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LEGAL STATUS OF A MINOR ENGAGED IN ECONOMIC ACTIVITY

Abstract

The objective of the paper is to prove the validity of the claim that a minor can be an entrepreneur. Minors involved in a business activity may perform legal acts or make transactions through a statutory representative and, in some situations, with the consent of a guardianship court. The requirement of full legal capacity is not included in the definitions of an entrepreneur provided in normative acts. Only special laws, in explicitly specified cases, make the economic activity contingent on having full legal capacity.

KEYWORDS

minor, entrepreneur, full legal capacity, economic/business activity

SŁOWA KLUCZOWE

małoletni, przedsiębiorca, pełna zdolność do czynności prawnych, działalność gospodarcza

1. INTRODUCTION

Polish legislation provides for many definitions of the concept of an entrepreneur, which, as a rule, are closely related with the objectives and subject matter of a particular legislative act.¹ According to these definitions, a natural person may be an entrepreneur yet it is not specified whether it is necessary for a natural person to have full legal capacity to be such. Therefore, it is important to examine the issue of whether a minor may have the entrepreneur's status in the Polish legal system and if he/she can conduct business independently and effectively. The foregoing analysis is supplemented with references to legal solutions – regarding a minor entrepreneur – developed in the German legal system.

2. A MINOR AS AN ENTREPRENEUR IN THE VIEWS OF POLISH LEGAL AUTHORS

In the literature on the subject, one can find different views on the requirement of an entrepreneur's full legal capacity. The vast majority of authors believe that economic activity involves primarily entering into legal transactions for which it is necessary to have full legal capacity that minors do not have.² A person who does not have full legal capacity may not engage in economic activity because, without the consent of a statutory representative, he/she cannot perform important legal acts, e.g. take on obligations.³ Thus, as indicated by some legal scholars and commentators, activities undertaken by statutory representatives on behalf of a minor cannot therefore be considered his/her economic activity.⁴

¹ Examples of such definitions of an entrepreneur can be found in the Act on competition and consumer protection of 16 February 2007 (Polish Journal of Laws: Dz.U. 2021, item 275), the Entrepreneurs Act of 6 March 2018 (Polish Journal of Laws: Dz.U. 2021, item 162, as amended) or the Civil Code of 23 April 1964 (Polish Journal of Laws: Dz.U. 2022, item 1360, as amended).

² S. Dmowski, (in:) S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2008, p. 169; R. Biskup, *Wolność gospodarcza w wymiarze podmiotowym*, Lublin 2011, p. 267; M. Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, Warszawa 2012, pp. 206–209; C. Kosikowski, *Pojęcie przedsiębiorcy w prawie polskim*, „Państwo i Prawo” 2001, No. 4, p. 20; M. Pawełczyk, (in:) A. Powałowski (ed.), *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2009, p. 40; A. Powałowski, *Publicznoprawny status osoby fizycznej wykonującej działalność gospodarczą w Polsce*, Gdańsk 2008, pp. 46–56.

³ T. Szymanek, *Swoboda działalności gospodarczej*, Europejska Wyższa Szkoła Prawa i Administracji, Warszawa 2010, p. 32.

⁴ *Ibid.* A similar position was taken by the Court of Appeal in Warsaw in its judgment of 2009, in which the court pointed out that economic activity conducted in an entrepreneur's own

According to authors holding a different view, it is not necessary to have full legal capacity to acquire the status of an entrepreneur.⁵ The basic argument for this claim is the constitutional premise on the freedom of economic activity. No legal provision defining the concept of an entrepreneur requires that the entrepreneur have full legal capacity. Special provisions, only in precisely defined cases, stipulate that an entrepreneur must have full legal capacity. This capacity is necessary, inter alia, for licensed activities⁶ or for practising of a freelance profession, which results from the provisions on freelance professions.⁷ These regulations, however, are the *lex specialis* in relation to the provisions defining the concept of an entrepreneur. Moreover, Article 4 of the Act on handicraft of 22 March 1989⁸ expressly allows for the option of a craft being practised by a person without full legal capacity.⁹ However, as some of the authors point out, entrepreneurs do not have to engage in economic activity on their own.¹⁰ The fact of running a business through a statutory representative does not exclude them from the group of entrepreneurs participating in economic activity on their own account.¹¹

name involves the performance of legal acts that exceed the scope arising from Article 14 § 2 of the Civil Code and requires that the entrepreneur be a natural person having full legal capacity. Judgment of the Court of Appeal in Warsaw of 22 April 2009, VI ACa 1083/08, OSA 2012, No. 4, pp. 60–72.

⁵ A. Stępień-Sporek, *Działalność gospodarcza z udziałem małżonków*, Warszawa 2009, p. 249; Z. Miczek, *Osoba fizyczna jako przedsiębiorca – na tle ustawy o swobodzie działalności gospodarczej i Kodeksu cywilnego*, „Przegląd Prawa Handlowego” 2005, No. 9, pp. 24–28; M. Biliński, *Sport elektroniczny. Charakter prawny*, Warszawa 2021, pp. 226–238.

⁶ In the judgment of 19 January 1998, II SA 1238/97, the Supreme Administrative Court stated that ‘concessions, especially for such specific activities as processing and trade in precious metals and stones, may only be operated by persons with full legal capacity. Only such persons can independently and effectively carry out all the activities related to the licensed activity and bear full responsibility (including criminal responsibility) for taking actions in this regard. On the other hand, the economic activity does not fall within the scope of matters that a minor may pursue without the consent of his/her statutory representatives, or matters related to the exercise of parental authority, which define the limits of the parents’ entitlement to represent their child. This position is also supported by the nature of concession being an administrative decision given to a particular entity. Only a licence issued to a person with full legal capacity guarantees that it will be used only by the named addressee of this decision. Furthermore, a licence issued to a minor could be used for conducting business by his/her statutory representatives, who would thus avoid direct responsibility for the financial results of their activities and private and public law obligations.’ Judgment of the Supreme Administrative Court of 19 January 1998, II SA 1238/97, Legalis.

⁷ For example, Article 24 para. 1(4) of the Act on attorneys-at-law of 6 July 1982 (Polish Journal of Laws: Dz.U. 2022, item 1166).

⁸ Polish Journal of Laws: Dz.U. 2020, item 2159.

⁹ P. Lewandowski, *Zdolność do czynności prawnych przedsiębiorcy jako osoby fizycznej*, „Studia Prawno-Ekonomiczne” 2016, Vol. C, p. 98.

¹⁰ M. Szydło, *Pojęcie przedsiębiorcy w prawie polskim*, „Przegląd Sądowy” 2002, No. 7–8, p. 94.

¹¹ *Ibid.*, p. 94.

3. REGISTRATION OF AN ENTREPRENEUR AND A MINOR

An application to the Central Register and Information on Economic Activity (hereinafter the CEIDG) may be submitted by an entrepreneur or an authorised person (item 02.3 of the CEIDG-1 application form for entry in the CEIDG). The provisions of the Act on the Central Register and Information on Economic Activity and the Information Point for Entrepreneurs of 6 March 2018¹² do not define the term of ‘authorised person’. Instructions for filling in the CEIDG-1 application prepared by the Ministry of Entrepreneurship and Technology, in item 02.3, read: ‘an application submitted by – in this field specify who submits the application. If it is the entrepreneur himself/herself, select “entrepreneur” from the list. If it is another person authorised to submit the application, e.g. his/her attorney, guardian or custodian, select “authorised person”’.¹³ In addition, apart from the data directly relating to the entrepreneur, the details of his/her legal representative and information about the limitation or loss of the entrepreneur’s legal capacity must also be entered in the CEIDG.¹⁴

Regarding the content of the application to the CEIDG, in the years 2019, 2020 and 2022, the author of this paper submitted a request for public information to the Ministry of Entrepreneurship and Technology in order to determine: (1) the number of minors (broken down into women and men) registered in the CEIDG as entrepreneurs running a business individually or as a civil partnership; (2) PKD (Polish Classification of Activities) codes under which minors are registered in the CEIDG as entrepreneurs engaged in economic activity individually or part of a civil partnership; (3) whether the CEIDG allows for the registration of a natural person without full legal capacity through an attorney/statutory representative.

The Ministry of Entrepreneurship and Technology, in its letter of 26 August 2019,¹⁵ made the following reply: ‘In the Polish legal system, the legislator does not provide for restrictions on the freedom of economic activity due to the lack of legal capacity. Both under the provisions of the Civil Code and the Entrepreneurs Act, which replaced the Act on freedom of economic activity, defining the concept of an “entrepreneur” in Article 43¹ and Article 4 paras 1 and 2, respectively, it is not stipulated that an entrepreneur should have legal capacity, nor is it specified what kind of capacity there should be. In this state of affairs, it should be recognized that not only an adult with full legal capacity should be registered in the CEIDG, but this requirement also applies to a person whose legal capacity

¹² Polish Journal of Laws: Dz.U. 2022, item 541, as amended (hereinafter CEIDG Act).

¹³ CEIDG-1_Instrukcja_w04_2019-11-22, moskorzew.pl (accessed 25.08.2022).

¹⁴ H. Wolska, *Model relacji pomiędzy krajowymi organami administracji publicznej a przedsiębiorcami*, Warszawa 2022, pp. 73–74.

¹⁵ Letter of the Ministry of Entrepreneurship and Technology of 26 August 2019, BM-II.015.323.2019.

is limited or to a person who does not have legal capacity (...). Generally, under Article 10 paras 7–9 of the CEIDG Act in connection with Article 96 of the Civil Code, an authorised person should be regarded as an entity whose authorisation to act on behalf of an entrepreneur is based on an act (statutory representation) or on a declaration of the represented entrepreneur (power of attorney). The interpretation of the above-mentioned provisions leads to a general conclusion that the person authorised to be entered in the CEIDG can be both an authorised attorney and a statutory representative, who in certain cases may be a parent, custodian or guardian (...) there are currently four entries for minor children (“active” status) in the CEIDG. Two of the entrepreneurs are female and two are male. All the minors are partners in a civil partnership and engage in economic activity only on the basis of a civil partnership agreement. The predominant business activity undertaken by the minors is that defined under the following PKD codes: 46.69.Z (Wholesale of other machinery and equipment), 46.90.Z (Non-specialised wholesale) and 68.10.Z (Buying and selling of real property on one’s own account).¹⁶

In another letter of 1 June 2020, the Ministry of Entrepreneurship and Technology¹⁷ stated that there were five businesses registered for minors (3 women and 2 men). The predominant business activity that the minors engaged in was defined under the PKD codes as: 46.69.Z (Wholesale of other machinery and equipment), 46.90.Z (Non-specialised wholesale), 47.19.Z (Other retail sale in non-specialised stores), 68.10.Z (Buying and selling of real property on one’s own account). On the other hand, to the question whether the CEIDG allows for the registration of a natural person without full legal capacity through a statutory representative, the Ministry replied that: ‘Technically it is possible, but only after prior notification of the case to the Ministry of Development’.

Finally, in the letter of 1 June 2022, the Ministry of Entrepreneurship and Technology¹⁸ responded that there were 20 businesses registered for minors (14 active and 6 suspended), including 10 women and 10 men. The predominant business conducted by the minors was defined under the following PKD codes: 47.91.Z (Retail sale via mail-order houses or the Internet) – 4 minors; 95.11.Z (Repair and maintenance of computers and peripheral devices) – 2 minors; 68.10.Z (Buying and selling of real property on one’s own account) – 2 minors; 96.02.Z (Hairdressing and other beauty treatments) – 2 minors; 55.20.Z (Tourist accommodation facilities and short-term accommodation) – 2 minors; 47.82.Z (Retail sale of tex-

¹⁶ It should be noted that Agnieszka Grygier submitted similar requests for public information in 2016. In the letter of 9 March 2016, No. BM.IV.015.59.2016.AR, Nk 51171/16, the Ministry of Development informed the author that on 9 March 2016 there were four minor entrepreneurs registered in the CEIDG, see A. Grygier, *Zdolność do czynności prawnych w zakresie statusu przedsiębiorcy*, „Przegląd Naukowy Disputatio” 2016, Vol. XXI, No. 1, pp. 25–26.

¹⁷ Letter of the Ministry of Entrepreneurship and Technology of 1 June 2020, BM-II.015.258.2020.

¹⁸ Letter of the Ministry of Entrepreneurship and Technology of 12 August 2022, BM-II.015.279.2022.

tiles, clothing and footwear at stalls and markets) – 1 minor; 81.21.Z (Non-specialist cleaning of buildings and industrial facilities) – 1 minor; 47.99.Z (Other retail sale outside stores, stalls and markets) – 1 minor; 02.40.Z (Service activities related to forestry) – 1 minor; 49.41.Z (Road transport of goods) – 1 minor; 59.12.Z (Post-production activities related to films, video recordings and television programmes) – 1 minor; 62.01.Z (Activities related to software) – 1 minor; 56.10.B (Mobile catering services) – 1 minor. Additionally, in response to the third question, the ministry stated that the provisions of the law applicable in Poland do not prohibit a natural person who does not have full legal capacity from registering in the CEIDG through a legal representative. Persons whose legal capacity is limited also have the right to register with the CEIDG. The entry in the CEIDG is then made by an authorised statutory representative of such person.

On the basis of the information obtained from the Ministry of Entrepreneurship and Technology, it should be concluded that public administration authorities interpret the provisions defining the concept of an entrepreneur in a way ‘recognising the freedom of business activity’. They acknowledge that there is an option for a person who does not have full legal capacity to register in the CEIDG, which is, as a rule, contingent on the involvement of a statutory representative. Thus, in legal transactions, minors, apart from concluding contracts in small everyday matters and performing legal acts in relation to objects given to them for free use, are represented by their parents, provided that they remain under their parental authority.

It should be emphasized that pursuant to Article 101 § 3 of the Family and Guardianship Code,¹⁹ statutory representatives may not, without the permission of the guardianship court, perform acts exceeding the scope of ordinary management. As highlighted in case law, the indication which activities exceed the scope of ordinary management is the weight of the undertaken activity, its effects on the minor’s property, the value of the object of a particular transaction, and the broadly understood welfare of a child and the protection of his/her life interests.²⁰ For example, in the judgment of 1997, the Supreme Administrative Court stated that the conclusion of a civil partnership agreement on behalf of a minor child is a legal act exceeding the scope of ordinary management within the meaning of Article 101 § 3 of the Family and Guardianship Code and requires the consent of the guardianship court. Furthermore, in the judgment of 2007, the Supreme Court ruled that a lease agreement concluded without the consent of the guardianship court by a person with limited legal capacity is invalid as it exceeds the scope of ordinary management and is not subject to validation pursuant to Article 18 of the Civil Code.²¹ This means that the consent of the guardianship court is necessary for the validity of legal acts having the nature of obligation and disposition per-

¹⁹ Polish Journal of Laws: Dz.U. 2020, item 1359.

²⁰ Judgment of the Supreme Court of 16 November 1982, I CR 234/82, LEX 8486.

²¹ Judgment of the Supreme Court of 3 April 2007, II UK 178/06, OSNP 2008, No. 9–10, p. 141.

formed as part of the minor's business activity, and it would be required for each of such transactions. Therefore, business conducted by minors may be hampered by the necessity to perform legal acts in the scope of ordinary management by statutory representatives or to obtain the court's consent for the minor's parents to effect transactions exceeding the scope of ordinary management.

4. MINORS UNDER THE GERMAN LAW

Under German law, minors may, as a rule, undertake any economic activity.²² Legal acts related to business conducted by a minor are effective with the consent of his/her parents (statutory representatives). Under § 112 of the BGB (German Civil Code),²³ a statutory representative may, with the consent of a family court, authorise the minor to undertake economic activity independently. In the event of such authorisation, the minor acquires partial legal capacity, and therefore the statutory representative can no longer act on behalf of the person with limited legal capacity, and his/her right to represent that person is suspended. In order to acquire full legal capacity, according to § 112 of the BGB, two conditions must be met: the authorisation and the consent of the family court.

The authorisation is a declaration of will expressed in any form, which takes effect upon reaching a person with limited legal capacity, i.e. a minor. The assessment of its effectiveness is the responsibility of the statutory representative. Moreover, the authorisation must be clearly expressed so that it cannot be replaced by the approval of the statutory representative. However, since the authorisation may be granted in any form, there may be problems with proving it. In such cases, from the point of view of a third party, the authorisation may be considered granted, at least when the consent of the family court has been obtained. The court does not take any action without the request of the statutory representative, therefore the request is a proof that the authorisation has been granted. The approval of the family court, which in theory may be given before or after the authorisation is provided, is at the discretion of the issuing court. For this purpose, the court must decide, in particular, whether a person with limited legal capacity is able to engage in a gainful activity, just like a person having full legal capacity. The court

²² Minors may not engage in business activities for which an official permit is required, e.g. for arms trade (§ 2 para. 1 of the WaffG, German Weapons Act) or corporate representation. Thus, a minor cannot be member of a management board of a joint-stock company (§ 76 para. 3 of the AktG, German Stock Corporation Act) or a managing director of a limited liability company (§ 6 para. 2 of the GmbHG, German Limited Liability Companies Act).

²³ Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (Federal Law Gazette: BGBl. I S. 42, 2909; 2003 I S. 738), as amended under Article 2 of the law of 21 December 2021 (Federal Law Gazette: BGBl. I S. 5252).

also checks whether the minor has the knowledge and skills required to run a particular type of business. As some authors point out, this results, *inter alia*, from the fact that the minor must be protected against incurring liabilities without due diligence, which could cause significant financial damage to him/her.²⁴ Pursuant to § 112 para. 2 of the BGB, the revocation of the authorisation is also conditional upon the court's consent. Once the requirements are met, a person with limited legal capacity should be deemed to have full legal capacity for all legal acts arising from a gainful activity.²⁵ A certain restriction is stipulated under § 112 para. 1 sentence 2 of the BGB only for the transactions for which also the statutory representative must obtain the court's consent.

The effective authorisation under § 112 of the BGB does not constitute an exemption from parental care within the meaning of § 1626 *et seq.* of the BGB. The right to act as a statutory representative under § 1629 para. 1 sentence 1 of the BGB is suspended in the case of all legal acts which the independent gainful activity undertaken by a minor entails. Nevertheless, the statutory representative is obliged to monitor the minor's financial situation and obtain the consent of the family court to revoke the authorisation in the event of threat.²⁶

Moreover, it should be emphasized that a minor under § 112 of the BGB is a person with limited legal capacity as defined in § 106 of the BGB. Pursuant to § 112 of the BGB, the eligible natural person may be one who has reached the age of seven but has not yet reached the age of eighteen. The provision in question does not apply to a person who is legally incapable of acting pursuant to § 104 of the BGB, i.e. a person who is not yet seven years old or suffers from a pathological mental disorder that renders the exercise of free will impossible, unless this condition is temporary. The declaration of will of a person who is legally incapable is invalid (§ 105 para. 1 of the BGB), therefore partial legal capacity based on the authorisation and consent of the family court is precluded. This applies irrespective of whether the legally incapacitated person is under the age of seven (§ 104 item 1 of the BGB) or his/her mental condition impeding the exercise of free will is only temporary (§ 104 item 2 of the BGB). As some authors point out, the minimum age limit of seven years is admittedly low but it does not contradict the purpose of the provision,²⁷ which only sets a general time frame that must be specified in individual cases. The decision whether independent economic activity is suitable for a minor at a certain age is taken by the court and a statutory representative. In addition, some gainful activities are often governed by provisions setting minimum age limits on activities that are harmful to minors.²⁸

²⁴ S. Klumpp, *BGB § 112*, (in:) S. Herrler (ed.), *Staudinger BGB*, Neubearbeitung 2021.

²⁵ U. Ch. Dißars, *Der beschränkt Geschäftsfähige im Steuerrecht – zivil- und steuerrechtliche Grundlagen*, DStR 1997.

²⁶ S. Klumpp, *BGB § 112*...

²⁷ *Ibid.*

²⁸ *Ibid.*

5. CONCLUSION

The discussion presented above leads to a conclusion that the arguments for the necessity for entrepreneurs to have full legal capacity are not well founded in the current state of affairs. Therefore, if the legislator does not require an entrepreneur to meet certain conditions (e.g. as regards licensed activities or practising a freelance profession), any person with legal capacity may engage in economic activity. However, to remove doubts expressed in the legal commentaries about minors running a business, Article 4 of the Entrepreneurs Act, inter alia, should be edited by stipulating explicitly that a minor may also be an entrepreneur. Moreover, it would be justifiable to introduce the solutions adopted in German legislation into the Polish legal system, thanks to which a statutory representative could, with the consent of a family court, authorise a minor to run a business independently. This way, the minor would gain full capacity to perform legal actions related to conducting business. The solution in question would enable the court to consider the circumstances of individual projects planned by minors and to decide whether, in particular conditions, such persons have sufficient knowledge, experience and preparation to participate in economic activity, just like in the case of persons with full legal capacity.

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