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Several reflections on a regulated activity within the scope of municipal waste collection from real estate owners (Part I)

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The last amendment to the Act on Maintaining Cleanliness and Order in Municipalities (further referred to as the Act on Cleanliness)[1] caused a lot of discussion in the society of lawyers in the scope of several disputable issues that may appear on the grounds of the application of this law. One of them concerns threats of legal nature, which are possible to appear in a situation when permits for municipality waste collection are replaced by entries

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[1] Act of 13 September 1996 on keeping cleanliness and order in municipalities, i.e. Journal of Laws of 2012, item 391.

into the register of regulated activities[2]. Such a course of the amendment leads to a necessary consideration of environmental protection issues based on a legal instrument, i.e. an entry into the register of regulated activities. Our hope is that presentation of legal situation after the amendment to the Act on Cleanliness will enable to illustrate this topic.

1. Municipal waste collection permits and an entry into the register of regulated activities

It is rightly indicated in the objective literature that an entry into the register of regulated activities is a great facilitation for entrepreneurs. This is related to the possibility of conducting business activity in the field of municipal waste collection which does not depend on the necessity of explanatory procedures undertaken by public administrative bodies, while they estimate the capacity to conduct a planned activity. The registration procedure is based on an applicant's statements[3].

It is also indicated that an entry into the register of regulated activities does not act in the capacity of certification of requirements fulfilled for starting business activity. This is caused by the fact that if an applicant fulfils the requirements provided by law, it will not be examined before putting an appropriate entry[4].

Undoubtedly it should be noticed that the Polish legislator defines in an enumerative way the catalogue of premises, appearance of which results in the rejection of an entry to the register. It is determined in article 68 of the Act on the Freedom in Business Activity[5] (further referred to as the FBA Act), which defines among others:

– the issuance of a legally binding judgement which prohibits an entrepreneur from business activity conduct covered by the entry;

[2] D. Wałkowski, *10 problemów prawnych związanych z nowym systemem gospodarowania odpadami komunalnymi*, www.wardynski.com. pl/…/nowy_system_gospodarowania_odpadami.

[3] Ibidem.

[4] M. Strzelbicki, *Wpis do rejestru działalności regulowanej*, RPEiS of 2005.4.67.

[5] Act on the freedom in business activity of 2 June 2004, Journal of Laws 2010, No. 220, item 1447, further referred to as the FBA Act.

– the removal of an entrepreneur from the register of regulated activities because of the reasons enclosed in article 71 section 1, during a three-year period before the entry submission.

However, the reasons justifying the removal of an entrepreneur from the register of regulated activities according to article 71 of the Act of 1996 are as follows:

– submission of a statement by an entrepreneur, which is expressed in article 65 of the Act of 1996, inconsistently with the facts of a case;
– non-removal, by an entrepreneur, of infringement in a term defined by a body;
– ascertainment, by a body keeping the register of regulated activities, of flagrant infringement of demanded requirements for regulated activity conduct by an entrepreneur.

It is also noticed in science of law that there should be distinction between an entry to the register of regulated activities and a concession or a permit. The difference is expressed in the fact that in the entry there is no element of giving any right to an entrepreneur to undertake specified business activity. Article 67 of the FBA Act is supposed to confirm this statement. Regulations in this article enable, only in exceptional circumstances, an entrepreneur to undertake business activity without receiving an entry. In such a case, an organ performing an entry, which keeps the register, does not decide about the right to conduct business activity. Nevertheless, decision rejecting an entry in fact adjudicates on this right. This happens because of the fact that undertaking business activity by an entrepreneur without receiving an entry precludes him from doing it later in the period of the next three years[6].

Taking into consideration the legal situation after the amendment to the Act on Cleanliness, the essence of a permit must be concerned. This will enable the estimation if replacement of a municipal waste collection permit by an entry into the register of regulated activities was an adequate step taken by the legislator, or not.

The essence of an administrative permit can be expressed in a form of an administrative act which contains rights in a field of administrative law or agreement to undertakings or defined actions admitted by the norms of administrative law. Acquisition of right or obtaining of consent, which

[6] Ibidem.

is established in a permit, usually progresses through defined by the law interdiction of certain behaviour or interdiction of taking certain actions[7].

Therefore, seeing such essence of permit, being expressed by granting certain right to a certain subject, its difference in relation to essence and effects of an entry into the register of regulated activities, cannot leave any doubts.

What should be noticed is that in accordance with opinions in science of law, permits are divided into two categories. The first one is a group of ordinary permits which mostly have preventive character. By way of these permits there is expressed consent to conduct certain activities, provided that requirements specified in statutes or other commonly binding legal acts will be fulfilled. On the other hand, the second category are extraordinary permits, also named as dispensation, which have power to repeal general interdiction. They are granted in particularly justified cases. It takes place if departure from interdiction, that comes from general norm, will not cause any negative consequences for protected public interest, which was the basis of the interdiction[8].

In the science of law it is indicated that those individual administrative acts have hypothetical character. They concern activity intended by the subject. At the same time in those acts there are defined future rights and obligations. Accurate definition of those rights and obligations is not an easy task and quite often it results in their too restrictive content. It was also noticed that obligation of permit receiving is so far the only one method of achieving intended quantitative limit of specified kind of behaviour[9].

This method allows to direct behaviour of addressees of legal norms in the way so that they can undertake the most desirable actions from social-wide interest point of view on their own. The function of directing is accomplished by resolutions in permits, e.g. terms of binding, provisions of changes, withdrawal or particular obligations of permit receiving subject. The addressee of a permit seems to be therefore forced to such behaviour which e.g. realizes obligations imposed on him, however, will not cause his

[7] A. Błaś, Zezwolenia, [in:] red. J. Boć, *Prawo administracyjne*, Kolonia Limited 2007, p. 332.

[8] D.R. Kijowski, *Pozwolenia w administracji publicznej*, Białystok 2000, p. 78, also compare M.A. Waligórski, *Działalność gospodarcza w ujęciu prawa administracyjnego*, Poznań 2006, p. 191.

[9] D.R. Kijowski, *Pozwolenia w administracji publicznej*, Białystok 2000, p. 222 and 228.

activity to be considered as fulfilling premises to expire, withdraw or limit the permit. In case of decision rejecting granting of permit, the subject is forced to cease his undertakings and to provide changes necessary for maintaining the permit[10].

On the other hand, provisions regulating the procedure of permits issuance are constructed in such a way that they allow to grant, by an appropriate body, trustworthy and precise information about the undertaking that the permit concerns. The right to a third party participation in this procedure, whose interests are not concerned by this particular permit, results in obtaining by the body information that was not mentioned by an applicant, purposely or not, or was intentionally concealed. Obtained data allow public administration to determine, analyse and estimate the most probable effects of undertakings and, on the basis of that, to give a decision causing that permit holders will behave according to pursued policy and in the way adjusted to current social, economic and political circumstances[11].

The superiority of 'using' permits by public administration, in comparison to the method based on creating interdictions and injunctions with administrative sanction, is expressed as bodies may react before damage is caused, and because of this, permits should be applied in each branch of activity where the risk of irreversible or difficult to reverse damage in goods protected by law exists. Such a good demanding the application of this method is undoubtedly the environment. Its damage is mostly difficult to remove, sometimes it is even impossible[12].

Attention to that issue should be also paid from the standpoints of science of law, whose author differentiates permits for taking advantage from environment in relation to permits for defined business activity. He finds justification for such differentiation of these two constructions in assertion that each of these administrative acts has different character.

[10] E.K. Czech, *Rola pozwoleń na wprowadzanie gazów lub pyłów do powietrza w działaniach administracji publicznej*, [in:] *Uwarunkowania ochrony środowiska*, red. E.K. Czech, p. 73.

[11] Compare Hans Peter Ipsen: Konstruktionsfragen der Getreideeinfuhr – Lenkung; [in:] Gedächtnisschrift für Walter Jellinek, München 1955, p. 604; Kurt Egon Turegg – Erwin Kraus: Lehrbuch des Verwaltungsrechts, Wyd. 4, Berlin 1962, p. 134; Peter Badurci: Wirtschatsverwaltungsrecht, [in:] Besonderesverwaltungsrecht, (red. Igo von Munch), Bad Hamburg, Berlin, Zürich 1969, p. 270: ibidem, p.220.

[12] E.K. Czech, *Rola pozwoleń na wprowadzanie gazów lub pyłów do powietrza*…, op. cit., p. 74 –75.

In his opinion permits for business activity conduct limit this activity. However, permits for usage of environment confirm fulfilment of the requirements for defined activity conduct, which are provided by law. In this permit such conditions are established and specified, within bounds of an act. The obligation of receiving the permit needs to be treated as one of entrepreneur's additional obligations indicated in article 18 of the FBA Act. This is the condition defined by provisions of law, which concerns the way of business activity, related to environmental protection[13].

In the legal status binding in the past, by virtue of article 7 of the act mentioned above, the legislator imposed on entrepreneurs interested in municipal waste collection, an obligation to obtain a permit for that collection.

In accordance with the standpoint of the Voivodeship Administrative Court in Poznan, expressed in the judgement of 25 October 2011[14] an entrepreneur, applying for a permit for municipal waste collection from real estate owners, has an obligation to fulfil not only the requirements included in the Act on Cleanliness, but also the requirements included in the statute of municipal council issued on the basis of article 7 section 3a of the Act on Cleanliness.

Although the judgement mentioned above concerns the legal status which is not presently binding, in combination with previously mentioned opinions of science of law, it allows to present the significance of permits for municipal waste collection. This significance should be estimated mainly from a particular point of view such as possibility to verify, by public administration, an entrepreneur with regard to his right to conduct activity in a scope of municipal waste collection. In accordance with article 7 section 1 point 1 of the Act on Cleanliness, which is not binding any more, the entrepreneur, whose intention was to conduct activity in the scope of municipal waste collection from real estate owners, was obliged to obtain the permit[15].

[13] M. Górski, *Komentarz do art. 180 ustawy Prawo ochrony środowiska*, [in:] *Prawo ochrony środowiska. Komentarz*, M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, S. Urban, J. Jendrośka, Warszawa 2011, p. 715.

[14] II SA/Po 457/11, the text comes from Central Administrative Courts' Judgements Base available at http://orzeczenia.nsa.gov.pl/cbo/query

[15] Amendment: Journal of Laws of 2010, No 47, item278.

Therefore it must be remarked that the legal status change for replacing permits by entries into the register of regulated activities may and should raise doubts. It is justly indicated by society of lawyers that in the scope of activity consisting in municipal waste collection, permits are by all means justified. Importance of their existence is supported by binding standards and guaranties of proper duty performing provided by legal norms. Moreover, it is rightly noticed that this activity is not part-time or odd activity, while obligation to obtain permit would be treated as unreasonable formalism. Liberalisation of requirements in the field of municipal waste collection activity may lead to a situation when there are more and more entrepreneurs who do not keep the appropriate level of their services. Regarding putting more pressure on correctness of waste management, and also fulfilment of requirements for environmental protection and aspiration for high quality of provided services, it needs to be indicated that replacement of permits by entries into the register of regulated activities makes achievement of these aims more difficult. It is also marked that the new instrument may not ensure that entrepreneurs will fulfil their duties[16].

2. Rights and obligations connected with an entry into the register

In accordance with article 9b section 1 of the Act on Cleanliness, the activity in the field of municipal waste collection from real estate owners is established as a regulated activity by provisions of the FBA Act. The legal definition is contained in article 5 section 5 of this act. It is formulated as business activity, conduct of which demands fulfilling the requirements specified by provisions of law. In addition, it must be indicated that an important opinion was expressed in the science of law. Its author claims that an entry into the register of regulated activities may exist in the legal system without existence of a definition of regulated activity that is contained in the FBA Act[17].

[16] D.Wałkowski, *10 problemów prawnych związanych z nowym systemem gospodarowania*…, op. Cit.

[17] M. Strzelbicki, *Wpis do rejestru działalności*…, op. cit., RPEiS of 2005.4.67.

The register of regulated activities dealing with the collection of municipal waste from private property owners is maintained by the head of gmina (wojt), mayor, or city president, this being relevant to the location where municipal waste collection from property owners takes place. The locality of the relevant authority performing the entry is not dictated by the location of the business but the actual area where the services are being provided.

The register is maintained as a data base on a data storage device which can be a part of other data bases dealing with environmental protection, including waste management.

The register contains: company name, main location and address, or first and last name of the business owner, tax identification number (NIP), company identification number (REGON) if a company possesses such a number, specification of the type of municipal waste being removed, and a register number (the register number is the sequential number under which the business has been entered into the register)[18].

It is obvious that in order to start providing services of municipal waste collection there will be an obligation to become entered into the register, but the legal status of businesses which already possess permits is not completely clear. If such businesses want to continue to provide these types of services they should obtain such entry during this year. The legislators have made an allowance that a business which wants to become entered into the register of regulated activities and already possesses permits for providing such services will be exempt from paying the stamp duty for the entry[19]. This does not mean an automatic exemption from the responsibility of paying all other fees (ex. it seems justified to charge the business for changes made to the entry already in the register).

In accordance with past regulations, having a permit directly enabled the performance of services specified, that is entering into agreements with property owners and removing their waste. However, becoming entered into the register only results in the same way when the waste collection services from property owners are provided on properties which are not occupied by residents, unless the council of the municipality takes advantage of the right resulting from article 6c section 2 of the Act on Cleanliness to abandon

[18] Act of 13 September 1996 on maintaining cleanliness and order in municipalities, Article 9b section 4.

[19] Act of1 July 2011 about changing of the act on maintaining cleanliness and order in municipalities and some other acts, Journal of Laws of 2011, No152, item 897, article 14.

this system and enact a new system reorganizing waste collection in the entire municipality[20]. Within this basic system the business gains the right to provide services of waste collection as a result of an agreement entered into with the the head of gmina (wojt), after having won a public tender procedure for waste collection.

This is a more favourable situation for the business since the administrative proceedings, during which it was verified whether the business fulfilled the necessary legal requirements, has been replaced with a technical procedure of entering into the register (no administrative decision is issued). Prior to entering the business into the register the authority cannot verify whether the business fulfils requirements specified. Filing of a completed application results in an entry into the register. The entry is made on the basis of the declarations made by the business. The requirements made of the business are defined in a general way by the act (article 9d. 1). In accordance with its text the entity which removes municipal waste from property owners must fulfil the following conditions:

1) possession of equipment enabling municipal waste collection from property owners and ensuring that it is kept in proper technical condition;
2) maintaining of proper sanitary conditions of vehicles and devices used for municipal waste collection from property owners;
3) fulfilling of technical requirements regarding the equipment of the vehicles used for municipal waste collection from property owners;
4) ensuring the correct location and equipage of a facility for storage and transport.

Detailed scope of the requirements will be included in a regulation of the minister responsible for environmental matters issued in agreement with the minister responsible for economic matters. Referring to the legal state in effect on the day of 20 June 2012 a relevant implementing regulation does not exist. The draft of the regulation establishes, for example, that a business fulfils the requirement of having a correctly located storage and transport facility (with proper legal title to the property). It is also necessary that the storage and transport facility be provided with suitable safeguards, space for vehicle parking (with protections preventing any pollutants from permeating the ground, secured space for storage of selected municipal

[20] Act of13 September 1996 on maintaining cleanliness and order in municipalities, article 6c section 2.

wastes). The storage and transport facility must have space for parking the vehicles, social facilities for employees adequate to the number of workers employed, space for storage of wastes selected from municipal waste, a certified drive on truck scale – in the event when the facility stores wastes. The draft of the regulation includes a wide range of requirements.

Entities which provide services of municipal waste collection as a result of a decision granted before 1 January 2012 are given time to conform to the requirements described in the regulation until 1 January of 2013. Organizational units of the municipality which provide services of municipal waste collection from property owners also, in accordance with article 15 of the above mentioned act, are obligated to conform to the requirements resulting from this ordinance within the same period of time, that is, within 12 months of the act coming into force. A business which after 1 January 2012 wants to start to provide services of municipal waste pick up from property owners is obligated to become entered into the register.

Entities which after 1 January 2012, but before the act coming into force, were entered into the register or applied to become entered into the register of regulated activities regarding providing services of municipal waste collection from property owners are also given the ability to conform to the requirements resulting from the ordinance until 1 January of 2013.

Currently a business applying to become entered into the register also files a declaration of conformance to the overall statutory conditions related to providing services. These conditions will become more precise after the act comes into force. After the end of the deadline determined in the decree entities providing services of municipal waste collection from private property owners are obligated to conform to the requirements of the decree, however, it is not necessary to change the declaration of conformance to the conditions necessary for providing services of municipal waste collection from private property owners if it has been filed before the day of the decree coming into force.

The registers should become implemented in municipalities starting from 1 January 2012.

3. Conclusions

The problems presented above constitute only a fragment of the points disputed appearing in connection to the execution of responsibilities placed on municipalities by the Act on Cleanliness. This point is interesting in the respect that during the stage of initial implementation of the Act on Cleanliness opinions have been heard in many municipalities that it is the construction of the register and the rules of its maintenance which are the least complicated. It is an essential issue whether the simplicity of legal solutions and easy usage of them should be the only one determinant to accept the solutions in order to protect the environment. The answer for this matter should be negative. The basic criterion of accepting such legal solutions should be their effectiveness in environmental elements protection.

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