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LEGAL PROTECTION OF CONTROLLED ENTITIES ON THE BASIS OF THE POLISH ACT ON FREEDOM OF BUSINESS ACTIVITY

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High hopes for creating a viable system of protection of controlled entities were placed on the "large amendment" of Chapter V of the Act on Freedom of Business Activities concerning the control of businesses. The crowning achievement of the expectations of entrepreneurs would be granting them independent legal protection in the form of opposition to the taking up and pursuit of control activities by all inspection bodies. The subject of the article is to present an extremely current problem of the so-called objection proceedings, in particular the discussion of the scope of the subject and object, the determination of the effects of its filing, as well as the possibility of appeal against the order to continue the inspection operations by submitting complaints. The intention of this article is the analysis and evaluation of the rules in objection proceedings, which, from the point of view of the protection of legitimate interests of entrepreneurs raise many controversies.

Key words: legal protection of controlled entities, objection proceedings, opposition to control activities, public economic law

Introduction

Controlling business activity consists in many activities, which constitute a complex process often based on evaluating criteria [3, p. 34; 11, p. 413 and n.; 14, p. 346; 15, p. 356]. Therefore, it is easy to make mistake during controlling activities which can violate the rights and interests of the controlled entities. Taking it into consideration, in the „great amendment” [23] of the act of 2 July 2004 on Freedom of Business Activity (hereafter: AFBA) [22] it was assumed to, above all, specify and organise the rules regarding control of the entrepreneur's business activity, including the ones concerning their rights. Next to the entrepreneur's right to indemnity for damage incurred by control actions violating the law regarding control of business activity the controlled were assigned a separate means of legal protection. It is the so-called objection to undertaking and carrying out actions by all controlling entities (art. 84c AFBA) [2, pp. 59-60; 17, pp. 273-275]. However, it is not an appeal as understood in the Code of Administrative Proceedings (hereafter: CAP) [21], although regulations of the administrative procedure are applied accordingly [34].

Objection proceedings

According to article 84c (1) AFBA the subject of an objection can be incorrect actions undertaken by controlling entities which can regard initiating a control without prior notice, violation of the ban to initiate and simultaneously carry out a few controls, carrying out controlling actions against the requirement of the presence of the controlled person or a person authorised by them, or exceeding the control time limit, etc. Enumerative indication of the catalogue of negligence does not fully cover the needs of the controlled entrepreneurs because many other actions cannot be a foundation for objection, for instance violating the rule of carrying out the control at the premises of the controlled or at the time and place of carrying out business activity and within working hours or during actual business activity. It is assumed that these negligence can be raised during a control or in reservations to the control protocol, however, indicating them does not have influence on the ongoing control actions, especially suspending it [9, p. 96]. Criticism is also due in regard to the regulation concerning inadmissible objections determined in art. 84d AFBA. There are

reservations mostly to the aim and relevance of introducing them [1, p. 48]. Moreover, it is not clear what procedure should be accepted for deciding the submitted quasi-objections, because there are no interpretation guidelines in the act itself as well as uniform direction of activities undertaken by entities [19, pp. 58-65]. From the point of view of real protection of entrepreneurs' rights it is not insignificant.

The subject authorised to submit an objection is solely the entrepreneur (art. 84c (2) AFBA). Due to lack of formulated requirement to submit the objection personally by the entrepreneur there are no contraindications for the activities to be undertaken by a person authorised to represent the entrepreneur during control, unless the extent of the proxy indicates clearly that they have been deprived of such authorisation [4, p. 16].

Submitting an objection is admissible only during the control process. Attempting to submit an objection before the control actions and after its completion should be deemed ineffective [27]. It should also be noted that the possibility to submit an objection is limited in time [16, p. 113]. According to art. 84c (3) AFBA an objection is submitted within 3 working days from the date the control was initiated by the controlling entity and in the case of exceeding the time limit of control - within 3 working days from the date this limit was exceeded. Regulation of the time for submitting an objection is under criticism. It is indicated that short time limits for submitting and objection might cause the entrepreneurs to submit objections, which are careless, without a well-considered legal foundation, aimed only at suspending control activities. Moreover, it should be noted that the accepted time limit allows to protect the interest of entrepreneurs only at the stage of initiating the control process. The postulate to change this regulation should be agreed with. It would be more beneficial to introduce a possibility to submit an objection within a time limit counted from the day the violation of existing standards occurred [18, p. 33].

The objection is submitted in writing to the entity initiating and carrying out the control. As a general rule, it is about keeping a written form understood as creating the text of the application manually, using a machine or any other technique on a piece of paper [8, p. 506]. For this reason the possibility to submit the objection

orally to the protocol or by phone should be excluded. In the case of using electronic means of communication it is important that the application includes protected electronic signature because then it is equivalent to preserving a written form regarding legal consequences [13, p. 8]. Also submitting an application via telefax should be deemed possible [26], whereas according to the dominant opinion the obligation of the entity is summoning the person submitting the application to personally sign or submit the original document [30; 33; 36; 38].

The act does not determine special requirements to the text of the objection except for justification for the application. Entrepreneur must justify submitting an objection, which means they have to give evidence and arguments for their position. On the one hand, they should give the factual justification through indicating facts and evidence which were the foundation for creating the objection and on the other hand - respective legal norms which were violated during the control process. Moreover, objection to an administrative procedure allows for applying the rule of limited formality. Therefore, the objection should include at least: description of a person it comes from, indication of their address, demands and the signature of the submitting person (art. 63 par. 2 CAP).

The consequence of submitting an objection is suspending control activities and suspending the running time of the control itself (art. 84c (5) to (6), AFBA) [24]. Suspending control activities means ceasing to further undertake all activities connected with obtaining evidence during control. However, taking into consideration the specificity of controlling actions it may happen that suspending control actions will not always be possible or desirable. Suspending control activities must be well thought out in order not to subject the entrepreneur or the controlling entity to damages or not to lose data which, as an effect of suspension, will not be possible to be obtained or recovered in the future [1, p. 55]. Currently the regulations are slightly unclear, especially regarding indication of the date of initiation and cessation of the indicated results. Using functional interpretation it should be accepted that suspending control activities and the course of control happens at the same time, i.e. at the moment of delivering to the controller the

notification about submitting an objection to the controlling entity [25]. Similar doubts appear with introducing different dates accepted for cessation of these results. Despite numerous interpretation doubts it should still be accepted that continuing control activities and the course of control should also happen at the same time, i.e. at the moment of successful deliverance of proper resolutions to the controlled entrepreneur.

Taking the above into consideration the controlling entity may, in the form of a decision, secure evidence connected with the subject and scope of the control, for the time the objection is considered. Securing concerns documents, information, product samples and other data carriers if they are or can be evidence in the course of the control (art. 84c (8) AFBA). It is definitely a perfect instrument preventing potential obstruction by a dishonest entrepreneur. This regulation introduces the rule of optionality of using this legal means. It is only authorisation of the controlling entity since here they have full discretion [1, p. 56]. This authorisation should be used with preserving the rationality postulate since securing evidence connected with the subject and scope of the control may, as a result, lead to complete paralysis of the entrepreneur's business activity.

According to art. 84c (9) AFBA the controlling entity processes the objection within 3 working days from the day of delivering the objection and issues a decision on:

- 1) withdrawing from control activities, thus accepting the validity of the objection or
- 2) continuing control activities, thus rendering the objection invalid.

Additionally, the legislator anticipated the case of so-called "silence" of the public administration entity (art. 84c (12) AFBA). In order to protect the entrepreneur's rights and interests in AFBA silence of the entity regarding the decision about the objection is equal to issuing a decision accepting the validity of the submitted objection.

In AFBA there are no regulations regarding the method of delivering a decision on the objection to the entrepreneur. This issue is included in the regulations regarding delivery described in the administrative procedure. According to a generally expressed rule a public administration entity traditionally delivers documents with return receipt requested through

a postal service, its own employees or other authorised people or entities. Taking into consideration the guidelines regarding speed and efficiency of control process it should be postulated that the decision is delivered as quickly as possible, i.e. without undue delay. A different position might influence unfavourably the whole control procedure.

It should also be underlined that according to a leading view it is accepted that making and issuing a decision does not include its delivery [31; 35]. Establishing short time for making a decision about an objection is aimed at disciplining controlling entities and assuring efficient process which does not mean that within 3 working days the decision regarding the submitted objection should also be delivered [35].

The decision about continuing control activities can be a subject of the entrepreneur's complain within 3 days from the reception date of the decision which will be decided by a higher level entity (art. 84c (10) AFBA). The time starts from the day after the day when the decision about the objection was delivered to the entrepreneur. There is no definition of the form in which the complaint should be submitted. Therefore, it can be assumed that it should be done in a written form meeting all the formal requirements of process documents. Unlike with the objection there is no requirement to give reasons for the complaint. Here proper administrative proceedings regulations regarding complaints will apply. Submitting a complaint suspends control activities until a decision is made or until the due date for the decision (art. 84c (5) to (13) AFBA), it also suspends the course of control until the day the final decision about complaint is delivered to the entrepreneur or until the due date for the decision (art. 84c (7) AFBA).

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

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

Taking into consideration the constitutional right to court which includes three fundamental rights: the right to litigation, right to trial and right to a court ruling [6; 12], it should be assumed that the final decision made by the appeal entity may then be a subject of a complaint to the voivodship administrative court which controls the activities of public administration. Limiting or excluding this rule on the basis of complaint procedure undermined the constitutional protection of values constituting the core of a democratic state of law and also the right to good administration [7, p. 192]. However, this issue raises numerous doubts causing discrepancies in Polish jurisdiction and doctrine [5; 28; 29; 32; 37].

Summary

Controlling business activity is a symptom of interference in the area of entrepreneurs' activity. The 'great amendment' of AFBA of 7 March 2009 gave a lot of hope for changing the hereto process of control procedure, especially regarding creation of a new mechanism for protecting entrepreneurs' interests. The regulation raises far reaching controversy not only from the point of view of an entrepreneur but also a controlling entity. Unfortunately, current regulations regarding objection proceedings do not allow the controlled subject to fully protect their rights and from the perspective of the control entity can actually decrease the efficiency of the control [10, p. 20]. At the moment it is worth to reopen the discourse on the current law in order to level the raised flaws and ambiguities.

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