

## THE SCOPE OF REGULATION OF ACCESS TO ACTIVITIES IN THE FIELD OF ORGANIZING TOURIST EVENTS AND FACILITATING THE PURCHASE OF RELATED TOURIST SERVICES IN POLISH LAW. SELECTED ISSUES

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### ABSTRACT

The considerations carried out in this article focus on the scope of regulation of undertaking (access to) activities in the field of organizing tourist events and facilitating the purchase of related tourist services in the part relating to the features of the activity covered by it. Entities operating in this area are subject to specific legal obligations, including requirement for obtaining an entry in the register. Business in question is no longer a regulated activity but the provisions regarding this activity apply to it. This study also deals with the consequences of this seemingly insignificant change in the nomenclature. These issues are presented against the background of EU regulations and selected EU Member States.

**Keywords:** Tourist entrepreneur, regulation of business activity, regulated activity

### INTRODUCTION

In order to precisely outline the field of research, the results of which have been presented in this study, it is necessary to define at the outset the concept of regulation of economic activity, including the regulation of access to it. Unfortunately, these concepts have not been defined by the legislator. However, they are considered by representatives of legal sciences.

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As Kazimierz Strzyczkowski points out, in colloquial language, regulation means limiting, subjecting an activity to the principles established by law. An alternative to regulation understood in this way is deregulation, i.e. a space of economic activity free from legal regulations<sup>1</sup>. According to Cezary Kosikowski, the essence of the regulation of business activity is to limit the freedom of behavior of entrepreneurs. It occurs due to a collision with other values that the state protects (such regulation aims, among others, at consumer protection). Regulation understood in this way consists in establishing conditions in the form of orders and prohibitions, on the fulfillment of which depends the possibility of exercising public subjective rights by entrepreneurs<sup>2</sup>. It should be noted that this is, however, about subjecting a particular type of economic activity to the specific requirements associated with its taking up and running<sup>3</sup>. Therefore, general requirements addressed to all entrepreneurs are not considered to be the regulation of undertaking business activity, but specific requirements for entities undertaking certain types of activities<sup>4</sup>.

It is emphasized in the literature that the regulation of economic activity is implemented on two levels, i.e. taking up and running a business<sup>5</sup>. The first of these is referred to as the regulation of access to economic activity, under which the law provides for bans on undertaking a specific type of business, orders to obtain permission to start it (in the form of concessions, permits and licenses) or notification to the competent authority about the intention to start business. On the other hand, the regulation of running economic activity is about limiting the manner of conducting it

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<sup>1</sup> Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warsaw: LexisNexis, 2011), 154–155.

<sup>2</sup> Cezary Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej* (Warsaw: LexisNexis, 2010), 179–180.

<sup>3</sup> Krzysztof Jaroszyński, „Funkcje administracji gospodarczej,” in *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, eds. Hanna Gronkiewicz-Waltz, and Marek Wierzbowski (Warsaw: LexisNexis, 2017), 198.

<sup>4</sup> Cezary Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, 181. Therefore, it is not about obligations related to undertaking any type of economic activity (e.g. registration in the business register, for VAT or social security purposes), but about obligations related to undertaking specific type of activity.

<sup>5</sup> Krzysztof Jaroszyński, „Funkcje administracji gospodarczej,” 199.

which is not indifferent from the public interest perspective<sup>6</sup>. The considerations carried out in this article focus on the regulation of undertaking (access to) activities in the field of organizing tourist events and facilitating the purchase of related tourist services.

The regulation of business activity of tourist service organizers after the change of the socio-economic system in Poland that took place at the turn of the 1980s and 1990s has evolved. Initially, it was a so-called free activity, and therefore not subject to any of the forms of regulation of economic activity occurring in Polish law. Running it was then based on an entry in the municipal business register. Then this activity was subjected to the strictest form of regulation, which in Polish law was (and still is) concessioning. Since the entry into force of the Act on the freedom of economic activity (i.e. since 21 August 2004), business in question has become a regulated activity<sup>7</sup>. The possibility of undertaking it was dependent on the entrepreneur meeting specific conditions specified in the provisions of the Act and on obtaining an entry in the register of regulated activity<sup>8</sup>. These were conducted by voivodship marshals.

The further stage of changes in the subject matter was determined by the Act of 24 November 2017 on tourist events and related tourist services<sup>9</sup> (hereinafter referred to as Tourist Events Act [2017]), which transposed Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC<sup>10</sup> (in short Directive 2015/2302/EU). Entities under-

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<sup>6</sup> Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne*, 157.

<sup>7</sup> More on the evolution of forms of regulation of tourism activities see Jerzy Gospodarek, „Meandry wolności gospodarczej w polskiej turystyce w świetle regulacji prawnych minionego kwartału (1989-2013),” in *25 lat fundamentów wolności działalności gospodarczej. Tendencje rozwojowe*, eds. Jan Grabowski, Katarzyna Pokryszka, and Anna Hołda-Wydrzyńska (Katowice: UŚ, GWSH im. W. Korfantego, 2013), 220 and next.

<sup>8</sup> „Justification to the draft Entrepreneurs’ Law,” 54, in *Sejm RP VIII kadencji. Druk nr 2051*, February 27, 2020, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/9E761CF9B6B-03CBCC12581E10059DD88/%24File/2051.pdf>.

<sup>9</sup> Consolidated text: Journal of Laws of 2019, item 548.

<sup>10</sup> OJ UE L 326, 11 December, 2015, p. 1–33.

taking and conducting activities in the field of organizing tourist events and facilitating the purchase of related tourist services are still subject to specific legal obligations, including requirement for obtaining an entry in the register. Business in question is no longer a regulated activity but the provisions regarding this activity apply to it. This study also deals with the consequences of this seemingly insignificant change in the nomenclature.

It should be noted that the issue of the scope of the regulation of the activity in question will be only partially examined. In order to fully indicate this scope, it would be necessary to determine the specific meaning of concepts such as organizing tourist services and facilitating the purchase of related tourist services. Only the activities falling within their scope are covered by the analyzed regulation. However, the above would far exceed the framework of this study. At the same time, it should be emphasized that these issues are the subject of separate studies, to which one should be referred<sup>11</sup>. Therefore, they will not be analyzed in detail in this study. The subject of the analysis will be exclusively the scope of this regulation in the part relating to the features of the activity covered by it. These issues will be presented against the background of EU regulations and selected EU Member States.

## 2. TOURIST ENTREPRENEUR AS AN ENTITY CONDUCTING BUSINESS ACTIVITY

Polish law defines economic activity in over ten acts<sup>12</sup>. The definition with the widest scope of application is contained in Article 3 of the Act of 6 March 2018 – Entrepreneurs' Law<sup>13</sup> (hereinafter referred to as Entrepreneurs' Law), according to which economic activity is organized gainful

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<sup>11</sup> See, e.g., the considerations led in this field by Piotr Cybula, „Aksjologia zmiany prawa konsumenckiego na przykładzie implementacji w Polsce dyrektywy 2015/2302 w sprawie imprez turystycznych i powiązanych usług turystycznych,” *Folia Turistica. Akademia Wychowania Fizycznego im. B. Czechka w Krakowie*, no. 49 (2018): 130–133, <https://doi.org/10.5604/01.3001.0013.0815>.

<sup>12</sup> See more widely Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym* (Warsaw: Wolters Kluwer Polska, 2012), 275 and next.

<sup>13</sup> Consolidated text: Journal of Laws of 2019, item 1292 as amended.

activity, carried out on its own behalf and in a continuous manner<sup>14</sup>. Entities performing it have been defined by the legislature as entrepreneurs<sup>15</sup>. Interestingly, the legislator, however, abandoned the definition of a tourist entrepreneur for the purposes of the Tourist Events Act [2017] with a reference to the definition of an entrepreneur included in the Entrepreneurs' Law<sup>16</sup> and currently the Act states that whenever it mentions a tourist entrepreneur, it should be understood as a tourism organizer, an entrepreneur facilitating the purchase of related tourist services, a travel agent or a travel service provider who is an entrepreneur within the meaning of Article 43<sup>1</sup> of the Act of 23 April 1964 - Civil Code<sup>17</sup> (hereinafter as Civil Code) or conducting payable activity.

It should be noted that the Civil Code does not, however, contain a definition of economic activity, although, like the Entrepreneurs' Law, entities conducting it (or professional activity) are referred to as entrepreneurs<sup>18</sup>. A problem therefore arose as to understand the concept of economic activity for the purposes of the definition from the Civil Code (and thus also now from the Tourist Events Act [2017]). The doctrine proposes

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<sup>14</sup> Maciej Etel even postulated the presumption that if the term „economic activity” or „entrepreneur” appears in the legal act, then it should be given the same meaning as in the Act on freedom of economic activity of 2 July 2004, Journal of Laws of 2017, item 2168 as amended, now Entrepreneurs' Law. See more Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 317; Polish Supreme Court, Judgment of 2 February 2009, Ref. No. V KK 330/08, reported in: LEX nr 485044.

<sup>15</sup> In accordance with Article 4 clause 1 of the Entrepreneurs' Law an entrepreneur is a natural person, a legal person or an organizational unit which is not a legal person, the separate act of which grants legal capacity, pursuing economic activity.

<sup>16</sup> However, this was the case in the Act on tourist services of 29 August 1997, Journal of Laws of 2017, item 1553 as amended, according to which (Article 3 item 14) the term entrepreneur used in the Act should be understood as an entrepreneur within the meaning of the Entrepreneurs' Law and a foreign entrepreneur within the meaning of the Act on the rules of participation of foreign entrepreneurs and other foreign persons in business trading on the territory of the Republic of Poland of 6 March 2018, Journal of Laws of 2019, item 1079 as amended.

<sup>17</sup> Consolidated text: Journal of Laws of 2019, item 1145 as amended.

<sup>18</sup> In accordance with Article 43<sup>1</sup> of the Civil Code, an entrepreneur is a natural person, a legal person and an organizational unit referred to in Article 33<sup>1</sup> § 1 of the Civil Code, conducting business or professional activity on its own behalf.

to use the definition from public law for this aim (formerly Article 2 of the Act of 2 July 2004 on the freedom of economic activity<sup>19</sup>, now Article 3 of the Entrepreneurs' Law)<sup>20</sup>. However, at the same time attention is drawn to the need for an auxiliary application of this definition<sup>21</sup> and flexible application of arising from it premises for recognizing the activity as an economic one<sup>22</sup>. It is also emphasised that there is a need of including the features not listed in the above-mentioned provision of the Entrepreneurs' Law that results from judicial decisions to define the concept of economic activity for the purposes of applying the provisions of the Civil Code<sup>23</sup>. The jurisprudence recognizes that activity in question may also be non-profitable, provided that it is subordinated to the principle of rational management<sup>24</sup>. According to Wojciech J. Katner such an immanent feature of a business activity, which is not explicitly referred to by law, is also its professional nature<sup>25</sup>. An entity performing this type of activity (or professional one as defined by the Civil Code) may therefore become a tourism entrepreneur within the meaning of the Tourist Events Act [2017], if, of course, it undertakes the activities of a tourism organizer, an entrepreneur

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<sup>19</sup> Consolidated text: Journal of Laws of 2017, item 2168 as amended.

<sup>20</sup> Wojciech J. Katner, „Art. 43<sup>1</sup>,” in *Kodeks cywilny. Część ogólna*, eds. Małgorzata Pyziak-Szafnicka, and Paweł Książek (Warsaw: Wolters Kluwer, 2014), 452–453, 456.

<sup>21</sup> Łukasz Żelechowski, „Art. 43<sup>1</sup>,” in *Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające Kc. Prawo o notariacie (art. 79-95 i 96-99)*, ed. Konrad Osajda (Warsaw: C.H.Beck, 2017), 290.

<sup>22</sup> Marian Kępiński, „Art. 43<sup>1</sup>,” in *Kodeks cywilny. Tom I. Komentarz. Art. 1-449<sup>11</sup>*, ed. Maciej Gutowski (Warsaw: C.H.Beck, 2016), 239–240. It should also be noted that Article 5 of the Entrepreneurs' Law contains a catalog of activities excluded from the application of the provisions of this Act. Pursuant to the subjective, objective and formal criteria, the types of activity indicated there are not considered to be economic activities under the Act. Therefore, this activity is not subject to registration or regulation. In these cases, there is therefore no need to obtain a permit, license, concession or entry in the register of regulated activity. See „Justification to the draft Entrepreneurs' Law,” 21.

<sup>23</sup> Andrzej Janiak, „Art. 43<sup>1</sup>,” in *Kodeks cywilny. Komentarz LEX*, ed. Andrzej Kidyba (Warsaw: Wolters Kluwer, 2012), 211. See also Wojciech Popiołek, „Art. 43<sup>1</sup>,” in *Kodeks cywilny. Tom I. Komentarz. Art. 1 – 449<sup>10</sup>*, ed. Krzysztof Pietrzykowski (Warsaw: C.H.Beck, 2015), 192.

<sup>24</sup> „Justification to the draft Entrepreneurs' Law,” 23.

<sup>25</sup> Wojciech J. Katner, „Art. 43<sup>1</sup>,” 455. See also Łukasz Żelechowski, „Art. 43<sup>1</sup>,” 293.

facilitating the purchase of related travel services, a travel agent or a travel service provider (as defined by the Tourist Events Act [2017]).

Before the above mentioned change of law it was argued in the literature that thanks to the criteria of economic activity contained in public law it was possible to make a distinction between the activity of so-called social tourism organizers (such as schools, associations, religious associations and church legal entities, as well as employers conducting social activities for the benefit of their employees) and the business activities of tourism entrepreneurs<sup>26</sup>. It was also considered that the organization of tourist events which were not of an economic nature and thus did not constitute a business activity was not subject to the obligation to enter into the register of regulated activity, or even to the provisions of the Act of 29 August 1997 on tourist services<sup>27</sup> (hereinafter as Tourist Services Act [1997])<sup>28</sup>.

In the context of economic activity it should be also remembered that Polish law imposes a number of obligations on entities that undertake it. This also applies to tourist entrepreneurs. In simple terms it can be said that depending on the legal form of performing this activity, it is necessary to submit a notification to the Central Register and Information on Business Activity (in the case of natural persons) or to obtain an entry in the Register of Entrepreneurs of the National Court Register (in the case of commercial law companies). Additional obligations of entity undertaking business activity include, among others, making registration for tax, social security and official statistics purposes<sup>29</sup>.

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<sup>26</sup> Jerzy J. Raciborski, „Komentarz do niektórych przepisów ustawy o usługach turystycznych,” in Jerzy J. Raciborski, *Usługi turystyczne. Przepisy i komentarz*, chap. 1, (Warsaw: Wydawnictwo Prawnicze, 1999), LEX.

<sup>27</sup> Consolidated text: Journal of Laws of 2017, item 1553 as amended.

<sup>28</sup> Mirosław Nesterowicz, *Prawo turystyczne* (Warsaw: Wolters Kluwer, 2016), 27; Katarzyna Marak, „Administracyjnoprawne warunki podejmowania działalności gospodarczej w zakresie prowadzenia biur podróży w świetle projektu nowelizacji ustawy o usługach turystycznych z 25 marca 2009 r.,” in *Transformacje prawa turystycznego*, ed. Piotr Cybula (Cracow: Proksenia, 2009), 81.

<sup>29</sup> See more Agnieszka Żywicka, *Rygory prawne podejmowania oraz prowadzenia działalności turystycznej w Polsce* (Warsaw: Difin, 2013), 47–53 and 62–72.

### 3. TOURIST ENTREPRENEUR AS AN ENTITY NOT CONDUCTING BUSINESS ACTIVITY

As indicated above, the situation in which a tourist entrepreneur could only be an entrepreneur within the meaning of the Entrepreneurs' Law changed on 1 July 2018, when the Tourist Events Act [2017] came into force. The wider subjective scope of this Act has already been indicated in the justification to its draft<sup>30</sup>. However, the need to regulate the activities of tourist organizers that did not conduct business was also noted in the Polish legal literature before 1 July 2018. Some of these entities often operated on a large scale, an example of which in Poland were pilgrimage organizers<sup>31</sup>. The doctrine emphasized the fact that participants of events not covered by the Act did not have legally guaranteed protection at the level of travel agency clients<sup>32</sup>. In the above context, it was also noticed that the Tourist Services Act [1997] gave a clearly narrower scope to the concept of a tourism organizer compared to the meaning that the directive gave to it<sup>33</sup>.

The key elements of the Tourist Events Act [2017], which determined the above change, are the exclusion of the said activity from the catalog of regulated activity, the catalog of tourist events and related tourist services

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<sup>30</sup> „Justification to the draft act on tourist events and related tourist services with draft implementing acts,” 16 and „Regulatory Impact Assessment,” 1, in *Sejm RP VIII kadencji. Druk nr 1784*, accessed February 27, 2020, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/2F-BA876288E41327C125818C003DE061/%24File/1784.pdf>.

<sup>31</sup> Mirosław Nesterowicz, „Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży,” *Przegląd Sądowy*, no. 9 (2018), note 13, LEX.

<sup>32</sup> Mirosław Nesterowicz, „Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży,” note 13; Piotr Cybula, *Usługi turystyczne. Komentarz* (Warsaw: Wolters Kluwer, 2012), 57; Katarzyna Marak, „Administracyjnoprawne warunki podejmowania działalności gospodarczej w zakresie prowadzenia biur podróży w świetle projektu nowelizacji ustawy o usługach turystycznych z 25 marca 2009 r.” 81.

<sup>33</sup> Piotr Cybula, *Usługi turystyczne. Komentarz*, 57; Katarzyna Marak, „Administracyjnoprawne warunki podejmowania działalności gospodarczej w zakresie prowadzenia biur podróży w świetle projektu nowelizacji ustawy o usługach turystycznych z 25 marca 2009 r.” 81.

to which the Act does not apply, and the definition of tourism entrepreneur adopted in this Act.

First of all, as it was noted above, in the legal status binding until 30 June 2018, only economic activity in the field of organizing tourist events and brokerage on behalf of clients in concluding contracts for the provision of tourist services was subject to the obligation to meet specific legal conditions and obtain entry in the register of regulated activity (register of tour operators and travel agents). The provision of Article 4 clause 1 of the Tourist Services Act [1997] explicitly defined it as a regulated activity within the meaning of the Entrepreneurs' Law, which was and still is a form of regulation of business activity<sup>34</sup>. Therefore, for a given activity to be covered by this form of regulation, it had to be characterized by organized and commercial character, and also had to be carried out on its own behalf and in a continuous manner (in accordance with Article 3 of the Entrepreneurs' Law)<sup>35</sup>. At present, therefore, the application of the analyzed provisions of the Tourist Events Act [2017] no longer applies only to economic activities and may therefore also be related to activities that do not have its characteristics.

In the analyzed scope, key importance should also be assigned to the exclusions of the application of the Tourist Events Act [2017] (and the Directive 2015/2302/EU). This Act does not apply, *inter alia*, to tourist events and related tourist services that are offered and whose ordering and delivery is facilitated occasionally, on a non-profit basis and only for a limited group of travelers (Article 3 point 1 of the Tourist Events Act [2017]). However, it is assumed that these conditions must be met jointly<sup>36</sup>. This

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<sup>34</sup> Regulated activity falls under the concept of economic activity. See Michał Strzelbicki, „Wpis do rejestru działalności regulowanej,” *Ruch Prawniczy Ekonomiczny i Socjologiczny*, no. 4 (2005): 67. As Katarzyna Melgieś notes, the basic formal condition determining the entry in the register of regulated activity is the applicant's status of the entrepreneur, see Katarzyna Melgieś, „Działalność regulowana jako forma reglamentacji wolności gospodarczej – uwagi konstrukcyjne,” *Studia Gdańskie. Wizje i rzeczywistość*, no. VII (2010): 326.

<sup>35</sup> See e.g. Provincial Administrative Court in Warsaw, Judgment of 8 October 2007, Ref. No. VI SA/Wa 1007/07, reported in: LEX nr 384175.

<sup>36</sup> „Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements Workshop with Member States 13 June 2016,” 12, accessed February 27, 2020, [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=46056](http://ec.europa.eu/newsroom/document.cfm?doc_id=46056).

means that the Act (and the Directive 2015/2302/EU) should also apply to entities conducting the above activities on a non-profit basis, if it is also carried out occasionally or (and) in relation to an unlimited group of travelers. Therefore, it seems that entities providing this type of services should be considered as tourism entrepreneurs within the meaning of the Act.

The statutory definition of the tourist entrepreneur is also a key issue in the context of the scope of regulation of the analyzed activity. As it was stated above, in accordance with Article 4 point 7 of the Tourist Events Act [2017], whenever the act refers to a tourist entrepreneur, it should be understood as a tourism organizer, an entrepreneur facilitating the purchase of related tourist services, a tourist agent or a tourist service provider, being an entrepreneur within the meaning of Article 43<sup>1</sup> of the Act of 23 April 1964 - Civil Code or operating for a fee. Therefore, a tourist entrepreneur as an entity conducting paid activities is an alternative to entities conducting business or professional activity (within the meaning of the Civil Code), who will be included in the category of entities referred to in Article 43<sup>1</sup> of the Civil Code. Thus, the construction of a tourist entrepreneur created on the basis of the content of Article 4 point 7 of the Tourist Events Act [2017] in connection with Article 43<sup>1</sup> of the Civil Code shows that not only entities conducting business activity can be considered as tourism entrepreneurs within the meaning of the Tourist Events Act [2017], but also entities conducting professional or paid activity. The addition of payment as a feature of the activity of a tourist entrepreneur who is not an entrepreneur within the meaning of the Civil Code is considered an expression of the extension of the subjective scope of application of the analyzed Tourist Events Act [2017]. As Dominik Borek points out, the condition for payment included in the legal definition being discussed has been added in order to cover the widest possible range of cases with the regulatory scope<sup>37</sup>.

However, the above construction should be considered controversial. It can be questioned whether this feature of the activity is significant from

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<sup>37</sup> Dominik Borek, „Przedsiębiorca w ustawie o imprezach turystycznych i powiązanych usługach turystycznych – koncepcja przedmiotowego charakteru regulacji,” *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 4 (2018): 34, <https://doi.org/10.7172/2299-5749.IKAR.4.7.2>.

the perspective of the obligation to apply the Act by the entity performing it. On the one hand, payment may indicate the profit-making nature of a given activity (which is a constitutive feature of economic activity), although it does not prejudge this<sup>38</sup>. As pointed out by the representatives of the European Commission, „the <>not-for-profit<> criterion is likely to be fulfilled where the amount paid covers only the incurred expenses, as well as where the profit is marginal and serves charitable/humanitarian purposes<sup>39</sup>.“ On the other hand, however, according to Article 3 point 1 of the Tourist Events Act [2017] it may be that a given activity will be carried out free of charge (due to its non-profit nature), and yet it will fall within the scope of application of the Tourist Events Act [2017] and the Directive 2015/2302/EU (due to the unlimited number of clients or (and) constancy of service). In connection with this, there may be doubts that the legislator in the definition of a tourist entrepreneur, apart from entrepreneurs from the Civil Code, referred only to entities conducting paid activities.

#### 4. PERSPECTIVE OF EU LAW AND THE LAW OF SELECTED EU MEMBER STATES

Considerations covering the scope of regulation of the analyzed activity in Polish law should also be referred to EU law. It should be emphasized that the Polish legislator created the above-mentioned definition of a tourist entrepreneur for the purposes of transposing Directive 2015/2302/EU into the Polish legal order. Therefore, the question should be asked – how widely the EU legislator regulated the scope of entities recognized as „traders” within the meaning of Directive 2015/2302/EU. Secondly, Polish normative solutions in this area can also be compared with those adopted

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<sup>38</sup> Eliza Komierzyńska-Korlińska, „Art. 3,” in *Konstytucja Biznesu. Komentarz*, ed. Marek Wierzbowski (Warsaw: Wolters Kluwer, 2019), 54.

<sup>39</sup> „Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements Workshop with Member States 13 June 2016,” 14. See also „Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements Workshop with Member States 25 February 2015,” 3-4, accessed February 27, 2020, [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=46054](http://ec.europa.eu/newsroom/document.cfm?doc_id=46054); Komierzyńska-Korlińska, „Art. 3,” 54.

in other EU Member States, which were also required to transpose the provisions of the above directive.

The EU legislator in Article 3 point 7 of Directive 2015/2302/EU indicated that „trader” is a person „acting for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider<sup>40</sup>.“ In that provision, the EU legislature did not therefore refer directly to the features of the activity, which would determine its economic nature (constant and continuous manner of its performance, focus on profit, independence etc.)<sup>41</sup>. This was also noted by the representatives of the European Commission, pointing out that from the analyzed Article 3 point 7 of the directive, it does not follow that the trader’s activity must be characterized by profitability, and therefore it should be assumed that it may also include non-profit entities. However, these representatives also indicated that in their opinion, this provision implies (somewhat indirectly) that this activity should be characterized by stability and organization<sup>42</sup>. It can therefore be assumed that

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<sup>40</sup> According to article 3 point 7 Directive 2015/2302/EU „trader” means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider.

<sup>41</sup> For example the Treaty on the Functioning of the European Union (OJ UE C 326, 26 October, 2012, p. 1–390) in Article 57 states that services shall be considered to be „services” within the meaning of the Treaties where they are normally provided for remuneration (...). „Services” shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. Also Article 2 point 2 of the Council Directive of 13 June 1990 on organized travel, vacation and trips (90/314/EWG, OJ UE L 158, 23 June, 1990, p. 59-64) stated that for the purposes of this Directive, „organizer” means the person who professionally organizes and sells packages or offers for sale, both directly and through a retail outlet.

<sup>42</sup> As pointed out by the representatives of the European Commission „the definition of trader (see Article 3 (7)) does not explicitly require the intention of making a profit. One may consider that it is sufficient for a trade, business, craft or profession that a regular activity is carried out with a certain level of organisation,” „Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements Workshop with Member States 25 February 2015,” 3.

the analyzed provision of the directive does not require that the „trader” conduct activities deemed to be economic in the understanding of Polish law (since the gainful purpose of such activities is not required). It follows that Directive 2015/2302/EU does not focus on including its provisions on entities conducting business activity, but on how tourist events are being organized. Therefore, even if the entity does not conduct business activity, but organizes tourist events in a way other than occasional, non-profitable and only to a limited group of travelers, such events are covered by Directive 2015/2302/EU. Also, if the entity is an entrepreneur, but the specific event is being organized sporadically, not for profit and to a limited group of travelers, it will not be covered by the directive (e.g. an employer organizing it for its employees for recreational purposes)<sup>43</sup>.

Even if we assume, however, that the trader’s definition from Directive 2015/2302/EU refers to entities conducting economic activity within the meaning of EU law, it could still cover a wide range of entities, broader than in the case of the concept of entrepreneur under Polish law<sup>44</sup>. The concept of entrepreneur and business activity is autonomous in EU law and its interpretation is very liberal. These meanings are detached from the ones given to them by the internal regulations of the Member States. The key in this context is that a given entity performs business activity, while in EU law it is understood as performing entrepreneurship and providing services<sup>45</sup>. In the EU’s understanding of these terms, however, the cross-border context is also key, but Directive 2015/2302/EU does not refer in this respect only to cross-border activities. All this means that the terms of an entrepreneur

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<sup>43</sup> As pointed out by the representatives of the European Commission „however, if a trader organises packages without the intention of making a profit for the recreation of its employees and only occasionally, such trips would probably not be covered by the Directive on the basis of Article 2 (2) (b),” „Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements Workshop with Member States 25 February 2015,” 3.

<sup>44</sup> The EU law assumes that entrepreneurs can be not only partnerships and capital companies, but also representatives of liberal professions, inventors, farmers, artists, athletes, civil law companies, trade unions, religious associations, budgetary units, public and private schools etc., as long as they carry out business activities. See more widely Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 117, 129–130.

<sup>45</sup> Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 128–130.

and business activity in the meaning of EU law cannot be equated with the meaning that Polish law gives to these terms. It should be emphasized here that in the case of a directive covered by the maximum harmonization, the scope of its regulation should be clear<sup>46</sup>, which cannot be said about the discussed case (in view of the doubts raised above).

As already indicated, all EU Member States had to deal with the problem of transposing the above provisions. Some of these countries simply transferred to the national legal order the content of the above definition<sup>47</sup> or created a definition very close to it<sup>48</sup> (e.g. Romania, Portugal, Netherlands, Malta, Ireland, Italy, Hungary, Greece, France, Finland, Denmark, Cyprus and Belgium).

However, the solutions adopted by the Member States in this respect are varied. Some of them have adapted the trader's definition of Directive 2015/2302/EU to their national laws<sup>49</sup>. The legislature from Sweden and Slovakia refers „only” to the economic activity of a given entity, legislature from Estonia refers to economic and professional activities, and the Croatian law lists the categories of entities that are entitled to provide the services in question (among them listing companies, cooperatives, sole traders and traders, craftsmen, but also cultural institutions, schools, higher education institutions and other educational institutions, for purposes of performance of their activities, churches or religious communities etc.). In its definition, legislature from Austria refers to the concept of entrepreneur within the meaning of the Austrian Consumer Protection Act, and from

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<sup>46</sup> Aleksandra Kunkiel-Kryńska, „Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych,” *Monitor Prawniczy*, no. 18 (2007): 989.

<sup>47</sup> This is called literal transposition (copying) of the text of the directive into national law, see Aleksandra Kunkiel-Kryńska, „Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych,” 990.

<sup>48</sup> The following are based on translations into English of the legislation of EU Member States transposing Directive 2015/2302/EU, posted on the European Commission's website, accessed February 27, 2020, [https://ec.europa.eu/info/law/law-topic/consumers/travel-and-timeshare-law/national-transposition-measures-package-travel-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumers/travel-and-timeshare-law/national-transposition-measures-package-travel-directive_en).

<sup>49</sup> This is the translation of the content of the directive into the language of terms known in national law (actual implementation), see Aleksandra Kunkiel-Kryńska, „Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych,” 990.

Bulgaria to the Bulgarian commercial law („traders within the meaning of the Commercial Act or legal persons entitled to carry out economic activities pursuant to another Act”).

It seems that the solution that deserves to be specified and which could also be used in Poland is the Slovenian concept, in which the legislator first referred to entrepreneurs, but in the next provision he indicated that the obligations that burden them also apply to other entities if they offer their services to consumers.

It follows from the above that the Polish definition of tourist entrepreneur in the Tourist Events Act [2017] is an adaptation of the definition of „trader” in Directive 2015/2302/EU to the provisions of Polish law (referring to the Polish provision of the Civil Code). Unfortunately, it may raise some doubts as to the correctness of solutions adopted in it (to the extent that it includes in the concept of tourism entrepreneur, apart from entrepreneurs from the Civil Code, only entities which conduct paid activity).

It should also be noted that although the Polish language version of Directive 2015/2302/EU uses the concept of entrepreneur (*przedsiębiorca* in Polish) in the context of the entity performing analyzed activity, only in some language versions of Directive 2015/2302/EU the EU legislator uses the word „entrepreneur”. This is also the case for the German (*Unternehmer*), Spanish (*empresario*) and Estonian (*ettevõtja*) language versions. In the case of other versions, however, it is a professional (*professionnel* in French and *professionista* in Italian), operator (*Operador* in Portuguese), organizer (*organizatorius* in Lithuanian), salesman (*trgovac* in Croatian, *obchodník* in Slovak, *kereskedő* in Hungarian), merchant (*търговец* in Bulgarian, *tirgotājs* in Latvian, *trgovec* in Slovenian) and trader (in English, *kummerċjant* in Maltese, *handelaar* in Dutch, *έμπορος* in Greek, *erhvervsdrivende* in Dutch, *comerçiant* in Romanian and *obchodníkem* in Czech). However, it would be difficult to find in the directive the application of concepts appropriate to Polish law or the law of any other Member State. Thus, the fact that the EU legislator used the term entrepreneur in the Polish language version of Directive 2015/2302/EU cannot lead to the conclusion that he meant entrepreneur within the meaning of Polish law.

It is also not the case that the law of each of the Member States uses the concept of entrepreneur in the scope of national acts transposing the analyzed directive, and if so, it should be remembered that in each of

these countries law the concept of economic activity and entrepreneur may be understood in other way<sup>50</sup>, if any of these terms are used there<sup>51</sup>. In addition, in each country these concepts can be defined differently in individual normative acts. In Poland, many acts contain separate definitions of the concept of an entrepreneur (24 definitions in total) and economic activity (11 definitions in total), and in addition the legislator also uses 64 other concepts to define business and entrepreneur activities in Polish law<sup>52</sup>. The above also seems to indicate that the EU legislator does not require that the obligations imposed by Directive 2015/2302/EU on entities operating in the field of organizing tourist events apply only to entities conducting economic activity and having the status of entrepreneurs in a given Member State.

## 5. CONCLUSIONS

One of the objectives of changes made to the Polish legal order by the Tourist Events Act [2017] was to extend the subjective scope of application of its provisions on organizing tourist events and facilitating the purchase of related travel services to non-economic entities. This was to increase the scope of travelers protection. Not only an entrepreneur within the meaning of the Civil Code may become a tourist entrepreneur now, but also an entity carrying out the specified in the Act activity for a fee. The above resulted in the creation of *quasi*-regulated activity, under which the hitherto existing system of regulation of business activity covered also non-entrepreneurs.

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<sup>50</sup> E.g., the Polish legislator in Article 43<sup>1</sup> of the Civil Code distinguishes economic activity from a professional activity, while in German law it is assumed that an entrepreneur participates in business transactions by undertaking commercial, business or professional activities. See Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 131.

<sup>51</sup> E.g., in France the concept of trader and commercial transactions is used instead of the entrepreneur and business. See Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 131–132.

<sup>52</sup> Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 275 and next, 354.

However, the statutory scope of the definition of a tourist entrepreneur may raise some doubts in the context of the catalog of tourist events whose organization and facilitation of purchase have been excluded from the scope of application of the Tourist Events Act [2017]. Coverage of the concept of tourist entrepreneur, apart from entrepreneurs within the meaning of Article 43<sup>1</sup> of the Civil Code, only entities conducting paid activities seems to be in conflict with the definition of a trader within the meaning of Directive 2015/2302/EU. Ensuring compliance in this respect is particularly important in the present case, as above mentioned directive is subject to maximum harmonization.

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