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# Ustanowienie zarządcy sukcesyjnego przedsiębiorstwa obejmującego prawo własności nieruchomości

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## Streszczenie:

Autorzy koncentrują się na prezentacji wynikających z ustawy z dnia 5 lipca 2018 r. o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej i innych ułatwieniach związanych z sukcesją przedsiębiorstw<sup>3</sup> sposobów ustanowienia zarządu sukcesyjnego w stosunku do przedsiębiorstwa w spadku, ze szczególnym uwzględnieniem przedsiębiorstwa, w skład którego wchodzi nieruchomość.

**Słowa kluczowe:** przedsiębiorstwo, spadek, przedsiębiorstwo w spadku, zarządca sukcesyjny, nieruchomość

## Appointment of a successor manager of a business that includes title to real estate

### Abstract:

The authors focus on presenting methods of establishing succession management of an enterprise in succession under the act of 5 July 2018 on managing the succession of a natural person's enterprise and other measures to facilitate the succession of enterprises, with particular emphasis on enterprises that include real estate.

**Keywords:** enterprise, estate, enterprise in succession, succession manager, real estate

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<sup>3</sup> Ustawa z dnia 5 lipca 2018 r. o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej i innych ułatwieniach związanych z sukcesją przedsiębiorstw (tekst jedn.: Dz.U. z 2021 r., poz. 170), dalej jako: u.z.s.

## 1. Introduction

The basic objective of the succession management act (SMA) is ensuring that entrepreneurs who are natural persons are able to maintain their enterprise as a going concern after they die, having regard to the fact that an enterprise should be perceived as a legal good which has not only property and economic but also social value.<sup>4</sup> In the legal environment prior to 25 November 2018 (the date on which the discussed act entered into force), fully maintaining the operations of an enterprise was virtually impossible. The only method available was to resume the operations; the period that elapsed from the death of the entrepreneur to resumption depended on the entrepreneur's personal situation, the consistency of plans of legal successors and their readiness to undertake joint actions to continue running the enterprise. This period was lengthened by the need to obtain consents of the family court in the frequent case where minor children of the entrepreneur were counted among the heirs. At least until obtaining a binding certificate of succession (or specific bequest) or registering an inheritance confirmation deed, and in practice until dividing an inheritance that included an enterprise, running the enterprise was impossible due to lack of an entity authorised to manage it or to make independent, day-to-day basic business decisions. Even if one or some legal successors were willing to continue the business relationships of the deceased or to take over a work establishment, the chance to continue the enterprise's activities were strongly dependent on a number of circumstances that affected the efficiency of inheritance proceedings. This quandary also affected third parties such as business partners, consumers or employees of the deceased entrepreneur who had to wait until the number of heirs was finally ascertained and formalities completed before they could advance their claims, exercise their rights or continue cooperation.<sup>5</sup>

The act regulates the rules of temporary management of an enterprise following the death of the entrepreneur who conducted economic activities in their own name on the basis of an entry into the Central Register and Information on Economic Activity<sup>6</sup> (hereinafter CRIEA) and of continuing the economic activities that used such an enterprise, as well as of management of the inheritance as regards temporary exercise of rights attached to a share in the enterprise held by a spouse of the entrepreneur, who is conducting economic activities in their own name based on an entry in the CRIEA, following the death of such spouse (Article 1, items 1 and 2 of the SMA).

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<sup>4</sup> Uzasadnienie projektu ustawy o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej - druk sejmowy nr 2293 Sejmu VIII kadencji.

<sup>5</sup> *Ibidem*.

<sup>6</sup> Zgodnie z art. 2 ust. 2 pkt 1 ustawy z dnia 6 marca 2018 r. o Centralnej Ewidencji i Informacji o Działalności Gospodarczej i Punkcie Informacji dla Przedsiębiorcy (tekst jedn.: Dz.U. z 2022 r., poz. 541), zadaniem CEIDG jest m.in. ewidencjonowanie przedsiębiorców będących osobami fizycznymi.

## 2. Real estate as an element of an enterprise in succession

While the act does not contain a legal definition of an enterprise in succession, it does describe its elements and the entities authorised and responsible for this new legal organism, referring to them as owners of an enterprise in succession. An enterprise in succession includes mainly tangible and intangible elements intended for conducting economic activity by an entrepreneur and being their property<sup>7</sup> at the moment of death (Article 2, item 1 of the SMA). If at the moment of the entrepreneur's death the enterprise within the meaning of Article 55<sup>1</sup> of the Civil Code was wholly owned by the entrepreneur and their spouse, an enterprise in succession includes the entire enterprise (Article 2, item 2 of the SMA). In addition, an enterprise in succession includes also tangible and intangible elements intended for conducting economic activity that have been acquired by the succession manager either based on the transactions referred to in Article 13 of the SMA from the moment of the entrepreneur's death until the date on which management succession expires or until the right to appoint a succession manager expires (Article 2, item 3 of the SMA). The entirety of provisions concerning an enterprise in succession demonstrates that this notion cannot be decisively classified in subjective, functional and objective terms.<sup>8</sup> It has, therefore, a peculiar nature and should not be equated with the enterprise defined in Article 55<sup>1</sup> of the Civil Code. According to the wording of the latter provision, an enterprise is an organised set of tangible and intangible elements intended for conducting economic activity. It means in particular:

- 1) a designation distinguishing the enterprise or its separated parts (name of the enterprise);
- 2) the ownership of real estate or chattels, including equipment, materials, goods and products, and other property rights to real estate or chattels;
- 3) rights resulting from contracts for tenancy and lease of real estate and chattels and rights to use real estate and chattels resulting from other legal relationships;
- 4) receivables, rights attached to securities and cash;
- 5) concessions, licenses and permits;
- 6) patents and other industrial property rights;
- 7) economic copyrights and related rights;
- 8) enterprise secrets;
- 9) books and documents related to conducting economic activity.

<sup>7</sup> Zgodnie z art. 44 ustawy z dnia 23 kwietnia 1964 r. - Kodeks cywilny (tekst jedn.: Dz.U. z 2022 r., poz. 1360; dalej jako: k.c.) mieniem jest własność i inne prawa majątkowe.

<sup>8</sup> *Zarząd sukcesyjny przedsiębiorstwem osoby fizycznej. Komentarz*, red. S. Babiarz, Wolters Kluwer Polska 2021, wersja elektroniczna, kom. do art. 2, nb. 2

In legal writings, three distinguishing features of an enterprise in succession are mentioned. The first is that it arises at the moment of an entrepreneur's death. The second is that it is founded from the very start on tangible and intangible elements used by the entrepreneur to conduct economic activity while they were still alive. The third is that it includes elements used to conduct economic activity and does not need to be specifically organised with a view to a conducting a particular activity.<sup>9</sup> An enterprise in succession may therefore be both an enterprise within the meaning of Article 55<sup>1</sup> of the Civil Code but also any other set of elements intended for conducting economic activity, even if they do not constitute an enterprise in the meaning of Article 55<sup>1</sup> of the Civil Code. The notion of an enterprise in succession should therefore be considered a synonym of property intended for conducting economic activity rather than an enterprise in the meaning of Article 55<sup>1</sup> of the Civil Code. On the other hand, this notion may encompass several enterprises within the meaning of Article 55<sup>1</sup> of the Civil Code.<sup>10</sup>

Considering the example elements of an enterprise in succession listed above, it needs to be stressed that they may include only elements owned by persons who meet the statutory criteria of "owners of an enterprise in succession" (Article 3 of the SMA) and that only such persons are parties to legal relationships related to succession management. Accordingly, a succession manager is entitled to manage only those elements of an enterprise that belong to the above persons.<sup>11</sup>

There can be no doubt that an enterprise in succession may include the right of ownership of real estate. This results not only from the direct wording of Article 55<sup>1</sup> of the Civil Code, but also from Article 2, item 1 of the SMA in connection with Article 44 of the Civil Code. It should be stressed that the owner of the real estate and the owner of an enterprise in succession must be one and the same person. This means that, if there are multiple joint owners of an enterprise in succession and the real estate belongs to one of them only, it cannot be included in the enterprise in succession and is not affected by succession management.

An enterprise in succession may only include real estate that remains in a functional relationship with the conducted economic activity, which means that it is used to conduct specific activity and is subject to succession management only in that respect. If there is a collision between the objectives for which the real estate is used,

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<sup>9</sup> Zob. P. Blajer, *Zarząd sukcesyjny przedsiębiorstwem osoby fizycznej. Pytania i odpowiedzi. Wzory pism. Przepisy*, Wolters Kluwer Polska 2019, s. 42.

<sup>10</sup> Zob. T. Szczurowski, *Zarząd sukcesyjny przedsiębiorstwem w spadku*, „Przegląd Ustawodawstwa Gospodarczego” 2018, nr 11, s. 31-36.

<sup>11</sup> *Ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej. Prawo spadkowe przedsiębiorców. Komentarz*, red. T. Osajda, Warszawa 2022, wersja elektroniczna, kom. do art. 2.

it should be considered in what scope it is used for the needs of conducted activity and for other needs not related to its economic purpose. For example, a situation can be imagined in which an entrepreneur conducts economic activity in one of the rooms of a house which they own and in which they live. The part of the house used for purposes related to economic activity will be subject to the provisions of the act, and therefore succession management, which does not extend to other rooms used to satisfy housing needs. Such a solution is aligned with the purposes of the act under consideration, because a succession manager is bound to manage those property elements which the entrepreneur had at their disposal before they died. Distinguishing between parts of real estate used to conduct economic activities and others has no property consequences as far as succession is concerned. It serves only to define the competences of the succession manager, or identify the scope in which the right of ownership belonging to heirs is exercised on their behalf by the succession manager.<sup>12</sup>

Including real estate in an enterprise in succession is of major importance in the context of defining the scope of activities of a succession manager, while doing so erroneously may cause the manager to exceed their competences and consequently to conduct transactions as an unauthorised person. The most far-reaching consequences may occur if a succession manager sells real estate which should have not been subject to management. In such situation, the risk of concluding an agreement with an unauthorised person, the manager of real estate erroneously included in an enterprise in succession, falls on the purchaser. One cannot, however, exclude protection based on the good faith of land and mortgage registers principle.<sup>13</sup>

### **3. The succession manager and the manner of their appointment**

Pursuant to Article 8, item 1 of the SMA, the only positive requirement concerning the natural person who is to become the succession manager is having full capacity for legal transactions. On the other hand, Article 8, item 2 suggests that appointing someone as a succession manager is not possible if they fall under the following prohibitions:

- 1) prohibition of conducting economic activities referred to in Article 373, item 1 of the Insolvency Act of 28 February 2003 (Dz. U. 2020, item 1228), or
- 2) a punitive or preventive measure in the form of prohibition of conducting economic activity, including economic activity conducted by an entrepreneur or economic activity related to property management.

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<sup>12</sup> *Ibidem*.

<sup>13</sup> Art. 5 ustawy z dnia 6 lipca 1982 r. o księgach wieczystych i hipotece (tekst jedn.: Dz.U. z 2022 r., poz. 1728).

Succession management includes an undertaking to conduct the enterprise in succession and the power to engage in any activity related to conducting the enterprise in succession, in and out of court (Article 18 of the SMA). The scope of succession management relates to activities towards the property of another, performed by a person who has been authorised to do so by statute while simultaneously denying the owner of the property a possibility to manage it. Regardless of the differences between succession management and other instances of managing the property of another which are provided for in statute (for example by a receiver of a insolvency estate, executor of a will, real estate manager in enforcement proceedings, guardian of inheritance), it should be stated that in case of an enterprise in succession that includes real estate it is justified to consider entrusting the manager function to a natural person competent to manage property of this kind. The discussed act does not set out detailed requirements for the competences of a succession manager, however it appears proper to suggest that an enterprise in succession that includes real estate should be managed by persons knowledgeable about real estate management. Entrusting such management to a natural person who is a real estate manager within the meaning of Article 184 of the Real Estate Management Act <sup>14</sup> stands out as the best method.

The succession management act distinguishes between two legal institutions: appointing a succession manager and establishing a succession management, although they remain related functionally, since to establish succession management it is first necessary to appoint a succession manager (cf. Article 6, item 1, point 1 of the SMA). An entrepreneur, while still alive, may appoint and dismiss a succession manager, even multiple times, but succession management is established only once, at the moment of the entrepreneur's death, provided that the entrepreneur filed a motion with the CRIEA to enter a succession manager appointed pursuant to Article 9, item 1 of the SMA<sup>15</sup> (cf. Article 7, item 1 of the SMA). If the entrepreneur did not file a motion to enter a succession manager into the CRIEA, no succession management arises despite the appointment of a succession manager (Article 10 of the SMA).

The entry of a succession manager into the CRIEA has a constitutive nature. The manager can therefore exercise their function only after the entry is made (Article 12, item 11 of the SMA).

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<sup>14</sup> Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (tekst jedn.: Dz.U. z 2021 r., poz. 1899).

<sup>15</sup> Przedsiębiorca może powołać zarządcę sukcesyjnego w ten sposób, że wskaże określoną osobę do pełnienia funkcji zarządcy sukcesyjnego albo zastrzeże, że z chwilą jego śmierci wskazany prokurent stanie się zarządcą sukcesyjnym. The appointment of a succession manager by the entrepreneur and the consent of the appointee to exercise this function must have a written form on pain of invalidity.

In turn, when the entrepreneur did not appoint a succession manager while alive or the appointment becomes ineffective for the reasons listed in Article 7, item 2<sup>16</sup> or Article 10 of the SMA, succession management is likewise established only once. This occurs when the succession manager is appointed by the entity mentioned in Article 12, item 1 or 2 of the SMA and entered into the CRIEA (Article 7, item 1, point 2 in connection with Article 12, item 11 of the SMA). The appointment of a person to exercise this function, however, can take place many times, for example if the originally appointed succession manager has died, resigned or was dismissed.<sup>17</sup>

As noted above, if a succession manager has not been appointed while the entrepreneur was alive, succession management can be established only by persons referred to in Article 12, item 1 of the SMA, or: 1) the spouse of an entrepreneur who has the right to a share in the enterprise in succession, or 2) heirs of the entrepreneur who accepted the inheritance, or 3) the beneficiary of a specific bequest, provided of course that the object of the bequest was the enterprise or a share therein. In addition, this right was granted to heirs of that property element if their rights to the inheritance were confirmed by a binding certificate of succession, a registered inheritance confirmation deed or a European certificate of succession, and potentially to purchasers of an enterprise in succession, both of whom the act calls owners of an enterprise in succession (Article 2).<sup>18</sup>

The owner of an enterprise in succession within the meaning of Article 3 of the SMA is a person who:

- 1) has acquired, according to a binding certificate of succession, a registered inheritance confirmation deed or European certificate of succession, the tangible and intangible elements referred to in Article 2, item 1 of the SMA, having been appointed to inheritance by a will or under statute, or has acquired the enterprise or a share therein based on a specific bequest;
- 2) the spouse of the entrepreneur in cases referred to in Article 2, item 2,<sup>19</sup> if they are entitled to a share in the enterprise in succession;
- 3) a person who acquired an enterprise in succession or a share therein directly from a person referred to in item 1 or 2, including a legal person or organisational

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<sup>16</sup> Akt zgonu przedsiębiorcy nie zawiera daty zgonu albo chwila śmierci przedsiębiorcy została oznaczona w postanowieniu stwierdzającym zgon albo uznającym przedsiębiorcę za zmarłego.

<sup>17</sup> Tak M. Jaśniewicz [w:] *Zarząd sukcesyjny przedsiębiorstwem osoby fizycznej. Komentarz*, red. S. Babiaryz, Wolters Kluwer Polska 2021, wersja elektroniczna, kom. do art. 6, nb. 2.

<sup>18</sup> Po uprawomocnieniu się postanowienia o stwierdzeniu nabycia spadku, zarejestrowaniu aktu poświadczenia dziedziczenia albo wydaniu europejskiego poświadczenia spadkowego zarządcę sukcesyjnego może powołać wyłącznie właściciel przedsiębiorstwa w spadku.

<sup>19</sup> Jeżeli w chwili śmierci przedsiębiorcy przedsiębiorstwo w rozumieniu art. 55<sup>1</sup> k.c. stanowiło w całości mienie przedsiębiorcy i jego małżonka.

unit referred to in Article 33<sup>1</sup>, item 1 of the Civil Code, to which the enterprise has been contributed in kind, in case when the enterprise or a share therein has been sold following the death of the entrepreneur.

From the above it appears that if the rights of an entity to an enterprise in succession result from inheritance, such entity acquires the rights of an owner of the enterprise in succession only after such rights are confirmed in a suitable form (after the certificate of succession becomes binding, an inheritance confirmation deed is registered or an European certificate of succession is issued), although they are entitled to appoint a succession manager earlier, namely from the moment of accepting the inheritance or specific bequest, if they are entitled to a share in the enterprise in succession according to the announced will of the bequestor.<sup>20</sup>

A prerequisite necessary for appointing a succession manager, for persons listed in Article 12, item 1, point 2 and 3 of the SMA, is solely the prior acceptance of the inheritance, as provided for in Article 1012 of the Civil Code, although this must occur within two months from the death of the entrepreneur and not within six months from the date on which an heir learned about the cause of their appointment, a deadline set in Article 1015, item 1 of the Civil Code (argued from Article 12, item 10 of the SMA). Identical regulations concerning acceptance of a specific bequest apply under Article 981<sup>5</sup> of the Civil Code accordingly to the beneficiary of a specific bequest. In addition, it should be noted that in case of testamentary heirs and beneficiaries of a specific bequest it is necessary for the will to be announced beforehand (Articles 646-654 of the Code of Civil Procedure of 17 November 1964<sup>21</sup>), The need to make a statement accepting a deceased's estate within the aforesaid deadline does not apply to the spouse of an entrepreneur who has a share in the enterprise in succession (Article 12, item 1, point 1 in connection with Article 59, item 1 of the SMA). However, all entities listed in Article 12, items 1 and 2 of the SMA have only two months from the date of the entrepreneur's death to appoint a manager. In addition, if there are multiple entities holding shares in the enterprise in succession, appointment of a succession manager requires the consent of persons whose total share in the enterprise in succession is larger than 85/100ths (Article 12, item 3 of the SMA). If a succession manager is appointed before the right to the deceased's estate is formally confirmed, the majority is determined by taking into account all persons who hold a share in the enterprise upon appointment of the succession manager and are known to persons appointing the succession manager (Article 12, item 4 of the SMA).

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<sup>20</sup> Tak M. Jaśniewicz, *op. cit.*, kom. do art. 12, nb. 1.

<sup>21</sup> Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego (tekst jedn.: Dz.U. z 2021 r., poz. 1805), dalej jako: k.p.c.



Statements of persons authorised to appoint a succession manager following the death of an entrepreneur (to appoint a manager or to consent to the appointment thereof) and of the person appointed to this function must have the form of a notarial deed. As a rule, the statement of a person authorised to appoint a succession manager and the statement of the manager to take up this function should be included in the succession manager appointment notice executed by a notary (Article 95za of the Notaries Act of 14 February 1991).<sup>22</sup> If, however, such statements had already been made, the notary should include information about the date, place and contents of these statements in the record (Article 95zc, item 4, points 4 and 5 of the Notaries Act) and append to the notice extracts from deeds that include such statement (Article 95zc, item 2, point 3 of the Notaries Act).

Having executed the record, the notary executes a succession manager appointment deed (Article 95zd of the Notaries Act). If, however, while executing the succession manager appointment record circumstances are revealed that cast reasonable doubts as to the group of persons entitled to a share in the enterprise in succession and it is not possible to ascertain that the required majority of these persons granted their consent to appoint a succession manager, the notary refuses to execute the deed (Article 95ze of the Notaries Act).

Subject literature has generally adopted the obviously correct view that a notary must refuse to execute a succession manager appointment deed if such execution would violate any applicable provisions of law. The following situations are offered as examples:

- 1) the entrepreneur died before 25 November 2018 (Article 125 of the SMA);
- 2) the deceased entrepreneur was not entered into the CRIEA (Article 1 of the SMA);
- 3) a succession manager has already been appointed (Article 11, item 1 of the SMA);
- 4) the right to appoint a succession manager has expired due to the lapse of the two months' deadline specified in Article 12, item 10 of the SMA or the one month's deadline specified in Article 54, second sentence of the SMA;
- 5) the entrepreneur has been declared insolvent (Article 6, item 3 of the SMA);
- 6) the person to be appointed as the succession manager does not have full capacity for legal transactions (Article 8, item 1 of the SMA);
- 7) the prohibition referred to in Article 8, item 2 of the SMA has been imposed on the person to be appointed as the succession manager;
- 8) the person to be appointed as the succession manager has not made a statement that they consent to perform this function and that no prohibitions referred to in

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<sup>22</sup> Ustawa z dnia 14 lutego 1991 r. - Prawo o notariacie (tekst jedn.: Dz.U. z 2022 r.. poz. 1799), dalej jako: pr.not.

- Article 8, item 2 of the SMA have been imposed on them (Article 12, item 8 of the SMA);
- 9) a certificate of succession has become binding, an inheritance confirmation deed was registered or an European certificate of succession was issued, if one of the heirs or the beneficiary of a specific bequest has acquired the enterprise in succession in its entirety (Article 59, item 1, point 2 of the SMA);
  - 10) the enterprise in succession has been acquired in its entirety by a single person referred to in Article 3, item 3 of the SMA (Article 59, item 1, point 3 of the SMA);
  - 11) an inheritance that includes an enterprise in succession has been divided (Article 59, item 1, point 6 of the SMA), regardless of whether the enterprise was acquired by one or more persons; each division of inheritance that includes an enterprise in succession causes the succession management to expire;<sup>23</sup>
  - 12) two years have passed since the death of the entrepreneur (Article 59, item 1, point 7 of the SMA).

However, at least two of the cases listed above need to be discussed in detail. Article 59 of the SMA lists circumstances that cause succession management to expire by operation of law. It should be added here that an established succession management is meant, because the statute does not in this case suggest the expiry of the right to appoint a manager and establish a succession management thereby, unless previously established. It is obvious that only a legal relationship that was established and existed in the legal space (trade) may expire.<sup>24</sup> An interpretation alleging that it is not possible to establish succession management following an event which the statute connects with expiry of the management, even if not previously established, is not entirely accurate and relies on a single, two-sentence paragraph from the justification of the bill.<sup>25</sup> Even if the legislator had such an intention, individual provisions of the act require to hold it up for criticism. First and foremost, the expiry of the right to appoint a succession manager is regulated in Article 12, item 10 of the

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<sup>23</sup> Przykłady za D. Celińskim [w:] *Prawo o notariacie. Komentarz. Wzory aktów notarialnych i poświadczeń*, red. W. Gonet, Wolters Kluwer Polska 2022, wersja elektroniczna, komentarz do art. 95ze.

<sup>24</sup> Por. np. wygaśnięcie stosunku pracy - art. 63 i nast. ustawy z dnia 26 czerwca 1974 r. - Kodeks pracy (tekst jedn.: Dz.U. z 2022 r., poz. 1510); wygaśnięcie mandatu członka zarządu - art. 202 ustawy z dnia 15 września 2000 r. - Kodeks spółek handlowych (tekst jedn.: Dz.U. z 2022 r., poz. 1467); wygaśnięcie umocowania pełnomocnika - art. 101 § 2 k.c.; wygaśnięcie prokury - art. 109<sup>7</sup>k.c.

<sup>25</sup> Uzasadnienie projektu ustawy o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej - druk sejmowy nr 2293 Sejmu VIII kadencji „W przypadkach, o których mowa w ww. pkt 2 i 3 (art. 59 ust. 1 u.z.s.), majątkiem przedsiębiorstwa w spadku może samodzielnie dysponować jedna osoba uprawniona (zapisobierca windykacyjny, spadkobierca lub inna osoba - nabywca przedsiębiorstwa, w szczególności osoba prawna albo spółka osobowa). Każda z tych osób - o ile sama nie zamierza zarządzać przedsiębiorstwem - dysponuje »klasycznymi« sposobami powierzenia zarządu przedsiębiorstwem innej osobie (zlecenie, prokura itd.)”.

SMA.<sup>26</sup> If the prerequisites for expiry of the management and of the right to appoint a succession manager were identical, the provision of Article 12, item 10 would be redundant considering the contents of Article 59, item 1, point 1 of the SMA.<sup>27</sup>

Similarly, pursuant to Article 6, item 3 of the SMA succession management cannot be established if the entrepreneur was declared insolvent. This provision would be unnecessary in the light of the disposition of Article 59, item 1, point 5 of the SMA.<sup>28</sup> On the other hand, in judicial application of law it is assumed that the legislator is reasonable and has no intention to set up regulations that are redundant, incomplete or contrary to law, especially to the Constitution. This assumption implies that the legislator's knowledge of law is non-contradictory and systematic, and its preferences are asymmetrical and transitive.<sup>29</sup> Consequent upon this assumption is the drive to create a set of legal norms that would be complete and non-contradictory.<sup>30</sup>

Here one should entirely share the view expressed by the Supreme Court in a resolution of 17 January 2001<sup>31</sup> that subjective interpretation, based solely on the mental intentions of the legislator, is questioned by contemporary legal theory and relegated into the junkyard of history as a method both unreliable and useless. It should be stated that referring to "the will of the legislator" may appear justified and useful only in extreme circumstances, when other interpretation methods failed or led to absurd conclusions. It needs to be stressed, however, that in such cases the legislator whose "will" is to be analysed in the interpretative process is not the real, actual legislator, which cannot hinder the freedom of the court to interpret the law, because the connection of such legislator with the provision has been broken once the provision was passed (entered into force), but rather a fictitious reasonable legislator. "The will of the legislator" should therefore be read solely based on the text of enacted law, trying to make it rational and objective by, among others, reference to the purposes (functions) of legal institutions in the entire body of legal norms.

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<sup>26</sup> Uprawnienie do powołania zarządcy sukcesyjnego wygasa z upływem dwóch miesięcy od dnia śmierci przedsiębiorcy. Jeżeli akt zgonu przedsiębiorcy nie zawiera daty zgonu albo chwili śmierci przedsiębiorcy została oznaczona w postanowieniu stwierdzającym zgon, termin ten biegnie od dnia znalezienia zwłok przedsiębiorcy albo uprawomocnienia się postanowienia stwierdzającego zgon.

<sup>27</sup> Zarząd sukcesyjny wygasa upływem dwóch miesięcy od dnia śmierci przedsiębiorcy, jeżeli w tym okresie żaden ze spadkobierców przedsiębiorcy nie przyjął spadku ani zapisobierca windykacyjny nie przyjął zapisu windykacyjnego, którego przedmiotem jest przedsiębiorstwo albo udział w przedsiębiorstwie (*vide* art. 12 ust. 1 pkt 2 i 3 u.z.s. w zw. z ust. 10), chyba że zarządca sukcesyjny działa na rzecz małżonka przedsiębiorcy, któremu przysługuje udział w przedsiębiorstwie w spadku (*vide* art. 12 ust. 1 pkt 1 u.z.s. - małżonek nie musi składać oświadczenia o przyjęciu spadku, jeśli przysługuje mu udział w przedsiębiorstwie w spadku).

<sup>28</sup> Zarząd sukcesyjny wygasa z dniem ogłoszenia upadłości przedsiębiorcy.

<sup>29</sup> Zob. L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973, s. 172.

<sup>30</sup> Zob. wyrok Naczelnego Sądu Administracyjnego z 10 grudnia 2007 r., II FPS 3/07, ONSAiWSA 2008/3/45 oraz z 20 grudnia 2011 r., I FSK 481/11, z aprobowaną glosą T. Grzybowski, OSP 2012, nr 5.

<sup>31</sup> Uchwała składu siedmiu sędziów Sądu Najwyższego z 17 stycznia 2001 r., III CZP 49/00. OSNC 2001/4/53.

Considering the above, one cannot escape the feeling that if the legislator distinguished the notions of expiry of the right to appoint a manager and expiry of management, this was done for rational reasons. The very fact that, for example, only one heir acquired the right to the enterprise in succession cannot by itself deprive the heir from the possibility of appointing a manager for a period of two years from the date of the entrepreneur's death, if such a manager had not been appointed previously. Teleological interpretation suggests that the sole heir of an enterprise in succession can in no wise be forced to continue to accept the will of the majority entitled to appoint the manager before the rights to inheritance were certified, or the will of the entrepreneur themselves if they appointed a manager before their death. This is a sufficient reason for the management to expire. On the other hand, one cannot accept the situation in which a succession manager has not been appointed and the sole heir of the entrepreneur is deprived of the right to appointment until the rights to inheritance are certified. The very possibility of making decisions about the enterprise, and thereby the possibility of entrusting the management of the enterprise on the basis of another legal title, such as commercial proxy or commission, or contributing it in kind to a company, should not by itself prevent succession management from being established. It is, after all, logical, that co-heirs have the same opportunity to entrust the direction of the enterprise based on another legal title as a sole heir. There are no rational reasons for distinguishing the right to appoint a succession manager in the illustrative situation in which the enterprise is inherited solely by the spouse or by the spouse and minor child(ren). There also no arguments in the statute that would favour depriving a sole heir of the possibility of appointing a manager, should they so desire. One should, therefore, accept a view assuming that a sole heir has the right to appoint a manager when the manager has not been appointed previously in any manner. If the intention of the legislator was quite the opposite, it should have been given normative value in statute and not in a justification thereto that lacks such value.

By plotting the respective periods related to an enterprise in succession on a timeline, it needs to be stated that within the first two months after the death of an entrepreneur who did not by themselves appoint a succession manager while still alive, persons listed in Article 14, item 1 of the SMA may initially undertake only the so-called maintenance activities regulated in Chapter 3 of the SMA. Such persons do not have to submit declarations about accepting the inheritance as a prerequisite. Then, once the heirs or beneficiaries of bequests have accepted the inheritance, the possibility to appoint a succession manager by a spouse of the entrepreneur who holds a share in the inherited estate and the entrepreneur's heirs and beneficiaries of bequests appears (Article 12, item 1 of the SMA). After rights to the inheritance are formally certified, only

persons who are owners of the enterprise in succession within the meaning of Article 3 of the SMA have the right to appoint a succession manager (Article 12, item 2 of the SMA). If the manager is not appointed after the lapse of two months from the date of death of the entrepreneur, they can no longer be appointed and the enterprise in succession ceases to exist.<sup>32</sup>

## 4. Summary

The provisions of the succession management act are meant to make it easier for entrepreneurs who are natural persons to maintain their enterprise as a going concern after they die and for their heirs to seamlessly take over managing the enterprise in succession with a view to continuing its economic activities. Doubts concerning the interpretation of SMA provisions concerning expiry of the right to establish succession management and an already established succession management may translate to the rather minor interest shown in this solution – since the act entered into force until mid-2022, only about 1% of entrepreneurs decided to appoint a succession manager. Out of 2.9 million entrepreneurs (bar those who suspended their activities), only 32,500 are potentially interested in succession management.<sup>33</sup>

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<sup>32</sup> *Ibidem*, nb. 22.

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