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On the Perception of Law as a "Space of Opportunity" for Entrepreneurs

O postrzeganiu prawa jako „przestrzeni możliwości" dla przedsiębiorców

ABSTRACT

The legal system provides both a framework for the development of economic activity, stating the principles according to which it is carried out, and a certain degree of protection for entrepreneurs. This article suggests an approach at normative regulations pertaining to entrepreneurship whereby they are perceived as a system composed of opportunities for entrepreneurs. The purpose of this study is to present the regulations of the Entrepreneur Law Act as a law comprising "opportunities" that stem from principles informed by a value system and the deriving, legally defined modes of action of the public authorities (economic administration) that shape relations with entrepreneurs. These principles and the resulting relations have been referred to the specific institution within the Entrepreneur Law Act, i.e. scrutiny of economic activity, which establishes legal scope (whose importance cannot be understated given the perspective of the protective function of public economic law) for not so much intervention

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as protection (respecting) of entrepreneurs' rights. It was pointed out that measures aimed at protecting entrepreneurs constitute an important element of balancing the position of the inspecting and the inspected in the course of scrutiny, without compromising the efficacy of enforcing law by a public authority.

Keywords: space of opportunity; economic activity; public authorities; Entrepreneur Law

INTRODUCTION

"Effective protection of fundamental rights at all tiers of public authority is a paradigm of the constitutional tradition",[1] which consequently implies their implementation not only as values of positive law but also as principles of compliance with fundamental rights – including rights of economic nature – on the part of public authority.[2] The fact that public authority is bound by subjective economic rights manifests in their being prohibited from violating the freedom of economic activity in an illegitimate manner. However, this does not mean that the exercise of freedom, liberty, equality and competition – the key components of subjective economic rights – is free from interference by public authority. Its bodies are entitled to restrict economic freedom, though only within the limits that justify the achievement of a public goal, whereas such restrictions may not violate the essence of said freedoms and rights.[3]

The capacity of public authority to interfere in the economy causes entrepreneurs to perceive the legal system as a set of restrictions which hinder furthering one's business,[4] which makes it anti-entrepreneurial.[5] However, as Philippart notes, the perception of the law[6] (for the purposes of research in line with the paradigm suggested by Cheneval[7]) requires a broader view. The law ensures a framework for the development of economic activity through rules governing its conduct, as well as provides a certain degree of protection. Still, the legal system should be approached as an open space which sees various types of interaction (involving

[1] K. Strzyczkowski, *Kilka uwag o obiektywizacji gospodarczych praw podstawowych*, "Przegląd Prawa i Administracji" 2018, vol. 114, p. 637.

[2] D. Miąsik, [in:] *Karta praw podstawowych Unii Europejskiej. Komentarz*, ed. A. Wróbel, Warszawa 2013, p. 612; L. Kieres, *Wolność działalności gospodarczej*, [in:] *System Prawa Administracyjnego*, vol. 8A: *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, p. 90; N. Bernsdorff, [in:] *Charta der Grundrechte der Europäischen Union*, ed. J. Meyer, Baden-Baden 2011, p. 297.

[3] K. Strzyczkowski, *Kilka uwag…*, p. 640.

[4] R.E. Litan, A.J Luppino, *Introduction*, [in:] *Law and Entrepreneurship*, eds. R.E. Litan, A.J. Luppino, Cheltenham–Northampton 2013, pp. ix–xxiv.

[5] P. Philippart, *The Law: A System Made Up of Opportunities for the Entrepreneur*, "Projectics / Proyéctica / Projectique" 2017, vol. 18(3), pp. 37–49.

[6] *Ibidem*, p. 38.

[7] F. Cheneval, *Entrepreneurial Rights as Basic Rights*, [in:] *Economic Liberties and Human Rights*, eds. J. Queralt, B. van der Vossen, New York–London 2019, pp. 114–132.

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social and economic systems) that ultimately produce a range of specific relations. On the other hand, the participants in these systems interact with public authority compelling – as Debouzy[8] points out – changes in the legal system so that specific interests may be furthered. As a result, the law is changed in pursuit of simplicity, also where it determines the relations between the state and the economy, or between public authority and entrepreneurs. This should be seen as an endeavour to build a space where individual freedoms may be exercised and an adequate (effective) system of protecting fundamental rights may operate.

This paper advances an approach to normative regulations pertaining to entrepreneurship, whereby they are construed as a system composed of opportunities for entrepreneurs, following the concept[9] according to which "the law as a system formed of opportunities implies not only that it is linked to the perceptions and actions of players, but also that it is more an area of possibilities than one of prohibitions".[10] That area, Philippart argues, generates certain opportunities which, next to legal norms, stem from the actions of the subjects at law and guardians of the law. "The legal system is made up of norms that some players, namely, subjects of law since they are subjected to the law, must respect, controlled by other players in charge of their application, or of law enforcers as described by Bourdieu (1990). Norms, subjects of law and law enforcers interact and give the legal system the characteristic of being a space that is jointly constructed by those who produce both meaning and action-related situations. This space in turn generates opportunities to be seized".[11]

Thus, the purpose of this study is to examine the regulation of the Act of 6 March 2018 – Entrepreneur Law[12] as a law consisting of "opportunities" whose primary sources lie in principles informed by a value system and the resulting, legally defined modes of action available to public authorities, which shape relations with entrepreneurs. In line with the above concept, the interactions taking place between the subjects of economic rights and public authorities constitute the source of legally defined opportunities. The chief premise adopted here is that the legal means of action introduced under the ELA – the catalogue of principles in particular – are intended to ensure the exercise of the subjective rights of entrepreneurs arising from the fundamental right to freedom of economic activity and, consequently, that the ELA constitutes a "space of opportunity". After all, the principles provide the axiological underpinning of its accurate delineation. Furthermore, they supply the basis for models which guide the behaviour of public authorities in their relations with entrepreneurs.

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[8] See O. Debouzy, S.C. Clemons, P.A. Butt, *Entreprises et politique étrangère. Le lobbying à Paris, Washington et Bruxelles*, Paris 2003, p. 91.

[9] P. Philippart, *op. cit.*, p. 38.

[10] *Ibidem*, p. 39.

[11] *Ibidem*.

[12] Consolidated text, Journal of Laws 2023, item 221, hereinafter: ELA.

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These principles and the relations they generate are considered in the light of a selected institution of the ELA, i.e. scrutiny of economic activity. The latter has been chosen in view of the fact that, systemically, it represents an institution of state interference in the economy. Chapter 5 ELA, titled "Restrictions on the Scrutiny of Economic Activity", suggests that the regulation establishes legal scope (whose importance cannot be understated given the perspective of the protective function of public economic law) for not so much interference as protection (respecting) of entrepreneurs' rights, establishing certain models of behaviour for the inspecting authority. Hence, the paper discusses the safeguards against unlawful actions of supervisory bodies, including objection, complaint, and complaint against prolixity of the inspecting authority. It is underlined that they constitute an important element of the mechanism of balancing the position of the inspecting and the inspected in the course of the procedure, without detriment to the efficacy of law enforcement by public authorities.

AXIOLOGICAL GUARANTEES OF THE FUNDAMENTAL ECONOMIC RIGHTS IN THE ENTREPRENEUR LAW

The special nature of the ELA, underlined in the jurisprudence of public economic law, owes to its structure and the fact that, relative to other laws, it is a key regulation where entrepreneurship is concerned. Its scope spans undertaking, conduct and termination of economic activity on the territory of the Republic of Poland, including the rights and obligations of entrepreneurs and the tasks of public authorities in this respect. Consequently, this is a fundamental and universal legal act in the domain of freedom of economic activity, providing a "space of opportunity" for entrepreneurs. Such an approach is reflected in the explanatory memorandum to the draft act, as it states that the ELA is central to the conversion and reform of the legal and institutional environment in which entrepreneurs operate and carry out their business, an undertaking aimed at creating more effective legislative guarantees and safeguards thanks to which entrepreneurs are not hindered in their exercise of economic freedom, which in itself is a mainstay of the social market economy.[13]

This approach is expressed in the legal instruments which serve to determine the relations between public authorities and entrepreneurs. Indeed, the legislator has designed a wide, highly diverse range of legal means. These include institutional solutions (the Small and Medium Entrepreneurs Ombudsman, entrusted with protecting entrepreneurs' rights[14]), as well as procedural provisions (handling

[13] Sejm RP, Rządowy projekt ustawy – Prawo przedsiębiorców, Druk nr 2051, https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=2051 (access: 12.12.2023).

[14] Act of 6 March 2018 on the Ombudsman of Small and Medium Entrepreneurs (Journal of Laws 2018, item 648).

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formalities related to economic activity[15]), institutions utilized at the legislative stage (principles which govern drafting normative acts in the field of economic law and evaluation of their functioning[16]) as well as in subsequent application of the law (individual interpretation,[17] institution of established interpretive practice[18]) and enforcement (restrictions of scrutiny with respect to entrepreneurs).[19] Their common denominator is being anchored in a system of values[20] that determine the relations between the state and the economy. The system spans values which are universal for the legal order (e.g. justice, human good), as well as crucial values of public law (such as legality/lawfulness, efficiency, purpose-oriented action of public administration). The catalogue is supplemented by values which are legally protected by public economic laws, which derive from the statutory duties of the state. They are reflected in the Preamble to the ELA which, besides freedom of economic activity, invokes other constitutional principles, including those rooted in the principle of democratic governance: rule of law, legal certainty, non-discrimination, sustainable development as well as protection of competition and development of the economy. The principles adopted in the ELA represent the foundations of the economic order[21] which relies on the axiological tenets arising from the Constitution of the Republic of Poland. In consequence, those values should be taken into account when law is made, applied and enforced, reinforcing the guarantees of the fundamental economic rights. The fact that legal norms are grounded in values informs the rules according to which public authorities act.[22] By virtue of the adopted values, the entities which make, apply, and enforce law operate in line with enduring axiological assumptions.

[15] Chapter 3 ELA.

[16] Chapter 6 ELA.

[17] Article 34 ELA.

[18] Article 35 ELA.

[19] Concerning functions in public economic law, see B. Popowska (ed.), *Funkcje współczesnej administracji gospodarczej*, Poznań 2006; M. Zdyb, *Publiczne prawo gospodarcze*, Kraków 1997; C. Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, Warszawa 2007; A. Borkowski et al., *Administracyjne prawo gospodarcze*, Wrocław 2005; K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2011; H. Gronkiewicz-Waltz, M. Wierzbowski (eds.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne. Aspekty publicznoprawne*, Warszawa 2023; A. Powałowski (ed.), *Prawo gospodarcze publiczne*, Warszawa 2015.

[20] K. Kokocińska, *Funkcjonalność i dysfunkcjonalność przepisów publicznego prawa gospodarczego z perspektywy kryterium wartości (zagadnienia ogólne)*, [in:] *Dysfunkcje publicznego prawa gospodarczego*, eds. M. Zdyb, E. Kruk, G. Lubeńczuk, Warszawa 2018, pp. 25–38.

[21] M. Zdyb, [in:] *Ustawa z 6.3.2018 r. – Prawo przedsiębiorców – analiza i ocena najważniejszych przepisów. Podstawowe zasady (standardy) ładu gospodarczego w świetle ustawy z 6.3.2018 r. Prawo przedsiębiorców*, ed. M. Sieradzka, "Monitor Prawniczy" 2018, no. 13(Suppl.), pp. 5–13.

[22] M. Zieliński, Z. Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie*, Warszawa 1988, p. 305.

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THE PRINCIPLES OF ECONOMIC ORDER AS A COMPONENT IN THE "SPACE OF OPPORTUNITY" FOR ENTREPRENEURS

The adopted social, economic and political values provide a foundation based on which principles are distinguished, including both universal and specific principles relating to entrepreneurship. They play a particular role, as they demarcate the axiological framework of the "space of opportunity". Simultaneously, the principles determine the desired models of behaviour which bear crucially on the relations between the participants in the interactions that complement the "space of opportunity". The models prescribed by the law apply both to the entities engaged in economic activity and to the public authorities which have been tasked with the application and enforcement of the law in this area. Therefore, these models of behaviour are not axiologically indifferent[23] and become a source of opportunities for entrepreneurs, with respect to whom public authorities are obliged to apply normatively defined legal measures in a manner (procedures) consistent with the adopted values and the envisaged models.

Next to the principle of freedom expressed in Article 2 ELA, the model entrepreneur is defined by the principle which posits that everything which is not prohibited by law is permitted (Article 8 ELA), as well as by the principle in Article 9 ELA, which introduces the obligation to perform economic activity in accordance with the principles of fair competition and compliance with good practice and legitimate interests of other entrepreneurs and consumers. In the exercise of their freedom of economic activity, an entrepreneur may undertake any form of activity which is not expressly prohibited or explicitly provided for otherwise in another normative regulation. This means that the domain of entrepreneurial operation which is not subject to statutory obligations constitutes permission to exercise the subjective rights to which an entrepreneur is entitled. However, this principle should be understood more broadly, as a requirement binding on public administration bodies to refrain from unjustified interference in economic relations. In the context of the opportunity concept, the fact that public authorities do not become involved in relations in unjustified situations should be regarded as an example of how the "space of opportunity" for entrepreneurs takes its shape.

In such a "space of opportunity", an entrepreneur should exercise is or her rights in accordance with the normative model, carrying out his or her business based on the principles of fair competition, compliance with good practice and legitimate interests of other entrepreneurs and consumers, simultaneously respecting and protecting human rights and freedoms. The principle arising from Article 9 ELA demands

[23] K. Strzyczkowski, *Uwagi o zadaniach nauki o prawnych formach działania administracji gospodarczej*, [in:] *Instrumenty i formy prawne działania administracji gospodarczej*, eds. B. Popowska, K. Kokocińska, Poznań 2009, p. 35; K. Kokocińska, *Funkcjonalność…*, pp. 25–38.

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specific actions as well as constitutes a statutory model of the desired behaviour of the entrepreneur. The jurisprudence traditionally affirms that such requirements should be treated as obligations to adhere to the prescriptions and prohibitions.[24] This obligation- and onus-oriented model of the entrepreneur may engender negative notions of the law as anti-entrepreneurial, which is in fact contrary to intention behind the ELA. Therefore, bearing the perspective of the opportunity concept in mind, the statutorily determined entrepreneur model should be approached precisely as an "opportunity". It is an opportunity for risk management, whereby the entrepreneur may act in the conviction that they are pursuing the stipulated model and, once they enter into certain relations with other participants (also at the enforcement stage), their behaviour will be assessed as compliant or non-compliant, desirable or undesirable, reflecting subsequently in a legally defined sanction. "The players in charge [public authority actors] of the application of the norm ensure it is respected and/or sanction its infringement. In general they have a certain degree of flexibility in the way they carry out their role, and their actions or inactions can modulate the application of the norm. Such modulations may result in a continuum of effects whose two extremes are real tolerance or even permissiveness and, at the opposite end of the scale, far tougher measures".[25] This approach is corroborated by the catalogue of principles addressed to public authorities by which they are required to abide in their relations with entrepreneurs. These principles should be seen as demands that the administration act in a particular manner. In this context, an important role belongs to the principle of presumption of entrepreneur's honesty (Article 10 (1) ELA), which draws on the positive model of the entrepreneur and obligates public authorities to assume that the entrepreneur acts in accordance with the law, honestly and consistently with good practice, unless proven circumstances demonstrate that the contrary is the case.

The model of public administration is defined by multiple principles relating to their behaviour in relation with entrepreneurs as well as rules of procedure in cases involving an administration entity and an entrepreneur. The following should be recognised as crucial: the principle of resolving factual doubt in favour of the entrepreneur (Article 10 (2) ELA), the principle of advantageous interpretation of applicable law (Article 11 ELA), the principle of increased trust, proportionality, impartiality and equal treatment (Article 12 ELA), the principle of liability of the officials for violation of the law (Article 13 ELA), the principle of legal certainty (Article 14 ELA) and the principle of providing information (Article 15 ELA), as well as the principles arising from Chapter 3 titled "Handling of Business-Related Matters", including the principle of speed of procedure (Article 27 ELA) or the

[24] M. Biliński, A. Żurawik, [in:] *System Prawa Administracyjnego*, vol. 8A: *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Legalis 2018.

[25] P. Philippart, *op. cit.*, p. 40.

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principle of cooperation (Article 28 ELA). According to Popowska, these principles reflect procedural functions, such as the principle of objective truth, protection of the public interest and the legitimate interest of entrepreneurs.[26] Among the above, the principle of legal certainty deserves special attention. Predictability of actions of public authorities, i.e. the ability to anticipate how a matter will be resolved, is inherent in the principle of entrepreneurs' trust in public authorities. It prevents public administration bodies from formulating distinct legal views in decisions which concern the same party, are issued against the background of the same facts, and cite the same legal grounds.[27] This principle is an eloquent example of establishing such rules governing the actions of participants in economic relations which contribute to the "space of opportunity"; in effect, the latter consists of legal safeguards of the fundamental rights of entrepreneurs, guarantees which, among other things, derive from the adopted system of values.

SCRUTINY OF ECONOMIC ACTIVITY: ENFORCEMENT OF THE LAW VS. RESPECT FOR THE RIGHTS OF ENTREPRENEURS

Although scrutiny does not amount to sovereign influence over the inspected entities, its outcomes are fundamentally important for entrepreneurs, whereas the results of scrutiny constitute the basis for rulings in administrative (e.g. regulatory, fiscal) and even judicial proceedings, with a direct impact on the situation or business of the inspected entities.[28] Also, administrative penalties or fines may be imposed on entrepreneurs at the regulatory stage. In order to ensure that the positions of the inspecting and the inspected are balanced in the course of scrutiny, the legislator has hedged the procedure with numerous principles, i.e. rules of action (emanating from the general principles or standards formulated in the ELA), which obligate the parties to act in a specific manner. Among them, one can distinguish those rules which pertain to the scrutiny itself: the principle of notification, the principle of entrepreneur attendance during scrutiny, the principle of limited annual duration of scrutiny, the principle of efficiency and speed of scrutiny, the principle of documenting the scrutiny.[29] It should be noted that the predominant approach in literature (whether relating

[26] B. Popowska, *Zasady postępowania w sprawach z zakresu działalności gospodarczej unormowane w ustawie Prawo przedsiębiorców*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, vol. 80(4), pp. 27–40.

[27] Judgment of the Voivodeship Administrative Court in Warsaw of 23 November 2006, VI SA/Wa 1773/06, LEX no. 345854.

[28] R. Blicharz, [in:] *Kontrola przedsiębiorcy*, ed. R. Blicharz, Warszawa 2013, p. 11.

[29] On this issue, see T. Kocowski, [in:] A. Borkowski et al., *op. cit.*, pp. 406–407; A. Dobaczewska, *Zasady kształtowania relacji organów władzy publicznej z przedsiębiorcami*, [in:] A. Dobaczewska, A. Powałowski, H. Wolska, *Nowe prawo przedsiębiorców*, Legalis 2018; M. Sieradzka,

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to the previous Act of 2 July 2004 on the freedom of economic activity[30] or the ELA) tends to underscore numerous exceptions to the principles of scrutiny, often noting the shortcomings of relevant provisions from the standpoint of protecting entrepreneurs' fundamental rights, as well as stressing the advantage of the inspecting authority over the inspected. The normatively formulated mechanism of scrutiny also features legal instruments which have been introduced by the legislator to eliminate or reduce this disproportion, and facilitate protecting entrepreneurs' rights in the event of scrutiny conducted contrary to the law.

In the Polish legal order, the scrutiny of economic activity has not been provided for as a uniform procedure in one particular legal act. It is a complex process which depends on the type of inspected activity and the nature of the inspecting authority. Even so, it may be argued that despite the multiple aspects involved, the legislator has recognised the priority of the ELA, which establishes the legal framework for scrutiny; its provisions constitute *lex generalis* with respect to the procedures contained in other laws.[31] Consequently, the legal instruments adopted in that normative act carry substantial significance. Those contained in Article 59 ELA, namely objection, complaint, complaint of prolixity of scrutiny, establish a universal mechanism – introduced already by the FEAA[32] – by virtue of which entrepreneurs are protected against any scrutiny where the action of the authorities is unlawful. Use of such instruments by entrepreneurs is intended to enable the authority to correct the actions taken in the course of scrutiny. In line with the current case law, entrepreneurs are entitled to a review by administrative courts in economic matters both in the event of unlawful action by administrative bodies and protracted scrutiny. In the judgment of 14 January 2021, the Supreme Administrative Court in Warsaw stated that "the filing of an objection under Article 59 of the 2018 Entrepreneur Law Act results in the institution of proceedings aimed at protecting the rights of entrepreneur, which should culminate in the issuance of an act of a sovereign and unilateral nature (decision), subject to verification in the administrative sequence of instances and, subsequently, to a review by an administrative court".[33]

[in:] *Ustawa o swobodzie działalności gospodarczej. Komentarz*, eds. M. Zdyb, M. Sieradzka, LEX/el. 2013.

[30] Consolidated text, Journal of Laws 2017, item 2168, as amended, hereinafter: FEAA.

[31] A. Żywicka, *Kontrola działalności gospodarczej a zaufanie przedsiębiorców do organów administracji publicznej. Uwagi na tle rozwiązań przyjętych w ustawie z dn. 2 lipca 2004 r. o swobodzie działalności gospodarczej*, [in:] *Sprawiedliwość i zaufanie do władz publicznych w prawie administracyjnym*, eds. M. Stahl, M. Kasiński, K. Wlaźlak, Warszawa 2015, pp. 650–663.

[32] Article 84 (c) FEAA amended by Article 1 (20) of the Act of 19 December 2008 on the amendment of the Act on the freedom of economic activity and certain other laws (Journal of Laws 2009, no. 18, item 97).

[33] Judgment of the Supreme Administrative Court in Warsaw of 14 January 2021, I GSK 1652/20, LEX no. 3117506.

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One cannot fail to note that the current position of the Supreme Administrative Court is concurrent with an entitlement underscored in EU law, i.e. the right to good administration, which is a manifestation of the rule of law.[34] In the Lisbon Treaty, the right to good administration is linked with the obligation of friendly and open approach of public authorities towards the citizen and other entities as well as administrative cooperation. The right to good administration may thus be seen as a set of rules governing the administration of public affairs, in which particular emphasis is placed on the interaction between the authority and the individual as well as the duties of the authorities, including fairness, impartiality, prudence and promptness.[35] The right to have one's case examined promptly, without undue delay and within a reasonable time, is construed as one of the fundamental rights of the individual and, simultaneously, a constitutional public subjective procedural right[36] which proves so important in economic matters. In the pursuit of the rule of law, the legislator is responsible for establishing such legal constructs and institutions that are capable of ensuring effective protection against the negative consequences of the lapse of time,[37] including those caused by the tardiness of administrative authorities in economic matters.

Having no equivalent in administrative procedure, objection is a particular protective measure against those actions of the inspecting authority which, undertaken in the course of scrutiny, contravene the ELA. This instrument serves to challenge a specific activity of the authorities as part of scrutiny, as opposed to specific decisions of such authorities.[38] Article 59 (1) ELA delivers a finite catalogue of deficiencies of scrutiny against which an objection may be lodged. Objection is the first response available to an entrepreneur whenever the essential principles of scrutiny formulated in the ELA are violated by the inspecting authority (filed within three days from the start of scrutiny or circumstances which justify its being filed), which is indicative of the guaranty nature of that measure. Following an objection filed by the entrepreneur, the inspecting authority has to discontinue the activities to which the objection relates (the objection is filed with the authority by which the scrutiny is carried out); simultaneously, the run of the scrutiny is suspended as well. This is effective as soon as the inspecting entity is notified that the objection has been filed and remains in effect until the date when a decision

[34] K. Milecka, [in:] *Prawo administracyjne Unii Europejskiej*, ed. E. Grzeszczak, Warszawa 2016, p. 226.

[35] Cf. I. Kawka, [in:] *Zasady ogólne prawa wspólnotowego*, ed. C. Mik, Toruń 2007, pp. 189–224.

[36] Cf. W. Jakimowicz, *Publiczne prawa podmiotowe*, Kraków 2002, p. 260.

[37] A. Hołda-Wydrzyńska, [in:] *Kontrola przedsiębiorcy*..., p. 154; A. Żywicka, *Kontrola działalności gospodarczej*..., pp. 650–663.

[38] Judgment of the Supreme Administrative Court in Warsaw of 28 June 2016, II OSK 2633/14, LEX no. 2106706; judgment of the Supreme Administrative Court in Warsaw of 14 January 2021, I GSK 1652/20, LEX no. 3117506.

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is issued to continue or terminate scrutiny. Such a solution makes it possible to examine the objection without the risk that the inspecting authority may lose time required to perform all activities involved in scrutiny. Given the requirement to protect entrepreneur's interests, any relevant activities and the run of scrutiny should be suspended at the same moment, i.e. when the notice of filing an objection has been effectively delivered to the inspecting authority. In the event that the entrepreneur's objection is dismissed, the authority may resume scrutiny on the day when the decision to continue becomes final, i.e. after three working days from the day of its delivery to the entrepreneur. Within that particular period, the entrepreneur is entitled to lodge a complaint against the decision which declared the objection groundless.[39] Submission of such a complaint suspends the scrutiny until the date when the ruling that the contested decision remains in force is delivered to the entrepreneur. It is observed in case law that "a complaint is a means to verify the decision of the inspecting authority concerning examination of an objection to the continuation of scrutiny. Its filing by the entrepreneur aims to challenge the decision that scrutiny be continued which the inspecting authority issued as a result of filing the objection".[40] The time limit for lodging the complaint is preclusive, running from the day following the date of delivery of the decision to the entrepreneur. There is a view in the literature that the appeal is ineffective when filed after the prescribed deadline, but the ineffectiveness is relative, since the deadline for filing a complaint may be reinstated.[41]

By means of a complaint against protracted conduct of scrutiny, an entrepreneur may appeal against the decision to continue issued by the inspecting authority.[42] In the judgment of 12 April 2018, the Supreme Administrative Court in Warsaw found that "as part of a complaint of prolixity of proceedings, the administrative court reviews the course and correctness of actions of the authority, their adequacy, concentration of evidence, the validity and expediency, from the standpoint of the decision. Prolixity in the conduct of administrative proceedings occurs when the authority does not resolve the case in a timely fashion whilst not remaining inactive, and the procedural actions it undertakes are not characterized by the necessary concentration, or demonstrate the nature of ostensible actions that are irrelevant to the substantive resolution of the case. A protracted conduct of administrative proceedings by an authority will be in evidence when one can successfully assert

[39] Judgment of the Voivodeship Administrative Court in Kielce of 9 September 2021, I SA/Ke 358/21, LEX no. 3248549.

[40] Judgment of the Voivodeship Administrative Court in Poznań of 5 January 2022, II SA/Po 285/21, LEX no. 3285965.

[41] G. Łaszczyca, [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. G. Łaszczyca, C. Martysz, A. Matan, vol. 1, Warszawa 2007, p. 180.

[42] Judgment of the Supreme Administrative Court in Warsaw of 20 May 2020, I GSK 1790/19, LEX no. 3047243.

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the defence of failing to exercise due diligence in organising administrative proceedings in such a manner that they end within a reasonable time".[43]

Considering protection of the legitimate interests of entrepreneurs, it is vital that the court determines whether the protracted conduct of scrutiny by the inspecting authority took place in gross violation of the law. In addition, the administrative court may rule, either *ex officio* or at the motion of a party, to impose a fine on the inspecting authority or may award the claimant a specific amount from the authority, in line with Article 149 of the Law on administrative court proceedings.[44] Importantly, a decision of the administrative court stating that the proceedings were protracted opens up a path for the entrepreneur to assert the rights before a common court under Article 417 ff. of the Civil Code,[45] as guaranteed by Article 46 ELA. The ruling in question constitutes one of the prerequisites for a public administration body to incur liability for damages as a result conducting scrutiny in breach of the law.[46]

It should be emphasized that application of the measures discussed here will be effective when they follow the sequence specified in Article 59 ELA: objection – complaint – prolixity complaint; as such, it exemplifies the peculiarity of procedures so characteristic of public economic law.[47]

CONCLUSIONS

The distinct part of the legal system which encompasses regulations pertaining to entrepreneurship should be seen as a system in which fundamental economic rights are guaranteed and protected. The legal system is a "space of opportunity" constructed around the adopted legal norms that serve the pursuit of the fundamental value of economic freedom, as well as resulting from the behaviour of the entities involved. The latter enter into legally defined, complex relations. Tasked with application of the law, public authorities ensure compliance with legal norms and, not infrequently, sanction their violation, thus exerting an influence on the legal position of entrepreneurs. As an element of the "space of opportunity" for entre-

[43] Judgment of the Supreme Administrative Court in Warsaw of 12 April 2018, I FSK 997/17.

[44] Act of 30 August 2002 – Law on administrative court proceedings (consolidated text, Journal of Laws 2023, item 259).

[45] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2022, item 1360, as amended).

[46] A. Żywicka, [in:] *Konstytucja biznesu. Komentarz*, ed. M. Wierzbowski, Warszawa 2019; K. Krzal, [in:] *Prawo przedsiębiorców. Komentarz*, ed. A. Pietrzak, LEX/el. 2019.

[47] Cf. K. Kokocińska, *Metoda regulacji stosunków prawnych w obszarze publicznego prawa gospodarczego (niejednorodność norm proceduralnych)*, [in:] *Swoistość procedur publicznego prawa gospodarczego*, ed. B. Popowska, Poznań 2014, pp. 80–93.

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preneurs, the relations in question should determine the rules of specific action that establish models informed by the values on which freedom of economic activity is founded. As a normative act which is fundamental to economic relations, the ELA includes a catalogue of values and principles. Consequently, it is consistent with the demand formulated in jurisprudence, which asserts axiological justification of legal norms,[48] i.e. "a situation in which it is argued that a given norm should be considered binding, because what a given norm prescribes is worthy of approval, and what it prohibits – worthy of disapproval"[49], but at the same time it enhances the position of entrepreneurs. Making public authorities aware that respecting fundamental rights in their relations with entrepreneurs is crucial, highlights the importance of the entrepreneur as an entity subject to administrative authority. Long since endorsed in jurisprudence, such an approach differs substantially from the previous conception, in which the administration was the primary category of administrative law.[50]

By stressing the importance of economic freedoms and subjective rights, the principles codified in the ELA are an important component of the "space of opportunity" for entrepreneurs, a space based on economic freedom, which in itself is a key attribute of market economy. This approach is corroborated by the systemic legal institutions provided for in the ELA, such as the scrutiny of economic activity. The mechanism adopted with a view to protecting entrepreneurs, who thus may take advantage of the objection–complaint–complaint of prolixity sequence, realizes the principle of procedural justice as well as the right of the individual to judicial review of the actions of an administrative body, which again enhances the position of entrepreneurs. Such measures do not constitute a hindrance to the enforcement of the law, but improve the quality of the operation of administrative bodies (inspecting authorities) through self-verification of the scrutiny they carry out. The normative mechanism of protecting entrepreneurs against unlawful conduct of scrutiny may readily be regarded as an actual implementation of the right to good administration in the Polish legal order.

[48] See J. Zimmermann (ed.), *Wartości w prawie administracyjnym*, Warszawa 2015; J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013.

[49] Idem, *Aksjomaty…*, p. 74.

[50] J. Jagielski, P. Gołaszewski, *O zasadzie zaufania administracji publicznej do jednostki w prawie administracyjnym*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana Profesorowi Markowi Wierzbowskiemu*, eds. J. Jagielski, D. Kijowski, M. Grzywacz, Warszawa 2018, p. 37.

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ABSTRAKT

System prawny zapewnia zarówno ramy dla rozwoju działalności gospodarczej, wskazując zasady jej prowadzenia, jak i określony stopień ochrony przedsiębiorców. Niniejszy artykuł stanowi propozycję spojrzenia na regulacje normatywne w obszarze przedsiębiorczości jak na system zbudowany z szans dla przedsiębiorców. Celem opracowania jest przedstawienie regulacji ustawy Prawo przedsiębiorców jako prawa składającego się z „możliwości", których źródłem są zasady osadzone w systemie wartości oraz wynikające z nich prawnie określone wzorce działania organów władzy publicznej (administracji gospodarczej) kształtujące relacje z przedsiębiorcami. Zasady te oraz wynikające z nich relacje odniesiono do wybranej instytucji ustawy Prawo przedsiębiorców, jaką jest kontrola działalności gospodarczej, która tworzy przestrzeń prawną (istotną z perspektywy funkcji ochronnej publicznego prawa gospodarczego) nie tyle ingerencji, co ochrony (poszanowania) praw przedsiębiorców. Wskazano, że środki ochrony przedsiębiorców stanowią istotny element równoważenia pozycji kontrolującego i kontrolowanego w toku kontroli bez uszczerbku dla efektywności egzekwowania prawa przez władzę publiczną.

Słowa kluczowe: przestrzeń możliwości; działalność gospodarcza; organy władzy publicznej; Prawo przedsiębiorców