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Customs and Tax Control of Entrepreneurs as a Factor Influencing the Level of Economic Freedom in Poland

Abstract: This contribution deals with the analysis of the impact of changes in the fiscal control institution of entrepreneurs in Poland. The new legislation combined administrative tasks in one institution previously held by the tax and customs administration and fiscal control. Initially, the planned reform of the customs and tax administration was to constitute only the reconstruction of the organizational structure of tax offices, fiscal control offices and customs services. In practice, the newly established National Tax Administration took over the competences of entities appointed on the basis of the previously applicable Act on fiscal control, additionally extending the powers of that body. The National Tax Administration, has gained the extension of existing control powers, which in practice may surprise many taxpayers, forcing them to attach more importance to the documentation of their company than to the development of business potential.

Keywords: law, legal economic, legal institutions

1. Introduction

The level of economic freedom in the Republic of Poland has undergone many changes in the last decade. According to the Index of Economic Freedom, Poland was ranked 70th in 2005 and 77th in 2006. Despite the deteriorating index until 2010, an upward trend can be observed in subsequent years. The current position was shaped already in 2017 on the 45th position and remained also in 2018. While in the Region we are overtaken by countries such as Armenia, Romania, Macedonia or our north-eastern neighbours: Lithuania and Latvia. Not to mention the European economic giants such as Germany or Great Britain. For comparison, at the bottom of the list

there are countries such as North Korea, Venezuela and Cuba, and in Europe Ukraine and Belarus.¹

But how is economic freedom measured? It is based on 12 quantitative and qualitative factors, grouped into four broad categories, or pillars, of economic freedom such as: Rule of Law which includes property rights, government integrity and judicial effectiveness, Government Size based on government spending, tax burden and fiscal health, Regulatory Efficiency which takes into consideration business freedom, labour freedom, monetary freedom and Open Markets which includes trade freedom, investment freedom and financial freedom. A country's overall score is derived by averaging these twelve economic freedoms, with equal weight being given to each.²

It is not possible to indicate direct reasons suggesting such a result for our country. Undoubtedly, the current regulations on financial control of entrepreneurs, and more precisely the customs and tax control of entrepreneurs, suggest that they are not in favour of Poland's location in the overall Economic Freedom Ranking.

2. Establishment of the National Tax Administration

Last year's amendment³ of the regulations introduced a number of organizational changes in the structure of the authorities controlling taxpayers. The National Tax Administration (NTA) was established, which eventually took over the competences of entities established on the basis of the previously binding Act on Tax Control, additionally extending the powers of this institution. The existing tax administration, organizational units of the customs service and tax control offices have been transformed into the Revenue Administration Regional Offices, tax offices and customs and tax offices.

The amendment of the regulations was dictated primarily by the reduction of administrative costs of tax collection, unification of control tasks of individual tax authorities and adjustment of the executive mechanisms to the modern way of functioning of economy entities at the economic and also accounting and tax level.⁴ An important aspect of the legislation was also the increase in the financial security of the state through the organization of work conducive to more efficient detection of fraud and other tax crimes committed to the detriment of the State Treasury and

1 Index of Economic Freedom, Country Rankings, <https://www.heritage.org/index/about> (access: 29.11.2018).

2 Index of Economic Freedom, About The Index, <https://www.heritage.org/index/about> (access: 29.11.2018).

3 Journal of Laws No. 2018, item 508.

4 Justification to the project of 17 February 2016 of the Act on National Tax Administration, https://www.sluzbacywilna.info.pl/images/stories/do_pobrania/uzasadKAS1702.pdf, p. 3-4 (access: 9.11.2018).

better identification and elimination of phenomena conducive to the depletion of budget revenues.⁵

It is worth mentioning that with the change of regulations, entrepreneurs may be subject to two types of controls. Tax control, carried out by employees of tax offices on the current principles, mainly based on the provisions of the Tax Ordinance and tax and customs control - carried out by heads of tax and customs offices, carried out both by employees of NTA and officers of the tax and customs control. Customs and tax control is a procedure of the so-called "hard control" nature. Its basic task is to detect and combat irregularities of large-scale fraud, extortion and other crimes causing significant damage to public finances, and thus having a significant impact on the state's financial security. Therefore, customs and tax control deals, among others, with the activities of organized criminal groups, carousel fraud resulting in the fraudulent evasion of VAT.

3. Modification of Procedures

Practical application of the regulations of the NTA in the field of control therefore results in extending the rights of administrative officers, thus reducing the rights of controlled entities. The regulations introduced changes already at the stage of initiating control at the entrepreneur's premises. Before 1 March 2017, controls carried out by tax control offices were preceded by an earlier, obligatory notification to the taxpayer as to the planned control. Inspectors could start control activities after 7 days from the date of notification, providing the entrepreneur with a decision on the initiation of control. However, the 7-day time limit could be shortened, e.g. if the taxpayer's consent was given.⁶

With the entry into force of the Act on NTA, customs and tax control begins without prior notification to the taxpayer. This means that entrepreneurs will not be able to prepare for control proceedings, e.g. by adapting the work of the company to the needs of control. Initiation of a customs and tax control takes place at the moment when the taxpayer receives an authorization to conduct the control. Additionally, in the case of suspicion that the provisions of law are not observed and the factual circumstances justify the immediate conduct of a customs and tax control, it may be initiated even on the basis of the presentation of an official ID card. Experts warn that this extraordinary procedure may become standard practice.⁷ In certain cases,

5 National Tax Administration: information guide, <http://www.kis.gov.pl/documents/6609173/6751991/broszura+KAS.pdf> (access: 14.11.2018).

6 M. Lewandowska, Customs and tax control in the light of the Act on the NTA, <https://poradnikprzedsiębiorcy.pl/-kontrola-celno-skarbowa-w-swietle-ustawy-o-kas> (access: 22.11.2018).

7 Ł. Zalewska, NTA reform: Head of the office as a tax super-policeman, <http://podatki.gazetaprawna.pl/artykuly/965240,reforma-kas-naczelnik-urzedu-w-rolu-podatkowego-superpolicjanta.html> (access: 22.11.2018).

officers are also entitled to a permanent authorization to perform control. Together with the official ID card, this applies in particular to activities carried out on public roads or internal roads and in sea ports and harbours, as well as in the case of control conducted outside the point of permanent sales location, i.e. door-to-door sales and at market places.

The control activities themselves may be carried out in the customs and tax office, in the registered office of the inspected person, in the place of keeping or storing tax books and in any other place connected with the activity conducted by the inspected person, including residential premises or in places where the equipment, goods or documents subject to control may be located. Inspection activities may also be carried out at other offices operating the NTA institutions.

In special cases, customs and fiscal controls may literally be conducted at any location within the territory of the Republic of Poland. This is particularly important in the case of enterprises engaged in processing or production of fuels or alcoholic products. The head of each customs and tax office may perform customs and tax control on the whole territory of the Republic of Poland - thus *de facto* local jurisdiction disappears.

Customs and tax controls are required to be completed without unnecessary delay and no later than 3 months from the date of its initiation. However, this is not an absolute deadline. In each case of not completing the customs and tax control in due time, the controlled person is notified in writing, providing reasons for extending the deadline for completing the customs and tax control and indicating a new deadline for its completion. At the same time, the deadline does not apply if the customs and fiscal control is performed on the basis of directly applicable provisions of the European Union law or on the basis of a ratified international agreement. Moreover, documents collected after the lapse of the 3-month deadline cannot constitute evidence in the customs and tax control, unless a new deadline for completion of the control has been indicated.⁸ Also in the case of an excessively long inspection, the inspected person is entitled to lodge a formal complaint about the inaction of the institution.

Customs and tax control is based on a number of control powers and obligations for controlled entities. Officers have maintained their existing powers but have also received a number of new privileges. Customs and tax control officer, in accordance with the law, may demand access to files, books and all kinds of documents related to the subject of control and to make copies, reproductions, extracts, notes, print-outs and documented data collection in an electronic form. Officers have the right to enter, stay and move on the ground and in the building or controlled premises. An officer may, in the event of an emergency, even search a private dwelling without the sanction of the district prosecutor. However, if, after a search, the authority

8 W. Maruchin, Customs and tax control of taxpayers' compliance with tax obligations, "MOPOD" 2017, no. 6, p. 18.

does not obtain its confirmation, any materials and information collected will not constitute evidence during the proceedings. Customs and tax control authorities were also given the right to search the premises with the use of technical equipment and service dogs, the right to inspect postal items, or the right to stop and inspect vehicles and perform other activities related to road traffic control or to stop and inspect seagoing vessels. Officers also have the right to legitimize or otherwise establish the identity of a person if it is necessary for the purposes of control. The inspected persons themselves may also be interrogated, as well as witnesses of certain activities covered by the inspection, e.g. employees or contractors. In relation to them, officers may request explanations concerning the subject matter of control, as well as search them. In cases requiring specific expertise, the tax administration may also consult experts.⁹

Customs and tax control officers are also equipped with a number of powers to physically check the subject matter of control. The Act allows them to examine, including taking samples of goods, raw materials, semi-finished products and finished products in order to examine them. In relation to gambling, officials may carry out experiments, trials or recreation of the possibility of playing on a machine or another machine. Even the type of fuel used for a given means of transport may be subject to control, as directly indicated by the Act.¹⁰

It is not without reason that customs and tax control is not well received by entrepreneurs. In order to secure the evidence, NTA officers can place official seals on the equipment, premises, vessels or means of transport, thus rendering them inoperable for use by the company. Also, current operations may be restricted to close the goods and operations documentation in order to enable a comparison of the actual state of affairs with the state of the records. In addition, inspection at the premises of the inspected entity should take place during the normal working hours of the organization. The regulations even allow inspections to be carried out in the private dwelling of the inspected entity, in particular when documents related to the subject matter of the inspection are kept there.¹¹

Privileges may also go beyond the financial control system and customs and fiscal control authorities have the power to identify, detect and combat certain offences if they are closely linked to a fiscal offence.

9 L. Bielecki, A. Gorgol, Act on the National Tax Administration. Commentary, Warszawa 2018, (comment on the Article 64).

10 K. Różycki, Customs and tax control. Comments, models, summaries and control procedures, Warszawa 2018.

11 W. Maruchin, Customs..., *op. cit.*

4. Direct Impact on Entrepreneurs

Some care has also been taken to ensure the safety of entrepreneurs. With the new regulations, they have been given, as mentioned earlier, the possibility to bring an action against a protracted inspection before an administrative court or secure a guarantee that there will be no re-inspection in the same case. Mainly, the provisions of the NTA impose obligations on entrepreneurs. Partly resulting from previous legal norms, but also new ones. Both the inspected person, his employees, persons cooperating with the inspected person, an entity keeping or storing tax books and documents, are all obliged to allow access to documents covered by the scope of the customs and tax control.¹² Apart from accounting documents, the inspector is obliged to provide access to commercial and financial documents, including confidential and electronic documents. In practice, confidential agreements between entrepreneurs, data resulting from contracts or negotiations conducted in electronic form remain available for inspection by the controlling authority. Additionally, already at the stage of conducted activities, entrepreneurs may feel the economic effects of control. Because at the request of the controlled persons, they must present an official translation into Polish of documents which are important for customs and tax control and which have been prepared in a foreign language. Considering the global reach of today's companies and the widespread use of foreign language communication, this may expose companies to severe financial consequences by having their key documents translated by appropriate specialists. If conditions allow, the controlled person should also provide an independent room for the duration of control activities and a place to store documents. The Act also emphasizes the obligation to cooperate with officers in order to explain specific issues on an ongoing basis, which in part resulted from their rights, but which previously had not been directly indicated in the Act.¹³

Customs and fiscal control is based on gathering evidence. Tax Acts, including the Act on NTA, contain a very broad definition of evidence. Evidence is everything that may contribute to the clarification of the case and is not contrary to the law. In particular, evidence in a case may include tax information, statements by a party, witness statements or information from a bank. The authority also has the right to inspect the subject of the inspection, e.g. the inspected vehicle or game machine, even if it occasions to be in the possession of another entity. It is difficult to imagine the retention of all vehicles belonging to a large transport company, but according to the law, the control body has the right to do so.

It also seems to be specific that the authority has the right to apply to controlled counterparties for access to documents related to the supply of goods or services,

¹² Article 72.: Act no. 1947/2016 Coll., on the National Tax Administration, as amended.

¹³ D. Strzelec, M. Łoboda, *Control of tax law compliance*, Warszawa 2017, p. 226.

as well as to provide explanations in relation to transactions between traders.¹⁴ Therefore, the controlling authority may acquire classified information both directly from the controlled entity and from contractors cooperating with it.

After completion of control activities carried out during customs and tax control conducted within the scope of tax law, such control ends with the result. Within 14 days from the date of delivery of the audit result, the inspected person may correct the previously submitted tax return within the scope covered by customs and tax audit. If the inspected person corrects the submitted tax return or if no irregularities are found, no tax proceedings are instituted. If, despite the irregularities found as a result of the audit, the return has not been corrected within the prescribed time limit, the customs and tax audit shall automatically turn into tax proceedings.¹⁵

If one does not agree with the decision issued by the head of the customs and tax office in proceedings initiated in connection with the customs and tax control carried out by this body, one can appeal against the decision within 14 days to the same body that issued the decision. The case is therefore reconsidered by the same authority.¹⁶ The decision of the appeal body may be contested in both modes to the administrative court on the same basis, but the other party is the director of the customs and tax control office in the mode, and the head of the customs and tax office in the case of proceedings conducted by the heads of customs and tax offices.

The control activities can also end with a protocol. This applies to compliance with customs legislation and to the export and import of goods between the territory of the European Union and third countries.¹⁷

5. Conclusions

While the regulations on fiscal control allow for tighter control over domestic enterprises, extending its powers may hamper the development of entrepreneurship in the country and reduce the willingness of entrepreneurs to be aggressive in their economic behaviour, which may also have an impact on the amount of budget revenues and the perception of the Polish economy in the international arena.

Data also show that entrepreneurs concerns about the length of controls are proving to be true. The tax administration takes advantage of the possibility of extending them for more than the three months specified in the act. On average they extend to 117 days, despite the fact that short inspections are included, when taxpayers themselves corrected their declarations within 14 days. On the other hand,

14 L. Bielecki, A. Gorgol, Act ..., *op. cit.*, (comment on the Article 59).

15 Article 83.: Act no. 1947/2016 Coll., on the National Tax Administration, as amended.

16 M. Szulc, A. Pokojska, Two-stability only apparent, [http:// podatki.gazetaprawna.pl/artykuly/953149,ustawa-o-kas-dwuinstancyjnosc-tylko-pozorna.html](http://podatki.gazetaprawna.pl/artykuly/953149,ustawa-o-kas-dwuinstancyjnosc-tylko-pozorna.html) (access: 2.12.2018).

17 Article 84.: Act no. 1947/2016 Coll., on the National Tax Administration, as amended.

however, their number has fallen significantly compared to previous years (from around 10,000 per year between 2010 and 2015 to 2,500 in 2017).¹⁸ However, we will have to wait for more summaries of the functioning of the appointed structures in view of the freshness of the current rules. The two-year period in terms of state administration is too short to clearly state the legitimacy of these regulations.

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18 M. Szulc, The tax offices stopped shooting blindly. The officials control much less often, but more effectively, <https://podatki.gazetaprawna.pl/artykuly/1107626,efekt-krajowej-administracji-skarbowej-mniej-kontroli.html> (access: 3.12.2018).