LEGAL STATUS OF ENTERPRISE IN SUCCESSION IN POLISH LAW IN THE GENERAL PERSPECTIVE OF THE NEED OF UNIFICATION OF THE REGULATION OF LEGAL STATUS OF LEGAL INSTITUTIONS NAMED IN AN IDENTICAL MANNER IN INDIVIDUAL BRANCHES OF LAW

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ABSTRACT

The publication refers to the legal status of an enterprise in succession in Polish law in the context of the general need to standardise the legal status of identical legal institutions in particular branches of law. Under Polish law, the legal status of an enterprise in succession was determined differently from the legal status of an enterprise in the general civil-law meaning (within the meaning of the Act of 23 April 1964 – The Civil Code, consolidated text: Journal of Laws of 2019, item 1145 – CC). The concept of enterprise in succession was introduced by the Polish legislature for the purpose of determining the subject (scope) of succession management of a natural person's enterprise after his/her death. For an enterprise in succession, as regards taxes strictly defined in statutes, unlike in the area of civil law (where it should be treated as a set of assets), this enterprise is considered an organisational unit without legal personality, to which the statute grants legal capacity. This dualism of the legal status of an enterprise in succession may raise doubts and ambiguities both at the theoretical and practical levels. This leads to a general reflection on the need of unification of the regulation of legal status of legal institutions called in an identical manner in individual branches of law. This study applies primarily the formal-dogmatic method in relation to generally applicable legal acts, and within this methodology, as a rule, all available methods of interpretation, including in particular linguistic interpretation and systemic interpretation.

Keywords: *Legal status, enterprise in succession, unification of the legal status of legal institutions in individual branches of law*

INTRODUCTION

In civil law, enterprise is defined in the Civil Code in the provision of Article 55^1 of the CC as an organised set of tangible and intangible assets intended for running business activity. The Polish legislature has listed in this provision examples of components of an enterprise in the material sense, including, inter alia, name of the enterprise, right of ownership and other property rights to real or movable property, rights under an obligation relationship related to real or movable property, concessions, licences and permits, receivables, copyright and related property rights, industrial property rights, etc. These components are usually divided into rights under property law, rights under an obligation relationship, rights to intangible assets, administrative decisions and others[1]. The provision of Article 55^1 of the CC is considered the legal basis for distinguishing one of the meanings given to the term "enterprise", namely enterprise in the objective sense, as opposed to enterprise in the functional sense (understood as the running of a business activity) and enterprise in the subjective sense (meaning an enterprise as a legal entity)[2].

While for an enterprise in the general civil-law sense (as understood in the Civil Code) there is no doubt that it is an organised set of tangible and intangible assets intended for running a business activity, hence a so-called organised property complex (a set of assets) which does not constitute an organisational unit having legal capacity, in the case of an enterprise in succession, as regards strictly defined taxes, the enterprise is treated as an organisational unit without legal personality, to which the statute grants legal capacity, unlike in the area of civil law (where it should be treated as a complex of assets). The legislation also regulates, among other things, the issue of running the affairs and representation of an enterprise in succession. This refers to the legal status of civil-law partnership contract, which, in the area of tax law (specific taxes), in contrast to those based on civil law, is treated as an organisational unit without legal personality, to which the statute grants legal capacity.

The meaning of the term "enterprise in succession" in the context of the general definition of enterprise

According to Article 2 (1) of the Act of 5 July 2018 on succession management of a natural person's enterprise, Journal of Laws of 2018, item 1629 (SMNPE), an enterprise in succession comprises tangible and intangible assets, intended for the running of economic activity by the entrepreneur, which constituted the entrepreneur's estate at the moment of his death[3]. It should be noted that intangible assets that form an enterprise in succession do not need to be an organised set of items, as in the case of enterprise in the general civil-law meaning. Moreover, this definition uses the term "estate", which was not defined separately for the purposes of the SMNPE. In the classical (traditional) approach, under Article 44 of the CC, the category of estate includes only property and other proprietary rights (i.e., it does not include, for example, non-property rights)[4]. This means that, as can be judged contrary to the legislature's intention expressed in the Grounds for the draft Act on succession management of a natural person's enterprise (Grounds for the draft Act)[5], in which the category of enterprise in succession is essentially tantamount to the general civil-legal category of enterprise, the definition of enterprise in succession set out in Article 2(1) of the SMNPE may be assessed, in this respect, as narrower than the notion of enterprise provided for in Article 55^1 of the CC which covers, apart from the entrepreneur's estate in a strict sense referred to in Article 44 of the CC, also such business components as administrative decisions related to the pursuit of business activities (concessions, licences and permits), business secrets, or accounting books and documents related to the pursuit of the business which cannot be clearly identified as falling into the notion of the estate. The literature on the subject (civil law) points out that it is not an enterprise (understood as an organised set of tangible and intangible assets intended for running a business), but the right to enterprise as a set of components, constituting in fact a sort of property right, should fall into the category of the estate[6]. It may be apparent here that "enterprise in succession" (not the right to an enterprise in succession according to the views expressed in respect of enterprise in general civil law), as opposed to an enterprise in the general civil-law meaning, has been linked by the legislature with the category of estate the entrepreneur is entitled to at the time of his/her death. This is the estate forming part of the enterprise as of the date of the entrepreneur's death. Where, at the time of death, an enterprise within the meaning of Article 55^1 of the CC constituted in its entirety the property of the entrepreneur and his/her spouse, the enterprise in succession shall cover the whole enterprise (Article 2 (2) of the SMNPE) Where there is a reservation that the partner's heirs will join a civil-law partnership in his/her place and the succession management has been instituted, an enterprise in succession shall also include the rights of the heirs of the partner in that partnership (Article 46 of the SMNPE).

An enterprise in succession shall also include intangible assets intended for the pursuit of business activity, acquired by the succession manager either as part of the activities referred to in Article 13 of the SMNPE (i.e. the so-called maintenance activities) within the period from the time of the entrepreneur's death to the date of expiry of the succession management or the expiry of the right to appoint a succession manager (Article 2 (3) of the SMNPE). It can be inferred from this, that an enterprise in succession is also composed of tangible and intangible components which, unlike the basic element of the definition of this enterprise in Article 2 (a) of the SMNPE, they are no longer closely linked to the category of estate, intended to run a business activity, acquired after the death of the entrepreneur by third parties (the succession manager or persons who perform maintenance activities), within the time limits set out in Article 2(3) of the SMNPE. Therefore, it is difficult to definitely argue that, as stated in the Grounds for the draft Act[7], the category of enterprise in succession is the same as that of the general notion of enterprise.

Enterprise in succession as a property complex – a set of intangible and tangible assets intended for running business activity (Article 2 of the SMNPE), as well as an organisational unit having legal capacity (Art. 49 of the SMNPE)

Therefore, an enterprise in succession, similarly to an enterprise in the general civil-law sense, may be considered in a traditional way, primarily as a property complex, i.e. a set of tangible and intangible assets constituting the estate of an entrepreneur, intended for conducting business activity. In the previous Polish legislation, there were no legal grounds for recognising an enterprise as a legal entity or an organisational unit, including an organisational unit without legal personality, which is granted even partial (fragmentary) legal capacity by a statute. The legal status of an organisational unit being a legal entity or an organisational unit without legal personality is held by an entrepreneur who is not a natural person. Each entrepreneur runs an enterprise in a functional sense (carries out business activity) based on an enterprise in the objective sense (a set of tangible and intangible assets intended for conducting business activity – an organised property complex) [8].

Upon the death of an entrepreneur who is a natural person, his/her enterprise in the objective sense (as an organised property complex) within the scope of the estate included in the enterprise becomes an enterprise in succession, which in principle should be perceived in the legal sense as a property complex – a set of intangible and tangible assets constituting the estate of the entrepreneur at the moment of death – and not an organisational unit. Currently, under the provisions of Article 49 and Article 50 of the SMNPE, this should generally apply to all legal relationships, except for some legal relationships arising from the tax law. Pursuant to Article 49 of the SMNPE, an enterprise in succession is an organisational unit without legal personality, being a taxpayer, in the area of taxes strictly defined in this provision, i.e: 1) Article 1a of the Act of 26 July 1991 on personal income tax (consolidated text: Journal of Laws of 2018, item 1509, as amended); 2) Article 1a of the Act of 20 November 1998 on a lump-sum income tax on certain income earned by natural persons (consolidated text: Journal of Laws of 2019, item 43); 3) Article 15 (1a) and Article 17 (1) of the Act of 11 March 2004 on the tax on goods and services (consolidated text: Journal of Laws of 2018, item 2174, as amended); 4) Article 3(4) of the Act of 24 August 2006 on tonnage tax (consolidated text: Journal of Laws of 2019, item 31); 5) Article 13(1) of the Act of 6 December 2008 on excise duty (consolidated text: Journal of Laws of 2019, item 864, as amended); 6) Article 71(1a) of the Act of 19 November 2009 on gambling (consolidated text: Journal of Laws of 2019, item 847); 7) Article 8(4) of the Act of 6 July 2016 on the activation of the shipbuilding industry and complementary industries (consolidated text: Journal of Laws of 2019, item 471). Moreover, in the light of Article 50 of the Act on stamp duty, also an organisational unit without legal personality referred to in Article

5(1) of the Act of 16 November 2006 on Stamp Duty (consolidated text: Journal of Laws of 2019, items 1000) is deemed an enterprise in succession. It should be noted here that the term "organisational unit without legal personality" used in the tax law is not the same as the term used in Article 33^1 of the CC. Organisational units which do not have legal capacity under private law may have such capacity in the area of tax law (i.e. they may be taxpayers). An enterprise in succession does not have legal capacity in the sphere of civil law, in particular it is neither a legal person nor organisational unit referred to in Article 33^1 of the CC. In the legislature's opinion, which is difficult to support, an enterprise in succession is actually a specific organisational unit "established" by legal successors or the spouse of the entrepreneur and managed by the succession manager[9]. This is so because the statute does not grant an enterprise in succession legal personality or legal capacity within the meaning of Article 33 and Article 33^1 of the CC. However, an enterprise in succession (similarly to a civil-law partnership) has acquired subjectivity in the scope of some taxes (on goods and services, excise duty, income tax, tonnage tax, ship tax and gambling tax). Some tax statutes, therefore, grant it the legal status of a taxpayer who is an organisational unit without legal personality. This enterprise may obtain the legal status of a taxpayer, even if the succession management has not been established, and may exist in the period from the day of death of the entrepreneur to the day of expiry of the period until the appointment of the first succession manager – if the person performing the maintenance actions submits a relevant notification to the head of revenue office. An enterprise in succession is also a payer of contributions for members of the personnel employed in the enterprise.

In view of the above-mentioned provisions, enterprise in succession has been considered by the legislature an organisational unit having a fragmentary (special) legal capacity as a taxpayer in strictly defined areas of tax law (including the taxes on goods and services, excise duty, income tax, tonnage tax, ship tax and gambling tax) and stamp duty. This enterprise in the area of private law (and other branches of law other than tax law) is a property complex, but in the area of taxes (and stamp duty) listed in Article 49 and Article 50 of the SMNPE, an organisational unit without legal personality granted the legal capacity by the statute. This indicates the dual nature of the legal-subjective status of an enterprise (in the objective sense) under Polish law. The similar dualism occurs in Polish law in the case of civil-law partnership, which in the area of private law (and other branches of law except tax law) is considered as a contractual, obligation-based legal relationship which has not establish an organisational unit separate from this relationship, while in the area of tax law (tax on goods and services and excise duty) is considered as an taxable organisational entity. There is a view, well-established in the case law, that it is a civil partnership, not its partners, which is the taxpayer under the Act on the tax on goods and services and the Act on excise duty, and decisions of tax authorities are addressed to a civil partnership as the taxpayer[10,11]. On the other hand, in civil law, the rights and obligations related to the activity of a civil law partnership are vested in its partners, and the partnership itself is in fact only a sort of contract. It operates in factual and legal relations as an organization of natural persons or legal entities[12]. In the past, an inheritance not accepted by heirs was also considered as a taxpayer of income tax (vacant inheritance)[13].

Arguments in favour of unification, in the normative aspect, of the legal status of legal institutions referred to in the same way in different branches (fields) of law as the base for cohesion of the state's legal system

The cases of non-uniform legal status of legal institutions named in the same way, occurring in the Polish law and presumably other legal systems (i.e. in principle, generally identical legal institutions) in individual, at least two different branches of law, such as the above mentioned enterprise and enterprise in succession, or the above-mentioned civil partnership contract (civil

partnership), leads to a general reflection, referring to the entire legal system (a given state, or even broader: a uniform legal system of many states bound by an international agreement, such as EU member states), on the need for the legislature to uniformly address the legal status of legal institutions referred to by an identical name.

There are many arguments that justify such an approach by the legislature (or legislatures). First of all, this duality of legal status (in principle: legal and subjective) of individual legal institutions (including e.g. enterprise in succession or civil-law partnership) may be deemed, at least to a certain extent, a result of inconsistent legal regulation. Sooner or later, such regulations with respect to a specific legal situation usually become a source of doubt and ambiguity, both at the theoretical and practical level (including the interpretation and practice of application of law).

This is usually associated with a threat to the security and certainty of legal transactions, both nationally (regarding the need to resolve fundamental doubts in this respect concerning the meaning of identical institutions regulated by various branches of national law in a given country), and internationally (regarding the need to resolve fundamental doubts in this respect concerning identical institutions regulated within the same or different branches in the legal systems of individual countries – especially in cases that justify the need to apply conflict-of-law rules – private international law, but also in situations where this law does not clearly decide which rule should be applied, which in turn may mean the need for parallel application of rules of more than one legal system that are different in the same normative scope). It is indisputable that the imperative of security and certainty of legal transactions should be of fundamental importance in the area of both establishing and interpreting and applying national and international law. The lack of a uniform understanding of legal institutions with identical or similar name may lead to different conclusions in the area of legal interpretation, which contradicts the security and certainty of legal transactions.

Therefore, the above-mentioned dualism of the regulation (legal status) should be eradicated. In my opinion, from a theoretical point of view, this can be done by the unification of regulations in one of the directions of norms adopted so far. The most reasonable, however, would be for this unification to aim at adopting the arrangement (legal status) of a given institution adopted within the branch (field) of law, which is the basic field for the regulation of this institution (such as civil law in relation to the category of enterprise), or the field in which a given legal institution was regulated historically earlier (as the institution of enterprise in the above example), or the field, or fields (areas) of law, in which the legal institution is more widely regulated.

In specific cases, where a non-uniform regulation of certain institutions occurs in the area of civil law (or broader: private law) and tax law (as in the case of an enterprise in succession or a civil partnership), one can debate whether from a fiscal perspective (including the revenue of the state budget) it would not be sufficient to tax an enterprise in succession in a classical way as inheritance – with the tax on inheritance and donations (and not other taxes), and in the case of a civil partnership – to typically tax activities carried out by partners of that partnership acting jointly – with the tax on goods and services and excise duty. It therefore seems that, in the case of an enterprise in succession, it is the heirs (using the terminology of the SMNPE: the owners of the estate in succession) who should be taxed (with the tax on inheritance and donations), not the enterprise in succession as an organisational on which a statute (SMNPE) confers legal capacity. This would rule out the need to grant legal personality to an enterprise in succession only for fiscal purposes in order to tax it as a legal entity with strictly defined taxes. Similar observations can also be applied to civil-law partnership. From the fiscal perspective, it would

be sufficient to treat as taxable persons only partners acting jointly, rather than merely creating for this purpose the legal personality of a civil-law partnership in the area of tax on goods and services or excise duty. In other words, it seems that for the constructs (or institutions) that has existed and developed for centuries, as in the case analysed herein, of a legal entity, such as the construct of enterprise, which is a set of assets intended for running a business not a legal entity, or a civil-law partnership which constitutes a contractual relationship between the partners acting jointly and not the legal entity, the legislature may achieve its fiscal objectives (including taxation) by maintaining the same legal status of legal constructs (or institutions) named in the same way. There also may be the need for the legislature to give up taxation in certain cases, in particular where it is impossible to clearly recognise the taxable subject or person, or when such taxable subject or person cannot be clearly classified, and to replace taxation with other forms of meeting the fiscal needs of the State (or financial need in the case of an international organisation). There is no doubt that introducing artificial legal constructs in the area of legal status in such situations only for fiscal (including tax) purposes, such as in the case of enterprise in succession, cannot be positively assessed as favourable to the manner of perception of the meaning of various legal institutions and, therefore, the coherence of the whole legal system of a particular State or a union of states operating under an international agreement.

CONCLUSION

First, the category of enterprise in succession in Polish law is presumably contrary to the intention of the legislature expressed in the Grounds for the draft Act, is autonomous and differs from the general civil-law category of enterprise in the following aspects: 1) the fact that an enterprise in succession does not have to be an organised set of tangible and intangible assets (intended for running a business), or even an unorganised set of these assets, 2) the link between the enterprise's constituent tangible and intangible assets with the category of the entrepreneur's estate, 3) and the fact that the enterprise also comprises the rights acquired by the succession manager and based on so-called maintenance activities following the death of the entrepreneur and thus acquired by persons other than the heir entrepreneur.

Secondly, the legal status of an enterprise in succession has been regulated in Polish law differently as compared to the legal status of enterprise in the general civil-law sense. Enterprise in succession, unlike enterprise in the general civil-law sense, has no uniform legal status in the field of civil law and tax law. Enterprise in succession, in contrast to enterprise in the general civil-law sense, for the area of taxes explicitly mentioned in tax legislation, i.e. tax on goods and services (including excise tax), income tax, tonnage tax, ship tax and gambling tax, treated as an organisational unit without legal personality, on which the statute confers legal capacity, and therefore the so-called third category of entities. Therefore, there is a duality of the legal status of enterprise in succession expressed in a different legal status of that enterprise in the area of private law (and presumably in areas other than tax law – under which enterprise is considered a set of tangible and intangible assets intended for running a business) and in the area of tax law, including strictly defined taxes: on goods and services (including excise tax), income tax, tonnage tax, ship tax and gambling tax, under which it is treated as (considered as) an organisational unit without legal personality, on which the statute confers legal capacity. Such dualism refers to the similar legal construct of civil law partnership in Polish law, which is generally considered, as regards the meaning attributed to it in civil law, as an obligation-based relationship between partners acting jointly, while in the area of tax law (including tax on goods and services and excise duty) as an organisational unit with legal capacity as a taxpayer.

Thirdly, every different legal regulation of legal status of legal institutions named identically in individual branches (fields) of law or, more broadly, legal systems (including the

dualism indicated above) may pose a significant threat to the security and certainty of business transactions, both nationally and internationally, and should therefore be removed. The most reasonable is to unify the legal status of these institutions towards adopting the arrangement (legal status) of a given institution adopted within the branch of law, which is the basic field for the regulation of this institution or the field in which a given legal institution was regulated historically earlier or fields (areas) of law, in which the legal institution is more widely regulated. From this perspective, in the specific case of the analysed diversified regulation, it seems that for the constructs (or institutions) that has existed and developed for centuries, such as the construct of enterprise or civil-law partnership the legislature may achieve its fiscal objectives (taxation) while maintaining the same legal status of legal constructs (or institutions) named in the same way in different branches of law. Introducing legal constructs in the area of legal status only for fiscal (including tax) purposes, such as in the case of enterprise in succession, cannot be assessed as favourable to the manner of perception of the meaning of various legal institutions and, therefore, the coherence of the whole legal system of a particular State or a union of states based on an international agreement, such as for example the EU.

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