

OBJECTION PROCEEDINGS UNDER THE POLISH ACT OF ENTREPRENEURS LAW

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Abstract

The Polish Act of 6.03.2018 on Entrepreneurs Law sets forth the general principles for undertaking, conducting and terminating economic activities within the territory of the Republic of Poland. An inherent part of the act are provisions concerning the control of businesses, which are regulated by Chapter 5 of this Act (art. 45–65 Ent Law). The regulations apply the rules of control, commonly called control standards, which should be respected by public administration authorities and controlled entrepreneurs. Controlling business activity concern also controlling entities' rights. The entrepreneurs have been provided with a special legal remedy, the so-called "objection to undertaking and carrying out actions by all inspection bodies" (the opposition to control activities). Such a measure was already available to the entrepreneurs under the Act of 2.07.2004 on Freedom of Business Activity. The Act of the Entrepreneurs Law has clarified the previous solutions. Therefore, the purpose of the article is to present the terms and conditions of raising that legal measure in the light of the new provisions binding from 30.04.2018.

Key words: *opposition to control activities; objection proceedings; control bodies, entities' right; the control of businesses; Polish Entrepreneurs Law*

JEL Classification: *K20*

I. INTRODUCTION

The Polish Act of 6.03.2018 on Entrepreneurs Law (Journal of Law from 2018, pos. 646, as amended) sets forth the general principles for undertaking, conducting and terminating economic activities within the territory of the Republic of Poland, including provisions concerning the control of businesses, which are regulated by Chapter 5 of this Act (art. 45–65 Ent Law). The regulations apply the rules of control, commonly called control standards (Hołda-Wydrzyńska, 2019: 267-282; Dobaczewska, Wolska & Powalowski, 2019: 119-134), which should be respected by public administration authorities and controlled entrepreneurs.

Recognizing the importance of the ailments of the inspection activities in Polish legal system was introduced a special legal measure, i.e. opposition to control activities, which gives the trader the opportunity to oppose authorities that do not comply with the rules on control (art. 59 Ent Law). The procedure for filing this legal remedy is currently determined by the Act on Entrepreneurs Law, which has entered into force on 30.04.2018. It has to be underlined that, it is not a new regulation. Such a measure was already available to the entrepreneur under the Act of 2.07.2004 on Freedom of Business Activity (Journal of Law from 2004, No 173, pos. 1807, as amended). The Act of the Entrepreneurs Law has slightly refreshed and clarified the existing solutions (Krzal, 2019: 423). That legal instrument is being an independent legal protection measure, which serves the controlled entities to protect their rights violated in the course of inspection. To the matters not regulated by the Act, the regulations of the Polish Act of 14.06.1960 – the Code of Administrative Proceedings (Journal of Law from 1960, No 30, pos. 168, as amended) are applied accordingly (art. 59 (16) Ent Law).

The aim of the article is to present the terms and conditions of the independent legal protection of the entrepreneurs, which is the form of opposition to the taking up and pursuit of control activities by all inspection bodies.

II. OBJECTION PROCEEDING

The scope of the opposition's subject

The legal remedies which the controlled entities may raise in the course of the inspection procedure may, in principle, relate to three areas. Firstly, the findings of fact or law made by the inspection body. Secondly, the

legal classification of the established facts against the legal norm. Thirdly, the adequacy of audit recommendations to the findings or qualifications made (Borkowski, Chełmoński, Guziński, Kiczka, Kieres & Kocowski, 2004: 462). The objection covers primarily the first and second of the indicated areas of activity of the inspection body.

The legal institution of the right to object to control activities is a legal protection measure, an instrument that allows an entrepreneur to react in the situation of undertaking and conducting control activities in violation of the provisions regulating the rules and procedure of control of business activity (I GSK 698/11).

According to art. 59 Ent Law the subject of an objection can be incorrect actions undertaken by controlling entities which can regard:

1. infringement of the rules initiating a control referred to in art. 48-49 Ent Law;
2. violation of the ban to initiate the control activities against the requirement of the presence of the inspected person or a person authorised by him referred to art. 50 (1) and (5) Ent Law;
3. violation of the principle of time and place of inspection (art. 51 (1) Ent Law);
4. violation of the principle of simultaneously carry out a few controls at the same time (art. 54 (1) EntLaw);
5. exceeding the control time limit (art. 55 (1) and (2) Ent Law);
6. infringement of the prohibition on reassessment referred to in art. 58 Ent Law.

The objection is not admissible when the authority carries out an inspection on the basis of the rules art. 48 (11) point 2, art. 50 (2) point 2, art. 54 (1) point 2, art. 55 (2) point 2 and art. 62 Ent Law. In the literature such objections are called *quasi*-objections (Zalewski, 2011). Unfortunately, it is not clear what procedure should be accepted for deciding them, because there are no interpretive standard in the Entrepreneurs Law.

Enumerative indication of the catalogue of negligence does not fully cover the needs of the controlled entrepreneurs, although the scope of the objection has been extended in the light of previous regulations. It is assumed that negligence, which are not mentioned in the art. 59 Ent Law, can be raised during a control or in reservations to the control protocol, however, indicating them does not have influence on the ongoing control actions, especially suspending it (Mariański & Strzelec, 2012: 96).

Entitled subject

In the light of art. 59 Ent Law, the right to raise an opposition to control activities is only for strictly defined entities. The subject authorised to submit an objection is solely the entrepreneur (art. 59 (1) Ent Law), whose rights as a controlled entity have been infringed by inappropriate behavior of the control body. Such right is available only to the entrepreneur in respect of whom the control has been initiated, i.e. the one who has been formally recognized by the authority as the controlled entity (II SA/Bd 885/11).

In the Polish law, the notion of "an entrepreneur" is not uniformly understood. There are at least a dozen of legal acts that use this notion. However, in view of the need to establish the concept of undertaking for the purpose of the objection proceedings, it is reasonable to use the definition of the term "entrepreneur" adopted in the Act of Entrepreneurs Law. In accordance with the provisions an entrepreneur is a natural person, a legal person or an organizational unit which is not a legal person, to which a separate act grants legal capacity, whose is performing business activity. Entrepreneurs are also partners in a civil partnership within the scope of their business activity (art. 4 Ent Law).

Taking the above into consideration the opposition to control activities, as a legal instrument, allows an entrepreneur to react in the situation of undertaking and conducting control activities in violation of the provisions governing the principles and conditions of control of business activity.

Time limitation

The postulate raised on the grounds of the former act to introduce the possibility of submitting an objection within a time limit counted from the day the violation of existing standards occurred, was successfully taken into account under Entrepreneurs Law (Hołda-Wyrzyńska, 2013: 149-150). Nowadays, according to art. 59 (4) Ent Law an objection can be submitted within 3 working days from the date the control was initiated by the controlling entity or when the grounds for its submission were occurred. It should be noted, that submitting an objection is admissible only during the control process. Attempting to submit an objection before the control actions and after its completion should be deemed ineffective (I FSK 1532/10). An objection submitting after the end of an inspection has no legal effect as the inspection activities that have been completed cannot be stopped (II SA/Bd 885/11).

Referring to the rules for calculating the time limits under administrative procedure, it should be considered that the three-day period for lodging an objection does not include the day on which the inspection was initiated or the infringement has occurred. This means that the period for lodging an objection should be counted from the day following the occurrence of the above mentioned facts (art. 57 CAP).

It is unclear whether the deadline for objection can be reinstated, as referred to art. 58 CAP. In this respect can be identified two different positions. On the one hand, it is assumed that the provision of art. 58 CAP does not apply in the case of proceedings concerning the reinstatement of the deadline for filing an objection. In the judicature is emphasized that it is not possible to reinstate the time limit for lodging an objection, as the reference

in art. 59 (16) Ent Law concerns a narrow application of procedural provisions. In the opinion of the courts, it refers only to the examination of the objection and complaint against the order, but not to the phase of submitting the opposition as such (II OSK 1574/15). On the other hand, there were also presented opposite views, where it was emphasized that above mentioned statement is inadmissible because it deprives the trader of rights to protection his interests (Record of Ministry of Finance, 2009; I SA/Łd 1261/10).

Formal requirements

The adoption of the Act of Entrepreneurs Law has not changed anything in terms of the formal conditions of opposition. The objection should be submitted in writing to the entity initiating and carrying out the control. The act does not determine special requirements to the text of the objection except for justification for the application. Entrepreneurs must justify submitting an objection. Therefore, in the justification shall state the factual justification through indicating facts and evidence which where the foundation for creating the objection and the legal norms which were violated during the control process. The objection should include also at least: description of a person it comes from, indication of their address, demands and the signature of the submitting person (art. 63 par. 2-3 CAP).

The consequence of submitting an objection

The consequence of submitting an objection is the suspension of control activities and the running time of the control itself (art. 59 (5) Ent Law). Suspending control activities means ceasing to further undertake all of the activities connected with obtaining evidence during control. Suspending the running time of the control means that the planned date of completion of the inspection activities is postponed until the end of the opposition procedure.

In accordance with the regulation:

- the suspension of the inspection activities shall take place upon notification to the inspector of the submitting the objection and
- the suspension of the running time of the control take place upon the date on which the objection was lodged until the date of completion of the proceedings brought by its filing.

It is essential that the objection must be communicated to the controller. It should be accepted that suspending control activities and the course of control happens at the same time, i.e. at the moment of delivering to the controller the notification about submitting an objection to the controlling entity (Record of Ministry of Finance, 2009).

As regards the provisions concerning the date of cessation of the indicated results, they are more clear than under the Freedom of Business Activity Act. The continuation of control activities may take place from the date on which the decision on continuing the control activities made following the examination of the objection has become final, which takes place upon expiry of the period for lodging a complaint by the interested entrepreneur. In the case of a complaint lodged by an entrepreneur, the continuation of control activities may take place from the date on which the decision to maintain the contested decision was delivered to the entrepreneur (art. 59 (11) Ent Law).

Consideration of the objection

According to art. 59 (7) Ent Law the controlling entity processes the objection within 3 working days from the day of delivering the objection and issues a decision on: 1) withdrawing from control activities, thus accepting the validity of the objection or 2) continuing control activities, thus rendering the objection invalid. Additionally, the situation of so-called "silence" of the public administration entity was foreseen by polish legislator. Under art. 59 (8) Ent Law the silence of the entity regarding the decision about the objection is equal to issuing a decision accepting the validity of the submitted objection.

It is accepted that establishing short time for making a decision about an objection does not mean that within 3 working days the decision regarding the submitted objection should also be delivered (III SA/Wa 1494/09).

Securing evidence relating to the subject matter and scope of the control

During examining the objection the controlling entity issuing a provision may secure evidence related to the subject and scope of the control. Due to the possibility of securing the evidence, it is possible to prevent a possible destruction by an entrepreneur of evidence proving conducting business activity in breach of the law. Securing concerns documents, information, product samples and other data carriers if they are or can be evidence in the course of the control (art. 58 (6) Ent Law). This regulation introduces the rule of optionality of using this legal means. It is only authorisation of the controlling entity since here they have full discretion (Banasiński & Bychowska, 2010: 56).

This decision expires on the day following the date of delivery of the entrepreneur's decision on the submitted objection, and if the authority has not issued a decision within the statutory period - on the day following the day on which the deadline for the authority to consider the objection expired. The same is true if the entrepreneur has lodged a complaint (art. 59 (12-13) Ent Law).

Entrepreneur's complain

Thereafter, the decision about continuing control activities can be a subject of the entrepreneur's complain

(art. 59 (9) Ent Law). The complain may be lodged within 3 days after the day when the decision about the objection was delivered to the entrepreneur. Unlike with the objection there is no requirement to give reasons for the complaint. Here proper administrative proceedings regulations regarding complaints will apply.

The complaint is considered no later than 7 days from the day it was submitted. The appeal entity issues a decision where it can:

- sustain the decision which was the subject of the complaint by issuing a decision about continuation of control activities, or
- issue a decision about ceasing control activities.

Failure to consider the complaint within the statutory time limit shall be tantamount, in effect, to issuing an order for the annulment of the contested order and withdrawal of control activities.

If the entrepreneur makes a complaint, the continuation of control activities is possible from the date on which the decision on countering control activities was delivered to the entrepreneur. The current regulation dispels the doubts that appeared on the grounds of the earlier legal regulation (Hołda-Wyrzyńska, 2017: 259).

A complaint to the administrative court

On the grounds of the old regulation, there was a dispute concerning the possibility of appealing to the administrative court against the control authority's decision made under objection proceedings. Two opposing views were presented in the jurisprudence. The first view indicated that the entrepreneur has the right to complain the decision of a higher authority to the Voivodship Administrative Court (I SA/Wr 1352/12). The opposite view indicated that there is no right to appeal to the administrative court against the decision to continue control activities (II GPS 3/13; II GSK 120/12).

Generally, one of the characteristic features of broadly understood control proceedings is the exclusion of the application of the provisions of administrative proceedings in their scope. Thus, in principle, the control procedure is a separate proceedings from the administrative ones (VI SA/Wa 1471/11). It is understood that decisions taken in an inspection procedure, as they are not made in an administrative proceedings, do not give rise to the shaping of the powers or duties of the entity. It means that only after they have been issued powers or duties can be shaped (I OSK 1030/10).

Nevertheless, taking into consideration the constitutional right to court it should be assumed that the final decision made by the appeal entity may then be a subject of a complaint to the voivodship administrative court which controls the activities of public administration. Undoubtedly, limiting or excluding this rule on the basis of complaint procedure undermined the constitutional protection of values constituting the core of a democratic state of law. Recently, the Constitutional Court has also made a statement on this matter. It is noted that the lodging of an opposition results the initiation of proceedings to protect the rights of the trader. These proceedings should end with the issuance of a ruling and unilateral act. Thereafter it should be verified in the administrative course of the instance, and then subject to judicial and administrative control made by courts (SK 37/15).

Moreover, the provisions of the Polish Entrepreneurs Law provide for the possibility for the entrepreneur to lodge a complaint to the administrative court for excessive length of proceedings. In case of excessive length of control activities, after the provision referred to art. 59 (9) point 1 has been made, the entrepreneur may lodge a complaint to the administrative court against the excessive length of proceedings. Lodging a complaint does not cause the suspension of control activities (art. 59 (14) Ent Law) (Żywicka, 2019: 238).

The provisions of the Act of 30.08.2002 Law on Proceedings before Administrative Courts shall apply accordingly to the complaint referred to par. 14, concerning action for failure to act. Proceedings may be protracted if the authority does not deal with the case on time, the procedural activities undertaken by that authority do not follow the principle of speed and simplicity of proceedings, or are of an ostensible nature, not very important for the substantive settlement of the case (I SAB/Kr 10/14; II SAB/Wr 4/12).

III. CONCLUSION

The Entrepreneurs Law maintained the right to raise the opposition to control activities. Opposition is a specific measure to protect the rights of the trader. The trader is required to act swiftly and at the same time a control body is required to consider it quickly. Establishing short time for making a decision about an objection is aimed at disciplining controlling entities and assuring efficient control process.

The regulation existing under Act of Freedom of Business Activity was considered insufficient and ineffective, especially the issue of the time limits for raising the objection was assessed negatively. Previous regulation allowed to protect the interest of entrepreneurs only at the stage of initiating the control process. The change in the introduction of the possibility to raise an objection within a time limit counted from the day the violation of existing standards occurred should be evaluated positively.

Moreover, the recently reopened discourse on the right to lodge an objection has brought the expected changes, in particular, very important is the vote of the Constitutional Court, which allowed for an administrative judicial review of the complaint against the decision to continue the control. The current regulation allows to dispel

some doubts and make this instrument an effective tool for the protection of the interests affected. The change of regulation is more beneficial mainly from the point of view of improving the position of the entrepreneur in the control proceedings.

REFERENCES

1. Banasiński, C., Bychowska, M. (2010). *Kontrola przedsiębiorcy w świetle ustawy o swobodzie działalności gospodarczej*. Przegląd Prawa Handlowego, 1.
2. Borkowski, A., Chełmoński, A., Guziński, M., Kiczka, K., Kieres, L., Kocowski, T. (2004). *Administracyjne prawo gospodarcze*. Wrocław. Kolonia Limited.
3. Dobaczewska, A., Wolska, H., Powalowski, A. (2019). *Nowe prawo przedsiębiorcy*. Warszawa. Publishing House CH.Beck.
4. Hołda-Wydrzyńska, A. (2013). *Środki ochrony prawnej*. In R. Blicharz (Ed.), *Kontrola przedsiębiorcy*. Warszawa. Publishing House CeDeWu.
5. Hołda-Wydrzyńska, A. (2017). *Kontrola działalności gospodarczej*. In R. Blicharz (Ed.), *Przedsiębiorca. Zagadnienia wybrane*. Katowice. University of Silesia Publishing House.
6. Hołda-Wydrzyńska, A. (2019). *Zasady kontroli działalności gospodarczej w świetle nowego Prawa przedsiębiorców*. In. A. Lityński, A. Matan, M., Mikołajczyk, D., Nawrot, G., Nancka, A. (n.d.) *Verus amicus rara avis est. Studia poświęcone pamięci Wojciecha Organiściaka*. Katowice. University of Silesia Publishing House.
7. Krzał, K. (2019). *Komentarz do art. 59 Prawa Przedsiębiorców*. In A. Pietrzak (Ed.), *Prawo Przedsiębiorców. Komentarz*. Warszawa. Wolters Kluwer.
8. Mariański, A., Strzelec, D. (2012). *Aspekty kontroli podatkowej przedsiębiorców*. Warszawa. Wolters Kluwer.
9. Zalewski, D. (2011). *Sprzeciw na czynności kontrolne w orzecznictwie sądów administracyjnych*. Zeszyty Naukowe Sądownictwa Administracyjnego, 1.
10. Żywicka, A. (2019). *Komentarz do art. 59 Prawa Przedsiębiorców*. In. M. Wierzbowski (Ed.), *Konstytucja Biznesu. Komentarz*. Warszawa. Wolters Kluwer.
11. ***Journal of Law from 1960, No 30, pos. 168, as amended. Consolidated text Journal of Law from 2020, pos. 256. Further referred to as: CAP.
12. ***Journal of Law from 2004, No 173, pos. 1807, as amended. One of the fundamental changes to the previous rules of entrepreneurs control was made on 7 March 2009. The entrepreneurs were entitled to raise objections to the undertaking and carrying out actions by all control authorities. See Act of 19.12.2008 amending the Act on Freedom of Business Activity and certain other acts (Journal of Law 2009, No 18, pos. 97).
13. ***Journal of Law from 2018, pos. 646, as amended. Consolidated text Journal of Law from 2019, pos. 1292. Further referred to as: EntLaw or Entrepreneurs Law.
14. ***Judgement NSA 24.02.2017. II OSK 1574/15. Lex No 2283258.
15. ***Judgement NSA 4.10.2011. I FSK 1532/10. Lex No 1218167.
16. ***Judgement NSA 6.06.2012. I GSK 698/11. Lex No 1215510.
17. ***Judgement of Constitutional Court 20.12.2017. SK 37/15. OTK-A 2017/90.
18. ***Judgement WSA in Bydgoszcz 21.09.2011. II SA/Bd 885/11. Lex No 1152403.
19. ***Judgement WSA in Cracow 6.6.2014. I SAB/Kr 10/14. Lex No 1546690.
20. ***Judgement WSA in Łódź 11.01.2011. I SA/Łd 1261/10. Lex No 751475.
21. ***Judgement WSA in Warsaw 5.03.2010, III SA/Wa 1494/09. Lex No 577716.
22. ***Judgement WSA in Wrocław 17.01.2013. I SA/Wr 1352/12. Lex No 1274174
23. ***Judgement WSA in Wrocław 20.06. 2012. II SAB/Wr 4/12. Lex No 1385274.
24. ***Record of Ministry of Finance of 12.08.2009. PK4/8012/98/ZAP/09/703. Lex No 27384.
25. ***Resolution NSA 13.01.2014. II GPS 3/13. OSP 2014, No 7-8, item 69.
26. ***Resolution NSA 17.12.2010. I OSK 1030/10. Lex No 741496.
27. ***Resolution NSA 24.04.2012. II GSK 120/12. Lex No 1244512.
28. ***Resolution WSA in Warsaw 11.11.2011. VI SA/Wa 1471/11. Lex No 1161320.