

НАПРЯМ 5. ПРИВАТНЕ ПРАВО В УМОВАХ ВІЙНИ

DOI <https://doi.org/10.36059/978-966-397-298-5-51>

TAKING UP AND PURSUIT OF BUSINESS ACTIVITY IN THE REPUBLIC OF POLAND BY A CITIZEN OF UKRAINE AS AN INDIVIDUAL ENTREPRENEUR ON THE BASIS OF THE ACT OF MARCH 12, 2022 ON ASSISTANCE TO CITIZENS OF UKRAINE IN CONNECTION WITH ARMED CONFLICT ON THE TERRITORY OF THAT COUNTRY

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On February 24, 2022, the Russian Federation attacked the territory of Ukraine. As a result of the attack of the troops of the Russian Federation, citizens of Ukraine, seeking shelter from the war, began to head towards the territory of the Republic of Poland. The outbreak of the war met with a rapid reaction of the state and citizens of the Republic of Poland on a social, international, economic, but also legal level. This was due to the fact that the Act on assistance to citizens of Ukraine in connection with armed conflict on the territory of that country¹ was adopted as early as on March 12, 2022. It entered into force on the same day. This is a novelty (special act) in relation to the general provisions regarding migration and asylum, resulting primarily from the Act of 12 December 2013 on Foreigners² and the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland³. As follows from the explanatory memorandum to the draft law on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country, it aims to create a special legal regulation providing an ad hoc legal basis for legal residence to Ukrainian citizens who, as a result of hostilities, were forced to leave their country of origin and entered the territory of the Republic of Poland with

¹ Consolidated text: Journal of Laws of 2023, item 103 as amended, hereinafter: HeUkrCitA.

² Consolidated text: Journal of Laws of 2023, item 519 as amended, hereinafter: ForeA.

³ Consolidated text: Journal of Laws of 2022, item 1264 as amended.

an appropriate entry authorization⁴. This objective is reflected in the wording of Art. 1, Section 1 of HeUkrCitA, pursuant to which the Act in question sets forth specific rules for legalizing the stay of Ukrainian citizens entering the territory of the Republic of Poland from the territory of Ukraine in connection with military operations conducted in the territory thereof, as well as Ukrainian citizens holding Karta Polaka [the Pole's Card] who, together with their immediate family, entered the territory of the Republic of Poland due to these operations. Nevertheless, it needs to be emphasized that aside the main goal of facilitating the legalization of stay in the territory of the Republic of Poland for Ukrainian citizens, the Act pursues additional objectives, e.g. introduces special regulations facilitating the taking up and pursuit of business activity by Ukrainian citizens residing legally in the territory of the Republic of Poland (Art. 1, Section 3, pt. 9 of HeUkrCitA). Prior to the entry into force of the abovementioned special act, citizens of Ukraine had been allowed to take up and carry out business activities in the territory of the Republic of Poland according to the general rules contained in the Act of March 6, 2018 on the rules of participation of foreign entrepreneurs and other foreign persons in economic turnover in the territory of the Republic of Poland⁵, applicable with respect to citizens of countries other than Member States within the meaning of Art. 3, pt. 6 thereof, which include citizens of Ukraine⁶. Under Polish law, the pursuit of business activity by a natural person is subject to registration in a special register designated for this group of legal entities, called Central Registration and Information on Business⁷. As far as foreign natural persons from countries other than Member States are concerned, the provisions of ForeEntrepA generally prohibit the taking up and pursuit of any business activity in the territory of the Republic of Poland which requires entry in the CEIDG. However, there are certain exceptions with respect to foreign natural persons with a special status in the Republic of Poland in the field of business activity. This is granted to natural persons from countries other than Member States who meet at least one of the conditions listed in Art. 4, Section 2 of ForeEntrepA, e.g. hold a permanent residence permit in the Republic of Poland, a residence permit for a long-term EU resident or a valid Pole's

⁴ Draft of the government bill on the Act on assistance to citizens of Ukraine in connection with armed conflict on the territory of that country, Print no. 2096, Sejm of the 9th term of office, P. 1; <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2069>

⁵ Consolidated text: Journal of Laws of 2022, item 470 as amended, hereinafter: ForeEntrepA.

⁶ Szafrński D., in: ed. Dremkowski P. (2022). *Ustawa o pomocy obywatelom Ukrainy. Komentarz z wzorami dotyczącymi pobytu, dostępu do rynku pracy, świadczeń społecznych, edukacji i opieki zdrowotnej* [Legalis Database], Commentary on Article 23, Thesis 2.

⁷ Hereinafter: CEIDG.

Card⁸. Article 4, Section 2 of ForeEntrepA stipulates that third-country nationals with a special status may take up and carry out business activity in the territory of the Republic of Poland on the same terms and conditions as Polish citizens. Thus, permanent performance of business activity in the territory of the Republic of Poland by a third-country national with a special status results in the acquisition of the status of a Polish entrepreneur by that person⁹. As regards foreign natural persons from outside Member States who do not hold a special status under Art. 4, Section 2 of ForeEntrep, such persons have the right to take up and pursue business activity solely and exclusively in the form of a limited partnership, limited joint-stock partnership, limited liability company, simple joint-stock company and joint-stock company, as well as to join such companies and take up or acquire their shares or stocks, unless international agreements provide otherwise (Art. 4, Section 3 of ForeEntrepA). The special act of 2022 introduced far-reaching simplifications for Ukrainian citizens in relation to the described general rules. Article 23, Section 1 of HeUkrCitA sets forth that Ukrainian citizens whose stay in the territory of the Republic of Poland is deemed legal on the basis of the said Act or the Act of 12 December 2013 on Foreigners may undertake and conduct business activity in the territory of the Republic of Poland on the same terms and conditions as Polish citizens. Thus, legal residence in the territory of the Republic of Poland is sufficient for a Ukrainian citizen to be treated as a Polish citizen as far as the taking up and pursuit of business activity in the territory of the Republic of Poland is concerned, although he does not have Polish citizenship¹⁰. Such treatment, however, depends on the fulfillment of the condition of registration of a Ukrainian citizen in the Polish population register, kept in the Universal Electronic System for Registration of the Population (PESEL)¹¹. According to Art. 23, Section 2 of HeUkrCitA, the right to conduct business activity is granted provided that a citizen of Ukraine obtains a PESEL number. The PESEL register collects data of Polish citizens as well as foreigners residing in the territory of the Republic of Poland. Obtaining this number is not difficult for the citizens of Ukraine. Generally speaking, in accordance with Art. 4, Section 1 of ForeEntrepA, a Ukrainian citizen whose stay on the

⁸ Mierzejewski P., in: ed. Powalowski A. (2019). *Lexykon prawa gospodarczego publicznego. 100 podstawowych pojęć*, Warsaw. P. 152.

⁹ Szafranski D. (2018). *Przedsiębiorca zagraniczny. Zagadnienia administracyjnoprawne*, Warsaw. P. 60.

¹⁰ Szafranski D., in: ed. Drembkowski P. (2022). *Ustawa...*, Commentary on Article 23, Thesis 10.

¹¹ Sander M., Szmida K., in: ed. Szmida K., Sawicki P. (2022). *Ustawa o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa. Komentarz* [Legalis Database], Commentary on Article 23, Thesis 14.

territory of the Republic of Poland is considered legal shall be assigned a PESEL number on the basis of an application submitted to any executive body of the commune on the territory of the Republic of Poland. The content of Art. 23 of HeUkrCitA opens up great opportunities for Ukrainian citizens in choosing the form of conducting business in the territory of the Republic of Poland. One of the simplest and most popular forms is the pursuit of business by a natural person as an individual entrepreneur. Taking up business activity in this form is deformalized. Obtaining the status of an entrepreneur, both in the light of private and public law, is associated with conducting business activity (Art. 43¹ of the Act of 23 April 1964 – Civil Code¹² and Art. 4 of the Act of 6 March 2018 – Entrepreneurs' Law¹³). The wording of Article 17, Section 1 of EntrepLaA is essential. It shows that when it comes to natural persons, business activity can be taken up on the day of submitting the application for entry in the CEIDG. There is a dispute in the Polish legal literature regarding the importance of an entry in the CEIDG in respect of the status of an individual entrepreneur. According to the first view, the performance of an activity that corresponds to the characteristics of business activity shall not be considered as performance of such activity without the person's entry in the CEIDG. Consequently, entry in the register is necessary to acquire the status of an entrepreneur¹⁴. According to the second view, obtaining this status is determined by the actual pursuit of business activity, regardless of the entry in the CEIDG¹⁵. On the other hand, submitting the application for entry in the CEIDG only legalizes the pursuit of a business. An individual entrepreneur who conducts business activity without submitting the application for entry in the register does so illegally and exposes himself to administrative liability. Pursuant to Art. 60¹ § 1 of the Act of 20 May 1971 – Minor Offenses Code¹⁶, anyone who conducts business activity without the required entry in the CEIDG, entry in the register of regulated activities or without the required license or permit, is subject to prison sentence or a fine. The second view is correct.

¹² Consolidated text: Journal of Laws of 2022, item 1360 as amended.

¹³ Consolidated text: Journal of Laws of 2023, item 221 as amended, hereinafter: EntrepLaA.

¹⁴ Kosikowski C. (2013). *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warsaw, P. 44; Sieradzka M., in: Zdyb Z., Sieradzka M. (2013). *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warsaw. P. 257.

¹⁵ Kruszewski A., in: ed. Pietrzak A. (2019). *Prawo przedsiębiorców. Komentarz*, Warsaw, P. 76; Lewandowski P. (2019). *O definicji przedsiębiorcy i działalności gospodarczej po wejściu w życie ustawy – prawo przedsiębiorców*, Palestra, no. 1–2. P. 98; Lubeńczyk G., in: Zdyb M., Lubeńczyk G., Wołoszyn-Cichocka A. (2019). *Prawo przedsiębiorców. Komentarz*, Warsaw, P. 312; Wolska H., in: Dobaczewska A., Powalowski A., Wolska H. (2018). *Nowe prawo przedsiębiorców*, Warsaw. P. 85–86.

¹⁶ Consolidated text: Journal of Laws of 2022, item 2151 as amended.

Therefore, on the basis of the special act of 2022, a Ukrainian citizen who has obtained a PESEL number in the light of the law becomes a Polish entrepreneur upon the taking up of business activity in the territory of the Republic of Poland in the form subject to the CEIDG procedure¹⁷. However, it should be emphasized that this is a general conclusion, referring to cases of full freedom of business activity. Polish law provides for types of business activity in which this freedom is restricted, the so-called regulated business activity. In order to undertake and perform it, it is additionally necessary to obtain a concession, permit or entry in the register of regulated activities. It should be added that if the stay on the territory of the Republic of Poland of a Ukrainian citizen being an individual entrepreneur ceases to be legal in the light of the provisions of HeUkrCitA or ForeA, then such person is subject to deletion from the CEIDG (Art. 23, Section 3 of HeUkrCitA).

¹⁷ Szafrński D., in: ed. Drebnkowski P. (2022). *Ustawa...*, Commentary on Article 23, Thesis 11.