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UNDERTAKING ECONOMIC ACTIVITY IN THE LIGHT OF NEW PROVISIONS

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I

1. The Law of December 23, 1988, On Economic Activity [1] is the turning point in the Polish economic law and is worthy of particular attention for this reason.

In its Art. 1, the Law introduced three fundamental principles : of economic freedom, of equality of economic subjects, and of legalism (conformability to law). The first of those principles has been formulated as follows : "The undertaking and pursuing of economic activity is free and permitted for all..." Thus the right to undertake and pursue economic activity is a common right, granted to all by force of the Law. Therefore, the former institution of the "licence to pursue economic activity" no longer comes into consideration today : all citizens have that license without the need to apply for it, to prove their special attributes or qualifications, or to justify the social profitability of the planned activity. If according to the Law economic activity is free, it is for the person who pursues it to define its range, conditions, and ways of pursuit. It is also for him to decide about its abandonment. Any limitations in this sphere (e.g. those related to environment protection, fire control or sanitary regulations, etc.) may only be introduced by statutes or acts based on explicit statutory authorizations.

Like any freedom expressed by law, also the economic freedom has certain limits. Guarding them is the definition of economic activity. It prevents both the excessively narrow and excessively broad interpretation of economic freedom. According to Art. 2 part 1 of the discussed Law, economic activity is distinguished by two traits : 1) it is to yield profit, and 2) it is pursued independently, on one's own account. Thus according to the Law, the term "economic activity" does not designate charity, unpaid propagation of knowledge, skills or opinions, provision of free

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[1] *Journal of Laws*, No. 41, item 324. The Law of December 23, 1988 has been amended in December 1989 ; the amendment will be discussed in one of the next issues of our *Review*.

amusement, etc. Naturally, a person involved in economic activity may contribute to charity or organize unprofitable events. One should bear it in mind, however, that some of such activities may be strictly regulated by law, unlike economic activity.[2] [3] Activity on another person's account is not economic activity, either, even if it yields profit (this concerns e.g. the activities of a commission agent who acts in the name of his orderer and received a commission in return). With the intention to make the denotation of the term "economic activity" as broad as possible, the legislator stresses the variety of forms of that activity, mentioning manufacture, building, trade, and services. Any person who pursues economic activity is interpreted by the Law as an "economic subject." That person may be an individual or legal person, as well as an organizational unit with no legal personality (e.g. a general partnership).

An economic subject is not obliged to restrict himself to one type of activity : he is not attached to it. He may simultaneously undertake activities in various spheres which may sometimes differ greatly from one another (e.g. manufacture and exports of furniture and imports of computers). The specification included in Art. 2 part 1 is not a binding legal classification. This approach makes away with the former organization of national economy, based on vertical divisions into sectors, departments, and branches. Worthy of attention in this context is Art. 6 of the Law which confirms the economic subjects' right to form organizations of such subjects, but at the same time introduces the principle of voluntary association. Thus the pursuit of a certain kind of economic activity cannot depend on membership of a given organization (guild, private transport association, etc.).[3]

The introduction of the principle of economic freedom should radically change the way of thinking—the whole of economic philosophy. The question, "Am I allowed to undertake any activity?," is now replaced by, "What is the most convenient form of activity I could undertake ?" Instead of considering the chances of undertaking a new activity, one should choose one of the many organizational forms possible (e.g. a natural

[2] See e.g. the Law of June 9, 1968, On Licensing Public Artistic Entertainement, and Sports Activities *(Journal of Laws,* No. 12, item 64).

[3] The principle of voluntary association is universal in nature and operative from the moment of entering into force of the Law on Economic Activity. At that moment, members of the then existing associations of craftsmen, private trade and services, and private transport acquired the right to resign from those associations. The principle of cooperatives' voluntary affiliation to unions of cooperatives (including the central ones) has already been introduced at an earlier date. See Art. 4 § 1 and 3 of the Law on cooperatives in the reading determined by the Law of October 23, 1987, On the Change of Certain Provisions Regulating the Principles of Functioning of National Economy *(Journal of Laws,* No. 33, item 181).

person's activity on his own account ; a cooperative ; a partnership ; an initiative to establish a new State enterprise, etc.).

2. Also the principle of equality of economic subjects departs greatly from the former principles. Before, an economic subject's legal status depended on his affiliation to a given sector of the economy. The most fundamental here was the division into units of socialized economy (USE) and units of nonsocialized economy, of which the former were privileged. This was expressed among others by a different tax system, a special system of supplies, differences as regards sales, etc. The revival of the institution of commercial partnership made the crossing of those barriers possible to some extent : the principle was used (which followed from practice rather than provisions) that for a partnership to be included among the USE's, a litle over a half of its opening capital should belong to a USE.

The principle of equality of economic subject, formulated in Art. 1 of the Law on Economic Activity, is explicated in Arts. 7 and 25 which point to some of its aspects. Thus equality is to concern the sphere of public legal liabilities, that is taxes above all. This announcement has been developed in the Law of January 31, 1989, On Income Tax from Legal Persons *(Journal of Laws,* no. 3, item 12). At present, there is a division into legal persons and individuals which seems more natural than the former differentiation of sectors. Further on, Arts. 7 mentions the uniformity of principles of obtaining bank credits and supplies of the means of production. The latter provision is connected with institutions of regulated supply, and will disappear as soon as such institutions are abolished with the development of market economy. It should be added here that the principle of equality is valid also in spheres where licences are obligatory by way of exception. A refusal to grant licence may in no case be grounded by the applicant's affiliation to a certain sector of the economy or by the type of economic subjects concerned. The only admissible grounds for such refusal are the conditions mentioned in Art. 20 part 5 of the discussed Law which will be discussed further on.

The principle of equality of economic subjects is expressed in the fact that economic activities of all types of subjects have been included in one and the same act. The Law concerns not only natural persons who undertake economic activity but also any other subjects, the State enterprises included. As such, it is a common act. Admittedly, it is "exclusive" for natural persons, while legal persons and other organizational units have other statutes "of their own" as well, which define the way of creating an economic subject and its inner structure. Those statutes include the following above all :

1) for State enterprises : the Law of September 25, 1987, On State Enterprises *(Journal of Laws,* No. 35 of 1987, item 201) ; the Law of September 25, 1981, On Self-government of Employees of a State Enterprise *(Journal of Laws,* No. 24, item 123) ; the Law of January 31, 1989, On Financial Economy of State Enterprises *(Journal of Laws,* No. 3, item 10) ; and the Law of June 29, 1983, On Improvement of a State Enterprise's Economy and Its Bankruptcy *(Journal of Laws,* No. 8 of 1986, item 46, and No. 3 of 1989, item 10) ;

2) for cooperatives : the law on cooperative societies ;[4]

3) for partnerships, non-commercial partnerships excluded : the commercial code ; for non-commercial partnerships : Arts. 860—875 of the civil code.

There are separate provisions to regulate the establishment of economic subjects with a foreign capital share : the Law of December 23, 1988, On Economic Activity with Foreign Capital Share *(Journal of Laws,* No. 41, item 325) ; and the Law of July 6, 1982, On the Principles of Economic Activity of Foreign Natural and Legal Persons in the field of small industry on the territory of the Polish People's Republic.[5]

Though it has been clearly formulated in the Law on economic activity and is legally binding, the principle of equality of economic subjects has not been consistently introduced in the entire legal system as yet. This may lead to certain difficulties. Thus provisions of the civil code and the code of civil procedure are still based on the traditional division into the U.S.E.'s and non-socialized subjects. It is therefore indispensable that those provisions should be amended as soon as possible. Until then, their interpretation should have regard to the common principle of equality of economic subjects which follows from Art. 1 of the Law on economic activity.

3. The discussed Law states that the undertaking and pursuit of economic activity is permissible under conditions defined by legal provisions. Its Art. 3 deals with those conditions, not specifying, however, the actual conditions of economic activity. It is, therefore, a regulation referring to another rule. On the other hand, it states explicitly that the conditions in question are only those "provided by law" and "defined by provisions." These formulations prevent a discretionary establishment of conditions by the administrative agencies. All restrictions must be justified

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[4] The Law of September 16, 1982—*Journal of Laws,* No. 30, item 210 ; No. 39 of 1983, item 176 ; No. 39 of 1986, item 172 ; and No. 33 of 1987, item 181.

[5] Due to its specific nature, the problem of those two statutes will not be included in the further discussion.

by an appropriate provision,[6] e.g. of building, sanitary, fire-control or environment protection regulations. The discussed conditions are not universal but related to the type and place of the activity concerned. Thus the provisions of building regulations do not apply to a subject involved in car transport, unless they concern the building and installations of garages, service stations, etc.

The interpretation of Art. 3 part 2 should be analogous. Its provision imposes on an economic subject the duty to employ persons with adequate qualifications. On the other hand, it does not specify the situations where this is indispensable, or the kind of qualifications required, leaving that matter to separate provisions. For instance, the fact that an economic subject involved in car transport may employ as drivers only persons with the adequate category of driving licence, follows not from the provisions of the Act on economic activity but from traffic regulations. It devolves upon that subject to know and observe the relevant provisions.

The economic subjects' direct and principally common duties have been specified in Art. 12 of the Law. There are few of them :

— the duty to put a sign on the outside to mark the seat and place where economic activity is pursued (the firm run), and

— the duty of subjects involved in manufacture to mark the products they put on the market.

The Law provides for no exceptions in this sphere. It defines precisely the contents of marks both on the seat or workshop (Art. 12 part2) and on the product (Art. 12 part 3). It seems, however, that as regards the duty to put a mark "on the product," it is sufficient to mark its wrapping or an enclosed document (specification, operation manual, etc.). It should be added that the signs marking both the seat and the product of an economic subject may arise no doubts whatever as to his identity, and must differ clearly from signs used by other economic subjects.[7]

A supplement of the principle of legalism can be found in Art. 4 of the Law. Its provision declares the widely-known principle according to which everything that is not explicitly prohibited by law is thus permissible. This principle has great difficulties forcing its way into the practice. In relation to economic subjects with legal personality, a certain hindrance

[6] The Law on Economic Activity is part of administrative law. Hence Art. XVI of the executory provisions of the civil code does not apply to it. Thus the notion of a legal provision is limited to statutes and executory acts passed on statutory authorization.

[7] Art. 1 part 1 and Art. 2 part 1 of the Law of August 2, 1926, On Fighting Unjust Competition *(Journal of Laws,* No. 56 of 1930, item 467). See also : S. Janczewski, *Prawo handlowe, wekslowe i czekowe [Commercial Law, Law on Cheques and Bills of Exchange],* Warsaw 1947, pp. 373*ff*.

may result from the second sentence of Art. 36 of the civil code which states that an artificial person's legal capacity does not include the rights and duties not related to that person's competences. Leaving a detailed discussion of that provision's further operation in the light of Art. 4 of the Law on economic activity out of account, it should be mentioned here that many economic subjects, partnerships in particular, protect themselves from the possible consequences of Art. 36 of the civil code, defining a very broad range of their activities.

A further explication of the principle formulated in Art. 4 of the discussed Law has been included in Art. 5. Its provision concerns the question of employment only, and grants a full freedom in this respect to economic subjects. It seems that Art. 5 might also be interpreted as a derogatory clause. It repeals the former limitations as to the number of employees and the duty to use the service of employment agencies. Instead, the actual limitations of increased employment may arise from tax provisions. A voluntary use of various forms of labour exchange has been preserved.

II

1. From the point of view of the range of operation of the Law on economic activity and the kind of formalities necessary to undertake economic activity, its several different groups can be distinguished. Above all, activities that fall under the discussed Law should be distinguished from those to which the Law does not apply at all, the former being the rule and the latter constituting exceptions. In this case, the rule is presumed, and exceptions cannot be extended through interpretation.

The exceptions include the above-mentioned economic activity with a foreign capital share which has a separate statutory regulation. Such regulation also concerns the establishment and running of banks (Banking Law—Law of January 31, 1989, *Journal of Laws*, No. 4, item 000) and of insurance institutions (Law of September 20, 1984, On Property Insurance and Insurance of Persons, *Journal of Laws*, No. 45, item 242). The State's statutory monopoly includes the sphere of post and telecommunications and of radiophony and television of common use (Law of November 15, 1984, On Communication, *Journal of Laws*, No. 54, item 275, and No. 41 of 1988, item 324). A legal monopoly has also been provided for in the field of production and adaptation of films as well as their distribution (Law of July 16, 1987, On Cinematography, *Journal of Laws*, No. 22, item 127). Instead, activities of artistic institutions do not fall under any monopoly. The Law of September 28, 1984, On Artistic Institutions

(Journal of Laws, No. 60, item 304) does not prohibit the establishment of theatres, philharmonic societies, bands etc. according to the priciples of undertaking economic activity, defining only the organizational forms of artistic activity undertaken by the State and local self-governments.

The Law on Economic Activity does not concern the creation and running of schools, and various kinds of educational institutions. They fall under the Law of July 15, 1961, On the Development of the Educational System *(Journal of Laws,* No. 32, item 160 with subsequent changes).

The specification of kinds of activities to which the discussed Law does not apply is not comprehensive and cites a few examples only. As regards economic activity which does fall under the Law, the following three types can be distinguished :

— registered activity which is to be the rule ;
— non-registered activity ;
— licensed activity.

2. Registered activity is the basic type of economic activity. In case of doubts, this very nature of such activity should be presumed. The subject who undertakes such activity has a single and simple duty : to register. According to the Law, registration is to proceed before one agency and in one proceedings.[8] Thus legal persons of various types fulfil the duty to register through the very fact of acquiring legal personality. As a rule, that personality is acquired by means of being entered in a given register (e.g. of State enterprises, cooperatives, a commercial register). In this case, an excerpt from that register is a sufficient authorization and proof that the duty to register has been fulfilled. Any changes in a legal person's economic activity should be reported according to the procedure provided for by the regulations concerning the given type of register. In the case of State enterprises, cooperatives and partnerships with legal capacity, the registration office is the court.

Natural persons and organizational units with no legal personality undertaking economic activity have that fact put on a special record. Considering the large number of economic subjects and planning to make the record as accessible as possible, the legislator turned the task of keeping such records over to local agencies of State administration of the basic level of extraordinary competence. Thus in larger towns and in districts of big cities, the registration agency is the head of the competent

[8] An exception here is a general partnership which is subject to registration in the commercial register (Art. 5 and 6 of the Commercial Code), and also—as a subject with no legal personality—in the record of economic activity (Art. 8 of the Law on Economic Activity).

department of town or city office.[9] In small towns and communes, that role is usually played by the mayor or head of the commune who acts through a commissioned official (Art. 135 parts *2* and 3 of the Law on the System of People's Councils and Local Self-government).

In the case of recording proceedings not regulated by the Law on Economic Activity, the relevant provisions of the code of administrative procedure apply. A notification should be made in writing, telegraphed, teletyped or even oral for the record (Art. 63 § 1 of the code of administrative procedure). It should contain the following :

1) definition of the economic subjects, that is first name and name[10] [11] in the case of a natural person ; first names and names of all partners in the case of a non-commercial partnership ; and the firm meeting the provisions of the commercial code in the case of general partnership. The use of the name of a suppositious or fictitious person is not permissible ; definition of the seat of the economic subject (places of residence) ; first names and names of the appointed plenipotentiaries. Such a plenipotentiary may be e.g. an agent of the economic subject, commissioned by him to run a shop, workshop, etc. in his name ;

2) definition of the object of economic activity ; that definition should be explicit and truthful but not necessarily based on the established systematics ;

3) definition of the place where economic activity is to be pursued, that is e.g. definition of the address of workshop or a statement that the activity will take place "at the customer's" or another similar statement ;[11]

4) definition of the date of starting economic activity.

The economic subject fulfils his duty to report through the fact of making or sending the notification only. He is not obliged to wait for any step whatever on the part of the registration agency before he can actually undertake his activity ; in particular, a "confirmation of notification" is not required.

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[9] The appointment of the head of department of a town office who is to play the role of a recording agency should be made in the office's statute (Art. 135 part 1 and Art. 139 part 4 of the Law of July 20, 1983 On the System of People's Councils and Local Self-government, *Journal of Laws,* No. 26 of 1988, item 183).

[10] In some cases, the designation will probably have to include not only the first name nad name but also additional elements fully to identify the economic subject concerned (Art. 2 part 2 of the Law on Fighting Unjust Competition). There seem to be no obstacles to the use of such additional elements which are part of the economic subject's name also in other cases, e.g. "DIGITAL Music Shop, Piotr Kulesza" (from advertisements in *Życie Warszawy* of 1989, No. 27, p. 9).

[11] The building contractor is not obliged to report the separate building sites as the places where he pursues economic activity. Instead, he must meet all the requirements of building regulations.

The registration agency is obliged to enter the economic subject in the record in the form mentioned in the latter's notification, and then to deliver a certificate of that fact to the subject concerned. Delivery should take place within 14 days after notification. It seems that if an economic subject reports to the office in person, the certificate should be issued off-hand (Arts. 12 § 2, 35 § 2, and 217 § 3 of the Code of Administrative Procedure).

A refusal to enter the applicant in the record is possible in definite cases only (Art. 17 of the Law on Economic Activity), that is if the activity concerned does not fall under the provisions of the discussed Law (e.g. activity with a foreign capital share ; a film producer ; a kinder-garten) ; if it is a licensed activity ; or the activity does fall under the Law but not subject to recording. The latter case concerns activities mentioned in Art. 10 point 1 of the Law on Economic Activity, that is agricultural production of plants and animals, horticulture and fruit culture. On the other hand, recording of a side line of profitable activity seems to be possible (Art. 9) : part 1 of that provision states that recording of such kinds of activity is not required, as compared to Art. 10 which states that another kind of activity "is not liable to recording." Also the reasons of expediency speak for recording of a side line of profitable activity, and a natural person involved in such activity may be obviously interested in having his name entered in the record and thus win a greater confidence of his customers. One should bear it in mind that the civil code abolished the institution of a registered merchant. The entering in the record might today be a substitute of that merchant's status.

A refusal to enter an applicant in the record may also result from defects of form of the notification (Art. 17 point 14). What is meant here is an absence of one of that notification's required elements as provided by Art. 16 part 1. For instance, if a natural person plans to run an agency for purchase and sale and contact his customers by means of a P.O. Box only, and gives the number of that P.O.B. as the seat of the economic subject, his notification will be defective. The person concerned must give his own address for the record. A refusal to enter an applicant in the record because of defective form may only take place after that applicant has been summoned to remove the defects but failed to do it in a specified period. The period here is specified by the recording agency.

Finally, a refusal may result from the fact that a given kind of economic activity has been reserved exclusively for cooperatives of the disabled or of the blind (Art. 17 point 5 of the Law on Economic Activity). Such a monopoly may be established by the Council of Ministers by means

of an ordinance passed according to Art. 181a § 4 of the law on cooperative societies.[12]

The Law demands that the record of economic activity should correspond with the reality and be updated. Thus economic subjects are obliged to inform the recording agency of any changes in the data included in the record. The notification should be made within 14 days after the emergence of the circumstance concerned (e.g. the opening of a new shop, starting of a new production). This point is regulated by Art. 18 of the Law on Economic Activity.

Access to the record of economic activity if free (Art. 16 part 2 of the Law). An economic subject may adduce the recorded data. Third parties gathering data about a subject's legal status and actual situation (such as banks) may avail themselves of the record. By force of the relevant provisions, the principle of free access also concerns registers of legal persons, kept by courts.

An economic subject is stricken off the record on his own motion in which he notifies the agency that he has ceased to pursue economic activity (Art. 19 part 1 point 1). Also the transformation of an economic subject into a legal person should have that effect (e.g. if partners of a non-commercial partnership get registered as a limited liability company). There are just two situations in which an economic subject can be stricken off the record against, his will :

1) if a valid judicial decision interdicts a natural person from pursuing economic activity liable to recording (Art. 19 part 1 point 2). The question arises here whether this provision provides the grounds for striking a non-commercial partnership off the record if such a decision concerns one or some of the partners only. It seems that this question might be answered to the affirmative only if the sanction concerns all partners or all but one. In the latter case, the partnership would lose its *raison d'etre* : the partner whom the ban does not concern could immediately apply to be recorded as a new economic subject : a natural person. The very dissolution of partnership and the related settlements between partners constitute a separate problem in this case. But if the above-mentioned ban does not concern at least two of the partners, the partnership may continue to exist and be on the record after the partners whose economic activity was banned have resigned. They should then notice the termination of their participation. Owing to the provisions of Art. 869 § 2 of the Civil Code, it is possible to make no account of the time limits

[12]The provisions regulating this issue have been temporarily maintained in force which were passed on the grounds of Art. 7 part 2 of the repealed Law of January 31, 1985 On Small Industry (Art. 52 of the Law on Economic Activity).

of termination in so doing : thus the resigning partners would save the partnership ;

2) if the recording involves a breach of law (Art. 19 part 2). In this case, the legislator cites the provisions of the code of administrative procedure which concern reopening of proceedings. The conditions of reopening of the general administrative proceedings have been specified in Art. 145 § 1 of the Code of Administrative Procedure. It seems that only some of them may apply in practice to the recording of economic activity. For instance, a possible reason for striking a subject off the record might be his concealment of a valid decision forbidding him to pursue economic activity, or a faulty definition of the nature of partnership (omission of the information that the partnership has legal personality and as such cannot be recorded according to Art. 10 point 1 of the Law on Economic Activity). In both of the above cases, the prerequisite for reopening of proceedings would apply which has been mentioned in Art. 145 § 1 point 5.

The striking off the record always takes place as a result of an administrative decision which should fix the time limit of that step, that is the date on which the activity should be discontinued (Art. 19 part 3 of the discussed Law). After the due course of instances has been exhausted in administrative proceedings, the decision to strike a subject off the record may be appealed against before the Supreme Administrative Court (Art. 196 § 2 point 4 of the Code of Administrative Procedure).

It is today difficult to anticipate the actual range of application of provisions on recording economic activity of subjects with no legal personality. One should bear it in mind that a person who undertakes economic activity individually may also be a legal person. This possibility is opend up by a new institution of a one-man limited liability company (Art. 158 of the Commercial Code, in the reading introduced by the amendment of December 23, 1988, *Journal of Laws*, No. 41, item 326). The chief advantage of this solution is the fact that the investor's property has been divided into personal and economic, and that the latter's liability has been limited. Moreover, a person who undertakes economic activity should analyze the tax regulations. The income tax imposed on natural persons differs from that of legal persons. The duration and costs of proceedings aimed at creating a limited liability company will probably result in this new possibility being used mainly in the case of larger-scale ventures involving considerable means or particular risk.

3. Non-registered activity can be undertaken without any formalities that follow from the discussed Law. It includes the following two spheres :

— side-line profitable activities in the case of which recording is not required (Art. 9) ;

— agricultural production which is not subject to recording (Art. 10 point 1).

For an activity to be recognized as a profitable side line, the following conditions must be met jointly : 1) The subject who pursues that activity may be a natural person only. 2) He must pursue it personally, which however does not seem to exclude the possibility of employing hands (Art. 5 of the Law on Economic Activity). 3) Beside the activity concerned, the person who pursues it must have another permanent source of income (e.g. earned salary, old-age or disability pension, a farm). The Law does not demand that the income from the side-line profitable activity should necessarily be lower than that from the basic source. What matters here is that economic activity should not be such person's only source of income. 4) We now pass to the last condition for the activity to be recognized as a profitable side line : its object must be contained in the specification of activities included in Art. 9 part 1. It is quite an extensive specification which allows a broad interpretation and concerns both manufacture and services. Trade, instead, has been taken into account here to a very narrow extent only (Art. 9 part 2 point 3 of the Law on Economic Activity).

Non-registered activity cannot be undertaken in spheres liable to licensing. A subject involved in non-registered activities—though exempt of the duty to report—is nevertheless liable to other provisions and duties related to the pursuit of economic activity. Thus he must meet the requirements of detailed provisions mentioned in Art. 3 of the discussed Law, and mark both his seat and the place where he pursues the activity, and his products which he puts on the market (Art. 12).

4. The Law mentions eleven spheres where economic activity is licensed, which are however not defined. Therefore, their exact limits must be determined basing on the statutes that concern the separate fields. Hence the spheres in question will presently be mentioned together with the relevant statutes but without their executory acts. Economic activity is licensed in the following spheres :

1) excavation of minerals under the mining law (decree of May 6, 1953 : Mining Law, *Journal of Laws*, No. 4 of 1978, item 12 ; No. 35 of 1984, item 35 ; No. 33 of 1987, item 180 ; and No. 41 of 1988, item 324), and prospective exploration of such minerals (Law of November 16, 1960, On Geological Law, *Journal of Laws*, No. 52, item 303; No. 38 of 1974, item 230 ; and No. 41 of 1988, item 324) ;

2) processing of and trade in precious metals and stones (Law of June 29, 1962 : Law on Assay, *Journal of Laws*, No. 39, item 173) ;

3) manufacture of and trade in explosives, arms and munitions (Law of January 31, 1961 On Arms, Munitions and Explosives, *Journal of Laws*, No. 6, item 43 ; No. 6 of 1983, item 35 ; and No. 41 of 1988, item 324) ;

4) manufacture of pharmaceutical drugs, intoxicants, and psychotropic agents, as well as sanitary articles (Law of January 28, 1987, On Pharmaceutical Drugs, Sanitary Articles, and Pharmacies, *Journal of Laws*, No. 3, item 19 ; and No. 41 of 1988, item 324), and manufacture of poisons (Law of May 21, 1963, On Poisons, *Journal of Laws*, No. 22, item 116 ; and No. 6 of 1983, item 35) ;

5) production, distilling and dehydration of alcohol and isolation of alcohol from other products, as well as production of vodka (Law of April 22, 1959, On Fighting the Illicit Production of Alcohol, *Journal of Laws*, No. 27, item 169 ; and No. 41 of 1988, item 324) ;

6) manufacture of tobacco products (decree of June 24, 1953, On Tobacco Cultivation and Manufacture of Tobacco Products, *Journal of Laws*, No. 34, item 144 ; and No. 41 of 1988, item 324) ;

7) sea transport (the Maritime Code—for the uniform text, see *Journal of Laws*, No. 22 of 1986, item 112), and air transport and other air services (Law of May 31, 1962 : Air Law, *Journal of Laws*, No. 32, item 153 ; No. 52 of 1984, item 272 ; No. 33 of 1987, item 180 ; and No. 41 of 1988, item 324) ;

8) running of pharmacies (see point 4) ;

9) foreign trade in services and articles defined by the ordinance of the Minister for Economic Cooperation with Foreign Countries (ordinance of December 30, 1988, *Journal of Laws*, No. 44, item 355) ;

10) trade in cultural goods created before May 9, 1945 (Law of February 15, 1962, On Protection of Cultural Goods and on Museums, *Journal of Laws*, No. 10, item 48 ; and No. 38 of 1983, item 173) ;

11) services : protection of persons and property, private investigations, and service in the field of passport matters.

The licensing agency is a chief or central agency of State administration competent on account of the given object of economic activity. If an economic subject plans to undertake various forms of activity which fall take activity in non-licensed spheres. Licensed activity is not subject to each of them for separate licences. The licences are not dependent on one another legally. A refusal to grant licence has no direct influence on the existence of the economic subject concerned : he may continue or undertake activity in non-licensed spheres. Licensed activity is not subject to recording as economic activity (Art. 10 point 3 of the Law on Economic Activity).

Licence is granted by way of an administrative decision. The same legal form is also required for a refusal to grant licence ; a limitation of the range or object of a licence granted ; and a withdrawal of licence. In the light of Art. 196 § 2 point 4 of the Code of Administrative Procedure, it may be stated that, the course of administrative proceedings exhausted (Art. 127 § 3 of the Code of Administrative Procedure), all such decisions may be appealed against before the Supreme Administrative Court.

Obtainment of a licence is the condition *since qua non* of the undertaking of the licensed activity. Thus licensed activity may only start on executability of the decision granting the licence.

A question arises whether the decision granting a licence is discretionary or not. Art. 20 part 5 of the discussed Act seems to provide the clue as to the right answer. It specifies three prerequisites for a refusal to grant licence or a grant of a licence to the extent smaller than demanded by the subject concerned. It does not follow from the reading of both that provision and the Law as a whole that any other prerequisites might exist as well. This would speak for treating licence as a non-discretionary decision. On the other hand, however, the above-mentioned prerequisites seem to be rather extensible. They include :

— regard to the State's security ;
— regard to its defence readiness ;
— regard to a danger to an important interest of national economy.

The latter prerequisite deserves a broader discussion. Its range seems to be the most extensive. Speaking of an important interest, it is based on valuation. It may thus be concluded that using this prerequisite, the licensing agency will have to include in the motives for its decision an explanation : which interest is endangered and why it has been found important.[13] Moreover, since the Law mentions the interest of national economy, then the value concerned should pertain to the whole of economy. Therefore the prerequisite is not fulfilled if the danger concerns a partial or local interest only ("departmental interest", interest of inhabitants of a city, etc.). Therefore, the justification should demonstrate that the interest of the entire economy has been threatened. It should be added here that also the notion of interest itself is subject to various interpretations.[14]

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[13] See J. Zimmermann, *Motywy decyzji administracyjnej i jej uzasadnienie [The Motives and Justification of an Administrative Decision],* Warsaw 1981, pp. 116*ff*, 136*ff*.

[14] See M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym [The Notion of Social Interest in Administrative Law],* Warsaw 1986.

A licence should answer the contents of the motion (Art. 20 part 4 of the Law on Economic Activity *in principio).* There are, however, some exceptions to this rule. Namely, the licensing agency may :

— firstly, define the object of licence less broadly than has been moved for ;

— secondly, grant a licence for a definite period though the mover has not applied for it. (Licensing for unspecified time is to be a rule.) Such decisions may only be taken by the licensing agency on the grounds of prerequisites analogous as in the case of refusal to grant licence. Thus the above remarks also pertain to this case.

The Law also entitles the licensing agency to define in the licence the basic conditions of pursuing economic activity (Art. 20 part 4 *in fine). A* question arises what underlies this expression. To what extent may the licensing agency define the way of pursuing the licensed economic activity on the grounds of this provision ? The answer is by no means easy due to the lack of experience and decisions. The fact is unquestionable that such "basic conditions" may only be defined in the licence itself and cannot be added in a subsequent decision. This is particularly important for the economic subject concerned who invests considerable means in the activity he undertakes. He should therefore „learn" about the possible conditions before he actually undertakes the activity. The way of organization of economic activity may greatly depend on those conditions.

The conditions of economic activity to be defined in the licence have been termed "basic" in the Law of economic activity. That term might mean "essential" as well as "general." It may thus be concluded that the licensing agency is not entitled to specify the details, and should limit itself to the indispensable statements, and also provide an explanation included in the motives of the grant, informing why it finds the specified conditions to be basic.

The most radical approach to the discussed provision would be to find that it does not constitute independent grounds for the definition of conditions of the licensed activity. It may only be applied together with provisions of other statutes, whether those mentioned in Art. 3, or others related to the nature of the licensed activity.[15] This approach seems most to approximate the general principles of the Law mentioned in its Art. 1, those of freedom and legalism in particular. One cannot tell, however, whether the acceptance of this interpretation will at all be possible, the pressure of tradition and bureaucratic habits considered. Let us therefore try to provide a "negative" interpretation of the discussed Law, indicating

[15] Concerned here are the statutes mentioned above on pages 15 and 16.

the elements which the ‘‘basic conditions” should not define. Firstly, they should not limit the freedoms directly mentioned in the Law, that is the freedom to undertake any activities that are not prohibited by law (Art. 4) ; to employ hands (Art. 5) ; and economic subjects’ freedom to associate (Art. 6) ; secondly, the discussed conditions should not infringe provisions in force, e.g. the anti-monopoly provisions, through the establishment of “directions of supply and sales.”

A licence may only be withdrawn in cases provided by the Law, that is :

— if the economic subject concerned fails to meet the basic conditions specified in the licence (Art. 22 part 1). In that case, the licensing agency may also confine itself to limiting the range or object of economic activity concerned ;

— if a natural person involved in a licensed economic activity has been forbidden to pursue such an activity by a valid judicial decision ;

— if the grant of a licence inolved a breach of law ;

— if the economic subject has notified the agency about his discontinuance of the licensed activity.

The Law provides for the possibility to be granted a promise of a licence (Art. 23). This seems important for persons who only prepare to undertake economic activity but at the same time wish to attain certainty as to the conditions they will have to meet when pursuing it. The promise is binding for the licensing agency in the period specified by that agency. Its validity cannot expire after a period shorter than six months (Art. 23 part 3).

The Law does not mention a transfer of the rights resulting from a licence or promise of license to another subject. This may give rise to many doubts in practice. For example, can the founders of a partnership “resign” the promise of a licence they have obtained to the future partnership ? Does the transformation of the economic subject concerned (e.g. of a State enterprise into a partnership) necessarily involve in the expiration of a licence or promise of licence ? It may be assumed that the above doubts will be dismissed with the passing of the draft statute entitled : General provisions of administrative law. The draft contains a general solution of the problem of legal succession in the field of the rights and duties concerning administrative law.

Translated by Joanna Krahelska