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Local-government Arrangements with Participation of Local Government Units as Compared to Other Forms of Activity in the Sphere of Public Administration

Porozumienia samorządowe z udziałem jednostek samorządu terytorialnego na tle innych form działania w sferze administracji publicznej

SUMMARY

Among the administrative arrangements (*porozumienia administracyjne*), one should distinguish a category of local-government arrangements (*porozumienia samorządowe*), i.e. those involving local government units. In the first place, it should be distinguished vertical arrangements, i.e. arrangements between units of different levels of the local government structure: arrangements between poviats (counties) and communes, between voivodeships (regions) and communes, and between voivodeships and poviats. Secondly, horizontal arrangements i.e. between communes, between poviats and between regions. Local government arrangements are a non-sovereign form of activity of the public administration, entered into with mutual declarations of intent of the parties. The basis for their conclusion is a resolution of the legislative body of a local government unit to agree to cooperate under the local government arrangement, while the very act of the arrangement is concluded by the executive body of the local government unit. The purpose of the local government arrangement is to ensure the fulfilment of a public task, to agree on its implementation and the necessary actions. The entrusting of public tasks by means of a local government arrangement is effected under public law and not by a civil contract. The arrangement relates to the implementation of already existing tasks, defined by specific legal provisions, resulting from the legal-systemic position of the parties to the arrangement, so they do not create new obligations arising from the arrangement concluded.

Keywords: administrative arrangement; local-government arrangement; local government unit; public tasks

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Data: 08/11/2026 02:41:04

ESSENCE OF THE ADMINISTRATIVE ARRANGEMENT

The current functioning of the public administration is closely linked to the issue of performing the public tasks, and hence satisfying our daily basic needs. The process of increasing the number of tasks to be carried out by the administration is clearly noticeable, as well as the related postulates to make the implementation thereof even more efficient, effective and productive than before. The public administration is therefore forced to modify the forms of its previous activities in order to meet these expectations. This may be faced by using the legal construct of administrative arrangement, since assuming that the effective and efficient execution of public tasks is the priority, we do not need to rely solely on a standard solution, namely the performance of the task by the body designated in the provisions of law by the legislature, but to apply a solution that involves the delegation and entrusting of the performance of public tasks to other authorities, in particular to the field administrations, based just on these arrangements. Particular significance is seen in the case of local government administration, whose bodies are focused on performing public tasks of a local nature, aiming to meet the current, fundamental, continuous needs of all members of local communities[1].

In the post-war period, for a long time, it was not considered necessary to develop and define legal forms of cooperation in the performance of public administration tasks. As a result of the demand to do so, administrative law scholars began proposing the construct of arrangement, which was distinguished within the legal forms of administrative activity. The origins of the administrative arrangements related essentially to economic arrangements on the operation of state-owned enterprises, especially between the entities supervising the activities of state-owned enterprises. However, the development of the agreement was inhibited by limiting the independence of national councils and then the field administrations, which resulted in the weakening of effectiveness and advisability of the solution[2].

The issue of the administrative arrangement was within the interest of J. Starościak, who referred to the concepts of pre-war inter-municipal unions established for a specific purpose. They were initially only deemed factual activities, then they began treated as civil-law institutions, and then institutions of a mixed civil-administrative nature[3]. At the outset, J. Starościak did not distinguish the administrative arrangement as a separate form of action, categorising it as agreements concluded by bodies that are not hierarchically linked. Ultimately, however, he decided

[1] E. Bonusiak, *Porozumienie administracyjne jako forma wykonywania zadań przez gminę*, [in:] *Sposoby realizacji zadań publicznych*, red. B. Dolnicki, Warszawa 2017, p. 102.

[2] M. Stahl, *Prawne formy działania administracji publicznej*, [in:] *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i praktyce*, red. M. Stahl, Warszawa 2016, p. 490.

[3] *Ibidem*.

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Data: 08/11/2026 02:41:04

to distinguish and place it among the following forms of administrative action: the adoption of normative acts, the issuing of administrative acts, the pursuit of social-organisational activities, the pursuit of technical activities, the conclusion of civil-law contracts and the conclusion of administrative arrangements[4]. The currently prevailing scholarly opinion states that the administrative arrangement is recognised as a distinct form of activity and occupies a firm position among the forms of activity of public administration[5]. This is a bilateral act of administrative law carried out by entities exercising public administration and having effect based on mutual declarations of intent of those entities. The arrangement is classified as a non-sovereign form of activity of the administration and should serve to enable the mutual achievement of specific objectives of co-operating independent entities[6]. The administrative nature of the arrangement is manifested by the essence of the provisions constituting the legal basis for concluding the arrangements, the subject of the arrangements, the parties to the arrangements and the guarantees in the implementation of the arrangement[7].

The essential features of the administrative arrangement are: 1) they are a bilateral or multilateral legal act containing declarations of intent of the parties, they have legal effects in the form of an establishment, amendment or termination of a legal relationship; 2) the arrangement takes effect when the parties to the arrangement make mutual declarations of intent; 3) the parties to the arrangement are in an equivalent position to each other; 4) the parties to the arrangement are public administration entities: state bodies of public administration, local government units, local government legal persons; 5) the administrative arrangements are concluded in order to cooperate in the performance of public tasks already stipulated in the law, but do not aim at creating "new" tasks; 6) the legal basis for the conclusion of administrative agreements are the norms of substantive or systemic administrative law, arrangements may be concluded on the basis of statutory provisions[8]. The arrangement requires the existence of a legal basis because public administration bodies cannot change the scope of their powers and responsibilities without a clear and unambiguous statutory authorization.

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[4] J. Starościak, *Prawo administracyjne*, Warszawa 1977, p. 231.

[5] L. Bielecki, *Prawne formy i metody działania administracji*, [in:] *Prawo administracyjne. Część ogólna*, red. L. Bielecki, P. Ruczkowski, Warszawa 2011, p. 345; E. Ochendowski, *Prawo administracyjne. Część ogólna*, Toruń 2013, p. 225.

[6] E. Ura, *Prawo administracyjne*, Warszawa 2015, p. 128.

[7] M. Stahl, *Prawne formy działania administracji…*, p. 490.

[8] M. Ofiarska, *Formy publicznoprawne współdziałania jednostek samorządu terytorialnego*, Warszawa 2008, pp. 101–102; L. Bielecki, *Prawne formy i metody działania administracji*, [in:] *Prawo administracyjne. Część…*, p. 345–346; Z. Cieślak, *Porozumienie administracyjne*, Warszawa 1985, p. 125; L. Bielecki, *Prawne formy i metody działania administracji*, [in:] *Prawo administracyjne*, red. M. Zdyb, J. Stelmasiak, Warszawa 2016, pp. 206–207; M. Stahl, *Prawne formy działania administracji…*, p. 491.

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Data: 08/11/2026 02:41:04

The prevailing view is that at least one of the parties to the arrangement should be an entity performing public administration functions, and the scope of rights and obligations covered by the arrangement must fit the scope of independent decision making powers of the parties to the arrangement, while the arrangement itself is binding and public-private in nature[9]. The thesis that the administrative arrangement is a public-law, external and non-sovereign form of activity is also presented in case law[10], but it should be remembered that the content of the arrangement depends on the will of its parties, which brings it closer to civil-law agreements.

In the case of administrative arrangement, the scope of administrative tasks covered is limited; this is due to the legal norms that define the scope of tasks of its participants. As rightly put by Z. Cieślak, the administrative arrangement may only cover the public tasks that already exist in the provisions of law, they must be only tasks within the scope of activity of at least one of its participants[11].

When deciding to conclude an arrangement, the parties have the objective of cooperation in the implementation of administrative tasks defined by legal norms. This means that the arrangement concerns the implementation of already existing tasks, defined by specific legal regulations, resulting from the legal and systemic position of the parties to the arrangement, so its participants do not create new obligations resulting from the arrangement. They only decide on the use of the most appropriate form for the implementation of tasks, taking into account the efficiency and effectiveness of their implementation[12].

An act consisting in agreeing upon the content of a normative act or an administrative act, made between public administrations before its adoption, even though the regulations require that the act in question is issued in agreement with another body, does not constitute an administrative arrangement, as this type of arrangement is merely a form of consultation of the content of the act between these bodies[13]. We are dealing with this e.g. on the basis of Article 6a (2) of the Act of 21 March 1985 on Public Roads[14], because the classification of a road in the category of poviat (county) roads is followed by a resolution of the Poviat Council in agreement with the Regional Government Authority, after obtaining the opinion of the mayors of these municipalities in the area of which the road runs and the boards of neighbouring poviats, and in cities with rights of a poviat – the opinion of the City Presidents.

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[9] M. Stahl, *Prawne formy działania administracji…*, p. 492.

[10] Judgement of the Supreme Administrative Court in Łódź of 27 September 1994, SA/Łd 1906/94, ONSA 1995, No. 4, item 161; judgement of the Supreme Administrative Court in Rzeszów of 5 December 1995, SA/Rz 1109/95, „Samorząd Terytorialny" 1995, nr 12, p. 116.

[11] Z. Cieślak, *op. cit.*, p. 114; E. Ura, *op. cit.*, p. 129.

[12] Z. Cieślak, *op. cit.*, p. 127.

[13] E. Ura, *op. cit.*, p. 131.

[14] Consolidated text Journal of Laws 2017, item 2222.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

The basis for concluding the arrangements is the provisions of the systemic or substantive administrative law, but the possibility of concluding an arrangement is actually determined by the active capacity of the entity concluding the arrangement to exercise the administrative functions, i.e. the legal possibility resulting from the relevant legal norms for establishing and shaping administrative relationships by such entity. The consequence of this is the entity's liability, based on legal norms, for legal and factual actions undertaken in order to perform public administration functions[15]. The application of the form of an administrative arrangement results in modification of the statutory scopes of activity and powers of public administration bodies. The content of the arrangements affects the transfer of not only the tasks but also the powers necessary for its implementation[16].

According to Z. Cieślak, the administrative arrangement should be concluded in writing, this is due to the complexity of its subject matter, the nature of the institution, the necessity of a clear, unequivocal definition of its content, and the ensuring of appropriate conditions for its implementation[17]. A similar view is presented by S. Biernat, who see the roots of the requirement written evidence in the necessity of documenting such action, i.e. the conclusion of an arrangement; in addition, the written form is intended to enable interested parties to become acquainted with its content[18]. The legislature has dealt with the problem of the form of arrangement in a general manner, referring only to the fact that it is to be made upon the submission of declarations of intent by its participants or the date specified in its content. Such an approach to the subject of an arrangement by the legislature is justified by the postulate that the participants have more freedom in shaping its content and form. On the other hand, the problem of adhering to or not adhering to the requirement of the written form within the meaning of civil law was solved by the legislature by the obligation to publish the arrangement in the relevant publication[19]. The administrative arrangement must be published in the regional Official Journal, according to Article 13 (6) of the Act of 20 July 2000 on the Publication of Normative Acts of Other Certain Acts[20], which is considered by M. Ofiarska and Z. Ofiarski the condition of its entry into force[21], although there

[15] Z. Cieślak, *op. cit.*, p. 117.

[16] M. Węgrzyn-Skarbek, *Porozumienie administracyjne a prawo miejscowe*, „Przegląd Prawa Publicznego" 2001, nr 6, p. 59.

[17] Z. Cieślak, *op. cit.*, pp. 116–117.

[18] S. Biernat, *Działania wspólne w administracji państwowej*, Wrocław 1979, pp. 221–222.

[19] M. Grążawski, *Porozumienie administracyjne jako prawna forma działania współczesnej administracji publicznej*, Bielsko-Biała 2007, p. 34.

[20] Consolidated text Journal of Laws 2016, item 296 as amended.

[21] M. Ofiarska, Z. Ofiarski, *Porozumienie jako podstawa wykonywania zadań przez jednostki samorządu terytorialnego*, „Zeszyty Naukowe Uniwersytetu Szczecińskiego" 2006, nr 426, p. 52; W. Kisiel, [in:] K. Bandarzewski, P. Chmielnicki, W. Kisiel, *Prawo samorządu terytorialnego w Pol-*

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Data: 08/11/2026 02:41:04

is also a view presented in the literature that such an announcement is merely of an information nature[22].

The problem of the expiry of an administrative arrangement was the subject of J. Starościak and S. Biernat's analysis. In their opinion such conditions include: 1) the passage of time for which the arrangement has been concluded; 2) the implementation of the content of the arrangement, i.e. the fulfilment of the tasks covered by it; 3) the mutual decision of the parties to terminate the arrangement; 4) the decision of a party to terminate its content unilaterally; 5) liquidation of the entity that is a participant in the arrangement; 6) changing the scope of activity of the delegating entity by depriving the entity of the right to perform the task that was subject of the arrangement; 7) annulment of declarations of intent of the participants of the arrangement on its conclusion under supervision procedure[23]. The presented conditions for terminating the arrangements do not raise any doubts, moreover, these conditions justify their division into arrangements concluded in order to perform a specific task, arrangements concluded for a definite period and for an indefinite period. As a result of the expiry of the arrangement, the tasks and competencies are transferred back to the delegating entity[24].

STRUCTURE OF THE LOCAL GOVERNMENT ARRANGEMENT

The subject matter of administrative arrangements is considerably related to the issues of local government, the functioning of local government and the performance of local public governance tasks by local government units in order to meet the current daily needs of local community members. The right to cooperation of local government units in order to carry out tasks of mutual interest is enshrined in Article 10 (1) of the European Charter of Local Self-Government (ECLSG)[25]. Done on 15 October 1985 in Strasbourg as an international agreement, it was ratified by the Republic of Poland on 26 April 1993, becoming universally binding law[26]. The content of the above provision stipulates that local communities when

sce, Warszawa 2006; C. Martysz, [in:] *Ustawa o samorządzie powiatowym. Komentarz*, red. B. Dolnicki, Warszawa 2005, pp. 451–452.

[22] K. Bandarzewski [in:] *Ustawa o samorządzie gminnym. Komentarz*, red. P. Chmielnicki, Warszawa 2013, p. 838.

[23] J. Starościak, *Studia z teorii prawa administracyjnego*, Warszawa 1967, p. 74 ff.; S. Biernat, *op. cit.*, pp. 223–224.

[24] L. Wengler, *Wygaśnięcie porozumienia komunalnego (zagadnienia wybrane)*, „Samorząd Terytorialny" 2006, nr 5, p. 47.

[25] European Charter of Local Self-Government is a document of the Council of Europe, the provisions of which govern the status of local governments in Europe *vis-à-vis* the authorities of a given country and in the relation to authorities of other countries and their local governments.

[26] Promulgated in Poland in Journal of Laws 1994, No. 124, item 607.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

exercising their rights are entitled to cooperate with other local communities and associate with them within the limits of the applicable law to perform tasks that are of their mutual interest.

Among the arrangements, one should distinguish those whose parties are only local government units. A. Błaś has reserved the term "administrative arrangement" for arrangements on the joint performance of administrative tasks by central government administration bodies or by a public administration body with other institutions, while he has distinguished arrangements he has called "communal arrangements", i.e. entered into only by local government units[27]. The Constitutional Tribunal, in its resolution of 27 September 1994[28], ruled that the term "communal"[29] means the same as "pertaining to a commune", so the term "communal arrangement" was adequate to the point where, as of 1 January 1999, as a result of the reform of public administration and territorial divisions, the local self-government structures in the Republic of Poland were expanded onto another two levels – the poviat and the voivodeship, for which both statutory regulations contained and to this day contain provisions enabling concluding arrangements by local government units. Thus, it would be more adequate to refer to the arrangements whose participants are only local government units (communes, poviats, voivodeships) is the term "local government arrangements".

Also, J. Korczak proposed a distinction and classification of administrative arrangements. Taking into account the criterion of belonging to the system of public administration, he distinguished arrangements concluded between entities of the same systemic structure, e.g. between local government units, and arrangements between entities with different systemic structures. On the other hand, he distinguished the vertical and horizontal arrangements based on the territorial criterion, namely the place of the entity in the major territorial divisions of the country (voivodeships/regions, poviats, communes). The vertical agreement means an arrangement in which an entity of a higher-level delegates its tasks to a lower-level entity. This results in a widening of the subject matter jurisdiction of the entity assuming the task e.g. where a commune takes over the task of the voivodeship or poviat; moreover, the territorial jurisdiction of the delegating entity is reduced to the territory of the entity which assumed the task. However, a horizontal arrangement takes place where the same level of territorial divisions is involved, e.g. between communes or between poviats. The horizontal arrangement has the effect of extending the

[27] A. Błaś, *Prawne formy działania administracji publicznej*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 1998, p. 222.

[28] W 10/93, OTK 1994, No. 2, item 46.

[29] "Communal" (from Latin *communis*) means 'of or relating to one or more communes'. See www.merriam-webster.com/dictionary/communal [access: 20.04.2019].

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Data: 08/11/2026 02:41:04

territorial competence of the receiving party onto the territory of the delegating entity, while the subject matter jurisdiction remains unchanged[30].

The legal formula of the local government arrangement allows for the cooperation between local government units both of the same and various levels of local government in the Republic of Poland. The legal base for their conclusion can be found in the laws on the system of local government, which include the Act of 8 March 1990 on the Communal Government[31], the Act of 5 June 1998 on the Poviat Government[32] , the Act of 5 June 1998 on the Voivodeship Government[33]. We can distinguish two subcategories within the category of local government arrangements. First, the local-government vertical arrangements, namely arrangements between local government units of different levels of the local government structure – of poviats with communes, voivodeships with communes and voivodeships with poviats (Article 8 (2a) ACG, Article 5 (2) APG, and Article 8 (2) AVG). Second, horizontal arrangements, i.e. inter-communal (Article 74 ACG), inter-poviat (Article 73 APG), inter-regional (Article 8 (2) AVG).

The legislature uses the terms "entrusting of tasks" and "delegation of tasks" in its statutory regulations, which, according to M. Grążewski, could suggest the existence of two different categories of tasks. However, such a distinction is criticized by some scholars, e.g. E. Olejniczak-Szałowska, who is of the opinion that the task entrusting is connected with their delegation, i.e. a voluntary declaration of intent to hand over the obligation to perform the public tasks specified in the arrangement to another entity, in this case to another local government unit. Furthermore, the delegation cannot be associated with "getting rid" of these tasks to the receiving entity because it would mean that this entity would perform the tasks in its own name and on its own responsibility, and the task would not be incumbent on the delegating entity[34]. The delegated tasks remain the responsibility of the delegating entity and the receiving entity performs these tasks on behalf of the delegating entity. The delegating entity bears, in addition to civil liability under Article 417 § 2 of the Civil Code, also liability under administrative law for effective and efficient performance of the delegated task, as well as political responsibility towards the members of the local community, because these have the right to demand to

[30] J. Korczak, *O nieporozumieniach wokół porozumień w administracji publicznej*, „Samorząd Terytorialny" 2009, nr 6, pp. 34–38; E. Bonusiak, *op. cit.*, pp. 108–109.

[31] Consolidated text Journal of Laws 2018, item 994, hereinafter: ACG.

[32] Consolidated text Journal of Laws 2018, item 995, hereinafter: APG.

[33] Consolidated text Journal of Laws 2018, item 913, hereinafter: AVG.

[34] E. Olejniczak-Szałowska, *Porozumienie w sprawie przekazania zadań publicznych (uwagi dyskusyjne na tle modelu ustawowego)*, [in:] *Nowe problemy badawcze w teorii prawa administracyjnego*, red. J. Boć, A. Chajbowicz, Wrocław 2009, p. 388; M. Stahl, *Glosa do postanowienia NSA z dnia 24 listopada 1999 r., II SA 1075/99*, OSP 2000, No. 10, item 158; judgement of the Voivodeship Administrative Court in Gliwice of 7 May 2008, II SA/Gl 275/08, LEX No. 511487.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

meet their common needs through effective and efficient performance of the tasks, regardless of to which entity their own local government unit delegated the implementation of the task. This is so since the local government unit delegating the tasks to another local government unit will always be responsible for the implementation of the task covered by the arrangement[35].

In the light of the systemic legislation on the local government, the essence of the local-government arrangement boils down to the transfer of the task from one local government unit to another local governing unit, therefore there is no need and necessity to establish a new organisational structure, and the local government unit taking over public tasks in this manner, performs these tasks through its bodies and organisational units[36]. The arrangement is not a one-sided act, its aim is to ensure the implementation of a public task, to agree on the manner of its implementation and the necessary actions in this respect[37]. Public tasks delegated under a local government arrangement must be entrusted in a public-law form, not in a form of civil-law contract[38]. Only private-law tasks may be delegated by way of civil contracts, not public-private tasks, the transfer of which may take place through a local government arrangement[39]. However, co-operating communes, poviats and regions may use a civil-law form, resigning from public-private forms, e.g. by using the form of company, but it should be noted that when using the form of civil law, it may not delegate tasks of a sovereign nature[40]. The regulation in the arrangement of the rules of participation of the local government unit delegating the task in the decision-making by the local government unit taking over the task to be carried out is limited only to the possibility of granting the local government unit delegating the task the right to express non-binding opinions or positions, without the possibility to participate in the on-going performance of public tasks and control over their performance. The addressees of the provisions of the arrangement are the parties thereto, i.e., in the case of local government units, the bodies representing them, which are responsible for implementing the provisions of the arrangement[41].

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[35] E. Olejniczak-Szałowska, *op. cit.*, p. 389; J. Wyporska-Frankiewicz, *Publicznoprawne formy działania administracji o charakterze dwustronnym*, Warszawa 2009, p. 158.

[36] Judgement of the Supreme Administrative Court in Lublin of 27 September 1994, SA/Lu 1906/94, LEX No. 1688471.

[37] S. Iwanowski, P. Sitniewski, *Rola porozumień administracyjnych w działalności samorządu terytorialnego*, [in:] *Administracja i prawo administracyjne u progu trzeciego tysiąclecia. Materiały z konferencji naukowej – Zjazd Katedr Prawa i Postępowania Administracyjnego*, Łódź 2000, p. 144.

[38] E. Ochendowski, *Glosa do postanowień NSA z dnia 24 września 1990 r., I SA 847/90 oraz z dnia 27 września 1990 r., SA/Wr 952/90*, „Samorząd Terytorialny" 1991, nr 4, pp. 47–51.

[39] Judgement of the Supreme Administrative Court in Łódź of 27 September 1994, SA/Łd 1906/94, ONSA 1995, No. 4, item 161.

[40] Z. Leoński, *Współdziałanie w samorządzie terytorialnym*, „Samorząd Terytorialny" 1995, nr 4, p. 55.

[41] M. Węgrzyn-Skarbek, *op. cit.*, p. 56.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

The local-government arrangement allows for the delegation of a public task which is the responsibility of a particular local government unit unless specific provisions provide for otherwise. The relative freedom of local government units to enter into arrangements, which entails the freedom to take decisions to consent to the conclusion of arrangements, is generally limited by the powers of the bodies of those units[42].

It should be noted that with regard to vertical agreements, i.e. concluded between local government units, located at different levels of the local government system, the legislature only permits the downward delegation of public tasks under the arrangements. This means that the legislature, on the basis of the provisions of the Act on the Communal Government, does not entitle the commune to entrust the poviat or voivodeship with the commune's public tasks[43]; similarly, under the provisions of the Act on the Poviat Government, it does not entitle to entrust the implementation of poviat governments task to the regional government, nor to take over commune's tasks from the commune[44]. This solution strongly corresponds to the principle of subsidiarity expressed in the Preamble to the current Constitution of the Republic of Poland of 2 April 1997[45], according to which subsidiarity is the principle of vertical division of power in the upward direction and not vice versa, that is a larger community (located higher in the hierarchy) must not be entrusted a task that can be performed in an equally efficient manner by a "smaller" (located at a lower level) community[46].

In addition, there is a restriction of a subjective character concerning the conclusion of arrangements by regions (voivodeships) with poviats and communes, because the legislature has limited the possibility of concluding them only to those local government units which are located in the territory of the region concerned. There are no such restrictions for arrangements between communes and between communes and poviats whose territories are part of different regions[47].

The local-government arrangement, which is based on mutual intent of the parties, has a bilateral character, as it creates mutual commitments between the local government unit which takes over the public task to be implemented and the local government unit which delegates the task. It is permissible for an arrange-

[42] Judgement of the Voivodeship Administrative Court in Kraków of 19 November 2007, II SA/Kr 736/07, LEX No. 340499.

[43] Judgement of the Supreme Administrative Court of 21 January 2010, I OSK 1140/09, LEX No. 594919.

[44] Judgement of the Voivodeship Administrative Court in Gliwice of 11 April 2008, II SA/Gl 174/08, LEX No. 506795.

[45] Journal of Laws No. 78, item 483 as amended. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.01.2019]

[46] M. Grążawski, *op. cit.*, p. 31.

[47] E. Olejniczak-Szałowska, *op. cit.*, p. 383.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

ment to have more than two parties, but there may only be one entity which takes over the tasks[48]. The local government arrangement is particularly suited to situations where one participant has a specific technical infrastructure and staff, which would enable fulfilment of the tasks for the other participants of the arrangement. Under local-government arrangements, such tasks can be carried out as e.g. waste management, public transport, education, collective water supply and wastewater disposal or environmental protection.

The provisions of generally applicable law do not set out the procedure for concluding local-government arrangements, which gives the possibility for a flexible approach to the subject[49]. The conclusion of a local-government arrangement is preceded by negotiations on the future cooperation between the parties. This can be carried out in any form, e.g. in cyclical meetings or agreed by mail. This stage is of an informal nature and allows the future content of the arrangement to be agreed, but it is reasonable that the course of this stage should be regulated in the charter of the given legal entity[50].

The construct of local-government arrangement includes the activities of both the legislative body and executive body of the local government unit. The basis for the conclusion of a local-government arrangement with the participation of a local government unit is a resolution of the unit's legislative body on the consent to cooperation under a local-government arrangement[51]. However, the very act of arrangement is not to be concluded by the legislative body, but by the executive body of the local government unit[52].

As regards arrangements concluded by a commune, to conclude arrangements under Article 8 (2a) ACG, as well as inter-communal arrangements under Article 74 ACG a resolution of the commune council is necessary because in both cases it belongs to the exclusive competence of this body based on Article18 (2) (11) and (12) ACG[53]. It should be kept in mind that the commune council is the only competent authority having jurisdiction over all matters falling within the scope of the commune's activity unless the Acts provide otherwise (Article 18 (1) ACG). To adopt a resolution on the conclusion of an arrangement under general rules, a simple

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[48] K. Bandarzewski, *op. cit.*, p. 834; C. Martysz, *op. cit.*, p. 450.

[49] L. Wengler, *Uwagi o niektórych aspektach porozumienia komunalnego*, „Samorząd Terytorialny" 1997, nr 4, p. 37; C. Martysz, *op. cit.*, p. 450.

[50] K. Bandarzewski, *op. cit.*, p. 834.

[51] R. Cybulska, [in:] *Ustawa o samorządzie gminnym. Komentarz*, red. B. Dolnicki, Warszawa 2018, p. 860.

[52] M. Węgrzyn-Skarbek, *op. cit.*, p. 57; judgement of the Voivodeship Administrative Court in Białystok of 16 December 2010, II SA/Bk 715/2010, LEX No. 752402.

[53] Judgement of the Supreme Administrative Court of 6 December 2002, II SA/Wr 2127/02, OwSS 2003, No. 2, item 43; judgement of the Voivodeship Administrative Court in Białystok of 16 December 2010, II SA/Bk 715/2010, LEX No. 752402.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

majority of votes and the quorum of at least half of the statutory composition of the Commune Council is sufficient (Article 14 ACG).

The issue of entering into arrangements by poviats was regulated differently. There is no equivalent of Article 18 (1) ACG in the Act on the Poviat Government, nonetheless, based on Article 9 (1) APG, which states that the Poviat Council is the poviat's legislative and controlling body, subject to the provisions on the poviat referendum, and therefore it is the body competent to decide on the conclusion of an arrangement[54]. Moreover, to the extent not regulated by the content of the arrangement, the legislature orders to apply *mutatis mutandis* to these arrangements the provisions on unions of poviats (Article 73 (2) APG). This means that pursuant to Article 67 (1) and (2) APG, the content of the arrangement must be included in the resolution of the Poviat Council. There is a doubt as to what kind of majority of votes should be taken on the resolution on the conclusion of the arrangement. According to L. Wengler, a simple majority of votes is sufficient to pass such a resolution, since the exceptions regarding the use of an absolute majority of votes should not be interpreted broadly in relation to the general principle expressed in Article 13 (1) APG[55]. M. Grążawski thinks differently. In his opinion this is not the case of broad interpretation of regulations of a special nature, which is justified by the reference contained in Article 73 (2) APG, therefore to adopt a resolution on the conclusion of an arrangement between poviats, an absolute majority of votes of the statutory composition of the Poviat Council is necessary[56].

The issue of concluding local-government arrangements by regions has also been settled in a very modest manner by the legislature. The exclusive responsibility of the Regional Assembly (*Sejmik*) is to adopt resolutions on entrusting the tasks of the regional government to other local government units[57]. To conclude an arrangement by which the task of the voivodeship is to be entrusted to a commune or poviat, it is necessary to adopt a resolution of the Regional Assembly by a simple majority of votes, in the presence of at least of the statutory composition of the Assembly (Article 19 AVG). These resolutions of the legislative bodies of local government units are governed by the general rules of the supervisory procedure provided for in the rules on supervision of activities of local government units[58]. Thus, in general terms, the Voivodeship Governor (the central government's rep-

[54] Judgement of the Voivodeship Administrative Court in Gliwice of 11 April 2008, II SA/Gl 174/08, LEX No. 506795; C. Martysz, *op. cit.*, p. 449.

[55] L. Wengler, *Uwagi o niektórych aspektach porozumienia…*, p. 41.

[56] M. Grążawski, *op. cit.*, p. 37.

[57] R. Cybulska, [in:] *Ustawa o samorządzie województwa*, red. B. Dolnicki, Warszawa 2012, p. 94.

[58] Article 171 (1) and (2) of the Polish Constitution, chapter X of the Act on the Communal Government, chapter VIII of the Act on the Poviat Government, chapter VII of the Act on the Voivodeship Government.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

resentative in the region) may challenge the correctness of the resolutions taken, if these are contrary to the generally applicable law[59].

Based on a resolution expressing the consent to conclude an arrangement, the bodies representing local government units conclude an arrangement by signing it. At the conclusion of the agreement, the commune is represented either by the village mayor, mayor, city president, or their deputies solely or jointly with a person authorised by the village mayor, mayor or city president[60]. The poviat is represented by two members of the Poviat Board or one member of the Board[61], together with the person authorised by the Board, while the voivodeship by the Marshal of the Voivodeship together with a member of the Voivodeship Board, unless the charter of the voivodeship stipulates otherwise, by only admitting the conclusion of the arrangement by the Marshal[62].

The final stage of the procedure is the publication of the concluded local-government arrangement in the relevant regional Official Journal[63], and from the date of publication, the date of entry into force of the obligations of the parties specified in the local government arrangement is counted.

In addition to the rules on the system of local government, the conclusion of local-government arrangements may also be based on the provisions of substantive administrative law[64]. Such an example is provided for Article (6a) (4) of the Act of 17 May 1989 – Geodesic and Cartographic Law[65], the Starost (Poviat Head) at the request of the commune delegates to the village mayor (mayor, city president), by way of an arrangement, the matters belonging to the scope of his responsibilities and powers, including the issuing of administrative decisions. The legislature has defined in an ordinance the specific organisational, personal and technical conditions to be fulfilled by the communes requesting the acquisition of responsibilities and powers, having regard to the need for the commune to ensure the proper level of substantive and technical performance of the full range of tasks[66]. Since the delegation of responsibilities and powers by way of a local-government arrangement should also be accompanied by the definition of rules and procedure for the transfer

[59] Article 91 (1) ACG, Article 79 (1) APG, Article 82 (1) AVG.

[60] Article 31 ACG.

[61] Article 48 (1) APG.

[62] Articel 57 (1) AVG.

[63] Article 5 (3) APG, Article 8 (4) AVG, Article 13 (6) of the Act of 20 July 2000 on the Promulgation of Normative Acts and Other Certain Legal Acts.

[64] R. Cybulska, [in:] *Ustawa o samorządzie województwa*, p. 92.

[65] Consolidated text Journal of Laws 2017, item 2101.

[66] Ordinance of the Minister of Internal Affairs and Administration of 29 December 1999 on the organisational, staffing and technical conditions to be fulfilled by the communes requesting the acquisition of the responsibilities and powers of the Starost in the field of geodesy and cartography (Journal of Laws 2000, No. 1, item 4).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

of adequate financial resources, the arrangement concluded needs countersignatures of the treasurers involved in the local-government arrangement[67].

THE LOCAL-GOVERNMENT ARRANGEMENT IN COMPARISON WITH THE CIVIL-LAW CONTRACT AND THE ADMINISTRATIVE SETTLEMENT

In order to emphasise the public nature of local-government arrangements, it is worth comparing them to other forms of administrative activity such as civil-law contract and administrative settlement, where we also find the element of "arrangement".

According to A. Agopszowicz, a self-government arrangement, i.e. an arrangement involving a local government unit, is actually a civil-law contract. The rationale for that argument is that the relation of subordination, characteristic of the administrative-law relationship, does not emerge in this case between the parties. In an arrangement, the parties thereto remain in a peer position to each other, which is a characteristic of any civil contract, hence the arrangement is a civil-law contract, actually a fee-for-task contract[68]. In support of the presented view, the resolution of the Constitutional Tribunal of 27 September 1994[69] may be mentioned, which recognises that the conclusion of a contract with a peer legal entity is a form of action typical of civil law. This view must be definitely rejected. The contemporary public administration applies different forms of action, not only of those of a sovereign and unilateral nature. However, the changing tasks to be implemented by the administration enforce the use of other forms, as the existing ones become insufficient. Nonetheless, this does not mean that administrative arrangements are of a civil nature, it is insufficient to refer only to the criteria of equivalence of entities. It is also necessary to look at the specificity of administrative activities which are dictated by the public interest and not merely the interests of the parties to the arrangement. The statement that local-government arrangements are civil-law contracts is not valid when the subject matter of those agreements, i.e. public tasks, is ignored. Civil-law forms of action are mainly aimed at the pursuit of the interests and needs of entities entering into such arrangements. In addition, civil law governs relations between autonomous entities which have their own legitimate interests, while public administration entities do not have any own interests,

[67] Article 46 (3) ACG, Article 48 (1) APG, Article 57 (3) AVG.

[68] A. Agopszowicz, [in:] A. Agopszowicz, Z. Gilowska, *Ustawa o samorządzie terytorialnym. Komentarz*, Warszawa 1997, pp. 86–88; *idem*, [in:] A. Agopszowicz, Z. Gilowska, M. Taniewska-Peszko, *Zarys prawa samorządu terytorialnego*, Warszawa 1997, pp. 53–54.

[69] W 10/93, OTK 1994, No. 2, item 46.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

and should be guided in their activities by the public interest. If we assumed that self-government arrangements are of a civil-law nature, only the provisions of civil legislation would be sufficient, and the regulations in the laws on the system of local government which indicate the legal possibilities for concluding arrangements would be unnecessary[70].

The only common feature of local-government arrangements and civil-law contracts is that both these legal constructs are based on the general concept of a contract, understood as the making of mutual statements by two or more entities in order to produce specific legal effects. Both these constructs are included in a set of legal actions, the basic structural element of which is the cooperation between the parties, because in the course of legal actions that make up the administrative arrangement there may also occur a civil-law contract, through which the cooperating entities implement the provisions of the administrative arrangement[71]. A civil-law contract is a civil-law institution and a bilateral legal action, which includes a mutual intention of the parties, aimed at the creation, change or termination of legal effects[72].

A prerequisite for the conclusion of a civil-law contract is to have legal personality and the resulting legal capacity and legal capacity to perform acts in law, which create for the entity a general power to conclude civil-law contracts[73]. However, to conclude an administrative arrangement it is necessary to have a specific authorisation contained in a legal norm of a statutory level. The differences between a civil-law contract and an arrangement are particularly noticeable in the subject matter of their regulation. In the case of an arrangement, it consists of public tasks and powers to use specific legal forms of action, in particular of a sovereign nature. While a civil-law contract can only regulate civil-law relations and cannot form a basis for the transfer of powers to unilaterally determine the rights and obligations of other parties. According to Z. Cieślak, the legal relationship created as a result of concluding a civil-law contract is a specific legal relationship, whereas in the case of concluding an administrative arrangement, the relationship created as a result of concluding it will constitute only the basis for establishing a whole range of legal relations resulting from actions taken as a result of implementing the provisions of the arrangement entered into[74].

These two institutions also differ in terms of legal effects that may be caused by both forms. This is so, as the civil-law contract exerts effects only between the parties to the contract, and it is possible that such a contract create rights specified

[70] M. Grążawski, *op. cit.*, pp. 47–48.
[71] Z. Cieślak, *op. cit.*, p. 214.
[72] Z. Czachórski, *Zobowiązania. Zarys wykładu*, Warszawa 1974, p. 107.
[73] J. Zimmermann, *Prawo administracyjne*, Warszawa 2016, p. 431; E. Ura, *op. cit.*, p. 133.
[74] Z. Cieślak, *op. cit.*, pp. 214–215.

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Data: 08/11/2026 02:41:04

therein for third parties. It is not possible to impose any obligation on a third party based on a civil-law contract[75]. However, the conclusion of an arrangement may result in an obligation for third parties to submit to the actions of an entity with respect to which such an obligation did not exist prior to the conclusion of the agreement. This will be the case when, by way of an administrative arrangement, the powers to apply sovereign forms of action are delegated. This is significantly related to the requirement of statutory authorisation to conclude an agreement.

The difference between a civil-law contract and an arrangement is also evident in the sphere of pursuit of interests, in the case of a contract, the parties act in principle to satisfy their interests, while the action through an administrative arrangement is intended to serve satisfaction of the public interest and, subsequently, of the legitimate interest of individuals, but cannot serve the pursuit of the interests of the entities co-operating under the arrangement[76].

The current activities of the public administration are largely based on actions that provide services to the public, and hence some of the administrative tasks can, and are actually carried out, by private entities, e.g. basic health care. This is because, according to J. Filipek, the public authority should not merely be geared towards providing services, especially since such services are much more costly and often "too slow" to implement, as compared to activities of private actors. Civil-law contracts are not suitable for this purpose because along with the delegation of tasks it may often be necessary to delegate the necessary powers for their implementation; here there is a place for administrative contracts. However, the difference in relation to the arrangements is seen when they serve the co-operation between public administration bodies, while the administrative agreement serves to transfer public tasks from a public entity to private entities. This means that the subject of an administrative contract is the delegation of a public task to a private entity, together with the authorisation of this entity to use administrative-law forms of activity. At the same time, obligations should be imposed on the private entity to ensure the actual and proper performance of the public tasks to their addressees. The activities of a private entity performing a public task should be subject to supervision by the body of public administration, and the failure by the administration of its supervisory responsibilities towards the private entity should give the addressee of the tasks the right to appeal to the administrative court, but excluding the jurisdiction of general courts[77].

[75] S. Biernat, *op. cit.*, p. 162.

[76] Z. Kmieciak, *Umowa cywilnoprawna i porozumienie administracyjne jako formy działania organów administracji w sferze zarządzania gospodarką państwową*, „Ruch Prawniczy, Ekonomiczny i Społeczny" 1987, nr 3, p. 172.

[77] J. Filipek, *Prawo administracyjne. Instytucje ogólne*, cz. 2, Kraków 2001, p. 142.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

Local-government arrangements are not civil-law contracts, but specific forms of public-law cooperation involving the delegation of public tasks of local government units, not private tasks. Such a position is prevailing in the case-law[78] and among scholars of law[79].

The local government arrangement also differs significantly from the amicable settlement, including the administrative settlement, although in this legal construct we also deal with the element of agreement. The amicable settlement occurs under administrative law (Article 114 ff. of the Code of Administrative Procedure), civil law (Article 917 ff. of the Civil Code), civil procedure (184 ff. of the Code of Civil Procedure), Labour Law (Article 121 of the Labour Code), criminal procedure (Article 494 of the Code of Criminal Procedure). The amicable settlement under the administrative procedure forms an alternative to the administrative procedure which is settled by an administrative decision. A settlement is a written agreement between the parties of conflicting interests in an ongoing administrative proceeding and replaces the administrative act to conclude the proceeding. Moreover, for its validity it must be approved by the authority which runs the proceeding, the approved settlement producing the same legal effects as an administrative decision[80]. In order to settle an administrative case, it is required that two parties with diverging interests participate in the proceedings, although this is not about the divergence of those interests itself, but that their interests are to be capable of reconciling at all[81]. The contradiction of the interests of both parties is merely a starting point which is to be changed by reaching the settlement before an administrative authority. The parties may enter into a settlement where the nature of the case concerned is suitable to do so and, in addition, it will contribute to the simplification or acceleration of the proceedings, and the conclusion of the settlement does not contradict the rules of law[82]. The subject matter of the settlement is therefore limited to individual cases that may be settled by an administrative decision, and the purpose of its conclusion is to accelerate and to simplify the very proceedings before the public administration body. The parties to the settlement will probably be more prompt to submit to the provisions resulting from the legal action in which they have actively been involved themselves than if their case was resolved by a unilateral decision

[78] Judgement of the Supreme Administrative Court in Lublin of 27 September 1994, SA/Lu 1906/94, LEX No. 1688471; resolution of the Supreme Administrative Court of 8 November 1999, OPK 20/99, ONSA 2000, No. 2, item 53.

[79] M. Kulesza, *Opinia dotycząca charakteru prawnego porozumienia zwanego pilotażowym*, „Samorząd Terytorialny" 1995, nr 12, p. 131; P. Lisowski, A. Pakuła, *Porozumienie komunalne*, „Przegląd Prawa i Administracji" 1996, nr 35, p. 95; Z. Leoński, *Ustrój i zadania samorządu terytorialnego*, Poznań 1994, pp. 27–28; A. Błaś, *op. cit.*, pp. 321–322.

[80] E. Ura, *op. cit.*, pp. 135–136.

[81] J. Zimmermann, *Polska jurysdykcja administracyjna*, Warszawa 1996, pp. 176–177.

[82] Z. Cieślak, *op. cit.*, p. 211.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

of the administrative body. An amicable settlement approved by public authority by way of order produces the same legal effects as an administrative decision delivered during the administrative procedure. The administrative settlement is still a specific administrative act which creates an administrative relationship in a particular procedure where the approved administrative settlement produces the same legal effects as a decision taken during the administrative proceedings. The specific nature of the settlement is evident in the equality of the parties to the proceedings before the public administration body, but once the settlement is approved, this equality is transformed into a system of dependence which is typical of the administrative substantive-law relationship which links the administrative authority with the addressee of its decision[83]. The rights and obligations arising from an administrative settlement are of an administrative-law nature and are not at the disposal of the parties, which distinguishes this kind of settlement from the amicable settlement in civil law. They derive their legal power not from the wishes of the parties themselves, but by the will of the administrative authority which has approved the administrative settlement. It, therefore, defines the rights and obligations of the parties in relation to the public administration and not in relation to each other. In the absence of a settlement, the administrative body should initiate enforcement proceedings[84]. The only similarity between an administrative settlement and an arrangement is seen in a certain element of the very essence of the settlement: an agreement between the parties which make mutual concessions, thus aiming at resolving the conflict of interest existing between them. However, there are more visible differences between the two constructs. An approved administrative settlement is a condition for an administrative relationship, which outlines the powers and obligations of its parties, it is a relationship in the strict sense, whereas an administrative arrangement creates a relationship in the general sense as a series of activities of the administration, constituting the basis for the creation of a series of autonomous relations in the strict sense. The arrangement is concluded between the entities of the public administration, while the administrative settlement comes into effect between the addressees of the administrative activity in the form of an administrative decision. The arrangement shapes the mutual relationship between the entities, while the settlement determines only what rights and obligations the parties to the settlement have towards the public administration. The subject of the administrative arrangement is public tasks and powers necessary for their implementation, attributable to the relevant entities of the arrangement, while the parties to the settlement do not pursue their own tasks or powers. The arrangement provides the basis for further action to implement its provisions, while the conclusion of

[83] *Ibidem*, p. 211.

[84] A. Wiktorowska, *Prawne formy działania administracji*, [in:] *Prawo administracyjne*, red. M. Wierzbowski, Warszawa 2017, p. 292.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 08/11/2026 02:41:04

an administrative settlement creates a specific legal relationship[85]. Although both constructs are classified as legal forms of administrative action, the arrangement is clearly distinguished from the administrative settlement by its legal structure, area of application and the role played[86].

CONCLUSIONS

To sum up, local-government agreements, i.e. arrangements entered into either vertically (between entities of different levels of local government) or horizontally (between entities of the same level of self-government), constitute a special category of administrative arrangements. In both cases, we are dealing with a non-sovereign public-law form of activity of public administration entities. Local-government arrangements of this type contribute to the increase of efficiency and effectiveness of performance of tasks through legal possibility of transferring these tasks between local government units. They are specific instruments that serve to organise the activities of public entities in relation to public tasks imposed on these entities, they are used in the implementation of tasks that are costly in financial, organisational and personnel terms, with which a single unit of local government unit is not able to cope independently in the interest of members of a given local community. The subject of a local government arrangement can only be public tasks legally assigned to the local government unit which enters into the arrangement, and through its conclusion there is no "divesting itself of" these tasks to the local government unit accepting the task. The task being delegated remains the task of the local government unit delegating the task, while the local government unit taking over the task performs it on behalf of the one which delegated the task.

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[85] Z. Cieślak, *op. cit.*, p. 212.
[86] E. Ura, op. cit., p. 136.

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STRESZCZENIE

Pośród porozumień administracyjnych należy wyróżnić porozumienia samorządowe, czyli takie, których stronami są wyłącznie jednostki samorządu terytorialnego. Wyodrębnić należy: 1) samorządowe porozumienia wertykalne, czyli porozumienia między jednostkami różnych poziomów struktury samorządowej (powiatów z gminami, województw z gminami i województw z powiatami), oraz 2) samorządowe porozumienia horyzontalne, czyli międzygminne, powiatowe i wojewódzkie. Porozumienia samorządowe są niewładczą formą działania administracji publicznej. Są one zawierane na podstawie zgodnych oświadczeń woli uczestników porozumienia. Podstawą ich zawarcia jest uchwała organu stanowiącego jednostki samorządu terytorialnego w kwestii wyrażenia zgody na współpracę w ramach porozumienia samorządowego. Akt porozumienia jest natomiast zawierany przez organ wykonawczy jednostki samorządu terytorialnego. Celem porozumienia samorządowego jest zapewnienie realizacji zadania publicznego, uzgodnienie sposobu jego realizacji oraz niezbędnych w tym zakresie działań. Powierzenie zadań publicznych w drodze porozumienia samorządowego następuje w formie publicznoprawnej, a nie w drodze umowy prawa cywilnego. Porozumienie dotyczy realizacji zadań już istniejących, określonych konkretnymi przepisami prawa wynikającymi z prawno-ustrojowej pozycji podmiotów porozumienia, jego uczestnicy nie tworzą zatem nowych obowiązków wynikających z zawartego porozumienia.

Słowa kluczowe: porozumienie administracyjne; porozumienie samorządowe; jednostka samorządu terytorialnego; zadania publiczne