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The Entrepreneur in the View of the Competition and Consumer Protection Act : Selected Issues

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THE ENTREPRENEUR IN THE VIEW OF THE COMPETITION AND CONSUMER PROTECTION ACT – SELECTED ISSUES

I. INTRODUCTORY COMMENTS

The Competition and Consumer Protection Act¹ entered into force on 21 April 2007 (hereinafter referred to as CCP Act²) and it brought in some changes in the definition of the entrepreneur, which actually constituted one of the most important factors determining the application of the act itself. However, the definition in question did not change dramatically compared to the legal status resulting from the Act of 15 December 2000 on competition and consumer protection³.

While introducing the CCP Act the legislator should have taken into account the motion to make the definition of the entrepreneur presented in the Competition and Consumer Protection Act as similar as possible to the one found in the Economic Freedom Act⁴. This motion, however, is not at odds at all with the idea of providing an exhaustive definition of the entrepreneur in the CCP Act so as to apply the act to all the business enterprises whose actions might influence competition behaviour on the market⁵.

II. THE ENTREPRENEUR AS VIEWED IN ARTICLE 4 ITEM 1 OF CCP ACT

The definition of the entrepreneur is found in article 4 item 1 of CCP Act and it includes the following business activity forms:

1) Entrepreneur as defined in the Economic Freedom Act and additionally:

¹ Act of 16 Feb 2007 on competition and consumer protection, Journal of Laws No 07.50.331 including amendments.

² A. Jurgowska, D. Miąsik, T. Skoczny, M. Szydło, *New Act of Competition and Consumer Protection of 2007 – another step to improve the basis of state and legal protection of competition in Poland*, Economic Legislation Review, issue 4, 2007.

³ Act of 15 Dec 2000 on competition and consumer protection, i.e. Journal of Laws No 05.244.2080 including amendments. Lost its power due to introduction of the Act of 16 Feb 2007 on competition and consumer protection on 21 April 2007.

⁴ Act of 2 July 2004 on the Economic Freedom, Journal of Laws No 04.173.1807 including amendments.

⁵ T. Skoczny, *Opinion on the bill on competition and consumer protection (the parliament working paper no. 1110)*, p. 3, <http://orka.sejm.gov.pl/rexdomk5.nsf/Opwsdr?OpenForm&1110>.

- 2) natural person, legal person, and an organisational unit which is not a legal person and is endowed with legal capacity by force of a separate Act, organising or rendering services of public utility nature, which are not business activity in the meaning of the Economic Freedom Act (article 4 item 1 letter a),
- 3) natural person exercising a profession on his own behalf and account or performing activity in the frame of exercising such a profession (article 4 item 1 letter b),
- 4) natural person who is having control, in the meaning of item 4, over at least one entrepreneur, even if not conducting business activity in the meaning of provisions on the Economic Freedom Act, provided that this person is undertaking further activities subject to control of concentration, referred to in article 13 (article 4 item 1 letter c),
- 5) association of entrepreneurs, in the meaning of item 2 – for the sake of the regulations concerning competition restricting practices and practices violating collective consumer interests (article 4 item 1 letter d).

The wording of the regulation in question might indicate that the business forms listed in article 4 item 1 letters a – d are not actually entrepreneurs in the meaning of the Economic Freedom Act. It is explicitly suggested by the expression “and additionally” used in article 4 item 1. Although this solution seems to be substantially right, it has not been carried out in a consequent way. As analysis of article 4 item 1 allows to conclude that to some extent business forms listed in article 4 item 1 letters a – d do fall into the definition of the entrepreneur as described in the Economic Freedom Act.

III. THE ENTREPRENEUR AS VIEWED BY ARTICLE 4 ITEM 1 LETTER B OF THE ECONOMIC FREEDOM ACT

According to the Economic Freedom Act article 4, the entrepreneur is a natural person, legal person, and an organisational entity which is not a legal person and is endowed with legal capability by a force of a separate Act – carrying on economic activity in their own name (section 1), and also partners in a civil partnerships to the extent of an economic activity conducted by them (section 2). In accordance with the Act in question (article 2), economic activity means a any profit-gaining activity in the fields of production, construction, commerce, services and in the prospecting for, exploration and extraction minerals from deposits, as well as professional activity carried on in an organised and uninterrupted manner.

At the same time in article 4 item 1 letter b of the CCP Act the legislator as entrepreneurs also mentions a natural person exercising a profession on his own behalf and account or performing activity in the frame of exercising such a profession. And as a matter of fact, the persons referred to in this regulation are already entrepreneurs in the light of the Economic Freedom Act. It should be itemed out that professional activity performed on one’s behalf and especially on one’s own account is actually economic activity as defined in the Economic Freedom Act which makes the person performing such an activity an entrepreneur also in the light of the CCP Act⁶.

⁶ M. Szydło, *New Act on Competition and Consumer Protection*, Law Monitor issue 12, 2007, p. 4.

However, if the activity is performed on behalf of somebody else like an employer and on their account, this is no longer a economic activity and therefore does not give this person the entrepreneur status⁷. This assumption complies both with article 4 of the Economic Freedom Act and article 4 item 1 letter b of CCP Act.

It also has to be stressed that the content of article 4 item 1 letter b of CCP Act was justified while the Law on Business Activity Act⁸ was in force. At that time, in accordance with some regulations, some freelance professions were refused the status of entrepreneurs. And so article 76 of the Law on Business Activity Act added to the Notary Law Act⁹ article 24a (not valid any longer) which read: „Notary is not an entrepreneur according to the provisions of the Law on Business Activity Act”. And article 87 section 1 (not valid any longer) of the Act in question stated that a person providing legal help is not an entrepreneur according to the provisions of the act, and the activity of legal counselling is regulated by the regulations of the Bar Act¹⁰ and the Legal Counselling Act¹¹. According to article 87 section 2 (no longer valid) of the Law on Business Activity Act, persons providing help with industrial ownership are not entrepreneurs in the light of the act of 11 April 2001. Neither is expert auditors due to the already invalid article 3 section 2 of the act of 13 October 1994 or physicians providing individual or associated medical care according to the invalid article 50 c of the act of 5 December 1996 on physician and dentist professions. Currently persons performing the above-mentioned professions i.e. notaries, legal counsellor, lawyers, patent agents, and physicians providing individual or associated medical care are all entrepreneurs in the light of the Economic Freedom Act. Therefore maintaining article 4 item 1 letter b of the CCP Act in its present form cannot be justified and repealing of this regulation should be considered in the nearest future.

IV. THE ENTREPRENEUR AS VIEWED BY ARTICLE 4 ITEM 1 SECTION A OF CCP ACT

By introducing the new act, the legislator also amended article 4 item 1 section a of CCP Act. The previously legally binding act as an entrepreneur considered a natural person, legal person, and an organisational unit without legal personality, organising or rendering services of public utility nature, which are not business activity in the meaning of provisions on business activity. At present the legislator has limited the group of organisational units which can be considered entrepreneurs in the light of the regulation in question to those which according to other acts were granted legal capacity. It means that organisational units with organisational structure regulated by the law which do not have legal capacity like the state budget or administration institutions¹² will not be able to become entrepreneurs as stipulated in article 4 item

⁷ C. Kosikowski, *The Economic Freedom Act. Comments*, LexisNexis, Warszawa 2006.

⁸ Act of 19 Nov 1999 on Law on Business Activity, Journal of Laws No 99.101.1178 including amendments).

⁹ Act of 14 Feb 1991 – Notary Law, Journal of Laws No 91.22.91 including amendments.

¹⁰ Act of 26 May 1982 – Barrister Law, Journal of Laws No 82.16.124 including amendments.

¹¹ Act of 6 July 1982 on Legal Counsellors, Journal of Laws No 82.19.145 including amendments.

¹² M. Szydło, *The Economic Freedom*, C.H. Beck Publishing, Warszawa 2005, p. 84.

1 letter a of CCP Act. For mainly practical reasons this solution should be regarded as needed and positive¹³.

Article 4 item 1 letter a of CCP Act considers as entrepreneurs the listed organisational units which organise or render services of public utility nature, which are not business activity in the meaning of the Economic Freedom Act. It means that the status of an entrepreneur shall obtain only the organisational unit which organises or renders services of public utility nature which are not business activity at the same time. However, according to:

- 1) article 2 item 4 of the Act on Communal Water Supply and Communal Sewage Disposal¹⁴ in the light of the Economic Freedom Act considers as a water and sewage handling company both an enterprise which performs business activity of communal water supply or communal sewage channelling and local district organisational units which are not a legal persons performing these services,
- 2) article 3 item 12 of the Energy Law Act¹⁵ considers as a power industry company any organisational unit performing business activity of producing, processing, storing, transferring or distributing fuels or energy or trading in them,
- 3) 1 of the Postal Law Act¹⁶ determines the letters of performing business activity of providing postal services nationwide and worldwide hereinafter referred to as “postal services”,
- 4) 2 item 27 of the Telecommunications Law Act¹⁷ considers as a telecommunications company an entrepreneur or other organisational unit entitled to perform business activity based on other regulations and which performs business activity of providing telecommunications network and other facilities or providing telecommunications services.

The above analysis shows that in most cases services of public utility nature at the same time constitute the subject of business activity. Therefore, we should sort out the legal basis of considering the body providing public utility services which are also business activity as an entrepreneur in the light of the CCP Act. Obviously, this legal basis is not article 4 item 1 letter a of CCP Act as it explicitly makes granting the status of an entrepreneur conditional on finding no possibility of categorising the given activity as business activity. As long as the given organisational unit provides public utility services, it will be considered an entrepreneur based on article 4 section 1 of the Economic Freedom Act because of a reference in the first sentence of article 4 item 1 of CCP Act. Regarding the organisational units “organising” public utility services which are business activity, it has to be itemed out that they are not entrepreneurs in the light of the Economic Freedom Act as the act requires actually performing business activity and not merely organising it. They are also not entrepreneurs in the light of the CCP Act as the relevant regulation allows granting the status only when the given public utility service cannot be qualified as busi-

¹³ M. Szydło, *New Act on Competition and Consumer Protection*, Law Monitor issue 12, 2007, p. 4.

¹⁴ Act of 7 July 2001 on Communal Water Supply and Sewage Disposal, Journal of Laws No 01.72.747 including amendments.

¹⁵ Act of 10 April 1997 – The Energy Law, Journal of Laws No 97.54.348 including amendments.

¹⁶ Act of 12 June 2003 Postal Services Law, Journal of Laws No 03.130.1188 including amendments,

¹⁷ Act of 21 July 2002 Telecommunications Law, Journal of Laws No 00.73.852 including amendments.

ness activity. As a result, it seems reasonable and justified to concur with the proposal put forward in the doctrine and amend the CCP Act so as to change the analysed wording to the following: “a natural person, legal person, and also any organisational unit without legal entity organising or providing public utility services including those which are not treated as business activity by the regulations concerning business activity”¹⁸.

V. THE ENTREPRENEUR AS VIEWED BY ARTICLE 4 ITEM 1 LETTER C OF CCP ACT

Crucial amendment was made to article 4 item 1 letter c of CCP Act. The previous act on competition and consumer protection of 2000 considered as an entrepreneur a natural person in possession of stocks or shares ensuring at least 25% of votes in organs of at least one entrepreneur or having control, in the meaning of item 13, over at least one entrepreneur, even if not conducting business activity in the meaning of business activity regulations, provided that this person is undertaking further activities subject to control of concentrations, referred to in Article 12. So it was a person in possession of a substantial but not control block of stocks or shares. At present as an entrepreneur is considered a natural person who has control, in the meaning of item 4, over at least one entrepreneur, even if not conducting business activity in the meaning of provisions on the Economic Freedom Act, provided that this person is undertaking further activities subject to control of concentration, referred to in Article 13. Therefore, the person in question cannot be regarded as an entrepreneur either in the light of article 4 item 1 letter a of CCP Act or article 4 item 1 letter b CCP Act¹⁹.

VI. THE ENTREPRENEUR AS VIEWED BY ARTICLE 4 ITEM 1 LETTER D OF CCP ACT

Regarding article 4 item 1 letter d of CCP Act it has to be said the legislator applied an inappropriate definition method assuming that an association of entrepreneurs is also an entrepreneur. The view presented by T. Skoczny seems to be worth considering as he suggests a more simple solution of applying to associations of entrepreneurs a ban on abusing dominating position or any practices violating collective consumer interests²⁰ by giving the relevant regulations the following form:

- 1) article 9 section 1 CCP Act: It is forbidden to abuse a dominant position on the given market by one or more entrepreneurs including associations of entrepreneurs,

¹⁸ M. Szydło, *Competition in Communal Activity in Water Supply and Sewage Disposal Services*, Local Government issue 6, 2003, p. 10–11).

¹⁹ Justification of the bill on competition and consumer protection [http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/\\$file/1110-uzas.doc](http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/$file/1110-uzas.doc).

²⁰ T. Skoczny, *Opinion on the bill on competition and consumer protection (parliament working paper no. 1110)*, page 4, <http://orka.sejm.gov.pl/rexdomk5.nsf/Opwsdr?OpenForm&1110>.

- 2) article 25 section 2 CCP Act: A practice violating collective consumer interests refers to illegal actions of an entrepreneur or associations of entrepreneurs affecting the collective consumer interests.

VII. CONCLUSIONS

It seems that the definition of an entrepreneur presented in the CCP Act should be as similar as possible to the one included in the Economic Freedom Act. This view can be supported by the fact that both of the legal acts in question belong to the same branch of law i.e. public economic law, and to public law in a broader approach. A thorough analysis of the term of entrepreneur as presented in article 4 item 1 indicates that while passing the bill the legislator did not take the opportunity to apply this idea. What is more, the legislator did not remove from article 4 item 1 all the inaccuracies addressed by the doctrine.

That being so, the following should be called for:

- 1) giving article 4 item 1 letter a CCP Act a new wording so as to avoid overlapping of this regulation with the first sentence of article 4 item 1 of CCP Act and also extending its application,
- 2) repealing article 4 item 1 letter b of CCP Act as the disposal of this regulation is fully included in the disposal of article 4 item 1 sentence one,
- 3) repealing article 4 item 1 letter d and implementing the above-mentioned amendments to article 9 sections 1 of CCP Act and article 25 sections 2 of CCP Act.