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A few words on outsourcing in Poland

Danuta Pajewska

In a world of larger and larger corporate ventures and the need to manage them rationally, companies do not have to do everything for themselves. But when considering outsourcing, it is important to know what to look out for and what to protect against so that outsourcing does not become a source of additional costs instead of a way to cut costs.

The idea of outsourcing is to conduct business operations using external resources. Large companies and capital groups pay increasing attention to efficiency and operating costs. Such functions as personnel, payroll, procurement, IT, or back-office in the case of financial institutions, are sometimes unnecessarily duplicated within a capital group or generate greater costs than if they were carried out by a specialised external firm.

Outsourcing services should be looked at from three different perspectives. First is the ability to use outsourcing by regulated institutions and the types of activities they can outsource. In the case of outsourcing by banks, investment firms and payment institutions, there are special legal rules. In the case of other companies, there are no special rules, but it is important in following the existing law to select a method that will enable achievement of the optimal effects of outsourcing.

The second perspective has to do with companies performing outsourcing services. It is important to note the degree of legal freedom for outsourcing companies to provide such services, which entities may perform them and what requirements they must meet. There are certain categories of services (such as accounting) that require specific qualifications.

The third set of issues that should be considered concerns the corporate aspects of outsourcing within capital groups. If a capital group establishes a company to perform certain services centrally, organise purchasing and take decisions in this regard, there may be a risk of violation of the corporate authority of board members of companies within the group, who may be personally responsible for the effects on their company, as a separate entity, of decisions they had no influence over. For the convenience of the companies in the group, the rules for use of shared services should be properly addressed, particularly by providing for decision-making procedures, so that the management boards of the companies are not deprived of the decision-making authority and duties assigned to them, which are tied to the managers' corporate liability.

In recent years, Poland has become a very attractive location for outsourcing centres due to the availability of educated staff, the ability to obtain public aid, the relatively low cost of centres, and the availability of office space. Foreign companies deciding to set up shared-services centres in Poland include banks and other financial institutions that operate in numerous countries, which in light of the nature of their back-office function may process data in a single centre created for that purpose. Banks operating in Poland also increasingly take advantage of the opportunity to outsource certain functions.

Outsourcing contracts are subject to specific legal regulations only in the case of financial institutions. In the case of other types of entities, outsourcing contracts are not governed by specific regulations, but fall within the category of miscellaneous contracts. Such arrangements lie within the realm of freedom of contract, and may be classified as a contract of mandate, a service agreement, or a contract to perform a specific work, depending on the nature and scope of activity of the outsourcing company. Thus it is important to define precisely the scope of the outsourced activities and the related rights and obligations of the parties, as well as the liability of the outsourcing company. This is particularly important for determining whether the agreement is one for making best efforts (e.g. a service agreement or contract of mandate) or is intended to produce a specific work or result.

If conclusion of an outsourcing agreement may result in outsourcing of the processing of personal data, the agreement should contain a provision specifically entrusting this activity to the provider of outsourcing services. The agreement should state that the service provider may process personal data only for the purpose indicated in the agreement and should require the service provider to comply with the organisational and technical requirements for data controllers as provided by law. The outsourcer will be liable for processing of the data by the outside service provider.

Proper protection should also be given to information classified as confidential or professional. Transmission of such data to an outsourcing centre must be made in the manner prescribed by law, specifically the Banking Law and the laws governing the operations of other financial institutions, which contain a number of restrictions on external transmission of such information.

The opportunity to receive additional financial benefits may be of interest to entities intending to open an outsourcing centre in Poland. Such benefits may flow from conducting operations in a special economic zone, reimbursement of job creation and training costs, and long-term direct aid.

Operating in a special economic zone under an SEZ permit provides an exemption from corporate income tax. However, SEZ benefits are not available in the case of regulated industries, specifically financial services.

Reimbursement of costs of establishing jobs is available upon application by the employer to the mayor of the locality, after conclusion of a corresponding agreement. The beneficiary is required to maintain the subsidised position for a period of two years. Such assistance is available only when hiring registered unemployed persons.

Refund of training costs is available upon application to the mayor of the locality and conclusion of a corresponding agreement. The available aid may be up to 80% (although usually it is no more than 50%) of the training costs, but no more than three times the average monthly salary in Poland.

Long-term aid is available under long-term plans adopted individually for a particular project by the Council of Ministers, for either job creation or investment expenditures. Such aid is granted on the basis of negotiations, without any specific limits in scope or time. Because of the incentive nature of the aid, any expenditures pertaining to the investment should be incurred only after obtaining the green light—typically a letter confirming the aid from the government. This is also the first step in the procedure to determine the final amount of state aid. The aid will also be subject to notification to the European Commission.

If personal data escape…

Marek Szydłowski

What is a release of personal data?

In popular usage, a "release" of personal data means any situation in which an unauthorised person obtains access to personal data processed by a data controller. Under Art. 37 of the Personal Data Protection Act of 29 August 1997, only persons holding authorisation from the data controller are permitted to process personal data. Such authorisation should be made in the name of each individual, specifying the type of data the person is authorised to process. Therefore, it cannot really be said that there is a release of personal data from a data controller if, in violation of Art. 37 of the act, the data controller has failed to issue authorisations. In such case, there is an ongoing violation of the data protection regulations, which falls under the criminal offence set forth in Art. 52 of the act.

Access to personal data by an unauthorised person does not necessarily mean that the person could modify the data. It is sufficient if the person reviewed or could have reviewed the data (e.g. by receiving an e-mail containing a file with the data). Therefore, any situation in which an unauthorised person reviewed or could have reviewed personal data constitutes a release of personal data.

Generally, a release of personal data will almost always be due to a breakdown in one or more of the technical and organisational measures used in processing of the data, specified in Art. 36–39 of the Personal Data Protection Act and the executive regulation issued pursuant to Art. 39a of the act, or failure to apply such measures.

A release of personal data may occur not only from the data controller, but also from an entity hired by the controller to process the data, whose legal situation is established in accordance with Art. 31 of the act (i.e. an entity which is a data processor). Under Art. 31(4) of the act, the data controller is also responsible for the data processor's compliance with the regulations concerning the technical and organisational measures used in processing the data. Therefore the consequences of a release of personal data fall first and foremost on the data controller, and it is the controller that must be capable of taking the appropriate steps—including through issuance of orders to the data processor—in order to prevent a release of data or minimise its negative effects.

Legal effects of data release

Unfortunately, this situation constitutes a criminal offence under Art. 51 of the act. This offence may also be committed unintentionally: In such case, any gap in the systems or procedures for securing personal data against disclosure to an unauthorised person will be grounds for criminal liability for the unintentional form of the offence set forth in Art. 51. The intentional form of this offence will arise in a situation where the data controller knowingly disclosed the data or knowingly failed to apply an organisational or technical measure to secure the data (thus consenting to its disclosure), or in the unintentional form if the data controller applied organisational or technical measures inadequately.

Liability for commission of this offence may be borne by the members of the management board of the data controller, or the information security administrator.

Apart from criminal liability, a release of data may also violate the privacy of the individuals whose data were involved (the data subjects). Privacy is one of the personal interests protected under Art. 23 of the Civil Code. Therefore a person whose data were released

has claims under Civil Code Art. 24 (and if the release involved the person's image, also a claim under Art. 81 of the Law on Copyright and Related Rights of 4 February 1994). Thus in the case of a release of personal data, civil claims may also be asserted by the data subjects.

When a release of data is the subject of a complaint to the Inspector General for Personal Data Protection or is reported broadly in the media, it will probably also be reviewed through an inspection by the data protection authority. As a result of the inspection, a decision may be issued under Art. 18 of the Personal Data Protection Act ordering changes in the data processing methods. If the changes affect IT systems, they may be costly to implement. However, failure to comply with decisions issued by the Inspector General for Personal Data Protection may result in employment of certain methods of enforcement provided under the Act on Enforcement Proceedings in Administration of 17 June 1966. These measures include a fine to enforce compliance, and in certain instances substitute performance is also possible.

Procedure in the event of a release

The first item that should be determined by the data controller in the case of a release of personal data is the cause and course of the release. It often happens that a data controller learns of a release through its effects, e.g. when destroyed files are found in a waste dump or complaints are filed by data subjects. Thus every data controller should have data processing systems and procedures in place so that if there is a release, the controller can readily identify where it occurred, or at least the general area, and also identify the culprit.

The current provisions of the Personal Data Protection Act do not address data release situations. Thus under current law there is no legal obligation to inform the data protection authority or the data subjects that a release has occurred. This means that in a situation where a release of data has occurred, each data controller will have to decide for itself whether it should notify the Inspector General for Personal Data Protection and the data subjects. Clearly, one aspect of the analysis by the data controller will be whether the release of the data could cause financial losses to the data subjects or the data are included within the category of "sensitive data" referred to in Art. 27 of the act.

Notification of the data protection authority should be considered in a situation in which the release resulted from the fault of a processor of the data and the processor is not cooperating with the data controller concerning the release or taking steps to prevent another release in the future. Then it would be reasonable to notify the data protection authority, indicating the need to examine the activity of the data processor and issue a decision concerning processing of personal data by the processor. When making a decision on notification of the Inspector General for Personal Data Protection, it should always be borne in mind that the management board of the data controller may be held responsible under Art. 51 of the act—even if the release occurred due to the fault of the processor.

Notification of the data subject whose data have been released will always be necessary if the data subject could take steps to protect against the negative effects of the release. For example, in the event of a release of credit card numbers, the cardholders should be notified so that they may cancel their cards and avoid financial losses. In such a situation, failure to notify the data subjects would cause a significant increase in the risk of civil liability of the data controller, because the claim against the data controller will involve not just a claim for moral satisfaction for the injury of unlawful release of the subjects' data, but a claim for damages for specific financial injury. A similar situation may occur in the case of release of sensitive data, where the claim for moral satisfaction may be higher due to unlawful disclosure of characteristics of the data subject which should not be known to unauthorised persons.

When deciding on notification of the Inspector General for Personal Data Protection or data subjects, consequences should necessarily be imposed on those guilty of the release, and data processes and systems in place should be reviewed in order to make changes to prevent releases in the future. In the case of complaints or claims by data subjects, a decision must also be made on how to deal with them, bearing in mind that too conciliatory an approach may attract more persons eager to file complaints and demand compensation for alleged injury.

It is also necessary to prepare for actions on the part of the data protection regulator and law enforcement authorities. Here the approach will largely depend on the facts, including the degree of fault on the part of the data controller in occurrence of the release.

Conclusions

A release of personal data is a crisis situation for businesses and is also a test of the company's systems and procedures. If a release has occurred, it is too late to protect against the negative consequences by modifying or implementing such systems and procedures. Therefore any manager dealing with issues of personal data processing should have an eye on the negative consequences of a release—and make decisions on data processing that will prevent a release from occurring in the first place.

Employment outsourcing

Dr Szymon Kubiak

Outsourcing agreements are the subject of heated discussion in Poland—especially during a time of economic crisis, when everyone is seeking additional savings. From the point of view of a legal practitioner, it is necessary to consider what to draw attention to and how to protect the client against unnecessary risks—particularly in the context of employment outsourcing, which has become so popular recently.

If an employment outsourcing agreement is properly drafted and performed, it should not result in creation of an employment relationship or service relationship between the buyer of the outsourcing services and the workers (employees of the outsourcing company). Simplifying, the fundamental difference between employment outsourcing and hiring of regular or temporary employees (within the meaning of the Act on Hiring of Temporary Employees of 9 July 2003) is that the persons performing the work are not subordinated (legally or factually) to the entity where the work or services are performed (the buyer of the outsourcing services).

Entrusting to outside entities tasks previously performed by the employer itself may result in transfer of a part of the workplace, for purposes of the Transfer of Undertakings Directive (2001/23/EC), as implemented into Polish law in Art. 23^1 of the Labour Code. Under these provisions, upon transfer, by operation of law, the employees become employees of the acquirer—in this case the

outsourcer (or, in reverse, they once again become employees of the outsourcing company when the outsourcing agreement terminates). This could effectively eliminate the benefits such as reduction of employment costs. It will therefore usually be in the interests of the parties entering into an outsourcing agreement to define the scope of the assumed tasks and to shape the parties' mutual relations to exclude or at least significantly limit the risk of application of the regulations concerning transfer of all or part of the workplace.

Neither the Transfer of Undertakings Directive nor Labour Code Art. 23[1] defines the concept of transfer of a workplace or part of a workplace to another employer. This concept is interpreted broadly in the case law of the European Court of Justice and the Supreme Court of Poland. To make matters worse, the precedent from the Supreme Court indicates a much broader understanding of the transfer of a workplace than under the directive, because Polish law does not include a requirement that the transferred unit maintain its identity. But under Art. 1(1)(b) of the directive, there is a transfer of a workplace or part of a workplace "**where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary**."

Until recently the Supreme Court of Poland had expressly held that the element of identity is irrelevant to the application of this provision. But there is light at the end of the tunnel. In one of its more recent rulings under Labour Code Art. 23[1] (Supreme Court judgment of 13 April 2010, Case No. I PK 210/09), the court attempted to limit such a broad construction of transfer of a part of the workplace. The court stated that the determination of whether a transfer of part of the workplace has occurred in the case of outsourcing of specific tasks to an external entity requires a holistic and comprehensive assessment of such factual circumstances as the type of establishment, acquisition of intangibles and other assets, acquisition of a majority of the staff, assumption of customers, and, **in particular, the degree of similarity between the activity conducted before and after assumption of the tasks**.

In short, even though employment outsourcing is increasingly common, no uniform practice (particularly in the case law) has developed yet in assessing such agreements. No standard form of employment outsourcing agreement exists, and it probably never will, because the economic reality in which outsourcing is used is too varied. Thus only a well-drafted agreement, adapted to the factual and legal situation of both the buyer and the seller of the outsourcing services, can safely and effectively meet the business goals of the parties while protecting them against lengthy, costly disputes.

Regulated outsourcing in financial institutions

Marcin Pietkiewicz

The regulations concerning outsourcing at financial institutions play a special role due to the status of financial institutions in the economies of developed countries and their influence over the functioning of commercial entities that entrust their assets to the institutions' safekeeping and management.

For these reasons, financial institutions are often referred to as institutions of public trust. It follows that their assignment of specific activities connected with regulated activity to third parties (outsourcing) should be done with particular caution so that the interests of the institutions themselves, but first and foremost the interests of their clients, are not violated.

The interests of the clients of financial institutions do not always refer to a purely financial dimension. They may involve, for example, personal interests. A financial institution should on the one hand pay attention to maintaining and growing the value of assets entrusted to it, and in this context should apply preventive measure to avoid a threat of loss to the assets because of unlawful actions by persons employed within the financial institution as well as third parties. The second dimension of due care for the interests of the client is the concern for the client's data and information concerning the client's contractual relationship with the institution. In the case of outsourcing of activities directly related to performance of financial services, these two aspects are inextricably intertwined, which often determines whether the given service will be subject to the specific requirements for outsourcing in financial institutions.

Provisions concerning regulated outsourcing have gradually been introduced in more and more types of financial institutions, beginning with banks (Art. 6a–6d of the Banking Law of 29 August 1997), and including brokerages (Art. 81a–81g of the Act on Trading in Financial Instruments of 29 July 2005) and investment fund companies (Art. 45a of the Investment Funds Act of 27 May 2004). Separate regulations have yet to be introduced in this respect for insurance companies.

Types of entrusted activities subject to regulation

The provisions concerning the activity of specific types of financial institutions do not uniformly indicate the same types of activity subject to regulated outsourcing. And not all activities connected with the activity of financial institutions and entrusted to outside entities are subject to the requirements of regulated outsourcing.

The basic principle is that entrusting the performance of regulated activities (banking, brokerage and investment activity) to third persons cannot result in such activities not actually being performed by the financial institution—in other words, outsourcing cannot lead to a situation in which the financial institution is a mere "mail drop." It is also prohibited to outsource the functions of the management board of the company, i.e. representing the institution and conducting its affairs.

The most extensive regulations in this respect are included in the Banking Law, and distinguish two groups of activities which are subject to the special requirements of regulated outsourcing. The first group lists activities involving intermediation in banking activities (Art. 6a(1)(1)), which to a large

degree must be performed on the basis of an agency agreement (e.g. conclusion of bank account agreements, credit agreements, and agreements for cash loans to individuals). This is not an exhaustive catalogue, but other intermediation activities than those directly mentioned may be performed only on the basis of a permit from the Polish Financial Supervision Authority. The second category of activities connected with performance of banking activity which may be assigned to third parties include "factual activities" connected with banking activity (Art. 6a(1)(2)). These are activities directly related to banking activity for which performance most often requires access to information that is sensitive from the point of view of the banking activity conducted by the bank (e.g. information concerning the bank's customers, including information covered by banking secrecy), or activities designed to assure continuous, uninterrupted operation of the bank and performance of its banking activities, e.g. the operation of IT systems for direct performance of banking activity.

Unlike the Banking Law, the regulations applicable to brokerages and investment fund companies do not expressly define the types of activities whose entrustment to outside entities is subject to special regulatory requirements, but instead indicate which activities are not subject to such requirements. These are agreements involving activities that are not materially important for proper performance of duties specified by regulations of law, financial condition, or the continuity or stability of operations, such as legal services, accounting, or protection of property.

Outsourcing agreements

The regulatory requirements imposed on financial institutions entrusting activities to external contractors connected with the institutions' regulated activity have a huge impact on the content of the agreements under which such assigned activities are performed (outsourcing agreements). Properly framing the rights and obligations of the parties will insure formal compliance with the statutory requirements, but more importantly will assure the regulated entity the ability to exercise real supervision over the contractor's performance of the outsourced services.

Among the most important provisions that should be found in outsourcing agreements concluded by financial institutions are provisions giving the financial institution the right to demand information on the contractor's financial condition and access to information and documentation connected with the performance of the entrusted activities. The latter is particularly vital in the context of oversight by the Financial Supervision Authority, for which purposes the financial institution must provide access to any and all information connected with performance of the outsourcing agreement, including, when required by the nature of the entrusted activity, providing representatives of the regulator with access to documents and information located at the contractor performing the activity.

In order to be able to exercise effective supervision over the contractor and proper management of the risk connected with the entrusted activities, the outsourcing agreement should precisely define the methods for evaluation of the performance of the activities and the measures that may be undertaken by the financial institution in order to assure proper performance of the agreement. The financial institution should also secure for itself the ability to terminate the agreement immediately if the contractor materially violates the terms of the agreement or performs the agreement in violation of applicable law.

A separate issue which significantly impacts the relations between the parties to the outsourcing agreement is the scope of the contractor's liability to the financial institution. The regulations concerning outsourcing by banks and brokerages address this issue in the same way, and fairly restrictively. It is prohibited to limit or exclude the service provider's liability to the bank or brokerage for a loss caused to the institution's customers resulting from non-performance or improper performance of the

outsourcing agreement by the service provider. On the other hand, banks and brokerages are prohibited from limiting their own liability to customers for losses caused by non-performance of the outsourcing agreement by the service provider.

Access to specially protected information

As indicated in the introduction, one of the most important aspects of entrusting activity connected with the regulated activity of financial institutions to an outside entity is access to information legally protected under banking secrecy or professional confidentiality. There are two opposing interests at work here, as on the one hand providing confidential information to the contractor is often necessary for proper performance of the services, and on the other hand it is in the interest of the persons whose data are involved that the circle of persons with access to the data be limited and that the data be protected under the same rules that apply within the financial institution.

Entrustment to a third party of performance of specific activities connected with the operations of a bank, brokerage or investment fund company is one of the circumstances justifying the institution's transfer of client data to the contractor. This ability to transfer such information is an exception from the general rule of the confidentiality of information about the client, and thus the information may be provided when necessary for proper performance of the outsourcing agreement and the scope is justified by the nature of the services performed. The outsourcing agreement should also address as extensively and precisely as possible how the contractor and its staff should handle sensitive information. Outsourcing of activities connected with the regulated activity of a financial institution to a third party must not have a negative impact on the security of legally protected information.

Outsourcing by foreign financial institutions

Entrustment of activities connected with the regulated activity of foreign financial institutions to Polish businesses is not covered by the Polish regulations concerning outsourcing by banks, brokerages and investment fund companies. This means that the permissibility and conditions of contracting out the performance of specific activities are determined by the domestic regulations of the home jurisdiction of the foreign financial institution.

It should be pointed out, however, that a Polish business performing specific activities for foreign institutions will be able to perform only activities that are not in themselves regulated activities in Poland (e.g. banking or brokerage activities) or activities whose performance requires fulfilment of additional conditions (e.g. the activity of an agent of an investment company). Otherwise, the Polish business would have to obtain the applicable permit or fulfil the conditions for performance of the activity in question.

With respect to the legal aspects, outsourcing by financial institutions related to their regulated activity is a highly complex topic, directly or indirectly touching on most of the areas of the operations of the institution, from its internal operations and organisational aspects to its relations with external service providers and the clients of the financial institution, who ultimately feel the effects of the outsourcing. The number and complexity of the areas of operation of such institutions and the overlapping areas of risks related to outsourcing mean that this process must be managed and supervised very specifically within the internal organisation of the financial institution, and should be precisely covered by internal control and audit procedures.

What to watch out for when outsourcing accounting services?

Kinga Ziemnicka, Łukasz Śliwiński

The market for business process outsourcing is growing rapidly, bringing an expansion of the services offered in this area. Outsourcing may involve a company's functions directly connected with its core business (such as production of certain components of the company's final product), or functions connected with the company's internal organisation (maintaining the accounting books, HR and payroll, IT services or collection of receivables).

Outsourcing of accounting services may include, more specifically, maintaining accounting and tax records, but also payroll calculations, financial control (i.e. managerial accounting), as well as advice in these areas, for example in connection with the rules for financing of the operations of the enterprise, establishing the capital structure, and maintaining financial liquidity, as well as advice on tax optimisation, and preparation of the required documentation, including reports and tax returns.

Pluses and minuses of outsourcing

When deciding to outsource certain functions to external contractors, businesses seek to achieve the following goals:

- **Reduction of costs** incurred by the relevant division of the enterprise, first and foremost a reduction in staffing costs (for example to maintain the accounting books), including office space, equipment, software and technology for such staff
- **Access to specialised, professional knowledge and greater efficiency** of the outside contractor, compared to the same function performed in-house
- **Focus on core business**, which can result in increased output
- **Limitation of risks connected with performance of tasks requiring specialised knowledge.**

In seeking opportunities for reduction of their operating costs, businesses more and more frequently decide to close their in-house accounting departments and shift these tasks to outside accounting firms. This is tied to yet another benefit, involving **liability for potential irregularities in the accounting and tax records**. An accountant hired as an employee who causes a loss through his or her own fault, as a result of non-performance or improper performance of employment duties, is liable to the employer to make up the loss, but the damages are capped at an amount equal to three months' wages as of the time of the loss (Labour Code Art. 119). The amount of damages is unlimited only in the case of intentional fault on the part of the employee (Labour Code Art. 122). This limitation on liability clearly does not apply when accounting services are contracted out to an external company. In other words, **the liability of staff employed in an in-house accounting department is limited by the**

Labour Code, while the liability of an external accounting firm is typically determined by the contract with the client or general rules of civil liability.

Although transfer of specific corporate functions to an outside contractor can generate the benefits mentioned above, the risks associated with such outsourcing must not be overlooked. The most typical downsides of outsourcing include:

- Access by an external entity to **confidential information** connected to the company's operations, as well as customer information
- Loss of the ability to conduct **direct, ongoing control** over the outsourced functions
- Restriction of **direct access to data** concerning the company's operations, although this problem may be largely eliminated through online access (via a secure connection)
- In certain situations, **liability for the results of services performed by external entities**, for example errors in calculation of tax obligations.

Thus a decision on whether to outsource certain functions will always be based on an analysis of the related pluses and minuses.

Before a business concludes an **outsourcing agreement** for accounting services, it should pay particular attention to such issues as the legal qualifications to perform the activity on the part of the outsourcing company's staff, and the scope of liability of the outside contractor. Under the Accounting Act, the service of maintaining accounting books, including more specifically accounting and tax records and other tax documents and preparing tax statements and declarations, may be performed only by **authorised persons**, i.e. certified accountants, auditors and tax advisers. While such authorised persons may be assisted in their duties by persons without such qualifications, they must be provided direct, ongoing supervision by authorised persons. If there are any doubts, the client should demand that the contractor present the relevant certifications.

It is equally important to word the outsourcing agreement properly, which can significantly limit risks and negative consequences for the client.

Agreement for outsourcing of accounting services: What to pay attention to?

The **scope of the accounting services** to be performed should be defined in the outsourcing agreement concluded between the client and the accounting firm. Such agreement generally falls within the category of miscellaneous agreements, although it may contain elements typical for a contract of mandate or a service agreement. The terms of the agreement should indicate more specifically the procedure for performing the accounting services, the rules for communication, circulation of documents, and access to information, and the deadline for performance of the contractor's duties. It is therefore in the interest of the client to assure that the scope of the services and the manner in which they are performed are described as precisely as possible in the outsourcing agreement. This helps avoid doubts in the course of performance of the agreement concerning what falls within the scope of duties of the accounting firm.

The **fee provisions** should also be clearly defined. They may be based on a flat fee or tied to the amount of work performed, or some combination of these two forms, for example providing that standard services are covered by a flat fee and additional services, e.g. involving tax advice, are charged on the basis of work input.

The accounting firm should also hold a current **civil liability insurance policy** for loss suffered in connection with the service of maintaining accounting books. Clearly, in this case **the client should be interested in the amount of the insurance coverage,** which should be proportional to the size and complexity of the enterprise whose accounting is to be maintained by the outside firm under the outsourcing agreement. For this reason, it is worthwhile to consider the issue of the liability of a contractor providing

accounting services for failure to perform this undertaking properly.

It should be stressed that it is the client, as the taxpayer, that bears fiscal criminal liability with respect to taxes. Under Art. 26 of the Tax Ordinance, the taxpayer bears unlimited liability for the taxes arising out of its tax obligations. Similarly, under Art. 52(1) of the Accounting Act, the director of the unit (e.g. the management board in the case of a company) shall assure that the annual financial report is prepared no later than 3 months following the balance sheet date and submitted to the competent authorities, pursuant to the laws applicable to the unit and the provisions of the corporate charter. In other words, **the client is responsible for its obligations, including accounting reports and tax obligations, despite entrusting maintenance of the accounting records to an outside contractor.**

This rule has been stated by the Supreme Administrative Court, which held in one of its rulings that because tax obligations are addressed solely to the taxpayer, the taxpayer is also responsible for proper tax documentation of its operations as well as proper selection of an accounting firm and the accounting firm's proper performance of its duties. This liability was not changed by the fact that the taxpayer had entrusted the maintenance of its tax records to a professional accounting firm. The same rule applies to an outsourcing company which the enterprise has hired to make tax payments (Supreme Administrative Court judgment of 16 October 2003, Case No. SA/Bd 1730/03).

Meanwhile, an enterprise which is the buyer of accounting services and which through the fault of the accounting firm has suffered a loss or a criminal or administrative sanction, for example for tax arrears, will be entitled to pursue a civil action against the service provider for contractual damages under general rules. Thus if the client suffers a loss because the accounting firm fails to comply with its contractual obligations, the client may seek damages before the state court, unless the parties have agreed on a different forum.

To make it simpler to enforce claims for breach of an outsourcing agreement for accounting services, the client may seek to provide for a **contractual penalty** in the agreement, which will allow the client to avoid the necessity to prove the amount of the loss in the future. But it is also important to include a provision permitting the client to seek additional damages if the actual loss exceeds the amount of the contractual penalty (in connection with Civil Code Art. 484 §1).

Another issue that should be addressed when concluding an outsourcing agreement is the risk, mentioned above, connected with the fact that outsourcing of the accounting function often involves **access to confidential information** concerning the operations of the enterprise. Therefore the outsourcing agreement should contain a **confidentiality clause** for the accounting firm (possibly with a contractual penalty if the duty of confidentiality is violated).

After conclusion of an agreement for outsourcing of the accounting function, it is also important to remember the related obligations under the Accounting Act. Art. 11a provides that if the accounting books are maintained at a location different from the registered office of the unit or the location of the management, the director of the unit is required to:

- Notify the relevant tax office of the location where the accounting books are maintained, within 15 days after the books are turned over, and
- Assure access to the accounting books and records by authorised external audit or supervisory authorities at the registered office of the unit or the location of management, or other place agreed with the audit or supervision authority.

Maintenance of accounting books by entities from another EU member state or an EFTA member state

It should be pointed out that **a business in Poland may outsource the maintenance of its accounting books to a business from another member state of the European Union or a**

member state of the European Free Trade Association which is authorised to perform such services. This may be particularly relevant for businesses from Poland which are members of a larger capital group in which the entity responsible for conducting accounting for all group companies is based outside of Poland. Although this approach is legally permissible, it is subject to certain conditions. Specifically, the books must be maintained in such a manner that they could be quickly made available at any demand of the Polish authorities, as Art. 11a of the Accounting Act mentioned above also applies in this case.

It should also be borne in mind that under Art. 9 of the Accounting Act, accounting records shall be maintained in the Polish language and currency, although they may also be maintained at the same time in a foreign language, particularly when there are foreigners among the management board or shareholders of the company. Moreover, under Art. 10(1) of the Accounting Act, the unit must maintain documentation in Polish describing its adopted accounting policy, including documentation required when the accounting books are maintained in a computer system, e.g. a description of the data processing system.

Summary

Outsourcing of accounting functions may generate financial and organisational benefits to businesses as well as a higher level of services from specialised suppliers. Outsourcing can also allow an enterprise to streamline its operations and increase its efficiency by focusing its resources on its core business. However, it is important that the agreement signed with an outside supplier of accounting services precisely define the scope of the assigned duties as well as the rules for calculation of fees and liability for performance of the services.

Outsourcing and the VAT exemption in the financial industry

Łukasz Pikus

VAT regulations which may have an impact on taxation of outsourcing in the financial industry were recently the subject of a ruling by the European Court of Justice as well as legislative changes. Because tax law does not directly address outsourcing, application of the regulations to services of this type may raise questions.

A particularly interesting issue is the application to outsourcing of the exemptions provided in the VAT Act for operations throughout the financial industry, including not just banking, but also activity such as insurance and investment fund management.

Because potential buyers of outsourcing services operating in the financial industry enjoy an exemption from VAT with respect to the overwhelming share of their activity, they cannot deduct the input VAT they pay. This means that when VAT is charged on the outsourcing services, finance companies bear the economic burden of the tax, which may have a significant influence on their decision whether or not to use outsourcing.

ECJ on outsourcing of investment advisory services

In the judgment issued on 7 March 2013 in *GfBk Gesellschaft für Börsenkommunikation mbH v Finanzamt Bayreuth* (Case C-275/11), the ECJ considered the case of a German company providing investment advisory services on an outsourcing basis to an investment management company. The services consisted of advising "in the management of the fund" and "constantly to monitor the fund and to make recommendations for the purchase or sale of assets."

The issue before the court was whether such services fall within the exemption provided in the VAT Directive for "management of special investment funds." The court held that the investment advisory services provided by the third party did constitute services exempt from VAT. The court also stated that if certain conditions are met, administration and accounting services provided by a third party are also subject to the exemption.

Although the ruling in the *GfBk* case involved an interpretation of VAT regulations in the context of a specific service, it may have an impact on the application of VAT exemptions for other outsourcing services, particularly in light of the reasoning followed by the court. As the court stated in its opinion, "It follows from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their transactions excluded from the exemption." If investment advice services provided by a third party were subject to VAT, the court reasoned, that would have the effect of giving investment management companies with their own investment advisers an advantage over investment management companies which decide to outsource this service to third parties.

Exemption for fund management services—changes from 1 April 2013

Since 1 April 2013, amended provisions have been in force in Poland implementing the VAT exemption for fund management services of a certain type (although the set of funds enjoying the exemption in Poland is extensive, including for example open pension funds). Before, the fund management activities enjoying the exemption were limited by the statutory definition of "fund management," which constituted a fixed list of activities regarded as exempt. Pursuant to the amendment, the statutory definition of fund management was eliminated. On one hand this means less certainty in application of the regulation, when previously it was enough to check whether the specific service was listed in the definition. But under the current wording, certain outsourcing services for fund management companies which did not previously fall within the statutory definition may now potentially be treated as exempt.

This amendment may therefore prove beneficial for some businesses providing outsourcing services to fund management companies. Nonetheless, to determine whether the VAT exemption is available, it is necessary to examine the outsourcing of services on a case-by-case basis, applying the criteria set forth in the ECJ case law.

The element of outsourcing in classification of asset sale transactions

Agnieszka Szydlik, Anna Dąbrowska

The issue of outsourcing is typically viewed in the context of a company's business operations, in terms of strategy, cost control and reduction, and other current needs. But outsourcing can have an impact in surprising areas, which should also be taken into account when considering adoption of outsourcing. For example, outsourcing can be relevant when preparing for a transaction involving the assets of a company that outsources some of its functions.

Under Polish law, classification of a company's assets as an enterprise, an organised part of an enterprise, or individual assets is an issue that must be dealt with in almost any transaction involving sale of a defined set of elements connected with the business conducted by a company. It is often difficult to reach an unequivocal definition of the legal nature of the assets which are the subject of the transaction, requiring an assessment of the set of elements from the factual side of their contents, the ties existing between these elements and the entity selling them, as well as ties existing within the set of assets themselves. And the legal regulations defining an enterprise or organised part of an enterprise are not entirely unambiguous either. If at the same time the company entrusts performance of some of its tasks to outside entities, it becomes even more difficult to reach the correct classification. Yet the classification of the assets involved in the transaction carries various legal consequences for the parties to the transaction (such as the scope of liability for debts and the form required for effective transfer of debts), as well as tax consequences (with respect to the manner in which the transaction is taxed).

The first doubts arise from the location of the definitions. The concept of an enterprise, with a list of examples of elements making up an enterprise, is set forth in Art. 55[1] of the Civil Code. Meanwhile, the concept of an organised part of an enterprise is found in the Corporate Income Tax Act of 15 February 1992 and the VAT Act of 11 March 2004. Regulating one of the definitions in private law and the other in public law has generated numerous doubts with respect to the scope of these concepts (e.g. in connection with obligations which in 2003 were excluded from the concept of an enterprise but are still reflected in the statutory definition of an organised part of an enterprise). Given this lack of legislative coherence, the necessity to determine whether a given set of elements meets the statutory criteria or not, and in consequence constitutes an enterprise or an organised part of an enterprise or merely a group of individual assets, has generated a wealth of case law and administrative decisions, including interpretations issued by tax authorities.

The view is well-established in the case law and the legal literature that it is not necessary that a transaction include the entirety of the assets of an entity (or organisationally distinct unit) before it may be classified as an enterprise or an organised part of an enterprise. However, the nature of the elements being transferred must be considered: the aspect of their organisation and functional connection[1] and whether they enable accomplishment of defined economic tasks.[2] In the case of an organised part of an enterprise, it is also necessary that it constitute a distinct and separate portion of the enterprise, such as a branch of a company.[3]

The general rule of civil law requiring that the subject of an agreement be determined in light of the mutual intention of the parties and the purpose of the legal actions undertaken (Civil Code Art. 65) must also be borne in mind. This was stressed by the Supreme Court of Poland when it held, "A finding of whether the subject of a specific sale agreement is an enterprise requires … a determination of the content of the agreement, an interpretation of the intention of the parties, and an assessment in light of the conditions set forth in Civil Code Art. 55[1]."[4] On the other hand, the parties' freedom to define what they intend to constitute an enterprise is subject to certain limitations due to the need to assure that the enterprise does not lose its nature and that it includes the determinative elements for the functions it performs.[5]

In many instances, principles of employment law must be superimposed on this already complicated conceptual framework—specifically Art. 23[1] of the Labour Code, concerning transfer of a workplace. Under this provision, there is no necessary connection between transfer of the workplace and sale of an enterprise or organised part of an enterprise.

In a number of judicial rulings, the definition of a workplace does dovetail with the concept of an enterprise, particularly through an emphasis that the workplace must constitute a certain organised whole, composed of certain material and property elements, organisational system and management structure which assure the ability for the staff employed there to continue performing their work.[6]

Nonetheless, despite a wealth of rulings from the labour courts, there continue to be questions surrounding the possibility of classifying a transaction as involving the sale of specific elements of property when one such element is a workplace. According to the rulings in recent years, the transfer of a workplace need not involve the formal acquisition of an enterprise or organised part of an enterprise at all.[7] As the Supreme Court has pointed out, transfer of a workplace may result from the transfer of the employer's tasks.[8]

The services necessary to maintain the enterprise and carry out its functions need not be performed by employees or other on-site workers, as demonstrated by the common practice of outsourcing. The fact that services necessary for an entity to do business are performed "outside" the entity does not exclude the possibility that assets being sold

[1] Warsaw Court of Appeal judgment of 30 November 2010, Case No. VI ACa 1058/10, Lex 681006; Supreme Court judgment of 3 December 2009, Case No. II CSK 215/09, Lex 551060; Supreme Court judgment of 25 November 2010, Case No. I CSK 703/09, Lex 724984; Province Administrative Court in Wrocław judgment of 6 June 2008, Case No. I SA/Wr 355/08, Lex 418277.

[2] Province Administrative Court in Warsaw judgment of 17 April 2008, Case No. III SA/Wa 232/08, Lex 468706.

[3] Province Administrative Court in Opole judgment of 7 December 2009, Case No. I SA/Op 325/09, Lex 532376; Supreme Court order of 9 December 2010, Case No. I SA/Ke 225/09, Lex 598341.

[4] Supreme Court judgment of 25 November 2010, Case No. I CSK 703/09, Lex 724984.

[5] Supreme Court judgment of 29 January 2009, Case No. V CSK 294/08, Lex 619667.

[6] Supreme Court judgment of 20 November 1996, Case No. I PKN 21/96, Lex 192324.

[7] Supreme Court judgment of 20 October 2009, Case No. I PK 96/09, OSNP 2011 No. 7-8 p. 103.

[8] Supreme Court judgment of 8 June 2010, Case No. I PK 214/09, Lex 602051.

can be classified as an enterprise. Such services, performed on the basis of civil-law contracts, may be transferred as part of the transaction in accordance with the rules applicable to transfer of other agreements concluded through the enterprise (or organised part of the enterprise, if they involve only a certain distinct and separate unit of the enterprise).

On the other hand, the presence of an element of outsourcing may also speak against recognition of specific assets as an enterprise. If, to assist the enterprise in performing its functions, the entity taking over certain elements of the enterprise will use services provided by third parties which were not previously connected with the enterprise, there may be insufficient grounds for finding that the transferred assets are connected with one another in a manner enabling continuation of the activity of the transferred enterprise (or its elements) in the previous scope. It would follow from this that only specific assets were transferred, and not an enterprise.

This overview of the classification of transactions involving the sale of assets may be summarised by stating that an assessment of the subject of any such transaction must be conducted on the basis of the factual circumstances of each specific case. It is not possible to create a fixed list of elements whose transfer will permit an unconditional determination that an enterprise has been sold.[9] Within the context of the business conducted by the parties to the transaction, an element of outsourcing may provide an additional fact to be weighed in reaching a proper determination of the subject of the transaction.

[9] Province Administrative Court in Warsaw judgment of 30 June 2008, Case No. III SA/Wa 540/08, Lex 399685; Supreme Court judgment of 11 April 2012, Case No. I PK 145/11, Lex 1168867.

Collateral warranties for construction contracts in Poland

Michał Wons

One of the key issues for businesses deciding on establishing outsourcing centres in Poland is to secure offices for the staff in the country. Typically they lease space for this purpose, but they want to be sure the structure of the building is sound.

To their surprise, some of the legal instruments they are used to in their home jurisdictions do not "fit" the Polish legal system. One of the clearest examples is collateral warranties, meaning third-party guarantees or additional security granted by

a third party. Such security is often encountered in connection with construction contracts.

Collateral warranties connected with construction contracts are typically issued in an additional document, in favour of a third party which was not a party to the main contract. Typically this is a guarantee by the architect, the contractor or a subcontractor to the tenant or buyer of the real estate, in which the guarantor warrants that specific duties were performed properly by the guarantor during the construction process. Often they concern the correctness of the performance of the work, the quality of the materials, or the professionalism and standard of the construction. This solution enables the beneficiary of the guarantee to pursue claims for damages which otherwise it could not assert because it was not a party to the construction contract.

In many countries with a common law legal system, a party interested in premises in a building—particularly where the building is to be built from the ground up to suit the needs of the specific occupier—will want to obtain assurance from the designer or builder who is responsible for any defects, rather than from the owner. Hence the institution of collateral warranties, which enables creation of a direct obligation between the designer or builder and a third party, e.g. the tenant. In this manner, the interested party has a claim directly against the designer or builder, e.g. if the building proves defective. Under the general rule in force under the common law, only the parties to a contract may enforce the rights and obligations arising out of the contract. This means that a third party interested in the structure, e.g. the tenant, will not be able to assert contract claims against the party which improperly performed the construction work, because it was not a party to the contract.

But if a client accustomed to this practice comes to Poland, it turns out that no investor wants to accept provisions in the agreement calling for a third party to present a guarantee connected with the construction process. Why is this?

The practice is different in Poland, and other forms of legal security mean that the parties can manage without the institution of collateral warranties.

First, receiving such additional security would be very difficult in Poland if no such obligation was previously provided for in the agreement between the owner (the investor) and the contractor. After performance of the construction contract (or other agreement, e.g. with the architect), the other party cannot be forced to issue a collateral warranty if the tenant later demands it.

Second, the general provisions of the Polish Civil Code concerning leases provide that the landlord is liable to the tenant for the fitness of the premises for the purpose provided for in the lease, over the entire term of the lease. In exchange, the landlord is entitled to receive the rent specified in the lease. Even in the case of a triple-net lease, i.e. a lease where all operating costs are borne by the tenant and the landlord's duties are very limited, the landlord still remains liable to the tenant for the structural portions of the building. Moreover, a guarantee covering the non-structural portions of the building may be included in the contract for the construction work for the fit-out of the leased space, concluded between the tenant and its contractor. The landlord may also provide appropriate representations and warranties in the lease in order to strengthen the tenant's potential future claims (e.g. that the building was constructed in compliance with the construction law, meets all safety regulations, does not violate any applicable laws in this jurisdiction, was not constructed using hazardous materials, and so on). Under Polish law, unless otherwise provided in the lease, if the leased premises are not fit for the agreed use because of construction defects, the tenant may demand that the landlord bring the building to the proper condition within an appropriate time. And the landlord will have a claim over against the contractor that built the structure if it is not yet time-barred. If the landlord does not repair the defects on a timely basis, the tenant may terminate the lease.

The market practice shows that Polish businesses do not require collateral warranties, because in place of the rights that collateral warranties would give them, they are protected by the provisions of the lease, the construction contract, and so on. A direct contractual link between the designer or builder of the structure and the tenant or acquirer of the building is not necessary in this instance.

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How can we help?

Wardyński & Partners has significant experience handling legal issues related to outsourcing processes for banks and financial services companies, the high tech industry, payment card companies, and producers of electronics and pharmaceuticals. Our team of lawyers practising across various fields supports clients in all legal areas, providing efficient and cost-effective legal solutions for client ventures.

Services

We provide legal advice to outsourcing companies as well as users of outsourcing services (including "internal outsourcing" within a capital group). Our services include:

- Assistance in HR planning and administration (hiring, firing and delegation of staff, job transfers, payroll, training and development, and maintenance of HR records)
- Legal structuring of the outsourcing process (e.g. offer inquiries and selection of contractors)
- Negotiating and drafting of outsourcing agreements for such areas as:
  - Sales and marketing
  - Customer service and call centre
  - Accounting and administration, including maintaining accounting books, invoicing, receivables and payables
  - Clearing of transactions involving payment cards and cheques
  - Logistics, including transport and distribution, warehousing and storage, and order fulfilment
  - Quality assurance
- Legal safeguards in relations between staff of the outsourcer and the outsourcing company (trade secrets, privileged or confidential information, and personal data)
- Legal safeguards with respect to liability of company authorities for outsourcing of corporate functions
- Legal compliance with respect to use of outsourcing services when outsourcing is regulated or in the case of outsourcing in a regulated industry
- Comprehensive advice on public aid for outsourcing facilities (including tax incentives and EU funding)
- Tax advisory on such issues as optimising the tax treatment of outsourcing centres, transfer pricing, and taxation of outsourcing services.

Experience

Our experience in the area of outsourcing includes such matters as:

- Comprehensive legal support for establishment of an outsourcing services centre for a foreign bank
- Advising global capital groups investing in Poland in innovative shared services centres, in matters related to obtaining public aid for investment
- Advice on tax optimisation for IT companies outsourcing portions of their operations to service centres in Poland
- Advice on outsourcing involving processing by a credit bureau of information subject to banking secrecy regulations as well as personal data
- Advice on outsourcing of banking activities to a foreign company from the same capital group, including banking

secrecy, money laundering and data protection compliance

- Legal assistance with respect to outsourcing agreements with banks involving personalisation of payment cards
- Advice for a borrower on hedging documentation related to a credit agreement for financing of an outsourcing centre and participation in negotiations with the bank.

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About Wardyński & Partners

Wardyński & Partners is one of the largest independent Polish law firms, with offices in Warsaw, Poznań, Wrocław, Kraków and Brussels.

The firm's practice is focused on such areas as arbitration, banking, bankruptcy, capital markets, competition law, corporate law, dispute resolution, employment law, energy law, environmental law, EU law, infrastructure projects and public-private partnership, intellectual property, maritime law, mergers and acquisitions, pharmaceutical law, project finance, public procurement, real estate, tax and tax disputes, and technology, media and telecommunications.

The firm publishes the Litigation Portal, presenting news and analysis concerning judicial, arbitration and administrative proceedings, and the Transactions Portal, which addresses legal aspects of M&A transactions on the Polish market. Both portals are available in Polish and English versions.

The firm is also the publisher of Wardyński+, the first Polish-language app on legal topics for iPad and Android. The app is available free of charge at the App Store and Google Play.

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