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THE SUPERVISION OF BUSINESS ENTITIES IN LITHUANIA: KEY PROBLEMS OF THE LEGAL REGULATION AND POSSIBLE SOLUTIONS

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Abstract. *The article analyses the legal, economic and other problems of the legal regulation of supervision of business entities in Lithuania and outlines solutions to these problems.*

The first chapter describes the present situation of the legal regulation of supervision of businesses in Lithuania. The second chapter analyses the problems of the legal regulation of business supervision that the authors consider the most important. The article concludes by offering solutions to the key issues identified.

Keywords: *Legal regulation, business entity, supervision of business entities, economic entity, undertaking.*

Introduction

The research problem. The research problem is related to the following interconnected goals, namely, the reduction of the administrative load, the creation of the business-oriented environment, and the increase of public confidence in the supervising

authorities. State and municipal institutions must be entrusted with particular legal, economic and other rights to achieve these goals. The paper raises the problem of incorporating the needs of the business, especially small and medium-size enterprises, into the law. The authors consider that the lack of clarity in legal regulation has a negative impact on the effectiveness of the supervision of business entities by weakening the ability of the supervisory authorities to reduce the administrative load, limiting the creation of the business-oriented environment and lowering public confidence in the supervisory authorities.

The relevance of the study. The scope of the research problem, (the research problem addresses not only the needs of business but also the needs of the entire society), its complexity (the solution to the research problem requires the legal regulation to address the needs of the business and the society), the novelty and practical significance of the study (the study suggests solutions to improve the legal regulation of supervision of business entities) underlines the relevance of the study.

The purpose of the study is to analyse the key problems of the legal regulation of supervision of business entities and to propose possible solutions to these problems.

The goals of the study are to evaluate the legal regulation of supervision of business entities and to address the most significant problems of the legal regulation of supervision of business entities.

The object of the research – the legal regulation of supervision of business entities in Lithuania.

Methodology of the study:

1. *Systemic analysis* was used to analyse the legal regulation, to evaluate its effect on economic environment of the country and corruption. The use of this method enabled the authors to draft the proposals that provide legal basis to decrease the administrative load, create business-oriented environment, and increase public confidence in the supervisory authorities.

2. *Document analysis* was used to acquire information and analyse the results of various studies and relevant legal acts. The authors applied the method of qualitative analysis of documents, based on intuitive understanding, and summarized the content of the documents. This allowed the authors to identify and evaluate the existing problems of the legal regulation of supervision of business entities and offer solutions to these problems.

3. One of the authors of the article has two years of professional experience in the field of supervision of energy enterprises. He participated in supervising how energy enterprises comply with the licence terms and evaluated their activities.

1. The Assessment of the Current Situation of the Legal Regulation of the Supervision of Business Entities

Various studies have stated that the operation of supervisory authorities of business entities is currently ineffective. Some important aspects of the market are not being mo-

nitored or are monitored inadequately, and others are monitored by different institutions at the same time. The study of the Institute of Law “Administrative load on business and suggestions to simplify legal regulation on business” mentions 152 institutions that currently supervise business entities.¹ The quantity and the diversity of the supervisory authorities and the functions entrusted to them lead to a situation where the legal regulation of their activities by one legal act is impossible in practice. The competence of these institutions is regulated by different legal acts (not only specific laws but also different regulatory acts). For instance, the activities of institutions reporting to the Parliament (the Bank of Lithuania, the National Control Commission for prices and energy, the Securities Commission, and others) can be regulated only by the legal acts adopted by the Parliament. Institutions reporting to the municipalities undertake independent functions and are not responsible to the Government. Therefore, activities of the municipal institutions cannot be regulated by the legal acts adopted by the Government. The supervision of business entities in some fields is regulated by the legislation of the European Union.² Although the above-mentioned study of the Institute of Law was presented on 1 July 2006, there were no significant changes in the field of supervision of business entities since that date. The need for changes, however, is obvious. For instance, the Framework of the main provisions on the activities of business supervisory institutions (the Framework) was adopted on 22 July, 2009 by the Lithuanian Government resolution No. 836 in accordance with the Government Program approved by the Resolution of the Parliament No. XI-52 adopted on 9 December 2008 (provisions of 48 point of chapter IV of the forth part “Fight with corruption,” and 303 point of chapter X “Business, innovations, investments.”) The purpose of the Framework is to identify the problems of the legal regulation and the practical problems of supervision of business entities, to establish the principles of operation of the supervisory institutions, to provide the main rules and objectives, and to offer some solutions to improve the legal regulation. The Framework requires that supervisory institutions organise their activities in such a way that is least restricting to the activities of the business entities, to coordinate the activities of the supervisory institutions, and aim to achieve higher public confidence.³ The authors approve of these Framework provisions. On the other hand, many of the provisions contained in the Framework cannot be implemented without the consent of the legislature, because specific laws apply to the supervision of business in certain fields and Seimas (Parliament) has the exclusive right to adopt the laws.

The common feature of all business entities is that they are objects of public administration, that is, their activities fall under the field of public administration. Thus, the general rules of supervision of business entities are provided under Article 9¹ of the

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- 1 *Administrative load on business and suggestions to simplify legal regulation on business*. Study of the Institute of law [interactive]. [accessed 27-04-2010]. <<http://www.teise.org/docs/publications/nastaverslui.pdf>>.
 - 2 Explanatory note to the draft law No. XIP-1848 amending articles 1, 9, 43 of the Law on Public administration and supplementing it with new forth section and repealing article 9¹[interactive]. [accessed 28-04-2010]. <http://www3.lrs.lt/pls/inter/dokpaieska.showdoc_l?p_id=359575&p_query=&p_tr2=>>.
 - 3 Resolution of the Government of the Republic of Lithuania of 22 July 2009 „On adoption of the Framework on main provisions on activities of business supervisory institutions“. *Official Gazette*. 2009, No. 91-3931.

Law on public administration (“Supervision of activities of business entities”), which is applied from 1 January 2009 with the entry into force of the Law No. X-1743 of 6 October 2008 on amendment of Articles 2, 5, 7, 8 and supplementing it with Articles 9¹ and 43.⁴ According to Article 9¹(2), supervision of activities of business entities consists of the following: 1. inspection of the activities of business entities; 2. evaluation of the information received in accordance with the procedure laid down by legal acts about activities of business entities; 3. carrying-out of preventive actions, which could preclude possible violations of the law, and application of sanctions in respect of business entities in accordance with the procedure laid down by laws and other legal. The authors distinguish the following positive features of the legal regulation provided in the Law on public administration: 1. Two requirements of supervision of business entities are established: a. The activities must be planned; b. The activities must make the smallest possible hindrance to the activities of business entities; 2. The duty to inform the business entity about the planned inspection is established (the business must be informed no later than 10 work days prior to the inspection); 3. The finite list of grounds for non-routine inspections⁷ is provided. An non-routine inspection may be carried out only in the following cases: a. when circumstances, which could not be predicted when approving a plan of inspections of activities of business entities, occur; b. upon the receipt of a request or instruction of any other competent entity of public administration to carry out an inspection of a business entity; c. in the case of the availability of information about activities of a business entity, which may conflict with legal acts or may not meet the requirements of legal acts; d. when seeking to ensure the elimination of the violations of legal acts, which were identified during the previous inspection and when seeking to ensure the implementation of the adopted decisions, e. in the case of a joint inspection together with other state agencies and institutions; f. in the case of an operational inspection, which is carried out in accordance with the procedure laid down by an entity of public administration in the event of a suspicion of the violation of legal acts (the implementation of which falls within the responsibility of the entity of public administration). 4. The right of a business entity not to submit documents to a supervisory authority, if, during current financial year, it has already submitted such documents to the regulatory authority.⁵

Even though the application of economic sanctions is one of the key parts of the supervision of business entities, the present Law on public administration contains few provisions regarding this matter. Article 8(1) establishes general requirements for an individual administrative act and provides that the applied sanctions must be reasoned. Article 3(3) establishes the principle of proportionality, which requires that the scope and the implementation measures of an administrative decision must conform to the necessary and reasonable goals of the administration.⁶ Economic sanctions applicable

4 Law of 8 October 2008 No. X-1743 on amendment of articles 2, 5, 7, 8 of the Law on public administration and its supplementing with articles 9¹ and 43. *Official Gazette*. 2008, No. 123-4657.

5 Law on public administration of the Republic of Lithuania. *Official Gazette*. 1999, No. 60-1945; 2006, No. 77-2975.

6 *Ibid.*

to business entities are also regulated by various laws (around 20 laws providing rather different regulation), for instance, the Law on competition, the Law on tax administration, the Law on alcohol control, the Law on energy and others.

2. The Key Problems of the Legal Regulation of Supervision of Business Entities

The analysis of various studies, provisions of relevant laws, the Framework and other legal acts, enables the authors to identify of the following problems of the legal regulation of supervision of business entities:

The concept of “business entities” in the Law on public administration does not apply to all undertakings. In practice, however, the supervisory authorities also monitor the activities of non-profit institutions and organizations (e.g. education, medical institutions, and others), which engage in certain economic activities. The European Court of Justice held that economic activities can be varied, ranging from manufacturing to services.⁷ This is reflected in different national legal acts, e.g., Article 3(1) of the Law on competition states that “Economic activity means any type of manufacturing, commercial, financial or professional activity, associated with purchase or sale of goods, except for acquisitions by natural persons intended for personal and household needs.”⁸ The European Court of Justice has also held that an economic entity can undertake activities both in private and public sectors, i.e., it must not necessarily be a for profit entity.⁹ Article 3(4) of the Law on competition states that an “undertaking” is defined as an enterprise, a combination of enterprises (associations, amalgamations, consortiums and others), an institution or an organisation, or other legal or natural persons, which perform or may perform economic activity in the Republic of Lithuania or whose actions affect or whose intentions, if realised, could affect economic activity in the Republic of Lithuania. Public administration and local authorities of the Republic of Lithuania shall be considered to be undertakings if they engage in economic activity.” Having analysed the practice of the European Court of Justice and provisions of different legal acts, the authors consider that the Law on public administration should establish not only the term of a “business entity” but also the more general concept of an “undertaking.” In this way, the principle of non-discrimination would be ensured, i.e., the same supervision would apply to all undertakings, regardless of the property form and other features, provided that all other conditions are identical.

2. Most of the business supervisory institutions have no criteria established for selecting and prioritising the supervision of business entities. Even though the Law on public administration requires that the supervision must be planned in advance, the supervision activities are often carried out based on complaints and not according to inspection plans. For instance, the National Control Commission for Prices and Energy,

7 Case C-29/91, *Dr. Sophie Redmond Stichting v. Hendrikus Bartol* [1992], ECR I-3189.

8 Law on Competition of the Republic of Lithuania. *Official Gazette*. 1999. No. 30-856.

9 Case C-35/96, *Commission v. Italy* [1998], ECR I-3851.

according to point 20 of the Licence is responsible for supervision of transfer, distribution, conservation, dissolving, and provision of natural gas,¹⁰ and must check whether a company complies with the licence terms at least once per year and upon receiving a complaint.¹¹ The same provision is established in the license rules of other energy sectors, such as electricity and heating. It is not, however, possible to implement these rules, because of the lack of human resources, finances, and the number of energy companies that have acquired adequate licences (around 15 natural gas companies, 40 electricity companies, and more than 50 heating companies). Therefore, this rule should be replaced with another one, which would require the National Control Commission for Prices and Energy to inspect only companies that are on the list of planned inspections, they are selected according to objective criteria, or a complaint has been received on the actions of the company.

3. The entities supervising businesses do not coordinate their activities and sometimes the same business entity is inspected by a couple of supervisory institutions. Even though the Law on public administration requires that supervisory activities make the smallest possible hindrance to the activities of business entities, the duration of inspections is not regulated, which hinders normal economic activity. For instance, Article 119(1) of the Law on tax administration requires that the time of the tax inspection conducted at the tax administrator's office shall not be limited, but the tax administrator must complete it within the shortest objectively possible period of time.¹² The Supreme Administrative Court of Lithuania thus adopted an important decision on 4 March 2009, where it held that the tax inspection at the office of the tax administrator must not last indefinitely. The judges chamber indicated that the indefinitely lasting tax inspection without reasoned motive and in the absence of tax inspector's performance of its statutory functions is not compatible with the rule of law. The chamber held that in case the tax administrator abstains from actions at its discretion, the tax payer's expectations on the shortest objectively possible period of time of the tax inspection are infringed. Even in cases where the tax payer fails to fulfil his duty of cooperation with the tax administrator at the time of the tax inspection, the tax administrator retains his rights and duties provided by the law. The public administration body cannot be passive and is not excluded from the function to supervise the calculation, declaration and payment of taxes, nor is it excluded from the duty to protect the interests of the state. The chamber of judges noted that even if the re-inspection lasted longer than 5 years, on the basis of the principles of reasonability, fairness, and justice, only active actions of the tax administration can ensure that the tax inspection is carried out in shortest objectively possible period of time, thus ensuring the constitutional rights of the tax payer.¹³

10 Resolution No. 1304 of 5 December 2007 of the Government of the Republic of Lithuania "On approval of the licence rules on transfer, distribution, conservation, dissolving, and provision of natural gases. *Official Gazette*. 2007, No. 132-5379.

11 Law on Competition of the Republic of Lithuania. *Official Gazette*. 1999, No. 30-856.

12 Law on public administration of the Republic of Lithuania. *Official Gazette*. 2004, No. 63-2243.

13 Supreme administrative court of Lithuania, decision of 4 March 2010 No. A575-1633/2010 [interactive]. [accessed 29-04-2010]. <<http://www.lvat.lt/naujienos/2010/kovas/mokestinis-patikrinimas-negali-trukti-neribot%C4%85-laik%C4%85.aspx>>.

4. The principle of separation of functions is not applied in all spheres of supervision of business entities. It must be noted that this principle is established in point 18 of the Methodological guidelines on licensing of commercial economic activities. It is approved by the Government Resolution of 15 March 2004 No. 274, which states that: “If the same institution issues licenses and performs supervision of the licensed activity, these functions should be transferred to separate structural units (in exceptional cases – to different state officials), which/who are independent in the context of adoption of licence issuing decisions.”¹⁴ The National Control Commission for Prices and Energy could be an example of the failure to comply with this principle. The functions of licence issuing, drafting of methodology for setting the prices for energy resources, monitoring of compliance with licence terms and application of economic sanctions are all carried out by the same officials of branch departments. The practice where all functions are performed by the same person must be evaluated negatively, because a high probability of corruption emerges in such cases.

5. The legal regulation of economic sanctions that can be enacted on business entities is not sufficiently defined (systemic approach and adequate application is lacking) because:

1) Legal regulation on adequate differentiation of the amount of the sanction or choosing another sanction proportionate to the infringement is not always in place. For instance, article 27(1)(2) of the Law on energy requires that for other infringements or failure to comply with the license terms, failure to comply or complying belatedly to the Commission’s orders to seize illegal activities, or to eliminate infringements of the license terms, the energy undertaking might be fined from one thousand LTL to 1 percent of annual income of the energy undertaking from the specific licensed activity (which was undertaken during the last economic year of the infringement).¹⁵ In this case, the institution retains a very high discretion to determine the size of the monetary fine. E.g., let us analyse the hypothetical case what would happen if AB “Lietuvos Dujos” was to infringe the licence terms. The company’s income during 2009 stood at 1,264,300,000 LTL.¹⁶ Provided that there are no extenuating circumstances, the rule of the medium would apply in determining the monetary fine. Because the size of the sanction can range from 1000 LTL to 1 percent of the company’s annual income, the fine of 6,320,000 LTL could in theory be enacted.

2) The procedural guarantees for the business entities in applying the economic sanctions are insufficient (the procedure is usually not regulated in detail). The European Court of Human Rights considers some infringements as criminal activities, while in our national legal system they are considered as violations of administrative law. Thus,

14 Resolution of the Government of the Republic of Lithuania of 15 March 2004 No. 274 “On approval of the methodological guidelines on licensing of commercial economic activities”. *Official Gazette*. 2004, No. 41-1333.

15 Law on energy of the Republic of Lithuania. *Official Gazette*. 2002, No. 56-2224; 2003, No. 69-3118; 2008, No. 135-5228; 2009, No. 10-352.

16 Consolidated annual report of AB „Lietuvos dujos“ [interactive]. [accessed 29-04-2010]. <<http://www.dujos.lt/index.php/investuotojams/metiniai-pranesimai/603>>.

the procedure of investigation of such infringements must be analogous to the criminal procedure. Based on the magnitude of monetary fines, it is important to ensure the same or similar procedural guarantees of business entities that apply during the criminal process.

3) The economic sanctions are regulated by laws that define extenuating circumstances differently. In some cases, there is no base to apply a smaller penalty than the one provided in the law or to offer an exemption; 4) The same infringement sometimes results in a revocation of the licence and a monetary fine.

6. The criteria for assessment of activities of the supervisory entities are not adequate, i.e., their activities are often evaluated based on the amount of fines collected or the number of inspections completed, thus promoting an artificial search for infringements. According to the authors, preventative functions of the supervisory authorities (e.g., State tax inspectorate under the Ministry of finance), rather than punitive, must be emphasized. The authorities should ensure that business entities comply with the requirements instead of imposing fines and other sanctions on them after the relevant infringement. The expansion of the concept of the supervision of business entities in the Law on public administration should thus be considered. This concept should state that the supervision of undertakings includes not only the inspections, the assessment of information and the application of sanctions and other fines, but also methodical guidance and consultations to the undertakings.

7. In practice, supervisory authorities require drafting documents of such content and form, which business entities do not preserve or systemize according to the business standards and which are not covered in the usual reports of business entities. For instance, the Bank of Lithuania demands that banks prepare capital sufficiency reports, or provide data on large loans, using forms that the banks do not normally use for their internal needs. The expenses that business entities incur (human resources, time and others) while complying with the statutory requirements to provide information are not always proportionate to the goal pursued. On the other hand, the right of the institutions supervising business to receive certain information should not be questioned, provided that the information is necessary to fulfil their functions.

Conclusions

1. The uncertainty of the legal regulation has a negative impact on the effectiveness of the supervision of business entities, diminishes the possibilities to reduce the administrative load, to create a more business-oriented environment, and to raise public confidence in supervisory authorities.

2. The analysis conducted on the issues of the legal regulation of supervision of business entities enabled the authors to present the following recommendations:

2.1. The Law on public administration should establish not only the term a “business entity”, but also the more general concept of an “undertaking”. In this way, the principle of non-discrimination should be ensured, that is, the same supervision should

apply to all undertakings, regardless of the property form and other features, provided all other conditions are identical.

2.2. The Law on public administration should establish the general requirements for supervision of undertakings, and apply to all entities, which carry out such activities (thus would supplement the Law on public administration and harmonize the rules in specific laws with the requirements in the law).

2.3. The Law on public administration should provide clear and objective criteria for selecting and prioritising the inspection of the undertakings. This would provide the legal basis for implementation of the requirement of the Law on public administration to plan supervision.

2.4. The procedures and the duration of inspections of the activities of undertakings should be regulated in more detail. This would provide the legal basis for implementing of the requirement in the Law on public administration the smallest possible hindrance to the activities of business entities and preventing possible abuses of the supervisory institutions.

2.5. The Law on public administration should require supervisory authorities to separate their functions. The functions of issuing licences, monitoring of licensed activities, and applying other functions should be performed by different departments (in exceptional cases, state officials), which have to be independent in the decision-taking process. This would provide the legal basis to decrease corruption.

2.6. The legal regulation and the application of economic sanctions: 1. The issue of the legal regulation of economic sanctions must be addressed in the following manner: a. incorporate it into the new draft of the Code on administrative law violations; b. prepare the new draft Law on economic sanctions; c. Regulate economic sanctions by various laws (as it was done presently). 2. After one of the alternatives in point 1 has been chosen: a. Provide the legal basis for adequate differentiation of the applicable sanction, proportional to the infringement, if possible, unifying the extenuating circumstances, and providing the base for extenuation from the liability; b. Ensure procedural guarantees for undertakings, analogous or similar to those applicable during the criminal procedure; c. Provide clear regulation on the procedural actions of the supervisory institutions and the procedure for appealing the adopted decisions.

2.7. The Law on public administration should require that the supervision of undertakings includes not only inspection, assessment of information, application of sanctions and fines, but methodical guidance provided to the undertakings.

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VERSLO SUBJEKTŲ PRIEŽIŪRA LIETUVOJE: KAI KURIOS TEISINIO REGULIAVIMO PROBLEMOS IR GALIMI JŲ SPRENDIMO BŪDAI

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Santrauka. *Straipsnyje analizuojamos kai kurios teisiniu, ekonominiu ir kitais požiūriais aktualios verslo subjektų priežiūros teisinio reguliavimo problemos Lietuvoje, pateikiami galimi jų sprendimo būdai.*

Straipsnis sudarytas iš įvado, dviejų dalių ir išvadų. Pirmoje straipsnio dalyje trumpai apžvelgiama esama situacija, įvertinamas esamas verslo subjektų priežiūros teisinis reguliavimas. Antroje straipsnio dalyje analizuojamos kai kurios, autorių nuomone, svarbiausios verslo subjektų priežiūros teisinio reguliavimo problemos. Straipsnis baigiamas motyvuotomis išvadomis ir rekomendacijomis, pateikiant galimus išanalizuotų problemų sprendimo būdus.

Straipsnis parašytas taikant sisteminės analizės, dokumentų analizės ir profesinės patirties metodus.

Autorių nuomone, teisinio reguliavimo neišbaigtumas neigiamai veikia verslo subjektų priežiūros efektyvumą, komplikuoja galimybes mažinti administracinę našta, kurti ūkinei komercinei veiklai palankią aplinką, didinti pasitikejimą verslą prižiūrinčiais subjektais. Autoriai rekomenduoja: Viešojo administravimo įstatyme įtvirtinti ūkio subjekto sąvoką; šį įstatymą papildyti nustatant ūkio subjektų priežiūros bendruosius reikalavimus, taip pat aiškius ir objektyvius tikrintinų ūkio subjektų atrankos bei prioritetų kriterijus; harmonizuoti ūkio subjektų veiklos priežiūros procedūras; nustatyti pareigą priežiūros subjektams laikytis funkcijų atskyrimo principo; tobulinti ekonominių sankcijų teisinį reguliavimą.

Reikšminiai žodžiai: teisinis reguliavimas, verslo subjektas, verslo subjektų priežiūra, ūkio subjektas.

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