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Unregistered economic activity in the light of Traders’ Law

Abstract

The aim of this article is to analyse the provisions of Traders’ Law providing for a possibility of undertaking a business activity without an obligation of its prior registration. A critical analysis is provided below of the potential implications of the solutions proposed in the Constitution for Business whereby individuals can undertake activities satisfying all conditions for business activity without having to register.

Keywords: trader, business activity, registration, regulation

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Preliminary remarks

The Act on Freedom in Business (FBA)² in defining business activity as profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals, as well as professional activity conducted in an organised and continuous fashion introduces at the same time a principle whereby a trader can commence business activity on the date a relevant application is filed with the Central Business Registration and Information³ or upon being entered into the National Court Register⁴. Both the definition and the entry requirement are, under the current provisions, equally applicable to small business generating little income and large-scale business operations generating accordingly large income.

This state of affairs does not, according to the authors of the Constitution for Business, including in its package the Traders' Law⁵ act, provide an adequate level of facility to micro businesses, which considering their scale of operations – should be allowed to trade under a less formalised regime. Introducing unregistered business activity is to provide a remedy to the situation. Such activity, meeting all the conditions required from business activity, will be capable of being carried out in a considerably easier way, due to a low level of income generated. This is to be achieved by the proposed law by way of excluding the activity of this kind from the list of business activities, and hence – exempting it from registration requirements.

The subject of consideration in this Article is the Traders' Law act as approved by the Sejm on 26 January 2018 and passed on to the Senate for further processing. The aim of the following remarks is an analysis of the reasonableness of the proposed regulations. In the first part, the current provisions will be discussed setting out the features enabling a given type of activity to be deemed business activity, as well as the regulations concerning registration of such activity. The analysis aims to demonstrate that the definition of business activity will essentially remain unchanged. The principle of registration of business activity also remains valid.

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³ CEIDG

⁴ KRS.

⁵ The Bill adopted by the Sejm on 26.1.2018.

What is new, is that micro business will be distinguished from general business activity and, taking into account the little income generated, will not be deemed business. An analysis of the solution adopted by the Sejm leads to a conclusion that the amendment, inspired as it may have been by the fair idea of making the life of micro businesses easier, raises a number of doubts.

Doing business under FBA

FBA defines business activity as profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals, as well as professional activity conducted in an organised and continuous fashion⁶. Hence, in order for an activity to qualify as business, three joint functional conditions must be satisfied: profit-making, formal organisation (i.e. choice of the legal form of business) and continuity⁷. The Administrative Court in Szczecin⁸ has held that in determining whether a given activity is business activity one must establish that the following elements are cumulatively present: its professional character, subjection to the rule of profitability and profit or rational management, acting on one's own account, repetitiveness of actions and participation in trade⁹. The lack of any of the features mentioned above means that the activity is not business¹⁰. In addition, the legislator has listed types of business, viz. manufacturing, construction, trading, provision of services and prospecting, identification and extraction of minerals from deposits¹¹.

The profit-making element entails an approach that is profit-driven. Behaviour aiming at mere satisfaction of one's own needs will not be business. The profit-

⁶ Article 2 FBA.

⁷ Judgment of WSA (Regional Administrative Court) in Poznań of 28.4.2009, III SA/Po 374/08, LEX no. 550514; judgment of NSA (Supreme Administrative Court) in Lublin of 4.2.2000, I SA/Lu 1518/98, LEX no. 61020; also C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2013, p. 16 et seq., who provides an extensive analysis of the case law as regards qualifying particular types of activity as business or denial of such qualification.

⁸ Decision of WSA (Administrative Court) in Szczecin of 7.8.2006, I ACz 441/06, LEX no. 279953.

⁹ Decision of SN (Supreme Court) of 19.10.1999, III CZ 112/99, OSNC 2000/4/78.

¹⁰ Judgment of WSA in Lublin of 19.4.2016, III AUa 1126/15, LEX no. 2039632; judgment of NSA of 26.9.2008, II FSK 789/07, LEX no. 495147.

¹¹ Cf. M. Sieradzka, [in:] M. Sieradzka, M. Zdyb (ed.), *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2013, p. 33; K. Kohutek, [in:] M. Brożyna, M. Chudzik, K. Kohutek, J. Molis, S. Szuster, *Komentarz do ustawy z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej*, LEX/el. 2005, Thesis 2 of the commentary on Article 2 FBA.

-making aspect of business involves being paid¹². Where a surplus of income is assumed over deliberately incurred costs, this entails that the activity is conducted for profit¹³.

Under FBA, doing business for profit is not identical with actually making a profit. In order for an activity to qualify as business, the small number of transactions, turnover, low or even null income are irrelevant¹⁴. Loss-making, even over a longer period of time, will not deprive an activity of its essentially business character, if the entity in question carries on with the intention of making a profit and the activity itself is such as may result in such profit¹⁵, since the for-profit criterion focuses on the object of activity rather than the actual outcome¹⁶.

According to the Supreme Court, assuming the constitutive character of profitability in the definition of 'business activity' would render the qualification entirely arbitrary and changeable. For the same type of activity would have to be qualified as 'business' or 'non-business' depending on the entity, period, geographical location and current business cycle¹⁷. Thus, the objective of the activity in question becomes a decisive criterion¹⁸. In the resolution of 6 December 1991¹⁹, the Supreme Court defined business activity as the activity that is characterised by: professional character, repetitiveness, pursuit of either full attainment of the goal set (the greatest outcome principle), or attainment of the goal to a certain degree with the least possible use of resources (the principle of economy of resources). Therefore, it must always be conducted reasonably, but the actual profit is not always its aim. Similarly, the Supreme Administrative Court in Warsaw held, in a judgment of 15 September 2005²⁰, that the features of business activity include its professional (stable) character, the repetitiveness of actions related thereto, subordination to the rational management principle and participation in trade. On the other hand, activities

¹² C. Kosikowski, op. cit., p. 30 et seq.

¹³ Judgment of WSA in Poznań of 28.4.2009, III SA/Po 374/08, LEX no. 550514.

¹⁴ Judgment of WSA in Poznań of 1.3.2016, III AUa 1142/15, LEX no. 2025565.

¹⁵ K. Kohutek, op. cit., Thesis 3.2 of the commentary on Article 2 FBA.

¹⁶ M. Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, Lex 2012, source: Lex, Thesis 1.3; K. Borowicz, M. Kurzajewski, *Ustawa o swobodzie działalności gospodarczej z komentarzem*, Warszawa 2005, pp. 17–18; P. Wrześniewski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2010, p. 21.

¹⁷ Resolution of SN of 30.11.1992, III CZP 134/92, OSNC 1993/5/79.

¹⁸ Cf. C. Kosikowski, op. cit., pp. 30–31.

¹⁹ III CZP 117/91, OSNC 1992/5/65.

²⁰ FSK 2643/04, LEX no. 153881.

such as non-profit²¹ or charity²² will not count as business. Accordingly, also minor ventures not requiring substantial financial outlay fall under the category of business within the meaning of Article 2 FBA – provided that those undertaking them are motivated to obtain income and satisfy the other constitutive elements of business activity²³.

Another feature determining the business character of an activity is its organised nature. Hence, chance activities, even if undertaken for profit and generating income on the part of the person undertaking them, will not be deemed business²⁴. According to an opinion expressed by the WSA in Warsaw²⁵, doing business involves not only creating proper conditions, awaiting orders, but also actual performance of the work ordered.

Thus, only those will be deemed traders who perform repeating activities and in such a manner as to create a certain whole rather than being a detached delivery, or deliveries, of goods or services²⁶. Organising an activity entails planning in both legal and actual respects²⁷. A. Powałowski associates being organised with the notion of enterprise under Article 55¹ KC (Polish Civil Code) whereby an enterprise means an system of tangible and intangible assets organised for the purpose of doing business²⁸. However, as the NSA held in the judgment of 14 July 2005²⁹, the condition of being organised must not be understood as only the one including business in the form that is a legal person or an organisational unit without legal personality. Business can also be carried out by an individual performing all the activities involved himself.

The third condition is continuity. In order for an activity to be deemed business it must be undertaken with a constant intention of performance. This does not essentially exclude activities carried out on a seasonal basis or until a pre-established goal is achieved³⁰. What is relevant is whether such seasonal activities involve an

²¹ This case is, however, assessed differently by CJEU, which in the case C-244/94 found a non-profit organisation as trader for the purposes of Article 85 of the Treaty. Cf. judgment of 16.11.1995, LEX no. 116365.

²² M. Sieradzka, op. cit., pp. 32–33.

²³ K. Kohutek, op. cit., Thesis 3.2 of the commentary on Article 2 FBA.

²⁴ C. Kosikowski, op. cit., p. 32.

²⁵ Judgment of 28.1.2009, VII SA/Wa 1374/08, LEX no. 489317.

²⁶ Decision of WSA in Szczecin of 7.8.2006, I ACz 441/06, LEX no. 279953.

²⁷ M. Etel, op. cit., Thesis 1.5.

²⁸ A. Powałowski, [in:] idem (ed.), *Ustawa o swobodzie działalności gospodarczej*, Warszawa 2007, p. 28.

²⁹ FSK 1971/04, LEX no. 173219.

³⁰ C. Kosikowski, op. cit., s. 32.

intention to repeat certain activities in order to generate income³¹. For continuity may be with respect to the season or to the attainment of the pre-established goal³². However, in order to determine whether a given activity constitutes a business activity it is necessary to establish whether it involves regular, repeating actions³³. It is only such set of actions repeated many times that can be deemed doing business for the purposes of Article 2 FBA³⁴. Nevertheless, continuity is not to be understood as a constant, ongoing process as this would mean that it is impossible to suspend or discontinue doing business³⁵.

The principle of registration of a business

Under Article 14 (1) FBA, a trader can begin doing business on the date of filing an application for entry into the CEIDG or upon being registered into the business register of the KRS.

Such entry is, in principle, a prerequisite to beginning to trade. An exception to this rule is set out in Article 14(4) FBA whereby a company in organisation can begin to trade prior to being entered into the business register. An entry into the register will be of declarative nature as it does not create a business. On the other hand, an entry will be constitutive in nature with respect to the creation of a legal person, whose existence is conditional on being entered into the KRS³⁶. However, this creative nature is only with respect to the very formation of a legal person. Naturally, legal personality, as constructed on the grounds of entry into the KRS, is prerequisite to doing business; however, one cannot infer from that fact that it is the entry as such that creates the business nature of the entity's activities³⁷.

As follows from the above reasoning, the application and entry into a relevant register only constitutes the basis for beginning to do business insofar as it legalises it and is not to be identified with the actual beginning of doing business³⁸. Conversely,

³¹ K. Kohutek, *op. cit.*, Thesis 3.4 of the commentary on Article 2 FBA.

³² A. Powalowski, *op. cit.*, p. 29.

³³ M. Sieradzka, *op. cit.*, p. 45.

³⁴ Judgment of NSA of 17.9.1997, II SA 1089/96, LEX no. 31312.

³⁵ Judgment of NSA of 14.7.2005, FSK 1971/04, LEX no. 173219.

³⁶ K. Kohutek, *op. cit.*, Thesis 6 of the commentary on Article 14 FBA, which indicates different opinions among the jurisprudence as to the nature of entry into the KRS.

³⁷ Cf. also *ibidem*, Thesis 3 of the commentary on Article 14 FBA.

³⁸ Judgment of WSA in Białystok of 1.3.2016, III AUa 961/15, LEX no. 2016291; judgment of WSA in Gdańsk of 16.7.2015, III AUa 193/15, Lex no. 1781873; judgment of WSA in Gdańsk of 16.12.2010, III SA/Gd 556/10, LEX no 756387.

the very existence of an entry in the register does not entail actual business being carried out, although there is definitely a legal presumption³⁹ that a person that has not filed a notification on discontinuation of business still performs the same⁴⁰.

Doing business and unregistered economic activity according to Traders' Law

Article 3 FBA lists the kinds of profit-making activities to which the act will not apply⁴¹. This is not to mean that the activities specified in Article 3 are not business, but merely that the provisions of the act will not, by way the legislator's *fiat*, apply to them.

Seen from this perspective, the draft Constitution for Business puts forward what is a revolutionary novelty. For it stipulates that activities of certain kinds will not be deemed business if the income generated thereby does not exceed the threshold set out in the act. Thus, the turnover being lower than the threshold, the activity in question will not constitute business despite having all the features fulfilling the statutory definition of business.

Business activity according to the Traders' Law draft

The act adopted by the Sejm introduces a change in the wording of the definition of business. Under the new regulations, business activity means organised, for-profit activity pursued on one's own behalf and in a continuous fashion⁴². Thus, the constitutive elements of business still include organisation, profit-bearing and continuity. The legislator has expressly stated that in order for an activity to qualify as business it must be undertaken on one's own behalf.

Moreover, the legislator did not give up the registration requirement in introducing, similarly to FBA, an obligation to register with the CEIDG, in the event of business undertaken by individuals, or the KRS, in the event of other trading entities. The principle has also been maintained whereby a company in organisation can begin to trade prior to being entered into the business register⁴³.

³⁹ Judgment of WSA in Szczecin of 16.6.2015, III AUa 499/14, LEX no. 1814827.

⁴⁰ Judgment of WSA in Białystok of 10.2.2016, III AUa 849/15, LEX no. 2015602.

⁴¹ Cf. Article 3 FBA.

⁴² Article 3 of Traders' Law (hereinafter 'TL').

⁴³ Article 17 (3) TL.

In light of the above, all the above considerations hold valid in determining what kind of activity constitutes business. The nature of the entry also remains unchanged as it merely legalises a business rather than constituting business activity⁴⁴.

Businesslike activity not being subject to entry into the register

What is novel about the Constitution for Business is the revenue-based exclusion, set out in Article 5(1), of a for-profit activity, carried on in an organised, continuous fashion and on one's own behalf from the list of business activities. Therefore, it is not an amendment intended to extend the exclusion under Article 3 FBA⁴⁵.

Under Art. 5(1) TL, an activity does not qualify as business that is carried out by an individual whose revenue due from such activity does not exceed, in any month 50% of the minimum wage as set out in the act on the minimum remuneration for work of 10 October 2002⁴⁶ and provided that such individual has not carried out business over the preceding 60 months. Such individual can apply to be registered with the Central Business Registration and Information. Such activity will become business on the date specified in the application⁴⁷. Where the revenue due from the above activity has exceeded in a given month 50% of the minimum wage, the activity becomes business as of the date on which the excess has been achieved⁴⁸. In this case, the individual in question must file an application for entry with the CEIDG within 7 days of the date the excess occurred⁴⁹.

As follows from the above, revenue is the only criterion differentiating such activity from business activity. Hence, there is no essential difference in terms of constitutive elements between the activity referred to in the bill adopted by the Sejm and standard business. The criterion adopted only applies to the level of revenue gained. The adopted bill assumes that business activity only arises upon the threshold of half the minimum monthly wage being exceeded. The remaining

⁴⁴ With the provision that entry into the KRS is constitutive for the formation of certain entities, therefore it will be prerequisite to commencement of business insofar as prior to the entry the entity in question lacks legal existence.

⁴⁵ I.e. a list of activities that are business activities in so far as they satisfy the conditions under Article 2 FBA, but have been excluded by the decision of the legislator from the application of the Act on Freedom in Business.

⁴⁶ Currently, PLN 1,050.

⁴⁷ Article 5(2) TL.

⁴⁸ Article 5(3) TL.

⁴⁹ Article 5(4) TL.

scope of economic activities has been excluded from the list of business activities. Notably, the legislator only allows this exception in the event of activities carried out by individuals.

The reason given for this solution is an intention of making it easier for individuals to make a living by undertaking small-scale or *ad hoc* economic activities that would otherwise qualify as business. Examples of such activities that are usually adduced are *ad hoc* private lessons or small trade. That much is said by the rationale for the bill. For it is difficult to search in it for more profound arguments for the proposed amendment, let alone any analysis of the implications of the proposed exclusion. Stating in conclusion that it is to be an emanation of the assumption of facilitating those who undertake business, the legislator fails to consider any problems that may arise as a result of the proposed law.

Expected implications of the introduction of unregistered activity

Article 5 of Traders' Law is undoubtedly in line with the declared principle "whatever is not forbidden is allowed" and extends the scope of the individual's economic freedom as it introduces a virtually unbounded possibility of undertaking income-bearing activities within predetermined confines with a minimum of formalities involved in its undertaking and performance. This undoubtedly praiseworthy idea was regrettably put forward in a form that raises considerable doubts.

A simple example may suffice to illustrate the issue. With reference to the very rationale for the bill, one can imagine a situation where a student of English philology wishing to 'top up' his scholarship, can teach English lessons without having to register his business. The facilitation proposed in the bill will apply indiscriminately to a student who teaches lessons at times and in places agreed *ad hoc* with a pupil and to one who meets his own pupils at regular times on a weekly basis at fixed locations and using teaching aids that allow him to effectively teach such lessons. Both can gain similar revenues and Article 5(1) TL does not in any way differentiate between the situations on the grounds of the level of organisation and repetitiveness of the activities undertaken. The type of economic activity pursued is also irrelevant – both the one requiring infrastructure, tools and greater commitment and the one whose performance requires comparatively null preparation will be subject to the same deregulation provided that both generate revenues lower than the statutory threshold.

Thus, a question arises whether this was the actual intention of the legislator. For as one can infer from the rather laconic rationale for the Constitution for Busi-

ness, Article 5(1) Traders' Law sets out to make life easier to those who occasionally undertake activities hitherto qualified as business. Leaving aside the question whether such regulation is needed in the first place (seeing that *ad hoc* activities do not meet the condition of continuity and for that reason alone could be exempted from business requirements), it should be considered whether the regulation, in its proposed wording, will actually achieve the aim it seeks to achieve. As mentioned above, its contents do not restrict its application to petty, little organised activities, but will rather apply to any activity generating petty revenue.

Furthermore, doubts can arise as regards the provisions of the Civil Code concerning the offer⁵⁰. If a seller offers his products for sale, thus making an offer, a contract of sale is made by the offer being simply accepted. What if an offer is accepted at the moment that the 50% of monthly remuneration threshold is exceeded by the seller? It is difficult to construe a right under the Civil Code on the part of the offeror to withdraw from the sale in this situation.

The regulation adopted by the Sejm also gives rise to considerable doubts as regards the possibility of monitoring the entities carrying out the activities set out in Article 5 Traders' Law. For it should be noted that it would be at the discretion of the individual to decide whether his business-like activity falls under the exception set out in the bill. If such activity is not to be registered, one could wonder how the public authorities would learn about it. This opens a possibility of abuse by those carrying out business activities without registration in reliance on Article 5 TL. Given this manner of operation, the chances of public authorities obtaining information on such activities, and hence being able to verify whether or not such activities exceed the prescribed threshold, may be considerably difficult, if not illusory.

The above also entails problems relating to the registration of income for the purposes of taxation. Here again, the lack of information in the register of the activities undertaken will considerably hinder any control in this respect or elimination of unfair practices.

As regards regulatory measures, one should not disregard the quality of the goods offered. If the risk is lower in the event of private tutorials, then the problem may arise with respect to small-scale sales of groceries. For it is obvious that such goods should meet the standards of quality, cleanliness and production. This is required in order to protect the purchasers' health. Eliminating petty sales from the scope of business and excluding it from registration requirements can lead to the quality control being illusory. For here also the concerns are as follows: if public authorities are not aware of the activity being carried out, how can they implement any quality control measures?

⁵⁰ Cf. Arts. 66–70 KC (Civil Code).

One should also notice the fact of the weakened protection of the potential purchaser of goods sold in the course of unregistered activity.

Since such sale will not be a business transaction, and consequently – the seller will not be a trader, then the transaction will be the one between non-professional entities (i.e. C2C). As a result, the purchaser cannot be deemed consumer⁵¹; hence, the provisions affording special protection for the assumingly weaker party to trade will not apply⁵².

Conclusions

An analysis of the Traders' Law as adopted by the Sejm reveals a number of doubts in respect of its proposed Article 5. For it is undoubtedly praiseworthy to attempt simplifying the procedures for establishing and carrying on business. It is of particular importance to small trade. However, the proposed changes may lead to a number of problems relating to supervision over so conducted activities.

The greatest concerns surround the possibility of verifying the level of generated revenue. Since the qualified activity under Article 5(1) of the bill will not be registered anywhere, the relevant public authorities will have little chance of discovering the fact that such activity is being conducted, let alone determining the level of actual revenue. The above mentioned fact may lead to individuals choosing not to register their business despite having exceeded the statutory threshold.

Less information on the part of the state on the activities undertaken will result in lesser control. Furthermore, in protecting entrepreneurship one must not lose sight of the legitimate interests of customers who should be granted protection through, inter alia, adequate quality control from the state of the products delivered.

Regardless of the above remarks, the scope of the amendments introduced by the Sejm merits positive assessment. For the initial draft of the law did not provide for any sanctions for exceeding, in a given month, 50% of the minimum monthly wage and also did not exclude from Article 5 those activities that require a license, permit or entry into the register of regulated activities⁵³.

⁵¹ Under Article 22¹ KC a consumer is an individual entering into a transaction with a trader other than in the course of such individual's business or profession.

⁵² Cf. the provisions of the Act on Consumer Rights of 30.5.2014, Dz.U. of 24.6.2014, Article 543¹ KC, 546¹ KC, 548 § 3 KC, 556¹ § 2 KC, 556² KC, 557 § 2–3 KC, 558 § KC, 560 § 2 KC, 561¹ § 3 KC, 561⁵ KC, 568 § 2 KC.

⁵³ Currently Article 44(3) TL.

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