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UNDERTAKING, CONDUCTING AND TERMINATING ECONOMIC ACTIVITY IN POLAND

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Table of contents

Part 4

Legalisation of an economic activity

Part 5

Regulated economic activity

Part 6

Licensed economic activity

Part 9

Economic activity of foreign entities on the territory of the Republic of Poland

Part 10

Termination of economic activity

LIST OF ABBREVIATIONS

AFEA – Act of 2 July 2004 on Freedom of Economic Activity (consolidated text: Dz.U. of 2013, item 672 as amended)

ANCR – Act of 20 August 1997 on the National Court Register (consolidated text: Dz.U. of 2013, item 1203)

CCC – Act of 15 September 2000, the Code of Commercial Companies (consolidated text: Dz.U. of 2013, item 1030)

CEIDG – Central Registration and Information on Business

Dz.U. – Journal of Laws

EDG – Register of Economic Activity

EU – European Union

GUS – Central Statistical Office

KRS – National Court Register

NIP – Tax Identification Number

PCA – Polish Classification of Activities

REGON – National Official Register of National Economy Units

RP – Republic of Poland

SME – Micro, small, medium entrepreneurs

TFEU – Treaty on the Functioning of the European Union (Dz.U. of 2004, No 90, item 864/2 as amended)

ZUS – Social Insurance Institution

INTRODUCTION

Assuming that economy is based on entrepreneurs, it is worth noting that according to analyses of the European Commission[1], in Poland operate 1,480,984 entrepreneurs, including micro-businesspersons: 1,410,335 (95.2%), small businesspersons: 51,129 (3.5%), medium businesspersons 16,206 (1.1%) as well as 3,313 (0.2%) of the others. Those entrepreneurs employ 8,656,858 people; micro: 3,084,242 (35.6%), small: 1,130,418 (13.1%), medium: 1,692,622 (19.6%), the others: 2,784,576 (31.8%). Their income amounts 172 billion euros, of which 26 billion (15.2%) was generated by microentrepreneurs, 23 billion (13.2%) by small businesspeople, 38 billion (22.1%) by medium ones as well as 85 billion (49.5%) by the other entrepreneurs.

Analysing the group under investigation for the type of economic activity, it is possible to demonstrate that the highest percentage of entrepreneurs ran trading (commercial) businesses (29.5%), construction businesses were run by 13.4% of the overall number of entrepreneurs, professional, academic and technological: 11.2%, and industrial 10.7%.[2]

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1 See: Enterprise and Industry. 2013 The Small Business Act for Europe Fact Sheet. Poland –http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/countries-sheets/2013/poland_en.pdf , accessed, December 6, 2013.

2 According to the data of the Central Statistical Office, in 2011 in Poland 1,785 thousand entrepreneurs ran business activities (the data does not embrace the units classified according to the regulation of the Council of Ministers of 24 December 2007 on the Polish Classification of Activities (Dz.U. of 2007, No 251, item 1885 as amended), hereafter referred to as as PCA, to section A: Agriculture, forestry, hunting and fishing, K: Finance and insurance, O: Public administration and national defence, obligatory social security), among which micro and small entities dominated, constituting 98.9% of the whole population (microentreprises: 95.9%), whereas the share of medium and big entrepreneurs made, respectively, 0.9% and 0.2% of the whole, within which 92.0% of entrepreneurs were natural persons. Legal persons and entities with no legal personality made 8.0%. The entities under the scrutiny, according to the state of 31 December 2011, employed 9,028.5 thousadn people. Altogether, in small and medium businesses worked 6,336,5 thousand people, i.e. 70.2% of all employed in the sector of non-financial enterprises, of which 51.9% in small units (including microenterprises, 38.9%), medium ones 18.2%, big ones: 29.8%. The incomes of the business under investigation in 2011 were at the level of 3,666.4 billion zlotys. See: A. Platek (ed.), Działalność przedsiębiorstw niefinan-

This means that the subjective structure[3], the employment scale[4] as well as the share in the entrepreneurs' achieved income[5] in Poland are not far from the standard of the European Union and correspond with the average of the member states of the European Union. Nevertheless, it is difficult to state that Poland is among the leaders in this matter.

A similar assessment is present in the report "Doing Business 2014". The World Bank carrying out a complete analysis of legal conditions of running a business, classified Poland at the 45th position out of 189 states under scrutiny[6]. Among 28 member states of the European Union it is at the 17th position, ahead of, for example, Slovakia, the Czech Republic or Luxemburg.[7]

This fact was noted and positively commented on[8]. It is important to observe, however, that the report is based on ten variables, these beings: 1) starting a business: 116,[9] 2) dealing with construction permits: 88, 3) getting electricity: 137, 4) registering property: 54, 5) getting credit: 3, 6) protecting investors: 52, 7) paying taxes: 113, 8) trading across borders: 49, 9) enforcing contracts: 55, and 10) resolving insolvency: 37.

The number above demonstrate that, while in many cases the solutions functioning in Poland are assessed as correct, or even good, such questions as starting a business and paying taxes, which are often key issues for entrepreneurs (or entities interested in starting a business), were classified at 116th and 113th position. Undeniably,

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sowych w 2011 r., Warszawa 2013: information and statistical studiem of the Central Statistical Office: http//www.stat.gove.pl, accessed 6 December, 2013.

3 Micro, small and medium entrepreneurs constitute in the European Union respectively: 92.1%, 6.6%, 1.1% and 0.2% of all involved in economic activity.

4 In member states of EU micro, small, medium and the other (big) entrepreneurs employ, respectively: 28.7%, 20.4%, 17.3% and 33.5%.

5 In member states of EU, where micro, small, medium and the other (big) entrepreneurs achieved, respectively: 21.1%, 18.3%, 18.3% and 42.2% of income.

6 See: http://www.doingbusiness.org/rankings, accessed 6 December, 2013.

7 Among member states of EU Poland is ahead of Slovakia (49), Spain (52), Hungary (54), Bulgaria (58), Luxemburg (60), Italy (65), Greece (72), Romania (73), the Czech Republic (75), Croatia (89) and Malta (103). The states classified higher: Denmark (5), United Kingdom (10), Finland (12), Sweden (14), Ireland (15), Lithuania (17), Germany (21), Estonia (22), Latvia (24), the Netherlands (28), Austria (30), Portugal (31), Slovenia (33), Belgium (36), France (38) and Cyprus (39).

8 See: http://www.mg.gov.pl/node/19371 , accessed, December 6, 2013.

9 Placement of Poland in the ranking.

they are some of the poorest results among the member states of the European Union.[10] This low rating is justified foremost by the cost and formalities connected with legalising a business, as well as the number of tax burdens as well as the time of performing all obligations in this matter.

The causes may be also sought for in the fact that the legal situation of an entrepreneur in Poland is determined by an enormous number of regulatory acts. Approximately 900 acts of law as well as over 2,500 regulations issued on their basis refer to an entrepreneur in the context of rights and responsibilities connected with undertaing, conducting and terminating a business. Besides, it is important to say that this part of Polish law is difficult to define as clear and coherent, not mentioning gaps, contradictions, interpretative difficulties or controversial discrepancies between theory and practice. It is just the wide range and diversification between various sources that makes one of the basic challenges in its perception (legislation and application).[11]

Certainly, this situation is a consequence of several questions. Nevertheless, it clearly demonstrates that it is indispensable and necessary that the state take further actions towards the development and improvement of the state of Polish entrepreneurship.[12] They should definitely refer also to regulatory determinants of the functioning of entrepreneurship in Poland.

This publication is devoted to the rules of undertaing, conducting and terminating economic activity in Poland and discusses the following issues:

a) regulatory senses of the terms entrepreneur and economic activity as well as presenting the classification of entrepreneurs,

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10 As far as starting a business is concerned, among all member states being merely ahead of Austria (138), the Czech Republic (146), Spain (142), and Malta (161). Furthermore, in tax burdens: the Czech Republic (122), Hungary (124), Romania (134), Italy (138).

11 Consequently, the entity which wants to run a business in accordance with the binding law, or at least wants to avoid negative consequences resulting from failing to fulfil (or fulfilling wrongly) responsibilities vested in them, is forced to delegate the legal service to expert entities, or else, he becomes a perfect lawyer-practitioner himself. Certainly, none of these solutions is ideal for the entrepreneur, since it either generates extra expenses or consumes time and hinders to fully involve himself in the activity performed.

12 See: Raport Ministerstwa Gospodarki: Przedsiębiorczość w Polsce, Warszawa 2012 – http://www.mg.gov.pl , accessed, December 6, 2013.

b) the system of legalisation of economic activity based foremost on the Central Records and Information on Economic activity and the register of entrepreneurs (KRS),

c) basic obligations of entrepreneurs as well as prescripts and prohibitions binding the state (its authorities and institutions),

d) the range and forms of economic activity regulation

e) supervision of an entrepreneur's economic activity: basic rules and its subjective and objective scope as well as naming the inspecting authorities,

f) rules of starting and running a business by foreign entities on the territory of the Republic of Poland,

g) closing down a business as well as the institution of suspension (and resumption) of economic activity.

Part 1

ACT OF 2 JULY 2004 ON FREEDOM OF ECONOMIC ACTIVITY AS A FOUNDATION OF ENTREPRENEURS' RIGHTS IN POLAND

The starting point of this study is regulations of the Act of 2 July 2004 on Freedom of Economic activity.[1] This act is defined in the literature as, in a way, "Constitution of Economic activity",[2] because it plays a fundamental role in Polish law, it realizes the idea of economic freedom deciding on questions overriding for relations between the state and the entrepreneur and economic activity.

The importance of AFEA is demonstrated in Article 1, which states that this act of law constitutes basic and universal principles addressed to all entrepreneurs, as well as the State and its authorities.[3] Within this scope it contains provisions important for the whole legal system: a) provides the regulatory substance for the terms: economic activity and entrepreneur, b) introduces the EU categorization of entrepreneurs based on the economic value of the business, c) defines a catalogue of general conditions of undertaing, conducting and terminating a business, d) identifies forms of the regulation of economic activity, e) introduces rules of control of an entrepreneur's economic activity, f) specifies the rules of starting and running a business by foreign entities on the territory of the Republic of Poland, as well as g) obligations binding

1 Act of 2 July 2004 on Freedom of Economic activity (consolidated text: Dz.U. of 2013, item 672 as amended), hereafter referred to as AFEA.

2 C. Kosikowski, Ustawa o swobodzie działalności gospodarczej. Komentarz. Warszawa 2013, p. 90–10.

3 In accordance with Article 1 of AFEA the law „regulates undertaing, conducting and terminating economic activity on the territory of the Republic of Poland as well as the work of authorities in this respect".

the state (its authorities and institutions) towards the entrepreneur and economic activity.

Simultaneously, it is important to underscore to substantial issues.

First of all, the fact that AFEA is not a so-called economic code. It does not decide on everything in a comprehensive and complete way, since it was not prepared for this purpose. AFEA is a "constitution of economic activity", because like the Constitution, it decides on the most important questions concerning the entrepreneur and economic activity. Thereby it constitutes a foundation, lex generis, for nearly 900 other acts of Polish law, which specify in details or complete its provisions referring to, for example, organisational and legal forms of economic activity, public law burdens connected with economic activity, or relations employer-employee.

It is not without importance that AFEA is not an ideal regulation. This result foremost from the fact that the provisions of this law are not complete and require complementing, and the legislator's imprecision, frequently observed, provokes interpretative difficulties and controversies often concerning key and paramount issues.

Secondly, it is important to note that AFEA is a third act of this type.

The first basic act of law intervening in the economic system after the end of World War II was the Act of 23 December 1988 on Economic activity (Dz.U. of 1988, No. 41, item 324). This law, entering into force on 1 January 1989, played a key role in the first period of building free market economy; it gave rise of the change of the economic system, replaced planned economy (controlled by directives) with market economy, changed the role of the government (state) and forms of its operating, and, finally, introduced a real economic freedom, whereby opened the prospect of international integration of the Republic of Poland. However, for over a decade of its validity there appeared new problems and new priorities, in face of which it became blatantly anachronistic.[4]

4 It was necessary to adjust economic law to the provisions of the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. of 1997, No 78, item 483 as amended). Not without an im-

Unquestionably the order then existent should be standardized and complement with indispensable issues, and somewhat by the way the solutions which caused interpretative difficulties should be modified or eliminated. The act that replaced the Act on Economic activity of 1988 was the Act of 19 November 1999: Law of Economic activity (Dz.U. of 1999, No. 101, item 1178 as amended). The date of its coming into force was correlated with the Act on the National Court Register[5] as well as the Code of Commercial Companies[6] for 1 January 2001. This fact resulted from an assumption that only introducing a comprehensive regulation would guarantee practical implementation of the reform of principles of economic activity legalization, fundamental for socio-economic relations, whose basic objective was to create standardized and transparent rules of registering businesses, regulating the question of the status of entrepreneur as well as consolidation of the rights of entrepreneurs, and thereby putting the system of national law in this respect in order. A fundamental reform was necessary immediately but its practical implementation required appropriate preparations in both legal and institutional spheres.

In accordance with the legislator's intention, the Law of Economic Activity of 1999 made new frames for economic freedom in Poland. It determined its limits through defining basic rules of starting and running economic activity as well as tasks of government administration and local government authorities in this respect. It was a modern act of law, comprehensively regulating the problems in point, in accordance with the Constitution of 1997, coherent with the provisions of other laws and harmonized with EU law.

This law was valid only till 2004. For foremost the necessity of subsequent reforms referring to the rules of undertaing, conducting and

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past were also international obligations resulting from RP joining the World Trade Organization (WTO), the Organization for Economic Co-operation and Development (OECD), and particularly the European Association Agreement signed in Brussels on 16 December 1991 establishing association between the Republic of Poland on the one part, and the European Communities and their Member States on the other, prepared in Brussels on 16 December 1991 (Dz.U. of 1994, No 11, item 38).

5 Act of 20 August 1997 on the National Court Register (consolidated text Dz.U. of 2013, item 1203), hereafter ANCR.

6 Act of 15 September 2000, the Code of Commercial Companies (consolidated text: Dz.U. of 2013, item 1030), hereafter CCC.

terminating an economic activity, which would be in compliance with the adopted model of EU member states, it was practically all replaced with AFEA.[7]

7 For more see: M. Etel, Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym, Warszawa 2012, p. 143–170 as well as the literature listed there.

Part 2

ENTREPRENEUR IN POLISH LAW

1. Introductory remarks: categories of entrepreneurs (businesspeople)

From the regulatory point of view entrepreneurs are an extremely large group, which cannot be perceived homogeneously. Adopting a certain relevant quality they may be diversified[1]:

1) according to the scope of entities: a) natural persons, b) legal persons, c) organizational unites not being legal persons but endowed with a legal power by another law;
2) according to the object of entrepreneurs' activities: a) running an economic activity, b) performing professional activities as businesspeople (for example: liberal professions);
3) according to the origins of the entrepreneur's capital: a) private, b) public, c) mixed (public-private);
4) on the basis of domicile (the place of permanent residence or citizenship, the place of the headquarters or the principal center of activity): a) domestic, b) foreign;
5) according to the organizational and legal form of an economic activity: a) acting in the forms strictly determined by law, b) not acting in the forms strictly determined by law (e.g. an economic activity of a natural person performed as the so-called self-employment exclusively on the basis of a record in the CEIDG);

1 For more see: C. Kosikowski, Publiczne prawo gospodarcze Polski i Unii Europejskiej, Warszawa 2010, p. 234–235.

6) according to the number of entities running a business: a) one-person, b) collective;
7) according to the way of obtaining the status of entrepreneur: a) recognized as entrepreneurs because of running a business, b) recognized ex lege as entrepreneurs (regardless of the nature of the activity really performed);
8) according to the purpose of running an economic activity: a) business is a basic goal, b) an economic activity is a side or auxiliary goal, c) the goal is not an economic activity;
9) according to the economic size of the enterprise: a) micro businesspeople, b) small businesspeople, c) medium businesspeople, d) big businesspeople;
10) according to connection with other participants in the market: a) dependent entrepreneurs, b) affiliated companies, c) independent entrepreneurs.

Besides it is important that the significance and effects of particular categorizations go beyond doctrinal considerations but are connected with a diversified catalogue of their responsibilities and entitlements, as well as the state's means of affecting entrepreneurs. It is also important to underscore that no all categories of entrepreneurs are perceived normatively.

2. Definition of the term entrepreneur (according to AFEA)

2.1 General remarks: definitions of the terms entrepreneur and business in the system of Polish law

Entrepreneur is identified in Polish law in Article 4 item 1 AFEA. In accordance with this regulation an entrepreneur is:

1) a natural person
2) a legal person
3) an organizational unit not being a legal person, to which a separate law attributes legal capacity

– exercising an economic activity on its own behalf.

It is characteristic that AFEA identifies an entrepreneur pointing out his relevant qualities: conditions: subjective, objective and functional combined (cumulatively) determine such a classification of the entity.[2]

The first of the conditions (subjective) determines the categories of entities which can recognised as entrepreneurs. They are exclusively natural persons, legal persons and organizational units of no legal personality to which another law attributes legal capacity (they are entrepreneurs insofar as they exercise an economic activity on their own behalf).

The objective condition characterizing the activity of an "entrepreneur" is a reference to an economic activity in the sense of Article 2 of AFEA.

Besides, it is worth noting that as far as an economic activity is an element indispensable for identifying an entrepreneur, it does not always determines such a classification. Thereby the assumption that an entrepreneur is anybody exercising an economic activity is not in accordance with the definition formulated in Article 4 of AFEA. This question is accurately presented in case-law, which states that the term an economic activity and the person exercising it (or entrepreneurs) have no homogeneous legal meaning, since the term an economic activity is semantically larger than the term entrepreneur.[3]

The last of the conditions (functional) constitutes an important complementation of the others. It reserves that an entrepreneur is only such a natural person, a legal person or a non-corporate organizational unit with legal capacity under provisions of a separate Act, conducting economic activity on its own behalf.

It is important to underscore that AFEA identifies entrepreneur and the object of his activity (or business) in the form of legal definitions.

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2 C. Banasiński, K. Glibowski, H. Gronkiewicz-Waltz, K. Jaroszyński, R. Kaszubski, M. Wierzbowski, Prawo gospodarcze. Zagadnienia administracyjnoprawne, Warszawa 2009, p. 216.

3 The Judgment of the Supreme Court of 12 May 2005, I UK 258/04, Lex No 171435, the Judgment of the Supreme Administrative Court in Warsaw of 18 August 2005, Lex No 20979.

This fact is quite significant for the theory of law emphasises certain consequences of defining in law.

Specifically determined conditions and effects of their introduction, fundamental rules of formulating, ways of editing, as well as the scope of binding of regulatory definitions guarantee a correct structure of the whole legal system. Moreover, legal definitions should be also perceived as one of the basic assumptions of correct law application: in the area of interpretation (language) they are attributed with a rank of priority and fundamental directive.[4]

The aforesaid refers to all legal definitions, including those in Article 2 and Article 4 of AFEA. On the other hand, a specific property of the definition of an economic activity and entrepreneur formulated in AFEA is the fact that they were created as supreme definitions of systemic importance. This statement is confirmed by the structure and objectives of defining, the evolution of the notions which occurred in Polish law, as well as the fact that they were recorded in AFEA, which is defined as a kind of "constitution for an economic activity".[5]

Thus, they are of priority and decisive importance but in practice they do not always play their role. Their interpretation is not unequivocal and undoubted. The meaning of these terms, foremost particular relevant qualities, although generally established in the doctrine and case law, is still discussed and raises doubts.[6]

However, problems with the identification of entrepreneur and an economic activity do not result from the insufficiently defined nature of the criteria adopted in Article 2 and Article 4 AFEA exclusively. An important additional source of complication is, constituted in Polish law, subjective and objective exceptions, as the consequence of which one can not be an entrepreneur despite exercising an economic activity,

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4 For more see: M.Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 35–75.

5 For more see: M. Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 143–170.

6 It is worth noting that economic activity and entrepreneur are so semetically divergent that economic activity does not determine the classification but makes exclusively one of many elements, which combined Defie entrepreneur in the understanding of Article 4 AFEA. It seems accurate to state that the sense of the terms entrepreneur and economic activity in Polish law has not been recognized as ultimately decided on and closed.

or due to the fact that the activity corresponding with the qualities of an economic activity was ex lege excluded from this category.

We can similarly perceive also the faulty constructed system of legalization of an economic activity, which frequently classify as entrepreneurs entities not exercising an economic activity, or reversely, this status is refused to entities conducting economic activities on their own behalf.[7]

Moreover, a clear identification of entrepreneur and an economic activity hinders the parallel functioning of many definitions of these terms: in Polish law there exist over 30 legal definitions giving the notions in question different meanings.

Besides, it is important to emphasize that different definitions were originated ad hoc, for the needs of a particular act of law or, alternatively, to enable to implement a particular group of regulations, and the reason for their constituting was the fact that the sense of the terms adopted in AFEA did not always met current need of the legislator or practice. This means that they are proper in this scope exclusively, and their aim is not a systemic (general) identification of an economic activity and entrepreneur. Nevertheless, such practice is unacceptable, and giving the same terms different meanings is a legislative technique excluding a "rational legislator". Consequently, separate definitions make the national law system incoherent and internally contradictory. They seriously impede or even make it impossible to identify an economic activity and an entrepreneur.[8]

2.2. Activity of an entrepreneur: an economic activity conducted on one's own behalf

In accordance with Article 2 AFEA "Economic activity includes profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identifying and mining of minerals in deposits, as well as professional activity conducted in an organised and continuous fashion."

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7 For more see: M.Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 171–273.

8 For more see: M.Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 274–354.

Analyzing the content of the legal definition quoted above, it is not difficult to note that meaning of economic activity in Polish law is formed through determining its relevant qualities distinguishing it from other types and forms of activity. They are:

1) economic classification of activity,
2) profit-making purpose of activity,
3) professional nature,
4) way of exercising taking into consideration organization and frequency of the activity.[9]

It is important to emphasize that the aforementioned determiners of economic activity do do not determine directly any particular type of activity clearly establishing its economic nature (or excluding such a classification). This results from the fact that the meaning of the term was formulated openly and, in a way, generally. Such a structure is to guarantee universalism and enable to assess the economic dimension of each type of activity.

The solutions adopted should be assessed positively, since other legislative actions, consisting in, among other things, an attempt at constructing a closed catalogue of activities recognized as an economic activity, would not be rational. It is impossible, however, to dismiss the fact that the meaning formulated in such an universal way may provoke several interpretative difficulties. Therefore, the definition in Article 2 AFEA should be interpreted in compliance with four superior rules. First, the activity is an economic activity and should be identified as such, when it corresponds cumulatively (jointly) all the premises of Article 2 AFEA. Second, every activity should be evaluated individually verifying particular actual circumstances corresponding or not to the attributes of an economic activity. Third, economic activity is a fact and objective category and therefore it cannot and it does not matter that an entity conducting a particular activity is defined; it

9 Economic activity is perceived in this way also in case-law; see: the Resolution of the Supreme Court of 6 December 1991, III CZP 117/91, Lex No 3709. The decision of the Supreme Court of 19 October 1999, III CZ 112/99, Lex No. 38861, the Judgment of the Supreme Administrative Court in Warsaw of 28 January 1998, II SA 1426/97, Lex No 43197, the Resolution of the Supreme Court of 18 June 1991, III CZP 40/91, Lex No 3682; the Resolution of the Supreme Court of 6 December 1991, III CZP 117/91, Lex No 3709.

does not assess it (subjectively) as an economic activity. Fourth, the essence of particular criteria is far from the sense attributed to them in the everyday language, which means that particular relevant qualities should be read according to their understanding formed in the doctrine and judicial decisions.[10]

Article 2 of AFEA provides that "an economic activity is an activity involving manufacturing, construction, trade, services as well as exploration, detection and extraction of minerals from deposits." The enumeration quoted is interpreted as a criterion of the economic classification of activities, whose fundamental objective is binding with an assumption that an economic activity is an activity in economic dimension (usually in one of the forms enumerated).

For the correct interpretation of this criterion it is important to reserve that treating the listed types of activity as an economic activity ex lege is not acceptable. They may be identified as such only when they simultaneously correspond with the remaining qualities determined in Article 2 AFEA.[11]

Moreover it is possible to state that the criterion of the economic classification of activity is merely a first, initial, stage and in truth does not determine the identification of an economic activity. The enumeration is vague enough to use it in practice – identifying an activity in relation with the state and its authorities (for example, legalizing an economic activity) the expressions of Article 2 AFEA are not applied but the nomenclature of the Polish Classification of Activity (PCA).[12] Moreover, it is not closed but only gives such an impression including all types of activity commonly identified with an economic activity – it is difficult to point at a domain of activity which would not be included in any of the definitions mentioned, but it is not possible. Thereby if an

10 See: the Judgment of the Supreme Administrative Court in Łódź of 12 May 1994, SA/Łd 36/93, Lex No 28621; the Judgment of the Supreme Administrative Court in Łódź of 2 December 1994, SA/Łd 74/94, Lex No 26531; the Decision of the Supreme Court of 19 October 1999, III CZ 112/99, OSP 2000, No 10, item 143, Lex No 38861.

11 The Judgment of the Provincial Administrative Court in Poznań of 13 December 2007, III SA/Po 665/07, Lex No 493211.

12 For more on connections and relations of PCA with international classifications see: an appendix to the Regulation of the Council of Ministers of 24 December 2007 on the Polish Classification of Activity (Dz.U. No 251, item 1885 as amended).

activity simultaneously exceeding the enumeration in Article 2 AFEA corresponds with the remaining relevant qualities it should be classified as an economic activity.[13]

An important criterion identifying an economic activity is its goal: Article 2 AFEA states directly that "economic activity is a profit-making activity". In the basic understanding the profit-making goal of an economic activity is interpreted as a directional indication, reduced to an assumption that the aim of the entity (entrepreneur) is to gain or to maximize profits from its conducting; thus, in its essence it refers to the goal of the activity and not to its result.[14]

However the necessity of an objective assessment of particular premises in Article 2 AFEA provokes an important problem: Is it possible to identify a (profit-making) goal of the activity not referring to the subjective opinion of the performing entity (especially it refers to the situation where the economic activity is carried out without meeting legalizing obligations). This doubt has been solved in judicature, according to which it is justified to assume a profit-making intention on the basis of the potential capacity of the activity to augment profits – if it is capable of generating income or generates income, it can be acknowledged that this is the fundamental purpose of its conducting.[15] Alternatively, the profit-making purpose of the activity may be decided on on the basis of the analysis of all activities of the entity, including the economic rationality of the decisions taken in reference to the activity performed: a commercial intention may be testified by participation in economic exchange understood as: using a certain mark, possessing premises, a registered office, a place of business, advertising, marks of goods and services introduced to the exchange or other elements determining the material organization of the activity.[16]

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13 See: the resolution of the Supreme Court of 6 December 1991, III CZP 117/91, Lex No 3709.

14 See: the Judgment of the Supreme Administrative Court in Warsaw of 26 September 2008, II PSK 789/07, Lex No 495147

15 Compare the Judgment of the Provincial Administrative Court in Gliwice of 7 April 2008, IV SA/G1 1157/07, Lex No 519071.

16 See: the resolution of the Supreme Court of 6 December 1991, III CZP 117/91, Lex No 3709.

It is also worth emphasizing that profit-makingness should not be identified with a charge. The occurrence of a charge may confirm the commercial intentions of the activity, but it is not a rule, because in many cases it may not occur at all. Consequently, the lack of profit, or even a loss, does not make it impossible to treat the activity as an economic activity. Thus, even if the activity fails to bring profits, it does not cease to be an economic activity.[17] Simultaneously, it is important to remember that not every profit and not every charge determines the economic nature of the activity. Otherwise, a great number of doubts would arise while qualifying as economic the following activities: science, art, composing, which can be chargeable and sometimes generates a one-off or even permanent profit. They are not, however, activities aimed at profit, and, what is important, they are carried out outside the commercial exchange.[18]

On the other hand, it is commonly recognized that activities, which aim at satisfying exclusively one's own needs, for example amateur fishing and hunting, manufacturing, services or construction for one's own needs, or else managing one's own property, are of no profit-making nature.[19]

Another criterion of identification of economic activity is its professional nature. In accordance with Article 2 AFEA, "economic activity is professional activity". The sense of this premise is also not free from doubt, since this quality may be read in two ways.

First, interpreted generally it enacts a presumption that economic activity is a professional activity. This means that by assumption it is performed professionally or is based on practical skills, theoretical knowledge and professional experience. The entity conducting an economic activity is thus a professional in this respect and we may require due diligence from him. The quality of professionalism in this

17 The resolution of the Supreme Court of 30 November 1992, III CZP 134/92, Lex No 3850.

18 C. Kosikowski, Ustawa..., *op. cit.,* p. 30–31; Compare: the resolution of the Supreme Court of 30 November 1992, III CZP 134/92, Lex No 3850.

19 C. Kosikowski, Ustawa..., *op. cit.,* p. 30; A. Powałowski (ed.), Ustawa o swobodzie działalności gospodarczej. Komentarz, Warszawa 2007, p. 27.

sense characterizes every economic activity with no exception, since every economic activity has to be a professional activity.[20]

Second, interpreted for functionality it refers to the activity of the so-called liberal professions.[21] Thus, it concerns the question of identification of this special type of activity[22] as economic activity, and the entities conducting it as entrepreneurs. The issue, foremost for the unclear normative regulation, has been widely discussed and arisen a great number of controversies. However, in the current legal order this problem seems solved: representatives of liberal professions are entrepreneurs, if the activity conducted by them (on their own behalf) is characterized by the qualities determined in Article 2 AFEA.[23]

The legal definition of economic activity also expresses the special way of its conducting including its organization and frequency: in accordance with the wording of Article 2 AFEA: "economic activity is activity conducted in an organized and continuous fashion". The legislator's idea was to create a conviction that we should not regard as an economic activity the activity which is of random nature (one-off or incidental) and is not organized, even despite the fact that it brings profit to the entity. This concerns, for example, activities carried out within the framework of neighborly or peer help, or else within the framework of the so-called acts of politeness, even if their performance is chargeable.[24]

While interpreting the way of proper conducting an economic activity one should take into consideration the fact that both determinants, organization and continuity, should be applied jointly because only jointly they render the nature of economic activity. It

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20 C. Kosikowski, Ustawa..., *op. cit.,* p. 34; W.J. Katner, Prawo działalności gospodarczej. Komentarz. Orzecznictwo. Piśmiennictwo, Warszawa 2003, p. 26–29.

21 Professions such as: lawyer, pharmacist, architect, construction engineer, expert auditor, insurance broker, tax accountant, stockbroker, investment advisor, accountant, physician, dentist, veterinarian, notary, nurse, midwife, property manager, solicitor, patent agent, valuer and sworn translator/interpreter.

22 Activity in this scope is characterized by several relevant qualities, these being, for example, regulated nature, personal participation, qualified education, established methods and organizational forms of exercising the profession, professional independence, professional ethos, remuneration, professional secret, corporate self-governing and liability; for more see: J. Jacyszyn, Wykonywanie wolnych zawodów w Polsce, Warszawa 2004, p. 38–107.

23 C. Kosikowski, Ustawa..., *op. cit.,* p. 35

24 C. Kosikowski, Ustawa..., *op. cit.,* p. 32.

concerns particularly continuity, which because of a great number of exceptions does not constitute an intrinsic quality on the basis of which it is possible to clearly identify economic activity.[25]

The organization of economic activity may be perceived on a formal plane and a material plane.[26] In the former case the organization of economic activity is (formally) determined by performing basic obligations concerning legalization of the activity, i.e. an entry in the register of economic activity or the register of entrepreneurs (National Court Register),[27] identification or updating registration for tax purposes, registration for the purposes of social insurance as well as statistical registration. In the case of some types of business it is also obtaining a license, permit or approval, or an entry in the register of regulated activity. Moreover, also the legal form (freely chosen or imposed organizational and legal form) opening a bank account may determine the formal organization. Each of these actions confirms the fact of the organization of economic activity, for it formalizes the activity in a certain way, adopting it to rigors and standards determined by the provisions of law.[28] On the other hand, it the latter case, the organization (materially) of economic activity is confirmed by capital, premises (office, room, workshop), machines and technologies, exclusive rights, know-how, employees, the mark of the place of running the business, headquarters, performing entity, goods or services offered, advertising, website etc.[29]

It is also worth remembering that the organization of economic activity may be determined by both formal and material elements, which means that the lack of formal organization does not exclude the classification as an economic activity, which has attributes of material organization.[30]

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25 L. Kieres (ed.), Nowe problemy badawcze w teorii publicznego prawa gospodarczego (z uwzględnieniem samorządu terytorialnego), Wrocław 2010, p. 257.

26 M. Szydło, Swoboda działalności gospodarczej, Warszawa 2005, p. 47.

27 See: the Judgment of the Supreme Court of 11 October 1996, III RN 4/96, Lex No 28627.

28 C. Kosikowski, Ustawa..., *op. cit.,* p. 31–32

29 See: the Judgment of the Supreme Administrative Court in Łódź of 10 February 2003, I SA/Łd 603/01, Lex No 79401.

30 The Judgment of the Supreme Administrative Court in Warsaw of 26 September 2008, II FSK 789/07, Lex No 495147; See: L.Kieres (ed.), Nowe problemy badawcze..., *op. cit.,* p. 256

The continuity, on the other hand, is to testify a relatively permanent intention of performing an economic activity.[31] Besides, it is important to explain that this relatively permanent intention should not be perceived in a time dimension (e.g. day, week, month or year) but should be identified with regularity, repetitiveness, frequency and persistency of the economic activity.[32] As A. Walaszek-Pyzioł observes, it is important that the entity aiming at regular and cyclic profits repeats the actions being components of his activity.[33]

The goal of the "continuity" as a criterion determining economic activity is eliminating from this category actions of a sporadic, temporary, occasional or incidental nature. Thus it is an essential quality and its emphasizing should be regarded as justified.[34] Simultaneously, the literature and judicature observes that "continuity" is not contradicted by business performed seasonally only, or until the time of achieving the goal assumed by the entity, and even a one-off action may be recognized as an economic activity.[35]

Simultaneously, it is important not to forget about the functional reservation formulated in Article 4 AFEA. This provision establishes directly that an entrepreneur is only such a natural person, a legal person or a non-corporate organizational entity with legal capacity under provisions of a separate law conducting economic activity acts on its own behalf.

The condition "on one's own behalf", by rule, embraces acting for one's own account, and means the entity bearing economic risk: direct liability for any decisions taken within the framework of (own) activity

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31 C. Kosikowski, Ustawa..., *op. cit.,* p. 32.

32 See: J. Odachowski, Ciągłość działalności gospodarczej, „Glosa" 2003, No 9, p. 31–32; See: the Judgment of the Supreme Administrative Court in Warsaw of 14 July 2005, FSK 1971/04, Lex No 173219.

33 A. Walaszek-Pyzioł, Status prawny przedsiębiorcy w świetle projektu ustawy – Prawo działalności gospodarczej, „Przegląd Ustawodawstwa Gospodarczego" 1999, No 5, p. 4.

34 W.J. Katner, Prawo działalności..., *op. cit.,* p. 23; See: the Judgment of the Supreme Administrative Court of 17 September 1997, II SA 1089/96, Lex No.31312.

35 See: the Judgment of the Supreme Court of 4 January 2008, I UK 208/07, Lex No 442841; the Judgment of the Supreme Court of 21 February 2007, I CSK 450/06, Lex No 274205; the Judgment of the Provincial Administrative Court in Warsaw of 28 January 2009, VII SA?Wa 1374/08, Lex No. 489317; the Decision of the Supreme Court of 17 July 2003, II UK 111/03, Lex No. 79921; the Judgment of the Supreme Court of 11 October 1996, III RN 4/96, Lex No 28627.

and their consequences, particularly in the form of financial results and obligation of a private and public law nature.[36]

Thereby it eliminates from the category of entrepreneurs entities which do not act "on their own behalf", even when their activity may be identified with economic activity. This concerns employees (acting on behalf of and in favor of their employer), agents (proxies), authorities of legal persons, authorities of commercial partnerships, partners of commercial partnerships and companies, trustees in bankruptcy and liquidators, or else, branches, subsidiaries and agencies acting on behalf and for an account of another entity (e.g. employer, foreign entrepreneur, legal person, organizational unit with no legal personality endowed with legal capacity by another law).[37]

It is also worth underscoring that the expression "on one's own behalf" does not mean that economic activity must be carried out personally, for an entrepreneur is an entity on whose behalf and for whose account the economic activity, or, alternatively, its particular components are conducted. A personal participation of this entity in the performing the activity is of no serious importance.[38]

2.3. Natural persons, legal persons and non-corporate organisational unitsas entrepreneurs

Article 4 AFEA specifies the subjective range of the term entrepreneur. According to this provision extremely different categories of entities may be classified as entrepreneurs:

a) natural persons

b) legal persons and

c) organizational units not being legal persons, to which a separate law grants legal capacity.

36 C. Kosikowski, Ustawa..., *op. cit.,* p. 54.

37 C. Banasiński, K. Glibowski, H. Gronkiewicz-Waltz, K. Jaroszyński, R. Kaszubski, M. Wierzbowski, Prawo gospodarcze. Zagadnienia..., *op. cit.,* p. 228–229.

38 It is important to remember, however, that personal performance and personal participation are regarded as a fundamental relevant quality distinguishing the activity of so-called liberal professions.

As to natural persons, it is important to say that the only person entitled to conduct economic activity on his own behalf is a natural person with full capacity for legal actions. Thereby an entrepreneur may be exclusively an adult and not incapacitated person, of course if he runs a business on his own behalf.[39]

Legal persons acting as entrepreneurs make a very large and heterogeneous group. In this category the following may be counted:

- Treasury and local government units,
- commercial companies (limited liability companies, joint stock companies, including companies belonging to the Treasury or local government units),
- government (state) enterprises,
- state banks not being joint stock companies,
- research institutes,
- cooperatives,
- mutual insurance companies,
- associations,
- foundations,
- trade unions,
- religious associations,
- organizations of economic or trade/professional self-government
- community organizations endowed with legal capacity,
- European companies,
- European cooperatives,
- European Economic Interest Grouping,
- universities and colleges,
- sport joint stock companies.

39 See: M. Etel, Pojęcie przedsiębiorcy..., *op. cit.*, p. 206–209 and the literature and judicature listed there.

The entities listed above may be treated as entrepreneurs if, in accordance with Article 4 item 1 AFEA, they perform an economic activity on their own behalf.

According to Article 4 item 1 AFEA, entrepreneurs are also non-corporate organizational units, to which provisions of separate laws grant legal capacity and which perform an economic activity on their own behalf.

Among organizational units not being legal persons in the category entrepreneurs the following may be classified:[40]

- commercial partnerships: as defined in the provisions of the Commercial Companies Code, they are: general (unlimited) partnership, professional partnership, limited liability partnership, limited joint-stock partnership,[41]
- companies under organization,[42]
- housing communities,[43]
- main foreign branches of insurance companies and main foreign branches of reinsurance companies.[44]

Of course, the aforementioned entities should be identified as entrepreneurs if they, cumulatively, meet the conditions of Article 4 item 1 AFEA, which means they carry out an economic activity on their own behalf.

The enumerations above demonstrate how large and simultaneously heterogeneous is the circle of entities entitled to conduct an economic activity.

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40 This catalogue is an open catalogue, because it depends on the provisions of separate acts of law constituting organizational units not being legal persons together with emphasis on their legal capacity in the area of economic activity.

41 See: Article 4 § 1 item 1 in connection with Article 8 § 1 CCC.

42 See: Article 11 § 1 CCC.

43 According to Article 6 of the Act of 24 June 1994 on the ownership of premises (consolidated text: Dz.U. of 2000, No. 80, item 903 as amended). See: the resolution of the Surpeme Court of 21 December 2007, III CZP 65/07, Lex No. 323147, the Judgment of the Provincial Administrative Court in Warsaw of 5 October 2004, III SA 646/03, Lex No. 175310; W.J. Katner, Podmiotowość prawna wspólnoty mieszkaniowej, "Glosa" 2009, No 2, p. 34–43.

44 See: Article 105 item 1 in connection with Article 106 item 1 and Article 223zf of the Act of 22 May 2003 on Insurance Activity (consolidated text: Dz.U. of 2013, item 950 as amended).

On the one hand it is worth underscoring that they include entities established for various purposes – on this basis it is possible to diversify their three different categories. The first is entities for which performing an economic activity is the main, superior, fundamental and exclusive goal. They are, for example, commercial partnerships, state (government) companies, mutual insurance companies, main branches of foreign insurance companies. The second category includes entities for which an economic activity is (or may be) one of many aims implemented parallelly (simultaneously). Among them are, for example, cooperatives, housing communities, research institutes, an also part of commercial companies. The third category, on the other hand, embraces entities which as a rule are not established in order to perform an economic activity, but which may run a business as a side activity in relation to the main activity, eg. Treasury, local government units, associations, foundations, trade unions, religious associations, organizations of commercial and trade/professional self-government as well as community organizations with legal personality.

In face of this diversification it may be surprising that AFEA does not notice this variety. In effect this means that even the entity carrying out an economic activity marginally, accessorily and collaterally only, is an entrepreneur, for the range, dimension or relation of the an economic activity towards the others of implemented goals, by no means affects this status. This state evokes many controversies because it allows for treating as entrepreneurs, among other things, entities (foundations, associations, trade unions or religious associations etc.), which in a basic dimension are directed to activities connected with community, charity, education, culture or another area customarily not connected with an activity aiming at augmenting or maximizing of profit. If they perform an economic activity on their own behalf, even if it is only an accessory activity, they are entrepreneurs as defined in Article 4 AFEA.

On the other hand it is important to note that AFEA does not take into consideration the fact of conducting an economic activity by

collective entities,[45] i.e. capital groups, concerns, consortia, syndicates, holdings, pools and cartels.

The relevant quality of collective entities of this type is that they implement joint intentions of the members, are a manifestation of joint performing an economic activity and in practice they are commonly operating economic forms of entrepreneurs' organizations. Their origins are not, however, the consequence of formal legal actions of the entities that make them. They are based on more or less visible connections of pecuniary or personal nature between the member-entrepreneurs. It is important that generally each of member-entrepreneurs invariably acts within his own legal subjectivity, and this concern, consortium, syndicate, holding, pool and cartel are not treated as separated addressees of rights and obligations. Thus, they cannot be treated as legal persons or organizational units, to which another law grants legal capacity (as a result, they are excluded from the category of entrepreneurs).

Therefore we can state that the legal status of collective entities has not been fully determined in regulatory terms. Polish law either discriminates it completely, as AFEA does, or notices it incidentally, as it happens on the grounds of tax law[46], public procurement law[47] and anti-monopoly law.[48]

2.4. Problems connected with classification of certain categories of entities (or types of activity) as entrepreneurs (or business)

Problems, beside those previously demonstrated, are particularly connected with two issues. First, identification of an entrepreneur in the case of performing an economic activity in the form of private

45 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 227

46 See: Article 1a of the Act of 15 February 1992 on income tax from legal persons (consolidated text: Dz.U. of 2011, No 74, item 397 as amended).

47 See: Article 23 of the Act of 29 January 2004. Public Procurement Law (consolidated text: Dz.U. of 2013, item 907 as amended).

48 See: Article 4 item 1 and item 2 of the Act of 16 February 2007 on Competition and Consumer Protection (Dz.U. of 2007, No 50, item 331 as amended).

partnership. Second, classification as an entrepreneur of an entity conducting an economic activity established in Article 3 AFEA.

Identification as entrepreneur in the case of conducting an economic activity in the form of private partnership has not been interpreted clearly and consequently has arisen many discussions. Especially controversial was the question of legal subjectivity of private partnership. The doubts concerned the question if private partnership has a legal subjectivity separate from the partners and on this basis in the scope of the an economic activity performed is an entrepreneur or else, if, due to the lack of legal subjectivity, it is not possible to classify of as such.

However, in the current legal status the problem is solved: AFEA in Article 4 item 2 determines directly that as entrepreneurs are regarded partners of private partnership in the scope of the economic activity they conduct. Such wording of the regulation does not leave mush space for considerations and discussions. At present private partnership is unambiguously perceived as the source of legal relationship (obligating) formed and implemented according to the rules and conditions determined in the Civil Code.[49] No act of law grants it a legal personality or legal capacity. What is also emphasized is the characteristics that exclude the possibility of identifying it with commercial partnerships.[50]

Consequently, private partnership cannot be treated as entrepreneurs because they do not meet the criteria identified in the legal definition in Article 4 item 1 AFEA, and, more precisely, do not fit the catalogue of entities which can be identified as such. However, as entrepreneurs can be considered a partner or partners of a private partnership (regardless of the fact if it is a natural person, a legal person or "defective legal person"), if he conducts an economic activity on his

49 See: Articles 860–875 of the Act of 23 April 1964: Civil Code (Dz.U. of 1964, No 16, item 93 as amended); E. Gniewek (ed.), Kodeks Cywilny. Komentarz, Warszawa 2008, p. 1356–1357.

50 They are in particular the property, the scope of lability and designation in legal and economic transactions (use of trademark). For more see: E.Gniewek (ed.), Kodeks..., *op. cit.,* p. 1356–1375.

own behalf or when jointly corresponds to all conditions of Article 4 item 1 AFEA.[51]

Other interpretative difficulties are connected with the classification as entrepreneurs entities running business activities defined in Article 3 AFEA.

Article 3 AFEA establishes that the provisions of the law is not applicable to productive activity in agriculture in the area of crops cultivation as well as breeding animals, gardening, vegetable growing, forestry and inland fishery, and also renting by farmers rooms, selling homemade meals and providing on farms other services connected with the stay of tourists as well as winemaking by producers being farmers producing less than 100 hectolitres of wine over an economic year, who make and bottle the wine obtained from grapes from their own crops only.[52]

Thereby, under this provision three types of activities were exempted for the rigors of AFEA. First, productive activity in agriculture (in the area of crops cultivation, animal breeding, gardening, vegetable growing, forestry and inland fishery). Second, agrotourism consisting in, as defined in Article 3 AFEA, renting by farmers rooms, selling homemade meals and providing on farms other services connected with the stay of tourists. Third, winemaking by producers being farmers producing less than 100 hectolitres of wine over an economic year, who make and bottle wine obtained from grapes from their own crops only.

Bearing in mind the discrepancies in the doctrine and judicature,[53] it is important to underscore that Article 3 AFEA does not decide on the nature of the activities which it concerns, because it is not the objective of this regulation.

The fundamental assumption of Article 3 AFEA is the exclusion of applying AFEA to the listed types of activity. It underscores the

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51 For more see: M. Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 210–213 and the literature listed there.

52 See: Article 17 item 3 of the Act of 12 May 2011 on Making and Bottling Wine Products, Exchange of These Products and Organization of Wine Market (Dz.U. of 2011, No 120, item 690 as amended).

53 For more see: M. Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 192–200 and the literature and judicature listed there.

activity which is distinguished by the nature of production and effects, the activity dependent on unpredictable natural and climatic conditions, in general focused on providing upkeep, often treated as marginal and occasional. In this context it gives a ground for its separate treatment. It generally results in certain privileges providing preferences in the area of starting and performing excluded types of activity: the lack or simplification of legalization obligations, increasing freedom of organization, repealing execution of other obligations resulting from AFEA connected with conducting an economic activity and functioning of the entities conducting it. It grants the excluded types of activity a special status. It establishes that it is not a typical economic activity in the understanding adopted in Article 2 AFEA, so binding the entities conducting it with all obligations determined in the substance of AFEA is groundless.[54]

Consequently it is important to recognize that productive activity in agriculture and agrotourism as defined in Article 3 AFEA are business activities and the entities performing these types of activity are (potentially) entrepreneurs; of course only when they correspond with the criteria of Articles 2 and 4 AFEA, but even then the provisions of AFEA are not applicable to them.[55]

This position finds a clear confirmation in the content of Article 3 AFEA in connection with Article 17 of the Act of 12 May 2011 on Making and Bottling Wine Products, Exchange of These Products and Organization of Wine Market. This regulation provides not only that winemaking by the producers being farmers making less than 100 hectolitres of wine over an economic year, who make and bottle the wine obtained from grapes from their own crops only, is an economic activity, but is even a regulated economic activity. Thereby the exclusion does not exclude this activity from the category of economic activity but unequivocally classifies this activity as an economic activity lifting the obligation of obtaining an entry (legalization) in the proper register of regulated activity.

54 C. Kosikowski, Ustawa..., *op. cit.,* p. 37–39; M. Szydło, Swoboda działalności..., *op. cit.,* p. 65.
55 See: the Judgment of the Supreme Administrative Court in Warsaw of 29 August 2007, OSK 1618/06, Lex No 364703.

3. Micro, small and medium entrepreneur (businessperson)

Among all classifications it is important to pay particular attention to the classification diversifying micro, small and medium entrepreneurs. The reason for that is foremost the fact that as a Union classification, it is used uniformly in all member states of the European Union. This results foremost from the fact that support for micro, small and medium entrepreneurs is one of the priorities of the European Commission concerning economic growth, creating workplaces as well as economic and social cohesion on the territory of the whole European Union.[56]

The normative legitimacy of this categorization is the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation).[57] Annex 1 of the Regulation No 800/2008 includes 6 articles, which determine elements indispensable to apply the division into micro, small and medium-sized entrepreneurs. Especially it specifies the definition of enterprise (Article 1), staff headcount and financial thresholds determining enterprise categories (Article 2), types of enterprise taken into consideration in calculating staff members and financial amounts (Article 3), data used for the staff headcount and the financial amounts and reference period (Article 4), staff headcount (Article 5) and the rules of establishing the data of an enterprise (Article 6).

The essence and purpose of the division of entrepreneurs according to their economic volume is, in general terms, defined in Article 103 AFEA. In accordance with this regulation, the state, respecting the principles of equality and competition, creates favorable conditions for functioning and developing of micro, small and medium-sized entrepreneurs, particularly through 1) initiating changes of the legal

56 The new SME definition: User guide and model declaration, p. 5: http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf , accessed, August 15, 2013.

57 Annex 1to COMMISSION REGULATION (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJEU L 2008.214/3).

status encouraging development, including those concerning the access to the funds from credits and loans and credit guarantees; 2) supporting institutions enabling financing an economic activity on favorable terms within the framework of ongoing government programs; 3) equalizing conditions of economic activity performance for public law burdens; 4) facilitating an access to information, trainings and consulting; 5) supporting institutions and organizations working for entrepreneurs; 6) promoting cooperation with other Polish and foreign entrepreneurs.

The planes of state activity mentioned in the regulation are of exemplary nature and do not exhaust all actions in this area. As C. Kosikowski observes, Article 103 and the other provisions of Chapter 7 AFEA should be treated as an extension of one of the superior principles forming the relation state-entrepreneur, i.e. supporting the development of entrepreneurship of Article 8 of this law.[58] In this context we should perceive the essence of the categorization in point, which manifest itself in preferential treating the aforementioned categories of entrepreneurs (especially in tax law, requirements of keeping accounts and providing public aid through grants, exemptions, consulting and infrastructural aid).[59]

As a microentrepreneur is recognized an entrepreneur, who in at least one of last two business years: 1) employed in an average year fewer than 10 employees and 2) reached a net annual turnover from selling goods, products and services as well as financial operations not exceeding the zloty equivalent of 2 million euro, or the sum of assets of his balance prepared at the end of these years did not exceed the zloty equivalent of 2 million euro.[60]

A small entrepreneur is an entrepreneur who within at least two last business years:

1) employed in an average year fewer than 50 employees and 2) reached a net annual turnover from selling goods, products and services as well as financial operations not exceeding the zloty equivalent of 10 million euro, or the sum of assets of his

58 For more see: C.Kosikowski, Ustawa..., *op. cit.,* p. 574–581.
59 Z. Snażyk, A. Szafrański, Publiczne prawo gospodarcze, Warszawa 2009, p. 84.
60 Article 104 AFEA.

balance prepared at the end of these years did not exceed the zloty equivalent of 10 million euro.[61]

A medium-sized entrepreneur is an entrepreneur who: 1) employs in an average year fewer than 250 employees and 2) reaches a net annual turnover from selling goods, products and services as well as financial operations not exceeding the zloty equivalent of 50 million euro, or the sum of assets of his balance prepared at the end of these years did not exceed the zloty equivalent of 43 million euro in at least one of the two business years.[62]

This demonstrates that the classification is based on economic criteria expressed quantitatively. They are: 1) the volume of annual average employment 2) the volume of a net annual turnover of selling goods, products and services as well as financial operations or the sum of assets of the entrepreneur's balance identified in at least one of two last business years.

The basis of the first criterion is an annual average employment. It is important that it is defined in full-time equivalent (so it is not the same as personal employment), and also the fact that its calculation does not include employees on maternity or childcare leaves and employed for vocational training.[63] It is also worth underscoring that employment (in the sense proper for this categorization) should be perceived broadly, i.e. as "work under a non-employment contract", which also includes other legal relations than an employment relationship, e.g. a contract of specific work or a contract of mandate.

The other criterion refers to the scale of the entrepreneur's financial activity. The volume of the net turnover and the sum of the asset balance of the entity are expressed in Euro, which is are converted into zlotys according to the average rate announced by the Polish National Bank on the last day of the business year selected for establishing the status of the entrepreneur.[64]

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61 Article 105 AFEA.
62 Article 106 AFEA
63 Article 109 item 2 AFEA
64 Article 107 AFEA: Compare: Article 9, Article 10, Article 45 item 5 of the Act of 29 September 1994 on accountancy (consolidated text: Dz.U. of 2013, item 330 as amended).

Correct application of the classification is expected to define precisely the category of entrepreneur; thus, it is based on two fundamental principles. First, the conditions of annual average employment as well as the volume of the net turnover or the sum of asset balance must be jointly fulfilled. Second, because of a negative nature of the definition, an entrepreneur may be classified in one category exclusively, so checking the conditions in reference to an entrepreneur marked individually must occur bottom-up, i.e. always begin with the category of microentrepreneurs and end at the first category, which meets both conditions simultaneously.

It is also important to note that employment and the financial scale of an economic activity in the aforesaid definitions are determined for at least one of two last business years.[65]

Thereby it is sufficient for classification to meet the criteria jointly only in one of last two business years. Exceeding both or one of the volumes in the subsequent business year, i.e. after the year of classification, is not the same as the change of the entrepreneur's status. However, it affects the classification in subsequent years. The consequence of this is also the fact that the volume of the criteria is determined for a business year understood as a period lasting 12 subsequent full months (it does not have to cover a calendar year then). It is important that a classification of an entrepreneur operating for less than a year (business year) is acceptable. In this case its expected net turnover from selling goods, products and services as well as financial operations, and also annual average employment are estimated on the basis of the data for the last (possibly shortest) period documented by the entrepreneur.[66]

In reference to the categorization discussed functions the so-called independence criterion, constituted in Article 3 of Annex 1 to the Commission Regulation (EC) No 800/2008. It divides all enterprises into: 1) linked enterprises, 2) partner enterprises and 3) autonomous enterprises adopting as the basis for the division their relations

65 Compare Article 104–106 AFEA.
66 Article 109 item 3 AFEA.

(connections and dependencies) with other entities participating in commercial exchange (entrepreneurs).

An autonomous enterprise is any enterprise which is not classified as a partner enterprise or a linked enterprise.[67]

The status of partner enterprises is attributed to all enterprises which have not been classified as linked enterprises and between which the following connections occur: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise). However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, either individually or jointly to the enterprise in question:

a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses (business angels), provided the total investment of those business angels in the same enterprise is less than EUR 1 250 000;

b) universities or non-profit research centres;

c) institutional investors, including regional development funds;

d) autonomous local authorities with an annual budget of less than EUR 10 million and less than 5 000 inhabitants.

Linked enterprises are enterprises which have any of the following relationships with each other:

a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

67 Article 3 item 1 of Annex 1 to Commission Regulation (EC) No 800/2008.

c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.[68]

The classification of enterprises as linked enterprises, partner enterprises and autonomous enterprises is made on the basis of a written declaration on belonging to the particular group, submitted by the entrepreneur concerned, containing the data and information confirming the validity of the assessment, subject to control from proper domestic or European authorities.

This underscores the role of the independence criterion in the assessment of an economic volume: complementary but also very important. It is possible to recognize that the relation of the classified entrepreneur with other participants in the market is the fist stage of identifying micro, small and medium-sized entrepreneur. Moreover, it is the stage forming the effect of this categorization, since it extends the number of the employed and the financial size of the activity of the assessed by the value of partner entities or connected therewith.

The reservation formulated as the independence criterion should be recognized as rational. The preferences should be used by those really entitled. It is necessary to eliminate any ineligible, particularly enterprises of a larger size, which would see in subordinating smaller participants in the market a method to use the preferences. There should be no situations where the special rights provided for micro, small and medium-sized enterprises are exercised by an enterprise of a larger size. It is possible to assume that in the case of not applying the independence criterion, which is actually just disclosure or non-

68 Beside the aforementioned examples, an enterprise cannot be recognized as a small or medium-sized enterprise if 25% or more capital or voting rights controls, either directly or indirectly, either jointly or individually, at least one state (government) organ.

disclosure relationships with other entrepreneurs, this would be common.

Simultaneously, it is important to emphasize that in the system of national law of the RP the independence criterion is not normatively regulated. The reference in Article 110 AFEA to the content of Annex 1 to the Commission Regulation (EC) no 800/2008 cannot be regarded as such a regulation. This fact may result in not applying this criterion in practice, which will cause negative consequences resulting from incorrect identification of the economic volume of the enterprise, and thus also preferential treatment of illegible entities.

Part 3

OBLIGATIONS AT UNDERTAKING, CONDUCTING AND TERMINATING AN ECONOMIC ACTIVITY

1. Introductory remarks: the essence of limits on the freedom of an economic activity

In accordance with Article 20 of the Constitution of the Republic of Poland, social market economy based on the freedom of economic activity, private ownership as well as solidarity, dialogue and cooperation of social partners constitute the fundament of the economic system of the Republic of Poland.

On this bases it is possible to maintain that economic freedom is a constitutional value and as a constitutional principle determines the system of market economy and its attributes (or the aforementioned: economic freedom, private ownership. solidarity, dialogue and cooperation of social partners).[1] Thus, it is a superior value for the existence and proper functioning of the Republic of Poland in terms of economy, and, more precisely, the economic system of the RP.

However, it is important to underscore that despite its priority (constitutional) nature, economic freedom is not absolute freedom. Depriving economic freedom of the attribute of absoluteness is inasmuch natural that full (unlimited) freedom of economic activity

1 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 65; W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Kraków 1999, p 25.

could threaten not only the safety of the state and its citizens but also the public order.[2]

It is Article 22 of the Constitution of the RP that determines the relative nature of economic freedom. This provision states that restrictions on economic freedom are acceptable, yet makes a reservation that they cannot be decided on arbitrarily. In order to effectively reduce economic freedom it is necessary to introduce it: 1) by law, 2) because of an important public interest. Of course, the restriction has to meet these both conditions simultaneously.

The Constitution of the RP in Article 22 defines the conditions, both formal and substantive, which determine the possibility of reducing economic freedom.

Despite the statements of the completeness of the constitutional regulation in the area discussed, which occur in judicial decisions,[3] the catalogue of criteria justifying the exception to the rule of economic freedom has been complemented by representatives of the science of law.

Referring to the formal conditions it is commonly assumed that restrictions on economic freedom may occur by an act of law only. This criterion reserves the exclusive property of statutory acts for formulating restrictions on economic freedom, and as a rule should not cast doubts.

Due to the system of law sources adopted in Poland, it is worth adding that reducing of the freedom in point may also occur by an international agreement, as well as an executive act.[4]

Moreover, an indispensable condition of effective reducing economic freedom is the completeness and precision of a statutory regulation. Derogation of economic freedom must be expressed in an act of law (alternatively a regulation issued on the basis of and in order to complement an act of law) clearly and directly. This results

2 See: the Judgment of the Constitutional Tribunal of 17 December 2003, SK 15/02, Lex No 82407.
3 See: the Judgment of the Constitutional Tribunal of 5 April 2011, P 26/09, Lex No 824078.
4 See: the Judgment of the Constitutional Tribunal of 10 April 2001, U 7/00, Lex No 46872.

from the prohibition of assuming restrictions on economic freedom as a consequence of the rule according to which any doubts in the course of interpretation of legal norms should be adjudicated in favorem libertatis.[5]

On the other hand, referring to substantive conditions, restrictions on economic freedom are acceptable if they were formulated because of an important public interest.

This reservation is completely rational because reducing economic freedom should be recognized not only as acceptable but also necessary for the protection of other values, including foremost freedoms and rights of other persons potentially threatened by economic freedom in its absolute dimension.[6]

It is not difficult to note that the essence of the substantive criterion is based on a typical general clause: an important public interest. This wording has been functioning in the science of law for long but has no unequivocally precised meaning. Its substance is formed by current political, economic and social circumstances of a given state, which affect judicature and opinions of the representatives of the doctrine of law.[7]

From the perspective of restrictions on economic freedom the essence of the general clause used in Article 22 of the Constitution of the RP may be reduced to the statement that an important public interest consists of certain values important to the State and its citizens, which may potentially infringed by an entrepreneur's activity. It is well-grounded to classify as components of an important public interest values such as: human health and life, public security and order, public morals, public and private ownership, value of money, honest competition, good commercial practice and natural environment.[8]

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5 K. Strzyczkowski, Prawo gospodarcze publiczne, Warszawa 2009, p. 95.

6 See: the Judgment of the Constitutional Tribunal of 17 December 2003, SK 15/02, Lex No 82407.

7 C.Kosikowski, Publiczne prawo..., *op. cit.,* p. 70–72.

8 M. Etel, M. Nowikowska, A. Piszcz, J. Sieńczyło-Chlabicz, W. Stachurski, A. Żukowska, Publiczne prawo gospodarcze. Ćwiczenia, Warszawa 2010, p. 107–108.

The use of general clauses (including the important public interest as a condition of reducing economic freedom) should be treated as the legislator's purposeful action, though which he intends to provide legal regulations with indispensable flexibility; he left the interpretation of the wording to the representatives of the doctrine of law and judicature. This proceedings are rational and in many situations even indispensable. Nevertheless it is connected with a huge risk of abuse in the sphere of interpretation of the legitimacy of restrictions on economic freedom protecting unidentified values. Therefore, the literature proposed the principle of proportionality complementing the catalogue of constitutional conditions justifying restrictions on economic freedom.[9]

As defined in the principle of proportionality, restrictions on economic freedom may be introduced only when indispensable and necessary, and in addition they should always be treated as exceptions to the general rule. While formulating them it is especially important to consider if they are introduced to protect an important public interest and if they are adequate to the burdens imposed upon entrepreneurs (as the beneficiaries of economic freedom). In other words, restrictions on economic freedom must be a measure really useful and, at the same time, necessary for protecting the values constituting an important public interest, and simultaneously should guarantee the protection which intervenes in economic freedom to the least degree.[10]

Summing up, it is important to state that despite its priority (constitutional) nature, economic freedom is not an absolute value. Its restrictions are acceptable if they meet certain criteria, especially those determined by the Constitution of the RP. First, they can by introduces by law only (alternatively a regulation issued on the basis and in order to complement a statutory substance). Second, they must be directly, clearly and precisely rendered in the wording of regulations. Third, always established in view of an important public interest (guaranteeing the protection of an important public interest or at least reducing the risk of infringing these values). Fourth, the legislator formulating restrictions should follow the principle of proportionality which enables

9 A. Walaszek-Pyzioł, Swoboda działalności gospodarczej, Kraków 1994, p. 57–66.
10 A. Walaszek-Pyzioł, Swoboda..., *op. cit.,* p. 57–66.

to maintain an appropriate relation between the necessity of restrictions and the hardship for the entrepreneur.

AFEA identifies economic freedom in the way similar to the Constitution of the RP. Article 6 item 1 AFEA establishes that undertaking, conducting and terminating an economic activity is free for everyone on an equal footing, with the conditions determined by the provisions of law.

The quoted regulation specifies the meaning of economic freedom emphasizing elements important for the interpretation of this freedom. According to it, economic freedom should always be perceived in three aspects: freedom of starting, freedom of running and freedom of closing an economic activity, which is all the more important that the lack of any of them is against the idea of economic freedom making it useless.[11] It emphasizes the subjective scope of economic freedom. It contains references to the constitutional principle of equality.[12] However, it foremost formulates the reservation which establishes that economic freedom cannot be perceived as absolute.

The wording "with the conditions determined by the provisions of law" clearly corresponds with Article 22 of the Constitution of the RP. Article 6 item 1 AFEA makes a reservation that economic freedom should not be treated as absolute freedom and its restrictions take a form of conditions of undertaking, conducting and terminating an economic activity determined by law.

The fundamental source of the restrictions on economic freedom established by the Constitution of the RP is AFEA regulating the rules of undertaking, conducting and terminating an economic activity on the territory of the RP.

The analysis of its provisions and complementary acts justifies the diversification of two categories of conditions: adopting the criterion of

11 A. Walaszek-Pyzioł, Swoboda..., *op. cit.,* p. 36–48.

12 See: the Judgment of the Supreme Administrative Court in Wrocław of 17 November 1992, SA/Wr 998/92, Lex No 10811.

function and the scope of the binding force it is possible to distinguish general conditions and specific conditions.[13]

An important quality of general conditions is the fact that they are universal. They concern every entrepreneur and every economic activity with no exceptions. By assumption general conditions establish foremost the range of economic freedom systematizing this freedom and the rules of exercising it. It is possible to state that they guarantee the protection of an important public interest determining the model of proper behavior of all entrepreneurs regardless of the economic activity they start (or run).

Specific conditions should be perceived in a different way. This results foremost from the fact that their fulfillment is obligatory for every entrepreneur. They are connected with classified types of economic activity, so they bind only some entrepreneurs: only those interested in starting and running just such a type of activity.

Moreover, specific conditions, like the universal obligations of an entrepreneur, aim at the protection of an important public interest from economic activity, yet they pursue the same objective in a different way. By assumption they are to provide access to a classified type of economic activity exclusively for the entrepreneurs who guarantee that it will be conducted properly and safely.

Intervention in the sphere of economic freedom through constituting general conditions with provisions of law is defined as rationing of economic activity.[14] In Poland the rationing takes one of the three forms: 1) concessions, 2) permits , licenses and approvals, and also 3) regulated economic activity.[15]

Economic freedom cannot be identified exclusively with restrictions binding entrepreneurs. In accordance with Article 1 AFEA, this law, beside undertaking, conducting and terminating an economic activity on the territory of the RP, also regulates the tasks of the state

13 See: the Judgment of the Supreme Court of 17 August 1993, III CRN 77/93, Lex No 3982.
14 For more see: C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 179–194.
15 M. Etel, Regulowana działalność gospodarcza a zasada wolności gospodarczej, "Państwo i Prawo" 2007, No 2, p. 41–52.

and its authorities.[16] In this respect, like general responsibilities of entrepreneurs, it contains universal and general norms. They are a type of superior prescripts and prohibitions, which are expected to guarantee proper behavior of state authorities towards an economic activity and an entrepreneur.

It is important that they are proper in the case of any relation state-entrepreneur, regardless of the relevant qualities of the entity or its activity. This relation is extremely extensive, also in a normative sense. Consequently, many responsibilities of the state was determined in separate laws. However, AFEA allows for constructing a catalogue of responsibilities of state authorities of fundamental importance, the basis for imposing certain standards upon this relation.

2. General conditions of starting and running an economic activity

2.1. Obligation of legalising an economic activity

The fundamental obligation of every entrepreneur is legalization of a business activity.[17]

In its basic dimension it includes the necessity of obtaining an entry in a proper register: in the case of natural persons it is CEIDG (Central Registration and Information on Business), while in the case of legal persons and so-called "defective legal persons" it is the register of enterprises KRS (National Court Register).

However, legalization of an economic activity is not reduced exclusively to these entries. The legalization obligations also include the necessity of appropriate registrations for the purposes of taxation, social and help security, as well as statistics. In order to reduce the

16 The term "authorities" used in Article 1 and other provisions of AFEA should be identified as authorities of state and government administration as well as local government and professional self-government administration, which were normatively granted the name of authorities, defining their tasks and competences as well as the legal forms of operation. C Kosikowski, Ustawa, *op. cit.*, p. 75–76.

17 See: Article 14 AFEA.

formalities during these registrations, the institution of so-called "one counter" was established.

In accordance with Article 25 item 5, an integral part of the application for registering in CEIDG is a demand of: 1) an entry or a change of the entry in the National Official Register of National Economy Units (REGON), 2) identifying or updating registering, discussed in the regulations on the rules of the record and identification of taxpayers and payers, 3) registering the premium payer or his change as defined in regulations on the social insurance system or submitting a statement on continuing social insurance for farmers as defined in the regulations on social insurance for farmers, 4) adopting a declaration on the entrepreneur's selection of the form of taxation with a personal income tax or an application for taxation in the form of a tax card.[18] On the other hand, by virtue of Article 28 AFEA, CEIDG sends appropriate data in the application for an entry in CEIDG, indispensable to obtain, change or crossing out the entry in the register of the National Business Registry Number, an identification or updating applications, which is discussed in the regulations on the rules of the record and identification of taxpayers and payers, registration of premium payer or their changes as defined in the regulations on the social insurance system or registration of the declaration on continuing social insurance for farmers as defined in the regulations on social insurance for farmers as well as submitting a declaration on selecting the form of taxation of natural persons or an application for taxation in the form of tax card, registering or updating declaration discussed in the regulations on the goods and services tax, via the electronic platform of public administration services or other means of electronic communication, immediately, not later than on the working day after the registration entry, to the proper head of the revenue office indicated by the entrepreneur, and on obtaining the information on the number of tax identity (NIP) to the Central Statistical Office (GUS), as well as the Social Insurance Institution (ZUS) or the Agricultural Social Insurance Fund (KRUS), together with the information on the registration in CEIDG and the obtained NIP number.

18 See: Article 25 item 5a AFEA.

An analogous structure of "one counter" functions in Article 19b AFEA. By virtue of this provision, together with the application for an entry or a change in the entry in the register of entrepreneurs, the applicant submits: 1) an application for an entry of a change in the entry in the National Official Register of National Economy Units (REGON), 2) declaration of a premium payer or the change thereof as defined in the regulations on the social insurance system, 3) identification or updating declaration for tax purposes together with indicating the proper head of a revenue office under pain of returning the application. On the other hand, by virtue of Article 19b item 1a-1b the registry court sends ex officio applications and declarations, together with the copy of the decision on the entry and the certificate of the entry, immediately, not later than within 3 working days from the day of the entry, to the statistical office of the province on the territory of which the entrepreneur has a headquarter, the head of the revenue office indicated by the entrepreneur as well as to the proper unit of the Social Insurance Institution.[19]

It is important to note that on the ground of the registration in the National Court Register (KRS), the rule of "one counter" is not applicable, when the applicant submits an application in an electronic form. In this case, he is obligated to fulfil, on his own, also electronically, the obligations of registration for statistical, taxation and social insurance purposes.[20]

2.2. Obligation of obtaining a concession, licence/permit or entry into the register of regulated business

It is also worth noting that the legalization of an economic activity is not always reduced to obtaining an entry in CEIDG or the register of enterprises KRS and submitting declarations for the purposes of taxation, social and health insurance as well as statistics.

19 Compare Article 19b item 2–3 AFEA.

20 Article 19b item 1c AFEA: Such a solution is a hindrance for the entities submitting their applications electronically. It seems groundless and irrational, bearing in mind the necessity of enhancing the relations state-entrepreneur, which is expected to occur through, among other things, common use of ICT systems.

An important reservation in this matter is formulated in Article 14 item 4–5, which establishes that in certain cases legalization includes also the obligation of concession, license/permit or an entry in a proper register of regulated activity.

Rationing of economic activity in Poland takes one of three forms, these being: 1) concessions, 2) licenses/permits, and also 3) regulated economic activity. These forms are not identical. Each of them is characterized by its own relevant qualities referring to foremost fundamental structural elements and procedural rules.

Nevertheless, independently from the separateness it is possible to demonstrate certain common qualities proper for concessions and licenses/permits as well as regulated economic activity.

Foremost, common is the objective of rationing of economic activity.

It is commonly assumed that rationing, regardless of the form adopted, aims at the protection of the interest of citizens and the economic interest of the state.[21] Particular restrictions in the area of undertaking, conducting and terminating an economic activity result from a special nature of the types of activity they concern. This special nature of activity manifests itself in many various facets. Nevertheless, it may be identified with: a) a particular risk (probability) of infringing an important public interest resulting from improper performance thereof, b) strategic value for the functioning of the state or c) reservation of a given activity for authorities and institutions of the state, where the state exceptionally waives its monopoly in favour of a private entity.

Consequently special restrictions are expected to guarantee that a given activity will be carried out correctly and safely, i.e. ensuring its proper quality while minimizing the risk of infringing an important public interest.[22]

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21 Rationing of economic activity protects superior rights such as: a) external (political) interests of the state, 2) proper functioning of internal market, 3) exhaustible natural deposits of the country, 4) economic interests of the state, 5) interests of consumers, 6) competition; see: A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, M. Szydło, Administracyjne prawo gospodarcze, Wrocław 2009, p. 490.

22 K.Kohutek, Zasady podejmowania działalności regulowanej, "Przegląd Prawa Handlowego" 2005, No 6, p. 36.

Thus the fundamental assumption of rationing is providing access to this type of economic activity for only those entrepreneurs who guarantee a correct and safe way of its performance and eliminating those who would not meet the standard expected by the state.

Regardless of the form of rationing this assumption is always reduced to the necessity of the entrepreneur fulfilling special conditions determined by the valid law. They concretize the ring of entrepreneurs potentially capable of conducting a particular type of economic activity through defining legal, financial, technological and organizational requirements with which they should cope.

Certainly, the conditions are usually functionally connected with a concrete type of activity and adjusted to its own characteristics. However, it is possible to distinguish certain groups of conditions consisting in:[23]

1) possessing appropriate premises and rooms equipped with required devices;
2) possessing a legal title to the property where the activity will be carried out;
3) possessing the legitimation for performing a given job or, potentially, employing people with appropriate education or professional practice (qualifications);
4) implementing internal control systems;
5) possessing financial capacity necessary to conduct a given activity (insurance, financial security, bank guarantees);[24]
6) the lack of a valid conviction of the entrepreneur for a certain offence (e.g. committed for private financial gain, against documents, property, commercial exchange, fiscal crime) and prohibitions of delegating management of the activity to people who have been validly convicted for a certain offence;

23 M. Szydło, Reglamentacja podejmowania działalności gospodarczej w nowej ustawie o swobodzie działalności gospodarczej, "Przegląd Ustawodawstwa Gospodarczego" 2004, No 12, p. 10–11.

24 In accordance with Article 62 and Article 64 item 2 AFEA, for a concession, its change, for a promise and also for an entry in the register of regulated activity due fiscal charge is collected.

7) failure to initiate bankruptcy and liquidation proceedings.

It is also worth underscoring that in the sphere of rationing of economic activity a special role is played by separate laws connected with concrete types of economic activity. The provisions of AFEA are reduced to constituting the forms of rationing, and also indicating their basic substantive and procedural properties, while in the issues unregulated by AFEA the provisions of separate specifying laws are applied.[25]

1) the type of activity under rationing (in the scope of regulated activity as well as permits, licenses and approvals),[26]
2) special conditions of starting and running a given type of economic activity,
3) procedural rules,
4) the name of the register (in the scope of regulated economic activity),
5) rationing organ,[27]
6) the elements and content of the application,[28]
7) the content of the declaration (in the scope of regulated activity),
8) payment,[29]
9) tender procedure (in the scope of concessions and permits, licenses and approvals),
10) the possibility of obtaining a promise (in the scope of concessions as well as permits, licenses and approvals),
11) the scope and form of control at the stage of starting and conducting a given activity,
12) conditions of the refusal of granting, reducing or withdrawal of a concession, permit (license, approval) and an entry in the register of regulated activity.[30]

25 Article 46 item 2, Article 63 and Article 75 item 5 AFEA.
26 Article 46 item 1 AFEA.
27 Article 47 item 1 AFEA.
28 Article 49 and Article 65 AFEA.
29 Article 62 and Article 64 item 2 AFEA.
30 C.Kosikowski, Ustawa..., *op. cit.,* p. 280.

The provisions of separate laws connected with a particular type of rationed business activity are lex specialis, and thus have priority in application over the provisions of AFEA.

2.3. Obligation of possessing and using a NIP (Tax identification number)

In accordance with Article 16 AFEA an entrepreneur is obligated to place in written declarations addressed within the scope of his activity to designated persons and authorities the tax identification number (NIP) and use this number in legal and economic transactions.[31] What is more, the identification of the entrepreneur in particular official registers occurs on the basis of the tax identification number.[32]

The fundamental assumption of this obligation was that the tax identification number (NIP) from 1 January 2007 on become the basic element identifying an entrepreneur in legal and economic transactions. Thereby the obligatory elements of designating an entrepreneur and his activity were to be simplified: mostly were replaced by NIP. However, in accordance with Article 16 item 2 AFEA the obligation of possessing and using the tax identification number is without prejudice the obligations determined by special regulations,[33] which means that the tax identification number, despite the original assumptions of the legislator, is only one of many obligatory elements or designating the entrepreneur and his activity.

It is also worth noting that the rule of granting (and updating) the tax identification number was affected by the constituting of the institution of "one counter" for the entrepreneur. These changes result from the fact that a identifying or updating declaration for the purposes of taxation are recognized as an integral part of the application for the legalizing entry in CEIDG or the KRS register of entrepreneurs. Consequently, the legalizing application addressed to CEIDG or the KRS register of entrepreneurs is the basis for granting (or updating) the NIP number

31 Article 16 item 1 AFEA.
32 Article 16 item 3 AFEA.
33 See: Article 5a item 1 of the Law on NIP.

for taxpayers commencing their economic activity.[34] On receiving this application the head of the revenue office issues a confirmation of granting NIP immediately, which occurs not later than within 3 days from the date of receipt.[35] Moreover he is obligated to pass the return information on NIP granted to an entrepreneur beginning his economic activity immediately on granting to the registry court of CEIDG.[36]

2.4. Model of accurate functioning of an entrepreneur

Article 17 and Article 18 may be interpreted jointly. They both constitute a model of the proper (correct) functioning of an entrepreneur. Thereby they should be interpreted as superior norms, generally imposing entrepreneurs a certain standard of performing an economic activity.

In accordance with Article 17 AFEA, an entrepreneur runs an economic activity following the principles of honest competition of respect for good business practice as well as right interests of consumers. In addition, by virtue of Article 18 AFEA an entrepreneur is obligated to meet the conditions of conducting an economic activity determined by law, especially those concerning protection against life-threatening, of human health and public morals, and also the natural environment.

The substance of these norms is a basis for formulating separate regulations, which, specifying certain prescripts and prohibitions adjust the general model to the relevant qualities of the entrepreneur or the economic activity. Among the acts of this type one may classify especially the Act of 16 February 2007 on Protection of Competition and Consumers (Dz.U. of 2007, No. 50 item 331 as amended), the Act of 16 April 1993 on Combating Dishonest Competition (consolidated text: Dz.U. of 2003, No 153, item 1503 as amended), and the Act of 23 August 2007 on Preventing Dishonest Market Practices (Dz.U. of 2007, No 171, item 1206), which specify foremost the essence of the model of Article 17 AFEA.

34 Article 5a item 1 of the Law on NIP.
35 Article 8b item 2–3 of the Law on NIP.
36 Article 5a item 3 of the Law on NIP.

2.5. Obligation of possessing proper professional qualifications

If the special regulations impose an obligation of possessing proper professional entitlements while performing a certain type of economic activity, the entrepreneur is obligated to secure that actions within the economic activity are performed directly by the person holding such entitlements.[37]

Professional qualifications determined in Article 19 AFEA should be understood as a body of theoretical knowledge and practical skills confirmed by a proper organ in the form of an adequate document (certificate, diploma etc.), on the basis of which it is possible to perform the activity in situations where it is required by law. Dependence of the possibility of starting and running an economic activity on holding adequate qualifications is expected by the legislator to guarantee their proper or correct and safe performance.

It is worth noting that Article 19 AFEA does not connect professional qualifications directly with the person of entrepreneur (thus, it does not mean that the entrepreneur himself has to hold appropriate qualifications).[38] The provision establishes only that the entrepreneur is obligated to secure that the actions within the economic activity are performed directly by a person holding such professional qualifications (if special regulations impose the obligation of possessing such qualifications). In other words, if in the scope of his economic activity are actions the performance of which depend on appropriate qualifications, the entrepreneur's obligation is to guarantee that they are performed by a person holding such qualifications.

This means that the basic obligation of the entrepreneur is foremost to know if at all and, if so, for what actions in the scope of his activity the qualifications (what qualifications) are required. He also has to remember that a person with professional qualifications (for instance, an employee) performs on this basis actions on his behalf and on his

37 Article 19 AFEA.

38 It is important to bear in mind, however, that personal performance and personal participation are recognized as a fundamental relevant quality distinguishing the activity of the so-called liberal professions.

account (i.e the entrepreneur-employer). Thereby, since it is he who is responsible for his employees' actions, he should, with due diligence, verify the employees' professional qualifications: formal verification, substantive verification or collecting the employee's declaration on the authenticity of submitted professional qualifications.

2.6. Obligation of proper entrepreneur's designation

AFEA also imposes a standard of entrepreneur's designation. As defined in Article 21 AFEA a proper designation includes: 1) the business name of the enterprise, 2) the tax identification number,[39] 3) the registered office and the address of the enterprise. The designation may also comprise other obligatory elements, whose necessity of placing results from the provisions of separate laws.[40]

The business name is the fundamental element individualizing the entrepreneur. In accordance with the provisions of the Civil Code[41], every enterprise acts under a name[42] which should be sufficiently distinguishable from the names of other enterprises on the same market.[43]

The business name of a natural person is his/her first name and surname. Beside, it is not impossible to include a pseudonym in the name or phrases indicating the subject of the entrepreneur's activity, its location and other terms freely selected.[44]

The business name of a legal person or an organizational unit with no legal personality, whom the law acknowledges legal capacity[45] includes the legal form, which can be abbreviated, and in addition can define the subject of the activity, the location of this person and other terms freely selected.[46]

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39 See: Article 16 AFEA.
40 See: Article 34 of the Act on the National Court Register.
41 The Act of 23 April 1964: the Civil Code (Dz.U. of 1964, No 16, item 93 as amended), hereafter CC.
42 Article 43^2 CC.
43 Article 43^3 CC.
44 Article 43^4 CC.
45 See: Article 33^1 CC.
46 Article 43^5 CC.

Business names of certain legal persons and so-called defected legal persons are specified by the provisions of separate laws. In accordance to the provisions of CCC:

- the business name of a registered partnership should contain the surnames or business names (names) of all partners or the surname(s) or business name(s) [name(s)] of one or several partners with an additional designation "spółka jawna" ["registered partnership"];[47]
- the business name of a professional partnership should contain the surname of at least one partner, an addition designation "i partner" ["and partner"] or "i partnerzy" ["and partners"] or "spółka partnerska" ["professional partnership'] and specification of the liberal profession practised in the partnership;[48]
- the business name of a limited partnership should include the surname(s) of one or more general partners and an additional designation "spółka komandytowa" ["limited partnership"];[49]
- the business name of a limited joint-stock partnership should contain the surname(s) of one or more general partners and an additional designation "spółka komandytowo-akcyjna" ["limited joint-stock partnership"];[50]
- any name may be selected as the business name of a limited liability company; however the business name should contain an additional designation "spółka z ograniczoną odpowiedzialnością" ["limited liability company'];[51]
- any name may be selected as the business name of a joint-stock company; however the business name should contain the additional designation "spółka akcyjna" ["joint-stock company"].[52]

47 It is allowed to use the abbreviation "sp.j." in business dealings. See: Article 24 CCC.
48 It is allowed to use the abbreviation "sp.p." in business dealings. See: Article 90 CCC.
49 It is allowed to use the abbreviation "sp.k." in business dealings. See: Article 104 CCC.
50 It is allowed to use the abbreviation "S.K.A." in business dealings. See: Article 127 CCC.
51 It is allowed to use the abbreviation "spółka z o.o." or "sp. z o.o." in business dealings. See: Article 160 CCC.
52 It is allowed to use the abbreviation "S.A." in business dealings. See: Article 305 CCC.

The seat and the address of the entrepreneur entail many important legal consequences.

Therefore they are treated as obligatory elements of designation. The address of an entrepreneur being a natural person is his place of residence understood as the place where this person stays with the intention of permanent stay.[53] On the other hand, the seat of a legal person and a so-called defective legal person is the place where its managing body is established (unless the law or a statute based thereupon states otherwise).[54]

Moreover, Article 21 AFEA states that the aforesaid designation is used (by placing it in the offer) exclusively by the entrepreneur who offers goods or services in direct sales or in remote sales via mass media, an IT networks or unaddressed mail. This wording of the provision may suggest a certain limitation of its subjective scope. It is important to underscore, however, that the obligation of designing an entrepreneur in Article 21 AFEA is binding for all entrepreneurs. The enumeration is expected to decide on the necessity of compliance with this obligation also on the part of the entities of the forms of participation in commercial exchange more direct than direct sale.

2.7. Obligation of proper trade designation

The entrepreneur placing goods for commercial exchange on the territory of the Republic of Poland is obligated to designate it properly.[55] Article 20 AFEA determines fundamental elements of designation and also the form in which it should be placed on the goods.

This obligation may be connected with the safety of commercial exchange and the protection of consumers' interests.

Proper designation includes two elements: 1) the entrepreneur's business name and address[56] as well as 2) information enabling identifying the goods.

53 See: Article 25 CC.
54 See: Article 41 CC.
55 Article 20 AFEA.
56 See: Article 21 AFEA.

As information enabling identifying the goods should be perceived any information with relevant qualities of the particular goods (distinguishing it from others, potentially similar). It is worth emphasizing that separate categories of goods are characterized by other properties, which means that they will be identified through various elements of designation.

Among the information identifying goods the following may be counted: name, price, quality (e.g. energy efficiency class), content (including the mark of caloric value), purpose, expiration date, certificate of safety, warning about the threats to life and health (including information on side-effects, contraindications, rules of storage, dedication to children or effect on the natural environment).

The phrase "information enabling identification of the goods" is not precise and, as such, allows for a far-reaching discretion on the part of the entrepreneur. Therefore several separate normative acts specify the substance of Article 20 AFEA pointing out obligatory elements of the designation of particular categories of goods allowed on the territory of the Republic of Poland.[57] This type of decisions are included, inter alia, in:

- Articles 22–23 of the Act of 29 July 2005 on waste electrical and electronic equipment (consolidated text Dz.U. of 2013, item 1155);
- Article 42 of the Act of 21 June 2002 on explosive materials for civil use (consol. text Dz.U. of 2012, item 1329 as amended);
- Article 23a of the Act of 22 June 2001 on Economic Activity in the Field of Production and Trade in Explosive Materials, Weapons, Ammunition and Products and Technology for Military or Police Purposes (consol. text Dz.U. of 2012, item 1017);
- Article 18 of the Act of 25 February 2011 on chemical substances and their mixtures (Dz.U. of 2011, No. 63, item 322 as amended);

57 See: Article 20 item 2–4 AFEA.

– Article 45 and Article 52a of the Act of 25 August 2006 on food and nutrition safety (consol. text Dz.U. of 2010, No 136, item 914 as amended);
– Article 4 and Article 11 of the Act of 20 May 2010 on medical products (Dz.U. of 2010, No 107, item 679 as amended);
– Article 9 of the Act of 24 April 2009, on batteries and storage batteries (Dz.U. of 2009, No 79, item 666 as amended);
– Article 44 of the Act of 13 September 2002 on biocidal products (consol. text Dz.U. of 2007, No 39, item 252 as amended);
– Articles 6–7a of the Act of 21 December 2000 on the trade quality of agri-food products (consol. text Dz.U. of 2005, No 187, item 1577 as amended);
– Article 153 of the Act of 16 July 2004. Telecommunication Law (Dz.U. of 2004, No 171, item 1800 as amended);
– Article 6 of the Act of 20 April 2004 on substances depleting the ozone layer (Dz.U. of 2004, No 121, item 1263 as amended).

Article 20 AFEA also determines the form in which the information identifying the entrepreneur's goods should appear: on principle they have to be placed directly on the product, its package, label or instruction in writing in the Polish language. However, it is worth noting that it is also possible to identify the goods through information delivered in an electronic form (on the enclosed data carrier or as a file to download from an IT network) or a written form (or even oral) addressed to people of specific qualifications; in such an event only basic information will be presented on the goods (package, label, instruction). It is also important to remember about proper names or exclusive rights of entrepreneurs: then, directly by the name expressed in a foreign language there should also be information on the usage of the goods or the way of its use.

2.8. Obligation of using a bank account

AFEA imposes on entrepreneurs an obligation of using a bank account. It is possible to assume that the objective of the norm in Article 22 item 1 AFEA was to create circumstances enabling greater

transparency of the finances conducted by entrepreneurs. It is of importance in tax law, where it reduces opportunities of avoiding paying taxes by concealing the turnover and in criminal law, where it counteracts against the phenomenon of so-called "money laundering" as well as preventing execution of monetary claims. It is impossible not to notice that this norm plays, however, also an important role in civil law, protecting the creditor from the actions of the debtor-entrepreneur, which aim at removal of assets necessary to satisfy the claims.[58]

It is important to underscore that Article 22 AFEA does not constitute an obligation of possessing a bank account binding absolutely ever entrepreneur. This norm determines exclusively the obligation of using a bank account in normatively determined circumstances.

The entrepreneur is obligated to make or receive payments via his bank account in every case when three conditions occur jointly:

1) the payment occurs in connection with the conducted economic activity,
2) a party to the transaction the payment results from is another entrepreneur,[59]
3) a one-time value of the transaction, regardless of the number of payments resulting therefrom, exceeds the equivalent of 15,000 euro[60].[61]

58 The Judgment of the Court of Appeals in Katowice of 21 May 2009, I ACa 259/09, Lex No 563071.

59 See: the Judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 1 June 2009, I SA/Go 209/90, Lex No 511214.

60 See: Article 22 item 1 AFEA.

61 See: the Judgment of the Supreme Court of 6 February 2009, IV CSK 271/08, Lex No 529733; Compare: the Judgment of the Provincial Administrative Court in Warsaw of 7 February 2013, III SA/Wa 1806/12, Lex No 1323888; the Judgment of the Provincial Administrative Court in Łódź of 22 April 2010, I SA/Łd 141/10, Lex No 584276.

3. General obligations of the state o entrepreneurs and business

3.1. Prescript of acting within the limits and on the basis of law

In accordance with Article 6 item 1 AFEA, undertaking, conducting and terminating an economic activity is free for everyone on equal footing but always in compliance with conditions determined by provisions of law. The prescript of acting within and on the basis of law constituted in Article 6 item 2–3 AFEA should be interpreted as a complement of the assumptions determined in Article 1 of this article. Its fundamental objective is elimination of the discretion of the state, its authorities and institutions in the area of economic freedom (freedom of economic activity). In relation with the entrepreneur the limits of their entitlements and competences is determined by valid law.

As defined in Article 6 item 2 AFEA, the competent organ cannot demand or subordinate its decision on undertaking, conducting and terminating economic activity by the person concerned to his/her fulfilling additional conditions, particularly to submission of documents or disclosure of data, not envisaged by provisions of law.

Article 6 item 3 provides that a competent organ, except a common court, cannot demand or subordinate its decisions on undertaking, conducting or terminating economic activity to submission of documents in the form of an original, a certified copy or a certified translation, unless this obligation is envisaged by the provisions of special acts of law because of the superior public interest or results from directly applied provisions of the commonly valid community law or ratified international agreements.

3.2. Prescript of respecting equality and competition

The source of another general responsibility of the state is Article 7 AFEA, in accordance to which the state grants entrepreneurs public aid on terms and in forms determined in separate regulations, respecting

the principles of equality and competition. This regulation may be interpreted in various ways.

On the one hand, Article 7 AFEA may be read as a general basis for the state granting public aid to entrepreneurs. This results from an assumption that public aid, especially in the scope of market economy, may be allowed only as derogation from the general prohibition. Consequently, it should always be treated as an extraordinary instrument of the economic policy of the state. Otherwise (in the case of general permission) it will bring about distortion of the values being the fundament of this type of economy (in particular including competition). This extraordinary nature of public aid as well as acceptable exceptions thereto, and also rules of conduct connected with the acceptability of public aid, the forms of its monitoring, control and supervision of its granting and using, and also the range of the liability connected with the infringement of these rules.[62]

Article 7 AFEA establishes the general competence of the state for aid measures yet as for rules and forms of granting public aid refers to separate regulations: Union law[63] and domestic law.[64]

On the other hand, Article 7 AFEA generally underscores the importance of equality and competition as the values superior for any relations state and its authorities-entrepreneur. Thereby equality and competition should always be taken into consideration by legislative bodies and those applying law concerning the rules of functioning of entrepreneurs. Of course, it is particularly important in the case of aid measures for public aid as such is connected with a potential risk of infringement of the aforementioned values. Simultaneously, however, their properties should not be reduced to the sphere of public aid only.

Moreover, in order to specify the dimension of acceptable aid measures it is worth noting that the state in this respect should treat

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62 C.Kosikowski, Ustawa..., *op. cit.,* p. 77–78.

63 Article 42, Article 93, Article 107 item 1–3 of the Treaty Establishing the European Community signed in Rome on 23 March 1957, which since the moment of adopting the Treaty of Lisbon has been called the Treaty on the functioning the European Union (Dz.U. of 2004, No 90, item 864/2 as amended), hereafter as TFEU.

64 The Act of 30 April 2004 on Proceedings in the Cases Concerning Public Aid (consol. text: Dz.U. of 2007, No 59, item 404 as amended).

entrepreneurs not only equally and competitively but also openly and objectively.

This results foremost from Article 8 item 2–3 AFEA, in accordance with which the authorities of public administration which implement aid programmes are obligated to pass electronically the information on conditions and forms of the aid granted to entrepreneurs to the Polish Agency for Enterprise, which collects them and shares on the website. This obligation must be met within 30 days of the date of the establishment of the aid programme, not later than 14 days before the established date of submitting applications for aid.

3.3. Prescript of supporting enterprise development

Supporting enterprise development is one of the fundamental functions of the state in economy. In this context it includes several diversified actions of the state and its authorities which are targeted to the common superior objective: creating and maintaining favourable conditions of entrepreneurs' functioning.[65]

The positive attitude of the state and its authorities towards entrepreneurs and economic activity is also expressed in AFEA. By virtue of Article 8 item 1 of this law the authorities of public administration are obligated to support enterprise development creating favourable conditions for undertaking and conducting economic activity.

It is worth underscoring that the prescript of supporting enterprise development formulated in Article 8 item 1 AFEA should be treated as a general rule. This means that it refers to all entrepreneurs and every economic activity. Simultaneously it is impossible not to notice that supporting enterprise was especially clearly emphasised in the context of micro, small and medium-sized entrepreneurs. This underscores the essential role of the aforementioned categories of entrepreneurs but by no means reduces the subjective scope of entrepreneurs to which the state is obligated to act in accordance with Article 8 item 1 AFEA.

65 For more see: C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 162–179.

Moreover, it is worth emphasizing that actions of the state aimed at creating and maintaining favourable conditions of enterprise development are not reduced to legislation only. Although the regulation does not specify the forms or planes of the state's activity in this area, on the basis of Article 8 item 2–3 AFEA it is possible to conclude that there are many of them, since public aid is not ruled out.

3.4. Prescript of respecting legitimate interests of the entrepreneur

By virtue of Article 9 AFEA, performing its tasks, especially in the area of supervision and control, the competent organ operates exclusively on the basis of and within law respecting legitimate interests of the entrepreneur.

This regulation serves eliminating (reducing) discretion in the state's actions in relations with the entrepreneur. Like Article 6 item 2–3 AFEA, it provides that the limit of competences and authorisation of the authorities is valid law.

Moreover, it introduces an important complement: fulfilling their tasks the authorities representing the state act with due respect to the entrepreneur's legitimate interests. This means that the state's actions are determined foremost by valid law. However, while legislating and applying it, the state should take into consideration also the position of the entrepreneur in the situation where it results from his legitimate interests. Furthermore, the state remaining within law and acting on its basis, cannot take actions aiming at infringement of the entrepreneur's legitimate interests.

It is worth underlining that the prescript of respecting legitimate interests of the entrepreneur refers to any relations state-entrepreneur. Definitely the provision on control and supervision in its substance does not contradict it. On the other hand, the clear reference to controlling and supervisory actions of the state allows us to recognise Article 9 AFEA as a superior rule of control over the economic activity of the entrepreneur.

3.5. Prescript of recognition of qualifications as well as professional insurances and guarantees

The prescript of recognition of qualifications as well as professional insurances and guarantees binding the authorities and institutions representing the state is a manifestation of implementing the rule of recognizing professional qualifications defined in Article 53 TFEU.

This prescript is to facilitate undertaking and conducting economic activity on the territory of the RP by entrepreneurs from the indicated states. The facilitation, according to Article 9a–9b AFEA is to consist in the domestic authorities not being allowed to demand a re-fulfilment of the conditions of undertaking and conducting economic activity, which have already been fulfilled by these entrepreneurs in another state and confirmed by appropriate documents from their authorities, and should recognize the insurances and guarantees of professional liability issued in those states.[66]

In accordance with Article 9a AFEA, a competent body, assessing the fulfilment of the requirements indispensable to undertake and conduct economic activity on the territory of the RP, recognizes the requirements fulfilled by the entrepreneur with the seat on the territory of one of the member states of the European Union, member states of the European Free Trade Association (EFTA), parties to the agreement on the European Economic Area, as well as other states which may exercise the freedom of enterprise on the basis of agreements signed by these states with the European Union and its member states, which confirm the fulfilment of the conditions of undertaking and conducting economic activity.

On the other hand, Article 9b AFEA provides that domestic authorities of the RP recognize the insurances and guarantees of professional liability issued in member states of the European Union, member states of the European Free Trade Association (EFTA) – parties to the agreement on the European Economic Area as well as from other states, which can exercise freedom of enterprise on the basis

66 For more on doubts concerning practical implementation of this prescript in Article 9a–9b AFEA see: C. Kosikowski, Ustawa..., *op. cit.*, p. 96–98.

of agreements signed by those states with the European Union and its member states insofar as they meet the conditions determined in the provisions of separate laws.

To the prescript of recognition of professional qualifications, insurances and guarantees it is important that the following conditions are fulfilled cumulatively:

1) the entrepreneur possesses a seat on the territory of one of member states of the European Union, member states of the European Free Trade Association (EFTA) as from other states, which can exercise freedom of enterprise on the basis of agreements signed by those states with the European Union and its member states.
2) the entrepreneur meets certain conditions of undertaking and conducting an economic activity on the territory of one of the aforementioned states and possesses appropriate professional guarantees and insurances.
3) the entrepreneur acquired qualifications, certificates or other documents confirming the fulfilment of the requirements of undertaking and conducting business activity, as well as professional guarantees and insurances.

3.6. Prescript of issuing interpretations of regulations on public levies

The prescript of issuing interpretations of regulations on public levies constitutes a comprehensive institution regulated in Article 10–10a AFEA.

In accordance with Article 10 item 1 AFEA, the entrepreneur may submit to competent public administration authorities or to a state organizational unit an application for issuing a written interpretation of the scope and the way of application of the regulations which provide an obligation of the entrepreneur to provide a public tribute as well as premiums towards social or health insurance, in his individual case.

Thus, the prescript of issuing interpretations of regulations on public levies in Article 10–10a AFEA is the obligation of the state

(competent authorities and institutions), which results from granting the entrepreneur a right to apply for interpretation.[67]

It is characteristic that it is only an entrepreneur in the understanding of Article 4 AFEA[68] that may apply for issuing an interpretation pursuant to Articles 10–10a AFEA, and also the fact that the application may concern the interpretation of the scope and way of applying the regulations providing the obligation of the entrepreneur to pay a public tribute as well as premiums towards social and health insurance, in his individual case.

Thus, the subjective scope of the interpretation pursuant to AFEA is extremely extensive. It encompasses all public law burdens to which he is bound. It is worth noting that the expression "public levies" used for their designation was not defined on the ground of AFEA. Consequently, in this respect we apply the provisions of the Act of 27 August 2009 on public finances, according to which among the public tributes are: taxes, premiums, fees, payments from the profit of state companies and sole-shareholder companies of the State Treasury, and also other monetary payments, whose obligation of bearing in favour of the state, local government, state special purpose funds as well as other units of the public finance sector results from separate laws[69].[70]

It is important to remember, however, that the property in question of the institution in Article 10–10a AFEA was indeed reduced by the

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67 See: the decision of the Supreme Court of 18 April 2011, III UK 117/10, Lex No 898257.

68 The Judgment of the Provincial Administrative Court in Gdańsk of 17 November 2011, III SA/Gd 404/11, Lex No 1153910.

69 Article 5 item 2 point 1) of the Act of 27 August 2009 on Public Finances (consol. text Dz.U. of 2013, item 885 as amended).

70 The phrase used in the provision of Article 10 item 1 AFEA "public levy" is connected with the obligation of a tribute (usually monetary) in favour of the state or another public law entity in order to accomplish tasks of public nature. The essence of such a tribute is its common, compulsory and irreclaimable nature. Thus, public levies are foremost taxes and fees, as well as duties, surcharges, compulsory loans, any sanctions and fines. This means that taxes are a separate category of public levies, but they do not exhaust their set. Saying "public levies" it is important to understand several tributes (including fees) of non-tax nature if they meet the aforesaid conditions: the Judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 16 July 2009, II SAB/Go 8/09, Lex No 523446. See: the Judgment of the Supreme Court of 9 September 2010, II UK 98/10, Lex No 11129/13; the Judgment of the Provincial Administrative Court in Warsaw of 13 July 2011, VI SA/Wa 818/11, Lex No 1088685; the Judgment of the Provincial Administrative Court in Gdańsk of 6 October 2011, III SA/Gd 236/11, Lex No 1132624.

reservation that the rules and the mode of issuing the interpretation of the regulations of tax law are regulated by the Act of 29 August 1997: Tax Ordinance[71].[72]

Interpretations pursuant to Articles 10–10a AFEA are issued on the request of the entrepreneur concerned addressed to the public administration authority or a state organizational unit competent due to the particular public law burden.[73] The application contains:

1) the designation of the entrepreneur, which comprises: a) the business name, b) the designation of the seat and the address or the place of residence and the address of the entrepreneur; c) the tax identification number (NIP), d) the number in the register of entrepreneurs in the National Court Register or in CEIDG, e) the address for correspondence in the case it is different than the address of the seat or the address of the entrepreneur's residence,[74]
2) the actual situation or a future event to which the application refers,[75] and
3) own position on the issue.[76]

The application is subject to a fee[77] of 40 zlotys, which should be paid within 7 days of the date of submitting the application. In the event of occurring two separate actual states[78] or future events in one application for issuing interpretation a fee is collected for each

71 Article 14a–14p of the Act of 29 August 1997: Tax Ordinance (consol. text Dz.U. of 2012, item 749 as amended), hereafter as TO. For more on differences between interpretations issued pursuant to Articles 10–10a AFEA and Articles 14a–14p TO see: C.Kosikowski, Ustawa..., *op. cit.,* p. 100–113.

72 The Judgment of the Supreme Administrative Court in Warsaw of 10 May 2012, II GSK 488/11, LEX No 1219037.

73 The Decision of the Supreme Administrative Court in Warsaw of 8 January 2013, II OW 134/12, Lex No 1242954; the Decision of the Supreme Court of 6 April 2011, II UK 331/10, Lex No 829137; the Judgment of the Court of Appeals in Warsaw of 27 October 2010, III AUa 264/10, Lex No 1110254.

74 Article 10 item 3 AFEA.

75 Article 10 item 2 AFEA; See: the Judgment of the Court of Appeals in Katowice of 5 May 2010, III AUa 3404/09. Lex No 686888.

76 Article 10 item 3 AFEA.

77 See: Article 10 item 8–9 AFEA.

78 The Judgment of the Provincial Administrative Court in Warsaw of 2 December 2011, VII SA/Wa 1644/11, Lex No 1155885.

separate actual state of future event presented in the application. In the case of failure to pay the fee on time the application is left without examination.[79]

Interpretation is issued without undue delay, but not later than within 30 days of the date of the receipt of the complete and paid application by the public administration authority or the state organizational unit. It is important that it is assumed that in the case of failure to issue the interpretation on time it is recognized that on the day following the day of expiry of issuing the interpretation, an interpretation confirming the correctness of the entrepreneur's position presented in the application for interpretation[80]. [81]

Issuing interpretation occurs as a decision against which it is possible to appeal. The decision contains the indication of a correct position on the case along with its legal justification and instruction on the right to appeal.[82]

AFEA indicates the effects of issuing interpretation. In accordance with Article 10a item 2 AFEA an interpretation is not binding for the entrepreneur, which means that he is not obligated to act in accordance with the interpretation. However, in the scope in which he complied with it he cannot be burdened with any public levies, administrative or financial sanctions or penalties. On the other hand, according to Article 10a item 3 AFEA, an interpretation is binding for the public administration authorities or state organizational units competent for the entrepreneur and may be changed through resumption of the proceedings.[83]

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79 Article 10 item 6–7 AFEA.

80 Article 10a item 1 AFEA.

81 See: the Judgment of the Provincial Administrative Court in Warsaw of 14 July 2009, VII SA/Wa 612/09, Lex No 553593.

82 Article 10 item 5 AFEA; see: the decision of the Supreme Court of 5 October 2011, II UK 33/11, Lex No 1308096; the Judgment of the Court of Appeals in Białystok of 3 September 2013, III AUa 193/13, Lex No 1363237; the Judgment of the Court of Appeals in Białystok of 26 September 2012, III AUa 501/12, Lex No 1220449; the Decision of the Supreme Court of 18 January 2012, II UK 113/11, Lex No 1130392.

83 Article 10a item 3 AFEA.

3.7. Prescript of handling entrepreneurs' matters without undue delay

The prescript of handling entrepreneurs' matters without undue delay encompasses three elements.

Article 11 item 1 AFEA provides that the competent organ is obligated to handle entrepreneurs' matters without undue delay. In this aspect the prescript is of general nature, it establishes a general obligation of immediate handling entrepreneurs' matters. Thereby the regulation is a reference to Article 35–38 of the Act of 14 June 1960: Code of Administrative Procedure[84] as well as other possible separate laws.

On the other hand, in accordance with Article 11 item 2 AFEA the competent organ cannot refuse to accept incomplete letters and applications or demand any documents the necessity of producing or submitting whereof does not result directly from a provision of law. Besides, it is worth remembering that in the case of necessity of completing the application the deadline for the examination of the application is counted from the date of the receipt of the completed application.[85]

Moreover, Article 11 item 3–9 AFEA forms a relatively new institution, on the grounds of AFEA, of confirmation of the receipt of an application along with defining the consequences of failure to handle the matter on time.

The competent organ, having received the application, immediately confirms its receipt. The confirmation contains: 1) the date of receipt and the date of the examination of the application, 2) the instruction on the means of appeal to which the entrepreneur is entitled, as well as 3) information on the consequences of failure to handle the matter on time. The deadline for settling the matter determined in the confirmation of the receipt of the application may be additionally prolonged once

84 See: Article 35–38 of the Act of 14 June 1960: Code of Administrative Procedure (consol. text Dz.U. of 2013, No 267); hereafter as CAP.

85 Article 11 item 5–6 AFEA.

only and the prolongation of the deadline of settling the matter cannot exceed two months.[86]

It is important that in the case of failure to decide on the matter on time, it is recognized that the organ issued a decision in accordance with the entrepreneur's application[87], unless the provisions of separate laws provide otherwise due to a superior public interest.[88]

3.8. Prescript of cooperation from public partners

Article 12 AFEA provides the freedom of association, i.e. making organizations and associations of professional and economic self-governments. It is important that the state not only allows for associations of entities but is also connected with the prescript of cooperation with this type of organizations.[89] In accordance with the provision of Article 12 AFEA, fulfilling their tasks, public administration authorities are obligated to cooperate with organizations of employees, organizations of employers, organizations of entrepreneurs as well as professional and economic self-governments.

This obligation refers to the principle of solidarity, dialogue and cooperation of public partners expressed in Article 20 of the Constitution of the RP of 1997, which means that the sphere of

86 Article 11 item 3–7 AFEA and Article 11 item 8 AFEA.

87 Article 11 item 9 AFEA.

88 Such exemptions contain: Article 181 item 4 of the Act of 27 April 2001.: Law of Environment Protection (consol. text Dz.U. of 2013, item 1232), Article 3a of the Act of 21 August 1997 on Animals Protection (consol. text Dz.U. of 2013, item 856), Article 9 item 2a and Article 18^5 of the Act of 26 October 1982 on Education for Sobriety and Preventing Alcoholism (consol. text Dz.U. of 2012, item 1356 as amended), Article 160 item 1a and Article 160a of the Act of 3 July 2002: Air Law (consol. text Dz.U. of 2012, item 933 as amended), Article 7 item 6a of the Act of 13 September 1996 on Maintaining Cleanliness and Order in Municipalities (consol. text Dz.U. of 2012, item 391 as amended), Article 8a of the Act of 29 January 2004 on Veterinary Inspection (consol. text Dz.U. of 2010, No 112, item 744 as amended), Article 8a of the Act of 11 March 2004 on Animals' Health Protection and Combating Animals' Infectious Diseases (consol. text Dz.U. of 2008, No 213, item 1342 as amended), Article 3a of the Act of 22 July 2006 on Fodders (Dz.U. of 2006, No 144, item 1045 as amended), Article 18b item 3 of the Act of 7 June 2001 on Collective Water Supplies and Collective Sewage Disposal (consol. text Dz.U. of 2006, no 123, item 858 as amended), Article 8a of 16 December 2005 on Products of Animal Origin (Dz.U. of 2006, No 17, item 127 as amended), Article 24 item 2 of 22 August 1997 on Protection of Persons and Property (consol. text Dz.U. of 2005, No 145, item 1221 as amended), Article 30 a of the Act of 27 August 2003 on Veterinary Border Inspection (Dz.U. of 2003, No 165, item 1590 as amended).

89 For more see: C. Kosikowski, Ustawa..., *op. cit.,* p. 116–120.

economy (functioning of the economic system) was included into the public dialogue understood as various, more or less formalized, ways of information exchange and presentation of opinions between citizens (for example, employees and employers) and public authorities. It also results in the proposal of consensual creating (legal) frameworks of economy: development and discussion on the proposals by all participating parties, which will take a form of a binding act: a law. This rule does not assume that compromise must be reached every time but encompasses foremost the state's obligation to create circumstances indispensable for conducting an open social dialogue. Simultaneously it propagates concord and community of interest of all individuals and social groups within a particular community, as well as assumes mutual understanding between individuals, social groups and the state. Moreover, it imposes an obligation of participating in burdens in favour of society (maintenance and securing the functioning of the RP, as well as in an economic aspect).[90]

3.9. Prescript of maintaining a contact point

The obligation of creating and maintaining of a contact point, according to the provisions of Articles 22a–22f AFEA results from Article 6 of the Act of 4 March 2010 on Providing Services on the territory of the Republic of Poland (Dz.U. of 2010, No 47, item 278 as amended).

This law implements into the national system Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 referring to services in the internal market. (OJ L 376, 27.12.2006, p. 36). Thus, it duplicates its fundamental objectives, which is eliminating barriers in free conducting of economic activity: enterprise and providing services as the guarantee of the internal market of the European Union determined by TFEU. Implementing these assumptions, it constitutes facilities for entrepreneurs (service-providers), including, for example, in the scope of completing several formalities connected with undertaking and conducting economic

90 See: C. Kosikowski, Publiczne prawo..., *op. cit.*, p.74.

activity in Poland. In this context it imposes on the state (all competent authorities and institutions) an obligation of constituting and securing proper functioning of the contact point.

The contact point is maintained in an electronic form (via webpage[91]) by the minister competent for economy. The task of the contact point is:

1) enabling completing the procedures connected with undertaking, conducting and terminating economic activity on the territory of the RP;
2) providing information referring to the rules of undertaking, conducting and terminating economic activity on the territory of the RP.[92]

Competent authorities enable, through the contact point, settling the matters connected with undertaking, conducting and terminating economic activity.[93] This consists in the opportunity of electronic submitting to the contact point applications, declarations and notifications indispensable to undertake, conduct or terminate economic activity as well as to recognize one's professional qualifications,[94] which will be immediately transferred (not later than on the next working day of their receipt) to competent authorities.[95] This corresponds with the obligation of competent authorities to receive the documents submitted at the contact point and initiate proceedings on the working day following the day of receipt at the contact point[96].[97]

Besides, it is important to note that neither the contact point nor the competent organ verifies the documents and information received. Therefore it is reserved that it does not secure any guarantee of the entrepreneur and his employees' honesty.[98]

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91 See: http://www.eu-go.gov.pl/ , accessed, December 6, 2013.
92 Article 22a item 2 and 4 AFEA.
93 With the reservation of Article 22c item 1 and item 5 AFEA.
94 Article 22a item 3 AFEA.
95 See: Article 22a item 6 AFEA.
96 See: Article 22c item 3 AFEA.
97 Article 22e AFEA.
98 Article 22c item 6 AFEA.

Moreover, the contact point provides access to the information concerning:[99]

- procedures and formalities required at undertaking, conducting or terminating business activity on the territory of the Republic of Poland;
- general rules of providing services in member states of the European Union, member states of the European Free Trade Association (EFTA) – the parties of the agreement on the European Economic Area and of other states, which can exercise the freedom of enterprise under agreements signed by these states with the European Union and its member states, especially in the scope of consumer protection;
- contact data of competent authorities with the scope of their competence;
- ways and conditions of access to public registers and public databases referring to economic activity and entrepreneurs;
- legal measures to take in the case of dispute between the competent organ and the entrepreneur or the consumer, between the entrepreneur and the consumer as well as between entrepreneurs;
- explanations issued or prepared by competent authorities concerning regulations referring to undertaking, conducting and terminating business activity;
- contact data of associations and organizations which may provide practical assistance for entrepreneurs and consumers;[100]
- rights and responsibilities of employees and employers;
- website addresses of contact points in other states.[101, 102]

Complete and up-to-date information should be provided in an understandable and exhaustive way in the Polish language.[103]

99 See: Article 22c item 4 AFEA.
100 See: Article 22b item 4 AFEA.
101 Article 22d item 1 AFEA.
102 Article 22b item 1–2 AFEA.
103 Article 22b item 3 and Article 22 item 2 AFEA.

Part 4

LEGALIZATION OF AN ECONOMIC ACTIVITY

1. Introductory remarks: functions and objectives of legalization of an economic activity

In accordance with Article 14 AFEA, the entrepreneur may undertake an economic activity on the day of submitting an application for registering in the Central Register and Information on Economic Activity (CEIDG) or after obtaining an entry in the register of entrepreneurs in the National Court Register (KRS).[1] This regulation constitutes one of the fundamental obligations binding all entrepreneurs (and entities interested in involvement in economic activity): the obligation of legalization of an economic activity.

Article 14 AFEA also decides on the subjective property of the two systems of legalization. It provides that an entry in the register (CEIDG) is obligatory for entrepreneurs who are natural persons,[2] which means that the competent register for legalization of their economic activities for the remaining entities is KRS functioning in accordance with the rules provided in the Act on the National Court Register.

In spite of separate legal bases and differences in the structure of both registers, they fulfil the same functions. Serving the legalization of economic activity they should be a source of information on the entrepreneur and the economic activity. Besides, it is worth underscoring that the legalizing and informative functions must be perceived as equal since they determine each other. This results from

1 Article 14 item 1 AFEA.
2 Article 14 item 2 AFEA.

the assumption that the obligation of legalization of an economic activity may be treated as a way of acquisition of information on every entrepreneur and every economic activity conducted on the territory of the RP. This information, if it is reliable and up-to-date, is of priceless value for entrepreneurs and consumers. Foremost it is of priority value for the state and its authorities, because it determines the fulfilment of its fundamental functions in economy: is a starting point in such actions as analysis and evaluation of the functioning of economy, planning macroeconomic development, forming the structure of economy, creating and maintaining favourable circumstances for the development of economy, rationing and regulation of economic activity, control and supervision over economic activity and the legal protection of domestic market in international relations.[3]

It is worth emphasizing that the idea of legalization of economic activity in Article 14 item 1–4 AFEA, which is reduced to obtaining an entry in CEIDG or the register of entrepreneurs KRS was originated as a result of considerable evolution. Changes of planned economy were necessary. Corrections referring to the legalization of economic activity were introduced gradually, taking into consideration both tentative and long-term needs. Evaluating them in general terms it is possible to acknowledge that they go in the right direction. However, as practice showed, not all solutions adopted achieve the objectives assumed and not all of them function correctly (moreover, not all of the planned reforms have been entered into force).

Thus, it is difficult to acknowledge that the evolution of the system of economic activity legalization in Poland has come to an end. For example, it has not eliminated cases where the obligation of legalization binds the entities which do not conduct an economic activity, or this obligation is not required from the entities which really conduct economic activity on their own behalf.

Moreover, it is important to note that inasmuch as CEIDG and the KRS register of entrepreneurs constitute the basic form of the

3 For more see: C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 117–203.

legalization of an economic activity, they are not the only registers competent in this respect:

b) to undertake and legally conduct an economic activity tax registration, statistical registration and registration for the purposes of social and health insurance are also indispensable;
c) subsequent registration obligations are also connected with the legalization of rationed economic activity;
d) yet another category binding at legalization, are registers of the representatives of liberal professions.

Thus, the idea of the legislator aiming at unification of the system of legalization of economic activity has not been realized. The legal status is still far from expectations and requires further corrections. Only an accessible, coherent and transparent system will guarantee the correct fulfillment of the legalizing and informative functions.

2. Evolution of the system of the legalisation of economic activity in Poland

The system of legalization of economic activity in Poland has been formed in the course of considerable evolution.

The consequence of planned economy was parallel functioning of several dozen registers serving recording the activity of economic units (state-controlled economy and non-state-controlled economy) and strict rationing of economic activity of natural persons – dependence on the consent of a competent public administration authority issued in the form of decision on permission or so-called confirmation of registering.

The political transformation forced the legislator to take necessary legislative actions. One of them was the introduction to the legal order the institution of Register of Economic Activity (EDG) serving legalization of economic activity of natural persons, which was introduced by virtue of the Act on Economic Activity.

Its constitution is commonly identified with exceeding the range of economic freedom or the guarantee of its implementation in the

practice of economic exchange. Thus it was an action indispensable to build an economic order from scratch. However, it is difficult to state that EDG according to the rules established in AEA was a well conceived construction adapted to contemporary needs. Foremost it failed to solve fundamental problems resulting from heterogeneous and opaque legislative system. This state prevented or considerably impeded the implementation of fundamental assumptions making the access to information on economic entities complicated. General arrangement of the whole system was recognized as necessary. It was to happen through developing a homogeneous, common, nationwide system of registration of economic entities corresponding with the needs of free-market economy.[4]

This concept took a normative shape in the form of the Act of 20 August 1997 on the National Court Register (KRS). As defined in the provisions of this act the National Court Register included, among other things, the register of entrepreneurs where all entrepreneurs had to be recorded, including natural persons conducting economic activity.[5] Consequently from the day of the Act on National Court Register (1 January 2001[6]) the functioning of EDG was suspended and its complete liquidation was provided for 31 December 2003.[7] This action seemed fully rational. Initiating the KRS register of entrepreneurs on 1 January 2001 was to revolutionize the system of legalization of economic activity in the RP also including economic activity of natural persons.

However, the original assumptions were modified and the expected change never occurred. This did not mean a complete renouncement of the KRS register of entrepreneurs, since the necessity of radical

4 Ł. Zamojski, Ustawa o Krajowym Rejestrze Sądowym. Komentarz, Warszawa 2009, p. 11.

5 The following registers were liquidated: trade, of state companies, cooperatives, socio-professional organizations of farmers, foundations, craft, associations, trade unions of individual farmers, organizations of professional self-government, chambers of commerce, associations of mutual insurance, trade unions, unions of employers, public healthcare institutions, associations for physical culture and sports unions: C.Kosikowski, Przedsiębiorca w prawie polskim na tle prawa europejskiego, Warszawa 2003, p. 40.

6 See: Article 1 of the Act on 20 August 1997. Annotations introducing the Act on the National Court Register (original text after Dz.U. of 1997, No 121, item 770 as amended), hereafter as Provisions introducing ANCR.

7 See: Article 7 item 1 and Article 8 item 1 of Provisions introducing ANCR.

reforms remained undisputable. The doubts referred to other questions. First, the fact that KRS is not organizationally prepared to serve natural persons, and the number of applications would paralyze the work of registry courts and prevent the successful fulfillment of basic competences towards other entities. Second, the costs, complicated procedure and formal requirements with the record in the KRS register of entrepreneurs would not maintain a due proportion and excessively impede and complicate the legalization of economic activity of natural persons.

This made the legislator to take subsequent legislative steps. Even before the ANCR by virtue of the act of 30 November 2000 on the amendment to the Act – Provisions introducing ANCR,[8] introduced a transitional period preserving the previous property of the EDG system until 31 December 2001, and then finally prolonged it till 31 December 2003.[9]

Simultaneously LEA was amended, where out of necessity the rules of its functioning were determined. The legal bases of EDG were in Chapter 11: Special, transitional and final provisions in the content of Articles 88a–88i LEA.

Owing to, by assumption, the transitive nature of recording economic activity of natural persons included in the temporal provisions of LEA, on 1 January 2004 the structure of EDG was subject to further modifications. By virtue of Article 1 of the Act of 14 November 2003 on the amendment to the Act: Law of Economic Activity and some other laws,[10] Articles 7–7i LEA were introduced, which maintained the institution of EDG in the system of Polish law. This was identified with the renouncement of the intention of imposing the obligation of registering in KRS upon natural persons, and thereby abandonment of the idea of unification of the legalizing systems. This was supported

8 See: the Act of 30 November 2000 on the amendment to the Act – Provisions introducing the Act of the National Court Register (Dz.U. of 2000, No 114, item 1194).

9 See: the Act of 14 December 2011 on the amendment to the Act on the National Court Register, the acts: Provisions introducing the Act on the National Court Register as well as the acts: Law of Economic Activity (Dz.U. of 2002, No 1, item 2).

10 The Act of 14 November 2003 on the amendment to the Act: Law of Economic Activity and Certain Other Laws (Dz.U. of 2003, No 217, item 2125).

by the fact of transferring legal bases of EDG from Chapter 11 to the content of Chapter 2: Undertaking and conducting economic activity determining fundamental obligations referring to economic activity and binding all entrepreneurs. Also the wording of Article 7 item 1 and Article 2 LEA, where the legislator provided that as a rule the entrepreneur may undertake an economic activity after recording in the KRS register of entrepreneurs with the reservation that the entrepreneur being a natural person may undertake an economic activity after recording in EDG. This meant a final adopting of two parallel systems of economic activity legalization: the record system for natural persons undertaking economic activity and the system of court registration for the remaining entities.

Simultaneously, once again, the rules of the functioning of the record system was modified. However, the changes were ad hoc and ill-conceived. They did not revolutionize the archaic structure of EDG. It was necessary to take further actions in order to create a system of recording economic activity of natural persons being an equivalent of the KRS register of entrepreneurs but, simultaneously, free from the basic drawbacks of the court registration.

As such should we perceive the original text of the Act of 2 July 2004 on Freedom of Economic Activity. Chapter 3: Recording of Economic Activity comprised the comprehensive regulation reforming EDG radically. It provided recording based on the IT system enabling the submission of an application electronically and legalization of an economic activity without personal presence in the municipal office; it referred to KRS through an extensive catalogue of data and information which had to be recorded in EDG on request or ex officio, contained guarantees of formal and substantive openness of the data recorded in EDG and provided opening, modeled on the Central Information of KRS, a Central Information on Economic Activity with branches at recording authorities.

Because of the necessity of organizational preparing of recording authorities, building information systems and issuing executive regulations, Chapter 3 AFEA was planned to enter into force on 1 January 2007. Afterwards the legislator decided to prolong

vacatio legis till 1 October 2008, then again till 31 March 2009. In this period the necessary yet archaic provisions of LEA were still maintained. Surprisingly, finally the text of Chapter 3 AFEA never entered into force. Decisive was here the Act of 19 December 2008 on the Amendment to the Act on Freedom of Economic Activity and Amendments to Certain Other Laws[11]. The amendment eliminated from the wording of AFEA the original content of Chapter 3, in place of which provisions establishing the Central Register and Information on Economic Activity (CEIDG) was introduced. Besides, a reservation was made that the 'new' Chapter 3 AFEA would enter into force only on 1 July 2011. Simultaneously, by that time the provisions of LEA proper in this scope were maintained.[12]

Imprudent and disorderly actions of the legislator consisting in prolongations of vacatio legis of the new regulation, and finally lifting the regulations which never came into force are difficult to define as "good legislation". As a result, they lead to the situation where the system of legalization of economic activity of natural persons, which failed to satisfy basic conditions, functioned, with just petty modifications, definitely for too long.

Anachronism and maladjustment of EDG resulted from the fact that the recording authority was the wójt (head of a municipality), the burmistrz (mayor) or city president competent due to the entrepreneurs place of residence. This solution did not cause problems in the situation where a natural person conducted an economic activity on the territory of the same municipality as his residence. Otherwise, i.e. in the case of activity conducted on the territory of the whole country, simultaneously in several municipalities or on the territory of a municipality different form his residence, it did not work at all. Then municipalitiess other than the municipality of residence had no data of the entrepreneur operating on their territories. This was against the essence of the informative

11 The Act of 19 December 2008 on the amendment to the Act: Law of Economic Activity and Certain Other Laws (Dz.U. of 2009, No 18, item 97).

12 See: Article 1 of the Act of 2 July 2004: Provisions introducing the Act on Freedom of Economic Activity (Dz.U. of 2004, No 173, item 1808 as amended), hereafter referred to as Provisions introducing AFEA; R.Dowgier, M.Etel, Zmiany w zakresie ewidencjonowania działalności gospodarczej oraz identyfikacji podatkowej przedsiębiorcy, "Przegląd Ustawodawstwa Gospodarczego" 2009, No 10, p. 23.

function and, simultaneously, hindered the performance of control and supervisory duties of the municipal authorities. Analogous doubts referred also to the auxiliary way of designation of the properties of the recording authority, according to the principal place of the economic activity, in the case of natural persons, whose place of permanent residents was still outside the territory of the Republic of Poland.

It is also worth remembering that the legalizing record in EDG was made on request of the entrepreneur submitted in person (in a paper version) in the proper (according to location) municipal office. It is true that along with subsequent amendments alternative forms of submitting the application were accepted, for instance, a registered letter with a notary's confirmation of the signature, or via the Internet, but due to the costs and dependence of the so-called certified electronic signature, it was applied just occasionally.

It was also problematic to establish when a natural person may legally begin the economic activity. The problems resulted from, for example, imprecise designation of the date when the recording authorities were obliged to make the entry and also the disputable nature of the record in EDG itself.[13]

Foremost it is important to underscore the lack of proper fulfillment of the informative functions. It is difficult to acknowledge that EDG guaranteed access to information on economic activity of entrepreneurs being natural persons.

The scope of data available in EDG was dubious. They included merely information from the application for the legalizing record, i.e. the designation of the entrepreneur, the registration number PESEL and the NIP number (if the entrepreneur had them), the designation of the place of residence and the address of the entrepreneur (if he permanently conducted his activity outside the place of residence, also this place and address of the principal office, branch or another place of mail receipt), the definition of the subject of the economic activity

13 K. Kozioł, Rejestracja osób fizycznych prowadzących działalność gospodarczą - ewidencja działalności gospodarczej czy Krajowy Rejestr Sądowy?, "Samorząd Terytorialny" 2009, No 9, p. 35–49; M. Niezgódka-Medkova, W kwestii charakteru wpisu do ewidencji działalności gospodarczej, "Państwo i Prawo" 1990, No 1, p. 112–116.

(in accordance with PKD – Polish Classification of Activities), dates of the commencement of the economic activity, as well as the contact telephone number and e-mail address (the applicant did not have to provide them, even if he had them).

Moreover, legal regulations established only that EDG is open. This means formal openness, thus only the fact that the data and information which have to be registered are available to everybody without the necessity of referring to a legal interest. Alas, they failed to specify the forms of access, the ways of providing information, and proceedings in the case of obtaining access to these data. On the other hand, owing to limitations of competence of record authorities to the territory of a particular municipality and the lack of any systematization of the data on the national level, it was left to wójts, mayors and city presidents' discretion.

It is also important to emphasize that no guarantees of substantive openness were formulated. The data included in EDG were not subject to the presumption of veracity, common knowledge or certainty of record. In this situation the entrepreneur was not responsible for the completeness and validity of the information in the record.. Also the recording authority, which did not verify the data in the legalization application, was not liable therefor.

As a result, the openness of records functioned pro forma and was of no considerable substantive importance, which meant that EDG failed to fulfill the basic assumptions of the system of legalizing economic activity.

3. Central Records and Information on Economic Activity

A fundamental reform of the system of recording economic activity of natural persons was indispensable. It occurred on 1 July 2011, when EDG was replaced with CEIDG kept by the Minister competent for economy.

First, it is worth underscoring that CEIDG operates in the IT system and data and information transfer to CEIDG as well as data and information transfer and sharing by CEIDG is carried out through the electronic platform of public administration services (e-PUAP).[14] This change (in reference to EDG) should be considered as a key change. Recording economic activity of natural persons through the IT system had a definitely positive effect on the fulfillment of legalizing and informative functions.

The responsibilities of CEIDG are:[15]

1) recording entrepreneurs being natural persons,
2) sharing information on entrepreneurs and other entities in the scope indicated in the Law,
3) enabling establishing the date and the scope of changes of records in CEIDG and the authority introducing them, as well as
4) enabling insight into the data sharing by the Central Information of the National Court Register for free.[16]

A record in CEIDG is made on request of a natural person (with an electronic

signature or a so-called confirmed trusted profile e-PUAP) submitted via the Internet on the commonly available official electronic form.[17] With the IT system of legalization it is a natural solution and should not be surprising. This does not mean that it is the only method of successful application.

The "classical" form of legalization was preserved as complementary: a paper application corresponding with the requirements of the electronic form, submitted in any selected municipal office in person or via mail as a registered letter. The application should be personally signed or contain a notary's confirmation of the

14 Article 23 item 2 AFEA in connection with Article 24 item 1 AFEA.
15 Article 23 item 3 AFEA.
16 This means that CEIDG shares in the IT system not only the information referring to economic activity of natural persons but also the remaining entities (recorded in the KRS register of entrepreneurs). Consequently, despite two legalizing systems (CEIDG and the register of entrepreneurs RS) the data of all entrepreneurs are available in CEIDG.
17 In accordance with Article 24 item 2 AFEA.

signature. Besides, it is important to underscore that the application so submitted does not cause directly legal effects. The municipal authority just verifies the content of the application formally and confirms the receipt to the applicant. Subsequently, it transforms the application into an electronic form and sends to CEIDG not later than then the next working day on its receipt.[18] This confirms the accessory nature of this solution – it indirectly makes the legalization independent from the e-signature but does not abandon this form of confirmation.

It is worth emphasizing that while legalizing economic activity of natural persons the definition of the property of a local recording authority (municipal authority) was renounced, which means that the application for a record in CEIDG may be submitted at any municipal office selected by the entrepreneur.[19] This results from the fact that the competence of CEIDG, as an IT system, covers the territory of the whole country whereas a municipal authority (freely chosen) does not resolve the entrepreneur's case but only mediates in the delivery of the application. This solution should be assessed as positive; it eliminates difficulties in designation of local competence due to the place of residence or the principal place of economic activity.

The entry in CEIDG is made if the application is submitted by an authorized person and is correct.[20] Submission of the correct application is confirmed by the information sent via the IT system to the email address indicated by the entrepreneur.[21] On the other hand, if the application for a record in CEIDG is not correct, the CEIDG IT system sends the applicant, electronically, only the information on the reasons why the application is incorrect[22] What draws attention is the lack of administrative decision on the refusal of the record (acceptance of the application). It is the consequence of the fact that an incorrect application does not initiate administrative proceedings. Thereby,

18 See: Article 26 item 4 AFEA.
19 Article 26 item 2 AFEA.
20 Article 27 item 1 AFEA.
21 Article 26 item 1 AFEA.
22 In accordance with Article 27 item 2 AFEA, an incorrect application is the application which fails to contain all the data required in the official form, contains erroneous data, refers to the activity to which the provisions of the Act do not concern, submitted by a person who was legally prohibited to conduct the activity indicated in the application, submitted by the person already registered in CEIDG, or unsigned.

AFEA does not mention the circumstance of the refusal of the record but the legitimacy of the rejection of the application.

A record in CEIDG remains a strictly technical operation and consists in introducing data into the IT system. Besides, it is worth noting that AFEA specifies the date of the entry. The record is recognized as made at the moment of placing the data in CEIDG, which occurs not later than the next working day after the day of receipt of a correct application submitted by an entitled person.[23] In addition, the question of certificates of the record confirming the legalization of an economic activity were resolved in an interesting way: they are not issued by CEIDG but are of an electronic form or the form of a print of the webpage. Moreover, public administration authorities cannot demand from entrepreneurs producing, transferring or enclosing to applications certificates of a record in CEIDG.[24]

In the situation where the registration procedure is via the Internet, it is not surprising that all applications for an entry in CEIDG are free of charge.[25]

In comparison with EDG the catalogue of information and data recorded in CEIDG has been definitely extended:

1) the entrepreneur's business name and his PESEL number (if he applicable);
2) the entrepreneur's REGON identification number (if applicable);
3) the tax identification number (NIP) (if applicable);
4) information on the entrepreneur's Polish citizenship (if applicable) and other citizenships of the entrepreneur;
5) the designation of the place of residence and the address, the address for mail delivery to the entrepreneur and the address of the place of conducting the economic activity, and if the entrepreneur conducts the activity away from his place of residence the address of the principal place of conducting the activity and the branch, if opened;

23 See: Article 25 item 3 AFEA.
24 Article 38 item 5 AFEA.
25 Article 29 AFEA.

6) the entrepreneur's email address and website (if applicable);
7) the date of the start of conducting the economic activity;
8) definition of subjects of the economic activity in accordance with the Polish Classification of Activities (PKD);
9) information on the existence or the termination of joint marital property regime;
10) information on the agreement of private partnership, if such was concluded;
11) the data of the proxy authorized to manage the entrepreneur's matters if the entrepreneur granted him the general power of attorney;
12) information on suspension and resumption of the economic activity;
13) information on limitation or deprivation of legal capacity and on appointment of a court appointed administrator;
14) information on the bankruptcy with an opportunity to enter into an arrangement, on the announcement of the bankruptcy including liquidation of the debtor's property, a change of the decision on bankruptcy with an opportunity to enter into an arrangement into a decision on bankruptcy including liquidation of the debtor's property and the termination of these proceedings;
15) information on initiating recovery proceedings;
16) information on the prohibition of conducting economic activity determined in the record in CEIDG.[26]

Most of the indicated data constitute elements of the content of the electronic form for the entry in CEIDG. However, the enumeration does not exhaust the catalogue of information subject to record, for example does not contain information on, for instance, concessions, permits, licenses or approvals as well as on a possible entry in the register of regulated activity.[27] Since CEIDG by definition is the

26 See: Article 25 item 1 AFEA.
27 Compare Article 37 item 5 AFEA.

fundamental source of knowledge on entrepreneurs, it should contain all data characterizing the natural person as an entrepreneur as well as his economic activity. Certainly, also the aforementioned should be counted among them. They were not included in the enumeration of the elements which have to be recorded but their placement in CEIDG results from the wording of Article 37 item 2 and Article 5 AFEA. The information and the documentation confirming obtaining, withdrawal, loss and expiry of entitlements resulting from a concession, permit or license and on the record in the register of regulated activities or possible prohibition of conducting the activity defined in the record as well as on removal from the register come directly from competent rationing authorities and are shared by the CEIDG system with the interested entities. However, there is still a doubt if the information in this area is bound by the formal and substantive openness.

As a rule, the data in CEIDG are immediately available, but not later than within 3 working days of the entry in the register.

The basic obligations of the entrepreneur functioning in CEIDG were not radically changed. He is obligated to provide information on a change in the recorded data, ultimate termination of the economic activity as well as to inform about suspension and resumption the economic activity. These obligations are fulfilled through applications addressed to CEIDG for, respectively, a change of the record, deletion of the record and suspension or resumption of the economic activity.[28]

The consequence of failure to fulfill the fundamental informative and updating obligation of the entrepreneur is deletion from CEIDG.[29] The deletion also occurs ex officio through an administrative decision of the minister for economy, in the event of:

1) valid prohibition of conducting by the entrepreneur the economic activity defined in the record,
2) ultimate termination of conducting the economic activity by the entrepreneur;

28 See: Article 30 item 3 AFEA.

29 By virtue of Article 35 item 1 AFEA, the minister competent for economy may ex officio delete the record containing the data inconsistent with the real state of things, after prior summoning the entrepreneur to submit a statement on these data within 7 working days.

3) failure to submit an application for the record of the information on resumption of the economic activity after the period of 24 months of the day of application for suspension of the activity (after a written call of the entrepreneur and setting an additional deadline of 30 days for submission of an application for the record of the information on resumption of the economic activity),
4) loss by foreigners registered in CEIDG the entitlements for conducting the economic activity,[30]
5) the record made with the infringement of law.

Moreover, Article 34 item 1 AFEA provides that the data contained in CEIDG cannot be deleted therefrom, and the erasure of the record does not mean the deletion of the data but their complementing. Thereby CEIDG allows for the reconstruction of the whole history outline of the economic activity of the entities obligated to be recorded, and not only for reading the current content of the record. This surely has a positive effect on the certainty of commercial exchange.[31]

The burden of securing the validity and accuracy of the data recorded in CEIDG does not rest on the entrepreneur exclusively. It also binds the minister for economy, municipal authorities, rationing authorities, the court appointed administrator as well as other public administration authorities and courts of law.[32]

The provisions of AFEA attach special attention to securing access to the data on the entrepreneur and his economic activity. Like in the case of KRS, this is a characteristic of the new regulation and definitely bring closer the system of recording entrepreneurs being natural persons to the court registration. Attributing formal and substantive openness to the data recorded in CEIDG the legislator provides the proper fulfillment of informative and legalizing tasks. The guarantee of access to information is implemented by the provision according to which the data in CEIDG are public (excluding the information being a secret of the enterprise, the PESEL number and the entrepreneur's

30 See: Article 34 item 3 AFEA.
31 See: Article 37 item 6 AFEA.
32 See: Article 31 item 2, Article 34 item 3, Article 35, Article 37 item 2 and item 5 AFEA.

address of residence, if it is different from the place of conducting the economic activity). Moreover, it is also presumed that they are true,[33] and the access thereto free of charge. Everyone has the right to access to information via the website of CEIDG through the electronic platform of public administration services. On the other hand, if in CEIDG are data incompatible with the application or written without this application, the entrepreneur cannot hide himself from a third party acting in good faith, with the accusation that the data are not true, if after receiving the information on this record he neglected to apply immediately for correction, complementing or deletion of the entry.[34] Bearing in mind the need for development of economic cooperation with foreign partners as well as increase in the security of international economic exchange, AFEA provides also the necessity (opportunity) of sharing the data in foreign languages.[35]

4. Register of entrepreneurs of the National Court Register

The National Court Register, i.e. kept by courts, nationwide, public and open information system being a collection of data statutory determined, up-to-date, complete and recognized as true, identifying the entities recorded[36] there is a relatively new institution, introduced by the Act of 20 August 1997 on the National Court Register, it has been operating since 1 January 2001.[37]

In accordance with Article 1 ANCR, KRS includes three separate registers, these being: 1) the register of entrepreneurs, 2) the register of associations, other social and professional organizations, foundations as well as public healthcare institutions and 3) the register of insolvent debtors. The aforementioned registers are subject to general rules,[38] and additionally to a competent special regulation included in relevant

33 See: Article 37 item 7 AFEA.
34 See: Article 33 AFEA.
35 See: Article 38 item 3 AFEA.
36 Compare: Ł. Zamojski, Rejestracja spółek. Zagadnienia materialne i procesowe, Warszawa 2008, p. 21.
37 Article 99 of the Provisions introducing ANCR.
38 See: Article 1–35 ANCR.

parts of ANCR.[39] Specific rules of functioning of the KRS register of entrepreneurs are defined in Articles 36–48 ANCR.

The KRS register of entrepreneurs is kept in the IT system district courts (economic courts) covering with their competence the territory of a province or its part.[40]

At registry courts works the Central Information of the National Court Register (KRS) appointed by the Minister of Justice. Its tasks encompass: 1) keeping the information collection of the Register and the electronic catalogue of documents of companies, 2) providing information from the Register as well as storing and sharing the copies of documents in the catalogue, and also 3) making and exploiting connections of the Register and the catalogue in the IT system.[41]

Moreover, auxiliary actions connected with keeping KRS were vested in municipalities (wójts, mayors and city presidents). Among their competences is providing the concerned with: 1) access to the Polish Classification of Activities (PKD), 2) official forms of applications required by law enabling the registration of general partnerships, 3) access to information on charges, the way of their payment and on the competence of local registry courts.[42]

The KRS register encompasses entities upon which provisions of laws impose the obligation of registration. By virtue of Article 36 ANCR, the following are obligated to be recorded in the KRS register of entrepreneurs:

1) general partnerships;

2) European economic interest groups;

3) partnerships;

4) limited partnerships;

5) limited joint-stock partnerships;

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39 See: Article 49–54 ANCR on the register of associations, other social and professional organizations, foundations as well as public health institutions and Articles 55–60 ANCR on the register of insolvent debtors.

40 Article 2 item 1 ANCR.

41 See: Article 4 ANCR.

42 See: Article 2 item 2–3 ANCR.

6) limited liability companies;

7) joint-stock companies;

8) European companies;

9) cooperatives;

10) European cooperatives;

11) state-owned enterprises;

12) research and development units;

13) entrepreneurs marked in the provisions on the rules of conducting on the territory of the Republic of Polish economic activity in the small-scale production by foreign legal and natural persons;

14) mutual insurance companies;

15) mutual reinsurance companies;

16) other legal entities if they perform economic activities and are subject to the registration of associations, other social and professional organizations, foundations and public health institutions;[43]

17) branches of foreign companies operating on the territory of the Republic of Poland;

18) the main branches of foreign insurance companies;

19) the main branches of foreign reinsurance companies;

20) institutions of budget economy.

In accordance with Article 19 ANCR the entry in the register KRS is made on the application submitted in person by the appropriate entity[44], unless the special regulation provides an entry ex officio.[45] This application is submitted on a correctly filled in official form meeting the requirements defined in the ordinance of the Minister of Justice on 21 December 2000 on model forms of applications for an entry in the National Court Register (KRS) as well as the method and

43 Article 50 ANCR.

44 See: Article 19 item 2a–2b ANCR.

45 The provisions of ANCR allowing for an entry ex officio: Article 12 item 2–3, Article 20 item 3, Article 24 item 3–4, Article 45 item 1, 1a, 3, 4 and 5, Article 46 item 2, Article 49a item 3, Article 55, Article 59 item 1–2, Article 60 item 1 ANCR.

place of access thereto.[46] Beside an appropriate principal form and complementary ones, by virtue of Article 19a ANCR, the application is accompanied by specimen signatures of persons authorized to represent this entity or the proxy certified by a notary or filed before a judge or an authorized court employee, and also, if the entity registered acts on the basis of an agreement or a statute, his application for a record is accompanied by the agreement of the statute.[47] Moreover, submitting the application the applicant pays the court fee without summons, and if the record has to be published also a fee for the publication in the Minitor Sądowy i Gospodarczy (Court and Economic Monitor). The fees are fixed and normatively determined[48] and are, respectively:

1) 500 zlotys for an application for the registration of the entity in the KRS register of entrepreneurs,
2) 250 zlotys for an application for a change in the record referring to the entity recorded in the KRS register of entrepreneurs,
3) 300 zlotys for an application for deletion of the entity from the register of entrepreneurs,
4) 150 zlotys for an application for deletion of the register of entrepreneurs (without deletion from KRS),
5) 100 zlotys for publishing the first entry in the Monitor Sądowy i Gospodarczy,
6) 250 zlotys for publishing subsequent entries there.

This demonstrates that obtaining an entry in the KRS register of entrepreneurs is connected with considerable formal requirements: an appropriate official form, correctly filled in and complete, containing required enclosures, with the court fee and the charge for the publication

46 The Ordinance of the Minister of Justice of 21 December 2000 on model official forms of application for an entry in the National Court Register as well as the method and place of access thereto. (Dz.U. of 2000, No 118, item 1247 as amended) provides 88 model official forms serving contacts with the registry court, among which distinguishes principal forms, i.e. constituting the essence of the application, and complementary forms constituting enclosures to the principal application; moreover, it binds relevant forms with colors.

47 Article 9 item 3 ANCR..

48 See: Articles 52–64 of the Act of 28 July 2005 on Court Fees in Civil Cases (consol. text Dz.U. of 2010, No 90, item 594 as amended) and § 8 of the Ordinance of the Minister of Justice of 15 April 1996 on organization, the method of publishing and disseminating as well as bases of establishing the price of the issues of the Monitor Sądowy i Gospodarczy and fees for placing notices and announcement therein. (consol. text Dz.U. of 2013, item 238).

in the Monitor Sądowy i Gospodarczy. These elements are inasmuch important as the application failing to meet these requirements is returned without calling for completing the missing information.[49] It is also important to underscore that the registry court verifies obligatorily the compliance of the form and the content of the documents enclosed to the documents with the provisions of law. The other elements obligatorily verified are also the first name, the surname and the PESEL number of natural persons designated in the application as well as, in the case of other entities, the business name and the REGON number, as well as the KRS number if the entity already is in the register. Moreover, optional verification of the compliance with the actual conditions covers all other data as to which the court has reasonable doubts.[50]

This results from the fact, that only a correctly structured application for an entry in the KRS register of entrepreneurs, free from defects and errors, imposes on the registry court an obligation of issuing a decision which makes a basis for the entry, while the entry itself consists in the introduction to the IT system the data contained in the decision of the registry court immediately on its issuing, which should take place not later than within 7 days of the date of the application, with the reservation that its examination does not require summoning the applicant to remove the obstacle.[51]

For the entity recorded in the register separate register files are kept. They encompass in particular the documents which are the basis for the entry.[52] Moreover, the registered are given a one-off individual and unchangeable 9-digit KRS number,[53] under which all the data in the record are placed. In it worth remembering that whereas the fact that a deletion is also a record and the deleted data are not removed from the register, those complemented with the entry on the deletion (or possible change) are properly archived.[54]

49 Article 19 item 3–3a and item 4 ANCR.
50 See: Article 23 ANCR.
51 See: Article 20a and Article 20b ANCR.
52 See: Article 9 item 1 ANCR.
53 See: Article 37 ANCR.
54 See: Article 12 item 1 ANCR and Article 20 item 4 ANCR.

The information on the entity recorded in the KRS register of entrepreneurs is systematized in 6 sections of the register including:

1) Section I: data on the entrepreneur making elements of designation, i.e. the business name, designation of its legal form, the seat and address or addresses, designation of the previous register or record number, the NIP number, possibly a mention on conducting the economic activity with other entities on the basis of a partnership agreement as well as other specific data depending on the type of entrepreneur;[55]
2) Section II: data on the representation of the entrepreneur as well as his supervisory authorities and other authorities, an also those referring to proxies and the scope of the proxy;[56]
3) Section III: data on the subject of the activity according to the Polish Classification of Activities as well as the data referring to submitted financial reports, their assessment and acceptance;[57]
4) Section IV: data on tax and duty arrears as well as arrears in relation to the Social Insurance Institution and other creditors, as well as information on securing the debtor's assets in bankruptcy proceedings through establishment of a temporary court supervisor or a compulsory administrator and its changes, on suspension of enforcement proceedings against the debtor, as well as on rejection of the application for bankruptcy due to the fact that the assets of the insolvent debtor are not sufficient to cover the costs of the proceedings and information on cancellation of judicial or administrative enforcement against the entrepreneur due to the fact that the enforcement does not produce the sum higher than the costs of the enforcement;[58]
5) Section V: information on the appointment and removal of a court appointed administrator;[59]

55 Article 38 ANCR.
56 Article 39 ANCR.
57 Article 40 ANCR.
58 Article 41 ANCR.
59 Article 43 ANCR.

6) Section VI: information on liquidation, establishment of management and receivership, dissolution or cancellation of the company, fusion with other entities, division or transforming the entity in another way, suspension and resumption of economic activity, bankruptcy and recovery proceedings, for a European company, European economic interest group and European cooperative: information on submission of the plan of moving the seat, and in the case of deletion due to the change of the seat information on the state to which the seat was moved and the register in which the entity was recorded.[60]

The provisions of ANCR also included the necessity of updating the data in the record, and the responsibilities therefor rests not only on entrepreneurs. Every entity recorded in the register, beside using a relevant designation,[61] was obliged to providing information and updating.[62] In accordance with Article 22 ANCR the entrepreneur has to submit an application for the change of the data and information in the KRS record not later than within 7 days of the date of the event justifying the record. Not without significance is the fact that failure to fulfill this obligation is sanctioned in the form of (renewable) fine,[63] establishment of a court appointed administrator authorized to initiated proceedings aiming at liquidation of the legal person[64] or dissolution of the company and appointment of a liquidator.[65] Moreover, also the registry court, due to the current validity of the content of the records, was entitled to enter and delete records ex officio in particularly justified cases.[66] On the other hand, by virtue of Article 21 ANCR authorities of government and local administration, courts, banks, bailiffs and notaries are obligated to inform immediately the registry court on events subject to the obligation of registration ex officio.

Undoubtedly the scope of the data and information to be recorded in the KRS register of entrepreneurs is very large and characterizes

60 Article 44 ANCR.
61 Article 34 ANCR.
62 Article 47 ANCR.
63 Article 24 item 1–2 ANCR.
64 Article 26–28 ANCR.
65 Article 25 ANCR.
66 Compare Article 24 item 3–4 ANCR.

comprehensively the economic activity of the entities registered. Thereby it actually fulfils the fundamental objective: guarantees access to complete and up-to-date information on entities conducting economic activity. Simultaneously, ANCR contains more regulations referring to the fulfillment of the informative function, and the guarantees of formal and substantive openness of records are actually a characteristic of the KRS system.

The formal openness of the register should be identified with access to the register and register files, including the possibility of receiving statements and copies of official documents confirming the data in the record. The formal openness is guaranteed by Article 8, Article 10, Article 11 item 2 and Article 13 ANCR.[67] Article 8 ANCR establishing the rule of openness provides directly that the register is public, which subsequently specifies with the statement that everybody has the right to access to the data in the register and everybody has the right to receive, also electronically, certified copies, extracts, certificates and information from the register. Moreover, everybody has the right to view the register files[68] as well as become familiar with specimen signature of the persons authorized to represent the entities registered. Furthermore, records in the KRS register are, as a rule, subject to publication in the Monitor Sądowy i Gospodarczy (Court and Economic Monitor).[69]

It is also worth noting the competences of the Central Information of the National Court Register, which guarantees formal openness. It issues copies, extracts and certificates as well as provides information from the register which are of legal validity of documents, if they were issued in the paper form, and issues from the electronic catalogue, electronically, copies of documents, which are certified as to its accordance with the documents in the register files of the entity. As a rule, the information about the aforementioned is provided for a fee according the prices normatively regulated under the ordinance of the

67 A. Nowacki, Jawność materiałów Krajowego Rejestru Sądowego, "Prawo Spółek" 2007, No 5, p. 36.

68 With the reservation of Article 10 item 3 and item 4 ANCR.

69 Exclusion of this obligation in provided by Article 49 item 2, Article 58, Article 19a item 3 and item 3a, Article 20 item 3, Article 20c item 3 and Article 42 ANCR.

Minister of Justice.[70] Nevertheless, this does not concern all data for free of charge is the information published electronically in public IT networks which contain the basic data of the entities registered as well as lists of entities about which, in Section 6 of the register of entrepreneurs, the information on their bankruptcy was recorded.[71]

Substantive openness, on the other hand, is connected with consequences resulting from the fact of the record of the missing certain data and information in the record. Thereby it provides certain effects of failure to fulfill the obligations of informing and updating by the entrepreneur registered. As A.Nowacki aptly observed, it is foremost substantive openness that is of fundamental nature and plays the fundamental role for the safety of economic exchange, since without it formal openness is devoid any meaning.[72]

The substantive openness of KRS results from the presumption of the verity of data, which motivates to fulfill obligations to inform and update and to provide proper protection for third parties acting in good faith. By virtue of Article 17 item 1 ANCR it is presumed that the data recorded in the register are true.[73] This presumption secures public credibility of the registered data and means that the entity registered cannot invoke, in relation to third parties acting in good faith, the data which were not recorded or were deleted if the data were recorded against the entity's report or without such a report, the entity cannot hid from the third party acting in good faith behind the allegation that the date are not true if he neglected to apply immediately for their correction, completion or for deletion from the register. Thereby the content of the record in KRS is binding regardless of the current actual state of the entrepreneur.[74]

The verity of the data (and their public credibility) was reinforced with the presumption of common knowledge of the content of the

70 The Ordinance of the Minister of Justice of 19 December 2006 on determination of the fees for providing information, issuing copies, extracts and certificates from the National Court Register and for publication of document copies from the electronic catalogue of documents of companies (Dz.U. of 2006, No 247, item 1812).
71 See: Article 4 item 4a and item 4b ANCR.
72 A. Nowacki, Jawność materialna..., *op. cit.,* p. 43.
73 Compare Article 42 ANCR.
74 Compare Article 17 item 2 ANCR.

KRS record; due to the general obligation ob publishing data and information in Monitor Sądowy i Gospodarczy nobody can excuse himself with the ignorance thereof.[75] Moreover, the third party may invoke the documents and data in reference to which the obligation of publication has not been fulfilled yet, if failure to publish does not deprive it legal effects, excluding the data the entry of which in the register is of constitutive nature.[76]

Moreover, on the basis of Article 18 ANCR the entity recorded in the register is liable for the damage made by reporting untrue data, if they were subject to the obligation of registration on his application, and also by failure to report the data subject to the obligation of registering at a statutory date, unless the damage occurred as the result of force majeure or as an exclusive fault of the aggrieved or a third party, for which he is not liable.

5. Other registers of entrepreneurs and their functions

While CEDIG an the KRS register of entrepreneurs constitute a fundamental form of legalization of an economic activity, they are not the only registers competent in this matter.

To undertake and legally conduct economic activity the following are also necessary: tax registration, statistical registration and registration for purposes of social and health insurance. Consequently, every entrepreneur, regardless of the type of economic activity, is obligated to register:

1) for statistical purposes (REGON) in the National Official *Register of National Economy* Entities,[77]

75 Article 16 ANCR.

76 See: the resolution of the Supreme Court of 5 December 2008, III CZP 124/08, Lex No 469106; Compare: J. Grykiel, Glosa do uchwały Sądu Najwyższego z dnia 5 grudnia 2008, III CZP 124/08, "Państwo i Prawo" 2009, No 9, p. 128.

77 Article 42 of the Act of 29 June 1995 on Public Statistics (consolidated text Dz.U. of 2012, item 591 as amended).

2) for purposes of taxation (NIP) in the National Taxpayer Records,[78]

3) for purposes of social insurance in the Central Register of Premium Payers as well as in the Central Register of the Insured kept by the Social Insurance Institution[79] or an equivalent in the form of the Agricultural Social Insurance Fund (KRUS),[80] as well as

4) for purposes of health insurance in the National Health Fund.[81]

An entry or a report in the abovementioned registers and records is obligatory for all entrepreneurs. Only the fulfillment of these obligations legalizes an economic activity in the basic dimension.

Moreover, in accordance with the content of Article 14 item 5–6 AFEA, obtaining records in the aforesaid registers and records is not always sufficient for a complete legalization of an economic activity. The reservation refers to regulated activity an activity under the obligation of concession, permit, license and approval. The special conditions, on which depends the possibility of undertaking rationed economic activity, provide further registration obligations of entrepreneurs.

In this area a special category is regulated economic activity, in the case of which the obligation of a record in a relevant register of regulated activity is its basic structural element.

A little different situation takes place in the case of other forms of rationing. Enumerative catalogues of conditions connected with concrete types of rationed activity which require a concession or permit (license and approval) do not impose an obligation of a record in another register or other records. In practice, on the other hand,

78 Article 16 AFEA and Article 2 of the Act of 13 October 1995 on the Rules of Registration and Identification of Taxpayers and Payers (consol. text Dz.U. of 2012, item 1314 as amended), hereinafter as the Act on NIP.

79 Article 6–14 of the Act of 13 October 1998 on the Social Insurance System (consol. text Dz.U. of 209, No 205, item 1585 as amended).

80 Article 1–3, Article 7, Article 16, Article 37 of the Act of 20 December 1990 on Social Insurance of Farmers (consol. text Dz.U. of 2008, No 50, item 291 as amended).

81 Articles 66–67 of the Act of 27 August 2004 on Healthcare Services Financed from Public Funds (consol. text Dz.U. of 2008, No 164, item 1027 as amended).

the entrepreneur who wants to conduct this type of economic activity is often obligated to obtain another legalizing entry (beside KRS or CEIDG). This entry is not actually a substantive condition of obtaining a concession or permit (license and approval), but is a formal effect of their obtaining; the relevant record determines conducting an economic activity, within which the entrepreneur fulfilled the special conditions and received a positive decision on the concession or permission. The following may be listed as such:[82]

1) the register of producers and traders,[83]
2) the register of channels in cable networks,[84]
3) the records of airstrips, the register of aircrafts, the register of civil airports, the register of aerodrome equipment,[85]
4) the register of issued individual or global permits as well as natural or legal persons exercising general permits for foreign commercial exchange of goods, technologies and services of strategic importance for the safety of the state, and for the maintenance of international peace and security,[86]
5) the register of entrepreneurs introducing batteries and storage batteries and conducting plants of processing used batteries,[87]
6) the Register of the Contained Use of GMO, the Register of Deliberate Release of GMO to the Environment, the Register

82 The registers listed do not refer to the rationed economic activity. They also cover the so-called free activity – not bound with special conditions. Their common characteristic is their secondary and formal nature. In contrast with CEIDG and the KRS register of entrepreneurs, they do not fulfill a constituting function – they do not grant the public law status of entrepreneur. An exception in this matter is the register of pension funds and the register of investment funds.

83 Articles 13–17 of the Act of 16 February 2007 on Stocks of Crude Oil, Oil Products and Natural Gas as well as on the Rules of Conduct in Situations of Threat to Fuel Security of the State and Disturbances on the Oil Market (consol. text Dz.U. of 2012, item 1190 as amended).

84 Articles 41–47 of the Act of 29 December 1992 on Radiophony and Television (consol. text Dz.U. of 2011, No 43, item 226 as amended).

85 Article 93, Articles 34–44, Articles 58–59, Article 88 of the Act of 3 July 2002: Air Law (consol. text Dz.U. of 2012, item 933 as amended).

86 Article 21 of the Act of 29 November 2000 on Foreign Commercial Exchange with Goods, Yechnologies and Services of Strategic Importance for the Safety of the State, and for the Maintenance of International Peace and Security, (consol. text Dz.U. of 2013, item 194).

87 Article 18 of the Act of 24 April 2009 on Batteries and Storage Batteries (Dz.U. of 2009, No 79, item 666 as amended).

of GMO Products, the Register of Export Abroad and Transit of GMO products through the territory of the Republic of Poland,[88]

7) the register of permits to conduct public pharmacies, pharmacy points and the register of approvals of conducting hospital and institutional pharmacies,[89]

8) the Register of Permits for Conducting a Pharmaceutical Warehouse,[90]

9) the Register of Biocide Products,[91]

10) the register of newspapers and magazines,[92]

11) the register of classified entities providing certification services,[93]

12) the register of transactions,[94]

13) the register of plants producing products of animal origins,[95]

14) the register of plants producing or selling food on the market,[96]

15) the register of representations of foreign enterprises,[97]

16) the register of pension funds,[98]

17) the register of investment funds,[99]

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88 Article 34, Article 40, Article 50, Article 56 of the Act of 22 June 2001 on Genetically Modified Organisms (consol. text Dz.U. of 2007, No 36, item 233 as amended).

89 Article 107 of the Act of 6 September 2001: Pharmaceutical Law (consol. text Dz.U. of 2008, No 45, item 271 as amended).

90 Article 83 of the Act of 6 September 2001: Pharmaceutical Law (consol. text Dz.U. of 2008, No 45, item 271 as amended).

91 Article 22 of the Act of 13 September 2002 on Biocide Products (consol. text Dz.U. of 2007, No 39, item 252 as amended).

92 Article 20 of the Act of 26 January 1984: Press Law (Dz.U. of 1984, No 5, item 24 as amended).

93 Article 23 of the Act of 18 September 2001 on Electronic Signature (consol. text Dz.U. of 2013, item 262).

94 Article 8 of 16 November 2000 on Preventing Money Laundry and Financing Terrorism (consol. text Dz.U. of 2010, No 46, item 276 as amended).

95 Article 20 of the Act of 16 December 2005 on Products of Animal Origins (Dz.U. of 2006, No 17, item 127 as amended).

96 Articles 61–67 of the Act of 25 August 2006 on Safety of Food and Nutrition (consol. text Dz.U. of 2010, No 136, item 914 as amended).

97 Article 96–102a AFEA.

98 Article 12 of the Act of 28 August 1997 on Organization and Functioning of Pension Funds (consol. text Dz.U. of 2013, item 989 as amended).

99 Article 15 of the Act of 27 May 2004 on Investment Funds (Dz.U. of 2004, No 146, item 1546 as amended).

18) the Central Register of Tour Operators and Tourist Agents.[100]

A separate category is registers of representatives of liberal professions. Their characteristic is the fact that they are kept by authorities of professional self-government of relevant professions. Membership therein is obligatory. They all certify the acquisition of the right to perform a liberal profession. Their task is to confirm the required qualifications. As a rule they are expected to guarantee the adequate performance of the profession through extensive competences of self-governments. In this regard it is possible to specify:

1) the list of barristers,[101]

2) the list of solicitors,[102]

3) the list of architects, construction engineers, town-planners,[103]

4) the register of physicians,[104]

5) the register of nurses and midwives,[105]

6) the register of veterinary surgeons,[106]

7) the register of pharmacists,[107]

8) the list of stockbrokers and the list of investment advisers,[108]

9) the register of insurance agents,[109]

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100 Article 8 of the Act of 29 August 1997 on Tourist Services (consol. text Dz.U. of 2004, No 223, item 2268 as amended).

101 Articles 65–71c of the Act of 26 May 1982: Law on the Bar (consol. text Dz.U. of 2009, No 146, item 1188 as amended).

102 Article 23–31^2 of the Act of 6 July 1982 on Solicitors (consol. text Dz.U. of 2010, No 10, item 65 as amended).

103 Articles 6–7 of the Act of 15 December 2000 on Professional Self-Governments of Architects, Construction Engineers and Town-Planners (consol. text Dz.U. of 2013, item 932).

104 Article 8 of the Act of 5 December 1996 on the Professions of Physician and Dentist (consol. text Dz.U. of 2011, No 277, item 1634 as amended).

105 Article 5 of the Act of 1 July 2011 on Self-Government of Nurses and Midwives (Dz.U. of 2011, No 174, item 1038 as amended).

106 Article 17 of the Act of 21 December 1990 on the Profession of Veterinary Surgeon and Medico-Veterinary Chambers (Dz.U. of 2009, No 93, item 767 as amended).

107 Article 8 of the Act of 19 April 1991 on Pharmacy Chambers (consol. text Dz.U. of 2008, No 136, item 856, as amended).

108 Article 127 of the Act of 29 July 2005 on Exchange of Financial Instruments (consol. text Dz.U. of 2010, No 211, item 1384 as amended).

109 Article 7 of the Act of 22 May 2003 on Insurance Brokerage (Dz.U. of 2003, No 124, item 1154 as amended).

10) the register of insurance brokers and the register of insurance intermediaries,[110]

11) the register of expert auditors and the list of entities entitled to examine financial reports,[111]

12) the list of tax advisors,[112]

13) the list of patent agents,[113]

14) the register of valuers and the register of real estate agents and the register of property managers,[114]

15) the list of sworn translators,[115]

16) the register of entities professionally engaged in lobbying.[116]

6. Acquisition and loss of the status of entrepreneur

In reference with the obligation of legalization of economic activity through a record in CEIDG or the KRS register of entrepreneurs a substantial doubt emerged concerning the acquisition and (respectively) loss of the public law status of entrepreneur, which comes down to a fundamental question: At what point does the acquisition (and, respectively, the loss) of the status of entrepreneur occur or at what point does an entrepreneur arise?

Resolution of this question is of considerable practical and theoretical importance. Since law imposes on entities (entrepreneurs)

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110 Article 20 and Article 37 of the Act of 22 May 2003 on Insurance Brokerage (Dz.U. of 2003, No 124, item 1154 as amended).

111 Article 3 and Article 47–55 of the Act of 7 May 2009 on Expert Auditors and Their Self-Government, Entities Entitled to Examine Financial Reports and on Public Supervision (Dz.U. of 2009, No 77, item 649 as amended).

112 Article 3 of the Act of 5 July 1996 on Tax Consultancy (consol. text Dz.U. of 2011, No 41, item 213).

113 Article 18 of the Act of 11 April 2001 on Patent Agents (consol. text Dz.U. of 2011, No 155, item 925).

114 Article 193 of the Act of 21 August 1997 on Real Estate Economy (consol. text Dz.U. of 2010, No 102, item 651 as amended).

115 Article 6 of the Act of 25 November 2004 on the Profession of Sworn Translator (Dz.U. of 2004, No 273, item 2702 as amended).

116 Article 12 of the Act of 7 July 2005 on Lobbying Activity in the Process of Legislation (Dz.U. of 2005, No 169, item 1414 as amended).

obligations resulting from conducting economic activity, it is necessary to resolve from when and till when these obligations can be executed. The problem is that there are different interpretations thereof. Consequently, the literature represents two basic and mutually contradictory positions.[117]

The first position, according to which the acquisition of the status of entrepreneur is determined by fulfilment of statutory conditions formulated in the legal definition of the term in Article 4 AFEA. This means that an entrepreneur is an entity (natural person, legal person, "defective legal person") conducting economic activity on his own behalf, who obtained this status the moment he commenced the activity. Accordingly, the loss of the status of entrepreneur occurs at the moment of termination of conducting the economic activity.[118]

Thereby an entry in the register or records only confirms this status and enables conducting economic activity. It is only the basis for starting an economic activity but it is not an event or action which means the real undertaking of this activity. It does not create a legal being of an entrepreneur and is not identical with the obtaining of this status. Thus, it is always of declaratory nature.[119]

This assertion seems prevailing. It is difficult to deny its rationality. According to A.Walaszek-Pyzioł's assumption that the entity conducting an economic activity is not (and should not be) exempted from the rigors which law imposes upon economic activity and entrepreneurs,[120] or that the lack of an official entry in the register or records does not mean that the entity is not an entrepreneur as defined in AFEA in the situation in which he does conduct an economic

117 See: M. Etel, Pojęcie przedsiębiorcy..., *op. cit.,* p. 257–264 as well as the literature and judgments appended.

118 K. Sławik (ed.), Działalność gospodarcza – kluczowe problemy, Warszawa 2007, p. 62.

119 The Judgment of the Supreme Administrative Court in Warsaw of 25 October 2006, II GSK 179/06, Lex No 276729; See also: the Judgment of the Provincial Administrative Court in Warsaw of 21 March 2006, VI SA/Wa 2215/05, Lex No 257125; the Judgment of the Provincial Administrative Court in Warsaw of 4 December 2007, VII SA/Wa 1578/07, Lex No 496344; the Judgment of the Provincial Administrative Court in Warsaw of 20 November 2007, VII SA/Wa 1444/07, Lex No 496336; the Judgment of the Provincial Administrative Court in Warsaw of 9 November 2007, VII SA/Wa 1394/07, Lex No 452355.

120 A. Walaszek-Pyzioł, Status prawny przedsiębiorcy..., *op. cit.,* p. 5.

activity but does not register it.[121] This assumption demonstrates the accurate context of this position; its aim is to enable the classification as "entrepreneurs" natural persons, legal persons and "defective legal persons" conducting economic activity on their own behalf, who operate without authorization in the register or records and, consequently, binding them with the obligations binding entrepreneurs and enabling their enforcement.

Thereby certain functional and practical reasons support this position. Nevertheless, treating it as a general rule seems unjustified. For it is important to underscore that it does not decide on the moment of acquisition of the status of entrepreneur.

On the other hand, in accordance with the other position, the moment constituting an entrepreneur is the legalizing entry (in CEIDG or the KRS register of entrepreneurs), and, correspondingly, the moment of the loss of this status is the moment of deletion of the record.[122]

This proposition also results from the interpretation of the provisions of AFEA. Article 4 AFEA, in connection with Article 14 of this law, allows for an assertion that an entrepreneur is an entity conducting an economic activity on his own behalf, while the (legal) conducting of the activity remains dependant on a prior legalizing entry. This means that in the situation where the condition of the (legal) conducting of economic activity is its undertaking (consisting in legalization), the entity acquires the status of entrepreneur at the moment of the entry.[123] This interpretation allows for identifying the moment of acquisition of the status of entrepreneur with the moment of the entry in the register or the records.

This position is also confirmed in case law, for the court decided that a natural person acquires the status of entrepreneur through fulfilment of the conditions defined in Article 4 item 1 and Article 2 AFEA; however, the fulfilment of the formal requirement, which is the

121 The Judgment of the Provincial Administrative Court in Warsaw of 7 November 2006, VI SA/Wa 1852/05, Lex No 312029.

122 W.J. Katner, Prawo działalności..., *op. cit.,* p. 60.

123 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 230; See: the Judgment of the Supreme Adminstrative Court in Warsaw of 10 October 2006, II GSK, 140/06, Lex No 276711.

legalizing entry, is also necessary, for it is the record which creates the entity and without it the entrepreneur's being remains basically of no legal meaning.[124]

Of course, it is important to remember that the fact of recording a particular entity determines, and thereby makes it more probable, the subsequent conducting of economic activity, although, simultaneously, it cannot be treated as a guarantor of the occurrence of such a fact (and not the evidence that this activity is really conducted). However, it causes an actual presumption that the economic activity was undertaken and was conducted until its deletion and thus it is a kind of declaration of the activity intended.[125] The legalizing record is of decisive importance from the point of view of certainty and security of legal transactions and therefore constitutes a priority obligation of the entity interested in conducting economic activity, whose failure to fulfill is subject to the punishment of imprisonment or fine.[126] Thus, the priority is also the obligation of reporting changes and updates of the content of the record, and in particular of informing on termination (intention of termination) the economic activity, which ultimately aims at deletion from the register or the records, or the loss of the status, since the lack of the information on terminating the economic activity arouses a presumption that the activity is still conducted and the entity is an entrepreneur.[127]

The institution of suspension of an economic activity may be used as another argument for. In this case the legislator normatively allows for situations where in public law and private law relations the entity not conducting an economic activity (who has formally suspended its conducting) is still treated as an entrepreneur. The suspension or (temporary) not conducting the economic activity did not affect this

124 The Judgment of the Provincial Administrative Court in Warsaw of 22 January 2008, VI SA/Wa 1957/07, Lex No 466055; the Judgment of the District Court in Białystok of 15 January 2009, VII GC 116/08, Lex No 522334.

125 See: the Judgment of the Supreme Administrative Court in Warsaw of 21 June 2007, II GSK 70/07, Lex No 338408.

126 See: the Judgment of the Supreme Court of 20 October 2005, II CK 120/05, Lex No 167116.

127 See: the Judgment of the Supreme Administrative Court in Warsaw of 12 January 1994, III SA 835/93, Lex No 43572; the Judgment of the Supreme Administrative Court in Warsaw of 22 October 1998, II SA 645/98, Lex No 43210.

status, which allows for an assertion that it is determined by an entry in the records or the KRS register of entrepreneurs.[128]

This confirms the accuracy of the second position. It is, however, worth noting that it may arouse justified doubts:

1) the obligation of an entry (especially in the KRS register of entrepreneurs) binds various categories of entities and all provided in Article 36 ANCR ex lege recognizes them as entrepreneurs whereas in practice not all and ant always conduct economic activity on their own behalf;[129]
2) the obligation of legalization through an entry in CEIDG or the KRS register of entrepreneurs does not refer to all entities entitled to conducting economic activity;[130]
3) law allows situations where the entity conducting an economic activity is not oblige to register in any of the relevant registers;[131]
4) it is not impossible that the entity functioning in the register of the records actually does not conduct an economic activity; this entity possesses the status of entrepreneur and does not lose it until the moment of deletion, in spite of the fact that he does not correspond with the conditions provided in the legal definition;
5) the KRS register of entrepreneurs and the records of economic activity are not the only registers the entry wherein is a necessary condition of legal conducting of economic activity;[132]
6) the legislator introducing objective and subjective exemptions from the area of "economic activity" and "entrepreneurs" provokes situations in which one may not be an entrepreneur despite conducting (on one's own behalf) economic activity,

128 For more see: Chapter 8: Termination of an economic activity.
129 In particular this refers to commercial companies/partnerships as well as research institutes, in the case of which economic activity may be but does not have to be the subject of activity. The possibility of conducting an economic activity is not tantamount with its real conducting.
130 The obligation of record is not binding for, for example, church legal persons, universities/colleges, institutions of culture and institutions of healthcare.
131 This refers to a commercial company/partnership in the organization as to which Article 14 item 4 AFEA provides clearly that it may undertake an economic activity before registration.
132 Compare: R.Sowiński, Rejestry i Ewidencje działalności gospodarczej i przedsiębiorców, Wrocław 2007, p. 225 +.

and the activity having all relevant qualities but normatively excluded from this category is not an economic activity.[133]

The doubts listed support exemption from the entry in favor of identifying the conditions provided in the legal definition of Article 4 AFEA, as decisive on the status of entrepreneur. It is worth, however, emphasizing that they do not deny the essence of the argumentation but result from errors and inconsistence of the legislator, which would not occur in a properly constructed legal system.

133 C.Kosikowski, Publiczne prawo..., *op. cit.,* p. 230–231.

Part 5

REGULATED ECONOMIC ACTIVITY

1. Essence of the regulated economic activity

Regulated activity is economic activity the conducting of which requires fulfilling special conditions determined by the provisions of law and obtaining an entry in a relevant register of the so-called register of regulated activity.[1]

It is a relatively new form of rationing economic activity. It was introduced by the provisions of AFEA in 2004. It is characteristic that its constituting aimed at reduction of economic activity rationing, especially in the form of permits. Therefore it is identified with the extension of economic freedom.

It is worth, however, underscoring that this assumption is not fully justified. On the one hand, the legislative procedure was really simplified – relevant qualities of the proceedings of registering in the register of regulated activity seem swiftness and accessibility. On the other hand, the regulation did not bring expected effects in the form of reducing the entrepreneur's obligations. Paradoxically, the catalogue of substantive restrictions on conducting this type of activity was either unchanged or even extended.[2]

2. Types of the regulated economic activity and register authorities

Article 64 item 1 AFEA provides that it is the provisions of separate law that determine if a particular type of economic activity is

1 Article 5 point 5 in connection with Article 64 item 1 AFEA.
2 For more see: M. Etel, Regulowana..., *op. cit.*, s. 41–52.

a regulated activity as defined in AFEA. AFEA does not formulate an enumerative catalogue of the types of activity considered regulated but introduces an important rule: one cannot presume that a particular type of economic activity is a regulated activity since this fact is directly determined by the wording of the provision of a separate act of law.

There are 20 laws of this type. These acts simultaneously define specific rules of undertaking and conducting regulated economic activity, contain decisions referring to separate and special conditions of undertaking and conducting a particular type of economic activity, as well as provisions referring to the name of the register and the registry authority, elements of the application and the content of the declaration, as well as the scope and the form of control and the grounds of the refusal of registering and the rules of deletions from the register.

A regulated activity as defined in the provisions of AFEA is:

1) economic activity in manufacturing, storing and trading in biocomponents; the registry authority in this respect is the President of Agricultural Market Agency;[3]
2) economic activity in trading in plant protection products or packaging thereof; the registry authority in this respect is the provincial inspector of plant protection and seed production;[4]
3) economic activity consisting in trainings in plant protection products; the registry authority in this respect is the provincial inspector of plant protection and seed production;[5]
4) economic activity in producing and bottling spirits; the registry office in this respect in the minister competent for agricultural markets;[6]
5) postal activity; the registry authority in this respect is the President of the Office of Electronic Communications;[7]

3 Article 4 of the Act of 25 August 2006 on Biocomponents and Liquid Biofuels (consol. text Dz.U. of 2013, item 1164).
4 Article 25 of the Act of 8 March 2013 on Plant Protection Products (Dz.U. of 2013, item 455).
5 Article 67 of the Act of 8 March 2013 on Plant Protection Products (Dz.U. of 2013, item 455).
6 Article 3 of the Act of 18 October 2006 on Production of Spirits and on Registering and Protection of Geographical Indications of Spirit Beverages (consol. text Dz.U. of 2013, item 144).
7 Article 6 of the Act of 23 November 2012: Postal Law (Dz.U. of 2012, item 1529).

6) economic activity in conducting a training centre; the registry authority in this respect is the voivod;[8]

7) production of number plates; the registry authority in this respect is the marshal of the province;[9]

8) economic activity in conducting vehicle testing stations; the registry authority in this respect is the starosta (head of poviat/district);[10]

9) economic activity in production of agricultural biogas or producing electric power from agricultural biogas; the registry authority in this respect is the President of the Agricultural Market Agency;[11]

10) training activity in conducting trainings for air personnel in order to acquire a qualification certificate of an air personnel member as well as the professional entitlements inscribed therein, except conducting an aviation training in order to acquire a certificate of qualifications of an Air Information Service informer and an informer of the Airport Air Information Service; the registry office in this respect is the President of the Civil Aviation Authority;[12]

11) currency exchange; the registry authority in this respect in the President of the National Bank of Poland;[13]

12) postgraduate education (for physicians, dentists) conducted by the entrepreneur; the registry authority in this respect is the district medical council (or the Supreme Medical Council);[14]

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8 Article 39g of the Act of 6 September 2001 on Road Transport (consol. text Dz.U. of 2012, item 1265 as amended).

9 Article 75a of the Act of 20 June 1997: Road Traffic Law (consol. text Dz.U. of 2012, item 1137 as amended).

10 Article 83 of the Act of 20 June 1997: Road Traffic Law (consol. text Dz.U. of 2012, item 1137 as amended).

11 Article 9p of the Act of 10 April 1997: Energy Law (consol. text Dz.U. of 2012, item 1059 as amended).

12 Article 95a of the Act of 3 July 2002: Air Law (consol. text Dz.U. of 2012, item 933 as amended).

13 Article 11 of the Act of 27 July 2002: Foreign Exchange Law (consol. text Dz.U. of 2012, item 826 as amended).

14 Article 19a of the Act of 5 December 1996 on Professions of Physician and Dentist (consol. text Dz.U. of 2011, No 277, item 1634 as amended).

13) economic activity in conducting refresher courses (on the transport of dangerous goods); the registry authority in this respect is the marshal of the province;[15]

14) postgraduate education (for nurses and midwives) conducted by the entrepreneur; the registry authority in this respect is the district council of nurses and midwifes (or the Supreme Council of Nurses and Midwives);[16]

15) economic activity in storage of employers' personnel and payroll documentation of temporal storage; the registry authority in this respect is the marshal of the province;[17]

16) economic activity in producing and bottling wine products; the registry office in this respect is the minister competent for agricultural markets;[18]

17) conducting a crèche or a children club; the registry authority in this respect is the wójt (head of a municipality) (mayor or city president);[19]

18) economic activity in conducting driver training centre; the registry authority in this respect is the starosta (head of a poviat/district);[20]

19) economic activity in conducting a psychological laboratory doing psychological research on psychology of transport; the registry office in this respect is the marshal of the province;[21]

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15 Article 50 of the Act of 19 August 2011 on Transport of Dangerous Goods (Dz.U. of 2011, No 227, item 1367 as amended).

16 Article 75 of the Act of 15 July 2011 on Professions of Nurses and Midwives (Dz.U. of 2011, No 174, item 1039 as amended).

17 Article 51a of the Act of 14 July 1983 on National Archive Resources and Achives (consol. text Dz.U. of 2011, No 123, item 698 as amended).

18 Article 17 of the Act of 12 May 2011 on Production and Bottling of Wine Products, Trade in These Products and Organization of Wine Market (Dz.U. of 2011, No 120, item 690 with amendment).

19 Article 26 of the Act of 4 February 2011 on Child Care under the Age of 3 (Dz.U. of 2011, No 45, item 235 as amended).

20 Article 28 of the Act of 5 January 2011 on Vehicle Drivers (Dz.U. of 2011, No 30, item 151 as amended).

21 Article 85 of the Act of 5 January 2011 on Vehicle Drivers (Dz.U. of 2011, No 30, item 151 as amended).

20) economic activity in conducting a centre of driving techniques perfection; the registry authority in this respect is the voivod;[22]

21) economic activity in organizing tourist events and intermediation on commission of clients in concluding contracts for tourist services; the registry authority in this respect is the marshal of the province;[23]

22) telecommunication activity as economic activity; the registry authority in this respect is the President of the Office of Electronic Communication;[24]

23) economic activity in detective services; the registry authority in this respect is the minister competent for interior;[25]

24) economic activity in producing, purifying, denaturing or dehydrating of ethanol; the registry authority in this respect is the minister competent for agricultural markets;[26]

25) economic activity in production of tobacco products; the registry authority in this respect is the minister competent for agricultural markets;[27]

3. Procedure for obtaining an entry in the register of regulated activities

Undertaking an economic activity recognized as regulated requires joint fulfilment of certain conditions. Their analysis allows for distinguishing three stages of the proceeding aiming at a legal undertaking of this type of activity:

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22 Article 114 of the Article of 5 January 2011 on Vehicle Drivers (Dz.U. of 2011, No 30, item 151 as amended).

23 Article 4 of the Act of 29 August 1997 on Tourist Services (consol. text Dz.U. of 2004, No 223, item 2268 as amended).

24 Article 10 of the Act of 16 July 2004: Telecommunication Law (Dz.U. of 2004, No 171, item 1800 as amended).

25 Article 3 of the Act of 6 July 2001 on Detective Services (Dz.U. of 2002, No 12, item 110 as amended).

26 Article 3 item 1 of the Act of 2 March 2001 on Production of Ethyl Alcohol and Production of Tobacco Products (Dz.U. of 2001, No 31, item 353 as amended).

27 Article 3 item 2 of the Act of 2 March 2001 on Production of Ethyl Alcohol and Production of Tobacco Products (Dz.U. of 2001, No 31, item 353 as amended).

1) fulfilment special conditions determined by the provisions of a separate law by the entrepreneur,[28]
2) submission by the entrepreneur a formally correct application for an entry in a relevant register of regulated activity together with a declaration on meeting the special conditions required for conducting the particular activity,[29]
3) the entry made by the so-called registry authority in the register of regulated activity.[30]

One of the properties of a regulated activity is that the substantive legal nature can be ascribed to the first stage of the proceeding only (the first of the aforementioned conditions), i.e. the fulfilment of the special conditions determined by the provisions of a separate law by the entrepreneur.

On its basis it is possible to assert that the right to conduct the activity is acquired ex lege by the entrepreneur after meeting the conditions determined by the law constituting the particular type of regulated activity.[31]

The subsequent two stages are of a formal nature only.

The first of them should be identified with the obligation of the entrepreneur consisting in the submission of an application for the entry in the register of regulated activity, for Article 65 item 1 AFEA provides that the authority keeping the register makes the record on the request of the entrepreneur on the submission by the entrepreneur a declaration on fulfilling the conditions of conducting this activity.

In turn, the other formal stage is reduced to an entry in the relevant register. It is important to remember that conducting a regulated activity by the entrepreneur without the record in the register is illegal.

The record is made by the competent registry authority on the basis of the application submitted by the entrepreneur along with the declaration of knowledge and satisfying the special conditions.

28 See Article 64 item 1 AFEA.
29 See Article 65 item 1–4 AFEA.
30 See Article 67 item 1 in connection with Article 65 item 5 AFEA.
31 See M. Szydlo, Reglamentacja..., *op. cit.*, p. 11; K. Kohutek, Zasady..., *op. cit.*, p. 39.

It is interesting that the compliance of the content of the declaration with the actual state is not checked at the stage of undertaking the regulated activity. The authority makes an entry without examining if the entrepreneur fulfils the special conditions connected with the particular economic activity.[32] It checks only if the application and the declaration of the entrepreneur meet all the formal requirements, i.e. if they contain the data and documents required.

The wording of Article 65 AFEA allows us to conclude that at the stage of undertaking a regulated activity occurs only initiative examination which is reduced to checking the formal requirements of the application, i.e. if the application submitted by the entrepreneur is complete and allows for making the record.

Consequently, undertaking a regulated activity does not depend on the prior issuing by the registry office an individual permit to conduct the particular activity (i.e. an administrative decision). To undertake it is only required to fulfil substantive conditions only and then the entrepreneur acquires the title to conducting it by virtue of law itself. On the other hand, meeting by the entrepreneur formal conditions causes on the part of the registry authority an obligation of making the record within 7 days.[33] In the case of regulated activity, however, the entry is of a declaratory nature only and is an obligation of the authority involving an material and technical action which emerges at the moment of the receipt of the application.

The lack of material examination at the stage of undertaking is a relevant quality of the structure of regulated economic activity. The registry office refrains from verification of the special conditions on the basis of the declaration submitted by the entrepreneur with the application for registration. In its content the entrepreneur declares that: 1) the data contained in the application for registration are complete and accurate; 2) he knows and fulfils the conditions of conducting the particular economic activity.[34]

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32 K. Kohutek, Zasady..., *op. cit.,* p. 37.

33 Article 67 item 1 AFEA.

34 The content of the declaration is included in the provisions of separate acts of law connected with the particular type of regulated activity: "I declare that: 1) the data contained in the application for the entry in the Register of Tour Operators and Tourist Agents are complete and ac-

The actual verification of material (substantive) conditions occurs only at the stage of conducting the regulated activity.[35]

Refraining from the material examination at the stage of undertaking a regulated activity is to serve foremost the swiftness of the legalizing proceedings. It is also worth noting that it is not the only solution adopted for this purpose. Also Article 67 item 2 AFEA should be perceived as such; it is an exception to the rule in accordance with which the legal conducting of a regulated activity depends on obtaining an entry in a relevant register. This regulated determines that in the situation where the authority keeping the register of regulated activity fails to make the record on time (within 7 days) and from the day of receipt of the correct application by this authority passed 14 days the entrepreneur may commence the activity.

4. Accountability of an entrepreneur running a regulated economic activity

Liberalizing the legalization proceedings of regulated economic activity, the legislator refrained from the necessity of the prior material examination in favour of formal examination, and freed the undertaking of economic activity from the constitutive assent of the registry authority.

On these grounds it is possible to assert that the freedom of economic activity has been extended, since obtaining an entry in the register of regulated activity is definitely simpler (procedurally) than obtaining a permit or a concession. It is important to underscore, however, that this liberalization occurred at a certain expense: the fundamental assumptions of rationing (preventive purposes) implemented by AFEA and separate laws on concessions and permits (licenses and approvals) have been abandoned.

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curate; 2) I am familiar with and fulfill the conditions of conducting an activity in organizing tourist events and act as an agent on commission of clients in concluding contracts on providing tourist services, determined in the Act of 29 August 1997 on Tourist Services": Article 7 item 4 of the Act of 29 August 1997 on Tourist Services (consol. text Dz.U. of 2004, No 223, item 2268 as amended).

35 Article 70 and Article 60 AFEA.

In this context it is important to note the range of the liability of the entrepreneur conducting a regulated economic activity. It seems particularly important in the situation of replacing the material ex ante examination with the ex post examination exclusively on the basis of the declaration submitted by the entrepreneur.

However, the provisions of AFEA dedicated to the liability of the entrepreneur conducting a regulated economic activity are not properly constructed. In the case of entrepreneurs acting in bad faith, who abused the liberal rules of proceedings and submitted an untrue declaration, they provide only a temporary prohibition of conducting the particular concrete regulated activity.[36]

In accordance with Article 71 item 1 AFEA the authority keeping the register of regulated activity issues a decision on the prohibition of conducting the registered activity[37] by the entrepreneur when: 1) the entrepreneur submitted a declaration is incompatible with the facts; 2) the entrepreneur failed to remove the infringements of the conditions required to perform a regulated activity within the period determined by the authority; 3) it observes a flagrant breach of the conditions required from the entrepreneur to perform a regulated activity.

As the consequence of issuing a decision prohibiting the entrepreneur to conduct the activity included in the record, the authority ex officio deletes the record of the entrepreneur in the register of regulated activity,[38] and in addition it is reserved that the entrepreneur (deleted or conducting the activity without the record in the register of regulated activities) may obtain a new entry in the register referring to the same economic activity not earlier than after 3 years of the decision.[39]

Accordingly, the registry authority by its decision refuses the entry of the entrepreneur in the register in the case if: 1) a binding statement prohibiting the entrepreneur to perform the economic activity in the

36 See Article 71, Article 72 and Article 68 AFEA.
37 See Article 71 item 2 AFEA.
38 Article 71 item 3–4 AFEA.
39 Article 72 item 1 AFEA with the reservation of Article 67 item 2 AFEA.

record was issued; 2) the entrepreneur has been deleted from the register of regulated activity within 3 years prior to the application.[40]

40 Article 68 AFEA.

Part 6

LICENSED ECONOMIC ACTIVITY

1. Types of licensed economic activity and concession authorities

Obtaining a concession requires conducting an economic activity in:

1) prospecting, exploring of hydrocarbons as well as solid minerals under the mining property, extracting minerals from deposits, underground tank-less storage of substances as well as underground refuse storage; the concession authority in this respect is the minister for the environment and the starosta (head of poviat/district);[1]
2) production and trade in explosive materials, weapons and ammunition as well as products and technology for military or police purposes; the concession authority in this respect is the minister competent for the Interior;[2]
3) production, processing, storage, shipment, distribution and trade in fuels and energy; the concession authority in this respect is the President of the Energy Regulatory Office;[3]

1 Article 22 of the Act of 9 June 2011: Geological and Mining Law (Dz.U. of 2011, No 163, item 981 as amended).
2 Article 7 of the Act of 22 June 2001 on Economic Activity in the Field of Production and Trade in Explosive Materials, Weapons, Ammunition and Products and Technology for Military or Police Purposes (consol. text Dz.U. of 2012, item 1017).
3 Article 33 of the Act of 10 April 1997: Energy Law (consol. text Dz.U. of 2012, item 1059 as amended).

4) protection of persons and property; the concession authority in this respect is the minister competent for the Interior;[4]
5) broadcast of radio and television programmes excluding programmes broadcast via IT system only, which are not distributed terrestrially, through satellites or in cable networks; the concession authority in this respect is the President of the National Broadcasting Council;[5]
6) air transport; the concession authority in this respect is the President Civil Aviation Authority;[6]
7) conducting a casino; the concession authority in this field is the minister competent for public finance.[7, 8]

It is essential that the catalogue of the areas of economic activity under the obligation of obtaining a concession is specified in Article 46 item 1 AFEA. Moreover, it is a closed catalogue, which means that AFEA is here of decisive importance and possible introduction of concessions other than those enumerated in this provision requires an amendment to AFEA.[9]

Separate acts of law remain relevant for the cases which are not regulated in AFEA, in particular determining the specific scope and conditions of performing economic activity under the obligation of concession.[10] Thus, in this are they are lex specialis and take precedence over the provisions of AFEA.[11]

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4 Article 16 of the Act of 22 August 1997 on Protection of Persons and Property (consol. text Dz.U. of 2005, No 145, item 1221 as amended).
5 Articles 33 item 2 of the Act of 29 December 1992 on Radiophony and Television (consol. text Dz.U. of 2011, No 43, item 226 as amended).
6 Article 164 of the Act of 3 July 2002: Air Law (consol. text Dz.U. of 2012, item 933 as amended).
7 Article 32 item 1 of the Act of 19 November 2009 on Gambling Games (Dz.U. of 2009, No 201, item 1540 as amended).
8 See Article 47 item 1 AFEA.
9 Article 43 item 3 AFEA.
10 Article 46 item 2 and Article 63 AFEA.
11 See Articles 21–49 of the Act of 9 June 2011: Geological and Mining Law (Dz.U. of 2011, No 163, item 981 as amended), Articles 6–33 of the Act of 22 June 2001 on Economic Activity in the Field of Production and Trade in Explosive Materials, Weapons, Ammunition and Products and Technology for Military or Police Purposes (consol. text Dz.U. of 2012, item 1017); Articles 32–43 of the Act of 10 April 1997: Energy Law (consol. text Dz.U. of 2012, item 1059 as amended); Articles 15–24 of the Act of 22 August 1997 on Protection of Persons and Property (consol. text Dz.U. of 2005, No 145, item 1221 as amended); Articles 33–40b of the Act of 29 December 1992 on Radiophony and Television (consol. text Dz.U. of 2011, No 43, item 226

2. Characteristics of concessions and granting thereof

Assuming, after C. Kosikowski, concession as a form of rationing economic activity it is worth characterizing it through listing its essential qualities.[12]

First, concession is an act of the state (the concession authority as defined in Article 5 point 1 AFEA) expressing its consent to undertaking and conducting the economic activity legally reserved for the state or that of particular importance for the safety of the state or the citizens or another important public interest.

As the most considerable restriction on economic freedom, the constituting of concession has to be treated as indispensable and necessary, acceptable only in the case where the particular activity cannot be conducted as free or after obtaining an entry in the register of regulated activity or a permit (licence, approval).[13]

Second, concession is an act issued on the grounds of provisions of law determining the conditions and procedures of licensing.

Licensing or procedure of concession, is a sequence of actions of the concession authority as well as the entrepreneur applying for a concession, which occur on the basis of CAP, AFEA and separate laws referring to the particular type of economic activity, which aim at issuing a resolution on the concession (licence).[14]

Resolutions on concessions are of the form of administrative decisions as defined in CAP,[15] referring to granting, refusal to grant, changes and withdrawal of the concession or reduction of its scope in relation to the entrepreneur's application.[16]

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as amended); Articles 164–172 of the of 3 July 2002: Air Law (consol. text Dz.U. of 2012, item 933 as amended); Articles 32–35, 40–42, 47–51, 58–60 of the Act of 19 November 2009 on Gambling Games (Dz.U. of 2009, No 201, item 1540 as amended).

12 For more see: C.Kosikowski, Publiczne prawo..., *op. cit.,* p. 188–190.

13 Article 46 item 3 AFEA.

14 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 273.

15 See Articles 104–113 CAP.

16 Article 47 item 2 AFEA.

Third, concession is an act establishing the right to undertake and conduct the particular activity not only in accordance with the rules determined by law but also on conditions determined in the concession.

Decisions on concessions are of constitutive nature, which means that they form the rights and responsibilities of the concessionaire as well as the concession authorities.

A concession decision specifies the conditions of performing the economic activity under the obligation of concession. They are conditions determined by the valid law; nevertheless the concession authority has the power to concretize their content taking into consideration individual characteristics of the entrepreneur or the activity (in the dimension established in the concession).[17] This right is a manifestation of the discretion of concession decisions.

Fourth, concession is an act issued exclusively on request of the entrepreneur concerned.

An application for granting or changing the concession includes:

a) the entrepreneur's business name, the designation of his seat and address, or the place of residence and the address, or the address of the principal place of conducting the economic activity,

b) the number in the register of entrepreneurs or in the records as well as the tax identification number,

c) the definition of the type and scope of the economic activity to which the concession is to be granted.[18]They are, however, only universal and basic elements and the wording of the application in essential part is specified by the provisions of separate acts referring to the particular type of economic activity under the obligation of concession.[19]

17 Article 48 AFEA.

18 Article 49 item 1 AFEA.

19 Article 49 item 2 AFEA. Compare: the Resolution of the National Broadcasting Council of 4 January 2007 on the content of an application for a concession as well as the specific procedure in granting and withdrawing concessions for dissemination and distribution of radio and television programmes (Dz.U. of 2007, No 5, item 41 as amended).

Fifth, concession is an act with the secured protection of duration. As a rule, it entitles to conducting a particular economic activity for an indefinite period.[20]

The provisions of separate laws, due to the superior public interest, contain, however, exemptions from this rule:

a) in the field of prospecting, exploring hydrocarbon deposits and solid minerals being mining property, extracting minerals from deposits, underground tank-less storage of substances as well as underground refuse storage; the concession is granted for a definite period, not shorter than 3 years and not longer than 50 years, unless the entrepreneur has applied for a concession for a shorter period,[21]

b) in the field of production and trade in explosive materials, weapons and ammunition as well as products and technology for military or police purposes; the concession is granted for a definite period, not shorter than 5 years and not longer than 50 years,[22]

c) in the field of production, processing, storage, shipment, distribution and trade in fuels and energy; the concession is granted for a definite period, not shorter than 10 years and not longer than 50 years, unless the entrepreneur applies for the concession for a shorter period.[23]

3. Tender in concession procedure

In certain circumstances the concession authority is obligated to order a tender on granting a concession. The fundamental assumption of this solution is guaranteeing equality, competitiveness, openness

20 Article 75a AFEA.

21 Article 21 item 4 of the Act of 9 June 2011: Geological and Mining Law (Dz.U. of 2011, No 163, item 981 as amended).

22 Article 14 of the Act of 22 June 2001 on Economic Activity in the Field of Production and Trade in Explosive Materials, Weapons, Ammunition and Products and Technology for Military or Police Purposes (consol. text Dz.U. of 2012, item 1017).

23 Article 36 of the Act of 10 April 1997: Energy Law (consol. text Dz.U. of 2012, item 1059 as amended).

and objectivity in the relation with the entrepreneur in respect of application for the possibility of conducting an economic activity under the obligation of concession.[24]

By virtue of Article 51–52 AFEA the concession authority is obligated to initiate a tender in the concession proceedings, when:[25]

a) it provides for granting a limited number of concessions,[26]

b) the number of entrepreneurs interested in a concession exceeds the number of concessions to be granted,

c) these entrepreneurs fulfil the conditions for the concession and guarantee the proper way of performing the activity under the obligation of concession.[27]

In the case where the aforesaid conditions occur cumulatively, the concession authority is obligated to announce and then conduct a tender.[28]

Referring to the aforementioned conditions it is important to underscore one of the fundamental relevant characteristics of a concession tender. This tender aims at the selection of the concessionaire on the basis of the amount of money offered by him for the concession. Nevertheless this choice is limited only to entrepreneurs who meet all special conditions and guarantee the proper performance of a particular economic activity. This means that the amount of the charge is not the only criterion of the selection but is, in a way, the second stage of tender proceedings. In the first place (at the first stage), on the other hand, the concession authority verifies if the entrepreneur can apply for the concession, i.e. if fulfils the special conditions and guarantees the proper performance of the activity; even before the

24 C.Kosikowski maintains that a better solution (than a tender) would be the institution of administrative hearing regulated in Article 89–96 CAP: see: C.Kosikowski, Ustawa..., *op. cit.,* p. 249–250.

25 See: the Judgment of the Supreme Administrative Court in Warsaw of 4 December 2012, II GSK 1819/11, Lex No 1367174, the Judgment of the Supreme Administrative Court in Warsaw of 4 December 2012, II GSK 1830/11, Lex No 1367184.

26 See: Article 51 AFEA.

27 Article 52 AFEA.

28 Article 53 item 3 AFEA.

tender is announced the concession authority examines him formally and substantively.

The announcement of a tender procedure is published in the Dziennik Urzędowy Rzeczypospolitej Polskiej (Official Journal of the Republic of Poland) "Monitor Polski" on the necessity of the tender.[29] The announcement determines: a) the minimal fee for the concession (not lower than that provided by law for concessions), b) the place and the date of submitting offers (bids), c) specific conditions for the offer to fulfil, d) the amount, the form and the date of the tender bond, e) the date of the selection of the winning tender.

The entrepreneurs should submit an offer prepared in the Polish language in time, place and form specified in the announcement in sealed envelopes. The offer contains: 1) the business name of the entrepreneur, the designation of his seat and address or his place of residence and address and the address of the principal place of conducting the economic activity, as well as 2) the declared amount of concession fee.[30]

It is assumed that the offers submitted cannot be withdrawn.[31] This rule arouses justified doubts for the prohibition of offer withdrawal may lead to the situation where the concession is granted to the entrepreneur who is not interested in undertaking and conducting this activity any longer.[32]

The concession authority selects the number of offers equal the number of concessions according to the amount of the concession fees declared.[33]

What is characteristic of the concession tender is just the fact that the concession authority grants the concession to the entrepreneur who declared the higher fee. Also this solution may arouse controversies. It is important to remember that the criterion adopted serves, foremost, the diversification of the entrepreneurs applying for the concession,

29 Article 53 item 1 AFEA.
30 Article 53 item 4–5 AFEA.
31 Article 53 item 6 AFEA.
32 See: Article 58 item 1 point 2 and Article 54 item 2 AFEA.
33 Article 54 item 1 AFEA.

and thus is to help to select the winning tender in accordance with the constitutional principle of equality.

AFEA also provides for a situation where several entrepreneurs declare the same and simultaneously the highest fee. Then, on the grounds of Article 54 item 2 AFEA, the concession authority calls these entrepreneurs to declare the amount of the fee again and selects the offer of the entrepreneur who declared the highest fee.

Immediately after the selection of the winning tender the concession authority is obligated to give all the entrepreneurs who participated in the tender procedure a written note on the result of the tender procedure as well as on counting the tender bond towards the fee in the case of the entrepreneurs whose offers has been selected and, accordingly, on returning the tender bond to the entrepreneurs whose offers has not been selected.[34]

The selection of the offer is a basis for issuing the resolution on the concession, i.e. the decision of granting the concession to the entrepreneur whose tender offer has turned out the winning one,[35] as well as the decision on a refusal to grant the concession to the entrepreneurs whose offers has not been selected..[36]

4. Examination in concession procedure

AFEA also provides examination of the licensed economic activity: Article 50 AFEA specifies the scope of the examination at the stage of undertaking this type of economic activity.

Before making a decision on granting the concession (or its change) the concession authority is obligated to: a) call the applicant to complete, within the established period of time, the missing documentation confirming his fulfilment of conditions determined by the provisions of law required for conducting the particular economic

34 Article 54 item 3 AFEA.
35 Article 54 item 4 AFEA.
36 Article 54 item 1 point 3 AFEA.

activity under pain of leaving the application without examination,[37] and b) examine the facts given in the application for the concession in order to assert if the entrepreneur fulfils the conditions of performing the economic activity under the obligation of concession as well as if he guarantees the proper performance of the activity under the obligation of concession.[38]

On the grounds of this it is justified to conclude that before granting a concession (at the stage of undertaking the activity) the concession authority always carries out a formal and substantive examination.

The formal examination consists in verification of the accuracy and completeness of the application for the concession and always occurs at the stage of undertaking the licensed activity. This is the consequence of the fact that the concession authority issues the resolution (administrative decision) on the basis of documents and information provided by law as indispensable for its issuing. Thus, if the application does not satisfy the requirements established by the provisions of law, the concession authority cannot resolve the case but is obligated to act according to the provision of Article 50 point 1 AFEA, i.e. call the applicant to complete the missing information with the instruction that failure to complete this information within the fixed period will result in leaving the application without examination.[39]

The substantive examination, on the other hand, consists in checking if the entrepreneur fulfils the (special) conditions determined by law and if guarantees the proper performance of the particular economic activity. The substantive examination is also a necessary element of the procedure of granting a concession.[40]

Article 57 AFEA refers to the examination at the stage of conducting the licensed activity.

In accordance with this provision, the concession authority is entitled to examine the economic activity in respect of: a) compliance

37 Article 50 point 1 AFEA.
38 Article 50 point 2 AFEA.
39 Article 64 § 2 CAP.
40 Article 50 AFEA.

of the activity conducted with the concession, b) obeying the conditions of conducting the economic activity, c) defence or security of the state, protection of safety or personal rights of the citizens.[41]

It is also provided that the persons authorized by the concession authority to examine are especially entitled to: a) enter the property, the object, the premises or part thereof, where the economic activity under the concession is conducted, on the days and at hours when the activity is performed or should be performed, b) demand oral or written explanations, documents or other information carriers as well as the data connected with the subject of the examination.[42] Moreover, the concession authority may call the entrepreneur to remove the errors within the fixed period[43].[44]

Therefore it is worth emphasizing that the examination of the economic activity under the obligation of concession the rules of inspection provided in Chapter 5 of AFEA are applicable.

5. Business secret protection

The entrepreneur giving the information being secretes of the enterprise during the concession procedure may submit an application for covering this information with the confidentiality clause.[45]

The confidentiality clause may encompass only the information being the secrets of the enterprise, or publicly undisclosed technical, technological or organizational information of the enterprise or other information of a commercial value, as for which the entrepreneur has taken necessary actions in order to keep it in secret.[46]

The entrepreneur applying for the confidentiality clause is obligated: a) to define the information the access to which he wants

41 Article 57 item 1 AFEA.
42 Article 57 item 2 AFEA.
43 Article 57 item 3 AFEA.
44 This regulation is not complete and the substantive scope and the rights of inspection authorities arouse several doubts; see: C.Kosikowski, Ustawa..., *op. cit.,* 266–268.
45 Article 55 item 1 AFEA.
46 Article 11 item 4 of the Act on Combating Dishonest Competition (ACDC).

to limit, b) justify his demand and c) prepare a summary of the transferred information, which may be made available to the other participants in the procedure.[47]

On the basis of the properly constructed application, the information defined by the entrepreneur is covered with the confidentiality clause, which means that they cannot be shared with the other participants in the procedure without the entrepreneur's consent.[48]

It is worth emphasizing that the confidentiality clause does not bind the concession authority in the sense that it has the permanently unlimited access to the information referring to the entrepreneur. It cannot, however, share the information under the confidentiality clause with the other participants in the procedure, who are entitled only to the access to the information in the summary prepared by the entrepreneur.

6. Decisions on concessions

Granting, refusal to grant, changing and withdrawal of the concession or reducing its scope occurs by an administrative decision.[49] It is a constitutive decision, which means that it grants (changes or takes away) the entrepreneur certain rights (forms his legal situation).[50]

A relevant quality of licensing is also the fact that decisions on concession are discrete. It is important to explain, however, that the discretion does not mean that the concession authority works independently from the valid law. The source of the discretion is just the valid law, which allows for far-reaching discretion in actions of the concession authority. This refers especially to Articles 56 and 58 AFEA referring to the refusal of granting and the withdrawal of the previously granted concession.

In accordance with Article 56 item 1 AFEA, the concession authority may refuse to grant a concession or reduce its scope in

47 Article 55 item 2 AFEA.
48 Article 55 item 3 AFEA.
49 Article 47 item 2 AFEA.
50 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 190.

relation to the application for the concession, or else refuse the change of the concession:

1) when the entrepreneur does not fulfil the conditions of conducting the economic activity under concession;
2) due to a threat to defence or security of the state or the citizens;
3) if, as the result of a tender procedure the concession was granted to another entrepreneur or entrepreneurs;
4) in the cases determined by the provisions of separate laws connected with the particular type of economic activity under the obligation of concession.[51]

Article 58 AFEA specifies obligatory and facultative conditions of concession withdrawal.

In accordance with Article 58 item 1 AFEA the concession authority is obligated to withdraw the concession if:

1) the valid statement prohibiting the entrepreneur performing the economic activity under concession has been issued;
2) the entrepreneur failed to undertake the activity under concession within the specified period despite the concession authority's calls, or permanently ceased to conduct the economic activity under concession.

On the other hand, on the grounds of Article 58 item 2–3 AFEA the concession authority may withdraw the concession or possibly change its scope:

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51 These are the following cases: a) the entrepreneur from whom in the period of last 3 or even 10 years a concession was withdrawn due to the entrepreneur's fault, b) the entrepreneur has, in the period of last 3 years, deleted from the register of regulated activity because of submitting a declaration incompatible with facts, c) the entrepreneur was convicted with a valid sentence for a crime related to the subject of the economic activity defined by the law, d) the bankruptcy or liquidation procedure has been initiated against the entrepreneur. See: Article 33 item 3, Article 41 item 3–4 of the Act of 10 April 1997. Energy Law (consol. text Dz.U. of 2012, item 1059 as amended), Article 16 of the Act of 22 June 2001 on Economic Activity in the Field of Production and Trade in Explosive Materials, Weapons, Ammunition and Products and Technology for Military or Police Purposes (consol. text Dz.U. of 2012, item 1017); Article 29 of the Act of 9 June 2011: Geological and Mining Law (Dz.U. of 2011, No 163, item 981 as amended), Article 17a, Article 22 item 2–3 of the Act of 22 August 1997 on Protection of Persons and Property (consol. text Dz.U. of 2005, No 145, item 1221 as amended).

1) if the entrepreneur flagrantly infringes the conditions specified in the concession or other conditions of conducing licensed economic activity determined by provisions of law,
2) if the entrepreneur failed to remove within the specified period the actual or legal status incompatible with the conditions specified in the concession or with the provisions regulating the economic activity under concession,
3) because of a threat to defence or security of the state or safety of the citizens, as well as
4) in the case of the entrepreneur's bankruptcy.[52]

Articles 56 and 58 AFEA allow for noticing two questions illustrating the discretion of decisions on concessions.

First, these provisions demonstrate that the concession authority may issue substantively extremely different resolutions on the grounds of the same premises. On the identical bases, at their own discretion, it may:

a) refuse to grant a concession or reduce its scope in relation to the application for the concession or else refuse to change the concession,[53]
b) withdraw the concession or change its scope.[54]

Second, the premises on the grounds of which the concession authority issues an administrative decision make no homogeneous group, for it is possible to point at:

a) premises precisely defined by law,
b) premises which may be specified with regulations (provisions of separate acts of law),
c) premises being general clauses.

The discretion of concession authorities is not reduced to decisions on concession issued on the basis of Articles 56 and 58 AFEA only.

52 See: Article 61 AFEA.
53 Article 56 item 1 AFEA.
54 Article 58 item 2–3 AFEA.

It is important to note that the concession authority in a concession decision may specify the conditions of performing economic activity, while the concession authority has the power to concretize the conditions determined by law at its own discretion basing on individual qualities of the entrepreneur or the activity (in the dimension specified in the concession).[55]

Moreover, pointing out the discretion of the concession authority it is impossible to omit the fact that the possible granting of a concession depends on not only the fulfilment of special (or possibly concretized) conditions but also on the so-called guarantee of the proper performance of the economic activity,[56] i.e. the general clause interpreted as the concession authority's positive opinion.

In this context it also possible to perceive Article 56 item 2 AFEA by virtue of which the concession authority may temporarily withhold granting the concession due to a threat to defense or security of the state or the citizens, publishing it in the Dziennik Urzędowy Rzeczypospolitej Polskiej (Official Journal of the Republic of Poland) "Monitor Polski".

In this case the authority makes an objective decision: it recognizes that the particular activity causes an (excessive) threat to defense or security of the state or the citizens regardless of the qualities of the entrepreneur concerned. Nevertheless, it just at its own discretion decides that the particular concession does not eliminate (minimize) the risk of infringement of the values in point, and the entrepreneur, even if fulfills all the conditions determined by law, does not guarantee that the activity will be performed in a proper and safe way.

7. Promise of concession

The institution which may reduce the risk of the entrepreneur resulting from the discretion of concession decisions is the promise of concession.[57]

55 Article 48 item 1 AFEA.

56 See: Article 50 point 2 and Article 52 AFEA.

57 The promise of concession allows for not only taking beforehand relevant actions connected with collecting of any documentation, but, what's more important, allows for determining befo-

On the grounds of Article 60 item 1 AFEA, the entrepreneur who has an intention to undertake an economic activity which requires a concession, may apply for a promise of issuing the concession.

In the procedure of granting the promise the provisions on granting concessions are applicable, which means that the promise of concession has a form of an administrative decision issued on request of the entrepreneur concerned. It is reserved, however, that the promise is not applicable in the case of a limited number of concessions[58] and in the concession tender procedure.[59]

The promise may be perceived as a commitment of the concession authority to issue a positive decision on the concession (granting the concession) provided certain conditions are fulfilled by the entrepreneur applying for its issuing.[60] Within the period of the validity of the promise, not shorter than 6 months,[61] it is impossible to refuse to grant a concession for an economic activity.[62]

However, an exception to this rule is acceptable. In accordance with Article 60 item 4 AFEA, the concession authority may refuse to grant the concession despite the validity of the promise in the situation where: 1) the data in the application for the promise have changed, 2) the applicant failed to fulfill all the conditions specified in the promise, 3) the entrepreneur fails to fulfill the conditions of performing the licensed activity specified in separate provisions or given for information by the concession authority, 4) because of a threat to defense of the state.

These conditions are treated as resting on the entrepreneur and dependent on his actions or abandonments.[63].

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rehand chances of obtaining the concession. The entrepreneur may be interested in obtaining a promise because after its receipt he is considerably certain that he will also obtain the concession. Therefore, in the period prior to obtaining the concession the entrepreneur may with no risk make investments, cumulate funds and take any organizational actions aiming at the conducting of the licensed activity. C.Kosikowski, Ustawa..., *op. cit.,* p. 276–277.

58 Article 51 item 3 AFEA.

59 Article 60 item 2 AFEA.

60 Article 60 item 1 AFEA. See: the Resolution of the Supreme Court of 28 September 1990, III CZP 33/90, Lex No 3590, the Judgment of the Supreme Administrative Court in Warsaw of 11 October 1996, II SA 2120/95, Lex No 29631.

61 Article 60 item 3 AFEA.

62 Article 60 item 4 AFEA.

63 C.Kosikowski, Ustawa..., *op. cit.,* p. 277.

Part 7

ECONOMIC ACTIVITY RUN ON THE BASIS OF A PERMIT (LICENCE/APPROVAL)

1. Types of economic activity under the obligation of obtaining a permit, licence and approval and concession authorities

Obtaining a permit (license, approval) is required by conducting an economic activity in the field specified in:

1) Article 9 item 1–2, Article 18 item 1 of the Act of 26 October 1982 on Education for Sobriety and Preventing Alcoholism (consol. text Dz.U. of 2012, item 1356 as amended):
   - domestic wholesale trade in alcoholic beverages containing over 18% of alcohol; the competent authority in this respect is the minister competent for economy;
   - domestic wholesale trade in alcoholic beverages containing up to 18% of alcohol; the competent authority in this respect is the marshal of the province;
   - selling alcoholic beverages to be consumed in the place or outside the place of the sale; the competent authority in this respect is wójt (head of the municipality) (mayor, city president);
2) Article 32 of the Act of 19 November 2009 on Gambling Games (Dz.U. of 2009, No 201, item 1540 as amended):
   - keeping a cash bingo parlor; the competent authority in this respect is the minister competent for public finance;

– organization of pari-mutuel betting; the competent authority in this respect is the minister competent for public finance;
– organization of a poker game tournament; the competent authority in this respect is the minister competent for public finance;
– organization of tombolas/raffles, audiotext lotteries, tombola bingo games and promotion lotteries; the competent authority in this respect is the director of the Customs Chamber;

3) Article 16 of the Act of 20 October 1994 on special economic zones (consol. text Dz.U. of 2007, No 42, item 274 as amended):
– conducting economic activity on the territory of the particular zone which entitles to use public aid; the competent authority in this respect is the minister competent for economy;

4) Article 7 of the Act of 13 September 1996 on Maintaining Cleanliness and Order in Municipalities (consol. text Dz.U. of 2012, item 391 as amended):
– emptying septic tanks and transport of liquid waste; the competent authority in this respect is the wójt (head of a municipality) (mayor or city president);
– protection from stray animals; the competent authority in this respect is the wójt (mayor or city president);
– keeping shelters for stray animals, as well as animal burial grounds and animal carcass incinerators; the competent authority in this respect is the wójt (mayor or city president);

5) Articles 35–37, Article 40, Articles 46–47 of the Act of 29 July 2005 on Prevention of Drug Abuse (consol. text Dz.U. of 2012, item 124 as amended):
– production, processing or reprocessing narcotic drugs or psychotropic substances which are medicinal products or which are not medical products, as well as category 1 precursors; the competent authority in this respect in the Chief Pharmaceutical Inspector;

- application of narcotic drugs, psychotropic substances or category 1 precursors for scientific research; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- harvest of poppy seed milk and poppy opium as well as the herb or the raisin of cannabis other than hemp for scientific research; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- preparation of poppy straw extractions; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- import, export, intra-EU delivery or intra-EU purchase of narcotic drugs or psychotropic substances; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- wholesale trade in narcotic drugs or psychotropic substances which are medicinal products or which are not medicinal products as well as category 1 precursors; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- cultivation of poppy or hemp; the competent authority in this respect is the wójt (mayor, city president);
- purchase of poppy or hemp; the competent authority in this respect is the marshal of the province.

6) Article 25, Article 36, Article 68a item 5, Article 69 item 1, Article 96, Article 111, Article 115, Article 119 of the Act of 29 July 2005 on Exchange of Financial Instruments (consol. text Dz.U. of 2010, No 211, item 1384 as amended):
   - conducting a stock exchange; the competent authority in this respect is the minister competent for financial institutions;
   - conducting an OTC market; the competent authority in this respect is the Financial Supervision Authority;
   - conducting a clearinghouse; the competent authority in this respect is the Financial Supervision Authority;

- brokerage; the competent authority in this respect is the Financial Supervision Authority;
- keeping securities accounts and consolidated accounts (trust fund activity); the competent authority in this respect is the Financial Supervision Authority;

7) Article 91 of the Act of 29 July 2005 on Public Offering, on Conditions for the Introduction of Financial Instruments to the Organized Trading System and on Public Companies (consol. text Dz.U. of 2013, item 1382):
   - restoring the form of document of the stocks (revoking the dematerialization of stocks); the competent authority in this respect is the Financial Supervision Authority;
8) Article 12, Article 53 of the Act of 28 August 1997 on Organization and Functioning of Pension Funds (consol. text Dz.U. of 2013, item 989 as amended):
   - opening a pension fund; the competent authority in this respect is the Financial Supervision Authority;
   - opening a pension fund society; the competent authority in this respect is the Financial Supervision Authority;
9) Article 30a, Article 39 item 1, Article 40, Articles 42–42a of the Act of 29 August 1997: Banking Law (consol. text Dz.U. of 2012, item 1376 as amended):
   - opening a bank in the form of joint stock company and a cooperative bank and conducting banking activity by them; the competent authority in this respect is the Financial Supervision Authority;
   - opening a bank abroad by a domestic bank, as well as opening a branch of a domestic bank abroad; the competent authority in this respect is the Financial Supervision Authority;
   - opening a branch of a foreign bank in Poland; the competent authority in this respect is the Financial Supervision Authority;

- opening a representation in Poland by foreign banks and credit institutions; the competent authority in this respect in the Financial Supervision Authority;
- opening a domestic bank by a credit institution; the competent authority in this respect is the Financial Supervision Authority;

10) Article 7 of the Act of 5 November 2009 on Savings and Credit Cooperatives (consol. text Dz.U. of 2012, item 855 as amended):
    - opening a savings and credit cooperative; the competent authority in this respect is the Financial Supervision Authority;
11) Article 7, Article 14, Article 38 of the Act of 26 October 2000 on Commodity Exchanges (consol. text Dz.U. of 2010, No 48, item 284 as amended):
    - conducting an exchange; the competent authority in this respect is the minister competent for financial institutions;
    - conducting an exchange clearinghouse; the competent authority in this respect is the minister competent for financial institutions;
    - conducting brokerage; the competent authority in this respect is the Financial Supervision Authority;
12) Article 41, Article 128, Article 144 of the Act of 14 December 2012 on Waste Materials (Dz.U. of 2013, item 21 as amended):
    - waste collection and waste processing; the competent authority in this respect is the marshal of the province, the starosta (head of a poviat/district), the regional director for environment protection;
    - keeping the landfill (permit); the competent authority in this respect is the regional director for environment protection;
    - waste extraction (approval); the competent authority in this respect is the regional director of environment protection;
13) Article 16c of the Act of 11 May 2001: Trade Metrology Act (consol. text Dz.U. of 2013, item 1069):

– conducting economic activity in installation or repairing as well as periodic inspection for the compliance with requirements, before and after the installation and after the repairing of certain types of measuring instruments, if it results from the international agreements binding the Republic of Poland: the competent authority in this respect is the President of the Central Office of Measures;

14) Article 16 of the Act of 7 June 2001 on Collective Water Supply and Collective Sewage Disposal (consol. text Dz.U. of 2006, No 123, item 858 as amended):
   – collective water supply; the competent authority in this respect is the wójt (mayor, city president);
   – collective sewage disposal; the competent authority in this respect is the wójt (mayor, city president);
15) Articles 15–16, Article 41, Article 51 of the Act of 22 June 2001 on Genetically Modified Organisms (consol. text Dz.U. of 2007, No 36, item 233 as amended):
   – conducting a reference laboratory; the competent authority in this respect is the minister competent for the environment;
   – closed use of GMO (approval); the competent authority in this respect is the minister competent for the environment;
   – export and transit trough the territory of the Republic of Poland of GMO products; the competent authority in this respect is the minister competent for the environment;
16) Article 3, Article 21a, Article 37l, Articles 38–38a, Article 8b item 1a, Article 74, Article 99, Article 106 of the Act of 6 September 2001: Pharmaceutical Law (consol. text Dz.U. of 2008, No 45, item 271 as amended):
   – marketing of medicinal products; the competent authority in this respect is the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products;
   – parallel import of medicinal products; the competent authority in this respect is the President of the Office for

Registration of Medicinal Products, Medical Devices and Biocidal Products;

- conducting a clinical trial; the competent authority in this respect is the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products;
- production of medicinal products (also medicinal products for advanced therapy); the competent authority in this respect is the Chief Pharmaceutical Inspector;
- import of medicinal product; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- conducting a pharmaceutical warehouse; the competent authority in this respect is the Chief Pharmaceutical Inspector;
- conducting a public pharmacy; the competent authority in this respect is the provincial pharmaceutical inspector;
- opening a hospital pharmacy (approval); the competent authority in this respect is the provincial pharmaceutical inspector;

17) Article 5, Article 5a, Article 5b, Article 18, Articles 28–29 of the Act of 6 September 2001 on Road Transport (consol. text Dz.U. of 2012, item 1265 as amended):

- pursuit of the occupation of road transport operator (undertaking and conducting road transport); the competent authority in this respect is the starosta (head of the poviat/district);
- undertaking and conducting international road transport (community license); the competent authority in this respect is the Chief Inspector of Road Transport;
- undertaking and conducting domestic road transport: transport of persons in a car; the competent authority in this respect is the starosta (head of the poviat/district);
- undertaking and conducting domestic road transport: transport of persons in a motor vehicle structurally designed

for the transport of more than 7 and not more than 9 persons, including the driver; the competent authority in this respect is the starosta (head of the poviat/district);

- undertaking and conducting domestic road transport: transport of persons in a taxi cab; the competent authority in this respect is the wójt (head of the municipality) (mayor or city president);
- undertaking and conducting domestic road transport as an agent for transport of goods (license); the competent authority in this respect in the starosta (head of a poviat/district);
- regular transport and regular special transport in domestic road transport requires a permit; the competent authority in this respect is the wójt (head of a municipality), the mayor or city president, the starosta (head of a poviat/district), the marshal of a province (depending on the range of transport);
- regular transport and regular special transport in international road transport; the competent authority in this respect is the Chief Inspector of Road Transport;
- international road transport of goods on the territory of the Republic of Poland (by a foreign entity which has no seat in a member state of the European Union, the Swiss Confederation or a member state of the European Free Trade Association – a party to the Agreement on the European Economic Area); the competent authority in this respect is the minister competent for transport;
- cabotage; the competent authority in this respect is the Chief Inspector of Road Transport;

18) Article 5, Article 18, Article 23 item 1, Article 29 item 1 of the Act of 19 February 2004: Fisheries Act (Dz.U. of 2004, No 62, item 574 as amended):

- sea fisheries with a fishing license; the competent authority in this respect is the minister competent for fisheries;

- sea fisheries with a fishing permit; the competent authority in this respect is the minister competent for fisheries, the district inspector of sea fisheries;
- fishing sea organisms in the Polish maritime area for scientific or training purposes (permits); the competent authority in this respect is the district inspector of sea fisheries;
- breeding or rearing fish and other sea organisms or fish stocking in the Polish maritime areas; ; the competent authority in this respect is the minister competent for fisheries;

19) Article 55 item 1, Article 173 of the Act of 3 July 2002: Air Law (consol. text Dz.U. of 2012, item 933 as amended):
- opening and conducting an airport; the competent authority in this respect is the President of the Civil Aviation Authority;
- management of an airport; the competent authority in this respect is the President of the Civil Aviation Authority;
- ground handling of aircrafts, crews, passengers and cargoes for air transport operators and other users of aircrafts; the competent authority in this respect is the President of the Civil Aviation Authority;

20) Article 6 item 1, Article 223a of the Act of 22 May 2003 on Insurance Activity (consol. tex Dz.U. of 2013, item 950 as amended):
- insurance activity; the competent authority in this respect is the Financial Supervision Authority;
- reinsurance activity; the competent authority in this respect is the Financial Supervision Authority;

21) Article 20 of the Act of 22 May 2003 on Insurance Agency (Dz.U. of 2003, No 124, item 1154 as amended):
- brokerage; the competent authority in this respect is the Financial Supervision Authority;

22) Article 48, Article 49 item 1, Article 56 item 1, Article 57 item 1, Article 62a of the Act of 6 December 2008 on Excise (consol. text Dz.U. of 2011, No 108, item 626 as amended):
   - conducting a bonded warehouse; the competent authority in this respect is the head of the customs office;
   - conducting an activity as an agent; the competent authority in this respect is the head of the customs office;
   - purchase of excise goods as a registered purchaser or a one-off purchase of excise goods as a registered purchaser; the competent authority in this respect is the head of the customs office;
   - shipping excise goods as a registered sender; the competent authority in this respect is the head of the customs office;
23) Article 23, Article 61, Article 45, Article 209 of the Act of 27 May 2004 on Investment Funds (Dz.U. of 2004, No 146, item 1546 as amended):
   - opening an investment fund; the competent authority in this respect is the Financial Supervision Authority;
   - conducting an activity by an investment fund society; the competent authority in this respect is the Financial Supervision Authority;
   - portfolio management, including one or more financial instruments, by a investment fund society; the competent authority in this respect is the Financial Supervision Authority;
   - investment consulting of a investment fund society; the competent authority in this respect is the Financial Supervision Authority;
24) Article 13 item 1 of the Act of 21 January 2005 on Animal Experiments (Dz.U. of 2005, No 33, item 289 as amended):
   - conducting an economic activity consisting in breeding laboratory animals or delivery of experiment animals; the competent authority in this respect is the poviat (district) veterinary surgeon;

25) Article 60 item 1, Article 132a item 1 of the Act of 19 August 2011 on Payment Services (Dz.U. of 2011, No 199, item 1175 as amended):
   - providing payment services as a national payment institution; the competent authority in this respect is the Financial Supervision Authority;
   - issuing electronic money as well as payment services as a national institution of electronic money; the competent authority in this respect is the Financial Supervision Authority;
26) Article 4 of the Act of 29 November 2000, Atomic Law (consol. text Dz.U. of 2012, item 264 as amended):
   - conducting an activity connected with exposure to ionizing radiation consisting in: a) production, processing, storage, transport and application of nuclear materials, radioactive sources and waste as well as spent nuclear fuel and trade therein, as well as in isotopic enrichment, b) construction, commissioning, exploitation and liquidation of nuclear objects, c) construction, exploitation, closing and liquidation of radioactive waste storage, d) production, installation, application and handling of equipment containing radioactive sources as well as trade in this equipment, e) commissioning and application of equipment producing ionizing radiation, f) commissioning laboratories where ionizing radiation sources are to be applied, including X-ray laboratories, g) intended adding radioactive substances in the production process of consumer goods and medical products, medical products for *in vitro* diagnostics, accessories for medical products, accessories for medical products for *in vitro* diagnostics, active medical products for implantation, h) also trade in these products and import into the territory of the Republic of Poland and export therefrom of these products and consumer products to which radioactive substances have been added, i) intended administration of radioactive substances to people and animals for the purposes of medical or veterinary

diagnostics, treatment or scientific research; the competent authority in this respect is the President of the National Atomic Energy Agency;

27) Article 6 item 1 of the Act of 29 July 2005 on System of Digital Tachographs (Dz.U. of 2005, No 180, item 1494 as amended):
   – conducting a workshop on installation, including activation, reparation or examination for compatibility with the requirements of digital tachographs, including their calibration; the competent authority in this respect is the President of the Central Office of Measures;

28) Article 43 item 1 of the Act of 28 March 2003 on Rail Transport (consol. text Dz.U. of 2007, No 16, item 94 as amended):
   – economic activity consisting in railway transport of persons or goods or traction (haulage) services (license); the competent authority in this respect in the President of the Office of Rail Transport;

29) Article 16 of the Act of 24 August 2001 on Finality of Clearing in Payment Systems and Securities Clearing as well as the Rules of Supervision Thereover (consol. text Dz.U. of 2013, item 246 as amended):
   – conducting payment systems (approval); the competent authority in this respect in the President of the National Bank of Poland;
   – conducting securities clearing systems; the competent authority in this respect in the Financial Supervision Authority.

This demonstrates that permits (licenses and approvals) are the most common form of rationing economic activity in Poland. All the more surprising may be the lack of more extensive regulation in AFEA. In the provisions of "the constitution of economic activity" these problems seem marginalized.

The evidence of this is the fact of the omission of permits (licenses and approvals) in the title of Chapter 4 "Concessions and regulated economic activity". Consequently its wording erroneously suggests

that on the territory of the Republic of Poland the rationing of economic activity occurs in the form of concessions and regulated activity only.

Moreover, the provisions of AFEA in this matter are actually reduced to mere enumeration of the acts of law which provide the obligation of obtaining a permit (license or approval), and referring to them as regulating: the competence of the authorities granting permits (licenses and approvals), all conditions of conducting the activity under the obligation of permits (licenses and approvals) as well as the rules and procedure of decision issuance on permits (licenses and approvals).[1]

2. Differences between a permit and a concession

The structure and procedural rules (in granting or withdrawing) relevant to permits (licenses, approvals) are close to concessions and concession procedures. Nevertheless it is worth underscoring, after C.Kosikowski, basic differences between these forms of rationing (and emphasize the properties of permits, licenses and approvals).[2]

First, permits do not refer to the domains of economic activity under concessions.

This results from the rule, according to which a particular type of economic activity is covered with only one form of economic activity rationing (either concession or permit, license, approval, or else regulated economic activity).

Second, the requirement of permits to conduct economic activity is put into action when the conducting of this activity cannot be free and the record in the register of regulated activity does not guarantee the proper protection of an important public interest.

On the other hand, the obligation of concession is put into action when the conducting of the particular activity cannot be free and when the proper protection of an important public interest (as well as the

1 Article 75 and Article 76 AFEA.
2 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 190–192.

proper standard of performance) is guaranteed neither by the record in the register of regulated activity nor by the permit (license, approval).[3]

Third, the obligation of obtaining a permit to perform a particular type of economic activity is determined by the provisions of separate laws (mentioned in Article 75 AFEA).

The obligation of obtaining a concession is determined by Article 46 item 1 AFEA containing a closed enumeration of types of the economic activity subject to concession.

Fourth, permit granting is an administrative procedure modified by the provisions of separate laws referring to the particular type of economic activity.

In turn, concession granting is an administrative procedure (CAP) modified by the provisions of AFEA (providing structural elements of concession procedure[4]) as well as the provisions of separate laws connected with the particular type of economic activity.

Fifth, resolutions on permits are of the form of administrative decision, which, as a rule, are issued only on the basis of the fulfillment of special conditions connected with the particular activity.[5]

Administrative decisions on concessions are characterized by considerable discretion.

Sixth, in the case of permits, the special conditions guarantee the protection of an important public interest and are formed only by the characteristics of the particular economic activity.

Special conditions related to concessions also reflect the strategic nature of the activity and are expected to secure its proper (correct and safe) performance.

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3 See Article 46 item 3 AFEA.

4 See Article 46–63 AFEA.

5 In order to allow the entrepreneur concerned to conduct an activity subject to permit (license, approval), the competent authority, before issuing a decision, always 1) examines the application for formal requirements and 2) examines the entrepreneur substantively (of special conditions referring to the particular economic activity).

Seventh, permits occur under different names (permit, license, approval, fishing license, foreign exchange license), which are used changeably but always as this form of rationing.

Eighth, the issuance of a permit to perform certain types of economic activity is also connected with (derivative) approval of creating, in the legal sense, a certain organization through which to conduct the particular activity under the permit (e.g. bank, bank cooperative, insurance company, pension fund, investment fund).

Part 8

CONTROL OF THE ENTREPRENEUR'S ECONOMIC ACTIVITY

1. Importance of AFEA and the range of regulations

AFEA, identified as a sort of "constitution of economic activity", plays an extremely important role in the system of Polish law. This also refers to the control of the entrepreneur's economic activity. In this respect it is the first attempt at formulating general and universal rules expressing fundamental rights and responsibilities of entities under control and control authorities.[1]

It is also important that these rules specified in the provisions of Chapter 5 AFEA "Control of the entrepreneur's economic activity" should be perceived as universal rules or relevant to any control of the entrepreneur regardless of the type of his economic activity.

Among the rules of the entrepreneur's economic activity control the following should be counted:[2]

1 It is important to remember that Polish law had no act of law which regulated comprehensively the issues of the entrepreneur's audit. Institutions and legal solutions in this matter were formulated in several specific laws relevant to exclusively particular spheres of entrepreneurs' functioning, and thus also particular inspections referring to the specificity, stage and fields of economic activity. Moreover, these provisions formed foremost the rights of audit authorities (their competences, the scope of inspection/audit as well as audit and post-audit measures), and only in this context they regulated possible rights of the entrepreneurs inspected.

2 It is worth noting that the catalogue of general rules of audit has been considerably extended. By virtue of the provisions of the Act of 19 December 2008 on Amending the Act on Freedom of Economic Activity and on Amending Certain Other Acts (Dz.U. of 2009, No 18, item 97 as amended) new rules and institutions of audit were introduced, and some of the existent ones were modified. Also the title of Chapter 5 was modified and now it is "Control of the entrepreneur's economic activity" (originally "Control of the entrepreneur").

1) the supreme rule of control: Article 9 AFEA.
2) the rule of primacy of AFEA: Article 77 item 1–3 AFEA.
3) the rule of compensation: Article 77 item 4–5 AFEA.
4) the rule of evidence exclusion: Article 77 item 6 AFEA.
5) the rule (institution) of reporting to control authorities: Article 78 AFEA.
6) the rule of notifying on the intention to start an inspection/audit: Article 79 AFEA.
7) the rule of professional launching and conducting an inspection: Article 79a–79b AFEA.
8) the rule of conducting an inspection on the premises and in the presence of the person concerned: Article 80–80b AFEA.
9) the rule of the audit book: Article 81–81a AFEA.
10) the rule of the limited number of inspections – prohibition of coincidence of inspections: Article 82 AFEA.
11) the rule of the limited time of inspection: Article 83–83a AFEA.
12) the rule (institution) of the objection of the entrepreneur: Article 84c–84d AFEA.

Article 9 AFEA deserves special attention. Placed in Chapter 1 "General Provisions", it specifies one of the fundamental obligations of the state towards economic activity and the entrepreneur. In accordance with this provision, fulfilling its tasks, especially those referring to supervision and control, the competent authority acts exclusively on legal grounds with respect for the entrepreneur's justified interests.

Due to the fundamental nature of this provision the prescript of acting within the law and on the basis of law with respect for the entrepreneur's justified interests refers to any relation of the state with entrepreneurs (and economic activity). Nevertheless, the direct mention of control and supervision emphasizes the special nature of this relation, which, through the broad range of rights of control authorities, may provoke considerable fraud and irregularities. Consequently, Article 9 AFEA deserves the name of the superior rule of control, which

should be treated as a fundamental interpretative rule of the control and supervisory relation over the entrepreneur's economic activity.

It is also important to note that AFEA is not an ideal regulation as far as the entrepreneur's economic activity control is concerned. Seeing its drawbacks it is foremost important to underscore that it fails to diversify the terms control and supervision, whereby it deepens the legislative incorrectness (and unawareness) of the approach to these issues in separate laws. It also fails to specify the criteria of control and supervision, which erroneously suggests that they can be exercised from any point of view. It sometimes incorrectly reduces the catalogue of control authorities to public administration authorities. It also fails to resolve doubts referring to the objective and subjective scope of control and supervision.

It is also worth underscoring that it is characteristic of the provisions of AFEA that they include a considerable number of exceptions and exemptions in the application of the control rules, for they are provided in relation to most rules and additionally constituted in Articles 84–84b of this law. As the result of so high (and even too high) a number of exceptions and exemptions it may appear that in many cases the AFEA regulation on the rules of control may turn out blank and empty, i.e. of no practical application.

2. Subjective scope of control

Defining the subjective and objective scope of control arouses certain doubts. They result from the fact that they have not been precisely specified in the provisions of AFEA, and one indication in this matter is the title of Chapter 5 of the act: "Control of the entrepreneur's economic activity", which allows for a conclusion that in the subjective dimension control concerns the entrepreneur in the object reduced to his economic activity.

However, referring to the subjective dimension of control it is worth noting after C.Kosikowski, that despite the apparent obviousness certain problems emerge in this matter. First, it is worth remembering that the term entrepreneur (or economic activity), according to the

legal definitions adopted in AFEA causes interpretative difficulties. Second, the entrepreneur (and economic activity) is parallelly defined in many act of Polish law. Third, the sense attributed to this term is not homogeneous, since particular acts of law identify the entrepreneur (and economic activity) differently. Fourth, AFEA, as well as other laws, institute subjective and objective exemptions. Consequently, an entrepreneur is not always he who conducts an economic activity on his own behalf (or possibly an activity corresponding with relevant qualities of economic activity cannot be identify in this way). Fifth, entrepreneurs (even in the sense attributed to them in AFEA) do not make a homogeneous group but adopting certain important qualities one may point out several (different) categories thereof. Sixth, it is still unresolved if control may cover also entities, who are not entrepreneurs but remain (or remained) in commercial relations with the entrepreneur concerned (e.g. suppliers or recipients of goods and services, agents, banks, law firms).[3]

Bearing in mind the aforementioned doubts, it seem reasonable to assume that as a rule control (in its subjective dimension) concerns the entrepreneur in the meaning of Article 4 AFEA.

3. Objective scope of control and control authorities

In the objective scope control of the entrepreneur refers to his economic activity (in the meaning of Article 2 AFEA). However, it is worth noting that the object of control so understood is extremely broad and encompasses (or at least may encompass) many planes. For it is possible to point out:

1) control at the stage of undertaking (and, correspondingly, termination) of an economic activity, including:
   a) control connected with the acquisition of the status of entrepreneur,

3 C. Kosikowski, Publiczne prawo..., *op. cit.,* p. 199–200.

b) control connected with legalization of an economic activity (on the grounds of AFEA and ANCR),

c) control connected with legalization of a rationed economic activity (examination of the application for an entry in the register of regulated activity, examination connected with undertaking an activity requiring a permit, license and approval, as well as examination connected with undertaking an activity requiring a concession),

2) control at the stage of conducting economic activity, including:

a) inspection of general conditions of conducting an economic activity

b) inspection of conditions of conducting a rationed economic activity (regulated activity, subject to permit, license and approval as well as concession)

c) inspection of other conditions of conducting an economic activity:

– tax and fiscal audit, foreign currency audit, customs audit, audit of financial reports, audit of application of official prices, inspection referring to reporting and public statistics, personal data and classified information protection, entry into and fulfilment of economic contracts, referring to restrictions on the volume of production or services as well as commercial exchange of certain goods and services with abroad, inspection concerning employment, working conditions, health and safety at work, salaries and social benefits, competition and entrepreneurs' interests, performing tasks connected with state defence.[4]

It is also important to note a great number of authorities and institutions entitled to check the entrepreneur's economic activity.

It is possible to distinguish the following among them:[5]

4 M. Etel, M. Nowikowska, A. Piszcz, J. Sieńczyło-Chlabicz, W. Stachurski, A. Żukowska, Publiczne prawo..., *op. cit.,* p. 254–269.

5 See: http://www.sejm.gov.pl , accessed, December 6, 2013.

1) institutions authorized to conduct and audit/inspection of an extensive substantive scope, i.e.: Supreme Audit Office, public prosecutor's office, Internal Security Agency, Intelligence Agency, Police, Municipality (Town/City) Guard, State Fire Service, Customs Service, General Inspector of Financial Information, Inspector General for Personal Data Protection, Office for Competition and Consumer Protection, Central Office of Measures, Social Insurance Institution, Central Anticorruption Bureau, Border Guard, wójt (head of a municipality) (mayor, city president), starosta (head of a poviat/district) and voivode (head of a province);
2) institutions authorized to conduct specialist inspections, i.e.: National Labour Inspectorate, State Sanitary Inspection, Veterinary Inspection, Trading Standards Inspection, Agricultural and Food Quality Inspection, Inspectorate of Environment Protection, revenue offices and inspectorates of fiscal control, State Pharmaceutical Inspection, Road Transport Inspection, State Plant Health and Seed Inspection, Office of Electronic Communications, National Fishing Guard, Inland Waterways Inspection, Inspection of Sea Fisheries, President of the National Bank of Poland, Inspectorate of Construction Supervision, State Fund for Rehabilitation of Disabled Persons, State Mining Authority, Civil Aviation Authority, Office of Rail Transport, Financial Supervision Authority, Agricultural Market Agency, Agency for Restructuring and Modernization of Agriculture, Geodetic and Cartographic Inspection, Chief Nuclear Regulatory Inspector, National Broadcasting Council, Veterinary Inspection, Inspection of Chemical Substances and Preparations, Pharmaceutical Inspection;
3) rationing authorities competent for the economic activity under the obligation of concession, permit (license, approval) as well as an entry in the register of regulated activity;
4) professional self-government bodies for particular trades and professions.

Certainly, the competence of a particular institution or body authorized to conduct an audit/inspection depends on the type of the entrepreneur's economic activity. Nevertheless, the catalogue of competent entities in this field is very extensive.

4. Rules of inspection/audit of economic activity of an entrepreneur according to AFEA

4.1. Rule of primacy of AFEA

The rule of primacy of AFEA results from Article 77 item 1 AFEA, in accordance with which an inspection of the entrepreneur's economic activity is conducted according to the rules determined by this act of law. This means that the standard of inspection presented in Chapter 5 AFEA is universal and generally is relevant to any inspection/audit of the entrepreneur's economic activity (regardless of relevant qualities of the entity or the economic activity). As far as the provisions referring to inspections/audits resultant from other laws are applicable for the cases not regulated by AFEA.[6]

Consequently, several separate laws containing provisions connected with inspections/audits of the entrepreneur's economic activity, in particular including the objective scope and authorities authorized to conduct them,[7] comprise provisions emphasizing the priority of AFEA regulations in this matter.[8, 9]

Simultaneously it was reserved that the rules of inspections/audits of the entrepreneur's economic activity in Chapter 5 AFEA are not applicable: a) when the rules and procedures of the inspection result from directly applied provisions of universally valid EU law or from

6 Article 77 item 2 AFEA.
7 Article 77 item 3 AFEA.
8 In accordance with Article 291c of the Act of 29 August 1997: Tax Ordinance, "to control of economic activity of the tax-payer who is an entrepreneur the provisions of Chapter 5 of the Act of 2 July 2004 on Freedom of Economic Activity".
9 See: Articles 3–63 of the Act of 19 December 2008 on the amending of the Act on Freedom of Economic Activity and the amending of some other laws (Dz.U. of 2009, No 18, item 97 as amended).

ratified international agreements,[10] as well as b) to inspecting the entrepreneur for compliance with the conditions of nuclear safety and radiological protection.[11]

4.2. Rule of compensation

In accordance with the rule expressed in Article 77 item 4 AFEA, the entrepreneur who has suffered damage as the result of inspecting actions infringing the provisions of law referring to inspection of the entrepreneur's economic activity, is entitled to compensation.

AFEA fails, however, to specify or the redress rules and procedure. This issue is left for the provisions of separate laws.[12] They are, in particular, Articles 417 CC and Article 4172 CC providing, respectively, liability of the Treasury for the damage and liability for the damage resulting from the exercising of public power.

It is important to remember, however, the rule expressed in Article 6 CC, according to which the burden of proving the fact rests on the person who derives legal effects from this fact. Thereby it is necessary for an effective claim for damages by the entrepreneur to provide due documentation on the inspecting actions exercised with the infringement of law.

4.3. Rule of evidence exclusion

According to the rule of evidence exclusion, the evidence obtained during the inspection by the inspecting body with the infringement of the provisions of law referring to inspection of entrepreneur's economic activity, cannot be treated as evidence in any administrative, tax, criminal or criminal-fiscal procedure concerning the entrepreneur inspected, if they considerably affected the inspection results.[13]

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10 See: Article 77 item 1 AFEA. Here it is worth noting Article 105i of the Act of 16 February 2007 on Competition and Consumer Protection (Dz.U. of 2007, No 50, item 331 as amended).

11 See: Article 77 item 1a AFEA. In this matter relevant provisions are those of the Act of 29 November 2000: Atomic Law (consol. text Dz.U. of 2012, item 264 as amended).

12 Article 77 item 5 AFEA.

13 Article 77 item 6 AFEA.

Here it is worth emphasizing after C.Kosikowski, that the rule of exclusion should be applicable to any evidence obtained with the infringement of law. Thereby it should not depend on the conditions listed in Article 77 item 1, i.e.: a) (considerable) effect on the result of the inspection, or b) administrative, tax, criminal or criminal-fiscal proceedings.[14]

4.4. Rule of reporting to inspection authorities

The rule provided in Article 78 AFEA gives legal grounds for an immediate reaction of the municipality authorities:

a) in the case of conducting economic activity against the provisions of the law, and

b) in the event of a threat to life, health, a danger of considerable material damages or infringement of the environment as the result of this activity.

Foremost, in the event of becoming aware of the aforesaid situations, the wójt (mayor, city president) is obligated to report on the fact to competent authorities immediately (at the municipality authorities' discretion) and all them to take appropriate actions aiming at preventing the law infringement or threats to public administration authorities.[15] In reply the bodies to which the situation has been reported to immediately inform the wójt (mayer or city president) on the actions taken.[16]

Moreover, beside the aforementioned obligation, the rule of reporting to the inspection bodies also provides important entitlement of municipality authorities. On the grounds of Article 78 item 3 AFEA, the wójt (mayor or city president) may order, through his decision, suspension of the economic activity for the time necessary but not longer than 3 days.[17] What is more, the decision may be made immediately enforceable in the event of assertion of a threat to life,

14 See: C. Kosikowski, Ustawa...,, *op. cit.,* p. 506.
15 Article 78 item 1 AFEA.
16 Article 78 item 2 AFEA.
17 See: the Judgment of the Provincial Administrative Court in Cracow of 15 March 2012, III SA/Kr 614/11, Lex No 1139261.

health, a danger of considerable material damages or infringement of the environment as the result of conducting this economic activity.[18]

However, the municipality authority may take the aforementioned decision in the case of the lack of possibility of reporting the competent public administration authorities.[19]

4.5. Rule of notifying on the intention to start an inspection

By virtue of Article 79 item 1 AFEA the inspection authorities notify the entrepreneur on the intention to start an inspection.

The notification on the intention to start an inspection contains: 1) the designation of the authority; 2) the date and the place of issuance; 3) the designation of the entrepreneur; 4) indication of the objective scope of the inspection, and 5) the signature of the person authorized to notify.[20]

It is important that the inspection is launched no sooner than after 7 days and not later than before 30 days of the day of the delivery of the notification on the intention to start the inspection.[21] If the inspection fails to be launched within 30 days of the day of the delivery of the notification, the inspection requires to be notified again.[22]

The ratio legis of this solution arouses well-grounded doubts. The entrepreneur acting in bad faith, notified on the intention to start an inspection and on its object, prepares himself therefore in such a way that the inspection authority could not assert any irregularities. Nevertheless, it may assume that a prior notification on the intention to start an inspection with defining its objective scope, will allow the entrepreneur for due preparations and thus will improve the inspection authority's actions and shorten the time of inspection. Transparency, efficiency and swiftness of the actual course of inspection seem to be the principal assumption of the legislator.

18 Article 78 item 4 AFEA.
19 Article 78 item 3 AFEA.
20 Article 79 item 6 AFEA.
21 See: Article 79 item 5 AFEA.
22 Article 79 item 4 AFEA.

In many situations, however, compliance with this rule would make the inspection groundless or even impossible to conduct. In this context it is important to underscore the exception provided in Article 79 item 2–3 AFEA. In accordance with this rule, the notification on the intention to start an inspection does not occur if:

- the inspection is necessary to prevent a crime or an offence, prevent a fiscal crime or a fiscal offence, and to secure the evidence thereof;
- the inspection is justified by a direct threat to life, health or the natural environment;
- the inspection is conducted on the grounds of the provisions of the Act of 26 August 2006 on the System of Monitoring and Control of Fuel Quality (Dz.U. of 2006, No 169, item 1200 as amended);
- the inspection is conducted within the course of proceedings conducted on the grounds of the provisions of the Act of 16 February 2007 on Competition and Consumer Protection (Dz.U. of 2007, No 50, item 331 as amended);
- in the events defined in Article 282c of Tax Ordinance, i.e. if 1) the inspection a) refers to grounds of refund of the tax difference or the refund of input tax under the provisions of the tax on goods and services, b) is to be launched on demand of the body conducting preparatory proceedings on a crime or a fiscal crime, c) refers to taxation on incomes which are not among the disclosed sources or from undisclosed sources, d) refers to the economic activity not declared for taxation, e) is to be launched on the basis of the information obtained on the grounds of regulations on preventing money-laundering and financial terrorism, f) is launched on production of an inspection identity card,[23] g) is of temporary nature and refers to recording trade with a cash register, the use of a cash register or preparing a physical inventory, h) concerns a tax on extraction of certain minerals; i) in the case of necessity of extending the scope of the inspection over

23 Article 284a § 1 TO.

other billing periods due to irregularities asserted as the result of the already completed inspection actions,[24] and if: 2) the tax authority possess information that the entrepreneur: a) has been convicted in the Republic of Poland for a fiscal crime, a crime against commercial exchange, a crime of Act of 29 September 1993 on Accountancy or an offence consisting in obstruction of the inspection; b) is an obligor in executive proceedings in administration, c) has no place of residence or address of the seat, or delivery of letters to the addresses provided were ineffective or difficult.[25]

– the inspection has to be conducted on the grounds of the provisions of the universally valid community law directly applicable or on the grounds of a ratified international agreement.

The inspection authority is obligated to justify the exception to the rule of notification on the intention to start an inspection. The justification of the lack of notification is placed in the inspection book and inspection protocol.[26]

4.6. Rule of professional launching and conducting an inspection

Professional launching and conducting of an inspection regulated in Articles 79a and 79b of AFEA consist of three rules:

1) launching and conducting an inspection by an employee of the inspection authority;
2) launching and conduction an inspection on the basis and within authorization;
3) open launching an inspection.

First, inspectrion actions may be performed by employees of inspection authorities on production of his ID card authorizing to perform such activities to the entrepreneur or a person authorized by

24 Article 282c § 2 TO.
25 After the inspection is launched on the grounds of Article 282c § 1–2 TO, the inspected person on the reason for not notifying him on the intention to start an inspection: Article 282c § 3 TO.
26 Article 79 item 7 AFEA.

the entrepreneur.[27] On the other hand, inspection actions performed by persons who are not employees of the inspection authority is acceptable exceptionally, i.e. only when provided by the provisions of separate laws.[28]

Second, inspection actions may be exercised on delivery of the inspection warrant, which contains at least:

1) indication of legal grounds;
2) designation of the inspection authority;
3) date and place of issuance;
4) first name and family name of the inspection body employee authorized to exercise the inspection as well as the number of his inspection ID;
5) designation of the entrepreneur concerned;
6) definition of the objective scope of the inspection;
7) indication of the date of the commencement and anticipated date of the termination of the inspection;
8) signature of the person authorizing with the official position and function;
9) instruction on rights and responsibilities of the entrepreneur concerned.

It is also emphasized that the document which fails to contain the aforementioned information is not a basis for the inspection.[29]

It is worth underscoring that the warrant is a document binding the inspection authority for the scope of inspection cannot exceed the scope indicated in the warrant and that the change of the person authorized to conduct the inspection, of the objective scope of the inspection as well as the place of performing inspection actions requires the issuance of a separate warrant.[30]

27 Article 79a item 1 AFEA.
28 Article 79a item 3–4 AFEA and Article 26 item 7 of the Act of 29 July 2005 on Supervision over Capital Market (Dz.U. of 2005, No 183, item 1537 as amended).
29 Article 79a item 7 AFEA.
30 Article 79a item 8 and item 5 AFEA.

Consequently, initiating an inspection without a warrant, only on the basis of the production of an inspection ID is accepted only exceptionally: exclusively when: a) the special regulations provide the possibility of launching an inspection on production of an ID,[31] and b) inspection actions are necessary to prevent a crime or an offence, to prevent a fiscal crime or a fiscal offence, or to secure the evidence thereof, as well as if the inspection is justified by a direct threat to life, health or the natural environment.[32] Moreover, in the event of launching inspection actions on production of an ID, before taking the first inspection action, the person initiating the inspection is obliged to inform the inspected person on his rights and responsibilities,[33] as well as deliver the warrant not later than on the third day of the launching of the inspection.[34]

Third, the entrepreneur should have no doubts concerning the moment of launching the inspection actions. Transparency of launching the inspection results from the obligations of the inspection authority: the employee of the inspection authority is obligated to produce his inspection ID as well as deliver the warrant directly to the entrepreneur or the parson authorized by him even before the first inspection action.

On the other hand, in the event of the absence of the entrepreneur inspected or the person authorized by him, the condition of initiating the inspection actions is producing the inspection ID to the inspected entrepreneur's employee[35] or in the presence of a summoned witness, who should be a public functionary but not an employee of the authority conducting the inspection.[36]

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31 Article 79a item 1 AFEA. This possibility is provided by Article 284a § 1 TO, Article 70 item 1 of the Act of 6 September 2001 on Road Transport (consol. text Dz.U. of 2012, item 1265 as amended), Article 65a item 3 of the Act of 29 November 2000: Atomic Law (consol. text Dz.U. of 2012, item 264 as amended), Article 30 item 2 of the Act of 23 December 1994 on the Supreme Audit Office (consol. text Dz.U. of 2012, item 82 as amended), Article 13 item 9 of the Act of 28 September 1991 on Fiscal Audit (consol. text Dz.U. of 2011, No 41, item 214 as amended).

32 Article 79a item 2 AFEA.

33 Article 79b AFEA.

34 Article 79a item 1 AFEA.

35 See: Article 97 CC

36 Article 79a item 9 AFEA.

4.7. Rule of conducting an inspection on the premises and in the presence of the person concerned

Articles 80–80b AFEA constitute the rule of conducting an inspection in the presence and in the seat of the entrepreneur. This rule, like the professional launching and conducting an inspection is implemented through three elements.

First, inspection actions are taken in the presence of the inspected person or the person authorized by him.[37]

It is worth noting that appointing in writing a person authorized to represent the entrepreneur during the inspection is the entrepreneur's obligation, from which the presence of the entrepreneur himself at the inspection actions does not exempt.[38] Moreover, any negligence in this regard, i.e. hindrance in the inspection by the entrepreneur's absence or the lack of the person authorized to represent, are not included in the time of the inspection.[39] Inspection actions may be conducted in the presence of another employee of the inspected person or in the presence of the summoned witness, who should be a public functionary yet not an employee of the authority conducting the inspection.[40]

This rule, however, is not absolute. Article 80 item 2 AFEA indicates that it is not applicable if:

1) ratified international agreements provide otherwise;
2) the inspection is necessary to prevent a crime or an office, to prevent a fiscal crime or a fiscal offence or to secure the evidence of its commitment;
3) the inspection is conducted within the proceedings conducted on the basis of the provisions of the Act of 16 February 2007 on Competition and Consumer Protection (Dz.U. of 2007, No 50, item 331 as amended);
4) the inspection is justified by a direct threat to life, health or the natural environment.

37 Article 80 item 1 AFEA.
38 Article 80 item 3 AFEA.
39 Article 80 item 4 AFEA.
40 Article 80 item 5 AFEA.

Second, the inspection is conducted in the inspected person's stat or in the place of conducting the economic activity as well as at working hours or during the actual performance of the economic activity.[41]

Nevertheless in order to enhance the course of the inspection, all or particular inspection actions may conditionally be also conducted in the office of the inspection authority after the inspected entrepreneur gives his consent.[42]

Third, inspection actions should be conducted in an efficient way, possibly not disturbing the functioning of the entrepreneur inspected.[43]

On the other hand, if the entrepreneur complains in writing that the inspection actions disturb considerably his economic activity, the authority is obligated to justify the necessity of taking them in the inspection protocol.[44]

4.8. Rule of the inspection book

Articles 81–81a AFEA specify foremost the entrepreneur's responsibilities referring to documenting the number and the duration of inspections of his economic activity.[45]

The entrepreneur is obligated to keep and store in his seat an inspection book as well as inspection warrants and protocols.[46]

Moreover, at the launching of an inspection, the entrepreneur is obligated to produce it immediately to the inspector.[47] On the other hand, in the event when its production is impossible because of sharing it with another inspection body, the entrepreneur produces the inspection book in the office of the inspection authority within 3 working days of the day the inspection body returns the book.[48]

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41 Article 80a item 1 AFEA.
42 Article 80a item 2 AFEA.
43 Article 80b AFEA.
44 Article 80b AFEA.
45 See: the Judgment of the Provincial Administrative Court in Łódź of 9 February 2012, I SA/Łd 1408/11, Lex No 1116073, the Judgment of the Provincial Administrative Court in Warsaw of 5 May 2010, V SA/Wa 188/10, Lex No 67608.
46 Article 81 item 1 AFEA.
47 Article 81a item 1 AFEA.
48 Article 81a item 2 AFEA.

An inspection book contains two types of entries:

1) records made by inspection authorities including:
   - designation of the inspection body;
   - designation of the inspection warrant;
   - objective scope of the inspection;
   - dates of launching and termination of the inspection;
   - after-inspection recommendations and determination of after-inspection measures;
   - justification of the lack of notification on the intention to start an inspection;
   - justification of launching the inspection on the basis of an ID;
   - justification of applying exceptions to the rule of notification on the intention to start an inspection, conducting the inspection in the presence of the inspected person, prohibition of a coincidence of inspections and its limited duration;
   - justification of prolonging the inspection duration;
   - justification of the duration of the break in the inspection;
2) records made by the entrepreneur including information on fulfilling the after-inspection recommendations or on their revoking by the inspection body or its superior authority or else an administrative court.

As for the form of an inspection book, AFEA allows for certain discretion. An inspection book may have a form of a collection of documents or may be kept electronically.[49]

4.9. Rule of the limited number of inspections

As a rule, it is prohibited to initiate and conduct more than one inspection of the entrepreneur's activity simultaneously.[50] On the other

49 Article 81a item 1–1a AFEA.

50 Article 82 item 1 AFEA. See the Decision of the Supreme Administrative Court in Warsaw of 19 January 2012, II FSK 2984/11, Lex No 1104115, the Judgment of the Supreme Administrative

hand, if the entrepreneur's economic activity is already inspected by another body, the inspection authority shall abandon taking inspection actions and may agree with the entrepreneur on another date of inspection.[51]

The regulation uses the categorization of entrepreneurs based on the economic volume of the enterprise. Article 82 item 1a–1c indicates that in the case of medium-sized and big entrepreneurs,[52] conducting economic activity in more than one plant or another separate part of his enterprise, the prohibition of the coincidence of inspections covers exclusively a concrete plant or part of the enterprise being inspected, whereas its remaining components may be inspected by another body.[53]

It is also worth noting that the rule of limited number of inspections is not applicable in situations where:[54]

1) ratified international agreements provide otherwise;
2) the inspection is indispensable to prevent prevent a crime or an offence, prevent a fiscal crime or a fiscal offence, and to secure the evidence thereof;
3) the inspection is conducted within the procedure on the basis of the provisions of the Act of 16 February 2007 on Competition and Consumer Protection (Dz.U. of 2007, No 50, item 331 as amended);
4) the inspection is justified by a direct threat of life, health or the natural environment;[55]
5) the inspection refers to the grounds for a refund of goods and services tax before the refund;
6) the inspection is implementation of obligations resulting from the provisions of community law on competition protection

Court in Warsaw of 20 January 2009, II GSK 644/08, Lex No 51035, the Judgment of the Provincial Administrative Court in Wrocław of 2 June 2009, I SA/Wr 175/09, Lex 564509.

51 Article 82 item 2 AFEA.
52 See Article 82 item 1c AFEA.
53 With the reservation of Article 82 item 1b AFEA.
54 Article 82 item 1 AFEA.
55 See the Judgment of the Supreme Administrative Court in Warsaw of 1 September 2010, I OSK 370/10, Lex No 617297.

or the provisions of community law on protection of financial interests of the European Union;

7) the inspection refers to the grounds for a refund of goods and services tax under the provisions of the reimbursement to natural persons of certain expenses related to housing construction.

4.10. Rule of the limited duration of an inspection

The rule in Article 83 AFEA consists in limiting the duration of inspections in the calendar year at a particular entrepreneur's.

It is important to underscore that this rule does not reduce the duration of all inspections in the calendar year at a particular entrepreneur's, since it determines only the maximal duration of an inspection conducted in a particular calendar year by a particular inspection body (at a particular entrepreneur's),[56] which cannot exceed:

1) in reference to microentrepreneurs: 12 working days;[57]

2) in reference to small entrepreneurs: 18 working days;

3) in reference to medium-sized entrepreneurs: 24 working days;

4) in reference to other entrepreneurs: 48 working days.[58]

In order to interpret the aforementioned time restrictions correctly it is important to note assertions emphasized in judicial decisions.

Courts underscore foremost the fact that time limits should be treated as disciplining the body to settle the case, and its exceeding does not result in impossibility of conducting an inspection as well as does not disqualify in any way the method of the actions in these proceedings; in particular it does not affect the validity of the inspection

56 The Judgment of the Supreme Administrative Court in Warsaw of 9 August 2012, II FSK 75/11, Lex No 1312292, the Judgment of the Supreme Administrative Court in Warsaw of 29 June 2011, II FSK 345/10, Lex No 1083112, the Judgment of the Provincial Administrative Court in Warsaw of 15 September 2010, III SA/Wa 375/10, Lex No 757657, the Judgment of the Provincial Administrative Court in Warsaw of 9 March 2010, VI SA/Wa 1834/09, Lex No 606994, the Judgment of the Provincial Administrative Court in Warsaw of 14 May 2007, VI SA/Wa 2230/06, Lex No 342075.

57 See the Judgment of the Provincial Administrative Court in Białystok of 6 April 2011, I SA/Bk 56/11, Lex No 785829; the Judgment of the Supreme Administrative Court in Warsaw of 16 December 2011, II GSK 1344/10, Lex No 1112030.

58 Article 83 item 1 AFEA.

actions as well as does not make it impossible to issue a substantive resolution of the case.[59]

It is also important to observe that the duration of an inspection is only the period within which the inspectors actually remain at the enterprise inspected, which means that the actions taken outside the seat of the inspected entrepreneur should be excluded from the duration of the inspection.[60]

Article 83–83a AFEA include also exclusions and also institutions which are exceptions to the rule in point.

In accordance with Article 83 item 2 AFEA, restrictions on the duration of an inspection is not applicable when:

1) ratified international agreements provide otherwise;
2) the inspection is necessary to prevent a crime or an office, to prevent a fiscal crime or a fiscal offence or to secure the evidence of its commitment;
3) the inspection is conducted within the proceedings conducted on the basis of the provisions of the Act of 16 February 2007 on Competition and Consumer Protection (Dz.U. of 2007, No 50, item 331 as amended);
4) the inspection is justified by a direct threat to life, health or the natural environment.

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59 The Judgment of the Supreme Administrative Court in Warsaw of 14 January 2011, I FSK 33/10, Lex No 951813, the Judgment of the Supreme Administrative Court in Warsaw of 14 January 2011, I FSK 34/10, Lex No 918218, the Judgment of the Supreme Administrative Court in Warsaw of 13 July 2010, I GSK 955/09, Lex No 594775, the Judgment of the Supreme Administrative Court in Warsaw of 8 October 2009, I FSK 165/08, Lex No 537012, the Judgment of the Supreme Administrative Court in Warsaw of 29 August 2006, I FSK 1045/05, Lex No 262095, the Judgment of the Provincial Administrative Court in Cracow of 19 December 2008, I SA/Kr 578/08, Lex No 558957, the Judgment of the Provincial Administrative Court in Wrocław of 5 March 2009, I SA/Wr 847/08, Lex No 491032, the Judgment of the Provincial Administrative Court in Warsaw of 29 October 2009, III SA/Wa 878/09, Lex No 558954, the Judgment of the Provincial Administrative Court in Poznań of 21 December 2011, II SA/Po 934/11, Lex No 1191088.

60 The Judgment of the Supreme Administrative Court in Warsaw of 20 November 2012, II GSK 1593/11, Lex No 1291730, the Judgment of the Supreme Court of Administration in Bydgoszcz of 26 August 2008, II SA/Bd 528/08, Lex No 505865, the Judgment of the Provincial Administrative Court in Warsaw of 4 August 2011, VI SA/Wa 26/11, Lex No 996366.

5) the inspection refers to the grounds for a refund of goods and services tax before the refund;
6) the inspection is implementation of obligations resulting from the provisions of community law on competition protection or the provisions of community law on protection of financial interests of the European Union;
7) the inspection refers to the entities to which, by virtue of separate provisions, a competent authority issued a decision on recognition of the properness of the selection and application of the method of establishing a transaction price between connected entities within the scope connected with the implementation of this decision;[61]
8) the inspection refers to the grounds for a refund of goods and services tax under the provisions of the reimbursement to natural persons of certain expenses related to housing construction.

Article 83 item 3–3c AFEA regulate the issue of prolonging the duration of an inspection.

Such prolongation is possible only for the reasons independent from the inspection authority, requires a written justification[62] and, as a rule, cannot infringe the deadlines which are the substance of Article 83 AFEA.[63]

Furthermore, Article 83 item 4 AFEA provides inspection authorities with a possibility of a so-called re-inspection, if the results of the inspection proved flagrant infringement of provisions of law by the entrepreneur. It is allowed to conduct a re-inspection in the same objective scope and in the same calendar year, but its duration, which is not included into the basic duration, cannot exceed 7 days.

Moreover, Article 83a AFEA provides a break in the inspection conducted. It is a possibility of a temporary refrain from conducting inspection actions by the inspection body, which it may exercise if:[64]

61 See: Article 20a–20r TO.
62 The justification is delivered to the entrepreneur and recorded in the inspection book before taking further inspection actions.
63 See: Article 83 item 3a–3c AFEA.
64 Article 83a item 1 AFEA.

a) it notifies the entrepreneur in writing, b) the break is necessary for examination of a product sample or a control sample, c) the only action on receipt of the sample examination is an inspection protocol.[65] It is important that the break time is not included in the basic duration if the entrepreneur could conduct his economic activity and had unlimited access to the components of the enterprise.[66]

4.11. Objection of the entrepreneur

The essence of the rule (institution) of objection is reduced to granting the entrepreneur a right to file an objection to launching and conduction by the inspection body actions infringing: 1) the rule of notification on the intention to start an inspection; 2) the rule of professional launching of the inspection; 3) the rule of conducting the inspection in the presence of the inspected person; 4) prohibition of the coincidence of inspections; 5) the rule of the limited duration of an inspection.[67]

The entrepreneur may exercise this right within 3 working days of the day of the initiation of the inspection[68] filing a written objection to the authority launching and conducting the inspection with justification, additionally notifying (in writing) the person performing inspection actions.[69]

The idea of this right is clear and unambiguous. Article 83c AFEA provides the entrepreneur with a possibility of protecting his own interests from an incorrect (i.e. inconsistent with fundamental principles) actions of inspection authorities. The protection results from the fact that a correctly filed objection brings legal effects in the form of suspension of inspection actions by the inspection body concerned the moment the inspector receives the notification on the filing of the objection until the objection is considered, and in the event of filing a complaint, until the complaint is considered.[70]

65 See: Article 83a item 2–3 AFEA.
66 See: Article 83a item 4 AFEA.
67 Article 84c item 1 AFEA.
68 Article 84c item 3–4 AFEA.
69 Article 84c item 2 AFEA.
70 Article 84c item 5 AFEA.

The inspection authority is obliged, on the other hand, by virtue of Article 84c item 9 AFEA, within 3 working days of the day of receipt of the objection, to consider it and issue a decision on: 1) abandoning the inspection actions or 2) continuing the inspection actions.[71] It is important that a failure to consider the objection on time is equivalent to issuance of a decision on abandoning the inspection actions.[72]

Objection is also connected with the regulations which are expected to eliminate the effects of possible abuse of this right by the entrepreneur.

On the basis of Article 84c item 5–7 AFEA filing an objection results in suspension of the course of the inspection.[73]

Moreover, in the case of filing an objection, the inspection authority may, through its decision, secure the evidence (documents, information, product samples and other information carriers, if they are or may be evidence during the inspection) being connected with the object and the scope of the inspection, for the time of examination of the objection.[74]

Moreover, filing an objection is unacceptable:[75]

1) if the inspection is indispensable to prevent a crime or an offence, to prevent a fiscal crime or a fiscal offence, or to secure the evidence thereof;
2) if the inspection is conducted in the absence of the inspected person or a person authorized by him and is indispensable to prevent a crime or an offence, to prevent a fiscal crime or a fiscal offence, or to secure the evidence thereof;

71 See: Article 84c item 10–11 AFEA.
72 Article 84c item 12–13 AFEA.
73 Suspension of the course of the inspection occurs: - from the day of filing the objection till the day of delivery to the entrepreneur the decision on abandoning and continuing inspection actions, or – from the day of filing the objection till the day the objection is recognized as outstanding, or – if the entrepreneur filed a complaint against the decision on abandoning or continuing inspection actions, the suspension of the course of the inspection occurs from the day of delivery to the entrepreneur a decision on the complaint, or till the day when the complaint is recognized as outstanding.
74 Article 84c item 8 and item 14–15 AFEA.
75 Article 84d AFEA.

3) the prohibition of conducting more than one inspection is waived if the inspection is indispensable to prevent a crime or an offence, to prevent a fiscal crime or a fiscal offence, or to secure the evidence thereof;
4) the restrictions on the inspection duration are not applicable if the inspection is indispensable to prevent a crime or an offence, to prevent a fiscal crime or a fiscal offence, or to secure the evidence thereof;
5) if the inspection of entrepreneurs' economic activity remains under special provisions.[76]

5. Excluding the application of the rules of inspection of the entrepreneur's economic activity

It is characteristic of the provisions of AFEA on the rules of inspection of the entrepreneur's economic activity is a considerable number of exceptions.

Exceptions are provided for most of the rules in the provisions which constitute them.[77] Besides, Articles 84–84b AFEA provide them.

By virtue of Article 84 AFEA the rules of a) prohibition of coincidence of inspections and b) their limited duration are not applicable to the activity of entrepreneurs referring to:

1) financial market supervision (supervision of capital market, bank supervision, supervision of electronic money institutions, insurance supervision, pension supervision),[78]
2) sanitary supervision.[79]

76 See: Article 79 item 2 point 2, Article 80 item 2 point 2, Article 82 item 1 point 2, Article 83 item 2 point 2 and Article 84a AFEA.
77 See: Article 77 item 1–2, Article 79 item 2, Article 79a item 2–3, Article 80 item 2, Article 82 item 1, Article 83 item 2, Article 84d AFEA.
78 Discussed in Article 1 item 2 of the Act of 21 July 2006 on Financial Market Supervision (consol. text Dz.U. of 2012, item 1149 as amended).
79 See: the Act of 14 March 1985 on the Chief Sanitary Inspectorate (consol. text Dz.U. of 2011, No 212, item 1263 as amended), and also the Act of 25 August 2006 on Safety of Food and Nutrition (consol. text Dz.U. of 2010, No 136, item 914 as amended).

Furthermore, Article 84a AFEA provides that the rules of a) notification on the intention to start the inspection, b) professional launching and conducting inspection actions, c) conducting the inspection in the seat and in the presence of the inspected person, d) an inspection book, e) prohibition of the coincidence of inspections, as well as f) limited duration of an inspection are not applicable to entrepreneurs' economic activity referring to:

1) special tax supervision;[80]
2) veterinary supervision;[81]
3) supervision of fishery administration;[82]
4) inspection referring to assignment of customs-approved treatment or use to goods conducted in a customs office or in a place assigned or recognized by the customs authority;[83]
5) inspection of means of transport on a move, people using them and goods carried in them;[84]
6) purchase of products or services checking the reliability of the service;[85]

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80 On the grounds of the provisions of the Act of 27 August 2009 on Customs Service (Dz.U. of 2009, No 168, item 1323 as amended).

81 On the grounds of the provisions of the Act of 21 August 1997 on Animal Protection (consol. text Dz.U. of 2013, item 856), the Act of 6 September 2001: Pharmaceutical Law (consol. text Dz.U. of 2008, No 45, item 271 as amended), the Act of 27 August 2003 on Veterinary Border Inspection (Dz.U. of 2003, No 165, item 1590 as amended), the Act of 10 December 2003 on Veterinary Inspection in Trade (Dz.U. of 2004, No 16, item 145 as amended), the Act of 29 January 2004 on Veterinary Inspectorate (consol. text Dz.U. of 2010, No 112, item 744 as amended), the Act of 11 March 2004 on Animal Health Protection and Combating Animal Infectious Diseases (consol. text Dz.U. of 2008, No 213, item 1342 as amended), the Act of 16 December 2005 on Products of Animal Origins (consol. text Dz.U. of 2006, No 17, item 127 as amended), the Act of 22 July 2006 on Fodders (Dz.U. of 2006, No 144, item 1045 as amended).

82 On the grounds of the provisions of the Act of 19 February 2004 on Fisheries (Dz.U. of 2004, No 62, item 574 as amended).

83 On the grounds of customs regulations or phytosanitary border inspection conducted on the grounds of the provisions of the Act of 18 December 2003 on Plant Protection (consol. text Dz.U. of 2008, No 133, item 849 as amended).

84 On the grounds of the provisions of the Act of 27 August 2009 on Customs Service (Dz.U. of 2009, No 168, item 1323 as amended), the Act of 6 September 2001 on Road Transport (consol. text Dz.U. of 2012, item 1265 as amended). Act of 28 March 2003 on Rail Transport (consol. text Dz.U. of 2007, No 16, item 94 as amended).

85 On the grounds of the provisions of the Act of 15 December 2000 on Trade Inspection (consol. text Dz.U. of 2009, No 151, item 1219 as amended).

7) sale outside the point of permanent location.[86]

Article 84aa AFEA provides directly that the rules of a) notification on the intention to start an inspection, b) conducting the inspection in the seat and in the presence of the inspected person, c) limited number of inspections, d) limited duration of the inspection are not applicable in reference to inspections of medial activity conducted by the authority keeping the register, the minister competent for healthcare, the voivode (head of a province) and the entity creating entities fulfilling tasks defined in the regulations on medical activity.[87]

Moreover, Article 84b provides that the rules of a) notification on the intention to start an inspection, b) limited number of inspections, c) limited duration of the inspection are not applicable to the inspection launched within the proceedings resultant from the entrepreneur's application in his own case, on the grounds of the provisions of separate laws and directly applied provisions of the universally valid EU law.

86 Itinerary sale on markets as defined in Article 15 item 2 of the Act of 12 January 1991 on Taxes and Local Fees (consol. text Dz.U. of 2010, No 95, item 613 as amended).

87 The Act of 15 April 2011 on Medical Activity (consol. text Dz.U. of 2013, item 217).

Part 9

ECONOMIC ACTIVITY OF FOREIGN ENTITIES ON THE TERRITORY OF THE REPUBLIC OF POLAND

1. Foreign person vs. foreign entrepreneur

Categorization of entrepreneurs according to the domicile criterion (place of residence, seat or citizenship) allows for distinguishing domestic and foreign entities. This division determines certain legal consequences. The Polish legal system specifies special (separate) rules of undertaking, conducting and terminating economic activity in Poland relevant to entities not having a Polish citizenship or having a seat outside the Republic of Poland.

Article 5 AFEA allows for important findings in this matter, dividing all foreign entities into two separate groups, these being foreign persons and foreign entrepreneurs.

In accordance with Article 5 point 2 AFEA, a foreign person is:

a) a natural person not having a Polish citizenship,[1]

b) a legal person with a seat abroad;[2]

c) a non-corporate organizational unit with legal capacity and a seat abroad.

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1 See: Article 2 of the Act of 13 June 2003 on Foreigners (consol. text Dz.U. of 2011, No 264, item 1573 as amended), hereinafter as AF.

2 See: Article 41 in connection with Article 33^1 § 1 CC. For more see: M. Szydło, Działalność spółek pozornie zagranicznych w Polsce - uwagi de lege lata i de lege ferenda, "Przegląd Prawa Handlowego" 2008, No 6, p. 52; D. Szafrański, Przedsiębiorca zagraniczny jako przedsiębiorca w zakresie praktyk ograniczających konkurencję, "Europejski Przegląd Sądowy" 2009, No 6, p. 14.

On the other hand, a foreign entrepreneur in the light of Article 5 point 3 AFEA is a foreign person conducting economic activity abroad as well as a Polish citizen conducting economic activity abroad.

The definitions quoted allow for noting a fundamental difference between a foreign person and a foreign entrepreneur, which is conducing economic activity.

In the case of foreign persons the definition does not indicate any involvement in economic activity. Thus, on this basis it is possible to claim that a foreign person is a natural person who does not have a Polish citizenship, a legal person and a so-called deficient legal person with the seat abroad, who do not conduct economic activity at all (i.e. do it neither abroad nor in Poland). Consequently foreign persons on the territory of the Republic of Poland will legalize their economic activity in its primary meaning.

On the other hand, the definition of a foreign entrepreneur determines that he conducts economic activity (abroad). This fact means that on the territory of the RP foreign entrepreneurs will continue their already conducted economic activity or legalize the activity in its secondary sense identified with the extension of its territorial range.

This difference is of fundamental importance. It is on this basis that AFEA defines separate rules of undertaking economic activity in Poland relevant, respectively, to foreign persons or foreign entrepreneurs.

2. Rules of undertaking and conducting economic activity by foreign persons

Undertaking economic activity in Poland by foreign persons is regulated in Article 13 AFEA. This provision assuming the criterion of origin as relevant (citizenship or the seat), diversifies three gropus of foreign persons and, separately for each of them, determines the scope of rights in this matter.

The first group encompasses foreign persons from member states of the European Union, member states of the European Free Trade Association (EFTA) – parties to the Agreement of the European

Economic Area (i.e. Iceland, Norway, Lichtenstein) as well as foreign persons from the countries which are not parties to the Agreement on the European Economic Area, which may exercise the freedom of enterprise on the grounds of agreements concluded by these countries with the European Union and its member states (e.g. Switzerland).

Foreign persons belonging to the first group may undertake and conduct economic activity on the territory of the RP on the same footing as Polish citizens.

The second group of foreign persons is constituted in Article 13 item 2 AFEA. They are citizens (natural persons exclusively) of the countries other than member states of the European Union, member states of the European Free Trade Association – parties to the Agreement on the European Economic Area, as well as the countries which are not parties to the Agreement of the European Economic Area, which may exercise the freedom of enterprise on the basis of agreements concluded with the European Union and its member states, who:

1) possess in the Republic of Poland:
   a) a settlement permit,[3]
   b) a residence permit for a long-term resident of the European Union,[4]
   c) a residence permit for a specified period of time,[5]
   d) the status of a refugee,[6]
   e) supplementary protection,[7]
   f) a tolerated stay permit,[8]

3 See: Articles 64–71d AF.
4 See: Articles 64–71d AF.
5 Granted in connection with the circumstance discussed in Article 53 item 1 point s 7, 13, 14 or 16 AF or, in the case of a person staying on the territory of the Republic of Poland or staying on this territory in order to join his family, a family member in the meaning of Article 53 item 2 and 3 of the Act of 13 June 2003 on Foreigners (Dz.U. of 2006, No 234, item 1694 as amended), persons discussed in letters a, b, e and f of Article 13 item 2 AFEA.
6 See: Article 13–89zb of the Act of 13 June 2003 on Providing Protection for Foreigners on the Territory of the Republic of Poland (consol. text Dz.U. of 2012, item 680); hereinafter as APF.
7 See: Articles 13–89zb APF.
8 See: Articles 97–105 APF.

g) a residence permit for a specified period of time and remain married to a Polish citizen residing on the territory of the Republic of Poland,

h) a national visa for the period of proceedings on granting a residence permit for a specified period of time[9] or for the period of proceedings on granting a settlement permit or a residence permit of a long-term resident of the European Union[10],[11]

2) exercise temporary protection in the Republic of Poland,[12]

3) possess a valid Karta Polaka (Pole's Card),[13]

4) are members of a family of foreigners (in the meaning of Article 13 item 2 AFEA) joining them or staying with them.[14]

The conditions listed in Article 13 item 2 AFEA formed by separate acts of law are not identical, although frequently mutually dependent. Their analysis leads to a fundamental conclusion: their common characteristic is granting a foreigner the status of a classified entity,[15] on the basis of which it is possible to assert that the foreigner (in the meaning of Article 13 item 2–2a AFEA) stays in Poland legally.

However, the legal effect of the conditions is more important than their nature. Articles 13 item 2–2a AFEA provide that if the conditions mentioned there have been fulfilled, the foreign persons classified in the second group exercise the same rights of undertaking and conducting economic activity as Polish citizens.

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9 See Article 63 item 3 AF.

10 See Article 71a item 3 AF with a reservation that before the issuance of the visa they were entitled to undertake and conduct economic activity on the basis of a permit for residence for a specified period of time.

11 Article 13 item 2a AFEA.

12 See Article 106–118 APF.

13 See Article 2 of the Act of 7 September 2007 on Pole's Card (Dz.U. of 2007, No 180, item 1280 as amended).

14 As a member of a foreigner's family being or not being a citizen of EU is considered: a) a spouse of an EU citizen, b) a direct descendant of a EU citizen or his spouse, at the age below 21 or dependant on the EU citizen or his spouse, c) a direct ancestor of a EU citizen or his spouse, dependent on the EU citizen or his spouse: see Article 2 point 4 of the Act of 14 July 2006 on Entry into the Territory of the Republic of Poland, Stay and Exit from this Territory of Citizens of the European Union Member States and Members of Their Families (Dz.U. of 2006, No 144, item 1043 as amended).

15 Compare M. Szydło, Swoboda działalności..., *op. cit.*, p. 147–152.

The third group includes the remaining foreign persons, i.e. not classified in the previous groups. They are legal persons or non-corporate organizational unit with legal capacity coming from the states other than member states of the European Union, member states of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area, as well as the states which may exercise the freedom of enterprise on the basis of agreements signed by these states with the European Union and its member states.[16]

Article 13 item 3 AFEA considerably limits their right to undertake and perform economic activity in Poland imposing certain organizational and legal forms. They can undertake and conduct economic activity only in the form of: 1) limited liability partnership (according to Articles 102–124 CCC), 2) limited joint-stock partnership (according to Article 125–150 CCC), 3) limited liability company (according to Article 151–300 CCC) and 4) joint-stock company (according to Article 301–490 CCC). The restriction refers to not only their creating but also joining such partnerships/companies and taking over or acquiring their shares or stocks unless international agreements provide otherwise.

Moreover, it is worth paying attention to Article 13 item 4–5 and item 2 point 4 AFEA, which refer to family members of natural persons without a Polish citizenship, and thus indirectly to the first, second and, theoretically, also third group of foreign persons. They provide family members the same rights of undertaking economic activity in Poland as the foreign persons who are natural persons classified in a particular group. The regulation adopted in relation to the first group of foreign persons is specified in the provisions of the Act of 14 July 2006 on Entry into the Territory of the Republic of Poland, Stay and Exit from this Territory of Citizens of the European Union Member States and Members of Their Families.[17] In accordance with Article 2 point 4 of this law the family member of a foreigner who is or is not an EU citizen is: 1) the EU citizen's spouse, 2) the EU citizen's direct descendant or his spouse, at the age below 21 or dependant on the EU citizen or his

16 Article 13 item 3 AFEA.

17 See: Article 2 point 4 of the Act of 14 July 2006 on Entry into the Territory of the Republic of Poland, Stay and Exit from this Territory of Citizens of the European Union Member States and Members of Their Families (Dz.U. of 2006, No 144, item 1043 as amended).

spouse, 3) the EU citizen's direct ancestor or his spouse, dependant on the EU citizen or his spouse. On the other hand, Article 53 item 2–3 of the Act of 13 June 2003 on Foreigners, defines the term of a foreigner's family member. In accordance to this provision, a family member is: 1) a person married to him, whose matrimony is recognized by law of the Republic of Poland, 2) a minor child of this foreigner and his spouse, whose matrimony is recognized by law of the Republic of Poland, including an adopted child, 3) a minor child of this foreigner, including an adopted child, dependant on him, over whom the foreigner exercises an actual parental custody, 4) a minor child of a person discussed in point 1, including an adopted child, dependant on him, over whom this person exercises an actual parental custody, as well as 5) an ancestor within the lineal consanguinity in the case of a minor foreigner with the status of a refugee who stays on the territory of the Republic of Poland without a custody.[18]

3. Rules of undertaking and conducting economic activity by foreign entrepreneurs

The rules of undertaking and conducting economic activity on the territory of the RP by foreign entrepreneurs are defined by the provisions of Chapter 6 AFEA dedicated to branches and representative offices.

In accordance with Article 85 AFEA, to conduct economic activity in Poland foreign entrepreneurs may create branches with seats on the territory of the Republic of Poland.

The legal definition of a branch is included in Article 5 point 4 AFEA. In accordance with this regulation, a branch is an organizationally separated and independent part of an economic activity conducted by the entrepreneur outside the entrepreneur's seat and his principle place of the activity. The definition is universal and corresponds with the term of a branch of a domestic entrepreneur and a foreign entrepreneur. It does not emphasize subjective elements but characterizes the branch

18 In view of so constructed a definition of a foreigner's family member it is important to remind that the granted right to undertake and conduct an economic activity in Poland may be exercised only an adult person with unlimited legal capacity.

objectively. Nevertheless it allows for distinguishing three structural qualities of a branch: 1) organizational separation and a defined degree of independence, 2) purpose to conduct economic activity, 3) placement outside the entrepreneur's seat (principal location of the activity).[19]

Article 86 AFEA determines the scope of the activity of the foreign entrepreneur's branch. It provides that the foreign entrepreneur in the form of a branch conducts an economic activity on the territory of Poland. The provision reserves, however, that a branch may conduct an economic activity only within the object of the foreign entrepreneur's activity. The assertion determines that it cannot exceed the scope of the activity and, consequently, may encompass the whole or only part of the foreign entrepreneur's activity. What is disputable is the establishment of a maximal scope of the activity of the branch: what is decisive, the foreign entrepreneur's actual activity. in the location of the seat or any activity disclosed in a relevant register, even though not performed in practice?[20] It is rational to recognize the latter concept due to the fact that the foreign entrepreneur's branch has to be recorded in the KRS register of entrepreneurs, and consequently what is important is the essence of the record and, connected therewith, presumption of truth and compliance of the record with the facts as well as the entrepreneur's updating and informative obligations.

Simultaneously it is important to remember, what C.Kosikowski aptly points out, that the foreign entrepreneur may conduct on the territory of the RP also completely different activity than that conducted substantively or that declared formally abroad. He will classified then as a foreign person, and the scope of the right to undertake an activity will be determined by the rules in Article 13 AFEA.[21]

AFEA also specifies fundamental obligations of the foreign entrepreneur relevant at the stage of undertaking and conducting economic activity on the territory of the RP in the form of a branch.

19 M. Szydło, Charakter prawny oddziałów przesiębiorców zagranicznych, "Glosa" 2004, No 12, p. 19.
20 W.J. Katner, Prawo działalności..., *op. cit.,* p. 152.
21 C. Kosikowski, Ustawa..., *op. cit.,* p. 553.

The fundamental obligation of the foreign entrepreneur creating a branch in Poland is to appoint a person authorized to represent him in the branch.[22] The obligation is justified by the essence of the functioning of a branch equivalent to the existence of an operation centre, which manifests itself permanently outside as an extension of the mother-enterprise, has a management and is materially equipped in such a way that there is a possibility to negotiate affairs with third parties in such a way, that the latter, knowing that a possible legal relationship with the mother-enterprise with the seat abroad will be established, are exempted from the necessity of a direct addressing it and could run businesses with the operation centre, which is its extension.[23] Hence it is indispensable to authorize in the branch a person who will submit and receive declarations of will on behalf of the foreign entrepreneur. Beside the obligation of establishment AFEA does not provide any special requirements from the person representing the foreign entrepreneur: employment, citizenship, command of the Polish language are irrelevant.

In turn, Article 88 AFEA provides that the foreign entrepreneur may commence the activity within the branch on an entry of the branch in the KRS register of entrepreneurs. The registration procedure corresponds with general rules defined in ANCR, but Article 89 AFEA emphasizes further obligations necessary to complete the registration obligations of the branch. Thereby, regardless of the obligations defined in ANCR, the foreign entrepreneur is obligated:

1) to give the first name and the surname as well as the address on the territory of the Republic of Poland of the person authorized in the branch to represent the foreign entrepreneur,[24] and also enclose the specimen signature of this person confirmed by a notary.[25]
2) if acts on the grounds of a certificate of incorporation, a contract or a statute, to submit their copies to the register files of the branch

22 See: Article 87 AFEA.
23 The Judgment of the Provincial Administrative Court in Opole of 16 January 2008, I SA/Op, 189/07, Lex No 461867.
24 Analogously Article 39 point 4 ANCR.
25 Analogously Article 19a item 1 ANCR.

along with a certified translation into the Polish language; if the foreign entrepreneur created on the territory of the Republic of Poland more than one branch, submission of these documents may take place in the files of one of the branches, provided that in the register files of the other branches it is necessary to indicate the branch in the files of which the aforementioned documents have been submitted, together with the designation of the court where the files reside and the number of the branch in the register,[26]

3) if exists or conducts an activity on the basis of the record in the register, to submit to the register files of the branch a copy from this register along with a certified translation into the Polish language; if the foreign entrepreneur opened on the territory of the Republic of Poland more than one branch, the submission of these documents may take place in the files of one of the branches but in the register files of the other branches it is necessary to indicate the branch, in the files of which the aforementioned documents have been submitted, together with the designation of the court where the files reside and the number of the branch in the register.

The foreign entrepreneur who functions in the form of a branch on the territory of the Republic of Poland is obligated:[27]

1) to use for designation of the branch the original name of the foreign entrepreneur along with the name of the legal form of the entrepreneur translated into the Polish language with the phrase "branch in Poland",[28]
2) to keep separate accounts for the branch in the Polish language in accordance with the regulations on accounting,[29]
3) to report to the minister competent for economy, within 14 days of the day of their occurrence, any changes of actual and

26 Analogously Article 9 ANCR in connection with Article 694^4 of the Act of 17 November 1964: Civil Procedure Code (Dz.U. of 1964, No 43, item 196 as amended).
27 Article 90 AFEA.
28 Compare Article 43^6 CC.
29 Compare Article 9 of the Act of 29 September 1994 on Accounting (consol. text Dz.U. of 2013, No 330 as amended).

legal status referring to launching the liquidation of the foreign entrepreneur, who created the branch, or his loss of the right to conduct economic activity.

Moreover, Article 91 AFEA lists conditions of deletion of a branch of the foreign entrepreneur from the KRS register of entrepreneurs. They are: a) flagrant infringement of Polish law by the branch of the foreign entrepreneur, b) launching the liquidation of the foreign entrepreneur, who opened the branch, or the loss of the right of conducting economic activity, c) safety and defence of the state, state secret protection or another important public interest.

What draws attention is the fact that these conditions are not very precise and are based on vague wording, i.e. "flagrant infringement of law" or "threat to an important public interest". The occurrence of any of them results in essential legal consequences: the loss of the right to conduct economic activity within the branch of the foreign entrepreneur. A decision thereupon is issued by the minister competent for economy. On its basis the person representing the foreign entrepreneur in the branch is notified on an obligation of launching (within no less than 30 days) liquidation proceedings of the branch, after which the copy of the decision is sent to the competent registry court. To liquidate the branch the provisions of CCC on the liquidation of a limited liability company.[30]

Certain problems may result from the identification of the foreign entrepreneur's branch as an entrepreneur.

Foremost the object of the activity supports the recognition thereof as an entrepreneur; the foreign entrepreneur's branch serves conducting and conducts economic activity. Furthermore, it is ex lege subject to the obligation of registration in the KRS register of entrepreneurs. What is also not without importance is the organizational separation and independence of the assets and the balance sheet of the branch.[31]

However, it is important to bear in mind that the essence of the branch is reduced to the functioning of formally and substantively

30 Article 270–290 CCC.
31 For more see: M.Szydło, Charakter prawny..., *op. cit.*, s. 22–23.

organized operation centre, which secures a possibility to establish legal relationships with the entrepreneur conducting his activity abroad without the necessity of direct contact with the entrepreneur. The branch makes a permanent extension of the foreign entrepreneur on the territory of the RP. Thus all actions completed by the branch or to the branch have an immediate effect on the foreign entrepreneur. The branch does conduct an economic activity but on the foreign entrepreneur's behalf and on his account. Even if it takes independent decisions on the economic activity, it does not bear independent responsibility for them. The criterion deciding on the status of entrepreneur is the fact of conducting economic activity on one's own behalf.[32]

The branch is not the only form in which a foreign entrepreneur may function. In accordance with Article 93 AFEA foreign entrepreneurs may open representative offices on the territory of the Republic of Poland. It is important to underscore, however, that a representative office has a different status than a branch of the foreign entrepreneur, and the differences are noticeable on many planes and lead to essential conclusions.

First, the scope of the acceptable activity of the representative office includes only conducting an activity in advertising and promotion of the foreign entrepreneur or the economy of the foreign person's country of origin. This means that the representative office, in contrast to the branch, is not a form of conducting economic activity, since it cannot conduct economic activity. Consequently, the representative office may be opened by both a foreign entrepreneur as well as a foreign person.[33]

Second, the opening of a representative office requires an entry in the register of representative offices kept by the minister competent for economy.[34]

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32 The Judgment of the Supreme Administrative Court in Warsaw of 1 June 2007, I OSK 961/06, Lex No 354721.

33 In accordance with Article 95 item 1 AFEA a representative office may be also opened by foreign persons appointed to promote the economy of the country of their seat, but the scope of actions of such a representative office may encompass promotion and advertising of the economy of that country.

34 Article 96 item 1 AFEA.

The entry into the register of representative offices is made on the basis of the submitted application and in accordance with its content.[35] The application, prepared in the Polish language, contains: 1) the name, the seat and the legal form of the foreign entity; 2) the object of the foreign entity's economic activity; 3) the first name and the surname as well as the address of stay on the territory of the Republic of Poland of the person authorized in the representative office to represent the foreign entity; 4) the address of the principal seat of the representative office on the territory of the Republic of Poland, where reside the originals of documents referring to the activity of the representative office.[36]

The application must be also accompanied by: 1) an official copy of the document confirming the registration of the foreign entrepreneur, on the basis of which the entrepreneur conducts his economic activity;[37] 2) an officially certified copy of the document defining the address of the foreign entrepreneur's seat, rules of representation of the foreign entrepreneur as well as indication of the persons authorized to represent him, if the document confirming the foreign entrepreneur's registration does not contain necessary information in this matter; 3) a certified copy of the document authorizing the foreign entrepreneur to use premises or a property for the needs of the principal seat of his representative office[38].[39]

If the application contains formal errors, the minister competent for economy calls the applicant to complete it within not less than 7 days. A deadline for completion of the application may be extended on a reasoned request submitted by the applicant before the deadline. Failure to remove the formal errors within the prescribed person results in leaving the application without examination.[40]

In the structure of a branch and a representative office occur also similarities. Responsibilities of the entity managing the representative

35 Article 96 item 2 AFEA.
36 Article 97 item 1 AFEA.
37 Article 97 item 4–5 AFEA.
38 Article 97 item 2 AFEA.
39 Article 97 item 3 AFEA.
40 Article 97 item 2a AFEA.

office are constructed analogously and so are the conditions justifying the decision on the prohibition of conducting an acitivty within the foreign entity's representative office.

The foreign entity, who opened a representative office is obligated: 1) to use an appropriate designation including the original name of the foreign entity along with the name of the legal form translated into the Polish language with the addition of the phrase "representative office in Poland", 2) to keep for the representative office separate accounts in compliance with the regulations on accounting, 3) to report to the minister for economy any changes of actual and legal status referring to the data subject to the obligation of registering and on launching the liquidation of the foreign entrepreneur and its completion, as well as on the foreign entrepreneur's loss of the right to conduct economic activity or to dispose his assets, within 14 days of the day of the occurrence of these events[41].[42]

In contrast with the foreign entrepreneur's branch the question of identification of a representative office as an entrepreneur raises no serious controversies. It is really difficult to classify a representative office in this way.

This results foremost from the fact that it does not conduct economic activity. The scope of actions of the representative office may comprise advertising and promotion of the foreign entrepreneur only (or promotion and advertising of the economy of the foreign person's country of origin). This activity should be definitely distinguished from economic activity in the interpretation of Article 2 AFEA, although it undoubtedly remains in connection with possible economic activity: it aims at creating a favorable image on the market and increasing the

41 Article 100 and Article 102 item 1–2 AFEA.

42 In accordance with Article 101 AFEA, the registry authority, i.e. the minister competent for economy is entitled to issue a decision on the prohibition of conducting the foreign entity's activity in the form of representative office if: 1) the activity of the representative office infringes flagrantly Polish law, 2) liquidation of the foreign entrepreneur who opened the representative office has been launched, or the entrepreneur has lost his right to conduct economic activity, and also 3) the foreign entrepreneur's activity threats the safety and defense of the state, state secret protection or another important public interest.

market. Nevertheless it cannot consist in acceptance and execution of orders in favor of other entities.[43]

Also separate laws refer to branches and representative offices of foreign entrepreneurs. Being lex specialis in relation to AFEA, they define special rules of functioning foreign entrepreneurs in certain types of economic activity. Separate rules of opening and conducting economic activity in the form of branch or representative office are included in:

1) the Act of 29 August 1997: Banking Law: it discusses the activities of branches and representative offices of foreign banks and credit institutions,[44]
2) the Act of 22 May 2003 on Insurance Activity: the activities of foreign branches of insurance companies,[45]
3) the Act of 29 July 2005 on Exchange of Financial Instruments: the activities of branches of brokerage houses,[46]
4) the Act of 6 April 1984 on Foundations: the activities of representative offices of foreign foundations.[47]

4. Objective limits in undertaking and conducting economic activity by foreign entities

Objective restrictions on foreign entities' economic activity are provided by separate laws connected with particular types of activity.

43 Neither a certain scope of independence justifies recognition it as an entrepreneur – it takes all actions on behalf an on account of the founding entity. Moreover, the representative office is not a natural person, a legal person or an non-corporate organizational entity with legal capacity by virtue of a separate law, which means that it does not correspond to the subjective scope in the definition of entrepreneur of Article 4 AFEA. A possibility of classification of the representative office as an entrepreneur is also excluded by the fact that is not subject to the obligation of registration in the KRS register of entrepreneurs, but in the register of representative offices kept by the minister for economy.

44 Article 40–42 of the Act of 29 August 1997: Banking Law (consol. text Dz.U. of 2012, item 1376 as amended).

45 Articles 103–126 of the Act of 22 May 2003 on Insurance Activity (consol. text Dz.U. of 2013, item 950 as amended).

46 Article 104, Articles 115–118 of the Act of 29 July 2005 on Exchange of Financial Instruments (consol. text Dz.U. of 2010, No 211, item 1384 as amended).

47 Article 19 of the Act of 6 April 1984 on Foundations (consol. text Dz.U. of 1991, No 46, item 203 as amended).

Origin and derivatives are of decisive importance, which is noticeable in particular in the sphere of rationing economic activity. In many cases this is a condition of obtaining a concession, permit or a record in the register of regulated activity. As such it is important to point out in particular:

1) production and trade in explosive materials, weapons and ammunition as well as products and technology for military or police purposes,[48]
2) production, processing, storage, shipment, distribution and trade in fuels and energy,[49]
3) protection of persons and property,[50]
4) broadcast of radio and television programmes,[51]
5) conducting a casino or a cash bingo parlor, pari-mutuel betting as well as organization of tombolas/raffles, tombola bingo games and promotion lotteries,[52]
6) brokerage,[53]
7) banking and the activity of credit institutions,[54]
8) collective water supply and collective sewage disposal,[55]
9) activity of foreign insurance companies on the territory of Poland,[56]

48 Article 8 of the Act of 22 June 2001 on Economic Activity in the Field of Production and Trade in Explosive Materials, Weapons, Ammunition and Products and Technology for Military or Police Purposes (consol. text Dz.U. of 2012, item 1017);
49 Article 33 of the Act of 10 April 1997: Energy Law (consol. text Dz.U. of 2012, item 1059 as amended).
50 Article 26 of the Act of 22 August 1997 on Protection of Persons and Property (consol. text Dz.U. of 2005, No 145, item 1221 as amended).
51 Article 35 of the Act of 29 December 1992 on Radiophony and Television (consol. text Dz.U. of 2011, No 43, item 226 as amended).
52 Article 6 and Article 11 of the Act of 19 November 2009 on Gambling Games (Dz.U. of 2009, No 201, item 1540 as amended).
53 Articles 95–96, Article 102 and Articles 115–118 of the Act of 29 July 2005 on Exchange of Financial Instruments (consol. text Dz.U. of 2010, No 211, item 1384 as amended).
54 Articles 48a–48o of the Act of 29 August 1997: Banking Law (consol. text Dz.U. of 2012, item 1376 as amended).
55 Article 16 of the Act of 7 June 2001 on Collective Water Supplies and Collective Sewage Disposal (consol. text Dz.U. of 2006, no 123, item 858 as amended).
56 Articles 103–145 of the Act of 22 May 2003 on Insurance Activity (consol. text Dz.U. of 2013, item 950 as amended).

10) telecommunication,[57]

11) conducting vehicle inspection stations,[58]

12) detective activity.[59]

In the aforementioned acts of law the legislator reduces a possibility of undertaking particular types of economic activity by foreign entities. Natural restrictions do not include foreign entities coming from the member states of EU, the member states of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area as well as entities from the states which are not parties to the European Economic Area, which may exercise the freedom of enterprise and providing services on the grounds of the agreements concluded by these states with the European Union and its member states. Most of the acts listed formulate directly exclusion of this category of foreign entities from the scope of binding of limits or prohibitions.

In relation to the listed types of activities the legislator constitutes restrictions with four methods. First, the legislator determines a condition in the form of possessing a Polish citizenship by the entrepreneur or the person holding a managerial post. Second, he requires certain professional qualifications to perform an economic activity (a document certifying these qualifications), and simultaneously makes their acquisition dependent on possessing a Polish citizenship. Third, the legislator defines as an indispensable condition of undertaking an economic activity possessing of a place of residence or a seat on the territory of Poland or a EU member state. Fourth, he asserts directly that this particular activity cannot be performed by foreign, or reserves their limited share in the activity.

57 Article 10 of the Act of 16 July 2004: Telecommunication Law (Dz.U. of 2004, No 171, item 1800 as amended).

58 Article 83 of the Act of 20 June 1997: Road Traffic Law (consol. text Dz.U. of 2012, item 1137 as amended).

59 Article 4 and Article 29 of the Act of 6 July 2001 on Detective Services (Dz.U. of 2002, No 12, item 110 as amended).

Part 10

TERMINATION OF ECONOMIC ACTIVITY

1. Introductory observations

In accordance with its Article 1 AFEA is an act regulating undertaking, conducting and terminating economic activity on the territory of RP. However, against the wording of this provision this law does not dedicate much space to the issue of terminating an economic activity.

The analysis of the content of AFEA allows for mere distinguishing two categories of conditions with which it is possible to connect termination of an economic activity, these being facultative conditions and obligatory conditionis.

It is also important to remember that regardless of the aforementioned conditions, termination of an economic activity means liquidation of an enterprise, with which the entrepreneur conducted his economic activity. In this matter relevant are legal regulations referring to particular organizational and legal forms of conducting economic activity, and also possibly norms regulating bankruptcy and recovery proceedings.[1]

It is also worth noting that despite the fact that termination of economic activity consists in permanent cessation of its conducting affirmed foremost by deletion from CEIDG or the KRS register of entrepreneurs, AFEA also regulates an institution of a similar nature,

1 See: the Act of 28 February 2003: Bankruptcy and Recovery Law (consol. text Dz.U. of 2012, item 1112 as amended).

i.e. temporary cessation of its conducting: suspension of economic activity.

2. Suspension and resumption of economic activity

The institution of suspension of economic activity was introduced by the Act of 10 July 2008 on the Amendment to the Act of Freedom of Economic Activity and to Certain Other Laws.[2] It enables the entrepreneur to cease temporarily to conduct his economic activity and, simultaneously, exempts him from public law burdens resulting therefrom. In addition, it is important that in the period of suspension of the economic activity the status of the entity does not change; on the grounds of public law and private law relations he remains an entrepreneur despite the fact that he does not conduct (by assumption temporarily) an economic activity.[3]

Before 20 September 2008 suspension of an economic activity had no legitimacy and occurred in the form of real cessation of the economic activity without any formal effects, for example as an appropriate entry in the EDG and KRS systems as well as other registers. This situation resulted in considerable discrepancies in interpretations of public administration authorities and courts, and thereby shaped the legal situation of the entity suspending his activity in various ways. The entrepreneur suspending his economic activity bore public burdens in the dimension relevant to the conducted activity. On the other hand, derivative, yet functioning independently, institutions of temporary cessation of conducting economic activity and breaks in fulfilling the tax obligation failed to work in practice giving bases for discrete decisions of administrative authorities. This state affected adversely the situation of the entities conducting economic activity, and the

2 Article 1 point 6 of the Act of 10 July 2008 on the Amendment to the Act of Freedom of Economic Activity and to Certain Other Laws (Dz.U. of 2008, No 141, item 888).

3 M.A.Waligórski, Prawo przedsiębiorcy do zawieszenia i wznawiania wykonywania działalności gospodarczej, "Przegląd Ustawodawstwa Gospodarczego" 2009, No 8, p. 2–10.

normative structure of suspension was adopted in order to implement their demands.[4]

Of key importance for the situation discussed is Article 14a AFEA, which determines the circle of the entitled, procedural rules, acceptable period and effects of suspension of an economic activity.

Article 14a item 1 AFEA provides that any entrepreneur (a natural person, a legal person, or "deficient legal person") may exercise suspension of economic activity, regardless of the economic activity conducted, unless he has employees.

What draws attention is the fact that AFEA fails to specify the term employee. In this matter Article 2 of the Act of 26 June 1974: Labour Code (consol. text Dz.U. of 1998, No 21, item 94 as amended) remains relevant. According to it, an employee is a person employed on the basis of a contract of employment, appointment, election, nomination or a cooperative contract of employment.[5] Thereby employing a person in the meaning of Article 2 excludes a possibility of suspension of an economic activity. On the other hand, reasoning a contrario, C.Kosikowski's opinion should be accepted, that other forms of employment which commonly occur, the so-called "work under a non-employment contract", for example contract of mandate, contract to perform a specific task/work, apprenticeship, as well as help from family members make no obstacle for suspension of an economic activity.[6]

Effective suspension (and resumption) of an economic activity requires certain actual and legal actions. Information on suspension (and resumption) of an economic activity has to be recorded in CEIDG or the KRS register of entrepreneurs. As a rule, the procedure in this case corresponds with the procedure of legalizing and updating records, but:

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4 See: A. Piszcz, Zawieszenie i wznowienie wykonywania działalności gospodarczej, "Przegląd Ustawodawstwa Gospodarczego" 2009, No 10, p. 27–28; the Judgment of the Supreme Court of 25 November 2005, I UK80/05, Lex No 195796, the Judgment of the Supreme Court of 26 March 2008, I UK 251/07, Lex No 508353.

5 Article 2 of the Act of 26 June 1974: Labor Code, hereinafter referred to as LC.

6 C. Kosikowski, Ustawa..., *op. cit.,* pp. 136–141.

– suspension (and resumption) occurs on a request of the entrepreneur submitted to the competent registry authority complemented with a declaration of not having employees,[7]
– an application for suspension and resumption of an economic activity is free of charge (it is not subject to publication in the Monitor Sądowy i Gospodarczy /Court and Economic Monitor/ either),[8]
– in the event of conducting an economic activity in the form of private partnership, suspension of conducting an economic activity is effective provided all the partners suspend it,[9]
– effective suspension of an economic activity also requires notifying the competent Head of the Revenue Office[10] on the fact and the period of the suspension, as well as reporting for statistical purposes.[11]

AFEA defines the periods referring to suspension (and resumption) of economic activity.

In accordance with Article 14a item 1 AFEA, the entrepreneur may suspend his activity for the period of 30 days to 24 months (with a reservation of Article 14a item 1a AFEA). In this way a minimal (30 days) and maximal (24 months) duration of a single suspension of economic activity is determined. Thereby, even after the maximal period the entrepreneur may suspend his activity again for 1–24 months. In addition, it is important to emphasize that the entrepreneur's obligation is to suspend and resume his economic activity in compliance with certain provisions of procedural rules with all its consequences.[12]

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7 Article 32 item 2 AFEA.
8 Article 20c item 3 ANCR.
9 Article 14a item 2 AFEA.
10 See: Article 25 item 5c of the Act of 15 February 1992 on Income Tax from Legal Persons (consol. text Dz.U. of 2011, No 74, item 397 as amended), Article 44 item 12 of the Act of 26 July 1991 on Income Tax from Natural Persons (consol. text Dz.U. of 2012, item 361 as amended), Article 21 item 1f of the Act of 20 November 1998 on Lump-Sum Income Tax from Certain Incomes of Natural Persons (Dz.U. of 1998, No 144, item 930 as amended).
11 Article 42 item 3 point 5 of the Act of 29 June 1995 on Public Statistics (consol. text. Dz.U. of 2012, item 591 as amended).
12 See: M.A. Waligórski, Prawo przedsiębiorcy..., *op. cit.,* p. 2–10; C. Kosikowski, Ustawa..., *op. cit.,* p. 137.

This rule is modified by Article 14a item 1d AFEA, which provides that the entrepreneur who does not have employees and has been conducting an economic activity for at least 6 months may suspend the economic activity for up to 3 years in order to exercise a personal child care, not longer, however, than until the child turns 5 years of age, and in the case of a child, who, because of its health confirmed by a certificate of disability or a degree of disability, requires care from the person conducting an economic activity, for the period up to 6 years, not longer, however, than until the child turns 18.[13]

It is also important to note that if suspension of an economic activity is the entrepreneur's right, which he may but does not have to exercise, resumption is an obligation which arises as the result of the exercising of this right.[14]

Failure to fulfill this obligation (i.e. resumption of the activity after the maximal period of suspension) results even in the loss of the status of entrepreneur and the right to conduct economic activity. In accordance with Article 34 item 2 AFEA, in the case of failure to submit an application for the record of the information on the resumption of the economic activity before the maximal suspension terminates the entrepreneur is ex officio deleted from CEIDG by an administrative decision of the minister competent for economy. Furthermore, by virtue of Article 24–26 ANCR the lack of notification on the resumption of the activity justifies launching coercive proceedings, in which he may in the first place apply fines, and subsequently even decide on dissolving the personal trading company and establish a liquidator, and for a legal person establish an administrator.[15]

AFEA also specifies the moment of the commencing of suspension of an economic activity as well as the period of the occurrence of its effects. The period of suspension of an activity begins on the day indicated in the application for a record of this information, not sooner than on the day of the submission of the application, and lasts until the

13 With a reservation of Article 14a item 1e AFEA.

14 See: C. Banasiński, K. Glibowski, H. Gronkiewicz-Waltz, K. Jaroszyński, R. Kaszubski, M. Wierzbowski, Prawo gospodarcze. Zagadnienia..., *op. cit.,* p. 269.

15 A. Piszcz, Zawieszenie..., *op. cit.,* p.30.

day of the submission of an application for a record of the information on resumption or until the day indicated in this application, which cannot bee earlier than the day of the submission of the application.[16] Moreover, in relation to public law obligations the suspension of conducting an economic activity has legal effect from the day when the suspension of conducting the economic activity commences, until the day before the day of resumption of conducting the economic activity.[17]

Article 14a item 3 AFEA defines the fundamental assumption of the institution of suspension of economic activity. In the period of suspension of his economic activity the entrepreneur cannot perform the economic activity and achieve current incomes from non-agricultural economic activity. This is the basis for a presumption of not conducting an economic activity in the period indicated in the application and has effect on the entrepreneur's public law liabilities: in the period of suspension of economic activity the entrepreneur does not bear public law burdens resulting from its actual performance.

As for social insurance suspension of economic activity exempts the entrepreneur from the obligation to pay premiums towards sickness and accident insurance, which results in impossibility of receiving a sickness benefit after 30 days of the day of suspension. In turn, pension and disability insurance during the period of suspension of economic activity is voluntary. The entrepreneur has no obligation to submit monthly statements and pay premiums towards social insurance. Analogous effects arise in health insurance. Suspension exempts the entrepreneur from the obligatory healthcare insurance under pain of the loss of the right to use services (free medical assistance) after 30 days of the suspension,[18] but does not exclude a possibility of joining a voluntary health insurance on the grounds of an agreement thereon with the National Health Fund (NFZ).

In tax regulations suspension of economic activity results in exemption from the obligation to pay advance installments towards

16 Article 14a item 6 AFEA.
17 Article 14a item 7 AFEA.
18 M.A. Waligórski, Prawo przedsiębiorcy..., *op. cit.,* p. 8.

income tax and to submit VAT declarations. The suspension does not exempt, however, from the obligations to submit an annual tax declaration, income tax from natural persons or legal parsons, or lump-sum tax from registered incomes as well as VAT settlement. On the other hand, the entrepreneur paying taxes in the form of a tax card is exempted from the obligation to pay a tax of 1/30 of the monthly due sum for each day of suspension.[19] Suspension of economic activity also affects taxes under other rules of taxation, for example property tax. [20]

The legislator has not reduce the effects of suspension to those aforementioned only. In Article 14a item 4 AFEA he defined further reaching consequences of the application of this institution.

The provision indicates that the entrepreneur during the period of suspension of his economic activity retains the right to: 1) perform any actions necessary to maintain or secure the source of income; 2) to receive due payments which accrued before the date of suspension of economic activity; 3) to sell his own fixed assets and equipment; 4) to participate in judicial proceedings, tax and administrative proceedings connected with the economic activity conducted before the suspension; 5) to achieve financial income, also from the activity conducted before the suspension.

It also decides that during the period of suspension of conducting an economic activity the entrepreneur: 1) is obligated to settle liabilities arisen prior to the date of the suspension of the economic activity, 2) is obligated to participate in judicial proceedings, tax and administrative proceedings connected with the economic activity performed before the suspension, 3) is obligated to fulfill all the obligations prescribed by the provisions of law, and 4) can be inspected according to the rules provided for entrepreneurs conducting an economic activity.

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19 In the case of paying a tax card, the entrepreneur has a choice between suspension and break, which cannot last longer than 10 days.

20 For more see: R. Dowgier, Wpływ zawieszenia działalności gospodarczej na zasady opodatkowania podatkiem od nieruchomości, "Finanse Komunalne" 2008, No 12, s. 31–35.; A. Kaźmierczyk-Jachowicz, K. Michałowska, Prawnopodatkowe konsekwencje zawieszenia wykonywania działalności gospodarczej, "Przegląd Podatkowy" 2009, No 9, s. 26–33; P. Borszowski, Zawieszenie wykonywania działalności gospodarczej a koszty podatkowe, "Prawo i Podatki" 2009, No 8, s. 6–8.

3. Termination of economic activity and its legal forms

3.1. Termination of economic activity: optional premises

In this case permanent cessation of conducting an economic activity results from the entrepreneur's subjective decision.

Article 6 item 1 AFEA asserts that undertaking, conducting and terminating economic activity is free for everyone on equal footing yet always under conditions determined by law. Thereby economic freedom (beside the freedom of undertaking and conducting) encompass also the freedom of terminating economic activity, which consequently means that the entrepreneur is allowed to take an autonomous (independent) decision on the termination of his economic activity.

What is important, a decision on permanent cessation of conducting the activity is taken by the entrepreneur for subjective reasons on his own behalf and account. Nevertheless, the entrepreneur exercises the freedom of terminating economic activity with the respect for the conditions determined by the provisions of law. This, in turn, means that the decision itself is not equivalent to the termination of the economic activity. Certain formal actions are also necessary: legal actions on which depends legitimate termination of economic activity.

Obligations of the entrepreneur who decided to terminate conducting an economic activity permanently include the necessity of taking actions analogous to the legalization of an economic activity.[21]

Thereby the entrepreneur is obligated to apply for deletion from a relevant register, CEIDG or the KRS register of entrepreneurs, as well as make appropriate notifications:

1) for statistical purposes (to the competent Provincial Statistical Office),
2) for the purposes of taxation (to the competent Revenue Office),

21 Of course, provided that in this case their aim is not the legalization of the economic activity but its termination.

3) for the purposes of social insurance (to the competent Branch of the Social Insurance Institution or the competent Branch of the Agricultural Social Insurance Fund),

4) for the purposes of health insurance (to the competent Branch of the National Health Fund),

and

5) other possible registers and records if the particular notification (or record) determines normatively the legitimate termination of the particular economic activity.

Applications and notifications in the aforementioned matter is obligatory for every entrepreneur. Only the fulfillment of these obligations means a legitimate termination of an economic activity.

3.2. Termination of economic activity: obligatory premises

AFEA also provides for events where permanent cessation of conducting an economic activity does not depend on the entrepreneur's will but is a manifestation of the power of the state. Competent authorities are entitled to issue an administrative decision which results in the termination of economic activity.

Circumstances of issuing this type of decision are different but they are always a consequence of the entrepreneur's infringement of the rules of conducting economic activity.

The following are worth mentioning as examples:

1) Article 34–35 AFEA, in accordance with which the entrepreneur is deleted from CEIDG ex officio (thus loses the right to conduct economic activity) by an administrative decision of the minister competent for economy, for example if:
   - the prohibition of conducting economic activity by the entrepreneur is adjudicated;
   - the entrepreneur fails to submit an application for a record of the information on resumption of an economic activity before the expiry of the maximal period of suspension of the economic activity;

– the entrepreneur has lost his rights to perform his economic activity;[22]
– it has been made with an infringement of law;
– despite a call for updating the content of the record, the entrepreneur fails to make the required change in his record within 7 days of the day of the receipt of the summons;[23]

2) Article 58 AFEA, by virtue of which the concession authority withdraws the concession in the event of:
– a valid adjudication prohibiting the entrepreneur to perform the economic activity under concession;
– the entrepreneur's failure to undertake the activity under concession within the fixed period despite the summons of the concession authority, or ceased permanently to conduct the economic activity under concession;
– the entrepreneur's flagrant infringement of the conditions determined in the concession or other conditions of performing the economic activity under concession determined by the provisions of law;
– the entrepreneur's failure to remove within the fixed period the actual or legal status inconsistent with the conditions determined in the concession or with the provisions regulating economic activity under concession;
– a threat to defence or safety of the state or the safety of the citizens;
– the announcement of the entrepreneur's bankruptcy;[24]

22 The rights on the grounds of Article 13 item 1–2 AFEA.
23 Analogous rights of the registry court in the field of deletions from the KRS register of entrepreneurs are constituted by Article 24–26 ANCR.
24 Moreover, by virtue of Article 61 the entrepreneur whose concession has been withdrawn because of: a) a valid adjudication prohibiting the performance of the economic activity under concession, b) flagrant infringement of the conditions determined in the concession or other conditions of performing economic activity determined by the provisions of law, c) failure to remove within the fixed period the actual or legal status inconsistent with the conditions determined in the concession or with the provisions regulating an economic activity under concession, may apply for a concession for the same type of activity again not sooner than after 3 years of the day of the decision of the withdrawal of the concession.

3) Article 71 AFEA, according to which the authority keeping the register of regulated activity issues a decision on the prohibition of performing by the entrepreneur the activity under the obligation of the record, if:
   - the entrepreneur submitted a declaration inconsistent with facts;
   - the entrepreneur failed to remove the infringements of the conditions required to perform a regulated activity within the period fixed by the authority;
   - it asserts the entrepreneur's flagrant infringement of the conditions required to perform a regulated activity,[25]
4) Article 91 and Article 1010 indicating analogous conditions of issuing a decision leading to termination of conducting the activity of a branch or a representative office on the territory of RP: the decision on the prohibition of conducting activity in these forms is issued by the minister competent for economy in the event of:
   - flagrant infringement of Polish law;
   - failure to notify the information on changes of actual and legal status in the liquidation of the foreign entrepreneur (who opened the branch or the representative office) or his loss of the right to conduct an economic activity within 14 day of the day of their occurrence;
   - launching of liquidation of the foreign entrepreneur (who opened the branch or the representative office) or this entrepreneur has lost the right to perform an economic activity;
   - the foreign entrepreneur's activity threatens safety or defence of the state, the security of secret information

25 In accordance with Article 72 AFEA, the entrepreneur who has been deleted from the register of regulated activity may obtain a new entry in the register referring to the same type of economic activity not sooner than after 3 years of the day of the decision of the deletion. Interim prohibition of conducting a particular regulated activity is also applicable to the entrepreneur who has conducted the economic activity without a record in the register of regulated activity (with a reservation of Article 67 item 2 AFEA).

with the classification “confidential” or higher, or another important public interest.

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