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

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The new statute dealing with maintaining cleanliness and order in municipalities (Journal of Laws 2012.391 j.t. later referred to as u.c.p.g.)¹ has not only significantly changed the way the entire system of municipal waste management within a municipality functions, but has also brought about changes in the legal status of the businesses providing services of municipal

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¹ Act from 13 September 1996 on maintaining cleanliness and order within municipalities, Dz.U.2012.391 j.t.

waste pick up for owners of properties. The past formula under which the business received a permit for providing services has been replaced with the obligation to become entered into the register of regulated activities. As a result of municipalities having to maintain registers of regulated activities and obligations which have been imposed on businesses numerous questions and doubts have arisen.

1. Range of the information included in the register

Keeping a register of regulated activities is based on the regulations of the u.c.p.g, as well as on The Act on Freedom of Conducting Business Activity², since it is a regulated activity³. The application filed by the business should include:

- 1) company name, designation and address of headquarters, or first and last name and address of the proprietor;
- 2) tax identification number (NIP);
- 3) company identification number REGON, if the business possesses such a number;
- 4) specification of the type of municipal waste to be removed.

Although most of the elements of the application do not cause any reservations, from the standpoint of the municipalities, the adequate specification of the type of municipal waste being removed may prove to be problematic.

Regulated activity – in the understanding of art. 9b par. 1 of the u.c.p.g – is an activity involving the pickup of all municipal waste from all private property owners. Some doubts are created by the definition of what is municipal waste. According to the text of art. 3 par. 1 pt. 4 of the Act on Waste, municipal waste is understood to be waste created by households, excluding vehicles no longer being used, as well as waste not containing dangerous waste from other waste generating entities, which, because of their character

² Act from 2 July 2004 on Freedom of Conducting Business Activity, Dz.U. 2010.220.1447 j.t.

³ Art. 9b par. 1 of the u.c.p.g. clearly states that „*activity of municipal waste removal from private property owners is a regulated activity as understood by the act from 2 July of 2004 on freedom of conducting business activity*”.

or content, are similar to waste generated by households. Additionally, the Directive of the Minister for the Environment from 27 September of 2001 on cataloguing waste indicates that municipal waste is placed in group 20.⁴ The statutory definition stresses the source of the waste while the directive lists, in an exhaustive manner, the types of municipal wastes designated with code 20. Some municipalities enter into the register of regulated activities only the wastes included in group 20. This would seem to unduly limit the range of the municipal wastes which the service provider may pick up from private property owners. Furthermore, the directive quoted above in § 4 par 6 classifies municipal packaging waste as municipal waste, if it is selectively collected or if it occurs as mixed packaging waste, into sub-group 15 01 and not in the 20 01 sub-group.⁵

A similar supposition is made by Prof. M. Górski. This author stresses that the activity should concern “waste having the character of municipal waste” and this means that in order to interpret the concept “municipal waste” included in the regulation, the definition of “municipal waste”⁶ should be used instead of the so called waste code, especially when it limits municipal waste to waste belonging to group 20.⁷ The conclusion is that the selectively collected packaging waste (classified into the 1501 group) in the understanding of the definition having a character of municipal waste, should be treated as municipal waste and the register entry should also include this group of wastes.⁸ Although this way of reasoning is coherent, logical and convincing it does not solve all of the problems.

First of all, it could be charged that the legislators within the text of the legal act do not use the expression “waste having the character of municipal waste”, and art. 9b par. 1 of the u.c.p.g outright determines that it concerns activity of “municipal waste pick up from private property owners”, which

⁴ Directive of the Minister for the Environment from 27 September 2001 on cataloguing wastes, Journal of Laws U.2001.112.1206.

⁵ Directive of the Minister for the Environment from 27 September 2001 on cataloguing wastes.

⁶ Act from 27 April 2001 on wastes – Journal of Laws from 2010 no. 185, pos. 1243, later amended, art. 3 par. 3 pt 4.

⁷ Directive of the Minister for the Environment from 27 September 2001 on cataloguing wastes.

⁸ M. Górski, *Wpis do rejestru działalności regulowanej (Entry into the register of regulated activities)*, „Przegląd Komunalny”, Number 2/2012 (245), <http://e-czytelnia.abrys.pl/index.php?mod=tekst&cid=14222>, (online 20.06.2012).

in turn, on some level, can limit the catalogue of wastes which are being removed. However, on the other hand, the cited definition of municipal waste is very broad and doubtlessly it concerns the source of the waste, meaning the household. The classification of wastes included in the ordinance, here plays a role of a certain auxiliary indicator.

Another unresolved problem is whether construction waste in the form of rubble from a minor renovation which has been carried out privately by a resident should be recognized as municipal waste and therefore should be entered into the register kept by the municipality. Construction wastes are classified into group 17 (which includes wastes from construction sites, renovations and demolition of buildings and road infrastructure, and which may contain earth and soil from contaminated areas).⁹ Taking into account the source of these types of wastes they also could be taken to be municipal waste. A problem of correctly entering them into the register emerges. Construction wastes can be entered into the register under code 17, while at the same time acknowledging that despite the fact that they are classified in the catalogue of wastes as a separate group, the deciding factor here is their source. Otherwise, it should be decided that construction wastes will be coded under 20 01 99 which includes wastes other than those which have been enumerated as part of group 20 (assuming that the rubble has been selectively collected).

Why does this problem concern mainly construction wastes and not others which also do not fit into the municipal waste group (are not classified with the code 20) and at the same time can be a product of the household? Well it should be underlined that there is an obligation to specify construction wastes in reports of entities removing municipal wastes from private property owners, in quarterly reports made to the municipality by businesses, and in reports which the municipality forwards to the marshal of the Voivodeship and to the Inspectorate of Environmental Protection (WIOŚ), in which it must account for, according to art. 3b par. 1 pt. 2 of the u.c.p.g, the level of recycling, preparation for reuse and recovery, using methods which are not dangerous, of construction and demolition wastes at a level of at least 70% of their weight, effective until 31 December of 2020.

The solution to the presented problem is not simple. It is possible to see opinions that selectively collected waste rubble after a renovation carried

⁹ Directive of the Minister for the Environment from 27 September 2001 on cataloguing wastes, Journal of Laws 2001.112.1206.

out by an owner of a property should be classified as part of group 20 as municipal waste coded under 20 01 99 (as other unspecified waste collected selectively). Therefore, only wastes belonging to groups 20 and 15 should be entered into the register of regulated activities. Hazardous wastes being the product of the household are coded with an asterisk. According to this idea, in the register and in the reports prepared by the municipality and businesses, no groups, other than 20 and 15, are being mentioned. The symbol “ex” also is not added to the register or in reports or decisions handed down by administrative organs.¹⁰ However, this interpretation does not solve the problem of designating rubble as municipal waste in the reports made by businesses (and later resubmitted by the municipality to the marshal and to WIOŚ).

The question posed is not clearly answered by the Commission Decision from 18 November of 2011 establishing the rules and methods of calculations for verification of compliance with the aims defined in art. 11 par. 2 of the Directive of the Parliament and Council of the European Union 2008/98/WE¹¹. On the basis of the above mentioned decision when reporting the amounts of materials being recovered from construction and demolition wastes it is necessary only to list specific types of wastes. The Decision itself, in reality, speaks separately about municipal wastes and about construction and demolition wastes, while at the same time introducing the obligation to report methods of utilizing some municipal wastes. Assuming that construction wastes could be picked up, on the basis of the entry into the register as other unspecified fractions of wastes, the municipality would not possess and could not further forward the applicable data. Of course, the Commission Decision itself is not directed to businesses and not even to municipalities and, as has been pointed out above, it differentiates between constructional and municipal wastes, but does not change the fact that the doubts expressed earlier are still present.

According to the Directive of the Minister for the Environment from 15 May 2012 on the format of reports for the pickup of municipal waste and

¹⁰ J. Jerzy, *Selektywnie zebrany gruz po wykonanym remoncie należy sklasyfikować jako odpad komunalny*. (Rubble selectively collected after a renovation should be classified as municipal waste) <http://www.srodowisko.abc.com.pl/czytaj/-/artykul/selektywnie-zebrany-gruz-po-wykonanym-remontcie-nalez-y-sklasyfikowac-jako-odpad-komunalny>, (online 20.06.2012 r.).

¹¹ Official Journal of the European Union from 25.11.2011, 2011/753/UE.

liquid impurities as well as realization of tasks related to municipal waste management, a business removing municipal wastes from private property owners is obligated to disclose in their report the information about the mass of individual types of municipal wastes picked up and the way they have been disposed of or utilized. In point IV the business indicates the level of recycling, preparation for reuse and recovery using non-hazardous methods of construction and demolition wastes picked up with municipal waste within the municipality (Wastes with the following coding should be taken into account: 17 01 01, 17 01 02, 17 01 03, 17 01 07, 17 02 01, 17 02 02, 17 02 03, 17 03 02, 17 04 01, 17 04 02, 17 04 03, 17 04 99 Other, non-hazardous construction and demolition wastes, in accordance to the Directive of the Minister for the Environment from 27 September 2001 on cataloguing wastes). There remains a question how the business is to indicate appropriate coefficients if the construction and demolition wastes are not isolated as municipal waste? It should also be considered how the business will be able to pick up construction and demolition wastes from private property owners if an appropriate entry is not made in the register of regulated activities? Within legal provisions there does not exist a separate permit (aside from the register entry) on the basis of which the business could pick up from private property owners construction wastes produced by the individual property owner. Hence, it seems that unequivocal limiting of municipal wastes only to those classified under codes 20 and 15 is an oversimplification.

The decision as to what types of wastes should be entered into the register of regulated activities remains in the hands of the authority. Regarding municipal waste pick up an entry into the register, which replaces the permit, gives a business the right to pick up municipal waste. It should be understood however that it does not automatically release it from the responsibility of obtaining additional permits if such are foreseen in legal regulations. It should be stressed that becoming entered into the register under the u.c.p.g. and the Act from 2 July 2004 on Freedom of Conducting Business Activity¹² (later referred to as u.s.d.g) does not grant permission to manage waste required by the Act on Waste (currently in the form of a permit or entry into the register kept under this Act by the staroste)

¹² Act from 2 July 2004 on Freedom of Conducting Business Activity, Journal of Laws 2010.220.1447 j.t

just like this permission was not granted by the past permit. In order to carry out this type of activity the business must also fulfill this condition.¹³

2. Entry into the register and removal from the register

The matter of entering the business into the register and eventual removal from the register also remains problematic. Entry into the register must be made before the business starts performing services of municipal waste pick up from private property owners. At the same time only a business selected by an authority through a legal tender process can perform such services. Therefore, the following thesis can be advanced: an entry into the register can only be made after the conclusion of legal tender procedure and before the business signs an agreement. A business entering legal tender does not have to be entered into the register since it is not certain whether it will win the procedure and therefore whether it will have to provide such services. Counter arguments often raised by municipalities are based on the position that choosing a business not entered into the register is not so much not in accordance with the law but that it creates the risk of choosing a business through the tender procedure which will not fulfill the requirements allowing its entry into the register. This in turn may lead to the invalidation of the tender procedure (very often a time consuming process). It seems, however, that it is dominated by thinking originating from the previous legal state. It is being forgotten that the possibility to verify whether a business fulfils the conditions to provide services before it is entered into the register does not exist. Hence, it must not be assumed that even a business entering the tender procedure and already entered in the register will fulfill all legal requirements.

In creation of the entries the regulations of the u.s.d.g are applied. In accordance to these regulations if reasons for denial foreseen by art. 68 do not exist, then the organ keeping the register must make the entry and issue an official certificate of entry into the register (art. 65 par. 5 of u.s.p.g.). Creating an entry does not require an administrative decision and inclusion of business' data in the register is equivalent to becoming entered (art. 9c

¹³ M. Górski, *op. cit.*

par. 6 of u.c.p.g). The Vogt, mayor or president of a city in making an entry gives the business a register number (art. 9c par. 7) and must ensure the protection of the data while it is being processed (art. 9c par. 8).

According to art. 67 par. 1 of the u.s.d.g. the body maintaining the register of regulated activities has 7 days to make the entry. This period is counted from the day the application for entry, along with declaration of conformance to the required conditions, is submitted to this body. The business is not permitted to perform services until it has been entered into the register. However, in accordance with art. 67 par. 2 of this act, if the body keeping the register does not make the entry within the period of 7 days and 14 days have passed since the submission of the application, the business can begin performing services. The only situation in which this is not true is when the body, before the end of the 7 day period, has requested that the business make corrections to the application. In this situation the 14 day period starts from the submission of the corrected application.

The u.c.p.g. assumes that the entry is completed at the moment the data has been input into the register and which results in assigning the business a register number. In a situation when the body has not made the entry in the allotted period of time the business has the right to start providing services on its own. This right is largely only theoretical. The business which has not been entered into the register does not possess a register number and, in an event of any sort of inspection, will have to prove that it has fulfilled the statutory requirements but the body has not entered the business into the register. Therefore an outcome in which, when the body does not complete an entry, the business requests in writing that it is done and in an event of a lack of response from the body makes a complaint of the body's inactivity to an administrative court, is possible.

As has been said before, making an entry does not require an administrative decision. An administrative decision is however required for a denial to make an entry into the register. According to art. 68 of the u.s.d.g a denial to make an entry into the register can only occur in two events:

- 1) when a legally valid ruling has been made forbidding the business to perform the activities covered by the entry; an example of this is when the court in a ruling uses a penal measure of prohibiting conducting of business activity, defined in art. 41 § 2 k.k. It should be underlined that having been sentenced for committing a crime is not basis for denial of an entry, only being prohibited from conducting business

activity covered by the entry (in essence such as is to be covered by the entry) is the basis for denial,

- 2) when a business has been removed from the register for reasons defined in art. 71 par. 1 and a period of 3 years has not passed since the said removal.

The legislator providing a limited catalogue of reasons for which a body can refuse to make an entry, excludes a decision to deny for any other reason. If the business submits an incomplete application it is necessary to request of it to complete it. Also, in an event when a business demands to enter into the register waste which is not municipal waste it is not possible make a denial. In this case the entry must be made in the part which is in accordance to legal regulations and concerning the rest the application it should be left without consideration.

Removal from the register is completed in the same manner as entry into the register, as a material-technical action. It should, however, be highlighted that in some cases the initiation of a material-technical action should be preceded by an issuing of an administrative decision. Reasons for removal from the register are defined by Art. 9i and 9j of the u.c.p.g. The first case deals with situations in which a business discontinues conducting business activities. In an event of discontinuing performing services of municipal waste pick up the business picking up municipal waste from private property owners is obligated to submit to relevant authority, Vogt, mayor or city president, within a period of 14 days from the day of discontinuing performing activities, a request to remove it from the register.

Art. 9j is penal in character and enumerates events under which removal occurs; it uses the u.c.p.g. and art. 71 of the u.s.d.g.

According to art. 9j par. 2, removal from the register also occurs in cases when:

- 1) a legally binding ruling has been issued forbidding the business from performing business activity covered by the entry;
- 2) a permanent discontinuation of performing business activity by the business within the municipality maintaining the entry has been determined;
- 3) it has been determined that the business does not fulfill the requirements defined for an entity picking up municipal waste from private property owners;
- 4) it has been determined that the business for a second time delivers mixed municipal wastes, green wastes or remnants from sorting

- of municipal wastes destined for storage to installations other than regional installations processing municipal waste;
- 5) a business which does not operate based upon an agreement described in art. 6f par. 1 and does not perform services of municipal waste pick up under a direct agreement contract described by art. 6f par. 2, for another year in a row has not achieved recycling, preparation for reuse and recovery levels using other methods, and limiting the mass of biodegrading municipal waste delivered for storage, defined in regulations established by art. 3b par. 2 and art. 3c of the act.

During the procedure of removal from the register art. 71 par. 1 of the u.s.d.g. should also be considered. According to its text: the body maintaining the register of regulated activities issues a decision forbidding the business form performing business activities covered by the entry when:

- 1) the business submitted a declaration described in art. 65 which is inconsistent with actual facts;
- 2) the business did not correct violations of conditions required for performance of a regulated activity within a period of time designated by the body;
- 3) the body determines blatant violation by the business of the conditions required for the performance of a regulated activity.

The decision to forbid performing of business activity is effective immediately after issue. According to the opinion stated by Prof. Górski during analysis of reasons for removing a business from the register defined in art. 9j par. 2, this removal should run along a course defined by art. 71 of u.s.d.g. This means that the Vogt, on the basis of one of the premises, first should issue a decision forbidding performing business activity, effective immediately and after the decision gains the status of a binding decision remove the entry from the register.¹⁴ This course of reasoning results from the fact that the author treats the text of art. 9j par. 2 as a certain way of refining of art. 71 of the u.s.d.g., which results in that fulfilling any premise for removal from art. 9j par. 2 fits within the scope of art. 71.¹⁵ Further argument which could be brought up here is that in art. 9j of the u.c.p.g. it is stated that removal occurs after fulfillment of premises described in art. 71

¹⁴ . Górski, *Wykreślenie przedsiębiorcy z rejestru działalności regulowanej*, (Removal of a business from the register of regulated activities) „Przegląd Komunalny”, Nr 4/2012 (247), <http://e-czytelnia.abrys.pl/index.php?mod=tekst&id=14533>, (online 20.06.2012).

¹⁵ See quote above.

of the u.s.c. and later in section 2: "*Removal from the register occurs also in an event of...*" which suggests that art. 9j is to some extent a continuation of the text of art. 71 and this in turn presumes the procedure defined by the u.s.d.g.

Prof. Radecki approaches the problem from a different direction and when asked whether removal from the register based on art. 9j par. 2 pts. 3, 4 and 5 of the u.c.p.g. must be combined with an issuing of a decision forbidding performing business activity covered by the entry, in accordance to art. 71 par. 1 pt. 3 of the u.s.d.g., states that this problem is easily solved but it should be noticed that the removal from the register itself is not an administrative decision, therefore the business does not have the right to appeal, which it would have in case of the decision forbidding it from performing business activity, so in this its position is disadvantageous. It could be, however, argued that the removal from the register is a public administrative action dealing with rights resulting from legal regulations, and therefore understood as one which is subject to an appeal at an administrative court. Hence, the author is inclined to treat the regulations of art. 9j par. 2 pts. 3, 4 and 5 of the u.c.p.g. as autonomic and not necessarily connect them with the decision to forbid performing business activity.¹⁶

In this case the arguments claiming the necessity to issue a decision to forbid business activity before removing the business from the register seem to be more convincing. First the body issues applicable decision through which it forbids the business performing services of picking up municipal waste. This decision can be appealed to the SKO (self-government appeals court), and then the removal from the register occurs. This action can be appealed to the administrative court (under art. 3 § 1 of the act form 30 August 2002 on Law on Proceedings before Administrative Courts).

According to art. 72 of u.s.d.g. a business which has been removed from the register of regulated activities can again become entered into the register in the same scope of business activity no sooner than after the passage of 3 years from the day of the issuing of the decision forbidding it from performing said business activity. These types of sanctions are also applied to businesses which have performed a business activity without becoming entered into the register of regulated activities.

¹⁶ W. Radecki, Komentarz do art. 9(j) ustawy o utrzymaniu czystości i porządku w gminach, (Commentary to art. 9j of the act on cleanliness and order in municipalities) (in:) Komentarz do ustawy o utrzymaniu czystości i porządku w gminach, 15.02.2012, LEX 2012.

3. Conclusions

To sum up all the consideration, it must be indicated that proper waste management should be treated as action aiming to protect elements of nature. Therefore, in case of such good as environment, it should be claimed that impairment of legal mechanism, guaranteeing accuracy of this activity, is undesirable. Nevertheless, we encounter such situation in case of replacing permits for municipal waste collection by entries to the register of regulated activity. We should just live in hope that the short period of the new regulations existence will be enough for the legislative bodies to notice incorrectness, which is not only hypothetical. Another issue is, whether after noticing this problem, organs would take appropriate measures leading to recovery of present situation by means of another amendment. Such amendment should restore the institution of permits for municipal waste collection. Moreover, Polish legislator's standpoint on acceptance of broadening of business freedom at expense of environmental protection, should be assessed in negative way.