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Dear Readers,

Thirty years may not be an impressive age for law firms around the world, but in Poland it's about as old as they come. When we started out, the possibility of establishing private firms of advocates in Poland had existed for barely two years.

With its offices in the freshly completed Marriott Hotel, the firm took part in the public offering of companies forming the Warsaw Stock Exchange. They were the so-called First Five, advertised to investors with the now-forgotten slogan "Learn the power of your money." We helped establish companies under the Commercial Code of 1934, as it would be years before the current Commercial Companies Code was adopted. We provided legal support for foreign investment flowing into Poland.

For 30 years (our youngest partners aren't much older), under evolving conditions, we have provided legal assistance to businesses and individuals, striving to maintain the traditional values of the legal profession as well as the values essential to the functioning of a civil society.

Along the way, we share our knowledge in numerous publications, led by the *Yearbook*, where we write about aspects of legal and commercial life deserving of particular attention in the months ahead.

We invite you to read this, the 8th edition of our *Yearbook*.

Tomasz Wardyński

Criminal liability of undertakings


Janusz Tomczak Jakub Znamierowski

Changes in criminal law, including those introduced in 2017 and those planned for 2018, are greatly expanding the map of legal risks for businesses operating in Poland.

Criminal lawyers may be struck by the inconsistency in the title, as Polish criminal law attaches criminal liability only to the behaviour of individuals, without specifying whether the individual is operating a business. So why do we refer to criminal liability of undertakings, which can operate in various forms (e.g. individuals and companies)?

The reason is that the changes we discuss here affect various aspects of commercial activity, regardless of the legal form in which the enterprise is operated. The changes planned for 2018 will in practice expand the range of entities subject to criminal (or quasi-criminal) responsibility to include collective entities. This essentially means all persons conducting or involved in business activity—both natural persons and legal persons—will potentially be subject to criminal (or quasi-criminal) liability.

What 2017 brought

"Extended confiscation" was introduced into the Criminal Code. This is an instrument for increasing the effectiveness of seizure of property derived from criminal conduct. This change implements Directive 2014/42/EU and generally should not be regarded as controversial. Nonetheless, the possibility of confiscating an enterprise used for commission of a criminal offence is undoubtedly a novelty in Polish law. This makes it necessary to prove new facts in criminal trials and will certainly pose a challenge in cases involving honest businesses unwittingly caught up in criminal operations (an issue that commonly arises in VAT carousel fraud cases).

The punishment for issuing fake invoices has greatly increased. In extreme instances perpetrators of this offence may face up to 25 years in prison.

Notable changes in criminal procedure include the new tools provided to the prosecutor's office for securing assets, first and foremost involuntary administration of an enterprise. This institution essentially allows prosecutors to take control over an enterprise allegedly involved in criminal dealings, while the case is still pending.

These changes in law correspond to changes in law enforcement priorities. Based on information revealed about current proceedings, organisational changes in the prosecution service, and comments by prosecutorial authorities, the stress is on combating the most serious economic, financial and tax offences. The prosecution service highlights its success in prosecuting and securing assets deriving from offences, focusing on combating VAT fraud, and financial offences generally.

What 2018 will bring

The most heated discussion in the last quarter of 2017 was over the published proposal for the Act on Transparency of Public Life and plans to amend the Act on Liability of Collective Entities for Punishable Offences.

Act on Transparency of Public Life

The proposed act is designed to regulate commercial activity bordering on the public and private sectors and to repeal and replace three existing acts involving restrictions on commercial activity by persons performing public functions, access to public information, and lobbying as part of the legislative process. Apart from these areas, this act would introduce into Polish law the notion of whistleblowers and legal protection provided to them by the prosecutor during criminal proceedings. It would also impose on large and medium-sized enterprises a legal obligation to establish anticorruption procedures, as well as criminal and administrative liability for a lack of such procedures or for failure to comply with them (more in Aleksandra Stępniewska's article at page 31).

New take on liability of collective entities

The issue that is generating the greatest controversy, even before a draft of the proposal has been published, is the announced change in the procedural model for cases involving the liability of collective entities for punishable offences. In short, this has to do with criminal offences committed by persons acting for or on behalf of an organisation (such as a company) in connection with its business.

The fundamental change is that proceedings would be conducted simultaneously against both the individual and the organisation (company or other collective entity). Under the existing model, proceedings are not conducted against the collective entity until a conviction is obtained against the individual perpetrator of the offence. In practice, this has rendered the existing act a dead letter.

In the proceedings under the proposed new rules, the collective entity will bear the burden of proving that it exercised due care to prevent commission of the offence. Collective entities charged in such cases will have to show that they were properly organised and exercised adequate supervision over the persons acting for the entity.

Liability of organisations will also not be limited to a fixed list of offences, but will extend to cases such as workplace accidents not currently covered.

Lawmakers plan to enable enterprises to reach agreement with prosecutors limiting their liability, in line with solutions that have been tested in practice in English-speaking countries. Regulations concerning internal investigations may also be adopted.

Lots of obligations, not much information

Officials from the Ministry of Justice clearly state that they do not intend to conduct a broad information campaign in connection with introduction of these new standards. They expect that the burden of educating businesses on complying with the stiffer requirements will be shouldered by business groups and trade associations.

Considering the length of the legislative process during the current term of parliament, it should be anticipated that the act will enter into force within a few months after the proposed bill is published, perhaps with minor amendments.

This means that businesses will need to be prepared for a major change in their map of legal risks during 2018. It is estimated that duties arising out of the need to enact anticorruption procedures (pursuant to the proposed Act on Transparency of Public Life) will affect about 20,000 businesses in Poland. All enterprises will need to make a critical examination of their internal regulations and assess their effectiveness to determine whether they are exercising due care to avoid criminal activity by their management and staff.

As the proposed changes begin to be applied in practice, we should expect to see a dramatic increase in the number of duties performed by prosecutors conducting preliminary proceedings in cases involving complicated economic offences and large enterprises.

Second, many issues will arise in criminal litigation practice concerning internal relations within big corporations (potential conflicts of interest between individual managers and the company, access to information and evidence, trade secrets during the course of investigations) which have so far arisen in criminal practice sporadically if ever.

This means that the year ahead will be full of challenges for businesses in the realm of criminal law.

Janusz Tomczak, adwokat*, partner in charge of the Business Crime practice*

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The legal basis for processing personal data for marketing purposes

Agnieszka Szydlik Katarzyna Żukowska

With the General Data Protection Regulation soon entering into force and the anticipated enactment of the ePrivacy Regulation, it's a good moment to examine how the changing regulations will affect marketing.

Grounds for processing data until 24 May 2018

Under Poland's Personal Data Protection Act of 29 August 1997, to remain in force through 24 May 2018, any undertaking may use the personal data of its own customers for marketing its own products and services. The basis is the provision of the act stating that processing is permissible if necessary for pursuing the legitimate purposes of the controller or a third party to whom the data are disclosed and the processing does not violate the rights and freedoms of the data subject. This provision further specifies that directing marketing of the data controller's own products and services is a legitimate purpose.

As a general clause, the notion of "legitimate purpose" is not precisely defined. In reported cases issued under the Polish act, it is recognised that the indefinite nature of this term provides a certain latitude, meaning that the Inspector General for Personal Data Protection (GIODO) may be guided by the individual assessment of the specific situation when issuing decisions.

Reliance on this basis for processing of personal data requires the data controller to first weigh the purpose or interest for which the data are to be processed against the risk of violation of the rights and freedoms of the data subject. This is the "balancing test" established in Opinion 6/2014 of the EU's Article 29 Data Protection Working Party. In practice situations arise where the data controller uses personal data for marketing of its own services in a manner indicating that the balancing test was not properly conducted, thus violating the rights and freedoms of the data subject. This would be the case, for example, if the controller entrusts the processing of sensitive data for purposes of transmission of marketing information to an entity that does not maintain the required standards for data security, or bombards the recipient with marketing information with irritating frequency.

There are also situations where a data controller (e.g. an intermediary in electronic payments) has a service to offer which formally is the service of another undertaking but has a major impact on the controller's business (e.g. expansion of the controller's services), and sometimes even a major impact on the person to whom the service is targeted (e.g. reducing the risk connected with a service). The act provides that within the legitimate purpose, data may be processed for marketing of the data controller's own products and services. But the provisions do not expressly prohibit reliance on this ground for processing of personal data with the aim of marketing the services of other undertakings. The absence of such a direct prohibition has resulted in attempts to base the processing of data for the purposes of joint marketing of products and services of the controller and a third party on the ground of a legitimate interest. But the decisions by GIODO have consistently taken the view that processing of personal data for purposes of direct marketing of products or services of a third party is permissible only with the consent of the data subject.

Objection and withdrawal of consent

In any situation, the data controller is required to provide information on the purpose of the processing and the rights of the data subject, as the data subject has a right to object to processing for marketing purposes. If an objection is asserted, the processing of personal data for marketing purposes must cease immediately, regardless of any other circumstances.

Withdrawal of consent has a similar effect for the data controller when the data are processed on this basis.

Formal conditions also relevant

It is increasingly rare for marketing to take the form of distribution of items by traditional post. More and more, marketing is conducted using electronic means of communications, regulated by acts other than the Personal Data Protection Act, in particular Art. 10 of the Electronic Services Act and Art. 172 of the Telecommunications Law.

Essentially, these regulations provide for the use of opt-in clauses for transmission of commercial information by electronic means or via electronic means of communication (e.g. email) to an individual as the end user. The opt-in clause means that transmission of marketing content in any form of e-communications requires the prior consent of the addressee.

Another formal condition for the use of personal data in the possession of the data controller for marketing purposes is registration of the database with GIODO, or in the register maintained by the data protection officer registered with GIODO. This obligation will cease to be in force from 25 May 2018.

And from 25 May 2018?

The GDPR becomes effective on 25 May 2018. Unlike the Polish act, the EU regulation does not restrict the permissibility of processing of personal data for direct marketing purposes based on the data controller's legitimate interests only to the data controller's own products and services. Point 47 of the preamble to the GDPR states, "The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest." This implies that products and services other than the data controller's own products and services are also covered.

Like the current Polish act, the GDPR provides for the right of a person whose data are being processed for purposes of direct marketing to object to the processing of the data for such marketing, including profiling. The GDPR does not specify any particular form for making such objection, or the need to justify it, and thus it may be made in any form and does not require justification.

The data subject may exercise this right at any time, free of charge. Objection by an authorised person results in an obligation on the part of the data controller to cease processing the person's data for direct marketing purposes.

The data controller is required to notify the data subject of his or her right to object no later than on the occasion of the first communication with the data subject. This information must be presented clearly and separately from any other information.

Processing for marketing purposes may be based on the consent of the addressee. This must be conscious consent, that is, based on a statement of the purposes of the processing in simple language complying with the informational requirements set forth in Art. 13 and 14 GDPR.

Point 59 of the preamble indicates that procedures must be provided for facilitating the exercise of the data subject's rights under the GDPR, including *inter alia* mechanisms for exercising the right to object. The controller should also provide means for requests to be made electronically.

More changes ahead?

Work is currently underway in the EU on an ePrivacy Regulation (Regulation on Privacy and Electronic Communications). Under the proposal, the ePrivacy Regulation is supposed to enter into force at the same time as the GDPR and fundamentally ensure the confidentially of electronic communications. To the extent that electronic communications cover personal data, the ePrivacy Regulation would overlap with the protection provided under the GDPR.

The proposed ePrivacy Regulation provides for the necessity to obtain consent from natural persons to send communications to them for purposes of direct marketing (opt-in clause). However, when the person is already a customer and has provided his or her electronic contact details in connection with the sale of products or services, the seller may use those details for direct marketing of its own similar products or services, but only if customers are clearly and distinctly given the opportunity to object to such use, easily and free of charge (opt-out clause). An opt-out clause is also provided for placing direct marketing voice-to-voice calls to end users who are natural persons.

End users must be informed of the marketing nature of the communication and the identity of the legal or natural person on whose behalf the communication is transmitted, as well as provided the necessary information for recipients to easily exercise their right to withdraw their consent to receiving further marketing communications.

An interesting solution included in the proposal is that telemarketers would have to identify a line on which they can be contacted or provide a specific code or prefix identifying the call as a marketing call.

The European Data Protection Supervisor and the Article 29 Data Protection Working Party have submitted a number of comments on the proposal for the ePrivacy Regulation. Among other things, they have pointed to the too-narrow definition of direct marketing communications, the lack of protection of natural persons against receiving unsolicited communications other than advertising, limitations on the possibility of withdrawing consent, failure to regulate the manner in which the right to withdraw consent or assert an opt-out should be exercised, as well as the absence of an express prohibition on masking of the sender's identity or use of false identities or return addresses and numbers when transmitting unsolicited commercial information. Thus further changes to the proposed ePrivacy Regulation should be anticipated in this respect before it is enacted.

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Hiring away the competition's employees

Dr Marta Derlacz-Wawrowska Agnieszka Lisiecka

With the favourable situation on the labour market, employees are eager to seek out new opportunities. Their professional experience with their current employer is a strength valued by competitors. But when an employee leaves to join the competition, it can have a major impact on the employer's business. It's something the employer must secure against when there is time.

It is generally permissible to offer a job to persons employed by a competitor, and for an employee to take a new job at a firm competing with the current employer. So if a company believes that information possessed by an employee and his or her knowledge and professional experience are important enough the company would suffer a loss if the employee left, the current employer should have the foresight to consider entering into a non-competition agreement with the employee.

Conclusion of a non-competition agreement first and foremost requires the employee not to take up employment with a competitor for the agreed period. But the fact that such a non-competition agreement exists is also relevant for the prospective new employer.

If the non-competition agreement provides for sanctions in the form of a contractual penalty for violation of the employee's obligations under the agreement, that serves as a fundamental and relatively effective method of securing the employer's interests. If there is no agreement in place, the former employer may seek protection, among other places, in the regulations governing trade secrets.

Non-competition agreement and offering competing employment

Offering employment that would violate a contractual non-competition obligation of the employee may be regarded as an act of unfair competition by the new employer, as defined in Art. 12(2) of the Unfair Competition Act, consisting of encouraging a person to breach a contract with the aim of obtaining an undue benefit for oneself or a third party or injuring another undertaking. Offering employment violating a contractual prohibition of competition is directly aimed at defeating the purpose of the non-competition agreement and breach by the employee of a voluntary, lawful non-competition obligation, which the employee has been compensated for, established in the interest of the undertaking.

But a necessary condition for liability for an act of unfair competition is intentional fault on the part of the defendant, which requires that the potential employer knew of the prohibition on competition and was aware of its scope in terms of subject matter, territory and time. Consequently, it is worth including in the non-competition agreement a provision stating that the employee has an obligation to inform prospective employers of the existence and scope of the prohibition.

It is an open question whether submitting an offer of work with the awareness that acceptance of the offer would violate a prohibition of competition binding on the employee meets the further ground for an act of unfair competition, namely that it is an act aimed at obtaining an undue benefit for oneself or a third party or injuring another undertaking. On one hand, offering employment violating a non-competition agreement appears in and of itself to be an act aimed at injuring the other undertaking, as it will lead to violation of the intention stated in the non-competition agreement of imposing a binding prohibition on the employee following the end of his or her current employment relationship, motivated by protection of the interests of the existing employer. On the other hand, it does not seem justified to apply an automatic rule, and the circumstances of each case require deeper analysis.

The purpose of the protection provided for in Unfair Competition Act Art. 12 is to prevent interference in contractual relationships aimed at obtaining an unjustified advantage in competition for customers, and not to create a regime for protection of contractual relations alternative to that provided for in the Civil Code. In the event of violation of a non-competition agreement, the former employer primarily holds contractual entitlements (e.g. the possibility of enforcing a contractual penalty against the former employee), as the non-competition agreement establishes legal relations between the parties to the agreement. Moreover, encouraging, aiding or abetting in causing injury arising out of breach of a non-competition agreement could be grounds for liability under Civil Code Art. 422. However, the unlawfulness of the behaviour of the prospective new employer in the context of the Unfair Competition Act lies primarily in the motivation behind its hiring of the person bound by a non-competition obligation. Thus, in the event of a dispute, this issue would also have to be examined by the court and would require the plaintiff to present evidence. It would be particularly relevant to examine the scope of duties assigned to the employee in the new job and their impact on achievement of the aim of the non-competition agreement. Among other issues, it should also be examined whether performance of the new obligations exposes the former employer to a loss resulting from disclosure by the former employee of important information obtained during the previous employment.

Observing the growing number of disputes involving poaching of employees, it may be anticipated that these issues will finally be resolved by the Polish courts.

Employee's move to a competitor in the absence of a non-competition agreement

In practice it often happens that employees leave for the competition when there is no non-competition agreement in force. Although this issue has not been resolved definitively, the dominant view in the literature and case law is that under certain circumstances, an offer of employment may violate principles of fair competition (Art. 3 or 12 of the Unfair Competition Act). These circumstances may include, for example, taking over a team of employees responsible for a given field of their employer's activity, with the aim of preventing the competitor from conducting a given line of business, or providing employees false information about their current employer in order to discourage them from continuing their current employment.

Moreover, the basis for pursuing legal measures against former employees or the competitor hiring them may be Art. 11 of the Unfair Competition Act, requiring protection of trade secrets of an undertaking both during an employment relationship and after the employment ends. However, this obligation does not prevent an employee from taking a job with the competition.

In practice a doubt may arise whether it is possible for a former employee to perform tasks for a competitor similar to those performed for the former employer without disclosing trade secrets of the former employer. This problem was identified in the case law of the American courts, where the doctrine of "inevitable disclosure" was developed. It involves imposition of limitations on an employee in taking up work with other employers despite the lack of any contractual non-competition obligation to the former employer. Such limitations are based on the presumption that during performance of duties for the new employer, it would be impossible to avoid disclosure of confidential information about the former employer.

This line of case law is founded on the decision by a US federal appeals court in *PepsiCo, Inc. v Redmond*, 54 F.3d 1262 (7th Cir. 1995), which involved a request for a preliminary injunction against a former employee hired by a competitor. The employee was not bound by a non-competition agreement following the end of employment, but had signed a confidentiality agreement. During his employment with PepsiCo, Redmond has served as general manager of the unit responsible for all of Pepsi's operations in California, and he had access to a range of confidential information about the company, such as annual financial targets and marketing plans, planned changes in the company's business in the upcoming year, and strategies for production, marketing, packaging and distribution for the next three years. The court ruled that the plaintiff could effectively pursue its claims related to unauthorised use of confidential information if it could show that performance of Redmond's duties with his new employer (beverage distribution for the Quaker Oats Co.) would inevitably lead to the employee's use of confidential information obtained in connection with his prior employment.

An examination of the circumstances justifying a limitation on a former employee's working for a competitor based on a presumption of inevitable disclosure of the former employer's trade secrets should focus on such factors as:

- The existence and scope of competition between the old and new employers
- The similarity between the employee's old and new job duties
- The value and relevance for the new employer of the trade secrets in the employee's possession
- Industry conditions
- Efforts taken by the new employer to respect the secrets of the former employer
- Manifestations of bad faith of the former employee and the new employer.

Since the issuance of the *PepsiCo* decision, a number of rulings have been handed down based on the doctrine of inevitable disclosure, but it is not uniformly applied and some state courts have rejected it entirely.

Under Polish law, adoption of solutions such as those arising under the doctrine of inevitable disclosure, and an attempt to prohibit a former employee from taking up gainful activity after the end of employment based on protection of trade secrets, would undoubtedly be precedent-setting. Even though use of the former employer's trade secrets in the person's new employment would be unlawful, separating trade secrets from the employee's knowledge, and the evidentiary hurdles that would have to be cleared by the former employer, would make it difficult to pursue claims against a former employee or his or her new employer under Unfair Competition Act Art. 11.

For these reasons, if an employer regards the information in an employee's possession as being so important that its use by another company in the same industry could expose it to injury, it should conclude a non-competition agreement with the employee.

Dr Marta Derlacz-Wawrowska, legal adviser, Employment practice

Agnieszka Lisiecka, adwokat, *partner in charge of the Employment practice*

Can foreign firms offer financial products and services in Poland?

Danuta Pajewska Marcin Pietkiewicz

Broad access to information and the multiplicity and variety of financial products encourage investors to seek out interesting investment opportunities both at home and abroad, while banks and other financial institutions want to pitch their products and services to as wide a group of potential customers as possible. Foreign institutions can conduct brokerage, banking or investment fund activity in Poland, including advertising and offering their products and services, either directly or via a branch, agents, or a representative office. The conditions for launching such activity depend on whether the institution seeking to conduct the activity has its registered office in the European Union or in a third country.

Brokerage activity

Investment firms from the EU holding a relevant permit from the regulator in their home country may perform brokerage activity in Poland without a permit from the Polish Financial Supervision Authority (KNF).

To this end, they can open a branch or conduct cross-border activity, i.e. without opening a branch but using local agents (under the "single passport" rule). The regulator in the home jurisdiction notifies KNF of the foreign investment firm's intention to commence operations in Poland, and within two months from receipt of the notice KNF will notify the entity of the conditions for conducting brokerage activity in Poland. Use of an agent for investment firms entered in the list maintained by KNF provides the ability to seek clients, provide them all information about products and services, and also accept orders and carry out other activities for and on behalf of the investment firm. Notification of the planned assignment of activities to an agent in Poland is submitted to KNF by the home regulator for the foreign investment firm. Following such notice, the investment firm submits to KNF an application for entry of the entity in question in the register of agents. KNF may refuse to make the entry if it finds that the entity cannot ensure proper performance of the agent's services.

An entity conducting brokerage activity in an OECD or WTO country (with its registered office outside the EU) may operate in Poland only in the form of a branch, and only with the approval of KNF issued after obtaining an opinion from the regulator in the home jurisdiction and fulfilment by the prospective members of the branch's authorities of the education and experience requirements for financial market institutions. Oversight of the branch is exercised by KNF.

A representative office is the simplest form for activity by foreign institutions in Poland, but also the narrowest in terms of the scope of operations. A representative office may be formed by entities from EU member states or other countries. The activity of a representative office is limited to advertising and promotion.

Banking

Foreign banks may also offer banking products and services in Poland in various forms. The fundamental and most obvious form is to establish a new bank or acquire a significant stake in the shares of an existing bank. A foreign bank may also open a branch or representative office in Poland. Establishment of a new bank, branch or representative office, or acquisition of the shares of a Polish bank by a bank with its registered office outside the EU, requires a licence from KNF.

Banks with their registered office in EU countries can operate in Poland through a branch or via cross-border activity. In that case, the regulator in the home jurisdiction notifies KNF of the intention to commence activity in Poland in the given form, indicating also the types of services to be offered. Provision of banking services in this manner is also subject to the legal requirements for provision of banking services in force in Poland, which the bank will be notified of by KNF after receipt of the notification from the home jurisdiction.

Investment funds

Apart from foreign investment firms and banks, foreign investment fund managers from the EU—i.e. undertakings for the collective investment of transferable securities (UCITS) and alternative investment funds (AIF)—may also take advantage of the single passport rule. They can create branches in Poland after KNF receives notification from the regulator in their home jurisdiction of the intention to sell fund participation units in Poland. The newly established branch may then commence the sale of participation units in the funds indicated in the notification after KNF presents the conditions for conducting operations in Poland.

Sale of investment units may be conducted directly or via a branch of the management firm or entities operating in Poland authorised to sell investment fund participation units. It must be stressed, however, that if the participation units of the foreign funds constitute securities, their sale is covered by the Public Offerings Act and the procedure set forth there for admission to trading on the regulated market.

An alternative investment fund (AIF) is defined as a collective investment undertaking which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors. An AIF from the EU may be introduced into trading in Poland without limitations among professional investors, but among retail investors only if the participation units are securities and information about the securities and the conditions for acquiring them is made available in any form and any method to at least 150 persons in the territory of a single member state or indeterminate addressees under the rules set forth in the Public Offerings Act.

KNF maintains a register of foreign funds selling participation units in Poland.

A separate category of AIF is an alternative investment company, i.e. a fund operating in the form of a company (including a European Company) or a limited partnership or joint-stock limited partnership in which the sole general partner is a company (including a European Company). The sole subject of the business of an alternative investment company is investing capital raised from a number of investors in accordance with a defined investment policy for the benefit of the investors. An alternative investment company may be managed by a company which is an alternative investment company, operating as an internal manager, or a company which is the general partner of an alternative investment company, operating as an external manager. This applies to investment companies operating in Poland for a long time as venture capital or private equity. Apart from the need to obtain an entry in the register of AIC managers and fulfil the related formal requirements, subjecting them to KNF oversight has not significantly changed their method of operation. An AIC is an investment fund exempt from the obligation to use a depositary or fulfil a number of organisational, technical and capital requirements.

Management of an AIC does not require a KNF licence and may be performed on the basis of an entry in the register of AIC managers maintained by KNF only when the total value of the assets in the investment portfolios of the AIC which the AIC manager manages or intends to manage does not exceed the equivalent of EUR 100 million, or if the AIC manager manages only unleveraged AIFs that do not grant investors redemption rights during a period of 5 years, the equivalent of EUR 500 million. If these thresholds are exceeded, the AIC must meet the capital, organisational and technical requirements provided by law.

Alternative investment funds not registered in the EU may be offered in Poland only through a public offering.

At the customer's request

The foregoing conditions do not apply if a customer from Poland directly contacts a foreign investment firm, bank or fund with the aim of using its services (reverse solicitation). Such services are provided exclusively at the customer's initiative, and the firm's activity is limited to executing the customer's orders and does not include the possibility of offering additional products or expanding the scope of services beyond those requested.

However, any promotional activities previously undertaken by the foreign entity in relation to the Polish customer may exclude the possibility of finding that the cooperation occurred at the customer's initiative, and in consequence could lead to a finding that the service was provided without holding a licence required by law.

Danuta Pajewska, legal adviser, partner in charge of the Capital Markets and Financial Institutions practice

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Can everything be tokenised?

In 2017 the technology of distributed ledgers broke into the broader public awareness. An immediate effect was the growth of interest in cryptocurrencies and the fear that they were developing into a speculative bubble. But behind the obsessive focus on cryptocurrencies lie even more interesting phenomena in the world of blockchain. Perhaps a new decentralised economy based on an entirely new class of assets is emerging before our very eyes.

Krzysztof Wojdyło

Token economy

It would be hard to grasp what is now occurring in the world of blockchain by applying any traditional conceptual framework. The assets being traded lack any material substratum. Nor is this market controlled by any traditional institutions guaranteeing its proper functioning. Nonetheless, between the beginning of 2017 and the beginning of 2018, the capitalisation of this market expanded from about USD 20 billion to USD 620 billion.

The scale of this phenomenon has taken on such dimensions that it cannot be ignored. We are witnessing an entirely new reality which has been given the working name of the "token economy." It generates extreme emotions. For some it is a global speculative bubble which sooner or later will end in catastrophe. For others, what is happening in the world of cryptocurrencies is proof that the global economy is undergoing re-evaluation, marking the start of an entirely new reality.

No one can predict how the current unprecedented accumulation of value in the realm of blockchain will end. The situation is so dynamic that any attempt at an accurate forecast seems condemned to failure. Instead, I propose for a moment to leave aside speculations and the wild fluctuations in exchange rates of cryptocurrencies, to examine more calmly what the token economy has to offer. The key to understanding this concept is a more intimate familiarity with the technology of distributed ledgers.

Distributed ledgers

The technology of distributed ledgers is an IT solution based on a specific decentralised architecture of ledgers. We should note first that many key elements of our economy are already based on ledgers. We use electronic registers of assets (such as real estate or intellectual property rights). The financial system itself functions as a kind of ledger. After all, financial transactions (payments of cash as well as, for example, transfers of securities) are now overwhelmingly made electronically and recorded in various electronic ledgers.

Ledgers have so far been constructed mainly in a centralised manner. This assumes the existence of a trusted entity (often a public administrative body, or an entity of particular importance to the economy, such as a bank) controlling the ledger and responsible for its security. The technology of distributed ledgers alters this approach and assumes that ledgers are maintained in a decentralised manner. The original of the ledger is recorded simultaneously by numerous entities. This approach requires many challenges to be overcome, first and foremost ensuring that the individual versions of the ledger are identical and none of the dispersed entities maintaining the ledger is in a position to alter the entries in the ledger independently and without consensus. Various solutions assist in achieving this, including cryptographic solutions as well as appropriate mechanisms for achieving consensus among the entities maintaining the ledger.

Distributed ledgers may be either private or public. In simple terms, the difference boils down to the status of the entities maintaining the ledger. Private ledgers may be maintained by entities from a certain sector of the economy (e.g. banks or energy companies), serving the specific needs of that sector. Public registers, including the most radical variations, may be maintained by anyone who is in a position to supply the computing power necessary to maintain them. It is such public registers that constitute the essence of the token economy. Examples of such registers include the blockchains mentioned in the introduction. They are maintained by anonymous suppliers of computing power dispersed all over the world.

Tokens

Distributed ledgers are platforms enabling economic exchange, and tokens are the subject of that exchange. Traditional centralised ledgers contain electronic entries which at the fundamental technological level are nothing but digital code. We ascribe various meanings to them depending on the context. An entry in the land and mortgage register reflects the title to real estate. An entry in a bank ledger reflects monetary value. So there are at least two fundamental layers of such entries: a relatively uniform technological layer, and a semantic layer that varies depending on the context.

It is the same with tokens. Oversimplifying, we can say that tokens are settlement units of decentralised ledgers. At the fundamental level they are only digital code entered in the decentralised ledger. But they also have a semantic layer which determines their function and meaning.

A decentralised ledger, such as blockchain, enables transfers of settlement units between entities creating the addresses on the blockchain. Anyone can create such an address. In simple terms, it can be said that an address on a blockchain is analogous to a bank account in the traditional financial system. In reality, what we call an address on a blockchain is a public key associated with a unique private key. The public key (address on the blockchain) is visible to all. The private key is, as a rule, known only to its holder. The pairing of public key and private key is generated automatically upon creation of the address on the blockchain.

Public addresses enable tokens to be recorded on them. In the broadest sense of the word, cryptocurrencies like Bitcoin or Ether are also tokens. Some blockchains can handle a wide range of settlement units, so long as they are created in a given IT standard. The best-known blockchain of this type is Ethereum. In addition to its "native" currency, Ether, it is a blockchain enabling generation and transfer of other tokens created in a given standard. Often it is these other tokens that are referred to as tokens in the narrow sense of the term.

Practically anyone can create their own token, in the sense of a settlement unit that can be transferred between participants in a blockchain and recorded at public addresses on the given blockchain. Thus, to some extent, everyone has an opportunity to create value on a blockchain.

The bounds of tokenisation

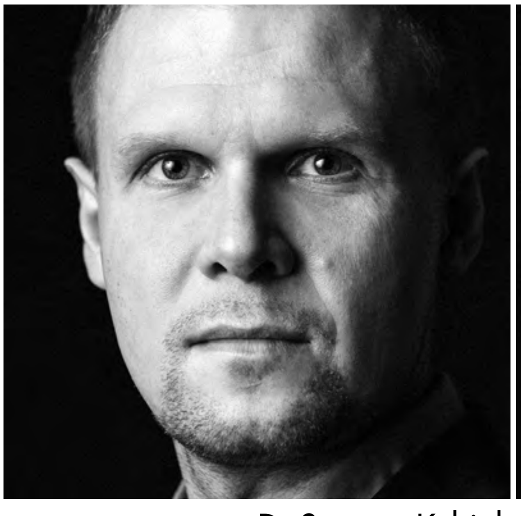
Faced with the possibilities offered by the technology of distributed ledgers, the question arises of the boundaries of tokenisation. Can anything be tokenised? On the technological layer, boundaries cease to exist. A token can even reflect movable things. But limitations can still arise from the semantic layer. Theoretically anyone can create a token and ascribe to it any meaning they wish. But respect for this meaning by traditional law may be a problem. Imagine tokens reflecting title to real estate. Theoretically a system of such tokens could be created on public blockchains without difficulty. But given the material nature of real estate as an asset, sometimes it will prove necessary to demonstrate this right in the physical world, e.g. by taking possession of the property. For this we will need the backing of the state and its enforcement authorities. In certain situations, a virtual token functioning in the abstract reality of a decentralised ledger will have to confront the traditional system of law. If the traditional system does not recognise its meaning, it will not vest its holder with any rights in the physical world.

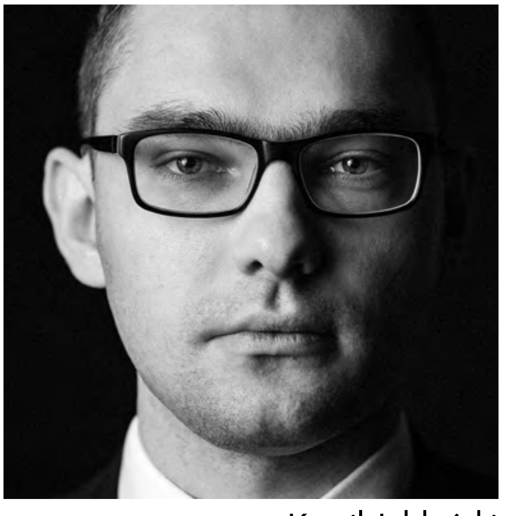
Thus tokenisation does have its limits. The space of material things will no doubt remain the domain of traditional legal systems for a long time to come. Those systems will still decide which material things can be tokenised and which cannot. It is different with respect to all assets in digital form. In that case, along with the development of the token economy, traditional legal systems are beginning to lose their relevance. The growth of cryptocurrencies so far has shown that a class of digital assets can successfully exist regardless of whether or not traditional systems of law recognise their existence or significance.

If only effective arbitration systems can be successfully created within the token economy, capable of resolving disputes, traditional legal systems may finally lose their control and relevance in the context of digital assets. All of the trading in such assets, from their creation and transfer to resolution of disputes, could then occur without the involvement of the state and traditional law. That would involve a huge realignment of the world as we know it. Particularly when we realise the growing significance of digital assets. This is already more than just computer games or music. Money and data—the basic raw material of Industry 4.0—already take almost exclusively digital form. All the rest is a natural consequence of this state of affairs.

Krzysztof Wojdyło, adwokat*, partner in charge of the New Technologies practice*

Artificial intelligence in recruitment





Dr Szymon Kubiak Kamil Jabłoński

Artificial intelligence is a concept that has made a great career in recent decades not only among engineers and scientists, but also in popular culture. Some take the view that no software or computers created to date truly qualify as AI, but technologies are already appearing on the horizon which can permanently change how companies operate, including on the HR side—and generating plenty of legal issues along the way.

One of the technologies that can strongly impact employment law is support systems for HR staff handling tasks such as recruitment. The new technologies are not replacing recruiters yet, but they can take a lot of work off their hands, especially when it comes to searching for candidates and pre-screening them.

A bot too far

Such technologies are already available in Poland. A Polish firm created one of the first bots on the market which uses the Messenger app to impersonate a career counsellor. It exploits mechanisms for machine learning to collect and process vast quantities of data. Chatting with a candidate, the bot learns the candidate's preferences and then selects job offers matching the candidate's preferences and suiting the candidate's profile.

From the perspective of employment lawyers sensitive to issues such as job discrimination, a huge advantage of such solutions could be the opportunity to make the recruitment process objective and to reduce the risk of erroneous decisions (rejecting a good candidate), based for example on unwarranted (or even illegal) criteria, prejudices or hunches.

Unfortunately, these hopes were quite brutally squashed by the example of the bot created by Microsoft with the charming name Tay, which communicated so effectively and eagerly with some of its followers on Twitter that the bot started creating its own racist and sexist tweets.

This case raises the interesting legal issue of the employer's liability for communications conducted by its bot "employee." Taking this a step further, the question is whether the bot's algorithms were too imperfect to identify and screen data which were digested within the machine-learning process, leading to such unfortunate results. And what should be the responsibility of the designer of such programming? What about the case of "black boxes"—algorithms so complicated it is impossible to determine what they actually analyse or what basis they use to generate results?

The employer is still liable

No doubt there are many such questions. The larger the sample or database which the algorithm processes and learns from, the lower the risk of a decision displaying unlawful discrimination. Access to data in the cloud also plays a huge role here, as data from a larger sample should reduce this risk. This leaves the issue of access to "training" data, particularly in light of the approaching entry into force of the EU's General Data Protection Regulation.

From the perspective of employment law, however, there is no doubt that liability for discrimination in hiring, for example, caused by an algorithm's matching of discriminatory data, is fully borne by the employer. The Labour Code requires employers to apply equal treatment in establishment and termination of employment relationships, employment conditions, advancement, and access to training to improve employees' professional qualifications, in particular without regard to sex, age, disability, race, religion, nationality, political beliefs, union membership, ethnic origin, or sexual orientation, or employment for a definite or indefinite period, full-time or part-time. For example, a job candidate whose application is rejected by an algorithm because of the candidate's race could seek damages in court against the employer in an amount no less than the applicable minimum wage.

A finger on the pulse

But let's focus on what we think is the key question: Will we trust AI if it selects a job candidate we just don't like? Or in the final reckoning, won't the decision always be taken by a human?

It may also turn out that recruitment bots, although only used for a relatively short time, will not prove revolutionary and soon will be discarded. Technologies are already emerging enabling analysis of facial expressions or even changes in job candidates' pulse (which from a legal perspective may raise similar doubts as the use of devices such as lie detectors in recruitment). Such technologies can determine whether a grin was sufficiently sincere, or whether the candidate answered a certain question frankly. And this is becoming possible not from hooking up a candidate to a lie detector, which is generally impermissible, but in a discussion with a robot recruiter with a soothing female voice and facial expression recognition software.

Such a recruiter already exists. Her name is Sophie and she is a robot created by the Japanese company NEC and La Trobe Business School in Melbourne.

From a legal perspective, such an examination of an employee by a robot remains decisively risky and may infringe the employee's personal rights. Even if a candidate consents to such an interview, during which a machine processes and analyses data such as the candidate's pulse or facial expression, under the existing case law in Poland (e.g. judgment of the Supreme Administrative Court in Warsaw of 13 February 2003, Case II SA 1620/01), it may be disputed whether such consent is truly voluntary.

At this stage of development of these technologies (and perhaps more to the point, at the present stage of their social perception and acceptance), we may wonder how a qualified and sought-after job candidate would respond when scheduled to meet with an android because the prospective employer does not have time for a personal interview. Will the candidate still want to work for that organisation?

The future is now

Although we believe that live recruiters will still play a key role at least in the final phase of selection of candidates, particularly when it comes to assessment of their soft skills, robot assistants already seem to be nipping at their heels. Employment law will need to rise to entirely new challenges of a new working environment, where part of that environment will include robot recruiters.

If this sounds too much like science fiction, we should point out that Sophia, a humanoid (android) created by Hanson Robotics from Hong Kong, and namesake of Sophie the robot recruiter, recently received Saudi Arabian citizenship. This may have been a purely symbolic act, but it is already the reality—whether we like it or not.

Dr Szymon Kubiak, legal adviser, partner, Employment practice

Kamil Jabłoński, legal adviser, Employment practice

Don’t delay pursuing IP claims


Lena Marcinoska Włodzimierz Szoszuk

Rightholders should not put off enforcing claims for protection of intellectual property rights and fair competition. But they should also not act hastily, without careful analysis and preparation. The best approach may be to act with “deliberate speed.”

Success story

The company is a well-known beverage manufacturer. For over two years it has been marketing a new drink under a fanciful name. The company invests heavily in developing, marketing and promoting the product. After some time the company files for registration of the product name as a trademark. The beverage quickly sells all over Poland, including the largest supermarket chains. It is intensely promoted. It rapidly gains popularity, as reflected in the sales results. After more than two years of sales, the company is pleased with the results the product has achieved, and intends to expand the brand further.

Unexpected turn of events

But then the company is surprised to be served with a court order prohibiting it from further use of the beverage name. The company has been enjoined from advertising, marketing or distributing the product. The bailiff seizes all the bottles and labels in the company's warehouse. It turns out that a competitor has applied for interim relief to secure its claims based on a prior trademark for the identical name, which it filed a few days before the producer of the beverage filed its own application for trademark protection. The company is in crisis. It faces the vision of financial losses and injury to its reputation, as well as the permanent loss of the name of the product it has invested in for over two years.

The court renders a judgment

The company appeals against the order. It raises numerous arguments and objections. It also shows that for over two years, the competitor tolerated the presence on the market of the beverage with the disputed name. The competitor never notified the company of the rights it now claims, although it admits that it knew of the use of the name for over two years. Nor did it ever begin using the same mark itself.

The appellate court upholds the defence of acquiescence and denies the application for interim relief to secure the competitor's claims. The court finds that by tolerating the company's actions for two years, the competitor has lost any legal interest in obtaining interim relief.

For the company, the history of the interim relief ends well. But that does not mean that the main proceeding will reach the same ultimate result. Fortunately, in this case the parties managed to reach agreement and the main proceeding was discontinued.

Defence of acquiescence to infringement

The course of this story is distinct, and the case is atypical for several reasons. It nonetheless shows that an undertaking exposes itself to risk by condoning actions infringing its intellectual property rights.

In certain instances, years of inaction may sanction infringements and prevent the rightholder from obtaining an injunction against infringement. It allows the opposing party to assert the defence of estoppel, as captured in the Latin maxim *venire contra factum proprium nemini licet*, meaning that a party cannot object to what arises out of its own actions. An undertaking should not behave in contradiction to its earlier express or implied statements which allowed it to gain the trust of another undertaking, which reasonably acted in reliance on that trust. This notion is sometimes treated as analogous or identical to the principle of acting in good faith, and sometimes is treated as a form of abuse of right.

Various reasons the rightholder might fail to react immediately

To allege the defence of acquiescence in court, the infringer must show that the rightholder induced in the infringer a reasonable belief that it tolerated its actions. The longer the holder fails to react to infringement, the more reasonable the infringer's belief may be that it may continue to act accordingly. In the case of EU trademarks, the length of this period is expressly regulated. The proprietor of an EU trademark cannot object to use of a later mark if it was aware of the use and acquiesced to it for five successive years. But such regulations are lacking in Polish law with respect to both trademarks and unfair competition. Each instance must be examined individually and treated with great caution. In some cases it might be a few years, or in others a decade or more. The reasons for the proprietor's failure to respond may also vary, and sometimes they are clearly justified.

After all, responding to an infringement, particularly in intellectual property cases, is a fairly complicated process, and the less obvious the infringement, the longer and more difficult it is to respond to it. Response requires organisational and financial investment by the rightholder. The rightholder must take the time to monitor the infringer's behaviour, evaluate its consequences, assess the rationale for taking action, and gather evidence, which in itself can be very time-consuming. It is also essential to consider the specific nature of the industry in question and the characteristic economic conditions.

There cannot be said to be acquiescence when the rightholder informs the infringer of the violation of its rights, takes actions with respect to the infringer, sending it a clear signal that it will not tolerate the infringement, or where the parties are in negotiations. The infringer's impression of acquiescence must arise from objective facts and not a subjective sense.

Under the facts described above, the court found that the lack of response from the rightholder for two years, without notifying the infringer in any form of its formal rights, could instil in the infringer an impression of acquiescence to its actions and a lack of conflict with the other party's rights.

Weighing the interests of the proprietor and the infringer

But creation of a justified belief in acquiescence is still insufficient to uphold the defence of acquiescence. The court must also weigh the interests of the parties. It must give due consideration to the proprietor's formal right and the resulting exclusivity, as well as the actions and expenditures the proprietor has taken, for example using the trademark. The court should also consider the situation of the infringer, examining among other things whether its actions were taken in good faith and what investments it made in connection with use of the mark.

Under the facts discussed here, the rightholder never marketed its own beverages under the disputed trademark. It made no efforts in this direction and did not incur any expenditures to this end. The court thus found that in the proceeding seeking interim relief, the interests of the party that had sold, promoted and established the disputed brand on the market deserved protection.

Weighing the interests of the parties should be approached with great caution. The interests of the infringer, even if in some instances they may seem justified, should not take precedence over the social interest, including the interests of consumers who could be misled by the infringer's actions. Reliance on a defence of acquiescence should also be excluded when the infringer acted in bad faith, particularly when it has intentionally violated the law.

Risks connected with the passage of time require heightened attention

This story shows that in practice, undertakings enforcing their rights must pay attention not only to the formal, objective limitations period, but also the potential defence of acquiescence to the infringement. This defence is sometimes overlooked in preparations for litigation and risk assessment. Although both defences are connected with the passage of time, they display great differences particularly in their nature, the grounds for upholding the defence, and the aims they are intended to serve. Essentially, the defence of acquiescence should arise when for whatever reason, e.g. procedural, the allegation that the claim is time-barred cannot be asserted. Other situations are rare, but do sometimes happen, as the facts discussed above indicate. In this specific case, the defence of acquiescence took precedence over the defence of the statute of limitations.

Conclusions

Anyone who delays in enforcing rights to intellectual property assumes some risk—that is obvious. It must be stressed, however, that situations where the court refuses to issue an order prohibiting infringement due to acquiescence must be the exception. Acquiescence may be grounds for denying injunctive relief only in very specific instances and circumstances. The state of facts can sometimes be very complicated. Nor can the actions by rightholders be taken hastily. Moreover, given the alienable nature of intellectual property rights, the proprietors holding the rights can change. The new proprietors must have a right to take their own decisions and actions against infringements even if they differ from those taken by their legal predecessors. The defence of acquiescence must not constitute a general justification for sanctioning infringement of intellectual property rights.

Lena Marcinoska, adwokat*, Intellectual Property practice*

Włodzimierz Szoszuk, adwokat*, senior partner co-heading the Intellectual Property practice*

How hard is it to win a tender in Poland?

Many foreign contractors complain that Polish tenders are difficult. Indeed the country does favour a highly formal approach to procurement. So it's essential to be prepared. Signatures and stamps on hard copies are essential, deadlines must be scrupulously met, and the ESPD must be completed in detail and also signed. The rest should be smooth sailing.

Anna Prigan

Although the Polish procurement regulations comply with the EU's procurement directives, here the directives are implemented in a quite literal and very restrictive manner. In many instances where the directive provides for an option, it is treated as an obligation in Poland, and thus foreign contractors must provide a lot of information and file numerous documents that are not required in their home jurisdictions. This sometimes generates problems, as we will discuss in this article. But we can start from the fact that procurement procedures in Poland are conducted in Polish.

Language of procedure

It seems obvious that contractors would expect procedures in Poland to be in Polish. Only in very few instances, involving highly complicated contracts, will the contracting authorities here publish an English version of the procurement documentation. Even when they do, they usually take no responsibility for the quality of the translation, indicating that the Polish version is controlling, and if something is lost in the English it is up to the contractor to find it.

Thus when bidding for a public contract in Poland, the contractor needs to know Polish or have a translator or a Polish partner or adviser. Otherwise it will be difficult to understand the rules for the procedure and the requirements for the documents.

A client of ours who relied on an online translation tool paid the price of losing the contract. Although the prospective contractor had filed the most advantageous offer, it did not meet the formal requirements because the contractor had not fully understood a summons from the contracting authority. Moreover, the contractor's own correspondence in the procedure was rendered into Polish by translation software and was unintelligible or funny-sounding. Unfortunately, the response time is often very brief. It is essential to grasp the meaning of the correspondence as soon as it is received, and the contracting authority always communicates with contractors in the language of the procedure.

Form

An English-speaking contractor who used a machine translation to decipher the documents unfortunately did not seek advice from a local lawyer or a Polish partner concerning the regulations governing the form of the procedure. Not everything is obvious from the contract announcement or even the terms of reference. The contracting authority need not include information there about the obligations that must be fulfilled in every tender procedure under the applicable regulations. Thus sometimes the tender documentation is written in general terms. Our client was also unaware that an up-to-date (but unofficial) English version of the Polish Public Procurement Law is available at the website of the Polish Public Procurement Office.

The rule is still that tender procedures are conducted in writing. The electronic procurement platform known as e-Zamówienia is supposed to be launched in the autumn of 2018, which may make life easier for foreign contractors. For now, contractors have the convenience of using the European Single Procurement Document (ESPD), as applied in the EU, as well as the ESPD Tool provided by the European Commission to fill out and reuse the ESPD. There the ESPD can be generated in any of the EU's official languages, but not all contractors are aware that the ESPD forms used in the member states can differ. In some countries a simple "yes" or "no" to questions set forth in the ESPD is an adequate form of documentation of the circumstances. In Poland, the accuracy of the responses to questions in the ESPD will need to be proved at a later stage of the procedure using certificates issued by the competent tax and social insurance authorities, the commercial register and the criminal register.

Certificates

Where the EU directive states that a certificate may be required, it is safe to assume that in Poland the certificate will always be required. The general rule is that a complete set of certificates will be required only from the bidder that submitted the most advantageous offer. But in multi-stage procedures, at the stage of prequalification the contracting authority may require a complete set of documents from all the candidates. Under the law, the period which the contracting authority provides for contractors to submit certificates cannot be less than 10 days. Sometimes this is too short a time to obtain a certificate abroad, particularly when the certificate in question is usually not required in tenders in the country in question. Thus it is worth considering gathering certificates before they are needed. If a certificate was issued no earlier than 3 months prior to the deadline for filing applications for admission to the procedure, or for filing offers, and the facts stated in the certificate are still accurate, the contracting authority may regard the certificate as proper, even if in practice the contractor submits the certificate only a year later because of the time already taken for conducting the procedure.

The Polish regulations sometimes require certificates that are not issued in a given country. Only when the specified type of certificate is not issued at all, i.e. no competent office exists or the office in question does not issue such certificates, can the contractor replace the certificate with its own statement, but the statement must be made before a notary.

It seems that the most annoying requirement in Poland is to present a certificate showing a clean criminal record, which must be presented by every management board member, supervisory board member, and commercial proxy. A certificate must also be presented stating that a prohibition on seeking the award of a public contract has not been issued against the company. For Polish entities both of these certificates are issued in a simple and quick process by the National Criminal Register, but it's not so easy in all other countries. Many of our foreign clients, including the one discussed in this article, are not in a position to obtain such certificates quickly and easily. But if the foreign contractor wants to win a tender in Poland, it must obtain them. That is why we recommend reviewing the relevant formalities early on and the possibilities for fulfilling them.

Subcontractors and partners

If a partner is needed, it should be quickly found and the relations with the partner sorted out. Essentially, a partner may be needed for two different roles: either as a member of a consortium with whom the contractors will jointly meet the conditions for participation in the proceeding, jointly participate, and jointly file an offer; or only as a subcontractor. There are also two types of subcontractors: it may be a firm that will help perform part of the contract, or a firm that can help meet the conditions for participation in the procedure and then will jointly perform the contract, although the offer is filed without the subcontractor.

The company referred to in this article needed a partner but did not manage to formalise its relations with the partner. But it is necessary in the ESPD to specify whether the contractor taking part in the tender intends to use a subcontractor in performing the contract and whether any third party is lending its capacity (knowledge, experience, staff, or technical, financial or economic capacity) in order to meet the conditions for the contractor to participate in the procedure.

Our client did not fulfil the conditions for participation in the procedure on its own. But in the ESPD form it answered "no" to the question about reliance on the capacity of third parties, and in another item it indicated that "yes" it intended to hire subcontractors. Soon the company found the appropriate partner which was to act as its subcontractor. Moreover, the partner could (and would) make available to the client its potential required for participation in the procedure. But that was no longer possible. Indicating in the ESPD that it would not use the capacity of third parties was tantamount to a declaration that it individually fulfilled all the contracting authority's requirements. Such a declaration cannot be subsequently withdrawn in favour of reliance on third parties. Even though it's just marking an X next to a yes or no question, placement of the X can be decisive on whether or not the contractor participates in the contract award procedure. That's how it happened with our client.

Lawyers

The company we are discussing made surprisingly many mistakes in a tender that was very important for its business. It did not properly review the terms of the procedure, seek advice on the realities under which it could compete in the tender, find a partner in due time, or verify how it should complete the ESPD so that it could still salvage the situation. On top of that, it first made all these mistakes and only after losing the tender decided to seek out a lawyer in Poland. Unfortunately, on many issues we could no longer provide any help.

The client based all these rash decisions on its own deep knowledge of the business, in which it is an undisputed leader. In this tender, its product was objectively the best and offered for the best price. The company thought that would suffice to win the tender. It forgot, however, that it was dealing with the public procurement regime, where completion of the formalities is vital. It's essential to know the procedure before you can comply with it. The rest is downhill.

Anna Prigan, legal adviser, Infrastructure, Transport, Public Procurement & PPP practice

Cross-border defence of companies in criminal cases

Aleksandra Stępniewska

Prosecution of commercial entities for criminal offences is becoming increasingly common internationally. The fact that a company is registered in a different jurisdiction is no bar to prosecution, and neither is the concept of the "corporate veil." Consequently, allegations affecting the operations of a subsidiary may be pursued against its foreign parent.

Crossing the boundaries of responsibility

Pursuant to the concept of the corporate veil, legal liability is ascribed to the entity within a business structure whose operations are tied to the specific event caused by persons acting for and on behalf of that entity. This concept is consistent with the principle of individual criminal responsibility, under which commercial entities can and should be held criminally responsible for actions that can be directly attributed to them.

In practice, however, piercing of the corporate veil occurs more and more often. This applies as well to the sphere of criminal liability, even if it is governed by stricter standards than for example civil liability.

The lack of clear guidelines on when the corporate veil can be pulled aside in criminal cases creates a risk of arbitrariness in evaluations and decisions that are the basis for potential criminal allegations and convictions. An effective defence is another issue in cases of this type.

Polish parent, French subsidiary

This lesson was learned by a Polish company that is the sole shareholder of a subsidiary based in France.

The model of opening a separate subsidiary abroad suited the company's business model. The aim of the subsidiary was to find and serve foreign clients and build the international dimension of the business.

Due to suspicions of commission of an economic offence in France, the French law enforcement authorities began an investigation into the activities of entities allegedly exploiting business relations with the French company to commit the offence. In conducting their investigation, the prosecutors did not consider the business model for the operations or the specifics of the sector in which the parent and subsidiary operated.

Consequently, charges were filed against the Polish parent company. It was ultimately acquitted, but first it had to undergo a criminal trial before the French court at two instances.

Allegations—myths and facts

The basis for the allegations against the Polish company was its involvement in the French subsidiary, which, in its business operations, entered into dealings with companies which it later turned out had failed to pay VAT to the French treasury.

The French subsidiary was deemed to be an entity with no real substance, serving only as a front for the parent company, and thus the actions of the subsidiary were attributed to the Polish parent company.

At the same time—inconsistently—nearly the entire indictment referred to the activity of the subsidiary, among other things the turnover generated by the subsidiary and the share in that turnover of the entities that had failed to pay tax. One of the grounds for the indictment was the erroneous finding that these entities accounted for up to 80% of the turnover of the French subsidiary, at a time when its turnover was reaching historic highs. For the French authorities, this suggested that the company and persons acting for it were knowingly involved in tax fraud.

Under French criminal law, a legal person can be held criminally responsible if a prohibited act is committed by a person acting on behalf of the legal person as an authority or representative of the legal person.

Depending on the circumstances of the case, French judicial practice also permits piercing of the corporate veil and holding criminally liable the structure controlling the entity whose activity is formally connected with the event that is the basis of the criminal prosecution. In this respect, the French courts attempt to lay down the criteria for determining when the corporate veil may be ignored. This can happen in particular when the subsidiary does not display any decisional autonomy or real economic existence—including when, due to a lack of resources, the subsidiary is not in a position to provide the services which pursuant to its declared business purposes it should essentially be able to provide.

Moreover, the French Court of Cassation has indicated in its case law when directing criminal allegations and sanctions to a parent company violates principles of criminal responsibility. In particular, it is not proper to address allegations to the parent company only because the subsidiary subcontracts some of its business to external suppliers, the same persons serve on the authorities of both companies, or the companies have the same shareholders, the same subject of activity, long-established business relations, or common customers. If in the relations between the companies there is decisional autonomy as well as separate organisation and assets, then, according to the Court of Cassation, it is impermissible to pierce the corporate veil for purposes of criminal liability.

These rules were not followed by the French law enforcement authorities when asserting allegations and criminal charges against the Polish parent company in this case.

Defence—evidence from economic analysis

One of the grounds of defence before the French court was to demonstrate that the French subsidiary of the Polish company is an entity that conducts genuine commercial activity, and thus there was no basis for asserting criminal charges directly against the Polish parent company.

Arguments were also presented showing that neither the Polish company nor the French company had cooperated in the criminal offence. In this respect it was essential to rebut the prosecutor's assertion of knowledge and intent to participate in the offence by the person acting for the

French company (who was also a commercial proxy for the Polish company). This was inferred by the prosecutor from the erroneously calculated percentage share of the French subsidiary's turnover by the companies that failed to pay tax. For the prosecutor, the fact that entities representing a small percentage of the company's customers had generated 80% of its historic turnover implied that the person managing the company and maintaining contacts with the customers must have known (or could not have been unaware) that he was participating in fraud.

In response to these arguments, the defence presented an economic analysis based on the numerical data concerning the operations of the French subsidiary and the market. The results of the analysis were set forth in a report prepared by a private expert hired by the Polish company, who subsequently testified as a witness.

The analysis and findings in the report undermined the accuracy of the findings made in the case by the prosecutor.

The point of departure for the analysis was the well-known Pareto principle, according to which 20% of a business's customers will generate 80% of its profit. Thus, the breakdown of the company's financial results in this case did not represent an anomaly which should in and of itself rouse suspicions.

The analysis showed that during the time in question, the financial results of other entities on the market were also generated by a small group of their customers. Finally, the analysis showed that contrary to the prosecutor's assertions, the commercial relations with the companies involved in the tax offence did not cause the French company to generate the highest revenue in its history.

The economic analysis also demonstrated the real existence of the French company, while reflecting the specifics of the market in question, which due to its intangible nature does not require the creation of an extensive organisational structure.

Epilogue

These and other arguments led to the acquittal of the Polish company. Nonetheless, piercing of the corporate veil for purposes of criminal liability remains an open issue.

On one hand, targeting a criminal prosecution against another entity in the group, e.g. the parent company, is countered by the principle that each entity should be responsible for its own deeds. On the other hand, corporate structures are sometimes exploited for criminal activity. Consequently, setting aside the rules of individual responsibility in relation to collective entities can be a weapon in the battle with criminality, particularly economic crime. But this should occur as the exception rather than the rule, making it necessary to establish and follow a set of strictly defined grounds for piercing the corporate veil.

Perhaps surprisingly, this is also relevant to the Polish legal system, particularly in the context of approaching changes in the model of criminal responsibility of collective entities. According to planned changes in law, it will be possible to impose criminal responsibility directly on collective entities, and not, as is now the case, only based on the prior conviction of an individual.

Aleksandra Stępniewska, adwokat*, partner, Business Crime practice*

International tax disputes: Faster and easier?


Jakub Macek Michał Nowacki

The budgetary demands of many countries are leading to tightening of tax policy, more exacting tax audits, and sometimes authoritarian measures by the tax administration, particularly in the area of transfer pricing. The actions taken by the tax administration in one country can impact the situation of companies or groups in other countries. In such cases, the interests of the different tax administrations may conflict, resulting in tax disputes. International regulations provide tools for resolving such disputes, but of varying effectiveness.

What's the problem?

A company registered in an EU member state holds shares in a number of companies spread about the world. They conduct manufacturing activity, including in Poland.

The tax authorities of the country where the company has its registered office decided to audit the company. After examining the company's records, the tax authority issued findings estimating the company's income reflecting the profit of the Polish subsidiary, among others.

The foreign authorities took the position that the Polish entity had been allocated profits higher than were justified by the role it played in the structure of the overall capital group. The key to this conclusion was a functional analysis—a comparison of the functions and economic risks borne by the specific entities in the group and the share in the profits allocated to them.

The functional analysis leads to allocation of profits at a level appropriate to the risk borne by the given entity. For the tax authorities to decide what order of profit an undertaking should achieve might seem to conflict with how the free market operates, but it allows profits of international capital groups to be taxed where the profits are actually generated.

Under these facts, the group faced a tough challenge. Although the income was subject to taxation in Poland, it was taxed again in the state where the shareholder was a tax resident. The result is a situation where the same income is taxed in two different countries.

Mutual agreement procedure

With growing pressure from public opinion, the tax authorities are intensifying their efforts to assign the largest possible tax base to their own jurisdiction. Measures aimed at allocating income to the state where it is actually generated may be laudable, but they sometimes lead to cases of effective double taxation.

The remedy for this problem is supposed to be the mutual agreement procedure, or MAP as it is known. This instrument has so far not enjoyed great popularity. According to figures from the Polish Ministry of Finance, there were a few dozen proceedings of this type pending in 2016, although that number also includes cases commenced in earlier years.

Under current law, there are two grounds for conducting this procedure. The first can be a tax treaty. A clause enabling the use of MAP is currently included in all the tax treaties Poland is a party to.

Tax treaties are the most common basis for MAP indicated by applicants, but major weaknesses of this mechanism have been revealed over the years it has been applied (MAP has been provided for by the OECD's Model Tax Convention since the 1960s). The key faults are the taxpayer's limited involvement in the procedure (after the application is filed, the role of the most vitally interested party is held to a minimum) and the absence of an obligation to develop a unified position. The states that are parties to the tax treaty are not obliged to reach a compromise solution, but only to make efforts toward finding a consensus.

The need to eliminate the weaknesses of the treaty procedure inclined the member states of the European Economic Community to adopt the so-called Arbitration Convention (Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC)). Application of the convention is generally limited to shifting profits based on transfer pricing regulations. The main advantage of the convention procedure is that it requires the tax authorities involved in the dispute to eliminate double taxation. But unfortunately the convention replicates some of the weaknesses of the treaty procedure, by failing to ensure active involvement by the parties and instruments for enforcing the time limits for resolving the dispute.

New directive—will things improve?

In light of the shortcomings of the treaty procedure and the procedure under the Arbitration Convention, in 2016 the European Commission presented a proposal for a new directive governing MAP. Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union is aimed at streamlining and expediting the MAP procedure. The scope of cases covered by MAP is expanded beyond that provided for in the Arbitration Convention. The new procedure will apply to all taxpayers subject to income tax with respect to their cross-border transactions within the European Union.

To ensure the efficiency of the procedure, it is divided into three main stages.

In the first stage (the complaint stage), a taxpayer may file a complaint within three years after it learns of the occurrence of double taxation. With the complaint, the taxpayer is required to present a detailed description of the facts, the applicable regulations, and copies of the decisions issued in the matter. Significantly, the taxpayer has a right to file a complaint regardless of whether it has had recourse to the appeal measures available under national law.

Within six months of receipt of the complaint, the competent tax authorities will issue a decision on acceptance of the complaint for consideration and admissibility of the complaint. This launches the second stage (the mutual agreement procedure). The directive imposes on the authorities of the interested member states a two-year period for resolving the dispute (with the possibility of a one-time extension of six months).

The aim of the second stage is to eliminate double taxation through:

- Taxation of the disputed income in only one member state, or
- Reduction of the tax payable in one member state by an amount equal to the tax payable on the same income in another member state.

If the complaint is rejected (e.g. when the tax authorities find that no double taxation has occurred), the taxpayer can appeal against the decision using the legal means provided by national law.

But if the complaint is rejected by one of the member states or the competent authorities could not reach an agreement eliminating the double taxation, the MAP passes to a third "dispute resolution" stage. To resolve the dispute, an advisory commission is appointed made up of a chairperson and two representatives of each authority involved in the dispute, as well as one or two independent representatives.

The advisory commission, comparable to the role of an arbitral tribunal in civil or commercial disputes, is a new institution introduced by the directive. Each of the member states will nominate five persons with the relevant competencies and guarantees of independence and impartiality, and the tax authorities involved will then appoint the persons serving on the advisory commission from that list.

The aim of appointing the advisory commission is issuance of an opinion in the case which will then be forwarded to the competent authorities of the member states. The commission will have six months to issue an opinion. After receiving the opinion, the authorities of the interested member states will have another six months to reach agreement in the case eliminating double taxation. If they do not reach agreement, the opinion of the advisory commission will become binding.

Another new feature introduced by the directive is limited openness of the mutual agreement procedure. Currently, the course and result of MAP are known only to the participants in the dispute. The results of procedures conducted under the directive will be published in the form of an abstract of the final decision, describing the issue, the subject of the dispute, and the final outcome. If the taxpayers involved in the case consent, the final decision can be published in its entirety.

The directive will apply to complaints submitted from 1 July 2019 relating to tax years commencing on or after 1 January 2018.

Tax arbitration?

International tax law provides for one more form of resolution of interstate tax disputes. Rules for mandatory binding arbitration were adopted in one of the BEPS (Base Erosion and Profit Shifting) measures initiated by the OECD and included in the Multilateral Instrument (MLI) adopted in 2017.

The MLI provides for commencement of arbitration if the tax authorities cannot reach an agreement using MAP. In that situation, the case is submitted to a panel of independent arbitrators whose determination will be binding on the parties to the tax dispute.

Introduction of this arbitration mechanism is optional. Despite initial interest in this institution, so far only a handful of countries around the world have decided to include such provisions in their tax treaties (Poland is not one of them). Thus it is likely that this form for resolution of international tax disputes will remain largely a theoretical curiosity.

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A foreign employer goes bankrupt: When can Polish staff receive their pay from the Guaranteed Employee Benefits Fund?


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If an employer with staff in Poland is declared bankrupt in a foreign proceeding, the employees may have difficulty collecting their unpaid salary. Do staff employed in Poland by a foreign undertaking have the right to payment of benefits from Poland's Guaranteed Employee Benefits Fund?

It is the nature of cross-border bankruptcies that they generally involve multiple legal systems in solving problems affecting the bankruptcy estate and creditors' claims. In the case of the bankruptcy of an undertaking from an EU member state employing workers in another member state, the law that is key to employees' claims is the law of the state where the workers were employed as of the date of declaration of bankruptcy. Without waiting for satisfaction of their claims (including overdue wages) in time-consuming bankruptcy proceedings, workers employed in the EU may apply for benefits guaranteed by national insurance funds. Payment of benefits requires fulfilment of strictly defined conditions regulated by national law. In this respect, the Polish Act on Protection of Employee Claims in the Event of the Employer's Insolvency of 13 July 2006 may not be interpreted uniformly, causing complications in the procedure for satisfaction of claims by the Guaranteed Employee Benefits Fund (FGŚP).

Foreign bankruptcy and employment in Poland

In our practice we dealt with a case of the bankruptcy of a foreign employer with a large group of workers in Poland. The debtor provided hotel and flight reservation services in Poland. The staff were employed directly by the foreign company but worked exclusively in Poland. Although the foreign undertaking had opened a branch in Poland, the staff still worked under employment contracts signed with the foreign undertaking. After the declaration of bankruptcy, the receivers terminated the employment contacts with all staff using the group layoff procedure.

The staff had unpaid salary for the period prior to the declaration of bankruptcy and also had other claims against the bankrupt employer (e.g. cash equivalent for unused holiday leave). As soon as they learned of the employer's bankruptcy, many of the employees immediately applied to their province labour office for payment of benefits pursuant to the Act on Protection of Employee Claims in the Event of the Employer's Insolvency.

FGŚP inclined to refuse to pay benefits

After reviewing their employment documentation, FGŚP concluded that the employees of the bankrupt company were not covered by the Polish act because none of them were employed at the branch registered in Poland, as for the entire time of their employment they were employees of the parent company with its registered office in another EU member state (the UK). Consequently, the fund concluded that the employees had no right to payment of benefits under the Polish act, and because they were employed by a foreign undertaking, their claims should be submitted instead to the British National Insurance Fund. Based on an interpretation of Art. 2 of the act, FGŚP found that a necessary condition for payment of benefits was registration by the foreign undertaking of a branch in Poland and also employment at that branch of at least one employee in connection with commercial activity conducted in Polish territory. Thus, in the view of FGŚP, only workers employed by a branch of a foreign employer have a right to receive benefits from the Polish fund.

Unclear national regulations

A literal interpretation of Art. 2 of the act can indeed lead to divergent conclusions. The wording of this provision raises doubts whether a claim for benefits may be asserted by workers employed by a foreign undertaking doing business in Poland, or, in addition, as FGŚP argued, it is essential for the foreign undertaking to have a branch and for the staff to be employed at the branch.

In response to the position of FGŚP, the receivers for the debtor expressed the view that Polish law does not make payment of benefits conditional on employment at a branch opened in Poland, because in their opinion the Polish law simply does not impose such a requirement. Consequently, direct employment by a foreign undertaking, accompanied by actual conduct of business in Poland, for example in the form of a branch, is sufficient. The Polish act does not differentiate the situation of workers employed by a foreign undertaking from that of workers employed by a branch of a foreign undertaking.

Apart from this, the receivers pointed to other relevant factors which in their view justified the claims asserted by the employees. First, for all employees working in Poland, the foreign employer paid contributions to the Polish Social Insurance Institution, National Health Fund, and FGŚP. Second, the staff performed work in Poland in an office complex rented by the debtor. Third, all the staff were employed in accordance with the Polish Labour Code under employment contracts. Fourth, the employees paid tax to Polish tax offices.

It should be noted that despite the lack of a legal basis, FGŚP asserted that in this situation the foreign employer had no obligation to pay Polish social insurance contributions. But as it turned out, the decisive legal issue in this case was an interpretation of European law.

EU law to the rescue

Unlike Polish law, EU law does not make protection of the employees of an insolvent employer conditional on the fact of opening a branch in the territory of another member state—nor does it mention at all employment of staff as part of the branch. However, Art. 9(1) of the Employer Insolvency Directive (2008/94/EC) expressly states that if an undertaking with activities in the territories of at least two member states is insolvent, the institution responsible for meeting employees' outstanding claims shall be that in the member state in whose territory they work or habitually work.

EU law thus clearly provides that for protection of employees, what is decisive is the place where they perform work, not the location of the employer's registered office. Moreover, under the Insolvency Regulation ((EC) 1346/2000, now (EU) 2015/848), "The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment." On this basis as well, it should have been found that the Polish act applied to employees of the foreign undertaking, as it hired them under employment contracts governed by Polish law.

Finally, after reviewing the arguments by the receivers for the bankrupt company and obtaining an interpretation from the Ministry of Family, Labour and Social Policy, FGŚP decided to grant the applications for payment of benefits to the debtor's employees. Consequently, the award of protection to staff employed in Poland was based on provisions of EU law taking a more liberal approach than Polish regulations to the conditions for satisfying the claims of employees of an insolvent undertaking. An additional factor for extension of protection to employees by the Polish institution was the lack of any other prospects for satisfaction of the employees' claims, whether in the employer's bankruptcy proceeding or on the part of the insurance fund in the foreign employer's home jurisdiction (as social insurance contributions for the employees were not paid abroad, but only in Poland).

Assertion of EU law was essential in this case from the practical point of view, because the employees who decided to pursue claims against the Polish fund could rely directly on EU regulations. As a rule, directives are not applied directly by the national courts. However, in certain situations, individuals (or undertakings) can demand direct application of EU directives before the national courts. This applies to cases where the other party is a state, local government, or quasi-state institution, such as a public hospital (known as "vertical direct effect").

Summary

The insolvency of an employer, particularly a large enterprise employing hundreds of people, will typically cause legal and organisational problems for the employees in recovering their unpaid benefits. A further difficulty arises when the employer is based abroad and the bankruptcy proceeding where the employees may assert their claims is conducted there, not in the country of employment.

It is important to the debtor's employees to recover as soon as possible at least part of their unsatisfied claims, which should be possible in a simplified procedure before the national institutions charged with satisfying claims in a crisis connected with the employer's insolvency. As the example here shows, pursuit of claims by employees may be hindered when issues arise involving cross-border insolvency and employment relationships formed with an entity with its registered office in an EU member state other than the one where the employees work.

An optimistic side to this story is that the employees here were awarded benefits by the national fund because they were employed in the country where the fund is located, regardless of their connection to an employer with its registered office in another country. Another significant aspect of the case was the openness of the Polish institutions to consultation on the relevant legal issues with other participants in the proceedings, ultimately reaching a determination ensuring the consistency of national regulations with standards of EU law.

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Savings insurance policies: How to recover liquidation fees?

Until recently, life insurance with a capital fund, known popularly (but erroneously) as savings insurance policies (*polisolokaty*), were offered widely on the insurance market in Poland. But many customers lost their savings due to clauses in the general conditions of insurance requiring them to pay a "liquidation fee." Now they want to recover their invested funds.

Paweł Mazur

The concept

The investment product popularly referred to as a savings insurance policy (*polisolokata* or *polisa lokacyjna*) appeared on the financial services market in Poland as an attempt to avoid the flat-rate tax on capital gains (known as "Belka's Tax" after the Minister of Finance who introduced it in 2002). When opening a savings account at a bank and depositing funds in the account for a certain period in exchange for the payment of interest, the customer must pay over to the treasury 19% of the interest income in the form of capital-gains tax. But no capital-gains tax is owed on benefits paid out under a life insurance policy or endowment policy.

Originally, savings insurance policies were similar from an economic point of view to regular time deposits in a bank. The customer, typically through a bank, would conclude an insurance agreement in which the event triggering payout of the insurance benefit plus interest was survival to a specified age. Because these products were not taxed and due to the guaranteed return of capital, these products enjoyed great popularity and over time evolved into instruments of a much riskier nature: life insurance policies with an insurance capital fund (UKF).

Life insurance policies with a UKF combine a life insurance policy or endowment policy with investments in investment funds. This product is also popularly referred to as a *polisolokata*, but it should be clearly distinguished from a savings insurance policy (*polisa lokacyjna*) in the sense discussed above. This is the instrument that for several years has caused consumers to lose their savings and been the subject of numerous lawsuits. The UKF policy combines a protective element with an investment element. The initial portion of the premiums (typically smaller) is used to pay out the benefit guaranteed in the contract in the event of the insured's death or survival to the stated age. The other portion of the premiums is invested in insurance capital funds, which invest in various types of financial instruments. Consequently, UKF policies carry investment risk. Only when certain events defined in the contract occur is the consumer entitled to receive a cash benefit in the amount specified in the policy. This product is thus no longer an "economic time deposit," because the consumer is not assured a guaranteed profit. Moreover, the profit generated from the policy is taxed.

By definition, a UKF policy is of a long-term nature, and only in exceptional circumstances did insurance companies offer customers contracts for a period less than 10 years. This meant that consumers were practically deprived of the ability to dispose of their funds, as surrendering the policy was tied to the obligation to pay very high costs. A typical clause provided for in the general conditions of insurance was for a "liquidation fee," the amount of which, particularly in the case of surrender of the policy during the initial term of the contract, could be as high as 100% of the insured amount. Such clauses meant that cancellation of the product entailed the loss of the great majority or even all of the invested funds.

Prohibited contract terms

UKF policies were complicated financial instruments. Consumers often decided to enter into these agreements without sufficiently understanding their nature as a structured product, thus depriving themselves of the ability to dispose of their money for years. Many customers, unaware of the liquidation fee clauses, decided to terminate their policies, but received in return only a portion of the amounts they original invested, as the liquidation fees were automatically deducted before the insurers repaid the contributions made by the insureds.

This practice by insurance companies led to attempts to challenge the general conditions of insurance before the courts under Civil Code Art. 385^1 §1, which provides that unfair contractual terms are not binding on consumers. For a clause to be held to be unfair, four conditions must be met:

- The contract must be concluded with a consumer (i.e. a natural person entering into a transaction with a business which is not directly connected to the person's business or professional activity).
- The clause must not be individually agreed (i.e. the consumer had no opportunity to negotiate the clause or real influence over the wording of the clause).
- The clause establishes the rights and obligations of the consumer in a manner inconsistent with fair practice (e.g. exploiting the consumer's ignorance or inexperience) and grossly infringing the consumer's interests (i.e. when there is an unwarranted disproportion in the parties' rights and obligations, to the consumer's disadvantage).
- The clause does not involve the principal, clearly stated consideration provided by the parties (in the UKF policies, the principal consideration on the part of the insurer was to pay out the insurance benefit in the event of the death of the insured and to manage the assets of the insurance capital fund, and on the part of the consumer, to pay premiums and management fees).

Litigation

If the conditions set forth above are met, the consumer may demand a refund based on unjust enrichment regulations (Civil Code Art. 410 §2 in connection with Art. 405), as the insurer has obtained the funds in the amount of the liquidation fee without a legal basis.

Insurance customers' battle against insurers in this arena has been well-publicised since 2015. Recently the courts have looked favourably on consumers' demands, holding the liquidation fees to be unfair contractual terms and ordering insurance companies to refund the fees they withheld. Particularly noteworthy was the precedent-setting judgment of the Warsaw Regional Court of 10 May 2017 (Case XXIV C 554/14), upholding the class-action suit brought by 165 customers against a well-known insurance company. The insurer was ordered to refund over PLN 2 million in improperly collected fees. It was also held in that judgment that claims for refund of improperly deducted liquidation fees are governed by a 10-year statute of limitations.

Procedure for recovering liquidation fees

An injured consumer has several means to pursue recovery of the liquidation fee.

- **Complaint**

If customers believe that the contract or the general conditions of insurance contain prohibited clauses, they may file a complaint with the business with which they signed the contract—typically a bank or financial intermediary. In light of the current line of precedent from the courts, which generally upholds the consumers' demands, many financial companies will agree to sign an annex to their existing contracts removing the provisions concerning liquidation fees.

- **Individual suit**

If the negotiations with the insurer do not achieve the desired result, the consumer may consider filing an individual lawsuit or joining a class action. An individual suit will involve filing a statement of claim with the court demanding a refund of the money withheld in payment of the liquidation fee. This procedure will probably be faster than a class action but may expose the consumer to higher costs.

- **Class action**

An alternative to individual litigation is a class action. This institution enables a group of 10 or more people to pursue together claims sharing common factual and legal grounds. The permissibility of seeking recovery of liquidation fees under this procedure is now expressly provided for by Art. 1(2) of the Class Actions Act as amended in April 2017, and was also recognised in the judgment of the Warsaw Regional Court cited above.

The claim is filed by a class representative, who may be a member of the class or the county (or municipal) consumer ombudsman. In either case, the class representative must be represented by an *adwokat* or legal adviser. Counsel will file the statement of claim with the court, which will examine whether the class action is permissible. If the court finds that the case may be considered under the class-action procedure, it will order publication in the mass media of a notice on commencement of the class action. The notice is published in order to inform as many people as possible of the pending proceeding. They can then file a written statement joining the group within a designated time of one to three months.

Pursuing refund of liquidation fees through a class action has numerous advantages. First, this procedure allows the injured parties to obtain the support of the consumer ombudsman, resulting in savings in court fees. Second, collective action gives the case broader social and media impact. Third, the class can afford to hire highly qualified counsel, as the legal fees are divided among numerous plaintiffs.

Summary

It thus seems that a class-action suit now offers an attractive alternative to other means of recovering liquidation fees provided for by the law. In light of the judgment favourable to consumers issued by the Warsaw Regional Court, it should be anticipated that more such class actions will be filed against insurers.

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Sexual harassment: An old, new problem

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Time **magazine's person of the year for 2017 was "The Silence Breakers"—the women who broke the code of *omertà* surrounding sexual harassment and launched the #MeToo campaign. Should employers expect to face a wave of harassment claims? What is sexual harassment and what are the employer's obligations to counteract it?**

In October 2017 the *New Yorker* and the *New York Times* published articles describing cases of sexual harassment allegedly committed by the head of one of the major Hollywood film studios against actresses working with the studio. These publications sparked a worldwide debate. It was marked by a post on Twitter in which a victim of harassment called on other victims to stand up and be counted on social media with the hashtag #MeToo. Twelve million such posts appeared on Facebook in the next 24 hours. Similar posts began to appear in other countries, including Poland.

But if Polish judicial statistics are to be believed, the problem of sexual harassment barely exists here. In 2016 there were 15 cases pending before the district courts seeking damages for sexual harassment, and five cases before the regional courts. Considering that trials last some 12–18 months, in practice such claims represent less than one in a thousand cases before the labour courts.

This presents a stark contrast with the results of studies of sexual harassment. According to a report issued by the STER Foundation in 2016, 87.6% of women in Poland have experienced some form of sexual harassment on the job or in public places. The perpetrators include, for example, the woman's boss (15.8%), a co-worker (41.8%), or a client, customer, patient or student (19.9%). International research conducted by the European Commission in 1987–1997 found that in Europe, about 40–50% of women had experienced harassment in their work environment. And according to a pan-European study in 2014 by the EU Agency for Fundamental Rights, 75% of women employed at top managerial positions and 74% practising the free professions had experienced some form of sexual harassment in their lives. Thus the research shows that sexual harassment in the work environment is a vastly more common problem than suggested by the negligible number of lawsuits. This is consistent with the conclusions from the #MeToo campaign.

It may be wondered whether the small number of trials results from unclear regulations, slow proceedings, low damages, or problems of a social nature, such as low awareness of what constitutes harassment under the law. But it seems that following the #MeToo campaign, harassment claims may rise. So now is the time to pay attention to this problem, particularly considering that employers bear a statutory obligation to combat phenomena of this type.

Under Poland's Labour Code, sexual harassment is understood as a particular form of sex discrimination which includes any unwanted behaviour of a sexual nature or referring to the employee's gender, with the aim or effect of infringing the employee's dignity, in particular by creating an intimidating, hostile, degrading or offensive atmosphere (Labour Code Art. 18^{3a}). Such behaviour may include physical, verbal or nonverbal elements. The legal definition of sexual harassment is therefore based largely on evaluative terms (such as "infringement of dignity" or "degrading"). This may be one source of the difficulty in correct identification and classification of instances of harassment. Given the small number of holdings on these issues by the Polish courts, it is worthwhile to consult the rulings from courts in other countries on similar cases, as well as the views expressed in the legal literature.

In the literature, it is most often indicated that sexual harassment can take the form of sexual blackmail, also known as *quid pro quo*, or it may consist of creating a hostile environment. A hostile environment may be further broken down into unwanted sexual attention or gender harassment.

While identifying *quid pro quo* cases may often be straightforward, as it is the starkest form of interference with the employee's sexual autonomy, other forms of harassment sometimes take a subtler or coded form. Unwanted sexual attention may also take more unequivocal forms (such as coerced hugging or patting), or forms that are harder to define and thus harder to prove (although rulings from European courts confirm that stares, gestures or comments may be regarded as harassment).

Harassment based on belonging to a particular gender can be the most difficult case to identify. Such behaviour as telling jokes depicting a certain gender in a frankly sexual context, or displaying pornographic materials (such as photos on a calendar or computer wallpaper), may constitute gender harassment—even if in some environments such behaviour is viewed as an expression of a certain corporate culture or "mere" rudeness.

The case law from the US courts presents instances of sexual harassment that would be especially doubtful under the Polish regulations. This could include for example instances of questioning the qualifications of employees holding jobs culturally associated with a different gender (e.g. a women surgeon or a female taxi driver), by referring in an insulting manner to the category of gender, for example a blunt statement that a woman is incapable of properly performing certain duties. According to those rulings, such instances may constitute sexual harassment. This issue has yet to be analysed by the Polish courts. In our own view, treating such behaviour as harassment would be doubtful in Poland, even though such a situation appears to meet the conditions for harassment as set forth in Labour Code Art. 18^{3a} §6. It may be argued that under Polish law such behaviour would rather be regarded as an infringement of the employee's personal interests rather than sexual harassment.

However, it does appear correct to classify as sexual harassment another type of gender harassment often called "horseplay." This involves a form of bullying occurring for example among men working together on a team, which is expressly connected with sexuality and takes such forms as inappropriate remarks, name-calling and assaults. Although this form of harassment is not directly connected with the sex drive, and the sexual orientation of the perpetrators and the victim is irrelevant (the person does not become the object of harassment because he or she is regarded as desirable by the perpetrator(s)), nonetheless, given the close connection with the victim's sexuality (the subject of the taunts and aggression), it could be regarded as harassment under Polish law as well.

Under the Labour Code, protection extends to job candidates, employees, and former employees who experienced discrimination during their employment, regardless of sex (although statistics show that instances of harassment of women are decidedly more common) or position held. Harassment may occur not just from boss to subordinate, but also between co-workers. Persons working under civil (non-employment) contracts are also protected under the Act Implementing Certain Regulations of the European Union on Equal Treatment of 3 December 2010, which contains a definition of harassment analogous to Labour Code Art. 18^{3a} §6 but provides for different liability rules.

It remains problematic, however, whether harassment can include an incident where the perpetrator is a business partner of the employer (i.e. a person who does not work for the employer). In practice, employees can be exposed to abuse by persons cooperating with the employer on an ongoing basis (e.g. regular customers). Because the employer is obligated to provide employees with safe and hygienic working conditions and to combat discrimination in employment (Labour Code Art. 15 and 94 (2b) and (4)), it can also be argued that in this instance the abuse constitutes harassment. This view has been adopted by commentators in the legal literature.

But it seems that many doubts surrounding the proper classification of behaviours constituting sexual harassment remain to be resolved. Notwithstanding the practical issues outlined above involving the definition of this phenomenon, employers should be prepared to face a growing number of sexual harassment claims in the upcoming years. Thus appropriate measures should be taken now. This also follows from the legal obligation imposed on employers to combat harassment (Labour Code Art. 94(2b)). To this end, employers should at the least introduce policies for combating harassment, tailored to the realities of the given workplace and containing rules for how to proceed when an incident of harassment is reported. It should also be remembered that employers are required to inform employees of the substance of regulations governing equal treatment (Labour Code Art. 94^1). To fully accomplish this, employers should provide the text of anti-harassment regulations to employees in writing or make them available in another manner followed at the given workplace.

Given the seriousness of the problem and potential negative consequences for the employer (financial losses and injury to the employer's reputation), sexual harassment in the workplace must be treated with the attention it deserves. Proper performance of the employer's obligations in this respect can help reduce or eliminate harassment as well as contain the risk connected with potential disputes.

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Good credit for bad debts


Daniel Smarduch


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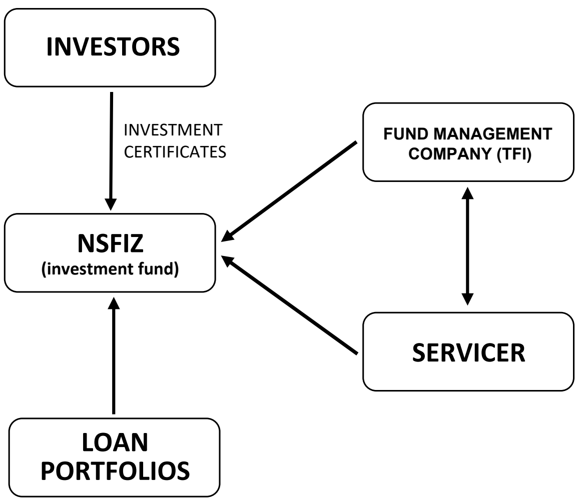
Debt financing of profit-generating assets is an obvious strategy in a free-market economy. The risk of non-payment of credit can be reduced by due diligence, analysis of the borrower's business plan, gradual release of funds as projects progress, and establishment of security against the financed asset (real estate, inventories, shares in a company being acquired). But what if the subject of the investment is non-performing loans? We already know that these assets are not generating a return, attempts at enforcement have so far been ineffective, and these assets cannot be encumbered in favour of the creditor. One of our clients faced the issue of whether it could finance such an investment, and if so, how to do so effectively.

Acquisition structure and financing structure

Purchasing bad debts is not a new phenomenon in Poland. Such investments are financed by investors' own capital, bond issues, or loans. Recently there has been growing interest in lending for such investments not only among Polish investors, but also foreign banks and funds.

Debt is often acquired with the involvement of a non-standard closed-end securitisation investment fund (NSFIZ), regulated in Poland under the Act on Investment Funds and Management of Alternative Investment Funds.

The fund acquires a loan portfolio and becomes the creditor and beneficiary of the claims. A separate entity, the servicer, administers the fund's receivables and is responsible for collections. The investors provide the fund with the money necessary to purchase the portfolio and in exchange receive investment certificates and become the beneficiaries of the profits generated by the fund. The investors also control the fund's investment policy. The servicer is often itself an investor in the fund—sometimes the only investor and sometimes one of the larger investors.



This structure requires a non-standard approach to financial documentation and identification of the risks connected with the sector of acquiring portfolios of non-performing loans. In the case of foreign financing parties, it is also important for them to understand the structures and roles of the different entities, in light of the local variations in how securitisation funds operate. We present below an overview of these issues using the example of a case we handled, advising the bank financing the investment.

Who is the borrower—who takes out credit

The question arises which of the entities in the structure described above will be the borrower. The fund, which pays the purchase price, must have the means to acquire the receivables, and thus there are two candidates: the fund or the investor, which borrows money and then pays it into the fund in exchange for investment certificates.

At this point, regulations governing investment funds enter the picture. Under the Investment Funds Act, the fund is not free to finance its activity any way it likes. It can take out loans or credit or issue bonds, whose total value cannot exceed 75% of the fund's net asset value. It should be borne in mind that apart from value restrictions, there are additional restrictions concerning the entities that can be the source of such financing.

There's also a practical aspect. One investor may use multiple funds to acquire receivables (and that was the case in the matter we handled). For purposes of flexibility, the more attractive candidate for the role of borrower is the investor, which then may place the proceeds in further funds. That is why the investor assumed the role of borrower in relation to our client.

What the money is for…

A special type of financed investment requires a special approach to the provisions of the credit agreement. Knowledge gained in transactions involving the sale of non-performing loans may be useful at this stage, enabling a grasp of the risks not arising in other types of financing.

To define the purpose of the financing, it is necessary to imagine the structures that will serve for acquisition of the portfolio of receivables. Banks essentially sell their loan receivables to securitisation funds, but that is not a fundamental requirement for other sellers. The aim of the credit may be identified as acquisition not only of receivables, but also investment certificates in the securitisation funds which will acquire the receivables. Also remaining for consideration is the scope of influence of the financing bank over the purchase of specific portfolios by the borrower or fund. It should be anticipated that the greater the financing party's involvement in the investment, the greater the control it will want to have over the acquisition of portfolios.

… who acquires the portfolios …

Portfolios of receivables may be acquired by the borrower itself; then the situation is simpler because this entity is known at the very beginning of the cooperation. But the situations where portfolios are acquired by funds must be addressed. How many funds should there be? Can they have just one investor? Do we also allow co-investors other than the borrower or guarantors? For the financing bank these answers are vital for controlling the risk. Situations should be avoided where an investment financed with credit granted by a bank is burdened with the additional risk of other, unauthorised acquisitions of portfolios which the bank has no control over.

For example, if the bank finances investments in investment certificates of a fund whose investment decisions are controlled by investors other than the borrower, unsuccessful investments will reduce the value of the borrower's investment certificates. It may turn out that even if the portfolio of receivables acquired by the fund with the money paid in by the borrower generates excellent results, repayment of the credit may be threatened due to other, poor investment decisions by the fund.

In the case we handled, the bank accepted the existing co-investors, but stipulated that any changes in the investors or the agreement between the investors would require the bank's consent in the future.

… and who works on them

Non-performing loans in themselves generate only modest receipts. The degree to which a non-performing asset begins to perform again for the new creditor depends on the effectiveness, knowledge and experience of the servicer. On one hand it is essential that the servicer be already known or that its selection provides for the possibility of the financing entities' oversight. Portfolios of receivables acquired by the borrower may be serviced by the borrower itself. However, in the case of a fund, it is always necessary to involve a separate servicer, as the fund itself cannot independently enforce the required receivables (lacking the necessary human resources, technologies etc). On the other hand, we must remember that the servicer as well as enforcement of the receivables as such are among the most important sources of costs, constituting points where money can leak out of the financial structure, increasing the financial risks.

In our client's case, this problem was not so vital. The structure was "sealed" through establishment of security by the servicer, which thus became individually liable for repayment of the credit.

How's business going?

When the investment is financed largely from credit, it is necessary to monitor the fundamental indicators for evaluating the course of the investment over short time intervals. The key parameters connected with investments in portfolios of receivables include EBITDA, cash EBITDA, and the loan-to-value ratio (LTV). For these indicators to play their role, they must be calibrated precisely, reflecting the structure of the group and the cash flows. Other important data include the ERC (estimated remaining collections) and the ratio of actual collections to ERC.

When warning bells should go off

Apart from these indicators, changes in the structure of the portfolio should be monitored. Particularly disturbing changes may include:

- Exercise by the original creditor of the right to buy back the receivables, which could deprive the portfolio of valuable receivables
- Reassignment of receivables because they do not meet the conditions assumed in the assignment agreement, which may demonstrate that the assumptions adopted for valuation of the portfolio were erroneous
- Reassignment or exercise of the right of renunciation by the original creditor alleging breach of the assignment agreement by the acquirer, which may demonstrate improper performance of its obligations by the acquirer or practices by the servicer that are unlawful or in breach of its agreements.

Changes in the structure of portfolios do happen in practice, however, and not every change necessarily represents a threat to the entire investment. In the case of our client, this was reflected in the form of an agreed threshold of materiality and a list of circumstances that could raise objections. This provided the parties with the comfort of knowing that flexible cooperation with the sellers of the portfolios would not upset relations with the lender.

Security? The fund can't provide it

A natural source of security for the entity financing the acquisition of portfolios of receivables would be the portfolios of receivables themselves. But this solution only appears to be the simplest option.

Portfolios of receivables are acquired by a securitisation fund, and the law imposes restrictions on the fund concerning not only incurring financial obligations, but also granting security. The fund cannot grant guarantees, and thus cannot guarantee the credit granted to the investor.

What about the receivables? Formally, the act does not prohibit the fund from establishing *in rem* security on the assets. Thus establishment of a registered pledge in favour of the financing entity might be considered … but here a red warning light flashes. As the act does not allow the fund to assume personal liability for a third party (guarantees), does *in rem* liability circumvent this prohibition?

It turns out that in this instance, when the fund is not the borrower, the financing entity does not receive direct access to the assets of the fund, or at least not in a manner providing it the necessary comfort that everything will work in a crisis.

The investor would rather not, but must

If security cannot be obtained against the property of the fund, the remaining solution is to look to the investment certificates in the securitisation fund. These are securities which the investor receives in exchange for paying money into the fund, and reflect the value of the fund's assets. Such securities may be encumbered with a registered pledge or financial pledge, and we used such security in the transaction with our client. Here there are several elements that demand attention. Firstly, the statute of the fund should not contain restrictions on establishing encumbrances on investment certificates or sale or transfer of the certificates. In this respect, our client agreed with the borrower on an additional period for adapting the statutes to suit the requirements of the credit agreement. It is also essential to remember to notify the TFI managing the fund of the established security. From a practical perspective, this security has a certain downside that is particularly burden for investors. Each time the investor intends to invest further money in the fund, there is an issue of further certificates. From the lender's perspective, all new certificates should also be covered by the security, which makes it necessary to conclude additional agreements and make additional registrations. The more often issues are conducted, the more of a nuisance this obligation can be.

In light of the role played in the structure by the servicer, it is worth considering, in a situation where the servicer is the borrower or is part of the borrower's capital group, establishment of security that will enable the lender to take over the company providing this service, e.g. via a registered pledge and financial pledge over the shares. In our case, this type of security also supplemented the security package.

Summary

Despite certain peculiarities of the legal environment of the claims management sector as well as regulatory restrictions, the example of our client confirms that it is possible to create an effective structure for financing investments in portfolios of non-performing assets. But it is necessary for all the parties to understand the business model and how these investments differ from traditional investment in "performing" assets, and also to identify the place and time when added value is generated, as non-performing assets turn into assets generating income. This makes it possible to work out a compromise providing comfort to the financing parties that the money they have lent will be repaid, and to the investors, that the agreement with the financing parties will not impose a muzzle on them limiting their further growth.

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Compulsory mortgage as a method for securing claims: What to do to ensure that the mortgage does not expire prematurely?

Imposing a compulsory mortgage on the debtor's real estate has many advantages as a form of security for the creditor's claims. It offers a high degree of legal and economic protection. But alongside the advantages there are also legal risks. Certain measures must be taken to ensure that the security does not inadvertently lapse before the claims are satisfied.

Karol Czepukojć

Imposing a compulsory mortgage on real estate is one of the methods of interim relief for securing monetary claims provided for in the Polish Civil Procedure Code. The court may grant such security before the litigation is commenced or during the litigation, and in certain instances also after an enforceable title has been obtained.

The security is essentially issued upon application by the creditor. The application must substantiate the underlying claim and demonstrate the creditor's legal interest in obtaining security, as well as indicate the proposed method and subject of the security. If the creditor knows that the debtor possesses real estate but does not know the land and mortgage register number, or in general the status of the debtor's assets, it may hire a licensed detective to determine that information.

Holding such security, after obtaining a legally final judgment in the creditor's favour, the creditor may commence an enforcement proceeding, carried out by the bailiff, to satisfy its claim against the encumbered property.

Advantages of compulsory mortgage

Obtaining a compulsory mortgage against the debtor's real estate ensures the creditor a high degree of legal protection. A change in the owner of the encumbered real estate does not result in lapse of the security and extinguishment of the compulsory mortgage. The creditor can still enforce satisfaction of its claim against the encumbered real estate.

Moreover, under certain conditions a compulsory mortgage also remains in force if the debtor is declared bankrupt or court restructuring is opened with respect to the debtor. The creditor holding the mortgage then retains priority of satisfaction in the bankruptcy or court restructuring ahead of other creditors with lower priority of satisfaction, secured against other property of the debtor, or unsecured. To this end, the mortgage must be entered in the land and mortgage register in favour of the creditor prior to the declaration of bankruptcy or opening of the court restructuring, or the application for entry of the mortgage must have been filed with the land and mortgage register court at least six months prior to that date. If the creditor suspects that the debtor is threatened with insolvency or is already insolvent, it must act quickly to obtain security for its claims within the appropriate time.

In general, encumbering the debtor's real estate with a compulsory mortgage also provides a high degree of economic protection. In recent years in Poland we have not observed significant fluctuations in the market prices of real estate over the mid-range perspective. Consequently, a compulsory mortgage provides the creditor significant comfort during the phases of litigation and enforcement of the judgment.

The case is obviously different when the market value of the real estate is lower than the amount of the claim or it is already over-encumbered by mortgages in favour of third parties. Then obtaining security in this form can be illusory. Thus it should first be determined what is the estimated value and legal status of the property which could become the subject of the security, for example by consulting an appraiser and analysing the land and mortgage register for the property.

Lapse of security

There are also legal risks associated with a compulsory mortgage. The current wording of the Civil Procedure Code and the Act on Land and Mortgage Registers and on Mortgages does not reflect the specificity of enforcement against real estate. To avoid falling into a "trap" created by the legislature, certain actions should be taken in due time.

The Civil Procedure Code provides for a number of situations where security can lapse and the creditor can lose its protection. We will focus here on one of these.

Under Art. 754^1 §1 of the Civil Procedure Code (in the wording in force since 1 June 2017), "Unless otherwise provided by a specific regulation or otherwise ordered by the court, security granted under the provisions of this title shall lapse two months after the ruling granting the claim which was the subject of the security becomes legally final…." This provision applies among other things to security in the form of a compulsory mortgage. Consequently, after obtaining a judgment in its favour on the underlying claim, the creditor has only two months to conduct and finalise enforcement against the encumbered real estate.

Moreover, under the current regulations, applying to the bailiff to take enforcement action against real estate encumbered by a compulsory mortgage does not interrupt the running of this two-month period. Thus a compulsory mortgage is extinguished two months after the event indicated in the code, even if the creditor has filed an application with the bailiff before the end of that period to commence enforcement. Then the mortgage will expire while the enforcement is still underway. This conclusion is supported in the legal literature and in the case law of the Polish common courts, the Supreme Court, and the Constitutional Tribunal. The opposing views are in the minority.

It is also debatable whether a creditor can file an application with the land and mortgage register before the end of the two-month period to amend the entry of the compulsory mortgage from a form of interim relief into a mortgage based on an enforceable judgment, so that, for example, the creditor does not lose the resulting priority in satisfaction of its claim as against other creditors secured by the same real estate.

In the event of lapse of the security, it is possible to reapply for entry of a compulsory mortgage, now based on an enforceable judgment, but then the mortgage may not have the same priority as the expired compulsory mortgage. This is because between the filing of the application for entry of the first compulsory mortgage and the application for the second one, the real estate may become encumbered by further mortgages in favour of other creditors. Those creditors will then take priority over the mortgage established on the basis of the enforceable judgment. Or if the debtor has been declared bankrupt or court restructuring with respect to the debtor has been opened in the meantime, it will no longer be possible to enter a new compulsory mortgage in the land and mortgage register.

Change in date for lapse of security

The law does provide for exceptions from the rule that security lapses two months after issuance of a legally final judgment on the merits of the dispute. These exceptions may arise by statute or from a judicial ruling. We will focus on the latter situation.

According to the case law of the Supreme Court of Poland, there is nothing preventing the court from modifying the period for lapse of security to suit the nature of the compulsory mortgage—either at the court's own initiative or at the creditor's request. The court should take into account the fact that enforcement of the mortgage requires that the mortgage remain in place for the duration of the enforcement carried out by the bailiff. The court may do this in the order granting the security or in a separate order, but must do so prior to the date when the security lapses.

Experience shows that the courts generally do not specify at their own initiative the period for which the security is granted, modifying the statutory period set forth in Civil Procedure Code Art. 754[1] §1. Consequently, the creditor should take the initiative of requesting prolongation of the statutory period for lapse of the security, either along with the application for establishment of the security or in a separate application filed well within the two-month period specified in Art. 754[1] §1. For this request to achieve the desired effect, the court must issue the order granting the application for an extension before the two-month period expires.

Unconstitutionality of the regulation

Insofar as Civil Procedure Code Art. 754[1] §1 governs security for claims in the form of a compulsory mortgage, this section of the code was held to be unconstitutional in the Polish Constitutional Tribunal's judgment of 25 October 2016 (Case SK 71/13). However, the tribunal postponed the effective date when the rule stated in Art. 754[1] §1 ceases to be in force for a period of 18 months after publication of the judgment. That period ends on 30 June 2018.

The Constitutional Tribunal held that the statutory period for lapse of the security (which at the time was only one month), regardless of enforcement actions undertaken by the creditor in the meantime, limits the realisation of the creditor's property rights, undermines the creditor's reliance on the established security, and is inconsistent with the legislative intent behind this provision. Instead of encouraging the creditor to enforce its claims quickly against the property, it only forces creditors to prolong the period for lapse of the security. As pointed out in the legal literature, the current period for lapse of the security is so short it can entirely defeat the purpose of establishing a compulsory mortgage.

In the tribunal's view, this rule in the code was not salvaged by the existing authority of the court to extend the period for lapse of the security, as this authority should not be exercised by the court routinely, but only as an exception, in atypical situations.

With effect from 1 June 2017, the Polish Parliament did amend this provision to prolong the period for lapse of security from one month to two months. However, this did not cure the unconstitutionality of the regulation. The two-month period still appears too brief to obtain satisfaction during that period through the bailiff's enforcement against the real estate encumbered by the compulsory mortgage, as this is a complicated and time-consuming procedure.

Planned legislative changes

In November 2017 a proposal to amend the Civil Procedure Code and the Act on Land and Mortgage Registers and on Mortgages was filed with the Sejm (print no. 2064). This is a legislative initiative by the Senate and is directly connected with the need to bring the law into compliance with the judgment of the Constitutional Tribunal discussed above. The proposed changes would also meet the demands of most legal commentators.

It is proposed to enable the creditor to interrupt the running of the period for lapse of the security by applying to the bailiff to pursue enforcement measures against the encumbered property. Moreover, under the proposed changes, a creditor that has obtained interim security for its claims in the form of a compulsory mortgage will be entitled to apply prior to the end of the period for lapse of the security to change the existing compulsory mortgage, established as interim security, into one based on an enforceable judgment.

After adoption of these changes, the creditor will have three methods for ensuring that the compulsory mortgage remains in force for the time necessary to satisfy the creditor's claims. As now, the creditor will be able to apply to the court to extend the period for lapse of the security (although after the changes this option will probably be applied only in special situations). Moreover, the creditor will be able to stop the running of the period for lapse of the security through any enforcement measure carried out by the bailiff, or demand that the existing mortgage be converted into one based on an enforceable judgment, without actually undertaking execution measures. This will greatly increase legal certainty and the protection of creditors in Poland in this respect.

As of the writing of this article, the bill had yet to be presented for its first reading in the Sejm and is currently being considered by Sejm committees. Hopefully the bill will not be greatly revised during the legislative process and will enter into force by the end of June 2018, when the Constitutional Tribunal judgment takes effect.

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Risks connected with the use of boilerplate contractual clauses

It is common in commercial dealings to use standard contractual provisions—"boilerplate clauses"—or entire readymade contract forms. The availability of such templates may generate certain advantages, for example by helping the parties record in writing the arrangements they have agreed on orally, but they are also a source of numerous dangers.


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This phenomenon involves both non-professionals (e.g. individuals concluding a contract for sale of a car) and professionals concluding contracts related to their business.

It is much rarer for professionals to automatically reach for readymade contract forms. But this does not change the fact that in business-to-business transactions, it is common to use a wide range of standard contractual clauses—commonly known as "boilerplate."

What are boilerplate clauses?

This term derives from the standard rolled steel used to construct steam boilers. In the early 20th century this expression came to be used to refer to steel plates for printing items, such as press notices, where the content had to be reused numerous times. This is also the etymology of the notion of "boilerplate clauses"—standard provisions "mechanically" reused in contract after contract without adjusting the wording to the specific transaction.

Provisions of this type have their origin in common-law systems where (generally speaking) the contract signed by the parties is expected to set forth exhaustively the sum total of their rights and obligations. Conversely, if the parties did not address a particular issue in the text of their contract, that issue was excluded from the binding content of their contractual relations. This is quite a different approach from that followed in code-based Continental legal systems (such as Poland). Under Polish law, the consequences of a legal act (including a contract concluded by the parties) is determined not only by the express wording, but also by statutory provisions, principles of social policy, and established custom (Civil Code Art. 56).

In practice, "incidental" provisions are typically drawn from a repository of readymade clauses or previously used contracts. Moreover, unlike the core provisions of the contract (*essentialia negotii*), the parties often pay scant attention to the boilerplate clauses typically thrown in at the end of the contract, treating them as an afterthought, harmless provisions included for the sake of good order, not as a material part of the contract. This attitude can lead to lesser or greater mischief, inconsistency in the terminology used in the contract, or, in extreme instances, obliteration of the parties' true intention reflected in the main body of the contract.

Main types of boilerplate

The most commonly encountered clauses of this type include provisions on *force majeure,* the consequences of invalidity of one or more clauses in the contract, confidentiality, assignability, and so on. It is clear just from the titles of such clauses that their content will often overlap to a considerable degree with provisions of the Civil Code.

The question thus arises what purpose the parties are attempting to achieve when including specific boilerplate clauses in their contract. Assuming conscious action on their part, boilerplate clauses may be broken down into three main categories.

First, there are provisions that essentially repeat the relevant statutory regulations. These are typically used to ensure that all of the terms of the contract (including those arising from statutory sources) are included in the text of the contract. An example is inclusion in a contract of a savings clause, worded more or less as follows: "If any provision of this contract proves invalid or unenforceable, the other provisions shall remain fully binding and enforceable as if the invalid or unenforceable provision did not constitute part of the contract."

Inclusion of such a provision serves a serious purpose if the contract is governed by the law of a jurisdiction that lacks regulations enabling the "rescue" of a partially invalid contract. But in the case of contracts governed by Polish law, this merely repeats the rule set forth in Civil Code Art. 58 §3.

The second category is provisions supplementing statutory regulations. Here again, a good example is the savings clause, which in practice is often modified by the parties. Such changes typically impose an additional obligation by the parties to take all necessary steps (e.g. good-faith negotiations) to find a solution rescuing the contract from partial invalidity. For example, the savings clause mentioned about might further provide: "In such case, the parties shall enter into negotiations in good faith with the aim of agreeing on an effective provision replacing the defective provision."

The third category of boilerplate includes provisions modifying the dispositive off-the-rack solutions that would apply if the parties did not agree otherwise, or governing issues not covered by statutory regulations. These include, for example, provisions on the choice of court to hear disputes arising under the contract, clauses on the controlling language version for bilingual contracts, and so on.

Problems in application

Undoubtedly the use of standard contractual provisions can make it easier for the parties to record the terms of their contract, but using such provisions without adequate attention can cause more problems than they are worth. Provisions that are poorly drafted or insufficiently examined before signing of the contract can result in defeating the true purpose for concluding the contract, as discussed below.

Sometimes clauses are used that were originally drafted to benefit the other party, so that unthinking reuse of such clauses in another contract may result in modification of statutory regulations (e.g. with respect to the choice of the court to resolve disputes in a situation where the seller proposes that it should be the court proper for the buyer's location, which in particular will mean that such court will generally not have jurisdiction to resolve potential disputes involving liability for defects in the subject matter of the contract).

But more often, it may prove that such provisions are ineffective or achieve a result the opposite of what the parties intended.

Merger clause

An example of a provision which, improperly applied, can have far-reaching negative consequences for the parties is the "entire agreement" clause (also known in the common law as a "merger clause" or "integration clause"). The essence of the clause is to declare that the parties exclude any previously discussed terms and that the written contract supersedes any prior agreements on the subject matter. It might read for example: "This contract constitutes the entire agreement between the parties and supersedes all prior understandings and agreements between the parties, whether written or oral, unless otherwise stated in this contract."

Thus, if the parties previously entered into a letter of intent for a planned transaction, use of an "entire agreement" clause in the final agreement rescinds any binding force the letter of intent might have had. The point is to avoid any doubt as to what terms, rights and obligations are included in the parties' final agreement.

In practice, however, the parties sometimes state in the contract that it supersedes "all prior agreements" between the parties. Failure to specify the subject matter of such prior agreements could be interpreted literally to mean that this clause refers to any and all previous contractual relations between the parties, regardless of the subject matter (for example if the parties cooperate on an ongoing basis on various matters, and in one of their contracts they unwittingly declare that the contract supersedes all of their other existing contracts).

In effect, such a subsequent modification of the parties' contractual relationship may not best reflect the parties' true intention.

Insolvency and bankruptcy clauses

Another example of a provision that is essentially copied and pasted from solutions applied in common-law systems is insolvency or bankruptcy clauses. Provisions of this type state that in the event of the insolvency or bankruptcy of one of the parties, the other party has a right to terminate the contract. But if the contract is governed by Polish law, it must be borne in mind that Art. 83 of the Bankruptcy Law imposes the sanction of invalidity on contractual provisions reserving the right to modify or dissolve a legal relationship the debtor is a party to because the debtor is declared bankrupt. Thus inclusion of such a right in a contract governed by Polish law will not achieve the intended effect.

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In short, whether a boilerplate clause merely repeats the applicable statutory rule, or affirmatively shapes the relations between the parties, it is clear that proper attention must be paid to such clauses during the negotiation and drafting of the contract. Otherwise, there is a risk that the contract concluded by the parties will not accurately reflect the mutual understandings and concessions they agreed to during the negotiations. This can open the way to needless disputes over interpretation of the contract.

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How to eliminate unlawful amendments to a company's articles of association?

The unlawfulness of provisions in the articles of association is a big problem for companies. The matter is relatively simple if the deadline for invalidating the resolution introducing the unlawful amendment has not yet passed. But what to do if this deadline has passed and the articles of association contain unlawful provisions, yet the majority of the shareholders do not wish to repeal the unlawful provisions?

Dr Kinga Ziemnicka

Effect of unlawfulness of resolution involving the wording of articles of association

The regulations governing the rules for challenging unlawful resolutions of shareholders, i.e. Art. 252 of the Commercial Companies Code for limited-liability companies or Art. 425 for joint-stock companies, contain a specific sanction of invalidity. Unlike the typical sanction of absolute invalidity, arising by operation of law (Civil Code Art. 58), the invalidity of shareholder resolutions requires a constitutive judgment of the court. While recognising that a judgment finding the invalidity of a shareholders' resolution exerts effect *ex tunc* (retroactively), the Supreme Court of Poland has also stressed that this does not mean that the challenged resolution was invalid from the very beginning. Such a judgment eliminates the legal existence of the challenged resolution from the time it was adopted, creating a situation as if the resolution had never been adopted. But the possibility of relying on this effect does not arise until the judgment declaring the unlawfulness of the resolution is issued and becomes legally final. Meanwhile, the absence of such a judgment means that the resolution must be respected in dealings between the shareholders and by third parties, and also must be enforced by the management board (Supreme Court resolution of 20 December 2012, Case III CZP 13/13, and judgment of 18 February 2016, Case II CSK 156/15).

The question therefore may arise what are the possibilities for disputing a shareholders' resolution amending the articles of association of a limited-liability company or joint-stock company by introducing provisions that do not comply with the law, and what to do in a situation where the deadline for filing a claim seeking a judgment declaring the invalidity of the resolution has passed.

Possible methods for challenging unlawful resolutions affecting the wording of the articles of association

If the deadline for filing a claim seeking a declaration of the invalidity of the resolution (under Art. 252 §3 of the Commercial Companies Code for a limited-liability company or Art. 425 §§2–3 for a joint-stock company) has not yet passed, an application for preliminary relief securing the claim should first be filed under Art. 730 and following of the Civil Procedure Code. Most often the security for the claim in such cases includes a stay of the registry proceeding for entry of the amendments introduced pursuant to the unlawful resolution (Supreme Court resolution of 2 July 2010, Case III CZP 49/10), or if the entry has already been made, staying the enforceability of the resolution. The application for preliminary relief may be filed before filing the statement of claim or may be included in the statement of claim itself. Standing to file a claim seeking a declaration of the invalidity of a resolution is vested in the specific persons listed in Art. 250 or 422 §2 of the Commercial Companies Code (as well as other persons in strictly defined situations, such as a shareholder's creditor under Civil Procedure Code Art. 910^2 §1).

A much more complicated issue arises when the statutory period for filing a claim seeking a declaration of the invalidity of such a resolution has already passed. The problem then arises of whether to apply the invalid provisions of the articles of association, or apply the relevant provisions of law. It should be pointed out that in such instance the law expressly excludes the possibility of filing a claim for a determination of the existence or non-existence of a legal relationship or right under Civil Procedure Code Art. 189 (Commercial Companies Code Art. 252 §1 and 425 §1).

In such cases, the selection of the proper route for proceeding is not obvious, but depends on the circumstances of the case. When examining this issue, it would be worthwhile to consider two examples from practice.

Almighty minority shareholder

In one case, the client was struggling with the problem of the broad corporate rights awarded to a minority shareholder. Awarding minority shareholders broader rights than those they would enjoy under the code is clearly permissible and is applied in practice. The peculiarity in this case was that resolutions of the general meeting of shareholders in matters important to the company (including resolutions amending the articles of association) required a prior resolution of the company's supervisory board, and the validity of supervisory board resolutions required the consent of one of its members appointed by the minority shareholder. Moreover, this entitlement was not limited in time. Essentially this meant that decisions on key matters for the company were taken by the minority shareholder via the supervisory board member appointed by the minority shareholder. But such provisions of the articles conflicted with the nature of a joint-stock company (Commercial Companies Code Art. 304 §4), where in principle the majority rules over the minority.

The first solution that comes to mind is to amend the company's articles of association to eliminate the unlawful provision. But typically the situation is more complicated, as the persons benefitting from such provisions will not consent to eliminate them. In this example it was obvious that the minority shareholder awarded the right to decide on key matters for the company through its appointed member of the supervisory board would not consent to amend the articles to strip it of this privilege. The question then is whether the majority shareholder can pursue measures in such situation to remove from the articles such provisions inconsistent with the nature of a joint-stock company.

It should be pointed out that under Commercial Companies Code Art. 252 §4 and 425 §4, the passage of the deadline for filing a claim seeking a declaration of the invalidity of a resolution does not exclude the possibility of alleging the invalidity of the resolution. But according to the position stated by the Supreme Court on 28 September 2011 (Case I CSK 710/10), a shareholder may not demand a finding of the invalidity of a resolution of the shareholders' meeting of a limited-liability company pursuant to Art. 252 §4 if, due to expiration of the time specified in Art. 252 §3, challenging the resolution is impermissible. In other words, based on an allegation of the invalidity of a resolution, a shareholder may not file a claim to set aside the resolution if the period for challenging it has already expired.

Under the facts presented here, the majority shareholder may however apply another solution, namely to propose a resolution amending the articles of association to eliminate the unlawful provision, exposing itself at the same time to a challenge of that resolution by the minority shareholder. In such case the majority shareholder will not be able to demand that the court set aside the unlawful provision of the articles with retroactive effect. But if the minority shareholder files a challenge to the resolution amending the articles, then the company will be entitled to assert in the ensuing litigation the defence of the invalidity of the provisions under Commercial Companies Code Art. 425 §4 (or Art. 252 §4 in the case of a limited-liability company).

Automatic redemption of shares upon filing of a bankruptcy petition

In the second example, the company's articles of association contained a provision on automatic redemption of a shareholder's shares in the event of filing of a bankruptcy petition, which constituted an attempt to circumvent Art. 83 of the Bankruptcy and Recovery Law at the time (now Art. 83 of the Bankruptcy Law).

In this case a different solution was used, namely an application to delete the unlawful data from the National Court Register. Under Art. 12(3) of the National Court Register Act, if data are included in the register that are impermissible in light of applicable provisions of law, then the court shall delete the data at its own initiative, after hearing the interested persons at a session of the court or summoning them to file written statements.

Under the facts in that case, the registry court considering the unlawfulness of the provisions of the articles of association permitting the automatic redemption of a shareholder's shares due to filing of a bankruptcy petition involving the company deleted the invalid provisions of the articles of association. Ultimately this decision exerted favourable consequences for the shareholder's creditors by preventing redemption of its shares in the company (particularly as with the shareholder's consent, the redemption could be made without compensation).

Notwithstanding the positive conclusion of that case, the competence of the registry courts to review the validity of provisions of articles of association under the regulation cited above generated controversy in the case law. In its resolution of 8 December 2017 (III CZP 54/17), the Supreme Court resolved this doubt, holding that in a proceeding under Art. 12(3) of the National Court Register Act for deletion of an entry that is impermissible under applicable regulations of law, the court is not authorised to examine the lawfulness of the shareholders' resolution that constitutes the substantive legal grounds for making the entry. The Supreme Court thus excluded the possibility for the registry court to delete unlawful provisions of articles of association at the court's own initiative.

Summary

As these examples show, the possibility of disputing resolutions introducing unlawful provisions into the articles of association of a company are relatively limited when the period for filing a claim seeking a finding of the invalidity of the resolution has already passed. This means that a rapid response by the persons entitled to file a claim seeking to eliminate unlawful resolutions is vital. Otherwise the participants in legal transactions, primarily the company's authorities, will face the dilemma of whether to apply the provisions of law or the unlawful provisions of the articles of association.

Selection of the proper manner of proceeding will always depend on the circumstances of the specific case. It must be pointed out, however, that the limitation on the ability to dispute unlawful provisions of articles of association of companies do not encourage legal certainty. Thus the best solution would be for lawmakers to permit the possibility of filing a claim seeking a finding of the unlawfulness of such provisions regardless of passage of the specified time limits.

Dr Kinga Ziemnicka, legal adviser, M&A and Corporate practice

Copyright to a website —more than meets the eye

Joanna Woźniak

At first glance a website is just a page displayed on a browser, typically a graphic work supplemented by more or less creative text and pictures. But just once glance will not satisfy a lawyer examining the status of such a work. If we look more deeply, under the appealing graphic interface we can discern a quite complicated IT structure.

One of our farsighted clients asked us to draw up a contract with a designer who was preparing the company's new visual identity. The tasks assigned to the contractor included preparation and launch on the client's server of a new website.

While it might seem straightforward—a contract to perform a specific work with a transfer of the economic copyright to the work—it nonetheless required certain technical information to be gathered, or at least certain assumptions to be adopted. These days it's rare to encounter a simple, single-function website. The standard now is to combine several functions via one web page (more precisely, one site comprising several web pages)—from strictly informational functions such as a page providing transit schedules, to advertising functions, e.g. a corporate website, and various service sites, such as an online store, a portal offering video on demand, an internet search engine, or an online banking site.

Content and functions

So it was in this case. The portal was not only supposed to support advertising of the client's company, but also enable consumers to take advantage of services offered by the client. It was apparent from a brief discussion with the client about the shape of the website that copyright protection should extend to the look of the site (graphic layer), which seemed obvious, as well as the programming layer.

The graphic layer is usually understood to mean the view of the website displayed on a computer screen. It is made up of the general layout of the site (including the font, colours, the method of navigation and presentation of content, design of graphic elements such as icons, navigation menus and widgets), filled in with text, graphics, images or audiovisual works.

Assuming that the specific elements of the graphic layer, including its layout, meet the criteria for treatment as a work for purposes of copyright law, they will typically be protected independently, and providing access to them on the internet will require the consent of the owner of the copyright, and in the case of initial access to the rights, also the consent of the creator. The copyright transfer agreement should thus reflect both the economic rights held by the creator of the layout of the site but also the rights to the content, graphics and other elements included on the site but created by other authors. Obviously, it will not always be possible to acquire the complete set of economic copyrights. In that case, for example when stock photos provided by photo agencies are used, it is at least necessary to ensure that the proper licence is obtained.

Front-end and back-end

The appropriate presentation of the site (in essence, its graphic layer) on the computer screen is reflected in the code—both the code transmitted to the device where the site is displayed and which can be read on the browser, and partially in the code stored on the server supporting the portal.

The code transmitted to the browser defines at least the structure of the web page (typically in HTML language) and its appearance (in CSS language). Additional elements included in the page—such as text, audio and video files, and pictures—are also embedded in the page using HTML code. In the case of more complicated sites, an additional programming language is also used, e.g. JavaScript, to enrich the site with interactive elements enabling scrolling of the page or expanding successive options through clicking.

That is the "front-end" of the site. The "back-end" of the site is stored on the server. Apart from the framework for building the website (typically comprising standard elements) and databases (containing e.g. the text and pictures displayed on the site), together with the engine, often the back-end also includes separate source code written for the site and ensuring proper communication between the browser and the server.

The elements created by the web designer thus include not only the appearance of the site and its description in HTML and CSS (as to which there are diverging opinions whether they constitute programming languages), but also classic source code created in other languages, i.e. software.

Obviously, determining how the code for the website is recorded is not enough to determine whether such code is covered by copyright protection as a computer programme. To qualify as a work, in each instance the programming layer of a website must fulfil the criteria of originality and individuality. Thus a simple record of the code for a website, lacking creative elements, may not meet these criteria even if written in a language other than HTML.

A bundle of rights

After examining the client's project we concluded that the client should acquire from the designer the rights to the designer's graphic work determining the appearance of the website, the rights to other works included on the site, and the rights to the programming created for the needs of the site, together with the authority to exercise derivative rights.

Only joint acquisition of these elements will ensure the client safety and the possibility of independently modifying the website. The framework and the database engine—technically also necessary to use the site—typically are not created by the programmer. It should be remembered also to obtain a licence to these elements of construction of the site from the authorised holder.

Proper and precise construction of the contract seemed especially important to us because the Polish courts are only slowly becoming knowledgeable about websites and the case law in this area is inconsistent. Among the rulings by the courts there are cases carefully examining the legal status of all elements of the website, even those that may constitute databases, but there are also cases entirely ignoring the programming layer of a site, and even instances where the courts have refused to recognise an extensively developed website as displaying the features of a work eligible for copyright protection.

Thus it is worth holding to a minimum the risk of litigation over the copyright to websites. A well-drafted contract is certainly one way to achieve this.

Joanna Woźniak, adwokat*, Intellectual Property practice*

Financial liability of management board members


Piotr Wcisło Krzysztof Libiszewski

The members of the management board hold a great deal of power in a company, which is also tied to great responsibility. A member of the management board can be held liable for an act or omission not only to the company, but also to the creditors and shareholders. There are different grounds for such liability and different possibilities for being released from liability.

Members of management boards play a key role in the operation of companies, administering their day-to-day activity and taking strategic business decisions. In the ordinary course of the company's affairs and cooperation with its business partners an act of a management board member made within the scope of his or her authority is from a legal point of view deemed to be an act by the company as such. Management board members thus have great influence over the company and its business, and indirectly on the interests of the company's shareholders as well. This influence also extends to the company's business partners tied to the company by contractual or commercial relations.

It is therefore natural that the law provides for a number of oversight or restitution mechanisms designed to combat the abuse of power over the company by management board members, in particular by taking actions contrary to the interests of the company, causing injury to the company, or significantly exposing it to a loss. Among these mechanisms, a major role is played by regulations providing for liability in damages of management board members for injury caused in exercise of their functions to the company, its creditors, or its shareholders.

Liability to the company

Here the key provisions are Art. 293 and 483 of the Commercial Companies Code, which state that a member of the management board is liable to the company for damage caused by an act or omission contrary to law or the company's articles of association, unless the member is not at fault. A management board member is thus liable in tort primarily to the company harmed by the member's actions, as these regulations do not provide grounds for management board members' liability to the company's shareholders or creditors.

It should be pointed out that unlike in the case of tort liability under the general rules of civil law, a member of the management board may be held liable to the company not only for damage caused by an unlawful act, but also an act that conflicts only with the company's articles of association. The grounds for liability in damages are thus defined more broadly and more restrictively than would be the case under the general rules of civil law.

An example of an act contrary to the articles of association is for the members of the management board to carry out a transaction without obtaining the relevant authorisation, if the company's articles of association require that they first obtain consent of the shareholders or the supervisory board. When determining whether there was culpable damage to the company, they are held to a high standard of care, reflecting the professional nature of the office of management board member.

A calculated risk or acting against the interests of the company?

Doubts involving borderline situations arise in commercial practice. When does an action involve assumption of an acceptable commercial risk, allowing for the possibility of suffering a loss as a result of a potentially profitable investment or venture, and when is the action taken against the company's interests? Naturally, no rigid border between these situations can be established. Each case must be considered separately, in light of the circumstances and the peculiarities of the given business sector.

It appears from the views expressed in the case law that instances of culpably causing injury by members of the management board may include in particular concluding contracts for the company, including employment contracts, where the value of the consideration provided by the company greatly exceeds the market value of the consideration provided by the other party, or issuance by the company of guarantees for the obligations of third parties, even members of the same capital group, without obtaining an equivalent mutual consideration for the company, or without other appropriate business justification.

Significant financial injury = criminal responsibility

Changes in the regulations governing assumption of business risk by the management board show that Polish lawmakers are seeking to liberalise the rules for conducting business by companies and permit the risk of loss or unsuccessful ventures if the risk has a business justification. This is indicated by the repeal of provisions of the Commercial Companies Code which provided for criminal responsibility of a management board member for acting to the detriment of the company, as well as replacing them with regulations in the Criminal Code providing that an act by a management board member is punishable only when it takes the form of abuse of authority vested in the member or failure to perform an obligation borne by the member, directly exposing the company to the danger of suffering a significant financial injury. This means that under current law, the only actions that are penalised are those violating clear principles of proper management, realistically exposing the company to a loss of PLN 200,000 or more.

It should be added, however, that culpably causing significant injury to a company can give rise not only to civil liability, as discussed above, but also criminal liability of the management board member. Thus, as the victim of the offence, the company may also seek redress of the injury caused by the management board member in the criminal proceeding, apart from a civil trial.

Liability to shareholders and creditors

Although the Commercial Companies Code expressly provides for management board members' liability only for injury caused to the company, it also states that this does not limit the rights of shareholders or other persons, including the company's creditors, to pursue redress of injury caused to them under general rules. It appears in this respect that the relevant legal basis is the Civil Code provisions on tort liability, requiring proof that the management board member's action was unlawful and culpable, and also caused an injury to the shareholder or creditor, with a relevant causal link. But contract liability will not be the proper grounds here, because the members of the management board are not bound to the company's shareholders or creditors by any contract.

It seems that tort liability of management board members to the shareholders of public companies may apply in particular to a situation where as a result of culpable actions by the management board, they suffer an injury in the form of a loss in the value of their shareholdings. But in the case of the company's creditors, this may be a situation where as a result of actions taken by the management board members in bad faith, the company's satisfaction of the creditors has become definitively impossible.

In addition to the rules of liability described above, there are also a number of specific regulations providing legal grounds for members of the management board to bear liability in damages.

Failure to file for bankruptcy

Of particular interest here is Art. 21 of the Bankruptcy Law, which provides for liability in damages of the management board members for culpable failure to file a timely bankruptcy petition for the company even though the company has become insolvent. This provision does not limit the list of entities that may seek damages in connection with late filing or non-filing of a bankruptcy petition when required by law. This means that redress of injury caused by a member of the management board may be sought by both shareholders and creditors of the company.

Members of the management board may be released from liability by demonstrating the lack of fault on their part or demonstrating that other appropriate measures were taken in the run-up to bankruptcy with the aim of heading off the company's insolvency. This has to do in particular with showing that under the rules provided by law, a restructuring proceeding was opened with respect to the company, or an arrangement was approved in the relevant proceeding. If a creditor of an insolvent company seeks damages, it is presumed that the injury suffered by the creditor is equal to the amount of the creditor's claim not satisfied by the company.

Incomplete prospectus

Another specific regulation that can provide a legal basis for liability in damages of management board members is Art. 98 of the Act on Public Offerings and Conditions for Introduction of Financial Instruments into an Organised System of Trading and on Public Companies of 29 July 2005. It states that in the event of offering of securities by the company via a public offering, admission to trading on a regulated market of securities or financial instruments other than securities issued by the company, or seeking such admission by the company, a member of the management board, acting as an entity responsible for the correctness, reliability and completeness of the information included in the prospectus, information memorandum or other documents prepared and published in connection with such transactions, is required to redress the injury caused by publication of unreliable, false or incomplete information or omission of information, unless fault cannot be ascribed to the management board member or persons providing the information for whom the management board member is responsible.

Power, but also responsibility

It is thus apparent that members of the management board of companies do not have complete discretion in how to perform their functions. The manner in which they execute their office is subject to a number of regulations and restrictions, of which the overriding principle is a duty to act in the interest of the company. Violation of that principle in a manner that causes an injury, arising out of the fault of a management board member, may lead to the member's liability in damages first and foremost to the company, but also to other entities that have suffered a loss, including the company's shareholders and creditors.

Piotr Wcisło, adwokat*, M&A and Corporate practice*

Krzysztof Libiszewski, legal adviser, partner, M&A and Corporate practice

The power of substitute performance

Hiring another entity to complete construction works at the cost and risk of the original contractor is an effective solution but painful for the contractor. The contractor's interests are protected, however. The fees must be settled in such a manner that the contractor is not forced to bear excessive costs.

Hanna Drynkorn

When a contractor for construction works is in delay in performing the works or is not performing them at all, the investor has a range of options at its disposal to apply against the contractor. For one thing, the contractor may be held liable in damages. But the investor's primary aim is usually not to exact sanctions against the contractor but to obtain the timely and proper completion of the contract, i.e. delivery of the structure the contractor was hired to build. A solution that can achieve this result is "substitute performance," that is, hiring another entity to carry out the incomplete or improperly performed work at the cost and risk of the original contractor.

This solution will have a major impact on the contractor, as it will no longer perform the work and will not receive the agreed fee, with the fee going instead to another entity offering similar services on the market—typically one of its competitors. Moreover, the work will be performed at the contractor's risk, meaning that if the investor suffers a loss resulting from the work performed by the third party, the original contractor will bear the liability.

The importance of the institution of substitute performance is reflected in the regulations, which are designed to balance the interests of investors and contractors.

This institution functions differently depending on the stage of performance of the work at the time that irregularities are found—during the course of performance or after completion. It will also depend on the nature of the contractor's act or omission—whether the contractor is performing the work defectively or not in compliance with the contract, or the contractor has either failed to start work entirely or is performing the work with delay (due to the contractor's fault).

When the contractor is performing the work incorrectly, substitute performance is intended to allow the investor to avoid performance that does not comply with the contractual terms or statutory criteria for proper performance, such as performance of the obligation in compliance with its socio-economic aim, principles of public policy, and established custom. Sometimes substitute performance can prevent physical or legal defects from occurring in the work. Then the relevant provision is Civil Code Art. 636.

But when the contractor fails to begin work or falls into delay, under Civil Code Art. 480 the investor may commission substitute performance after obtaining authority from the court, unless there is an urgent need for performance. Then the investor has a separate entitlement to renounce the contract under Civil Code Art. 635.

The issue of substitute performance may also be addressed in the contract. In that case the parties have the discretion to regulate this issue as they wish, within the bounds of freedom of contract.

When time is of the essence

The parties concluded a contract for construction of a primary school. Initially the contractor performed the work within the schedule provided in the contract, but at some point it ceased performance. In informal negotiations, the contractor told the investor that it first had to complete earlier commitments and would then return to work on the school project at a later time. But the terms of the contract were framed so that the school would be able to begin operating in the new facility from the start of the new school year. The date for completion by the contractor was vital because the summer holiday had been set aside for moving the necessary equipment and furnishings into the new building. For obvious reasons, postponing completion of the work would greatly interfere with the investor's plans, as the move would then have to be made during the school year, which would cause huge complications, or not until the next summer holiday.

Because the contractor was in delay, the investor summoned it to continue the work and, citing the contract terms, stated that if the work were not taken up within 14 days or the progress of the work did not comply with the schedule provided in the contract, it would hire a third party to perform the work at the contractor's cost and risk.

After analysing the statutory possibilities for employing substitute performance, the contractor replied that the only route that would enable the investor to take that step would be to apply to the court for authority to hire a third party to perform the work. The contractor argued that the parties were not facing defective performance of the work, which under Civil Code Art. 636 would entitle the investor to entrust the work to a third party without authorisation from the court, but instead there was only delay in performance of the contract.

The investor rejected the contractor's position, and after it failed to take up the work by the time indicated in the demand, it assigned the work to several other entities who divided the remaining work among themselves. After the building was completed by the new contractors, the investor added up the amounts they had invoiced and demanded payment of that amount by the original contractor, whose delay in carrying out the work made it necessary to involve third parties in the project.

The contractor did not back down from its original position that substitute performance was impermissible in this situation. It also argued that the amount it was requested to pay was excessively high, and hiring several entities duplicated some of the work, which could have been avoided if a single contractor were hired for the substitute performance or the work were properly planned and divided among several contractors.

The contractor refused to pay the amount demanded, and consequently the contracting authority deducted this amount from the contractor's originally agreed fee and paid the contractor the small difference.

Performance yes, excessive costs no

On the issue of assigning the work to third parties, the contractor's position was groundless. The contractor would have been right but for a provision in the contract stating that the investor could resort to substitute performance in the event of delay in contract performance. If the parties had not included such a provision in the contract, the investor would be entitled to exercise only the options provided by law—as the contractor had argued when it claimed there was no justification for substitute performance. Providing in the contract for an entitlement to resort to substitute performance is legally permissible, however, and consequently the investor acted properly in this case.

A similar issue was addressed by the Warsaw Regional Court in its judgment of 18 October 2016 (Case XXV C 429/15). In that case, which involved a large public contracting authority, the court held that a contractual provision stating that in the event of delay by the contractor, it was not necessary to obtain court approval to resort to substitute performance, was not circumvention of the law and did not violate public policy. The court recognised that this action by the investor would not escape judicial review to protect the contractor's rights. On the contrary, in the event of a dispute between the parties to the contract, as occurred in that case, the court would examine the justification for the costs of substitute performance charged to the original contractor and decide the case by reference to general principles of liability in damages on the part of the contractor.

However, the amount of the costs charged to the contractor in connection with hiring third parties was not warranted. The costs to be borne by the contractor must be duly proved and the amount must be appropriate to the scope of the work which the contractor failed to perform. As stressed in the case law, the contractor's interests are subject to statutory protection, and the contractor may not be charged with "excessive costs" (e.g. Supreme Court of Poland resolution of 15 February 2002, Case III CZP 86/01, and judgment of 10 January 2009, Case IV CNP 147/07). And as the Supreme Court held in its judgment of 15 July 2004 (Case V CK 2/04), the justification for the costs incurred by the contracting authority for the substitute performance should be properly evaluated to avoid charging the contractor with disproportionate costs.

Thus when exercising the option of reassigning the unperformed work at the contractor's cost and risk, the investor must be aware of the obligations imposed on it to carefully determine the work remaining to be performed and select the new contractor. Compliance with these obligations is necessary for the investor to properly charge these costs to the contractor. Improper proof of the costs or imprudent assignment of the work to other contractors may result in the investor being required to cover the costs of the work of the third parties, which can be particularly hard to justify in public projects, in the context of responsibility for discipline in public finances.

Hanna Drynkorn, Infrastructure, Transport, Public Procurement & PPP practice

Better safe than sorry

Dr Ewa Butkiewicz

Chocolate fanciers, who probably include most people, appreciate the taste and aroma as well as the wide range of available chocolate products. Their pleasure in consuming chocolate is rarely interrupted by reflections on the safety of this food product. This may result from a lack of awareness of the potential threats posed for example by microbiological contamination, or they may simply rely on the EU's food safety system to protect them. How effectively and rigorously this system operates is illustrated by a case one of our clients faced.

What happened

A company with a chocolate factory in Poland imported raw material—cocoa mass—from a country in East Africa. The cargo was unloaded at a German port and was subjected there to routine screening by a certified laboratory for microbiological purity, particularly to determine if it contained salmonella bacteria. The sample tested was found to be contaminated by the salmonella serotype Tennessee. For this reason, the foodstuff, cocoa mass, was found to present a danger to human life and health. Under the requirements of the EU's Rapid Alert System for Food and Feed (RASFF), Germany notified the contaminated batch to RASFF in the form of an "alert." This is a notification regarded as urgent and requiring immediate measures by the national food safety authorities. In Poland, the county sanitary inspectorate conducted a sanitary inspection at the producer's location two days after the alert was filed with RASFF. During the inspection it was found that three batches of chocolates had been produced from the cocoa mass in question, and a portion of them had been exported to another EU country. The results of the inspection were immediately introduced into the RASFF system, resulting in a ban on sale of those chocolates in the buyer's country. The administrative proceeding against the producer ended in issuance of a decision under which the producer was ordered to halt distribution of the chocolate produced from the tested batch of cocoa mass and to withdraw the batch of chocolates from the market. The entire proceeding from submission of the sample of cocoa mass for testing in Germany through issuance of the decision in Poland lasted four and a half months.

What the producer had to say in its defence

During the proceeding the producer presented various evidence and arguments to rebut the charge that the raw material used for production of the chocolate was an unsafe food product and to demonstrate that the end product complied with the microbiological standards for foods. At various phases in the preparation for production (including heating the mass to a high temperature and intensive mixing of the mass), the producer provided samples of the cocoa mass to an accredited Polish lab for testing. The results of all three tests of the cocoa mass came back negative, and the raw material was not found to contain salmonella. Thus the producer alleged that the tests by the German laboratory were equivocal. Moreover, the producer disputed the correctness of the sample used. The German lab examined a sample weighing 750 g, while samples of 25 g are commonly accepted for testing. Based on a private scientific opinion, in the producer's view the heavier sample meant a 30-fold increase in the requirements for the tested material. If the German lab had tested a 25 g sample, it was highly likely that no bacteria would be discovered. The lab tests of the finished chocolates also came back negative, which in the producer's view proved that there was no microbiological contamination, in particular by salmonella, in the ready products.

And the arguments used by the inspector

In the justification for the decision the sanitary inspector explained that the testing method used by the German lab was consistent with European standard EN:ISO 6579, which calls for testing of a sample weighing more than 25 g. The assessment of the microbiological purity of the tested material was made in accordance with the indicated limits, i.e. the maximum permissible quantities of salmonella in 25 g. With respect to the argument that there was no contamination in the ready product, the inspector cited in his decision the risk evaluation made by the National Institute of Hygiene.

Risk analysis principle

Risk analysis is a general principle of food law. The subject of risk analysis is the examination of dangers posed for example by biological or chemical agents that can potentially occur in foods and cause adverse consequences for human health. In examining the risk, the likelihood of occurrence and the seriousness of the adverse effects for health are assessed. As an element of the risk analysis process, the risk evaluation must be based on scientific findings.

In its risk evaluation conducted at the request of the sanitary inspector, the National Institute of Hygiene concluded that even though the presence of salmonella was not confirmed in the tested samples of finished chocolates produced from the batch, that did not necessarily mean that the batch was entirely free of pathogens. They might have been distributed unevenly in the product mass and thus not found in the test of the samples. The process of heating the cocoa mass to the appropriately high temperature during the production process also might not have sufficed to inactivate all of the bacterial cells, which are additionally protected against the action of high temperatures by the high fat content of the cocoa mass.

Citing this portion of the risk evaluation in his justification for the decision, the sanitary inspector found that the producer had not presented reliable evidence of elimination of microbiological threats during the production process; for example, it had failed to prove that heating the cocoa mass to the appropriate temperature, maintained for a long enough time, would kill the pathogens (although scientific opinion was divided on this issue). Without that certainty, the sanitary inspector found that consumption of the chocolate produced from the contaminated mass presented a danger to human health.

In the second part of the risk evaluation, addressing the threats and their seriousness, the National Institute of

Hygiene pointed out that chocolate is popular among children, who are particularly sensitive to microbiological threats. The fat content in chocolate protects salmonella against the action of stomach acid and thus even small quantities of this bacteria can cause poisoning. And this is not just a theoretical threat. In 2001 mass poisoning by chocolate was noted in several European countries, and in 2006 in the UK. Justifying his decision, the sanitary inspector stressed that salmonella is regarded as the most serious microbiological threat involving chocolate. He also pointed to the danger of cross-contamination, e.g. of the production lines where microbiologically contaminated cocoa mass was processed.

Thus there were grounds to classify both the cocoa mass and the chocolates produced from it as a microbiologically contaminated food and thus dangerous to human health. Such food is not fit for human consumption. These two characteristics determine whether a food is regarded as hazardous. In such situation, EU and national law requires the inspection authority to take appropriate measures, and the sanitary inspector specified these in his decision.

Liability of persons operating food enterprises

Halting the distribution of foods and withdrawing the product from the market obviously entails a loss for the producer. But between protection of human life and health and protection of the economic interests of commercial entities operating in the food industry, there is no doubt which interest takes priority. The case law of the Court of Justice of the European Union recognises the priority of protection of human life and health, and the EU's food law treats such protection as its highest aim. This aim is to be realised in the first ranks by food enterprises, which are responsible for ensuring food safety. This is another principle of food law cited by the sanitary inspector in the justification for the decision in this case. He additionally explained that the food producer can take steps to protect consumers against the effects of an unsafe product, for example by withdrawing the product from sale and recalling products from the market. He also pointed out that the producer bears the entire risk of a finding that a food product is unsafe. (However, it is argued in the legal literature that introduction of regulations enabling food enterprises to seek release from such liability should be considered.)

The sanitary inspector also instructed the producer that the contaminated raw material must not be processed at all at the producer's plant, because it threatens recontamination. The producer had to properly dispose of the material as waste once it learned of the risk of contamination, which it did in this case.

The law protects chocolate lovers

It is hard to raise any objections to the action of the sanitary inspector in this case or the justification for the decision, although another principle of food law cited in the justification deserves some comment: the precautionary principle. The sanitary inspector defined it as a principle taking precedence over the certainty of the test results. Under EU regulations, the precautionary principle is invoked in a situation where potentially adverse effects have been identified with respect to a process or product but there is no scientific certainty that such consequences will occur. In this case, the sanitary inspector had no doubt that the occurrence of negative consequences for human life and health had been confirmed in the scientific literature and in recorded instances of mass poisonings. Thus it was sufficient to rely on the principle of risk evaluation, which was properly applied in this case. It seems that the reference to the precautionary principle arose from a colloquial understanding of the word "precaution" rather than knowledge of its legal meaning.

This case study is a good illustration of how the rules of European food law and the competent inspection authorities effectively protect our life and health against dangerous foods. Thanks to them we can basically enjoy our chocolate without fear.

Dr Ewa Butkiewicz, legal adviser, senior counsel, Life Science and Regulatory practice

How to avoid food waste: Reworks in the production process


Joanna Krakowiak Bartosz Kuraś

Even when food producers apply the strictest manufacturing standards, not all defects can be entirely eliminated. Sometimes misshapen sausages, leaking hams, or cheeses with the wrong sort of holes emerge from the production line. These are factory reworks. To avoid the economic and environmental cost of disposing of them as waste, it would be better to reuse them. But how can this be done safely from a regulatory standpoint?

Step 1: Analysis of regulatory risk

First it should be determined what types of departures from the declared characteristics of products most commonly occur at the particular plant, and then assess the risk on this basis. If the product does not comply with the producer's declaration, the product cannot be sold.

The producer's declaration set forth in the product information sheet is treated as a source of voluntarily adopted duties of the manufacturer. Because the specification is made by the producer itself, any departures are treated especially strictly. For example, in the judgment of 15 April 2016 (Case II GSK 2597/14), the Supreme Administrative Court found that:

- Commercial quality includes the organoleptic properties of the product
- The holes or "eyes" in cheese are one of its organoleptic properties
- The eyes in cheese are not defined by regulations of law but are based on the manufacturer's declaration
- For defining commercial quality, the manufacturer's declaration contained in the product specification has the same legal significance as universally binding regulations
- When issuing a voluntary declaration, the manufacturer is conducting a form of self-regulation and undertakes to comply with it.

Marketing of a product that does not comply with the product information sheet or the label, even if it involves properties regarded as trivial by the consumer (e.g. the size of the "eyes" in cheese), may be treated by the inspectorate overseeing the manufacturer (authorities from the Agricultural and Food Quality Inspectorate or the Veterinary Inspectorate) as a violation of regulations governing the commercial quality of products or even as misleading consumers. This is threatened with a fine or a ban on marketing the product until the labelling or product information is corrected.

Step 2: Legal classification of reworks

The key question is whether a food product that is entirely safe for consumers but inconsistent with the declared properties may be treated at the processing plant as a "factory rework," and whether it can be reused for food production.

"Factory rework" is a technical concept, not a legal concept. From a legal perspective, reworks are processed foods. If they meet the basic requirements for foods set forth in the EC General Food Law Regulation (178/2002), and thus are fit for human consumption and safe for consumer health, they can be processed again and become an ingredient in food.

For example, in its guidance document for Regulation 853/2004 (SANCO/1732/2008), the European Commission states: "In general terms, it would not seem logical to ban products fit for human consumption from being used for human consumption. The use of small pieces (trimmings and cuttings) of meat that are fit for human consumption for the preparation of minced meat should therefore not pose a problem, it being understood that the microbiological quality of the minced meat must be guaranteed at all times, and that they have been obtained from whole muscle." With respect to certain types of products, such as egg products, reuse of reworks is expressly provided for in Regulation 853/2004, Annex III ("A batch that has been insufficiently processed may immediately undergo processing again in the same establishment if this processing renders it fit for human consumption.")

Reworks should not be equated with waste, although there is some connection between the two. Under the statutory definition, "waste" is any substance or item the possessor is disposing of, intends to dispose of, or is required to dispose of. Thus if we recognise that a food producer is required to dispose of reworks that do not meet food requirements, then those reworks would be classified as waste. In particular, factory reworks of foods may be classified as biowastes, as biowastes include among other things waste subject to biodegradation from production plants or food sellers.

From the point of view of the law governing waste management, items or substances arising as a result of a production process whose fundamental aim is not to produce such items or substances may be classified as wastes. (In the example here, the fundamental aim of the process is to produce foods, not reworks.)

If reworks meet the fundamental requirements for foods, are fit for human consumption and safe for consumers' health, they may be regarded as a by-product (and thus not waste). Under the Wastes Act, a rework may be regarded as a by-product if it meets the following four conditions:

- Further use of the rework is certain (it is thus necessary to ensure a technical process guaranteeing its use).
- The rework may be used immediately, without further processing apart from normal industry practice (in particular, other than special processing typical for wastes)—change in the shape or dimensions, e.g. breaking up into smaller pieces, is permissible in this regard.
- The rework is produced as an integral part of the manufacturing process—to confirm this, it should primarily be considered what actions must be taken for it to be ready for further use, and how its production is connected to the manufacturing process.
- The rework meets all the essential requirements, including legal requirements, for the product and for protection of the environment and human life and health, connected with its intended use, and such use will not lead to general negative impacts on the environment, life or health.

The reworks we have dealt with in our practice met all the conditions for a by-product, but they were so similar to the intended product that they were not notified as by-products.

But sometimes such notification should be considered in order to avoid the risk of reworks being classified as waste. This depends in particular on how much the rework differs from the product intended to be produced through the specific manufacturing process. Under the Wastes Act, the producer of an item or substance meeting the criteria for recognition as a by-product is required to submit to the province marshal for the place of production a notification of recognition of the item or substance as a by-product. Such recognition will follow if the province marshal does not assert an objection, in the form of a decision, within three months from receipt of the notification.

Step 3: Developing the proper procedure

If the reworks meet the definition of foods, as a rule they can be reprocessed. However, the manufacturer must have an internal procedure for handling them, and should pay particular attention to its key elements:

- **Preliminary—assessment of fitness of product.** The procedure should provide for a preliminary verification of the rework to determine whether a product that is safe for consumers can be made out of the rework. If so, it can be reprocessed, and if not, it should undergo denaturing or some other process under the procedure for dealing with manufacturing waste.
- **Throughout—traceability.** Ensuring full traceability of reworks at the stage of their verification, storage and processing is key, because under Chapter IX of Regulation 852/2004, raw materials or ingredients of unknown origin are treated the same as raw materials or ingredients that are contaminated (with parasites or pathogenic microorganisms) or toxic. This means that if the procedure for reworks is not properly documented at some stage, that is grounds to eliminate them from further processing. Otherwise, the manufacturer would be exposed to the risk of an allegation of using ingredients of unknown origin, i.e. potentially dangerous ingredients.
- **Finally—proper recipes for products**. It must be clearly defined what types of reworks may be added to what products and in what quantities. Establishing the catalogue of products which reworks may be added to requires a detailed calculation of quantities of ingredients in the quantitative ingredient declarations (QUID) system and attention to consumers' hypothetical expectations, which in practice eliminates the use of reworks for manufacturing premium-range products or products intended for children.

Step 4: Beware of labelling and double standards for foods

If the rework is reprocessed, it becomes an ingredient of another product. Considering that the rework itself is a processed product and contains more than one ingredient, it will be a complex ingredient, and thus the labelling of the new product will have to ensure, in compliance with the Food Information Regulation (1169/2011), proper realisation of consumers' right to accurate information about the composition of the foods they are consuming. While the manufacturer is not required to include information on the product that it contains reworks (the average consumer probably wouldn't know what they are anyway), the label must contain information about the rework as a complex ingredient as well as its composition.

Moreover, when marketing products containing reworks, special attention should be paid to the consequences of the European Commission's guidance on dual quality of foods issued on 26 September 2017 (C(2017) 6532 final). When offering a product on multiple European markets, the manufacturer should maintain consistent composition (unless otherwise expressly stated by regulatory provisions), if the product is to appear under the same name. Before marketing a product containing reworks in its composition, it should be checked whether in the given country there are regulatory provisions or guidelines concerning the use of reworks, but as a rule, the manufacturer must treat consumers in different countries in the same way, and avoid a situation where products containing reworks are delivered only to certain EU markets, even though this is also permitted in other markets.

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The new Water Law: New fees, new sanctions, new challenges

Dominik Wałkowski

Martyna Robakowska

From the beginning of 2018, businesses whose operations involve the use of water must face the challenges posed by Poland's new Water Law. The new regulations modify the rules for water and wastewater management, including the fees for using water, and create an entirely new structure of water administration authorities.

The act adopted on 20 July 2017 introduced revolutionary changes in the water management system in Poland. To a greater or lesser degree, the new regulations affect nearly every enterprise using water in its operations. The effects of entry into force of the new regulations will be felt most strongly by industrial plants and all enterprises whose operation requires abstraction of water from their own intakes or requires discharge of wastewater to waters or the ground. This article is devoted to such use of water in industrial operations.

Water permit still needed but issued by a different authority

Previously, abstraction of groundwater or discharge of wastewater to waters or the ground was classified as "special use of water," and thus such activity required a water permit. Under the new regulations, such activities constitute "water services" and also require a water permit. Fortunately the new act maintains in force water permits issued under the prior regulations. Thus, as a rule, an enterprise will need to obtain a new permit only when the current permit expires.

An application for a new permit will not be filed as before with the county executive (*starosta*) or the province marshal (*marszałek województwa*), but with an authority of Polish Waters (Państwowe Gospodarstwo Wodne "Wody Polskie"). Polish Waters is a state legal person established pursuant to the new Water Law which has assumed most of the competencies connected with water management. Polish Waters comprises four units: the National Water Management Authority, regional water management authorities, river basin authorities, and water inspection services. Water permits for use of water services are issued by the directors of the regional water management authorities and the directors of the river basin authorities.

Fees for use of water services involving abstraction of water and discharge of wastewater

In the past, enterprises reported their use of water in annual information summaries on use of the environment. Based on such reports, enterprises calculated and paid environmental fees on their own. The reports filed with the province marshal covered such information as the quantity and quality of abstracted groundwater and surface water, the quantities, condition and composition of wastewater discharged to waters or the ground, the quantities and types of gases or particles released to the air, and landfilled wastes. The amount of the fees depended on the magnitude of actual exploitation of the environment—the actual quantities of abstracted water or emitted substances.

Now the fees for use of water are assessed according to complicated new rules. Firstly, the fee for abstraction of groundwater and discharge of wastewater to waters or the ground is not calculated by the enterprise itself, but is determined by an authority of Polish Waters. The fee is composed of two elements: a fixed fee and a variable fee. In the case of enterprises abstracting water from an intake or discharging wastewater to waters or the ground, this will in practice mean four components: a fixed fee and a variable fee for abstraction of water, and a fixed fee and a variable fee for discharge of wastewater. Each of these amounts is calculated according to a different algorithm. The fixed fee for discharge of wastewater to a river depends on such factors as the unit rate of the fee, the duration, and the maximum permissible quantity of wastewater discharged to waters under the water permit. In turn, the fixed fee for abstraction of water is affected by the ratio of the quantity of water that may be abstracted under the permit to the available groundwater, and, as in the case of the fee for discharge of wastewater, the unit rate, duration and maximum quantity of water that can be abstracted under the water permit. The level of the variable fee is determined solely by the quantity of abstracted water or wastewater discharged to waters or the ground, and the unit rate. The specific fee rates are set in an executive regulation issued by the Council of Ministers.

An enterprise using water services in this respect will also be required to conduct measurements of the abstracted water and discharged wastewater. Enterprises will be supplied with the relevant measuring equipment by Polish Waters, at the authority's cost, by 31 December 2020. Until then, the fees for water services will be determined on the basis of:

- The purpose and scope of the use of water specified in the water permit or integrated permit
- Results of measurements made by administrative authorities in monitoring of water management and findings from the review of water permits
- Results of measurements made by administrative authorities in monitoring of integrated permits.

This enigmatic wording of the regulations will probably generate many doubts. As the regulations have just entered into force, it is hard to say how they will be interpreted until measuring devices are installed.

In practice, beginning with reports on exploitation of the environment for 2017, it will not be necessary to disclose data on the use of water. The amount of the fees in this respect will be calculated by the relevant authorities of Polish Waters and presented to enterprises in the form of a notice.

We should also mention a practical aspect enabling a reduction in the fees. As indicated, the amount of the fixed fee depends on the maximum permitted quantities of water or wastewater indicated in the water permit. Before, this parameter of the permit did not affect the environmental exploitation fee, as the fee depended on the actual quantities of abstracted water and discharged wastewater. It should thus be checked whether the quantities allowed in the permit are higher than needed for the enterprise's operations. If so, an amendment to the water permit to reduce the permissible quantities of abstracted water or discharged wastewater can reduce the fees.

Increased fees and ban on use of water

Previously, the financial sanctions for failure to obtain required emissions permits or violation of permit conditions were specified in the Environmental Protection Law. In the former case, the enterprise was required to pay "increased fees," and in the latter case was exposed to imposition of an administrative fine.

An enterprise abstracting water from its own intake or discharging wastewater to waters or the ground must also deal with major changes, as the new Water Law has introduced different regulations in this area as well. Entities using water services without a required permit or in violation of a permit may be ordered to pay increased fees. If an entity abstracts water or discharges wastewater to waters or the ground without a permit, the authorities of Polish Waters will impose a fee equal to 500% of the variable fee for abstraction of water or discharge of wastewater, as the case may be. If an enterprise violates the terms of its permit, the environmental inspector will charge an increased fee equal to 10 times the unit rate of the variable fee for the water abstracted or wastewater discharged in violation of the permit. Moreover, if it is found that an enterprise is operating without a required permit, a decision may be issued prohibiting it from using water. Imposition of this sanction could not only greatly hinder operations by the enterprise, but outright prevent it from continuing to do business.

Therefore it should first and foremost be determined whether an obligation has arisen to obtain an additional water permit in connection with entry into force of the new act. And when deciding to reduce the maximum permitted quantities of abstracted water or discharged wastewater, the new limits should be set at a level that will avoid imposition of increased fees for exceeding the quantities stated in the permit.

Acquisition of real estate—pre-emption by the State Treasury

When planning to expand operations, the new provisions of the Water Law concerning trading in real estate must not be overlooked. They have introduced a statutory right of pre-emption by the State Treasury with respect to land covered by inland standing waters. Such waters include inland waters in lakes and other natural bodies of water not directly and naturally connected with flowing inland surface waters. The act also provides that the regulations on inland standing waters shall apply as relevant to waters in recesses in land created as a result of human activity which do not constitute ponds.

When considering the acquisition of real estate, it should be examined whether the State Treasury holds a right of pre-emption to the land. Conclusion of a transaction without making the required notification to the county executive will result in absolute invalidity of the contract transferring ownership of the real estate.

More obligations, tougher challenges

Those using water for conducting their business will undoubtedly be strongly impacted by entry into force of the new Water Law. The introduction of new obligations, changes in the structure of the water administration authorities, and first and foremost the lack of practice in interpreting the new regulations and case law from the administrative courts in this respect will make water management issues some of the most difficult challenges faced by businesses in Poland this year.

Dominik Wałkowski, adwokat, *partner in charge of the Environmental Law practice*

Martyna Robakowska, Environmental Law practice

Unlawful exemption from real estate tax

Tax exemptions and abatements in special economic zones increase the investment attractiveness of the region and thus help draw new money to the zone. The councils of local communes in Poland may seek to achieve this by adopting exemptions from real estate tax for investments in the territory of an SEZ. Investors assume that they will be eligible for the exemption for the period and under the rules specified in the resolution. But the exemption may later be deemed to be illegal state aid.

Agnieszka Kraińska

State of facts

A company was operating in a special economic zone in Poland under a zone permit issued in 2005. When filing its real estate tax declaration for 2011 it indicated that it is entitled to an exemption from real estate tax pursuant to a resolution of the commune council from 2002.

But the tax authority (the mayor of the commune) held that the company could not benefit from the exemption because the resolution was not notified to the European Commission as state aid when Poland joined the EU, and thus the exemption constitutes illegal state aid pursuant to EU law.

The local government appeal board upheld the position of the tax authority, pointing out that the resolution from 2002 was not included in the list of existing state aid schemes referred to in the EU accession treaty, and thus from 1 May 2004, when Poland joined the EU, the exemption constituted illegal state aid for purposes of EU law.

The company filed a complaint with the province administrative court, arguing that refusal to grant the aid provided for in the commune council resolution from 2002 violates constitutional principles such as legalism, trust in state authorities, and protection of vested interests.

In the meantime, the commune council had sought in subsequent resolutions, beginning in 2007, to pass new resolutions repealing the 2002 resolution because of its negative consequences for the commune budget. But the administrative courts consistently invalidated the new resolutions on the grounds of similar constitutional principles: legalism, trust in state authorities, legal certainty, and legitimate expectations.

However, the argument of illegal state aid and the duties of the state authorities under EU law in such situation was raised by the commune for the first time in this case.

Findings by courts of first and second instance

The court of first instance focused on showing that in this case, both the commune council (by failing to notify the aid) and the state authorities (by creating conditions allowing inconsistency with EU law to continue for many years) failed to perform their duties, but imposed the consequences of their neglect on the taxpayer. The court also pointed out that neither the tax authority nor the local appeal board was authorised to take action to prevent the granting of unlawful aid to the company, because Art. 108 of the Treaty on the Functioning of the European Union empowers only the European Commission to assess the compliance of aid with the internal market and to order the recovery of aid.

Moreover, in the view of the court of first instance, the aid granted in 2002 was rendered lawful by changes in EU law (Regulation 1628/2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid and the General Block Exemption Regulation (800/2008)) and amendments to Poland's Local Taxes and Fees Act introduced in 2007.

The Supreme Administrative Court rejected this position and held that the aid was not validated by these subsequent changes in law, because the resolution did not meet the conditions set forth in those regulations. The aid awarded under the resolution was not sufficiently transparent, and constituted an aid programme rather than individual aid, and also did not meet the formal requirement of a reference to the EU regulations providing an exemption from notification of the aid.

The court also held that under the Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), the national courts are obliged to draw all legal consequences from the granting of illegal state aid. Thus, in the court's view, the national courts are empowered to rule on both the recovery of unlawful aid and suspension of future payments of unlawful aid. Moreover, under the principle of the priority of EU law, tax authorities recognising a national regulation as inconsistent with EU law are required to refuse to apply the national regulation—in this case, the commune council resolution from 2002.

Addressing the constitutional principles of legalism, trust in state authorities, and protection of vested interests, the Supreme Administrative Court found that the issue of unlawful state aid was not considered in the cases in which the administrative courts invalidated the resolutions by the commune council repealing the resolution from 2002.

In the court's view, the protection envisaged by Art. 2 of the Constitution extends only to justly acquired rights, which do not include rights acquired under unjustly established norms, such as unlawful state aid.

Case law of the Court of Justice

We decided to examine how the Court of Justice of the European Union has ruled in similar cases.

In Case C-505/14, *Klausner Holz Niederesachsen GmbH*, as in our case, it was the authority that granted the aid that later itself asserted the unlawfulness of the aid against the beneficiary. Additionally, there were final judgments in that case holding that the legal basis for granting the aid was valid. But the Court of Justice took the following view:

- Only aid compatible with the internal market may be implemented, and thus EU law provides for a system of control in which the Commission and the national courts play complementary roles. Intervention by the national courts arises from the direct effectiveness of the prohibition against implementation of aid not notified to the Commission (Art. 108(3) TFEU).
- The immediate enforceability of this prohibition on implementation extends to all aid which has been implemented without being notified.

- When the national court finds that a measure constitutes state aid implemented in breach of Art. 108(3) TFEU, it may suspend the implementation of the measure in question and order the recovery of payments already made.
- In the related cases in which final judgments were issued confirming the validity of the legal basis for awarding the aid, the issue of state aid was not examined.

Thus the Court of Justice held in that case that EU law precluded the application of a rule of national law enshrining the principle of *res judicata* from preventing a national court which had held that the measures that were the subject of the dispute before the court constituted unlawful state aid under EU law from drawing all the consequences of that breach.

In Case C-368/04, *Transalpine Ölleitung in Österreich GmbH,* the Court of Justice held that:

- Even if the Commission subsequently examined the measure and found that non-notified, and thus unlawful, state aid was nonetheless compatible with the common market, that does not have the effect of validating the national act awarding the unlawful aid. Any other interpretation would reward non-observance of EU law by the member state and deprive EU law of its effectiveness.
- The national courts must take care to ensure that whatever remedies they grant in fact negate the effects of aid granted in breach of Art. 108(3) TFEU and do not extend the aid to a further class of beneficiaries.

And in Case C-493/14, *Dilly's Wellnesshotel GmbH,* the Court of Justice ruled that the absence in an aid scheme of an express reference to the General Block Exemption Regulation (800/2008) precludes that scheme from being considered to fulfil the conditions for exemption from the notification obligation in Art. 108(3) TFEU.

As these rulings show, the Court of Justice has expressly required the national courts to draw consequences from the non-notification of state aid.

Possible mitigation of CJEU's strict position

It should nonetheless be pointed out that the current version of the EU's procedural regulation on application of Art. 108 TFEU (Art. 16 of Regulation (EU) 2015/1589), like its predecessor (Art. 14 of Regulation (EC) 659/1999), provides for the possibility for the European Commission to refuse to require recovery of aid if that would be contrary to a general principle of EU law. Such principles include the principle of protection of legitimate expectations and the principle of legal certainty arising under the principle of the rule of law in Art. 2 of the Treaty on European Union. As a rule, the prevailing view with respect to state aid is that no justified expectation arises if the aid was not notified, but nonetheless the CJEU has recognised in several cases involving recovery of state aid that the conditions giving rise to legitimate expectations were met.

While the EU procedural regulation does not address the issue of rulings on recovery or suspension of unlawful state aid by national courts, the rules set forth there may be applied by analogy to the case discussed here. In particular, it should be stressed that the principle of the rule of law is also expressed in Art. 2 of the Polish Constitution and is shared by the EU and its member states.

In our view, the action of the commune council in this case exhibits exceptional disloyalty toward investors in the special economic zone. It is relevant that the council justified its attempt to repeal the 2002 resolution by claiming that it had too great an impact on the commune's budget. The argument that the real estate tax exemption constituted unlawful state aid was raised only in the subsequent proceeding.

If the commune council were truly motivated by a concern for compliance of the aid with EU law, it should have long ago notified the aid to the Commission or issued a resolution complying with the requirements for an exemption from notification. In our view, in this case the commune was attempting to benefit from its own unlawful act, which clearly violates overriding principles of the rule of law.

No one should benefit from their own unlawful act

In our view, the administrative court could have set aside the decisions of the tax authorities for violation of the principles of trust in state authorities, legal certainty, legitimate expectations, and protection of vested interests, as well as the prohibition on the commune benefitting from its own unlawful action. Under these facts, in the conflict between the rules governing unlawful state aid and the principles of legal certainty, legitimate expectations and vested interests, the latter should prevail.

Agnieszka Kraińska, legal adviser, EU Law practice

Will administrative offices really work faster and more efficiently?

Everyone hopes so, particularly following the amendment to the Administrative Procedure Code that entered into force on 1 June 2017. One of the aims of the amendment was to tackle the problem of overlengthy administrative proceedings involving businesses and citizens.

Dr Maciej Kiełbowski

One of the goals of the last overhaul of Poland's Administrative Procedure Code was to streamline and expedite administrative proceedings. It is true that there was no change to the general deadlines for resolving administrative matters pursuant to Art. 35 of the code, under which matters should be resolved without undue delay and in any event within one month, or two months in particularly complex matters, nor the other deadlines provided in some instances under specific laws (e.g. 65 days to issue a building permit). Such a change would have been moot, because in a great many instances the existing deadlines aren't met anyway.

But there is a new instrument introduced by the amendment for combating delay or inaction in administrative proceedings, namely the "reminder" (*ponaglenie*) governed by Art. 37 of the code. This instrument holds great potential which was not found in the complaint for inaction or delay previously provided for in that article. We will examine this instrument more closely.

How it was

The previous form of complaint (*zażalenie*) did not function as it should. Generally we did not recommend it to clients who expected their matter to be decided within the not-too-distant future, as the construction of the complaint itself led to further delay in the case.

The old complaint for failure to resolve the matter on a timely basis generally required the entire case file (which was to be the basis for issuance of the decision for the business or citizen in question) to be packed up and forwarded to the higher authority which would rule on the complaint. This resulted in a loss of additional weeks, if not months, devoted exclusively to consideration of the issue of whether the case which had already been conducted for several months was overlengthy or not.

Under the old rules as well the administrative courts sometimes noted that filing of a complaint against delay in the proceedings must not serve as an excuse for the authority considering the case (although too slowly) to just pack up the files and ignore the matter until the complaint was resolved (as well as a possible petition to the administrative court in this respect). As the Province Administrative Court in Poznań observed in its judgment of 19 May 2011 (Case II SAB/Po 27/11), "If the proceeding before another authority or the court has no direct influence on consideration of the matter, and the only barrier is that the case file remains in the court or with the other authority, the authority competent to consider the case is required to take actions aimed at obtaining the documentation required for consideration of the case, e.g. by requesting delivery of the file for use in delivering a ruling, or to prepare copies of the necessary documents. Passively waiting for the case to be decided by the appellate authority or the court, followed by return of the case, may be regarded only as inaction by the authority." Interestingly, in that case (where inaction was found and the applications for invalidation of the decisions were ordered to be considered), this state lasted "only" two months before the complaint was filed with the court.

How it is

The "reminder" seems to solve these drawbacks of the previous complaint procedure. The procedure is sped up to a certain extent as soon as the reminder is filed, as under the current regulations the authority conducting a proceeding in relation to which a reminder is filed is required to forward the reminder to a higher authority promptly, within 7 days after the reminder is received. The appellate authority also has a brief period for considering it—another 7 days. While there may be doubts whether this deadline will actually be met (particularly in the case of large appellate authorities such as local government appeal boards, given the number of cases they hear), it is included in the act and thus is binding on the authority.

But what is perhaps most important and most sensible in the new reminder is the manner in which it is filed and considered. It is no longer necessary to transmit all possible case files in order to resolve this issue. Under the amended regulations, the reminder is forwarded to the appellate authority only with the essential copies from the files. First, it is only copies that are passed along, not the original documents which the authority will rely on to decide the underlying matter. Second, the appellate authority is not inundated with all documents (which may be unnecessary from the perspective of inaction or delay), which should further speed up the action by the appellate authority. It may indeed be wondered whether in many cases it would suffice to present the reminder along with the index for the administrative case (if conducted in cases of this type), from which much can be determined concerning the timeliness of the decision of the case.

Most importantly, however, the authority considering the case still has the file at its disposal and thus the filing of a reminder does not halt the case on the merits.

When can a reminder be filed?

It's good that there is an interesting new legal instrument available with great promise to function properly and speed up cases. The question arises, however, when a reminder can actually be used. The answer can be found in the interim provisions of the act, regulating issues connected with pending cases and new cases.

Art. 16 of the Act of 7 April 2017 Amending the Administrative Procedure Code and Certain Other Acts provides: "The act amended in Art. 1 [i.e. the Administrative Procedure Code] shall apply in its previous wording to administrative proceedings commenced but not concluded prior to the date of entry into force of this act by a final decision or order; provided, however, that Art. 96a–96n of the act amended in Art. 1 [i.e. the new chapter on administrative mediation] shall apply to such proceedings."

This essentially means that a reminder can be filed only in cases initiated on or after 1 June 2017, which for now greatly limits the force of this solution (as it cannot be used in cases that have already been pending for quite some time).

When can inaction or delay be challenged in court?

This is similar in the case of proceedings before the administrative court, where a complaint can also be filed for inaction or delay of an administrative proceeding.

Here the interim provisions should be consulted again, and the conclusions generally narrow even further the set of cases to be considered under the new procedure. The new procedure for challenging inaction or delay in a proceeding before the court provides great leeway to the party, enabling filing of a complaint with the court without any deadline, so long as it is after filing of the reminder. (The new Art. 53 §2b of the Law on Procedure Before the Administrative Courts provides: "A complaint against inaction or delay in conducting a proceeding may be filed at any time after filing of a reminder with the competent authority.") However, the requirement to first file a reminder means that this must refer to a new case, i.e. one commenced on or after 1 June 2017.

Conclusions

There is one fundamental conclusion: a business or citizen facing greater or lesser resistance from the public administrative authorities in considering a matter within a reasonable time, or at all, can take action.

The method this action can take depends on when the case was commenced, but it is reasonable to expect that over time, more and more parties will have real access to this apparently worthwhile new means for combating administrative lethargy.

The construction of the reminder no longer discourages its potential beneficiaries from using it, as was the case with the institution of a complaint against delay or inaction previously functioning under Art. 37 of the Administrative Procedure Code. And it should probably not contribute to further unnecessary dragging out of the proceeding.

So far no substantive rulings have been issued yet under the new regulations, but it appears that they will prove their usefulness in practice and contribute to quicker resolution of cases important to the parties involved.

Dr Maciej Kiełbowski, adwokat*, Administrative Disputes practice*

Whistle-blowers at the Polish competition authority: How does the system work?

Our clients are familiar with the notion of "whistleblowers" through internal corporate channels for reporting irregularities within the firm. Many corporations, particularly multinationals, have adopted this approach. It can be used to disclose irregularities in the public administration, institutions, and social organisations, as well as private companies. This institution is also used by competition authorities, including Poland's Office of Competition and Consumer Protection (UOKiK). Here we examine UOKiK's understanding of the whistleblower function and how it can affect businesses operating in Poland.

Marcin Kulesza

Whence whistleblowers at UOKiK?

The Sarbanes–Oxley Act adopted in the US in 2002 following the WorldCom and Enron scandals uses the term "whistleblower" to refer to an employee of a public company who has reported information to the competent authorities about certain categories of abuses or has supported the authorities in their proceedings. The act protects whistleblowers against retaliation by the company or its management. Adoption of the act represented a sea change. Before then, persons reporting irregularities were not protected in any way against being identified and subjected to revenge by persons they had outed for their illegal or unethical behaviour.

In Poland, introduction of rules for protection of whistleblowers is now being considered, although limited to criminal offences, in the proposed Act on Transparency of Public Life (discussed at page 8).

The antitrust authorities also use information obtained from businesses and their workers in uncovering violations of the prohibition against restricting competition. For years these authorities, including the European Commission, have taken the view that persons functioning within a firm participating in an unlawful arrangement, with access to inside information, are vital to uncovering cartels and other anti-competitive practices.

Some time ago, the Commission provided a telephone hotline and special email address for potential whistleblowers to use. It was an informal, unencrypted channel of communications. In March 2017, following the examples of Denmark and Germany, the Commission added a new channel in the form of an encrypted system for two-way exchange of messages. The role of the system is to provide communications stripped of all information such as metadata, IP addresses and passwords enabling identification of the informer. But if the whistleblower agrees, the Commission can respond to the message and request details and clarifications.

The positive experiences of the Commission, as well as Denmark, Germany, Hungary, Slovakia, and the UK, also encouraged the Polish competition authority—the president of UOKiK—to seek its own path toward use of this source of information about violations.

None of our clients has yet been targeted by UOKiK thanks to information obtained from whistleblowers. But we have worked with companies that have received such reports internally, from their own whistleblowers, particularly within corporate compliance programmes, and then decided to cooperate with UOKiK. We have also advised clients in proceedings initiated as a result of non-anonymous notifications submitted to UOKiK. However, we believe that the watchdog's new anonymous information channel greatly increases the risk of discovery of irregularities. Thus it is important to know the rules for operation of whistleblowers at UOKiK and the possible responses if the authority takes an interest in information about your company.

How do whistleblowers function at UOKiK?

A pilot programme for whistleblowers has functioned at UOKiK since April 2017. Technically, it resembles the Commission's programme (without the internet channel). It specifies the rules for communications between UOKiK and whistleblowers, who have a special telephone number and email address at their disposal as well as the possibility of submitting information in writing or in person. The president of UOKiK primarily counts on obtaining information through this route about collusion in price-fixing and bid-rigging. The authority is also interested in other prohibited arrangements and abuse of a dominant position.

Despite its flaws, particularly the lack of real, legal guarantees of anonymity, the programme has proved to be something of a success. According to press reports, in its first three months of operation, UOKiK received about a thousand tips on violations. Although in reality only some of them involved anti-competitive practices, the president of UOKiK announced that in a dozen or more cases, the tips had stirred the interest of the watchdog, which intended to follow up by taking action in those cases.

The aim of UOKiK is that anyone who knows of an illegal arrangement—an employee or undertaking with information about potential violations of competition rules by an employer or trading partner—can submit information about the prohibited practice anonymously (without indicating the sender) in writing, via an intermediary, or at a meeting with UOKiK lawyers. UOKiK recommends that information provided anonymously in writing (in a letter delivered by post, by hand at the office, or by email) be supported by evidence backing the veracity of the report. The office also encourages face-to-face meetings. This can be arranged using the indicated means of contact (telephone or email) or through an intermediary (attorney).

The competition authority also assures that it takes efforts to protect the whistleblower's anonymity. It stresses for example that when arranging a meeting between a whistleblower and UOKiK lawyers, and during the meeting, the office will not try to uncover the whistleblower's identity, but only to establish the facts of the case and possibly the reasons for reporting the information about the illegal practice to the office. But UOKiK does not have any practical or legal instruments for protecting whistleblowers from exposure and retaliation.

What happens when UOKiK receives a tip?

So it is easy to imagine a situation in which an employee (or a partner the employee has fallen out with), customer, supplier, or competitor provides anonymous information to UOKiK about an anti-competitive practice your firm is involved in: for example setting minimum prices in agreements with distributors, or exchanging confidential information with competitors and dividing the market with them. Such information is invaluable to the office—particularly considering that the other sources for such information are an official notification, which businesses are especially sceptical of using, the office's own sources (e.g. press reports), and the leniency programme, which has been only modestly successful recently.

After receiving and verifying information from a whistleblower, the president of UOKiK may initiate an investigation "in the case" (i.e. not against a specific party). This proceeding is intended to clarify whether the circumstances the authority has learned of indicate a possible violation of the Competition and Consumer Protection Act. Or, if the information is clear and unambiguous, the authority can immediately commence an antitrust proceeding (against a specific undertaking concerning a specific violation). In either proceeding the authority may conduct an inspection or search.

In the investigation the authority will ask questions. An undertaking that receives a summons to present information or documents may not refuse to respond by asserting, for example, the protection of trade secrets. In an antitrust proceeding, it must defend against specific allegations.

If thanks to information from a whistleblower the president of UOKiK launches an antitrust proceeding which leads to a finding that the practice which the information concerned constitutes a violation of the prohibition against agreements restricting competition or abuse of a dominant position, the authority may impose a fine. The maximum amount of the fine is 10% of the turnover generated by the undertaking in the year preceding imposition of the fine. The risk connected with reporting by whistleblowers to UOKiK is thus very high for businesses. The risk is even higher when we consider that a violation of competition law may also lead to the assertion of claims by customers or suppliers injured by the anti-competitive practice.

It is also important to remember the personal liability of persons managing an undertaking for knowingly allowing the undertaking to violate the prohibition on agreements restricting competition. The president of UOKiK may impose a fine on such individuals of up to PLN 2 million (about EUR 500,000). There are also sanctions connected with corporate liability and possible negative consequences for the employment relationship between the manager and the company.

What to do about it?

An undertaking that has violated competition law cannot counter the risk of disclosure of the violation by a whistleblower, but once the president of UOKiK commences a proceeding against the undertaking, it has several possibilities.

First, it can defend against the allegations, hoping to persuade the authority that it did not commit the violation. But if the violation truly was committed, the undertaking may consider several options for cooperation with UOKiK or amicable conclusion of the matter.

Thus, second, the undertaking may take advantage of the leniency programme. Simply put, this is a programme of cooperation with the antitrust authority in which, in exchange for waiver or reduction of the fine, the undertaking admits to the violation and presents documents and information enabling the president of UOKiK to commence an antitrust proceeding or issue a decision. An undertaking can resort to this programme at the investigation stage if it is obvious that it will lead to initiation of an antitrust proceeding justifying the imposition of a fine. The benefit of the programme is either waiver of the fine or reduction of the fine, depending on the order in which the leniency application is filed, by 50%, 30% or 20%.

Third, also when the undertaking has filed a leniency application but has no chance to completely avoid a fine, it may submit a request for settlement. This means that the undertaking will not challenge the factual findings by the authority or appeal against the decision issued by the president of UOKiK. In exchange, it may receive a reduction in the fine by 10% of the amount the authority originally planned to impose.

Finally, if the circumstances allow, it may submit a proposal to the president of UOKiK in which it undertakes to take certain actions or refrain from certain actions with the aim of ending the violation or eliminating its consequences. Then there is also an opportunity to avoid a fine.

Thus the advantages and drawbacks of each of the foregoing options need to be considered. Once an undertaking has violated competition law and UOKiK learns of the violation, the only thing left is to try to minimise the negative consequences. The risk that a whistleblower will report the violation cannot be avoided.

Marcin Kulesza, Competition practice

Is it feasible to generate electricity without subsidies?

Radosław Wasiak

The energy sector is one of the fundamental branches of every economy. It is hardly imaginable than any firm could operate without a steady supply of electricity. Many firms also require access to thermal energy. Given the demand for such products, it is hard to believe that producing them might not be feasible without additional support.

The power sector must not only ensure a steady and reliable supply of electricity to customers, but must also tailor its own activity to changing legal regulations. This applies in particular to tougher requirements for limiting harmful emissions into the environment. On top of this there is ongoing growth in technology and a growing need for electricity. This requires new investment, including investment in new sources for generating power. Any project of this type will entail costs incomparably greater than those incurred in other sectors of the economy.

Growing competition on the power market and the continuing limitations on full liberalisation of power prices (particularly prices for households) make it impossible for energy firms to finance development projects out of their own funds. The scale of investments and the related risks also have a negative impact on the possibility of raising funds for such projects on the commercial market. For this reason, it is necessary to increase the number of support mechanisms for the energy sector, from public funds or from consumers.

Energy from renewables

The Renewable Energy Directive (2009/28/EC) established overall national targets for the share of renewables in the gross final consumption of energy for all EU member states. In the case of Poland, this target was set at a minimum of 15%, and as with the other member states this should be achieved by the end of 2020.

Despite significant progress in the development of technologies for generating electricity from renewable sources, the initial cost of such projects remains high. Moreover, renewables continue to be less efficient than conventional sources, and will probably remain so for a long time. Thus it would be highly risky to base an investment in any renewable project on the assumption that the income from the project will derive solely from sales of the electricity generated by the installation. Changing market prices for electricity prevent the assumption of a steady level of income from the project over a foreseeable timeframe. Based on such a revenue model, it would also be difficult to raise funding from commercial financial institutions, which as a rule are not eager to finance high-risk investments.

Thus the obligation for Poland to raise the share of renewables in its overall energy mix requires state intervention to enhance the stability of such projects, at least until they begin to generate a return on investment.

The Polish system of support for renewables is currently in a transitional phase. The system of certificates of origin (also called "green certificates"), in force until recently, is being replaced by a new auction system. This change is occurring gradually, as renewable installations that generated electricity for the first time before the new regulations governing support for renewables continue to be entitled to obtain certificates of origin for the following 15 years, but no later than 31 December 2035.

Certificates of origin

The system of support in the form of certificates of origin was based on creation of an additional source of income for entities generating electricity from renewable sources. This additional source of income was supposed to be certificates of origin, property rights arising out of production of a certain quantity of electricity in a renewable installation for the purpose of sale. Generators of power from renewables were to sell the green certificates they obtained to power companies generating or selling power to end customers. Such companies had an annual obligation to present a certain quantity of certificates for redemption, as part of their RES obligation, or to pay an appropriate substitution fee, intended to be higher than the market price of the certificates. But a great oversupply of certificates of origin on the market, caused among other things by admission of co-combustion to the system, resulted in a huge drop in the value of green certificates, which in turn upset the financial situation of investors in renewable projects.

While the system of green certificates is being phased out, it remains in force for projects already completed and constitutes a significant source of revenue for them, which would worsen the situation of those investors if it were lost. Thus the possible grounds for refusal to issue certificates must be borne in mind, and in particular the obligation to confirm the "incentive effect." Under the EU's state-aid regulations, an entity seeking support must demonstrate that it would not have undertaken the given investment but for the funds deriving from state aid. Interestingly and importantly, it is not only the investors who actually built the new project who are required to confirm the incentive effect. This obligation also applies to investors acquiring facilities already in operation, in connection with which the certificates of origin are issued to their current owners. Ignoring this obligation and acquiring rights to the project without appropriate confirmation of the incentive effect may result in refusal to issue certificates of origin, and the fact that green certificates were previously issued for the same project will unfortunately be irrelevant. The incentive effect is confirmed during the procedure for grant of a promise to issue a concession for generation of electricity, on the basis of the technical and economic description of the project submitted by the applicant.

Auctions

Given this situation, it was decided to abandon the system of certificates and introduce a new solution, namely an auction system. Entities interested in carrying out renewable energy projects may seek support in specially organised auctions, conducted separately for various types of renewables and also for various capacities.

During the auction, interested undertakings offer a price at which they are willing to sell the electricity they generate, but no higher than the "reference price" (also called the maximum price) announced prior to the auction. The entities offering the best price and declaring a quantity of electricity within the limit established for the auction will obtain the right to specific support taking the form of coverage of the negative balance, i.e. the difference between the net value of the electricity generated and sold and the value of the electricity at the price offered in the auction. This system is thus generally designed to guarantee for installations a steady stream of income comparable to the average market price for electricity. In the auction system, smaller RES installations (below 500 kW) will benefit from an obligation to purchase their entire power output at the fixed price offered in the auction, instead of coverage of their negative balance.

Capacity market

The public are familiar with the system of support for renewables, and the system is broadly debated. This is not the case with support for investments in power production from conventional sources. But because of the need to increase the total capacity of the power generation system, and the spectre of a blackout if this is not done, the need to ensure funds for implementation of conventional projects has also been raised for a long time.

In the near future, conventional power plants currently in operation will have to cut their capacity due to exhaustion of existing generation units and their high level of emissions. Modernisation of existing units, or replacement with new units, will require huge financial investments, and it is hard to raise funds for these projects from the market. Out of concern for the security of the overall energy system, such units cannot be abandoned altogether, as, apart from generating power, they also perform the important function of stabilising the system—for example when there is increased demand for power or due to unfavourable atmospheric conditions renewable sources cannot produce enough power.

To ensure funds to carry out essential investments, a new support mechanism is being introduced in the form of a capacity market. Under the regulations adopted at the end of 2017, this system is to be based on capacity contracts between generators of electricity and the transmission system operator. Under these contracts, producers of electricity will be paid not for the power they actually generate, but for their mere readiness to generate it. The funds to cover the expenses connected with the capacity market are to come from consumers, who will pay it as an additional item on their electricity bills.

Subsidies or roulette

The support mechanisms presented here are not the only ones functioning on the broader energy market. There is also support provided to "prosumers" generating electricity in low-capacity installations mainly for their own needs, and the evolving support for combined production of heat and power in a co-generation system.

The continually changing solutions concerning support mechanisms as well as the current market situation demonstrate, however, that it is not feasible to produce electricity without additional funds from beyond market mechanisms alone, and will not be feasible in the foreseeable future.

Radosław Wasiak, adwokat*, M&A and Corporate practice*

Partitioning real estate doesn't have to be so costly

The structure of the transaction aimed at ending the joint ownership of property is crucial for the potential tax consequences, and thus the economic feasibility of the venture. This is particularly relevant in cases when there are numerous co-owners and numerous plots, as the properly established method of settlement among the parties (buyouts and additional contributions) can greatly reduce the tax basis and thus reduce the fiscal burden of the transaction.

Dr Przemysław Szymczyk

It sometimes happens that the subject of partition is several pieces of property belonging to multiple co-owners, where each co-owner has a defined share in some or all of the properties. This situation may occur for example in the case of inheritance, when the estate includes more than one piece of real estate (Civil Code Art. 1035). The heirs (co-owners) may then agree (for various reasons, for example to resolve a dispute) that they will divide the acquired property so that some of them obtain exclusive ownership (or joint ownership) of some of the property and others acquire exclusive ownership (or co-ownership) of the other inherited property. The value of the shares is then typically equalised through an appropriate cash contribution (Civil Code Art. 212 §1), intended to make up for the differences arising from physical division of the property, where there is a discrepancy between the value of the portion of the property actually allotted to the heirs and their share in the estate. The heirs may also decide to sell the property or award it to one or more of the co-owners, with a requirement for those heirs to buy out the shares of the others (Civil Code Art. 212 §2).

Agreement to divide inheritance

A similar situation was faced by our clients, heirs of a pre-war Warsaw entrepreneur who owned a number of properties nationalised in the 1950s under the so-called Bierut Decree. After many years of complicated reprivatisation proceedings, we succeeded in recovering most of the former property for our clients. The recovered real estate made up two complexes located in different parts of the city, which we will call "Property 1" and "Property 2."

Our clients represented several lines of kinship for purposes of inheritance law (several decades had passed since the estate was opened), but in family property terms they fell into two groups, which we will call "Family 1" and "Family 2." The combined share in the estate of Family 1 was 45% (as to all of the real estate), and Family 2 55% (also as to all of the real estate). The heirs agreed among themselves that Family 1 would acquire exclusive ownership of Property 1 (while giving up all rights to Property 2), and Family 2 would acquire exclusive ownership of Property 2 (giving up rights to Property 1). But because the market value of the complex making up Property 1 was higher than the market value of the complex making up Property 2, the members of Family 1 (also holding a smaller share in the estate) had to contribute additional payments to members of Family 2. In order to partition the joint ownership it was also necessary to conclude a notarial contract dividing the inheritance.

Financial consequences

Before the contract could be concluded, it was necessary to analyse the tax consequences, which it soon proved could be very disadvantageous. Firstly, the tax authorities could treat the planned transaction as subject to VAT, because a portion of the recovered property was used by the heirs for commercial activity (some premises were let). Thus, with respect to that portion of the property, the heirs could be acting as business entities and VAT payers (even though all transactions based on inheritance law should, in principle, be regarded as outside the sphere of commercial operations and thus not falling within the scope of VAT). At the same time, the nature of these properties meant that the grounds for an exemption from VAT did not arise. With respect to the other properties (not let by our clients, and thus not the subject of commercial activity), in turn, the tax on civil-law transactions (PCC) would apply. Additionally, the payments (contributions) received by individual heirs in connection with the partition would be regarded as income from the sale of real estate and thus subject to personal income tax (PIT).

Consequently, the planned transaction could generate consequences under three separate taxes—VAT, PCC and PIT—and one of the biggest issues was to establish the proper tax basis for each of these taxes. There was a risk that the tax basis could be the combined amount of the mutual payments (contributions) due to each of the heirs in connection with the partition, which in the context of the significant value of all the properties would result in a very high total tax bill.

Many payments or one contribution?

After an analysis, we concluded that there were two possible solutions for determining the tax basis, depending on how the method of settlement for the partition was established between the heirs. This applied to each of the taxes in question (VAT, PCC and PIT).

- **VAT**

In the case of VAT, the tax basis is everything constituting the payment received or to be received by the supplier of the goods or services (VAT Act Art. 29a(1)). The first possible solution assumed that as to each property included in the estate, an appropriate payment would be established chargeable to the person who receives exclusive ownership of that property, and due to the person who ceases to be a joint owner of that property. In that situation, the basis for VAT taxation for each of the co-owners would be the combined amount of the payments due to the co-owner for giving up co-ownership of the specific real estate. Although the amount of the mutually due payments could be settled by mutual setoff up to the lower amount, that would not change anything in terms of the basis for taxation. That basis would still be the sum of the amounts of the payments due to each of the parties to the transaction of eliminating the joint ownership. Unfortunately, this solution would increase the tax basis, and would do so for each of the co-owners.

The other scenario consisted of awarding exclusive ownership to specific properties to each of the co-owners, appropriately factoring in the size of the shares in the co-ownership belonging to each of them, the overall value of all the properties making up the estate, and the fragmentary value of each of them. The financial settlement of each method of eliminating joint ownership could be limited only to the possible one-time payment of a contribution. This would constitute the monetary compensation for each of the co-owners who obtained exclusive ownership of one or more properties with a value lower than the value of their shares in all of the properties included in the estate (and thus for the members of Family 2). Those obliged to pay a contribution would on the other hand be those co-owners receiving exclusive ownership of one or more properties with a value exceeding the value of their shares in all the properties included in the estate (i.e. members of Family 1). Under this solution, the basis for VAT taxation would be only the amount of the equalising contribution, and that only on the part of the persons entitled to receive it, as, in a way, "suppliers of goods" (i.e. on the part of members of Family 2). This solution was more favourable and was thus suggested to the clients.

- **PCC**

The remarks above in connection with VAT apply here as well, but the persons charged with the tax in this case would be the "buyers" of the property rights above and beyond their shares in the estate, i.e. the co-owners required to pay contributions (members of Family 1), and not those who receive the payment (PCC Act Art. 4(5)). As mentioned before, PCC would apply only to those properties or parts of properties that were not used by the clients for commercial purposes (i.e. were not let).

- **PIT**

Here also the remarks on VAT apply, and in this case as well the persons required to pay the tax would be those co-owners who receive payment of an equalising contribution (i.e. members of Family 2).

Significant reduction in costs

The foregoing favourable solution, calling for a one-time contribution instead of payments for specific properties, was submitted to the tax authorities for review through an application for an individual interpretation of tax regulations. The tax authorities fully upheld our position, which meant huge savings for our clients (several hundred thousand zloty). The one-off equalising contribution payable from members of Family 1 to members of Family 2 was intended to cover the difference in value of the shares of Family 2 in both complexes of real estate (55%) and the market value of Property 2, which was less valuable than Property 1 and which was ultimately to be allocated to Family 2. In other words, the contribution came from those heirs who as a result of the division of the estate received property with a value exceeding their share in the estate. Additionally, for the tax office to be able to verify whether the amount of the contribution reflected the market value of the "sold" rights in the joint ownership of real estate, an appraiser had to be hired to value the elements of the divided assets before determining the amount of the contribution, and this was done.

This allowed our clients to significantly reduce the costs of conducting the transaction. This was particularly relevant because they were the heirs of a person injured following the Second World War, whose property was unlawfully nationalised. Imposing grossly high taxes in this case would have added insult to historical injury, because if it weren't for the nationalisation, these people probably never would have been placed in such a situation and would not have had to partition this property.

Dr Przemysław Szymczyk, adwokat*, Real Estate, Reprivatisation and Private Client practices*

The patchwork nature of Polish industrial land: Practical issues

Tomasz Zasacki

Since April 2016, Polish land ownership rules have become more restrictive. This has repercussions for businesses operating in Poland.

Most Polish factory owners probably believe that the land where their plants are located is classified for industrial use. It often comes as an unwelcome surprise when they discover this is not the case, and this has numerous legal ramifications.

The plots making up an industrial site, along with its various outbuildings, offices, other facilities and road infrastructure, located on a multi-hectare site, are classed according to their official land-use (cadastral) classification. Alongside plots designated "industrial," "other developed," "roads," and "other communications," plots (or parts of plots) are often classed as "agricultural" or "forest" land. For example, a clump of trees or bushes between factory buildings might be designated as "forest" land, while the lawn in front of the main office block, along with the nearby unpaved parking lot, may well be "agricultural." Plots earmarked for future expansion or development are frequently classified as agricultural or forest land.

Businesspeople in Poland are often unaware of the implications of owning such agricultural or forestry plots until they attempt to conclude transactions such as disposal of land, selling or buying an enterprise, merger of companies, or acquisition of shares. Only then does it become apparent that agricultural and forest land can be a millstone around the neck.

Agricultural plots

Land classified as agricultural brings with it the greatest problems. The Agricultural System Act as amended in 2016 severely restricts trading in such land. As a rule, agricultural land can be purchased only by farmers, or entities that pledge (with the consent of the appropriate authority) to run a genuine agricultural business. In addition, the State Treasury has pre-emption rights on agricultural land sales. These restrictions may seriously complicate and delay business transactions such as the sale of all or part of an enterprise, a factory or other facility, if these include agricultural land—even ditches.

There are further restrictions. The State Treasury has pre-emptive rights on the shares of any company that owns agricultural land. For example, if a company with a network of retail stores or, say, petrol stations in rural locations sells its shares, it will be subject to such restrictions, even if only a single plot that it owns has agricultural status. This does not apply to companies whose shares are traded publicly.

If the acquisition of agricultural land takes place other than by a sale, for example by a contract of exchange or through a corporate division, reorganisation or merger, the State Treasury may purchase such land at market value. If no market value is specified in the transaction contract, the state will value the land using provisions set down in the accompanying legislation.

Similar restrictions apply to shares traded or acquired other than through a sales transaction. For example, acquiring shares in the increased share capital of a company that owns agricultural land will be subject to a right of purchase.

Forestry plots

Acquisition and disposal of forest land is not quite as restrictive as for agricultural land. The Forestry Act as amended in 2016 provides the State Treasury with pre-emption rights on the sale of forest land along with the right of purchase if the land is acquired otherwise than by sale. The act is not clear on whether the pre-emption right also applies to land held in perpetual usufruct (ground lease), and legal opinions on this issue differ. Unlike the Agricultural System Act, the Forestry Act provides no restrictions on trading in shares of companies that own forest land.

Plots of land, especially large ones, do not always have a single land-use classification. For example, a plot with an area of one hectare might comprise irregularly shaped parts, each with a different classification, e.g. 0.5 hectares industrial, 0.3 hectares of forest, and 0.2 hectares of internal roads. The question arises whether the pre-emption right applies to the entire hectare mixed-use plot or only the 0.3 hectares classed as forest. It is legally impossible to physically break up a plot to trade only part of it, so the conclusion is that the entire cadastral plot is subject to a pre-emption right. The Forestry Act introduced a pre-emption right to enable the State Treasury, represented by State Forests, to control the trading of Polish woodlands and to help concentrate ownership of this strategic resource in the hands of the State Treasury, taking account of the demand for proper management. It is hard to imagine that State Forests would exercise this pre-emption right with respect to a plot comprising a large factory, an internal access road and a small strip of woodland, but a reading of the Forestry Act leads to the conclusion that it could.

The same property may be subject to two pre-emption rights vested in different parties. According to established practice, both entitled parties are simultaneously notified of the transaction triggering the pre-emption right, which is exercised on a "first come, first served" basis. The Forestry Act addressed this conflict for the first time by providing that if a forest plot is also subject to a statutory pre-emption right vested in a third party (based on different regulations), the pre-emption right of State Forests has priority over the other party's right. For example, if the forest plot is undeveloped and held in perpetual usufruct, it is also subject to a pre-emption right of the local commune. The commune is notified of the transaction one month after the period "reserved" for State Forests has elapsed. This approach significantly prolongs the sale process.

Water Law

A new Water Law came into force on 1 January 2018. This affords the State Treasury a pre-emption right on the sale of any plot that includes "still inland waters." Such bodies of water are generally defined as lakes and other natural bodies of water that are not naturally connected to flowing surface waters. These provisions also apply to still inland waters (other than ponds) created as a result of human activity. Many industrial sites contain such artificial bodies of water as an integral part of the plant's operational infrastructure. As a result, many businesses will find their land is subject to the new provisions.

The extended provisions of the Agricultural System Act and the state's pre-emption rights introduced into the Forestry Act both entered into force on 30 April 2016, and the Water Law on 1 January 2018. This is too short a time for case law and legal literature to have reached a nuanced understanding of all the potential implications of this recent legislation.

It should be stressed that any land transactions conducted in breach of these restrictions may be deemed null and void and cannot be rectified retroactively.

In view of the problems associated with the patchwork structure of Polish land, owners of large industrial sites would be well advised to compile inventories of the plots they own, in order to identify potential trouble spots. Such an inventory should be based on the land-use classifications in the official land registers, local zoning plans and other regulations. Further pre-emptive actions should help limit or eliminate the risk of exposure, including (i) updating entries in the land register which due to the passage of time no longer reflect the actual land-use status; (ii) where possible, partitioning mixed-classification plots into "forest" and "agricultural" plots exposed to a pre-emption right or right of purchase from industrial plots not exposed to such rights; and (iii) monitoring what is happening in local zoning and planning, and submitting applications and suggestions when possible to ensure that any agricultural plots are designated for industrial use.

The new Water Law introduces a special procedure to establish the status of still inland waters and thus answer the question of whether a pre-emption right applies to the land under these bodies of water. This appears to be a useful solution providing the owner certainty as to the status of the body of water and the land.

In short, it is useful to know what type of land your company owns and the pitfalls and legal ramifications of its land-use status.

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