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TYPES OF ENTREPRENEURS IN THE DRAFT CIVIL CODE

Introduction

The aim of the article is to discuss draft solutions as regards the concept of entrepreneur (in this article the term refers to natural person, legal person and an organizational unit) and its categories (specific, minor and registered entrepreneur) in the draft civil code (in Book One). The legislator developed the one-article definition of an entrepreneur that is currently in force. Several new solutions refer to the provisions of the pre-war Commercial Code¹. The article includes reservations concerning the introduction of new categories of entrepreneurs and presents adequate and necessary proposals of changes in the civil law as regards this issue.

Definition of entrepreneur according to civil law – comments to *de lege lata*.

The concept of entrepreneur is discussed vastly in the literature on the subject². The legal definition in the private law is included in article 43¹ of the Civil Code, in which “an

¹ Decree of the President of the Polish Republic of 27 June 1934, Commercial Code (Journal of Laws, 1934, No.57, item 507, as amended), hereinafter- C.C.

² P.Bielski, Pojęcie przedsiębiorcy w systemie prawa polskiego (zagadnienia konstrukcyjne), Gdańsk 2005, W.J.Katner, Pojęcie przedsiębiorcy-polemika, PPH 2007, No 4, E. Gniewek (in:) E. Gniewek, Komentarz. Kodeks cywilny, Warszawa 2011, R. Trzaskowski, Działalność gospodarcza w rozumieniu przepisów prawa cywilnego na tle orzecznictwa, Glosa 2006, No. 2; T. Szanciłło, Przedsiębiorca w prawie polskim, PPH 2005, No 3-4; J. Frąckowiak (in:) System Prawa Prywatnego, tom I, Prawo cywilne – część ogólna, (ed. M. Safian, Warszawa 2007; W.Popiołek (in:) Kodeks cywilny. Komentarz do Art. 1-449¹⁰ Kc. Vol. I, ed. K. Pietrzykowski, Warszawa 2011; J. Jacyszyn, Przedsiębiorca a wolny zawód, rejent 2003, No. 10; A.G.Harla, Pojęcie kupca i przedsiębiorcy (1918-2005), PPH 2006, No. 12; P. Lissoń, Zakres pojęcia „przedsiębiorcy” w prawie działalności gospodarczej oraz innych aktach prawnych, PREiS 2002, z.2; T. Mróz, E.Bieniek-Koroniewicz, Kontrowersje wokół pojęcia „przedsiębiorca”, Prawo Spółek 2003, No. 6; M.Szydło, Pojęcie przedsiębiorcy w prawie polskim, PS 2002, C. Kosikowski, Pojęcie przedsiębiorcy w prawie polskim, PiP 2001, z. 4, No. 7-8; B. Gnela, Pojęcie przedsiębiorcy w relacjach prawnych z konsumentami (in:) W.J.Katner, U.Promińska (ed.), Prawo handlowe po przystąpieniu Polski do unii Europejskiej, Warszawa 2010, J. Lic, M.Łuc, Definicje pojęć „działalność gospodarcza” i „przedsiębiorca” (potrzeba rewizji), PiP 2008, z. 10; A. Janiak (in:) A. Kidyba (ed.), Kodeks cywilny. Komentarz, Vol. I, Warszawa 2009.

³ See, e.g. Art. 5 item 1 of the Act of 28 February 2003 – Law on Bankruptcy and Reorganization (Journal of Laws, 2009, No. 175, item 1361 as amended.), Art. 479² item 1 of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws No. 43, item 296 as amended), Art. 4 item 1 of the Competition protection act, Art. 2 item 1 of the Act of 23 August 2007 on combating unfair commercial practices (Journal of Laws No. 171, item 1206) and Art. 3 of the Act of 30 June 2000 – Industrial Property Law (Journal of Laws of 2013, item 1410 as amended). See more on the variability of the definitions of entrepreneur in the substantive civil law and the law of civil procedure: J.P. Naworski, Przedsiębiorca w polskim prawie cywilnym (materialnym i procesowym) *de lege lata i de lege ferenda*, Toruń 2011, pp. 17-35.

entrepreneur is a natural person, a legal person or an organizational unit referred to in article 331 § 1 conducting business or professional activity on its own behalf". The definition is universal and refers to any civil law relationships; the application of regulations that refer to entrepreneur does not depend on the fact whether the term *entrepreneur* appears in the regulation – it is applicable when the entity in question has features defined by article 43¹ of the Civil Code.

The regulations of the private law include also special definitions that are either similar or differ from the one applied in article 43¹ of the Civil Code³. The fact that there are so many definitions in the regulations of the private law should be assessed negatively. The Code definition should refer to all civil law relationships⁴.

The concept of entrepreneur was also defined in the public economic law. According to Art.4 of the Act on freedom of economic activity⁵, *the term 'entrepreneur' shall denote a natural person, a legal person, and a non-corporate organizational unit with legal capacity under provisions of a separate Act, conducting economic activity on its own behalf.*

There are opinions that the F.E.A.A. definition of entrepreneur applies only within the scope of this act and other acts of public economic law that use this concept.⁶

In the light of Art. 4 of F.E.A.A., the term entrepreneur includes also the partners in a civil partnership within the scope of their business operations. The range of the definition in Art. 43¹ of the Civil Code is different as it does not include the partners in a civil partnership. However, it should be pointed out that both definitions (the ones in the Civil Code and F.E.A.A.) include

³ See, e.g. Art. 5 item 1 of the Act of 28 February 2003 – Law on Bankruptcy and Reorganization (Journal of Laws, 2009, No. 175, item 1361 as amended.), Art. 479² item 1 of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws No. 43, item 296 as amended), Art. 4 item 1 of the Competition protection act, Art. 2 item 1 of the Act of 23 August 2007 on combating unfair commercial practices (Journal of Laws No. 171, item 1206) and Art. 3 of the Act of 30 June 2000 – Industrial Property Law (Journal of Laws of 2013, item 1410 as amended). See more on the variability of the definitions of entrepreneur in the substantive civil law and the law of civil procedure: J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym (materialnym i procesowym) de lege lata i de lege ferenda*, Toruń 2011, pp. 17-35.

⁴ J. Frąckowiak (in:) *System Prawa Prywatnego...*, p. 1107. According to the author a particular disharmony between the definition of entrepreneur in the Civil Code and the Code of Civil Procedure that should be removed and which appeared after the introduction of Art. 43¹ of the Civil Code. See: Art. 479² of the Code of Civil Procedure.

⁵ The Act of 2 July 2004 on freedom of economic activity (Journal of Laws of 2013, item 672 as amended; hereinafter – F.E.A.A.

⁶ As: W.Popiołek, (in:) *Kodeks cywilny...*,p.215. Other views on the subject are expressed, inter alia, by e.g.: Bielski, *spółka kapitałowa w organizacji a status przedsiębiorcy*, PPH 2002, No. 6, and also R. Trzaskowski, *Działalność gospodarcza w rozumieniu przepisów prawa cywilnego na tle orzecznictwa*, Głosa 2006, No. 2. According to R. Trzaskowski, Art. 2 F.E.A.A. does not restrict the definition of business activities to the act in question.

individuals that conduct “professional” activity⁷. F.E.A.A. includes also the definition of business operations, as well as of micro-, small and medium-sized enterprise⁸, while the current Civil Code gives only a one-article definition of entrepreneur in Art. 43¹ of the Civil Code, which was mentioned before.

The definition included in Art. 43¹ of the Civil Code raises some doubts, both theoretical and practical in character. The concept of entrepreneur is defined by two criteria: the subject and functional ones⁹.

Currently, according to the Polish law, only a person can be an entrepreneur. Thus, the necessary condition for being an entrepreneur is to have legal capacity. Organizational entities that do not have legal capacity cannot be considered as entrepreneurs in the sense given by the Civil Code¹⁰. Personal companies and capital companies in organizations are entrepreneurs while housing communities are not¹¹. It seems justified to say that entrepreneur can be a natural person without a full legal capacity; in such cases the economic activity is conducted by a statutory agent on behalf and for the sake of the entrepreneur.¹²

Employees, administrators, board members of enterprise bodies or proxies will not be considered entrepreneurs as – even if they participate in an economic activity – they do not do it on their behalf. The statement that an entrepreneur conducts the activity on its own behalf does not allow to treat as entrepreneurs the organizations that conduct economic activities on behalf of persons that create them or are part of them. That is confirmed by the fact that civil partnership, branches, plants or organizational entities of the State Treasury, communes, counties regions (voievodships) are not entrepreneurs.¹³

The functional criterion relates the status of entrepreneur to the kind of activity of the legal person – the point is in conducting either a professional or economic activity on its own

⁷ Art. 4 of F.E.A.A. treats professional activity as a kind of economic activity, while Art. 43¹ of the Civil Code differentiates professional activity from business activity. On the lack of the substantiation for the existence of different definition structures see: M. Szaraniec, „ *Professional activity as a kind of business activity – comments on the law de lege lata and de lege ferenda*” (in:) Directions of private law Development. Comments on the draft of book one of the Civil Code, academic supervision: B. Gnela, K. Michałowska, Warszawa 2014, pp. 97-111.

⁸ Art. 104,105 and 106 of F.E.A.A.

⁹ As in W. Popiołek, (in:) Kodeks cywilny...,p.217. The author points to the fact that an additional criterion can be indicated, i.e.undertaking economic activity on one’s own behalf.

¹⁰ C. Kosikowski, Pojęcie....., J. Frąckowiak, System.....,p.1102.

¹¹ C. Kosikowski, Pojęcie....., J. Frąckowiak, System.....,p.1102.

¹² As in W.Popiołek, (in:) Kodeks cywilny...,p.217, otherwise see K Z. Miczek, Osoba fizyczna jako przedsiębiorca – na tle ustawy o swobodzie działalności gospodarczej i kodeksu cywilnego, PPH 2005, No. 9, pp. 24 - , as well as the sentence of the Court of Appeal in Warsaw of 22 April 2009, VI ACa 1083/08, Apel. Warszawa 2009, No. 4, p. 38.

¹³ J. Frąckowiak, System, p. 1104.

behalf.¹⁴ None of the provisions of the Civil Code includes a statutory definition of the concept of economic activity. The concept is defined by regulatory provisions, i.e. by Art. 2 of F.E.A.A.¹⁵ and is an indication when determining the meaning of the terms applied in Art. 43¹ of the Civil Code.¹⁶

Thus, activity that aims at meeting the needs of the entity that is conducting it, cannot be considered an economic activity.¹⁷

Conducting economic activity consists in performing repetitive activities in a way that they form a certain entity and do not constitute a single provision of products or services. The requirement that it has to be an activity and not separate actions results in the condition that a person can be considered to be entrepreneur when its doings are somehow organized and last in time¹⁸. As a rule, it will be an activity that aims at gaining some profits i.e. an economic activity¹⁹. Moreover, it has to be an economic activity that is run in a professional way, on the entrepreneur's behalf and risk²⁰. According to 43¹ of the Civil Code, the status of entrepreneur does not involve any formalities, particularly a registration in an adequate register²¹. Thus, the entry to the register of entrepreneurs does not prejudice that a given entity is an entrepreneur.²² In conclusion, it has to be pointed out that the substantive definition of entrepreneur included in Art. 431 of the Civil Code has its significance if civil law provisions are to be applied to economic relationships.

¹⁴ As in W.Popiołek, (in:) Kodeks cywilny...,p.217. According to the author, that criterion makes it possible to differentiate between natural persons that are entrepreneurs and consumer .

¹⁵ Pursuant to Art. 2 F.E.A.A., economic activity includes profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identifying and mining of minerals in deposits,

as well as professional activity conducted in an organized and continuous fashion. Various types of economic activities are reflected by the provisions of the Regulation of the Council of Ministers of 24 December 2007 on the Polish Classification of Activities (PKD), (Journal of Laws No. 207, item 1293 as amended)

¹⁶ J. Frąckowiak, System...,p.1104, and also C. Kosikowski, Prawo..., p.18, and also J. Lic, M.Łuc, Definicje pojęć...,p.59.

¹⁷ J. Frąckowiak, System...,p.1104.

¹⁸ Ibid, p. 1106, also J. Szydło, Pojęcie przedsiębiorcy..., p.

¹⁹ J. Frąckowiak, System...,p.1106. The author points out to the fact that it is a contentious issue. The aim to gain profit does not prejudice that a given activity should be qualified as an economic one and the entity conducting it as an entrepreneur. Particularly, the lack of such objective does not exclude the possibility to consider such entity to an entrepreneur in the case when it conducts activity that may be profitable. As in Popiołek, (in:) Kodeks cywilny...,p.219.

²⁰ As in: W.Popiołek, (in:) Kodeks cywilny...,p.220 and the literature on the subject that is quoted there.

²¹ Contrary to Art. 14 f.e.a.a where the status of entrepreneur involves an entry to an appropriate register

²² As in J. Frąckowiak, System...,p. 1108 and W.Popiołek, (in:) Kodeks cywilny...,p.222.

Regulation of the notion of entrepreneur in the draft civil code (Art. 57 of the draft)²³

Before starting the analysis of the assumptions of the draft as regards the notion of entrepreneur, it should be mentioned that the legislator developed significantly the current one-article definition of entrepreneur. The basic provision of the draft that defines the notion is Art. 57 section 1 of the draft civil code, which says that *entrepreneur is a legal or natural person that conducts economic activity on its own risk and in a permanently organized way*. The current expression *on its own behalf* has been replaced by *on its own risk*, which must be approved as risk is a typical characteristics of economic activity. The indication *acting on its own risk* in the definition of entrepreneur seems to be a right solution. However, the literature on the subject applies alternative solutions which consist in introducing *independence* to the notion of economic activity; independence would replace the requirement of conducting economic activity on one's own account or behalf. Thus, conducting economic activity on one's own behalf would mean the lack of being under anybody's management.²⁴ Other authors state that term *on one's own risk* expresses more adequately the requirement in question and does not exclude the possibility for a third party to conduct operations related to the economic activity.²⁵

Moreover, one should not question the part of the provision in question that indicates the necessity to conduct economic activity by entrepreneur *in a permanently organized way* as the criterion of being organized is imminently associated with economic activity, which is confirmed by the current definition in Art.2 of F.E.A.A. that requires *in fine* that economic activity should be organized.²⁶

The wording of Art. 57 of the draft civil code according to which *it is presumed that the economic activity of a legal person is permanently organized* raises some doubts. According to the substantiation of the draft, the presumption was introduced with the aim to determine properly whether such a legal person is entrepreneur and also to increase the level of security

²³ Civil Code Codification Commission by the Ministry of Justice, Book one of the Civil Code . Draft and substantiation. (Księga Pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem,) Warsaw, October 2008: www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/ksiega.rtf : (Accessed:15.12.2014)

²⁴ J. Lic, M.Łuc, Definicje pojęć..., p. 60.

²⁵ As in: T. Szczurowski, Cywilnoprawna definicja przedsiębiorcy – uwagi *de lege lata* i *de lege ferenda* (in:) Instytucje prawa handlowego w przyszłym kodeksie cywilnym, ed. T. Mróz, M. Stec, Warszawa 2012, p. 224.

²⁶ J.P. Naworski, Przedsiębiorca w polskim prawie cywilnym (materialnym i procesowym). *De lege lata* i *de lege ferenda*, Toruń 2011, p 337. According to the author the term permanently referring to the organization of economic activity is controversial as the requirement of economic activity to be organized prejudices its permanence and it is difficult to image conducting economic activity in an organized way that is not permanent in character.

of its counterparties. The presumption means that the economic activity of a legal person is permanently organized, which justifies basing the definition of legal person on the concept of organizational entity. The presumption regarding legal person results from the conviction of the authors of the draft that the condition for the permanence and external visibility of the legal person's organization is fulfilled *ex definitione*.²⁷

Nobody calls into question the issue of legal persons being organized, however, the draft provisions accept a rebut of the presumption as it is mutable in character, which should not be the case with regard to legal persons.²⁸

The final wording of Art. 57 section 1 of the draft civil code is acceptable (with the exception of the second sentence)

The draft civil code defines the notion of economic activity that is inseparable from the concept of entrepreneur. The issue was studied by the author of this article in the first part of her statutory research and, consequently, the concept of economic activity according to the draft civil code, will not be discussed here.²⁹

Specific entrepreneur (Art. 58 of the draft)

Art.58 of the draft introduces the concept of a specific entrepreneur, which is *a person that conducts professional activity on its own in a permanently organized way*. In order to understand this part of draft art.58, one should analyze it jointly with Art.57 section 2, which states that *economic activity is a permanent gainful activity or activity that has any other economic objective, as well as an independent professional activity*.

Independent professional activity, the conducting of which determines the existence of a specific type of entrepreneur, is defined correctly in draft Art. 58 section 2, which states that it is *a permanent activity requiring specific qualifications that are certified by a state or local government examination*. The substantiation of the draft states that, as a result of independent

²⁷ Civil Code Codification Commission by the Ministry of Justice, Book one of the Civil Code . Draft and substantiation. (Księga Pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem.) Warsaw, October 2008: www.bip.ms.gov.pl/Data/Files/public/bip/kkpc/ksiega.rtf: (Accessed:15.12.2014). The introduction of an analogous presumption for a natural person is highly more difficult . The reference to the criteria of employment as the basis for presuming the status of entrepreneur of a natural person had been analyzed by the Codification Commission but it was considered too arbitrary.

²⁸ J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym...*,p.338.

²⁹ See: M. Szaraniec, „Działalność zawodowa jako rodzaj działalności gospodarczej – uwagi *de lege lata* i *de lege ferenda*” published in: „Professional activity as a kind of business activity – comments on the law *de lege lata* and *de lege ferenda*” (in:) Directions of private law development. Comments on the draft of book one of the Civil Code, academic supervision: B. Gnela, K. Michałowska, Warszawa 2014, pp. 97-111.

professional activity, a natural person becomes a “full” entrepreneur in a simplified way if its professional activity is permanently organized (the volume of income is irrelevant). A legal person becomes an entrepreneur on the basis of the same criteria.³⁰ Consequently, the concept of a specific type of entrepreneur is not clear. It seems that conducting independent professional activity should be restricted only to natural persons (which should result directly from Art. 58, section 1), which is indicated by draft Art.58 section 2 due to the fact that a legal person cannot have specific qualifications, including state or local government examinations.

The substantiation implies that the accepted concept assumes that the notions of economic and professional activities may overlap and a separate regulation is required only by activities that require specific qualifications certified by state or local government examinations, when the criteria of economic activity are fulfilled (permanently organized activity on its own risk) The legislator’s suggestion that professional activity could be conducted by a legal person is erroneous as such type of activity can be performed only by a natural person. Thus, it seems justified to decide precisely on that issue in draft Art. 58 section 1 (if such provision were to remain in the draft) because distinguishing a specific entrepreneur in the civil code seems to be superfluous as it would be enough to reword Art.57 section 2 in the following way: *economic activity is a permanent gainful activity or activity that has any other economic objective, as well as an independent professional activity that requires particular qualifications certified by a state or local government examination.*

The legislator assumes a simplified way of the operations of entrepreneur that conducts professional activity, which is evident in draft Art.58 section 3. It is obvious, that draft Art. 58 refers to persons that are freelance entrepreneurs (regulated profession) since, as being entrepreneurs, they are entered to a commercial register (Art.14 item 2 of F.E.A.A.). They operate under a business name (Art. 43² section 1 of the Civil Code) but cannot grant procuration (Art. 109¹ section 1 of the Civil Code). Due to the activity typical for particular professions, the legislator prejudices that registration regulations or provisions that regulate particular profession may lift the entrepreneur’s obligation to enter the register. However, regulations should not exclude the principle that gives entrepreneur the right to demand the entry to the register if the entrepreneur considers it beneficial to be subject to the regulations on

³⁰ Civil Code Codification Commission by the Ministry of Justice, Book one of the Civil Code . Draft and substantiation. (Księga Pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem.) Warsaw, October 2008: www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/ksiega.rtf: (Accessed:15.12.2014).

company and commercial proxy³¹ (which is not the case if entrepreneur is not entered in the register)

The regulation that entitles an entrepreneur to be entered to the register on demand, in the cases when the entrepreneur is exempt from this obligation pursuant to specific provisions, should be accepted. However, it is not clear in the light of draft Art. 58 section 3, sentence 3 if the entrepreneur will be subject to the obligation to enter the register, which results from draft Art. 63, after reaching the volume of revenues that exceeds the figure given in draft Art. 59 section 2. Several arguments support an affirmative answer to that question.³² Draft Art. 58 section 3 sentence 4 according to which the entrepreneur that is not entered to a register is not subject to the provisions on business name and commercial procuration is superfluous as the draft – similarly to the commercial code – associates the two institutions only with a registered entrepreneur.³³

Minor entrepreneur (draft Art. 59)

Draft Art.59 section 1 introduces the notion of minor entrepreneur, which is *a natural person that gains income by economic activity that does not exceed the amount resulting in the obligation to keep accounts as required by the provisions on accounting*. The term refers to the so called minor traders that were distinguished by previous law. However, the basic difference is that minor traders were not considered to be tradesmen, while the draft includes this category of natural persons to entrepreneurs.³⁴

Moreover, a minor entrepreneur – in the light of the draft civil code – is not entered into the register and has no right to a business name or to granting procuration. It can be concluded from the substantiation that a minor entrepreneur conducts activity on a small, local scale and its relationships with customers are personal in character, which results in their lack of interest as regards the entry to the register. What is more, a minor entrepreneur usually is not interested in a business name or procuration.³⁵

³¹ Civil Code Codification Commission by the Ministry of Justice, Book one of the Civil Code . Draft and substantiation. (Księga Pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem,) Warsaw, October 2008: www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/ksiega.rtf: (Accessed:15.12.2014).

³² J.P. Naworski, Przedsiębiorca w polskim prawie cywilnym...,p.343.

³³ Ibid, p. 343.

³⁴ S. Janczewski, Prawo handlowe, wekslowe i czekowe, Warszawa 1946, p. 46 and the following.

³⁵ Civil Code Codification Commission by the Ministry of Justice, Book one of the Civil Code . Draft and substantiation. (Księga Pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem,) Warsaw, October 2008: www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/ksiega.rtf: (Accessed:15.12.2014).

According to draft Art. 59 section 3, a minor entrepreneur may become a registered entrepreneur on demand and then is subject to the provisions on business name and procuration.

The institution of a tradesman registered on his own will existed in the Commercial Code but it referred only to individuals running farms.³⁶ Granting the rights to become a registered entrepreneur on one's own will is not a good solution³⁷. It seems that the registration system that has been functioning for years aimed at the security of trading. It is unconvincing when the legislator states in the substantiation that the right to a business name is of no significance to a minor entrepreneur and that it normally does not need a proxy and the burden of the registry obligation is unnecessary in such situations. That is due to the fact that the area of activity of a minor entrepreneur does not have to be local in character and the registration obligation does not only have the civil law but also a regulatory character. Moreover, it is purposeless to deprive such entrepreneur of the possibility to use business name. These defects are partly reduced by granting minor entrepreneurs the right to apply for registration but it seems that the application should be obligatory.³⁸

Pursuant to draft Art.56, minor entrepreneur is entitled to consumer protection when purchasing products or services from other entrepreneur along the provisions that apply to consumers. However, the parties may exclude such protection. The substantiation of the draft points at the axiological assumption that the position of a minor entrepreneur in the relationships with other entrepreneurs brings it closely to the position of a consumer as it is a weaker party in the contract and is devoid of the possibility to negotiate.³⁹ However, the draft regulation is dispositive in character, which should be considered to be its drawback. The equalization of minor entrepreneurs with consumers, particularly on the financial market, is a step in the right direction.⁴⁰

However, reservations regarding the draft are raised by restricting the status of a minor entrepreneur solely to a natural person as similar arguments may support the idea of protecting a small personal company.

Registered entrepreneur (draft Art. 63)

³⁶ S. Janczewski, *Prawo handlowe...*, p.36.

³⁷ J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym...*,p.343.

³⁸ As in: T. Szczurowski, *Cywilnoprawna definicja...*, p. 229.

³⁹ Civil Code Codification Commission by the Ministry of Justice, Book one of the Civil Code . Draft and substantiation. (Księga Pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem.) Warsaw, October 2008: www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/ksiega.rtf: (Accessed:15.12.2014).

⁴⁰ More in: M. Szaraniec, „*Obowiązki informacyjne pośredników ubezpieczeniowych dotyczące ich przedsiębiorstwa jako instrument ochrony klienta nieprofesjonalnego*” (Chapter 9), in: *Kierunki rozwoju ubezpieczeń gospodarczych w Polsce. Wybrane zagadnienia prawne*, ed. B. Gnela, M. Szaraniec, Warszawa 2013.

Pursuant to draft art.63 *if the act does not state otherwise, the entrepreneur whose income from economic activity exceeds the value defined in Art. 59 section 1, is subject to registration.* The above provision re-establishes the concept of registered entrepreneur that is differentiated due to the volume of the income from economic activity, regardless of the legal status of the entrepreneur. The legislator made an attempt to apply such solution, which followed Art.4 of the Commercial Code that concerned a tradesman who run a company on a bigger scale, in order to eliminate major civil law partnerships by the obligation to transform into general partnerships.⁴¹ It can be deduced from the substantiation of the draft that the obligatory transformation of a civil law partnership generated criticism as it imposes a legal form of conducting economic activity and, consequently, it is the volume of economic activity⁴² and not its form that sanctions the presentation of data in the commercial register for the sake of the security of trading.

Although draft Art. 63 applies to any entrepreneur regardless of the type, it will mainly concern natural persons. As regards entrepreneurs that have legal personality, the entry to the commercial register is usually constitutive, while in the case of other legal persons it is the Act on the National Court Register⁴³ that decides on the obligation to register. The acceptance of a different concept would involve far reaching changes of the regulations in the future, which is not assumed by the draft.⁴⁴

As regards the order, it seems that draft Art. 63 should follow directly Art. 59 on minor entrepreneur as such arrangement of the provision would be more logical: first the definition of entrepreneur and then their types: specific, minor and registered entrepreneur.

Entrepreneur ex lego (Art. 60) and ostensible entrepreneur (draft Art. 61)

The legislator suggests in Art. 60 a controversial regulation according to which *a commercial partnership is an entrepreneur regardless of the fact whether it conducts economic activity or not.* The provision refers to the regulation of the concept of *a merchant regardless of the form* in the previous commercial code. However, it differed in the respect that Art. 5 of

⁴¹ As in: J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym...*,p.346. The author points out to the fact that the return to such solution has been postulated in the doctrine for years. See: e.g. P. Bielski, *Pojęcie przedsiębiorcy...*,p. 404, or J. Lic, M. Łuc, *Postulaty...*, pp.14-15.

⁴² Finally the legislator resigned from the obligation for civil law partnerships to be transformed. See the amendment of 23 October 2008 (Journal of Laws 2008, No. 217, item 1381)

⁴³ Act of 20 August 1997 on National Court Register (KRS) (Journal of Laws, 2013, item 1203, as amended).

⁴⁴ J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym...*,p.347.

the commercial code did not include the expression: *regardless of the fact whether it conducts economic activity*. The entry of commercial partnerships to a commercial register is constitutive⁴⁵ but there are no prerequisites to assume that a capital company running activities other than economic (e.g. charity) is an entrepreneur. Granting the status of entrepreneur to all commercial partnerships is questionable and, consequently, it seems justified to state in the regulation that *a trading partnership is an entrepreneur*.

Draft Art.60 section 2 implies that *a commercial company in organization is an entrepreneur if it undertakes economic activity; such company is obliged to report the undertaking of the economic activity to the commercial register*. According to the draft, a capital company in organization will be – as it is now – a legal entity without a business name.⁴⁶ The legislator follows the current solution and states in Art.60 section 2 that a commercial company in organization is an entrepreneur if it undertakes economic activity. Perhaps it should be made clear that the regulation in question concerns limited liability and joint-stock companies as the ones being in organization have legal capacity (it is necessary to have the status of entrepreneur). There are opinions in the literature on the subject that the legislator applied a wider term in case other commercial partnerships in organization receive legal capacity in the future.⁴⁷

The concept of a non-registered economic activity makes it possible for capital companies in organization to conduct activities for maximum 6 months without the registration. Thus, the decision on the obligation of a separate registration for joint-stock companies in organization as regards undertaking economic activity deserves a firm support.

Pursuant to draft Art.61, a person that is entered to the commercial register or records is considered to be entrepreneur even if the entry was groundless or the grounds for the entry have expired. In the pre-war doctrine the term obsolete tradesman referred to a tradesman that was listed in the commercial register but the justification for the entry to the register had expired or never existed.⁴⁸

Currently, the legislator is not concerned with ostensible tradesman, which results in uncertainty. A good example is the case of capital companies that do not conduct economic activity and are entered to the commercial register as well as the resulting distinction of

⁴⁵ See Art. 25¹ section 1, Art. 94, Art. 109 section 1 and Art. 134 section 1 of the Commercial Companies Code

⁴⁶ See: draft Art. 43

⁴⁷ J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym...*,p.349.

⁴⁸ S. Janczewski, *Prawo handlowe...*, p.36, also M. Allerhand, *Kodeks handlowy. Księga pierwsza. Kupiec*, reprint, Warszawa 1991, p. 19.

entrepreneurs in a material and formal way. Pursuant to Art. 43¹ of the Civil Code, it is not the entry to the register or records that is decisive as regards the status of entrepreneur but conducting business or professional activity on its own behalf. The distinction of the categories of typical entrepreneurs significantly reduces the problem.

The introduction of draft Art. 61 should be accepted as it only concerns the significance of the entry to the status of entrepreneur and its effects – including the ones related to the groundless entries or the entries whose grounds expired – are regulated by the Act on the National Court Register (uKRS).

Conclusion

It should be pointed out that the draft definitions of entrepreneur have several drawbacks that are presented above and only partially take into consideration the needs of the civil law practices. It seems justified to define minor entrepreneur by reinforcing its status on the market through granting it the protection that so far has been granted only to consumers. However, some doubts are raised by considering every commercial company, especially the ones that do not conduct any economic activity, to be entrepreneur. Moreover, it is a mistake to consider every entity that is entered to the register to be entrepreneur.

Bibliography

- M. Allerhand, Kodeks handlowy. Księga pierwsza. Kupiec, reprint, Warszawa 1991
- P. Bielski, Pojęcie przedsiębiorcy w systemie prawa polskiego (zagadnienia konstrukcyjne), Gdańsk 2005.
- B. Gnela, Pojęcie przedsiębiorcy w relacjach prawnych z konsumentami (in:) W.J. Katner, U. Promińska (ed.), Prawo handlowe po przystąpieniu Polski do Unii Europejskiej, Warszawa 2010.
- E. Gniewek (in:) E. Gniewek, Komentarz. Kodeks cywilny, Warszawa 2011 A.G. Harla, Pojęcie kupca i przedsiębiorcy (1918-2005), PPH 2006, No. 12.
- J. Jacyszyn, Przedsiębiorca a wolny zawód, Rejent 2003, No. 10.
- S. Janczewski, Prawo handlowe, wekslowe i czekowe, Warszawa 1946
- A. Janiak (in:) A. Kidyba (ed.), Kodeks cywilny. Komentarz, volume I, Warszawa 2009.
- W.J. Katner, Pojęcie przedsiębiorcy-polemika, PPH 2007, no. 4.
- J. Lic, Definicje pojęć „działalność gospodarcza” i „przedsiębiorca” (potrzeba rewizji), PiP 2008, z. 10.
- P. Lissoń, Zakres pojęcia „przedsiębiorcy” w prawie działalności gospodarczej oraz innych aktach prawnych, PREiS 2002, book 2.
- K. Z. Miczek, Osoba fizyczna jako przedsiębiorca – na tle ustawy o swobodzie działalności gospodarczej i kodeksu cywilnego, PPH 2005, No. 9.
- T. Mróz, E. Bieniek-Koroniewicz, Kontrowersje wokół pojęcia „przedsiębiorca”, Prawo Spółek 2003, No. 6.

- J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym (materialnym i procesowym) de lege lata i de lege ferenda*, Toruń 2011.
- W.Popiołek (in:) *Kodeks cywilny. Komentarz do art. 1-449¹⁰ Kc. Tom I*, ed. K. Pietrzykowski, Warszawa 2011.
- T. Szanciłło, *Przedsiębiorca w prawie polskim*, PPH 2005, No. 3-4; J. Frąckowiak (in:) *System Prawa Prywatnego, tom I, Prawo cywilne – część ogólna*, ed. M. Safian, Warszawa 2007.
- M. Szaraniec, „*Obowiązki informacyjne pośredników ubezpieczeniowych dotyczące ich przedsiębiorstwa jako instrument ochrony klienta nieprofesjonalnego*” (chapter 9), in: *Kierunki rozwoju ubezpieczeń gospodarczych w Polsce. Wybrane zagadnienia prawne*, ed. B. Gnela, M. Szaraniec, Warszawa 2013.
- M. Szaraniec, „*Professional activity as a kind of business activity – comments on the law de lege lata and de lege ferenda*” (in:) *Directions of private law development. Comments on the draft of book one of the Civil Code*, academic supervision: B. Gnela, K. Michałowska, Warszawa 2014.
- T. Szczurowski, *Cywilnoprawna definicja przedsiębiorcy – uwagi de lege lata i de lege ferenda* (in:) *Instytucje prawa handlowego w przyszłym kodeksie cywilnym*, ed. T. Mróz, M. Stec, Warszawa 2012.
- M.Szydło, *Pojęcie przedsiębiorcy w prawie polskim*, PS 2002, C. Kosikowski, *Pojęcie przedsiębiorcy w prawie polskim*, PiP 2001, book 4, No. 7-8.
- R. Trzaskowski, *Działalność gospodarcza w rozumieniu przepisów prawa cywilnego na tle orzecznictwa*, Glosa 2006, No. 2.

ABSTRACT

The article *Types of entrepreneurs in the draft civil code* presents legal solutions regarding the concepts of entrepreneur and its categories as given in the draft civil code. The legislator developed the current one-article definition of entrepreneur and introduced the notions of specific, minor and register entrepreneur. The author of the article points at the doubts concerning the introduction of new categories of entrepreneurs and presents relevant and necessary proposals of changes in the civil law in that respect.