

“Recertification” of a delisted but still functioning employment agency

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In a difficult labour market, it is becoming more and more popular to operate an employment agency. In Poland, this is considered a regulated activity for purposes of the Business Freedom Act and requires entry in the Register of Employment Agencies under Art. 18 of the Act on Promotion of Employment and Labour Market Institutions.

In commercial practice, however, it is fairly easy – even unintentionally – to bring about deletion of an agency from the Register of Employment Agencies. For example, if the agency fails to submit an annual report on its activity to the province marshal, as required by Art. 19f of the Act on Promotion of Employment, the marshal will issue a decision deleting the agency from the register.

The question thus arises of what an agency should do if it finds itself in this situation for whatever reason. Should it seek to re-register as quickly as possible? Even after it re-registers, will it still face significant sanctions – including the most severe, i.e. a ban on doing business for as long as three years (the sanction that may be applied to a business that conducts operations without a required entry in the register)?

A fine?

Under Art. 121(1) of the Act on Promotion of Employment, operating an employment agency without the required registration is a petty offence punishable by a fine.

Only an individual may be guilty of this offence – typically a management board member if a legal person is involved.

Even though the person convicted of such an offence is an individual, the entity registered as an employment agency may be a legal person, and thus even if a member of the management board were convicted of the offence under Art. 121, this would not result in the employment agency being deleted from the Register of Employment Agencies if the agency is a company.

Prohibition on conducting business activity?

The Business Freedom Act provides for an administrative sanction in the form of a prohibition against conducting business activity, as well as possibly removing a legal person once again from the Register of Employment Agencies. This represents a very serious risk.

Under Art. 18m(2) of the Act on Promotion of Employment, the province marshal shall delete an entity from the Register of Employment Agencies if a decision is issued prohibiting the business entity from conducting activity pursuant to the entry. The legal basis for the decision in this case would be Business Freedom Act Art. 71(1)(3), and lack of a required entry in the Register of Employment Agencies would be regarded as a gross violation of conditions required to perform a regulated activity.

Significantly, in a situation where such a decision has not been issued and the fact that a regulated activity has been performed by the given business entity without a required entry in the register has not been discovered by the administrative authority, but in the meantime the entity has obtained a new entry, in our view the authority will no longer

be able to issue a decision based on a retroactive finding that the entity was in gross violation of the conditions required to perform a regulated activity, under Business Freedom Act Art. 71(1)(3). There would be no substantive grounds for issuing the decision, because no gross violation of conditions could be found at a time when the entity has again obtained an entry in the register. The substantive grounds for issuance of any decision, including a decision prohibiting a business entity from conducting an activity that is subject to entry in a register, must at least exist as of the date of issuance of the decision.

Or prohibition on seeking registration?

The possibility is still open, however, for the relevant authority to impose a 3-year ban on the ability to obtain an entry in a register of regulated activity, which is the sanction provided under Business Freedom Act Art. 72(2). This is another serious risk.

We take the view that this is not a freestanding administrative sanction, in the sense that application of this sanction is dependent on issuance of a decision under Art. 71(1). In the situation discussed here, issuance of such a decision would appear not to have any foundation under the applicable regulations. Thus we may state that in the case of an employment agency, a ban on the ability to obtain an entry in the register could be applied only in a situation where the relevant authority discovered that the employment agency was operating without the required registration and issued a decision prohibiting the agency from performing the activity that required entry in the register.

In summary, in the example presented in the introduction, the best approach would be to take steps to obtain a new entry in the register as quickly as possible – before the authority discovers that the employment agency has been operating without the required entry and issues a decision on this basis prohibiting the agency from conducting such activity.

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