

*Krzysztof Kucharski*

Uniwersytet Mikołaja Kopernika, Toruń

krzysztofkucharski@umk.pl

<https://orcid.org/0000-0003-0528-3962>

## Freedom of business activity in the Polish legal system\*

<http://dx.doi.org/10.12775/SIT.2019.007>

### 1. Introductory comments

The subject of freedom of business activity<sup>1</sup> is current issue, raised both in statements made by the legislator, as well as in the doctrine of law (mainly public economic law). Although the issue of economic freedom is the subject of a number of studies, in particular monographic ones<sup>2</sup>, one should fully agree with the view that studies referring in their content to the axiology of the rule of law are always needed. The matter of the general principles of

---

\* The present study is an updated and amended version of an article which was published in Polish, in the "Przegląd Prawa Publicznego" 2011, No 4.

<sup>1</sup> Defined interchangeably in this article as economic freedom.

<sup>2</sup> E.g. A. Walaszek-Pyziół, *Swoboda działalności gospodarczej*, Kraków 1994; C. Kosikowski, *Wolność gospodarcza w prawie polskim*, Warszawa 1995; M. Szydło, *Swoboda działalności gospodarczej*, Warszawa 2005; R. Swoiński, *Wolność i swoboda działalności gospodarczej*, Wrocław 2007; K. Klecha, *Wolność działalności gospodarczej w Konstytucji RP*, Warszawa 2009; J. Ciapała, *Konstytucyjna wolności działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009.

law as the stabilizing factor of law falls into the category of nodal issues of the legal system<sup>3</sup>. The above justifies the resumption of the issue of freedom of business activity.

Economic freedom is of interest not only to the science of law. It is also a research problem for economic<sup>4</sup> and philosophical sciences. Owing to the multidimensional nature of the subject in question, only the synergy of research results from various disciplines can contribute to the development of an optimal legal regulation.

The author's presumption is to present the legal substance of the freedom of business activity based on its structural features, both in the sphere of the state's political and governmental system and in that of substantive law. In particular, the paper will present issues in respect of which there is no state of *communis opinio doctorum* in the doctrine. Naturally, the framework of the study does not allow for a comprehensive analysis of the presented issues, therefore the nature of the article is that of signaling observations referring to the state of the national legal regulation and views presented in the literature.

## 2. Freedom of business activity – source of origin

Economic freedom originates from the inherent and unalienable natural law which is the individual's personal freedom<sup>5</sup>. The personal freedom of the individual is, in turn, rooted in human dignity<sup>6</sup>.

---

<sup>3</sup> Z. Niewiadomski, T. Asman, *Wolność budowlana jako prawo podmiotowe inwestora*, in: *Księga Jubileuszowa Profesora Stanisława Jędrzejewskiego*, H. Nowicki, W. Szwałdler (eds.), Toruń 2009, p. 558.

<sup>4</sup> Cf. A. Rytel-Warzocha, *Wolność działalności gospodarczej w świetle orzecznictwa polskiego Trybunału Konstytucyjnego*, „Gdańskie Studia Prawnicze” 2017, No 37, p. 157.

<sup>5</sup> K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2007, p. 73.

<sup>6</sup> M. Chmaj, *Godność człowieka jako źródło jego wolności i praw*, in: *Konstytucyjne wolności i prawa w Polsce. Zasady ogólne. Tom I*, eds. M. Chmaj et al., Kraków 2002, p. 73 and subsequent.

The free will of legal entities is therefore the basic premise for making a rational choice when organizing a business activity<sup>7</sup>.

The natural origin of freedom of business activity influences the role of positive law in the sphere of economic activity<sup>8</sup>. Statutory law does not create freedom. It has only a secondary role, confirming the existence of the freedom of business activity, formulating a guarantee for its implementation and protection<sup>9</sup>. Economic freedom is a natural state, independent of the state and its laws<sup>10</sup>.

The essence of the origin of economic freedom is revealed especially in economic systems aimed at “suppression of individual entrepreneurship”. Despite the state’s actions to limit or even exclude the individual from the sphere of business activity, the individual initiative is not eliminated. Even in a hostile legal environment, individual entrepreneurship will develop in a formal or informal manner<sup>11</sup>. This leads to the statement that a human being as a person is free from the state<sup>12</sup>.

The origin of the freedom of business activity, as a value rooted in human dignity, is most fully manifested in the case of natural persons who undertake and engage in business activity<sup>13</sup>. On the other hand, it seems that the view according to which other legal entities (legal persons, legal persons with limited legal capacity) are not the beneficiaries of the freedom of business activity, is too

---

<sup>7</sup> M. Zdyb, *Istota decyzji. Personalistyczno-normatywistyczna analiza zjawiska*, Lublin 1990, p. 57. However, as the author emphasizes, a legal regulation directs one’s will rather than predetermines it.

<sup>8</sup> A. Rytel-Warzocha, *Wolność działalności gospodarczej w świetle orzecznictwa polskiego Trybunału Konstytucyjnego*, „Gdańskie Studia Prawnicze” 2017, No 37, p. 160.

<sup>9</sup> K. Strzyczkowski, *Prawo gospodarcze*, p. 73.

<sup>10</sup> Similarly, cf. K. Działocha, *Zasada ochrony praw nabytych w orzecznictwie Polskiego Trybunału Konstytucyjnego*, in: *Prawa człowieka, geneza, koncepcja, ochrona*, B. Banaszak (ed.), Wrocław 1993, p. 17.

<sup>11</sup> A. Powalowski, *Publicznoprawny status osoby fizycznej wykonującej działalność gospodarczą w Polsce*, Gdańsk 2008, p. 43.

<sup>12</sup> M. Zdyb, *Istota decyzji. Personalistyczno-normatywistyczna*, p. 31 and the literature referenced thereto.

<sup>13</sup> A. Powalowski, *Publicznoprawny status*, p. 39.

far-fetched<sup>14</sup>. The dignity of the human person, as a source of economic freedom, is not completely lost in the case of running a business activity in the form of a legal person (or a legal person with limited legal capacity). In the case of these entities, the legal and natural elements stem from the fact that these entities are created by individuals who are entitled to unalienable dignity. Therefore, the source of freedom of business activity of legal persons (legal persons with limited legal capacity) is the dignity of individuals constituting these entities (a derivative source)<sup>15</sup>. The fact that private-law entities are entitled to economic activity derived from the individuals who constitute them is supported by the recognition of legal persons as social constructs pursuant to civil law (the so-called realistic theory)<sup>16</sup>. The literature assumes that private law entities also have public individual rights<sup>17</sup>, which include freedom of economic activity.

Freedom of business activity is of an evolutionary nature. It is not limited solely to the self-realization of entrepreneurs, but creates space for the development of other individual and group rights<sup>18</sup>. It has a direct impact in particular on political and social rights<sup>19</sup>.

---

<sup>14</sup> The thesis that legal persons and legal persons with limited legal capacity are not entitled to the liberty which is the freedom of business activity is supported by M. Szydło, *Swoboda działalności gospodarczej*, pp. 9–10. A. Powałowski goes even further, by claiming that: “economic freedom as a value ought not to be combined with the operating of entities other than a natural person, since they are a human creation, fully dependent upon human will”, A. Powałowski, *Publicznoprawny status*, pp. 43–44. The author, assuming a differentiation between axiological, economic, and legal representation of the freedom of business activity, connects only the economic representation with all legal entities.

<sup>15</sup> Similarly, cf. K. Klecha, *Wolność działalności gospodarczej w Konstytucji RP*, Warszawa 2009, p. 105.

<sup>16</sup> F. Zoll, *Prawo cywilne. Tom I*, Poznań 1931, p. 163 and subsequent.

<sup>17</sup> W. Jakimowicz, *O publicznych prawach podmiotowych*, „Państwo i Prawo” 1999, No 1, p. 43.

<sup>18</sup> Cf. T. Długosz, *Spoleczna gospodarka rynkowa jako kryterium organizacji gospodarki*, „Gdańskie Studia” Prawnicze 2017, No 37, p. 17.

<sup>19</sup> Cf. M. Friedman, *Kapitalizm i wolność*, Gliwice 2008, p. 37 and subsequent. However, one has to agree with the belief about the lack of an absolute mutual conditioning for the existence of freedom of business activity and

The consequences resulting from the freedom of business activity go far beyond the economic system. Economic freedom therefore aspires to be a universal social value<sup>20</sup>.

### 3. Freedom of business activity – structural features

#### 3.1. The basis for the economic system

Economic freedom has been recognized in accordance with the regulations of the Constitution of 2 April 1997<sup>21</sup>, as the basis for the economic system. Including the principle of economic freedom in Chapter 1 of the Constitution, although there is no formal gradation of the provisions of the Constitution in view of their systematics, indicates its constitutional nature.

Economic freedom lies within the scope of economic laws (the so-called second generation, the family of human rights)<sup>22</sup>. Despite its editorial separation from Chapter 2 of the Constitution discussing liberties, human, and civil rights, the freedom of business activity should be seen in the context of other liberty rights. It is a constitutional value factored out from other liberties. The applied legislative technique is aimed at highlighting the new systemic values proclaimed in the Constitution, which are a response to the experience of an etatistic, centrally planned economy.

---

political rights, cf. C. Kosikowski, *Wolność gospodarcza w prawie polskim*, Warszawa 1995, p. 29 and subsequent.

<sup>20</sup> Economic freedom is perceived as a factor stimulating the process of the uniformization of law in Europe in the 19th century, cf. K. Sobczak (ed.), *Europejskie prawo gospodarcze w działalności przedsiębiorstw*, Warszawa 2002, p. 98.

<sup>21</sup> Journal of Laws No 78, item 483 as amended.

<sup>22</sup> T. Jasudowicz, *Administracja wobec praw człowieka*, Toruń 1997, pp. 40–41. The author advocates for the correctness of the term: “family of human rights”.

The systemic dimension of economic freedom affects the bringing of the social dimension thereto. Creating the right social environment provides the best possible conditions for the development of the individual. Within the economic process the individual may exercise other liberty rights independently or together with others<sup>23</sup>. By itself, the statutory regulation of the freedom of business activity does not provide it with a general social value and, in legal terms, a systemic nature. Neither does the guarantee of economic freedom in a statutory act provide stability of its applicability. With regard to the above, it is necessary to emphasize the value of including this freedom *expressis verbis* in provisions of the constitutional level.

Economic freedom in the general social dimension is one of the basic incentives for the entities who create the economy (mainly entrepreneurs) to achieve economic objectives. The achievement of objectives is aimed at creating and maintaining a balance between supply and demand in the economy. Freedom is obviously not an independent stimulating factor. It is always present together with other incentives, while being their source at the same time.

Economic freedom as the meta-source of other incentives influences the behaviours of business entities, contributing to the achievement of social market economy assumptions. The derived tangible and non-tangible property generated on the basis of the liberty stimuli can be redistributed while factoring in social needs (e.g. fighting unemployment, poverty, exclusion of the disabled, and economic exclusion). Thanks to economic freedom, a social market economy can become more socially sensitive, constituting a basis for social inclusion. Society, being a co-responsible and interdependent structure, ought to perceive economic freedom as a mechanism for the achievement of socially accepted objectives.

The legislator's creating real mechanisms to ensure and protect economic freedom is an example of grass rooting of this freedom. In such a form freedom is not a restricted value intended for the

---

<sup>23</sup> M. Nyka, *Aksjologiczne podstawy wprowadzenia i ograniczenia zakresu zasady wolności gospodarczej w prawie Polskim i prawie UE*, in: *Księga Jubileuszowa*, p. 354.

self-fulfillment of business entities. Therefore, the social interest suggests referring to economic freedom in terms of the common good.

As far as the exercising of the freedom of business activity is concerned, this freedom belongs to the so-called optimization standards. The legislator undertakes legislative actions aimed at implementing the standard as fully as possible<sup>24</sup>. The legislator's actions are determined by the objective set out by the optimization standard. Thus, the freedom of business activity is a horizontal guideline of legislative actions regardless of the branch of the law. Implementation of this constitutional value is a permanent process, based on continuation.

The ordinary legislator is authorized, and even obliged, to take actions which will enable the implementation and protection of constitutional principles<sup>25</sup>, including economic freedom. The basic form of developing constitutional values is the regulation contained in the acts. The implementation of the aforementioned obligation of the legislator can be found in the regulation of art. 2 of the Act of 6 March 2018, Law of Entrepreneurs<sup>26</sup>. However, it must be stated that art. 2 in its essence does not bring any particular juridical novelty into the principle of freedom of economic activity. The fact that the legislator indicates that undertaking, conducting, and ending business activity is free for everyone (open subjective scope) results from the subjective scope of freedom of business activity. Further wording of the provision referring to the equality of entrepreneurs is in turn a restating of the principle resulting from art. 32 of the Constitution – the principle of equality before the law.

---

<sup>24</sup> M. Szydło, *Swoboda działalności gospodarczej*, Warszawa 2005, p. 1.

<sup>25</sup> Judgment of the Constitutional Tribunal of 23 March 1999, file ref. no. K 2/98, "Court case law in economic matters" 1999, no. 11–12, item 130; judgment of the Constitutional Tribunal of 24 October 2000, file ref. no. K 12/00, "Case law of the Constitutional Tribunal. The Official Compilation" 2000, no. 7, item 255, judgment of the Constitutional Tribunal of 24 April 2006, file ref. no. P 9/05, "Case law of the Constitutional Tribunal. The Official Compilation" 2006, no. 4 A, item 46.

<sup>26</sup> Journal of Laws of 2018, item 646 as amended.

### 3.2. Restriction of the freedom of business activity

The basic systemic guarantee of the inviolability of the freedom of business activity is art. 22 of the Constitution<sup>27</sup>. Restriction of this freedom can only occur pursuant to an act and only because of an important social interest. Determination of a formal and legal, as well as a substantive, premise for the restriction of the freedom of business activity creates a fundamental model of control of the imposed restrictions. The freedom of business activity as a liberty law which is economic in its nature, can be present in ordinary legislation in a way going further than personal and political rights<sup>28</sup>.

Fulfillment of the premises arising from art. 22 does not lead to deeming every restriction as conforming to the constitutional model. The premises from art. 22 are necessary, but not sufficient to introduce the restriction in accordance with the Constitution. The jurisprudence of the Constitutional Tribunal, which supports the need for a joint interpretation of art. 22 and art. 31, section 3 of the Constitution is justified<sup>29</sup>. Lack of mutual correlation of these provisions could lead to depreciation of constitutional values.

---

<sup>27</sup> The literature usually emphasizes the limitative functions of art. 22, usually stating that economic freedom is not an absolute right and is subject to restrictions, and constitutional regulation is the basis for its application.

<sup>28</sup> Judgment of the Constitutional Tribunal of 8 April 1998, file ref. no. K 10/97, "Case law of the Constitutional Tribunal. The Official Compilation" 1999, No. 3, item 29. Different views are also presented in the case law of the Constitutional Tribunal, cf. the judgment of the Constitutional Tribunal of 29 April 2003, file ref. no. SK 24/02, "Case law of the Constitutional Tribunal. The Official Compilation" 2004, No. 4 A, item 33, on the reasons for discrepancies in CT case law, cf. Z. Cieślak, *Constitutional Tribunal – the negative "lawmaker"*, in: *Case law in the legal system*, T. Bąkowski, K. Grajewski, J. Warylewski (eds.), Warszawa 2008, pp. 61–67.

<sup>29</sup> Cf. Judgment of the Constitutional Tribunal of 10 April 2002, file ref. no. K 26/00, "Case law of the Constitutional Tribunal. Official Compilation" 2002, no 2 A, item 18.



The imposed restrictions should correspond to the clause of the democratic rule of law and the principle of proportionality of interference. Furthermore, restrictions of the freedom of business activity should not lead to the restriction of its essence. A regulation infringing upon the nature of freedom, despite the fact that it fulfills the premises from art. 22, does not use the [right] of presumption of constitutionality. It results from the adopted assumption that economic freedom originates from the dignity of the human being. The correctness of the imposed restrictions of economic freedom should be assessed also in consideration of *acquis communautaire*<sup>30</sup>. Relying solely on the premises from art. 22 could justify the introduction of nearly any restriction. This would result in recognizing the legal order as the only medium of social values.

Restrictions of the freedom of business activity can be of a primary or secondary nature. Primary restrictions are the ones which oblige the entrepreneur to meet the relevant premises conditioning the legal undertaking of a particular type of business activity. Apart from the fulfillment of premises relevant to achieving the status of an entrepreneur, it is necessary to meet other requirements in the scope of legal organization of the activity (registration obligations and other conventional legal activities). Primary restrictions are demonstrated in particular in regulated types of business activity, the undertaking of which involves the obligation to obtain a positive administrative decision (licence, permit) or for the entrepreneur to make a statement (regulated business activity) declaring the fulfillment of the relevant premises.

Primary restrictions of freedom of economic activity are preventive and related to the need to protect the public interest. When determining the detailed legal terms and conditions for the undertaking of a business activity, the legislator aims at restricting the conducting thereof by entities who do not warrant it would be carried out in a correct way.

---

<sup>30</sup> More, cf. A Szafranski, *Wolność działalności gospodarczej w perspektywie prawa Unii Europejskiej*, in: *Konstytucyjna Zasada Wolności Działalności Gospodarczej. Materiały Zjazdu Katedr Publicznego Prawa Gospodarczego*, pp. 421–433.

Secondary restriction of the freedom of business activity is related to the entrepreneur's infringement of provisions which regulate it or the general legal order. Secondary restrictions usually come in the form of economic sanctions. Their application results in depriving the entrepreneur permanently or temporarily of the right to conduct a particular business activity. Restrictions resulting from the limitation of the subjective scope of economic freedom are also of a secondary nature. The results of both the primary and secondary restrictions affect the legal sphere of the possibility of conducting a particular type of business activity. However, they do not impact the possibility of obtaining the status of an entrepreneur in general and conducting a different type of business activity than the one which is subject to restrictions.

Both the primary and secondary restrictions can take place only by means of a legal act of a statutory level. Formulating even cautious opinions about the possibility of introducing restrictions in basic acts (e.g. in a regulation)<sup>31</sup> constitutes a violation of the formal and legal requirement laid down in the Constitution. The adoption of another assumption would undermine the sense of the regulation of art. 22. The introduction of non-statutory restrictions would severely limit the possibility to control them in a proper way. Limitation solely by means of an act does not exclude the possibility of issuing executive acts. However, in accordance with the rules of legislation resulting directly from the Constitution, a regulation is issued on the basis of an act, by an authorized body, in compliance with statutory guidelines as to its content. In essence, a regulation cannot contain normative novelty; it aims only to relieve the content of the Act from specific and technical issues.

---

<sup>31</sup> Cf. K. Kiczka, *Uwagi o wolności działalności gospodarczej*, in: *Księga Jubileuszowa*, pp. 234–235. The author indicates differences in the editing of the formal requirement of art. 22, where the legislator used the wording only by way of an act, and the identical requirement introduced in art. 31, section 3, using the phrase only in an act. The difference in the literal wording of the provisions in the Author's opinion may give rise to the introduction of a restriction in a form other than an act, e.g. a regulation.

### 3.3. The principle of law

Economic freedom, in the light of the regulations of the Constitution, can be treated as a principle of law<sup>32</sup>. A principle of law (in directives) should be treated as a legally binding constitutional standard which has been considered to be particularly important socially, because it expresses basic values<sup>33</sup>.

Economic freedom, as a principle of law, has its positive and negative reflection. A positive obligation is connected with the legislator's creation of a legal environment enabling the use of economic freedom. On the other hand, the negative obligation includes the prohibition of issuing legal acts contrary to the principle of economic freedom<sup>34</sup>.

The prohibition of the legislator's interference in the sphere of constitutionally recognized liberties results also from recognizing freedom of business activity as a public subjective right with negative content<sup>35</sup>. The state, therefore, has a general duty not to violate economic freedom<sup>36</sup>, as well as to provide protection against unlawful interference by other legal entities in the sphere of this freedom<sup>37</sup>. Recognizing economic freedom as a public subjective right not only provides an opportunity to evaluate the state's legislative actions, but extends this possibility to any public administration action regardless of its form.

In the event of the state interfering in the sphere of economic freedom in an unjustified manner (breach of the negative obligation), the individual has the right to demand that such an activity be stopped<sup>38</sup>. It seems that one will also be entitled to make a claim

---

<sup>32</sup> K. Strzyczkowski, *Prawo gospodarcze*, p. 75.

<sup>33</sup> M. Zieliński, *Konstytucyjne zasady prawa*, in: *Charakter i struktura norm konstytucyjnych*, ed. J. Trzciniński, Warszawa 1997, p. 68.

<sup>34</sup> K. Strzyczkowski, *Prawo gospodarcze*, p. 75.

<sup>35</sup> W. Jakimowicz, *Publiczne prawa podmiotowe*, Kraków 2002, p. 264 and subsequent.

<sup>36</sup> A. Walaszek-Pyziół, *Swoboda działalności*, p. 12.

<sup>37</sup> W. Jakimowicz, *Publiczne prawa*, p. 267.

<sup>38</sup> M. Szydło, *Swoboda działalności*, p. 8.

against the state in the case of the state's inactivity with regard to the development of an appropriate environment for the exercise of economic freedom (breach of the positive obligation). In such a case the legal basis could be the structure of the State's liability for omission in the exercise of public authority (Article 77 of the Constitution of the Republic of Poland in relation to Article 417<sup>1</sup>, section 4 of the Civil Code<sup>39</sup>).

Protection of the freedom of economic activity is due with regard to an objective violation of the legal order. A claim for protection based solely on the conviction that economic freedom has been violated does not include the right to a trial. Freedom of economic activity is a category of meta-law and the formation of claims against the state or a private entity will always be associated with violation of specific standards of substantive law<sup>40</sup>.

Economic freedom, as a principle of law, also affects public administration and judicial authorities which interpret legal provisions. In the event of interpretation doubts, they should apply the presumption (in *dubio pro libertate*) and, therefore, give more weight to the side of the freedom of business activity. In the case of the interpretation of provisions introducing exceptions to the principle of freedom of business activity, public administration bodies should apply a presumption of interpretation prohibiting an extended interpretation of exceptions (*exceptiones non sunt extendendae*)<sup>41</sup>.

### 3.4. Subjective scope

The subjective scope of the freedom of business activity is an open category. It includes both natural persons, legal persons, and legal persons with limited legal capacity<sup>42</sup>. The issue disputed in the

---

<sup>39</sup> The Act of 23 April 1964 (consolidated text: Journal of Laws of 2018, item 1025, as amended).

<sup>40</sup> Cf. W. Jakimowicz, *O publicznych prawach podmiotowych*, „Państwo i Prawo” 1999, no. 1, p. 40.

<sup>41</sup> Cf. judgment of the NSA of 29 August 1991, file ref. no. III SA 635/91, „Orzecznictwo Naczelnego Sądu Administracyjnego” 1993, No. 1, item. 2.

<sup>42</sup> K. Strzyczkowski, *Prawo gospodarcze*, p. 78.

doctrine is the state's participation in the circle of entities entitled to use the freedom of business activity in a positive way.

The state's legal capacity in the sphere of economic activity (the sphere of dominium) is identified with the State Treasury and its organizational units. The State Treasury, as a special type of public legal person, constitutes the financial and organizational basis for the undertaking of activities by the state<sup>43</sup>. In axiological and legal terms, the state's economic activity is a method of implementing public tasks and is its sole purpose<sup>44</sup>.

The Constitution of the Republic of Poland does not contain provisions *expressis verbis* authorizing the state to undertake business activity. However, there is no doubt about the legally admissible possibility of the undertaking and pursuing of economic activity by the state. State-owned enterprises, single-member companies of the State Treasury, and other state legal persons appointed to manage public property base their own economic activity on axiological and constitutional grounds other than economic freedom<sup>45</sup>.

The constitutional basis for the undertaking of business activity by the state is art. 2 and 20 of the Constitution. The wording of both provisions points to the adjusting for social justice in actions conducted by the state and, in the dimension of market economy, adjusting for the implementation of social policy objectives. The state is therefore responsible for shaping the social order. The state's conducting of economic activity is a direct form of its influence on the social order and at the same time the implementation of systemic tasks<sup>46</sup>. The state's undertaking of economic activity in the forms of private law (currently the predominant form) is purely

---

<sup>43</sup> Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2007, p. 190–192.

<sup>44</sup> A. Szafranski, *Konstytucyjne podstawy prowadzenia działalności gospodarczej przez przedsiębiorców publicznych*, „Przegląd Sejmowy” 2008, No 1, p. 47.

<sup>45</sup> C. Kosikowski thinks otherwise, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2008, p. 47.

<sup>46</sup> M. Szydło, *Konstytucyjne podstawy udziału państwa w działalności gospodarczej*, „Przegląd Sejmowy” 2004, no 6, pp. 48–54 and literature referenced thereto.

instrumental and serves to carry out tasks<sup>47</sup> resulting from art. 2 and 20 of the Constitution more effectively.

The subsidiarity principle is another basis for the undertaking of business activity by the state. The principle has not been expressed explicitly in the provisions of the Constitution. A reference to this principle *expressis verbis* can be found in the preamble to the Constitution. Regardless of the discrepancies in the assessment of the legal nature of the preamble, it should be noted that the entire constitutional regulation is based on this principle. Of particular importance in the implementation of the principle of subsidiarity are regulations concerning territorial, professional, and economic self-government.

In accordance with the principle of subsidiarity, the state should undertake tasks exceeding the executive capacity of smaller organizational communities (e.g. other state legal persons, private entities). Subsidiarity directs the state's activity to the types of economic activity which for organizational and economic reasons are not the subject of interest of other entities<sup>48</sup>.

The constitutional foundations for the state's participation in economic life can also be found in the institution of legal monopoly<sup>49</sup>. Legal monopoly in legal language means a situation in which only one entrepreneur runs a specific type of business on the relevant market. In subjective terms, the concept of monopoly is not reserved to the state. Monopoly can also be established for private entities<sup>50</sup>. According to art. 216. section 3 of the Constitution, the establishment of a monopoly takes place by way of an act. Considering the fact that a monopoly essentially leads to the restriction of economic freedom, its regulations should be interpreted in the light of the remarks made in the context of art. 22. The introduction of a legal monopoly will involve presumed constitutionality, if not only the requirement of a statutory form of its implementation is met, but

---

<sup>47</sup> A. Doliwa, *Dychotomiczny charakter podmiotowości prawnej państwa (imperium i dominium)*, „Studia Prawnicze” 2004, No 3, pp. 40–41.

<sup>48</sup> M. Szydło, *Konstytucyjne*, pp. 58–59 and the literature referenced thereto.

<sup>49</sup> *Ibidem*, pp. 59–61.

<sup>50</sup> K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2009, p. 269.

also substantive and legal requirements (important public interest, the principle of the democratic rule of law, and proportionality of interference) are preserved.

The state also undertakes to conduct economic activity in sectors recognized as strategic (usually of an infrastructural nature), e.g. power generation, postal services, telecommunications. The premises for recognizing a given type of activity as crucial for the state are: particular importance for the economic interests of the state, a particular impact on the stability, and security of infrastructure necessary for the proper functioning of the national economy. Types of business activities deemed strategic should be based on a restricted subject catalogue. The number of entities conducting strategic activities may be subject to appropriate changes, depending on the implementation needs.

The economic activity of public entities is limited by the scope of tasks indicated by the legislator<sup>51</sup>. The element of freedom in undertaking economic projects has been, by definition, restricted.

In countries with market economies, there is a process of limiting the participation of public entities in business activity. It is a continuous and dynamic process, demonstrated even in the phenomenon of ownership transformations and privatization of public tasks.

### 3.5. Substantive scope

The substantive scope of economic freedom includes a bundle of rights, the implementation of which gives the basis for the free undertaking and conducting of a business<sup>52</sup>. The substantive scope includes such components as: freedom to choose the organizational

---

<sup>51</sup> S. Biernat, *Podjęmowanie i prowadzenie s. działalności gospodarczej – wolność gospodarcza de lege lata i de lege ferenda*, „Przegląd Prawa Handlowego” 1994, No. 9, p. 10.

<sup>52</sup> M. Waligórski, *Reglamentacja działalności gospodarczej a ochrona praw jednostki*, in: *Rola materialnego prawa administracyjnego a ochrona praw jednostki*, ed. Z. Leoński, Poznań 1998, p. 88.

form, freedom to compete, invest, shape prices, freedom of contracts<sup>53</sup>, and freedom of advertising. The substantive scope defines the limits of legally acceptable conditions for the implementation of the public subjective right in the form of freedom of business activity<sup>54</sup>.

The comprehensive further clarification of the substantive scope of the freedom of business activity is not practically important. This is owing to the diverse nature of economic projects. Depending on the type of economic activity, entrepreneurs undertake a number of activities resulting from the nature of business activity, based on individual rights. Consequently, one can only speak of a certain general construction of the substantive scope, which *in concreto* is supplemented with further legal entitlements<sup>55</sup>.

The substrates of the substantive scope are not absolute. The implementation of the substantive legal entitlements is always subject to the conditions provided for by law. The limitation of the substantive scope constitutes a restriction of economic freedom, mainly at the stage of the entrepreneur's activity. Substantive restrictions are not universal. They apply only to those entrepreneurs who exercise the particular rights.

Restrictions take place owing to the characteristics of the entity conducting the economic activity, e.g. the freedom to compete has been limited by the requirement to obtain the consent of the President of the Office of Competition and Consumer Protection for consolidation of entrepreneurs who achieved a certain annual turnover in the year preceding the intent to merge. Restrictions are

---

<sup>53</sup> The substantive legal basis for the principle of freedom of contract (until it was expressed in Article 353<sup>1</sup> of the Civil Code, which took place as a result of the amendment of the Code on 28 July 1990) was the principle of freedom of business activity expressed in art. 1 of the Act of 23 December 1988 on economic activity, K. Bączyk, *Zasada swobody umów w prawie polskim*, in: *Studia Iuridica Toruniensia. Przemiany polskiego prawa. Tom drugi*, E. Kustra (ed.), Toruń 2002, p. 42. It is to be assumed that the freedom of business activity is a source of the freedom of contract also today, although it is now of constitutional nature.

<sup>54</sup> K. Strzyczkowski, *Prawo gospodarcze*, p. 78.

<sup>55</sup> A. Walaszek-Pyziół, *Swoboda działalności*, pp. 45–46.



also of a substantive nature owing to the type of business activity, for example restricting the freedom to choose the organizational and legal form for banking and insurance activities, limiting the freedom to advertise for entrepreneurs from the spirits sector.

The introduction of a restriction in the substantive scope of freedom of business activity should correspond to the premises set out in art. 22 of the Constitution. Therefore, what takes place is the process of detailing of the concept of an important social interest in the statutory acts as a premise for interference. Thus, the need to spend public funds rationally is an important social interest, which is a premise for limiting the freedom of investment through the obligation to apply procedures provided for in the Public Procurement Law<sup>56</sup>. What should also be seen in terms of an important social interest are restrictions on the freedom of advertising which constitutes an act of unfair competition, prohibit the advertising of specific goods or services, placing advertisements in specific places. Advertising which constitutes an act of unfair competition is, in particular: advertising which is contrary to the law, good practice, or demeaning of human dignity, etc. Prohibition of advertising of, for example, disposal for consideration, purchase, or intermediation in the sale or purchase of a cell, tissue or organ for transplantation, constitutes an important social interest in the form of securing public health.

## 4. Conclusions

Freedom of business activity is a right of natural origin and complex structure. The substrates of economic freedom are not of an intrinsically uniform nature. Furthermore, different ways of understanding particular aspects of economic freedom can be found in the literature. Regardless of these discrepancies, it should be stated that for the correct reconstruction of the freedom of economic activity it should be perceived through the prism of: the basis of

---

<sup>56</sup> The Act of 29 January 2004 (Journal of Laws of 2017, item 1579 as amended).

the economic system, principles of law, public subjective law of negative content, and its subject and substantive scope.

Within each juridical characteristic of the freedom of business activity there are basic elements without which a given feature will not exist, and additional elements that may be modified by the legislator without affecting the essence of a given feature<sup>57</sup>, and thus economic freedom as a whole. The modification of features which are non-essential in terms of their relevance may take place only by way of an act and only because of an important social interest. It is also necessary to take into account the principle of the democratic rule of law and the principle of proportionality of interference in constitutionally protected freedoms.

The correct construction of legal regulations based on the principle of freedom of business activity is subject to the assessment of supranational institutions. The state of a given country's economy is not only of interest to the state itself. Domestic economies are a subsystem of the global economy and are subject to assessment on such a scale. In the annual reports of the World Bank, which evaluate the so-called index of economic freedom, Poland has been improving its ranking position in recent years. It is hoped that the above tendency indicates that the freedom of business activity under the Polish legal system is gaining the qualities of *law in action*, not just *law in books*.

## STRESZCZENIE

### Wolność działalności gospodarczej w systemie prawa polskiego

W artykule przeprowadzona została analiza konstrukcji jurystycznej wolności działalności gospodarczej w ujęciu systemowym. Wskazano, iż dla prawidłowego rozumienia przedmiotowej wolności należy ujmować ją w per-

---

<sup>57</sup> Cf. judgment of the Constitutional Tribunal of 12 January 2000, file ref. no. 11/98, "Case law of the Constitutional Tribunal. Official Compilation" 2001, No. 1, item 3.

spektywie jej pochodzenia, ustroju gospodarczego, zasad prawa oraz jej zakresu podmiotowego i przedmiotowego. Powyższe wskazuje zatem na wielopłaszczyznowość problematyki wolności działalności gospodarczej i jej znaczenia dla prawidłowego kształtowania stosunków gospodarczych. W artykule wskazano również, iż ustalenia teoretyczne powinny być podstawą właściwego kształtowania ustawodawstwa zwykłego, które wpływać będzie na realizację wolności gospodarczej w sferze podejmowania i wykonywania działalności przez przedsiębiorców.

**Słowa kluczowe:** Konstytucja RP; system prawa; prawa i wolności; przedsiębiorcy; wolność działalności gospodarczej

## SUMMARY

### Freedom of business activity in the Polish legal system

This article is an analysis of the juridical structure of the freedom of business activity from the perspective of the state system. It has been indicated that for the correct understanding of this freedom, it ought to be recognized in the perspective of its origin, economic system, principles of law and its subject and substantive scope. The above indicates, therefore, the multidimensional nature of the freedom of business activity and its importance for the proper development of economic relations. The article also indicates that theoretical findings should be the basis for the proper development of ordinary legislation which will affect the exercise of economic freedom in the sphere of undertaking and conducting business activity by entrepreneurs.

**Keywords:** Constitution of the Republic of Poland; legal system; rights and liberties; entrepreneurs; freedom of business activity

## BIBLIOGRAPHY

- Bączyk K., *Zasada swobody umów w prawie polskim*, in: *Studia Iuridica Toruniensia. Przemiany polskiego prawa. Tom drugi*, E. Kustra (ed.), Toruń 2002.
- Biernat S., *Podejmowanie i prowadzenie s. działalności gospodarczej – wolność gospodarcza de lege lata i de lege ferenda*, „Przegląd Prawa Handlowego” 1994.

- Chmaj M., *Godność człowieka jako źródło jego wolności i praw*, in: *Konstytucyjne wolności i prawa w Polsce. Zasady ogólne. Tom I*, M. Chmaj (ed.) et al., Kraków 2002.
- Ciapała J., *Konstytucyjna wolności działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009.
- Długosz T., *Spółeczna gospodarka rynkowa jako kryterium organizacji gospodarki*, „Gdańskie Studia Prawnicze” 2017, No 37.
- Doliwa A., *Dychotomiczny charakter podmiotowości prawnej państwa (imperium i dominium)*, „Studia Prawnicze” 2004, No 3.
- Działocha K., *Zasada ochrony praw nabytych w orzecznictwie Polskiego Trybunału Konstytucyjnego*, w: *Prawa człowieka, geneza, koncepcja, ochrona*, B. Banaszak (ed.), Wrocław 1993.
- Friedman M., *Kapitalizm i wolność*, Gliwice 2008.
- Jakimowicz W., *O publicznych prawach podmiotowych*, „Państwo i Prawo” 1999, No. 1.
- Jakimowicz W., *Publiczne prawa podmiotowe*, Kraków 2002.
- Jasudowicz T., *Administracja wobec praw człowieka*, Toruń 1997.
- Klecha K., *Wolność działalności gospodarczej w Konstytucji RP*, Warszawa 2009.
- Kosikowski C., *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warsaw 2008.
- Kosikowski C., *Wolność gospodarcza w prawie polskim*, Warszawa 1995.
- Niewiadomski Z., T. Asman, *Wolność budowlana jako prawo podmiotowe inwestora*, in: *Księga Jubileuszowa Profesora Stanisława Jędrzejewskiego*, H. Nowicki, W. Sz wajdler (eds.), Toruń 2009.
- Powałowski A., *Publicznoprawny status osoby fizycznej wykonującej działalność gospodarczą w Polsce*, Gdańsk 2008.
- Radwański Z., *Prawo cywilne – część ogólna*, Warszawa 2007.
- Rytel-Warzocho A., *Wolność działalności gospodarczej w świetle orzecznictwa polskiego Trybunału Konstytucyjnego*, „Gdańskie Studia Prawnicze” 2017, No 37.
- Sobczak K. (ed.), *Europejskie prawo gospodarcze w działalności przedsiębiorstw*, Warszawa 2002.
- Strzyckowski K., *Prawo gospodarcze publiczne*, Warszawa 2007.
- Strzyckowski K., *Prawo gospodarcze publiczne*, Warszawa 2009.
- Swoiński R., *Wolność i swoboda działalności gospodarczej*, Wrocław 2007.
- Szafrański A., *Konstytucyjne podstawy prowadzenia działalności gospodarczej przez przedsiębiorców publicznych*, „Przegląd Sejmowy” 2008, No 1.
- Szydło M., *Konstytucyjne podstawy udziału państwa w działalności gospodarczej*, „Przegląd Sejmowy” 2004, No 6.
- Szydło M., *Swoboda działalności gospodarczej*, Warszawa 2005.
- Walaszek-Pyziół A., *Swoboda działalności gospodarczej*, Kraków 1994.

Waligórski M., *Reglamentacja działalności gospodarczej a ochrona praw jednostki*, in: *Rola materialnego prawa administracyjnego a ochrona praw jednostki*, Z. Leoński (ed.), Poznań 1998.

Zdyb M., *Istota decyzji. Personalistyczno-normatywistyczna analiza zjawiska*, Lublin 1990.

Zieliński M., *Konstytucyjne zasady prawa*, in: *Charakter i struktura norm konstytucyjnych*, ed. J. Trzeciński, Warszawa 1997.

Zoll F., *Prawo cywilne. Tom I*, Poznań 1931.