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Proportionality of interference with economic freedom in the context of state controlled economic activity

<http://dx.doi.org/10.12775.SIT.2022.013>

1. The constitutional and legal boundaries of legislative voluntarism in limiting economic freedom

The basic mechanism that limits the adoption of solutions that constitute a restriction of economic freedom is provided by Art. 22 of the Constitution of the Republic of Poland. In fact, restricting this freedom¹ in accordance with constitutional requirements is

¹ The authors accept economic freedom as a freedom that is an inalienable right of the individual, see H. Nowicki, P. Nowicki, *Reglamentacja działalności gospodarczej a zasada proporcjonalności* [State Control of Economic Activity and the Principle of Proportionality], in: *Przedsiębiorcy i ich działalność* [Entrepreneurs and their activity], eds. A. Powałowski, H. Wolska, Warszawa 2019, p. 122.

only allowed when two conditions are met. The first is the requirement of a formal legal nature which consists in the possibility of introducing restrictions only through legislation. The second requirement, of a substantive legal nature, is that a restriction of liberty may only be imposed for reasons of important public interest.²

The requirement for the statutory introduction of restrictions on the freedom of economic activity refers to the need to ensure universality and equality in the scope of the validity of the introduced restrictions, the possibility for entrepreneurs to participate in the legislative process. Ultimately, it is also associated with the possibility that the adopted solutions are controlled by the Constitutional Court.³ The premise of an important public interest is a complex issue.

The results of the conducted research indicate that public interest is a conceptually open category. The socio-economic environment significantly influences the manner in which it is decoded at any given time. Accordingly, the development trends of societies and economies influence the prevailing conceptions of the public interest at a given time. Therefore, it is not possible to determine its meaning. The objective analysis of this concept can only aim at reproducing (redefining) its meaning by relativisation to the current situation. The understanding of this interest should also take into account “[...] broader forces beyond the state in question, as there is a complex interrelationship of overlapping and often interdependent national, regional, and supranational bodies and systems”.⁴ In particular, membership of the European Union pro-

² For more on the topic, see H. Nowicki, K. Kucharski, *Interes publiczny w sferze reglamentacji działalności gospodarczej (wybrane zagadnienia)* [Public Interest in the Sphere of Controlling Economic Activity (Selected Issues)], in: *Interes publiczny w prawie gospodarczym* [Public Interest in Economic Law], eds. H. Nowicki, P. Nowicki, K. Kucharski, Toruń 2018, pp. 109–123.

³ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. A Commentary], Warszawa 2009, pp. 135–136.

⁴ J. Supernat, *Prawo administracyjne w przestrzeni globalnej* [Administrative Law in Global Dimension], in: *Przestrzeń w prawie administracyjnym* [Space in the Administrative Law], ed. J. Zimmermann, Warszawa 2013, pp. 169.

vides an important reference point for understanding this concept. Therefore, the above-mentioned factors affect the understanding of the public interest. Consequently, the public interest belongs to a conceptual category of a vague nature.

In the subjective scope, the public interest is constituted by the interest of the organized community. It takes into account the totality of its interests, providing the opportunity to pursue them. The pursuit of this interest should always be done with respect for individual interests,⁵ for the public interest is not the arithmetical sum of the individual interests of the members of the community, although it remains in relationship with it to a limited extent.⁶ “What we have here is a fiction in the form of a generalization of interests, which assumes, to some extent, that there is mechanical (identical) thinking by all individuals”.⁷ In contrast, the public interest is not a reflection of the interest of the state or its bodies.⁸

Definitions of the concept of public interest are formulated in the legal system. They can be contextual, with an indication of the elements of the concept's meaning,⁹ or they can consist in giving the term a specific meaning, taking into account the context of the normative legal act for the purpose of which the definition has been formulated.¹⁰

⁵ M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym* [The Notion of Public Interest in Administrative Law], Warszawa 1986, p. 36.

⁶ A. Krajewska, *Główne narzędzia centralnego kierowania gospodarką narodową* [Main Instruments for Central Governance of National Economy], in: *Zarys teorii funkcjonowania gospodarki socjalistycznej* [An Outline of the Theory of Socialist Economy], eds. J. Mujżel, A. Marszałek, Warszawa 1980, p. 319.

⁷ A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego* [Public Interest in the Codified Law and the Case Law of the Constitutional Tribunal], “Przegląd Prawa Handlowego” 2009, No. 6, p. 48.

⁸ M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, p. 32.

⁹ A. Michalak, *Interes publiczny i jego oddziaływanie na powstanie, treść i wykonywanie prawa własności intelektualnej* [Public Interest and its Impact on the Creation, Content and Performance of Intellectual Property], Warszawa 2012, pp. 83–84.

¹⁰ M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyj-*

In accordance with the case law of the Constitutional Tribunal, when interpreting the concept of public interest in context, Art. 31(3) of the Constitution applies. This provision lists formal and substantive legal prerequisites for restricting the exercise of constitutional freedoms and rights. The line of interpretation of the Constitutional Tribunal indicates that the substantive and legal premises such as security of the state, public order, protection of the environment, public health and morality, as well as freedoms and rights of other persons are examples of the public interest.¹¹ The values used in this provision are themselves characterized by openness in content, and are therefore subject to specification by interpretation of the law. Thus, Art. 31(3) only exemplifies the interpretational directions of the concept of public interest.¹² The constitutional framing, however, has a universal dimension, which represents “[...] a timeless emanation of the public interest”.¹³ From the point of view of Art. 22 of the Constitution, the contextual framing of the concept of public interest will be applied most broadly when restrictions on economic freedom are introduced.

The ordinary legislation, as mentioned above, also introduces legal definitions of this concept.¹⁴ It should be remembered, however, that in accordance with the principle of the autonomy of constitutional concepts, terms contained in the Basic Law cannot be interpreted in the light of definitions contained in ordinary

nym, p. 117.

¹¹ A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego*, p. 51.

¹² M. Zdyb, *Interes publiczny w orzecznictwie Trybunału Konstytucyjnego* [Public Interest in the Case Law of the Constitutional Tribunal], in: *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy* [The Concept of Public Interest in Jurisprudence, Codified Law and the Case Law of Poland and Ukraine], eds. A. Korybski, M.W. Kostycki, L. Leszczyński, Lublin 2006, p. 206.

¹³ A. Mednis, *Prawo do prywatności a interes publiczny* [The Right to Privacy and the Public Interest], Warszawa 2006, p. 191.

¹⁴ E.g. Art. 3(3) of the Act of 6 March 2018 on the principles of participation of foreign entrepreneurs and other foreign persons in economic turnover in the territory of the Republic of Poland (Journal of Laws of 2018 item 649).

legislation.¹⁵ The inverse relationship applies in this respect. Accordingly, statutory definitions of public interest will not become more broadly applicable for the purposes of interpreting the regulation of constitutional norms.

Additionally, Art. 22 uses a quantifier that is important in terms of the concept of the public interest. Thus, not every public interest, will justify the introduction of restrictions in the sphere of economic freedom. This interest must be qualified in its nature. Therefore, a proper reconstruction of the concept of an important public interest, should aim at limiting the application of the above prerequisite to those cases which are indispensable in a democratic state under the rule of law. In the provisions of the law that introduce restrictions on business freedom, the legislator should indicate the type of the public interest that forms the basis for the restriction. In addition, in the explanatory memorandum to the draft, which constitutes auxiliary interpretative material, the legitimacy of the introduced restriction should be justified in detail in the light of the premise of an important public interest. The above serves to implement the principle of persuasion in the legislative process and mainly concerns the addressees of the introduced restrictions. It also provides a basis for the Constitutional Tribunal to review the restrictions in light of the constitutional standards.

It should be stated that in the case of failure to comply with the above requirements provided for in Art. 22 of the Constitution, we will have to deal with a violation of a standard of the Basic Law. This type of positive law regulation, will remain outside the limits of the regulation of Art. 22. It is important from the point of view of the norms contained in this article to maintain high standards in the reconstruction of the concept of important public interest. Invoking values that do not fall within the meaning of this concept, or in the absence of a proper link between the introduced limitation and the exemplification of an important public interest to be

¹⁵ The Decision of the Constitutional Tribunal of 8 May 2012 r., file No. K 7/10, Case Law of the Constitutional Tribunal Series A 2012, No. 5, item 48.

protected by the introduced limitation, will constitute an action that is outside the constitutional standard.¹⁶

During the preparation of this article, a draft of a new law on cemeteries and the burial of the dead was under way. According to the proposed regulation of Section V (Art. 150–159), activities in the so-called funeral industry, i.e. business in the field of crematoria, funeral homes, the transfer and transport of corpses, and the exhumation of corpses is to be limited. The taking up and pursuit of the activity in question, which has hitherto been based on the principle of economic freedom, is to be limited in the form of state-controlled economic activity.¹⁷

The explanatory memorandum to the draft rightly states that the industry's activities address such socially significant issues as respect for human remains and ashes. It was also rightly stated that the performing of services in this industry is associated with increased sanitary and epidemiological risks. Both the issue of respect for human remains and ashes, as well as sanitary and epidemiological risks, fall within the concept of important public interest. However, it does not constitute new circumstances for the exercise of the activity in question. The explanatory memorandum in no way indicates how the planned restriction of economic freedom is intended to contribute to the protection of the indicated public interest. It only mentions the need to bring the industry's activities under control. The relevant public administration bodies already have control competences. Additionally, the justification states that the scale of violations in hygienic and sanitary or technical standards in the funeral industry is negligible. Thus, paradoxically, state-controlled business activity was found to be an appropriate form of control for funeral industry activity. Additionally, it should be mentioned that the legislator, invoking the need to control the activity in question, does not specify any additional requirements related to the control. It does not indicate when the

¹⁶ Draft dated 23 September 2021, <https://legislacja.rcl.gov.pl/projekt/12351755/katalog/12819378#12819378> (access: 21.10.2021).

¹⁷ More information: K. Kucharski, *Signum specificum działalności regulowanej* [Signum Specificum of State-controlled Activity], in: *Prawo przedsiębiorców* [The Law of Entrepreneurs], ed. B. Rakoczy, Warszawa 2020, pp. 153–172.

first inspection of the entrepreneur, after it obtains an entry in the register of the controlled activity, should take place. It also does not specify the frequency with which the inspection is to be conducted. The above example indicates that the voluntarism of the legislator in imposing economic restrictions, and with only apparent compliance with the requirements of Art. 22 of the Constitution, constitutes a violation thereof.

2. The control proportionality test in the case of licensing economic activity

Compliance with the requirements of Art. 22 of the Constitution is not sufficient to impose restrictions on the licensing of economic activities.¹⁸ Pursuant to the provisions of Art. 37(1) of the Entrepreneurs Act,¹⁹ an additional assessment should be made as to whether it is justified to impose the obligation to obtain a licence for a given activity. The initial drafting of the provision in question does not add anything new to the licensing restrictions. This is because it constitutes a repetition of the conditions that result directly from Art. 22 of the Constitution.

The second part of the provision, on the other hand, provides for an obligation on the part of the drafter to conduct the so-called proportionality test. For the legality of introducing a licensed activity, it is necessary to assess the necessity of including a given type of activity in the obligation to obtain a licence. The drafters

¹⁸ More on the topic, see H. Nowicki, *Koncesja jako prawna forma reglamentacji działalności gospodarczej* [Licensing as a Legal Form of Controlling Economic Activity], in: *Prawo przedsiębiorców* [The Law of Entrepreneurs], ed. B. Rakoczy, Warszawa 2020, pp. 121–139.

¹⁹ Pursuant to Art. 37(1) of the Entrepreneurs Act, the performance of business activity in areas of particular importance for the safety of the state or citizens or other important public interest requires a licence only if the activity cannot be performed as a free activity or after an entry in the register of regulated activities, or after a permit has been obtained. The same regulation was also present in the Act of 1999 Business Activity Law (Art. 14(2)) and the Freedom of Economic Activity Act of 2004 (Art. 46(3)).

should first assess if it is possible to do business without any form of state control. If the result of the analysis indicates that state control is necessary, consideration should first be given to placing the activity in question under state control in the form of a regulated economic activity. The form of state control in question, at least as intended by the legislator, restricts economic freedom to the least degree. If the result of the analysis is negative, and it is therefore determined that the regulated economic activity will not adequately serve to protect an important public interest, consideration should be given to whether the activity should be subject to receiving a permit. Only if it is determined that the above form of control is not an appropriate means to achieve the goal, can the activity be considered to be subject to licensing.

The above sequence with regard to the gradation of control types should be included in the explanatory memorandum to the Act.²⁰ The drafters should address each form of control, other than licensing, in detail and demonstrate that they are not sufficient to protect an important public interest. Evaluation in this regard requires detailed justification. The drafters should also refer to the possibility of carrying out a given type of activity without the necessity to restrict it. In particular, this should apply to activities that were previously performed as free from control or were covered by a form of control other than licensing. The proper implementation of the regulation of Art. 37(1) of the Entrepreneurs Act provides the basis for the theoretical and legislative assumption that licensing as a form of controlling business activity is an *ultima ratio* measure.

Therefore, only the combined fulfilment of the requirements provided for in Art. 22 of the Constitution, together with the statutory test of proportionality, constitute a correct formation of positive law in the introduction of licensing economic activity. Constitu-

²⁰ Despite the obligation under Art. 46(3) of the Freedom of Economic Activity Act, no proportionality test of interference in economic freedom has been carried out in the case of introducing a licensing obligation to, for example, operate a gaming casino (see: Justification to the Draft Gambling Act, print No. 2481, 6th Sejm, Warsaw 2009, pp. 21–34).

tional and statutory solutions are in close correlation with each other and are intended to prevent the legislator's voluntarism in restricting economic freedom. Therefore, it can be concluded that the proportionality test provided for in Art. 37(1) in the dimension of licensing economic activity, constitutes the implementation of the proportionality of interference principle in constitutionally protected freedom.

On the other hand, the lack of a statutory obligation to conduct a proportionality test when introducing other forms of control (permits, regulated economic activity) does not mean that the legislator is exempt from the obligation to assess the proportionality of interference with economic freedom in the case of covering economic activity with other forms of control.

3. The principle of proportionality in standard-setting in the area of permits and regulated economic activity

The obligation to take into account the principle of proportionality when regulating economic activities in the form of a permit or regulated activity stems from the principle of a democratic state of law.²¹ This is because the constitutional principle in question provides a constitutional and legal basis for considering the proportionality of interference with economic freedom.

In constitutional terms, as well as in the light of international standards, the principle of proportionality is recognized at three levels. First, it is necessary to determine the suitability of the measure to achieve the specific objective for which it is introduced. The criterion of suitability in question means that "[...] the measure provided for by the act must be suitable for achieving the objective, which operates within the framework of the legal system in force, [...] for which it was established".²² Pursuant to Art. 22 of the Constitution, as far as controlling economic activity is concer-

²¹ Art. 2 of the Constitution of the Republic of Poland.

²² J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Kon-*

ned, the objective can only be the protection of an important public interest. The assessment of how useful the controlling norm is for the achievement of the intended purpose should be interpreted against the background of the specific type of economic activity. It is necessary to reconstruct the important public interest that the controlling norm is supposed to protect. It is also necessary to establish an undoubted relationship between the form of control and the protected value. In this regard, it must be unequivocally demonstrated that applying state control to a particular type of economic activity indeed serves to protect this interest. It must also be shown that the means used to date are not sufficient to protect an important public interest.

Another plane at which the principle of proportionality is recognized is related to the assessment of the so-called legitimacy of the measure. "This requirement, also known as the necessity requirement or the principle of the mildest interference [...] places emphasis on whether the legislator could have chosen a measure that is equally effective, but less restrictive for the individual. If it were possible to choose from among several ways of restricting a given right, which are equally useful for the attainment of the pursued objective, it is the duty of the legislator to apply the restriction which is the least severe on the one hand, and sufficient to attain the objective on the other".²³ If a given activity is to be subjected to control in the form of a permit or regulated activity, it is necessary to prepare an analysis modelled on the control test from Art. 37(1) of the Entrepreneurs Act. Firstly, it must be proved that the activity cannot be exercised, in light of the compelling public interest, as free. Next, regulated economic activity should be considered. If it is demonstrated that it is impossible to achieve the intended purpose of regulation through the form of control presented above, the legitimacy of introducing a permit should be considered. The drafter is, of course, required to demonstrate

stylucyjnego [The Principle of Proportionality in the Case Law of the Constitutional Tribunal], Warszawa 2011, p. 20.

²³ *Ibidem*, p. 25.

that applying the permit to the activity will serve the intended purpose.

The third plane of examining the principle of proportionality of interference involves determining the presence of the so-called proportionality *sensu stricto*. “Therefore, the requirement of proportionality *sensu stricto* implies the need to weigh [...] the two values whose full realization is impossible: the value affected by the measures of action taken [...], and the value whose protection is, in the concrete circumstances, the aim of the State’s interference. The resolution of the resulting conflict is accomplished through giving up (to a certain extent) the first value in favour of the implementation (also to a certain extent) of the other value, but one value cannot be completely given up in favour of the other”.²⁴ In the case of activity control, the values that are subject to weighing up include economic freedom and the protection of an important public interest. The weighing up of the above values should be based on the principle of proportionality. Thus, accepting and acknowledging the protection of an important public interest does not mean that shaping control norms is legally possible without preserving economic freedom. The freedom in question constitutes a principle of law and should be taken into account to the fullest extent possible, also when introducing a set of control norms. Otherwise, the mere fulfilment of the requirements of Art. 22 of the Constitution would mean the unfettered shaping of control norms. In lawmaking processes, it must be remembered at all times that the control of economic freedom is an exception to that very same economic freedom. Thus, the totality of controls in a given type of economic activity is to be the result of weighing up economic freedom and the protection of an important public interest, for the protection of the latter value does not justify giving up economic freedom. To do otherwise would violate the essence of that freedom.

The above indicates that in the case of activities that are to be subject to control in the form of a permit or regulated activity, it is also necessary to take into account the principle of proportionality of interference with economic freedom. Proportionality of interfe-

²⁴ Ibidem, p. 28.

rence with constitutional freedoms, derived from the principle of a democratic state under the rule of law, is part of the decision-making process in lawmaking. Just as in the case of introducing licences, also with other forms of control, it is necessary, apart from satisfying the prerequisites of Art. 22 of the Constitution, to take into account the principle of proportionality. The difference is that, in the case of licences, the principle of proportionality is explicitly expressed in the Entrepreneurs Act. However, in the case of permits and regulated activities, Art. 2 of the Constitution will be the source of the principle of proportionality for the legislator.

4. Conclusion

Economic freedom is fundamental to the development of a market economy. It is the basis of the economic system, a principle of law, and a public subjective right with negative content. Its subjective and objective dimensions are also broad.²⁵ Consequently, it is a fundamental duty of the legislator to shape positive law correctly on the basis of this freedom. For the proper conduct of decision-making processes in the area of lawmaking, it is necessary to maintain the principle of proportionality of interference with economic freedom.

Transferring the above to the formation of the law in the area of control, it should be stated that for the introduction of restrictions in the sphere of economic freedom it is not sufficient to meet only the requirements indicated in Art. 22 of the Constitution. This is because it is necessary to conduct a statutory test of proportionality of interference with economic freedom related to the introduction of licences. If the legislator wishes to introduce other forms of control, the measures in question should also be preceded by an assessment with regard to proportionality. In the case of permits and regulated economic activity, the principle of the democratic

²⁵ For more on the topic, see K. Kucharski, *Istota wolności działalności gospodarczej* [The Essence of the Freedom of Economic Activity], "Przegląd Prawa Publicznego" 2011, No. 4, pp. 48–59.

state under the rule of law provides the basis for taking into account the principle of proportionality in legislative action. Fulfilling only the requirements of Art. 22 of the Constitution, without taking into account the principle of proportionality of interference with economic freedom, does not deserve a positive assessment from the point of view of the overall constitutional standard related to the restriction of this freedom.

The draft explanatory memorandum should make specific reference to the principle of proportionality of interference with economic freedom. The result of the conducted analysis should, objectively and unequivocally, confirm the need to apply control to a given type of economic activity. The best practice would be to devote a separate section to the proportionality of the interference in the explanatory memorandum. On the other hand, one may also assume a situation where it is possible to infer the results of the proportionality analysis directly from the entirety of the explanatory memorandum. The above refers both to the control test provided for in Art. 37(1) of the Entrepreneurs Act, as well as cases of control in the form of permits or regulated activities.

In the context of the above, it should be noted that in the period when the controlled economic activities were listed (subjectively or in the form of legal acts) in the leading laws on undertaking and carrying out economic activity,²⁶ and the given law was replaced by a new act, the legitimacy of maintaining the controlled activities was not re-examined. By maintaining the control, the legislator did not make an assessment from the point of view of Art. 22 of the Constitution. Nor did it conduct a proportionality test with regard to licences, much less an assessment of the proportionality of interference based on Art. 2 of the Constitution. Based only on a continuity, it maintained control in some of the activities. The above action cannot be recognized as being compliant with constitutional requirements, in particular Art. 22. The premise of an important public interest, as it is a general clause, requires, as already mentioned, to be evoked by reference to the current

²⁶ I.e. the Business Activity Act of 1988, the Act of Business Activity Law, the Freedom of Business Activity Act.

socio-economic situation. This is because one cannot assume that the grounds justifying the control of economic activity are unchangeable.

It should also be borne in mind that the requirements of Art. 22 of the Constitution must be met not only with respect to the activities that were previously not subject to control, but also those for which the legislator presumes the maintenance of restrictions. Therefore, the resignation from the list of activities subject to control in the Entrepreneurs Act is another manifestation of weakening the legislator's self-restraint mechanisms in applying control to other activities. Any instance of broadening the scope of control would require amendments to the Entrepreneurs Act. In the current situation, as a result of transferring control to the level of special laws, the legal awareness of the horizontal and vertical scope of control is blurred. Additionally, in the case of the works on a new leading law on taking up and pursuit of activities, which are possible in several years, it would be possible to systematically verify the scope of activities subject to control.

It should be remembered that in the case of every freedom, including economic freedom, its legal structure includes two aspects. In accordance with the views of the Constitutional Tribunal, we have components of freedoms that determine its essence and these cannot be subject to statutory interference. Otherwise, freedom will be annihilated. The second part of each freedom consists of additional elements, a specific "envelope" that can be modified. In such a case, the said action of the ordinary legislator does not constitute an infringement of the essence of freedom. Properly applied, the principle of proportionality is to protect the legal system against violation of essential components of freedoms. It is also to serve the correct shaping of additional elements that may be modified by the legislator within the framework of the legislator's freedom.

Incorporating the principle of proportionality in the design of the law in the area of control is a safeguard of the system of law against its excessive expansion by norms that limit economic freedom. Incorporating the principle of proportionality is not an expression of good faith on the part of the drafters. The formation

of legal norms on the basis of the principle in question has the character of a formalized analysis, with a constitutional and legal basis, which, if carried out correctly, should determine the admissibility of the introduction of control norms to legal transactions. Without the proper application of the principle of proportionality in the area of lawmaking, there can be no proper formation of positive law in the area of control norms. Disregard for the principle of proportionality of interference with economic freedom is a direct cause of the ever-increasing number of controlled activities. The above may consequently lead to a violation of the essence of economic freedom in specific cases.

STRESZCZENIE

Proporcjonalność ingerencji w wolność gospodarczą w kontekście reglamentacji działalności gospodarczej

W artykule wskazano na regulacje prawa pozytywnego, a także ustalenia teoretyczne, które powinny być podstawą właściwego kształtowania ustawodawstwa zwykłego w zakresie realizacji wolności gospodarczej. Gwarantowana konstytucyjnie wolność gospodarcza może być bowiem poddawana ograniczeniom. Najdalej idącą formą tych ograniczeń jest reglamentacja podejmowania i wykonywania działalności gospodarczej, której formy określa ustawa Prawo przedsiębiorców. Natomiast objęcie działalności gospodarczych reglamentacją powinno odbywać się przy zachowaniu zasady proporcjonalności ingerencji w tę wolność. W przypadku koncesji przedmiotowy obowiązek wynika wprost z ustawy Prawo przedsiębiorców, w przypadku pozostałych form reglamentacji – z konstytucyjnej zasady demokratycznego państwa prawnego.

Słowa kluczowe: Konstytucja RP; wolność gospodarcza; reglamentacja działalności gospodarczej; zasada proporcjonalności; zasada demokratycznego państwa prawnego; koncesja; zezwolenie; regulowana działalność gospodarcza

SUMMARY

Proportionality of interference with economic freedom in the context of state controlled economic activity

The article indicates the regulations of positive law, as well as theoretical findings that should be the basis for the proper formation of ordinary legislation with regard to the implementation of economic freedom. The economic freedom guaranteed by the constitution may be subject to limitations. The most far-reaching form of these restrictions is the control of taking up and pursuit of economic activity, the forms of which are defined by the Entrepreneurs Act. On the other hand, the control of economic activities should be carried out in accordance with the principle of proportionality of interference with this freedom. In the case of a licence, the obligation in question arises directly from the Entrepreneurs Law. In the case of the other forms of control – the constitutional principle of a democratic state under the rule of law.

Keywords: Constitution of the Republic of Poland; economic freedom; control of economic activity; principle of proportionality; principle of democratic state under the rule of law; licence; permit; regulated economic activity

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