YEARBOOK 25

WARDYŃSKI + PARTNERS

For the past 15 years, in the firm's *Yearbook* we have sought to chart a course through the changing legal and economic environment.

Storing energy instead of wasting it. The state's migration strategy. Whistleblowers. Cross-border conversion of companies. The deposit scheme for containers, integrated development plans, and the market for non-performing loans. Surreptitious advertising, use of artworks in films, and online criticism of employers.

As always, we cover lots of ground. We hope you find topics of interest for you and your business.

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Wardyński & Partners has been a vital part of the legal community in Poland since 1988. We focus on our clients' business needs, helping them find effective and practical solutions for their most difficult legal problems.

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Our lawyers are active members of Polish and international legal organisations, gaining access to global knowhow and developing a network of contacts with the top lawyers and law firms in the world, which our clients can also benefit from.

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There are over 150 lawyers in the firm, serving clients in Polish and English, but also, through our language desks, in Czech, French, German, Italian, Korean, Russian, Spanish and Ukrainian. We have offices in Warsaw, Kraków, Poznań and Wrocław.

We share our knowledge and experience through our portals In Principle and HRlaw.pl, the firm *Yearbook*, the newtech.law blog, lively commentary on the Public Procurement Law and the GDPR, the scholarly journal *In Principle: Legal Studies and Analyses*, and numerous other publications and reports.

2025 YEARBOOK

YEARBOOK 25

WARDYŃSKI + PARTNERS

Print run
250 copies

Publisher
WiW Services sp. z o.o.

Production
Justyna Zandberg-Malec

Translation
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Graphic design and typesetting
Marta Duda (Dobry Skład)

Photos
Paweł Wodnicki

Printing
Drukarnia Piotra Włodarskiego

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CONTENTS

9 **Energy storage: The next essential stage in Poland's energy transition**
Igor Hanas, Rafał Pytko

17 **Poland's immigration strategy: Security policy and the demands of the labour market**
Magdalena Świtajska, Katarzyna Sawicka, Aleksandra Wójcik

25 **When AI software is a medical device**
Joanna Krakowiak

33 **Art on the big screen: What to remember when featuring a painting in a film**
Ewa Nagy

41 **A deposit system, yes—but how will it work?**
Małgorzata Piekarska, Karol Maćkowiak

49 **Sustainability agreements: How to cooperate for sustainable development in compliance with competition law**
Weronika Nalbert

59 **The limits of online criticism of employers: The power of a "single click"**
Dr Szymon Kubiak, Natalia Bigdowska

69 **Whistleblowing à la polonaise**
Prof. Marcin Wujczyk, Przemysław Zając

77 **Cross-border corporate conversions: Legal aspects**
Dr Kinga Ziemnicka, Monika Lutomirska

85 **Dividends and the disposal of shares: Can a dividend in a limited-liability company go to someone other than a shareholder?**
Adam Pawlisz, Mateusz Próchnicki

95 **Liability of supervisory board members … and how to avoid it**
Jakub Lerner, Piotr Ząbkiewicz

103 **A few words about D&O insurance on the Polish market**
Mateusz Kosiorowski, Klaudiusz Mikołajczyk

111 **Enterprise in crisis: In what order should debts be paid to avoid exposure to criminal liability?**
Ewa Kruszko

117 **Foreign investment funds and withholding tax —current challenges**
Sandra Derdoń, Wojciech Marszałkowski

125 **Implementation of the Non-Performing Loans Directive: Practical consequences for investors and debt collectors**
Joanna Werner, Daniel Smarduch

135 Reverse solicitation
Danuta Pajewska, Grzegorz Wojnar

143 How the National Broadcasting Council deals with surreptitious advertising
Barbara Załęcka-Wysocka

151 Consumer proceedings—where a business can lose even if it wins
Maciej Zych, Agnieszka Kubowicz

161 Is there a place for decency in the courts?
Piotr Golędzinowski

171 Settlement of public procurement disputes
Karolina Parcheniak

179 Indexation of fees payable to the contractor in a public procurement contract
Anna Prigan

187 Access to a public road in the real estate development process
Sylwia Moreu-Żak, Iwona Kasperek

197 Integrated development plans
Marcin Rżysko, Michał Wons

207 A new approach to defining relevant markets?
Andrzej Madała

Dear Readers,

The widespread demand for clear and precise laws, so that we always know how to act, can't always be achieved, but can inspire lawmakers to produce formulas rather than laws. Meanwhile, the aim of any legal system is to protect the values regarded as essential for the harmonious functioning of the society in which that system operates.

Reality is changing so dynamically that the legal system cannot manage to accommodate these changes just by passing more and more regulations. This is the role of interpretation of the existing regulations, with a view to protecting the values which the legislature originally intended for the regulations to protect. Only when the established methods of interpretation fall short of protecting those values does it become necessary to change the law itself.

And once these changes are introduced, we must be vigilant in ensuring that while protecting one set of values, we do not neglect others. So that while protecting energy security, we support energy storage, not just generation. When controlling the influx of foreigners, we must not lose sight of the country's demographic challenges and the needs of the labour market.

And when the administrative authorities interpret the law, they should seek to clarify problematic issues, not fuel long-term disputes (as in the case of taxation of foreign investment funds).

In this, our 15th *Yearbook*, we traditionally seek signposts in an ever-evolving legal and economic situation.

We write about major legal changes that can finally be tested in action (protection of whistleblowers, cross-border conversions of companies) and those that will still need to wait for assessment (the deposit system for beverage containers, integrated development plans, trading in non-performing loans).

We write about legal anomalies, such as the amendment introducing special consumer proceedings that sets the same demanding standards for both big companies and sole traders.

We examine whether there is a place in the courts for decency, and whether to be effective a lawyer really needs to be aggressive. We discuss the possibility of settling disputes in the public procurement arena.

Some of the topics have been the subject of interest for years, such as indexation of fees in public contracts, the order of payment of debts by an enterprise in crisis, shareholders' right to receive a dividend, and access from real estate to a public road (not as simple as it might seem).

We discuss topics that might seem only loosely connected with the law, such as surreptitious advertising, the ability to use artworks in films, or online criticism of employers.

We also raise topics that appear purely theoretical but have a direct impact on practice, such as the regulatory requirements for medical devices using AI software, and the European Commission's new guidance on defining relevant markets.

We write about the liability of supervisory board members and the increasingly common (and increasingly necessary!) insurance coverage for corporate directors and officers.

About the possibility for foreign financial institutions to deliver services at the request of a Polish client when the institution is not licensed to offer services in Poland.

And about situations where new obligations also generate entirely new opportunities—for example where sustainability requirements facilitate lawful cooperation between competitors.

As usual, there are lots of topics. We hope you find among them something for yourself.

We invite you to read our *Yearbook*!
The Editors

Energy storage: The next essential stage in Poland's energy transition

In 2024, 29% of electricity in Poland was produced from renewable energy sources—the best result to date. But it was also the first time such large volumes of energy from RES were lost in the spring and summer due to overproduction and the inability to utilise this energy. As Poland statistically has some of the highest energy prices in the European Union, this is a loss for all consumers, not only energy producers and the historically very energy-intensive economy.

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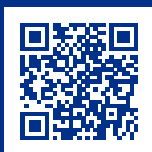

energy

Dynamic growth of renewables, surplus energy, and systemic disconnection of installations

In 2024, for the first time, there was a regularly occurring surplus of energy production from renewable sources, especially on sunny days on weekends. The lack of consumers of electricity on these days not only caused prices on the balancing market of the Polish Power Exchange to be negative (they fell to as low as –PLN 200/MWh), but also endangered the electricity system. For these reasons, transmission and distribution system operators disconnected RES plants from the grid, especially high-capacity photovoltaic plants. The compensation model for "non-market redispatching" itself has resulted in a significant drop in the revenues of energy producers, especially those using photovoltaic units.

Taking into account the currently installed capacity of renewable sources (21 GW at PV power plants and 10 GW at wind farms at the end of 2024), as well as the renewable projects already commenced or planned, expected to add more gigawatts of capacity, in 2025 the problem of unused electricity will increase and become systemic.

Poland—energy storage desert

No one would be talking about lost and unused electricity in Poland (nor would we be writing this article) if national legislation kept up with the changing market reality, or at least if decision-makers systematically analysed how the energy transition has been carried out in other EU countries. In those countries, energy storage has become a necessary stabiliser and safety valve of the power system, collecting excess energy from renewable sources and reducing the consumption of fossil fuels.

In Poland, the energy storage sector—not only for electricity, loss of which is reported more broadly by the media, but also for heat—is in its infancy. There are very few completed energy storage facilities, and their power and capacity are insignificant. Many developers have completed the permitting phase of projects, but domestic investors are often unable to obtain financing for their implementation. The reason is the lack of systemic support (with the exception of the capacity market system, discussed below) and the lack of clarity and stability in the regulations, as well as regulatory difficulties in combining different sources. Financial institutions and investment funds simply refuse to finance such investments. The situation is approaching a stalemate, as due to the increasing frequency of non-market redispatching, financial institutions have also started to look very closely at the revenue side of new renewable energy projects.

PERMITTING PHASE
the stage of obtaining administrative permits for a project, such as:

- decision on construction conditions
- decision on environmental conditions for the project (environmental decision)
- building permit

Broad definition of storage—narrow media coverage

The media focus mainly on storing of electricity by battery systems, which would store electricity and then release it to the grid during peak hours. But heat, which can be stored by a range of different installations, is also energy. These installations include large-scale solutions, which in many places use surplus electricity from RES to power heat storage, and then use this stored thermal energy to power production plants or local heating networks. It is essential to keep sight of this issue when drafting changes to the law, because generation of systemic heat in Poland is associated with significant greenhouse gas emissions from coal- or gas-fired installations. Heat storage can therefore be a real game-changer in the country's energy transition.

A necessary paradigm shift for RES investors

The times of financing simple RES projects without a clearly defined concept for managing surplus energy in the spring and summer are gone forever. Financing of energy storage facilities as independent units also seems like a novelty on the Polish market, and the

”

The times of financing simple RES projects without a clearly defined concept for managing surplus energy in the spring and summer are gone forever.

domestic financial sector is miserly in sponsoring such projects. For the time being, the remedy (also due to the lack of free grid connection capacity) is to "hybridise" current RES installations by adding energy storage facilities to them, or plan new RES installations that incorporate an energy storage component from the start.

The response to these challenges in obtaining grid connection conditions and the increasingly frequent restrictions on introduction of energy into the grid was the statutory regulation of the possibility of connecting an energy storage facility to a generation source without increasing the connection capacity, which was long called for by the industry. This has made it possible to use the capacity of existing infrastructure more efficiently, without the need for network operators to incur the costs of expanding the infrastructure. As a result, distribution network operators, previously sceptical of such practices, have been obliged to accept the expansion of generation sources to include storage facilities without incurring additional investments.

Storage attacks the capacity market

Participation in the capacity market, a stabiliser of the system, is a segment in which large-scale energy storage facilities have a chance to be implemented. In capacity market auctions, the main support system for controllable generation capacity in Poland, coal and gas sources dominated during the first years of the system's operation. It was pointed out that this system was primarily intended to support large production projects carried out by state-owned companies. But storage sources have definitely been winning for the past two years. In 2024, despite the deterioration of the conditions offered to storage facilities in capacity market auctions, financial support was secured for construction of 2.5 GW of storage capacity (0.8 GW more than in 2023).

It should be noted that in these auctions, very often investors offered only part of the capacity of the energy storage facilities they were developing, so the real potential of the energy storage market seems to be much greater. This is also confirmed by the combined capacity of the connection conditions issued for electricity storage facilities—24 GW as of the end of October 2024, according to PSE, the Polish transmission system operator.

However, storage projects, as was the case in previous years with renewable energy sources, are often developed with the aim of selling them on to foreign or domestic investors. For this reason, and taking into account the current costs of investments in storage facilities, it is estimated that a large number of projects may ultimately never be built or perform their intended function.

The successes of energy storage facilities in capacity market auctions have raised doubts about the possibility of expanding storage facilities to add generation sources, using a secured grid connection. Industry investors rightly point out that from the point of view of ensuring the security of the system by units operating on the capacity market, it is irrelevant whether the energy in the storage facilities comes from the grid or is produced from their own sources. But this issue remains quite controversial and has not been unequivocally resolved.

A wide range of revenues for storage facilities

All of this suggests a huge potential for the development of storage facilities, also in areas other than the capacity market. It is argued that energy storage facilities will also benefit from system services for the power grid, frequency regulation, and price arbitrage during the day—an experience confirmed by investors who successfully participated in 2024's capacity market auctions. The differences in the price of energy during peak and trough hours of demand in Poland regularly run into the hundreds of zlotys, often exceeding PLN 500 per MWh. This is particularly relevant in the context of the problems described above in curtailment and non-market redispatching.

CURTAILMENT
when operators of the transmission system or distribution system limit the ability to introduce electricity into the grid, in order to prevent overburdening the grid and to maintain the stability of the electrical system

Are these ambitious plans feasible?

In mid-2024, there were 12 concessions issued for energy storage facilities (i.e. with a capacity of more than 10 MW), and their total installed capacity was 1,465 MW. To this should be added the 185 installations entered in the registers maintained by the respective distribution system operators (i.e. units with a capacity of 50 kW to 10 MW).

Counting current capacity plus the aforementioned storage projects with a combined capacity of 24 GW (which will certainly grow), it is worth asking whether these development plans are feasible. At the current price for building a storage facility of about PLN 4 million per megawatt of built capacity, this yields the staggering figure of almost PLN 100 billion. Therefore, we must ask ourselves whether it is at all realistic to implement this scale of investment in the next few years—bearing in mind that connection agreements are valid only for a limited time. Nonetheless, the industry as a whole (and the authors of this article are no exception) anticipates that the systematic decline in energy storage prices will lead to these bold plans being implemented to the greatest possible extent, significantly contributing to stabilisation and subsequent decline of electricity prices in Poland.

Poland's immigration strategy: Security policy and the demands of the labour market

Migration exerts an ever-increasing impact on the demographics and economies of contemporary societies, including Poland. The society is aging, and the percentage of the population in a professionally productive age is declining. According to projections, by 2060 the number of professionally active Poles may decline by as much as 40%. This makes immigration and integration of foreigners not just a social challenge, but a strategic issue for the future of the Polish labour market.

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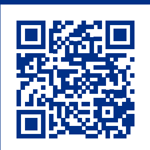

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changes in immigration regulations

Statistics: the reality vs the expectations of the labour market

According to estimates by Statistics Poland, as of the end of May 2024 there were over a million foreigners (1,024,200) working in Poland, or 6.7% of the total number of workers. The foreigners working in Poland in May 2024 came from over 150 countries, with the most from Ukraine (over 70%), Belarus and Georgia. Immigrant labour in Poland helps cover the labour shortage in numerous industries.

The number of foreigners working in Poland is thus significant, but still not enough to meet the needs of the market. At the end of June 2024 there were 110,800 unfilled jobs in Poland. Due to the demographics of the country, in the years to come this gap will only widen. According to the Polish Economic Institute, by 2035 the number of professionally active people in Poland will fall by 2.1 million. This situation demands urgent action.

Poland's immigration strategy for 2025–2030 and (disappointed) hopes

Answers to the problems of the labour market were sought in the immigration strategy, which had been anticipated for many months and in which many hopes were placed. But when the strategy was announced in October 2024, it set off a wave of debate. The document, tellingly titled "Taking Back Control, Ensuring Security," focuses on heightened control over the influx of foreigners and creating more precise (restrictive) rules for admitting foreigners to the Polish labour market, so that immigrants coming to Poland would only secondarily, and in a tightly controlled manner, fill the gaps in hiring. Consequently, the immigration strategy does not

There are
over 1 million
foreigners working in Poland

Share	Sector
29%	Industrial processing
22%	Transport and machinery
16%	Administrative and support services, including temporary employment agencies
22%	Other
11%	Construction

Source: Information on employment of foreigners in Poland (1st half of 2024), Labour Market Department, Ministry of Family, Labour and Social Policy

The needs of the market

SECTOR	PROBLEM
Industry and construction	Shortage of up to 400,000 workers
Transport	Shortage of about 150,000 drivers
IT	Shortage of about 150,000 specialists
Education and healthcare	Aging workforce and difficulty recruiting new (young) employees

meet the economic needs or the expectations of employers. Nor was the substance of the strategy consulted with the principal stakeholders, including employers' organisations or industry experts.

Moreover, under the strategy, the Polish border is to be protected, and illegal immigration discouraged, by such measures as temporary and territorial suspension of the right to temporary protection, i.e. protection of migrants most often with the aim of saving their life or health. This emphasis sparked justified opposition.

The strategy also places great stress on the integration policy, but understood entirely differently than before. Under the principles set forth in the strategy, foreigners should comply with the

social norms and rules in force within Polish society, including speaking Polish, which seems like a step backward from the policy of openness, social diversity, and multiculturalism promoted in recent years.

Strategy and practice

The immigration strategy is naturally just a platform for laying out policy aims. More important is how it translates into concrete legal solutions. Work is underway in Polish ministries on several bills concerning foreigners, many of them launched before publication of the immigration strategy. The drafts show how certain aims of the strategy are to be implemented in practice, and they already point to a range of approaches, from easing of administrative burdens to more restrictive regulations generating concerns among employers.

Some of the planned changes provide hope for streamlining the procedures for legalising foreigners' employment and residence. An example is the plan to digitalise the filing of applications for residence permits, one of the main documents obtained by foreigners legalising their work and stay in Poland. Currently, applicants may have to wait many months, or even years, for issuance of these permits. The new regulations would allow for filing of digital applications with an electronic signature. This change should speed up the administrative procedures. Following verification of formal requirements, the applications would be automatically transmitted to the national system of registers and records, eliminating the need for state offices to manually re-enter this data and physically transfer the applications between authorities.

Parallel solutions include changes affecting a specific type of residence permit, the EU Blue Card, intended for highly qualified workers. The minimum period for the contract required to obtain this type of permit is to be cut from one year to six months. Blue Card holders could also operate a business under the same rules as Polish citizens. For foreigners, this would open up new opportunities for professional growth. With this, companies could hire their services under "business-to-business" contracts, which are popular on the Polish labour market.

Moreover, the simplified procedure would be maintained under which citizens of Ukraine, Belarus, Moldova, Georgia or Armenia can now be hired to work in Poland following registration of a statement at the labour office (which typically takes about seven days), without obtaining a work permit issued by the province governor (which in practice takes two to four months). By the end of 2025, this list of countries is to be reviewed. Although it is unclear what specifically this review would entail, there is a possibility that the set of countries whose citizens are eligible for the simplified procedure will be expanded or at least updated. This will make it easier for employers to legalise the work by people from these countries, and also unburden the province offices which handle applications for work and residence permits.

But at the same time, the bills being processed in Polish ministries also include more restrictive solutions and added barriers. The most controversial proposal is to limit the forms for hiring foreigners to employment contracts exclusively. Ruling out other forms, such as civil contracts, would greatly reduce the flexibility of hiring, particularly in sectors like IT, construction and transport, where alternative models of cooperation are often preferred over the employment model. The insistence on employment contracts is designed to protect employees' rights and eliminate abuses, but it may have the unintended effect of reducing the accessibility, attractiveness and competitiveness of the Polish labour market for foreigners, and also lead to discrimination against foreigners. It should be underlined in this respect that current law also provides extensive grounds and tools for bodies such as the State Labour Inspectorate to combat abuses in employers' use of service contracts (contract of mandate or contract to perform a specific work) when they are not legally justified. Therefore, limiting access to these contracts for all employers hiring foreigners on the basis of a work permit is undoubtedly a shortcut shifting to employers the consequences of the ineffectiveness of oversight authorities.

Equally controversial is the proposal to limit access to the Polish labour market by full-time foreign university students, by extending to them the requirement to obtain work permits (they are currently exempt).

There are also plans to introduce a point system which would limit foreigners' access to the labour market through a preference

for workers with the education and qualifications essential for jobs where there is a particular shortage of workers. While it may seem logical to target foreigners where their work is most needed, in practice this could reduce the flexibility of hiring in sectors where labour shortages may not be formally recognised. This would also require more dynamic monitoring of the labour market, which would be hard to achieve given the realities of public administration in Poland.

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By focusing on security and controlling the influx of foreigners, the new immigration strategy may not live up to the demographic challenges and the growing needs of the labour market.

Summary

The prospects emerging from the aims of the Polish immigration strategy are ambiguous. By focusing on security and controlling the influx of foreigners, the new immigration strategy may not live up to the demographic challenges and the growing needs of the labour market. The strategy needs to be revised to reflect the economic realities, particularly as the lack of cooperation with employers and experts in drawing up the strategy means that the strategy's aims are unsuited to the real needs of the economy, which can make it even harder to fill the gaps in staffing across key sectors.

Ignoring the long-range demographic analysis, and restricting legal economic immigration, poses a risk to the stability of the pension system and the competitiveness of the Polish economy. Creation of new regulations with the aim of eliminating irregularities and abuses, at the cost of depriving law-abiding employers of solutions that should be available to them, will make the law overly restrictive and even oppressive.

At the same time, some of the changes already proposed to the existing regulations, such as digitalisation of procedures for legalisation of work and residence, and the possible expansion of the list of countries whose citizens can be hired under a simplified procedure, may expedite the handling of applications and improve the efficiency of the system. But that on its own will not suffice to solve the most pressing problems of the Polish labour market.

When AI software is a medical device

MedTech companies are developing and marketing innovative solutions providing completely new capabilities for diagnostics, treatment, and delivery of healthcare. For example, they are creating mobile applications using AI algorithms to generate advanced reports on the state of patients' health. But the legal environment is extremely dynamic, generating more and more challenges, mainly regulatory requirements. Such software may be subject to both the Medical Device Regulation and the AI Act.

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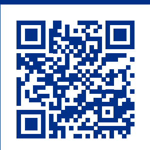


life sciences

Software as a medical device

With the growing popularity of mobile applications and their potential in the area of healthcare, more and more companies are planning to create and market medical apps. But not everyone is aware that such an app may qualify as a medical device.

We usually associate the term "device" with something tangible, a tool on the shelf. When we hear of a "medical device," we might think of a blood pressure monitor or a stethoscope. Indeed, the definition of a medical device refers to tools and equipment, but it also mentions software. Software can be a medical device.

This raises the question of the features software must have to qualify as a medical device. These issues have already been addressed by the Medical Device Coordination Group, a European body established to help implement the EU's Medical Device Regulation in a harmonised way. Although the MDCG guidance is not a source of law, it can play an important role in practice.

MEDICAL DEVICE REGULATION OR MDR
Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices

Under the MDCG guidance, "software" is defined as "a set of instructions that processes input data and creates output data." This is a very broad notion, covering many types of software, not only mobile applications.

Software can be a standalone medical device if it:

- **Has a medical purpose**—software that performs only organisational functions, such as storage, archiving, communication or simple retrieval, does not have a medical purpose, even if it is used in healthcare
- **Benefits a particular patient**—programs that generate instructions for doctors on how to perform various procedures will not be medical devices, because they are not intended for use "on humans" (similarly, a hardbound medical textbook is not a medical device, although it is closely related to healthcare)

OBLIGATIONS UNDER THE MDR

A manufacturer placing a medical device on the market must, among other things:

- Hire a person responsible for regulatory compliance
- Prepare the necessary documentation, procedures and systems
- Perform a clinical evaluation of the device
- Carry out a conformity assessment, i.e. obtain an MDR certificate issued by the notified body
- Assign UDI codes to medical devices, submit them to the EUDAMED database (this will become obligatory in the years to come, but can be done now voluntarily), and place them on the devices
- Draw up a declaration of conformity and label the products with the CE mark
- Notify the intention to place the device on the market.

– **Has a medical function**, such as diagnosing, preventing, monitoring, predicting, prognosticating, treating or mitigating a disease.

If these conditions are met, the software can be considered a separate medical device. Software often needs a physical component (hardware) to work properly. In such cases, depending on the circumstances, it may be found that:
– The hardware is an accessory to the software medical device
– The hardware and software are integral parts, together making up one medical device, or
– The hardware is a separate medical device and the software is a separate medical device.

Here we will assume that the software is a standalone medical device, and focus on the classification of the device.

Determining the risk class of software under the MDR, and the key consequences

The MDR recognises four basic risk classes for medical devices: from lowest to highest, class I, class IIa, class IIb, and class III. The higher the class, the greater the risk and the stricter the regulatory requirements.

The rules for assigning devices to specific risk classes are set forth in Annex VIII to the MDR. There are special rules for software. In general, software for monitoring physiological processes and software intended to provide information used in decision-making for diagnostic or therapeutic purposes falls in class IIa.

There are exceptions for cases where:

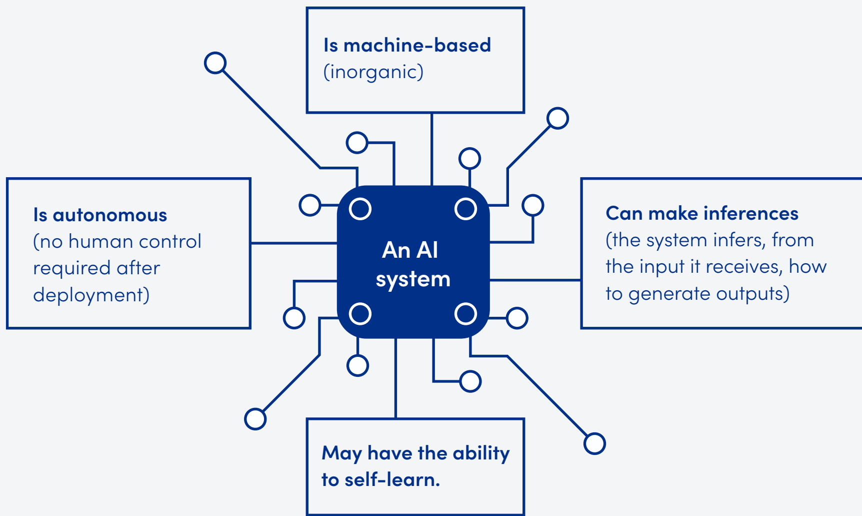
- The software is designed to monitor vital physiological parameters, and variations in those parameters could result in immediate danger to the patient, in which case it is placed in class IIb
- The software is to provide information used in decision-making for diagnostic or therapeutic purposes, and the consequences of such decisions may cause serious deterioration of the patient's health or the need for surgical intervention, in which case the device belongs to class IIb
- The software is to provide information used in decision-making for diagnostic or therapeutic purposes, and the consequences of such decisions may cause death or irreversible deterioration of health, in which case the device belongs to class III.

In other cases than those indicated above, the software belongs to class I.

Assigning a device to a class higher than class I means that a notified body will have to participate in the process of assessing the device's compliance with the MDR requirements (certification), and self-certification will not suffice.

On the other hand, if the device is not implantable (software is not necessarily intended to be inserted into the human body) and does not belong to class III, it is not absolutely necessary to conduct clinical trials. In the case of class III devices, a clinical trial will always be necessary.

	CLASS I	CLASS IIA	CLASS IIB	CLASS III
Self-certification	×			
Involvement of notified body		×	×	×
Mandatory clinical trial				×



Software as an AI system

The EU's AI Act contains regulations for AI systems.

If the software qualifies as an AI system, it must comply with numerous obligations under the AI Act, depending on the class of the software. This is a separate classification from the MDR, based on an assessment of the level of risk the software generates.

AI ACT
Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence

The AI Act identifies the following risk classes:

- **Unacceptable risk**—for AI systems using, for example, techniques to manipulate humans, placing such systems on the market is completely prohibited (blacklist)
- **High-risk**—most of the rules in the AI Act apply to this class
- **Limited risk**, posed for example by chatbots and AI generating deepfakes—in these cases it must be indicated that the content has been generated by AI
- **Minimal risk**—some AI programs, such as spam filters, are not regulated at all due to the low risk they pose.

OBLIGATIONS UNDER THE AI ACT

Under the new rules, providers of high-risk AI systems must:

- Establish a risk management system
- Establish a quality management system
- Develop technical documentation and instructions for using the AI system
- Carry out an assessment of compliance with the requirements of the AI Act (this is part of the conformity assessment carried out under the MDR, with the involvement of a notified body assessing compliance with the MDR)
- Draw up a declaration of conformity
- Properly label the AI system (including with the CE mark)
- Design the AI system appropriately (to enable human oversight and ensure adequate accuracy, robustness, and cybersecurity)
- Ensure that the AI system uses relevant training data
- Establish a post-market monitoring system for the AI system
- Report major AI incidents.

Software that is a medical device will be classified as a high-risk AI system if:

- It is subject to conformity assessment with the participation of a notified body (in other words, it falls into an MDR risk class higher than class I), or
- It is used in a critical area listed in Annex III to the AI Act (for example as part of an emergency patient health assessment system).

If AI software that is a medical device is considered a high-risk AI system, the provider will have to meet specific obligations under the AI Act.

Some of these obligations are similar to those familiar to manufacturers of medical devices (e.g. preparation of technical documentation, establishment of a quality and risk management system, and CE marking). Interestingly, under both the AI Act and the MDR, a conformity assessment must be carried out with the participation of a notified body in the described circumstances. The law provides that the notified body operating under the MDR will also

check compliance with the AI Act (so that two separate conformity assessment procedures will not be required).

However, the AI Act also provides for obligations not found in the MDR. These include the requirement for "explainability" of the system—to ensure that the operation of AI systems is transparent and understandable to the user. To do this, it is necessary to provide user manuals explaining the technical capabilities and enabling interpretation of the results generated by the AI system.

Another obligation specific to the AI Act is to design the AI system so that it enables human oversight of the system. This is intended to protect against machine errors (e.g. so that the machine can be reversed or corrected, or operation of the system can be halted).

What's next?

MedTech companies will face a considerable challenge in designing compliance processes so they optimally meet the obligations under the MDR and the AI Act.

The MDR is not ideal, as it provides for complex certification processes in which notified bodies play a key role. There is already unevenness in the approach of notified bodies to the assessment of medical devices, leading to unpredictable certification deadlines and a lack of consistency in decision-making. Difficulties with certification and a lack of resources on the part of notified bodies are already causing serious delays in the certification of medical devices.

These problems in implementing the MDR have prompted the European Parliament to adopt a resolution on the need to amend the Medical Device Regulation, as well as the In Vitro Diagnostic Medical Devices Regulation. The resolution passed in October 2024 with 545 votes in favour, 80 opposed, and 15 abstentions. Therefore, we should expect a revision of the European rules governing medical devices—which may or may not help companies from Poland and elsewhere in Europe compete effectively on the global market for medical technology.

Art on the big screen: What to remember when featuring a painting in a film

Artworks often appear in films, TV shows and ads, and indeed can be the main inspiration for creating the film. But use of artworks on the screen is subject to restrictions, primarily under copyright law and property law. There have been disputes surrounding the use of artworks in films without the consent of the copyright holder. What details need to be dealt with before placing a painting or a copy of a painting on a film set?

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Artworks often inspire the creators of films and TV series. Screenwriters and directors may draw on immediate themes relating to iconic works (as in the films *Woman in Gold, Girl with a Pearl Earring*, and *The Monuments Men*), create films about famous artists (e.g. *Basquiat* and *Big Eyes*), build the central plot in the film around works of art (as in *The Thomas Crown Affair* or *Entrapment*), or include quotations or allusions to well-known artworks (as in the 2023 film version of Władysław Reymont's novel *The Peasants*).

EXAMPLES OF ARTWORKS IN FILMS

Woman in Gold	Gustav Klimt, *Portrait of Adele Bloch-Bauer I* (aka *The Lady in Gold*)
Girl with a Pearl Earring	Johannes Vermeer, *Girl with a Pearl Earring*
The Monuments Men	Hubert and Jan van Eyck, *The Ghent Altarpiece* Michelangelo, *Madonna of Bruges* Raphael, *Portrait of a Young Man* and many, many more
Basquiat	Works by Julian Schnabel in the style of Jean-Michel Basquiat Pablo Picasso, *Guernica* Works by Andy Warhol
Big Eyes	Paintings by Margaret Keane
The Thomas Crown Affair (1999)	Claude Monet, *San Giorgio Maggiore at Dusk*
Entrapment	Rembrandt van Rijn, *Bathsheba at Her Bath*
Notting Hill	Marc Chagall, *La Mariée*
The Peasants	Young Poland paintings by such artists as Józef Chełmoński, Julian Fałat, Stanisław Masłowski, Józef Rapacki, Ferdynand Ruszczyc, Jan Stanisławski, Władysław Ślewiński, Alfred Wierusz-Kowalski and Leon Wyczółkowski, as well as Jean-François Millet and Johannes Vermeer

Sometimes artworks appear in films as a decorative element of the space where the action takes place. Marc Chagall's painting *La Mariée* (*The Bride*) was used in this way in *Notting Hill*, while an apparent work by Mark Rothko (actually only painted in Rothko's style) hangs in the home of the heroine of *Home Again*.

tinyurl.com/rmbsxbfk

tinyurl.com/mr2mykhy

Use of artworks for the purposes of films, TV shows, commercials or other audiovisual productions is subject to restrictions, primarily under copyright law but also out of concern that the works may be damaged during filming.

Risky inspiration

Court cases have arisen out of the use of artworks in films without the consent of the copyright holders.

Distribution of the film *12 Monkeys* was enjoined due to a dispute between artist Lebbeus Woods and the producer of the film, Universal Pictures, over alleged infringement of the artist's copyright to a drawing he made in 1987 titled *Neomechanical Tower (Upper) Chamber*. Both works depict a chamber with a high ceiling, a chair mounted on the wall, and a sphere suspended in front of the chair. The artist claimed that the drawing was copied in its entirety for a scene in the film. A federal court in New York upheld the artist's claim, after which the parties reached a settlement allowing further distribution of the film.

tinyurl.com/mz26ahmt

Woods v. Universal City Studios, Inc., 920 F. Supp. 62 (S.D.N.Y. 1996)

Another newsworthy court case involved the use in the film *Devil's Advocate* of a bas-relief by Frederick Hart titled *Ex Nihilo*, installed over the portico of Washington National Cathedral. Ultimately the parties reached a settlement, and the film's producer, Warner Bros., changed the disputed scenes and agreed to enclose with existing videocassettes information on the lack of connection between the scenes in the film and Hart's work.

tinyurl.com/msyu9ett

These disputes involved American films and were brought before courts in the United States. Nonetheless, if a dispute like the one concerning *12 Monkeys* were heard by a court in Europe, and in particular a Polish court, the result could be similar. But in the *Devil's Advocate* case, courts in Europe could reach different results due to the lack of consistency across legal systems in their treatment of the "freedom of panorama." But considering that film

FREEDOM OF PANORAMA
a copyright exception allowing the use of works, particularly architectural structures or sculptures in public space, without the need to obtain the consent of the artists or owners

Drawing Neomechanical Tower (Upper) Chamber and still from the film 12 Monkeys
Source: filmsuits.com/12-monkeys

producers hope for global distribution, they need to take a cautious approach, weighing the potential restrictions in their use of artworks in countries around the world.

Stylings may also lead to litigation

But copyright may not be the only barrier to using artworks on a film set. The value or dimensions of the works may pose a challenge when it comes to transporting a piece to the site of filming. The producers of *Basquiat* experienced all of these problems. First and foremost, however, they failed to obtain the consent of the holders of the economic copyright to show original Basquiat works in the film (as a rule, a work is subject to copyright protection from the time it is created until 70 years after the creator's death). So the film's director, the artist Julian Schnabel, painted works in the Basquiat style instead for use in the film.

According to media reports, these works were vetted by lawyers to determine whether they went too far—in copyright terms—in imitating Basquiat's style. Obtaining consent from Basquiat's heirs to show original works was too costly for the producers. Reportedly, Basquiat's father opposed these efforts, alleging that the paintings created by Schnabel were derivative works and thus infringed the copyright to Basquiat's original works. Ultimately the Basquiat estate decided not to sue. It would have been an interesting case.

← tinyurl.com/dhtjaraj

← tinyurl.com/ycy3zcbp

Bespoke solutions

In the case of older artworks to which the copyright has already expired, the problem may be the lack of consent from the current owner of the piece to borrow the work or take pictures of it to enable the work to be shown in a film. According to press reports, using Gustav Klimt's portrait of Adele Bloch-Bauer in the film *Woman in Gold*—a starring role in the narrative—was made possible thanks to high-quality photos of the painting made in Austria before the painting was shipped to the United States. It was anticipated that negotiations with the owner of the painting, Neue Galerie in New York, would be too costly and time-consuming.

← tinyurl.com/ycy3zcbp

It should be mentioned that even if the relevant approvals can be obtained without a hitch, the works shown in films are most often high-quality reproductions, not the originals. This is because of concerns about damage to the work on the set, as well as insurance issues. Sometimes as a condition for obtaining consent to create a reproduction for use in a film or TV show, the producer must promise to destroy the replica after filming. One of the "actors" in the 1996 film *Basquiat*, discussed above, was Picasso's large-scale painting *Guernica*. For purposes of the shoot, the producers sought special consent from the holders of the economic copyright to Picasso's works to create a precise replica of the painting. The Picasso family also demanded that after shooting the film, the producers would have to destroy the copy and send them footage of the destruction as proof of compliance. A similar situation occurred with the use of Chagall's 1950 painting *La Mariée* in Notting Hill.

To facilitate producers' efforts to obtain the relevant rights or approvals to include artworks in films or other audiovisual

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even if the relevant approvals can be obtained without a hitch, the works shown in films are most often high-quality reproductions, not the originals

productions, agencies have arisen specialising in securing all the necessary approvals and negotiating with the holders of the rights. These firms maintain a database of artworks for which approval has already been granted for use by filmmakers. Such agencies can also help negotiate global licences for specific works which are essential to bring the screenwriters' vision to life.

Whether a particular work is ultimately used in a film will depend on the budget, and in the case of artworks still protected by copyright, also the position of the artist or their estate.

A deposit system, yes—but how will it work?

Debates over introducing deposits on glass, plastic and metal packaging have continued in Poland for many years. But these debates were not carried over into specific legislative proposals until the previous term of parliament. In June 2023 a draft of the “Deposit Act” was filed with the Sejm. The bill followed the legislative path, and despite widespread doubts entered into force before the end of 2023. The deposit system was supposed to launch on 1 January 2025, but the new government proposed amendments to the act, including changes in the start date. Until the very end, it was not known when and in what form the new rules would apply.

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DEPOSIT ACT
Act of 13 July 2023 Amending the Act on Packaging and Packaging Waste Management and Certain Other Acts

SINGLE-USE PLASTICS DIRECTIVE
Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment

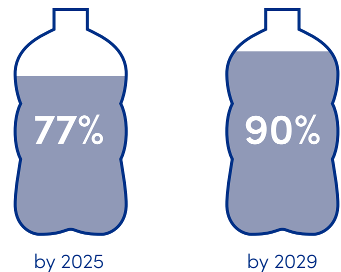
The Deposit Act partially transposes the SUP Directive into Polish law. The SUP Directive imposes an obligation to achieve a 77% level of waste collection for single-use plastic beverage containers of up to 3 litres in 2025, rising to 90% in 2029. Polish lawmakers determined that such a high level of waste collection can be achieved only through a well-functioning deposit system. This is consistent with Art. 9 of the SUP Directive, which expressly states that to achieve the required collection levels, member states may establish a deposit-refund scheme, among other options. This is also confirmed by the experience in other EU member states.

The deposit scheme in Poland was support to start operating on 1 January 2025, but ultimately it will not launch until 1 October 2025. Under the regulations now in force, it will cover the following categories of packaging:

- Single-use plastic beverage bottles with a capacity of up to 3 litres, including plastic caps and tabs (excluding glass or metal beverage bottles whose caps or tabs are made of plastic)
- Metal cans with a capacity of up to 1 litre
- Reusable glass bottles with a capacity of up to 1.5 litres.

Changes in the adopted regulations were to be expected following the change in the parliamentary majority in the October 2023 elections. From the time of the government changeover, clear signals emerged from the Ministry of Climate and Environment that the previously adopted rules for operation of the deposit system

LEVEL OF COLLECTION OF SINGLE-USE PLASTIC BOTTLES WITH A CAPACITY OF UP TO 3 LITRES REQUIRED BY THE SUP DIRECTIVE



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the launch of the deposit system was postponed to 1 October 2025, although the Senate proposed a date as late as 1 January 2026

would have to be modified. Consultations on this topic were held mostly in the first half of 2024.

The consultations with businesses and local governments resulted in a government bill to amend the relevant acts. Probably the most important news for businesses is that the launch of the deposit system was postponed to 1 October 2025, although the Senate proposed a date as late as 1 January 2026. But there are many more changes, and some of them could have a major impact on the effectiveness of the regulation.

Key changes

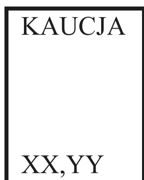
The scope of the deposit system in its original form needed to be changed. This was pointed out primarily by businesses impacted by the new rules. After hearing the voices of the industry, many of the original solutions were either not applied or were modified accordingly. But there is no doubt that as soon as the operation of the deposit system is fully launched, issues will arise requiring further modifications or improvements.

PACKAGING AND PACKAGING WASTE REGULATION
Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste

Packaging of milk and dairy products was excluded from the deposit system for sanitary reasons—maintaining cleanliness and appropriate standards at dairy packaging collection points would be difficult or impossible, especially during the warmer months. This exclusion is also consistent with the PPWR, i.e. the exemption under Art. 50(4)(d) for packaging of milk and milk products.

Apart from this, other changes important from the perspective of businesses and consumers were also introduced. Below we describe the most important changes.

Old pattern



New pattern

– Annex 2 to the amended act presents a new pattern for the labelling indicating that the packaging is covered by the deposit system and stating the amount of the deposit. This was a response to outcries from both businesses and consumer groups that the earlier symbol might not be legible or attractive for customers. After all, the deposit system cannot function properly without sufficient consumer engagement. During 2025 it will be permissible to use either the old pattern or the new pattern, which should help avoid generating extra costs for producers.

- The representative entity will have to ensure that in every local commune, there is at least one fixed point for collection from end users of packaging and packaging waste covered by the deposit system. This will make it easier for consumers to participate in the deposit-refund scheme. As indicated, this is vital for the success of such systems, which under the regulations should be universal and accessible.
- For consumers to be able to return reusable glass beverage containers (and receive a refund of the deposit) near where they live, the amended act requires retail sales locations with an area greater than 200 m^2 to accept such packaging, if they sell beverages in such bottles.
- The parliament introduced a closed-loop deposit system, where a deposit is collected at every link in the distribution chain. This tightens the system and ensures that the circulation of the deposits can be monitored, eliminating fraudulent removal of funds from the scheme and other payment issues.
- Failure to join any deposit system will entail serious consequences. Such businesses introducing products in beverage packaging will have to pay a triple product fee. This is intended to motivate introducers of packaging to join the deposit scheme—any other attitude will not pay off.
- The regulations on issuance of licences to operate a deposit scheme were tightened. Under the new rules, broader authority is vested in the minister for climate, who in certain circumstances will even be entitled to withdraw a previously issued licence.
- Another major change concerns the VAT Act. Lawmakers simplified the rules for collecting VAT in this scheme. A single entity will be designated, responsible for calculating the tax, collecting it, and remitting it to the tax authority within the designated period. Under the adopted regulations, this duty will fall on the representative entity, as the remitter of VAT.
- There are also changes in the Waste Act. The new rules provide for an exemption from the obligation to obtain a licence for collection of packaging waste generated from packaging covered by the deposit scheme for entities collecting such waste on a non-professional basis. This will undoubtedly make life easier for businesses.

Nonetheless, the new shape of the deposit system still raises certain doubts. For example, experts point out that it does not cover single-use glass bottles. Whether products such as coffee with milk will be excluded from the deposit system is not entirely clear. It remains an open question whether such products fall within the exclusion for dairy products, or should be covered by the scheme. Difficulties may also arise in determining whether to charge a deposit on products distributed free of charge, e.g. for promotional purposes. This is not explained in the act.

Numerous difficulties may also occur in the course of refunding deposits. Refunds are to be paid without the need to present a purchase receipt, which is essential to make the system user-friendly for consumers, but the question remains how to maintain records of such operations. Record-keeping is after all vitally important for settlement of VAT. This may make it necessary to maintain more extensive records than provided in the regulations.

Concluding remarks

Poland should have had a deposit-refund scheme in place for many years, because, as the experience of other countries shows, such a system encourages the recovery of waste packaging and reduces littering of public space. Work on introducing such a system should have been conducted in an atmosphere of dialogue between the central government, local governments, and first and foremost businesses. But there was no such dialogue leading up to adoption of the framework for the deposit system in Poland at the end of the previous term of parliament. This generated many doubts, particularly concerning the capacity for participants in the system to prepare for the system on time, and the rules for collecting VAT in the scheme.

However, the manner in which the amendment of the Deposit Act was considered also raises justified concerns. This has to do firstly with the speed of work on the amending act, as it was not known until the very end whether legislators would manage to finalise the amendment before the end of 2024. It must be remembered that entry into force of the new rules for operation of the deposit system also depended on obtaining the President's

signature. If the amendment could not be adopted before 1 January 2025, then the deposit system would have entered into force in the form passed by the previous parliament. Ultimately, the Sejm adopted the amending act on 6 December 2024, rejecting the amendments passed by the Senate, and the President signed the act on 18 December 2024. Application of the new regulations was thus postponed at the last minute.

On one hand, it is encouraging that the new government took up consultations with businesses and identified the need to amend the regulations. Some of the adopted amendments indeed appear essential. On the other hand, work on the amendment should have wrapped up much earlier. Postponing the launch of the deposit system is also dubious in light of the risk that Poland will not meet the targets set in the SUP Directive. Now we can only point to legal chaos, because until the very end it was not known when and under what rules the deposit system would launch. After entry into force of the amendment to the Deposit Act, all that remains is to wait for the launch of the system, which should reveal how effective the regulations are in practice.

Sustainability agreements: How to cooperate for sustainable development in compliance with competition law

Sustainability efforts, due to their complexity, often require cooperation with other businesses —sometimes competitors. But how to structure such cooperation so that it complies with antitrust rules?

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Prohibited agreements and sanctions

Art. 101 of the Treaty on the Functioning of the European Union

The general rule is that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" are prohibited.

In particular, agreements are banned which would:

- Directly or indirectly fix purchase or selling prices or any other trading conditions
- Limit or control production, markets, technical development, or investment
- Share markets or sources of supply
- Apply unequal conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Such agreements or decisions are invalid by operation of law, unless they meet certain exemptions (i.e. to be deemed lawful). Moreover, for concluding or participating in such an agreement, the Polish competition authority (the President of the Office of Competition and Consumer Protection) may fine a business an amount equal to up to 10% of its annual turnover in the preceding year. In addition, a fine of up to PLN 2 million may be imposed on the responsible individuals (management board members, directors, managers, department heads, etc) for knowingly allowing the business to violate the ban on anticompetitive agreements.

When is an agreement between competitors permitted under competition law?

Agreements that do not adversely affect competitive parameters (such as price, quantity, quality, choice or innovation) normally do not raise competition concerns and are therefore generally allowed.

In addition, any agreement may be exempt from the ban on anticompetitive agreements (and thus be deemed lawful) if it meets certain conditions. First, such agreements must contribute to improving the production or distribution of goods, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Such agreements must not impose restrictions on the undertakings which are not indispensable to attainment of these objectives. And they must not eliminate competition. For an agreement to benefit from this exemption, all of these conditions must be met.

European Commission guidelines

To help undertakings assess their planned cooperation from the point of view of EU antitrust rules, the European Commission has issued Guidelines on applying Art. 101 TFEU to horizontal cooperation agreements. The guidelines aim to facilitate cooperation between undertakings, which in many cases is economically desirable and thus may contribute, for example, to the green transition or digital transition, and help improve the resilience of the EU's internal market.

Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01)

In 2023, the guidelines were supplemented by a separate chapter on sustainability agreements. The Commission has recognised that cooperation agreements between competitors (or even potential competitors) can generate significant economic benefits, including sustainability benefits, in particular when they bring together complementary activities, skills or assets.

SUSTAINABILITY AGREEMENT
any agreement between competitors that pursues sustainability objectives, regardless of the form of cooperation

HORIZONTAL COOPERATION ON SUSTAINABILITY CAN CONTRIBUTE TO:

- Reduced risk
- Cost savings
- Increased investment
- Accumulation of know-how
- Improved quality and variety of products
- Accelerated introduction of innovations to the market
- Elimination of shortages and disruptions in supply chains
- Reduced dependency on specific products, services and technologies.

How to assess sustainability agreements under the guidelines

Sustainability agreements are not a separate category of horizontal cooperation agreement for the purposes of applying Art. 101 TFEU. Thus, if a sustainability agreement between competitors corresponds to one of the types of horizontal agreements identified in the guidelines, and the same agreement also pursues a sustainability objective, it must be assessed on the basis of the guidance for both sustainability agreements (Chapter 9) and the other category of agreements (previous chapters).

The Commission has adopted a broad approach to sustainability, encompassing not only climate change and environmental aspects, but also the numerous issues set out in the 17 Sustainable Development Goals (SDGs) adopted by the United Nations in its the 2030 Agenda for Sustainable Development. These include such issues as:

– Reduction of the use of natural resources
– Respect for human rights
– Supporting the development of infrastructure and innovation
– Reducing food waste
– Facilitating the transition to healthy and nutritious foods
– Ensuring animal welfare.

SUSTAINABLE DEVELOPMENT GOALS

1. No Poverty
2. Zero Hunger
3. Good Health and Well-being
4. Quality Education
5. Gender Equality
6. Clean Water and Sanitation
7. Affordable and Clean Energy
8. Decent Work and Economic Growth
9. Industry, Innovation, and Infrastructure
10. Reduced Inequalities
11. Sustainable Cities and Communities
12. Responsible Consumption and Production
13. Climate Action
14. Life Below Water
15. Life on Land
16. Peace, Justice, and Strong Institutions
17. Partnerships for the Goals

There are 169 different measures connected with the 17 SDGs, to be pursued by all stakeholders: national governments, international organisations, NGOs, researchers, business, and citizens.

Importantly, anticompetitive agreements cannot escape the prohibition set out in Art. 101 TFEU by merely citing SDGs—the parties must be able to demonstrate genuine sustainability benefits.

The Commission guidelines set out a number of factors to be taken into account when assessing the impact of sustainability agreements on competition. These include:

- The market power of the parties to the agreement
- The market reach of the agreement
- Any limiting of the parties' independent decision-making regarding the main parameters of competition
- Exchange of commercially sensitive information
- Any effect of a noticeable increase in prices or a noticeable reduction in production, variety, quality or innovation.

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cooperation agreements
between competitors
can generate significant
economic benefits, including
sustainability benefits,
in particular when they bring
together complementary
activities, skills or assets

Sustainability agreements regarded as restricting competition, by object or effect, may still be exempt from the ban (i.e. allowed) if the parties can demonstrate that the following four conditions are all met:

1. **Efficiency gains**—the agreement must contribute to improving the production or distribution of products or promoting technical or economic progress (e.g. less polluting production or distribution technologies, improved production and distribution conditions, more resilient infrastructure and better-quality products, reduced supply chain disruptions). Performance gains must be demonstrable.
2. **Indispensability**—the constraints of the agreement must be necessary to achieve these efficiency gains, and the parties must demonstrate that there are no other economically feasible and less restrictive ways of achieving these benefits.
3. **Pass-on to consumers**—consumers must receive their fair share of the benefit from the agreement, i.e. the efficiency gains, including qualitative efficiency gains, achieved as a result of the necessary restrictions, must be appropriately passed on to consumers, to at least compensate them for the negative effects of the agreement. Therefore, it is not enough for the parties themselves to achieve efficiency gains. Under the guidelines, the concept of "consumers" is broad, as it includes customers of the parties and subsequent buyers.
4. **No elimination of competition**—the agreement must not allow the parties to eliminate competition in relation to a substantial portion of the products.

Examples from other countries

The competition authorities of some countries (e.g. the Netherlands and Greece) offer undertakings the possibility to seek advance clearance of planned cooperation from the point of view of competition rules. Such an assessment may conclude that the envisaged agreement does not restrict competition, or that it does restrict competition but is necessary to achieve sustainable development goals. In such situations, the benefits of the sustainability agreement are weighed against the anticompetitive impacts.

For example, the Netherlands Authority for Consumers and Markets positively assessed an agreement among soft-drink suppliers (Coca-Cola, Vrumona, Albert Heijn, and Jumbo) to cease using plastic handles on collective packaging. The environmental goal of the agreement was to increase the recycling rate of packaging and reduce the use of plastic. The suppliers first assessed the agreement themselves to see if the arrangements were consistent with competition rules. Coca-Cola then asked the authority for an opinion. One of the elements of the assessment was to check whether the agreement would negatively impact competition and harm consumers, for example by resulting in higher prices or reduced product quality. That was not the case here. According to the suppliers, the handles on packages (or the resulting convenience) did not play a competitive role. This was confirmed by a market study conducted by several suppliers.

The Dutch authority found that the agreement in that case allowed the undertakings to effectively join forces to help to achieve sustainability goals, without distorting competition. The authority emphasised that when assessing the agreement, it is relevant whether the agreement allowed the participants to continue to make their own decisions (sustainable or not). In this case, each participant could decide for itself when to stop adding handles to its multipacks, and how to go about it.

In other cases involving these principles, the Dutch authority found that:

- Dutch banks could coordinate their individual activities with regard to sustainability reporting, mainly because it would make all the reports similar and thus easier to compare for a range of external stakeholders (e.g. investors)
- Cooperation between commercial waste collection companies was allowed, to encourage waste recycling
- Partnerships between coffee capsule manufacturers were permitted, to encourage recycling of capsules.

Similarly, a German court blessed an initiative by an association of numerous companies involved in production and trade of plants, to implement a common system for reuse of plastic trays.

A German court and the Belgian Competition Authority also approved cooperation in the retail food sector, to agree on sustainability standards for living wages in the banana sector.

More cooperation opportunities available to businesses

Due to the risk of high penalties, before concluding an agreement with another business, it should be analysed each time whether the agreement complies with competition law. In this respect, it is worth taking advantage of the growing importance of sustainability aspects, which shed new light on the assessment of agreements and allow businesses to take new and innovative measures which until recently might have been banned.

The limits of online criticism of employers: The power of a “single click”

Do employees have complete freedom of expression? Or, when criticising their employer, should they face consequences, including losing their job? How far can such criticism go until it meets a regrettable response? Our clients often encounter these and similar questions. Based on our many years of practice, we will try to answer them, while pointing out significant legislative initiatives in this area.

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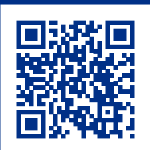
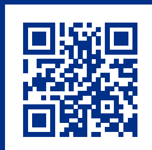


employment



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In an era of omnipresent social media, when any opinion can reach hundreds or thousands of people (and remain on the internet forever), the line between permissible and impermissible criticism of an employer is becoming harder and harder to draw. While Polish labour law generally gives employees significant freedom to express their views, including criticising their superiors, not every such statement will go without consequences. On the internet, it is easy to cross the thin line between legitimate opinion and a malicious act that could irreparably harm a company's reputation.

The right to criticise employers—seeking the boundary

Every employee has a right of criticism, including the right to criticise their employer. This is an element of the freedom of expression enshrined in the Polish Constitution and in a number of international conventions. The parties cannot contractually exclude or restrict this freedom. But at the same time, being in an employment relationship entails for the employee a significant obligation to care for the good of the workplace. This duty is interpreted broadly, and includes an obligation to refrain from any actions that harm or could harm the employer, as well as an obligation to take all necessary actions for the good of the workplace. This applies to the employer's property, but also intangibles. These include a duty of loyalty to the employer and a duty to respect the personal interests of the employer and fellow employees. This duty of care for the good of the workplace determines the scope of permissible forms of behaviour by the employee at work, but also—perhaps more controversially—during their free time.

Labour Code Art. 100 §2(4)

Undoubtedly, criticism of the employer may reach the level of infringing the duty of care for the good of the workplace and other employment duties. So where is the border between permissible

and impermissible criticism of the employer, particularly online, where critical comments on employers more and more often appear?

Permissible and impermissible criticism —looking for answers in the case law

Although so far the courts have not issued many rulings on the issue of critical comments about employers on the internet, in evaluating such content the rulings on criticism of employers in general can be quite illuminating.

First and foremost, permissible criticism should be based on objective arguments and expressed in an appropriate form. It must also be proportionate under the specific factual circumstances, and the employee should act in good faith, that is, in the belief that the criticism is based on fact (using due diligence to check the facts), and in the legitimate interest of the employer.

Supreme Court of Poland judgment of 9 March 2022, case no. III PSKP 62/21

Even if the allegations do not hold up, but the employee's behaviour cannot be regarded as driven largely by bad faith and a conscious effort to endanger the employer's interests or expose the employer to a loss, the criticism should be found to be permissible.

Supreme Court judgment of 16 November 2006, case no. II PK 76/06

The assessment of how far an employee can go in criticising their employer should be tied in each case of the circumstances of the particular matter—which carries the risk of some unpredictability. For example, the Supreme Court held that it exceeded the bounds of permissible criticism for an employee to belittle the company's CEO for allegedly earning his engineering credentials at night school, finding the statement to be insulting.

Supreme Court judgment of 23 September 2004, case no. I PK 487/03

The Supreme Court took a similar view of groundlessly accusing a member of the employer's board of committing a crime. The Supreme Court also found that it was impermissible to post on the workplace notice board a claim that "the CEO has turned the cooperative into a swamp of lawlessness" and that actions of governing bodies of the cooperative were "planned excesses seeking to destroy the blind community."

Supreme Court judgments of 7 March 1997, case no. I PKN 28/97, and 12 January 2005, case no. I PKN 145/04

However, the Supreme Court found it was permissible, for example, for an employee of a school to send a letter to the school

Supreme Court judgment of 1 October 1997, case no. I PKN 237/97

Supreme Court judgment of 14 July 2004, case no. IV CK 588/03

board and county officials reporting irregularities allegedly committed by the director of the school. The court reasoned that even though the allegations proved to be ungrounded, the employee did not exceed the bounds of permissible criticism of the employer, because the criticism was not spread among unauthorised persons but was directed (narrowly) to the authorities who would be competent to consider any allegations against the director of the school.

Dede v. Türkiye (application no. 48340/20)

The European Court of Human Rights took a similar tack in evaluating the situation of an employee who sent an email from his work account to the HR department containing a critical evaluation of his superior and the company's employment politics. The ECtHR held that the employee had not crossed the boundary of permissible criticism of his employer. Like the Supreme Court of Poland, the ECtHR took into consideration that the email was sent to a narrow group of staff of the HR department, and not to all employees or people outside the company.

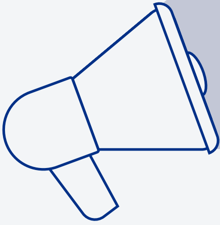
Online criticism—a click too far?

Supreme Court judgment of 10 May 2018, case no. II PK 74/17

Thus, to assess criticism of the employer, the reach of the criticism is also relevant. In the case of online posts, this criterion is key for determining whether the boundary of permissible criticism has been crossed. As the courts have held, if the criticism occurs in a public forum, particularly severe criteria should be applied. The internet is undoubtedly a public forum. Critical and sometimes vulgar statements about companies by former or current employees regularly appear on social media or discussion forums. These posts don't always align with reality, but they instantly reach a large audience, including job candidates and the company's current and potential customers and suppliers.

Poznań Regional Court judgment of 3 November 2020, case no. VII Pa 118/20

At the same time, instances of online criticism of employers have been analysed by the courts surprisingly mildly. In one case, an employee had posted a comment on the employment portal GoWork.pl about her employer: "I don't recommend them. Warning. Total lack of respect for the employee. They think they can buy anyone." The court found that the criticism was permissible, and a single post, which the court found to be "toned down (by internet standards)" could not cause any real damage to the employer.



Reach of criticism

the reach of the criticism can also impact whether it is permissible or impermissible

IMPERMISSIBLE CRITICISM

- not on the merits
- disproportionate
- employee's bad faith
- derogatory or vulgar language

PERMISSIBLE CRITICISM

- objective arguments
- proportional to the circumstances
- employee's good faith
- appropriate form

The Supreme Court considered a case involving a museum employee who, in a television interview, called the director of the museum "a cultural illiterate," and then wrote on an online forum that the director had "fired a pregnant woman and a woman undergoing cancer treatment." Significantly, the employee was also a member of the local council. With this in view, the court ruled that the employee's subjective views were expressed "for the good of society in the broader sense," and that the employee had acted in the capacity of a council member.

Supreme Court judgment of 28 August 2013, case no. I PK 48/13

Moreover, criticism of employers more and more often uses images, memes, and increasingly realistic "deep fakes." The Polish courts have yet to rule on a case in this context, but given visual media's dominance of contemporary culture it is no doubt just a question of time. Such cases have already arisen in other countries. An example is a colourful case heard by an Australian court involving the dismissal of an employee who had posted on a private Facebook group a video with scenes from *Downfall* (a film about the last days of Adolf Hitler) to which the employee had

added hilarious subtitles alluding to the salary negotiations at his company. Although the Fair Work Commission initially upheld the dismissal, on appeal the commission found that the dismissal was improper. Recognising that the *Downfall* clip had developed into "a meme," the commission pointed out: "Anyone with knowledge of the meme could not seriously consider that the use of the clip was to make some point involving Hitler or Nazis." The employee was reinstated, and the reinstatement was upheld by the Federal Court of Australia.

Tracey v BP Refinery (Kwinana) Pty Ltd, [2020] FWCFB 820 tinyurl.com/f84vhzv5

BP Refinery (Kwinana) Pty Ltd v Tracey, [2020] FCAFC 89 tinyurl.com/2pctenpa

What steps can employers take?

In practice, crossing the line in criticising the employer may lead to a disciplinary interview with the employee, a reprimand, and ultimately, termination of employment (with or without notice). However, according to the Supreme Court of Poland, even if the employee has violated their employment duties, it must be considered whether termination is proportional to the infringement. Every case of online criticism of the employer should be assessed separately, in light of the specific circumstances, including the reach of the post and its consequences, and the position held by the employee. In extreme instances, crossing the line may even warrant disciplinary dismissal.

Impermissible criticism may also expose the employee to liability for infringing the personal interests of the employer or its representative (e.g. their reputation). If the online post is untrue, the employer can request the site administrator to take it down. Additionally, with a view to potential litigation, it may be worthwhile to make a notarial record of the offending post.

In practice, it can be hard to hold people to account, because most critical comments concerning employers are posted online anonymously. And under the Polish civil procedure rules, a case cannot be pursued if the plaintiff cannot provide the full details identifying the defendant. A proposal to address this problem is a bill on "blind" statements of claim, filed by members of parliament from the Poland 2050 party. It would introduce a separate procedure for pursuing claims for protection of personal interests against unidentified persons. Under this proposal, the duty to identify

10th Sejm, print no. 728 tinyurl.com/msw7vz4e

the infringer would be shifted to the court, and the plaintiff (e.g. a company about which a former employee has made disparaging statements on the internet) would include in its statement of claim an application to require the service provider through which the infringement occurred (e.g. the owner of a social media platform) to disclose the infringer's details. The bill had a first reading in parliament and was then passed on for further work in committee.

Parliamentarians from the Polish People's Party (PSL) have submitted an even broader proposal to address this area. Apart from the "blind" statement of claim, the bill also includes provisions enabling rapid response to illegal online content where the details of the infringer are known. It would also introduce proceedings against service providers who fail to take down unlawful content. Thus the bill would add to the Civil Procedure Code three separate new types of proceedings for online infringements:

10th Sejm, print no. 864
tinyurl.com/3a72ebsu

- Against identified persons
- Against unidentified persons
- Against providers of indirect services.

The last of these, perhaps the most interesting, would allow claims to be pursued against a service provider for not taking down content infringing the plaintiff's personal interests. The PSL bill had a first reading in parliament and was then passed on for further work in committee.

In practice, currently the details of persons infringing personal interests are often obtained in investigative proceedings following notice of suspected defamation. This is because an employee can face criminal liability for impermissible criticism of the employer rising to the level of criminal libel. In certain instances, impermissible criticism may also constitute an act of unfair competition, which carries the risk of civil and criminal sanctions under the Unfair Competition Act.

Significantly, the employer does not have a right to continually or preventively monitor its employees' online activity, including on social media. However, the employer can react if it learns from certain sources of statements by an employee that could violate the employee's duty of care for the good of the workplace, e.g. crossing the boundary of permissible criticism of the employer. In such situations, employers are entitled to take certain steps, although they

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Every case of online criticism of the employer should be assessed separately, in light of the specific circumstances, including the reach of the post and its consequences, and the position held by the employee.

must make sure that the measures do not fall afoul of the General Data Protection Regulation.

But employers need not wait until they face the first overly critical post about the company. Instead, they can consider rules governing their employees' online activity. To this end, they can include relevant provisions in the workplace policies, or adopt a separate policy for employees' use of the internet, including social media. It is also worthwhile to conduct periodic training in this area, including refresher courses, and to conduct a regular review of the agenda for such training to keep up with the growth of new forms of communication, and thus new opportunities for creative criticism.

Importantly, the wording of provisions concerning employees' online activity must be carefully weighed to reflect the interests of both the employer and the employees, particularly the right to privacy.

Summary

Today the internet is the basic platform for seeking out and sharing information, and virtual image is an inseparable element of doing business. The uninterrupted stream of information in real time shapes users' views, including their opinion of employers. Ensuring mutual respect within the digital environment requires introduction of clear policies and regular training on the limits of criticism of employers. Only such measures can minimise the risk of conflicts in this area—and may also cause an employee to think twice before clicking "publish."

Whistleblowing à la polonaise

In 2024, after several years of delay, Poland finally implemented the EU's Whistleblowing Directive. Despite the excessively long work on a dozen drafts, the Whistleblower Protection Act as adopted still raises lots of doubts. Resource-sharing by corporate groups is particularly problematic.

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Whistleblower Protection Act of 24 June 2024

The Whistleblower Protection Act imposes a range of new obligations on businesses. The most important one is for private entities to adopt an internal whistleblowing procedure. The Polish parliament also introduced several provisions that seem to allow corporate group to cooperate on whistleblowing procedures.

Whistleblowing procedures in corporate groups

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

The Whistleblowing Directive does not directly address the issue of the functioning of a single shared whistleblowing procedure between companies in a corporate group. The directive does refer to such groups, or more precisely affiliates and subsidiaries, in recital 55 of the preamble: "Internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates ('the group'), but also, to any extent possible, by any of the group's agents and suppliers and by any persons who acquire information through their work-related activities with the entity and the group."

WHISTLEBLOWER PROTECTION ACT ART. 28(8)
Private entities belonging to a capital group within the meaning of Art. 4(14) of the Competition and Consumer Protection Act of 16 February 2007 may establish a joint whistleblowing procedure, so long as it ensures that the actions taken comply with this act.

According to experts, recital 55 should not be treated as a basis for joint follow-up actions, particularly to designate a single person or unit at the group level responsible for taking such actions (e.g. to conduct proceedings to verify whistleblower reports).

However, Art. 28(8) of the Polish act (added near the end of the legislative process) incorporates by reference the definition of a capital group in the Competition and Consumer Protection Act, under which such a group means all undertakings controlled directly or indirectly by one undertaking, including that undertaking. In turn, the notion of an "undertaking" (*przedsiębiorca*) should be understood in accordance with the Business Law, and that law excludes foreign entities from the notion of an "undertaking."

Business Law of 6 March 2018, Art. 4(3)

Consequently, the concept of a corporate group within the meaning of the Whistleblower Protection Act is limited to a group in which all the entities are established in Poland. Thus a group that includes related entities established in different countries does not constitute a corporate group for purposes of the act.

For this reason as well, it is not permissible to adopt a shared whistleblowing procedure in an international group.

But for a Polish corporate group, the possibility of adopting a shared procedure is also not entirely clear.

Under Art. 28(8) of the act, entities can establish a shared procedure, but only under the condition that it ensures compliance with the act. Thus, a shared procedure must contain the same elements as a standard internal procedure, meaning that among other things it must:

– Designate a unit, person, or third party authorised to receive reports, and
– Designate an impartial unit or person within the given legal entity authorised to take follow-up actions.

This means that the Polish act does not provide an exemption from the duty to appoint a person responsible for conducting an investigation, separately for each undertaking within a Polish corporate group.

While Art. 25(1) of the act does admit the possibility of appointing an external entity to receive reports (which could be another company from the group), it does not provide for the possibility of entrusting such entity with taking follow-up actions, including conducting investigations.

WHISTLEBLOWER PROTECTION ACT ART. 25(1)(1)
The internal whistleblowing procedure shall identify the internal organisational unit or person within the organisational structure of the legal entity, or an external entity, authorised by the legal entity to receive internal reports.

In practice, the shared procedure within the meaning of Art. 28(8) of the act cannot be identical—in every group company, an internal person or organisational unit should be designated for taking follow-up actions. In addition, within each entity, the procedure should be introduced after consultation with the employee representative functioning within the entity.

It should thus be recognised that Art. 28(8) of the act does not provide a basis for adoption of a single shared whistleblowing procedure for the entire group, and designation under that procedure of one person or unit authorised to receive reports and take follow-up actions in the event of a report made within any of the entities in the corporate group.

However, this does not exclude the possibility of engaging external experts or advisers to participate in investigations or to take certain actions. But in this case as well, the proceedings will still be led by a person or unit within the given undertaking, and not by such expert.

"Sharing resources" and "establishing common rules"

The only provision of Directive 2019/1937 that enables the sharing of resources in private entities (and thus—note—also within corporate groups) is Art. 8(6). And significantly, the EU lawmakers limited this possibility to entities with 50 to 249 employees. The notion of "resources" under the directive includes all activities related to receiving reports and conducting investigations.

The provision implementing Art. 8(6) of the Whistleblowing Directive into Polish law is Art. 28(3) of the Whistleblower Protection Act. But where the directive refers to "sharing resources," the Polish act refers to "establishing common rules" (although the initial drafts of the Polish act employed the same terminology as the directive). What does this mean in practice?

ART. 8(6) OF DIRECTIVE 2019/1937	ART. 28(3) OF THE WHISTLEBLOWER PROTECTION ACT
Legal entities in the private sector with 50 to 249 workers **may share resources** as regards the receipt of reports and any investigation to be carried out. This shall be without prejudice to the obligations imposed upon such entities by this Directive to maintain confidentiality, to give feedback, and to address the reported breach.	Private entities for whom at least 50 persons, but no more than 249 persons, perform gainful employment, **may on the basis of an agreement establish common rules** regarding the receipt and verification of internal reports and the conduct of investigations, under the condition that they ensure that the activities performed comply with this act.

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The Polish act does not provide an exemption from the duty to appoint a person responsible for conducting an investigation, separately for each undertaking within a Polish corporate group.

In our assessment, the rules whose establishment is referred to in the Polish act are overarching standards intended to help interpret other legal norms and ensure uniformity in application of the whistleblowing procedures within a group of entities. In other words, these "rules" are certain abstract values, which may include for example:

- The principle of the rule of law
- The principle of impartiality in conducting investigations
- The principle of protecting the whistleblower's identity.

The jointly established rules might also govern issues of the scope and course of investigative proceedings or the selection of persons to conduct follow-up actions.

But in practice, Art. 28(3) of the act has nothing to do with the relevant provision of the directive. Under the Polish realities, entities employing 50 to 249 workers cannot, de facto, share their resources in this respect. The mere possibility of establishing joint rules—on top of that, requiring conclusion of a separate agreement (which seems an unnecessary formality)—is not sufficient for sharing resources.

Since it is not possible to entrust follow-up actions to persons or units located outside the undertaking's organisational structure, this Polish provision will not be applied in practice.

WHISTLEBLOWER PROTECTION ACT ART. 28(1)
The authorisation of an external entity referred to in Art. 25(1)(1) requires conclusion of an agreement for entrusting the handling of receipt of internal reports, confirmation of receipt of the report, providing feedback, and providing information on the whistleblowing procedure using technical and organisational solutions ensuring that such activities comply with the act.

The possibility of appointing an external entity to receive internal reports

Under Art. 25(1)(1) of the Whistleblower Protection Act, an external entity may be appointed to receive internal reports. Art. 28(1) specifies what this appointment may concern.

In our assessment, on this basis it is permissible to outsource the following tasks on the basis of such agreement (and importantly, only these tasks):

- Handling the receipt of reports
- Confirming receipt of reports
- Providing feedback
- Providing information on the whistleblowing procedure.

The external entity could also be the provider of a whistleblowing system, a law firm, or for example another company from the corporate group, including one from outside Poland. But in the latter case, it is essential that the reporting channels through which the external entity receives whistleblower reports meet the requirements established by the Polish Whistleblower Protection Act, particularly concerning the possibility of filing reports in Polish and compliance with regulations on protection of personal data.

Summary

Although the Polish parliament has introduced provisions suggesting the possibility of establishing common whistleblowing procedures within corporate groups, in practice only one regulation actually provides a basis for entrusting the performance of certain activities to another company in the group.

This possibility is unfortunately limited to the tasks referred to in Art. 28(1) of the Whistleblower Protection Act, i.e. receiving reports and providing confirmation of receipt, feedback, and information about the whistleblowing procedure.

Nowhere does the Polish act provide for the possibility of authorising another entity to conduct follow-up actions. This task, a key element of the whistleblowing system, must be performed within the entity itself, by persons or units in its organisational structure.

It is therefore justified to state that the solutions adopted by the parliament do not take into account that there are proven, effective whistleblowing systems functioning within corporate groups (particularly international groups), where verification of reports is entrusted to specialised organisational units. It follows that the need to conduct follow-up actions internally, without the possibility of authorising such expert units operating for example in parent companies to conduct follow-up, may have a negative impact on the effectiveness of verification of whistleblowers' reports of irregularities.

Cross-border corporate conversions: Legal aspects

Starting 15 September 2023, Polish companies and joint-stock limited partnerships can now apply the cross-border conversion procedure, resulting in transfer of the registered office of the entity to another country and adoption of a legal form available in that country. This change, arising from the need to harmonise the law of the member states, contributes to the cross-border mobility of companies within the European Union.

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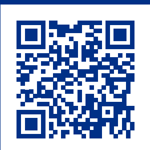

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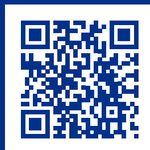


M&A

The need for change

PRIVATE INTERNATIONAL LAW ART. 19
Upon transfer of its head office to another state, a legal person shall be subject to the law of that state. The legal personality acquired in the state where it previously had its head office shall be retained if the law of each of the states concerned so provides. Transfer of the head office within the European Economic Area shall not lead to the loss of legal personality.

The changes to the Commercial Companies Code in 2023 implemented the EU's Company Law Package into the Polish legal system. Before this change, a company's "migration" to another member state was theoretically possible (despite the absence of relevant provisions of corporate law in this respect). This conclusion can be drawn indirectly from other regulations, in particular Art. 19 of the Private International Law.

But to achieve this purpose, the Polish regulations required the relevant corporate body to adopt a resolution on transfer of the company's registered office abroad. Under the previous wording of Commercial Companies Code Art. 270(2), adoption of such a resolution led to dissolution of the company, as a result of which it was necessary to conduct a liquidation proceeding. This greatly complicated the process of reorganisation of the company, as it first required winding down the activity in Poland, and then "reopening" in another member state.

Therefore, in practice many doubts arose whether a cross-border transfer to another member state could be carried out without conducting a liquidation. The Court of Justice of the European Union touched on these doubts in C-106/16, *Polbud–Wykonawstwo*, giving priority to the EU principle of freedom of establishment.

Polbud–Wykonawstwo sp. z o.o. in liquidation, Case C-106/16, judgment of 25 October 2017

In that case, in response to a request for a preliminary ruling, the Court of Justice held that Art. 49 and 54 of the Treaty on the Functioning of the European Union must be interpreted as meaning that **freedom of establishment is applicable to the transfer of the registered office of a company** formed in accordance with the law of one member state **to the territory of another member state**, for the purpose of its conversion, in accordance with the conditions imposed by the legislation of the other member state, into a company incorporated under the law of the latter member state. Moreover, these articles must be interpreted as precluding legislation of

Art. 49 and 54 TFEU prohibit restrictions on the freedom of establishment of nationals of a member state and require companies established in the EU to be treated in the same way as natural persons who are nationals of member states.

a member state which makes the transfer of the registered office of a company incorporated in one member state to the territory of another member state subject to liquidation of the company.

The Court of Justice stressed that national law cannot limit the competence of other member states to establish the conditions for creation and operation of companies in those states.

Notwithstanding this ruling, to synchronise Polish law with EU law and avoid practical doubts in transferring a company abroad, it was necessary to introduce certain procedural solutions into the Polish legal system.

Cross-border corporate conversion —the procedure in practice

Immediately after the new regulations entered into force, we received our first case in this area. It concerned a company where changes in the owners' family made it necessary to move the company's operations to Italy without having to go through liquidation.

In that particular case, it was necessary to start with handling inheritance issues and making the relevant changes in the share ledger, the list of shareholders, and the commercial register. This is because before launching the cross-border conversion procedure, ownership, formal and business issues need to be addressed, to check how the conversion of the company will impact its operations (required licences or administrative decisions in the other country) and its tax arrangements.

The first formal step for initiating the cross-border company conversion is typically to draw up a cross-border conversion plan and reports justifying the conversion for the company's shareholders and employees. This obligation was introduced with a view to the people for whom the company's cross-border conversion will be important not just for legal reasons, but also because it will impact their life situation. It will not be necessary to prepare a report for the shareholders if all the shareholders consent. A report for employees will not be needed if the company does not employ anyone other than the management board members.

The conversion plan is subject to examination by an auditor, but the audit can also be skipped if all the shareholders consent.

The regulations on preparation of the documents which are the basis for the cross-border conversion of the company generally place much greater weight on protection of the interests of the company's shareholders, employees and creditors, whose interests might be infringed by the change in the law governing the company. This is apparent for example in the obligation of prior disclosure of the conversion plan or particular information about the cross-border conversion in the company's registry file. As part of this procedure, the relevant notation should also be made concerning the cross-border conversion, visible in the excerpt downloaded from the National Court Register. This is intended to allow the shareholders, employees and creditors of the company undergoing conversion to submit comments on the conversion plan, and in the case of creditors also to make a timely assertion of any claims they may have against the company.

Interestingly, there is a change in the place where this information is disclosed. Instead of *Monitor Sądowy i Gospodarczy* (the journal where documents related to domestic reorganisations are typically published), information about a cross-border conversion is disclosed in the National Court Register. The practical justification for this is that while *Monitor Sądowy i Gospodarczy* is rarely consulted in domestic commercial transactions, excerpts from the National Court Register are obtained in connection with nearly any major transaction involving the company. This greatly increases the probability that the conversion procedure will come to the attention of potential creditors.

Then a resolution on the cross-border conversion should be adopted, after twice notifying the shareholders of the intention to adopt the resolution. The resolution must be adopted before a notary and requires a three-fourths majority of the votes representing at least half of the share capital, unless the company's articles of association provide for a higher majority, although the requirement may not exceed 90% of the votes.

After adoption of the resolution, the company undergoing conversion applies to the registry court for issuance of a certificate finding that the cross-border conversion complies with domestic law. Significantly, a request for issuance of an opinion by the competent tax authority must be enclosed with this application.

In the procedure for issuance of a legal compliance certificate, the registry court will examine in particular whether the

cross-border conversion plan contains information about the procedures for involvement of employees, on the basis of which the relevant arrangements are agreed, as well as possible variants for these arrangements.

Oversight of cross-border conversions is interdisciplinary and serves to protect the interests not only of the company's shareholders, employees and creditors, but also the fiscal interests of the state (in case the planned reorganisation is intended to circumvent tax regulations).

After obtaining the legal compliance certificate, the converted company may apply to the registry court (proper for the registered office of the converted company) for entry in the relevant commercial register in the other member state.

Governing law in the process of cross-border conversion of a company

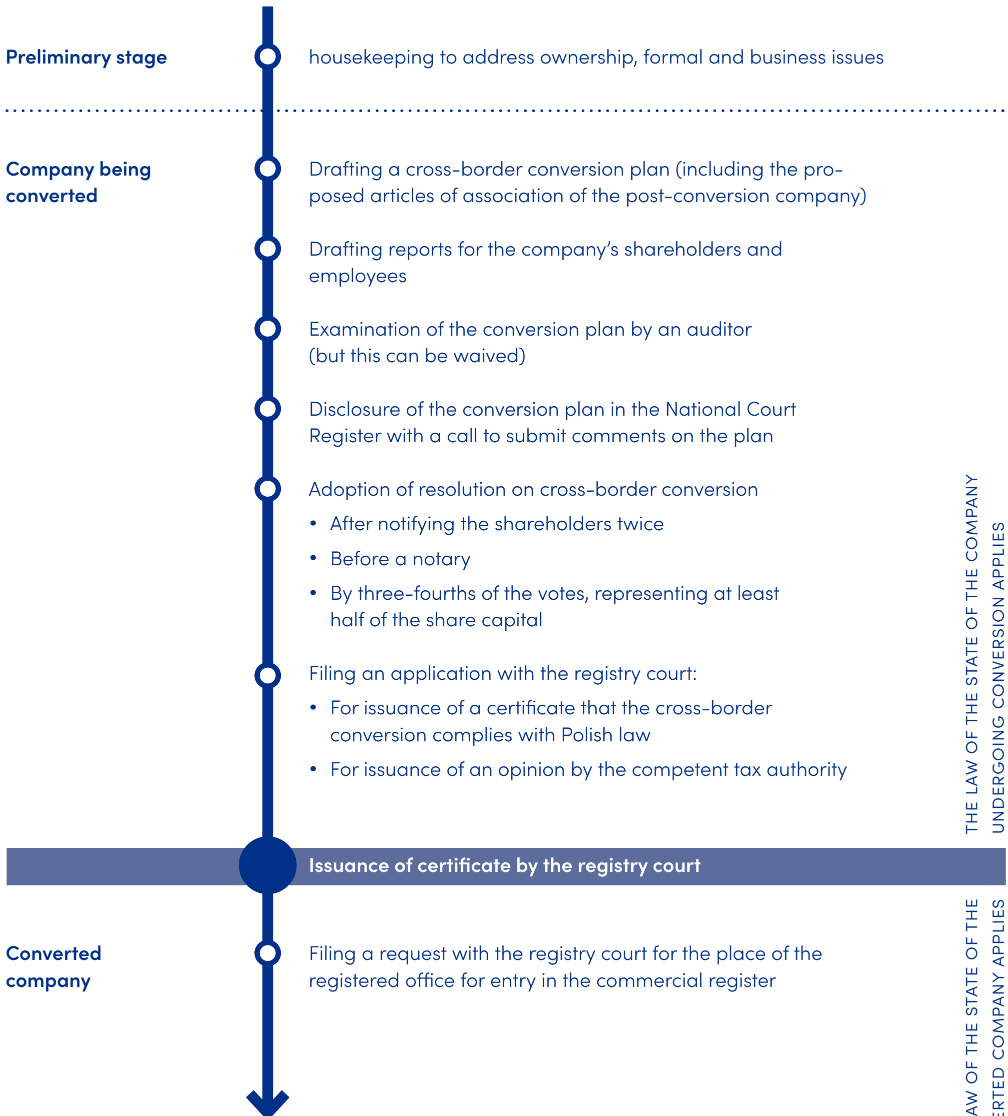
Until receipt of the certificate of compliance of the cross-border conversion with domestic law, the cross-border conversion is governed by the law of the state where the company undergoing conversion has its registered office, and after that date it is subject to the law of the state where the converted company has its registered office.

Commercial Companies Code Art. 580[2]

But this does not mean that the cooperation of lawyers on the project on both sides will be limited to obtaining the judicial certification that the cross-border conversion of the company complies with national law. To the contrary, it is in the client's best interest to obtain legal assistance in both jurisdictions starting from the conceptual stage.

Despite the efforts to unify the EU regulations on company law so that an undertaking moving across the border can easily find its way within the new legal system, there will still be differences between the jurisdictions affecting the scope of the documentation that needs to be drafted throughout the process.

The best example is the need to enclose with the conversion plan the proposed wording of the articles of association of the post-conversion company, which will ultimately be governed by the law of another member state and thus must be drafted applying the relevant provisions, i.e. foreign law.


Preliminary stage
housekeeping to address ownership, formal and business issues
Company being converted
Drafting a cross-border conversion plan (including the proposed articles of association of the post-conversion company)
Drafting reports for the company's shareholders and employees
Examination of the conversion plan by an auditor (but this can be waived)
Disclosure of the conversion plan in the National Court Register with a call to submit comments on the plan
Adoption of resolution on cross-border conversion
• After notifying the shareholders twice
• Before a notary
• By three-fourths of the votes, representing at least half of the share capital
Filing an application with the registry court:
• For issuance of a certificate that the cross-border conversion complies with Polish law
• For issuance of an opinion by the competent tax authority
THE LAW OF THE STATE OF THE COMPANY UNDERGOING CONVERSION APPLIES
Issuance of certificate by the registry court
Converted company
Filing a request with the registry court for the place of the registered office for entry in the commercial register
THE LAW OF THE STATE OF THE CONVERTED COMPANY APPLIES

Practical problems

The first problem the company undergoing conversion may encounter in the cross-border conversion process is not strictly legal, but linguistic. Many European courts still reject the possibility of conducting registry proceedings in any language other than the official language of that member state. In Poland as well, as a rule content in any language other than Polish may not be included in documents signed in the form of a notarial deed (the form in which the resolution on cross-border conversion, part of which is the draft articles of association of the converted company, must be adopted).

This is one of the reasons why it is essential to engage counsel on both sides of the reorganisation process early on, at the preliminary stage of the project. This enables oversight of the translations of the required documents early enough to avoid problems involving incorrect translation of the legal structures relevant to the given system of law.

Moreover, the registration procedure for cross-border conversions, or at least the technical elements, is also a new procedure for the registry courts. And the procedure has not been fully adapted to the needs and solutions used in the regulations governing the procedure. Consequently, it may be necessary to apply atypical solutions when conducting and coordinating the process.

Not just procedure

Apart from purely formal issues involving the cross-border conversion procedure, practical issues related to the business conducted by the company, including tax, accounting and payment issues, are equally important. It is necessary to keep in view the performance and continuation of contracts, obtaining licences required at the company's new location, and all of the other matters encountered by businesses. In this respect as well, cooperation with advisers in both jurisdictions will be essential to foresee potential problems and resolve them as they arise.

Dividends and the disposal of shares: Can a dividend in a limited-liability company go to someone other than a shareholder?

Participation in the profit is a fundamental right of a shareholder in a limited-liability company. This is linked with the status of a shareholder, which is why a disposal of shares during the course of the financial year can be relevant for this right—particularly when the shares are disposed of between the date of adoption of the resolution on distribution of the profit and a later dividend date. In this article we discuss the impact that the disposal of shares has on the right to participate in the profit earned by the company and designated for distribution among the shareholders.

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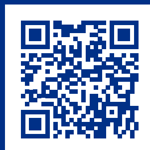


corporate

Right, debt, claim

The abstract right to participate in a company's profit (the general right to a dividend) must be distinguished from the concrete claim for disbursement of an approved dividend (claim for payment).

A general right to participate in the profit is vested in a shareholder from the very notion of being one of the shareholders of a limited-liability company. But this abstract right does not guarantee that a shareholder will actually obtain money from the company, or constitute a sufficient standalone source of a claim on the part of the shareholder for payout of any profit earned by the company. And, as a rule, a shareholder cannot independently dispose of the general (abstract) right to share in the profit, without selling the actual shares in the company's capital. This follows from the ban on splitting the share rights from the specific entitlements bundled into them.

The abstract right to participate in the profit is transformed into a specific claim for payment of a dividend upon fulfilment of the statutory grounds, specifically when:

- The company has earned a profit which is eligible for distribution among the shareholders, and then
- The profit is designated for distribution among the shareholders.

Commercial Companies Code Art. 191 §1, 192, and 231 §2(2)

Once the resolution on distribution of the profit has been passed, the company (as debtor) becomes obligated to the shareholder (as creditor) to pay out the profit in accordance with the adopted resolution. As a rule, without the shareholder's consent, the company cannot unilaterally modify or restrict this obligation. The claim thus created does, however, constitute an entitlement that can be the subject of a separate trade, assignment, setoff, pledge or execution.

See e.g. Kraków Court of Appeal judgment of 19 November 2015, case no. I ACa 1009/15

Dividend date

Unlike the general rules governing profits set forth in the Polish Civil Code, with respect to dividends the law adopts the notion of a "dividend date" as of which the entities entitled to receive the dividend are determined. The persons entitled to receive a dividend for a given financial year are the persons who held the shares on the date of adoption of the resolution on distribution of the profit or on another date if the shareholders' meeting exercised the right vested in it under the company's articles of association to define the dividend date or such date is expressly provided for in the articles of association. Consequently, as a rule the specific right to participate in the distribution of profit is solely determined by holding the status of a shareholder on the dividend date. In this respect, whether the person held shares during the period preceding that date is legally irrelevant. In particular, being a shareholder during the course of the financial year in which the profit was generated does not in itself guarantee participation in distribution of the profit.

Civil Code Art. 54 in connection with Art. 55 §1

Commercial Companies Code Art. 193 §§ 1 and 3

Commercial Companies Code Art. 193 §2

The dividend date may be designated as the date of adoption of the resolution on distribution of the profit, or some other date within two months after adoption of the resolution on distribution of the profit. In the case of M&A transactions, setting a later dividend date may be warranted if the parties' business terms call for awarding the buyer the right to collect the approved dividend, but the closing of the transaction will not occur until after the statutory deadline for approving the financial report. Then postponement of the dividend date will allow the company to meet the deadline for performing its statutory duties, while effectively awarding the right to receive the profit to the buyer of shares who was not yet a shareholder at the time when the resolution on distribution of the profit was adopted.

However, the dividend date cannot be set for the period preceding the date of adoption of the resolution on distribution of the profit. This conclusion follows from the literal wording of Art. 193 §3, and is also dictated by functional considerations. If the dividend date were determined retroactively, it would create a risk that the valuation of the shares acquired in a transaction occurring after such (retroactive) dividend date, but before adoption of the actual resolution on distribution of the profit, would erroneously reflect

COMMERCIAL COMPANIES CODE ART. 193 §3
The dividend date shall be set within two months after the date of adoption of the resolution referred to in Art. 191 §1.

funds of the company which were subsequently effectively allocated to the seller by paying out the dividend.

Setting the dividend date

Therefore, to determine the set of entities entitled to receive the profit, it should first be established which date should be deemed to be the dividend date. In this respect, the code allows for several possibilities.

First, if the articles of association include the relevant authorisation, the dividend date may be established by a resolution of the shareholders' meeting.

Commercial Companies Code Art. 193 §2

Second, because the articles of association may authorise the shareholders' meeting to set the dividend date, some commentators in the legal literature allow for the possibility of designating a dividend date in the articles of association, by identifying either a specific calendar date or a method for calculating it (e.g. 21 days after adoption of the resolution on distribution of the profit).

Third, if the resolution of the shareholders' meeting does not designate the dividend date, and the relevant provisions in this respect are not included in the articles of association, the dividend date is the date of adoption of the resolution on distribution of the profit.

Commercial Companies Code Art. 193 §3

Dividend payment date

Adoption of a resolution on distribution of profit and arrival of the dividend date does not necessarily mean that the shareholder can effectively enforce payment of the dividend against the company. This will happen when the claim for payment of the approved dividend disbursement becomes due and payable. If the payment deadline was not designated in the shareholders' resolution, then the approved dividend becomes due and payable immediately following the dividend date. But there is generally nothing preventing the company from paying out the dividend before the dividend payment date designated by the shareholders. It should be recognised that the deadline for payment of the dividend, unless the resolution says otherwise, is reserved to the benefit of the debtor

Commercial Companies Code Art. 193 §4

(i.e. the company), and consequently the company may perform this obligation before the deadline arrives.

Disposal of shares

After setting the dividend date, the specific set of entities entitled to receive the dividends earmarked for distribution must be established. The situation is clear when neither the shareholder structure nor the capital structure of the company has changed from the end of the financial year when the profit was generated, through the date of adoption of the resolution on distribution of profit, up to the dividend date and the dividend payment date. But doubts may arise if there has been a disposal of shares during this period.

If the share disposal occurred before adoption of the resolution on distribution of the profit by the ordinary (annual) shareholders' meeting, then, along with the shares, the right to participate in the profit (being incorporated into the shares) also passes to the buyer. It is irrelevant whether, in particular, the seller was a shareholder for the entire financial year or years when the profit to be distributed was earned.

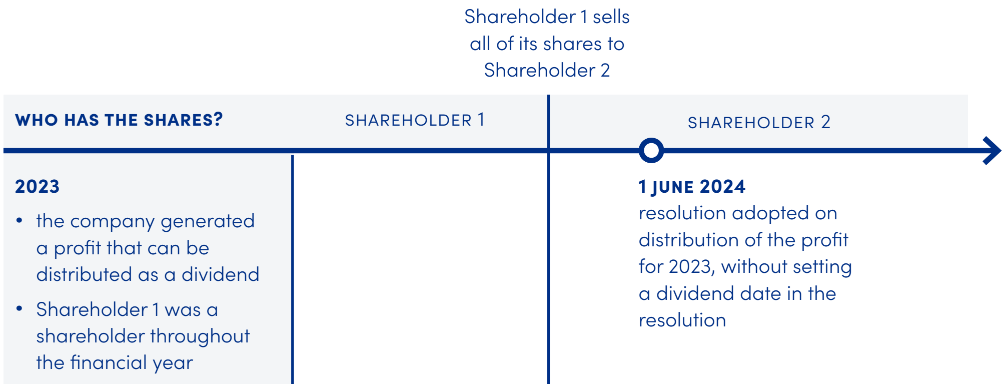
If the dividend date coincides with the date of adoption of the resolution on distribution of profit, the shareholders entitled to receive the dividend are the persons holding the shares on the date of adoption of the resolution on distribution of profit. Consequently, on the date of adoption of the resolution, the general (abstract) right to participate in the profit is converted into a specific right to payment of the dividend. From that moment on, the right to payment of the dividend is a standalone right, no longer dependent on the shares. Subsequent disposal of the shares will thus not cause the right to payment of the approved dividend to automatically pass to the buyer of the shares.

The same conclusion follows from a Supreme Court judgment clearly rejecting the notion that along with acquisition of rights to the shares in a limited-liability company, any other claims the seller may have against the company in question also pass to the buyer. An example of such a separate claim is the dividend approved by the shareholders' meeting, where the shares were sold after the dividend date.

Supreme Court of Poland judgment of 4 September 2014, case no. II CSK 776/13, Lex no. 1541048

EXAMPLE NO. 1

Facts	Answer
The financial report for the 2023 fiscal year shows a profit which can be distributed among the shareholders, and which was entirely generated in 2023. On 1 June 2024 the ordinary (annual) shareholders' meeting adopted a resolution on distribution of the profit, but without also setting a dividend date. Shareholder 1 was a shareholder of the company throughout 2023, but then, on 13 May 2024, sold all its shares to Shareholder 2, and the company was effectively notified of the sale under Commercial Companies Code Art. 187 on the same day.	Shareholder 2 will be entitled to receive the entire dividend. It was a shareholder on the date of adoption of the resolution on distribution of the profit, which was also the dividend date, as the shareholders' resolution did not set a separate dividend date (Art. 193 §3). That the profit being distributed was earned entirely during 2023 (when Shareholder 1 was a shareholder) is irrelevant for establishing the set of entities entitled to receive the dividend. At the point of selling the shares, there was not yet a specific, mature claim for payment of the dividend, but at most an expectancy associated with the shares, which passed to the buyer along with the shares. Thus the price paid for the shares should reflect the existence of undistributed profit as of the time the shares were sold.

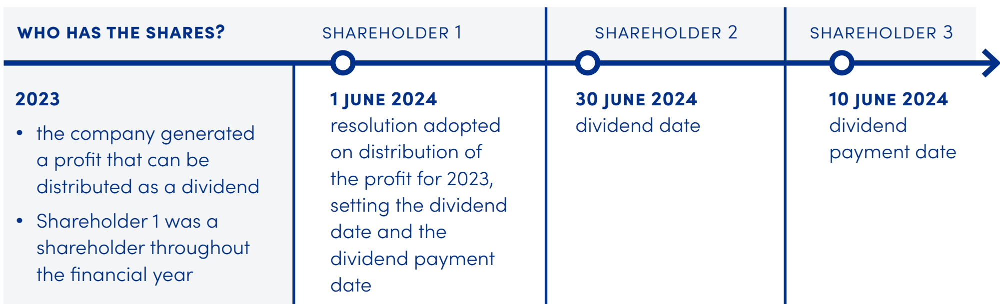


The disposal of shares may also occur between the date of adoption of the resolution on distribution of the profit and the separate dividend date for the dividend set in the shareholders' resolution or arising directly from the articles of association. In that case, the right to payment of the dividend arises as of adoption of the resolution on distribution of the profit. At the same time, however, it should be recognised that until the dividend date, this claim will be strictly tied to the shares, as before the dividend date the entity entitled to a claim against the company has not yet been individually determined. Consequently, unless the parties to the disposal

of the shares provide otherwise, from the time of adoption of the resolution on distribution of the profit, until the dividend date, the approved dividend will be linked to the shares, and thus, in the event of a disposal of the shares in the interim, the right to payment of the dividend will pass to the buyer.

EXAMPLE NO. 2

Facts	Answer
On 1 June 2024, the ordinary (annual) shareholders' meeting passed a resolution on distribution of profit and also set the dividend date at 30 June 2024 and the dividend payment date at 10 July 2024. On 28 June 2024 Shareholder 1 sold all of its shares to Shareholder 2, which in turn sold the same shares to Shareholder 3 on 9 July 2024. The company was effectively notified of each transfer of the shares under Commercial Companies Code Art. 187 on the same day as each disposal occurred.	Shareholder 2 will be entitled to receive the entire dividend. It was Shareholder 2 who was the shareholder on the dividend date designated by the shareholders' meeting, which is relevant for determining the set of persons entitled to receive the profit distribution. Although the right to payment of the dividend arose at a time when the shares were held by Shareholder 1, that claim became individualised and attributable to a specific creditor on the dividend date, when Shareholder 2 was already the owner of the shares. The dividend date need not coincide with the dividend payment date. The payment date is specified in the shareholders' resolution, or if not, the dividend is payable immediately following the dividend date (Art. 193 §4). Arrival of the dividend payment date means that the creditor can now effectively demand that the company pay the claim it holds for payment of the profit distribution. Even if the dividend has not yet been collected by Shareholder 2, the fact that Shareholder 3 possesses the shares on the dividend payment date is irrelevant for determining the parties to the obligation associated with payment of the dividend. Arrival of the dividend payment date only means that the company's debt to Shareholder 2 becomes due and payable, in which case delay in performing the obligation (paying out the dividend) will also entitle Shareholder 2 to demand interest.



Notification to the company

Acquiring the shares before the dividend date is not in itself sufficient for the buyer to be awarded a right to payment of the dividend enforceable against the company. For such a right to arise, the buyer of the shares must obtain formal standing as against the company as a shareholder. And for this to happen, in the case of share transactions notification of the company under Commercial Companies Code Art. 187 is required, i.e. informing the company of transfer of the shares to a new owner along with proof of the transfer. Only when the company receives such notification (with proof) is transfer of the shares effective against the company, entitling the buyer to effectively demand fulfilment of the company's obligation to the new shareholder (once it is due and payable). However, in this case, what counts is notification to the company as such under Art. 187, not updating of the information in the company's share ledger (although some commentators take a different view in the legal literature).

Before the company is notified, it does not have information about the disposal of shares, and thus it would be authorised to perform its obligation to the entity which to its knowledge remains a shareholder. If as a result of failure to notify the company of transfer of the shares, the company paid the dividend to the seller, the buyer could require the seller to turn over the dividend payment on the basis of unjust enrichment.

Contractual methods of settling the dividend

Separating the date of adoption of the resolution on distribution of the profit from the dividend date for the dividend may result in the beneficiaries of the dividend being different persons than the shareholders who were entitled to vote on the distribution of profit. This may serve in particular to ensure that the buyer of the shares (not the seller) receives the dividend, even if adoption of the resolution occurred before the share disposal transaction. This also opens the way to applying various mechanisms to regulate cashflows contractually between the company, the seller and the buyer, for example through subrogation, assignment or setoff. Sometimes

this can simplify the mutual settlements between the parties carried out as part of an M&A transaction. In economic terms, transfer of the right to payment of the dividend to the buyer of the shares should be reflected in a higher price for the shares. However, this may carry certain negative consequences in terms of the transaction costs (higher tax on civil transactions or higher notary fees).

Summary

Unless otherwise provided by the parties, the person entitled to collect a dividend will be the entity that held the shares on the date of adoption of the resolution on distribution of the profit, or, if a separate date is designated, on the dividend date established by the shareholders' meeting or provided in the company's articles of association. In particular, for determining which person is entitled to receive the dividend, it is irrelevant whether the shareholder was a shareholder during the financial year when the company earned the profit subsequently earmarked for distribution.

If an M&A transaction is finalised (dispositive effect) during the period when the ordinary (annual) shareholders' meeting would be held, the transaction documentation should specify the conditions for payment of the dividend for the financial year in question, including the beneficiary and the date. It is possible for the parties to introduce a settlement model different from the statutory one, e.g. through assignment of the claim against the company for payment of the dividend, inclusion of the value of the distributed profit directly in the price for the shares (price formula), or by applying other institutions of civil law enabling simplification of the settlements, or effective allocation of the profit in some other manner to reflect the parties' arrangements.

Liability of supervisory board members … and how to avoid it

In recent years, there have been significant changes in the rights and responsibilities of corporate authorities, especially supervisory boards. These changes directly affect the liability of supervisory board members. As a result, corporate boards and individual members must take them into account when structuring the supervisory board's work.

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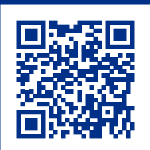

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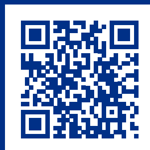


M&A

Supervisory boards in Poland

The changes in the rights and duties of supervisory board members are linked to the increasing number of regulatory requirements, and consequently the growing professionalisation of business, which is also impacting corporate authorities.

As of the end of 2023, there were 77,500 supervisory board positions in Poland across joint-stock companies, limited-liability companies, and joint-stock limited partnerships. A total of 61,300 individuals served as supervisory board members, with some holding positions on multiple boards.

In limited-liability companies that have a supervisory board, whether due to statutory requirements or other reasons, the board's duties are often not taken seriously enough, even though most supervisory board positions are found in these companies.

This applies in particular to SMEs, where members of the supervisory board often receive no pay or are paid only symbolically in the form of per diem expenses. However, perhaps surprisingly, the amount of the person's remuneration has no impact on their scope of liability, including financial liability of a supervisory board member for injury caused to the company. After all, no one can be forced to serve on a supervisory board.

Due to the statutory requirement for joint-stock companies to have a supervisory board, and the heightened internal corporate governance requirements in such companies, this problem does not affect joint-stock companies to the same extent. Nonetheless, precisely because of the additional requirements, members of supervisory boards of joint-stock companies and companies owned by the State Treasury should be expected to exercise particular care in performing their duties.

SUPERVISORY BOARDS IN NUMBERS—DATA AS OF 31 DECEMBER 2023

	LIMITED-LIABILITY COMPANIES (SP. Z O.O.)	JOINT-STOCK COMPANIES (SA)	JOINT-STOCK LIMITED PARTNERSHIPS (SKA)	TOTAL
Positions on supervisory boards	44,400	32,700	400	**77,500**
Companies	13,300	9,000	100	**22,400**
No. of positions on supervisory boards of companies based in Warsaw				**19,900**

Source: "Supervisory Boards in Poland 2024" report, NadzorKorporacyjny.pl

Rights and duties of supervisory board members

In both joint-stock companies and limited-liability companies, the supervisory board exercises ongoing oversight across all areas of the company's activity. A supervisory board member must perform his or her duties with the due care reflecting the professional nature of the role, and must maintain loyalty towards the company.

Under current law, supervisory boards in joint-stock companies and limited-liability companies are tasked with:

- Evaluating the management board report and financial report for factual accuracy and consistency with the books and records
- Reviewing motions from the management board regarding the distribution of profit or coverage of loss
- Preparing (and submitting to the shareholders) an annual written report on the results of the assessments referred to above
- Preparing (and submitting to the shareholders) a written report on the activity of the supervisory board for the preceding financial year (supervisory board report).

To perform their duties, the supervisory board may:

- Examine any and all documents of the company
- Audit the company's property
- Appoint advisers to examine the foregoing matters (in limited-liability companies, only if this right is provided for in the articles of association)

– Demand that the management board, commercial proxies, employees, or persons performing certain activities for the company on a regular basis (under a service contract or similar) prepare or provide any information, documents, reports or clarifications concerning the company, in particular its operations or assets.

Such demand may also extend to information, reports or clarifications concerning subsidiaries or affiliated companies, in the possession of the body or individual in question.

If the company's financial report is subject to a statutory audit, the supervisory board must notify the key auditor who examined the company's financial report, at least one week in advance, of the date of the session for approval of the financial year. The company must ensure the participation of the key auditor or other representative of the audit firm at the session of the supervisory board. During the session, the key auditor or other representative of the audit firm will present the report on the audit to the supervisory board, including an assessment of the grounds for the adopted statement on the company's ability to continue as a going concern, and answer questions from the supervisory board members.

The regulations also contain detailed guidelines on the minutes of the supervisory board session. The minutes must contain the agenda, the names of the supervisory board members present at the session, and the number of votes on specific resolutions. Any dissenting opinion asserted by a supervisory board member should also be noted in the minutes, along with the grounds stated for the dissent, if any. The minutes must be signed by at least the supervisory board member chairing the session or administering the voting, unless otherwise provided by the company's articles of association.

The above enumeration illustrates the extent to which the Commercial Companies Code defines the specific rights and duties of the supervisory board. However, several other laws also regulate the activities of supervisory boards. In the case of companies in which the State Treasury holds shares, the Act on the Rules for Managing State Property introduces a series of additional requirements for candidates for supervisory bodies, and involving the matters that should receive prior approval of the supervisory body in state companies.

The Act on Public Offerings and Conditions for Introduction of Financial Instruments into an Organised Trading System and on Public Companies establishes additional requirements and sanctions with respect to members of supervisory boards of public companies subject to oversight by the Polish Financial Supervision Authority (KNF). KNF may impose fines on members of the supervisory boards of public companies in instances of gross violation of their duties—even if the company itself has already been sanctioned. In imposing fines, KNF will take into account such issues as the seriousness of the infringement, the reasons and duration. For this reason as well, it is particularly important to properly document the activities of the supervisory board and the individual members.

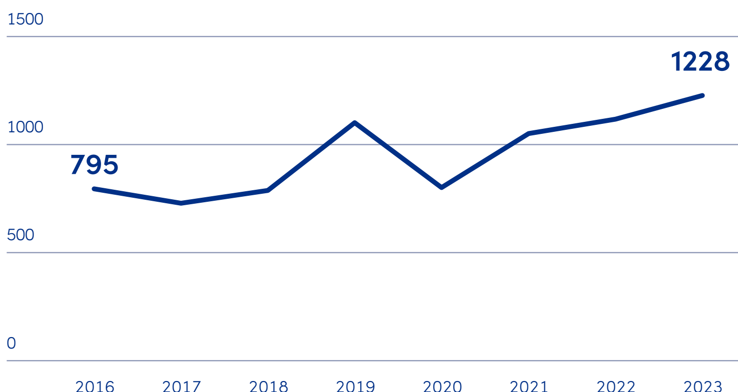
Liability and the business judgment rule

Many of the rights and duties mentioned above were incorporated into the Commercial Companies Code through a 2022 amendment. The goal was to provide detailed regulations on issues that had previously been addressed more generally. As a result, it is now often possible to clearly determine whether a supervisory board has breached its duties or acted with due care. As the statistics below indicate, the number of cases related to the civil liability of members of corporate bodies (under Commercial Companies Code Art. 291–300 or 479–490) has been increasing, except for a temporary decline during the pandemic.

Under current law, supervisory board members are required to exercise the due care reflecting the professional nature of their activity and to maintain loyalty to the company in performing their duties. At the same time, a new regulation has been adopted codifying the business judgment rule in Poland concerning the civil liability of supervisory board members to the company. Under this regulation, a supervisory board member is considered not to have breached their professional duty of due care if, while acting loyally towards the company, they operate within the bounds of reasonable commercial risk. This includes making decisions based on information, analyses, and opinions that should be considered under the given circumstances for a careful assessment.

← Commercial Companies Code Art. 483 §3

CASES FILED WITH THE WARSAW DISTRICT COURT BASED ON ART. 291–300 OR 479–490 OF THE COMMERCIAL COMPANIES CODE



Source: Statistics for the Warsaw District Court

In light of this rule, as well as the increasing number of duties imposed on supervisory boards and their members by lawmakers, the supervisory board's activities should be organised and conducted in a way that allows members to demonstrate they exercised due care in fulfilling their responsibilities.

Previously, supervisory board bylaws often consisted of extensive repetition of provisions from the Commercial Companies Code and the company's articles of association. However, under current conditions, the bylaws should serve as a practical document that clearly outlines the procedures and responsibilities of the supervisory board and its members. While not every company seeks legal advice for ongoing corporate matters, well-drafted and structured bylaws can act as a guide, helping supervisory board members navigate complex regulations and properly document their actions.

Additionally, emphasis should be placed on drafting detailed minutes of supervisory board meetings, recording the positions taken by individual board members on key issues. If necessary, this documentation can help reconstruct the course of a meeting and demonstrate due care in decision-making, particularly if a company asserts claims against a supervisory board member or, in the case of public companies, when KNF conducts oversight.

It is also worth considering protecting supervisory board members from civil liability by securing directors and officers insurance.

While D&O coverage is already common for management board members, recent legal changes may justify extending this protection to supervisory board members as well.

More on this topic in the next article

Summary

As the rights and duties of supervisory boards and their members are increasingly detailed, it is crucial to establish a clear and practical organisational framework for the supervisory board's work within the company. It is worth adopting supervisory board bylaws to provide a roadmap for members. Additionally, supervisory boards should maintain detailed minutes of their meetings. In justified cases, supervisory board members may also benefit from civil liability insurance for directors and officers.

A few words about D&O insurance on the Polish market

D&O coverage (directors and officers liability insurance) is a key instrument to protect managers taking vital business decisions. It protects corporate managers and board members when the company seeks damages from them for strategic, legal or financial decisions they have made, and for errors in risk management.

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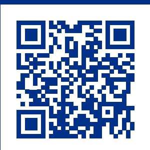


insurance

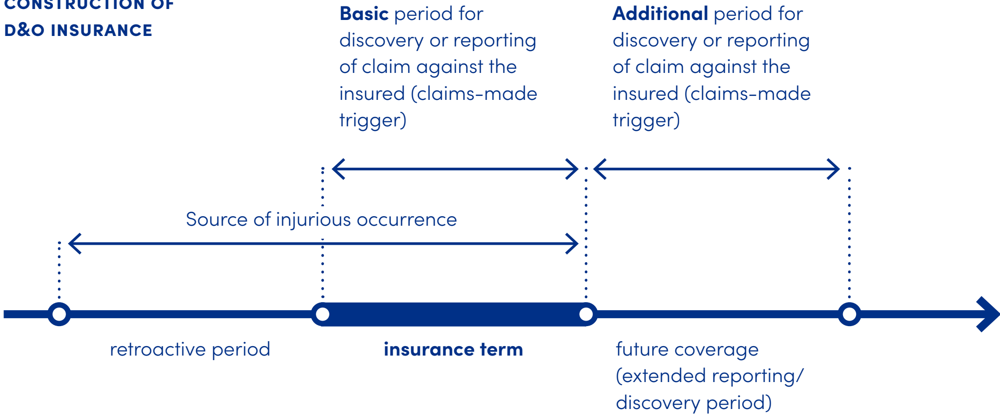
Companies may have many potential reasons for seeking damages from their former managers, but the key to triggering D&O coverage is a link between the alleged injury and the function of a corporate director or officer held by the insured.

Scope of D&O coverage

This type of insurance differs in many respects from other types of insurance. First and foremost, the D&O construction is based on a "claims-made trigger," meaning that the insurance covers events that are the subject of a claim asserted during the term of the insurance.

The claims-made rule may carry the risk that claims asserted after the term of the insurance will not be covered, even though the causative action occurred during the term of the D&O policy. To address this, a rider is typically added to the policy extending the coverage to claims raised after the term of the insurance, known as an extended reporting or discovery period. Nonetheless, claims must arise out of acts or omissions committed during the term of the insurance (or in an earlier period covered by a retroactive discovery clause, e.g. in the case of certain products). This clearly distinguishes D&O coverage from standard insurance products, in which the term of the insurance clearly marks the beginning and end of the insurer's responsibility.

In the context of the claims-made rule, the retroactive period, which is most often defined in the policy itself, is also relevant. This designates the start of the time from which the insurer may be liable. Claims originating from actions prior to that period will typically not be subject to insurance protection.



It should be pointed out here that some other countries have adopted statutes governing the temporal modifications applied on the Polish market to D&O coverage. For example, French law provides for a mandatory minimum additional period for asserting claims under civil liability insurance.

Interruption and extension of insurance coverage

An additional period for raising claims will be particularly important when, after the end of the period of coverage under a given D&O policy, it was decided not to continue the insurance or take out a different new policy. In that situation, an extended discovery period may be helpful.

For obvious reasons, an additional period for raising claims will not be needed if a new policy has been taken out. The new policy will cover claims arising out of events occurring during the term of the new policy. In that situation, the additional period will not begin, or if it has begun it will lapse.

Interestingly, insurers also provide for an additional period for asserting claims with respect to persons who on the last day of the term of the policy were no longer formally insureds. This is known as an additional period for "former insureds."

This applies for example to individuals who resigned from office during the term of the policy. This additional period begins to run simultaneously with the main period described above, but ends significantly later. Under the current market realities, this period is described as "lifelong" or "indefinite." Unlike the main additional term, the additional term for former insureds does not lapse if a new insurance contract is signed. It will apply even if a new contract is signed with an exclusion of certain categories of persons or with a limitation or exclusion of retroactive coverage.

Nonetheless, it should be borne in mind that D&O insurance is voluntary. Each product is essentially individual and subject to certain modifications (e.g. via amendments typically indicated in the insurance policy). While D&O products are obviously based on a similar construction—due to the conditions imposed by the reinsurers with whom the insurers cooperate—nonetheless not every D&O insurance policy will have exactly the same rules and contractual provisions (although most often they will be very similar from one policy to the next).

Criminal exclusion

In D&O insurance, it is standard to exclude certain categories of events from coverage. One of these categories is an exclusion from liability for losses arising out of or related to intentional tortious behaviour or actions resulting in unjust enrichment of the insured. This is the market standard, arising among other reasons out of the reinsurance requirements, and is also tied to combatting insurance fraud.

Nonetheless, if an insurer wishes to exercise this type of exclusion, a very common condition is that the circumstances that are grounds for the exclusion must be confirmed by a legally final judgment or other final resolution by the competent authority. In the general conditions of insurance, insurers also often allow this exclusion to be exercised on the basis of an arbitration award, or even a written statement by the insured.

Resolution required in insured vs insured disputes

The existence of D&O insurance may result in certain disputes being conducted practically between two insureds (insured vs insured). This involves, in particular, situations where the insured entity (e.g. a limited-liability company) decides to seek damages under Commercial Companies Code Art. 293 against a former manager or board member who is also recognised as an insured person under the D&O policy.

On the Polish market, such disputes arise much more frequently than on Western markets. For example, following changes on the Polish political landscape, resulting in numerous reshufflings in top positions in state-owned companies, there is more and more talk about enforcing liability against the former managers, particular in critical sectors (such as energy).

It should remembered, however, that the Commercial Companies Code requires consent of the shareholders to pursue damages against members of the company's authorities. This requirement applies not only to the intention to initiate court proceedings. Pursuing claims out-of-court against members of the company's authorities also requires a shareholders' resolution. Absence of such resolution results in the lack of standing to bring suit, which can result in dismissal of the claim in its entirety.

Commercial Companies Code Art. 228(2)

Supreme Court of Poland judgment of 28 March 2024, case no. II CSKP 1257/22

COMMERCIAL COMPANIES CODE ART. 293	COMMERCIAL COMPANIES CODE ART. 228(2)
§1. A member of the management board, the supervisory board or the audit committee, or a liquidator, shall be liable to the company for injury caused by an act or omission in breach of law or the articles of association, unless he or she is not at fault. … §3. A member of the management board, the supervisory board or the audit committee, or a liquidator, does not breach the duty of care arising out of the professional nature of such activity if, acting in a manner loyal to the company, he or she acts within the bounds of reasonable commercial risk, including on the basis of information, analyses or opinions which under the circumstances should be considered when making a careful evaluation.	In addition to other matters provided in this title or in the articles of association, … a resolution of the shareholders shall be required for … a decision on claims for redress of injury caused upon formation of the company or in the company's management or supervision.

Therefore, when seeking redress of injury under an insurance contract, the relevant resolution should first be adopted. This position was shared by the Warsaw Court of Appeal in a case involving D&O insurance, holding:

> To seek damages from the insurer, conclusion of an insurance contract protecting members of the company's management board against civil liability, and demonstrating mismanagement on their part, is not sufficient. Apart from fulfilling these two grounds, it is necessary for the general meeting (or shareholders' meeting in the case of a limited-liability company) to adopt the appropriate resolution on pursuing claims against members of the management board for redress of injury caused to the company in their exercise of management.

Warsaw Court of Appeal judgment of 30 August 2011, case no. VI ACa 1273/10

This is particularly crucial in the case of an insured vs insured dispute. The insurer's liability under civil liability insurance is accessory (also under D&O insurance when an insured vs insured dispute has arisen). It follows that:

- The insurer's liability coincides with the insured's liability (in grounds and scope)
- The insurer may assert any defences directly held by the insured under the civil liability insurance.

Thus if the person who originally caused the injury (the management board member responsible for the loss) could assert against the company the defence of lack of standing to bring suit (the inability to effectively commence the proceeding seeking payment), the same defence could be asserted by the insurer in a potential proceeding seeking payment under the D&O insurance.

These resolutions are vital, both during a liquidation proceeding and in a potential judicial proceeding.

Summary

The foregoing overview of certain characteristic features of D&O insurance should help convey how it differs from other insurance products—from the specific insurance trigger and the possibility

of extending the insurance protection (both retroactively and in coverage of the discovery period), through the complicated configurations of the parties in ongoing disputes (i.e. parties who also insureds under the same policy). All of this makes D&O insurance a particularly interesting phenomenon on the insurance market, deserving of further study.

Recent months have shown that holding prominent positions in major companies carries not only prestige, but also great liability, which sooner or later may materialise. More and more reports are appearing in the media about companies that have decided to hold former board members responsible for mismanagement of the organisation, and have taken steps in this direction, including adoption of the required resolutions.

This trend can be expected to intensify, which will drive further growth in the popularity of directors and officers coverage on the Polish insurance market.

Enterprise in crisis: In what order should debts be paid to avoid exposure to criminal liability?

Managing an enterprise in crisis is a challenge that often requires the managers to make tough decisions. On one hand, the aim is to rescue the business, but on the other hand, the measures they take must be lawful to avoid the risk of criminal liability. In particular, the members of the management board of companies that are insolvent or at risk of insolvency must maintain special caution when deciding on payment of the company's debts.

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Any action by management board members of an insolvent company, or a company at risk of insolvency, will be evaluated in light of the regulations, including Art. 302 §1 of the Criminal Code, which penalises selective satisfaction of creditors. An added difficulty is the ambiguity of the regulations in this area, generating numerous doubts in interpretation. Consequently, managers may find it hard to determine which actions are lawful and which may lead to criminal charges.

CRIMINAL CODE ART. 302 §1
Anyone who is under threat of insolvency or bankruptcy, and unable to satisfy all creditors, pays or secures only certain of them, thus acting to the detriment of the others, shall be subject to a fine, probation, or imprisonment of up to two years.

When can the debtor pay its obligations, and which obligations can it pay, to avoid being accused of selective satisfaction of creditors?

This question is often raised by management board members, particularly when the entity's financial condition is teetering on insolvency.

The crime of selective satisfaction of creditors —elements of the offence

The basic aim of Criminal Code Art. 302 §1 is to ensure the fair distribution of the debtor's assets among its creditors and to prevent situations where a debtor losing its liquidity can arbitrarily decide in what order to pay its debts.

A literal reading of this provision might suggest that a debtor facing a threat of insolvency should refrain entirely from paying any claims, to avoid accusations of selective satisfaction of creditors. But in practice this approach may not be reconcilable with the need to maintain the basic functions of the enterprise, or achievement of the aims of a potential bankruptcy proceeding.

The prevailing view in the legal literature is that not just any payment to a creditor automatically infringes the interests of the other creditors. The only payments that should be penalised are

those clearly outside the scope of ordinary activities necessary to keep the enterprise in a condition enabling it to continue functioning or secure its assets.

What expenditures are justified?

Essentially, actions by a company manager in the runup to insolvency or bankruptcy aiming to improve the entity's financial situation and maintain its normal operations should not expose the manager to criminal sanctions.

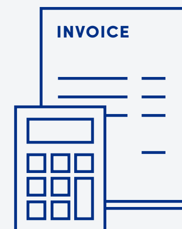
If these key expenditures fall within the range of market prices, they should not be treated as infringing the interests of creditors. Expenditures connected with the need to draft and timely file a bankruptcy petition, such as the fee on the application and the necessary costs of legal and accounting services, should also be regarded as justified.

But when undertaking larger transactions not falling within the bounds of day-to-day management of the enterprise, such as the sale of key assets or incurring significant obligations, the manager should maintain particular caution.

It should also be borne in mind that in the case of an entity at risk of insolvency, the final assessment of the manager's decisions on how to dispose of the entity's assets—even when aimed at payment of current obligations—will lie to a large degree within the discretion of prosecutors and the court.

KEY EXPENDITURES FOR MAINTAINING CURRENT BUSINESS OPERATIONS INCLUDE SUCH ITEMS AS:

- **Utilities**
  (e.g. electricity, gas, water, heating, internet and telephone)
- **Workers' salaries**
- **Accounting services**
- **Payments to key suppliers**
- **Costs of leasing real estate**
  (e.g. for offices, manufacturing facilities, and warehouses)



When the company is already insolvent (and not just threatened with insolvency), the management board member's duty is first and foremost to secure the interests of the company's creditors as a whole by timely filing of a bankruptcy petition (i.e. no later than 30 days after the insolvency arose).

What does it mean to be "under a threat of insolvency"?

Determining the moment when a company enters a state of threat of insolvency is vital. It is this moment that determines the point from which the manager's actions may be assessed in terms of possible criminal liability.

Bankruptcy Law of 28 February 2003, Art. 11 (1) and (1a)

Under the Polish Bankruptcy Law, insolvency occurs when a debtor has lost the ability to perform its due and payable monetary obligations, in which respect it is presumed that a debtor has lost the ability to perform its due and payable monetary obligations if it is late in performing its monetary obligations by more than three months.

Bankruptcy Law Art. 11(2)–(5)

In the case of legal persons (including companies), insolvency may also result from an excess of liabilities over assets, if this condition continues for over 24 months. The Bankruptcy Law contains a presumption that the debtor's monetary obligations exceed the value of its property if according to the balance sheet, its liabilities, excluding provisions for liabilities and liabilities to affiliates, exceed the value of its assets, and this state continues for more than 24 months.

A state of threat of insolvency arises earlier, when the entity is still in a position to service its obligations, but, in light of the current financial and commercial situation, it is highly likely that it will lose this ability in the near future.

The limits of actions by the management board in a crisis—what should the manager know?

Criminal liability under Art. 302 §1 of the Criminal Code attaches only to intentional acts. A manager may be held responsible only if he or she acted deliberately, i.e. with the intention

of injuring creditors or at least recognising the possibility of injuring them.

It is essential to carefully document every decision related to performance of obligations in this context. It must appear from the documentation that the actions taken were economically justified, served to maintain the company's fundamental operations or secure its assets, and were aimed at protecting the overall interest of creditors, not just selected creditors.

In such situations, managers may be tempted to pay related entities first, particularly the parent company. But it must be remembered that it is specifically these types of payments that will be analysed most painstakingly by prosecutors and the court. We should also at least signal that payments to related entities made in the runup to bankruptcy may, if the debtor is subsequently declared bankrupt, be challenged by the bankruptcy trustee under a special procedure and be held ineffective against the bankruptcy estate.

Summary and recommendations

Managing an enterprise in crisis is an art balancing between rescuing the business and complying with the law. Decisions made in a crisis must be carefully thought-out, transparent, and properly documented. Managers should focus on expenditures connected with maintaining the integrity and value of the enterprise, such as utilities, salaries, and key supplies. This approach will protect the overall interests of all the creditors to the greatest degree. It is important to avoid actions that could be regarded as unreasonably favouring some creditors at the expense of others.

Nonetheless, it would be desirable to make certain changes in the regulations to facilitate decision-making by managers in crisis situations. Clearly defined exceptions, or amending Criminal Code Art. 302 §1 to reflect the commercial reasonableness of payments, would go a long way not only to increasing legal certainty, but would also eliminate doubts in interpretation and protect managers against unwarranted allegations.

Foreign investment funds and withholding tax —current challenges

Foreign funds that want to invest in Poland have the right to know what tax rules will apply to them. But determining these rules can be difficult due to the wording of the regulations and how they are interpreted by the tax authorities. We perceive the challenges, but we also see simple solutions to these problems, allowing for creation of a more consistent and non-discriminatory environment for investors.

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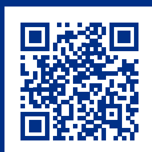

tax

For several years, the Polish tax authorities have shown particular interest in the area of withholding tax. There is no indication that this will change in the near future.

Some taxpayers struggle with an unfavourable interpretation of the relevant facts, some face an unfavourable interpretation of the applicable regulations, and others have issues with the regulations themselves. The last group includes foreign investment funds—taxpayers that Poland certainly needs.

One word, four disputes

The regulations provide for exemption of Polish investment funds from withholding tax. Exemptions may also apply to foreign investment funds (collective investment institutions) from countries in the European Union or the European Economic Area, if they are similar to domestic ones.

If the funds must be similar, it would seem that the exemption of a foreign fund should not be conditioned on demonstrating a feature that a Polish entity does not have to have. This view is shared by the courts, but not by the Director of National Tax Information, who issues tax rulings.

According to the regulations, one of the conditions for exempting a foreign fund from Polish corporate income tax is that the fund's activities must be subject to "direct" supervision by the financial market supervisory authority in the country of its establishment. No such requirement is imposed on a Polish closed-end investment fund. Nor is such a requirement provided in the EU regulations.

In their applications for tax rulings, four Polish companies argued to the Polish tax authority that a Luxembourg investment fund meets the condition of supervision, because supervision is indeed exercised by the competent authority in Luxembourg, albeit through the entity managing the fund.

The authority found that the provisions should be applied literally, and thus the lack of direct supervision precluded the fund's exemption from withholding tax.

Dissatisfied with the decision, the companies sought review by the province administrative courts. The judgments issued in the four cases left no doubt that the tax authority was wrong.

The courts reasoned that the conditions for the exemption should be interpreted in the context of equal treatment of Polish investment funds and their EU counterparts and the free movement of capital. The law should guarantee that the tax exemption can be used by any collective investment institution from another EU member state whose purpose and basic principles of operation coincide with the objectives and principles of operation of Polish investment funds. If the other requirements are indisputably met, the form of supervision itself should not make such a drastic difference that it would justify denying the fund the right to apply an exemption.

In addition, the courts drew attention to the legislative history. In the justification for the bill introducing the requirement of direct supervision, no motivation for this requirement was stated, or any indication of what purpose this would serve. It is therefore difficult to give decisive importance to this requirement.

Despite the courts' persuasive and logical reasoning, the tax authority filed cassation appeals against the judgments. These cases will ultimately be decided by the Supreme Administrative Court.

One procedure, two years of analysis

Taxpayers and tax remitters are slowly getting used to the new mechanism for collection of withholding tax, which officially debuted in January 2022. Under the new mechanism, at the time payments are made, the tax remitter is required to withhold the full amount of the tax, and only later can a refund be sought—known as the pay-and-refund mechanism. The new solution replaced the more taxpayer-friendly mechanism allowing tax remitters to apply exemptions or lower withholding tax rates at the time of payment (known as "relief at source").

The regulations clearly indicate that the tax collected under the new mechanism is refundable under a special procedure described in the CIT Act and that the amount of tax to be refunded is determined on the basis of exemptions or rates set forth in special regulations or in tax treaties to which Poland is a party.

It is equally clear that tax remitters making payments to foreign related investment funds (collective investment institutions established in the EU or EEA) are required to apply the new pay-and-refund mechanism.

A Polish company whose sole shareholder is a collective investment institution from one of the Baltic States complied with these regulations and collected the tax in full when paying out interest to the foreign institution. Subsequently, the taxpayer (collective investment institution), as the entity bearing the economic burden of the tax, applied for a refund of the tax in the procedure designed for this purpose. The taxpayer provided evidence demonstrating its right to benefit from an exemption under a special provision, i.e. the exemption for foreign investment funds (collective investment institutions) from other EU or EEA countries. As a rule, the tax authorities should issue a decision on the refund within 6 months after filing of the application for a refund.

Finally, after nearly two years of proceedings, in which the conditions for application of the exemption for foreign collective investment institutions were also examined, the authority issued a decision finding that the procedure was inappropriate. The authority found that the pay-and-refund procedure is appropriate only when the taxpayer wants to claim an exemption under an EU directive or a tax treaty.

For the sake of the temporary benefit of postponing the refund of overpaid tax, the tax authority ignored the regulation which clearly indicates that the exemption may result from any special provision, and not only from an EU directive.

The case is the subject of a continuing dispute, and there are two options for resolving it:

– The authority may change its mind and admit that in the case of a tax refund due to fulfilment of the conditions for exemption for foreign collective investment institutions, the procedure chosen by the taxpayer is appropriate, or

- The authority may maintain its original position, which would be tantamount to recognising that the pay-and-refund mechanism does not apply at all to payments to foreign collective investment institutions.

It would be illogical to claim that in the pay-and-refund mechanism, the tax remitter must collect and pay the tax in full, but at the same time cannot apply for a refund of the tax under what is practically the same procedure. But the remedy is within reach. Amending the regulations and clearly indicating the procedure for refund of withholding tax to a foreign fund will facilitate the activities of the authorities and reduce the waiting time for tax refunds.

One system, many possibilities

The pay-and-refund mechanism applies to payments of amounts due (including interest, dividends or royalties) to foreign related entities if they exceed PLN 2 million in total in a given tax year. But this mechanism can be excluded when:

- The tax remitter submits a statement confirming that it holds the documents required by tax law for application of the tax rate or exemption or non-collection of tax, provided under special regulations or tax treaties
- The tax remitter or taxpayer holds an opinion on application of the preference, which it obtained by demonstrating compliance with the conditions for exemption under an EU directive or the conditions for application of a tax treaty.

These provisions are constructed in such a way that payments of amounts due to foreign collective investment institutions, subject in principle to the pay-and-refund system, but covered by the tax exemption:

- May be the subject of a statement by the tax remitter, but
- It is not possible to obtain an opinion on application of a preference for the institutions.

”

The remedy is within reach. Amending the regulations and clearly indicating the procedure for refund of withholding tax to a foreign fund will facilitate the activities of the authorities and reduce the waiting time for tax refunds.

The question may be asked whether this was a deliberate move or an oversight by the legislature. Regardless of the answer, the consequences must be borne by the foreign collective investment institutions. Before an allegation of discrimination is raised, the regulations should be amended to put the rights of foreign collective investment institutions on an equal footing with other entities.

Many problems, one solution

The unclear regulations may discourage foreign funds from investing in Poland. And the tax authorities are hardly encouraging when, instead of seeking to clarify problematic issues and apply a rational interpretation, they prefer to pursue long-term disputes.

But the rulings from the administrative courts are cause for optimism, as they resolve precedent-setting issues and pave the way for a more predictable and investor-friendly tax system in Poland. In addition, the changes to the regulations which we call for would be easy to introduce. They would not privilege foreign funds, but only equate their status to the status of other taxpayers and provide certainty to both the tax authorities and the funds about the rules to be applied.

Implementation of the Non-Performing Loans Directive: Practical consequences for investors and debt collectors

The EU's Non-Performing Loans Directive entered into force on 28 December 2021. The work on implementing the directive into the Polish legal system is essentially complete, so we can take a closer look at the impacts the new rules will have on investors and debt collectors on the Polish receivables market.

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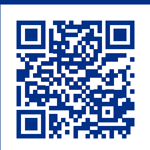


banking & finance

Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers

The Non-Performing Loans Directive was designed to create more advantageous conditions for growth of the EU market in secondary trading of non-performing loans (NPLS). The rules in the directive encourage banks to eliminate exposures of this sort from their balance sheet, in particular by developing common rules for trading in NPLS on the secondary market, while respecting the interests of borrowers. The directive was also designed to ensure greater transparency and standardise the scope of information provided to investors in the case of such sales, which in turn should increase demand on this market and thus its competitiveness.

To this end, the NPL Directive, and the Polish regulations adopted to implement it, impose a range of new obligations on entities directly engaged in trading in NPLS, i.e.:

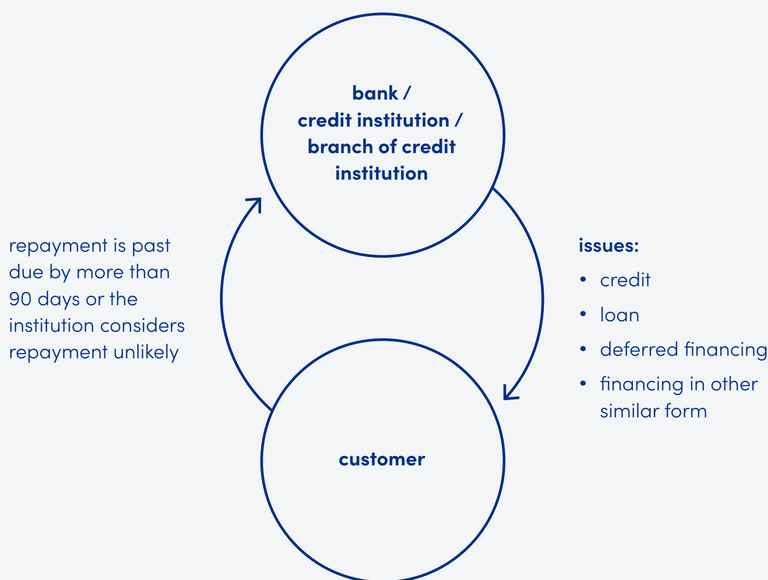
- Entities selling NPLS (primarily banks)
- Purchasers of NPLS
- Entities handling such claims on behalf of the purchasers (in practice, debt collection companies).

The objectives of the NPL Directive framed by European lawmakers are driven to some extent by the experiences in various EU countries. The market for trading in non-performing bank loans in Poland is much more advanced, highly professionalised, with strong competition between purchasers. In this context, from the beginning of work on the NPL Directive the legislation was perceived by market participants not so much as a long-awaited growth opportunity, as a potential threat to a well-developed sector of the economy.

In this article we examine aspects that should be noted by entities involved in this market. The directive and the Polish act implementing it make major changes affecting entities engaged in:

- Debt recovery
- Handling complaints by debtors
- Ancillary activities concerning claims.

WHAT CONSTITUTES A NON-PERFORMING EXPOSURE UNDER THE CAPITAL REQUIREMENTS REGULATION (CRR)*



* Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms

The new regulations introduce the notion of a "credit servicer," authorised to perform these services. Credit servicers will have to obtain a licence from the Polish Financial Supervision Authority (KNF). This change will primarily affect debt collection companies.

The NPL Directive, followed by the Polish act, does not introduce detailed restrictions or requirements for investors wishing to acquire non-performing loans. However, it does impose additional obligations on investors involving the need to cooperate with credit servicers (if the investor does not hold a licence itself) and requiring a range of information to be provided to the regulator.

Act on Credit Servicers and Credit Purchasers of 20 December 2024

The least affected by the changes in question appear to be potential sellers (banks), on whom only information obligations have been imposed.

What claims are subject to the NPL Directive?

The directive applies only to purchasers and servicers of a creditor's rights under a **non-performing credit agreement**.

The status of the seller of the claim is essentially irrelevant. The directive covers acquisitions from both the original creditor and any subsequent purchaser of the claims under a non-performing loan. Thus any potential purchaser, but also sellers on the secondary market, need to ascertain what sort of portfolio they are dealing with in the given case.

It should be irrelevant for application of the new regulations whether the claim being sold arises out of financing issued to a borrower from Poland (or more broadly the European Union) or whether the credit agreement is governed by Polish law. Whether the new regulations apply is determined by the identity of the original creditor, i.e. a Polish bank or an EU credit institution (or a branch of such institution).

Significantly, the new rules will not cover:

- Acquisition of "bank" claims that are not classified as non-performing exposures
- Acquisition of "non-bank claims," i.e. where the original creditor is an entity other than a bank, credit institution, or branch thereof (such as loan institutions or telecoms).

Thus the rules for purchasing and servicing such receivables remain unchanged.

Practical doubts

This dichotomy between receivables covered by the new rules and receivables not covered by the new rules might seem clear at first glance, but it already raises practical doubts—for example, how to classify claims arising out of agreements concluded by a branch of a foreign bank, or by a cooperative savings and credit union.

It is also unclear what moment along the timescale is relevant for determining whether a given claim arises from a contract classified as a non-performing exposure: the date of the sale by the

”

The new regulations will not apply to investment fund companies or investment funds as such (including receivables funds)—entities making up a particularly important and sizable group of acquirers of claims under the Polish market realities.

original creditor (bank) or the date of each subsequent resale. The answer to this question will be of vital importance in instances where a portfolio is initially performing but then, after the portfolio is sold by the bank, becomes non-performing. This will also be relevant for the increasingly important area of "re-performing loans," i.e. where the debtor has had a period of problems in its dealings with creditors but then has a turn for the better and begins regularly servicing its debts.

Which purchasers of NPLs are covered by the new rules?

Lawmakers in the EU, followed by those in Poland, decided to exclude from the scope of the new regulations certain groups of entities operating on the receivables market. These groups can continue their business of purchasing and servicing NPLs under the existing rules, and the obligations arising under the new act will not apply to them.

In particular, it is worth noting that the new regulations will not apply to investment fund companies or investment funds as such (including receivables funds)—entities making up a particularly important and sizable group of acquirers of claims under the Polish market realities.

Administration of the rights of lenders by "servicers," i.e. entities managing the claims of claim funds based on a special licence, will also fall outside the scope of the new regulations. This exemption means that the NPL Directive will have a very limited impact on the Polish NPL market. Due to tax restrictions, Polish banks generally sell their non-performing loans to receivables funds, and investors wishing to acquire non-performing receivables in Poland also operate via receivables funds. Excluding these entities from application of the act implementing the NPL Directive means that the new rules will not introduce revolutionary changes for market participants in Poland.

→ Act on Investment Funds and Management of Alternative Investment Funds of 27 May 20024, Art. 192

New (rights and) obligations of purchasers

Let's first look at the bright side. Investors on the EU's NPL market can count on greater transparency and standardisation (and, following from this, comparability) of the information provided by sellers concerning the portfolios they are selling. Sellers will need to use the patterns developed at the EU level conveying this data.

On the darker side, however, investors operating on the Polish market who decide to resell a previously acquired NPL portfolio will need to meet the same information obligations in their dealings with the next purchaser of the portfolio. This is because the Polish regulations extend these informational obligations to cover purchasers of loan portfolios, whereas the NPL Directive itself imposes these obligations only on the original creditors (i.e. credit institutions).

The list of new duties also includes:

- The duty to designate a representative in a member state in the case of purchasers from outside the EU
- The duty to designate a credit servicer, domestic bank or branch of a credit institution, in the case of acquisitions of consumer portfolios (and in the case of purchasers from outside the EU, also SME portfolios)—investors which themselves (or their representatives in the EU, in the case of purchasers from outside the EU) have this status, will be exempt from this duty
- Duties to inform borrowers of a sale that has taken place ("silent" assignment of receivables will no longer be an option)
- Duties in dealings with borrowers, including to act in good faith, fairly and professionally, to provide information to borrowers that is not misleading, unclear or false, and to avoid harassment, coercion or undue influence in their communications with borrowers
- Obligations to report to KNF regarding purchases of portfolios and subsequent resales
- Payment of fees to KNF to cover the costs of oversight.

New duties of credit servicers

Although the new regulations will not apply to a large portion of the Polish receivables market, this does not mean market participants can ignore the new rules. The new regulations may have a subtler impact on existing business models.

This will be particularly visible in the case of entities servicing claims acquired by entities other than receivables funds, particularly when they provide this service for foreign entities. The exact same service may be classified entirely differently for regulatory purposes depending on the status of the service recipient.

For example, debt collection activities concerning bank NPLs acquired by a claims fund will not be covered by the new act, but the same actions in relation to claims acquired (on the primary or secondary market) by another entity (e.g. a fund from Luxembourg, the UK or the US) will require compliance with the newly introduced legal changes.

In the latter case, an entity collecting debts on behalf of, for example, a fund from Luxembourg, will have to:

- Hold the relevant authorisation to act as a credit servicer
- Adjust its business model to reflect the de facto prohibition on accepting repayments from borrowers
- Maintain the appropriate procedures and policies for operating in the area of credit servicing (e.g. risk management and internal control systems, complaint procedures, and procedures for guarding legally protected secrets)
- Perform informational duties with respect to borrowers
- Adapt to the new duties on retention of business documents
- Ensure proper selection and formalisation of dealings with co-operating entities and sub-providers (i.e. outsourcing)
- Ensure compliance with AML/CFT regulations, as credit servicers will become obligated institutions for AML/CFT purposes
- Prepare annual operating reports and submit them to KNF
- Pay annual fees to KNF to cover the costs of oversight.

AML/CFT
anti-money laundering and combating the financing of terrorism

Summary

Under the realities of the Polish market for non-performing loans, the NPL Directive and the Polish act implementing it will have a limited impact on credit purchasers and credit servicers, due to the exemptions for certain types of entities. Nonetheless, in light of the numerous new duties, purchasers and servicers need to review their business models and determine whether their operations will be subject to the new rules, and in what respect.

Importantly, investors already holding portfolios of non-performing bank receivables, and entities servicing such portfolios, can breathe a sigh of relief, because the new rules will apply only to transactions carried out after the Polish implementing act enters into force.

Reverse solicitation

Can Polish clients use financial products and services offered by foreign financial institutions? In the case of institutions from other EU countries, the matter is simple. They can offer their products and services in Poland across borders or open a branch in Poland—and this does not require approval of the Polish Financial Supervision Authority, but only entry of these firms in the appropriate register. But for financial institutions from outside the EU to offer services directly to customers in Poland, they must open a branch in Poland, which requires approval of the Polish regulator. Foreign investment firms that don't meet these requirements are left with the option of "reverse solicitation," i.e. providing services at the customer's request.

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capital markets

Financial institutions authorised to offer products and services in Poland are entered in the register published on the website of the Polish Financial Supervision Authority (KNF).

However, an investment firm that does not meet the regulatory requirements may provide services on the basis of "reverse solicitation." This is the term used to describe the possibility of offering financial services to customers in Poland but solely at the customer's initiative and only in the range in which the customer has expressed an interest in the financial institution's services. In practice this means that if a customer from Poland contacts the financial institution (which is not authorised to operate in Poland), by referring to the information about the firm's services and contact details on the firm's website, the firm can offer its services and conclude a contract with the Polish customer, but only involving the services requested by the customer.

Under Poland's Trading in Financial Instruments Act, "reverse solicitation" means delivering services to a customer in Poland by an entity residing or headquartered in a country other than Poland, if the customer has pursued the services solely at the customer's own initiative. According to the act, such delivery of services does not constitute brokerage activity requiring a permit.

Trading in Financial Instruments Act of 29 July 2005, Art. 115a

A condition for reverse solicitation is that the customer has contacted the investment firm at the customer's own, exclusive initiative, and was not first encouraged to make contact, and that no products or services are provided to the customer other than those requested by the customer.

The initiative is the customer's own, and exclusive, when it does not follow from advertising or promotional activity by an investment firm which is not authorised to offer services in Poland.

In the case of banking, lending and investment fund services, there is no legal regulation or position on the part of KNF in this respect, and thus the use of reverse solicitation is regarded as a tolerated practice.

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In relations with an existing customer (obtained through reverse solicitation), the financial institution can freely contact the customer, but cannot offer the customer new or expanded services, without the client’s prior initiative.

When does reverse solicitation occur?

Based on these rules, it should be considered what actions taken by a financial institution will be classified as reverse solicitation, and which actions will be regarded as advertising or promotion which does not provide a basis for reliance on the reverse solicitation principle.

Actions taken by a financial institution in relation to a potential customer should also be distinguished from actions taken in relation to an existing customer. In relations with an existing customer (obtained through reverse solicitation), the financial institution can freely contact the customer, but cannot offer the customer new or expanded services, without the client's prior initiative. The freedom of contact with the customer applies only within the scope of services already provided.

Below we discuss the most frequently encountered activities from the perspective of whether they can be treated as reverse solicitation.

One-on-one meeting at the potential customer's initiative

Get-acquainted meetings with potential customers are permitted, and should not be regarded as advertising or promotion, so long as the representative of the financial institution does not launch at their own initiative into discussing issues related to the financial institution itself or the services it offers—or steer the discussion toward these topics.

If the potential customer begins to ask questions or raise issues connected with the financial institution or its offerings, the representative can respond, but only within the scope of the questions asked by the potential customer.

One-on-one meeting at the financial institution's initiative

Action of this sort generates a risk that it will be found to be advertising or promotion.

During such a meeting, the investment firm's representative should restrict themselves to purely social matters. However, as above, if the potential customer begins to raise issues related to the financial institution and its offerings, the representative may respond to such questions.

Participation in a conference

A representative of a financial institution may participate in conferences and conduct discussions during the conference to get to know other participants, so long as the representative does not begin discussing issues related to the financial institution at the representative's own initiative, including issues related to the services offered by the institution or the terms under which it serves potential clients.

However, the financial institution should not operate a stand at a conference held in Poland, as this would create a risk that the institution could be found to be conducting promotional activity or advertising.

Organising a conference

For an investment firm from outside Poland to host a conference would not be regarded as advertising nor offering services, so long as the participants from Poland learn of the conference from public sources of information and take part in the conference at their own initiative.

Press releases

A financial institution may distribute press releases about its offerings and the financial institution itself, but only among foreign press.

It is prohibited to distribute such information among the Polish press.

Distributing and collecting business cards

During social events, conferences or occasional events, representatives of a financial institution from outside Poland may hand out or receive business cards among potential customers. Then, if a potential customer expresses a desire to learn about the financial institution's offerings, the representative may arrange a meeting for this purpose.

Distributing informational brochures

Distributing informational brochures about the financial institution and the products and services it offers to potential customers is impermissible without the customer's prior express request.

Informational brochures also cannot be sent to existing clients when containing information about services which the customers are not currently using—unless sent at the customer's own request.

Third-party recommendation

A financial institution providing services to a customer within a corporate group may provide services for any entity within the group, but only at the initiative and request of that entity within the group. The institution may not initiate contact with another entity from the group at the request of an existing customer.

Similarly, if the financial institution is part of a corporate group and provides services to a customer from Poland, and the customer was acquired through reverse solicitation, this does not entitle another entity from the institution's corporate group to contact that Polish customer and offer its own services to the customer. It may do so only at the customer's own express request.

Necessary documentation

The investment firm should save all documentation and recorded discussions with the customer for evidentiary purposes, i.e. to show that the contact occurred at the customer's express request.

To avoid doubts in a situation where a potential customer has requested the financial institution to present an offer or send a brochure, the message to the customer containing the offer or brochure should include a statement it is being sent at the potential customer's express request, also referencing the date of the customer's request.

How the National Broadcasting Council deals with surreptitious advertising

A ban on surreptitious commercial messages exists in many countries and enjoys broad acceptance. It protects consumers by allowing them to clearly distinguish advertising from objective information. It also prevents businesses from obtaining an unfair advantage over their competitors. Because consumers encounter advertising via the media, it is the media who bear many of the obligations aimed at combatting hidden advertising. Below we examine how these regulations and compliance with them work in practice.

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TV advertising still on top

Traditional linear television continues to enjoy high viewership in Poland. So far we have yet to observe a huge exodus by audiences in favour of streaming services (VOD) to the same extent as in some markets, such as North America. Advertisers are eager to reach this audience for TV programs, and broadcasters can charge high prices for ads. This in turn demonstrates the high demand for this type of advertising among businesses.

Broadcasting Act of 29 December 1992, Art. 16

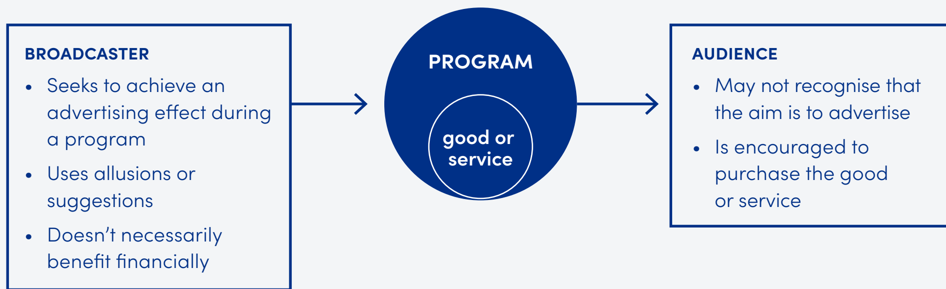
Poland's Broadcasting Act requires commercial messages to be easily recognisable and distinguishable from editorial content (Art. 16(1)–(2)). The act bans hidden commercial messages (Art. 16c(1)), subliminal messages (Art. 16b), and product placements (Art. 16c(3)). These prohibitions apply to television and radio. In theory.

Most common infringements

The practice shows that broadcasters frequently violate the regulations against hidden commercial messages, aka surreptitious advertising, which occurs when:

- Goods or services are presented, although it might be merely an allusion to the name, activity or trademark of a company, so long as
- The broadcaster's intention is to achieve the effect of advertising, and
- The audience could be misled as to the nature of the message—the risk is that viewers might erroneously assume that the message is dictated by editorial rather than promotional considerations.

WHEN IS THERE SURREPTITIOUS ADVERTISING?



By its nature, surreptitious advertising is ambiguous and not evident at first glance. It does not employ the means of expression typical for advertising, but exists within an aura of apparent neutrality. It uses allusion or implication, along with particular images or expressions that are no accident. In this respect, surreptitious advertising occurs during the programs themselves, not during commercial breaks or when the sponsor of a program is identified, when the promotional character is expressly indicated. When determining whether a commercial message qualifies as surreptitious advertising, the entire communicative context of the situation in which the message occurs must be considered.

Such a message may be linked with receipt of payment or other benefit by the broadcaster, but not necessarily. The existence of a fee would obviously indicate the intent to achieve the effect of advertising. This effect consists of evoking in the viewer or listener a subjective desire to purchase goods or services. But the intention of evoking the effect of advertising can also be inferred on the basis of grounds other than financial gain. In practice, this intention is determined within the context of the form and content of the program itself—it must display an element of persuasion. Thus an advertising type of message or product placement within a program, which is not labelled as such or presented separately, will be regarded as a hidden commercial message, even if the broadcaster does not earn a fee from it.

Residential forecast

Even the weather forecast can include surreptitious advertising.

In one case decided by the chair of the National Broadcasting Council (KRRiT), a TV weather report was aired against the backdrop of an image of a residential development, and the name of the project even appeared on a banner on the screen. The name of the project happened to coincide with the popular name of a certain area within the Polish capital. Both during the weather forecast and during the accompanying content (going on air to report on the weather), for several days in a row the presenter praised the location, stressing that it was in the city centre but also close to nature ("a beautiful place," "a small oasis of calm combined with nature," "views from the lake district," "a special place on the map of Warsaw," "it offers wonderful nooks and crannies," "it's a great place to live"), while also drawing attention to the construction itself ("you can hear them building apartments next door," "beautiful apartment buildings are going up"). And a bird's-eye view of the site where the project was under construction, filling the TV screen, was also presented at the end of the weather report.

The regulator rejected the broadcaster's explanation that the aim was to create an interesting natural setting for the weather forecast, and that the presenter's statements were spontaneous. This claim was refuted by the number and frequency of the statements praising the site, the use of superlatives, display of the name of the project, and the use of specific drone shots. The message that was effectively created was "Live in the bosom of nature within the city centre." But viewers, who were not informed that the material was in the nature of advertising, could interpret it as neutral information.

The regulator also rejected the broadcaster's claim that it had no connection with the developer of the project from which a financial gain or an advertising effect could be obtained. In fact, the broadcaster's owner was also the developer's majority shareholder. These capital ties were sufficient to demonstrate an advertising intention on the broadcaster's part, while the benefit would flow to another company from the same corporate group.

Party time!

Broadcasters also use surreptitious advertising to promote their own programs. The chair of the National Broadcasting Council has imposed sanctions several times for including messages in news programs about an upcoming New Year's Eve celebration. Artists taking part in the event were featured in the news show, along with their statements encouraging viewers to attend, shots from the artists' performances, and organisational details (the time and place of the event). Apart from hidden commercial messages, this content also violates the ban on interrupting news programs to show advertisements.

A thin line

It can be quite a challenge to draw the line between what is allowed and what is not. Some television shows offer advice or reviews concerning various products such as films, gadgets or automobiles. Editorial content of this type, under the broadcaster's strict control, is not in itself prohibited, even though it concerns goods and services from other businesses.

The practice shows that everything is a question of degree, the nature of the positive evaluations and how they all add up, along with the overall tone of the program. When products are featured excessively, the program may be found to be surreptitious advertising.

Programming is even more likely to fall afoul of the ban on hidden commercial messages if the display of products is accompanied by a narrative unfavourable to competing products. Such an unfavourable narrative might involve, for example, showing that other goods contain harmful (but legally permissible) substances which the featured product lacks. This context, relying on deliberately chosen experts, means that the program cannot be regarded as a neutral presentation of views and opinions.

EXAMPLES OF EXCESSIVE DISPLAY OF GOODS AND SERVICES

- Repeated verbal and visual references to a business, its activity or products (particularly using trademarks)
- Statements concerning only one business, particularly when others would also fit the topic of the program
- Highlighting the products of a particular company during the program, e.g. when the interviewer holds up the product during the interview or takes other such actions (particularly when there is no editorial justification)
- Reporting from the featured company's factory
- Multiple placements of expert comments by employees or representatives of a business, causing the brand to gradually take hold (e.g. with a caption identifying the person and their position at the company)
- Only favourable depiction of products of a given type, with an indication that the business being presented manufactures such products
- Stressing the advantages of a particular company (e.g. that it is the only one using a certain technology or substance)
- Multiple laudatory statements by the host concerning the business, its activity or products

Penalties for infringements

The National Broadcasting Council tends to impose fines on the biggest market players for airing hidden commercial messages in the range of PLN 15,000–50,000 per violation.

If the chair of the National Broadcasting Council finds that hidden commercial messages have been broadcast in a program, the regulator will impose a fine on the broadcaster. In practice, the fines imposed on the largest players on the market tend to fall within the range of PLN 15,000–50,000 per incident. Undoubtedly these sanctions do exert a deterrent effect—particularly when the broadcaster does not actually receive any fee from the business it has promoted. When preparing content, broadcasters must be particularly careful not to overstep the boundary—hard as it may be to define—between a neutral lifestyle show and surreptitious advertising.

Summary

As the foregoing examples show, to identify surreptitious advertising, it is essential to consider the entire context, not just an isolated message or statement. A series of messages may be considered, separated in time and occurring over several days in a row, within the program itself and in previews.

In recent years, the National Broadcasting Council has found infringements mainly in television shows, and less often radio. Violations have been uncovered either in the course of monitoring by the regulator itself, or as a result of complaints by viewers or by competitors of the business promoted in the broadcast.

It should be borne in mind that the ban on surreptitious advertising applies not only to traditional television programs, but also to VOD services and video-sharing platforms. This means that the regulator may also take an interest in hidden advertising by YouTubers and other influencers.

CONSUMERS · BUSINESS · CIVIL PROCEDURE

Consumer proceedings —where a business can lose even if it wins

In a dispute with a business, a consumer generally holds a weaker position. For this reason, two years ago the Polish parliament introduced separate consumer proceedings with the aim of eliminating this imbalance. The rules are concise, but can hardly be regarded as successful, which is also demonstrated by the negligible practice of the courts in applying the new solutions.

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The amendment to the Civil Procedure Code which went into effect on 1 July 2023 added another separate type of proceeding, called "proceedings involving consumers." The parliament imposed additional procedural duties and risks—particularly involving evidence and costs—exclusively on businesses, thus introducing a deliberate asymmetry between the parties to these proceedings.

According to the justification for the amendment, the proponents wanted to ensure a counterweight to the "actual economic disproportion" in favour of businesses. The regulations as proposed and subsequently adopted were strongly criticised at the stage of public consultations by a range of entities, including the SME Ombudsman, the Polish Bank Association, the National Council of Attorneys-at-Law, and the judges' association SSP Iustitia.

The wording of the regulations themselves, as well as how they have been absorbed—or rather not absorbed—by the courts, seems to confirm this criticism.

Mandatory procedure

Application of the rules governing consumer proceedings is always mandatory when one of the parties is a business and the other is a consumer. Lawmakers did not provide for any exception, or even exclusion of these provisions at the mutual request of the parties or at the consumer's sole request. In this respect, this solution is even more rigorous than the commercial (B2B) procedure, which can be excluded at the request of a business entity that is a natural person.

Moreover, applying the consumer procedure is mandatory even when the business entity in the case has ceased to operate a business. It is hard to discern why in this situation as well, the parliament perceives an "actual economic disproportion" between the parties, particularly considering that this configuration can

essentially occur only in disputes between two natural persons, one of whom previously was a sole trader (i.e. operated a single-person business).

The consumer loses, but the business pays

Probably the most striking and controversial feature of the consumer procedure is the modification of the rules for allocation of trial costs.

Under the general rule in Polish civil procedure, trial costs are borne by the losing party, although the judge may refuse to charge the losing party with the opponent's costs if called for by special equitable considerations.

The rule in consumer proceedings goes much further. It allows the *winning* party to be charged with the costs of the *losing* party—but only if the business has won and the consumer has lost.

The court may modify the allocation of costs if the business:

CIVIL PROCEDURE CODE ART. 458[16]
If, before filing of a lawsuit, the party which is a business entity abandoned an attempt to resolve the dispute voluntarily, avoided participation in such attempt, or participated in such attempt in bad faith, and thus contributed to unnecessary filing of suit or incorrect determination of the subject matter of the case, then, regardless of the outcome of the case, the court may charge that party with all or part of the costs of the proceeding, and in justified cases even increase the costs, but by no more than double.

- Abandoned any attempt to resolve the dispute amicably
- Avoided participating in an attempt to reach a voluntary resolution of the dispute, or
- Participated in an attempt to voluntarily resolve the dispute, but in bad faith,

And thereby contributed to:

- Unnecessary filing of suit, or
- Erroneous determination of the subject matter of the case.

As stated in the justification for the amendment, this solution is intended to encourage businesses to resolve potential disputes involving consumers amicably, without engaging the courts. It is also intended to promote best practice in dealings between businesses and consumers. But the assumptions behind this provision and way it is constructed raise a number of doubts.

Clearly, a party that has culpably forced the other to file an unnecessary suit should bear negative consequences. The question is whether it was a sufficient measure to deprive that party of recovery of its costs, which the regulations already provided for.

However, if the parliament considered it right to punish the winning party by bearing the costs of the losing opponent, it is hard

to justify why this equity would operate only in one configuration, where a "guilty" business prevails over an "innocent" consumer. Why not charge a "guilty" business in a commercial dispute with the other business's costs when, for example, it has deliberately dragged a competitor into costly and unnecessary litigation? Or punish the "guilty" party whose harassment has led to litigation between neighbours or family members? Experience teaches us that there are only too many such cases. And undoubtedly, a business will respond on the merits to a complaint by a customer much more often than would be the case in a dispute between neighbours.

Leaving this question aside, the construction of the regulation also raises serious doubts. The court must assess the behaviour of the business in its dealings with the consumer in light of many variables, while applying such vague and arbitrary criteria as "bad faith," what it means for a business to "avoid" an amicable resolution, and whether the litigation was "unnecessary." From a litigant's perspective, any case that party lost was a case they could do without. A cynic might add that every trial is "unnecessary" to an overburdened court. What notion of "unnecessary" did the drafters have in mind?

Similarly, it is not clear when there has been an attempt to "voluntarily resolve the dispute," especially when this condition applies to a business that *wins* a dispute after being unsuccessfully sued by a customer. In such a situation, it was probably the customer who took the initiative, prior to litigation, to resolve the dispute against the business, not the other way around. For example, it will be the customer who first files a complaint over a defective product. A seller not asked for its opinion will not write to a consumer out of the blue and assert that a product purchased by the consumer was damaged by the consumer's misuse. Nonetheless, the code requires the business to attempt to "voluntarily resolve the dispute," rather than requiring the business to provide the customer with a response clearly and adequately explaining the real reasons for refusing to comply with the consumer's demand—which would seem more appropriate.

Meanwhile, in referring to an "attempt at voluntary resolution of the dispute," it is unclear what action the lawmakers actually were driving at, particularly whether this means that the business must offer to make some concession. This might seem to be the case, as

the provision speaks of "resolution of the dispute," and "voluntarily," rather than a simple attempt by the party to pursue its own rights. Wouldn't this mean that in a dispute with a consumer, the business has a *duty* to make some concessions? For example, if it receives a warranty claim that was clearly filed too late, must the business recognise the claim in some small part, or perhaps offer the consumer a discount voucher for the consumer's next purchase?

Such absurd conclusions are obviously unacceptable, but are suggested by the poor phrasing of the provision. Unfortunately, the other grounds set forth in this provision also raise similar doubts.

Thus, from the perspective of businesses, this regulation, as worded, primarily generates a state of uncertainty and a danger of arbitrary decisions by the courts, potentially involving substantial sums (particularly in mass cases). The use of so many vague phrases in a single section of the code means that businesses that truly want to follow best practice in their dealings with consumers have to guess which measures to take and which to avoid, and then count on the chances that the court will reach the same conclusion. The only thing that is clear is that businesses should respond to complaints, but they are already required to do that by other regulations, which indeed include a presumption that failure to respond to a claim is deemed to mean upholding the complaint.

Wouldn't it have been better to add an additional sanction in the form of charging the business with the litigation expenses of a losing consumer who filed suit because they didn't receive a response to their complaint? This seems to be the result the drafters had in mind, but the way they chose to achieve this is strangely complicated and counterproductive.

Evidentiary preclusion—a unique "privilege" of business litigants

Another asymmetric burden on businesses in proceedings with consumers is the duty to assert all allegations and evidence in the initial pleading it files in the case (the statement of claim or statement of defence, depending which side the business is on). Evidence and allegations may be asserted later only when the possibility or need to do so arose at a later stage, and in that case, within 14 days.

	CONSUMER	BUSINESS (INCLUDING SOLE TRADERS)
Trial costs	May be relieved of trial costs even if the consumer loses (this requires a decision by the court)	May be ordered to bear the opponent's costs even if the business has prevailed (this requires a decision by the court)
Evidence	May raise new allegations and evidence at any stage, up until closing of the hearing	Must assert all allegations and evidence in the first pleading filed in the case—later, only within 14 days after the need or ability arises

The sanction for failing to meet these deadlines is preclusion, i.e. ignoring the allegations or evidence asserted too late. This burden is not placed on the consumer. Here again there are doubts about the end the proponents had in mind and the means chosen for achieving it.

It seems that the parliament wanted to avoid deliberate prolongation of the case by businesses through late assertion of evidence or entire lines of argument. It is obviously a justified aim to combat intentional delay of proceedings, but for a long time Polish law has included a range of regulations serving this purpose, including allowing the court to ignore evidence offered late, or concerning circumstances that are irrelevant or have already been proved. In proceedings under the general rules, when summoning the parties to take a position in writing the courts often impose the sanction that late assertions will be ignored (although they rarely enforce this sanction, as is also the case with the provisions on evidentiary preclusion in force in commercial proceedings, which were a model for this solution in consumer proceedings). In any event, for a long time the courts have had means at their disposal to combat delay. The problem might instead be the practice for employing these means, which is not changed by adding more provisions with a similar function, tied to rigid and arbitrary deadlines.

In practice, the preclusion provisions are a pain for the parties mainly for precautionary reasons, because it is hard to predict how rigorously these provisions will be enforced by the court. As

the practice under the same solution in the separate commercial procedure teaches, evidentiary preclusion does not live up to these aims. The main impact of this rule is overproduction of pleadings filed purely as a procedural precaution, to avoid potential negative litigation consequences. This may also happen under the consumer procedure, which was intended to be transparent, strengthening the position of consumers in disputes with businesses. The practice may bring results opposite from what was intended.

All of this makes it risky, at the very least, for a business to pursue a dispute covered by the preclusion rules without professional counsel (*adwokat* or attorney-at-law). When constructing the provisions on consumer proceedings, the drafters did not consider the situation where the non-consumer party is also a natural person, operating a business as a sole trader. The financial, human and organisational resources of such an individual are usually incomparably smaller than in the case of large businesses organised as companies. Nonetheless, the parliament equated the status of these two very different types of businesses in terms of the procedural sanctions demanding a high level of professionalism in conducting the litigation—and higher costs. While declaring greater protection for consumers, lawmakers imposed many procedural duties on persons whose status, and often also their financial capabilities, do not differ materially from those of consumers.

Which court is proper in consumer cases?

In consumer proceedings, the consumer may file suit in the court proper to the consumer's place of residence. This right it awarded only to consumers. This regulation in itself should be regarded as clearly a step in the right direction, but it should have been included in the general regulations governing which court is proper. In this case as well, the level of legislative technique also fell short.

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When constructing the provisions on consumer proceedings, the drafters did not consider the situation where the non-consumer party is also a natural person, operating a business as a sole trader.

Summary

Two years have already passed since entry into force of the amendment introducing consumer proceedings. The negligible practice to date by the courts applying these new rules appears to confirm the criticism preceding their adoption. It seems more and more likely that these rules will become another example in a series of ill-considered or outright populist legislative changes, such as the famed 24/7 courts or the 70 m^2 houses constructed without a building permit. What they have in common is that they exist only on paper. Perhaps that is just as well.

Is there a place for decency in the courts?

An interview with Piotr Golędzinowski, attorney-at-law, partner in the Dispute Resolution practice

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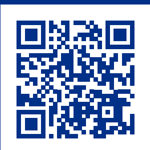

litigation

Can a lawyer be a decent person? Should they?

PIOTR GOLĘDZINOWSKI: I think so. In the context of contentious cases, the lawyer's goal is to persuade either the judge or the other party that the client's position is right. This can be done in two ways. You can present the argumentation purely on the merits, but you can also support this argumentation with certain values that will speak to the audience.

But for values-based argumentation to be credible, it must be consistent with the lawyer's conduct. So if we talk about positive values, we must also behave in a way that adheres to these values. Otherwise, we will not be credible, and will be less effective as advocates for our client's case.

Clients are sometimes convinced that they need an aggressive, forceful lawyer. They certainly need a person who knows what they are doing and has an idea of how to run the case. But I don't believe they need a lawyer who is aggressive, especially when aggression is a mindless reflex.

Raising the emotional intensity of the case can be a useful tool at some stage of the litigation, but only if it is just one of the instruments at our disposal. Because this will not in itself lead to the goal, which is a favourable resolution for the client.

Does this reliance on values also persuade judges?

In my opinion, judges decide cases largely based on values. That is, they want the decision to be consistent with their own beliefs. Of course, it is always a mystery to what extent these internal beliefs are steeped in values, and to what extent the judge is operating on a purely technical level, where the judge believes that the court's role should only be to apply the provisions of the law literally.

But basically every judge, when issuing a ruling, wants to feel they are doing the right thing. They want the ruling to be consistent with their way of thinking about the world. And Polish law creates a

lot of space for such deliberations. We do not have a precedent-led system of case law in which lower courts are bound by the existing interpretation of the provisions by the appellate court or the Supreme Court. Judges therefore have some leeway in interpreting the law, and often do so for the purposes of a given case so that they reach a resolution they consider fair under the circumstances. I think that many judges act like this.

Judges can also take other factors into account. Sometimes the judgment can be driven by which decisions is easier to justify, easier to defend. But I am convinced that not all judges, or at least a significant group of them, do not act in this opportunistic fashion, but truly take the time to examine the case thoroughly.

Polish law gives some discretion to judges, but does it also provide support for values-based decision-making? Art. 5 of the Civil Code instructs the courts not to apply the law in a manner contrary to principles of social coexistence. Do other provisions also refer to values?

The way the Civil Code is constructed, it includes many such appeals to principle. This applies not only to the code itself, but also to other acts together making up the system of civil law.

There is Civil Code Art. 58 §2, which declares that transactions contrary to the principles of social coexistence are void. There is Art. 353^1, according to which obligations must be performed in accordance with their purpose and the principles of social coexistence. We have regulations prohibiting exploitation, and in the case of liability for damages, various mechanisms recognising the joint responsibility of other entities for contributing to an injury. The regulations also require proof of proximate cause: if the perpetrator of an injury could not have foreseen the extent of the damage, that person will not be liable to that extent. We have the institution of slashing a contractual penalty if it is grossly excessive.

There are a lot of such safety valves that allow the court to step in and modify the parties' civil arrangements. Technically, this is not provided for in the law, and therefore does not constitute interference in the parties' dealings, but a limitation on the extent to which they can enforce their apparent rights. However, in practice, in my opinion, it is tantamount to interference.

So judges can invoke values. But can we assume that this system of values is shared in common by all judges or the entire legal community?
I think it is. The way society functions, there must be a common denominator of socially acceptable behaviour. This common denominator is fluid, however, and some behaviours deemed outrageous 20 years ago would not draw much response today.

One case that comes to mind is the notorious "Rywingate" scandal from 2002, when film producer Lew Rywin approached *Gazeta Wyborcza* editor-in-chief Adam Michnik to suggest that Rywin might influence the drafting of a new media law in a way that could benefit Michnik's business. Today it would not cause an uproar, but then it was an earthquake. This situation led to the launch of the first parliamentary investigative commission, whose activities were closely followed by many people.

So you can see that this is changing, but there is still a certain consensus as to what is acceptable. And I think that it is different from just what would fit within the bounds of the law. The law sets certain standards, but has no ambition to say how we should live and what values should shape our relationships. That is the realm of social life.

Some time ago, the media described the case of a lawyer who had a car accident and commented that the mother and daughter who died in the accident were driving a coffin on wheels. We all sense that crossed some line, expressing contempt for people who were injured in an accident and probably died innocently.

So the limits are still there. There are probably fewer of them than there were in the past, or the lines are drawn differently, but it seems to me that in a sense these are the principles that really govern social life, not the law itself. Without them, society could not function, because anarchy would reign. Everyone would do whatever they wanted. The law would be ineffective, because people usually behave in a certain way not because the law orders them to, but because they have an internalised system of values which they believe in, and they feel that they want to behave this way and not otherwise.

And do counsel often invoke such vague legal principles? What if one party focuses on the merits, the facts, and which regulation covers the situation, while the other party points to extra-legal reasons for behaviour?

My experience is that a dispute usually arises when communication between the parties breaks down.

There are, of course, a number of disputes, not so few in the market sense, that arise simply because someone has run out of money. Perhaps someone took out a payday loan and can't pay it back. But then it is hard to say there's a genuine dispute, because the debtor may claim they're unable to pay, but doesn't really question the debt.

From my perspective, a real dispute arises when there is a gap in communication. Each side has its own reasons, rooted in values. But for various reasons they're unable to explain these issues to themselves. The parties feel that the communication is deteriorating, they begin to sense that a dispute may arise, and they begin to prepare for the dispute. Then they communicate even less, or start communicating only officially. Then, like a self-fulfilling prophecy, the case heads to court or arbitration.

Sometimes it is still possible to break this sequence, for example through negotiations or mediation, and then there's a chance that the parties will be able to resume communications, and at least on some level convey their arguments to each other and agree on some constructive solution.

But it seems to me that in every case, and on each side, there is a narrative based on values. We seem to function in such a way that everyone rationalises their own behaviour. Often a critical element in a dispute is the capacity to understand the other party's perspective, and in a sense inoculate the judge against it, so it is harder for the court to uphold the other party's position.

Usually, under the law, one of the parties has a slightly stronger position, meaning that the regulations or the contractual provisions are more favourable for them. But the other party feels that their arguments are important enough to affect how the court weighs the interests of the parties. Then the party in a slightly weaker position on the law or the contract tries to invoke broader values. This is a fairly standard arrangement in commercial disputes.

Of course, lawyers have different strategies for conducting a case, and a lot depends on what the lawyer chooses to emphasise. Still, it is necessary to adhere strictly to the letter of the law or the contract, because those are the basic frames of reference for resolving the case. So you have to weigh and balance all of this somehow. It is rarely possible to win a case only based on values, but it can happen. But the mere possibility doesn't mean it should be tried in every case.

One case we have in mind happened a year ago, when the court refused to reinstate the deadline for an attorney, a solo practitioner, whose child was in hospital over the holidays and the deadline fell just after Christmas. In that case, the court did not consider any aspects beyond a strict reading of the regulations. Does this mean that something should change, in the procedure or in the way judges and lawyers are trained?
I don't know if there is one element of the law, or even multiple elements, that could be changed to prevent this kind of situation. As I see it, the main reason for refusing to reinstate the deadline for this particular attorney was the court's insistence on relying strictly on the regulations—disregarding the social norms of what is considered admissible. In my opinion, that is a flawed interpretation.

Regulations are constructed as a certain set of minimum standards of what should be considered possible at a given time, but they are not intended to impose solutions that will necessarily be socially approved. Such a solution must still be adopted by the judge, on the basis of the regulations. Here the judges concluded that in this case, they could reach this decision because it was consistent with a certain tendency for the courts to require attorneys to meet unrealistic standards—for example to foresee the child's illness and organise the work in their law practice to be prepared for any eventuality. And if the attorney is not prepared, that is their problem, and they must manage it somehow in their dealings with the client.

In my opinion, the source of this problem is the separate system of training for lawyers and judges. This means there is no sense of a community of interest between the two professions. Judges feel that any powers they cede to counsel will be granted at their own expense. And attorneys feel that they are treated unfairly by judges,

and they don't feel obliged to behave loyally toward the court in every situation.

As there are more and more lawyers, it is not realistic for these professional training systems to function in a common way. In this regard, various initiatives to bring the two professions closer together, for discussions and sharing experiences, are invaluable. It should also be remembered that judges are not a homogeneous community, so we should not generalise. Lawyers should approach their relations with judges with an open mind, even if in some cases this leads to disappointment. It's better than assuming bad faith from the start.

But given the workload of judges, isn't it unrealistic to expect them to consider the case not only on the basis of the law, but also on the basis of some system of values?

No. And I think that the judges in the case we are talking about knew exactly what they were doing. After all, the attorney had written that she was with her child in the hospital, it was Christmas, and it would be very difficult for her to organise her work so that she could file the application on time. She was just busy with other things.

It is more a matter of a misconceived notion of professional solidarity, and limiting the rights of attorneys so cases can be concluded faster. After all, if the court had upheld the lawyer's complaint, the case would have to be taken up by the appellate court and then perhaps would reach the Supreme Court on a cassation appeal. In this way, judges try to eliminate the excessive workload of the courts, but at the expense of attorneys, or actually at the expense of their clients.

But don't attorneys do the opposite? The stereotypical view is that when a communication gap opens up between the parties, i.e. a dispute, counsel double down and reinforce the client's belief that they have to fight for their rights in court. Is it the attorney's task to attempt mediation and help bring the parties to an out-of-court settlement?

Certainly, the lawyer's task is to prepare the case so that this is possible. At an early stage, various options should be analysed and developed so that the client can assess how events are likely

to unfold, and on this basis decide whether they are interested in a settlement or not.

Imagine our client is a potential plaintiff who has not received payment and does not want to waive any part of it, but insists on being paid in full. However, if the debtor is a company that is about to go bankrupt, accepting even a portion of the payment may be beneficial.

It is actually more complicated than that. You have to be careful, because this is where the issue of settlements by entities on the brink of bankruptcy comes into play. This requires caution because the party may be accused of participating in selective satisfaction of creditors, which can be a criminal offence.

more on this topic on page 111

But the client must know, first of all, whether it has a claim, or how it can defend himself, and how things may turn out in different scenarios. Only then can the client make an informed business decision based on advice obtained from counsel.

Analysis of the case must be balanced. You need to show the client that you understand their arguments, but you also need to skilfully inform them of the weaknesses of their position. And at the same time, not frighten the client too much, so they don't bend to conclude a less than optimal settlement. That is, the client must be given comfort based on understanding the case, in the awareness that in each scenario we will support them in obtaining an optimal solution.

Of course, someone may say that pursuing litigation is more profitable for the law firm than concluding settlements. But this is a short-term perspective. With clients from big companies, the firm has probably built a client relationship over many years. Such clients also have good in-house lawyers, who can sense that someone is steering them into litigation, or even escalating the dispute, instead of behaving rationally. I reach many settlements, and when the client is satisfied I am satisfied.

How does this preliminary analysis of the case work?

First of all, you need to collect and evaluate documents before any emails or other materials are deleted. It is also worth talking to as many people as possible who are involved in the case and could be potential witnesses, because often different people have different perspectives and see the situation in different ways. This is not

always easy, because in the case of large clients, we usually have contact with only one person as a liaison, but it is worth taking the time to contact other people from the organisation. This allows us to understand the problem much better at this early stage.

And then this early analysis must be preserved in some way. When we start writing down our thoughts, we start to draw a certain picture and it is easier to assess how many strengths and weaknesses there are. This is written up in a litigation memorandum. It is the basis for proposing a strategy for the client. And this approach works well.

It is not always possible to draw up a thorough litigation memorandum in every case, but the more often this is done the less randomness and chaos there is later on. Of course, it all depends on the case. In a big construction or infrastructure project with many different aspects, if the dispute escalates quickly there may not be time for such analysis and you simply have to act to secure the interests of clients. But when possible, it is worth preparing a litigation memorandum so the client can make an informed decision.

Is there anything else worth paying attention to when conducting disputes?

I would like to add that in a dispute, the attorneys are functioning in a situation of conflict. But it is a conflict between the parties. It is easy to internalise the client's position too much. To defend the client and pursue the client's interests, we must be able to look at the problem from the client's perspective. But then it is crucial to set that perspective aside and assess how a judge or arbitrator might look at the case. So on one hand, you have to understand the client, but on the other hand, you must not identify with the client too much.

In practice, it looks different at different stages of the case. Sometimes counsel are in a position to do this, and sometimes they aren't. Everyone has their own experience in this area. It's not that simple. But every dispute is interesting, and can always teach us something new.

Interview conducted by Justyna Zandberg-Malec

Settlement of public procurement disputes

Few public procurement contracts are carried out without any disputes arising. Every dispute is different, at least in terms of specifics of the contract. However, the background is often similar: no one is solely at fault, and usually each party is only partially (if at all) responsible for the circumstances surrounding the dispute. This is why most disputes are not resolved until a court issues a judgment after an exhausting and time-consuming trial. But that is not the only path. Settlement is an alternative worth promoting as an effective tool for resolving disputes.

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The definition of settlement

Civil Code Art. 917

According to the Polish Civil Code, in a settlement both parties make mutual concessions in the legal relationship between them, to avoid the uncertainty surrounding claims arising out of that relationship, to ensure performance, or to eliminate an existing or potential dispute. The key features of any settlement can be inferred from this definition:

- The settlement is intended to reconcile the parties, with the aim of removing a state of uncertainty
- The settlement resolves the dispute through compromise
- A concession by only one party to a legal relationship is not a settlement
- As a rule, a settlement does not create a new legal relationship, but only clarifies or modifies an existing legal relationship.

Settlements in public procurements —specific legal issues

Because we are focusing in this article on settlements in public procurement, we will begin with the most important of the specific regulations defining the admissibility and scope of settlements within the regime of the Public Procurement Law, which do not apply to other types of settlements, particularly in the realm of private law.

Public Procurement Law

To begin, we will cite the Supreme Court of Poland:

> A settlement agreement (Civil Code Art. 917) is of a determinative nature and aims to transform a legal relationship as to the existence or substance of which the parties have doubts, into

> an undisputed relationship with a mutually defined and stable shape. Although a settlement can even significantly alter the original substance of the parties' rights and obligations, usually it does not—unlike a novation (Civil Code Art. 506)—create a new legal relationship which is a separate, standalone basis for the obligation. This basis continues to be the legal relationship covered by the settlement, but in a modified shape.

Supreme Court judgment of 25 February 2002, case no. II CSKP 72/22

Why is this so important? Well, if the settlement modifies the original contractual relationship, the parties must be sure it is not in conflict with the Public Procurement Law. The law expressly provides that conclusion of a settlement must not lead to violation of the regulations governing modifications to a public contract. Thus, if the wording of the settlement is to include a change in the procurement, then, under the regulations:

Public Procurement Law Art. 592

- The settlement may only introduce changes in the procurement that do not constitute material modifications (as these generally require conduct of a new contract award procedure)
- A material change introduced by the settlement must not require conduct of a new contract award procedure, e.g. when:
    - The change was clearly provided for in the tender documentation or contract announcement
    - The change concerns performance by the contractor of additional services, supplies or construction works that have become essential (under certain conditions)
    - The need for the change is due to circumstances which the contracting authority, with due diligence, could not have foreseen (under certain conditions)
    - The value of the change does not exceed the *de minimis* threshold.

Public Procurement Law Art. 454

Public Procurement Law Art. 455

MINOR CHANGES
Amendments not altering the overall nature of the contract, with a cumulative value below the EU thresholds and below:
- 10% of the initial contract value for service and supply contracts
- 15% of the initial contract value for construction works contracts

In other words, if the substance of the settlement will cover mutual concessions deemed to be a modification of the substance of the obligation, it should always be examined whether the scope of the intervention in the procurement is permissible under the aforementioned regulations. In this respect, the permissibility of the change can only be examined in light of the specific procurement. Only knowing the substance of the specific contract can it be determined whether the change is material, and if so, despite

its materiality it is permissible without conducting a new contract award procedure.

But what if the settlement concerns a public contract, but does not involve amendment of the contract? What relevance does Art. 592 have then? In my own view, this provision does not prohibit such settlements, and thus they are permissible. Thus, in practice, settlements covering claims not arising out of the contract, but indirectly related to the procurement (e.g. for damages or unjust enrichment) will be consistent with Art. 592.

It is stressed in the jurisprudence that Art. 592 was adopted primarily to draw the attention of the courts deciding whether to confirm a settlement to the rules governing modifications to public contracts—in particular, that the settlement not be an attempt to circumvent the law or bless an impermissible modification of a public procurement contract. Thus there are no grounds for interpreting Art. 592 rigorously and finding in that section any barriers to other types of settlements (not modifying the procurement) than those referred to in Art. 454 and 455 of the Public Procurement Law.

Special regulations in the area of public finance

Because the contracting authority under a public procurement contract is usually an entity from the public finance sector, the substance of the settlement must also be analysed in terms of the Public Finance Act and the principle of Polish law known as "public finance discipline."

Public Finance Act Art. 54

The rule is that a unit from the public finance sector may reach a settlement concerning a disputed civil claim if it determines that the effects of the settlement are more advantageous for the unit (or the State Treasury or a territorial governmental budgetary unit, as the case may be) than the likely outcome of a judicial or arbitration proceeding. In that case, it will not be a breach of public finance discipline to:

Act on Liability for Violation of Public Finance Discipline, Art. 5(4) in connection with Art. 5(1), Art. 11(2) and Art. 15(2)

- Perform a lawfully-concluded settlement concerning a disputed civil claim
- Make an expenditure of public funds based on a lawfully-concluded settlement concerning a disputed civil claim, or
- Incur or modify an obligation based on a lawfully-concluded settlement.

The notion of disputed civil claims is understood broadly today, and thus should not be limited to monetary claims (e.g. for contractual penalties or the contractor's fee for additional work not included in the original cost estimate). For some time, there were doubts surrounding the notion that the Public Finance Act generally concerns financial management of units from the public finance sector, while this rule is found among the regulations governing the handling of public funds. Nonetheless, Art. 54a of the Public Finance Act does not refer to "monetary claims," but more generally "civil claims." It should thus be recognised that a settlement may also address non-monetary claims, in particular tangible items such as putting a facility into operation.

Finally, it should be clarified that settlements in which the contracting authority and the contractor appear in any sequence of roles—creditor, debtor, or mixed—can all be consistent with the Public Finance Act. Thus there is nothing preventing for example settlement of a civil claim held by the contractor, even if the contracting authority is not asserting any claims against the contractor (and vice-versa). It is sufficient that there is some disputed claim generating uncertainty, and the mutual concessions by the parties—i.e. settlement—can remove this state of uncertainty.

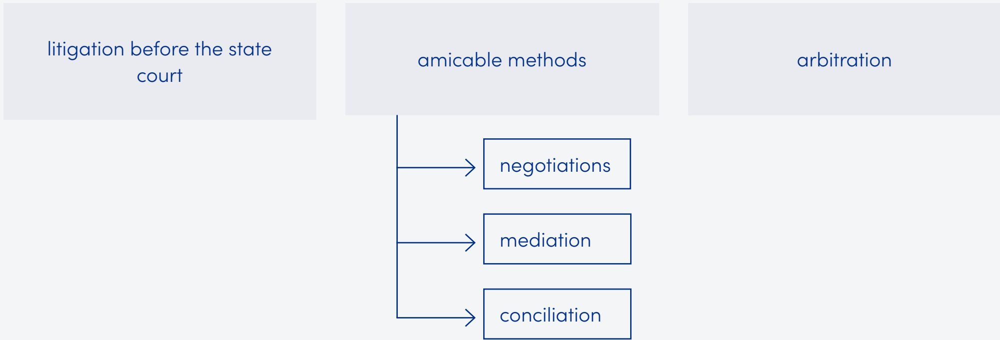
Methods for resolving the dispute

There are various methods for resolving disputes over civil claims in public procurement, in particular:

- Litigation before the state courts
- Arbitration
- Alternative dispute resolution via:
  - Negotiation
  - Mediation
  - Conciliation.

All of these examples of proceedings may end in conclusion of a settlement. Although I mention arbitration here, proceedings before an arbitration court do not necessarily have the characteristic of an amicable resolution of disputes. However, there is no bar to

SELECTED METHODS OF RESOLVING DISPUTES IN PUBLIC PROCUREMENT



reaching a settlement before an arbitral tribunal. I could point to the same rule in litigation before the state court. During such proceedings, the parties can always decide to reach a settlement, even though the parties' resort to the courts implies a lack of room for settlement (at least at the time the litigation is initiated).

But in light of Title x of the Public Procurement Law, "Out-of-Court Resolution of Disputes," there is an emphasis on mediation and other amicable methods of dispute resolution, such as conciliation (although Art. 591 does not exhaust the possibilities), which, if successful, generally lead to conclusion of a settlement.

PUBLIC PROCUREMENT LAW ART. 591(1)
In a case of property in which settlement is admissible, if a dispute arises out of a contract, either party to the contract may submit a request for mediation or other amicable resolution of the dispute to the Court of Arbitration at the Office of General Counsel to the Republic of Poland, a chosen mediator, or other person handling amicable resolution of disputes.

Under this provision, a request for mediation or other form of alternative dispute resolution may be submitted by either party to:

– The Court of Arbitration at the Office of General Counsel to the Republic of Poland
– A selected mediator, or
– Other person conducting amicable resolution of disputes.

This means that negotiations directly between the parties, without involving a third party (such as a mediator), are not covered by this provision.

Selection of the right method of resolving a dispute will always be driven by the characteristics of the method. The dominant method is mediation, in my view because it is voluntary, confidential, informal, and relatively inexpensive (at least compared to a trial).

Although the regulations discussed above might seem complicated, in practice settlements in public procurement can successfully deal with a range of disputed claims, such as:

- Price indexation claims
- Damages
- Interest on late payment of fees
- Fees for the contractor for additional work which the contracting authority did not include in the cost estimate (and has not paid for)
- Contractual penalties charged by public finance entities for improper performance of the contract, including claims to mitigate such penalties
- Perpetual usufruct fees.

So it is worthwhile for the parties to always bear in mind the possibility of resolving disputes via settlement, particularly when the parties share responsibility for the circumstances giving rise to the dispute.

Indexation of fees payable to the contractor in a public procurement contract

The durability of the terms of the contract is one the fundamental principles ensuring fulfilment of the aims of procedures for award of public contracts. Therefore a public contract can be modified only under the conditions set forth in the contract from the beginning, and based on grounds set forth in the Public Procurement Law. There are also specific regulations governing indexation of contractor's fees.

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Can the contractor's fee be indexed?

The Act of 7 October 2022 Amending Certain Acts to Simplify Administrative Procedures for Citizens and Businesses, which entered into force on 10 November 2022, had the biggest impact on the issue of indexation of fees under public contracts.

Since then, every public procurement contract for a term of longer than 6 months has had to contain an indexation clause.

This special act also introduced a provision enabling indexation of contracts concluded prior to entry into force of Public Procurement Law Art. 439 and not containing an indexation clause.

In the Polish economic reality, the topic of indexation of public contracts essentially did not exist until 2022. Probably anyone knowledgeable about the topic and asked about the possibility of indexing the contractor's fee would have said that under the Public Procurement Law of 2004, if the right to indexation was stated in the public contract, then it was possible.

The problem was that the contracts actually functioning on the public procurement market only very rarely contained such provisions, and when they did the degree of indexation was generally narrow. A contractor encountering the problem of indexation was left to its own devices. It could either forego the anticipated profit from the contract, or seek to increase the fee through the courts by alleging an extraordinary change of circumstances.

Rules for indexation of contractors' fees were included in Art. 439 of the new Public Procurement Law of 2019, which entered into force on 1 January 2021. Art. 439 introduced a rule requiring contracting authorities to include provisions on indexation of fees in contracts lasting 12 months or longer, when the subject of the procurement was construction works or services. Then, from 10 November 2022, this obligation was extended to contracts for supplies and contracts concluded for a period of longer than 6 months.

What is subject to indexation?

Art. 439 requires contracting authorities to set rules for adjusting the amount of the fee payable to a contractor when there is a change in the price of materials or expenses connected with performance of the contract. Thus indexation under this provision applies to

materials and expenses, and not other elements of the contractor's fee. Indexation related to a change in the legal minimum wage is addressed separately, in Art. 436.

As indicated in Art. 439(4), a change in the price of materials or expenses is understood to mean either an increase in the prices of materials or expenses, or a decrease, as the case may be, from the amount adopted for the purpose of setting the contractor's fee in its tender. Thus, fundamentally, the concept of indexation refers to an adjustment in the contractor's fee to reflect changes in the economic environment occurring between the date the price was established and the date of indexation. Consequently, indexation doesn't mean just increasing the contractor's fee, but may also mean reducing the fee. But whether the contractor bears the risk of a reduction in its fee will depend on the wording of the specific indexation clause.

It should be stressed that the regulation does not require the contract to provide for the possibility of cutting the contractor's fee. This mechanism can be justified only in certain contracts, where the specifics of performance make it possible to capture the moment when the amount of a given expense on the part of the contractor is determined. However, in many instances, downward indexation would not reflect the market realities, due to the timetable for contracting specific purchases by the contractor. In addition, the contractor's internal purchasing policies may treat downward indexation as generating too big a risk, translating into the need to ask for a higher contract price at the tendering stage. For this reason, contracting authorities should always consider whether in a given instance, introducing the possibility of downward indexation will actually be advantageous for the contracting authority and acceptable to the potential contractors.

Level of changes in prices of materials or expenses providing a right to indexation

The contract must specify the degree of the change in prices or expenses which will entitle the contractor to seek indexation. The contractor's fee may be adjusted even to reflect relatively small fluctuations in the prices of materials or expenses. Or a higher

threshold for such changes may be set—in which case, the contractor will need to factor in the risk of an increase in prices or expenses up to a certain level. Only when this level is exceeded will the contractor have a right to an increase in its fee.

Setting a higher threshold for increases in prices or expenses allowing indexation has its advantages and disadvantages. This would postpone the need for a change in the contractor's fee and reduce the likelihood that such a need will arise, but at the cost of bidders raising the cost of executing the overall procurement at the tendering stage. It therefore appears that in long-term contracts, it would be more advantageous to allow for the contract fee to be indexed even multiple times, than to agree to an inflated price from the very start.

A GOOD INDEXATION CLAUSE should allow the contractor to file a request for indexation with relatively little effort and without the need for detailed documentation of the costs it has incurred.

PAYMENT OF THE INDEXED AMOUNT should be certain, and if it covers past periods, payment should also be as fast as possible for the purpose of the indexation clause to be fulfilled.

Timing of determining a change in the contractor's fee

The indexation clause will also define when indexation may occur for the first time and, following the first indexation, the frequency with which further indexations may occur. In practice, this is typically done in annual periods, often tied to the publication dates of the specific indicators used for calculating the indexation. Completion of the first year of contract performance will often entitle the contractor to seek indexation for the first time.

Moreover, under Art. 439(3) of the Public Procurement Law, if the contract was concluded more than 180 days after the deadline for submitting tenders, the initial period for determining a change in the fee will run from the date of opening of the tenders, although the contracting authority may set an earlier date. However, the process of building the price to include in an offer can be lengthy and complex, and thus it may be reasonable to adopt a reference date earlier than the deadline for filing bids.

Method of calculating the increase

A key element of an indexation clause is provisions on how to determine that there has been a change in prices or expenses authorising indexation of the fee. In this respect, there are two main methods: reference to an indicator, or reference to some other basis.

The relevant indicator of a change in prices of materials or expenses may be one published by Statistics Poland (GUS). But other indicators may also be used, published by other institutions, particularly Eurostat.

If a statistical indicator is not the most suitable benchmark, some other basis may be indicated for a change in the prices of materials or expenses, particularly a list of types of materials or expenses, a change in prices for which will entitle a party to the contract to demand a change in the fee. The benchmark could be, for example, the price of a given commodity on a particular commodities exchange.

Once the indicator is determined, the method for the indexation should be defined, i.e. a mathematical formula defining the impact of the change in prices of materials or expenses on the cost of contract performance, and indicating the period for the change in the contractor's fee.

SAMPLE FORMULA FOR CALCULATING INDEXATION OF FEES UNDER A PUBLIC CONTRACT

The value of the change referred to in Art. ... of this contract shall be determined pursuant to the formula:

Change = (NF × AM)/100

where:

NF – is the net fee for the subject of the contract not yet performed by the Contractor and not yet taken over by the Contracting Authority prior to submission of the request

AM – is the arithmetic mean of the four successive values for the changes in prices of materials or expenses connected with execution of the contract according to communiqués issued by the president of Statistics Poland (GUS)

Source: repository of documents at the Public Procurement Office tinyurl.com/4p2bs5a7

Limit of indexation

The contracting authority should also set the maximum value of the change in fee permissible as a result of applying the indexation clause. This provision will protect the contracting authority against an increase in the contractor's fee beyond the amount provided for in the contracting authority's budget.

However, setting a low limit for indexation will reduce the effectiveness of the indexation clause. Thus the requirement to set a limit is not entirely understandable. While public contracts are typically concluded for a period of no longer than four years, for complicated projects and long-term service contracts the contract performance period can be much longer. This should mean that it is permissible to include very high indexation limits, without the need to burden the contracting authority's budget with provisions for this purpose. It is also worth defining the maximum value of changes in the fee on an annual basis, rather than summing up the limit over the entire term of the contract.

Sharing indexation with subcontractors

A contractor whose fee was modified is required to modify the fee owed to a subcontractor whose contract was concluded for a period of longer than 6 months, to the extent corresponding to the changes in the prices of materials or expenses regarding the subcontractor's obligation. All categories of subcontracts are subject to sharing of indexation, regardless of the subject of the subcontract, applying the definition of a subcontract under Public Procurement Law Art. 7(27).

SUBCONTRACT
a written contract between an economic operator and a subcontractor (and in the case of a contract for construction works other than a defence and security contract, also between a subcontractor and a sub-subcontractor or between sub-subcontractors), under which the subcontractor or sub-subcontractor undertakes to perform part of the contract

The principle of sharing the indexation with subcontractors may appear basically sound, but unfortunately it does not take into account the differences in circumstances in conclusion and performance of subcontracts, including how the price is set under subcontracts. Often, at the stage of concluding the subcontract, the parties are already in effect indexing the price in relation to the price in the main contract. The ability to properly perform the procurement depends on performance of subcontracts. This puts the contractor under greater indexation pressure from its

subcontractors than the contracting authority experiences from the contractor.

The practice of applying indexation clauses in Polish public procurement still has much room for improvement. Unfortunately, despite clear mechanisms set forth in the contract, often indexation does not occur automatically, and the process of applying for indexation by the contracting authority can be tedious and time-consuming. Often the contractor will first have to index the fees of its subcontractors before obtaining indexation of its own fee. This can also be the case when a subcontractor will not experience any negative impact of changes in prices and expenses.

Consequently, the essence of proper application of the duty to share indexation with subcontractors under Art. 439(5) can be found in how the notion "to the extent corresponding to the changes in the prices of materials or expenses regarding the subcontractor's obligation" is interpreted under the specific circumstances. It should also be borne in mind that this provision is addressed to the contractor, not the contracting authority, and is not covered by the contracting authority's duty to make direct payment to subcontractors in the circumstances referred to in Art. 465 of the Public Procurement Law.

Access to a public road in the real estate development process

To carry out any development project, it is necessary to ensure that the property is connected to the network of public roads. Without such access, the developer cannot obtain a decision on construction conditions, a building permit, or an occupancy permit. At every stage of the development process, the competent authorities will verify whether the planned project has a real capability of joining the network of public roads. Even though this issue is examined at numerous stages of development, unfortunately we often encounter situations where the property does not have appropriate access to a public road.

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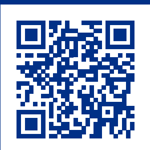

real estate

It is not sufficient in every case to show that the property where a project will be executed is immediately adjacent to a public road. The development must be connected to the public road by an entrance/exit route, i.e. a direct connection between the property and the public road enabling access to the public road. Unfortunately, the rulings from the courts do not provide a uniform interpretation of the regulations on this topic, generating many disputes between investors and the public administration.

Proceedings prior to obtaining a building permit: decision on construction conditions

Under Polish law, if there is a local zoning plan in force for the real estate where a development project is planned, the plan will specify the conditions for connecting the property to the network of public roads.

But if no local zoning plan has been adopted covering the property, a change in use of the site, such as constructing a building, generally requires the investor to obtain a decision on construction conditions. One of the key requirements for issuing a decision on construction conditions is to have access to a public road. This condition complements the requirement that a planned development must comply with the "good neighbour" principle.

Spatial Planning and Development Act of 27 March 2003, Art. 61(1)(2)

Definition of access to a public road

We should start by determining what sort of road can be regarded as a public road. A **public road** is defined as a road falling within one of four categories—national, provincial, county or communal—which may be used by anyone for its intended purpose, subject to restrictions and exceptions set forth in the regulations. By contrast,

internal roads are roads not falling into any of the categories of public roads and not located with the right of way of a public road, in particular roads within a residential estate, access routes to agricultural plots, and access routes to buildings. Public roads are owned by public-law entities, while ownership of internal roads may vary, as private entities can also hold title to an internal road.

While the legal definition of access to a public road is intended solely for purposes of interpreting the Spatial Planning and Development Act, it is also used in an auxiliary fashion by the public administrative authorities issuing building permits. Based on this definition, access to a public road may be **direct**, where the property is immediately adjacent to the public road, or **indirect**, via an internal road or establishment of a road easement.

Access to a public road
Access to a public road means direct access to such road or access to such road via an internal road or establishment of an appropriate road easement.
(Spatial Planning and Development Act)

Two different positions have formed within the jurisprudence on how to interpret access to a public road under the Spatial Planning and Development Act.

Under the first view, before issuing a decision on construction conditions, the administrative authorities must first determine whether the planned project has secured both factual and legal access to a public road.

This view has been expressed by, among others, the Supreme Administrative Court, which has held:

> Access of a development site to a public road for the purpose of determining the construction conditions for the site cannot be equated with factual access. Such access must be legally guaranteed, meaning that it must arise from a legal regulation, a legal act, or a judicial or administrative ruling.

Supreme Administrative Court judgment of 20 October 2010, case no. II OSK 1467/09

According to this judgment, the authorities should examine not just whether a development site has actual access to a public road, but also whether the investor holds legal title to the land through which this access will run. This primarily refers to a share in co-ownership of the plot through which the access is to run, an *in rem* right to the plot (most often a ground easement), or a right of usufruct.

The question arises whether in the case of establishment of a ground easement for a definite period, for example 10 years, it can be found that the plot has secured access to a public road. An

analysis of the jurisprudence shows that the courts accept this solution, stressing that what is relevant is the existence of an easement as of the date of issuance of the decision on construction conditions. The situation is different in the case of lease or tenancy agreements, which are not regarded as a sufficiently stable legal relationship to ensure a long-term right to the plot enabling access to a public road.

Under the second view expressed by the administrative courts, at the stage of issuance of a decision on construction conditions, it should only be verified whether the planned project has actual, and not necessarily legal, access to a public road. The courts reason that the investor has no duty to demonstrate that it holds legal title to the real estate on the site covered by the application.

e.g. Supreme Administrative Court judgment of 23 January 2014, case no. II OSK 1986/12

This issue most often arises in a situation where access to a public road is secured via an internal road, to which investors often do not hold legal title. In our view, in such cases it is of vital importance which entity is the owner of the internal road: a private entity, or a public entity—when the internal road is publicly owned, as a rule access to the internal road is public and unrestricted.

The rules for access to an internal road are decided by the owners of the internal road. Thus these issues must be examined individually in each case. Moreover, the regulations do not clearly address this issue, and investors may encounter different positions by the public administrative authorities.

Access to a public road—hypothetical or actual?

It should also be stressed that access to a public road must exist as of the date of issuance of a decision on construction conditions, rather than arising in the future. Thus it cannot be merely hypothetical access, dependent on completion of a road project.

Therefore, it should be regarded as incorrect for the authority to impose on the investor an obligation to rebuild a public road or conclude a contract for execution of a road project based on Art. 16 of the Public Roads Act of 21 March 1985.

The technical conditions that must be met by the route ensuring access to a public road are not examined at the stage leading up to issuance of a decision on construction conditions. This is an element of the examination conducted prior to issuance of a building permit.

Entrance/exit route—the connection between the property and a public road

Access to a public road is obtained first and foremost using an entrance/exit route, i.e. a direct connection between the property and a public road. Building or rebuilding an entrance/exit route is up to the owner or user of the real estate adjacent to the public road, while in the course of building or rebuilding a public road, the investor is the administrator of the public road.

The investor must obtain permission to build an entrance/exit route prior to filing an application for a building permit. During the course of the proceeding for issuance of a decision on construction conditions, the administrator of the public road with which the planned project is to be connected needs to agree on arrangement of the manner of connecting the project to the public road proposed by the applicant.

ARRANGEMENT
a form of binding influence by one public body on another, by conditioning the possibility of issuing a decision on approval of the content of the decision by the arranging authority

The administrator of the public road is competent to agree on arrangement of the planned development when the development is located within the right of way for the road or impacts on the area adjacent to the right of way and the public road itself. The administrator of the public road will agree on the arrangements for a change in the use of the site adjacent to the right of way, particularly involving erection of a structure, in terms of the possibility for merging of traffic to the road generated by this change in use.

Public Roads Act Art. 35(3)

This possibility of merging of traffic within the road also includes issues of **traffic safety**, which is one of the conditions for evaluating the permissibility for the road administrator to agree on the arrangements for a change in use of the site adjacent to the right of way for the public road. Consequently, this is a condition for the permissibility of a development which is to be built along the road. Failure to ensure the necessary level of traffic safety is a justified ground for refusal to reach agreement on the arrangements for the draft decision on construction conditions.

In practice, refusal to agree to the design for connecting the development with a public road may arise from the existence of heavy traffic intensity near the planned development, as well as a high rate of collisions, which can be grounds for the road administrator to refuse to agree to the arrangements in the draft decision on construction conditions.

The road administrator cannot arbitrarily refuse to agree to the proposed method of connecting the development with the public road.

Arranging of an entrance/exit route from a public road should be denied only when the exit or entrance would pose a threat to traffic safety. Thus the road administrator cannot arbitrarily refuse to agree to the proposed method of connecting the development with the public road, but is required to conduct a detailed analysis in this respect.

Proceedings for obtaining a building permit

Construction Law Art. 6

Appropriate development should be designed for building plots or sites on which erection of a structure or functionally connected complex of structures is planned, and implemented before the building or complex of buildings is put into use, and it should be ensured that this development is maintained in proper technical and operational condition for the period of existence of the building or complex of buildings.

The issue of access to a public road is also the subject of analysis by the public administrative authorities at the stage of proceedings for issuance of a building permit. At this stage, it is primarily the technical aspects of access to a public road that are examined, such

as the width of the road and compliance with fire safety regulations. An executive regulation specifies the manner in which access to a public road by buildings should be ensured, appropriate for the intended use of the buildings and the fire safety requirements set forth in separate regulations.

Regulation of the Minister of Infrastructure on the Technical Conditions to Be Met by Buildings and Their Location of 12 April 2002

At the stage of the proceeding to obtain a building permit, the investor must demonstrate that appropriate access to a public road actually exists or can be ensured within the planned development. If the local zoning plan provides for a public road that would enable access from the development site to the network of public roads, but the road has not been built as of the time the investor applies for a building permit, the investor will not be able to demonstrate fulfilment of the conditions set forth in the executive regulation cited above, and will not obtain a building permit.

Under current law, the investor does not hold a claim against the road administrator to build or rebuild a public road necessary to link the planned development with the network of public roads. In such case, the investor may use the opportunity afforded by the Public Roads Act and propose to the road administrator that they conclude a contract for building or rebuilding a public road, when this need arises due a planned non-road development.

Public Roads Act Art. 16

The courts stress that imposing an obligation on an investor to build or rebuild a public road must be preceded by thorough consideration of the impact that the planned project will have on the existing network of public roads. This is confirmed in the case law, where the courts have found that Art. 16(1) of the Public Roads Act does not provide grounds to force on the investor specific solutions for building or rebuilding a road, which would shift to the investor the burden of the tasks belonging to the administrator of the public road.

The Supreme Court of Poland has held that it is impermissible to conclude an agreement obliging a private entity to execute a road project to an extent disproportionate to the non-road project. The court found that construction of a non-road project may make it necessary to rebuild a road if execution of the non-road project threatens an increase in the intensity of traffic on a public road not suited to handling the transport needs of the site where the non-road project is planned, in terms of traffic safety and technical conditions.

Supreme Court judgment of 24 February 2021, case no. III CSKP 62/21

The courts have also condemned the practice that has grown up in many cities, including Warsaw, involving the investor's payment of a certain fee earmarked for construction of a public road, reasoning that the regulations do not provide for this possibility.

Based on our experience, investors are often forced to execute a more extensive road project than would be dictated by the scope of the planned non-road development. But if the investor does not cooperate with the road administrator, it may not obtain a building permit, thus delaying or outright blocking execution of the investor's planned project.

Proceedings for obtaining an occupancy permit

Use of a structure whose construction requires a building permit or notification of construction may commence (with certain exceptions) after notification of the completion of construction to the construction oversight authority, unless the authority issues a decision objecting to occupancy of the structure within 14 days after service of the notice of completion.

Construction Law Art. 54

The regulations do not state expressly that access to a public road is a requirement for commencing use of the structure. However, before issuing an occupancy permit the construction authority will conduct a mandatory inspection of the construction for compliance with the conditions and arrangements set forth in the building permit and compliance with the construction design. This inspection will include verifying the structure's compliance with the plan for development of the site. The transport system and manner of access of the intended construction to a public road are set forth in both the descriptive and pictorial sections of the site development plan.

Construction Law Art. 59a

§§ 14(3) and 15(2)(6) of the Regulation of the Minister of Development on the Detailed Scope and Form of Construction Designs of 11 September 2020

It follows that issuance of an occupancy permit is conditioned on ensuring in the construction design that the project has access to a public road.

The rules discussed above apply to the procedure for obtaining an occupancy permit, and not to notification of completion of construction. In the latter case, there is no obligation to carry out an inspection. The construction oversight authorities are nonetheless empowered to enter the structure and conduct oversight activities.

In exercise of these oversight powers, they can verify and challenge the existing transport system and the structure's access to a public road. The construction oversight authorities are vested with legal means to eliminate any potential irregularities, including by imposing fines or ordering a halt to use of the structure.

Summary

At every stage of the real estate development process, the administrative authorities in Poland will examine the issue of securing access by the planned development to a public road. Ensuring proper legal and factual access to a public road is thus a condition for the investor to achieve its intentions.

The examination of access to a public road requires both legal knowledge (civil and administrative law), and technical knowledge to verify whether the existing or planned access meets the technical requirements, including safety standards. Unfortunately, the judicial practice in Poland in interpreting the regulations on access to a public road is not uniform, which can make it harder to determine whether the property has secured proper access to a public road.

Integrated development plans

A new tool known as the integrated development plan was added to the spatial planning regulations in Poland in 2023. It can expedite and streamline the planning process, and consequently also implementation of the project. The aim of this new solution was to give local communes more freedom in the location and execution of development projects, while maintaining compliance with the general plan and increasing social participation. How is this instrument functioning, and can it be useful from the investor's perspective?

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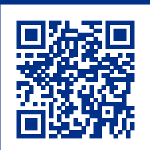


real estate

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

DEVELOPER'S ACT
Act on Facilitation of Preparation and Implementation of Residential Developments and Accompanying Projects of 5 July 2018

The integrated development plan (*zintegrowany plan inwestycyjny* —**ZPI**) was introduced through an amendment to the Spatial Planning and Development Act. A similar institution functioned under the law popularly known as the Developer's Act, where it was called a resolution on determination of the site of a residential development (**siting resolution**). To start, we should examine the differences between these two solutions, which is interesting from the investor's point of view.

Differences between siting resolution and ZPI

The ZPI will ultimately replace the siting resolution, but siting resolutions can still be adopted until 1 January 2026. Thus, for a certain time both of these solutions will be in force simultaneously.

The ZPI differs significantly from the siting resolution:

– Siting resolutions involved only execution of residential developments within certain parameters. The ZPI enables execution of any project, not just residential ones.
– Unlike the siting resolution, the ZPI does not set a time limit for obtaining a building permit, but is binding indefinitely, under similar rules as a local zoning plan. The siting resolution will expire if a building permit is not issued via a legally final decision and published in the province official journal within 6 years after issuance of the siting resolution.
– The earlier solution applicable to a siting resolution, allowing departures from the study on conditions and directions for spatial planning in strictly defined instances, has been dropped.
– The regulations governing siting resolutions established rigid standards for example for the number of parking places, which in practice could greatly hinder execution of the project. The act introducing the ZPI does not contain such restrictions. The

number of parking places will be determined through negotiations with the commune and based on the general plan or study.

Features of the ZPI

Existing local plans, or parts thereof, concerning the site covered by the ZPI, will cease to be in effect when a ZPI enters into force. Thus the parliament places in the hands of the local authorities and investors a tool allowing for implementation of projects with parameters different from those foreseen in the plan, as long as the project is consistent with the study. Limiting the planning activities to the area where the project will be implemented can speed up the work and cut the costs. This instrument is intended to allow for faster development of the site in line with the investor's intentions, but in agreement with the commune and while protecting the interests of the commune with respect to future accompanying infrastructure.

Because from the perspective of maintaining spatial order, a more advantageous solution is adoption of spatial development plans for larger areas, the parliament allows the commune to impose a number of obligations on the investor, described in the planning agreement concluded with the investor. This solution is aimed at protecting the interests of citizens and reducing the costs on the part of the commune which arise or could arise in connection with implementation of a private development project.

Procedure for adopting a ZPI

For a ZPI for a given area to enter into force, it is necessary to launch a formal procedure. The ZPI is adopted by the commune council based on an application filed by the investor via the head of the commune (*wójt, burmistrz,* or mayor [*prezydent miasta*], depending on the type of commune). To apply for a ZPI, the investor does not have to hold legal title to the real estate covered by the ZPI.

The proposed ZPI is drafted by the investor. It should be pointed out that at this preliminary stage in the procedure, it will be necessary to incur significant costs in connection with the draft ZPI,

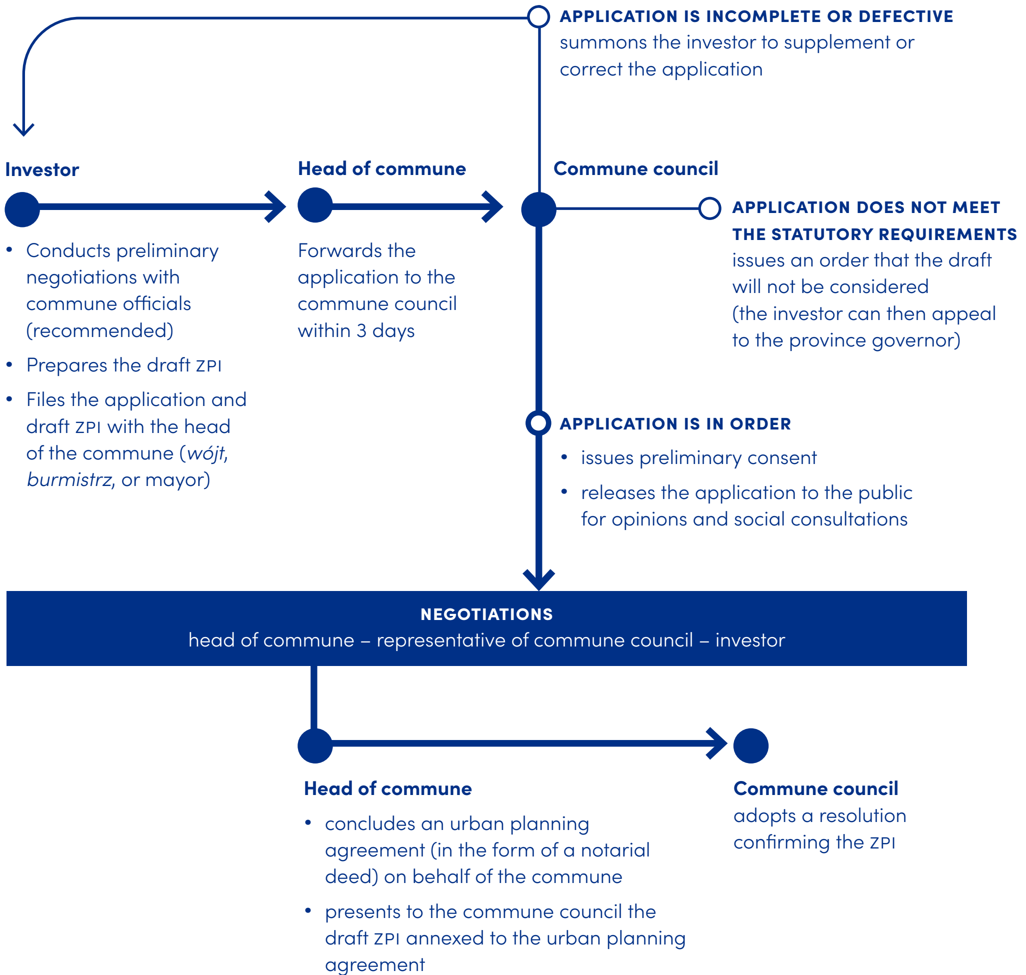
even though there is no legal guarantee that the ZPI will be adopted. For this reason, in practice negotiations should be conducted with commune officials before filing the draft ZPI to determine whether there is a possibility for approval of the ZPI in the shape planned by the investor.

After receiving the investor's application and draft of the ZPI, the head of the commune is required to forward it to the commune council within three days. Introduction of this binding deadline is intended to expedite the procedure. Investors praise this aspect of the regulation. In the past it sometimes happened that an application for a siting resolution was analysed for a long time by different departments in the local office, prolonging the entire process or even effectively blocking it in extreme cases. If the application is incomplete or defective, the investor will be summoned to supplement or correct the application. Failure to meet the statutory requirements will lead to issuance of an order not to consider the application; such an order can be appealed to the province governor.

To take up the actual work on the application, the commune council must consent to take up preparation of the ZPI. The act does not include a time limit for the commune council to consider the draft ZPI. The resolution by the commune council does not yet mean that the ZPI will ultimately be adopted. Consequently, even at a fairly advanced stage the investor remains uncertain as to the final result of the proceeding. The ZPI will be subject to further revisions during the course of the work within the local government office and further negotiations with the investor, preceding the final resolution by the commune council. However, introducing an obligation for the commune council to express preliminary consent at this stage should be assessed positively. This allows the investor to obtain information that the commune council is generally not opposed to the proposal, or if the commune council does not provide preliminary approval, the investor will be spared unnecessary costs.

After the commune council grants its consent, negotiations will begin on the terms of the urban planning agreement (*umowa urbanistyczna*) and the wording of the ZPI. Meanwhile, the draft ZPI is released to the public. Based on the negotiations and the opinions obtained, and taking the social consultations into account, the head

TIMETABLE OF WORK ON INTEGRATED DEVELOPMENT PLAN (ZPI)



COMPLEMENTARY PROJECT

A project involving construction, change of use or reconstruction of:

- utilities networks
- public roads
- rail lines
- public transport infrastructure
- cultural facilities
- childcare facilities for children up to age 3
- preschools
- schools
- daycare facilities
- healthcare facilities
- social assistance facilities
- public-benefit facilities
- sports and recreation facilities
- public green areas
- buildings for commercial or service activities

if they support the main project.

of the commune will conclude an urban planning agreement on behalf of the commune, and present the draft ZPI to the commune council as an enclosure to the urban planning agreement. The application originally filed by the investor is subject to modifications, which may cause the ZPI as ultimately adopted to differ significantly from the investor's preliminary assumptions.

After adoption of the ZPI, the commune council cannot seek changes. However, if the ZPI is rejected, the commune council can resolve to return the draft ZPI to the head of the commune, along with proposed amendments to the urban planning agreement, including changes to the enclosed draft ZPI. It should be pointed out that this rule creates a right but not an obligation on the part of the commune council—it may propose amendments but does not have to do so. Nor does the act provide any time limit for exercise of this right. If the commune council does propose changes, and the investor is still interested in adoption of the ZPI, the necessary actions will have to be repeated.

Urban planning agreement

Adoption of a ZPI entails the need to conclude an urban planning agreement, in the form of a notarial deed between the investor(s) and the commune. Other persons, such as the owners of neighbouring properties, can also be parties to the agreement.

The urban planning agreement includes a commitment by the investor to carry out a complementary project, which is defined very broadly in the act.

Although imposing the obligation to carry out an additional project might seem troublesome due to the increased cost for executing a private development, in practice this gives investors interesting new possibilities.

As pointed out for example by Jagoda Lewandowska, a development specialist at White Star Real Estate, introduction of the duty to execute a complementary project allows the investor to gain an influence on how the space around the main project will be developed, and generally provides a greater opportunity to impact the spatial planning in the area than previously. A complementary project can thus be an instrument for raising the overall

attractiveness of the planned development, not just a financial burden on the investor.

Conclusion of the urban planning agreement is preceded by negotiations among the head of the commune, a representative of the commune council, and the investor.

The act indicates examples of commitments made by the investor to the commune that may be covered by the urban planning agreement, including:

- Transferring real estate that is part of the main project (this is why the urban planning agreement is made in the form of a notarial deed)
- Covering some or all of the costs of implementing the complementary project, including payment of the price for the real estate necessary to execute the complementary project
- Covering some or all of the costs incurred by the commune for adoption of the integrated development plan, including the costs of satisfying the claims of holders of real estate for limiting the right to use their property.

The act does not limit the undertakings that may be included in an urban planning agreement. Thus the commune obtains a highly flexible mechanism for exerting pressure on the investor, and potentially a tool for getting the investor to cover practically any cost, so long as it is related to adoption of the ZPI.

If the investor is the owner or perpetual usufructuary of the real estate where the complementary project is being executed, it is required to transfer the property to the commune. There is no bar to the transfer being free of charge, under rules provided for in the urban planning agreement. Under the act, if the agreement provides for an obligation for the parties to transfer the property, it must specify the rules for the transfer. Because entry into force of the urban planning agreement is conditioned on adoption of the ZPI, an additional dispositive agreement will be necessary to transfer the actual ownership of the property to the commune.

The act indicates that the legal effects of the urban planning agreement arise upon entry into force of the ZPI in the wording specified in the enclosure to the agreement. Entry into force of the ZPI, in turn, is conditioned on passage of the resolution by the commune council. Thus the agreement is first signed with the

investor, and then it waits for adoption of the ZPI by the commune council. Conclusion of the urban planning agreement itself does not require separate consent from the commune council. Rather, consent is implicitly granted upon approval of the ZPI.

The investor's liability for failure to carry out the provisions of the urban planning agreement presents an interesting issue. The act does not prevent the parties from including provisions in the urban planning agreement governing the parties' liability in the event of breach of the agreement. It should be anticipated that in the exercise of their freedom of contract, communes will secure their interests and ensure execution of the complementary project.

If the ZPI is set aside, amended or invalidated within 5 years after the ZPI enters into force, the parties to the urban planning agreement may cancel the agreement within the following 6 months. The act does not specify how the parties' mutual consideration will be handled in that case, or how expenditures should be reimbursed. It appears reasonable to consider including appropriate provisions in the urban planning agreement to enable the parties to mutually settle such matters in the event of cancellation of the agreement.

Betterment fee

The regulations introducing the ZPI do not automatically exempt the investor from the betterment fee (*opłata planistyczna*), but instead provide that the urban planning agreement may include such an exemption in whole or part. Consequently, following adoption of the ZPI, construction of the project, and subsequent sale of the project, the investor can be charged a betterment fee if there is no such exemption provided for in the urban planning agreement. Significantly, an exemption from the betterment fee is subjective, not objective. It is important to note the commentaries stating that if the investor conditions acquisition of the real estate on adoption of the ZPI in the form expected by the investor, and the value of the real estate increases as a result of adoption of the ZPI, the entity that sells the property to the investor may be required to pay the betterment fee, as the seller will not be covered by the subjective exemption for the investor in the urban planning agreement.

ZPI in practice

The procedure for adoption of the ZPI is driven by the calendar of the commune council, and drafting of the ZPI and negotiation of the urban planning agreement is a complicated process. At this stage, considering how long the act has been in force, it is still too early for a practical assessment of this instrument. The first notices have begun to appear on the website of the City of Warsaw on drafting of integrated development plans, while work is underway in Kraków on approval of several such plans, and some smaller communes have already adopted their first integrated development plans.

The statutory requirement that the ZPI be consistent with the provisions of the general plan—even though the process of adoption of general plans has not yet been completed and the parties must instead rely on the study for the general plan—means that currently we are in a period of transition. The practice for using integrated development plans will depend in large measure on the quality of the solutions adopted in the general plans, and on the effectiveness of the communes' organisational units considering investors' applications in this area.

A new approach to defining relevant markets?

The concept of “relevant market” has huge importance in competition law. The definition of the relevant market is a tool used by the European Commission to mark the boundaries of competition between undertakings. The Commission defines the relevant market for specific undertakings when determining the existence of a dominant position, analysing anticompetitive agreements, and conducting merger controls. This makes it essential to become familiar with the new guidance from the Commission on the definition of relevant markets.

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The notion of "relevant market" in competition law differs from the notion of "market" applied in a business context. Businesses often use the term "market" to refer to an area or place where they sell their products, or as a general term for the industry or sector in which they operate. For example, a company might claim that it operates on the global market, if it believes that it is competing for revenue on a worldwide scale with other companies on all continents.

By contrast, "relevant market" is a key concept in the field of competition law, as well as a legal and economic construction that is the basis for applying the regulations. (Indeed, competition law perhaps best illustrates the interpenetration of concepts, rules and institutions drawn from the study of economics and law.)

Under the Commission guidance from 2024, the main purpose of defining the relevant market is to identify the effective and immediate **competitive constraints** faced by undertakings subject to assessment under competition law when they offer particular products in a particular area.

Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645)

The new guidance is intended to increase legal transparency and certainty for undertakings and facilitate their compliance with competition law, and also to increase the predictability of findings by the Commission in its examination of anticompetitive practices and when reviewing concentrations of undertakings.

Relevant market and its significance for competition law

The new guidance contains a more expanded general methodology than in the 1997 guidance for defining relevant markets.

Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

The new guidance regards the three main sources of competitive constraints as demand substitution, supply substitution, and potential competition.

DEMAND SUBSTITUTION
the substitutability of products from the perspective of the customer

SUPPLY SUBSTITUTION
the substitutability of products from the perspective of suppliers

POTENTIAL COMPETITION
refers for example to competing firms which could enter a given market in the future, or firms from other sectors offering similar products or services.

The basic definition of the relevant market in the new guidance emphasises the two most important elements, i.e. the products involved (product market) and the territorial aspect (geographic market).

The **relevant product market** comprises all those products (i.e. goods, services or technologies) that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their prices and their intended use, taking into consideration the conditions of competition and the structure of supply and demand on the market.

The **relevant geographic market**, in turn, comprises the geographic area in which the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas.

In certain instances, in analysing the market it is necessary to consider additional factors like time, due for example to seasonality or peak/off-peak demand for a product, such as electricity.

Moreover, the temporal perspective of the relevant market will be different in cases involving anticompetitive practices than it is

in concentration cases. For anticompetitive practices, what is relevant is the structure of the market over the duration of the practice in question. In merger controls, the assessment of the intended concentration by the competition authority is a forward-looking analysis, predicting the impacts on competition on the market over a number of years.

General principles for defining the relevant market under the new guidance

The new guidance contains a useful list of general principles for defining the relevant market. They can be used as a first resource when determining the boundaries of the relevant market in a range of cases. In this respect the new guidance is more detailed than the guidance from 1997.

The general principles of market definition include the following elements:

- Market definition is always based on the facts of each case—relevant markets may differ for example from sector to sector, at different levels of the supply chain, or across geographic areas.
- The Commission is not bound to apply the definition of a relevant market from its past decisions in future cases.
- Market definition includes effective and immediate competitive constraints. However, the Commission takes into account all types of competitive constraints (whether effective and immediate or not) in the assessment of competition, including competitive constraints from outside the market, such as potential competition.
- The Commission takes expected short-term or medium-term structural market transitions into account where they would lead to effective changes in the general dynamics of supply and demand within the period relevant to the forward-looking assessment. Structural market transitions can affect the definition of the relevant product market, for example where there is sufficient probability that new types of products are about to emerge on the market. Structural changes may also affect the definition of the relevant geographic market, for example where there are impending technological changes or impending

changes in the regulatory framework. For structural changes to be considered, there must be "sufficient likelihood" that the projected structural changes will take place, based on reliable evidence going beyond mere assumptions.
- In defining the relevant market, non-price parameters with equivalent added value play an increasingly important role.

Non-price parameters include in particular:
- The degree of the product's innovativeness
- Various aspects of product quality, e.g. durability, value, safety, protection of privacy, and accessibility (including delivery time, the reliability of supplies, and transport costs)
- Customers' purchasing behaviour.

The most common theoretical tool applied to date in analyses of the price aspect of the relevant product market is whether a hypothetical monopolist could exercise its market power—whether a hypothetical monopolist in the proposed market would find it profitable to implement a "small but significant non-transitory increase in price," known as the SSNIP test.

The SSNIP test is hard to apply in the case of products with a zero monetary price, where undertakings compete on parameters other than price, such as quality or the level of innovation. In such cases, the Commission proposes to apply the hypothetical monopolist test by assessing the behaviour of customers based on a "small but significant non-transitory decrease of quality" (SSNDQ test).

Defining the market in specific circumstances

The Commission's guidance also discusses specific aspects of the relevant market peculiar to certain sectors of the economy, particularly innovative markets and multi-sided platforms, but also after-markets, digital ecosystems, and bundled markets.

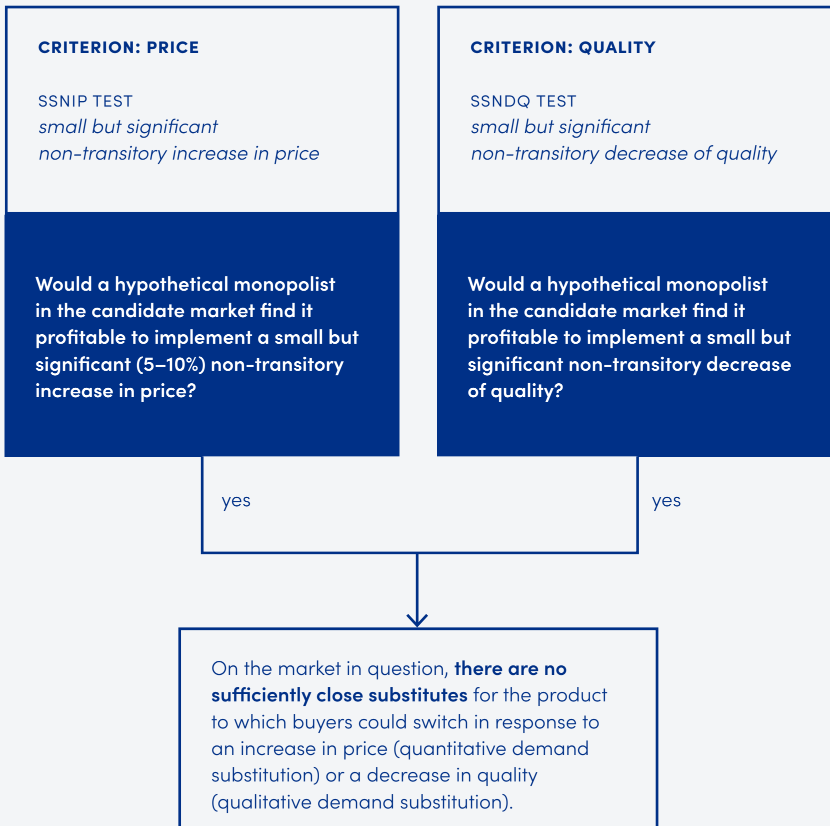
Innovative markets

Innovations are a key aspect of competition. They affect many different industries characterised by a great emphasis on research

Hypothetical monopolist test

Under competition law, the relevant market can sometimes be as narrow as a single product.

The hypothetical monopolist test can be used to determine the actual scope of the product market.



and development. These uncertain processes are connected with "pipeline products," which do not yet exist as end products but may soon be launched on the market. Even though they are not yet available to customers, they should be taken into account when defining the relevant market.

The Commission takes the view that pipeline products may belong to an existing relevant product market (as substitutes) or may form a separate relevant market. Even mere innovative efforts by undertakings, and the existence of R&D processes, may be separately examined by the Commission when determining the boundaries of competition on the market.

Multi-sided platform markets

A multi-sided platform is an organisation that creates value primarily by supporting interactions between different groups of users. These groups may include the producers of items (such as content creators or product sellers) on one side, and on the other side the recipients of these items (audiences or buyers). Exploiting network effects, the platform reduces operating costs and supplies the infrastructure needed to conduct transactions. Typical examples of multi-sided platforms include payment card systems and ad-sponsored platforms such as LinkedIn.

As the platform supports interactions between different groups of users, a relevant product market may be defined for the products offered by a platform as a whole (encompassing all user groups), or separate relevant product markets for the products offered on each side of the platform. This depends primarily on whether the actions of specific user groups impact the demand of other groups.

Non-price parameters can be particularly relevant for assessing substitutions in the operation of multi-sided platforms, because these platforms often supply products at a zero monetary price. Then the focus will be on factors such as the functionalities of the product, its intended use, barriers or costs of switching, interoperability with other products, data portability, and licensing features. This provides practical opportunities to apply the SSNDQ test to assess whether customers would switch providers due to a decrease in quality.

After-markets, digital ecosystems and bundled markets

An after-market exists when consumption of a durable product (primary product) leads to consumption of another connected product (secondary product). For example, the purchase of an automobile is connected to the need for ongoing service and repairs.

It is similar in the case of digital ecosystems, which may be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance by technological links or interoperability. An example of a digital ecosystem is an ecosystem of products built around a mobile operating system, including hardware, an application store, and software applications themselves.

In bundled markets, although the consumption of one or more products is not dependent on a primary product, customers may still prefer to consume several products together as a bundle. For example, for some customers there may be a separate product market for the one-stop-shop supply under contracts of traditional office supply categories of stationery, paper, ink and toner.

In the Commission's view, in such situations, the relevant market may generally be defined in any of three different ways:

- As a system market comprising both the primary and the secondary product
- As dual markets, i.e. the market for the primary product and the market for the secondary product
- As multiple markets, namely a market for the primary product and separate markets for the secondary products associated with each brand of the primary product.

In the new guidance, the Commission explores in more detail situations where each of these methods of defining the relevant market is more appropriate than the others.

Methods for determining market share

The next stage in a competition analysis is estimating market shares, i.e. the measure of market power held by particular participants in the relevant market. In calculating market shares, the Commission first considers the value and volume of merchant sales or merchant purchases in the given sector (i.e. to or from unrelated third parties).

The new guidance also contains a helpful overview of other factors that can be more useful for determining market power for specific products or sectors.

TYPE OF MARKET	USEFUL METRICS
Markets characterised by the strategic importance of capacity	• Production capacity • Production volume
Tender markets and innovative markets (involving formal calls for tenders or where innovative products are at the development stage)	• Number of suppliers • Number of contracts awarded (or won)
Digital markets (including multi-sided platforms)	• Number of active users • Number of website visits or streams • Time spent on a site • Audience numbers • Number of downloads, updates or interactions • Volume or value of transactions concluded over a platform
Transport markets	• Units of fleet • Seat capacity • Number of trips • Number of access rights (such as take-off/landing slots at specific airports)
Markets with significant investments in R&D	• Level of R&D expenditure • Number of patents • Number of patent citations

Summary

Publication of the new guidance should be welcomed. It contains a range of pointers on interpretation summing up the decisional practice to date of the European Commission on identification of relevant markets. It makes an important contribution to legal transparency and predictability.

But undertakings should be aware that the Commission maintains significant discretion and flexibility in how it conducts analyses of the relevant market, and that in its practice it will continue to clarify its interpretation of the relevant market. Sometimes it will be hard for undertakings to find answers in the guidance to their pressing questions.

The previous guidance on relevant markets had been in force since 1997. The new guidance is unlikely to break this endurance record, considering the rapid pace of change in the world around us. Yet other factors (such as the war underway for the past three years across the EU's eastern border) are causing certain routine legislative and interpretive activities to recede into the background. The deepening identity crisis of the EU itself may also be to blame, as this once-thriving project is more and more evidently going astray in its principles, politics and economics. Perhaps there should be more focus on restoring the EU project to health than on drafting more guidelines and communications?

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