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POLISH "ENTREPRENEUR" AND EU "UNDERTAKING": MULTILINGUALISM AND DIFFERENCES IN LEGAL IDENTIFICATION

Abstract. The European Union and its member-states' involvement in the economic sphere, manifesting itself in establishing the rules of entrepreneurs' functioning – their responsibilities and entitlements – requires a precise determination of the addressees of these standards. Proper identification of an entrepreneur is a condition of proper legislation, interpretation, application, control and execution of the law. In this context it is surprising that understanding the term entrepreneur in Polish law and in EU law is not the same, and divergences and differences in identification are fundamental. This fact formed the objective of this article. It is aimed at pointing at key differences in the identification of an entrepreneur between Polish and EU law, explaining the reasons for different concepts, and also the answer to the question: May Poland, as an EU member-state, identify the entrepreneur in a different way than the EU?

Keywords: entrepreneur, undertaking, identification, different concepts, European Union, EU member-state.

Introduction: the essence of the issue

The entrepreneur is an object of wide interest of the State. Economy is based on the entrepreneur [Annual Report on European SMEs 2015/2016] and thereby a mature and aware State cannot allow itself to be indifferent to entrepreneurs – they generate the means indispensable for realizing fundamental social and political functions (in the doctrine of public economic law, one of the overriding functions attributed to the State is the responsibility of supporting the economy through creating favourable conditions for the development of entrepreneurship) (Kosikowski, 2010, p. 117, Grabowski and Kieres and Walaszek-Pyzioł, 2013, p. 753, Grabowski and Kieres and Walaszek-Pyzioł, 2013, p. 779, Gronkiewicz-Waltz and Wierzbowski, 2009, p. 158, Strzyczkowski, 2009, p. 155, Zdyb, 1997, p. 387).

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For this reason (even in a market economy) the State must form the rules of the functioning of entrepreneurs by the means of law – including determination of their responsibilities and entitlements to public authorities and institutions, as well as to other entrepreneurs, consumers, employees and yet many other entities, including international ones (it is also important to note the complex nature of legal relations with the participation of the entrepreneur, who functions in the law as: entrepreneur, employer, tax-payer, payer, competitor, producer and investor).

As a result, it is necessary to precisely define the addressees of these regulations – i.e. the entities bound with responsibilities towards entrepreneurs, as well as beneficiaries of the powers granted to entrepreneurs – the proper identification of an entrepreneur makes a condition of proper legislation, interpretation, application, control and execution of law.

The necessity for precise identification of an entrepreneur is obvious in reference to Polish law (as a national law). It is important not to forget that the Republic of Poland has been a full member state of the European Union since 1 May 2004. The consequence of the membership is Europeanization, which should also include the identification of an entrepreneur: the European Union, whose priority is economic development, elimination of barriers acting against economic freedom, and creating an internal market, has initiated several regulatory actions referring to the entrepreneur. In this dimension EU is inscribed into the model relation of the State and economy – if the implementation of the Union solutions (Europeanisation) fails to include identification of the entrepreneur, it is highly probable that all actions of EU and EUMS focused on the entrepreneur and business may turn out ineffective, and integration and the internal market will remain just postulates.

Furthermore, the relation between the national law of the member state and EU law, created according to the principles of priority and direct effectiveness (Kawka, 2015, p. 33, Barcik and Wentkowska, 2008, pp. 169–170, Grzeszczak, 2004, pp. 209–228), allows us to assume that a member state, in the internal order, should adopt and apply the way of identifying an entrepreneur in accordance with *acquis de l'union*.

In view of the foregoing it is surprising that the understanding of entrepreneur in Polish law and EU law is not the same, and divergences and differences in the identifications are fundamental.

This fact formed the purposes of this article. It is aimed at pointing at key differences in the identification of an entrepreneur between Polish and EU law, explaining the reasons for applying different concepts, and also at answering the question: May Poland, as a EU member state, identify an entrepreneur in a different way from the EU?

For adequate understanding of this article it is also required to highlight three crucial issues.

Firstly, the article is based on the author's research realised over a long time, the result of which is several dozen scientific publications concerning entrepreneur and entrepreneurial activity. In this text the Author refers to statements and arrangements from other, including his own, publications (primarily to avoid repetition of evident and prejudicial issues).

Secondly, the aim of the article is not a detailed discussion on the criteria identifying an entrepreneur and undertaking as well some problems that may be caused by their practical application – in this range the text cross-refers to other publications and literature and judgements indicated there.

Thirdly, the article intentionally limits itself to reminding of identity conceptions. It is directed to introduce established solutions as appropriate for the relevant law system and to indicate differences between them. Detailed and complete discussion on the definition of an entrepreneur and undertaking functioning in Poland and the EU along with complex commentary concerning doubts, problems, and practical consequences of their application is not possible according to the permissible size of this article (the issue is so complex that its coverage requires at least a comprehensive monograph).

The concept of "entrepreneur" in Polish law and its characteristics

Polish law, in order to define an entity involved in business, employs the term "entrepreneur".

The sense of this term is specified in the form of a legal definition formed in Article 4 of the Act of 2 July 2004 on Freedom of Entrepreneurial Activity [AFEA]. In accordance with this regulation, an entrepreneur is a natural person, a legal person, and an organisational entity not being a legal person, to whom a separate law grants legal capacity, and who performs entrepreneurial activity on their own behalf.

The structure of the definition is reduced to articulating three premises: subjective, objective, and functional cumulatively (jointly) deciding on the identification of an entity as an entrepreneur (Gronkiewicz-Waltz and Wierzbowski, 2009, p. 216). The premises:

- indicate the categories of entities which may be recognised as entrepreneurs – these are exclusively natural persons, legal persons and organizational entities of no legal personality, to which another law grants legal capacity,

- classify the entrepreneur's activities as entrepreneurial activity – in this scope it refers to entrepreneurial activity interpreted as in Article 2 of AFEA, according to which entrepreneurial activity is a gainful activity in manufacturing, construction, commerce, service, and also in searching for, recognizing, and extracting minerals from deposits, as well as a professional activity performed in an organized and continuous way,
- introduce the reservation that only such an entity may be recognised as an entrepreneur that, performing entrepreneurial activities, acts on their own behalf, at their own risk, on their own account, in the scope of their own responsibility and self-reliance (Etel, 2014, p. 17, Etel, 2012, p. 171).

This structure of the definition results in entrepreneurial activity being an element necessary to identify entrepreneur, but as one of the three equally important premises is of no decisive meaning. Thereby, in Poland the terms entrepreneurial activity and entrepreneur are not identical and the concept of entrepreneurial activity is semantically more extensive than the concept of entrepreneur, which means that not everybody performing an entrepreneurial activity may be recognised as an entrepreneur (Judgement of the Supreme Court of 12 May 2005, I UK 258/04, Judgement of the Supreme Administrative Court of 18 August 2005, OSK 1850/04). In other words, entrepreneurial activity is merely one of three steps towards the identification of entrepreneur.

It is also worth noting that the concept of entrepreneur and the content of the quoted definition were formed in the process of considerable evolution (in Polish law entrepreneur was defined by several different terms, phrases and expressions) (Etel, 2012, pp. 143–170). This allows us to assert that the application of this word as well as attributing it with the currently binding meaning results from previous experiences, is based on proven solutions, and includes the achievements of the doctrine and the judicature. This also suggests that it is a deliberate, conscious and rational action of the legislator. Moreover, the term itself allows us to perceive it as well-established in the system of Polish law.

It is important to underscore the function of this definition – it is commonly accepted that this definition is shared in the whole legal order (as a so-called systemic definition). It was formed to set in order the national law, as universal and decisive, which means that it is always accurate whenever law refers to this term (Resolution of the Supreme Court of 18 December 1992, III AZP 25/92). Its systemic dimension is confirmed by the fact that it was placed in AFEA or the law of particular importance for all entrepreneurs, which, for its superior role and content is called a constitution of entrepreneurial activity (Etel, 2016, pp. 29–31, Etel, 2013, pp. 127–138,

Etel, 2012, pp. 143–170, Katner, 2007, p. 42, Katner, 2003, p. 9, Kosikowski, 2000, pp. 5–6, Walaszek-Pyzioł, 1999, p. 2, Strzyczkowski, 1999, p. 2, Szydło, 2002, p. 79).

Unfortunately, the meaning of the term entrepreneur in Polish law has not been recognised as ultimately decided on and closed. This does not mean, either, that the concept does not raise doubts and controversies (Etel, 2012, p. 143, Jacyszyn, 2003, p. 51, Szydło, 2002, p. 105).

Moreover, a clear identification of entrepreneur and an entrepreneurial activity hinders the parallel functioning of many definitions of these terms: in Polish law there exist over 30 legal definitions giving the notions in question different meanings.

Besides, it is important to emphasize that the different definitions were originated ad hoc, for the needs of a particular act of law or, alternatively, to enable implementation of a particular group of regulations, and the reason for their constituting was the fact that the sense of the terms adopted in AFEA did not always meet the current needs of the legislator or practice. This means that they are proper in this scope exclusively, and their aim is not a systemic (general) identification of entrepreneur. Nevertheless, such practice is unacceptable, and giving the same terms different meanings makes the national law system incoherent and internally contradictory. They seriously impede or even make it impossible to identify an economic activity and an entrepreneur (Etel, 2012, pp. 274–354).

The concept of undertaking in the European Union law and its characteristics

The determination of the meaning of the term "entrepreneur" in EU law may cause difficulties. They stem from two principal reasons. Firstly, as a rule EU acts of law do not employ this expression but use the word "undertaking". Secondly, EU law has no universally binding systemic and superior legal definition of this term (this does not at all mean that no EU act of law has the definition of "undertaking", for there are functional definitions, whose property is reduced to a specific subject of the regulation only) (Bellamy and Child and Rose and Roth, 2008, p. 92, Whish, 2009, p. 82).

Obviously, because of the Union's involvement in economy and the essential role attributed to the relation with "undertaking", the sense of the term has been specified. Its source, however, is not primary law but judicial achievements and literature on the subject.

Developed by the Court of Justice of the European Union (Judgement of the ECJ of 16 June 1987, 118/85, Judgement of the ECJ of 18 June 1998, C-35/96, Judgement of the ECJ of 11 July 2006, C-205/03, Judgement of ECJ of 1 July 2008, C-49/07, Judgement of the ECJ of 23 April 1991, C-41/90, Judgement of the ECJ of 11 December 1997, C-55/96) and doctrine, the concept allows us to assume that "undertaking" is just anyone performing entrepreneurial activity – the qualities characterising the entity itself such as the organisational form (legal form) and the source of financing, as a rule, remain with no effect on the status (Bellamy and Child and Rose and Roth, 2008, pp. 92–95, Kennelly and Lee and Riches and Vaughan, 2006, p. 30, Odudu, 2006, pp. 24–27, Shaw and Hunt and Wallace, 2007, pp. 140–143, Faull and Nikpay, 2007, p. 188, Whish, 2009, p. 84). Furthermore, entrepreneurial activity in the understanding resulting from the EU acquis is performing entrepreneurship and providing services (of course both forms of activity are separately formed in accordance to general assumptions and regulatory structures proper for each of them separately). Entrepreneurship is identified with an activity aimed at profit (commercial), performed independently in a regular and permanently organised way in a transboundary dimension. Services are interpreted as immaterial paid provision ("usually for a fee") of a transitional and temporary nature (temporarily determined) implemented in another member-state (Etel, 2012, pp. 98–114, Kawka, 2015, p. 185).

Thus, the EU concept is of an objective and casuistic nature. It assumes an individual approach concentrated on the analysis of particular factual circumstances directed to, foremost, classification of the activity (as either entrepreneurship or providing services), which directly decides on the identification of the performing entity as an entrepreneur.

Moreover, it is a very extensive and open approach. The way of forming the sense of the concept under discussion through subsequent establishments and justifications, as well as jurisdictional and scientific conclusions is very flexible: the substance of its particular elements, including, for example, entrepreneur, entrepreneurship, and providing services, is continuously evolving and developing.

As a result, the concept of the *acquis de l'union* clearly exceeds the definition framework determined by national law and allows us to identify as "entrepreneurs" those entities which are not perceived as such by AFEA or any other act of Polish law (in Polish law a few dozen regulatory definitions of the term entrepreneur function simultaneously) (Etel, 2012, p. 274).

Justification of the applied identification concepts and their dissimilarities

The justification of the existent differences between the Polish and EU concept of entrepreneur requires referring to the achievements of the theory of law.

Analysis of the statements of doctrine supported by judicial decisions and rules of legislative technique (Regulation of the President of the Council of Ministers of 20 June 2002 on "The Rules of Legislative technique") constitutes rules, or even groups of rules, obliging "the rational legislator and interpreter" of a legal text.

It: a) indicates unequivocally certain consequences defined by law, b) determines premises and effects of introducing regulatory definitions, c) rules of their formulation, d) ways of editing, and e) the scope of their validity, which guarantee a proper structure for the whole legal system. Moreover, in the dimension of interpretation, the superior role is ascribed to linguistic interpretation, treating its other forms (systemic and functional interpretation) accessorily. It stresses the functions of the language and definitions formulated in it – since it recognizes that it is the literary meaning of provisions which determines the borders of interpretation, whereas specific analysis of the rules proper for linguistic interpretation justifies the identification of the language with the legal definition – and thereby grants definitions placed in the law the rank of a superior, prior, and fundamental directive (Etel, 2012, pp. 35–75).

This leads to the conclusion that the adopted method of identification of the entrepreneur – the application of the universal and superior legal definition giving the term its meaning – is in accordance with the requirements of the theory of law and the rules of legislative technique and is naturally inscribed in the tradition of Polish law.

It is important to underscore, however, that the aforesaid establishments concern the system of national law (the law of the Republic of Poland). The law of the EU, on the other hand, is a system combining the qualities of national law and international public law (Kalisz, 2010, pp. 326–329), and this fact undoubtedly affects the rules of legislation and application of regulations, including the process of interpretation of *acquis de l'union* (Mik, 2008, p. 9, Mik, 2000, pp. 684–713).

Consequently, insofar as one may recognize that in Union law interpretation is performed with the use of linguistic, systemic, and functional interpretation, it is difficult to state, however, that it is linguistic interpretation that determines the borders of interpretation (Fryźlewicz, 2008,

pp. 53–54, Fiedorow, 2008, pp. 64–66, Semeniuk, 2008, pp. 209–212, Mik, 2000, pp. 690–693, Cieśliński, 2001, pp. 7–17). In the EU systemic and purpose-oriented (purpose-oriented-functional) interpretation plays an extremely important role. It is even a rule to confront the result of the linguistic interpretation with the remaining methods aiming at the harmonization of contexts and, in the case of a conflict of the results, abandoning the linguistic interpretation of the text (this does not change the fact that in EU law the linguistic interpretation determines the fundamental plane of interpretation and, insofar as the meaning constructed on the basis of extra-language methods, may modify or make more flexible the substance of the regulation; this cannot, however, lead to a complete rejection of its linguistic meaning) (Morawski, 2010, pp. 300–302, Kalisz, 2010, p. 332, Kukuryk, 2000, pp. 25–34, Brodecki, 2000, pp. 37–46).

The fundamental reason of the above is the relevant quality of EU law: multilingualism. It is a natural consequence of the application in the *acquis de l'union* of the rule of equivalence of all language versions of a legal text (each prepared in the language of each member-state) (Kalisz, 2010, pp. 329–337, Doczekalska, 2006, pp. 14–21, Mulders, 2008, pp. 145–159). On the other hand, for obvious reasons, it is a variable unknown in the internal systems of member states using one (their own) language.

Unfortunately, multilingualism, unavoidable from the EU's perspective, complicates the process of legislation, application, and interpretation of law. For it may result in a situation where the same words (expressions) are used simultaneously in EU law and in the laws of particular member states, but they have different contents and semantic ranges.

For this reason, the aquis of the European Union developed directives (assumptions) facilitating the correct identification of the meaning of a legal regulation, which includes the multilingualism of the system and are directed to eliminating difficulties resulting from language pluralism.

First, the *acquis de l'union* adopted the property of applying autonomous notions. They are notions of a transnational nature, which should be interpreted uniformly and not necessarily based on the national terminology of any of the member states. They have their own independent meaning proper for the implementation of EU law (Kalisz, 2010, pp. 330–331).

Second, a linguistic comparative method, specific to the EU order, has been developed, which assumes the application of comparative linguistic interpretation (mutual comparing different language versions) in order to establish the real meaning and range of the interpreted provision (Fryźlewicz, 2008, pp. 9–58).

Third, the *aquis de l'union* made a clear reservation about the property of other methods of interpretation, which were recognized as indispensable for the correct reading and applying of the law, or at least confirmation of the accuracy of the result of the linguistic interpretation. The important qualities of EU law decide that the regulations should be interpreted in a broader context of the whole of provisions (the entirety of the legal system), or the purposes and functions of EU solutions, or else the axiology of the EU order. Confronting the linguistic content with the systemic, purpose-oriented-functional and axiological contexts of a particular regulation seems a natural stage of the interpretation of EU law (Kalisz, 2010, pp. 340–341).

Fourth, also solutions of an institutional nature have been provisioned since, as such, the principle of transferring interpretative questions by national courts to CJEU (Wróbel, 2010, pp. 566–633, Mik, 2006, p. 7).

The above is to guarantee that EU law will be interpreted uniformly, effectively, and in a way fully guaranteeing the achievement of the assumed result in all member states (Judgement of the ECJ of 3 April 2008, C-187/07, Morawski, 2010, pp. 303–306, Kalisz, 2010, pp. 350–354, Kowalik-Bończyk, 2005, pp. 9–18, Miąsik, 2008, pp. 16–22).

Conclusions

In conclusion, it is important to state that divergences and differences in identification of an entrepreneur in Poland and the European Union are fundamental. They refer to the words employed to denote the entities involved in entrepreneurial activity, as well as the adopted structure and its accents, the given meaning, and the methods and the results of identification.

First, in Polish law, in order to denote entities bound with obligations directed to businesspeople, and also beneficiaries of the entitlements granted to entrepreneurs, the expression "entrepreneur" is used. In EU law, on the other hand, the term "undertaking" is applied.

Second, in Poland the meaning of the term was specified in the form of a legal definition, whereas in the European Union, the substance of the notion has been developed by the Court of Justice of the European Union and the doctrine.

Third, the legal definition in AFEA is treated as a so-called systemic definition which was developed in order to set the national law in order, and is of a universal and decisive nature, which means that it is proper every time the law refers to the term.

Fourth, Polish law has adopted the narrow (closed) identification conception, which requires the application of the legal definition every time. EU law, on the other hand, applies the extensive (open) approach, where the casuistic way of forming the meaning of the term under discussion through subsequent classifications (foremost establishments and conclusions of CJEU) is very flexible: the contents of particular elements of the concept, including foremost entrepreneurship and providing services, is evolving and developing.

Fifth, the national (Polish) concept is complex, which means that it requires the subsuming of three criteria (an objective, subjective and functional premise, which cumulatively identifies entrepreneur). The EU conception, however, requires the identification of entrepreneurship or services exclusively.

Sixth, the Polish concept of entrepreneur is aimed at identification of the entity, and the entrepreneurial activity constitutes merely one of the identification premises (equivalent importance is ascribed to the subjective and functional premises). On the other hand, the EU concept is object-oriented, which means it identifies the entrepreneur with the activity: performing the entrepreneurship and providing services, whereas other variables, such as the individual qualities of the entity, the organizational form, and the financing sources, remain with no bearing on the status.

As a result, the concept developed in the *acquis de l'union* undoubtedly exceeds the definition framework determined by the national law, and allows us to identify as "entrepreneurs" entities which are not perceived as such by AFEA or any other act of Polish law.

The differences indicated above are a derivative of relevant qualities of the system of national law (of the Republic of Poland) and EU law.

Reference to the theory allows us to recognize that the identification of entrepreneur adopted in Poland – through the universal and superior legal definition giving meaning to the term for the needs of the whole system of law – is in accordance with the rules of legislative technique, corresponds with the postulates of "rational legislator and interpreter", and is established in the tradition of Polish law.

On the other hand, EU law, as a transnational system, is characterized by, for example, linguistic pluralism, unknown to national orders. This fact affects the process of developing, applying, and interpreting the *acquis de l'union*. It justifies the necessity of adopting specific directives facilitating the proper identification of the meaning of a legal regulation, which include just the multilingualism of the system.

They emphasize the more extensive role of a systemic and purpose-oriented interpretation – for generally the linguistic meaning of a regulation must be confirmed as the result of systemic and purpose-oriented interpretations – and the accurate and desired form of the interpreted regulation stems from the harmonization of the results of all forms of interpretation. They also indicate the autonomous interpretation of EU law reduced to the assumption that the EU law is based on terms and linguistic structures occurring universally in member states, yet their interpretation may diverge from the meaning it was given in the national law. They also constitute the category of autonomous terms, in the case of which it is assumed that the semantic range given to them is independent from that adopted in internal legal orders (Szydło, 2007, p. 216, Morawski, 2010, p. 303, Masło, 2008, pp. 87–111).

Answering the question posed in the introduction, it is important to assert that the existence of differences between "entrepreneur" and "undertaking" does not mean, however, that member states (in this case the Republic of Poland) are obliged to introduce to the national legal order the structure formed in the *acquis de l'union* (in Poland it would be in many cases impossible and groundless). They are, however, obliged to assess every factual state aiming at finding a transboundary aspect, on the basis of which they should classify the entities as the category of entrepreneurs according to the EU structure.

Transboundariness is a characteristic, a structural element, of entrepreneurship and providing services. This quality introduces a reservation, in accordance with which entrepreneurship and providing services (particularly entitlements, guarantees, guaranteed protection of CJEU in this scope) should not include so-called purely internal situations or those of no EU aspect. The lack of this link excludes the classification of the activity as entrepreneurship or providing services, and thereby excludes the possibility to apply CJEU simultaneously preserving the property of national law. In this sense, transboundariness constitutes a specific collision rule deciding on the property of legal systems: the national law and the EU law (Etel, 2012, pp. 105–114, Chalmers and Hadjiemmanuil and Maduro and Monti, 2006, p. 751, Barcz, 2006, p. II 96, Szwarc-Kuczer, 2008, pp. 893–894, Cała-Wacinkiewicz, 2007, pp. 46–47, Craig and de Burca, 2003, p. 772).

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