YEARBOOK 24

WARDYŃSKI + PARTNERS •

In the 14th Wardyński & Partners *Yearbook*, we examine a full range of legal topics. We move from the macro to the micro scale: from space technology and nuclear energy to internal investigations, new employee entitlements, and railroad boom barriers. We write about what works well and what needs improvement. We discuss new legal approaches to M&A transactions and urban planning in Poland. We write about amendments to the law that businesses should pay attention to. We suggest how clients can cope with evolving factual and legal circumstances in the year ahead.

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Dear Readers,

In the 14th edition of the Wardyński & Partners *Yearbook*, as usual we present a full cross-section of topics. We move from the macro to the micro scale: from space technology and nuclear energy to internal investigations, new employee entitlements, and railroad boom barriers.

We write about what works well, such as proceedings in procurement disputes before the National Appeal Chamber, and what would be worth improving—even with modest effort and resources. (Taxes!)

We describe how EU law deals with issues of sustainability, patients' rights, and competitiveness in the internal market—and what side effects can follow from the Union's decision to get involved in these areas.

We talk about arbitration with the chair of the arbitration council of the largest arbitration court in Poland, and seek some of the possible drawbacks of this method of dispute resolution (the advantages are much easier to find).

We dispel certain myths surrounding attorney-client privilege (it doesn't work the way it does in the movies—and not as many people imagine).

We write about best practice—and worst practice—in eco-marketing and when seeking trademark registration for the titles of video games. (And along the way, we invite you to play a game.)

We discuss new legal institutions in M&A transactions and urban planning in Poland. We write about the risk of court disputes over ESG, and—in the "E" part—overlapping criminal and administrative liability in environmental law.

We advise how to cope with new factual and legal circumstances. How to ensure business continuity after a corporate split or merger? And will artificial intelligence soon be making hire-and-fire decisions about human employees?

We have something of interest for sponsors of clinical trials, and for parties to securitisation transactions.

We write about amendments to the law that businesses should pay attention to, although we can't cover all the major changes. With our timetable, we couldn't wait any longer for the final version of Poland's Whistleblower Act. Instead, we examine the promised new, streamlined pre-pack bankruptcy procedure, although it will be a couple of years before it becomes a reality. We also dig about in the omnibus reform package for the financial industry, nicknamed the "vegetable patch."

Heeding the responses to a survey of our readers, this year we have taken a fresh approach to the format and graphic design of the *Yearbook*, while keeping the elements of "legal design" which drew positive feedback. We are curious to learn your impressions of our new look.

We hope you enjoy reading the latest *Yearbook*.

The Editors

Implementing projects for the European Space Agency —a Polish contractor's perspective

Recent years have seen rapid growth in the space technology sector around the world. This includes both traditional "Old Space" programmes, devoted mainly to research and defence purposes, dominated by the public sector, including state space agencies, and "New Space," a segment developed by private companies (e.g. Elon Musk's SpaceX) seeking commercial applications of space technologies. Polish companies are also getting in on the space boom. What should a Polish contractor participating in a project for the ESA take into account?

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aviation

new technologies

The domestic space industry is growing faster and faster, and a major driver of this growth is the European Space Agency, which Poland joined in 2012. The flight of Polish astronaut Sławosz Uznański to the International Space Station as part of an ESA mission, scheduled for the autumn of 2024, will be a shining moment for the fledgling Polish space sector, while highlighting the role played by the ESA.

The Polish space sector now works for New Space companies as well as other public space agencies (including NASA and the Polish Space Agency—POLSA), but ESA programmes remain a key source of procurement, where Poles usually (but not always) act as subcontractors. Participation in an ESA contract, including as a subcontractor, is governed by a distinct set of terms and conditions developed and regularly updated by the agency. The latest version is dated July 2019 and includes separately:

– ESA Procurement Regulations and related Implementing Instructions
– General Clauses and Conditions for ESA Contracts.

What is ESA, and how does it work?

Before examining these contract conditions, we should first glance at the legal status of the agency itself, which significantly affects the way it operates. First it must be emphasised that the **ESA is not an organ or creation of the European Union**. The agency was established under the European Space Agency Convention, signed in Paris on 30 May 1975, and one of its founders was the Swiss Confederation, which has never been a member of the European Community or the European Union. Today, the ESA Convention, and as a result the ESA too, has 22 member states, including 19 EU members plus Norway, Switzerland and the UK. One consequence

of the agency's non-EU pedigree is that its method of operation is not governed by EU law, it is not funded from the EU budget, and it is not managed by EU bodies such as the European Commission.

Although under Art. I of the ESA Convention the agency has its headquarters in Paris, the ESA is not an organisation established under French law. The ESA derives its legal personality directly from Art. XV of the convention, which also provides for judicial and enforcement immunity for the agency and its personnel. The ESA is thus an **intergovernmental organisation** (IGO) established by a treaty entered into by national governments, much like the European Union, the World Trade Organization, the United Nations, or the International Monetary Fund.

From the legal perspective, this status of the agency means that it operates primarily on the basis of the ESA Convention and regulations it develops for itself, and is not subject to the authorities of any state (with some exceptions).

The international nature of the agency also has a significant financial dimension. The ESA's budget is financed by contributions from the member states, which translates directly into the agency's procurement policy under the mechanism of **preferences for member states' industries** and the "industrial return coefficient." Crucially, Art. IV(3) of Annex V to the ESA Convention expressly provides:

INDUSTRIAL RETURN COEFFICIENT
the ratio between the share of a country in the weighted value of contracts and its share in the contributions paid to the agency

> Ideally the distribution of contracts placed by the Agency should result in all countries having an **overall return coefficient of 1**.

Therefore, optimally, the industry of each member state should earn from contracts with the ESA, pro rata, the same percentage as the state has paid in contributions, i.e. its percentage share in payments should be returned at the same rate, as an investment in its own economy. But of necessity, it is not always possible to perfectly match the nature, number and value of ESA procurements in a given fiscal period with the potential of each member state and the amount of its contribution. In this regard, rather narrow wiggle room is set by Art. IV(6) of Annex V, pursuant to which in no case should the cumulative return coefficient fall below 0.8 for individual members, i.e. recouping through procurement at least 80% of its proportional share based on its contributions to the ESA.

ESA procurement procedure

The European Space Agency's procurement procedure itself consists of eight stages:

1. Planning and preparatory phase
2. Initiation phase
3. Preparation of the invitation to tender (ITT) or request for quotation (RFQ)
4. Distribution of ITTS/RFQ
5. Tendering phase—preparation and submission of an offer
6. Admission and evaluation of offers
7. Award and placing of contracts
8. Debriefing of unsuccessful tenderers.

In the first three, preparatory, stages, the agency itself is involved, at least on a formal level, as it is clear that developing a procurement (especially within a larger programme) may be preceded by industry or scientific consultations. The further five stages of the procedure are an interaction between the agency and the tenderers.

Only the prime (general) contractors, who will be responsible directly to the ESA for execution of the entire contract, submit offers. But before submitting an offer, they must secure a chain of subcontractors and suppliers tailored to the needs of the procurement. This is particularly essential because in the case of ESA contracts, unlike for example in Polish public procurement, the rule is that contractors cannot freely farm out performance of tasks, and any subcontractor must obtain direct, prior approval from the agency.

Due to the technological and financial capacity required for implementing many ESA contracts, particularly the most serious ones, large Western European aerospace companies such as Airbus, Thales, Sener and Kongsberg dominate among prime contractors. In such cases, smaller companies, including those from Poland, tend to act as subcontractors, although overall there is considerable diversity among tenderers engaged by the ESA, and direct contracts from the agency also fall to smaller companies, research centres or universities.

Technically, the entire tender procedure is carried out through the electronic tendering platform *esa-star*, which replaced the previous EMITS system. Information on open and planned tenders is

published in this system, and prime contractors submit their offers through the platform. Typically, contractors have a minimum of 6 weeks from publication of the ITT/RFQ to prepare documentation. The exceptions are non-competitive tenders, in which the agency sets a shorter time limit for submitting an offer.

Interestingly, in the course of the procedure, the participating entities cannot communicate directly with agency representatives —to ensure the transparency of the decision-making process and the impartiality of decision-makers on the ESA side. Correspondence is conducted only with designated agency contacts who are not substantively involved in the project. If any questions arise from potential contractors during the procedure, they are published in the system, visible to all tenderers, along with the agency's answers.

The winning offer is selected by the tender evaluation board. Unlike for example Polish and EU procurement procedure, there is no provision for an appeal against the decision of the tender evaluation board to select an offer.

If, on the other hand, in a competitive tender procedure it turns out that only one offer was submitted or only one offer meets the requirements, the tender evaluation board, together with the ESA Contracting Department, must decide whether to evaluate the offer, or cancel the tender and conduct it again.

Within 10 calendar days from the end of the procurement procedure, the unsuccessful tenderers may only request an explanation of why their offer was not selected. Then, within 20 calendar days, the agency will present its reasons for not selecting the offer, usually via teleconference.

The description of the ESA's procurement procedure may bring to mind the public procurement procedure familiar from Polish and EU law, but there are important differences. First of all, the ESA has much broader discretion in selecting an offer, which cannot be challenged on appeal and is subject to looser criteria. In particular, unlike typical Polish procurement markets, price will not necessarily be the primary criterion. The agency must navigate within its budget, but under the ESA Convention itself, it has a legal obligation to give preference to tenderers from member states and to seek to allocate contracts proportionally to the contributions paid.

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In the case of ESA contracts the rule is that contractors cannot freely farm out performance of tasks, and any subcontractor must obtain direct, prior approval from the agency.

Conditions for implementation of ESA contracts

An ESA procurement award consists in entering into a contract with a selected contractor based on a contractual template called the General Clauses and Conditions (GCC) of the European Space Agency. As mentioned, the latest version of this template dates from July 2019 and is still in force today. Compared to the forms used in some industries, it is a fairly concise document, but still runs to almost 100 pages (including variants). It covers a standard set of conditions such as determination of the price and the prerequisites for payment, allocation of the parties' liability, grounds for withdrawal, and the consequences of breach. Below we discuss in more detail selected GCC issues that are either unique to ESA contracts or for other reasons may be surprising to a Polish contractor or subcontractor.

Subcontractors and key personnel

As mentioned, the GCC (Clause 10) bans the engagement of subcontractors without prior approval by the ESA, which should be expressed either in the terms of the contract itself or by formally amending the contract through a contract change notice. Introducing a subcontractor bypassing this procedure is a serious breach of contract and entitles the ESA to rescind the contract due to the contractor's fault. This approach clearly differs from Polish law, which in principle allows contractors to engage subcontractors, and the lack of consent or objection by the contracting authority usually only deprives the subcontractor of a direct claim for payment from the contracting authority under joint and several liability—which the GCC also does not foresee. Settling of accounts between the subcontractor and the general contractor always boils down to the internal dealings between the two entities.

In this context, Clause 10.4 of the GCC mandates that the terms of the subcontract ensure the effectiveness of the rights reserved to the agency under the GCC. While this does not strictly mean that a subcontract must be subject to the GCC or literally copy its provisions, in practice a key provision in any subcontract is a "back-to-back" clause, ensuring that the legal responsibility to the agency borne by the general contractor must fully carry over into

its relationship with the subcontractor (e.g. liability for delay or defects, or arrangements in the event the contract is rescinded).

The GCC not only bans subcontracting of work without prior approval, but also secures the ESA control over the selection of key personnel of the contractor delegated to the contract. Under GCC Clause 9, the contract should be performed by specific persons designated as key personnel, and their replacement must be notified to the agency with an explanation, which the ESA can object to. The agency also reserves the right to require (for good cause) replacement of the key personnel assigned to the task by the contractor. These provisions are very far from the standards found in Polish law, which generally leave it up to the contractor to select its own personnel, at its own risk.

Mutual exclusion of claims (cross-waiver)

The heightened risk of innovation posed by the implementation of space programmes is the basis for specific provisions limiting mutual liability for damages. Clause 18 provides for cross-waiver, i.e. mutual exclusion of indemnity claims between the contractor and the ESA and their subcontractors, agents and consultants, whether for personal injury or for property damage. The contractor must ensure that this exclusion of claims is carried over into its subcontracts and that its insurance policies exclude the insurer's recourse against the direct perpetrator of the injury.

Some exceptions exist where indemnity liability will be retained, e.g. if the injury is caused intentionally or through gross negligence, but overall it is an unusual solution, rarely seen or accepted outside the space industry. But in one sense this is a fair solution, because it mandates that each party bear its own risk for participating in a risky venture. This is undoubtedly easier to accept for the agency or large companies with sufficient reserves, than for small subcontractors. Optimally, such risks should be offset by obtaining adequate insurance coverage, but that is greatly hampered by the limited availability of insurance products for the space sector, especially in the Polish insurance market.

Dispute resolution and applicable law

The GCC's dispute resolution procedure takes into account the agency's immunity under the ESA Convention, which protects it from being sued in the domestic courts of member states. For this reason, the convention directs the ESA to include arbitration provisions in its contracts and a choice of the law governing the contract, while excluding immunity with regard to arbitral awards rendered under this procedure.

GCC Clause 35 is aligned with these provisions and foresees a three-tier system of dispute resolution. The first resort is direct negotiations, and if these fail to reach an amicable solution, the dispute should be submitted to a dispute adjudication board (DAB). But the DAB is more of an advisory body that proposes a settlement, and the parties are not bound by it without their consent. After resorting to the DAB, either party can seek arbitration.

The GCC leaves the details of the arbitration proceedings and the choice of law governing the contract and disputes to be determined in the given contract. By default, it provides for arbitration before the ICC International Court of Arbitration in Paris, one of the world's most esteemed arbitration institutions.

Ad astra per aspera

Despite some of the peculiarities of the legal solutions, which prospective contractors must become familiar with—or perhaps even because of those peculiarities—the European Space Agency is functioning smoothly and implementing more and more ambitious programmes, with a growing involvement of the Polish space industry. If it sticks to this trajectory, the only laws that the space sector will have to fight will be the laws of physics.

Development of nuclear energy in Poland: Upcoming challenges

2023 brought huge steps forward in the development of nuclear power in Poland. This sector is expected to be one of the main elements of the overhaul of the country's energy system, currently reliant on fossil fuels. Significant political and administrative decisions have been made for both large reactors with a capacity of more than 1,000 MWe and small modular reactors (SMRs) of up to 300 MWe. Under an amendment to the Nuclear Special Act, investors have submitted their first applications for the fundamental decisions for individual projects. Their advancement toward implementation continues apace, as does public awareness of nuclear power in Poland.

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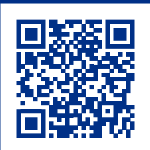

energy

Act of 29 June 2011 on Preparation and Execution of Nuclear Power Projects and Accompanying Projects

2023 was marked by the development of Polish nuclear energy, as investors and public administrative bodies applied for the first time the amended Nuclear Special Act, which enabled issuance of the first fundamental, environmental and siting decisions.

The most advanced project is being implemented near the village of Choczewo in Pomerania by investor Polskie Elektrownie Jądrowe sp. z o.o. (PEJ), with a capacity of up to 3,759 MWe, in co-operation with a consortium of Westinghouse and Bechtel, which will build and supply AP1000-type pressurised water reactors. The investor obtained the decisions and agreements required at this stage, and at the end of the year the transmission system operator (Polskie Sieci Elektroenergetyczne SA) also issued conditions to PEJ for connection to the grid. At the end of September 2023, the parties signed an engineering services contract for design of the main components of the nuclear power plant: nuclear island, turbine island, and associated facilities.

Also notable are SMR projects being implemented by investors including Orlen Synthos Green Energy with GE Hitachi (BWRX 300). In December 2023, Orlen Synthos obtained decisions-in-principle for six projects.

Support for nuclear power continues to grow

A few years ago, just over half of Polish society expressed support for nuclear projects, but in recent years support for these projects has grown significantly.

Studies conducted annually by the Ministry of Climate and Environment show that last year, 90% of those surveyed expressed support for nuclear power plants in Poland, with only 10% opposed. Thus Polish society concurs that nuclear power should be part of the country's energy mix.

Nuclear power will do better and better around the world

The support for nuclear projects in Poland happens to coincide with the development of this sector abroad. Globally, 59 reactors are currently being built.

In Europe alone, there are now 13 reactors under construction, not including reactors still on the drawing boards. This shows that nuclear power will make a significant contribution to the energy transition, alongside renewables, and Poland is part of this trend. Notably, the EU's Taxonomy Regulation includes nuclear power as one type of environmentally sustainable technology.

For more on the Taxonomy Regulation, see page 133

Formal legal stages of nuclear power plant implementation

The nuclear development process is characterised by special legal rationing, due to safety issues related to ionising radiation, as the source of emission-free electricity in a nuclear power plant is the chain reaction of nuclear fission in the reactor, accompanied by ionising radiation. Hence there is heightened oversight by a specialised nuclear regulatory authority—in Poland the President of the National Atomic Energy Agency (PAA)—before the power plant is allowed to operate.

In addition to administrative acts issued by the relevant public administrative bodies in the course of the development procedure, we should also mention specific acts for rationing of activities related to exposure to ionising radiation, required in the case of the implementation of nuclear power projects.

The Atomic Law specifies the administrative acts that must be issued for conducting activity involving exposure to ionising radiation:

← Atomic Law of 29 November 2000

- Licence for construction of a nuclear facility
- Commissioning licence for the nuclear facility
- Operating licence for the nuclear facility.

For nuclear projects, these decisions will be fundamental for full operation and establishing that the projects meet the legal safety requirements.

Therefore, since 2022 we have seen progressive expansion of the competences of the National Atomic Energy Agency and its human resources.

It should be assumed that it will not be until 2025, after the technical designs of the nuclear power plants have been executed, that the investors, with PEJ in the lead, will submit their first applications for licences and permits for construction of the country's first nuclear reactors.

SIMPLIFIED SEQUENCE OF OBTAINING ADMINISTRATIVE DECISIONS FOR A NUCLEAR POWER PLANT

DECISION ISSUED BY MINISTER OF ENERGY

DECISON-IN-PRINCIPLE
Art. 3a, Nuclear Special Act

DECISIONS ISSUED BY PROVINCE GOVERNOR

PROJECT SITING DECISION
Art. 7, Nuclear Special Act

BUILDING PERMIT
Art. 15, Nuclear Special Act

USE PERMIT
Art. 18, Nuclear Special Act

DECISIONS ISSUED BY PRESIDENT OF NATIONAL ATOMIC ENERGY AGENCY (ART. 4(3), ATOMIC LAW)

BUILDING PERMIT

START-UP PERMIT

OPERATING PERMIT

OPINION OF THE EUROPEAN COMMISSION
Art. 43, Euratom Treaty

OPINION OF THE EUROPEAN COMMISSION
Art. 37, Euratom Treaty

Prospects for 2024

2024 will be characterised by further advancement of design work for the planned nuclear projects. We can also expect that investors and contractors will select subcontractors and prepare for seeking new decisions allowing them to launch the development process or bring it to completion. At this point, the PEJ project, which is the closest to submitting applications for construction licences and permits, has the best chance of achieving its stated objective of putting the first Polish nuclear power plant into operation in 2033.

Conclusion

2024 promises to be as dynamic in this area as last year. We can expect an increase in activity on the part of both investors and the nuclear regulator. We will witness the application of nuclear power regulations in practice, as well as implementation of perhaps the most technologically complex projects ever in the Polish power industry, requiring the participation of subcontractors from various branches.

Ultimately, it should be remembered that development of nuclear power facilities in Poland involves a high level of regulatory detail, which will pose numerous challenges for investors, contractors, and the public administration, requiring an integrated approach and a multifaceted legal and technical analysis.

Given the absence of many regulations and standards governing the process of construction and operation of nuclear facilities, in the coming years we can expect intense legislative work in this area. New laws will be drafted, the likes of which Polish industry has never dealt with before. Both Polish and foreign players in this industry should monitor the legislative process if they wish to participate in construction and operation of nuclear power plants here.

Successful management of the development of the nuclear power sector requires cooperation between various stakeholders and the state, including adherence to the highest safety standards.

The impact of the Foreign Subsidies Regulation on the public procurement market

Financial contributions from third countries distort competition on the EU's internal market. These practices are targeted by a new EU regulation. Public procurement contractors receiving subsidies from outside the Union will be scrutinised by the European Commission.

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public procurement

The European Union internal market is built on the concept of a highly competitive social market economy. The member states are limited in their ability to finance companies operating in the single market, under the principle that competition should be based on substantive criteria, and unjustified state aid distorts the free market. For this purpose, EU lawmakers have established a rigorous system for oversight of state aid. So far, these rules have applied only to EU member states, and funds from third countries have not been subject to review by EU institutions.

However, in recent years, glaring examples of infringement of competition in the internal market by players financed by third countries have come to light. The pandemic, in particular, proved to be a difficult time for many European companies, which ran into temporary financial problems, and state aid was rationed. This situation was exploited by businesses receiving money streams from outside the Union, who could take over parts of European companies, dominate successive sectors of the economy, and submit unrivalled bids for public contracts. European institutions had no legal measures to counter this phenomenon.

Regulation (EU) 2022/2560 of the European Parliament and the Council of 14 December 2022 on foreign subsidies distorting the internal market

The situation was changed by the Foreign Subsidies Regulation, which came into force on 12 January 2023. It is a comprehensive regulation that armed the Commission with oversight powers to protect competition in the internal market. In principle, the regulation covers all companies doing business in the European Union that are beneficiaries of state aid from third countries. The Commission's actions focus on review of corporate concentrations and awarding public contracts. In this article, we focus on regulations governing the public procurement market and resulting new obligations of contractors and contracting authorities.

We write about the impact of the Foreign Subsidies Regulation on merger controls in the article at page 77.

What is a foreign subsidy?

First of all, it is worth emphasising that foreign subsidies are not banned, and the regulation cannot interfere with the mere fact of granting subsidies by third countries—unlike state aid from member states, which is essentially rationed. Therefore, the regulation gives the Commission the tools to investigate distortions in the internal market only when a subsidy improves (or is likely to improve) the competitive position of a particular company operating in the Union market.

FOREIGN SUBSIDY
a financial contribution made, directly or indirectly, by a third country (non-EU) that benefits a company doing business in the internal market and which is limited to at least one undertaking or at least one industry

In practice, a foreign subsidy will potentially be of interest to the Commission when it actually or potentially negatively affects competition in the internal market. For these reasons, a foreign subsidy is defined very broadly. Under the regulation, "financial contribution" is understood to mean, among other things:

- **Transfer of funds or liabilities**, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setoff of operating losses, or tax abatements
- **Forgoing revenue** that is otherwise due, such as tax exemptions or granting special or exclusive rights without adequate remuneration
- **Purchase or provision of goods or services**.

In ambiguous situations, the principle of objective assessment of the profitability of the contribution applies, according to which the financial contribution should benefit an enterprise doing business in the internal market. Thus, it concerns events where such benefits could not be obtained under normal market conditions.

To be classified as a foreign subsidy, a contribution need not be made directly by a foreign state government institution. The regulation foresees that contributions made by foreign public and private entities whose actions may be attributable to a third country should also be treated as subsidies originating from a third country and subject to appropriate control.

The timing of financial contributions is also relevant. To prevent abuse of the calculation periods, the regulation provides that a foreign subsidy is considered to be granted from the time the beneficiary becomes eligible to obtain it. Thus a promised cash contribution will fall within the scope of the regulation, even if no actual payment has been made.

How high do the subsidies need to be?

The regulation has thresholds for screening foreign subsidies:

- Where the total amount of a foreign subsidy to an undertaking does not exceed EUR 4 million over any consecutive period of three years, that foreign subsidy is considered unlikely to distort the internal market.
- Where the total amount of a foreign subsidy to an undertaking does not exceed the amount of de minimis aid per third country over any consecutive period of three years, that foreign subsidy is not considered to distort the internal market. The threshold varies from industry to industry and generally amounts to EUR 200,000—the limit for de minimis aid.

de minimis aid defined in Art. 3(2) of Commission Regulation (EU) 1407/2013

The control procedure

procedure regulated in detail in Commission Implementing Regulation 2023/1441 of 10 July 2023

In public procurement, the control procedure varies depending on the amount of foreign contributions, the size of the procurement, and whether it is divided into parts.

In principle, contractors must report foreign financial contributions:

- When the estimated value of the procurement or framework agreement is **EUR 250 million** or more
- In the case of procurements divided into parts, when the estimated value of the entire procurement exceeds the threshold of EUR 250 million, and the value of a given part or the total value of all parts for which the bidder is applying is **EUR 125 million** or more.

If these conditions are met, the contractor participating in a procurement procedure should submit a **notification** to the contracting authority of all foreign financial contributions exceeding the threshold of **EUR 4 million** in total.

In all other cases, contractors submit a **declaration** listing all foreign financial contributions received and confirming that they are not reportable.

As a rule, the notification or declaration on foreign financial contributions is submitted only once, at the time of submitting a bid. If it is a multi-stage procedure, it will be submitted twice: first

with the request to participate, and then as an updated notification or declaration with the bid.

The notification obligation covers subsidies obtained by the contractor, as well as its subsidiaries without commercial autonomy and its holding companies. Where applicable, major subcontractors and suppliers of a contractor participating in the same bid in a procurement procedure are also covered by the reporting obligation if they have received total financial contributions of EUR 4 million or more per third country in the three years preceding the notification (or updated notification).

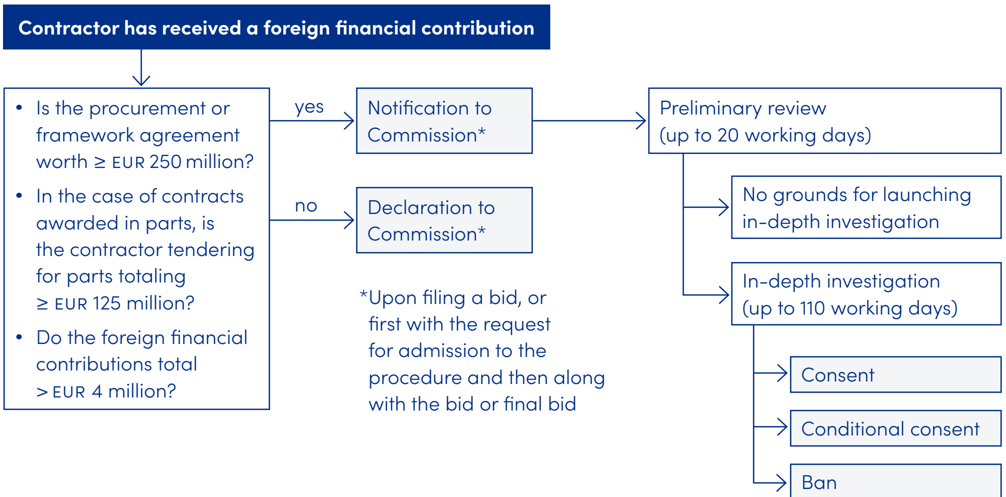
The contracting authority transmits notifications and declarations to the European Commission, thereby initiating the preliminary review stage, lasting in principle 20 working days. Based on its own findings (including documents the Commission may request in addition to the notice), the Commission decides whether to initiate an in-depth investigation, and then promptly informs the contractor and the contracting authority.

The in-depth investigation should last up to 110 working days, and may result in the following decisions of the Commission:

– It finds that the contractor is not benefiting from a foreign subsidy distorting the internal market
– It finds that the contractor does benefit from a foreign subsidy distorting the internal market within the meaning of the regulation, but the contractor has offered commitments that completely and effectively remedy the distortion in the internal market (then, an implementing act in the form of a decision imposing commitments on the contractor is adopted)
– When the contractor does not propose remedial commitments, or the proposed commitments are inadequate or insufficient to completely and effectively remedy the distortion, the Commission will adopt a decision banning the award of the contract to the contractor. Following this decision, the contracting authority will reject the contractor's bid.

The contractor should cooperate with the Commission during the investigation and accurately report on the financial contributions it has obtained (during the course of the procurement procedure). The regulation provides for fines for omissions or negligence in presenting information on the company under investigation (up to

COURSE OF THE CONTROL PROCEDURE



1% of annual turnover), as well as for delays in presenting the requested information (up to 5% of average daily turnover for each day of delay). Also, deliberate or negligent failure to report foreign financial contributions during the procurement process, including circumventing or attempting to circumvent subsidy reporting requirements, may be penalised. In this case, the fine may not exceed 10% of the company's total turnover in the previous fiscal year.

Impact on the procurement market

The notification requirement under the regulation is at odds with calls to reduce the formality of procurement procedures. But according to the Commission, this sacrifice will be offset by an increase in the level of competition in the internal market. Because this scheme has been in force for such a short time, it is impossible to assess at this point whether this goal is achieved—for this, practice in applying the regulation going forward will be necessary. However, in carrying out its new duties, it can be expected that the Commission will use the acquis developed over the years of conducting oversight of state aid granted by EU member states, so

implementation of the provisions at the EU level should proceed smoothly. The Commission's decisions under the regulation will be subject to review by the Court of Justice of the European Union, and that will not speed up the process.

Due to the thresholds set in the Foreign Subsidies Regulation, the effects of the new rules will be felt by contracting authorities organising the largest tenders. And it is the procedures with the highest value that are also of the most interest to foreign contractors, and the bidders for the biggest contracts also tend to be the largest beneficiaries of foreign subsidies. Therefore, the oversight procedure may constitute a barrier of sorts for non-EU contractors, who may refrain from bidding in European tenders for fear of rejection. So, will the increased protection of the internal market end up restricting access to foreign knowhow? It may just as well stimulate European contractors and improve their situation, which would be an additional benefit resulting from the regulation.

Procedure before the National Appeal Chamber: Fast and effective

In public procurement in Poland, contractors' appeals are actually the norm. This is a side effect of the efficiency and speed of the proceedings before the National Appeal Chamber. In 69% of cases, filing an appeal leads to modification of the contracting authority's decision. The key is to act quickly and prepare the allegations well.

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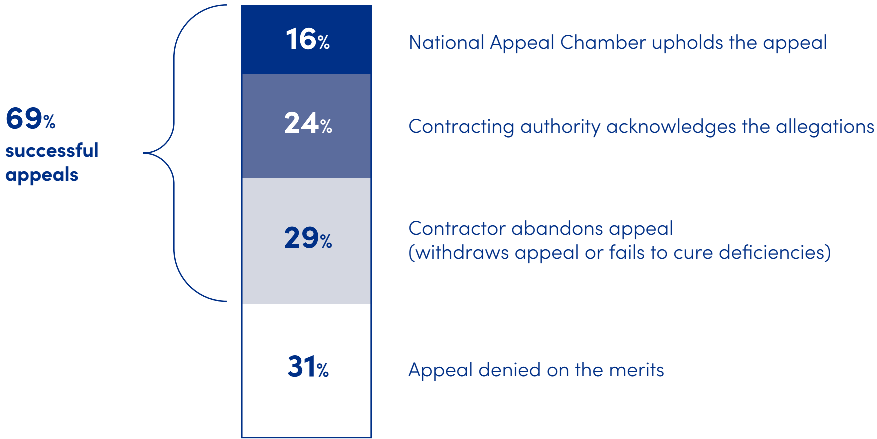
public procurement

The Polish procurement appeal procedure is among the fastest in the entire European Union. Only two to three weeks elapse between the filing of an appeal and issuance of a ruling. All appeals are heard by a single body, the National Appeal Chamber, based in Warsaw. The chamber is currently composed of 46 arbitrators. It receives more than 3,500 appeals a year (in 2022, 3,514, and in 2023 an additional 200+). About half of them are heard on the merits.

An appeal: Is it worth it?

An appeal may be filed against any of the contracting authority's acts or omissions in the course of the procedure for award of a public contract, including failure to conduct a procurement procedure when the contracting authority was obliged to do so. High competition among contractors for procurement works means that there are more and more appeals every year. In large procurements, challenging the correctness of selection of the most advantageous offer is basically the rule. Contractors whose bids were not selected, especially second-ranked bidders, often treat an appeal as a routine element of the procedure.

The costs associated with filing an appeal are not low, but contractors usually include them in their budget for participation in the procedure. Although in 2022 the National Appeal Chamber upheld only 16% of the appeals filed, the actual effectiveness of the appeals is much higher, given that 24% of the appeals filed were withdrawn, for 5% formal deficiencies were not cured, and for another 24%, the contracting authority addressed the allegations. Therefore, it can be assumed that in 69% of cases, filing of an appeal led to a change in the decision of the contracting authority. Additionally, more than half of the appeals led to a review of the contracting authority's actions even before the hearing, at the contracting authority's own initiative. For this reason alone, it is worth appealing.



Filing an appeal

There is little time to decide on filing and preparing an appeal: as a rule, in proceedings with a value below the EU thresholds, it is only 5 days, or in those with a higher value 10 days, from the time the party learns of an action by the contracting authority inconsistent with the Public Procurement Law. And in many cases, the contracting authority provides documents that are the source of knowledge of the existence of grounds for appeal only after the actions that will be challenged in the appeal have been taken. Then the time to work on an appeal is even shorter, and the process often begins with certain assumptions that are tested in the course of drafting the appeal. This means that there is very little time to gather evidence to support the allegations—even considering that evidence can only be presented at the hearing. The most difficult part is to correctly frame the allegations. To do this, the appellant must properly establish the facts of the case.

The appeal is filed with the president of the National Appeal Chamber. It can either be submitted to the chamber's registry office or filed electronically via the chamber's electronic mailbox, using the ePUAP platform. This requires an electronic signature,

but not necessarily a qualified one. An appeal filed after the deadline is ineffective. It is not enough to dispatch the appeal from the post office before the deadline: it must reach the chamber within the allotted time. At the same time, a copy of the appeal should be provided to the contracting authority, by email, via the electronic platform on which the proceedings are conducted, or in person.

Art. 516 of the Public Procurement Law

A procurement appeal is a formalised document. Art. 516 of the Public Procurement Law lists the necessary elements (if an appeal is filed electronically, the form on the ePUAP platform guides the party through all the necessary elements). The most important of these elements is presenting and justifying the allegations. The correct fee on the appeal must also be paid. If payment is entered after the deadline for filing an appeal, the appeal will be returned without consideration.

Allegations in an appeal

ALLEGATION
An allegation is an objection to acts or omissions by the contracting authority, with an indication of the factual circumstances under which the violation occurred.

Typically, an appeal will cite the provisions of the Public Procurement Law that the appellant claims have been violated, and justify how they were violated. However, the most important element of the allegation is the factual basis, identifying exactly what the violation consisted of. The chamber is not bound by the legal basis for the allegation stated in the appeal. Therefore, describing why in the particular situation the contracting authority did not behave correctly is more important than citing specific provisions.

Proper description of an allegation is crucial to the success of the appeal, as the chamber will consider the appeal only within the four corners of the stated allegations. The chamber will not rule on violations established in the course of the appeal procedure but not identified as the subject of the appeal. In an appeal, omission of a particular allegation will not only mean that the chamber will not address it, but will also cause the lapse of the time limit for filing an allegation as to that particular factual circumstance. Such an allegation can no longer be made at a later stage of the procedure, including in a new appeal.

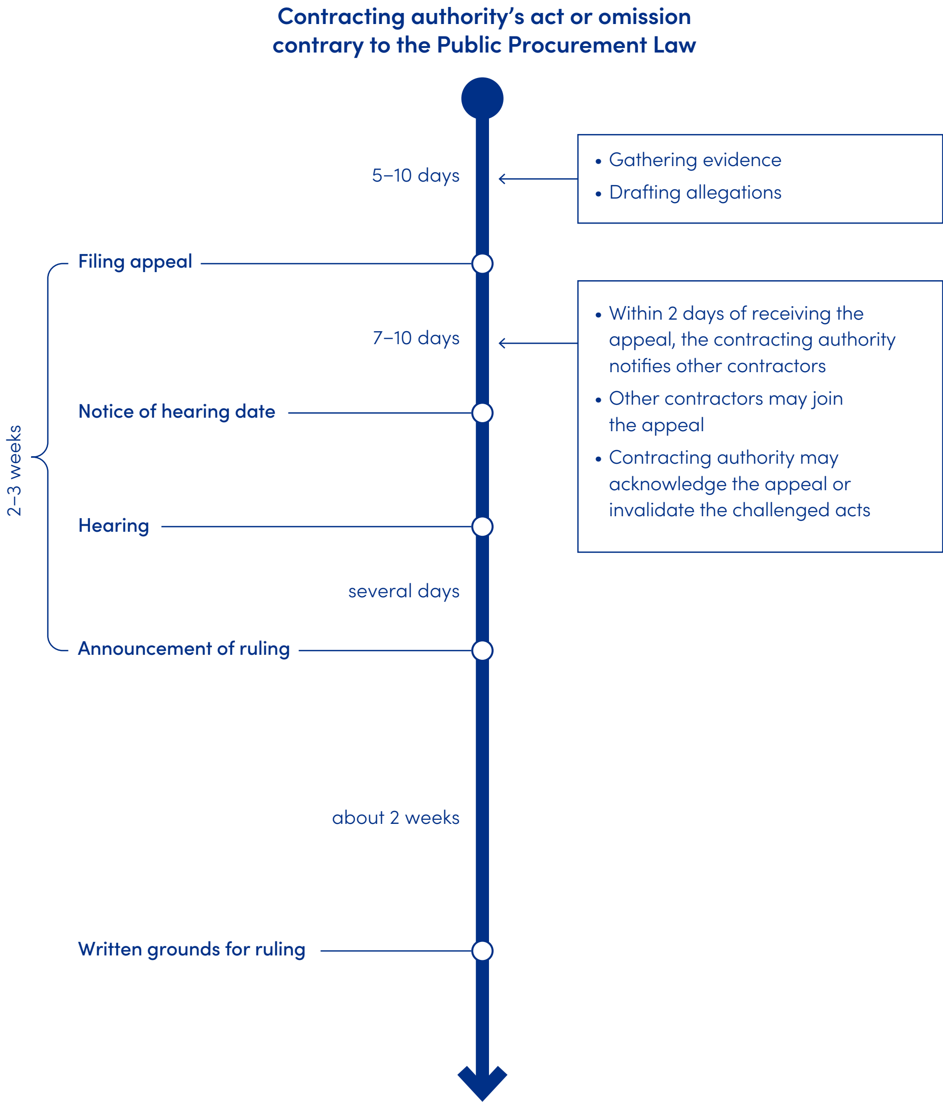
With regard to the allegations, the appeal must also indicate the relief sought by the appellant, that is, what actions should be undertaken by the contracting authority.

Response to the appeal and joinder

Usually, there is 7 to 10 days between the filing of a correct and complete appeal and receipt of notice of the hearing date. That's not long, but a lot can happen in that time. Upon receipt of a copy of the appeal, the contracting authority will forward it immediately, within two days, to other contractors participating in the procurement procedure. If the appeal relates to the wording of the contract notice or procurement documents, it will also post the appeal on the website where the procurement documents are posted, and call on other contractors to join the appeal. The contracting authority may file a response to the appeal, in which it may acknowledge some or all of the allegations.

Joinder may be filed within three days from receipt of a copy of the appeal, indicating the party joining the appeal and its interest in obtaining a ruling in its favour. Filing of a notice of joinder means that even if the contracting authority acknowledges the appeal in its entirety, this will not lead to discontinuance of the appeal procedure without obtaining the position of the intervenor. The intervenor may oppose acknowledgement of the appeal and assume the position of the opposing party, in place of the contracting authority.

In addition, instead of making procedural statements, i.e. as to its position on the allegations in the appeal, the contracting authority may take action within the public procurement procedure itself—so to speak, outside of the appeal. Therefore, the contracting authority may request that the appeal be dismissed, or even express no position at all, while acting in the procedure as if it recognised the appeal as justified, by invalidating its actions challenged by the appeal and undertaking new actions, and not necessarily the actions requested in the appeal. This way, the contracting authority may cause the act or omission challenged in the appeal to no longer exist, so that the appeal procedure will be discontinued as moot, without holding a hearing.


Contracting authority's act or omission contrary to the Public Procurement Law
5–10 days
• Gathering evidence
• Drafting allegations
Filing appeal
7–10 days
• Within 2 days of receiving the appeal, the contracting authority notifies other contractors
• Other contractors may join the appeal
• Contracting authority may acknowledge the appeal or invalidate the challenged acts
Notice of hearing date
2–3 weeks
Hearing
several days
Announcement of ruling
about 2 weeks
Written grounds for ruling

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If a pleading was served prior to the hearing, generally, the arbitrators will not permit a break in the hearing for the parties to read the pleading, and will require them to reference the pleading during oral presentations at the hearing.

Pleadings

There is little time for pleadings, so they often come at the last minute, including the night before the hearing. And, since many counsel and parties travel to hearings from all corners of Poland, receiving a pleading so late makes it difficult to read and digest it beforehand. Such inconveniences should be borne in mind, and remember that if a pleading was served prior to the hearing, generally, the arbitrators will not permit a break in the hearing for the parties to read the pleading, and will require them to reference the pleading during oral presentations at the hearing.

The rule is for the parties to serve pleadings directly on each other. A pleading addressed by email to the chamber is simultaneously sent to the email of all parties or counsel. Then it is not necessary to use the chamber's mailbox.

Hearing

If a duly filed appeal is neither acknowledged nor withdrawn, and the actions challenged by the appeal are not set aside, the parties will meet at a hearing. These hearings have their own dynamic and a different pace from court proceedings. Usually the case is heard on a single hearing date, which can last up to a whole day. During this time, the parties present their positions and evidence until the case is sufficiently explored. Then the chamber closes the hearing and announces when it will publish its ruling (usually after a few days).

Evidence can be submitted until the end of the hearing, but in practice is submitted with a pleading, or the chamber orders the parties to exchange evidence at the opening of the hearing, thus giving opponents at least a minimal chance to properly address the evidence. If evidence is presented only in a party's oral statement, the other party should comment on it as part of its own statement following the opponent's presentation of evidence.

Before the hearing, a meeting is held to determine the participants. This will involve verification of the authority of the persons appearing for the appellant and the contracting authority, but also of formal allegations, which may result in rejection of the appeal or barring another party from joining the proceeding.

During the hearing, the appellant and all intervenors on its side usually present their positions first. Then, the contracting authority and intervenors on its side take the floor. After the first round of statements, the panel usually allows a reply, responding to the opposing party's assertions which the party has not had a chance to address. There is usually only one reply, which means that the hearing closes with the last word going to the contracting authority or an intervenor on its side.

Ruling

If the case has been sufficiently clarified, which is assumed to mean after a round of statements in reply, the chamber closes the hearing. As with a court, the chamber does not announce the ruling right away, but announces when publication of the ruling will occur. Most often, it is a few days after the hearing date.

There is no obligation to attend the announcement of the ruling, but it is worthwhile to do so, as the chamber also makes an oral presentation of the grounds for the ruling. The grounds are later set forth in a written statement, which usually takes about two weeks. If a party does not attend the announcement of the ruling, the operative wording of the ruling can be obtained almost immediately after publication by an email request to sentencje@uzp.gov.pl.

Although the National Appeal Chamber hears cases in the first instance, and appellate review can be sought against the chamber's ruling, such appeals are filed in only 4% of cases, and upheld even more rarely. In 2022, for example, the chamber's ruling was amended or set aside on appeal in only seven cases.

Revolution in spatial planning in Poland

2023 brought revolutionary changes to the planning and zoning system. Soon the possibility to build anything based on the currently popular decision on development conditions will be severely limited. Local communes have also been given new tools for shaping development on their land. But can they implement them in time? If not, how will it affect the viability of construction projects in Poland?

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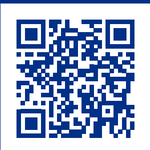

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Act of 7 July 2023 Amending the Spatial Planning and Development Act and Certain Other Acts

Last year, a long-awaited overhaul of the Spatial Planning and Development Act was adopted. The vast majority of provisions entered into force on 24 September 2023. It is the largest reform of the planning and zoning system in Poland in the last two decades. It is generating lots of heat among both investors and local governments, primarily communes (*gminy*).

The amendment is an element of the National Recovery Facility. This was intended to enable local governments to raise the funds necessary to enact master plans—new planning acts that communes will be required to adopt within a specific timeframe for the entire commune area (with a few exceptions).

The main purpose of the amendment was to simplify and speed up planning procedures, combat fragmented development, and preserve areas of special natural or cultural value. Currently in Poland only about 30% of areas are covered by local zoning plans, while the process of enacting local plans lasts an average of about three years (but often much longer, even more than a decade).

Master plan

In our view, the most important change in the spatial planning system is the introduction of a new legal instrument called a master plan. A master plan is an act of local law, the provisions of which will be binding when adopting zoning plans and decisions on building conditions. In principle, a master plan will be mandatory for all the land in the commune.

Additionally, starting 1 January 2026, the amendment introduces an obligation for communes to adopt a development strategy, unless the communal area is already covered by a supra-local development strategy. The strategy will have to take into account such issues as:

– The model of the functional and spatial structure of the commune
– Findings and recommendations on establishment and implementation of the commune's spatial policy, such as the rules for siting of large-scale retail and key public-purpose projects.

The master plan is intended to replace the planning guidelines, in effect since 1994, which in general creates the commune's zoning policy and is taken into account in the procedure for adopting local zoning plans. The planning guidelines are not an act of local law, but their biggest shortcoming was that the guidelines' findings were not binding when issuing decisions on building conditions. In the absence of a local zoning plan, these decisions constitute the basis for determining the methods of development and building conditions for the land.

Since the vast majority of Poland's land area was not covered by local plans, during the development process investors often resorted instead to a decision on building conditions (*decyzja o warunkach zabudowy i zagospodarowania terenu,* popularly known as a "WZ"). The main condition for issuance of a WZ was fulfilment of the "good neighbourhood" principle. This led to development that might have been compatible with existing functions or parameters, but in many cases was chaotic and inconsistent with the commune's zoning policy.

A zoning decision will only be granted to an investor planning a project in the complementary development area. Importantly, in the master plan, the commune will not have to establish a complementary development area, which will preclude obtaining a decision on building conditions within that commune. The boundaries of the complementary development area will not be determined arbitrarily, but with reference to existing development, based on an algorithm to be introduced in the implementing provisions.

Planning guidelines will remain in force until adoption of the master plan, but no later than 31 December 2025. According to local governments, this timeframe is too short to carry out the entire planning procedure for adoption of the master plan. The result of failing to enact a master plan by this date will be that no decisions on building conditions can be issued after that date. If

ELEMENTS OF THE MASTER PLAN

Mandatory

- **Planning zones**
  the amendment introduced 13 zones
- **Communal urban planning standards – catalogue of planning zones**
  functional zone profile,
  urban indicators

Optional

- **Complementary development area**
  the only place where a zoning decision may be obtained
- **City-centre development area**
  area of compact, intensive residential and service development in a city
- **Communal urban planning standards – accessibility of social infrastructure**
  rules for providing access to schools and public green areas

a commune does not have a local zoning plan in force, this can block the development process. Due to many controversies over the small window for enactment of master plans, legislative work is currently underway in parliament to extend the validity of the planning guidelines and enactment of master plans for another two years, i.e. until 31 December 2027.

Often, investors ask us how to protect against a situation where a master plan is not enacted within the expected timeframe. First and foremost, we point out that previously adopted local zoning plans remain in effect, and therefore if a master plan is not adopted, it will be possible to obtain a building permit based on the local plan. However, if no local plan is in effect for a given area, then under the law in force after 1 January 2026, it will not be possible to issue a decision on building conditions, unless the application was submitted before that date. Therefore, it is worthwhile to apply for a decision on building conditions by 31 December 2025, which will allow the decision on building conditions to be processed under the existing rules.

Integrated development plan

The amendment introduced a new legal instrument, the integrated development plan, which is a special type of local plan. An integrated development plan consists of the main project (e.g. a housing

development, shopping mall, or industrial plant) and a complementary project (e.g. construction or reconstruction of networks, public roads, public transport infrastructure, schools, public green areas, or structures for commercial or service activities, as long as they serve the main project).

Like any local plan, the content of the integrated development plan must be consistent with the master plan (or planning guidelines, until a master plan is adopted). An integrated development plan is a local plan for one or more specific developments.

Issuance of an integrated development plan supersedes the local plan, or the relevant part, for areas covered by the integrated plan.

An application for an integrated development plan is submitted by one or more investors, enclosing their proposed draft plan.

To proceed with preparation of an integrated development plan requires approval of the commune council. After this approval is granted, a planning procedure will be carried out, one stage of which is conclusion of an urban planning agreement. It is a document in the form of a notarial deed clearly and formally defining the mutual obligations of the parties (commune and investor(s)), including, first and foremost, the investor's obligations to implement a complementary project for the benefit of the commune. Importantly, the commune can also commit to implementation of a complementary project if it falls within the scope of the commune's own tasks.

URBAN PLANNING AGREEMENT
a notarial deed defining the mutual obligations of the commune and investor(s), including implementation of a complementary project

Applications for adoption of an integrated development plan could be submitted starting 24 September 2023. This is certainly an intriguing solution, and we believe it offers an alternative method for investors to carry out the development process, especially if no other options exist.

Other important changes

In the spatial planning system, the amendment maintains local zoning plans, which constitute acts of local law. The local plans will have to be consistent with the master plans, which are higher-ranking, but once a master plan is enacted, the existing local plans will not have to be amended, even if their provisions turn out to be inconsistent with the master plan.

SELECTED CHANGES IN THE URBAN PLANNING SYSTEM (IN A NUTSHELL)

HOW IT WAS	HOW IT WILL BE
Planning guidelines binding when adopting zoning plans, but not in issuance of decisions on building conditions	**Master plan** binding when adopting zoning plans and decisions on building conditions
Optional development strategy for the commune	**Mandatory development strategy for the commune** unless a supra-local development strategy exists
Local zoning plan consistent with the planning guidelines	• **Local zoning plan** consistent with the master plan • **Integrated development plan** a local plan for one or more specific developments, covering the main project and complementary projects
Decision on building conditions	**Decision on building conditions** only in the complementary development area specified in the master plan

It is worth monitoring the ongoing planning procedures aimed at adopting local plans. In principle, as of the date the planning guidelines cease to be effective, a local plan can be enacted or amended only if a master plan has been enacted in the commune, unless a date for public review of the draft local plan was announced before the date the planning guidelines ceased to be effective.

The amendment also introduced the possibility of adopting a local plan through a simplified procedure, but only in a limited subject matter.

The procedure for issuing decisions on development conditions has also been amended. First of all, as already mentioned, once master plans are enacted, decisions on building conditions will be issued only for areas designated in the master plans as complementary development areas. Additionally, a new definition of the analysis area was introduced, limiting it to 200 metres. Decisions on building conditions that are issued will no longer be issued for an indefinite period, but for a period of 5 years from the date they become final (this provision enters into force on 1 January 2026).

Additionally, the amendment cleaned up and expanded the catalogue of tools of public participation, i.e. ways to conduct public dialogue on draft zoning acts, to enable the community to build a public consensus and avoid lengthy litigation after the act is adopted. The applicable forms of public participation include compiling comments, open meetings, outdoor meetings, surveys, and meetings with the designer, although not all forms will need to be used in every case.

Also, as of 1 January 2026, the amendment calls for creation of a nationwide urban planning registry, which is expected to make urban planning data more accessible to the public. Maintained in electronic form, the registry will provide a universal source of spatial data and planning information in Poland.

Conclusion

The assumptions and aims of the amendment seem laudable, especially increasing the planning authority of communes through the introduction of mandatory master plans that will be binding when issuing decisions on building conditions. However, a legitimate concern exists that, for objective reasons, communes will not meet their obligation to enact master plans by 31 December 2025. This is all the more likely as no executive regulation exists on designation of complementary development areas in the master plan. And the planning industry points to an insufficient number of urban planners who could undertake drafting of all these master plans within the available timeframe.

Investors are concerned about the prospect of not being able to obtain a decision on building conditions in a situation where a master plan has not been adopted by 31 December 2025 and no local zoning plan was adopted for the area they are interested in. In such a situation, it will be possible to consider the use of the new integrated development plan, but this will entail incurring the costs of a complementary project. And whether or not to approve the investor's proposal to enact an integrated development plan will lie within the commune's sole discretion.

Agricultural real estate: New restrictions on trading in company shares

Poland has imposed restrictions on both direct and indirect trading in agricultural real estate within the country. To acquire agricultural property (of 1 hectare or more), the buyer must obtain a permit from the National Support Centre for Agriculture. The centre also has a right of pre-emption or purchase of shares of companies that are owners or perpetual usufructuaries of agricultural real estate (with an area of 5 hectares or more). As of 5 October 2023, the Polish parliament extended restrictions on trading in shares of companies controlling agricultural real estate to cover trading in shares of their parent company.

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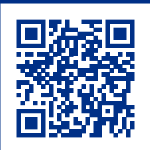


real estate

Previously, in the case of an intention to transfer shares in a company (limited-liability company or joint-stock company) which was the owner or perpetual usufructuary of agricultural real estate with an area of at least 5 hectares, the National Support Centre for Agriculture (KOWR), a government agency acting for the Polish State Treasury, had a pre-emption right to the shares (in the case of a sale) or a right to purchase the shares (in the case of a transaction other than a sale). As a result of the amendment, which introduced changes to laws including the Agricultural System Development Act, KOWR's pre-emption right or purchase right also applies to the transfer of shares in a parent (dominant) company holding shares in a subsidiary that is the owner or perpetual usufructuary of agricultural real estate in Poland with an area of at least 5 hectares.

Act of 13 July 2023 Amending the Act on Management of State Treasury Agricultural Real Estate and Certain Other Acts

Hence, share trading restrictions apply not only to subsidiaries directly holding agricultural real estate, but also to parent companies of subsidiaries holding agricultural real estate with an area of at least 5 hectares.

What constitutes a parent company?

For these restrictions, the act adopts the meaning of a "dominant company" as defined in the Commercial Companies Code.

Commercial Companies Code Art. 4 §1

Primarily, a dominant company is understood to be a company or partnership governed by the Commercial Companies Code (registered partnership, professional partnership, limited partnership, joint-stock limited partnership, limited-liability company, simple stock company or joint-stock company). However, since the Agricultural System Development Act addresses restrictions on trading shares in dominant companies, it is reasonable to assume that these restrictions pertain specifically to trading shares in limited-liability companies and joint-stock companies.

A company is considered dominant over another company when:

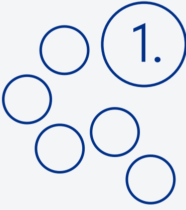
- It controls a majority of the votes at the shareholders' meeting or general meeting or on the management board of the subsidiary
- It is entitled to appoint/dismiss a majority of the members of the subsidiary's management/supervisory board
- Its management board members make up more than half of the members of the subsidiary's management board, or
- It exerts a decisive influence over the activities of the subsidiary, particularly through an agreement between the parent (dominant) company and the subsidiary providing for management of the subsidiary or transfer of the subsidiary's profits.

Recommended pre-transaction activities

Before transferring shares in the parent company of a limited-liability company or joint-stock company that owns or holds agricultural real estate in perpetual usufruct in Poland, the parties should conduct a thorough investigation into the legal status of both the subsidiary and the parent. This examination should focus on their ownership structure and the extent of control one company exercises over the other. Additionally, it is essential to analyse the legal status of the subsidiary's real estate, including the type and area of the property (whether it is agricultural or non-agricultural and whether it falls under the purview of the Agricultural System Development Act).

Pre-emption right to shares in the parent company

When the transfer of shares in a dominant company is subject to the restrictions outlined in the Agricultural System Development Act, the sale of shares may take place under the condition that KOWR does not exercise its pre-emption right, and thus refrains from assuming the role of the purchaser in the sale agreement. Consequently, the transfer of shares must be contingent upon this condition, which can be achieved by executing either one or two agreements (the first agreement would entail an undertaking to



A PRE-EMPTION RIGHT OR RIGHT TO PURCHASE SHARES OF THE PARENT COMPANY IS VESTED IN KOWR WHEN:

- The subsidiary is the owner or perpetual usufructuary of agricultural real estate in Poland with an area of at least 5 hectares
- A relationship of dominance exists between the parent and the subsidiary
- The parent company holds shares in the subsidiary
- The transaction involves trading of shares in the parent (dominant) company.

transfer the title, while the second agreement would effectuate the transfer of title if KOWR opts not to exercise its pre-emption right).

KOWR should be notified of the possibility of exercising its pre-emption right. Subsequently, within two months after receiving the notice, KOWR may submit a declaration to exercise its pre-emption right. However, the examination of the company's factual and legal status often proves to be more intricate than mere verification of the status of the real estate. Therefore, the parliament has granted KOWR not only a longer period to exercise its powers but also the right to review the company's books and records and to request information regarding unrecorded debts and liabilities.

Notification to KOWR of its pre-emption right must be accompanied by:

– Extracts from the land and building register
– A copy of the land and mortgage register
– The company's balance sheet and profit and loss account for the last three fiscal years
– A current list of shareholders
– The company's articles of association
– A declaration of the company's management board regarding the amount of contingent liabilities, with acknowledgment of criminal liability for making a false statement.

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KOWR should be notified of the possibility of exercising its pre-emption right and of its right to acquire shares in the parent company.

Right to purchase shares in the parent company

The right to purchase shares in a parent company is vested in KOWR when the transfer of shares occurs as a result of an agreement other than a sale contract, such as:

- A unilateral legal act
- A court ruling, a decision of a public administrative body, or an order by an enforcement authority issued under the provisions on enforcement procedure
- Another legal act or event, such as inheritance.

As in the case of the pre-emption right, KOWR should be notified of its right to acquire shares in the parent company, and within two months from receipt of the notice, it should make an appropriate statement to that effect. This implies that unlike the pre-emption right to shares, an unconditional transaction between the parties occurs, but after the transaction KOWR can declare its intention to acquire the shares that were the subject of the transaction.

As in the case of the pre-emption right to acquire shares in a company, KOWR may review the company's books and records and request information on encumbrances and liabilities not included in the books and records. This review may be based on various documents, including but not limited to an extract from the land and building register, a copy of the land and mortgage register, the company's balance sheet and profit and loss account for the last three fiscal years, the current list of shareholders, the company's articles of association, and a statement of the company's management board on the amount of contingent liabilities.

When exercising the statutory right to purchase shares, KOWR is obliged to pay the price. If the price is not clear from the legal act or event in question, then KOWR must determine the value of the shares. In cases where the price stated in the legal act significantly deviates from the market value of the shares, KOWR reserves the right to apply to the court to determine the price.

Sanctions for violating trading restrictions

The Agricultural System Development Act imposes severe sanctions for violations of its provisions. Primarily, any acquisition of ownership of agricultural real estate, an interest in co-ownership of agricultural real estate, or perpetual usufruct, as well as the acquisition of shares in a company that owns agricultural real estate with an area of at least 5 hectares, is deemed invalid if concluded in circumvention of the restrictions outlined in the act.

Consequently, if shares in a company that owns or holds perpetual usufruct of agricultural real estate of at least 5 hectares, or in its parent company, are transferred without notifying KOWR, or if shares in these companies are acquired through an act other than sale and KOWR is not notified, such actions will be considered invalid.

Do the restrictions apply to "grandparents"?

The question has arisen whether KOWR's right of pre-emption or purchase of shares applies exclusively to direct parent companies or also extends to "grandparents" controlling those companies. The answer is no.

The Polish parliament has imposed restrictions on trading in companies' shares only when the subject of trading involves shares of companies that are owners or perpetual usufructuaries of agricultural real estate with an area of at least 5 hectares, or shares in parent companies of such companies, provided that the parent company owns shares in the subsidiary.

Thus, we must conclude that trading in shares in companies higher up in the ownership structure is free of restrictions, particularly "grandparents" controlling the parent companies, unless, of course, the parent company itself is also the owner or perpetual usufructuary of agricultural property in Poland of 5 hectares or more.

Do trading restrictions apply to foreign companies?

An interesting yet rather complicated and controversial issue arises regarding whether restrictions on trading in shares in subsidiaries and parent companies apply when the companies are registered abroad. For instance, does this apply when trading in shares of a company based in Germany that owns agricultural real estate in Poland with an area of at least 5 hectares, or shares in a parent company based in Germany that controls shares in a subsidiary holding Polish agricultural real estate?

The Agricultural System Development Act does not directly address this question. However, there are several reasons why these restrictions may not apply in this scenario.

First, the Agricultural System Development Act makes reference to the definition of a parent (dominant) company in the Commercial Companies Code, concerning trading in shares of such a company. A dominant company to which the shares belong must be included in the catalogue of companies specified in the Commercial Companies Code, particularly a limited-liability company or joint-stock company.

Commercial Companies Code Art. 1 §2

Second, it is assumed that the concept of a dominant company within the meaning of the Commercial Companies Code typically applies to Polish companies, with foreign companies being included in exceptional cases. This is because the commands and prohibitions in the Commercial Companies Code are primarily directed at companies established under Polish law. Additionally, the concept of a subsidiary within the Commercial Companies Code often encompasses foreign subsidiaries to ensure that specific restrictions aimed at parent companies are also applicable to subsidiaries, rather than the other way around.

Finally, according to choice-of-law rules, the acquisition or loss of the status of a shareholder or member, along with the associated rights and obligations, is governed by the law of the state in which the legal entity has its registered office. Therefore, it can be inferred that the transfer of shares of companies with their registered office outside Poland, but holding agricultural real estate in Poland, is not subject to the restrictions outlined in the Agricultural System Development Act.

Art. 17(3)(7) of the Private International Law of 4 February 2011

On one hand, considering the aim of the act, applying the restrictions to trading in shares of companies registered abroad might seem justified. But on the other hand, it is difficult to imagine how the exercise of the pre-emption right or the right to purchase shares would practically work in such cases. Enforcing against a foreign company the duty to provide the information and documents needed to investigate its legal status, analysing them, and drawing conclusions based on foreign law, all within a relatively short timeframe of two months, presents significant challenges.

However, it cannot be ruled out that the parliament may take the opposite view, for example, by amending the law to clarify the provisions. Likewise, there is a possibility that the courts may adopt an interpretation different from the one indicated above. Therefore, it is all the more reasonable to exercise particular caution and thoroughly assess the legal status of companies and their real estate in light of the current state of the law. It is also advisable to analyse the case law and legal literature before structuring and carrying out transactions involving agricultural real estate in Poland or shares in companies holding agricultural real estate, or shares in such companies.

Conclusion

The amendment raises numerous questions, some of which are challenging to answer definitively until the provisions are adequately clarified by the legislature or until a consistent line of case law is established. Therefore, as part of the preparation for a share transaction that may fall under the purview of the Agricultural System Development Act, a comprehensive examination of the companies' legal status, their links, and the real estate they possess is imperative. Additionally, an in-depth analysis of current regulations and the position taken by courts and commentators is essential.

New demerger by spin-off: The simplest of demergers and a practical alternative to the demerger by separation and in-kind contribution

On 15 September 2023, an amendment to the Commercial Companies Code entered into force, introducing into the Polish legal system a previously unknown method of demerging companies: the demerger by spin-off. The parliament was obliged to implement EU directives providing for the demerger by spin-off as well as additional methods for cross-border demerger.

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M&A

Corporate reorganisations in practice

What is demerger by spin-off?

Demerger by spin-off is a new feature of Polish commercial law, but, as our experience shows, it has already been used in practice. It draws heavily on the legacy of German legislation, which, even before entry into force of the EU directive, specifically provided for this method of demerger.

A demerger by spin-off involves a transfer of a portion of the assets of the demerged entity (which may be a company or a joint-stock limited partnership) to an existing or newly formed company or companies in exchange for shares of the acquiring or newly formed company or companies, **which are taken up by the demerged company**. As a result of the demerger, the acquiring company enters into the rights and obligations of the demerged company specified in the demerger plan (universal succession) as of the date of the demerger, including, by operation of law, all rights and obligations of the demerged company provided for in tax law. Permits, licences and concessions related to assets assigned to the acquiring company in the demerger plan are also transferred to the acquiring company, unless the act or decision granting the permit, licence or concession provides otherwise. The acquiring company can be either an existing company or joint-stock limited partnership, or a company newly formed in connection with the demerger by spin-off.

UNIVERSAL SUCCESSION
accession to all rights and obligations

SINGULAR SUCCESSION
acquisition of individually designated right or rights

In a demerger by spin-off, the partners or shareholders of the demerged company do not take up shares in the company to which the assets of the demerged company are transferred. Rather, newly created shares in the acquirer are taken up directly by the demerged company. Against the backdrop of the provisions on changes in corporate form, the design of a demerger by spin-off resembles a demerger by separation. The biggest difference is the limited participation in the demerger by the demerged entity's partners

or shareholders. As in the case of the demerger by separation, a company subject to demerger by spin-off is not dissolved as of the date of demerger.

Streamlining

Carrying out a demerger by spin-off is greatly facilitated by the law itself. In a demerger by spin-off, certain elements of the company's demerger plan are excluded because the shares in the acquiring company are taken up directly by the demerged company and not by its partners or shareholders. And for the same reason, the companies participating in the demerger by spin-off must include in the demerger plan information regarding the number and value of shares in the acquiring company or newly formed companies taken up by the demerged company. As a result, the plan for a demerger by spin-off does not have to include the following elements:

- The ratio for exchange of shares of the demerged company for shares of the acquiring or newly formed companies and the amount of additional contributions in cash, if any
- The rules for granting shares in the acquiring company or newly formed companies
- Indication of the date from which the newly created shares entitle the holder to participate in the profit of the acquiring or newly formed companies
- Indication of the rights granted by the acquiring or newly formed companies to shareholders, partners, or persons with special rights in the demerged company
- Rules for distribution among the shareholders or partners of the demerged company of the shares of the acquiring company or newly formed companies.

Additionally, the management board of a company participating in the demerger is not obliged to prepare a written report justifying the company's demerger. Unlike a demerger by separation, where examination of the plan by an auditor can be waived (optionally, with the shareholders' consent), in the case of a demerger by spin-off the need for audit of the company's demerger plan is excluded by law.

	DEMERGER BY SEPARATION	DIVISION BY SPIN-OFF
Shareholders' rights	Shareholders of the separated company become shareholders of the acquiring company	Shareholders of the spun-off company do not become shareholders of the acquiring company
Property of the demerged company	The separated assets are transferred from the separated company to the acquiring company without mutual consideration	The spun-off company obtains shares in the acquiring company for transfer of the spun-off assets
	Shares in the acquiring company are taken up by shareholders of the separated company	Shares in the acquiring company are taken up by the spun-off company
	The separated company does not become a partner or shareholder of the acquiring entity	The spun-off company becomes a shareholder of the acquiring company

At the same time, other simplifications can be introduced with the consent of all the partners or shareholders of each of the entities involved in the demerger. It is possible to skip:

- Attaching to the demerger plan a statement on the accounting status of the demerged company, prepared for purposes of the demerger as of a specified date in the month preceding the filing of an application for announcement of the demerger plan, using the same methods and the same layout as the last annual balance sheet
- Notification by the demerged company's management board to the management board of each acquiring company, or the newly formed company in organisation, of any material changes in assets or liabilities between the date of preparation of the demerger plan and the date of adoption of the resolution on demerger.

Demerger by spin-off as an alternative to demerger by separation or in-kind contribution of an organised part of an enterprise

Due to the foregoing simplifications, a demerger by spin-off may be an interesting alternative to carrying out a reorganisation in a

group of companies, which under previous law would have to be carried out by a demerger by separation, in-kind contribution, or transfer of an enterprise or organised part of an enterprise.

In essence, a demerger by spin-off seems to most resemble an in-kind contribution, as the acquiring company issues shares to the demerged company in exchange for the assets it receives. However, the differences are significant, and therefore a decision to conduct a separation or in-kind contribution should be preceded by meticulous legal, business and tax analysis.

As a rule, an in-kind contribution to a company includes solely assets. By contrast, in a demerger by spin-off the company's spun-off items include both assets and liabilities (for example contractual obligations). With an in-kind contribution, singular succession (contribution of individual assets to the company) takes place, which may require additional agreements between the company contributing certain assets and its creditors. Also, in the case of in-kind contribution, broad tax succession does not take place (as of the date of the demerger, accession of the acquirer to all rights and obligations of the separated company provided for in tax law connected with the assets allocated to the acquiring company). Similar restrictions will also apply to the disposal of an enterprise or an organised part of an enterprise. The advantage of a demerger by spin-off is the transfer of rights and obligations by operation of law (partial general succession). The effect of general succession will be the transfer as of the date of spin-off of, among other things, permits, concessions and exemptions, unless the law or a relevant decision provides otherwise.

TAX SUCCESSION
accession to all rights and obligations under tax law related to the acquired assets

IN-KIND CONTRIBUTION	DIVISION BY SPIN-OFF
singular succession	universal succession
(in principle) transfer of assets only	transfer of assets and liabilities
acquisition of shares by the contributing company	
lack of tax succession	tax succession (if the spun-off assets constitute an organised part of an enterprise)

Here, it should be pointed out that if the acquiring company is a joint-stock company (SA), both in-kind contributions and demergers by spin-off will, in principle, require an auditor's opinion under the provisions on in-kind contributions to joint-stock companies.

When is it a good idea to choose a demerger by spin-off, and how quickly can it be conducted?

During the company's existence, there are many situations where it is necessary to carry out restructuring. The reasons may include:

- A need for refinancing of operations
- A need to isolate specific business lines to optimise processes
- Starting joint activity with another undertaking
- The need to spin off part of the existing business in order to sell that part of the business.

Suppose a parent company spins off part of its business to a 100%-owned subsidiary. But the subsidiary has already been granted a number of permits that would have to be updated in the event of a change of shareholders (direct change of control). In such a scenario, if a demerger by separation were to take place, a need to update the permits would occur, as the shares in the subsidiary would pass to the shareholders of the parent company. The demerger by spin-off allows the parties to avoid updating the permits, as in that scenario the entities involved in the ownership structure of the subsidiary will remain unchanged.

Preserving the existing ownership structure after reorganisation may also be important, for example, for regulated entities in the capital market (investment fund companies) and financial institutions (banks), which will not be obliged to obtain a decision from the Polish Financial Supervision Authority on the lack of objection to implementation of the demerger, which might have to be obtained in the event of a change in shareholders.

Also, against the backdrop of state aid regulations, preservation of the existing ownership structure by a company that is the beneficiary of state aid may, at least in some situations, allow the state aid to be maintained, while avoiding the need to notify or obtain approval from the financing institution for the reorganisation.

In business practice, a number of other situations certainly will occur in which a demerger by spin-off will be the optimal solution.

Tax considerations should be taken into account when choosing the appropriate form of restructuring. To maintain the tax neutrality of the process (in the case of both in-kind contributions and demergers), it will most often be necessary to first internally spin off an organised part of the company. Depending on the assumptions made, allowing for the tax requirements (such as obtaining interpretations), it should be possible to carry out a demerger by spin-off within a minimum of three to four months.

The choice of the right legal form for a reorganisation will always be dictated first and foremost by the business needs, which must be effectively translated into legal and tax solutions. In this context, a demerger by spin-off creates new opportunities for reorganisation that were not available before the change of law and are worth considering at the initial planning stage.

Ensuring business continuity after a merger or demerger

For companies participating in a merger or demerger to continue their operations uninterrupted, they must be sure to maintain or reapply for the necessary permits, licences or other administrative acts. Proper preparation for this process requires not only knowledge of the regulations, but also familiarity with the various authorities' practice. The more regulated a sector is, the more issues need to be analysed in the initial reorganisation phase.

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Permits issued under administrative law in Poland are wide-ranging, and cases involving them are decided by different levels of administration. Sometimes rulings are delegated to field offices, whose practice and interpretation of the regulations can be inconsistent. And administrative officials are not always comfortable navigating the corporate reorganisation provisions, which are outside their daily routine.

Pursuant to general principles, rights and obligations under administrative law are closely tied to the entity for which they are established. As a rule, rights arising under administrative law are non-transferable and non-hereditable. They are binding on the named addressee and on the public administrative body. Thus, the rule is the impermissibility of legal succession, unless the transferability of rights arising under administrative law is grounded in a specific provision of substantive law or in the administrative decision issued pursuant to that provision.

Art. 494 of the Commercial Companies Code

Exceptions to this rule are provided for in the Commercial Companies Code. For example, Art. 494 provides for universal succession in a merger, unless a decision or a special law provides otherwise. However, the wording of this provision and analogous provisions on demergers indicates that the rules in the code are not universally applicable. Meanwhile, rights arising from such "non-transferable" administrative decisions may be crucial for the acquiring or newly formed company to be able to conduct its business. Awareness of the constraints and inconsistent approach of the authorities enables proper planning of the reorganisation (often on a day-to-day basis) to continue operations.

When planning a reorganisation, the following general principles should be kept in mind:

– Administrative-law succession applies only to permits, concessions or exemptions granted after 1 January 2001.
– The Commercial Companies Code constitutes the basis for the acquiring (or newly established) company to step into the shoes

of the acquired (or demerged) company—unless in the given case there is an act or decision excluding application of the code in this respect. Claims by some authorities that a special provision is needed for this to occur are unfounded.

- After the date of the merger or demerger, the acquiring or newly formed company must further continue to meet the criteria for obtaining the permit in question, whether the criteria are subjective (e.g. having a clean criminal record, or requirements for legal form) or objective (e.g. possessing appropriate assets or qualified personnel).
- The code rules cannot provide a basis for allocation of rights and duties among the companies involved in a demerger.

Reorganisation and transfer of a decision on environmental conditions

Pursuant to Art. 72a of the Environmental Impact Assessment Act, with the consent of the party to whom the decision was issued the authority competent to issue an environmental decision is obliged to transfer the decision to another entity if the recipient accepts the conditions contained in that decision.

Art. 72a, Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection, and Environmental Impact Assessment

In the procedure for transferring a decision on environmental conditions for development, only two parties are involved, i.e. the rightholder under the decision and the party interested in assuming the rights. The entity entitled to assume the rights should submit a request to transfer the rights under the decision to the authority that issued the decision. The rights arising from an environmental decision are transferable, but only under the conditions stipulated by the act. This means that the transfer of such a decision can only take place via an administrative decision.

However, practice shows that the transfer procedure is not so simple. Administrative authorities interpret Art. 494 of the Commercial Companies Code in conjunction with Art. 72a of the Environmental Impact Assessment Act inconsistently. Moreover, a statement from the existing holder may not be sufficient, and sometimes is impossible to obtain, since the entity has already been "absorbed" by the newly formed or acquiring company, i.e. formally it no longer exists.

Art. 494 of the Commercial Companies Code in conjunction with Art. 72a of the Environmental Impact Assessment Act

This lack of consistent treatment by the authorities disrupts reorganisations, especially if multiple decisions are being transferred, issued by different authorities in different parts of the country (a dilemma we have faced more than once).

Transfer of a non-final decision, or partial transfer, i.e. of only some conditions of the environmental decision, is also problematic. Most commentators seem to reject this possibility. To avoid complications and ensure business continuity, this issue should be consulted in advance and planned for in the draft terms of reorganisation.

These problems also arise in corporate mergers and demergers, as the Commercial Companies Code and specific laws in relation to the code often prove inadequate.

Reorganisations of energy companies and industrial customers

Due to its importance to state security, energy is one of the most regulated areas of the economy. For example, the Energy Law provides for expiration of a licence due to deletion of the company holding the licence from the commercial register. However, the legal literature has begun to recognise that this provision does not apply when the licensed activity is continued through succession (or under the principle of continuation in the event of conversion of corporate form).

The Energy Law contains a whole catalogue of requirements for obtaining a licence, and the President of the Energy Regulatory Office has issued guidance in the form of "information packets" whose volume exceeds the length of this article many times over. This guidance is intended to help applicants submit the correct set of documents when applying for a licence. These requirements include:

- No criminal record for offences related to the business in question (harder than it might seem to demonstrate in the case of foreign entities)
- Possessing the necessary infrastructure (technical capabilities)
- Access to financial resources ensuring proper operations
- Guarantee of proper performance of the licensed activity.

The regulator may request clarifications to verify whether the acquiring or newly formed company meets the necessary requirements for holding a particular licence. If this cannot be confirmed, the regulator may amend or revoke the licence.

On the other hand, with a demerger, the parties need to remember to contact the market regulator to determine the procedure for obtaining a new licence or amending the existing one, if after the reorganisation the licensed business is to be continued by more than one company. While an existing licence may be amended some time after the merger or demerger, a new licence should be issued on or immediately after that date. This means that it is necessary to prepare the application and collect the required documentation well in advance, so that the regulator issues a licence in due time to guarantee the continuity of the licensed activity.

For obtaining and enjoying relief for industrial customers, the regulator has confirmed that in performing its obligations as an industrial customer and applying for industrial customer status in the following year, the acquiring company may rely on the financial data of the acquired company which had this status on the date of the merger. The authority recognises that the application for relief for the following year may include the aggregated financial data of both companies, to demonstrate that the acquiring company meets the requirements for obtaining relief.

Reorganisations of food and healthcare companies

The food industry and healthcare market are strictly regulated areas. Meeting numerous requirements set forth in the Pharmaceutical Law, the Medical Devices Act, the Food and Nutrition Safety Act, as well as for example the Act on Prevention of Alcoholism and Upbringing in Sobriety, is subject to supervision by such authorities as:

- The Office for Registration of Medicinal Products, Medical Devices and Biocidal Products
- The Minister of Agriculture and Rural Development
- The Minister of Climate and Environment
- Pharmaceutical and sanitary inspectorates
- Field offices of the state administration and local government bodies.

”

Even if a permit is transferable, in practice administrative bodies are reluctant to amend an administrative decision (the form in which all types of permits are issued) to designate a different holder.

For example, in transactions or reorganisations involving a supermarket chain, in the food industry it is important to remember that each store has a separate sanitary approval, and if the store sells alcoholic beverages it must have three retail licences (depending on the strength of the products) to offer the full range of products. Under law and practice, alcohol permits are treated as non-transferable, as are pharmacy permits (especially after last year's amendment to the "Pharmacies for Pharmacists" law, which is highly controversial and has been challenged before the European Commission).

Even if a permit is transferable, in practice administrative bodies are reluctant to amend an administrative decision (the form in which all types of permits are issued) to designate a different holder.

Thus, if as a result of the companies' reorganisation, a regulated activity carried out by company X is taken over from a given date by company Y, the administrative bodies usually take the position that it is necessary to issue a new administrative decision to the new entity. Formally, this will involve revocation of the permit for X and issuance of a new permit to Y. In this case, it is necessary to coordinate the reorganisation process for all new permits to be issued on the scheduled implementation date of the companies' reorganisation, as well as to realistically predict the time required to transfer the legally required permits or obtain new ones.

Conclusion

Only an extensive analysis of the factual and legal status of the planned reorganisation will allow it to be properly prepared, while maintaining business continuity and minimising the costs. Involving specialists in various fields of law in the reorganisation will ensure that the entire process runs smoothly, while reducing the risks associated with transfer of rights under Polish administrative law.

Control of foreign subsidies: New restrictions in M&A transactions

Undertakings planning significant mergers and acquisitions in the European Union should pay attention to a number of regulations and legal restrictions on M&A at the EU level which the Commission has begun to apply in recent years—particularly the Foreign Subsidies Regulation. The new EU provisions can complicate, prolong, and sometimes block transactions altogether.

ANDRZEJ MADAŁA
Competition practice

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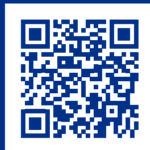
M&A



competition

In difficult times, security issues, including oversight of businesses, become a priority, at the EU level and in the member states. The provisions on control of foreign investments adopted in recent years are a good example. In the European Union, such a regulation was adopted in 2019 and went into force in 2020, as did the expanded Polish provisions comprehensively regulating control of foreign investments. Since then, new or amended acts have been adopted in 22 EU member states.

Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. Act on Control of Certain Investments of 24 July 2015

The European Commission has implemented other legal instruments to increase the security of economic transactions within the single internal market. As a first step, the Commission expanded the application of Art. 22 of the EC Merger Regulation. Under the one-stop-shop rule, concentrations with an EU dimension (i.e. significantly larger than the domestic dimension) are notifiable to the Commission and are no longer examined by national antitrust authorities. However, there is a referral mechanism between the Commission and national authorities. It helps assign cases between the Commission and member states in accordance with the principle of subsidiarity (the idea is that each case should be addressed by the most appropriate authority). Currently, under Art. 22 of the EC Merger Regulation, **member states (national antitrust authorities) may file a request with the Commission to examine on their behalf any concentration that does not have an EU dimension and was not notifiable under domestic merger control provisions**. Moreover, such a request can be filed even if the transaction has already closed.

Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings

This approach makes it possible to review transactions involving undertakings that may play a big competitive role in a given market, even though at the time of the concentration they generate little or no turnover. These could include, for example, startups, undertakings supplying critical goods or services to another industry, as well as entities with access to competitively significant

assets (such as raw materials, infrastructure, data or intellectual property rights), conducting significant research, or owning innovative solutions.

And in 2023, the EU provisions on oversight of the impact of third countries on the proper functioning of the internal market came into force, introducing a mechanism for the Commission to investigate and control third countries' subsidising of planned business ventures in the EU by undertakings (both private and state-owned). The Commission's new powers pertain to two spheres of economic activity: public procurement (see article on page 25) and M&A.

Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market

Oversight of foreign subsidies: Legal framework for merger control

Foreign subsidies can distort competition, in particular if a concentration results in a change of control of EU undertakings—hence the introduction of oversight mechanisms allowing the Commission to examine the source of funds giving a competitive advantage to foreign undertakings in the area of corporate concentrations.

The provisions refer to typical transactions defined as "concentrations" in antitrust provisions. These will be transactions concerning:

- **Merger** of two or more independent undertakings or parts thereof
- **Acquisition of control** over another undertaking or part thereof via the purchase of securities or assets, by contract, or by any other means
- **Establishing a joint venture** performing all the functions of an autonomous economic entity.

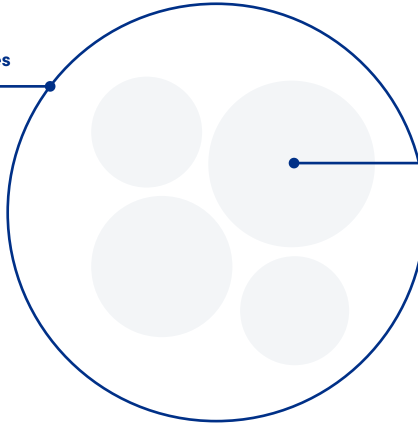
The obligation to notify intended concentrations applies to transactions meeting both of the following criteria:

- At least one of the merging undertakings, acquired undertakings or joint ventures is established in the European Union and generated **aggregate turnover in the EU of at least EUR 500 million** in the financial year preceding the concentration, and

REQUIREMENT TO NOTIFY INTENDED CONCENTRATION (GENERAL RULE)

EUR 50m
granted from third countries

All participants were granted a total of > EUR 50 million from third countries during the last three years



EUR 500m
turnover in the EU

At least one of the participants is established in the EU and generates at least EUR 500 million in turnover in the EU

– **The undertakings participating in the concentration were granted combined aggregate financial contributions of more than EUR 50 million from third countries** in the three years preceding conclusion of the contract, announcement of the public bid, or acquisition of a controlling interest (in the case of an acquisition, this pertains to the acquirer(s) and the acquired undertaking; in the case of a merger, the merging undertakings; in the case of a joint venture, the undertakings creating the joint venture, and the joint venture itself).

The concept of financial contribution is defined broadly in the regulation, encompassing a wide range of support measures, not exclusively monetary transfers (e.g. tax exemptions or supplies of goods or services).

Importantly, a financial contribution provided by a third country should be understood to include support funds provided by central government institutions, as well as by other public authorities, foreign public entities, and private entities whose actions are attributable to a non-EU state. The restrictions also apply to multinationals based in the EU that have been granted subsidies from third countries.

FOREIGN SUBSIDY

where a third country (from outside the EU) provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.

Foreign subsidies are subject to Regulation 2022/2560 if they actually—or even potentially—distort competition within the EU.

Notification procedure and the Commission's powers

The Commission has broad investigative powers in the control of concentrations of undertakings involving foreign subsidies, and is the exclusive body authorised to apply Regulation 2022/2560.

On its own initiative (*ex officio*), the Commission may, among other things:

- Investigate information from any sources (e.g. member states, natural or legal persons, business associations, etc) pertaining to alleged foreign subsidies distorting the internal market
- Conduct necessary inspections of undertakings and associations of undertakings in EU member states, including searching their premises and vehicles, requesting explanations from representatives or members of staff, and examining books and business records and making copies of such documentation
- Conduct a market survey in a specific sector and request that all necessary information be provided by designated undertakings or associations
- Request the transfer of all necessary information regarding pending proceedings not only from the parties to the proceedings, but also from other undertakings or associations, member states and third countries.

The Commission may also carry out inspections in a third country (outside the EU), provided that the government of that state has been officially notified and raises no objection to the inspection.

Under Regulation 2022/2560, in principle, the **review of concentrations is *ex ante* control**: obliged undertakings must notify their intention to concentrate. The Commission may also request prior notification of any concentration that is not otherwise a notifiable concentration, at any time prior to its implementation. This will take place when the Commission suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration.

Additionally, the Commission may review a concentration meeting the notification criteria but not notified by the party or parties prior to implementation (***ex post* control**), or notified at the request of the Commission. If in such case the Commission finds that the concentration distorts the internal market, the Commission may

require the participants to **restore the situation prevailing prior to implementation of the concentration** as far as possible (e.g. by unwinding the concentration, or if that is not possible, ordering other appropriate measures aimed at restoring the status quo ante).

Moreover, **the Commission may impose interim measures on the participants of a concentration** when (i) there are sufficient indications that a financial contribution constitutes a foreign subsidy and distorts the internal market and (ii) there is a risk of serious and irreparable harm to competition on the internal market. The catalogue of these measures is open-ended, but may include for example a commitment to:

- Refrain from certain investments
- License assets acquired with the help of foreign subsidies
- Offer access to elements of infrastructure (research facilities, production capabilities, essential facilities) acquired or supported by foreign subsidies distorting the internal market.

As a rule, the parties to a planned concentration must **refrain from implementing a concentration before notification, and until the Commission issues a decision or the time limit for issuing a decision lapses (suspension requirement)**.

The notification procedure is conducted in **two stages**. Following notification of the intended concentration, the first stage, a **preliminary review**, is held. This proceeding should be completed within 25 working days. During this time the Commission will either close the proceeding, or issue a decision launching an in-depth investigation (second stage). This decision is based on the Commission's determination of whether the undertaking has received a foreign subsidy, and if so, whether it could distort the internal market.

The **in-depth investigation** should be completed within 90 working days. However, the Commission may extend it up to an additional 20 working days. If the parties to the concentration propose commitments to remedy the distortion of the internal market, the in-depth investigation will be extended by 15 working days. The time limits for both the first and second phase exclude periods where the Commission is waiting for the parties to make up shortcomings in the notification, or to submit additional information requested by the Commission.

During the in-depth investigation, the Commission will make a further assessment of the foreign subsidy, using a **balancing test,** weighing the negative effects of distortion against any positive effects on growth of the internal market, in line with relevant policy objectives of the EU.

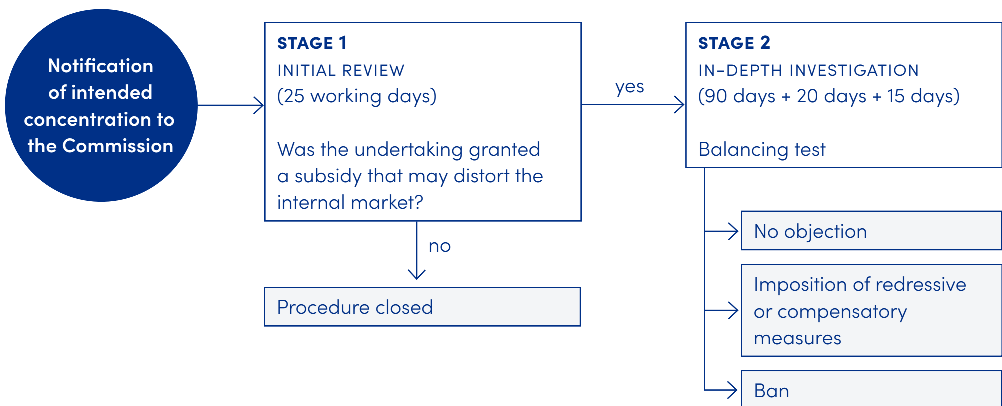
After conducting the proceeding, the Commission may issue one of the following determinations:

- A no-objection decision (if the distortion is outweighed by positive effects)
- A decision with redressive measures or commitments (if the measures will fully and effectively remedy the distortion), or
- A decision prohibiting the concentration, where the Commission finds that the foreign subsidy distorts the internal market.

The redressive measures or commitments within the Commission's reach may include the following (an open-ended list):

- Offering access to infrastructure (research facilities, production capabilities, or essential facilities)
- Reducing capacity or market presence
- Refraining from certain investments
- Divestment of certain assets
- Repayment of the foreign subsidy.

NOTIFICATION PROCEDURE BEFORE THE EUROPEAN COMMISSION



In extreme cases, **the Commission may even demand dissolution of the transaction.**

Undertakings failing to comply with the regulation must take into account the possibility of facing **hefty fines**. If the undertakings failed to notify a notifiable concentration, or if they carried out the concentration before obtaining the Commission's position or in breach of the Commission's position, the Commission may impose a fine on the undertakings not exceeding 10% of their aggregate turnover in the preceding financial year. Additional fines not exceeding 1% of their aggregate turnover may be imposed for submitting incorrect or misleading data to the Commission.

New obligations and challenges for undertakings

The Commission's control of foreign subsidies significantly alters and complicates the M&A environment. The new regulations also significantly reduce the legal certainty of undertakings. The Commission may call on them to notify a transaction as soon as it suspects that the transaction may have a negative impact on the state of competition in the EU market.

For undertakings, particularly those outside the EU (but also for global capital groups based in the EU), this means examining the obligation to report new transactions and investments within the EU. Significantly, the regulation's requirements apply not only to undertakings from states such as the Russian Federation or the People's Republic of China, but also encompass countries like the United States, Japan, South Korea, Canada and Taiwan—large, non-European free-market economies whose companies account for a significant portion of M&A transactions in the EU market.

To establish the notification obligation, a large amount of data on financial contributions (subsidies) received from non-EU entities must be collected and processed. Given the very broad definition of subsidies (also including loans or the supply of goods or services), this involves a great deal of effort and resources. This is critical, especially for large corporate groups which may number dozens of entities. Such requirements can pose a particular problem for investment funds and their capital structures (where the flow of information between different entities tends to be limited).

Additionally, only submission of all the required information and documents will allow the Commission to consider the notification complete, so it can begin the procedure. In this regard, the notification form (FS-CO) is very detailed.

We can expect that the importance of expanded merger control mechanisms for undertakings in the European Union will continue to grow. These mechanisms are already an integral element in planning M&A transactions, particularly international deals.

From state court to arbitration

On 1 July 2023, another major amendment to the Civil Procedure Code entered into force. The changes are intended to speed up the hearing of court cases. They involve general provisions, consideration of the merits, interim relief, enforcement, and arbitration. In this article, we examine the changes to Part Five of the Civil Procedure Code—the arbitration chapter.

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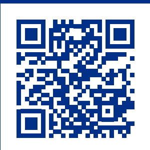


arbitration

Changes to the Civil Procedure Code in Poland regarding arbitration are generally moving in the right direction. They expand the types of disputes that may be resolved by arbitral tribunals, limit the number of instances in post-arbitration proceedings, as well as create incentives for parties to enter into arbitration agreements.

Redirecting a case to arbitration

The amendment from July 2023 enables the parties to a dispute brought before a state court to move the case to arbitration. Similar solutions have been discussed in many countries, including France, Italy and the UK, with the aim of relieving the burden on state courts.

Prior to last year's amendment, conversion to arbitration was possible under the Civil Procedure Code, but now it is provided for expressly and has been institutionalised.

The newly added Art. 1161^{1} entitles the parties to redirect the case to arbitration at any time up until final resolution of the dispute. For this purpose, the parties must enter into an arbitration agreement after a dispute arises, known as a compromise agreement. Part Five of the code already provides for similar solutions in individual employment disputes and disputes involving consumer contracts, and specifies the requirements that must be met for a compromise on these issues to be valid.

In our view, the introduction of Art. 1161^{1} and the placement of this provision indicate the permissibility of extending this provision to individual employment cases and disputes over consumer contracts. After all, since the case is pending in state court, the requirement for the arbitration agreement to be reached after the dispute has arisen is satisfied. Compared to other cases, the only difference will be the obligation to conclude a compromise clause while observing the specific requirements foreseen for cases of this type.

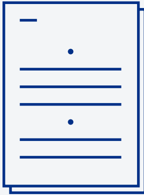
Scope and effects of conversion

If the parties decide to divert the case from state court to arbitration, they will be required to submit the agreed arbitration clause to the court. It should include an explicit agreement by the parties to submit a specifically defined dispute to arbitration and identify the subject matter of the dispute or legal relationship from which the dispute arose. Also, for the parties, it would be in order to note the legal basis for the record, i.e. Art. 1161 §1 of the Civil Procedure Code, and to indicate the court before which the dispute is pending and the case number.

The court must affirm that the provision is consistent with the law and public policy, does not seek to circumvent the law, and is valid and effective. This means that the admissibility of entering into a compromise will be assessed analogously to the withdrawal of a statement of claim, acknowledgement of a claim, waiver or limitation of a claim, or conclusion of a settlement in conciliation proceedings or before the competition and consumer protection court.

In practice, it seems that when entering into a compromise, to avoid doubts and potential obstruction in the future, the parties should more broadly set the rules under which they are moving the dispute to arbitration, in particular since the scope of those rules will depend on the stage of the state court proceedings when the dispute is transferred. After all, conversion is permissible at any time before the dispute is resolved with legal finality, i.e. also when the case is on appeal.

For the parties, it makes sense to determine the place of arbitration, as if they do not choose the law applicable to the arbitral agreement, it is the law of the place of arbitration that will be applied to assess its effects and determine the extent of interference by state courts in the arbitration proceedings and the award. It is worth agreeing on whether the procedure is to be conducted before an institutional or *ad hoc* tribunal, as well as how big an arbitral panel is to decide the dispute. Also, it is possible to agree on the procedural rules according to which the arbitration will be conducted, e.g. the rules for exchange of pleadings or service of documents. But above all, given the differences in arbitration proceedings in this regard, the parties should determine the extent to which evidence already shown to the state court can be used in



AN ARBITRATION AGREEMENT AFTER A DISPUTE HAS ARISEN (KNOWN AS A COMPROMISE CLAUSE) SHOULD INDICATE:

- An express agreement of the parties to submit a specific dispute to arbitration for resolution
- The subject matter of the dispute or legal relationship from which the dispute arose
- The legal basis for the arbitration agreement (Civil Procedure Code Art. 1161 §1)
- The court before which the dispute is pending and the case number
- The place of arbitration
- Procedural rules (e.g. exchange and service of pleadings)
- How evidence admitted before the state court will be treated in arbitration

the arbitration. Making the widest possible use of evidence from the court case will reduce arbitration costs and avoid duplication of costs.

For example, in arbitration proceedings, it is the party that must ensure the presence of a witness at the hearing, and the tribunal cannot forcibly compel attendance. This may result in eliminating from the witness list anyone whose attendance the party cannot ensure. Regardless, it may be expedient and cost-saving to agree to base the arbitration award on the record of witnesses' testimony they presented before the state court.

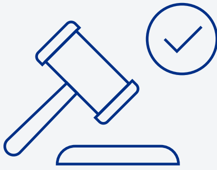
In arbitration, there are also different rules governing the admission of expert opinions. In principle, it is the parties who present expert opinions, but unlike in state court, they are not treated as private document evidence, i.e. merely a statement of the proponent's position, but as an expert opinion. It is exceptional for the arbitral panel to appoint an expert, and when it does so it is not limited to the list of court experts.

If the state court approves the compromise clause entered into by the parties, it will discontinue the proceedings at the parties' mutual request, although it does not seem that a mutual request is required. By effectively concluding a compromise, the parties have set aside the jurisdiction of the state court over a particular dispute, and therefore the court no longer has the authority to rule on the dispute, and a request by one of the parties should be sufficient grounds for discontinuing the state court procedure.

In view of Art. 744 §1 of the Civil Procedure Code, discontinuance of the proceedings will result in the lapse of previously ordered interim relief, and as a result will give rise to the possibility under Art. 746 §1 to seek compensation for injury caused by enforcement of interim relief. This does not seem to be an effect of discontinuance intended by the drafters. To avoid this risk, a minor amendment to Art. 746 §1 would suffice, namely to exclude from its application cases redirected to arbitration under Art. 1161¹, while setting a time limit within which the claimant would have to initiate arbitration proceedings (i.e. how long interim relief would remain in force after the state court proceeding is discontinued). This would be analogous to Art. 733 §1, which specifies the time within which a claimant who has obtained interim relief prior to commencement of state court proceedings must file a statement of claim, or else the interim relief will lapse.

Art. 1161¹ §2 provides that the limitations period on claims redirected from state court to arbitration begins to run anew from the date on which the order discontinuing the proceedings becomes final. Until now, the prevailing position has been that due to the lack of a regulation analogous to the case of rejection of a statement of claim, which explicitly states that a rejected statement of claim does not cause any effect that the code attaches to the filing of a pleading with the court, discontinuance of the procedure does not abrogate the substantive and legal effects of filing a statement of claim, including interruption of the statute of limitations. A separate rule in Art. 1161¹ §2 may deepen doubts regarding the effect of discontinuing the procedure.

The foregoing provision is supplemented by Art. 1165 §1¹, pursuant to which the court is obliged to dismiss, at its own initiative, a statement of claim or a motion to institute non-adversarial proceedings if it concerns a dispute that was the subject of a case discontinued pursuant to Art. 1161¹ §2. The purpose of this provision is to preclude the state court from re-examining a dispute that is the subject of a case discontinued pursuant to a compromise agreement. If the parties decide to move the case to arbitration, but the arbitration award is unsatisfactory, they will not be able to bring another action on the merits before the state court.



IF THE COURT APPROVES THE COMPROMISE:

- The state court will discontinue the proceeding
- Any existing injunctive relief will lapse, and the respondent can claim compensation for damage caused by enforcement of interim relief
- The limitation period for claims begins to run anew
- It will no longer be possible to file suit in state court over the same case
- The court will refund three-fourths of the court filing fee, but no other incurred costs

Court costs in case of conversion

Along with the introduction of Art. 1161^{1} to the Civil Procedure Code, the Act on Court Costs in Civil Cases has also been amended to provide that in the event of discontinuance of the proceedings at the mutual request of the parties before the court of first instance following conclusion of a compromise agreement, three-fourths of the court filing fee is to be refunded. While this is reasonable, it may prove unsatisfactory to the parties, and thus discourage the diversion of pending cases from state court to arbitration. Additionally, if any evidentiary proceedings were already conducted, or even completed, before the state court, generating costs (e.g. for appearance of witnesses or preparation of expert opinions), it should be assumed that such costs will also be subject to the state court's decision and will be borne by the parties. Unfortunately, there are no rules in the code for incurring such costs, and the rules for allocation of costs under the Civil Procedure Code do not seem adequate for a situation where the dispute is redirected to arbitration.

Conclusion

In short, we view this amendment to the Civil Procedure Code as a step in the right direction, but it needs to be refined regarding:

- Interim relief obtained before the case is redirected to arbitration
- The possibility of discontinuing the proceedings at the request of one of the parties
- The rules for allocation of costs incurred in state court before the case is redirected to arbitration.

Also, it seems that conversion should only be allowed in the proceeding before the court of first instance. Conversion when the case is on appeal is financially unattractive—after all, the costs of gathering and submitting evidence are incurred in the first-instance proceedings, and any potential costs of supplementary evidence are usually marginal. Also, the time to rule on cases in the first instance is significantly longer due to the need to admit evidence. Therefore, conversion of court proceedings in the second instance will not speed up the ruling, especially since the arbitral award may be subject to judicial review under a petition to set aside the award, which requires additional time and also usually suspends enforcement. Finally, the transfer of a case under appeal raises procedural doubts, in particular relating to the status of the judgment entered by the court of first instance. The Civil Procedure Code does not explicitly address this situation, and thus it is uncertain whether discontinuance of the proceeding due to conversion to arbitration requires the judgment of the court of first instance to be set aside first, and whether this should be done at the request of a party or at the court's own initiative.

As the purpose of this amendment to Part Five of the Civil Procedure Code is to relieve the burden on state courts, especially in large cities, where there is a backlog of cases and a long wait between filing suit and obtaining a judgment, persuading the parties to take advantage of conversion to arbitration requires clearing these obstacles as soon as possible and creating broader incentives to choose this route.

Arbitration: A recipe for efficient dispute resolution

A conversation with Monika Hartung, attorney-at-law and partner in the Dispute Resolution & Arbitration practice at Wardyński & Partners, chair of the Arbitration Council of the Court of Arbitration at the Polish Chamber of Commerce (SAKIG)

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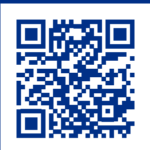

arbitration

JUSTYNA ZANDBERG-MALEC **SAKIG is one of the main arbitration courts not only in Poland, but also in Europe. According to the statistics, about 200 cases a year are filed with the court, the average resolution time is 9–10 months, and only 1% of awards are set aside by the state courts. This raises the question of what is the recipe for a well-functioning court.**

MONIKA HARTUNG Certainly, the court's reputation, which should be nurtured, is important. SAKIG is the oldest general business arbitration court in Poland. Only the highly specialised maritime courts, the Wool Chamber and the Cotton Chamber in Gdynia, have a longer tradition.

Additionally, there is the arbitrators' experience and the efficiency of the secretariat, staffed by five meticulous, hard-working, experienced people. Discipline is vital for maintaining a tight average resolution time for cases. And the negligible number of awards set aside by the courts testifies to the high standard of the rulings by SAKIG arbitrators.

Tech support is also crucial. At the moment, we are switching to electronic service of documents. We are considering abandoning service of hard copies altogether—except for the initial filing and the award, which both must be in paper form. Experts also work on digitised materials. This not only streamlines the proceedings, but also reduces costs.

Another strength of our court is the Arbitration Council, which I have had the honour of chairing since the beginning of 2023. It consists of 13 people, all of them arbitration practitioners, some of them also professors. It includes people with vast experience, but also young lawyers with enthusiasm, strength, and a desire for improvement. We do a lot to promote arbitration generally. We talk about the practical aspects of arbitration proceedings—from the moment of receiving either a statement of claim or a notice of arbitration (the two pleadings through which a dispute can be

initiated), through the organisational meeting, written witness statements, expert opinions, hearings, written summations, and finally the award. Recently we held two workshops with corporate counsel for this purpose.

We also organise conferences, some of them in cooperation with the University of Warsaw. The most recent ones concerned the evidentiary procedure, specifically the updated IBA guidelines, as well as litigation and arbitration in construction disputes, which is a hot topic.

We have held two editions of the Solidarity Arbitration and Mediation Days international conference, in cooperation with colleagues from arbitration courts and associations from Austria, Germany, Sweden, Switzerland and Ukraine. At the first conference, we raised more than EUR 20,000 for scholarships for young Ukrainian lawyers. I hope that the second one generated even more funds for this cause.

How do the relationships with other arbitration courts and associations look? Do you share experiences?

For a long time, there was a rivalry between the arbitration courts at Polish Confederation Lewiatan and the Polish Chamber of Commerce. This arose because, in a sense, the Lewiatan Court of Arbitration was originally founded to overcome procedural shortcomings of SAKIG at that time. But with my own longstanding friendship with the current president of the Lewiatan court, Prof. Marcin Asłanowicz, whom I hold in high esteem, we could hardly compete unfairly even if we wanted to. The two courts have also collaborated on the Solidarity Arbitration and Mediation Days and other events.

The arbitration community is narrow enough that predatory competition is completely pointless. The focus should be on promotion of arbitration, improving the law and procedures, and education. But it is no secret that arbitration courts—and there are more than 50 of them in Poland at various institutions—do compete with each other. This made the Solidarity Arbitration and Mediation Days conference, which was supported by many arbitration institutions, unique.

International cooperation is easier. We have signed a cooperation agreement with the Arbitration Institute of the Stockholm

Chamber of Commerce (SCC). And quite some time ago, as part of Lewiatan, together with Prof. Beata Gessel, we organised a Polish-Austrian conference with the Vienna International Arbitral Centre (VIAC).

Do these workshops and conferences ever lead to changes in the court's rules to better meet the expectations of participants?
Certainly. The rules are revised from time to time. Around five years ago, there was a big movement in arbitration institutions in this area. Currently, we are also working on an amendment. The idea is to make the proceedings more flexible, on one hand, and on the other hand to introduce mechanisms and tools to make arbitration even more time- and cost-effective.

On the SAKIG Rules Committee, we have arbitrators with a great deal of experience, including professors Wojciech Popiołek and Andrzej Szlęzak, the German lawyer Karl Pörnbacher, and Dr Maria Hauser-Morel, who worked at the International Chamber of Commerce (ICC) for years and now practises in Paris. The head of the committee is Michał Kocur, who has experience both as an arbitrator and as counsel.

Of course, we will consult the changes we have developed with the arbitration community and users, i.e. first of all with in-house lawyers, but also with transactional lawyers, as they are the ones who draft the contracts and the jurisdictional clauses in them. We are committed to meetings with these communities, because their representatives are familiar with the differences between the state court system and arbitration courts, and have arguments at hand to encourage their clients to opt for arbitration.

Before I became chair of the SAKIG Arbitration Council, it did not occur to me how little knowledge there was about arbitration, even among lawyers. Therefore, my priority is to spread this knowledge, not only to corporate counsel and transactional lawyers, but also to advocates, attorneys-at-law, trainees and students.

So what is arbitration, and what advantages does it have over the state courts?
We could talk about that for days. But in short, the advantages of arbitration are speed, confidentiality and costs.

Arbitration is seen as an expensive procedure, which is not true. The SAKIG arbitration fees are lower than court filing fees when the amount in dispute is between PLN 1.12 million and PLN 24.58 million. Additionally, in arbitration, the fees can be lower than in state court even when the amount in dispute exceeds PLN 50 million, if the parties agree to reduce the number of arbitrators from three to one.

As for confidentiality, there are no public hearings in arbitration. For someone other than the parties, for example a trainee, to attend a session, both the parties and the arbitrators must consent. The only additional people at the proceedings are witnesses, and it is probably worth considering whether even this can be tightened somehow. But the witnesses do not gain much extraneous information about the procedure, because they are testifying to facts they know about that are relevant to the case. They are not exposed to the entirety of the proceedings or the award.

Awards are not published. We do seek to publish awards in redacted form, protecting the confidentiality of the parties, but generally the parties do not consent to publication. Therefore, in the name of transparency, we are considering instead identifying the panels of arbitrators, so there is no suspicion that cases are assigned over and over to the same arbitrators.

Because SAKIG has about 200 arbitrators?

Yes, there are about 200 on the list, but the list is essentially meaningless. The rule is that each party chooses an arbitrator, who can be anyone whether or not they are on the SAKIG list, and then those arbitrators choose a third, presiding arbitrator. According to the rules, the presiding arbitrator should be selected from the SAKIG list of arbitrators, but if the arbitrators prefer to appoint a presiding arbitrator who is not on the list, the arbitrators report this to the Arbitration Council for approval of the arbitrator from outside the list. I myself was one of the first people nominated and approved as the presiding arbitrator at a time when I was not on the list.

I admit that the list includes almost exclusively lawyers, and this is not a good idea. There should also be other professions, such as engineers. This is the case with the Arbitral Tribunal of the Polish Consulting Engineers and Experts Association (SIDiR).

Very often, the parties either do not appoint an arbitrator, or ask the Arbitration Council to appoint one. This brings the appointment process closer to how judges are assigned in a state court. We do not draw lots for arbitrators, but there is a nominating committee, which reviews the file, considers the needed qualifications, and recommends an arbitrator, and the Arbitration Council approves the appointment—or not.

Would you say that SAKIG specialises in certain types of cases?
Certainly in business cases. As a court, we suffered a bit after public entities significantly reduced their enrolment in SAKIG, but that was about 10 years ago. I do not know what the issue was, I was not on the council at that time, but we are now talking to public entities in an effort to restore the trust they previously had in the arbitration court. I think we are on the right track, and arbitration clauses will follow. Some of these contracts will generate disputes that become arbitration cases after an average of three to five years. In any event, more disputes from these sources should be heard at SAKIG when appropriate. We are talking about that too.

And what are the main drawbacks of the state courts that can be avoided through arbitration?
Excessive formalisation in the state courts—by contrast, in arbitration the panel basically agrees the entire procedure with the parties. It looks as follows: once the panel is constituted, the presiding arbitrator prepares an organisational order, indicating the parties and the rounds of pleadings, i.e. when the statement of claim and defence, or the application for arbitration and response were filed. How many rounds of pleadings there will be is agreed with the parties.

In my view, the statement of claim, statement of defence, and written summations are usually sufficient, but generally the parties like to have an opportunity for a reply and a rejoinder. Thus the deadlines for filing these pleadings, the method of service, the method of dealing with witnesses and experts, and the deadline for issuing an award are established.

As a rule, an award must be issued within nine months from filing of the statement of claim, but that can be hard to meet, as sometimes it takes three months or longer for the panel to be constituted,

for example when there are requests to remove one or more arbitrators. If the presiding arbitrator knows that the deadline will not be met, he or she must notify the secretary general of SAKIG, who must approve the extension or at least acknowledge that the deadline for entering the award will be postponed. All of this is also agreed with the parties in the organisational order.

We do set a backstop date by which the parties must request the admission of evidence, so that the parties cannot unreasonably prolong the proceedings by submitting evidence at the last minute. But the arbitration court or panel does not routinely deny all late applications—which is actually the standard in Polish state courts, forcing the parties to file many unnecessary submissions just in case. This does not happen in arbitration. It does sometimes happen that the statement of claim is rejected, but this occurs only in exceptional situations. Certainly the degree of formalisation is much more collegial between counsel for the parties.

The atmosphere itself and the way the case is conducted is also different, if only because the arbitrators do not wear togas. There is much less emotion, a shorter distance. This does not carry over to the award, however. There are usually three arbitrators—whereas in the state courts, during the pandemic even single-member panels heard appeals. It was only recently that mandatory three-member panels were reinstated in the state courts.

Additionally, and very importantly, the possibility exists of issuing an equitable award (*ex aequo et bono*), i.e. not based on the letter of the law but in accordance with general principles of justice. This happens very rarely at SAKIG, as arbitration is bound only by the most important mandatory provisions of law.

But does that mean that the parties must be more aware? It could be quite a burden to design this procedure themselves.

No, usually the parties obtain a proposed organisational order from the presiding arbitrator, which is typically about 10 pages long, and are asked to submit comments. In general, the manner of address is also different. The panel does not "order" the parties to do things, but politely requests. And the parties can propose amendments.

Then we have an organisational meeting, most often online, and the parties submit their comments. The presiding arbitrator notes them, agrees on the final version of the order with the other

arbitrators, and delivers it to the parties. Usually most of the comments, if not all, are taken into account. This is the flexibility of the procedure.

Unfortunately, sometimes, in defiance of the panel, the parties extend the deadlines themselves, for example for pleadings. The arbitrators might propose a one-month deadline, while the parties ask for three months. This happens very often.

SAKIG hears around 200 cases per year, within the default deadline of nine months. What if the number of cases increased significantly? What is the capacity of the arbitration court?
We could hear about 600 cases per year. At this point, we are only limited by our obligation to record the proceedings, and we currently have only two rooms equipped for recording. We have an extensive list of arbitrators. Assuming one hearing per day, as the arbitration hearings are also different, we could easily handle 600 cases in a year.

But there are not that many cases. A really large number of them are filed with us compared to other arbitration courts in Poland. A much bigger number, about 600 cases a year, are filed with the leading Ukrainian arbitration court. But they deal exclusively with international cases, while most of our cases are domestic.

So it is mainly low social awareness that holds down the number of arbitration cases?
Yes.

Are there no downsides to arbitration?
Judicial review, in the form of an application to set aside an award, can be considered a downside, but less than half of awards are challenged and the risk that the award will be set aside is very low. In Switzerland, the parties can exclude the right to apply for setting aside the award, but in Poland we are fond of arguing. But note that more than half of all awards are performed voluntarily by the parties.

Another disadvantage could be that the justifications for the awards are sometimes not as meticulously drafted as in the state courts, where the requirements are more strictly defined, as the factual and legal basis for the decision must be provided under

Art. 327^1 §2 of the Civil Procedure Code. In the arbitration award, it is sufficient to state the grounds for the award. But if there are severe shortcomings in the justification for the award, the parties can seek to set aside the award.

It is also not very good that when a party files an application to set aside an award, it may also seek to suspend execution of the award. Following such a request, the court will stay enforcement of the arbitration award until the application is heard.

As an aside, purely private "arbitration courts" also exist, and they should be subject to at least minimal oversight, as they sometimes create bizarre situations but also commit outright fraud, issuing awards impossible to perform, in exchange for money. An example would be the so-called "European Court of Arbitration" in Ciechanów. This lack of oversight can be considered a defect.

On the other hand, the single-instance nature of the proceedings is an advantage. The parties can agree on two instances (an additional appellate level within arbitration), because the flexibility of the rules would allow this, but in my view this is a misunderstanding. The parties themselves would have to determine the rules of procedure, the scope of appeal, and generally the method of proceeding at an appellate level. This would also undercut the advantage of speed.

Normally, in arbitration, an award is issued much faster than a judgment in state court. Even if it is not nine months, but a year, and then perhaps a second year for consideration of an application to set aside the award, as these ruling are issued fairly quickly by the courts of appeal. And by definition, the ruling of the court of appeal on such an application is the end of the road (unless a cassation appeal is available). So that adds up to two years.

Additionally, the state courts practically never set aside arbitration awards. And reportedly the judges who hear these applications are impressed by the quality of the awards issued by SAKIG arbitrators. I myself might write awards that are perhaps 60 pages long. I think arbitrators focus carefully on the awards they draft, also because they impact the reputation linked to their own names. Then an award by such an arbitrator can be easily identified, if only from the arbitrators' initials.

Arbitration also takes a different approach to private experts' opinions submitted by the parties. In state court, a private expert's opinion does not constitute evidence that can take the place of an opinion by a court-appointed expert, and that is a problem in state court proceedings. In our arbitration court, an expert is an expert.

There is also the advantage of not having to draw judges by lot, so you don't have a terribly complicated case being randomly assigned to a judge ill equipped to handle it.

Can an arbitrator refuse to hear a case?
Yes, and recusal is mandatory if there is a conflict of interest. Soft law exists helping to clarify potential conflicts. The arbitrator can step down on their own, or disclose the potential conflict and invite the parties to inquire further. I have been in such a situation twice myself. Once the parties submitted questions and did not request removal, and the second time I stepped down as arbitrator.

Are arbitrators bound by the relief requested by a party?
Yes, just as in a state court, they cannot grant relief beyond what was requested. And as in state court, they must also notify the parties if the legal basis for the ruling will differ from that briefed by the parties. If, for example, a party seeks an award for breach of contract, and the panel finds there was non-contractual unjust enrichment, the panel must warn the parties and give them an opportunity to comment.

There are also certain fundamental principles in arbitration, such as equal treatment and non-discrimination. The parties have a fundamental right to present their positions and be heard by the arbitral tribunal. Non-discrimination would bar, for example, an arbitration clause allowing one party and not the other to choose between arbitration and state court. There are a few such principles.

It is said that the profession of judge is the crowning of the legal profession, and only people with extensive legal and life experience should be judges. Is it similar for arbitrators?
I would dispute that. I also used to assume that this should be the crowning of the profession, but now I see that younger people can

also wear this crown. I think it is a matter of skill and mentality. It cannot be assumed that if someone is in their 60s, they are wiser than someone in their 40s. What counts is knowledge, experience, but also enthusiasm, dedication, focus, quality, and transparency. And an unambiguous approach to conflicts of interest.

Finally, I have to ask, is it fun to run an arbitration court?
It's a big effort, a big satisfaction, and a big responsibility.

Interview conducted by Justyna Zandberg-Malec

Tax policy: Dare to think small

We are living in an era of sophisticated tax diplomacy, coordination of fiscal systems on a global scale, and a high-profile fight against illegal tax avoidance, but also against perfectly legal tax optimisation regarded by the tax administration as equally undesirable. Grand tax policy is front-page news in Poland. But everyday exposure shows that the state can also pursue an active tax policy at the micro level, even achieving "customer" satisfaction. We have a few modest proposals.

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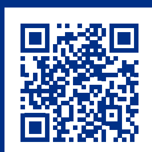

tax

To people who deal with tax law on a daily basis, our suggestions will seem completely trivial. But we are not concerned here with innovation for innovation's sake. Most tax-law problems have long been named, criticised and condemned. Rather, we would like to gather these postulates in one place, and raise the question whether the state can adopt these ideas as its own and pursue a smarter policy when making and enforcing tax laws.

Sometimes this will require consistency and sophisticated analytics, but other times it will just require thinking outside the box. That's nothing the Polish tax authorities can't handle.

Plan, prepare, act

The order of these three words is no accident. Taxpayers' recent experience with implementation of the National e-Invoicing System reveals the importance of this order. The brief and widely criticised period allotted to taxpayers to prepare for entry into force of the new system also proved too short for the public administration to properly implement the system. The decision by the Minister of Finance to postpone the rollout was welcomed with relief by taxpayers. But those who had already incurred implementation costs should not write off that investment as a dead loss.

However, when planning and preparation for entry into force of new regulations leaves much to be desired, the results are not always financially neutral for the economy. Suffice it to say that the regulations on indirect transactions with tax havens, which were set aside at the last minute, or the regulations on withholding tax on cross-border payments, which were repeatedly postponed and modified, have generated huge unnecessary costs for businesses—and therefore for the economy—which have not been reimbursed and never will be.

Sound planning and preparation for legal changes can cut this legislative inflation and costs for both the administration and taxpayers.

Write carefully and concisely

The range of sources created by the tax administration for interpreting tax law and the drafters' intentions continues to evolve. We appreciate manifestations of this effort. For example, in the area of transfer pricing, staff of the Ministry of Finance and the National Revenue Administration have drafted or contributed to numerous documents that can be invaluable in analysing the provisions.

However, creative freedom must be backed by the letter of the law. For example, legal certainty requires that the tax administration's communications to taxpayers be derived from the regulations and have some legal weight. These publications should be concise and, if possible, compile all relevant information in one place. The catalogue of available instruments is already quite broad, and includes individual and general tax interpretations, tax explanations, as well as explanations annexed to regulations. Under such circumstances, it doesn't seem necessary to publish additional guides, FAQs, or website alerts (often published at the last minute). Also, relying on the provisions will require these guidance documents to stick to a certain framework, and not give the impression that guidance actually creates the law.

But more than anything, the administration should avoid the practice of issuing draft clarifications, as in the case of withholding tax. Two drafts were released; the first one is a thing of the past, while the second is still alive, but it is almost certain that the Ministry of Finance will not finalise it. Additionally, when taxpayers cite the draft explanations in pleadings, the authorities sometimes respond that the explanations are not a good reference, as evidenced by the fact that they never went into effect.

Rein in the creativity

A common problem with tax law is retroactivity. For the drafters, it is not uncommon to indicate in the explanatory memorandum to an amendment that the proposed change is only technical or organisational housekeeping, as the previous wording of the law already expressed a certain principle.

Currently, reinterpretation of withholding tax norms is particularly common. It is possible to encounter the view that the requirement included in the regulations in 2019 that the remitters of interest must act with due diligence in examining the profile of the recipient was already in force in its current form twenty years earlier. This claim only pursues a fiscal objective, and is far removed from the canons of legal interpretation.

This practice should be abandoned by lawmakers, the administration, and the courts. Otherwise, tax law will be utterly unpredictable for taxpayers.

The dog must drop the bone

Officials who audit taxpayers have it in their nature to argue with those taxpayers. Disputes with the tax administration can last more than a decade, and the divergence of views expressed by taxpayers and officials resonates differently in the administrative courts, often resulting in inconsistent case law. Once such inconsistency arises, the Supreme Administrative Court can resolve it, but unfortunately quite late in the game.

There are also situations where the tax authorities' stubbornness seems unwarranted, and completely inconsistent with the longstanding, uniform body of jurisprudence from the administrative courts of both instances.

This is sometimes encountered by taxpayers requesting individual interpretations from the head of the National Revenue Information Centre. For example, if a taxpayer asks whether rights to shares constitute "securities" for purposes of corporate income tax, and whether transfer of the shares will be taxed in a certain way, the authority will try to force the taxpayer to answer the first

of these questions itself. This practice has been condemned by the administrative courts for years, but it happens every day.

This may seem like a trivial issue, but it has momentous consequences as in practice it limits the protective power of individual interpretations, which in Poland are the primary instrument for safeguarding the taxpayer's interests.

Taxes must not be a high-risk area

The difficulty of obtaining a fully protective tax interpretation is closely related to a broader problem. In Poland, tax law is a high-risk area. This is not just our opinion. It is statistics. If every year some 30,000 taxpayers decide to apply for an individual interpretation, it may mean that they do not trust the Polish tax system and the people who represent it.

Applying for a tax interpretation may be the market standard in some types of transactions. But the fundamental reason the number of applications is so high is undoubtedly the complexities of the Polish tax system, and simple caution. The question is, does it have to be this way?

Experience teaches that in contentious cases, where taxpayers disagree with the tax administration on the merits in their interpretation of the legal norms, the administration decides to resolve the problem by instigating criminal tax proceedings! And a common question posed to suspects is, did you request a tax interpretation on this issue, and if not, why not?

In our view, trust in the tax system and rational interpretation of legal standards—and thus not having to seek an individual interpretation in every case—should be the norm, and not a circumstance that is turned against the taxpayer when a dispute arises.

In Poland, tax law is a high-risk area. This is not just our opinion. It is statistics.

Stop abusing the law

When tax policy hits the headlines, it usually involves tax-dodging legal abuses by multinational corporations and measures to counter this phenomenon. Less attention is paid to abuse of the law by the tax administration itself. One exception is the much-discussed topic of the tax administration initiating criminal tax proceedings in order to toll the running of the limitation period on a tax liability. This allows the administration to circumvent the statute of limitations and pursue tax investigations for years. This behaviour was condemned by a seven-judge panel of the Supreme Administrative Court, but in practice most judicial panels treat this practice by the authorities quite leniently.

This is not the only case of abuse of the law. Whether wilfully or ignorantly, bodies auditing and investigating taxpayers are eager to request documents covered by professional secrecy from taxpayers, and seek to interrogate witnesses notwithstanding procedural protections. A taxpayer confronted with such demands from the administration is forced to mount an active defence.

This cannot be reconciled with the principle that the authorities are obliged to act on the basis, and within the limits, of the law. This principle requires that the tax administration must never assert certain demands.

Clear the path

So far, none of these proposals require a change in the letter of the law. Our last call is an exception.

Today, Polish tax law allows for amicable resolution of disputes in very few cases. Meanwhile, the economic reality is evolving and becoming less and less black and white. Tax disputes can take an excessively long time, and taxpayers and tax authorities have limited resources. Therefore, the next stage in the evolution of Polish tax law will be to introduce the institution of amicable resolution of tax disputes.

However, the lessons learned from the past dictate that the possibility to settle tax disputes should be introduced not haphazardly, but in compliance with the principle of "plan, prepare, act" —in that order.

Are internal investigations confidential?

Attorney-client privilege is usually considered in the context of court proceedings. But clients are increasingly interested in how privilege applies in a different context: internal investigations outsourced to law firms. Current law in Poland does not expressly address this context, but experience in other jurisdictions, as well as interpretation of existing Polish law, can provide some insights.

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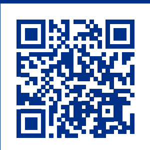

litigation

An example from England: Protection depends on the purpose of the document…

One of the more evolved mechanisms for protecting information exchanged between client and lawyer has been developed under English law. It distinguishes between litigation privilege and advice privilege. The legal advice privilege covers information exchanged between a client and a lawyer for the purpose of legal advice. The litigation privilege differs in that it also covers information exchanged with third parties, but applying it requires meeting an additional condition: conducting or preparing for litigation must be the main purpose for exchanging the information. It is recognised that such a situation may occur only if at the time the information is exchanged, a dispute has already arisen or can be expected.

In the context of investigations, this means that documents from external experts, e.g. financial audit reports, are not protected unless they were drawn up for the purpose of ongoing or anticipated litigation. However, it is irrelevant whether such documents were delivered to the lawyers, electronically or in hard copies. Contrary to the perceptions that clients sometimes share when they start working with a law firm, merely including a lawyer among the recipients of an email enclosing a document does not automatically make the document privileged. What matters is the actual relevance of the document to pending or anticipated litigation.

In one high-profile case, the British authorities were investigating suspected corruption involving an oil company, and demanded that the company release documents produced during an internal investigation it conducted into those suspicions. The company refused, asserting that it had drawn up these documents for its own purposes, precisely to prepare for the expected criminal investigation and trial that might follow. The appellate court held that the company could have expected a criminal proceeding

from the time law enforcement authorities became interested in the suspected irregularities and were just beginning to investigate them, even though they had not yet filed any charges against anyone, necessary to instigate criminal proceedings.

Serious Fraud Office v Eurasian Natural Resources Corporation

...or its content

If the link between the document and any dispute does not exist or cannot be proven in court, but it is a document exchanged between client and lawyer, protection of the document can still be sought by invoking the legal advice privilege. But in this context, another aspect is taken into account—whether the information sought to be protected contains an element of legal advice, or concerns only facts. In this regard, an arbitrary approach could lead to the absurd conclusion that to conceal documents, it would be enough to retain a lawyer to provide legal advice, and then send the lawyer the entire hard drive.

In the practice of internal investigations, this condition means that the legal advice privilege does not automatically cover all documents that a client hands over to its lawyers for analysis (e.g. contracts or accounting books), nor all documents that the lawyer hands over to the client (e.g. working documents prepared in the course of the proceedings, unless they are drafts or summaries of legal opinions). Even more so, such protection will not be afforded to reports and analyses of advisers who are not lawyers—which are never protected by the legal advice privilege.

In this context, a case in which a bank's shareholders, suing the bank over irregularities previously uncovered by the financial market regulator, asked the court to order the bank to produce transcripts of interviews with its employees conducted by lawyers as part of an internal investigation, reverberated more broadly. The court held that notes of this type do not fall into the category of documents covered by legal advice privilege if they do not reveal the tenor of advice the client obtained from a lawyer.

The RBS Rights Issue Litigation

The rules in Poland: It depends on who is asking and who is answering

In Poland, the basic category of protection for client's confidential contacts with a lawyer is the attorney-client privilege (in two flavours, depending on whether the lawyer is an advocate [*adwokat*] or attorney-at-law [*radca prawny*]). This is framed as a duty of these professionals to keep secret everything they learn from a client in relation to the provision of legal assistance. However, certain exceptions are permitted under civil and criminal procedure. They foresee that if an advocate or attorney-at-law is questioned in a civil dispute, the person may refuse to answer a question or hand over documents only if the secret that would thereby be revealed is "material." On the other hand, in criminal cases, the courts and law enforcement agencies may release counsel from the obligation of secrecy even for material information, if it is necessary for the "interests of justice" and no other evidence exists to establish certain facts.

Full protection of confidentiality is foreseen exclusively in criminal procedure, in relation to information obtained by defence counsel or counsel for a detainee. This is known as the "defence privilege," which also complements the person's right to a defence. It is understood that the right to a defence in criminal proceedings is held by a person against whom law enforcement authorities have completed an investigation and filed an indictment with the court, or have brought charges in the course of a pending investigation, or have taken any acts directed at prosecution of the individual, even before charges are brought. This essentially means that application of the defence privilege is subject to the same conditions as the English litigation privilege: the case must already be pending, or there must be a fear of initiation of the case, which can be said to exist if the acts of law enforcement authorities indicate that they suspect a certain person of having committed an offence. However, unlike the English litigation privilege, the Polish defence privilege does not extend to communications with third parties.

Supreme Court of Poland judgment of 9 February 2004, case no. V KK 194/03

An additional difficulty in ensuring full protection of confidentiality arises because the regulations do not give the client a right to refuse to answer or hand over a document on the grounds that it would violate the attorney-client privilege. Although the

Full protection of confidentiality is foreseen exclusively in criminal procedure, in relation to information obtained by defence counsel or counsel for a detainee.

Constitutional Tribunal has held that counsel's obligation to maintain secrecy is accompanied by the client's right to keep certain information confidential, and the European Court of Human Rights has found the lack of confidentiality of the lawyer-client relationship to be a violation of the right to a fair trial established by the European Convention on Human Rights, this does not completely remove the risk that authorities interested in learning information protected by the attorney's privilege may try to reach the information through clients. This was demonstrated by a judgment by an administrative court holding that since counsel is obligated to keep a secret, obtaining counsel's correspondence with the client through a search of the client's premises by the Internal Security Agency does not violate this obligation. Such an interpretation completely undermines the confidentiality of the client-lawyer relationship and means that documents would be protected by attorney-client privilege not due to their content, but due to their location at the lawyer's premises or elsewhere. This ruling was

← Constitutional Tribunal judgment of 22 November 2004,case no. SK 64/03

← *Michaud v France*, application no. 12323/11

← Province Administrative Court in Gdańsk judgment of 13 May 2015, case no. I SA/Gd 76/15

ultimately set aside, although on other grounds, but it shows that there is a real risk of such an interpretation of the regulations.

On the other hand, it would be unfounded to assume that since counsel is supposed to keep confidential everything learned from a client, clients cannot be questioned about anything they communicated to their advocate or attorney-at-law. That would allow the client to exempt all of its documentation from discovery in potential proceedings by simply turning the material over to counsel. It is just as hard to accept the notion that since the attorney-client privilege covers what the client has communicated to the attorney, the legal advice that the attorney has communicated to the client in return does not fall within the scope of the privilege. In turn, this would lead to a recognition that, for example, law enforcement authorities could freely find out how the attorney assessed the client's risk of criminal liability, which would obviously undermine the right to a fair trial and a defence guaranteed by the Polish Constitution and the European Convention on Human Rights.

English boots on Polish ground

A remedy for such systemic shortcomings in how attorney-client privilege is applied in Poland could be to implement the rules adopted by the English courts under the legal advice privilege, thus providing both the attorney and the client with an effective right to refuse to disclose information they have exchanged, if the information would reveal anything regarding the advice provided to the client. Cases in which documents containing elements of a legal opinion are sought from advocates or attorneys-at-law should be regarded as jeopardising the essential privilege under civil procedure, or ignoring (or even violating) the interests of justice under criminal procedure. On the other hand, cases in which documents containing elements of a legal opinion are sought from the client or third parties should be evaluated in terms of possible violation of rights to a fair trial and a defence under the Constitution or the ECHR.

Based on this reasoning, we may cautiously adopt the conclusions in the table below regarding the scope of protection afforded by the attorney-client privilege in Poland in the context of internal investigations.

Type of document	Possible scope of protection
Reports concluding private investigations and other documents including assessment by counsel	In principle, should not be obtainable from either the attorney or the client on whose instructions they acted, given the need to ensure the right to a fair trial and a defence
Working documents not containing elements of legal advice, but created by counsel based on information from the client (e.g. notes from interviews with employees)	Cannot be demanded from counsel as they contain facts learned in connection with providing advice—however, knowledge of the facts described in these documents can be obtained in other ways, e.g. by interrogating at trial the same employees who were interviewed during the investigation
Source documents from the client and covering correspondence sent to the lawyers for analysis as part of the internal investigation	Cannot be obtained from counsel, as documents covering facts counsel learned of in connection with the provision of legal advice, but can be obtained from the client, as they do not contain a legal assessment
Documents obtained for the purpose of internal investigations from third parties (e.g. expert reports and audit results), as well as documents provided to such third parties	Not protected in any way by the attorney-client privilege provisions, but to the extent that such third parties have been provided documents containing the legal opinions of counsel, the state authorities should refrain from obtaining them, to guarantee the client's right to a defence and a fair trial

Eco-marketing or a green lie?

Environmentally conscious consumers make up a growing segment of society. More and more people pay attention to how the production of goods affects the climate and the environment. Of course, this carries over to shopping trends, and businesses have eagerly tagged along with "green" advertising messages. But sometimes eco-advertising is more of a green lie. Products whose composition and production method have little in common with ecology are advertised as "natural" or "environment-friendly." In a flurry of advertising slogans and green emblems, it can be difficult to identify goods actually produced with respect for the environment. The scale of this phenomenon is not marginal, as evidenced by the interest of numerous consumer organisations and EU bodies.

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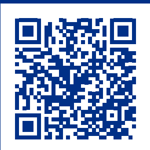


ESG & sustainability

The cardinal sins of eco-advertising

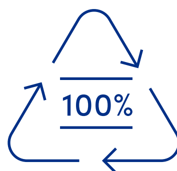
This article is based on a presentation by the authors during the webinar “Marketing in line with ESG: What should you know?” organised in conjunction with the British Polish Chamber of Commerce.

We treat the notion of an advertising message broadly, to include not only ad slogans as such, but also the appearance of the package, the label, product claims, and promotion. A product purporting to be “ecological” is often presented in green colours, against a backdrop of nature, and the label often features floral motifs.

As early as 2007, a report by the agency TerraChoice based on consumer surveys in North America identified seven sins of greenwashing, including:

- Fibbing—misleading or false information regarding the characteristics of a product or its environmental impact
- Vagueness—generic or imprecise statements and descriptions, or omission of certain information (e.g. the actual environmental impact of the product)
- Irrelevance—positioning a product as environment-friendly when the claimed distinction simply complies with legal requirements (e.g. claiming that a deodorant does not destroy the ozone layer because it does not contain chlorofluorocarbons—which have actually been prohibited for years).

MISLEADING OR FALSE INFORMATION



GENERIC OR IMPRECISE STATEMENTS

BOASTING OF JUST FOLLOWING THE LAW

Green coal—is that really a thing?

In Poland, the best-known example of greenwashing is eco-pea coal. As critics point out, apart from the greenness of peas themselves, the "eco" part of "eco-pea coal" was short for "economical," meant to refer to the low price and emphasise the cost-effectiveness of the product. But consumers may perceive the prefix "eco" as an indication that the product has environment-friendly, ecological features. This message is emphasised by "green" elements of labels for this type of coal, for example leaves, trees, and the colour green. But research by the Client Earth Foundation shows that eco-pea coal can hardly be considered friendly to the environment or human health. The name of the product is misleading to the public, as it suggests "green" features of the product that it does not have.

Eco-pea coal is an industry name for a grade of solid fuel produced from coal or lignite (in roughly pea-sized chunks) for the production of thermal energy in retort boilers.

For this reason, the foundation has taken legal action against manufacturers and distributors of eco-pea coal. Poland's Office of Competition and Consumer Protection also commissioned an audit of the legal compliance of eco-pea coal products. An additional difficulty with eco-pea coal is the inclusion of this term in the Regulation of the Minister of Climate and Environment on Quality Requirements for Solid Fuels. An attempt was made to amend this regulation, but it still uses the term "eco-pea coal," although it was clarified that this is only an industry name.

Misleading "green" assurances

In November 2023, the European Consumer Organisation (BEUC) issued the report *Unbottling greenwashing: Lifting the lid on plastic bottle recycling claims*. The document identifies the most common advertising assurances on plastic bottles, in two groups:

- "100% recyclable"
- "100% recycled."

An average consumer could read such slogans as an assurance that the bottle is entirely recyclable or comes from recycled materials, especially since the message is reinforced by the use of "green" graphics and label elements on the bottles. But these statements are

not entirely true. Not all parts of a plastic bottle can be made from recycled materials (e.g. bottle caps or lids). Thus slogans such as "This bottle was made from 100% recycled materials," "Bottle from 100% recycled materials," and "I am from 100% recycled plastic" were challenged as misleading.

The BEUC report questioned the use of various "green" logos in the form of leaves or images of nature, suggesting closed-loop circulation of plastic. Logos may also suggest environmental neutrality, an endless circulation of the same plastic, or even a positive impact on the environment.

A legal maze

No piece of legislation comprehensively answers the question of what is allowed in this area and what is not. A trader's activities can be evaluated in light of various provisions, such as unfair competition and consumer law, including directly applicable EU regulations. But the number of provisions affecting this area will steadily increase. Various bodies agree that more discipline is required for assurances of the environmental qualities of products, and efforts in this regard are being undertaken with great intensity at various levels and in various organisations.

→ Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims

One example is the work on the proposed Environmental Claims Directive, which is one of the elements of the European Green Deal. Among other things, it aims to ensure that environmental claims can be verified, for example backed by scientific data. Before a trader advertises a product as ecological, it will have to make a proper assessment, including by gathering evidence to prove the veracity of each claim. Similar requirements will apply to ecolabels and ecolabeling systems.

→ Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition process through better protection against unfair practices and better information

Work is also underway on a directive strengthening the role of consumers in Europe's ecological transition. The updated provisions are intended to enable consumers to make informed, environment-friendly decisions when purchasing products, and strengthen consumer protection against unreliable or false environmental claims by outright banning practices constituting greenwashing. Among the commercial practices considered to be unfair and deceptive acts, the directive lists for example:

- Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim
- Presenting requirements imposed by law on all products in the relevant product category on the Union market as a distinctive feature of the trader's offer.

Also worth noting is the industry self-regulation initiative of the Polish Advertising Council seeking to ensure that advertising messages are honest and comply with the standards set by the Advertising Code of Ethics. In 2023, the council expanded the code to include provisions on environmental advertising. An entire chapter of the code has been devoted to these provisions. It is tempting to suggest that the principles there should be assimilated by every trader regardless of whether it is covered by the code. The code now specifies language that should be used in "green" advertising—for example, environmental advertising should refer to a specific product or service, and the advertiser must not bathe its entire business in a green halo.

A new mindset

The activity of EU lawmakers and other organisations makes it clear that the days of "green lies" are numbered. Traders will face new requirements. So it is a good time for businesses to implement not only modern systems to protect the environment, but also best practice in advertising and marketing, to avoid exposure to nasty legal and PR surprises. Even now, it would be worthwhile for any trader to:

- Avoid the cardinal sins of greenwashing
- Develop and update marketing guidelines, including ensuring that claims and representations are factual, precise and verifiable
- Conduct an "eco-compliance" test of the veracity and honesty of advertising messages before launching campaigns (even if the campaign is prepared by an external agency)
- Develop appropriate models for responding to potential negative reception of advertising or an accusation of greenwashing.

On the road to environmentally sustainable business

Soon the European Union will require companies to proactively identify sustainability risks in their operations and supply chains, and implement measures to prevent and mitigate such risks. This is the aim of legislation already adopted and still on the drawing boards: the Corporate Sustainability Reporting Directive (CSRD), the Taxonomy Regulation, and the proposed Corporate Sustainability Due Diligence (CSDD) Directive. This is forcing companies to pay more attention to environmental self-examination.

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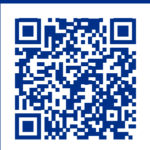


environmental protection

CSRD

Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

The CSRD entered into force on 5 January 2023. EU member states have until 6 July 2024 to implement the directive. Poland has not done so yet.

The CSRD establishes a new sustainability reporting framework and uniform reporting standards, and expands the circle of entities required to report on ESG.

The CSRD is not the first legal act requiring undertakings to disclose indicators other than financial indicators to assess their performance. A decade ago, the European Parliament enacted the Non-Financial Reporting Directive (2014/95/EU). It was transposed into Polish law through an amendment to the Accounting Act. However, that directive proved less effective than hoped, as the circle of entities subject to mandatory non-financial reporting was severely restricted. This spurred further efforts in this direction.

The CSRD is not formally related to environmental protection. Its legal basis is the EU principles of freedom of establishment and harmonisation of legislation within the EU internal market.

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings

Technically, the CSRD did not introduce any new legal act, but amended four existing EU acts. Particularly relevant here are the amendments relating to Directive 2013/34/EU with respect to corporate sustainability reporting.

The CSRD:

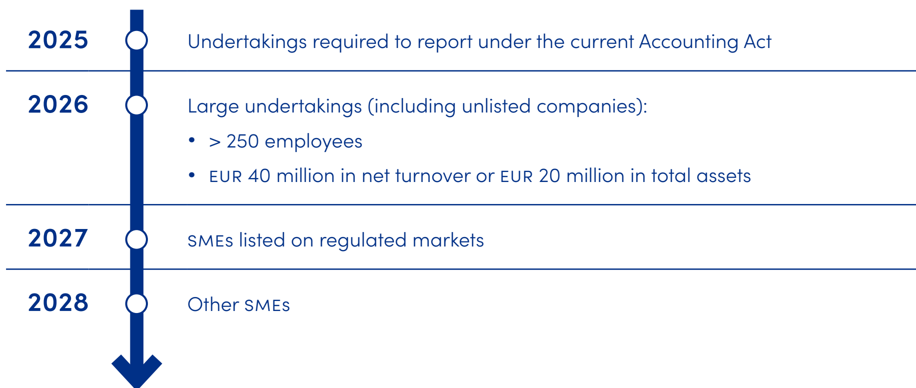
- Expands or sets standards for financial reporting, including on environmental protection and sustainability in general—the scope of such reporting will be very broad, requiring specialised knowledge and diligence in preparing the relevant information
- Amends selected rules for required audits of annual financial statements and consolidated financial statements, and expands requirements for attestation of reporting

– Clarifies the requirements for independence, objectivity, confidentiality and professional secrecy for sustainability reporting attestation.

In 2025, undertakings that are currently required to report under the Accounting Act will disclose sustainability information for 2024 based on the new CSRD guidelines. In the following stage, in 2026, large undertakings (including unlisted companies) that are not currently subject to the Non-Financial Reporting Directive will publish sustainability reports if they meet at least of two of the three following prerequisites:
– They employ more than 250 employees (average number of employees in a given financial year)
– They generate EUR 40 million or more in net turnover
– They hold EUR 20 million or more in total assets.

Small and medium-sized undertakings (SMEs) listed on regulated markets will disclose their data in 2027, but other SMEs may defer their reporting obligation until 2028. The directive also provides that SMEs should be allowed to report information according to standards commensurate with their capabilities and resources. Notably, Recital 21 of the CSRD expressly states that unlisted SMEs can use these proportionate standards on a voluntary basis. The SME standards will set a benchmark for entities covered by the directive in determining how much detailed sustainability information SMEs can reasonably request from suppliers and clients in their value chains.

ENTITIES OBLIGED TO REPORT ON SUSTAINABILITY



Sustainability reporting is intended to cover sustainability issues and the information necessary to understand how sustainability issues affect a unit's growth, performance and position. These issues are listed in quite some detail in the revised wording of Art. 19a of Directive 2013/34/EU, covering among other things:

- A brief description of the unit's business model and business strategy, including the resilience of the unit's business model and business strategy to sustainability-related risks
- A description of the unit's time-bound and established sustainability targets, including in particular, where appropriate to the unit, greenhouse gas emission reduction targets for at least 2030 and 2050
- A description of the role of administrative, management and supervisory bodies with regard to sustainability matters, and their expertise and skills
- A description of the unit's policies developed and carried out with regard to sustainability matters
- A description of the due diligence process implemented by the unit.

The last of these issues is expanded upon in the CSDD Directive, discussed further on.

Taxonomy Regulation

The Taxonomy Regulation was adopted on 18 June 2020 and became effective directly from 1 January 2022.

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment

Among other things, the guidelines under the regulation are to be applied in published non-financial reports.

The purpose of the regulation was to create a classification (taxonomy) of environmentally sustainable economic activity. Previously, no clear, uniform criteria existed for assessing what economic activity could be considered sustainable and supporting the achievement of climate neutrality.

Under Art. 8 of the regulation, undertakings subject to sustainability reporting obligations will publish information on how and to what extent their activities are related to business activities

qualifying as environmentally sustainable. In Art. 9, the regulation identifies the environmental objectives that need to be met, including:
- Climate change mitigation
- Climate change adaptation
- Sustainable use and protection of water and marine resources
- Transition to a circular economy
- Pollution prevention and control
- Protection and restoration of biodiversity and ecosystems.

In pursuit of these objectives, undertakings subject to sustainability reporting obligations will disclose information indicating:
- What percentage of their turnover originates from products or services related to business activity qualifying as environmentally sustainable
- What percentage of their capital expenditures and operating expenses corresponds to assets or processes related to business activity qualifying as environmentally sustainable.

Therefore, to consider a specific undertaking's business environmentally sustainable under the Taxonomy Regulation, it is necessary to indicate the proportion of turnover, operating expenses and capital expenditures originating from environmentally sustainable activities, in relation to those that are not environmentally sustainable.

Assessment of an activity as environmentally sustainable is to be performed on the basis of Art. 3 and 9 of the Taxonomy Regulation, with an activity qualifying as environmentally sustainable if it:
- Contributes substantially to one or more of the foregoing environmental objectives
- Does not cause serious harm to any of the foregoing environmental objectives
- Is carried out in compliance with the minimum safeguards laid down in Art. 18 of the regulation
- Complies with technical screening criteria established by the Commission in accordance with Art. 10(3), 11(3), 12(2), 13(2), 14(2) or 15(2) of the regulation.

CSDD Directive

Proposal of Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

The CSDD will have to be transposed into national law in the member states. Under the current wording of the proposal, member states will have two years from entry into force of the directive to adopt the implementing and administrative provisions necessary for transposition. The implementing provisions will have to take effect within three years of adoption of the CSDD Directive.

The negotiations on the final form of the directive, pertaining to due diligence in supply chains, began in mid-2023.

The current proposal imposes human rights and environmental due diligence obligations on certain large undertakings, including:

- Identifying actual and potential adverse impacts
- Integrating due diligence into undertakings' policies
- Preventing or mitigating adverse impacts
- Establishing a complaint procedure
- Monitoring measures and policies
- Reporting.

The measures pursued by undertakings to implement their CSDD obligations should be risk-based, i.e. proportionate to the likelihood and severity of potential adverse impacts, taking into account, among other things, their scale and scope.

The undertaking's primary duty is to exercise due diligence in conducting human rights and environmental protection activities. This is about preventing adverse impacts and remedying adverse impacts arising from the undertaking's business, to the extent that the objectives are guaranteed by law. This scope is indicated in Annex 1 to the proposal, which enumerates thirteen groups of requirements based on the indicated regulations, such as:

- The obligation to avoid or minimise adverse impacts on biodiversity under Art. 10b of the Convention on Biological Diversity of 5 June 1992
- The prohibition of production and use of chemicals listed in Annex A of the Stockholm Convention of 22 May 2001 on Persistent Organic Pollutants
- The prohibition on exporting hazardous waste or other wastes outside the EU under Art. 1(1)–(2) of the Basel Convention on

the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989.

Perhaps the most important environmental principle in the proposal is that for climate protection, inclusion of the private sector is key to achieving the objectives of these international agreements, in addition to the specific actions to be undertaken by all signatory states (including the EU and its member states). The role of the private sector is to incorporate environmental considerations into its investment strategies. The proposal creates legal tools ensuring the inclusion of business in achieving climate policy targets. It also addresses undertakings' liability for violations of the general duty of environmental due diligence, including the use of adequate preventive measures, and lays out specific requirements for performing this duty.

The proposal also provides a specific formula for supervision of fulfilment by obligated undertakings of their due diligence obligations in respect of human rights and environmental protection —undertakings should provide individuals and organisations with the opportunity to submit complaints directly to them when there are justified concerns regarding actual or potential adverse impacts on human rights and the environment due to the operations of an undertaking.

We note that the largest undertakings, required to report also concerning their supply chains, will effectively be forced to obtain this data from SMEs in their supply chain. Therefore, the coming years will show to what extent SMEs can or will actually disclose such data.

Prospects

The new environmental sustainability reporting obligations just coming into force mark only the beginning of the changes affecting companies in this area. Adoption and implementation of the Corporate Sustainability Due Diligence Directive will be revolutionary. Indeed, the proposal is clearly aimed at making enforcement of environmental obligations more realistic, but also at obliging undertakings to comply with concrete environmental obligations, and to take comprehensive sustainability requirements into account in their operations going forward.

Environmental violations: When criminal liability and administrative liability overlap

Concurrent liability occurs when the same set of facts run afoul of two different legal regimes. For example, the manager of a business might be liable under both criminal law (e.g. in the form of incarceration) and administrative law (e.g. in the form of an administrative fine). This arises particularly in environmental protection law, where over recent years there has also been a steady increase in both criminal and administrative sanctions.

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environmental protection

Situations where there is a concurrence of liability between different legal regimes raise legitimate concerns, as they could infringe the constitutional principle that one must not be punished twice for the same act (*ne bis in idem*) and thus also violate the principle of proportionality and adequacy of sanctions. Nonetheless, under current Polish law, concurrence of liability is not at all uncommon. (Concurrence of liability can also occur under a single legal regime, but it is something lawmakers strive mightily to avoid.)

For many years, in environmental law there has been a visible increase in the imposition of both criminal and administrative sanctions. The latest example under EU law, which provides for introduction of new types of environmental crimes and harsher punishment of the existing ones, is the proposed (and politically agreed) new Environmental Crime Directive. Also, the number of administrative fines and other financial and legal measures in environmental protection is steadily increasing. Therefore, business operations are linked to an increasing risk of liability under various legal regimes, and incurring liability under one regime does not eliminate the risk of incurring liability under another regime.

→ Directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC

Concurrent liability vs. ban on double jeopardy

In addressing the issue of the concurrence of criminal and administrative liability, we should first consider the principle of *ne bis in idem,* a doctrine derived from Roman law translated as "not twice in the same case" (and comparable to the doctrine of double jeopardy in common-law jurisdictions). Although this principle is specific to criminal law, it should also be taken into account in addressing the problem of overlapping with administrative sanctions.

The principle of *ne bis in idem* is not expressly enshrined in the Polish Constitution, but the Constitutional Tribunal has consistently inferred it from the principle of the rule of law, expressed in

Constitution Art. 2. The essence of the principle of *ne bis in idem* is that it is impermissible to punish someone doubly for committing the same act, or to initiate multiple proceedings against the same person in the same case.

Constitution Art. 2

The principle of *ne bis in idem* in the legal literature and the case law is understood broadly. Therefore, it covers not only concurrent liability under the criminal law regime, but also concurrent criminal liability and administrative liability. A prerequisite for application of the principle of *ne bis in idem* in a situation of the concurrence of criminal and administrative liability is that the administrative sanction must be punitive in nature—then the overall sanctions might be unduly punitive, violating the principle of proportionate sanctions.

But in the Polish legal system there is no general rule requiring application of the principle of *ne bis in idem* in a situation of concurrent criminal and administrative liability. In this respect, there is no choice-of-law rule or special procedure precluding dual sanctions. The Constitutional Tribunal has dealt with this issue many times, and its jurisprudence shows that concurrence of criminal and administrative liability is in principle permissible and does not violate the *ne bis in idem* principle. This view is justified by the consideration that the sanctions under criminal and administrative law have different purposes and perform different functions. Nonetheless, cases may arise in which administrative sanctions essentially boil down to punitive sanctions. In such a situation, double punishment cannot be accepted, as it would violate the principle of *ne bis in idem*. Each situation where criminal liability and administrative liability overlap must be considered on a case-by-case basis. Also, it should be borne in mind that the ultimate ruling in such cases will be made only in the Constitutional Tribunal.

Differences between legal liability in the administrative and criminal regimes

The legal literature and the case law aptly point to three basic differences between administrative liability and criminal liability.

First, under Polish law, only natural persons can be held criminally liable. The only exceptions are provided for in the Corporate

Act on Liability of Collective Entities for Punishable Offences of 28 October 2022

Liability Act. By contrast, under administrative law liability rests primarily on legal persons and other organisational units. In environmental law, administrative liability of individuals plays only a marginal role.

Criminal Code Art. 1 §3

Second, imposing criminal liability requires a finding of the perpetrator's culpability in commission of a crime or misdemeanour, because a lack of culpability excludes criminal liability. This is a principle fundamental to criminal law (comparable to the *mens rea* requirement in common-law jurisdictions), and is expressed in Criminal Code Art. 1 §3, pursuant to which the perpetrator of a criminal act does not commit an offence if no culpability can be attributed to him or her at the time of the act. On the other hand, liability in administrative law is strict (objective). In principle, this means that the mere fact of occurrence of a certain state leads to liability. The perpetrator's culpability does not play a fundamental role.

Constitution Art. 42(2)
Constitution Art. 42(3)

Third, in the criminal regime, the perpetrator's guilt is determined in a judgment issued by a court. In criminal proceedings, the accused enjoys certain rights, including important guarantees, some of them enshrined in the Constitution, such as the right to a defence and the presumption of innocence. In the event of violation of standards of administrative law, the relevant sanction will be imposed in the first instance by an administrative body by issuance of an administrative decision. Only if the decision is appealed will its legality be reviewed by a court (i.e. the relevant administrative court). Importantly, proceedings before an administrative body lack many of the guarantees available to the defendant in criminal proceedings.

Still, it is worth noting a worrying trend toward harsher and harsher administrative liability, which at its core becomes purely punitive. This is especially true of administrative fines, the amounts of which, as a rule, far exceed the fines imposed in criminal proceedings. This means that the parliament is shifting more severe sanctions to the administrative regime, which does not protect suspected violators with the guarantees found in criminal law. This concerns the lack of a need to determine culpability (strict liability) and the imposition of sanctions by an administrative body (instead of an independent and autonomous court).

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If criminal proceedings and administrative proceedings are conducted independently against the same person in connection with the same act, and they both result in imposition of sanctions on that person, it is necessary to examine whether in the particular case there was a concurrence of punitive liability.

An example of concurrence in environmental laws

CRIMINAL CODE ART. 182
§1. Anyone who pollutes water, air, or the land surface with a substance or ionising radiation in a quantity or form that could pose a danger to human life or health, cause a significant decrease in the quality of water, air, or land surface, or cause significant destruction to plant or animal life, shall be liable to imprisonment for a term between 6 months and 8 years.
§2. If the perpetrator of an act defined in §1 acts unintentionally, he or she shall be liable to a fine, community sentence, or imprisonment for a maximum term of 3 years.

WASTE ACT ART. 194(1)(6)
An administrative fine shall be imposed for discharging waste oils into water, soil or land contrary to the ban set forth in Art. 93.

ADMINISTRATIVE PROCEDURE CODE ART. 189D(3)
When imposing an administrative fine, the public administrative authority shall consider the sanctions previously imposed for the same conduct, criminal offence, fiscal offence, petty offence or fiscal petty offence.

Polish regulations often lead to overlapping of criminal liability with administrative liability, or overlapping of liability within the same legal regime (e.g. under criminal law). As mentioned, the parliament tries to avoid dual sanctions for one event under a single regime, but the circumstances and significance of the act do not always allow the person to escape double punishment. Practically, concurrent liability will tend to arise in situations vital for the environment and for human life, health and safety, as well as transparency in regulated industries.

Art. 182 of the Criminal Code and Art. 194(1)(6) of the Waste Act are an example of the concurrence of criminal and administrative provisions.

In Criminal Code Art. 182 §1, a condition for punishability of the perpetrator is the wilfulness of his or her action and the objective magnitude of the danger the action caused. It is not a matter of simply exceeding the applicable norms for the permissible amount of environmentally harmful emissions—rather, the scale of the threat is found in the potential of the polluter's activity to affect human life or health, or the state of the environment.

By contrast, in the case of an alleged violation of Art. 194(1)(6) of the Waste Act the administrative body will not examine the violator's intent. If waste oils are discharged, an administrative fine will be imposed. In this case, liability is not based on the principle of culpability, but is purely objective.

Furthermore, if the oil discharge simultaneously leads to the danger envisioned in Art. 182 of the Criminal Code, the relevant law enforcement agencies will instigate criminal proceedings—and the person will find themselves in a situation where they can be held doubly liable for the same act, the same event.

Fortunately, the law contains safety fuses, such as Art. 189d(3) of the Administrative Procedure Code, which provides that when imposing an administrative fine, the authority shall take into account any previous punishment for the same event.

Concluding remarks

More examples of potentially concurrent liability such as the ones discussed above exist under Polish law. Then, if criminal proceedings and administrative proceedings are conducted independently against the same person in connection with the same act, and they both result in imposition of sanctions on that person, it is necessary to examine whether in the particular case there was a concurrence of punitive liability. If so, the principle of *ne bis in idem* can be invoked in administrative proceedings.

However, the concurrence of criminal and administrative liability will not always be condemned as infringing the principle of proportionality. This is because the function of criminal sanctions is fundamentally different from the function of administrative sanctions. Thus there are still grounds for believing that the legislature (Polish and EU) will seek to act rationally, and dual liability will always be an exception and a deviation from general principles, and administrative bodies, law enforcement agencies and courts will properly and reasonably enforce the liability provided for in different legal regimes.

The risk of ESG litigation

The number of environmental, social, and corporate governance regulations is on the rise. Public awareness that businesses should adhere to sustainability principles is also growing. This may expose more businesses to the risk of litigation in this area. Such claims may also affect the assessment of whether management is properly fulfilling its duties. What are the implications of such disputes, and how can companies minimise the risk?

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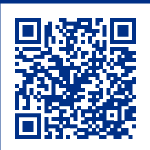
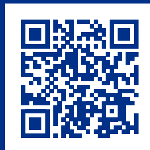


ESG & sustainability



litigation

What may disputes involve?

To date, most sustainability litigation has focused on issues of climate change and environmental impact. Cases pending in Poland and abroad show that claims are brought by individuals and groups of plaintiffs, as well as NGOs.

A significant portion of climate lawsuits have been filed against companies from the energy sector conducting high-emission activity or against entities financing their operations. These claims may, for example, seek damages for climate change based on allegations that the defendant is contributing by emitting large quantities of greenhouse gases.

→ *Luciano Lliuya v RWE AG*

Often, the purpose of lawsuits is to force the defendant to implement an effective climate policy, stop supporting the growth of the fossil-fuel sector, or take even more ambitious environmental protection measures.

→ *Les Amis de la Terre France v BNP Paribas*

ClientEarth v Danone

Litigation may ensue from the publication of misleading information or incomplete disclosure to shareholders. And the risk that members of the company's authorities will be held liable in derivative actions by shareholders for injury to the company from mismanagement or improper supervision also cannot be ruled out.

ESG issues can feature in disputes arising out of contracts with sustainability clauses (e.g. in supply or manufacturing contracts). This in turn is increasingly leading to disputes between companies over the obligation to apply sufficiently high standards.

Companies may bring ESG-related claims against states—particularly in the context of investor–state arbitration. One example is an arbitration case from 2019 where the Austrian company Strabag and two of its affiliates attacked legislative changes affecting renewable energy, including offshore wind power, that allegedly forced the claimants to abandon their offshore projects, and thus they were injured as a result of action by the state.

→ *Strabag SE v Germany*

But sometimes states sue companies for environmental damage. For example, in 2016 Indonesia sued an oil palm plantation for fires covering 1,626 hectares, alleging that the defendant intentionally set the fires to clear land for planting, posing a dire environmental threat because the area included peatland. The Indonesian courts upheld the claim, ordering the company to pay damages.

Indonesian Ministry of Environment and Forestry v PT Waringin Agro Jaya

And the future may see litigation exclusively between states. In September 2022, Vanuatu proposed that the UN General Assembly seek an advisory opinion from the International Court of Justice to determine what obligations, under international law, countries historically accounting for the largest percentage of greenhouse gas emissions have toward other countries most affected by the resulting climate change. The potential plaintiffs primarily include small island states in the Pacific (such as Vanuatu), which may soon be completely inundated by rising ocean waters. And in December 2022, the Caribbean country Antigua and Barbuda and the Pacific country Tuvalu requested an advisory opinion from the International Tribunal for the Law of the Sea to determine other countries' climate protection obligations arising under the UN Convention on the Law of the Sea. If such advisory opinions are issued in the future, the countries suffering the most from climate change could rely on them to frame complaints against the countries contributing the most to climate change.

Mitigating the risk of ESG litigation

Above all, companies should treat the implementation of sustainability principles into their operations not as an irksome chore, threat or expense, but as an opportunity to build a competitive advantage. By preparing an ESG strategy, the company can diagnose and confront the sustainability risks arising out of its own operations. Then the company can pursue mitigating measures in advance. An ESG strategy tailored to the needs of the particular company and integrated into its business model can function as a tool for avoiding potential risks beforehand and adapting operations to a changing environment.

It is also key to verify on an ongoing basis that the company is operating in compliance with environmental, social, and corporate governance regulations, but also to implement non-binding recommendations or guidelines issued by international organisations.

e.g. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

To counter the risks, it is also essential to create awareness of sustainability among managers and employees. The members of the management board should be cognisant of their responsibility for implementing the company's new obligations under sustainability regulations (e.g. reporting), while employees should watch out for tasks that may involve particular risks (for example, the risk of greenwashing is particularly relevant for employees crafting marketing communications or designing product packaging).

Soon, entities with at least 50 employees will have to establish an internal whistleblowing procedure for reporting and following up on suspected irregularities. A well-designed procedure will help detect possible violations faster, and thus take remedial action at an early stage.

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The members of the management board should be cognisant of their responsibility for implementing the company’s new obligations under sustainability regulations (e.g. reporting), while employees should watch out for tasks that may involve particular risks

Possible legal grounds for claims

Under Polish law, there are a number of laws that could serve as a basis for formulating ESG claims.

Art. 323 of the Environmental Protection Law

First of all, Art. 323 of the Environmental Protection Law provides that anyone who is directly threatened or harmed by an unlawful impact on the environment may demand that the entity responsible for the threat or violation restore a state of compliance with the law, or if this is impossible or overly burdensome, may demand that the defendant cease and desist the activity causing the threat or violation.

Civil Code Art. 435

Pursuant to Civil Code Art. 435, "A person who runs on his own account an enterprise or an establishment set in motion by natural forces (steam, gas, electricity, liquid, fuels, etc) is liable for any injury to persons or property caused by the operation of the enterprise or establishment, unless the injury is due to *force majeure* or solely to fault attributable to the aggrieved party or a third party for whom the person is not responsible." The Environmental Protection Law takes this a step further, providing that in some cases that rule also applies to an enterprise or establishment not set in motion by natural forces.

Civil Code Art. 415

Liability for damages of an entity violating ESG standards can also be derived from the general standard set in Civil Code Art. 415, which provides that anyone who through their fault has caused injury to another person is obliged to compensate for the injury.

Commercial Companies Code Art. 293

Criminal Code Art. 296 §4a

Failure to properly implement ESG standards within the company could lead to liability of members of the management board (or supervisory board, audit committee, or liquidator) pursuant to Commercial Companies Code Art. 293, according to which these persons are liable to the company for injury caused by an act or omission contrary to the law or the articles of association, unless they are not at fault. Such compensation claims on behalf of the company may also be brought by shareholders in a derivative suit (*actio pro socio*). Shareholders have another weapon at their disposal in Criminal Code Art. 296 §4a, pursuant to which they can seek prosecution for the offence of acting to the company's detriment, initiating criminal proceedings against members of the management board.

Greenwashing creates fertile ground for potential litigation. This is a situation where, by providing false information, companies make it difficult for consumers and investors to make informed decisions. Importantly, greenwashing should raise red flags not only for businesses offering goods or services to consumers (a potential fine of up to 10% of the company's annual turnover). In relations between businesses, greenwashing can be considered an act of unfair competition. This could give rise to claims for damages by competitors under the Unfair Competition Act, alleging an attempt to profit from misleading designations of goods or services or dissemination of false or misleading information about the business.

Competition and Consumer Protection Act

Unfair Competition Act

Galimatias in game titles

Despite occasional fluctuations, game development is one of the most popular and profitable segments of the entertainment industry. It is also a complex business environment, confronting game creators, developers and publishers with a massive number of legal issues. In recent years, our experience has highlighted several trends which strike us as urgent for the industry and also disturbing. One of them is the increasingly restrictive and inconsistent approach of intellectual property authorities to registering game titles or names as trademarks.

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Article based on a presentation given by the authors at the Game Industry Conference 2023, "Trademarks—It's never been easier to get one!"

In this article, we will use examples from the European Intellectual Property Office (EUIPO), which plays a key role in the trademark registration process. Indeed, most of the GameDev industry, including Polish companies, have sought to register an EU trademark for their products.

We will not discuss here the advantages, procedure or costs of registering a game title as a trademark. The added value and cost-effectiveness of trademark protection is obvious, and recent high-profile examples from the computer game industry have shown that this is the right approach. Instead, we will discuss what we believe is a controversial practice of the authorities creating an impression of legal uncertainty.

Designations that will not be protected

At the outset, we should clarify that some designations simply will not be protected as a trademark. First of all, a designation devoid of distinctiveness cannot be registered as a trademark. We will focus on such a designation.

A designation will be devoid of distinctiveness if it merely describes the goods or services, and indicates a direct connection to those goods or services; without reflection, the recipient clearly and objectively perceives in the designation the essential features or characteristics of the goods or services.

Whether a designation is distinctive is assessed, first, in relation to the goods or services for which it is claimed, and second, by looking at the relevant circle of recipients for such goods or services. In game development, we are essentially dealing with goods in the form of video game software, and services of delivering or accessing video games. The circle of recipients for these goods and services is wide. Games have entered the mainstream market, and

Kalypso Media Group GmbH v EUIPO, T700/18 —the "Dungeons" mark

their recipients are the general public, consumers of all age groups, regardless of gender or knowledge of the industry.

A classic example of a designation devoid of distinctiveness, albeit from a slightly different market, was the word mark "GRA" (the Polish for "game"), filed for registration with the Polish Patent Office in 1991 for playing cards, among other things. The office rightly refused registration, finding that the mark lacked distinctiveness. The recipients would see it as a phrase merely describing the type of goods and their key characteristics. It is hard to disagree with this assessment.

Polish Patent Office, trademark application no. Z.101968

A similarly uncontroversial example was a trademark application in the EU for the word and graphical mark GAME TOURNAMENTS

for goods including video game software. For English-speaking recipients (whose perspective was crucial for this EU filing), "game" means "an activity or sport usually involving skill, knowledge or chance, in which you follow fixed rules and try to win against an opponent or to solve a puzzle," and "tournament" means "a sports competition in which players who win a match continue to play further matches in the competition until just one person or team is left." Thus there was a sufficiently direct and concrete connection between the mark and video games (i.e. the goods for which it was filed). For these goods, the mark was held to be merely descriptive and therefore did not merit registration.

Gameageventures LLP v EUIPO, T-776/21

EXAMPLES OF NAMES WITHOUT DISTINCTIVENESS:

→ Gra
→ Game tournaments
→ Stake

Another example is the unsuccessful attempt to register the word designation STAKE in the EU for, among other things, online gambling services, online casino services, and online sports betting. As the EUIPO found,

EUIPO refusal of 5 July 2023, application no. 018840166

> In this case, the relevant English-speaking consumer would understand the sign as having the following meaning: the money that a player has available for gambling. … The relevant consumers would perceive the sign as providing information that the goods and services are all software applications that would allow users to calculate the amount of money they can risk when placing a bet in the context of gambling platforms. Therefore, the sign describes the kind of goods in question.

The office thus concluded,

> Given that the sign has a clear descriptive meaning, it is also devoid of any distinctive character and therefore ineligible for registration.

Debatable trends in decisions denying protection

The principle here is that designations devoid of distinctiveness, descriptive, merely indicating the features, characteristics or purpose of a good or service, cannot obtain protection as a trademark. That principle is entirely sound.

But increasingly the authorities are assessing distinctiveness (and finding it lacking) based on criteria that are too far-reaching. Indeed, we see two dubious trends in the EUIPO decisions refusing to register trademarks (or invalidating marks).

The first is to assess the distinctiveness of a designation for video games by its reference to **the content of the game or the image of the game**, rather than in relation to **the type of good**, that is, video games as such (or related services).

Kalypso Media Group v EUIPO, T-425/22

Doubts, relating not so much to the outcome as the method of carrying out the distinctiveness assessment, were raised for example in the case of the word mark COMMANDOS, for which registration was sought in the EU for, among other things, computer game software and delivery of computer games online. The EUIPO

regarded the designation as directly informing consumers that the software "enables the use of war games with the participation of commandos," and therefore directly **describes the content** of the goods and services. As a result, it was not distinctive and cannot be registered as a trademark.

Another debatable example is the case of the CYBERPUNK word mark. The mark was registered for games software and games services, among other things, but was later accused of a lack of distinctiveness, in an application for invalidity. The EUIPO issued an interim decision upholding the invalidity claim in principle, declaring that the mark was "inherently descriptive." According to the EUIPO Cancellation Division, in context,

> "CYBERPUNK" will be seen as describing the content of the games or what they refer to. It is common for computer games to be set in a particular world and, in this case, "CYBERPUNK" indicates that this world is futuristic and dominated by computers. In other words, "CYBERPUNK" describes the subject matter or kind of game.

← *Global CP sp. z o.o. v CD Projekt SA*, cancellation no. C 48 308, 5 May 2023, appeal pending

Regardless of many other issues raised by the proprietor referring to the game's storyline or perceptions, EUIPO's assessment of distinctiveness here was questionable. After all, distinctiveness should be assessed in relation to the claimed good to be marked (a game), and not in relation to its "content." This interpretation appears overbroad.

Another emerging trend in the case law assessing distinctiveness is attributing to games features or characteristics not appearing to be common to them at all. In one case, the EUIPO found, for example, that re-releases of games are directly tied to the nature of games, and an essential feature. This reasoning was the basis for refusing to register the trademark for a game, as the authority found that the sign, interpreted in the context of games, would suggest this very feature. One would have to doubt whether a re-release is really inherent to the nature of games and would be recognised as such by the relevant set of recipients, which admittedly is wide. The mere fact that some games on the market may be re-released versions of earlier games does not seem to support the claim that re-releases are a permanent or common feature of games.

A pinch of fantasy wouldn't hurt

These examples illustrate some questionable trends in carrying out assessments of the distinctiveness of trademarks. Our aim is not to undermine the authorities' decisions, but to note the practices and conditions affecting the process of registering game titles as trademarks.

Due to the increasing competitiveness of the video game market, it's getting harder and harder to choose a game name that will be considered distinctive, without conflicting with prior rights. Additionally, the practice of authorities in registering marks, including at the EUIPO, seems more restrictive than it was some time ago, especially with goods or services that are relatively new (such as online games, virtual goods or cryptocurrency). The practice is also becoming less consistent, and decisions increasingly unpredictable. This affects the industry's freedom and confidence in creating games and doing business.

The correctness of some of the assumptions behind assessments of the distinctiveness of game designations raises questions. The authorities' practices should be reviewed and discussed, and above all standardised. The grounds excluding the possibility of registering a mark should not be interpreted expansively. Legal protection should not be denied unless required by applicable law. The assessment of a trademark's distinctiveness must reflect the market realities.

But in the meantime, to avoid the designation being deemed devoid of distinctiveness, and thus refused or challenged, we advise (although the law does not explicitly require it) that the title of the game have artistic merit. It is all to the good when a trademark is fanciful, imaginative and original—or failing that, at least includes additional elements helping the name stand out. These decisions have consequences, as applicants seeking trademark protection must be aware. We suggest devoting a little more time to search and selection of the title for any new game, and performing in-depth trademark clearance. Professional advice, including legal advice, is increasingly becoming an integral part of this process.

You're welcome to play

We don't just write articles about law in the game industry. Sometimes we spread the word in a lighter form. Our interactive **GameDev CEO simulator** plays like an old-school computer game, where users can pick an avatar for a role in the game industry (Creative, Executive, Accountant or Consultant) and explore the legal pitfalls lurking for the unwary. One of the avatars faces a mission involving trademarks.

GAMEDEV CEO SIMULATOR
The file is best opened in Adobe Acrobat.
wardynski.com.pl/en/publications/reports/gamedev-ceo-simulator

The pharmaceutical package and regulatory data protection

Work on the EU's pharmaceutical package is only just gaining momentum, but it is already clear how highly controversial the project is. The dispute turns around the regulatory protection of new drugs. This protection helps compensate for the huge financial investment in developing new drugs, but on the other hand delays the registration of cheaper counterparts. The reform would change the duration of this protection and require pharma companies to meet additional conditions.

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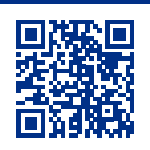


life sciences

On 26 April 2023, the European Commission officially announced plans for a major overhaul of EU pharmaceutical law, known as the "pharmaceutical package." Among other things, the changes would affect regulatory protection. For many years, along with patent protection, regulatory protection has been a prominent mechanism stimulating innovation in the pharmaceutical sector.

The pharmaceutical package proposes a new compromise in the calculation of protection periods. It is designed to reconcile many conflicting interests, in particular the interests of patients (who want access to innovative drugs, but also faster access to cheaper therapies with generic products) and the interests of innovative companies (which make significant financial outlays for research on new drugs in the hope of a return on investment at the product commercialisation stage).

Current regulatory data protection of drugs

Regulatory data protection (RDP), also known as "data exclusivity," is the period when applicants seeking marketing authorisation for a drug may not use the results of clinical trials of someone else's original product to obtain registration of their own generic product in a simplified procedure (i.e. relying on protected tests of the reference product). Currently, this period is eight years from the date of the first reference marketing authorisation for a medicinal product in any country of the European Economic Area.

Data exclusivity is supplemented by a period of "market protection," during which a generic drug registered using a simplified procedure (i.e. based on data of someone else's original product) cannot be marketed. Market protection extends to 10 years, i.e. two years longer than data exclusivity. During the two-year period between the end of regulatory data protection and the end of market

PERIODS OF REGULATORY PROTECTION CURRENTLY IN FORCE

RDP regulatory data protection, also known as data exclusivity

MP market protection

basic period

possible extension of protection period

protection, the equivalent of the original drug may not be marketed, but may be subject to registration procedures aimed at marketing the product as soon as the market protection period ends.

Data exclusivity and market protection (referred to together as "regulatory protection") constitute a separate legal regime, parallel to patent protection (which lasts, as a rule, 20 years).

The current regulatory protection periods are referred to as the "8+2+1" rule:

– Eight years of regulatory data protection
– Plus two years of market protection
– Plus one year of market protection (new indication).

Regulatory data protection lasts eight years. After this period, the party responsible for the original drug can still count on two years of market protection, with the possibility of an extension for an additional year if a new indication is registered for which significant clinical benefits are foreseen compared to existing therapies.

Shortening or extending protection periods?

This is what the dispute between innovative and generic companies is about. Patients need access to cheaper equivalents of innovative drugs, but their needs will not be met without innovative therapies. So what is needed is a balance between effective regulatory protection for innovators and the right of generic manufacturers to enter the market. This is also vital for pharma companies operating in Poland. Although the Polish pharmaceutical industry relies heavily on the production of generics, more and more often profits from production of generics are being reinvested in research into new drugs.

Changing the duration of regulatory data protection for medicines is one of the most important and widely discussed proposals found in the pharmaceutical package. The proposal published in April 2023 foresees reducing the overall data exclusivity period from eight to six years. However, this general period could be extended if additional conditions are met.

The Commission's proposal introduces a rule that can be described as "6+x+2":

- Six years of data exclusivity
- Plus a potential extension of data exclusivity (x)
- Plus two years of market protection.

The six-year data exclusivity period could be extended by:

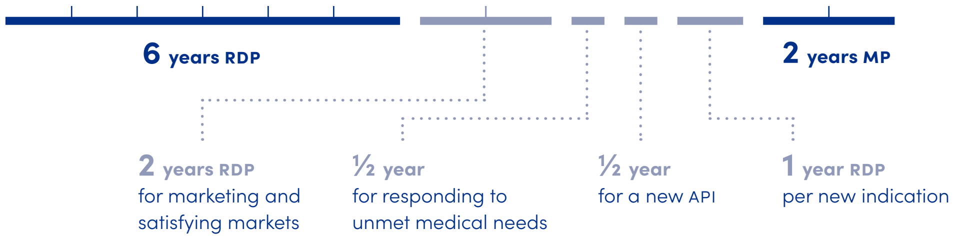
- **An additional two years** for meeting the criterion of marketing and satisfying the markets, i.e. that within **two years of obtaining authorisation** (three years when the responsible entity is an SME, nonprofit, or entity with less than five centrally registered drugs within its group), with regard to the markets of all EU member states where the drug authorisation is in force (for central registration, in all 27 member states), the drug has been marketed and is continuously supplied in quantities and presentations meeting the patients' needs in those markets
- **An additional six months** for meeting the criterion of responding to unmet medical needs, i.e. that at least one indication of the drug relates to a severely disabling or life-threatening disease and there is no registered drug for the disease in the EU (or a registered drug for the disease exists, but morbidity or

mortality is still high), and additionally, use of the drug significantly reduces morbidity or mortality
- **An additional six months** for meeting the criterion of a new active ingredient, i.e. that the drug contains a new active pharmaceutical ingredient and clinical trials were conducted using an appropriate comparator (an effective and commercially available comparator drug was used in the clinical trial for comparison with the studied drug), in accordance with scientific guidelines provided by the European Medicines Agency
- **An additional one year** for meeting the criterion of a new indication, i.e. that the responsible entity obtains registration for a new indication and the data presented show a significant clinical benefit compared to existing therapies (this extension can be used only once)
- **An additional one year** for use of a data exclusivity voucher obtained for the development of a new antibiotic ("priority antimicrobial drug" of a new category, with a new mechanism of action, containing a previously unregistered active pharmaceutical ingredient breaking through drug resistance to a significant degree and effective against a serious infection). Interestingly, the voucher is to be transferable, i.e. a company that obtains a voucher for its drug will not have to take advantage of the privilege of data exclusivity for the drug for which it obtained the voucher, but could transfer it to another of its drugs or even transfer it to another company (for a fee or free of charge). Taking advantage of the voucher would be possible only with regard to a centrally registered drug and only during the first four years of its data exclusivity period. The institution of the data exclusivity voucher would be limited, operating for no more than 15 years or until a total of 10 vouchers are issued (whichever occurs first).

Therefore, under the pharmaceutical package, the overall period of data exclusivity could last from 6 to 10 years (or up to 11 years when using a data exclusivity voucher).

The April 2023 proposal for the pharmaceutical package also provides for introduction of a special case for granting a separate data exclusivity period of four years. This would apply to drugs already present on the market which, as a result of new research, prove to be effective for a new indication (known as "repurposed

REGULATORY PROTECTION ACCORDING TO THE PHARMACEUTICAL PACKAGE (APRIL 2023 PROPOSAL)



RDP regulatory data protection, also known as data exclusivity
MP market protection
API active pharmaceutical ingredient

basic period
possible extension of protection period

medicinal products”). This four-year data exclusivity period could be used by a drug meeting the following conditions:

– It has been registered as a generic product and has not yet used data exclusivity (or 25 years have passed since first authorisation)
– It will obtain a new indication not previously registered in the EU, providing a significant clinical benefit confirmed by research.

How will the battle over data exclusivity end?

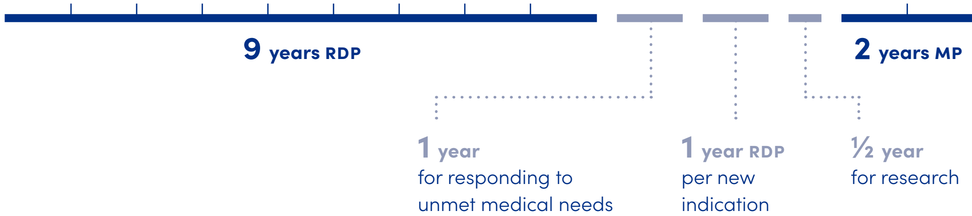
It is not known yet which changes will ultimately be adopted in EU law. Currently, the initial proposal by the Commission is undergoing work in the European Parliament. One of the legislative proposals being considered is to amend the original proposal, adding new provisions and regulating data exclusivity under a rule that can be described as “9+x+2”.

A key element would be extension of the basic period of data exclusivity to nine years (i.e. one year longer than under current law and three years longer than in the Commission proposal of April 2023). However, in that version, the two-year extension for meeting the criterion of marketing and satisfying markets would be dropped.

However, this does not mean that the issue of availability of drugs in member states' markets would fade into the background. A new obligation is proposed for responsible entities to submit a bona fide application for reimbursement of the drug at the request of a member state.

Additionally, this proposal provides for other mechanisms to compensate for removal of the two-year extension. A 12-month extension (instead of the previously proposed six-month extension) would be earned for meeting the criterion of addressing unmet medical needs. Additionally, the criterion for conducting research in accordance with European Medicines Agency guidelines, for which there is a six-month extension of the data exclusivity period, would be liberalised by removing the requirement that the tested formulation contain a new active ingredient.

ONE SCHEME OF REGULATORY PROTECTION PERIODS CONSIDERED BY THE EUROPEAN PARLIAMENT



RDP regulatory data protection, also known as data exclusivity

MP market protection

basic period

possible extension of protection period

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The pharmaceutical project is not just about data exclusivity. Less-controversial changes include speeding up of drug registration procedures, introduction of an e-leaflet, and changes reflecting environmental concerns.

What is next for the pharmaceutical package?

The pharmaceutical project is not just about data exclusivity. That is an important element of the planned reform, but by no means the only one. Less-controversial changes include speeding up of drug registration procedures, introduction of an e-leaflet, and changes reflecting environmental concerns.

While respecting the broad approach to the planned reform, we should not lose sight of the question of whether the search for a new compromise on data exclusivity is the only mechanism, and a sufficient mechanism, for stimulating (and maintaining) innovation in the EU, in particular considering the widening gap between the US and Europe, and China's strong activity in this field.

Adoption and implementation of such a major reform as the pharmaceutical package involves a lengthy procedure at the EU and national levels. Particular solutions may be subject to change. The first reading of the pharmaceutical package will take place after the European Parliament elections scheduled for June 2024. Time will tell whether the solutions proposed by the European Union can meet the needs of the pharmaceutical sector and, above all, patients in the EU.

The research team in clinical trials: What does the law say?

Polish and EU provisions governing the conduct of clinical trials of medicinal products for human use focus on the duties of the trial sponsor and the investigator. They don't refer to the research team carrying out various tasks within the project, but the clinical trial owes its success to the efforts of all members of the team. What are the rules governing operation of the research team?

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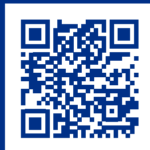


data protection

life sciences

A clinical trial is designed to test the safety and efficacy of a new drug. It is a business venture requiring major financial outlays, proper interaction of the stakeholders, and adherence to ethical principles and laws.

The principles compiled in the ICH Guideline for Good Clinical Practice (ICH-GCP) require that the sponsor financing the research —or the contract research organisation (CRO) on its behalf—enter into a written contract with the investigator and the research centre which is the site for the trial. In the contract, the parties confirm that they will comply with the applicable laws and standards, and in matters not covered by those provisions, the contract will specify the parties' rights and obligations, including—crucially —the rights to the research findings. Data protection regulations also occupy an increasing place in standard clinical trial contracts.

Qualifications of the research team

Conducting clinical trials requires the participation of many individuals. Of these, only the principal investigator has a legally defined status. There are no provisions in Polish law expressly pertaining to the remaining members of the research team, other than indicating the general criteria for their selection. In the Polish executive regulation codifying the ICH-GCP, the investigator's duties include:

> Engaging in the conduct of the clinical trial persons holding appropriately high professional qualifications, scientific knowledge, and experience working with patients, necessary to conduct the clinical trial.

Under Art. 49 of the EU's Clinical Trials Regulation (EU-CTR):

> The investigator shall be a medical doctor as defined in national law, or a person following a profession which is recognised in the Member State concerned as qualifying for an investigator because of the necessary scientific knowledge and experience in patient care.

Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use and repealing Directive 2001/20/EC

For example, Polish law also allows a nurse to serve as the investigator.

> Other individuals involved in conducting a clinical trial shall be suitably qualified by education, training and experience to perform their tasks.

Under the EU-CTR, the relevant qualifications may be acquired through education, training or experience. Evaluation of the qualifications and the decision to select a given person for the research team rests solely with the principal investigator. Under Art. 73 EU-CTR:

> The principal investigator shall assign tasks among the members of the team of investigators in a way which is not compromising the safety of subjects and the reliability and robustness of the data generated in the clinical trial at that clinical trial site.

However, under Art. 75, the regulation recognises that member states may impose civil or criminal responsibility not only on the sponsor or investigator, but also on those to whom the sponsor has delegated tasks.

Composition and role of the research team

The research team is a group of individuals professionally and practically prepared to perform the tasks assigned and supervised by the principal investigator to carry out a clinical trial in accordance with the clinical trial protocol, the clinical trial contract, laws and standards, with integrity and respect for patients' rights.

The composition of the research team depends on the tasks set before it in the protocol. As a rule, people with a range of qualifications are needed. The basic composition of the team would include:

- The **investigator** (also called the **principal investigator**), who forms the team and supervises its work, and is responsible for proper conduct of the study
- The **subinvestigator**, another physician carrying out medical procedures provided for in the clinical trial protocol
- A **nurse** performing medical procedures and activities assigned in the clinical trial protocol, or support tasks designated by the principal investigator (e.g. maintaining medical records, although this task might also be performed instead by a medical secretary as a member of the team)
- The trial **coordinator** and **monitor** (sometimes, the coordinator assumes the function of the monitor), overseeing proper preparation and execution of the trial
- A **pharmacist**, responsible for receiving, storing and dispensing the trial drug in accordance with the clinical trial protocol and applicable regulations.

As needed, medical technicians, laboratory technicians, statisticians, IT specialists or other specialists may be included in the team. Sometimes administrative staff, handling for example payments to contractors, are included in the research team. (In our view, this is not proper, as such tasks are not covered by the clinical trial protocol.)

According to the provisions, the principal investigator must acquaint the members of the research team with the clinical trial protocol, provide training as needed, and have team members perform appropriate tasks in his or her stead. Therefore, in practice, it is the members of the research team who will have the most direct contact with the study subjects and their medical records (subinvestigator or nurse), the research documentation generated during the trial (medical secretary or monitor), and even with the reported research findings (subinvestigator).

Thus, in principle, the members of the research team are held to the same standards in the conduct of a clinical trial as the principal investigator.

Duties of the research team

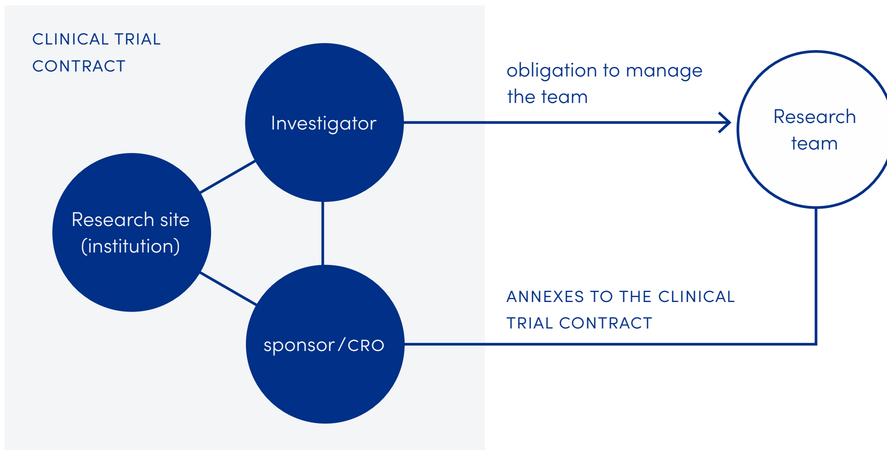
The provisions of generally applicable law say little about the status of a research team. Therefore, the roles, tasks and duties of team members are defined by clinical trial contracts.

As a rule, members of a research team will not figure as named parties to the clinical trial contract. Contracts for clinical trials are generally concluded among three parties: 1) the sponsor or contract research organisation, 2) the research site (institution), and 3) the investigator.

Usually, the duties of the research team will flow from the investigator's obligation to acquaint the team members with the duties provided for the investigator in the clinical trial contract that will be delegated to team members to perform, and to ensure that each member of the research team fulfils his or her tasks. Formally, it is the investigator who should obtain from each member of the research team a pledge to properly perform their duties in compliance with the clinical trial protocol and the clinical trial contract.

But sometimes sponsors feel safer collecting directly from the research team members their signed pledges to comply with key provisions of the clinical trial contract. These statements may be annexed to the clinical trial contract. Key provisions might include, for example, an anti-corruption clause which must be signed by all members of the research team. This helps the sponsor build a

TRIPARTITE ARRANGEMENT OF CLINICAL TRIAL CONTRACT



record showing that the research findings were obtained fairly and honestly, which facilitates the registration procedure and thus, ultimately, marketing of the new drug. The same applies to clauses requiring confidentiality in execution of the clinical trial, or transfer to the sponsor of certain rights related to the research findings.

Intellectual property rights

During a clinical trial, a number of intangible property rights may be created, for example research findings, trial documentation, the final report, or patentable inventions. Therefore, the clinical trial contract usually contains clauses under which the research site (institution) and the investigator transfer to the sponsor or the CRO the intellectual property rights created during the trial.

Generally, the investigator is also required by the sponsor or the CRO to obtain all rights and authorisations from the other members of the research team (especially key members of the team who are involved in the most creative aspects), so as to effectively transfer them to the sponsor or CRO or grant them further authorisations. Here, the chain of ownership must be precisely followed.

The provisions on intellectual property rights are vital primarily from the sponsor's or CRO's perspective, as they are the main stakeholders in these records. Defective assignments of intellectual property rights can limit the ability to use research findings, documentation, or inventions.

In practice, clinical trials are often conducted in multiple jurisdictions, and contracts are prepared according to an international standard. Perforce, such universal templates do not take into account the specific and rather formalistic requirements of Polish law on the disposal of intellectual property rights.

One peculiarity of Polish IP law is the need to expressly list in the contract the fields of exploitation covered by the transfer of the economic rights of the holder. A general provision (typical in common-law jurisdictions) indicating that all rights are vested in the sponsor or CRO is not sufficient. The issue of subsidiary rights should also be clearly regulated—basically, rights related to performance and dissemination of studies (e.g. translation of trial documentation).

Another often-overlooked aspects of IP law is moral rights and their implications for the contract. Moral rights would include, for example, the right of the investigator or team members to be identified in the documentation, or to object to interference in the form or content of the work. Moral rights cannot be transferred. The sponsor or CRO may exercise the moral rights of members of the research team, but this requires an appropriate provision in the contract. It is also necessary to regulate precisely the moment when rights are acquired, the remuneration, and the obligations (if any) of the sponsor (or CRO) to disseminate the works.

Another issue to address in the clinical trial contract is seeking protection for any inventions made during the study. In principle, rights to an invention are vested in the creator(s) of the invention. However, the parties usually agree that it is the sponsor (or CRO) who will have the right to seek patent protection, which is justified by the purpose and essence of the contract. While this is usually regulated in quite some detail, it is sometimes overlooked that even in such a situation the creator of the invention (the investigator or team member) is entitled to remuneration for use of their invention. But this issue can be regulated differently in the contract.

> **The clinical trial contract should be executed in the traditional written form—"wet ink signature." Although this can be a logistical nuisance, it provides a higher level of security.**

It may come as a surprise to some parties to clinical trial contracts, especially foreign sponsors or CROs, that under Polish law the valid transfer of an author's economic rights requires written form or a qualified electronic signature (within the meaning of the eIDAS Regulation). An exchange of PDFs, DocuSign signatures and other such signatures does not meet this requirement. In practice, despite the rapid development of electronic forms, many entities operating in the clinical trial industry in Poland are not equipped with this type of electronic signature. In its absence, the clinical trial contract should be executed in the traditional written form—"wet ink signature." Although this can be a logistical nuisance, it provides a higher level of security.

Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC

Personal data protection

Conducting clinical trials is inevitably linked to the processing of personal data, of the clinical trial subjects (patients) and their families, as well as personal data of members of the research team. This means that entities engaged in conducting clinical trials must comply with data protection rules, in particular the GDPR. In practice, the status of these entities under the GDPR raises a number of questions, and in this regard the contractual provisions often require arduous negotiations.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Regarding the processing of personal data of clinical trial subjects (patients) and their families, according to the relatively well-established view:

- The sponsor is considered the data controller
- The investigator is considered a data processor on behalf of the sponsor (as long as the clinical trial protocol was developed solely by the sponsor—if the investigator establishes the protocol along with the sponsor, then under certain circumstances both the sponsor and the investigator may be considered co-controllers of the data)
- And to some extent (e.g. for certain purposes of data processing by the sponsor), depending on the factual circumstances, the institution serving as the site for the trial may be considered a data processor (for example on behalf of the sponsor).

This implies a need for contractual regulation of data flows between these entities in accordance with the GDPR, as well as the sponsor's obligation to provide information to patients and their families (with special attention to the patient relationship, as the sponsor only has access to pseudonymised data), as required by Art. 13–14 GDPR. Nevertheless, the final determination of the parties' status under the GDPR requirements depends on an analysis of the factual circumstances and the contract.

Art. 13–14 GDPR

Similarly, determining the status of individual members of the research team requires a detailed analysis of the facts. Sometimes team members process personal data of trial subjects based on data processing authorisation (e.g. given by the principal investigator), and in other cases a team member may be considered a data processor within the meaning of Art. 28 GDPR (on behalf of the principal investigator or sponsor), and it may be necessary to enter into a data processing agreement with them. It should also be kept in mind that there are cases where the personal data of research team members themselves will be processed (e.g. by the sponsor). In such situations, the sponsor must fulfil its information obligation to such persons (pursuant to Art. 13–14 GDPR). A processing agreement might be needed, for example, between the sponsor and the investigator, if the investigator takes statements from team members on behalf of the sponsor.

Art. 28 GDPR

Railway accidents: Is the infrastructure manager also liable?

The most common railway collisions occur between two different species of motor vehicles: a train and a car. In such situations, the blame usually lies with the car driver (intentionally crossing the railroad tracks against a red signal light). But as Poland's National Commission for Investigation of Railway Accidents has found, sometimes the driver is not entirely at fault. A good example is when the level-crossing gates are poorly designed. If they interfered with the driver's field of view, it may reduce the motorist's fault to some extent.

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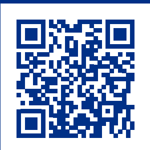

insurance

The railway infrastructure manager is responsible for operation of level-crossing gates. This raises a fundamental question of its tort liability. The answer to this question is also relevant in the context of third-party liability insurance, as then the insurer's liability is ancillary, meaning that the insurance company is liable on the same basis as the insured.

The manager is strictly liable

Art. 435 §1 of the Civil Code sets the standard for when a defendant can be held strictly liable in tort:

Civil Code Art. 435 §1

> A person who runs on his own account an enterprise or an establishment set in motion by natural forces (steam, gas, electricity, liquid, fuels, etc) is liable for any injury to persons or property caused by the operation of the enterprise or establishment, unless the injury is due to *force majeure* or solely to fault attributable to the aggrieved party or a third party for whom the person is not responsible.

As the Supreme Court of Poland has held,

Supreme Court of Poland judgment of 30 May 2017, case no. V CSK 511/16

> For the applicability of Civil Code Art. 435, it is necessary to clarify whether the global purpose of the enterprise's operation depends on the use of natural forces, and whether the use of these forces constitutes a condition *sine qua non* of the existence of the enterprise in the sense that its entire structure and work organisation system is adapted to the natural forces it uses. In this regard, the rapid development of technology requires continual re-examination of views.

That judgment was issued in a case where one of the parties was the principal Polish railway infrastructure manager, PKP PLK, and the court expressly found that "PKP Polskie Linie Kolejowe SA is an enterprise set in motion by means of natural forces, as stated in Civil Code Art. 435 §1."

This is consistent with the Supreme Court resolution of 26 July 2017, where the court reasoned:

Supreme Court of Poland resolution of 26 July 2017, case no. III CZP 30/17

> There is no doubt that performance by PKP PKL of the basic tasks set out in the act, in particular maintenance of railway infrastructure in a state allowing operation of rail traffic, requires the use of electricity on a large scale (traction networks, vehicles and machinery necessary for the development, maintenance and modernisation of rail lines), which means that PKP PKL operates on its own account an enterprise set in motion by means of natural forces within the meaning of Civil Code Art. 435.

Interestingly, this refers directly to the rationale for the cited judgment of 31 May 2017, concluding that "in the present case, 'operation' of the enterprise in fact involves the provision and maintenance of the availability of a certain section of the rail line for conducting rail traffic." It is hard to disagree with this interpretation of the legal norms, or the court's concept of "operation of the enterprise."

As it was expressly found that under Civil Code Art. 435 §1 the largest Polish railway infrastructure manager, PKP PKL, is responsible for managing the state rail network, applying the argument *a maiori ad minus* it is fully justified to conclude that smaller railway infrastructure managers can also be liable under this provision.

PKP Polskie Linie Kolejowe SA is responsible for management of the state railway network, including rail lines with a length of 18,634 km and 11,603 level crossings

Consequently, to be relieved of liability, the railway infrastructure manager must present evidence that the injury occurred due to *force majeure* or solely due to the fault of the aggrieved party or a third party for whom the manager is not responsible.

Interestingly, in the Supreme Court resolution cited above, the court clarified that this basis for exoneration also applies when "grounds exist for finding that the injury occurred due to the exclusive fault of a third party for whom the party is not liable, **even if the third party has not been identified**." In the justification to the resolution, the Supreme Court agreed with the assumption of the lower court seeking its ruling on this legal issue that "identification

Supreme Court resolution of 26 July 2017, case no. III CZP 30/17

of the third party is not necessary if sufficiently strong grounds exist for assuming that the injury was caused by the culpable behaviour of an 'outsider' for whom the person operating an enterprise is not responsible."

In litigation, the railway infrastructure manager may try to persuade the court that the test for its liability should be based on the general provision, Civil Code Art. 415, pursuant to which anyone who by fault on his part caused injury to another person is obliged to remedy the injury. This is the basic formula for tort liability on the basis of fault, in which the burden of proof is allocated differently than in cases of strict liability (not as advantageous for the plaintiff, as then the plaintiff must prove all the grounds for tort liability, including fault or a wrongful act or omission by the defendant).

Civil Code Art. 415

Nevertheless, at this point it seems that the Supreme Court's jurisprudence on railway infrastructure managers' strict liability is stable, and an attempt to shift the ground from strict liability to fault-based liability should not be effective. Thus, to fully or partially absolve itself of tort liability, the railway infrastructure manager must either prove the existence of the aforementioned basis for exoneration, or present evidence showing that the aggrieved party contributed at least to some extent to occurrence of the injury (or increased its extent).

The latter case is related to mitigation of damages, and lies within the court's discretion. Its application depends on the presence of objective (not subjective) criteria for assessing the facts. The opinion of an expert witness may be crucial, e.g. an expert in accident reconstruction, who could test whether there was a violation of rail traffic safety rules. At the same time, it should be remembered that an omission can also contribute to injury, e.g. when installations or technical components were not inspected or repaired.

Trees by the tracks can also cause injury

Another case in which the railway infrastructure manager may be liable is when a train collides with a tree (or branch) that has fallen on the tracks. The infrastructure manager is responsible for trees and shrubs in the vicinity of the railway line. The relevant regulation of the Minister of Infrastructure states that trees should not

be located less than 6 metres from the lower edge of an embankment (or the top edge of an excavation, or the outer edge of side ditches) or from the outermost rail.

Regulation of the Minister of Infrastructure of 7 August 2008 on the requirements for distances and conditions permitting the location of trees and shrubs, elements of acoustic protection and execution of earthworks in the vicinity of rail lines, and the method of arranging and maintaining snow screens and firebreaks

For many years, the minimum distance was set at 15 metres. As indicated on the government website of the railway market regulator, the President of the Office of Rail Transport:

> Between 2015 and 2019, more than 3,000 potentially dangerous situations caused by damaged or fallen trees occurred. For more than 1,000 of these situations, the trees were located on the strip of 15 metres from the axis of the outermost track. During this period, 149 railway incidents took place … caused by a falling tree or branch. For this group of railway incidents, this is a significantly higher level of threats to rail traffic safety. As a result of their occurrence (unlike in the case of potentially dangerous situations), the risk and negative consequences materialise. The reason for 99 of these railway incidents was a tree growing in the 15 m strip.

tinyurl.com/5aktja6v

One reason the width of the strip that must be kept clear of trees and shrubs was reduced was that infrastructure managers were not always able to fulfil this duty. It was not uncommon for a tree to grow in an area over which they did not have effective legal control, and thus they were unable to cut or replant the tree or otherwise effectively remove any threat from the tree. Then, most often, they were still held liable for damages under Civil Code Art. 435 §1, unless they could show that they should be exonerated (although it was, and still is, difficult to show exonerating evidence).

It seems that the foregoing change would be crucial if the ground of the railway infrastructure manager's liability were shifted to Civil Code Art. 415 (fault-based). But considering the currently established line of decisions from the Supreme Court and the interpretation of the legal standards under Art. 435 §1, in some cases this change may still make it possible for infrastructure managers to successfully prove that they should be exonerated from liability for damages. This could apply for example to a situation where a third party is legally obligated to remove a tree located near the rail line, but fails to do so before a rail incident occurs at that location.

Will we be fired by algorithms?

All of us have been using artificial intelligence for years, sometimes without even realising it, for instance when “talking” to a virtual assistant or using search engines. But now AI-based solutions are entering the labour market. Among other things, they allow organisations to streamline simple, repetitive processes previously handled by skilled workers. All indications are that this trend will continue. Here we examine it from the perspective of HR lawyers.

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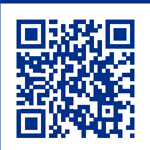
For more on this topic, please visit the In Principle portal and the HRlaw.pl blog



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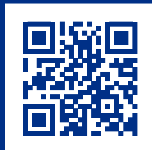


HRlaw.pl/en

The survey "How Polish companies are implementing AI" was conducted for EY Poland in August–September 2023 on a sample of 501 large and medium-sized enterprises in manufacturing, services and retail.

According to a survey by EY, Polish organisations are already implementing AI-based solutions: 20% of them have launched AI in their operations and another 42% are in the process. These numbers can be expected to increase with the advancement of technology, which will exacerbate the related issues and legal concerns.

The use of AI in employment

Undoubtedly, AI offers a number of solutions that can be useful to employers. Many organisations are already using AI in recruitment: chatbots are increasingly supporting human headhunters in their search for the best candidates, and dedicated programs analyse application documents along specific criteria. AI can also help organisations evaluate employees, or even in carrying out individual and group layoffs (ranking employees for dismissal according to specific selection criteria).

The introduction of algorithms in the HR field was accompanied by the expectation that they would help create a work environment free of typically human biases. If evaluation was turned over to an algorithm, the thinking went, the result would be objective. But automated decision-making turned out to raise very serious doubts—among others concerning discrimination. AI can perpetuate or even magnify existing inequalities through the algorithm's *modus operandi*, or due to bias inherent in the data it is fed.

An example is the widely discussed case (from nearly a decade ago) of Amazon, whose algorithms for screening job applicants discriminated against women when selecting candidates. As the system was based on existing employment data, it concluded from the current gender disparity in the tech industry that men are preferred candidates for IT jobs.

In another example, as a result of an initial error by a supervisor who failed to mark an employee's contract in the IT system as qualified for renewal, the algorithm triggered a cycle of automated decisions successively blocking the employee's access to all systems, including the keycard allowing them to enter the building, and ultimately led to the employee's real-life dismissal. It took supervisors more than three weeks to reverse the situation, and in the end the frustrated employee decided to change jobs anyway.

What does the law say about it?

When analysing the problem of algorithmic discrimination under Polish law, it should first be pointed out that employees should be treated equally in relation to establishment and termination of employment relationships, terms of employment, advancement, and raising their professional qualifications, in particular regardless of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, or whether they are employed for a definite or indefinite period, full-time or part-time.

Labour Code Art. 18[3a] §1

At the same time, the Labour Code significantly limits the scope of employees' personal data that an employer can process. Therefore, in principle, AI-based tools used in an employment context also should not rely on information beyond this catalogue. Moreover, under the General Data Protection Regulation, a data subject (here, an employee) has the right not to be subject to a decision which is based solely on automated processing, including profiling, and produces legal effects on that person or similarly significantly affects that person. In principle, the GDPR requires that a human being have the last word in such processing (aka "human in command").

GDPR
Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

Art. 22(1) GDPR

In this respect, it is also worth mentioning the ongoing work at the EU level on the Artificial Intelligence Act, which defines categories of prohibited AI systems. Importantly for employers, this is how systems intended to be used to detect the emotional state of individuals in workplace situations are generally classified. Also, the AI Act proposes to make it mandatory for employees to be informed

proposed Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence

of the implementation of a high-risk AI system at a workplace before it is put into service or used. Among AI systems regarded as high-risk, the proposal specifically includes those used in human resources, e.g. for reviewing or filtering applications or evaluating candidates during interviews or tests, as well as systems designed to monitor and evaluate employee performance.

Interestingly, similar proposals have already appeared in Polish legislation. In the previous term of the Sejm, a bill modelled on Spanish regulations was taken up which would require an employer to provide trade unions with "information regarding the parameters, principles and instructions on which algorithms or systems of artificial intelligence are based, which influence decision-making and may affect conditions of work and pay, access to employment and maintaining employment, including profiling." The proposal met with mixed reviews and was not adopted, but work in this direction is expected to continue in the current term of the parliament.

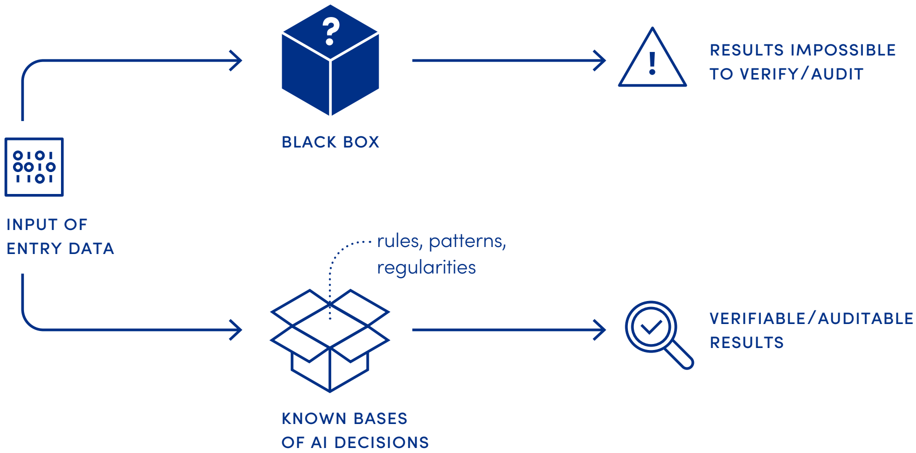
print 2642, committee bill amending the Trade Unions Act

Although the GDPR, in conjunction with the Labour Code, already restricts the use of AI tools in the workplace, it should be emphasised that the permissibility of using AI in employment remains largely unregulated. Some guidance may be provided, for example, by the executive order recently signed by US President Joe Biden or the EU's proposed AI Act, but employers operating in the Polish labour market must still rely primarily on internal regulations and best practices for the time being. In particular, employers using AI should ensure that they are collecting and using employee data in a manner fully complying with applicable provisions. Nonetheless, we expect the Polish and EU provisions on AI in the HR context to evolve rapidly.

Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence of 30 October 2023

Practical problems

In practice, the biggest challenge seems to be detecting the risk of discrimination by an algorithm. The lack of transparency of AI-based tools (the black-box problem) means that employers implementing AI-based solutions are often unaware of their potential undesirable effects.



Still, in this regard, the practice (including in Polish courts) generates more questions than it answers. After all, if we cannot verify how AI arrives at its conclusions, then we should apply the principle of (very) limited trust in those conclusions, especially considering the risk of AI "hallucination"—presenting made-up answers as categorically as if they were verified and true. Can an employer even expect any assurance of proper (non-discriminatory) operation of such systems from their suppliers? This is vital, as the employer's lack of awareness of the malfunctioning of the algorithm will not absolve the employer of liability (or at least not fully).

Will it soon become widespread to require auditing of such systems (already introduced, for example, in a local law in New York City)? But how to audit a "black box"? The answer offered at a major international HR conference was to use another, "better" black box. But it seems more reasonable to base audits on a very large number of trials to determine whether, given the input data, the algorithm generates discriminatory results, or for example superficial results in cases where deeper analysis is required. Or will HR applications have to rein in or greatly limit the creativity of such algorithms?

NYC Local Law 144-21

Here, an attempt at an answer is provided by the pioneering ordinance in New York, effective as of 5 July 2023, mentioned above, regarding automated employment decision tools (AEDT) used to select job candidates. The act requires an annual anti-discrimination audit of such arrangements, focusing primarily on those significantly limiting or even excluding human roles. The purpose is to eliminate discrimination based on traits such as a candidate's race, sex or age. Other US jurisdictions, such as the state of New Jersey, are planning to introduce similar regulations.

In Poland, artificial intelligence is not widely enough used to require such an audit, but this is likely to change very soon. Generative AI is just gaining popularity in our country. At the same time, its complexity means that here it will probably be more difficult to detect algorithmic discrimination. Therefore, given the advances in technology, it seems that Polish legislation may follow a similar path to that proposed in the US.

Finally, we decided to go to the horse's mouth, and ask AI itself about the problem of algorithmic discrimination. ChatGPT answered this question by saying that artificial intelligence in itself does not discriminate against employees, but discrimination can occur if the algorithms, data or instructions provided during its programming contain biases. It is hard to disagree with this answer. In short, the findings generated by algorithms cannot be accepted uncritically as revealed truth.

Combatting algorithmic discrimination —practical aspects

Having in mind the risk of potential algorithmic bias, employers should first and foremost ensure that the data fed to AI-based systems is reliably verified and that such tools are regularly checked for any potential errors made by the algorithm.

But in practice there may be major hurdles to overcome with this first task. In most cases, it is not the employer itself but the solution provider who will decide on the scope of the input data. For this reason, the AI Act would require the supplier of a high-risk AI system to ensure that the system complies with applicable laws, and regularly conduct risk assessments in this regard.

In such a case, from the employers' perspective, day-to-day cooperation between HR and IT departments would be vital, perhaps along with appropriate warranty provisions in contracts with providers of AI solutions. And in the case of high-risk AI systems, employers will have to ensure that the use of such solutions is supervised by a person ("human oversight") and meet other obligations specified in Art. 29 of the AI Act. Additionally, employers who want to launch the use of AI-based solutions should take into account the related obligations under data protection grounds (an issue deserving a separate article).

Again seeking AI's own view, we asked it about methods to combat algorithmic discrimination, and learned that employers should choose systems that can explain their decisions and allow persons affected by algorithmic decisions to provide feedback on such decisions. ChatGPT went on to suggest that preventing algorithmic bias is the role of humans! (programmers, data analysts, and experts in substantive fields). Evidently, AI is not yet ready to step up and take responsibility for its own decisions. Thus, organisations should be especially careful when using AI solutions in an area as sensitive as HR. Artificial intelligence will not yet replace the natural intuition of experienced managers who know their own employees well.

On the other hand, notwithstanding the aims of the proposed AI Act, the complexity of algorithms and their constant evolution may make it harder and harder to live up to the "human in command" requirement. Generative AI is likely to perform more than just a supporting role for employers making HR decisions, and end up deciding for its masters. This could happen in the very near future.

LABOUR LAW · REINSTATEMENT · INJUNCTIVE RELIEF

Injunctive relief for employees demanding reinstatement

Amendments to the Civil Procedure Code regarding employment cases entered into force on 22 September 2023. They allow former employees seeking reinstatement to secure their claims via an injunction continuing their employment pending resolution of the dispute.

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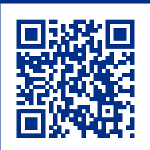

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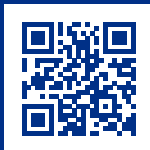

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Lengthy employment litigation in Poland has often resulted in terminated employees who have managed to find a new job giving up their claims for reinstatement, converting their reinstatement claim into a claim for monetary compensation (often capped at three months' salary). This phenomenon is targeted by new rules in Civil Procedure Code Art. 755^5 allowing employees to request an injunction continuing their prior employment until their claim for reinstatement is finally resolved.

Art. 755^5 Civil Procedure Code

Who is entitled to an injunction

This injunctive relief is available to employees who are:
- Subject to special protection, and
- Seeking a finding that termination of their employment contract was ineffective, or seeking reinstatement.

Employees subject to special protection means anyone falling into a category for whom the law provides additional restrictions on termination, including, among others:
- Union activists
- Staff council members
- European works council members
- Social labour inspectors
- Employees on maternity, paternity, parental or childrearing leave
- Pregnant employees.

Employees who were laid off when they were on sick leave or annual holiday may also apply for this form of injunctive relief.

An injunction under this provision may be granted only to former employees seeking a finding that their termination was ineffective, or seeking reinstatement. This relief will not be available to former employees only seeking compensation for wrongful termination.

When an employee's request will be granted

There are two conditions that must be met for an eligible employee to obtain this injunctive relief:

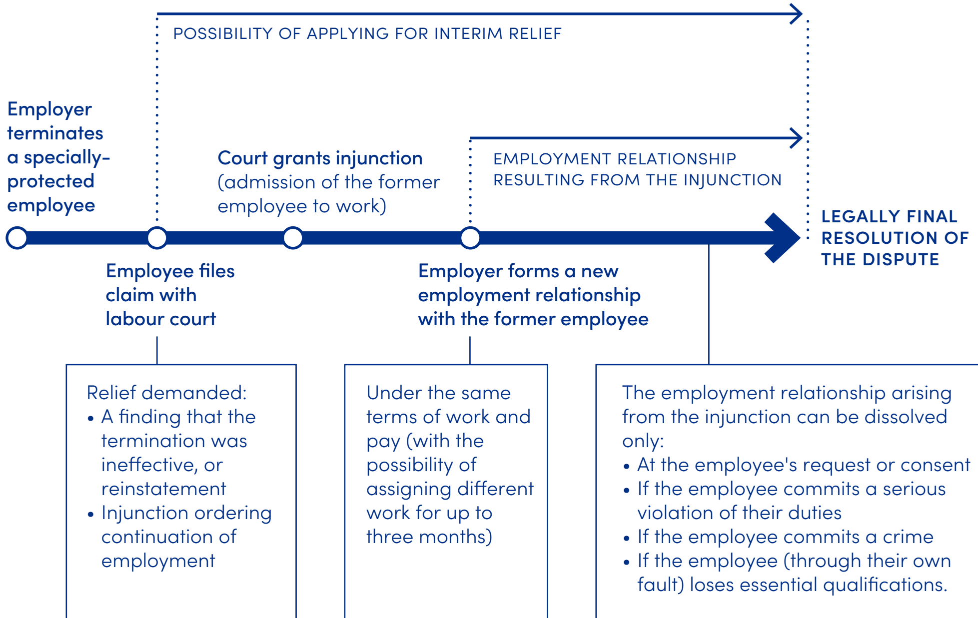
- The employee must substantiate the underlying claim (i.e. make a *prima facie* showing under the facts and the law that their termination was ineffective or they are entitled to be reinstated)
- The claim must not be obviously unfounded.

A claim is substantiated if, on its face, there is a significant probability that the claim is well-founded (which does not exclude the possibility that after a deeper analysis of the facts and the law, the claim may turn out to be unfounded). There are two notable aspects of probability in this context. First, the applicant must present factual evidence for the circumstances on which the claim is based. Second, there must be a legal basis for the claim.

Art. 755^5 of the Civil Procedure Code also provides for a negative premise, which is that the injunction cannot be granted if the employee's underlying claim is obviously unfounded. This would be the case if it would be apparent to any legal professional without the need for in-depth legal and factual analysis. If the court finds that the claim is obviously unfounded, it must deny the injunction.

Deadline for applying for an injunction

Under Art. 755^5, a request for an injunction may be filed at any stage of the proceedings. This means that it can be submitted along with the statement of claim, or after filing of the statement of claim. It may also be filed after the issuance of a non-final judgment, before an appeal is filed or when an appeal is pending.



However, the employee cannot seek an injunction, and the court may not grant it, once a final judgment has been issued.

The question arises whether this type of injunction may be granted even before initiation of the proceedings on the merits (as is the case with other forms of interim relief). In my own view, this possibility is ruled out, as it could result in satisfying the former employee's entire claim, even if they do not ultimately file suit.

Performance of the obligation

Issuance of an injunctive order alone does not result in restoration of the employment relationship. It only obliges the employer to allow the plaintiff to continue their employment. This should occur by establishing a new contractual employment relationship.

”

Issuance of an injunctive order alone does not result in restoration of the employment relationship. It only obliges the employer to allow the plaintiff to continue their employment.

The question arises under what conditions such a relationship should be established. The purpose of an injunction in the form of continued employment is to allow the employee's claim to be realised even before a judgment is rendered, due to the high probability of the validity of the claim. This can be satisfied if the employee performs work in the same position as at the time of service of notice of termination of the employment contract. Thus the court's order granting an injunction by ordering that the plaintiff be admitted to work means that the employment relationship established in performance of the injunction should include the same terms of work and pay as those in effect under the contract whose termination the employee is appealing.

The employee's status while the injunction is in force

Because performance of the injunctive order takes the form of establishment of a new employment relationship, the rights and obligations of the parties to the employment relationship under the Labour Code will apply in full. In particular, the employer should be allowed to reassign the employee to another type of work for a period of three months, as provided in the labour law.

There should be one exception to this rule. The employer cannot terminate the employment relationship established in performance of the injunction. This would render the injunction moot.

But this does not mean that the employment relationship created as a result of such an injunction can never be terminated.

Such a possibility exists, first, if the employee terminates the employment relationship, either by submitting a statement of termination (with or without advance notice) or signing a termination agreement.

Second, the employer will be able to terminate the employment relationship if the injunction is lifted. The employer may demand that the final order granting the injunction be set aside only if it shows that after the injunction was granted, grounds arose for termination of employment due to the employee's fault, without advance notice, i.e.:

– If the employee commits a serious violation of the employee's basic duties

– If the employee commits a criminal offence while employed which prevents further employment in the position they hold, and the employee's guilt is obvious or has been determined by the court in a final judgment
– If the employee, through his or her own fault, loses a licence required to perform work in the position.

The parliament expressly stipulated that modification of the injunctive order in other cases is impermissible.

Enforcement and appealability of the injunction

An injunctive order is enforceable via execution. An enforcement clause is granted to the order *ex officio*. The court should serve the order on the employer so that it can voluntarily comply. Nevertheless, at the employee's request, when granting the injunction the court may provide in the order that the employer must pay a certain sum of money to the employee if the employer violates its obligations under the injunction.

Regardless of how the court rules on the application for this injunctive relief, the order may be appealed to the court of second instance.

The financial market "vegetable patch"

The Act Amending Certain Acts for Development of the Financial Market and Protection of Investors in the Financial Market entered into force in Poland on 29 August 2023. It updated 32 different acts and, as a result, during consultations was affectionately dubbed the "vegetable patch"—growing a little bit of something for everyone. To avoid making a "vegetable patch" out of this article, we will focus on just a few plants in the garden, but we should signal that the changes also cover many issues not discussed here (such as tax, insurance and banking laws).

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capital markets

Act on Public Offerings, Conditions Governing the Introduction of Financial Instruments into Organised Trading, and Public Companies

Prospectus

Art. 27(1a)

Art. 27(1a) was added to the Public Offerings Act to "discipline" issuers regarding their diligence in preparing complete documentation for the Polish Financial Supervisory Authority (KNF) to approve a prospectus. This provision clearly indicates what defects in an application to KNF for approval of a prospectus will cause KNF to refuse to consider the application if the issuer does not cure the deficiencies within 7 days after KNF requests the issuer to do so. A material deficiency includes any failure to provide financial information required by law, e.g.:

- Financial statements
- Auditor's report or review, as the case may be.

In the explanatory memorandum to the amendment, KNF stated that this provision is intended to curb the bad market practice of submitting a prospectus lacking key information necessary not only for approval, but even for checking against the criteria required under EU law. It is in the issuer's interest to submit complete and consistent documentation, enabling the regulator to quickly review the application and approve the prospectus.

Art. 51(3)

The amendment to Art. 51(3) of the act equates the effect of a decision on approval of a prospectus with a decision on approval of an annex. Now both types of decisions are immediately enforceable and there is no right to seek reconsideration.

Extension of KNF's powers

The new wording of Art. 68(1)(5) strengthens KNF's supervisory measures in overseeing the performance of duties referred to in Chapter 4a governing remuneration policies and reports in public companies. Among other things, public companies are required to adopt and publish on their website a policy for remuneration of management board and supervisory board members. The expanded powers allow the regulator to request information from the company and make recommendations to the company with regard to shortcomings in performing these duties.

Art. 68(1)(5)

The amendment introduced Art. 68 (1b) and (2), allowing KNF to request information from issuers whose shares have been delisted, relating to events and circumstances that occurred when the issuer's shares were admitted to regulated or alternative trading or were the subject of an application for admission to trading on those markets. At KNF's request, members of the issuer's management or supervisory bodies, or employees, liquidators, receivers in bankruptcy or administrators in restructuring must provide KNF with written or oral information and explanations without delay, as well as prepare and provide KNF with copies of documents and other media enabling KNF to perform its oversight tasks. This duty also applies to the issuer's auditors and to members of the governing bodies, or employees, of the audit firm.

Art. 68 (1b) and (2)

KNF has also been empowered to request information from entities otherwise not overseen by KNF but parties to a contract, transaction or arrangement with an issuer of securities. The justification for this provision is plain: "It will increase the effectiveness of oversight with regard to market manipulation and disclosure of confidential information, due to the ability to cross-check the information provided by the supervised entity."

The Polish Financial Supervisory Authority must also inform the company operating the regulated market of the method for handling notification of a disclosed material breach of obligations under the Market Abuse Regulation (MAR) by issuers in the alternative trading system (ATS). The addition of this provision will allow the ATS operator to receive feedback on cases it has notified to KNF, which will ensure more effective supervision of issuers' compliance with their MAR obligations.

Act on Investment Funds and Management of Alternative Investment Funds

Securitisation

We also write about securitisation in the article at page 219.

In the Investment Funds Act, the type of fund previously called a "securitisation fund" (*fundusz sekurytyzacyjny*) is now called a "receivables fund" (*fundusz wierzytelności*), introducing appropriate amendments to Chapter 3 describing the nature and operation of receivables funds. This change is accompanied by a change in the name of these funds in other laws, such as the Banking Law.

The justification to the amendment states that the reason was to avoid overlapping names for concepts under Polish and EU law that have different meanings, and to avoid potential doubts about the relationship between Polish and EU law. The amendment preserves the existing construct in Polish law of funds investing in receivables (with exposure to receivables risk). If the conditions set forth in the EU's Securitisation Regulation are met, the relevant provisions of EU law will apply to the activities of these investment funds or other entities. However, the justification indicates that given the limited experience of applying Regulation 2017/2402 in Poland and the lack of established practice in this area, at this stage it would be premature to propose more far-reaching amendments to securitisation funds (receivables funds).

Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation

Alternative investment companies—ASI

The amendment made many changes regarding the management of alternative investment funds in the form of an "alternative investment company" (*alternatywna spółka inwestycyjna* or ASI) under Polish law, and offering and trading of participation rights in these companies. In particular, the amendment specifies that an ASI investor must be a professional client within the meaning of the Investment Funds Act.

Since this issue raised interpretive doubts whether the provision applies to all modes of share acquisition, on 1 September 2023 KNF and the Ministry of Finance published a joint communiqué reading:

> In this regard, it should be clarified that the purpose of the amendment is to regulate the trading of ASI participation rights primarily from the point of view of the possibility of their acquisition by retail clients outside of organised trading. Thus, these changes do not apply to shares issued by ASIs which, on the date of entry into force of the amending act, are admitted to trading on a regulated market or introduced into an alternative trading system. Therefore, the newly introduced provisions should not be interpreted to exclude such ASIs from organised trading. However, the introduced provisions limiting the transferability of participation rights (shares) in ASIs will apply to ASI shares that are not admitted to organised trading.

This interpretation means that retail clients will be able to buy and sell ASI shares in organised trading (on the secondary market).

Financial Market Supervision Act

KNF interpretations

The Financial Market Supervision Act governs the right of financial market entities to file a request with KNF for an individual interpretation on the scope and manner of application of statutory provisions and executive regulations. Such a request may be made only for products and services aimed at developing innovations on the financial market. The request for an interpretation must include a comprehensive description of the current facts or future event to which the interpretation will apply, and the applicant's own position on the issue.

The amended act states that KNF's interpretation must be issued without undue delay, but no later than 45 days after filing of a request for an interpretation, or in particularly complicated cases 60 days.

Art. 11b(4)

KNF's failure to issue an interpretation within the stated time limits will be deemed to confirm the applicant's position. KNF's interpretation is not binding, but compliance with the interpretation cannot be grounds for imposition of administrative sanctions by KNF.

Art. 11c

Art. 11c was added, governing the right of an entity to release information on financial market supervision measures taken against the entity or affecting the entity, in particular information on:
– Oversight performed by KNF
– Interpretations issued at the entity's request
– Responses and positions obtained by the entity.

Information published by the entity must not to be used to create an impression that the products or services offered by the entity are risk-free or carry a significantly lower level of risk, or that KNF guarantees that the entity will meet its obligations in this regard.

If this prohibition is violated, KNF will issue a recommendation to the entity to cease and desist. Within 7 days of receipt, the entity may raise objections to the cease-and-desist recommendation. Raising objections suspends the obligation to implement the recommendation until KNF acts on the matter. If objections are raised, KNF may withdraw the recommendation, issue a new recommendation, or issue a decision ordering compliance with the recommendation. KNF may also issue such a decision if the entity does not raise objections by the deadline and fails to comply with the recommendation.

If the entity fails to comply with the cease-and-desist order, the Polish Financial Supervision Authority may impose a fine on the entity not exceeding PLN 500,000.

RESTRUCTURING · BANKRUPTCY · PREPACKAGED LIQUIDATION · PRE-PACK

Streamlined pre-pack bankruptcy on the horizon

In December 2022, the European Commission presented a proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law. Although still distant, its implementation is aimed at further alignment of insolvency proceedings across EU member states, increasing their efficiency and better protecting creditors' interests. An important element of the proposed solutions is the prepackaged liquidation procedure, or "pre-pack," which already exists in the Polish Bankruptcy Law. Its purpose is the liquidation (sale) of the debtor's business or significant assets along with the declaration of bankruptcy.

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insolvency and restructuring

The proposed directive would introduce significant, innovative changes from the perspective of Polish bankruptcy law, and therefore it is worth getting acquainted with the proposal before it is implemented into both the European and national legal orders.

Pre-pack under Polish bankruptcy law

In Polish law, a pre-pack bankruptcy consists in the sale of the debtor's enterprise, an organised part of the enterprise, or assets constituting a significant part of the business to an acquirer designated by the debtor or a creditor filing a bankruptcy petition.

The pre-pack is inextricably linked to the declaration of bankruptcy. When declaring the debtor's bankruptcy, the bankruptcy court simultaneously approves the terms of sale of the debtor's assets, indicating at least the acquirer and the price. The court's approval of the terms of sale is based on an appraisal of assets prepared by an expert selected by the pre-pack applicant. The court must approve the terms of the sale if the price offered is **higher** than the amount obtainable in bankruptcy proceedings under the general rules, that is, in a liquidation conducted by a bankruptcy trustee after the declaration of bankruptcy (most often using a time-consuming bidding procedure). Also, the court may approve the pre-pack if the price is **approximately equal** to the amount obtainable in bankruptcy proceedings. The contract transferring ownership of the debtor's assets is concluded after bankruptcy is declared, between the trustee and the acquirer approved by the court.

When the pre-pack procedure was introduced in the Polish Bankruptcy Law (1 January 2016), interest in this liquidation procedure was high. Many insolvent debtors sought investors to liquidate their assets as quickly as possible as part of bankruptcy proceedings.

However, after a few months of applying the new provisions, it turned out that although the terms of sale are approved quite quickly, the court order approving the pre-pack is sometimes challenged by other stakeholders (e.g. secured creditors), prolonging the whole procedure (often by many months), making the procedure not very attractive for the acquirer.

Although the bankruptcy provisions allow the business or other components covered by the pre-pack to be released to the investor even before the order approving the pre-pack becomes legally final, the uncertainty surrounding the finality of the court's ruling approving the terms of sale discouraged investors. They also feared liability for managing property that ultimately would not become theirs. This discouraged them from investing time and money in an uncertain and lengthy process for acquiring distressed assets.

From 1 December 2021, changes were introduced to the Polish pre-pack. They were designed to safeguard creditors' interests, but in practice they further prolonged the entire procedure preceding the declaration of bankruptcy and approval of the terms of sale. Effectively, the Polish pre-pack has become marginalised, and is applied sporadically, in a situation where basically all stakeholders—the debtor and essentially all creditors—agree that a quick sale of assets at the price offered by the investor is beneficial to them. In view of the conflicting interests of different creditor groups, this is obviously a rare situation. Therefore, the new form of pre-pack provided for in the Commission's proposal is a welcome development for Polish law.

Two phases of the new procedure

According to the proposed directive, the pre-pack procedure is to consist of two phases: a preparation phase and a liquidation phase.

Proposal for a Directive harmonising certain aspects of insolvency law

In the preparation phase, at the debtor's request, the court will appoint a monitor, who under Polish law will be a licensed restructuring adviser. At this stage, with the adviser's help, the debtor will seek an acquirer for all or part of its business. The purpose is to present the best offer to the court for approval in the second phase (liquidation, the bankruptcy proceeding proper)—an offer that should be selected through a competitive, transparent, fair and market-based procedure.

The adviser will be chosen by the debtor at its discretion in line with market standards, and the court will merely confirm the choice.

The court's approval of the bid is subject to a finding by the monitor that the best bid does not clearly violate the criterion of protecting the best interests of creditors. Thus, the monitor will assess whether the sale of the debtor's business to the selected bidder would materially worsen the creditors' situation compared to traditional liquidation of the bankruptcy estate by a bankruptcy trustee. The responsibility for assessing the criteria for selecting the best bid rests with the monitor, whose position will be crucial to the court in approving the bid.

The directive would leave it up to the member states to determine the procedure that will determine the best bid in the preparation phase. It is permissible for only one bid to be submitted. At that time, the bid is considered to reflect the market price of the business. However, it is always possible to conduct an auction after the start of the liquidation phase. The auction must begin within two weeks of opening the liquidation phase and last no longer than four weeks. The auction is public, and will open at the bid selected by the monitor as part of the preparation phase.

During the preparation phase, at the request of a debtor who is insolvent or at risk of insolvency, the court could issue a stay of enforcement against the debtor, after hearing the views of the monitor.

The introduction of two phases for a pre-pack liquidation is a good solution. The first phase, which is essentially extrajudicial (the court only appoints the monitor), serves the purpose of seeking an investor. At this stage, the investor can conduct due diligence on selected assets. In the second phase, selection of the bid is only to be approved by the court, but the court can still refuse to approve the sale if the criteria for selecting the best bid have not been met.

An important new feature is restricting the suspensive effect of challenging the court's order approving the sale to a situation where the complainant submits security adequate to cover potential injury caused by suspension of the sale. Framing the right to appeal the court's order approving the sale in this way could do much to streamline the pre-pack procedure, since it has been the filing of complaints by creditors, or debtors themselves, that has been the main factor prolonging pre-pack proceedings in Poland. However, the obligation to provide security may be excluded in the case of individuals challenging the court order authorising the sale. And creditors and shareholders of the debtor retain the right to be heard before the court approving the terms of sale.

Special effects of a pre-pack sale

The proposed directive upholds the enforcement effect of the sale of the debtor's business, meaning that the acquirer will not be liable for tax obligations or other debts that arose before the asset was acquired. However, the proposal provides that the acquirer can still expressly agree to extend its liability.

A controversial solution is the automatic assignment to the acquirer of the business of contracts not being performed by the debtor that are necessary for continuation of the debtor's business, even without the consent of the other party to the contract (other than contracts with the acquirer's competitors). Although the court may individually waive this rule, for example in cases where termination of the contract is in the interest of the debtor's enterprise, this should be considered a proposal that goes too far. Indeed, it violates the enforcement effect of acquisition of assets in bankruptcy proceedings, which in principle means that the buyer does not assume any of the seller's liabilities. Forced assumption of defaulted agreements artificially binds the acquirer of the debtor's business to existing counterparties, whom the acquirer never selected or checked, significantly restricting the buyer's business freedom.

On the other hand, a positive proposal is the possibility for the monitor to obtain interim financing for the debtor, which will then, in the bankruptcy proceeding, enjoy priority over other creditors, as well as allow the financing claim to be set off against the price that would be paid for the debtor's assets acquired in a pre-pack, if the financer becomes both the bidder and the acquirer of the assets. Also, creditors secured against assets liquidated in the pre-pack procedure will have the right to setoff against the purchase price of the collateral if they decide to make a bid (with a credit toward the purchase price). Setoff will be allowed provided that the value of these creditors' claims is significantly lower than the market value of the business. However, this right will not apply to unsecured creditors—an approach that has been called for in Polish bankruptcy practice for many years.

PRE-PACK TODAY

Debtor or creditor:

- Files a bankruptcy petition
- Indicates the acquirer of the enterprise / organised part of the enterprise / assets comprising a significant part of the enterprise

Expert witness privately hired by the debtor or creditor:

- Appraises the assets (verifies the amount that could be obtained in a liquidation conducted by a bankruptcy trustee under the general rules)

Bankruptcy court:

- Declares the debtor's bankruptcy
- Approves the terms of the sale of the debtor's assets if, according to the expert's appraisal, the sale to the acquirer will yield an amount similar to or greater than the amount that could be obtained by a bankruptcy trustee under the general rules

Sale contract between the trustee and the court-approved buyer

Other stakeholders may challenge the approval of the sale (delaying the procedure by months).

PROPOSED STREAMLINED PRE-PACK

Preparation phase

- Debtor chooses a restructuring adviser
- At the debtor's request, the court appoints the restructuring adviser as "monitor"
- With the adviser's help, the debtor seeks an acquirer for its business
- With the adviser's approval, the debtor presents the best bid to the court

Liquidation phase

- The monitor makes a finding that the best bid meets the criteria of protecting the creditors' best interests
- If the criteria are met, the court approves the bid after giving creditors and the debtor's shareholders an opportunity to be heard

Optionally: a time-limited public auction (up to 6 weeks) in which investors other than the one selected by the debtor may bid higher than the bid selected in the preparatory phase

The order approving the sale can be appealed if the complainant submits security covering the potential injury caused by suspension of the sale.

Conclusion

The final shape of the directive and the method of its implementation in Polish bankruptcy law will determine whether the new solutions increase the efficiency of the pre-pack procedure and enable faster liquidation of an insolvent debtor's assets and satisfaction of its creditors. The approach of a two-phase procedure (with limited court participation) is a very good step aimed at deformalising the process of selecting a bidder with the help of a licensed restructuring adviser, followed by court approval in an expedited procedure with a limited right of appeal by creditors.

Certainly, the existing provisions of the Polish Bankruptcy Law could benefit from the aims of the proposed directive, especially simplifying the judicial part of the pre-pack procedure and the effectiveness of finalisation through irrevocable transfer of ownership of the acquired assets to the buyer.

When is a transaction deemed to be securitisation, and what are the implications?

Securitisation involves conversion of receivables into liquid funds or transfer of repayment risk to a third party. In Poland, this process is only sporadically regulated, covering only some of the structures found on the market. But when a transaction is deemed to constitute securitisation, there are additional obligations on the parties.

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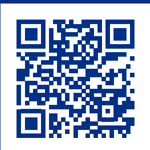


banking & finance

Understood as the right to receive payment from a customer or counterparty, claims for payment of money due (receivables) are a significant asset of any business. They arise whenever the creditor does not receive immediate payment. Sometimes this occurs in the form of credit or loans (from banks or other lenders), or other times in the form of trade credit (from manufacturers or suppliers of goods) or deferred payment for goods or services purchased by consumers ("buy now, pay later").

Whether and when a business receives money in payment of its receivables is of great importance for its financial liquidity and operating success. Not surprisingly, transactions in receivables are nothing new or unusual on the market. Receivables are offered as collateral for financing from a bank or specialised fund (pledged or assigned as collateral), but are also sold in exchange for immediate payment (e.g. factoring). The risk of non-payment of these receivables often constitutes a separate element of various agreements under which the initial creditor or a third party may be liable for the debtor to make payment.

When preparing to conduct transactions involving receivables, it is important to consider whether a transaction in the proposed form and content might get the parties caught up in the framework of regulated forms of receivables management. In this article, we will focus on the classification of such a transaction as securitisation (traditional or synthetic), which affects the scope of obligations of the original creditors, purchasers of receivables, and investors financing the acquisition.

The most important factors for properly determining whether a transaction constitutes securitisation are its structure and the allocation of risk among the participants in the transaction. Of secondary importance will be the nature of the receivable, and even whether the receivables are being serviced or are non-performing.

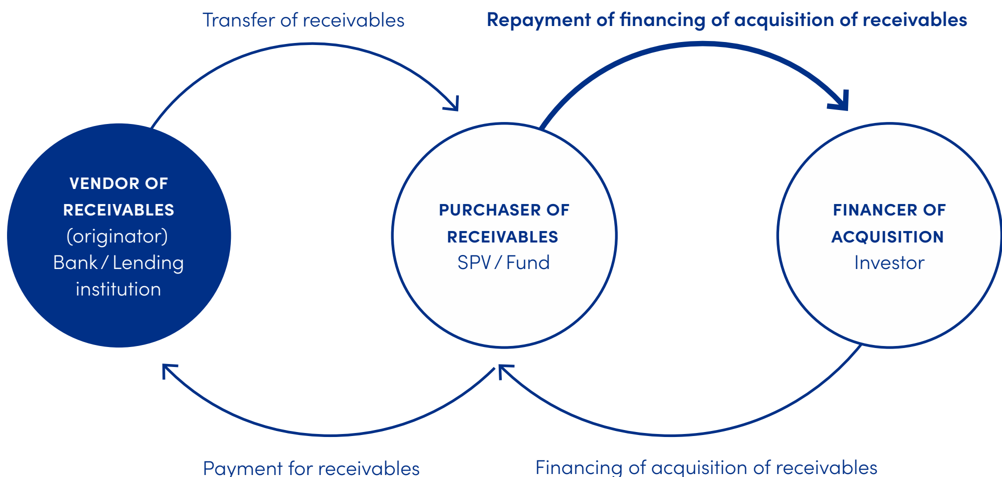
What is securitisation?

Securitisation does not have one simple definition. It is essentially an economic process consisting of converting a receivable into liquid funds or transferring the risk of non-payment to a third party. This process can consist of a number of legal acts. In Poland, specific definitions of securitisation can be found in certain laws, but at the moment it can hardly be said that any one statute comprehensively regulates the process of securitisation of receivables.

The entire process usually consists of three stages:

1. A set of financial assets, i.e. certain receivables against debtors, is separated from the assets of the existing creditor. The business line of the original creditor (the originator) is irrelevant for this purpose—it could be a bank, a non-bank lender, or a provider of goods or services completely unrelated to the financial market.
2. These receivables or the risks associated with them are transferred to a third party.
3. The third party covers the value of the purchased receivables with funds from investors whose financing is secured by the receivables acquired by the third party from the originator.

FIG. 1 SIMPLIFIED DIAGRAM OF A SECURITISATION TRANSACTION



A simplified diagram of a securitisation transaction is provided in Figure 1. In practice, many more entities may be involved, but for the purposes of this article this simplified scheme will suffice. Most important is to recognise that the subject of the contract must be receivables, and the party purchasing the receivables or assuming the risks must be financed by external parties.

A securitisation transaction may also involve a debt collector or servicer, who is responsible for dealing with the debtors of the receivable and who may also be the originator, e.g. a manufacturer or a bank.

In legal terms, securitisation is defined at the EU level in the Securitisation Regulation (2017/2402), and the risks we want to highlight are associated with this regulation. Securitisation has no legal definition in Polish law. Regulation of this area used to be residual and scattered across several laws, mainly in the Act on Investment Funds and Management of Alternative Investment Funds and the Banking Law, but after the September 2023 amendments the terms related to securitisation were removed from these legal acts and replaced with other terms (e.g. what was called a "securitisation fund" (*fundusz sekurytyzacyjny*) is now called a "receivables fund" (*fundusz wierzytelności*)). The drafters of these amendments justified them by the need to ensure consistency between the national law and the EU regulation, so that the same legal term is not understood differently in the same system.

Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012

An economic approach to defining securitisation has also been adopted by the Supreme Court of Poland, stating:

> Securitisation is an economic process aimed at generating cash from receivables by issuing securities whose redemption is secured by the securitised receivables. The rationale behind this process is to create a situation allowing investors who place funds in such collateralised securities to reduce their risk, making them more attractive and allowing them to increase their value. This is done by establishing a separate legal entity whose situation and economic position provides higher creditworthiness than the entity interested in raising funds from the receivables (the originator of the securitisation).

Supreme Court of Poland resolution of 29 November 2007, case no. III CZP 101/07

An analysis of the domestic regulations and the method of operation of investment funds led to the conclusion that the activity of securitisation funds (today's "receivables funds") constitutes securitisation in the economic sense, but may or may not fulfil the characteristics of securitisation as referred to in Regulation 2017/2402.

Nonetheless, it should be pointed out that securitisation transactions that do not constitute securitisations within the meaning of Regulation 2017/2402 do exist. From a legal point of view, for assessing the risks and obligations of applying the EU regulation, what is relevant is that the transaction fulfils the prerequisites stated there. If a transaction does not fall within the definition of securitisation in Regulation 2017/2402, this does not mean that it is a prohibited transaction or is not a securitisation in the economic sense. But the special obligations described in the regulation will not apply to such a transaction.

Securitisation in Regulation 2017/2402

Pursuant to Regulation 2017/2402, securitisation means a transaction or scheme whereby the credit risk associated with an exposure or pool of exposures is tranched, having all of the following characteristics:

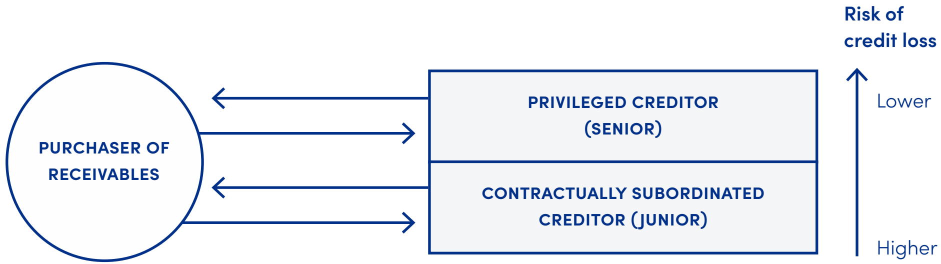
- Payments in the transaction are dependent upon the proceeds from the receivables
- The subordination of tranches determines the distribution of losses during the ongoing life of the transaction
- The transaction does not constitute specialised financing with the characteristics indicated in Regulation (EU) 575/2013.

Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012

Interestingly, Regulation 2017/2402 is not linked with the issuance of securities. This means that the manner in which the acquisition of receivables or assumption of credit risk is financed, whether by a loan, bonds or investment certificates, is irrelevant in assessing whether a transaction constitutes securitisation.

Instead, a key feature is the so-called tranching of credit risk. This involves establishing a hierarchy of tranches determining how losses will be allocated over the life of the transaction. Under the EU regulation, "tranche" is defined as a contractually established segment of the credit risk associated with receivables, where a position in the segment entails a risk of credit loss greater than or less than a position of the same amount in another segment. In other words, what matters is whether, as a result of the contract, one investor has a greater risk of non-repayment of the financing than another

FIG. 2 HIERARCHY OF TRANCHES



investor. For example, two or more classes of securities are issued, where the return on the investment is allocated between the classes of securities by preference. The most privileged tranches (senior) are the first to receive the cash flows that remain after paying the transaction costs. Then the remaining balance is distributed among the lower-priority tranches (mezzanine and junior). In the case of losses, the reverse mechanism occurs: the tranches with the lowest priority lose first and lose the most. As long as all investors are treated the same, or the differences between them are not due to contractual arrangements, but for example structural arrangements (one investor takes up shares (equity) and the other provides a loan), the tranching prerequisite will not be met. But typically this problem can arise if one of the financing entities enters into an agreement to subordinate the repayment of its financing to the repayment of another investor (e.g. a bank provides credit to a company and a shareholder provides a subordinated loan). Also, there may be scenarios that are much more complicated, with the use of different collateral and agreements between investors.

Another feature of securitisation described in Regulation 2017/2402 is that the payments must be dependent on the performance of the receivables. Such a requirement should relate to the source of repayment of the financing by the entity that acquires the receivables or credit risk. If payment of the debt can be the only source of repayment, as opposed for example to the business carried out by the debtor, then the prerequisite will be met. Here, it is important to distinguish a situation in which a business venture, e.g. construction of a factory, is financed by the sale of receivables

as a result of the business arrangements between the entities involved, but the financing bank or shareholder does not look to the acquired receivable as the source of repayment, but looks to the operations of the factory itself and the creditworthiness of the borrower. Often, this link will be evidenced by a limitation of the liability of the purchaser of a receivable to investors, where payments to investors become due only to the extent that the purchaser first receives payments on the securitised receivables.

A negative premise that prevents a transaction from qualifying as securitisation within the meaning of the EU regulation (even if the first two prerequisites are met) is when specialised financing is involved, consisting in providing financing to special-purpose vehicles, but the acquisition or operation of physical assets is financed. The purpose of this prerequisite is to remove the risk that such financings, such as project finance, asset finance etc (despite the use of tranching and the capacity to repay the financing being tied to the ability of the financed assets to generate cashflows), will be regarded as securitisation.

It should be stressed that treatment of a transaction as securitisation is independent of the type of receivables that are the subject of the transaction. It does not matter whether they are trade, loan or leasing receivables, receivables against third parties or intra-group receivables. It is also irrelevant whether the receivables are fully performing and timely serviced by the debtors, or the debtor has ceased payment and servicing of the debt.

This approach to defining securitisation transactions may raise practical problems for some entities, e.g. vendors of receivables. This is because many of the prerequisites, e.g. regarding the method of financing a transaction by the purchaser, may be beyond their knowledge and control. Thus it is possible to imagine a situation where a vendor of receivables is not even aware that it is subject to obligations under the EU regulation.

Traditional or synthetic?

The EU regulation distinguishes between two types of securitisation: traditional (off-balance sheet) and synthetic (on-balance sheet). The main difference lies in the method of transferring the

credit risk from the originator to the purchaser. Under the first, the risk under the receivables is transferred by transferring ownership of the economic interest from the vendor (the originator) to the purchaser (e.g. an SPV). Thus, in "traditional" securitisation, the receivables must be transferred.

By contrast, in "synthetic" securitisation, the transfer of credit risk is achieved using credit derivatives or guarantees, and the receivables being securitised remain with the originator. This presupposes the transfer of a specific risk without transferring assets and separating them from the assets of the originator. It occurs by creating a right on the part of the vendor to obtain certain benefits in the event of default on the securitised receivables.

In the context of synthetic securitisation, one has to be particularly careful when dealing with unusual financial products—as was discovered by one trader who wanted to shorten the timeframe for obtaining payment from its customers. The trader agreed with a financial institution that the financial institution would provide loans to the trader's customers to pay the trader's invoices. The lender demanded that the vendor assume part of the risk by guaranteeing up to 15% of the financing. Due to the assumption of credit risk through the guarantees, this structure was recognised by the European regulator as a synthetic securitisation.

FIG. 3 TRADITIONAL SECURITISATION

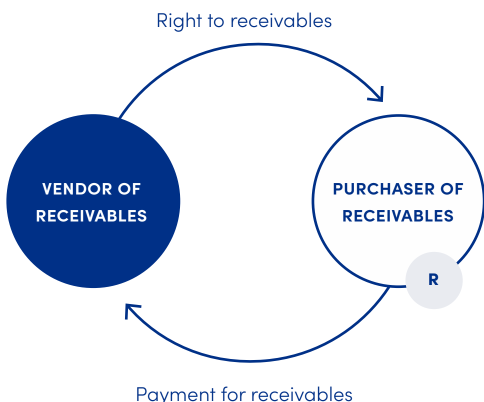


FIG. 4 SYNTHETIC SECURITISATION

Consequences of classification of a transaction as securitisation

Treatment of a transaction as securitisation entails additional obligations for the participants, especially the investor, the vendor of the receivables or risk, and the purchaser of the receivables or risk.

The primary obligation of an investor is to exercise due diligence, both before taking a given securitisation position and when holding it. Only an institutional investor within the meaning of the EU regulation, e.g. an insurance company, an alternative investment fund manager (AIFM) or a credit institution, is required to do so.

Before taking possession of a securitisation position, an institutional investor conducts due diligence enabling it to assess the risks. It examines the risk characteristics of a given position and underlying exposures, the structural features of the securitisation, including the sequence of payments, credit enhancement and liquidity, and transaction-specific events of default.

When holding a securitisation position, the investor must have adequate procedures in place to monitor compliance of the securitisation with the conditions examined at the due diligence stage, including monitoring overdue positions, the occurrence of violations, recovery, and the collateral coverage ratio. The investor must also conduct stress tests in the context of cashflows and collateral, and ensure internal reporting and adequate knowledge of underlying positions and exposures.

Vendors and purchasers of receivables are required to make available to investors, potential investors and the relevant supervisory authorities (in Poland, the Polish Financial Supervision Authority):

- Information on the underlying exposures
- All documentation essential for understanding the transaction, including asset sale agreements, assignments, novations, transfers of assets, and documentation relevant to derivatives and guarantees
- Monthly or quarterly reports
- Information on any significant events, such as material breaches of the obligations set forth in the foregoing documents or a change in the risk profile of the securitisation or underlying exposures that may materially impact the income generated by the securitisation

– Information on cases where securitisation no longer meets the requirements for simple, transparent and standardised securitisations, if compliance with these requirements was previously reported.

Originators (the primary creditors) have another important obligation—to retain risk. This consists in permanently retaining a significant net economic interest in the securitisation of not less than 5%. By way of an exception, the risk-retention obligation may fall on a receivables servicing entity (e.g. a receivables portfolio management entity) when non-performing receivables are the subject of securitisation.

Conclusion

Because securitisation transactions are at least partially covered by the EU's Securitisation Regulation, anyone entering into a transaction involving receivables or credit risk must ask at least a few basic questions about the structure and parameters of the transaction. Indeed, examining the regulation, it is hard to avoid the impression that more transactions than originally expected may be subject to it, and certainly more than one's business instincts might suggest.

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