

**Małgorzata Klaudia Kozłowska**

mgr, adwokat, doktorantka

Uniwersytet Wrocławski; Wydział Prawa, Administracji i Ekonomii:

Zakład Prawa Administracyjnego

m.kozłowska86@wp.pl

**Anna Oranowska**

mgr, doktorantka

Uniwersytet Wrocławski; Wydział Prawa, Administracji i Ekonomii:

Zakład Prawa Prawa Gospodarczego i Handlowego

anna.oranowska@uwr.edu.pl

DOI: 10.35117/A\_ENG\_16\_08\_02

**Special purpose road companies**

**Abstract:** In Polish legal system special purpose road companies could be created for almost 10 years, but only in 2015 actions were undertaken to actually establish them. The fundamental purpose of these companies is preparation and implementation of road transport's infrastructure projects. The actual future investment plans for the special purpose road companies, have been introduced in the National Roads` Construction Program for years 2014-2023. The detailed purposes and legal form of these entities are also presented in the article.

**Keywords:** Road infrastructure; Road transport; Law

The Polish legal system has introduced the ability to create traffic SPEs almost 10 years ago, but only in 2015 actions have been taken to their actual creation. The main objective of these companies is the preparation and implementation of projects in the field of road transport infrastructure. Specific investment plans, which will be implemented by the company are presented in the National Roads Construction Programme for the years 2014-2023. The article will also discussed specific objectives and form of activity of these companies.

**History of the Company**

The Law on Special Purpose Road Companies, (hereafter the Act) [19], was adopted on 12 January 2007. The purpose of the adopted nine years ago the law was to determine the conditions for the creation and rules of activity of road special purpose companies for the preparation or implementation of projects in the field of construction , reconstruction, repair, maintenance, conservation and management of national roads within the meaning of the Act of 21 March 1985. on public roads (Dz. U. of 2015. pos. 460, 774, and 870) called "road projects." this adjustment would accelerate the implementation of road projects.

Prompted to start by the Parliament of the Polish Republic in 2006, work on the Act was a critical report of the Supreme Chamber of Control (NIK hereinafter) in November 2005 in which the chief organ of state administration announced the results of the control operation of road and rail transport in 1994-2004. Department of Communications and Transport Systems NIK in a report No. 161/2005 indicated the systematic deterioration of the technical state of the inland transport infrastructure, which has a significant impact on the economic development of Poland, as well as obstruction of traffic on major transport routes within the European Union. According to the controlling authority the reasons for this state of affairs should be sought primarily in the "insufficient activity of state bodies in shaping the Polish

transport policy. Developed assumptions, strategies and programs of development of individual elements of the system of civil infrastructure were not implemented or were implemented ineffectively. "[10] Checking, which covered a range of ten-year period revealed that only 1% of public roads and built-in no bridges to 2004 meet EU standards. Attention was also drawn to the lack of an extensive network of highways and expressways [11]. Moreover, it was found that for the period audited Poland failed to comply with the imposed its international obligations, object of which was to adapt the road transport infrastructure to the existing EU standards, and which rely aimed at "upgrading the road network of primary importance for international traffic, the implementation of its program of modernization of the main road network outside the network TINA (Transport Infrastructure Needs Assessment), but substantial international traffic and transit, and to provide for modernized roads in force in the EU load standard 115 kN/axis [12].

For the failure of the road transport system in Poland Highest Chamber of Control burdened mainly administrations road, including successive ministers of transport and managers of individual public roads, which "have failed to fulfill their statutory obligations with regard to maintenance, repair, construction and respiratory protection [13]."

On 12 July 2006 the Polish Sejm V term of office influenced on print No. 856, in which the then President of the Council of Ministers submitted to the legislative authority on behalf of the Government draft act, which was to remedy the poor state of road transport infrastructure in the country. According to the Government's adoption of the Law on Special Purpose Road Companies, and consequently the establishment of the respective companies would create conditions for "speed up the construction of motorways, express roads and other national roads and the adaptation of national roads to load 11,5 t/axis lying on European transport corridors " [1] and provide opportunities for increased realization of the investment program in the sector of road infrastructure. Bearing in mind the objective, which lay at the basis of the prepared Act, the operation of the planned company, as underlined in the prepared impact assessment contained in print No. 856, was to be assessed in terms of their efficiency. The establishment of companies, as optimistically indicated in the cited impact assessment, would increase the pace of implementation of large road projects, because it was assumed that these entities will be able to "prepare and implement road investments much faster, more efficiently, using additional financial resources, highly qualified and managerial management system." [2] In the opinion of the secretary of state Ewa Ośniecka-Tamecka from the Committee for European Integration vocation road special purpose was to provide a new instrument for organizational and legal, coexisting with the traditional system of construction of public roads and the system construction and management of roads by private sector entities, through which had come to efficient execution of projects in the field of road transport infrastructure in Poland [15]. The Law on Special Purpose Road Companies entered into force on February 27, 2007.

### **Road special purpose company as a target company**

Road special purpose company, according to art. 1 paragraph. 1 of the Act is a company, which was set up in a specific, precise purpose, i.e. for the preparation or implementation of projects in the construction, reconstruction, repair, maintenance, conservation and management of national roads within the meaning of the Act of 21 March 1985 of public road. Must be noted, however, that the provisions of the Act in accordance with the exception contained in paragraph 2 of the same Article shall not apply to national roads in towns with county rights managed by the mayor.

Implementation of projects from the scope road transport infrastructure by using specially created for this purpose, specialized companies (SPVs), from the assumption is desired solution. The legislator on the basis of a legal act establishing into force road special

purpose company did not specify explicitly that this is a special purpose company. The special purpose company, in contrast to the partnership or company typified in the Law of Commercial Companies Code [20], whose partners or shareholders are free to determine the scope of activity, is generally limited to the extent to which it can carry out its activities. It is the limited scope of activity of the company, circled in the art. 4 paragraph. 2 of the Act and accurately circled purpose for which can be formed (Art. 4, paragraph. 1 of the Act) determines the intentional nature of the entity. The legislator citing SPV road destiny decided that entrusting a single, specific operator tasks related to the implementation of road projects will lead to a smooth implementation of investments from the scope of road transport infrastructure and will enable the effective use of subsidies and EU funds that have been allocated at this target [4]. Creating a road special purpose company was a response to criticism of the Supreme Chamber of Control, expressed in terms of the administration of the road, on the unsatisfactory state of public roads in Poland. Control body pointed out among other ministers responsible for transport and to the road "undertaking the investment tasks without their proper preparation, including in terms of funding (e.g. without having ownership of the land, or a set of building permits, failure to specify the material scope investment or improper award of public works road) " [14], the lack of a unified and internally coherent system for the construction and financing of highways and the lack of stability and continuity in the administration of road.

### **Company legal form**

According to Article 3 paragraph 1 of the Act, road special purpose company can be established and operate as a public company. This is one of the types of commercial companies, whose creation and operation is regulated by the Law of Commercial Companies Code. The basis of the scheme of the Code is divided into partnerships and capital, which is widely adopted in legislation continental [16]. The key role of partnerships plays a widely understood component bedded understood as the skills and resources to property partners, and in companies: capital factor, unrelated to those shareholders. In contrast to other companies, the company's capital can be created by one person; significant differences between the two types of companies also apply to the management and supervision. Stock-offering company in Poland, clearly bases on the solutions used in the German legal system, where Aktiengesellschaft is a capital company in its purest form, and bedded factor has been eliminated.

The main document regulating the existence, tasks, internal structure and functioning of the stock-offering company is its statutes. Elements of the internal structure of stock-offering company are the authorities. Partners are not able to act on behalf of the company, but only as members of its organs. There are three obligatory bodies: management board, the annual general meeting and the supervisory board.

The Board is a body of management and executive of the company that manages the company and represents it. It consists of one or more members, is appointed by the supervisory board, unless the partners in the articles of association do not choose a different solution. The Board is a body cadential, may be appointed for no longer than 5 years, the term of office of each member is counted separately. Member of the Board may be dismissed at any time. In a situation where management board takes the form of collegial decisions usually taken by an absolute majority of votes.

The annual general meeting consists of all shareholders is the supreme body of the company, make decisions on important matters of the company and take the resolution (representing function). According to the art. 395 of the Commercial Companies Code, the ordinary annual general meeting should be held within six months after the end of each financial year. The right to convene a general meeting of its Board of Directors, and in

extraordinary circumstances, the shareholders representing at least one twentieth of the share capital. Depending on the issues discussed, decisions at the general meeting of shareholders shall be taken by a different majority (e.g. The majority of  $\frac{3}{4}$  of the issue of convertible bonds, amendments to the statutes of the company, the redemption of shares, the share capital reduction, sale of the enterprise, dissolution of the company; the majority of  $\frac{2}{3}$  for a substantial changes in the company's business; the majority of  $\frac{4}{5}$  for depriving shareholders of new shares).

The Supervisory Board is a collegial body, which continuously acts as a supervisory and control in all areas of the company. It consists of a minimum of three members and the public companies - a minimum of five. The supervisory board is appointed by the general meeting of shareholders. The supervisory board is entitled to temporary delegation of its members to perform the duties of a board member. The doctrine of law is held a discussion on mutual relations management and supervisory boards, and regulation of these relations. In Poland adopted a dualistic system of corporate governance bodies should be independent of each other, which is not always observed in practice.

The stock-offering company is acceptable to also the specific vocation an audit committee, but only in the case of express provision of such a body in the articles of association of the company. There should be no shift of competences between authorities. The main activity of the company and the conduct of its business is the competence of the management, but some issues require a decision of the general meeting (e.g. granting of discharge to the members of the company's continued existence of the company, mandating, dismissal of members of the supervisory board, the sale of the company, changing the statute, the issue of new shares, profit sharing). Not everyone has the right to participate in the company bodies, the basic limits aim to avoid conflicts of interest (e.g. non-competition clause for board members).

In Article 3 of the Act 2-10 was determined separateness road special purpose company to the regulated in the Code of Commercial Companies, stock-offering company. All shares, at the time of incorporation of the company are covered, on behalf of the Treasury, by the minister responsible for transport. It determines the company's statutes. The share capital is not less than 1000000 zł and is covered with a cash contribution or contribution in kind, the contribution in cash cannot be less than 500,000 zł. All shares are registered, and its privatization requires the approval of the Council of Ministers. The Management Board shall consist of not less than 3 and not more than 5 persons. Members of the board are mandated and dismissed by the minister responsible for transport among persons with appropriate qualifications and experience in management, finance, road or road transport. The supervisory board of the company is appointed and dismissed by the minister responsible for transport and composed of not less than 5 and not more than 7 members. The supervisory board shall consist of one person designated by the minister responsible for public finance, the minister responsible for regional development and the General Director for National Roads and Motorways.

### **Purpose of activity road special purpose company and method of its implementation**

The aim of the company, as follows directly from Article. 4, paragraph 1 of the Act, is the preparation or implementation of the road project. The use of the alternative by the legislature in the form of a switch, "or," referring to literal wording of the provision indicates that the SPV road destination may result in one or more activities referred to in the legislation creating it. As follows from prepared for the bill opinion impact, the concept adopted in 2006 by the Ministry of Transport concept assumed "that the company will be able to be appointed to both the preparation and implementation of projects in the construction, reconstruction, repair, maintenance, conservation and management of national roads ". This means that under the

Act it is permitted creation of the entity, which will address both the preparation and the implementation of the road project, as well as the preparation or execution of the same, including the operation of business ventures [3]. Through the preparation or implementation of the road project legislature understands the construction, reconstruction, repair, maintenance, protection and management of national roads. On the basis of the law but there is no definition of the above-mentioned concepts and their designates must be sought in the Act on public roads [21]. Construction of roads, according to the legal definition, these are activities involving the carrying out the new road connection between specified places or localities that are "factual acts aim to create the path on the designated for this purpose ground, not the acquisition of the land by purchase or expropriation [22]." On the other hand, the reconstruction of the road is perform the work, which occurs as a result of an increase in technical and operational parameters of the existing road, which do not require changes to the boundaries of roadway. As noted by Renata Strachowska "reconstruction of the road has only positive aspect, because the results only increase the technical parameters and standards in the operation of an existing road [17]." Repair of the road, unlike in the case of reconstruction, is to carry out works to restore the original state of the road also using the construction products other than used in the original state. It should also be distinguished from each other terms that in ordinary language seem to be prima facie coincided, and that the maintenance of roads and road protection. The special purpose company that will undertake the maintenance of roads will carry out maintenance work, cleaning and other measures to increase the safety and convenience of traffic, including the removal of snow and fighting the winter slipperiness. Protection of the road is the efforts to prevent the premature deterioration of the road, lower class roads, limiting its functions, its inappropriate use and deterioration of traffic safety. These objectives, as follows directly from Article. 4 paragraph. 2 of the Act, SPV destination road can be achieved by:

1. construction, reconstruction, repair, maintenance and protection of roads, within the meaning of the Act of 21 March 1985 of public road,
2. preparation, implementation, construction or operation of the electronic system of electronic toll collection, using one or more of the three electronic technologies listed in the Act on public roads, and that the location and satellite mobile communication system based on standard GSM-GPRS compatible with the standards of the Member States European Union implementing standard GSM TS 03.60 / 23.060 or radio system to handle the transport and traffic operating in the frequency band 5.8 GHz,
3. preparation of documentation for decision: to establish the location of the road, on the motorway location, land development conditions and land development, or to establish the location of a public investment and documentation to the decision on environmental conditions of the construction permit, the permit to use, as well as other documentation necessary for the preparation or implementation of the road project and requesting their release,
4. acquisition of real estate under the road behalf of and for the State Treasury,
5. real estate management allocated or occupied by road to the extent specified in the agreement establishing the scope and terms of preparation or implementation of the road project,
6. tolls at the A1 motorway on the section Gdańsk - Torun - Lodz - Piotrkow Trybunalski - Czestochowa - Gliwice - Gorzyczki - state border, A2 between the state border - Świecko - Poznan - Lodz - Warsaw - Biala Podlaska - Kukuryki - state border, A4 section of the state border - Jędrzychowice - Krzyżowa - Legnica - Wrocław - Opole - Gliwice - Katowice - Krakow - Tarnow - Rzeszow - Korczowa - state border and the A18 on the section of state border - Olszyna - Cross,
7. charging for rides through the bridges and tunnels located on national roads,

8. electronic toll collection, for traveling on the roads domestic vehicles, including combinations of vehicles consisting of a motor vehicle and trailer or semi-trailer with a maximum mass exceeding 3.5 tonnes, including buses, regardless of their maximum permissible weight,
9. financing organization of entrusted to company road project,
10. other business activities directly related to the preparation or execution of road projects entrusted to the company, observing the principles of free competition.

### **Perspectives**

In September 2015 the Minister of Infrastructure and Development Maria Wasiak announced that the company's road special purpose vehicle created in 2016 and the surgery will take effect in 2017. A key role for planned investments and their financing plays the National Road Construction Programme for the years 2014 to 2023 (with the prospect to 2025), hereinafter referred to as the Programme [5], [9], [18]. The program was approved September 8, 2015 by resolution of the Council of Ministers [6]. It identifies lines of action and investment priorities in the development of the national road network in Poland, diagnoses the current state of the roads, and also assesses the impact of the planned investment on the environment. Oversee the implementation of the Programme by the minister responsible for transport, and the contractor is General Director for National Roads and Motorways and road special purpose company.

The program sets a spending limit amounting to 107 billion zł, which is about 14 billion zł more than originally expected. This amount is to cover expenses related to the implementation of investment projects involving construction of highways, expressways and bypasses some of the village. According to the program, the choice of jobs will result from the provisions of the relevant strategic documents, such as the Implementation Document to Transport Development Strategy until 2020 (from the outlook until 2030) benefits for the national road network as well as the progress of the preparatory work for the investment. The Programme also provides expenditure on tasks related to the improvement of road safety in the amount of up to 4.8 billion (for the years 2016 to 2023) - the so-called. Program Elimination of Hazardous Locations. Another element of the Programme are the expenses incurred for the maintenance of the relevant technical standards of the existing road network, preparation of the tasks and the management, in the years 2014-2023 the expenditure incurred by the state budget have been planned for about 46.8 billion zł. You should also pay attention to the spending limit for the continued tasks within the National Road Construction Programme for 2011-2015 which was set in the amount of 14.5 billion zł. Investments implemented in the framework of the Program by road special purpose company will be financed from the National Road Fund.

It is planned vocation of road special purpose companies whose task will be to raise funds on market terms. It was assumed that this mechanism will be used for three investment:

- 1) A1 highway the end of ring road Czestochowa - Tuszyn,
- 2) A2 highway Minsk Mazowiecki - Siedlce,
- 3) A18 highway Olszyna – Golnice,

At first place is provided the establishment of a road special purpose company for the construction of the A1 motorway Tuszyn-Czestochowa. The program assumes that the State Treasury's share road special purpose vehicles will be 100%. The Company will be responsible for the preparation, financing, implementation and maintenance entrusted to them sections of motorways under contract with the State Treasury. They will be located outside the public finance deficit.

On the content and implementation of the Programme may affect the result of the parliamentary elections, which were held in October 2015. Three months later, Barbara

Dzieciuchowicz, CEO of the National Economic Chamber of Road said: "The construction of national roads for years 2014-2023 with the prospect of 2025, which has been adopted yet by the previous government in September, it is unrealistic. I think you need to do a review of the program in terms of both substantive and financial terms [7]. "At March 2016 has been mandated team of the Ministry of Infrastructure and Construction intended to the revision of the Programme [8].

### Source materials

- [1] Druk nr 856, Ocena skutków regulacji, Warszawa, 12.07.2006 r., s. 1
- [2] Druk nr 856, Ocena skutków regulacji, Warszawa, 12.07.2006 r., s. 6
- [3] Druk nr 856, Ocena skutków regulacji, Warszawa, 12.07.2006 r., s. 8
- [4] <http://drogi.inzynieria.com/cat/1/art/11528/drogowe-spolki-specjalnego-przeznaczenia> 13.02.2016 r.
- [5] <http://mib.gov.pl/files/0/1796809/2.pdf> 24.05.2016 r.
- [6] <http://mojafirma.infor.pl/moto/wiadomosci/drogi/728483,Rzad-przyjal-Program-Budowy-Drog-Krajowych-na-lata-20142023.html> 24.05.2016 r.
- [7] [http://www.biznes.newseria.pl/news/program\\_budowy\\_drog,p430033954](http://www.biznes.newseria.pl/news/program_budowy_drog,p430033954) 05.02.2016 r.
- [8] <http://www.pgt.pl/rewizja-programu-budowy-drog-krajowych-na-lata-2014-2023> 20.03.2016r.
- [9] <http://www.rynekinfrastruktury.pl/wiadomosci/spolki-drogowe-specjalnego-przeznaczenia-w-dzialaniu-od-2017-roku-50878.html> 24.05.2016 r.
- [10] Najwyższa Izba Kontroli, Departament Komunikacji i Systemów Transportowych, „Informacja o wynikach kontroli funkcjonowania transportu drogowego i kolejowego w latach 1990-2004”, Nr ewid. 161/2005/P/05/067/KKT, Warszawa listopad 2005, s. 5
- [11] Najwyższa Izba Kontroli, Departament Komunikacji i Systemów Transportowych, „Informacja o wynikach kontroli funkcjonowania transportu drogowego i kolejowego w latach 1990-2004”, Nr ewid. 161/2005/P/05/067/KKT, Warszawa listopad 2005, s. 5-7
- [12] Najwyższa Izba Kontroli, Departament Komunikacji i Systemów Transportowych, „Informacja o wynikach kontroli funkcjonowania transportu drogowego i kolejowego w latach 1990-2004”, Nr ewid. 161/2005/P/05/067/KKT, Warszawa listopad 2005, s. 10
- [13] Najwyższa Izba Kontroli, Departament Komunikacji i Systemów Transportowych, „Informacja o wynikach kontroli funkcjonowania transportu drogowego i kolejowego w latach 1990-2004”, Nr ewid. 161/2005/P/05/067/KKT, Warszawa listopad 2005, s. 11
- [14] Najwyższa Izba Kontroli, Departament Komunikacji i Systemów Transportowych, „Informacja o wynikach kontroli funkcjonowania transportu drogowego i kolejowego w latach 1990-2004”, Nr ewid. 161/2005/P/05/067/KKT, Warszawa listopad 2005, s. 12
- [15] Ośniecka-Tamecka E., Opinia o zgodności z prawem Unii Europejskiej projektu ustawy o drogowych spółkach specjalnego przeznaczenia wyrażona na podstawie art. 2, ust. 1 pkt 2 ustawy z dnia 8 sierpnia 1996 r. o Komitecie Integracji Europejskiej (Dz. U. Nr 106, poz. 494) przez Sekretarza Komitetu Integracji Europejskiej, Ewę Ośniecką-Tamecką, Min. EOT/1494/2006/DP/arl, Warszawa czerwiec 2006, s. 1
- [16] Sołtysiński S, Moskwa P. W: Sołtysiński S. (red.), Prawo spółek kapitałowych. Tom 17A, Beck 2015, s.5
- [17] Strachowska R., Ustawa o drogach publicznych. Komentarz, ABC 2012
- [18] Uchwała nr 156/2015 Rady Ministrów z dnia 8 września 2015 r. w sprawie ustanowienia programu wieloletniego pod nazwą „Program Budowy Dróg Krajowych na lata 2014–2023 (z perspektywą do 2025 r.)” (RM-111-156-15)
- [19] Ustawa z dnia 12 stycznia 2007 r. o drogowych spółkach specjalnego przeznaczenia Dz.U.2015.1502 z dnia 2015.09.30

- [20] Ustawa z dnia 15 września 2000 r. kodeks spółek handlowych (Dz.U.2013.1030 z dnia 2013.09.06)
- [21] Ustawa z dnia 21 marca 1985 r. o drogach publicznych (Dz.U.2015.460 z dnia 2015.03.31)
- [22] Wyrok Naczelnego Sądu Administracyjnego w Warszawie z dnia 24 września 2003 r., I SA 2932/01, LEX nr 159175