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Medical professions in Poland – selected legal aspects

Abstract

This article is a voice in the discussion of legal problems related to understanding the concept of a medical profession. The considerations were divided into three main parts. In the first one, the concept of "medical profession" was reconstructed and problems in the classification of particular professions to the category of medical professions were pointed out. Not every medical profession is characterized by the quality of public trust, although due to the good that medical professions are dealing with, such a state would most likely be the most desired one. In the second part of the text, based on the jurisprudence of the Constitutional Tribunal, the features determining the recognition that a given profession is a profession of public trust were indicated. These remarks were related to medical professions. The content of the third part is a consequence of the fact that it is difficult to precisely establish a catalog of medical professions. The practical significance of the lack of systemic solutions in defining a medical profession is given in the example of tax law, in the scope of the exemption from the Goods and Services Tax.

Keywords: medical professions, professions of public trust, medical activity.

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INTRODUCTION

In the Polish legal space, the legislator repeatedly uses the term "medical profession", but at the same time, he did not decide to introduce a uniform definition of the term for the entire legal system. Considering that understanding the concept of "medical profession" determines the interpretation of other regulations, an attempt to reconstruct its determinants seems necessary.

AIM

The main purpose of the research presented in this study is to analyze the provisions of Polish law in terms of determinants of the concept of the medical profession. Qualification of a given profession as a medical profession is therefore a boundary condition for further research on the legal aspects of performing medical professions. At the same time, it should be stipulated that this study does not pretend to be a comprehensive approach of the issue of medical professions in Poland. Out of the scope of research there are problems of the functioning of professional self-governments, standards for the performance of medical professions, rights and duties of medical professions.

The considerations of this study were divided into three main parts. In the first one, the concept of "medical profession" was reconstructed and problems in the classification of particular professions to the category of medical professions were pointed out. In the second part of the text, based on the jurisprudence of the Constitutional Tribunal, the features determining the recognition that a given profession is a profession of public trust were indicated. These remarks were related to medical professions. The practical significance of the lack of systemic solutions in defining a medical profession is illustrated by the tax law, in the scope of the exemption from the Goods and Services Tax.

The research material consisted of normative acts, court and administrative jurisprudence and views of the doctrine, whereas the primary research method - exegesis of legal provisions.

The definition of a medical profession

The analysis of the definition of a medical profession should start with the statement that in the Polish legal system there is no uniform definition of the term, and the definition of an individual practicing a medical profession contained in Article 2 paragraph 1 point 2 of the Act of 15 April 2011 on Medical Activity [1] is only an explanation for the purposes of this Act.

At the same time, however, it is impossible not to notice that many normative acts adopted the understanding of a medical profession as given by the AMA and they refer to it. As examples, one can indicate the Act of 28 April 2011 on the Information System in Health Care [2], in which Article 2 point 11 explains that a medical employee is, among others, an individual practicing a medical profession referred to in Article 2 paragraph 1 point 2 of the AMA, or the Act of 6 November 2008 on Patients' Rights and the Patient Ombudsman [3], of which Article 3 paragraph 1 point 3 refers in the

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scope of understanding the term "a person practicing a medical profession" to Article 2 paragraph 1 point 2 of the AMA, thus stating the duties of individuals practicing medical professions in their relations with patients. In addition, pursuant to Article 17 paragraph 1 point 3 of the AMA, the healthcare entity is obliged to provide health services only by persons performing the medical profession.

For the sake of order, it should be indicated that the legal system also has provisions that list individuals practicing medical professions and identify their responsibilities, yet at the same time they do not explain what their personal scope is. An example of such a regulation is article 3 paragraph 2 of the Act of 22 August 1997 on Public Blood Service [4], which obliges individuals practicing medical professions to support the Public Blood Service in the promotion and development of voluntary and free donation of blood and its components and in creating favorable conditions.

When referring to the reconstruction of the term "medical profession" on the basis of the AMA, it should be emphasized that this law uses the phrase "a person practicing a medical profession", which does not address the abstract term "medical profession", and associates it with a specific activity of a natural person.

Based on Article 2 paragraph 1 point 2 of the AMA, a person practicing a medical profession is a person entitled under separate provisions to provide medical services and a person who has acquired the professional qualifications to provide medical services in a specific scope or in a specific field of medicine.

The above-mentioned definition is built of two components that determine the division into two groups of entities entitled to provide medical services. The first one is individuals whose entitlement to provide medical services results from separate provisions. In the case of this group, for most professions it is not enough to obtain qualifications, but it is necessary to obtain a licence. As far as obtaining qualifications in the field of medical professions takes place by the way of graduating from the relevant school and completing an internship (specialization), since the creation of professional self-governments of certain medical professions, the right to practice is usually obtained by being listed by the appropriate local council of a given self-government. Currently, the legal status of the following medical professions has been regulated in a comprehensive manner: doctor and dentist (on the basis of the Act of 5 December 1996 on the Professions of a Doctor and a Dentist [5]); nurse and midwife (on the basic of the Act of 15 July 2011 on Nurse and Midwife Professions [6]); laboratory diagnostician (on the basic of the Act of 27 July 2001 on Laboratory Diagnostics [7]); pharmacist (on the basic of the Act of 19 April 1991 on Pharmaceutical Chambers [8]); physiotherapist (on the basic of the Act of 25 September 2015 on the Profession of a Physiotherapist [9]). The literature on the subject indicates that these are the basic, major medical professions [10].

The second group includes individuals for whom there are no separate regulations (e.g. profession of cosmetologist) or there are fragmentary regulations (e.g. professions of: a paramedic, pharmaceutical technician), who acquired professional qualifications to provide medical services "in a specific scope" or "in a specific field of medicine". In this case, due to the lack of appropriate overall legal regulations, the question arises whether a given profession can actually be classified as one of medical professions.

Given the constant development of medicine, the representatives of these professions constitute a fairly large, continually evolving, professional group [11]. Its reconstruction can be done by referring to the regulation of the Minister of Labor and Social Policy of 7 August 2014 on the Classification of Professions and Specialties for the Needs of the Labor Market and the Scope of Its Application [12]. Its annex, in addition to the so-called basic medical professions, classifies, among others, the following professions: paramedic, school nurse, dental hygienist, medical assistant, audiophonologist, speech therapist, neurological speech therapist, surdospeech therapist, dietician, cosmetologist, psychotherapist, addiction therapy specialist, psycho-oncologist, toxicologist, psycho-traumatologist, electro-radiologist, dental technician, medical caretaker, specialist in medical engineering, dental assistant, medical preparator, hospital attendant, balneotherapist, pregnancy and childbirth assistant for pregnant woman (doula). Interestingly, this regulation does not classify the profession of psychologist among medical professions or health care professions, placing it in a separate category "Psychologists and related ones". Meanwhile, the thesis is justified, according to which a psychologist, in particular a specialist in clinical psychology, is a representative of medical professions, as long as he provides health services [13].

To practice the indicated professions and provide medical services, a person has to document their professional qualifications, which include knowledge and skills. The knowledge is all the reliable information about reality and the ability to use it, while the skill is a proven ability to perform the appropriate class of tasks within the profession (specialty) [14]. The law does not in all cases involve the acquisition of qualifications with a specific education or its level.

It should be emphasized here that although the legislator has decided to regulate the requirements which a person needs to fulfill in order to be able to practice his/her profession in a given position in a medical facility, the scope of the regulation has been limited to non-entrepreneurs [15]. This situation leaves open the question about the professional qualifications of people who work in the private sector and practice medical professions not regulated in the legal acts dedicated to them, and consequently about the quality of medical services provided and the safety of patients using them. It is from the perspective of protection of health and life of people that the possible subsequent market verification of the representatives of medical professions who provide medical services in the private sector seems highly insufficient.

The above assessment is not changed by the fact that the Minister of Health, based on the delegation in Article 46 of the Act of 24 February 2017 on Obtaining the Title of a Specialist in Areas Applicable to Health Care [16], in the Regulation of 13 June 2017 on Specialization in Areas Applicable to Health Care [17] clarified the requirements determining the possibility to use the title of a specialist, but did so in relation to 15 selected areas in health care, which certainly do not overlap with the fields of medicine.

The catalog of standardized professions referred to in the Regulation on the Classification of Professions and Specialties applicable to health care is much broader [18], but it should be remembered that when reconstructing the concept of "a person practicing a medical profession" it is necessary to consider, beside the personal factor, whether a representative of a given

profession practices his or her profession by providing medical services.

In the light of Article 2 paragraph 1 point 10 of the AMA, a medical service is a measure for maintaining, saving, restoring or improving health and other medical activities resulting from the treatment process or separate provisions regulating the principles of their performance. Considering the capacity of this definition and the fact that having qualifications to provide medical services in a specific (and therefore also limited) scope determines the term "a person practicing a medical profession", it is not surprising that it is difficult to comprehensively determine the scope of the term "a person practicing a medical profession".

In the context of this situation, it is particularly desirable to regulate in a comprehensive manner the qualifications and rules for practicing medical professions that are not yet covered by statutory regulations in Poland. It is worth emphasizing that the legislator has made attempts to adopt regulations aimed at establishing the rules of access to the practice of medical professions, practicing medical professions, lifelong learning and professional liability [for example, see a Parliamentary Draft Bill on Some Medical Professions (Sejm print no. 846 / VI tenure), but so far legislative work has not gone beyond the project phase.

Medical professions and professions of public trust

Although the professional activity of representatives of all medical professions, both *sensu stricto* and *largissimo*, refers to the sphere of particularly sensitive human goods, not all medical professions can be qualified on the basis of law as professions of public trust.

In order to reconstruct the term "profession of public trust", reference should be made to Article 17 paragraph 1 of the Constitution of the Republic of Poland [19] in which the legislator used this concept, but at the same time did not define it. Pursuant to this provision of the Constitution, the legislator may create professional self-governments, representing individuals who follow professions of public trust and are responsible for the proper performance of these professions within the public interest and for its protection.

In the absence of the constitutional definition of a profession of public trust, the Constitutional Court formulated the criteria for qualifying individual professions as professions of public trust, while stating that this assessment should be made ad casu. Approving the current case-law regarding the understanding of the notion of profession of public trust, in the judgment of 24 March 2015 (file reference number: K 19/14) the Constitutional Court found that the characteristics of such a profession include:

a) the need to ensure that the profession is performed properly and in accordance with the public interest, because of the importance of the field of professional activity in society;
b) provision of services and interaction of representatives of the discussed professions with natural persons in the event of a potential or real threat to goods of a special nature (e.g. life, health, freedom, dignity, good name);
c) diligence and attention of representatives of the discussed professions to the interests of individuals using their services, care for their personal needs, as well as ensuring protection of their personal rights guaranteed by the Constitution;
d) special qualifications required to practice the discussed professions, including not only relevant, formal education, but also acquired experience and giving guarantees of sound professional performance consistent with the public interest, taking into account specific standards of professional deontology;
e) obtaining personal and private information about individuals using the services of representatives of a public trust profession; this information is covered by the obligation of professional secrecy, and release from the obligation may take place under the terms of the Act of 6 June 1997 – Code of Criminal Procedure [20];
f) relative independence of the profession.

The above-mentioned Court's findings are consistent with the views expressed in the legal doctrine, which the Court refers to [21].

The analysis of the legal provisions regulating medical professions allows one to state that a clear instruction from the legislator is not needed for determining whether a specific profession is a profession of public trust, and the status of such a profession should be read through the general regulation dedicated to it, including, in particular, standards creating the professional self-government and its competence.

Recognizing a profession as a profession of public trust makes it possible for the legislator to create a professional self-governing body with twofold competence: first, to represent the profession of public trust outside (towards citizens and public authorities), and secondly, to ensure proper performance of these professions, within the public interest and to protect it. This finding is of great practical importance, since the affiliation of individuals practicing the profession of public trust is obligatory [22] in order to ensure that professional self-governments can exercise custody over the performance of professions of public trust [23].

However, although Article 65 paragraph 1 of the Constitution contains the constitutional guarantee of three separate freedoms: to choose a profession, to pursue a profession and to choose a place of work, Article 17 paragraph 1 of the Constitution is the one that provides for the possibility to restrict the freedom to practice a profession of public trust by applying the ruling instruments that the professional self-government was equipped with. These instruments may be of an individual character (e.g. recognition of education acquired abroad, applying a disciplinary punishment) as well as general, which means that they are addressed to all members of a given professional corporation (e.g. code of ethics, standards of professional conduct).

In the judgment of 19 April 2006 (file reference number K 6/06), the Constitutional Court further stated that "recognizing certain professions as professions of public trust means, within the meaning provided for in the Constitution, the statutory admissibility of imposing certain restrictions on the constitutional freedom of access to a profession and its practice" (Article 65 paragraph 1 of the Constitution).

While supervising the proper practice of a given profession, the self-government undertakes a number of activities, including: granting/determining the right to practice, admission to practice, in other words, making a list of individuals practicing a given profession, applying statutory sanctions for improper pursuit of the profession, maintaining a list of people practicing a given profession, conducting training for members or exercising disciplinary authority. As the Constitutional Court emphasized, "the guarantee of providing services at an appro-

priate level is also a system of sanctions and procedures within the professional self-government organization that ensures compliance with the rules of deontology" (Judgment of the Constitutional Court of 18 March 2003, file reference number K 50/0).

When transferring the findings made to the field of regulations concerning medical professions, it should be indicated that the analysis of legal provisions leads to the conclusion that currently there are the following professions of public trust among medical professions:

a) doctor and dentist (recognized together, corporation: The Polish Chamber of Physicians and Dentists);
b) nurse and midwife (corporation: The Supreme Chamber of Nurses and Midwives);
c) pharmacist (corporation: Polish (Supreme) Pharmaceutical Chamber);
d) laboratory diagnostician (corporation: The National Chamber of Laboratory Diagnostics);
e) physiotherapist (corporation: The Polish Chamber of Physiotherapists).

Considering that human health needs are mentioned in the social sciences in the hierarchy of human needs among the first-order existential needs [24], the proper functioning of self-governments of medical professions is particularly important. Their activity serves the patients and influences their health safety [25].

For the sake of completeness, it should be added that on the basis of Article 17 paragraph 2 of the Constitution the legislator may establish other self-governments, also dedicated to medical professions that do not have the status of the profession of public trust. However, such self-governments could not interfere with the freedom to pursue a profession or restrict the freedom to undertake business activities, which means that they would not be able to exercise authority over their members. The legislator has not yet exercised this power.

Problems with the definition of a medical profession in tax law

The lack of systemic solutions in defining a medical profession is not only theoretical. In tax law, performing the activities indicated in legal provisions by individuals who follow a medical profession determines the exemption of these transactions from the Goods and Services Tax.

According to Article 43 paragraph 1 item 19 of the Act of 11 March 2004 on Value Added Tax [26], VAT exemption applies to services in the field of medical care for disease prevention, maintaining, saving, restoring and improving health, provided as part of the following professions: a) doctor and dentist, b) nurse and midwife, c) medical, referred to in Article 2 paragraph 1 point 2 of the AMA, d) psychologist.

The mentioned regulation is the implementation of the provisions of Council Directive 2006/112/EC of 28 November 2006 on the Common Value Added Tax [27], in which, in accordance with Article 132 paragraph 1 letter c, countries have been obliged to apply tax exemptions to medical care transactions in the medical and paramedical professions specified by the Member State concerned [28].

In addition, two issues should be noted. First of all, tax exemption has been addressed in relation to medical care. Judgments of the Court of Justice of the European Union paved the way for a view that tax exemptions should not apply to services that do not aim to protect health. For example, in the Judgment of 8 June 2006, C-106/05, L.U.P. GmbH v Finanzamt Bochum-Mitte, EU:C:2006:380, the Court stated that: "the concept of 'medical care' [...] and that of 'the provision of medical care' [...] are both intended to cover services which have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders". In the Judgment of 1 December 2005 in joined Cases C-394/04 and C-395/05, Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ypourgos Oikonomikon, EU:C:2005:734, the Court indicated that "The hospital and medical care envisaged by this provision is, according to the case-law, that which has as its purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders". At the same time, the Court has clearly confirmed that preventive measures are also covered by the VAT exemption (Cf.: Judgment of the CJEU of 10 June 2010, C-262/08, CopyGene A/S v Skatteministeriet, EU:C:2010:328).

Secondly, the EU legislator, while providing for the analyzed tax exemption, ordered states to indicate certain medical and paramedical professions whose practice in a given scope is related to the VAT relief.

The Polish legislator, in addition to indicating specific professions: doctor and dentist, nurse and midwife, psychologist, decided to refer to a broader group of "medical professions" and refer in this respect to the Act on Medical Activity, on which ground, as the conducted analyses show, it is difficult to determine which profession is a medical one.

The discrepancies in interpretation as regards determining the scope of the content of the term "medical profession" for the purpose of actualization of the VAT exemption can and are settled in the case-law of tax administration bodies and administrative courts. However, as the following examples show, this practice does not remove interpretational doubts.

Before citing a few examples from the case-law, it should be recalled that the discussed exemption is of material-personal nature, which means that there is a need for accumulation of conditions. The service provided must remain within the scope of medical care and be intended to prevent diseases, preserve, rescue, restore and improve health, and at the same time it should be performed by a person following a medical profession.

According to the statements of tax administration bodies and administrative courts:

a) services provided by a dietitian meet the conditions to be recognized as services benefiting from exemption from Value Added Tax (ruling by the Director of the Tax Chamber in Warsaw of 17 February 2011, file reference number IPPP1-443-1135/10-4/JL);
b) a psychological therapist conducting addiction therapy with the use of the bioresonance method can benefit from VAT exemption for the aforementioned services (ruling by the Director of the Tax Chamber in Poznań of 19 April 2011, file reference number ILPP1/443-122/11-2/MK), however, at the same time, if the same therapist provides the services to support the treatment of allergies, bacterial and fungal infections as well as parasitic diseases, intestinal diseases, heart and circulatory system diseases, respiratory tract diseases and weight loss, cannot benefit from exemption from Goods and Services Tax;
c) the exemption applies to dental services involving prosthetic restoration based on implants (ruling by the Director of

the Tax Chamber in Poznań of 21 April 2011, file reference number ILPP2/443-161/11-2/BA), while the teeth whitening service does not benefit from the exemption because it does not fulfill the therapeutic purpose (ruling by the Director of the Tax Chamber in Poznań of 12 April 2011, file reference number ILPP1/443-309/11-2/BD);

d) the activity of a psychologist (although mentioned expressis verbis in Article 43, item 1, point 19, letter d of the VAT Act) in the scope of assessment of a person's professional predispositions and directing them to select a profession is not covered by the scope of health protection and is therefore not covered by the VAT exemption (Cf.: Judgment of the Supreme Administrative Court of 26 January 2017, file reference number I FSK 965/15);
e) the activity of neurotherapist using EEG Biofeedback training (Judgment of the Voivodship Administrative Court in Szczecin of 8 October 2013, file reference number I SA/Sz 464/13).

The Supreme Administrative Court also faced the necessity to define the concept of medical profession in order to establish the conditions for the VAT exemption. In the judgment of 4 October 2016, file reference number I FSK 878/14, the Court stated that a cosmetologist with a specialization in podiatry, due to the lack of statutory regulation of the profession of a podiatrist, excludes the possibility of exemption for podiatric services under Article 43 paragraph 1 point 19 of the VAT Act. The Court found that both a cosmetologist with a specialization in podiatry and a graduate in the field of public health do not meet the conditions for recognition of their qualifications as individuals practicing medical professions.

In the Author's opinion, in relation to podiatrists, this is a quite controversial thesis, as the Supreme Administrative Court equated a medical profession with a regulated profession. The adoption of such a framework of thought excludes from the scope of the term "medical profession" individuals who, under the Act on Medical Activity, have acquired professional qualifications to provide health services in a specific scope or in a specific field of medicine.

In the light of the findings made, it should be emphasized that establishing the clear scope of the term "medical profession" in the context of tax law is of great importance in the constitutional and legal aspect.

The basic principle of tax law, provided in Article 84 of the Constitution, is the universality of taxation and interpretation of tax regulations should take place with its consideration, while any deviations from it, as exceptions, cannot be interpreted with broadening tendency. On the other hand, the constitutional standard is the principle of equality before the law. Therefore, given the necessity to interpret according to the Constitution (its Article 32 paragraph 1), Article 43 paragraph 1 point 19 of the VAT Act should be interpreted in a way that does not infringe the principle of equality. A common feature of the compared entities, mentioned in this provision in letter c, is having the status of a medical profession referred to in Article 2 paragraph 1 point 2 of the Act on Medical Activity. Thus, if these entities provide services in the field of medical care for disease prevention, maintenance, rescue, restoration and improvement of health as part of their professional activity, tax law guarantees the VAT exemption for these services, regardless of which of the prerequisites, contained in the Act on Medical Activity, that determine the definition of a medical profession is fulfilled in their case.

CONCLUSIONS

Reconstruction of the concept of the medical profession, although the legislator included its definition in law, remains difficult due to two factors. Firstly, there is no comprehensive regulation of professional qualifications necessary to provide health services in a specific scope or in a specific field of medicine (specific to individual professions). Secondly, due to the wide scope of the term "health service". As a consequence, the catalog of medical professions is open and changeable, and the assessment on whether a specific subject is entitled to the status of a medical profession should be made ad casu. Such a state is not conducive to legal clarity, therefore the de lege ferenda postulate should be formulated to regulate in a comprehensive manner the qualifications and rules for practicing medical professions that are not yet covered by statutory regulations in Poland.

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