Prime Minister. Leaving this difference aside, the most important point is that, in districts and provinces, the departing executive boards continue to operate without any interruption.²¹ Meanwhile, in the case of communes, the legislature has failed to specify any time limit for such a person to be appointed. Hence, in practice, there are numerous known cases in which this has taken as many as several weeks – not infrequently more than four, and sometimes even longer.²² This shows that, unfortunately, the solution in question does not

¹⁹ With regard to the executive board, I am referring here to dismissal as an expression of the councillors' will, i.e. dismissal carried out at the request of the councillors or possibly due to fact that the council has not granted approval of the financial accounts or has not passed a vote of confidence. Apart from this, an executive board may also be dismissed as a result of a violation by the district/province executive of the prohibitions set out in the so-called Anti-Corruption Act (Article 5(3) of the Act of 21 August 1997 on Restrictions on the Conduct of Business by Persons Performing Public Functions (Journal of Laws of 2023, item 1090) or due to their failure to submit an asset declaration within the time limit prescribed in Article 25f(3) of the District Act, which legally obliges the council/assembly to dismiss them.

²⁰ More precisely, pursuant to Article 31b(1) of the District Act, in the event of the dismissal or resignation of the entire executive board, the district council shall elect a new one in the manner referred to in Article 27 within three months from the date of its dismissal or the date of accepting its resignation, respectively. In turn, under Article 474(2) in conjunction with Article 372(1) of the Election Code, an early election of a mayor should be ordered and conducted within 90 days from the date on which the cause occurred – which is also almost three months, depending on which three months the 90-day period falls into. However, importantly, under Article 474(3) of the Election Code, if the council's resolution or the electoral commissioner's decision on the expiry of the mayor's mandate has been challenged before an administrative court, the early election of a mayor shall be ordered and conducted within 60 days from the date the judgment of the administrative court dismissing the complaint becomes final and non-appealable. In such a case, this period is thus even shorter.

²¹ For example, in the Kłobuck District, the district executive was elected a member of the Sejm in the parliamentary election held on 15 October 2023. The district executive board continued to operate until a new one was elected on 22 November 2023 – see M. Mamóń, 'Starosta kłobucki został posłem, więc wybrano nowego i cały zarząd powiatu. Postawiono na kobiety', *Gazeta Wyborcza*, 22 November 2023, <https://czestochowa.wyborcza.pl/czestochowa/7,48725,30432626,starosta-klobucki-zostal-poslem-wiec-wybrano-nowego-i-caly.html> [accessed on 26 December 2023].

²² In the parliamentary election held on 15 October 2023, as many as 14 mayors were elected members of the Sejm or Senate – see 'Prezydenci, burmistrzowie oraz wójtowie zostali posłami

guarantee the continuity of the operation of the executive branch, even though it should do so. This results in significant problems for communes in practice. For many weeks, they strive to function based on authorisations granted by the mayor (usually to commune clerks) before the expiry of the mayor's mandate.²³ However, not all powers can be exercised in this way, e.g. those concerning budget and budget-related matters. These powers belong exclusively to the mayor and cannot be delegated through authorisation.²⁴ These powers belong exclusively to the mayor and cannot be delegated through authorisation.²⁵

Hence, a fundamental question arises as to what changes are needed to ensure continuity in the operation of the commune self-government's executive branch.

i senatorami. Co będzie się działo w samorządach, które opuszczają?', *Portal tvn24.pl*, <https://tvn24.pl/wybory-parlamentarne-2023/wybory-2023-prezydenci-burmistrzowie-oraz-wojtowie-zostali-poslami-i-senatorami-w-samorzadach-rzadzic-beda-komisarze-7396770> [accessed on 26 December 2023]. The appointment of persons to take over their functions was a lengthy process. The Prime Minister appointed the first six persons on 10 November 2023, i.e. more than three weeks after the election – see article: 'Znamy nazwiska sześciu komisarzy, którzy zastąpią samorządowców wybranych do parlamentu', *Serwis Samorządowy PAP*, <https://samorząd.pap.pl/kategoria/aktualnosci/znamy-nazwiska-szesciu-komisarzy-ktorzy-zastapija-samorzadowcow-wybranych-do> [accessed on 22 December 2023]. The last, fourteenth appointee, for the city of Inowrocław, was designated as late as on 28 November 2023, i.e. more than six weeks after the election – see J. Blikowska, 'Ostatnie z czekających miast ma komisarza. „Policzek wymierzony mieszkańcom”, *Rzeczpospolita*, 29 November 2023, <https://regiony.rp.pl/spolecznosci-lokalne/art39493741-ostatnie-z-czekajacych-miast-ma-komisarza-policzek-wymierzony-mieszkancom> [accessed on 22 December 2023].

²³ This is because the expiry of the mayor's mandate does not affect the authorisations granted by the mayor. The same position was taken by the Provincial Administrative Court in Łódź in its judgment of 23 June 2020, III SA/Łd 410/20 LEX No. 3027804. A different opinion has been expressed by J. Pitera, see J. Pitera, 'Ważność upoważnienia administracyjnego oraz pełnomocnictwa w przypadku vacatu piastuna organu administracji publicznej', *Kwartalnik Prawa Publicznego*, 2009, No. 1–2, pp. 91–107.

²⁴ The drafter pointed this out in the explanatory memorandum to the Draft Act of 23 November 2023 amending the Act on the Commune Self-Government and the Election Code Act, Sejm print No. 75, p. 3, <https://orka.sejm.gov.pl/Druki10ka.nsf/0/FC23452B0DBC21B4C1258A-76003D5823/%24File/75.pdf> [accessed on 20 December 2023]. See also judgment of the Provincial Administrative Court in Poznań of 28 October 2015, I SA/Po1300/15, in which the Court expressly indicated that, under the regulations in force, a deputy mayor is not authorised to make changes to the budget resolution – Regulation Impact Assessment concerning the Draft Act submitted by members of the Sejm amending the Act on the Commune Self-Government and the Election Code Act (Sejm print No. 75), <https://orka.sejm.gov.pl/Druki10ka.nsf/0/41095D2A05ADAF54C1258A-830049D852/%24File/75-001.pdf> [accessed on 20 December 2023].

²⁵ For example, Andrzej Dziuba, the former mayor of the City of Tychy, pointed this out during the prolonged time of waiting for a person designated by the Prime Minister. At a briefing held on 8 November 2023, he said that '15 November is the deadline for submitting it [the budget – M.G.] to the city council. Of course, it has been prepared and is only waiting for signature by a person who has the right to sign it, and such a person is the city mayor or a person performing the mayor's duties, i.e. the commissioner' – see J. Pierończyk, 'Tychy ciągle bez prezydenta. Kto rzadzi miastem?', *Dziennik Zachodni*, 8 November 2023, <https://dziennikzachodni.pl/tychy-ciagle-bez-prezydenta-kto-rzadzi-miastem/ar/c1-18052779> [accessed on 22 December 2023]. The same position was taken by the Provincial Administrative Court in Warsaw in its judgment of 10 October 2006, I SA/Wa 913/06, LEX No. 303211.

PROPOSED LEGISLATIVE AMENDMENTS TO ENSURE THE CONTINUITY OF THE EXECUTIVE BRANCH

It seems that two paths can be taken in this discussion. The first would involve respecting the legislature's will as expressed to date, i.e. a distinct regulation in the Act on the Commune Self-Government that provides for the mayor being effectively and immediately precluded from performing their duties in the event that the mayor's mandate expires before the end of the term of office. Accordingly, without any fundamental changes – and thus maintaining the current regulations – it would only be necessary to set a short, fixed time limit, e.g. 48 or perhaps even 24 hours,²⁶ for the Prime Minister to designate a new person to take over the mayor's functions, since it is necessary for the mayor's tasks and competences to be transferred quickly. The other path would involve a fundamental change, namely the introduction into the Act on the Commune Self-Government of solutions modelled on the other two local self-government acts and on the provisions of the Constitution of the Republic of Poland concerning the Council of Ministers' operations. These amendments would mean that the mayor, regardless of the circumstances, would always perform their duties until they are taken over by a newly elected mayor.²⁷ Accordingly, Article 28e and Article 28f(1) of the Commune Act should be repealed, and the wording of Article 29(1) of the Commune Act should be amended by extending its scope and providing that, after the mayor's term of office ends or in the event that the mayor's mandate expires before the end of the term of office, the mayor shall perform their functions until a newly elected mayor takes over. It would also be possible to shorten the wording of this provision by stating that the mayor (in each case) shall perform their functions until a newly elected mayor takes over. Article 29(2) of the Commune Act, relating to a deputy mayor, would need to be amended similarly.

The first of the aforementioned ways of amending the Commune Act – while it seems to be the simplest, as it would not revolutionise the existing regulations – has a certain drawback. Namely, a person designated by the Prime Minister – even if, following the expiry of the mayor's mandate before the end of the mayor's term of office, they took over the mayor's functions in a very short time – would still not

²⁶ The setting of a time limit with a specific number of hours is not unusual for the Act on the Commune Self-Government. In another case that also requires quick designation of a person to take over the mayor's tasks and powers, in Article 28g(7) of the Commune Act, the legislator has set the chairperson of the commune council a 48-hour time limit to notify the province governor [*województwo* – the representative of the Council of Ministers in a province] in writing of the occurrence of such a circumstance.

²⁷ A different opinion has been expressed by Cz. Martysz, who argues that 'for obvious reasons, these functions cannot be entrusted to the person who has served as the mayor to date because it was precisely this person's activities that resulted in the expiry of their mandate, e.g. due to removal through a referendum or resignation' – Cz. Martysz, 'Komentarz do art. 28f ustawy o samorządzie gminnym', in: Dolnicki B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa, 2021, electronic version: <https://sip.lex.pl/#/commentary/587718880/645584/dolnicki-bogdan-red-ustawa-o-samorzadzcie-gminnym-komentarz-wyd-iii?pit=2023-12-23&cm=URELATIONS> [accessed on 28 December 2023]. Nevertheless, in the case of the district and province self-government and the Council of Ministers, the legislator has decided to adopt such a solution.

guarantee the proper functioning of the commune during the ensuing period, i.e. until a newly elected mayor takes over. As a side note, it should be mentioned that this period may even extend to 12 months.²⁸ This gives rise to another issue, namely that, unfortunately, the legislator leaves the Prime Minister complete discretion in selecting such a person – which, in my opinion, is not a good solution. In such cases, in districts and provinces, despite the executive board's dismissal, resignation or a member losing their membership, the executive authority's functions continue to be performed by the same persons involved in its duties to date. Meanwhile, in the case of communes, in a similar situation, any person whatsoever may be designated to perform the mayor's functions. Therefore, it would also be appropriate to introduce a further change in this respect to exclude the possibility of entrusting the mayor's functions to a random person who is not in any way related to the functioning of the commune and is unfamiliar with its affairs. It would be possible to at least specify the conditions such a person should meet. At a minimum, this person would need to be, for instance, an employee of the commune office – so as to narrow down the group from whom the Prime Minister could choose. Given that the legislature has not decided to introduce the same mechanism for the commune self-government as that applicable to districts or provinces – which would mean that the mayor continues with their duties until a new mayor is elected – then, perhaps, at the very least, it would be possible to have a deputy mayor exercise the executive power in this interim period. Undoubtedly, a deputy mayor would be the most suitable person to do this, as they are perfectly aware of the current situation of the commune due to being familiar, on an ongoing basis, with the performance of the commune's tasks. After all, the grounds for the expiry of the mayor's mandate apply strictly to the mayor as an individual and not to their deputy. Although, in the current legal situation, a deputy mayor is dismissed upon the expiry of the mayor's mandate by operation of law, they would still be the best candidate to take over the mayor's functions until a new mayor is elected.

The potential of a departing deputy mayor is recognised by local government officials and the legislature. Namely, on 23 November 2023, a Draft Act Amending the Act on the Commune Self-Government and the Election Code Act, authored by members of the Sejm from the Parliamentary Club of Poland 2050 – Third Way (*Polska 2050 – Trzecia Droga*),²⁹ was submitted to the Sejm. However, this draft act proposed other solutions, which, as it were, combined some of the ideas I mentioned

²⁸ Under Article 28d(2) of the Commune Act, an early election shall not be held if its date falls within six months before the end of the mayor's term of office. An early election shall also not be held if the election date falls more than six and less than twelve months before the end of the mayor's term of office and the council resolves not to hold an election within 30 days of the date a resolution declaring the expiry of the mayor's mandate is passed.

²⁹ The Draft Act of 23 November 2023 amending the Act on the Commune Self-Government and the Election Code Act, Sejm print No. 75, <https://orka.sejm.gov.pl/Druki10ka.nsf/0/FC23452B0DBC21B4C1258A76003D5823/%24File/75.pdf> [accessed on 23 December 2023]. Some of the MPs who signed this bill had recently served as local government officials – see M. Rozalska, 'Nowe zasady powoływania komisarzy w gminach; do Sejmu trafił poselski projekt ustawy', *Serwis Samorządowy PAP*, <https://samorząd.pap.pl/kategoria/aktualnosci/nowe-zasady-powoływania-komisarzy-w-gminach-do-sejmu-trafił-poselski-projekt> [accessed on 23 December 2023].

above.³⁰ Namely, according to the newly added Article 28f(1a) of the Commune Act, until a person designated by the Prime Minister is appointed, the mayor's functions would be performed by the deputy mayor or, in communes where more deputy mayors have been appointed, the first deputy mayor, or, in communes where no deputy mayor has been appointed, the commune clerk (*sekretarz gminy*). At first glance, this proposal appears to be reasonable. Namely, to ensure the continuity of the executive branch's operations – which is necessary – it seems appropriate for the mayor's functions to be taken over immediately upon the expiry of the mayor's mandate, preferably by a person who could carry on the activities of the departing mayor in a continuous manner, so to speak. A deputy mayor is certainly such a person, as they are involved in the functioning of the commune on an ongoing basis and knows its problems, procedures and tasks in progress. A deputy mayor could, therefore, take over the mayor's functions and lead the commune safely through the period of waiting for a person designated by the Prime Minister.

The drafter provides that, in a commune where more deputies have been appointed, the mayor's functions would be taken over by the first deputy and, in a commune where no deputy has been appointed at all, the mayor's functions would be taken over by the commune clerk. These proposals also need to be discussed. While the regulation providing that the first deputy would take over the mayor's functions is appropriate, it seems it should be supplemented with a sentence stating that, if the first deputy is unable to do so for any reason (including if they do not consent),³¹ then the mayor's functions should be taken over by the next deputy – and accordingly by the next two deputies, if appointed. In my opinion, further regulations to protect communes where no deputy has been appointed at all are, theoretically, entirely unnecessary, since at least one deputy mayor must be appointed in each commune according to the regulations in force. This directly results from the definite wording of Article 26a(1) of the Commune Act: 'the mayor shall appoint their deputy' – rather than 'may appoint their deputy'.³² Moreover, it

³⁰ M. Rozalska, 'Nowe zasady...', op. cit.

³¹ It seems that in this case, as opposed to the regulation provided for in Article 29 of the Commune Act, it would not be possible to impose a strict obligation on a deputy mayor to take over the mayor's functions. After all, with the expiry of the mayor's mandate, the deputy mayor is dismissed (Article 28e of the Commune Act), and taking over the mayor's functions would impose new duties on them – unlike the case with dismissed executive boards, which continue with their previous duties. In their case, it is thus assumed that they are obliged to continue their operations under the still-existing employment relationship (in relation, of course, to those members who are employees).

³² See, e.g. M. Gurdek, 'Status prawny zastępcy wójta', *Przegląd Prawa Publicznego*, 2008, No. 7–8, p. 107; M. Gurdek, *Monokratyczne organy jednostek samorządu terytorialnego*, Sosnowiec, 2012, p. 159; B. Dolnicki, 'Monokratyczne organy samorządu terytorialnego', *Samorząd Terytorialny*, 2003, No. 1–2, p. 53; M. Poglódek, 'Prawnoustrojowa pozycja wójta (burmistrza, prezydenta) oraz starosty powiatowego i marszałka województwa', in: Michałowski S., Pawłowska A. (eds), *Samorząd lokalny w Polsce. Społeczno-polityczne aspekty funkcjonowania*, Lublin, 2004, p. 58; cf., for instance, W. Śniecikowski, 'Zagadnienia administracyjnoprawne wykonywania funkcji przewodniczącego zarządu gminy podczas jego nieobecności przez zastępcę wójta, burmistrza (prezydenta)', *Samorząd Terytorialny*, 2000, No. 11, p. 39; Cz. Martysz, 'Władze gminy', in: Dolnicki B. (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa, 2010, p. 486. A different view presented by: L. Wengler, 'Prawnoorganizacyjne aspekty „zawieszenia wykonywania mandatu”

is difficult to imagine a commune where a deputy mayor has not been appointed and the mayor is temporarily unable to exercise their powers for any reason (such as being on leave or due to illness not exceeding 30 days). This would paralyse the commune operations. However, since I realise that, in practice – unfortunately – there are communes where no deputy mayor has been appointed (especially for cost-saving reasons),³³ I must admit that the drafter was right to specify that the mayor's functions should be taken over by the commune clerk if there is no deputy mayor. The commune clerk should also do so in a situation where, despite the appointment of a deputy mayor (or deputy mayors), none of them is able to substitute for the mayor. The commune clerk seems to be a good candidate, as they are the next most important person in a commune. This is usually a person with a stable position in the commune office hierarchy and, through reporting lines or simply by their authority, can effectively influence other people involved in the commune tasks.³⁴ This, of course, would be an additional burden for the commune clerk since, apart from holding this position, they would also take over the tasks and powers of the mayor.³⁵ Nevertheless, such a regulation would ensure the smooth substitution of a new (but not unfamiliar)³⁶ person for the departing mayor.

While the proposed solution might ensure the continuity of the exercise of executive power by eliminating the 'gap' that currently exists between the expiry of the mayor's mandate and the designation of a person to perform the mayor's functions by the Prime Minister, it still does not solve the other problem, namely the Prime Minister's discretion in choosing the person who will ultimately take over the mayor's functions. Hence, it would perhaps be necessary to go a step further and adopt the idea of narrowing down the group from whom the Prime Minister could appoint a person to take over the mayor's functions, as already proposed above. However, since the best person seems to be a deputy mayor, it would make no sense for the Prime Minister to appoint the departing deputy mayor to perform the mayor's functions, as the deputy mayor would anyway, by operation of law, temporarily take over the mayor's functions upon the expiry of the mayor's mandate – only to be formally designated again by the Prime Minister. Therefore, if the potential of the deputy mayor (or possibly the commune clerk) is to be used, the best solution might be to give up the idea of designating another person and simply entrust the departing deputy mayor with this role from the moment of the

wójta (burmistrza, prezydenta miasta)', in: Ura E. (ed.), *Sprawność działania administracji samorządowej*, Rzeszów, 2006, p. 663; see also A. Szewc, 'Władze gminy', in: Szewc A., Jyż G., Pławewski Z., *Samorząd terytorialny*, Warszawa, 2005, p. 296.

³³ M. Gurdek, 'Status prawny...', op. cit., pp. 107–110.

³⁴ See, e.g. A. Pytel, in: Horbaczewski R., *Premier ma za dużą dowolność w powołaniu komisarza, gdy wójt zostaje posłem*, 8 December 2023, <https://www.prawo.pl/samorzad/powolanie-komisarza-a-wygasnienie-mandatu-wojta,524326.html> [accessed on 20 December 2023].

³⁵ However, according to L. Świątalski, the Head of the Office of the Association of Rural Communes of the Republic of Poland, the commune clerk has a different position in the system and also performs labour-law-related activities with regard to the mayor, so they should not take over the mayor's functions – L. Świątalski, in: Horbaczewski R., *Premier ma za dużą dowolność w powołaniu komisarza, gdy wójt zostaje posłem*, 8 December 2023, <https://www.prawo.pl/samorzad/powolanie-komisarza-a-wygasnienie-mandatu-wojta,524326.html> [accessed on 20 December 2023].

³⁶ In the sense of a person from the outside, unfamiliar with the realities of the commune.

expiry of the mayor's mandate for the entire period until a new mayor is elected. This would be a reasonable solution.³⁷

Of course, no solution is perfect. One can always raise some reservations, and this case is no different. Namely, due to the variety of grounds resulting in the expiry of the mayor's mandate, such a solution might raise doubts in certain situations, an example of which may be the expiry of the mayor's mandate due to their removal through a referendum. Given that the local community has decided to remove the mayor, or, in other words, revoke the authority granted to them during the election, the community might also have lost trust in the deputy mayor – appointed by the mayor themselves. In such a case, the local community might feel disappointed if the deputy mayor takes over the mayor's functions. In the other cases, however, the grounds for the expiry of the mayor's mandate are closely related to the mayor as an individual. Hence, for example, if they relinquish the mandate, decides to become an MP, or consciously fails to submit a financial disclosure statement on time, why should the commune not be managed by the person best suited for the job until a new mayor is elected?

Indeed, in light of the regulations of the Act on the District Self-Government or the Act on the Province Self-Government, this is arguably not a problem for the legislature. In these regulations, the legislature agrees that if the district or province executives are dismissed, which entails the dismissal of the entire executive board (after all, the dismissal does not necessarily have to result solely from objections to the executive's work – it may concern the work of the entire board), the departing executive board, including the dismissed district or province executive, will continue with their duties until a new executive board is elected. Why could this not be the case with a deputy mayor in a commune?

CONCLUSION

To summarise, based on the above discussion, it is difficult to find reasonable arguments justifying a situation where, in the case of district and province executive boards, the legislature does not object to them continuing with their duties after their dismissal until a new executive board is elected, while no such possibility has been provided for in the case of mayors. Nevertheless, respecting the legislature's rationality – as there must have been some reasons it was guided by – it must be pointed out that the current regulations of the Act on the Commune Self-Government need at least a minimal amendment, if only to limit, as much as possible, the time for the Prime Minister to appoint a person to take over the mayor's functions. All proposals put forward in this study need careful consideration by the legislature so that the regulations actually – and not just apparently – guarantee the continuity of the executive branch of the commune self-government. This issue is emphasised

³⁷ The issue of the deputy mayor's employment – specifically, on what basis they would perform this function – would also require analysis; however, this matter falls outside the scope of the present study.

by the multiple infamous examples that have arisen in practice, especially in recent months, when, in the last parliamentary election, a number of mayors were elected members of the Sejm or Senate.

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