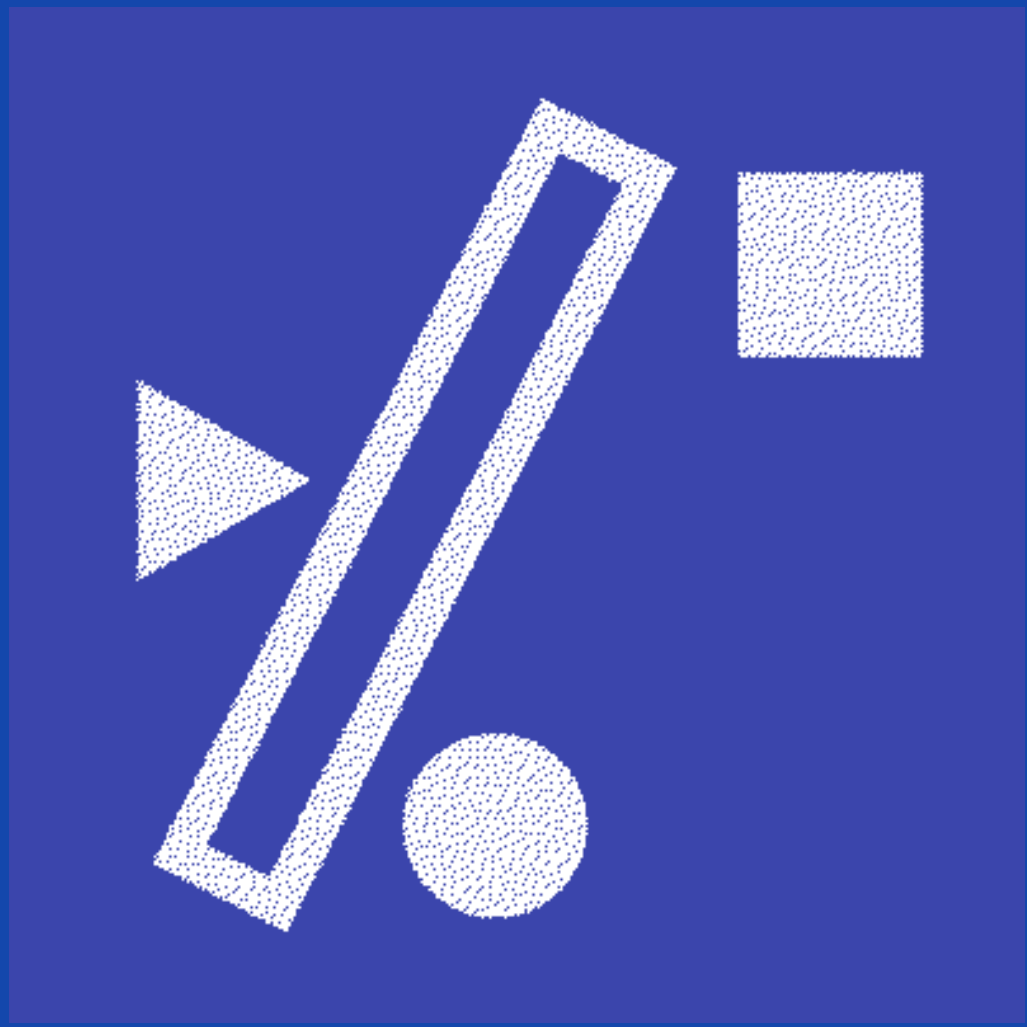

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Entrepreneurship

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Contents

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Competition, politics, and double standards

Contemporary competition law is built on two pillars: faith in the liberal market economy and faith in economic analysis. But in many countries in the West, including Poland, this faith is clearly dying. How will competition law look in the third decade of the 21st century, and will the current situation inevitably lead to changes in the principles governing enforcement of competition law?

Competition law in the next decade

There are many indications that competition law will be aimed at protection of the weakest players, regardless of whether such protection is justified by an economic analysis. Economic considerations will increasingly give way to social and political considerations.

On the other hand, we may anticipate that global rivalry will force competition law to be applied under two different standards. The privileged standard will be reserved for national champions—firms capable of global rivalry, favoured by individual states.

Whither the liberal economy?

Contemporary Polish antitrust law arose in the 1990s. The dominant economic narrative at that time, which still undergirds our antitrust law, was based on assumptions that are now being challenged.

For example, it was claimed then that state debt should be as low as possible, and interest rates should be high enough to hold inflation in check. In turn, printing empty money was regarded as suicidal for the economy. Deregulation was regarded as essential, and privatisation as a priority. Long-term investments in the equity markets were regarded as the best security for the money of future retirees. Finally, somewhat later, Poland's rapid accession to the eurozone, ideally before 2015, came to be regarded as crucial.

The events of recent decades have painfully tested these declarations. Some experts, looking at them from today's perspective, claim that they were all erroneous. For over five years, stimulation of a large segment of Western economies has been conducted with the help of debt drastically exceeding any levels deemed acceptable 20 years ago. It is the same with printing of fiat currency, with quantities in circulation beating all records. We live in a world of negative interest rates, which combined with empty money massively pumped into Western economies (contrary to earlier canons of economics) is not causing an increase in inflation. After the 2008 financial crisis, sparked among other reasons by the extremely deregulated American banking sector, it turned out that central regulation is nonetheless required. Companies controlled by the Polish government are holding their own against Western competitors. The Warsaw Stock Exchange is today about 10% below its peak from 12 years ago. And hardly anyone mentions the need to adopt the euro as soon as possible.

The situation across the Atlantic didn't look any better. Suffice it to say that no American economist predicted the scale of the 2008 crisis, and hardly any predicted the crisis itself. In turn, since at least 2013 a number of outstanding economists have been prophesying the imminent breakdown of the global economy, which so far has not occurred. It's hardly surprising that it is has become a popular saying to claim that an economist is an expert who can persuasively and logically explain why his predictions have not come true.

What does this mean for the development of competition law? A lot, as current experiences dampen any optimism placed in the economic sciences as a tool for solving legal, business and social problems—and antitrust problems are of this nature. As economic gauges fail, the temptation arises to replace them with social and political indicators.

The eight richest versus the rest of the world

The economic fathers of today's competition law agreed that competition would lead to the "fairest division of goods within society." But is that the distribution of resources that really functions in today's world? According to the latest reports, the eight richest people in the world hold as much wealth as half of humanity.

In building the foundations of contemporary competition law, proponents of the liberal economy knew that thanks to the free market and competition, the strongest would prevail, and they promoted this situation. But undoubtedly none of them could have predicted that the global village of 2020 would be occupied by just eight men who have carved out a bigger slice of the cake than the slice that must feed nearly four billion people.

current experiences dampen any optimism placed in the economic sciences

The economic analysis and liberal approach to the economy out of which contemporary competition law grew did not take into account the social aspects of competition.

Rapidly growing social inequalities are the first of these. Nor is it irrelevant that competition forces a ceaseless battle, improvement, constant clearing of hurdles. The question arises how much pressure of this sort the psyche of the average person can bear. It is telling that in Japan, one of the world's most competitive economies, there are over 30,000 suicides a year.

Ultimately, a certain paradox is a socially significant aspect of competition. The economic picture assumes that competition is a perfect mechanism because it provides consumers with the broadest possible choice of goods and services at the lowest price. But the economic analysis doesn't reflect that the great majority of consumers are workers employed by businesses. And it is these consumer employees who will have to shoulder the burden of the increase in efficiency thanks to which they can be offered the lowest price for the broadest selection. Oversimplified, it may be said that thanks to competition the consumer receives greater selection and lower prices on the store shelves, but in exchange must work more—for example working in supermarkets on Sundays. The societal mood in many countries shows that groups dissatisfied with these solutions are growing.

Whom to protect? The most efficient or the weakest?

Contemporary competition law is focused on a purely economic perception of reality. Sensitivity to social issues has been rejected from it almost by definition, as an economic analysis suggests that the most efficient undertakings should be preferred, not their weaker rivals (e.g. small agricultural producers). But preferences of voters in many countries are forcing a change in this direction. It may be said that history has come full circle, as historically competition law was a tool helping combat inequalities—weakening the strong to strengthen the weak. After all, protection of small and medium-sized enterprises is one of the oldest aims of antitrust law.

It may thus be expected that changes occurring in many Western countries, manifest for example in the need for greater social sensitivity, will make protection of smaller and weaker economic entities against stronger rivals one of the main aims of competition law. The economic indicators commonly promoted until recently to justify antitrust interventions will probably decline in favour of social and political indicators.

Legislative changes are already underway

Faith in the liberal vision of the world and the liberal economy is weakening, and in some countries it has already practically collapsed. Poland is no exception in this regard. We see that in the field of the Polish law of competition and consumer protection, a social perspective is gradually replacing an economic perspective. For example, the Contractual Advantage Act was adopted with the particular aim of protecting small agricultural producers against retail chains, even though from an economic point of view such retailers do not have market power. In turn, the amended Act on Delays in Commercial Transactions gives the president of the Office of Competition and Consumer Protection (UOKiK) administrative means to prosecute late payment of trade debts—a field having nothing to do with competition, but socially needed.

Another important change is the amendment to the Civil Code entering into force in June 2020, which extends to sole traders protection previously reserved for consumers. Other changes beyond the purview of UOKiK but impacting the competitive position of undertakings include the Sunday Trade Ban Act and plans to restore the tax on retail chains. These are solutions supporting small shops at the expense of large competitors.

Global policy forces double standards

But what do these trends have to do with global rivalries, particularly between firms from the US and the EU?

It is doubtful that the United States would agree to weakening of the biggest American companies in order to create more space for smaller American undertakings (although there are strong voices for this view also in America). This is because such a weakening could strengthen firms from the EU, for example, rather than "small" American firms. In the area of global rivalry, the US doesn't seem inclined to make any concessions, and strives to support its own firms at the cost of their foreign competitors. For example, once upon a time the US legally allowed a situation where American firms could enter into price-fixing arrangements as long as they concerned territories of other countries. The federal government protected the internal US market against cartels, but at the same time condoned or outright encouraged infringements of this type in other countries (if they could benefit the American economy). It may be expected that if the US decides against weakening its largest firms to protect their smaller competitors, the EU will respond in kind.

One approach for resolving this dilemma (already implemented in many countries) is to refresh the conception launched in the West, particularly in the 1960s and 1970s, of national champions—companies favoured by individual


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governments either so they can compete more effectively with global rivals, or for other social or political reasons. But this requires competition law to be applied under a double standard.

The first (baseline) standard assumes that antitrust authorities can protect weaker firms at the cost of stronger ones by not only following an economic analysis, but also being guided by social and political considerations.

The second standard would limit how the first standard is applied to national champions. For example, a merger of two state-owned giants would be accepted even if it could injure weaker national competitors and consumers, as long as the merger furthered the national champion's chances in global rivalry.

It is hard to resist the impression that the next decade, no doubt revolutionary for humanity in fields like artificial intelligence, biotechnology and the internet of things, will in the regulatory and legal area offer a combination of ideals and concepts brought forward from many decades in the past.

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Marcin Wujczyk

Labour law in times of change

The last 30 years has been a period of significant change in the area of labour law. The perception of the employer has changed. The objective approach, in which the workplace was the most important factor, was abandoned in favour of the concept of an employer emphasising the economic nature of relations with employees. A number of regulations were also introduced allowing for greater flexibility in working-time arrangements. Concepts formulated in EU law, such as discrimination and temporary work, were also introduced into the Polish legal system. Over the past 30 years, several times there was a need to introduce temporary legislation, valid for a short period in response to economic crisis. It was within these solutions that the Parliament allowed the possibility of unlimited conclusion of fixed-term contracts or extension of working-time and payment calculation periods.

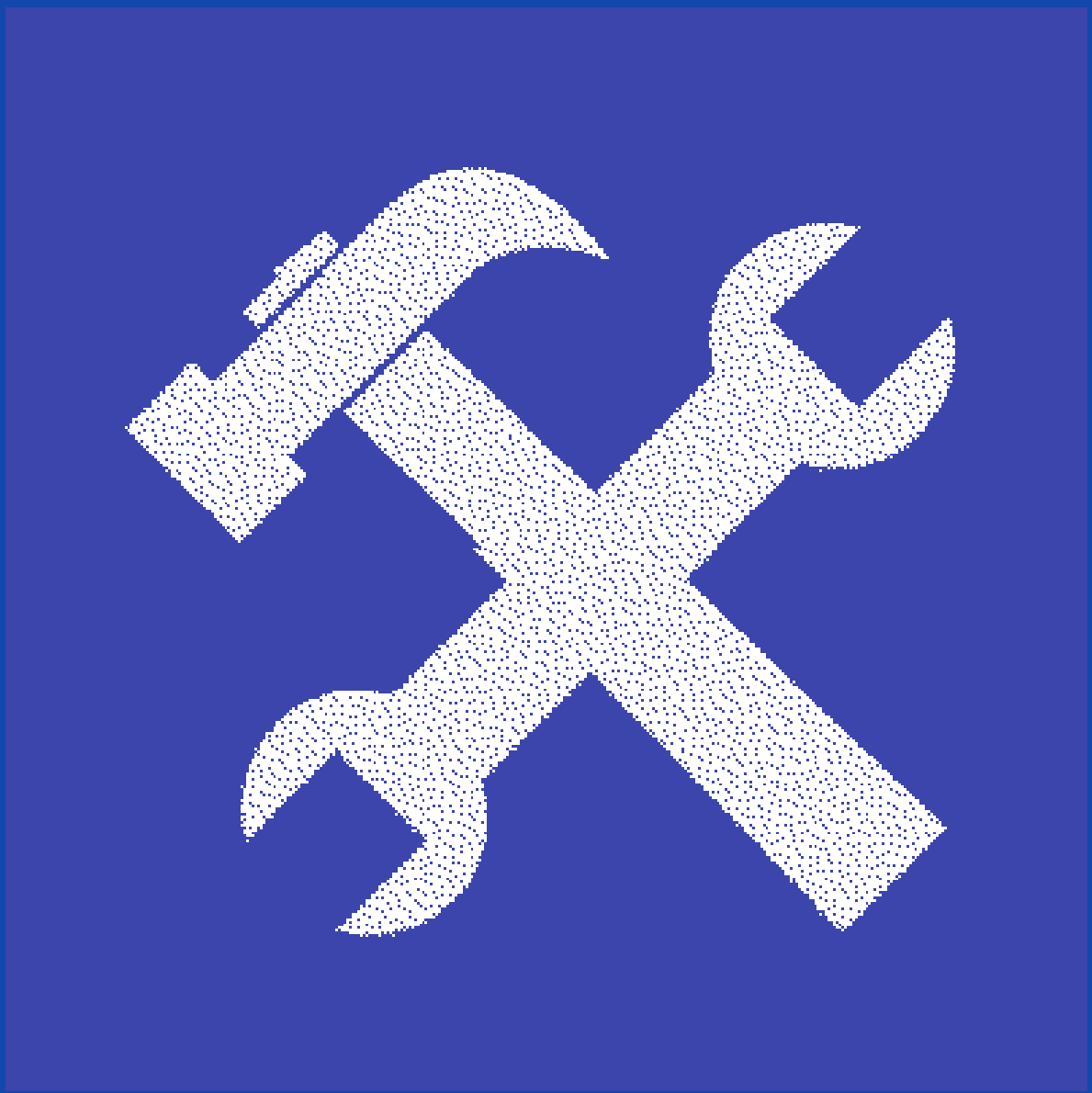
Frequent amendments to the Labour Code and new provisions added to it show that labour law is still subject to profound changes. On one hand, this is justified by changing social expectations of the role of work in everyday life and, on the other hand, by the need to adapt employee regulations to new economic conditions, e.g. resulting from technological changes.

What changes can we expect in labour law in the coming years? Will we be prepared for them?

Flexibility of employment

Employees increasingly expect working conditions allowing them to fully reconcile their private and professional lives. The Parliament has recognised this trend and introduced provisions to make employment more flexible for workers with parental or care responsibilities. Further continuation in this direction can be expected. More forms of employment will be created allowing employees to decide freely on how much they will work. Job sharing is an example—a system already existing in some countries, in which two people work at one position and determine the division of duties between them.

Greater flexibility in employment arrangements will primarily affect working-time regulations. It can be expected that today's rigid working-time



standards will be relaxed and workers will be more able to decide when and to what extent they perform work. Long breaks for personal matters may not become standard in a few years' time, but are certainly becoming an increasingly common solution.

Salary transparency

Employees increasingly expect salary information to be public, and to be able to see if their fellow team members earn as much as they do. They want any pay differences for the same positions to be objectively justified. As a result, it will become increasingly difficult for employers to keep the salary grid confidential. Efforts to keep salaries secret are not helped by challenges to accepted principles of labour law, including some recent Supreme Court rulings on the employer's right to oblige employees to keep their salary confidential. A good example is the judgment of 15 July 2011 (case no. I PK 12/11), in which the Supreme Court ruled that disclosure of salary figures covered by a confidentiality clause to other employees, with the aim of combatting wage discrimination against employees, was not valid grounds for immediate termination of an employment contract. The court also pointed out that employers should not abuse the protection of confidentiality of employees' wages in order to defend themselves against claims of discrimination.

Salary information will increasingly be seen as information employees can freely make us of. Thus we can expect salary figures to become increasingly transparent. It is even possible that, as in Finland and Norway, larger employers will be required to disclose annually full salary information for all employees. Transparency of pay can also become an element of "employer branding," aimed at encouraging potential employees to work with the employer and increasing the loyalty of current employees by formulating clear and objective rules for pay and for salary increases.

New technologies

The technological revolution we are witnessing will have a huge impact on labour relations. Not only will certain professions disappear and new ones be created, but the way many duties are performed will change. A good example of such changes is the recently introduced possibility of maintaining employee records in electronic form. Particular attention should be paid to increasing intrusion in employee privacy by new technologies. Employers can already monitor how employees work, and it can be assumed that in the future it will be possible to supervise employees even more extensively. Labour law will have to ensure a balance between the needs of employers

arising from new technological challenges and the protection of workers' privacy. Provisions introduced to the Labour Code in 2018 head in this direction, precisely defining when employee monitoring is admissible. It can be expected that new forms of control will also meet with similar constraints.

New technologies will also influence employers' decisions on hiring, promotion, and dismissal of employees. There are already computer programs screening applicants to decide whom to invite for a job interview. Wider implementation of such solutions may lead to a situation where an imperfect algorithm decides the fate of hundreds or thousands of persons. It is hard to imagine banning such solutions, as they generate more opportunities than threats. However, labour law regulations will have to introduce mechanisms to minimise these risks, mainly due to mistaken decisions based on new technological solutions. Thus, we may expect the introduction of a right to appeal against a decision taken by artificial intelligence, or exclusion of such solutions in the most sensitive matters (e.g. dismissal on disciplinary grounds).

Active fight against employment discrimination

In an increasingly diverse society, the risk of discrimination against minorities or groups subject to exclusion on the basis of origin is increasing. It seems that discrimination will also occur to an even greater degree in labour relations. As a result, there is already a visible trend to increase protections against unequal treatment of employees. A good example is the introduction in 2019 of a provision setting forth an express but open catalogue of unauthorised grounds for differentiation. However, Polish anti-discrimination laws are still extremely modest compared to those in other countries. For example, the UK Equality Act runs to several hundred articles and dozens of schedules, while the provisions of the Polish Labour Code on non-discrimination are covered in just five articles.

Looking at the actions taken in other countries, it can be expected that regulations will be introduced to counteract discrimination more actively. Giving the courts the right to issue binding recommendations to employers, non-compliance with which would entail financial responsibility for the employer, may be a solution heading in this direction. The following recommendations may be mentioned as examples:

- A recommendation that a person found guilty of sexual harassment be transferred to another position
- An order that a decision finding that an employee has been discriminated against be communicated to all members of the employer's supervisory board and management

it will become increasingly difficult for employers to keep the salary grid confidential

- Imposing an obligation on the employer to appoint an employee responsible for verifying that of anti-discrimination procedures are up-to-date
- An obligation to introduce anti-discrimination training.

It cannot be ruled out that measures will be taken to introduce quota systems. Already widely used in other countries, such systems aim to eliminate discrimination against women. They provide for the introduction of a minimum number of posts for which female employees should be hired. However, it is worth noting that Poland is one of the countries with the lowest gender pay gap in the salaries of men and women employed at the same position. Quota systems may therefore prove unnecessary.

Change in the age structure of the workforce

According to research by Statistics Poland (GUS), at the end of 2017 the Aging Index was 112, i.e. for every 100 "grandchildren" (children aged 0–14) there were 112 "grandparents" (people aged 65 and up). The difference in size of these populations was 700,000 fewer "grandchildren." As GUS forecasts, "In the future, this will cause a decrease in labour supply and difficulties in the social security system as a result of an increase in the number and percentage of elderly people." However, this change will also force changes in how work is performed. More cooperation with people of retirement age will be necessary. The needs of such persons are often greater than those of younger workers. For this reason, it can be expected that stricter (shorter) working-time standards based on employees' age, or an obligation to support them in carrying out their duties, will be introduced. Indeed, the labour shortage may result in such solutions being introduced by employers on their own, without intervention by the Parliament.

Summary

When analysing the amendments introduced in recent years to the provisions of Polish labour law, it is not difficult to notice that they are trying to face the changes taking place in labour relations. Unfortunately, in the vast majority of cases, the new regulations refer only to a fragment of the new reality. There is no attempt to take a broader view of the evolution of labour relations and to design a legal framework for the evolving ways of performing work. This does not help employees or employers. Employers in particular are often confronted with questions about employment rules related to new social conditions, to which the current rules do not provide a clear answer.

Labour law is still reacting more to changing reality than trying to shape it. From this point of view, it is clear that the last 30 years has not prepared us for the changes ahead. However, relations between employees and employers

have remained largely flexible during this period, and that should be assessed as positive. Thanks to this, even without relevant statutory regulations, it is possible to work out in practice solutions which, although imperfect, meet the needs of the changing reality. Certainly this level of flexibility, probably often underestimated, is one of the greatest achievements of employees and employers in the last 30 years.

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Digitalisation in public procurement: From paper to bytes

The development of information technology is gradually changing almost all areas related to doing business. The public procurement system is also evolving. The pace of changes varies between procedures above and below the EU thresholds. Above the thresholds, procurements have already been fully digitalised, but below the thresholds the Polish Parliament has allowed contracting authorities and contractors more time to prepare for modifications. Under the current law, proceedings of relatively small value are to be digitalised at the beginning of 2021.

The process of digitalisation aims at the complete elimination of paper documents in favour of electronic files. This should streamline and increase the transparency of proceedings, as well as increase the number of offers and applications submitted. It is also expected to result in savings of public funds spent on arranging procurement proceedings. Therefore, the purpose of the changes is primarily to facilitate the process of awarding contracts and to improve the efficiency of proceedings.

Digitalisation is a long-term process. The changes are being introduced gradually to accustom public procurement actors to completely new solutions. However, during the adaptation period, problems with interpretation of the regulations are multiplying, which, at least for a while, weakens the enthusiasm for the "simplifications" that were supposed to be achieved through digitalisation.

Gradual changes in contracts above thresholds

The first stage of digitalisation was the introduction of an obligation to submit an Electronic Single Procurement Document (ESPD) for proceedings above EU thresholds. Thanks to the ESPD, contractors do not have to present full documentary evidence at the initial stage of the proceeding. In

addition, the introduction of mandatory electronic form for this document in all procedures greatly simplifies access to procurement, in particular for foreign contractors.

The next step is to implement mandatory use of electronic communication between contracting authorities and potential contractors. Currently, contracting authorities are required, among other things, to publish procurement notices electronically and to make the tender documentation available by electronic means. The most important documents—contractors' bids and applications—are also submitted in electronic form.

The use of electronic communications must not lead to a breach of public procurement rules. Platforms used by contracting authorities must allow for non-discriminatory communication with contractors, to avoid restricting access to the procedure. The tools used by contracting authorities must first and foremost ensure that the content of bids and applications is not disclosed until the time appointed to open the bids, and guarantee that certain information is accessible only to authorised persons.

Other elements of public procurement digitalisation include the dynamic purchasing system, the electronic auction, and the electronic catalogue, which have been operating for some time now.

Difficult beginnings

At first glance, the current legal solutions indeed appear to be easier for both contracting authorities and contractors. Introduced in 2016 (and in 2014 at the European level), the provisions on digitalisation included a long transition period to allow both contracting authorities and contractors to prepare for technical changes. Nevertheless, the actual implementation of digitalisation is currently causing a lot of problems.

Basic tool: qualified signature

One of the new obligations which is supposed to make life easier for all participants in the procurement process is the need for contractors to use a qualified electronic signature.

First of all, contractors' bids and applications must bear such a signature in order to be valid. The secure electronic signature is not a common tool. It is issued, for a fee, by entities entered in the register of the Minister of Digital Affairs kept by the National Certification Centre or included in the trusted list of qualified trust service providers kept at the European level.

The EU's procurement directives emphasise the unification of devices and required formats across the whole market. Nevertheless, problems often occur with the use by foreign contractors of formats, e.g. electronic signatures, not

problems with interpretation of the regulations weakens the enthusiasm for the “simplifications”

accepted by Polish contracting authorities. In the current legal state, this causes foreign contractors to look for alternative solutions. Instead of signing a document with a signature it owns in its own country, it can, for example, grant a power of attorney to sign a bid to a holder of a signature in a format recognised on the Polish market.

e-procurement

Construction of an e-procurement platform, subject to government administration, is planned for the full implementation of digitalisation of public procurement. This tool will be used to receive and secure bids and applications, and conduct electronic auctions and bidding. Standard forms for documents will also be proposed, which will lead to their harmonisation. The platform will enable correspondence between participants in proceedings and will be used, above all, for the submission of bids and applications by contractors.

However, before this happens, the Public Procurement Office has provided free of charge a temporary tool—a miniPortal providing electronic communication. It uses the existing accounts of contracting authorities registered in the Public Procurement Bulletin and is integrated with the ePUAP platform, through which it is possible to submit bids and applications in procurement proceedings.

e-invoices

The next stage of digitalisation is the introduction of a new method for issuing invoices between contractors and public contracting authorities. An e-invoice is not a scan or an invoice sent in .pdf format. It is a separate type of document, known as a structured electronic invoice.

The evolution of the invoicing system from traditional paper to structured electronic invoicing should bring at least some major benefits, namely savings for all market participants, facilitation and acceleration of the transmission of documents between contracting authorities and contractors, and a smaller environmental footprint. Certainly, it will also make it easier for foreign entities to participate in the Polish public procurement market.

E-invoicing will also increase the transparency of information on public spending, as information on performance of public procurement contracts, budget execution, tax liabilities, operations of companies, and activity within the public finance sphere will be gathered in one system.

The use of e-invoices can result in full or at least partial automation of issuing, receiving and settling invoices, which in turn will optimise the costs

of storing, archiving and securing invoices. The proliferation of e-invoicing can also help contractors get paid faster.

Summary

The change of habits and long-term practice, although painful at first, may result in a more effective public procurement system, friendly to all its participants. However, these optimistic assumptions can only be fulfilled with the support of consultative bodies such as the Public Procurement Office, which should assume the burden of resolving on an ongoing basis the doubts arising in practice, as terse legal regulations generate a multiplicity of interpretations and reduce the sense of legal certainty among procurement market participants.

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Julia Dolna

Entrepreneurship across borders

Internationalisation of business has been one of the most important economic phenomena over the last 30 years. Different legal solutions foster conducting business across national borders. Currently in Poland, foreign businesses have a wide range of choices, so they can select the operating form that best suits their needs.

The Act on the Rules for Participation of Foreign Businesses and Other Foreign Persons in Commerce in the Territory of the Republic of Poland of 6 March 2018 entered into force on 30 April 2018. It is one of the legal acts making up the Business Constitution. In this act, the Parliament consolidated provisions previously found in various legal acts and made several changes concerning the participation of foreign entities in the Polish economy.

The act sets out the principles for taking up and performing economic activity by foreign entities in Poland, provision of services, and establishment of branches and representative offices.

The act systematises the rules for participation of foreign entities in the Polish economy. It also clarifies the scope of exercise of the freedom of establishment and freedom to provide services in Poland by foreign entities from member states of the European Union or from member states of the European Free Trade Association which are parties to the European Economic Area Agreement.

Cross-border economic activity

One of the freedoms of the EU's internal market is the freedom of establishment. It is directly expressed in the Treaty on the Functioning of the European Union, and its essence boils down to the right of citizens of various member states to take up and pursue business activity on their own account, or establish and manage companies, in other member states under the same conditions as citizens of those states.

The act of 6 March 2018 indicates that other entities listed in the act may operate in Poland in the same manner. However, foreign entities that are not citizens of member states, and entities not listed in the act, may conduct business activity in Poland only in specific legal forms, unless otherwise provided by international agreement. These forms are the limited partnership, the joint-stock limited partnership, the limited-liability company and the joint-stock company (and from 1 March 2020 also the simple stock company). These entities may also join such companies and partnerships, and acquire shares in them.

Cross-border service activities

The basic principles governing the provision of services by citizens of member states in the territory of another member state are regulated by the Treaty on the Functioning of the European Union. The act also regulates this issue in the context of the provision of services in Poland. It should be noted that activities related to the provision of services are of a more temporary nature than conducting business under the freedom of establishment, and therefore they are subject to separate regulations.

According to these provisions, citizens of other member states may provide services in Poland without the need to register their activity in the National Court Register or the Central Register and Information on Economic Activity. However, other persons may provide services in Poland under the rules set out in agreements between states or on the basis of reciprocity.

If in the case of given services in Poland, it is required for example to hold a licence or permit or to obtain an entry in a register of regulated activity, these obligations will also apply to foreign businesses. The freedom to provide services and the freedom of establishment are not absolute, but are subject to certain restrictions motivated by concerns such as public policy, public security, and public health.

Branches and representative offices

Foreign entities may also establish a branch or representative office in Poland. Within a representative office, foreign companies may conduct only advertising and promotion, whereas within a branch office they may undertake and perform activities within the scope of their existing operations abroad.

The act of 6 May 2018 regulates the obligations that foreign businesses must fulfil in order to establish a branch in Poland. These include, among other things, the requirement to be entered in the commercial register of the National Court Register and the obligation to appoint a person authorised to represent the foreign business within the branch. On the other hand,

establishment of a representative office involves obtaining an entry in the Register of Representative Offices, maintained by the minister for economy.

Other forms of involvement of foreign entities

Apart from the aforementioned possibilities for doing business in Poland, foreign entities may also take advantage of other forms.

For example, it is possible to consolidate business in several member states through cross-border mergers. In the case of Polish companies, only a joint-stock limited partnership, a limited-liability company or a joint-stock company (or from 1 March 2020 also a simple stock company) may participate in a cross-border merger with a foreign company formed under the law of another member state and meeting the criteria set out in EU legislation. This procedure requires execution of a range of legal formalities.

Another solution for entities wishing to conduct business across borders of member states is a European company (Societas Europaea or SE). The SE is a European public limited-liability company which may be formed by existing public or private limited-liability companies, at least two of which come from different member states. The minimum capital for an SE is EUR 120,000, and the registered office of the SE must be where the office of the management board is located.

Summary

The above examples show that Polish law provides for various possibilities for foreign entities to participate in our economy. Poland's accession to the European Union and integration into the EU internal market, which enabled the citizens of other member states to benefit from the freedoms of this market on the basis of reciprocity also in Poland, has been hugely important for the internationalisation of business from the perspective of the past 30 years. Currently, foreign business can, among other things, undertake and perform economic activity, provide services, establish branches or representative offices, and participate in cross-border mergers and establishment of European companies in our country.

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Przemysław Szymczyk
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Acquisition of real estate by foreigners

In recent years, the Polish market has seen a steady increase in the number of real estate transactions. The value of sale contracts is also growing steadily. Foreign investors, especially from elsewhere in the European Union, are increasingly playing a part here. The national regulations governing trade in real estate involving foreigners have gradually been relaxed, starting from the changeover in systems from 1989 (with some exceptions concerning agricultural land). These changes are largely driven by globalisation and the free movement of capital on international markets.

Real estate market indicators in Poland

According to Statistics Poland (GUS), in 2018 real estate sales increased by 7.6% from the previous year (more than half a million notarial deeds were signed documenting the sale of real estate). The total value of real estate transactions in 2018 was over PLN 120 billion, an increase of 18.5% from 2017. The analogous figures for 2019 are likely to be even higher, given the considerable volume of transactions concluded and the significant, steady increase in property prices across the country.

These statistical data include turnover involving foreigners, which is also showing high dynamics and continuous growth trends. Over the last five years alone, the number of properties purchased by foreigners has increased by almost 60%. Buyers are both individuals and businesses, for whom real estate in Poland constitutes a safe form of capital investment and a source of income.

Acquisition of real estate by foreigners, as in other countries, is characterised by elements of a regulated market. This is due to the specific nature of the regulation itself (an obligation to obtain a permit under pain of nullity of the transaction), and is also indicated by the obligation of the Minister of Interior and Administration to draw up annual reports on implementation

of tasks imposed on the minister with regard to issuing permits and promises to issue permits. In 2018 alone, the minister issued a total of 335 such permits.

This issue is regulated by the Act on Acquisition of Real Estate by Foreigners of 24 March 1920. From the beginning, it has been amended many times (20 times since 1989, most recently in 2017), mainly due to the need to adapt regulations to current political and economic changes and to implement EU directives. For assessment of the legal risk in real estate transactions, it is essential to keep abreast of changes in the act and the evolving practice in this area.

Historical conditions

The first significant amendment to the act took place at the beginning of 1989, just before the political and socio-economic transformation in Poland as the country moved away from communism. That amendment was required because the original definition of the subject matter and persons covered by the act was imprecise and raised many doubts in interpretation. In particular, the act did not define the term "foreigner," which undoubtedly posed a barrier for foreign investments, which were expected then to play a crucial role in development of an economy suffering from a shortage of capital. Initially, the act indicated simply that the acquisition of real estate by foreigners—both natural and legal persons—may take place after obtaining a permit from the minister for internal affairs, issued in agreement with the minister for military affairs. In turn, with regard to real estate of special industrial, commercial, agricultural or other significance, the decision of the minister for internal affairs was to be taken in agreement with another competent minister.

This legal state was changed by the Act on Business Activity Involving Foreign Entities of 23 December 1988, which entered into force on 1 January 1989. The preamble to that act stated that its aim was "to create stable conditions for further development of mutually beneficial capital cooperation between domestic and foreign entities and to guarantee foreign entities protection of their property, income and other rights," and the regulations governing acquisition of real estate by foreigners were partially clarified through individual provisions. The amendment was important, as it explained who could be considered a foreigner (e.g. from then a person holding both foreign and Polish citizenship would not be regarded as a foreigner), and also clarified the status of foreign companies, which in turn allowed foreign businesses to plan their investments when seeking to start operations in Poland (including in regulated and industrial sectors).

Another shortcoming of the Act on Acquisition of Real Estate by Foreigners in its original wording was that it did not provide for issuance of justifications for decisions on permits, and these decisions were not subject to any appeal (under a specific legislative exception in the administrative procedure). Therefore, a foreign business could not find out why it was denied a permit, and could not obtain review of the denial. This presented a serious barrier to trading in real estate by foreign entities.

These rules hostile to investors were changed in the course of further amendments after the beginning of the transformation in Poland. At that time, the procedural restrictions described above were lifted, and the minister for internal affairs was required to report annually and publicly on performance of designated tasks concerning trade in real estate involving foreigners. In addition, the minister was required to maintain a register of properties traded without the need to obtain a permit (under circumstances specified in Art. 8(1), (2) and (2a) of the act).

Current rules for acquiring real property by foreigners

Under the current act, acquisition of real estate is defined as acquisition of the right of ownership or perpetual usufruct on the basis of any legal event, and, as a rule, acquisition of real estate by a foreigner requires a permit. In addition, acquisition or taking up by a foreigner of shares in a company with its registered office in Poland, as well as any other transaction in shares, requires a permit if as a result of the transaction a company that is the owner or perpetual usufructuary of real estate in Poland becomes a "controlled company." (This also applies to situations where a company is already a "controlled company" and shares are acquired or taken up by a foreigner who is not an existing shareholder of the company.)

The permit is issued by way of an administrative decision by the minister for internal affairs, if no objection is raised by the minister for defence, and in the case of agricultural real estate, if no objection is raised by the minister for rural development.

A foreigner is defined as a natural person not holding Polish citizenship, a legal person with its registered office abroad, a business entity without legal personality with its registered office abroad (established in accordance with foreign law), as well as a legal person or entity without legal personality with its registered office in Poland but controlled directly or indirectly by such persons or entities.

In turn, a "controlled company" is a company in which a foreigner or foreigners hold, directly or indirectly, more than 50% of the votes at the shareholders' meeting or general meeting, including as pledgees or usufructuaries or

under agreements with other persons, or hold a dominant position within the meaning of the Commercial Companies Code (i.e. Art. 4 §1(4)(b), (c) or (e) of the code). This refers to foreigners who, in a controlled company, are entitled to appoint or dismiss the majority of members of the management board of a company (controlled company) or a cooperative (controlled cooperative), or are entitled to appoint or dismiss the majority of members of the supervisory board of a company (controlled company) or a cooperative (controlled cooperative), or hold directly or indirectly the majority of votes in a controlled partnership or at the general meeting of a controlled cooperative. It is irrelevant whether the dominant position results from agreements concluded with other persons.

A permit is issued upon application by the foreigner. (The application must identify the applicant and its legal status, the real estate to be acquired, the seller, the legal form of the acquisition, and the purpose and possibility of the acquisition.) The application will be granted if the acquisition of the real estate will not cause a threat to defence, state security or public order and is not opposed by considerations of social policy and public health. Moreover, the applicant must demonstrate a connection with Poland. In the case of foreign legal persons, circumstances demonstrating such a connection may include, for example, membership in the governing body of a controlled company or performing of commercial or agricultural activity in Poland in accordance with Polish regulations (in this respect, the regulations set forth in the Business Law of 6 March 2018 are relevant).

The minister for internal affairs must consider the foreigner's application without undue delay. However, if the application concerns real estate within a special economic zone, the decision should be issued within one month from the date of application. If the examination is positive, the authority will issue a permit, specifying the buyer and seller, the subject of the acquisition, and any special conditions related to trade in real estate. The permit is valid for two years from the date of issue.

A very popular solution used by foreigners intending to acquire real estate in Poland is a "promise" in which the authority undertakes to issue a permit to purchase a given property. The promise is valid for one year, and during that period a permit cannot be denied unless there is a change in the relevant facts.

Acquisition of real estate by a foreigner in violation of the act is invalid. Such invalidity will be declared by the court at the request of officials of the local commune (e.g. *wójt* or mayor), county (*starosta*), or province (marshal or governor) for the location of the property, or at the request of the minister for internal affairs.

The Act on Acquisition of Real Estate by Foreigners provides for certain exemptions (subjective and objective) from the obligation to obtain a permit.

acquisition of real estate by a foreigner in violation of the act is invalid

A particularly important exemption concerns foreigners who are nationals or undertakings of countries from the European Economic Area or Switzerland. Under this exemption, the decisive aspect for undertakings is their registered office, the location of which should be determined in light of the Treaty on the Functioning of the European Union and the Treaty on European Union. This means that geographical location of the registered office within EU territory will not always automatically result in this exemption. For example, the British Virgin Islands is a dependent territory of the United Kingdom but not part of the UK, and therefore does not belong to the EU or the EEA. This means that undertakings established in BVI do not benefit from this exemption. By contrast, Gibraltar, also a dependent territory of the UK, is part of the EU and is covered by the above exemption.

The basic premise in this respect is not the source of capital, but the mere fact that an undertaking is located in a member state of the EEA or Switzerland.

Agricultural property

Regardless of the issues analysed above, it should be borne in mind that acquisition of agricultural property by foreigners is additionally subject to the Agricultural System Act of 11 April 2003.

According to Art. 2(1) of the Agricultural System Act, "agricultural property" means agricultural property within the meaning of the Civil Code, with the exception of real estate located in areas zoned for non-agricultural purposes. Therefore, agricultural property includes property that is or could be used for agricultural production of plants and animals, also including horticultural, fruit and fish production. (The act provides for certain exemptions, where it will not apply to agricultural property (or shares in co-ownership of such property). This concerns, among other things, agricultural property included in the Agricultural Property Stock of the State Treasury, or with a surface area of less than 0.3 ha, or constituting internal roads.)

The use of the phrase "could be used" implies that the definition is extremely broad. Therefore, the agricultural character of the land will be determined by its potential agricultural use and not its current use. In transaction practice, there are situations where the parties incorrectly determine the nature of a given property (e.g. due to its location, previous use, or classification in the plot register), when the property is deemed to be agricultural under the Agricultural System Act due to its agricultural potential, and therefore acquisition of the land is subject to additional restrictions.

As a rule, a buyer of agricultural property can only be an individual farmer, although the Agricultural System Act provides for certain exceptions, both subjective and objective (such as family members of the seller, the State

Treasury, and local government units). An additional obstacle for potential buyers, including foreign businesses not involved in agricultural activity, is that approval of the National Support Centre for Agriculture (KOWR) for the purchase of agricultural property by an entity that is not an individual farmer is connected with an obligation for the buyer to run an agricultural holding including the acquired agricultural property for five years. (It must also be demonstrated that there is no possibility to sell the agricultural property to an individual farmer and that the acquisition of the property by the buyer will not lead to excessive concentration of agricultural land.) Additionally, during this five-year period, ownership or possession of the acquired property shall not be transferred to other entities. This regulation also applies to shares in a property, as well as sale of the right of perpetual usufruct of agricultural property.

Business planning is also hindered by the fact that KOWR has been granted a right of pre-emption as to sold agricultural property, as well as shares in a commercial entity that is the owner or perpetual usufructuary of agricultural property.

Most of these restrictions were introduced as of 30 April 2016. As they have resulted in a significant reduction of turnover on the agricultural property market, the Parliament decided to relax the existing provisions. This has been done by partially limiting KOWR's involvement in real estate transactions (including extension of the fixed list of exemptions from the act) and by simplifying and clarifying the procedure before KOWR.

Thanks to these changes, it is no longer required to obtain KOWR consent, among other things, for the acquisition of agricultural property in the course of bankruptcy or enforcement proceedings, or as a result of division, conversion or merger of commercial entities. At the same time, it was decided to retain KOWR's pre-emptive right to purchase shares in a company owning agricultural property. But this can happen only if the company is the owner or perpetual usufructuary of an agricultural property of at least 5 ha or multiple agricultural properties with a combined area of at least 5 ha. Shares admitted to organised trading under the Act on Trading in Financial Instruments of 29 July 2005 are also excluded from this pre-emption.

From the point of view of planning new business ventures, the introduction of Art. 2a(3)(1a) of the Agricultural System Act, exempting properties of less than 1 ha from the rule that agricultural property can only be sold to individual farmers, is also very important.

Summary

Real estate transactions involving foreign entities have always been highly regulated, and this is true not only in Poland.

This is an area where the state must balance conflicting interests. On one hand, foreign investments can provide a significant stimulus for development of the country and have a positive impact on the economy. On the other hand, the real estate market is obviously based on limited resources, and this requires some kind of restrictive measures, particularly in the case of agricultural land.

Polish legislative experience over the last 30 years proves that overly restrictive interference in real estate transactions involving foreigners may have negative consequences for the economy, and these in turn force the Parliament to relax such restrictions. Subsequent amendments to the Act on Acquisition of Real Estate by Foreigners and the Agricultural System Act should reflect not only the current economic conditions, but also increasing globalisation, including the general flow of capital.

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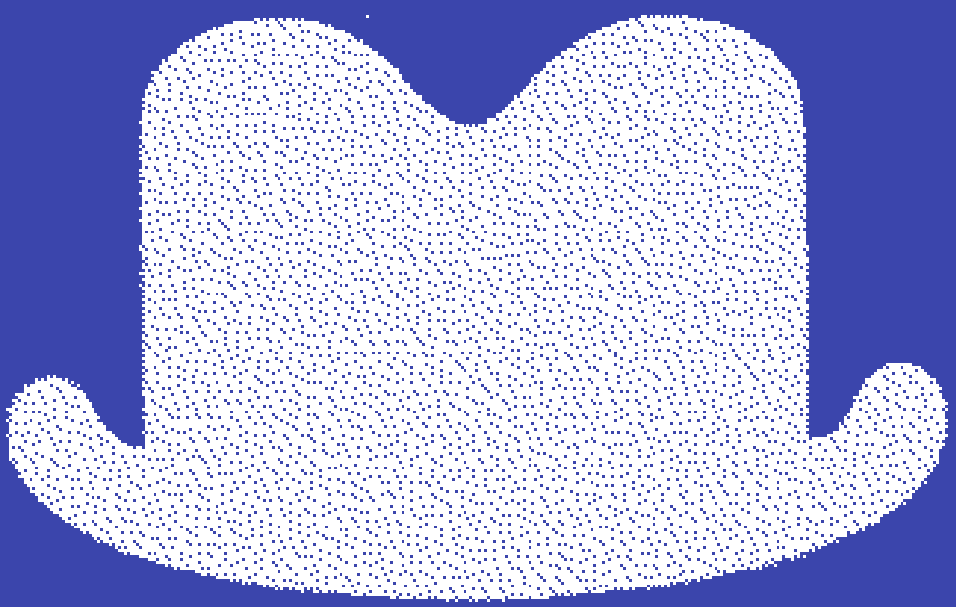


Krzysztof Libiszewski

Will the simple stock company become the most popular corporate form in Poland?

In the current legal system, the regulations on types of companies, their bodies and manner of functioning, liability for the company's obligations, and protection of creditors, derive in basically unaltered form from the Commercial Code of 1934. The 1990s saw the introduction of modern regulation of the capital market in Poland. The following decades led to adoption of the Commercial Companies Code, gradual harmonisation of corporate law with EU law, and introduction of regulations allowing the use of digital technology in the establishment of limited-liability companies and certain aspects of their functioning.

In the course of these changes, regulations have been broadened and new forms of partnerships have been added to the Polish legal system. However, at no stage has there been any significant revision of the basic principles of operation of companies, including the creation of any new type of company beyond the limited-liability company and joint-stock company.

2020 will significantly change this situation.

On 19 July 2019, the Polish Parliament adopted an act introducing the simple stock company (*prosta spółka akcyjna*—PSA), amending the Commercial Companies Code in this respect. It will take effect on 1 March 2020.

According to data from Statistics Poland, at the end of 2018 there were nearly 489,000 commercial companies and partnerships of all types in Poland, including over 402,000 limited-liability companies and 10,000 joint-stock companies. At this stage, the Parliament has deliberately decided not to interfere in the rules of operation of existing types of companies, as the introduction of new, significantly modernised provisions would risk destabilising entities operating according to standards set over the decades the existing rules have been in force.

The simple stock company was created as a vehicle for investing in innovative activity and new technologies, providing the flexibility necessary to use electronic communications and other ICT tools at every stage of the company's operation. However, it may easily turn out that in the near future, a significant proportion of all new companies may be set up as simple stock companies, and many existing companies will be converted into simple stock companies.

So what are the advantages of a PSA?

PSA assets, shareholders' rights and creditor protection

A simple stock company will have share capital from shareholders' contributions in an amount as little as PLN 1. Contrary to the previous rules, the subject of in-kind contribution to a PSA could be a non-transferable right with property value or performance of work.

These rules will allow the status of shareholder to be granted to persons bringing exclusively knowledge and skills to the company, or property rights that cannot be sold. No such leeway has been provided for either of the existing forms of companies, as the Parliament has relied on the paradigm of creating the power of companies solely on the basis of the salable value of the assets contributed to the company by its shareholders. But changes taking place in the economy demonstrate that the knowledge and abilities of the company's founders and managers may be commercialised and contribute to the company's substance just as well as transferable property rights or cash in the current model for functioning of companies. Meanwhile, the protection granted to shareholders of companies against liability for the company's obligations is unavailable to partners of partnerships without creating complex structures involving the creation of a group of companies consisting of both a partnership and at least one company.

In relation to the change in the approach to contributions to the company, a simple stock company can have share capital formed solely from in-kind contributions, i.e. with salable value for the company. As the company will be able to accept other contributions too, and issue shares for them, all shares in a PSA will be of the same nature and will not have a nominal value. As a result, contributions incapable of being made in kind will not be recognised as forming the substance of the share capital, and the amount of share capital will not be correlated with the total number of shares as in the other types of companies.

No less important, the amount of share capital will not be specified in the articles of association, and in certain cases it will not be necessary to follow the provisions on amendment of the articles of association when changing the amount of share capital. It will be possible to make contributions to the share

capital within three years from formation of the company. Only non-cash contributions to share capital will be subject to the regime obliging shareholders to supplement their contributions if the fair value proves to be lower than the value at which the contributions were made. It will be permissible to distribute amounts accumulated in the company's share capital to shareholders as dividends after registration of a change in the share capital.

The procedure for notifying creditors of a share capital reduction will be applied only if payments from the share capital would reduce the share capital below 5% of the company's total liabilities as set out in the approved financial report for the last financial year. The interests of the company's creditors will be protected by the company being prohibited from making any distributions to shareholders which could lead to the company losing its ability, under normal circumstances, to meet its due and payable cash obligations within six months of the date of the payment. Similarly, there will be an obligation to inject share capital to cover future losses of the company, by at least 8% of the annual profit until the share capital reaches at least 5% of the company's total liabilities under the most recent annual financial statement. These rules will create a new regime for protection of the rights of creditors of a simple stock company, including the regime for protection of the company's equity. As is currently the case with limited-liability companies, the management board members or directors of a PSA will be liable for the company's obligations only if they do not file a timely bankruptcy petition for the company.

The right to dividends and any preference for shares can be shaped without restrictions as to the rules of profit distribution and the scope of preference imposed by law, unlike the rules applicable to other companies. The same applies to the possibility of freely shaping the shareholders' individual rights. In addition, unlike in the rules governing limited-liability companies, it will be possible to waive voting rights in respect of preferred dividend shares in a PSA.

The far-reaching freedom to shape the legal relations within a simple stock company, as well as the freedom to structure the company's bodies (see below), can be used to flexibly adjust the company's corporate governance to its current situation, regardless of the company's business. This flexibility will be an important advantage of the PSA as a vehicle for all investments of a structured nature.

Issuance of shares and trading in PSA shares

One of the basic advantages of a simple stock company is the ease of issuing new shares and disposing of shares.

PSA shares will not have any material form. They can be sold and encumbered in document form, although such transactions must be registered in

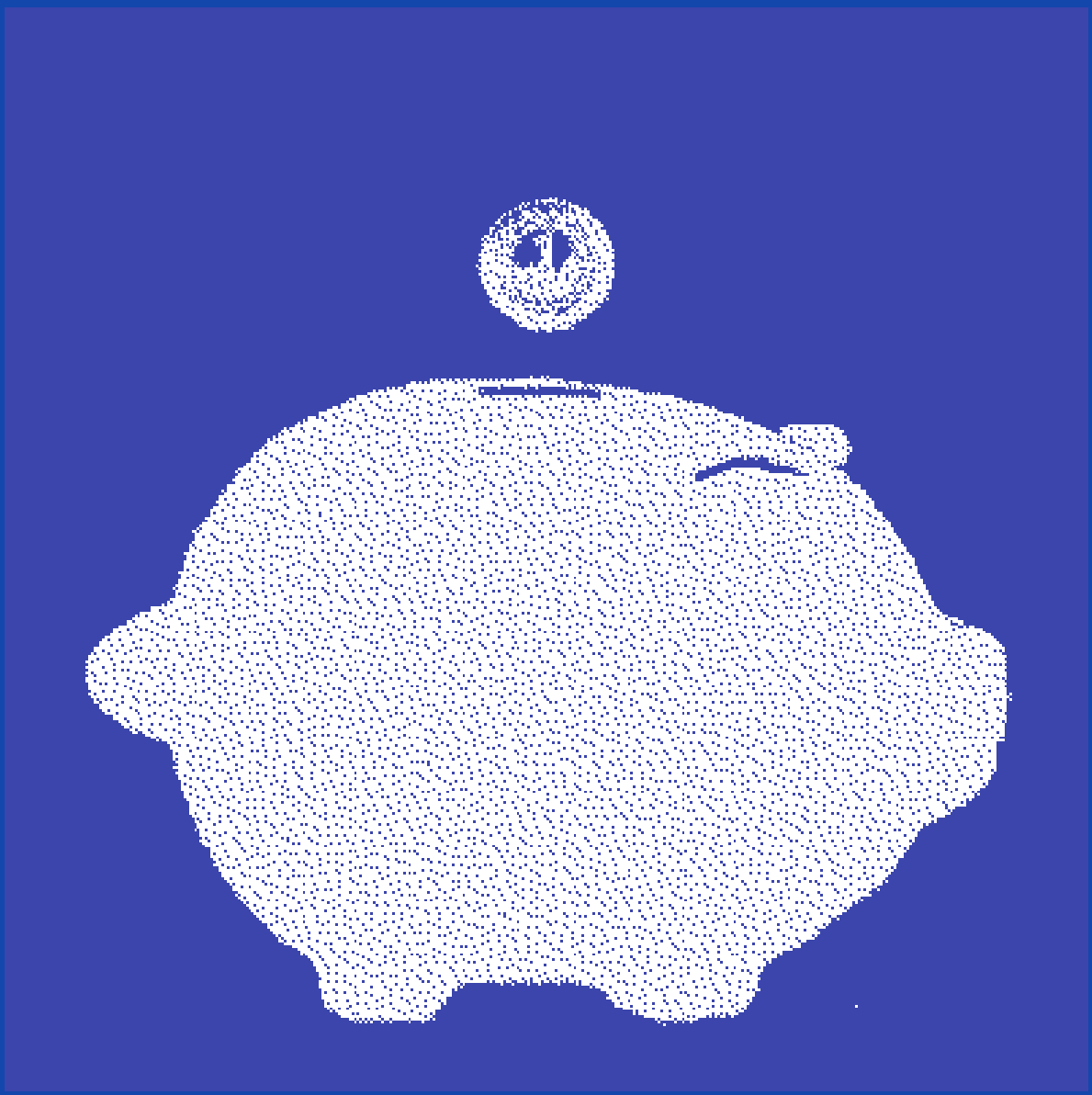
order to be valid. The document form for legal transactions was introduced into the Polish legal system in 2016 and is well-suited to making declarations of intent using any information carriers and means of communication other than a written document. All this makes the document form well suited for making declarations of intent using digital data recording. Consequently, PSA shares can be sold and encumbered by declarations of intent recorded and transmitted remotely using electronic means of communication, without the need to issue a share document, and even without (as required in the case of limited-liability companies) notarisation of the parties' signatures. The disposal of shares in a PSA will be effective from the time the relevant entries are made in the share register.

It will be possible for one person to set up a simple stock company by concluding the company's articles of association in the form of a notarial deed or using model articles available in the S24 ICT system, after the articles of association have been signed with qualified electronic signatures or trusted signatures. Only if a PSA is formed on the basis of in-kind contributions will the articles of association have to be made in the form of a notarial deed, although the value of in-kind contributions themselves will not be verified by an auditor.

It will be possible to increase the share capital of a simple stock company under the existing provisions of the articles of association, without having to amend the articles of association and without any legal restrictions as to the maximum amount or timing of such an increase in the share capital. Since document form is reserved for the submission of declarations of intent of the company and the shareholder concerning the subscription of shares, the issue of new shares also will be possible using only electronic means of communication.

For the security of commerce, issuance and trading in PSA shares will be subject to entry in the share register, which the company will be obliged to entrust either to a notary public or to an entity authorised to maintain securities accounts. It will be possible to keep the register of shareholders in electronic form, including in a dispersed and decentralised database. The obligation to entrust the register of shareholders to a third party is certainly a far-reaching practical constraint on PSA operation. However, it is likely that most banks will offer this service along with maintaining the company's bank account. In that case, the restriction will not be onerous.

In line with these legal principles, PSA shares will be dematerialised under simplified rules, in significant aspects analogous to dematerialisation of shares in public companies, but without the participation of the National Depository for Securities. Share trading and registration of shareholder rights will be



possible via internet or using blockchain technology. However, PSA shares will not be admitted to organised trading. Nothing will prevent a company from permitting its newly issued to be taken up via internet, provided that the offering of the company's shares does not constitute a public offering. Offers by shareholders to sell their shares may also be made in a similar manner. Basically, the same will apply to cases where capital market rules allow an offering to be made without the need for preparation of a prospectus or an information memorandum.

PSA bodies, conversion of other companies into a PSA, and liquidation of the company

Appointment of a supervisory board in a PSA will be optional, and a single--member management board will be permissible. The articles of association may also provide for a board of executive and non-executive directors, in place of the management board and supervisory board. Thus, PSA authorities may be structured in accordance with the monistic model of corporate governance widespread in Anglo-Saxon legal systems, as well as in China, France, India and Russia. Regardless of the structure of the bodies, the shareholders of a simple stock company will be able to exercise a right of personal control on the basis of principles currently used in limited-liability companies. Meetings of all PSA bodies may be held using electronic communications.

A simple stock company can be established not only by formation of a new company in accordance with Commercial Companies Code, but also by transforming an existing company into a PSA under the previously known conversion procedure.

Liquidation of a PSA can take place in a simplified form, without reducing the company's assets to cash and paying off its liabilities, if at least one shareholder, with the consent of the registry court, takes over the company's assets and assumes its liabilities.

Predictions about the popularity of the PSA

The simple stock company is at least as well adapted as the limited-liability company to all types of business operations, if not better. The PSA has the advantages inherent to other companies, but with reduced formality of the rules for functioning of company bodies. The rules for PSA operation are sufficiently flexible and well adapted to the dynamics and rules of communication in the digital economy. The regulations concerning the disposal of a PSA's assets offer a successful compromise between the rights of creditors, the interests of shareholders, and efficient management of the company's assets and finances.

The protection of equity in limited-liability companies has long been in need of thorough reform, and the new rules for PSAs seem to provide more effective tools to protect against possible abuses by the company's managers or majority shareholders. At the same time, the PSA provisions clarify rules that have given rise to problems of interpretation in the practice of functioning of companies.

It seems that the only factors that may limit the popularity of the simple stock company in commerce at the initial stage of operation of the amended provisions of the Commercial Companies Code will be the force of habit in following the existing forms of companies, and the need to hire a qualified third party to maintain the PSA's register of shareholders. Naturally, along with the development of new habits and the market's adjustment to the existence of a new type of company, both of these restrictions will fade over time, giving rise to broad use of this form of company. It seems likely that the advantages of the simple stock company will prove beneficial for any type of activity requiring the formation of a company, except for companies introducing their shares into public trading and other companies which, due to industry regulations or the scale of their activity and shareholding structure, must operate under restrictions appropriate for public companies.

As a postscript, it should be pointed out that in recent days, the Sejm's Justice Committee supported proposed MP amendments to a government bill to amend the Civil Procedure Code. One of the consequences of the amendments may be to postpone the effective date of the PSA provisions until 1 March 2021, so that they enter into force at the same time as provisions on electronic registry proceedings. This change drew an unfavourable response from the Ministry of Development, which had authored the PSA provisions. It thus remains to be seen whether this new form of company will be available from March of this year.

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Entering into agreements: Who can act for a company?

Whatever type of agreement you are dealing with, if the other party is a company it is important to make sure that the person "representing" the company (the use of quotation marks is entirely intentional here) indeed has the right to enter into commitments on behalf of the company. This applies both where the agreement is in the form of a written (or otherwise established) contract and where it is concluded in another legally permissible way (e.g. through offer and acceptance).

Management board

Companies in Poland, i.e. limited-liability companies and joint-stock companies, are legal persons, and thus, under Art. 38 of the Civil Code, they act through their bodies. The body vested by the Commercial Companies Code with the right to represent a company is the management board.

But it is not only members of the management board who can perform legal acts on behalf of a company. If that were the case, their duties would include not only activities relevant to achievement of the company's objectives (e.g. conclusion of key agreements), but also completely trivial and technical matters (such as stocking beverages for employees). That would be not only inefficient, but even irrational.

Fortunately, subject to restrictions provided for in the aforementioned codes and organisational policies of the given company (e.g. the articles of association), the management board can appoint representatives: proxies and attorneys-in-fact.

Information in the National Court Register is not everything

The most important thing for the company's counterparty is to be certain that the person acting for the company is entitled to do so. It is not uncommon for problems to occur in this respect.

The basic measure providing a certain degree of certainty is the commercial register, part of the National Court Register (KRS). The presumption provided for in the KRS Act of common knowledge of KRS entries announced in *Monitor Sądowy i Gospodarczy*, as well as the correctness of those entries, undoubtedly serves to ensure security. However, in trade it is difficult to rely blindly on the entries in the register and treat these presumptions as absolute.

New member of the management board

First of all, it should be noted that apart from constitutive entries, i.e. where entry is essential for a legal act to take effect (such as amendment of the articles of association or increase of the share capital), a significant portion of KRS entries are only declaratory. As the name suggests, these are entries declaring or disclosing a particular legal status, but not creating it (as is the case with constitutive entries). Any failure or delay in making such entries does not impact the effectiveness, not to mention the validity, of the act.

This category includes all entries relating to the personal composition of the company's bodies (including the management board) and its proxies. This means that, on one hand, the persons indicated in the register as board members are not necessarily members of the board at a given moment, and on the other hand, it cannot be excluded that the status of board members is also held by other persons not (yet) disclosed in the register. However, until the actual state of affairs is reflected in the commercial register, we cannot exclude far-reaching difficulties for the company related to the operations of persons who have not (yet) been disclosed, or related to possible (abusive or unlawful) actions of persons who are listed in the register but in reality have lost their previous status.

Such a situation occurs in the case of any change in membership of the management board. There will always be a time lag between their appointment or dismissal and the time this is disclosed in the register. Therefore, it may happen that the company's counterparty receiving a statement made for or on behalf of the company from such a new person has doubts as to its effectiveness (when referring to the current transcript from KRS).

Although in such a case a member of the management board cannot be denied the right to make a given declaration (for the sake of simplicity let us assume that, in principle, it could have been made in the given case), nevertheless, the position of the counterparty also deserves to be taken into account.

After all, the other party has every right to claim, based on the presumption of accuracy of KRS entries, that there are not sufficient grounds to regard the person they are dealing with as indeed a member of the board. On the other hand, the company itself, on behalf of which such an undisclosed member of the management board acts, cannot claim with a bona fide contractor that the data in the register are no longer up to date. In such a situation, the admission of a new member to act will usually depend on the good will of the other party.

Active and passive representation

Secondly, a cursory glance at the KRS entries may give a misleading impression with regard to representation rules applicable to the company.

Section 2 of the commercial register for a company indicates the body authorised to represent the company. Unless otherwise provided in the articles of association, it is very often stated that in the case of a multi-member board, the company is represented in particular by two board members acting jointly. So if a counterparty makes a statement (e.g. on withdrawal from an agreement) to only one member of the management board, will the statement be ineffective?

In such a case, the statement (again, let us assume that it has appropriate material and factual grounds) will have the expected legal effects, because regardless of the regulations concerning active representation (the rules regulating how statements are made for the company), there is a rule granting each member of the management board the individual right of passive representation (i.e. accepting third-party statements on behalf of the company). However, there is no information on this subject in the register.

It should be recalled here that not every action on behalf of a company (performing legal or factual acts) constitutes representation of the company within the meaning of the Commercial Companies Code.

Proxy not indicated in KRS

So, will the company's counterparty find from the KRS transcript who can act on behalf of the company, apart the management board? Partly yes, because a commercial proxy (*prokurent*) must be disclosed in the register. However, other representatives are not subject to such disclosure (e.g. employees authorised to perform certain activities and conclude certain agreements, or legal representatives for the purpose of litigation). But even in the case of entries concerning commercial proxies, some doubts may arise.

Independently of the other forms of proxy, a business entity may issue a joint commercial proxy (*prokura łączna*), authorising two or more persons to act together. It would be appropriate in such a case to clearly indicate in the commercial register that such a proxy may act together with one or more

similar proxies. However, the actual practice is quite different, and it is not uncommon for an entry relating to such a representative of the company to be limited to indicating that he has been granted a "joint proxy."

Thus, if there are three or more proxies indicated in the register as holding a "joint proxy," it is impossible to determine, without analysing the documents under which such commercial representation was granted, whether two, three or more proxies are sufficient to act.

Ordinary attorneys-in-fact

Finally, it is also worth noting the "ordinary" attorney-in-fact (*pełnomocnik*), not subject to entry in the KRS. This category includes both persons from "outside" the company, performing certain acts on its behalf, as well as persons who are "part" of the company, such as employees (purchasing raw materials for the company's production, for example). The scope of their authorisation may be verified by the other party to the given act only on the basis of the power of attorney itself. Without going into detail on how the company's counterparty could verify whether the power of attorney presented remains valid, it is worth noting whether the power of attorney was validly granted.

If the person (e.g. management board member) who granted the power of attorney on behalf of the company was subsequently deleted from the register, the power of attorney itself can be questioned. Is that correct?

This practice is also incorrect. Since the power of attorney was granted not to represent a specific person who is a member of the management board, but was granted on behalf of the company, then, in the absence of any reservations to the contrary in the wording of the power of attorney itself, the power of attorney remains in force regardless of the subsequent fate of the signatory. Another matter is to how an attorney-in-fact can demonstrate the validity of his legal status. A current transcript from the National Court Register (including an electronic equivalent available free of charge online) will unfortunately not be helpful here. It will be necessary to use the full transcript, containing historical data, including data concerning the period in which the person who signed the power of attorney was disclosed in the register. (Such full transcripts are also available online free of charge.)

General lack of knowledge

To sum up the above considerations, it should be noted that the most common cause of confusion is not the imperfection of entries in the commercial register (caused by companies or courts, or for purely systemic reasons such as the design of the register or the procedure for making entries in it). Often

there is a lack of knowledge of the provisions relating to representation rules or disclosure of such rules in the register. This refers both to the companies themselves, to which these rules apply, as well as third parties, including companies' counterparties, and even persons functioning within the public administration and the courts.

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Remember about insolvency

Companies begin their legal existence with an entry in the commercial register. But some end their existence prematurely by being removed from the register, against their will. Termination of business activity by liquidation takes into account the interests of creditors. Liquidation is carried out either when all creditors can be repaid in full (then we are dealing with the liquidation of a solvent company), or when there are insufficient funds or assets to satisfy all creditors. At that point, the liquidation takes place according to strictly defined rules under the supervision of the court and deprives the undertaking of the right to continue managing its assets and conducting its business.

Rescuing a company is a more desirable solution than liquidation, but as a rule it applies only to those companies for which it is objectively possible, i.e. where it is feasible to restore the profitability of the company to the extent that it can generate surpluses over the costs of current operations for the repayment of creditors. To save a company from liquidation and restructure its debt, it is necessary for the company to cooperate with creditors.

From the perspective of the firm's 30-year practice, the role of bankruptcy regulations in the economic environment seems to have changed periodically. In times of economic downturn, the number of cases commissioned by clients grew and insolvency laws increased in importance, while in periods of economic growth, the rules governing the freedom to conduct business and facilitating the growth of companies were more important.

Bankruptcy and Recovery Law (2003–2016)

A key issue in assessing the ability of a company to overcome a crisis is insolvency.

Under Poland's Bankruptcy Law of 1934, a registered merchant who ceased to pay his debts could be declared bankrupt (i.e. liquidity grounds), but a short-term suspension of payment of debts due to temporary difficulties was not grounds for declaring bankruptcy. Companies and other organisational

units were also deemed insolvent when their assets were insufficient to satisfy their debts.

The Bankruptcy and Reorganisation Law which entered into force in 2003 replicated the division into two grounds for bankruptcy, even though at each stage of the evolution of the law it was clear that it was the liquidity ground that was decisive for declaring bankruptcy.

The notion of ceasing to pay one's debts generated many doubts, and was interpreted differently in practice by the courts. One of the initial problems was to determine what kind of debt was at stake—whether it was just cash liabilities or also in-kind obligations. This was vital because, for example, a developer who failed to deliver apartments on time to buyers would not be considered insolvent, because the buyers' claims were not monetary. Despite the apparent need for bankruptcy in that situation, the developer was formally not insolvent. Buyers of apartments first had to terminate the contract due to failure to meet the delivery deadline, and only then did they become cash creditors (with a claim for damages for recovery of amounts paid), and then the court could find that the developer was insolvent. On the other hand, the recognition under a newly introduced provision that temporary difficulties could not last longer than three months with regard to the balance-sheet grounds for insolvency (the bankruptcy law assumed that the value of assets represented market value), this bore no relation to the actual amount of the debt in the case of short-term cessation of payments, where the statutory indicator of short-term insolvency was very quickly exceeded. That change in the rules increased overnight the number of companies deemed permanently insolvent under the law, whose bankruptcy should have been declared.

The definition of the balance-sheet grounds for insolvency generated greater problems of interpretation. This type of insolvency arose in a situation where the amount of the undertaking's obligations exceeded the value of its assets, even though it was currently performing its obligations. Questions arose concerning which obligations should be regarded as due. Should future or contingent liabilities be included if the debtor's assets were of greater value? What methods should be used to determine the value of the assets? The consensus in the literature was that as far as assets were concerned, the law referred to the market value and not balance-sheet value. But there was no uniform position on how to determine the market value. What is more, because the undertaking (or its representative) was required to file a bankruptcy petition within 14 days after the undertaking became insolvent, a huge gap arose between the literal understanding of the regulations and economic reality.

It was required by the provisions that a company should be able to determine the value of all its assets at any time and compare that value with its

payable obligations. Under this interpretation, in the initial period of validity of those provisions, it was estimated that based on those criteria over 50% of all companies could be deemed "insolvent." This situation was not improved by the procedure, which required a company to take certain steps—very quickly—if the grounds for bankruptcy occurred.

Amendments, practice, and rulings from the Supreme Court came to the rescue. At the end of the validity of the Bankruptcy and Recovery Law, it was clear that the law could not be interpreted literally, and the understanding of the provision on grounds for bankruptcy brought it closer to the meaning given by the Bankruptcy Law of 1934. On the other hand, the practice showed that there were no situations where the courts would declare bankruptcy based solely on balance-sheet grounds; if such a situation occurred, it was always in conjunction with fulfilment of the liquidity grounds, i.e. the company was also failing to pay its debts on time.

Poland in the European Union: Cross-border proceedings

Poland's accession to the EU did not significantly affect national bankruptcy rules, except for one area: direct application of EU regulations to Polish persons. Even before EU accession, the UNCITRAL Model Law on Cross-Border Insolvency, applicable to the insolvency of non-EU companies, was transposed into the Polish Bankruptcy Law.

In the context of cross-border proceedings, the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings had the greatest practical importance from the perspective of our practice and beyond. Until entry into force of the Bankruptcy and Recovery Law of 2003, i.e. one year before Poland joined the EU, cross-border insolvency was an unused term, and the impact of domestic insolvency regulations in other countries went virtually unregulated (although court decisions addressed the effects of cross-border insolvency). The legal doctrine distinguished between the territorial effects of insolvency (those occurring only in a given country) and the universal effects arising everywhere, including outside the country where the declaration of bankruptcy was issued. Applying the principle of territoriality in practice meant that if bankruptcy was declared in Poland, but the debtor's assets were located outside Poland (even if the assets were transferred abroad after the declaration of bankruptcy), a dishonest debtor could escape the country with some of its assets.

With the automatic application of the rules of the state where the insolvency was declared in other EU member states (except Denmark, where the public policy clause was invoked), bankruptcy adjudications issued in one EU member state were automatically recognised, by operation of law, in any other

member state, without the need for a ruling in the other state, constitutive or even declaratory, recognising or confirming the ruling issued in the first state. The principle of *lex fori concursus* provided (with the exception of a fixed list of effects of a declaration of bankruptcy in certain areas of law, such as property law or labour law) that the substantive bankruptcy law, and partly procedural law, of the state where bankruptcy proceedings were first opened applied to all the assets of the insolvent debtor, irrespective of location. Regulation 1346/2000 also introduced the principle that the jurisdiction of the court determined on the basis of the location of the debtor's registered office could be rebutted in favour of the place where the debtor's centre of main interests (COMI) was situated.

Rebuttal of the presumption of jurisdiction of the court of the registered office of an insolvent domestic debtor in favour of the jurisdiction of another member state meant that a foreign court could declare the bankruptcy of a Polish company on the basis of the other country's provisions on insolvency or threatened insolvency. This had far-reaching consequences, including for the debtor's domestic creditors, who often found out about such a bankruptcy declaration by accident and were unfamiliar with the insolvency laws of the state where the decision was issued. To remedy this, Regulation 1346/2000 provided that local creditors were entitled to file for bankruptcy in their home state, and insolvency proceedings opened this way were conducted in accordance with local law and covered the debtor's assets located within the territory of the state where such secondary proceedings were opened. Importantly—and this has been changed under the new Regulation 2015/848, among other things as a result of our efforts in the course of our work on the European Commission's Group of Experts—any secondary insolvency proceedings were, as a rule, winding-up proceedings ending with the sale of all local assets, and the court had no right to verify whether the debtor was insolvent within the meaning of the national law of the state where the secondary proceedings were opened, because this finding had already been made when opening the main proceedings. It was rightly assumed that when insolvency is declared, it concerns a single debtor who manages all its assets regardless of their location (or where there is a risk of insolvency), so it is not possible to rule twice on the insolvency of the same debtor.

The application of Regulation 1346/2000 and the rules discussed above in practice highlighted the internal contradictions of the regulation, including the conflict arising from the mandatory provision that any secondary insolvency proceedings must be winding-up proceedings even if the main insolvency proceedings were not, i.e. when the main proceedings were rescue proceedings leading to an arrangement. In practice, this meant that the arrangement

concluded with all of the debtor's creditors in the main proceedings could be torpedoed by the sale of the company or its assets in secondary proceedings, even though those assets were intended to remain the property of the debtor and generate revenue enabling the creditors to be repaid under the arrangement in the main proceedings. This is the kind of conflict we faced in a case we handled, which was resolved through the national court's submission of a request for a preliminary ruling to the Court of Justice of the European Union (C-116/11, *Bank Handlowy*).

Prevention is better than cure: Preventive procedures (recovery, restructuring)

The 2003 act had "recovery" in its title, but in practice recovery proceedings (*postępowania naprawcze*) did not function. Among other things, there was a race between the debtor and creditors to see who would be first to submit a bankruptcy petition (by the creditor) or a declaration on opening of recovery proceedings (by the debtor) in order to stay bankruptcy proceedings. Difficulties in interpreting the term "threat of insolvency" of a company and the uneven interpretation of this term by courts around the country were a separate problem. The maximum duration of recovery proceedings was set by law at three or four months (depending on the undertaking declaring the opening of proceedings). The court could not extend this period, as it was assumed that recovery proceedings had to be as short as possible to protect the interests of creditors, some of whose rights were suspended for that period (e.g. the debtor's obligation to pay both principal and interest).

On the other hand, such an inflexible provision led to a situation where exceeding this period by even a few days, despite the greatest organisational effort of the debtor and all stakeholders in setting the terms of the arrangement (and this was a considerable organisational challenge in view of the need to contact all creditors at the same time), made it impossible to achieve the objectives of the recovery procedure. There were few instances where the recovery provisions were applied, and even fewer where arrangements were reached, let alone implemented. In our practice we dealt with one of the few cases of a successful recovery procedure for a public company, where the measure of success was the stock-market value of the company—the share price after the recovery returned to what it was before the opening of the proceedings.

Also in Poland there were preparations for changes in the law. In December 2010, our firm won a tender organised by the Ministry of Economy to prepare a comparative report presenting the types of insolvency prevention proceedings operating in selected EU countries. Apparently this was the first document that instigated the work in the Ministry of Economy and the Ministry of

Justice on changes in Polish insolvency law. This work was completed by entry into force on 1 January 2016 of the new Restructuring Law and the recast Bankruptcy Law.

From the perspective of four years of application of the new provisions, it can be pointed out that they opened a new chapter in the area of debtor protection, by changing the balance of rights between creditors and debtors in favour of debtors. The aim of all restructuring proceedings has become to prevent companies from going bankrupt, and the bankruptcy provisions have also changed. Among other things, the definition of insolvency has become much less restrictive, the calculation of costs has been changed, and bankruptcy trustees have been motivated to act more quickly.

Where are we heading?

Just a few years ago, the answer to this question seemed simple. Observing the changes in the legislation of many EU countries, it seemed clear that there would be a rapid move away from purely winding-up proceedings to restructuring proceedings, either because of EU membership or for the needs of each country's economy. The recent adoption of the Directive on Restructuring and Bankruptcy (Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt) is intended to give impetus to this process. Its aim is to ensure that there are rules in each member state governing at least one preventive procedure to head off insolvency. This procedure must contain certain common elements and institutions of law whose meaning is regulated in the directive. As a result, there will be restructuring procedures across the EU based on consistent principles. States have two years to implement most of the rules.

This trend seems to be unthreatened for years to come. From the point of view of the integration of EU countries (assuming that certain principles are universally important), the desire to harmonise the rules of insolvency law, both substantive and procedural, remains unchanged. The end of an undertaking's existence in the legal sphere or its rescue should be governed by universal and, above all, economically justified principles. The benefits of full harmonisation for businesses are obvious.

However, achieving full harmonisation of insolvency rules over the next decade seems to be a utopian plan, even assuming that the economic integration of EU countries is progressive and not threatened by internal processes.

As for the harmonisation of insolvency provisions, an evolution, i.e. gradual legal changes reflecting economic processes, not a revolution, is to be expected.

Several years ago, when the European Commission started working on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, during one of the first meetings of the Group of Experts a question was asked about the possibility of a common definition of the term "insolvency" (and, as a result, "threat of insolvency"). The consensus of the lawyers from different European countries was that there was no such possibility at that stage of unification. Today, and after implementation of the Directive on Restructuring and Bankruptcy, which leaves the definitions of these terms at the national level, after CJEU rulings and key decisions of national courts, and after the formation of trans-European best practices, the answer to that question may still be the same. And that may remain so for many years to come.

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Court restructuring in practice

For nearly four years, Polish businesses have been in a possession of an important tool to restructure their debt and return to economically sustainable operations. Our experience since the Restructuring Law has been in force shows that with proper selection and cooperation with creditors, the new court procedures have many advantages and can lead to effective debt reduction. At the same time, we see room for improvement in the current regulations, which cannot be corrected through the practice of the authorities and participants in the restructuring process alone.

Fast-track arrangement proceedings *(przyspieszone postępowanie układowe)* have been the most frequently chosen model of judicial arrangement proceedings over the last four years. We had the opportunity to conduct this procedure while representing a debtor with debts of several million zlotys, starting with the submission of an application for restructuring and ending with confirmation of the arrangement by the creditors' meeting. After the filing of the application, pending the opening of proceedings, doubts already arose as to the debtor's ability to pay its liabilities arising in the period between the filing of the application and the court's issuance of a decision opening the proceedings. The problem was serious because we were dealing with a company on the move, which had to accept new orders every day, make many payments for supplies and services, and participate in bidding procedures, in which new commitments were also made.

The case was opened within the instructive period of one week, which is quite exceptional anywhere in the country, but nevertheless this period was a challenge for the debtor. After all, it had to incur liabilities which were soon to be included in the arrangement as a result of the opening of proceedings, and also to pay creditors who refused to deliver goods to the debtor without making any prepayments on this account. Failure to supply the goods necessary for production by the debtor's plant would result in a loss of production capacity and thus interruption of the plant's operation. Therefore, a failure to supply due to non-payment would be undesirable from the perspective of

maintaining the debtor's business and the continuity of production essential to the debtor's activity.

Basically, the Restructuring Law does not contain any provisions regulating the debtor's operational and financial situation (e.g. payments) during the period when the restructuring application is pending. We regard this as a far-reaching shortcoming, especially as there are known cases of waiting even two months for the opening of proceedings. During that time, the debtor may not know how to meet its obligations, given that under criminal law, selective satisfaction of creditors in a situation threatening the debtor's insolvency or bankruptcy is a punishable offence.

The basis for the success of restructuring proceedings, as proved by our case, is the debtor's close cooperation with creditors, even before submission of the restructuring application. An agreement with creditors even on the outline for the arrangement proposals submitted with the application results in a more favourable attitude towards the whole court procedure, which is still perceived as stigmatising in the market reality. Our practice proves that surprising creditors with information on the submission of an application or even the opening of proceedings often leads creditors, especially creditors secured by collateral in the debtor's assets, to break off negotiations on the terms of the arrangement, which in effect significantly limits the debtor's ability to achieve acceptance of the arrangement. Openness to talks with creditors, who often understand the difficult situation of the debtor (they often find themselves in a similar situation and are also dependent on the market situation), may help the debtor not only to create a widely acceptable arrangement proposal, but also to gain support for the candidate proposed by the debtor to act as the court-appointed supervisor in restructuring proceedings. And obtaining the support of creditors holding more than 30% of the total amount of claims for the court-appointed supervisor nominated by the debtor obliges the court to appoint the supervisor proposed by the debtor.

The role of the court-appointed supervisor in a time-bound procedure, such as a fast-track arrangement procedure, is invaluable. Within a relatively short period of two weeks, the supervisor prepares three main documents that will determine the dynamics and effectiveness of the proceeding: the list of claims (including the list of disputed claims), the restructuring plan, and, for the needs of the creditors' meeting to vote on the arrangement agreement, an opinion on the feasibility of the agreement. Smooth cooperation between the debtor and the supervisor is essential for timely and accurate preparation of the list of claims on the basis of which the creditors' votes on the agreement will be calculated. The supervisor also prepares ballots, which creditors often

the basis for the success of restructuring proceedings is the debtor's close cooperation with creditors

mistake for a certificate of the amount of their claim, comparing them with the balance in their account books.

The role of the supervisor is also to "educate" creditors about their rights during voting on the arrangement and the scope of claims covered by the arrangement. Clarification of any doubts related to the creditors' voting power and the amount of the claims covered by the arrangement allows for efficient voting and also voting in favour of the arrangement by creditors, which is in the interest of both the debtor and the creditors. The supervisor may also communicate directly with the judge-commissioner, which is conducive to efficient organisation of the creditors' meeting to vote on the arrangement and to resolve legal doubts, which often crop up in the course of the proceedings.

In the case of large companies with numerous creditors (more than 100), the fast-track arrangement procedure can be completed within six months by approval of the arrangement (pending appeal), but this period must be regarded as optimistic. The two-month deadline for completion of such proceedings projected by the Parliament will only be realistic in extreme cases involving companies encumbered with low debt and subject to the jurisdiction of courts handling a small number of insolvency and restructuring cases, and there are currently very few such cities.

The example of the case we dealt with in our practice ended with approval of the arrangement, and therefore a vote for the arrangement by a large majority of the creditors on the terms proposed by the debtor. This shows that the model of judicial restructuring can be effective and helpful to companies in crisis. It should be remembered, however, that a vote in favour and approval of adoption of the arrangement is just the first step toward successful completion of the restructuring proceeding. The court will refuse to confirm the arrangement if it violates the law, in particular if it provides for the award of state aid contrary to the regulations, or if it is obvious that the arrangement will not be executed. The latter ground, obvious inability to execute the arrangement, is often founded on the debtor's failure to perform its obligations arising after the date of opening of the restructuring proceeding. During the hearing on confirmation of the arrangement, the court may take statements from the debtor and the court-appointed supervisor on whether since opening of the restructuring proceeding the debtor has currently and timely performed all of its obligations towards creditors. Fulfilment of this requirement is often problematic for debtors undergoing restructuring, and therefore estimating the debtor's capacity to bear the burden of the costs of the proceeding and current obligations arising after opening of the proceeding should be considered as an element of the restructuring strategy at the stage leading up to filing of the application.

Completion of the restructuring proceeding with confirmation of the arrangement, which we have encountered in our practice, was possible primarily thanks to close and transparent cooperation between the debtor, the creditors, and the court-appointed supervisor. Other cases of restructuring proceedings known to us, often ending in a discontinuance, would contradict the claimed effectiveness of the Restructuring Law. However, in our opinion, this results from inappropriate selection of the specific procedure for the debtor, lack of agreement with key creditors at the stage of submitting a restructuring application, or the debtor's attempt (often late) to save itself from inevitable bankruptcy using court restructuring procedures.

Therefore, the future of the Restructuring Law depends to a large extent on practitioners dealing with it on a daily basis. Nevertheless, the procedures available to businesses currently contain a wide range of remedies that can save properly prepared debtors from bankruptcy, which is the main aim of restructuring procedures.

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