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contents

Dear Readers,

This is the 10th edition of our *Yearbook*. In the very first edition, in 2011, we reported on novelties at that time such as the establishment of compliance departments in companies and procedures facilitating reporting of irregularities by whistleblowers (we used the English term in Polish as well because the language did not yet have a word for such a person—now it does).

We did not anticipate then that the weight of our work would shift to such a degree toward new technologies, but we open this anniversary issue of the *Yearbook* with an article weighing the possibility of battling censorship on Facebook through the courts. Another niche topic a decade ago was sustainable growth, which today occupies the attention of financial institutions in the guise of sustainable finance. We also write with a new outlook on human rights, presenting them from the perspective of the world of sport and reporting on efforts by the justice system to instruct citizens more clearly of their rights.

Recently the set of publications issued by our firm has grown considerably, both online and in print. The portal In Principle and the blog on new technologies law (newtech.law) have been joined by an employment law blog (hrlaw.pl), a lively commentary on the new Public Procurement Law (komentarzpzp.pl—Polish only), and the scholarly journal *In principle. Legal studies and analyses* (codozasady/studia-analizy—Polish only). That's a lot, but there is a lot happening in the law today and there are many topics we would like to share with you.

Tomasz Wardyński

When Facebook blocks content

Łukasz Lasek
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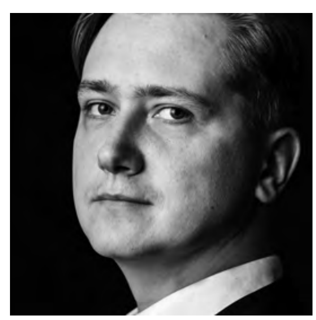

More and more often, Facebook users suddenly receive a notification that their content has been blocked or removed from the site. These notifications tend to be terse and don't make it clear why the account has been sanctioned. This raises the question of how to restore access to blocked publications. Can the courts provide relief? In a precedent-setting case before the Warsaw Regional Court, we argue that they should.

Our client is a nongovernmental organisation called the Social Drug Policy Initiative (Społeczna Inicjatywa Narkopolityki—SIN). The case has been covered extensively in the press, and here we are summarising previously disclosed information.

For nearly a decade SIN has been disseminating knowledge on the harmful impact of psychoactive substances. These initiatives are targeted first and foremost to young people, as they are most at risk of experimentation with narcotics. To reach this audience most effectively, the association began to maintain accounts on Facebook and Instagram (which was acquired by Facebook in 2012). These accounts reported on the risks associated with the use of narcotics and revealed the true ingredients of the most commonly encountered mixtures of psychoactive agents, as determined by laboratory tests.

But after seven years of smooth operation, SIN unexpectedly began to lose access to its accounts. They were blocked and deleted. After each such incident, the association opened new accounts, but they also disappeared. SIN never received any warnings or clear explanation of the reasons for taking down its content. The most extensive message the association received was three sentences long and said that the posts violated the ban on sale of marijuana and other drugs. But SIN had never conducted such activity, so it was clear that its content had been assessed erroneously. The posts might have been reviewed by an algorithm or by persons lacking the relevant knowledge or language skills. But SIN was not informed who stood behind the negative evaluation of its posts.

> The association had thus fallen into the snare of Facebook censorship without any possibility of learning the grounds for the decision or appealing against it.

It would be easy enough to dismiss this complaint by pointing out that Facebook is a private company governed by its own rules, and thus it can arbitrarily decide who can use its services and what content they can post. But this classic approach fails to reflect the true role played by certain social media platforms in today's socio-economic reality. A strong position in the exchange of information, goods or services requires a platform to observe fundamental rules of fair and objective access to its services.

Means of legal protection

So SIN decided to pursue legal measures against Facebook to defend its right to use the platform and to post there content that is lawful under the Polish legal system. From the start the association was supported by the Panoptykon Foundation, a watchdog organisation exercising oversight of various forms of social monitoring, from eavesdropping by law enforcement authorities to monitoring of the private lives of internet users or private censorship on social media.

SIN's aim is to recover the deleted accounts and gain assurances that if the association acts lawfully and in compliance with the site's lawful terms of use, its accounts and content will not be blocked or taken down in the future. But there are no regulations in Poland expressly addressing this issue and determining the rights held by the owner of blocked or deleted content. Perhaps in the future this area will be the subject to specific regulation. But at present, such specific regulations are not essential, because existing rules of civil law and competition law, properly interpreted, already provide adequate means of legal protection.

This primarily has to do with regulations on protection of personal interests. These are a set of fundamental or moral rights held by every individual, firm or organisation, such as privacy and image. It is an open list, and the courts can decide when the list needs to be expanded to cover new rights. If the court finds that a personal interest is at stake and that the defendant has infringed it, the court may order the defendant to cease and desist, to cure the consequences of the infringement, to apologise, and even to pay damages. Thus if the court finds that removal of SIN's accounts infringed the association's personal interests, it could order Facebook to cease such infringement (i.e. not to delete SIN's new accounts), to reverse the effects of the infringement (i.e. to restore access to accounts already deleted), and to apologise for deleting the association's accounts without warning or explanation.

Other cases against Facebook

Thus regulations adopted half a century ago are proving suitable for application to the contemporary problem of censorship on social media. The SIN litigation is one of just a handful of such cases in Poland. Another Polish case against Facebook involves the sudden deletion of the account for the Independence March in 2016, and a third case was filed by a former member of Parliament alleging that Facebook arbitrarily promotes selected posts, while refusing to promote posts from his own account. None of these cases has been decided yet, but they do show that judicial recourse to enforce rights in this arena may gain popularity.

This trend may be reinforced by the increasingly common removal from social media sites of accounts used to promote business activity. These events not only harm the users' image, but also have a financial impact. For example, the media recently reported on the deletion of the account of the Polish firm Brand24. This firm is hired by third parties to monitor internet users' opinions on selected brands. On Facebook, the firm conducted an active promotion using bots, but also gathered positive reviews from its own clients. An account with dozens of such reviews was deleted—as in the case of SIN—without any warning or clear justification. Such instances may lead not only to demands to apologise and restore the accounts, but also to claims for compensation for losses and damages for lost profits.

The position of the Polish courts on these issues is only now beginning to take shape. But the more fundamental issue is not whether the complaints by the users of these platforms are justified, but whether the courts have jurisdiction to intervene and grant relief to internet users. We take the view that the courts do have this authority. This approach is also supported by rulings from foreign courts. Taking down content from social media sites has already been held unlawful for example by French and German courts. These cases often reveal clear errors behind decisions to block accounts and take down content. For example, in a dispute before the courts in Paris, an account had been deleted for allegedly posting pornographic content, when it had only published an image of a 19th-century nude. This shows that there is a need for independent review of censorship by social media sites and that it is worth pursuing such review before the courts.

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Legal protection of TV formats

Paweł Czajkowski

The television market is undergoing a dynamic transformation as a consequence of constant technological changes. The popularity of VoD platforms, which have become firmly established in Poland for several years, and the progressing digitalisation of consumption of entertainment content are greatly changing the realities for trading in rights to audiovisual works. Alongside these processes, a key role on digital platforms and linear television is played by television formats. But despite their great importance in programming and financial terms, the legal status of TV formats remains unclear, and the means of protection available to creators of formats are not obvious.

What is a TV format?

In common usage there is no one, dominant definition of this concept, and thus it is essential to refer to its practical dimension. What we call a format is a set of characteristics and specific elements of a TV programme making up the foundations of its construction and the course of the individual episodes. A format is a set of rules according to which the narrative of the entire series is constructed, and thus also each individual episode. The format of a show comprises repeatable characteristics supplemented by the individual content of each production carried out within the format.

The characteristics of a format will differ depending on the genre of TV show. A reality show will have different fixed elements than a game show, a talk show or a lifestyle show yet other elements. But in each case, the format will establish a certain structure for the show and the key elements of the conception which make it innovative. These elements are referred to as the "engines" of the production.

In practice, the specifics of the format are reflected in a number of documents, the first of which is referred to as the "format paper," which is the initial design of the concept for the show. As work on the format progresses, the original idea is built out with detailed information and technical parameters: the traits of the characters, the set design, lighting, the map for how each episode runs, and even certain catchphrases associated with the protagonists. All this information is gathered into a single document referred to as the "production bible." The bible is the material embodiment of the conception constituting the show's format.

Format as the subject of trade

The great role of formats results from several factors. First, formats draw a wide audience, and that is the definition of success in the television industry. Broadcasters rely on formats because they are productions tested on other markets, which are very likely to be well-received by audiences.

Second, formats owe their key financial value not only to high viewership, but also, or even primarily, to revenue from licensing fees. The world's most popular formats generate billions of dollars in revenue. Significantly, formats work just as well on linear television as they do on VoD platforms or mobile devices. Around the world, more and more formats are being created and adapted to the reality of the digital age.

The exceptional power of formats is evident from the great length of their appeal as a product. Many of the most popular formats in the world are over a decade old. An example is the format for the original British show *Who Wants to Be a Millionaire?* (from 1998), the Polish version of which airs under the title *Milionerzy* (since 1999).

In addition, the creators of a format can gain from derivative commercialisation through merchandising efforts, which also represent a significant source of revenue.

But what legal protection does this vital element of the television market enjoy? The answer is not so straightforward.

Copyright protection of format

The dominant view in the Polish legal literature is that a format as a concept for a TV series is not subject to protection under copyright law. This is because under Art. $1(2^1)$ of the Polish Act on Copyright and Related Rights, "Protection extends only to a method of expression; discoveries, ideas, procedures, methods and rules for operation, and mathematical conceptions are not subject to protection." Consequently, it is recognised that a specific show may be protected by copyright, but not a format, which only creates a framework for production of the show.

But the legal literature admits the possibility of protection of a story line which is expressed in a specific project and gives that project a distinct character. Thus if the narrative or concept for specific episodes is adequately expressed in the format, protection for the narrative or concept could be sought under copyright law. It is stressed that to regard a format as a work within the meaning of copyright law, the originality of the elaboration of the concept for the show must be a recognisable element of every work created on the basis of the concept.

Undoubtedly the production bible should be regarded as a means of expression subject to copyright protection. If its content has adequate scope, it may provide a solid foundation for legal protection of a TV format. While it appears that a format paper possessing the quality of an individual creative work may constitute the subject of copyright, in the absence of other evidence it would be difficult to derive from the format paper a copyright to the TV format as a work. Other copyrightable ingredients of the format may also be helpful, such as musical works, logo, set design, or a database concerning viewership or marketing strategy.

It must be stressed, however, that an effective showing of infringement of the rights to a TV format based on copyright law will be possible only if the infringer unlawfully exploits key, characteristic elements of the format. Even conscious use of certain recognisable motifs of the production may be deemed a legally permissible inspiration for the other author, which does not require the consent of the author of the original work. As stated in the case law, "Use of another person's idea, or even names from another's work, where the new work has original content, does not constitute an elaboration of another's work but one's own original work" (Warsaw Court of Appeal judgment of 16 April 2013, case no. I ACa 1216/12). But as the Supreme Court of Poland has stated, "Creative processing of elements of the inspiring work such that the character of the inspired work is determined by its own individual elements, and not by the adopted elements, is regarded as the distinguishing criterion" (judgment of 10 July 2014, case no. I CSK 539/13).

Another noteworthy ruling was handed down in a dispute between broadcasters of two reality shows in Poland: *Big Brother* and *Dwa Światy* (Two Worlds). The Warsaw Regional Court held that the similarity between the general concepts for the shows was not grounds for upholding the plaintiff's claims, as the two shows differed in numerous aspects: different participants, different rules, and a different location for production of the show.

Protection of format based on unfair competition regulations

Another basis for legal protection of a TV format could be Poland's Unfair Competition Act. Imitation of the concept for a show could be found to infringe fair practice, and under Art. 3(1) of the act, "An action contrary to law or fair practice is an act of unfair competition if it threatens or violates the interest of another business or a customer." But this protection will extend only to the concept for a show already functioning on the market in the form of an executed production. This is because such a claim would be based on alleged infringement of the renown of a TV format, and the party seeking protection would bear the burden of proving the existence of the format's renown. Only after meeting both of these conditions could the claimant attempt to show an infringement in the form of adoption of key elements of the format (engines). It would also have to be proved that the infringer's action threatens or violates the interests of the author of the original format.

How best to protect a format in practice?

It is apparent that there can be no protection of a format until it is memorialised in the form of a document. The more detail in which the concept for the show is defined, the greater the chance of obtaining effective protection of the format. A bare minimum would be a format paper, while the optimal solution would be a production bible.

Undoubtedly it would also be worthwhile to obtain trademark registration for the title of the format (a word mark or figurative mark) or even the characteristic sayings by the protagonists, if they constitute an essential element of the show. By registering the title as a trademark, the owner of the format gains an exclusive right to use the trademark for gainful or professional purposes within the specified territory. It also allows the proprietor to prohibit third parties from using an expression similar enough to the registered mark to cause a risk of confusion. But to register the title or catchphrases, they must be original and possess sufficient distinguishing power.

An important element facilitating protection of the concept for a show will be to register it with one of the industry organisations maintaining a register of TV formats. This will carry predominantly factual, not legal, weight, but for evidentiary purposes in the event of a potential dispute it will be relevant to prove that documents reflecting the concept for the audiovisual work were filed with the industry organisation at a certain time and in a certain form. One such international organisation is FRAPA (the Format Recognition and Protection Association). On the Polish market, a register of works is also maintained by the National Chamber of Audiovisual Producers (KIPA).

It should be borne in mind that the need for protection of rights to a TV format may not relate only to actions by competitors. Conflicts can also arise between the co-creators of a show concerning who is responsible for authorship or the scope of their contribution. For this reason as well, it is worthwhile to define early on the part played by specific individuals in creating the format and to precisely describe their roles. Clear and consistent documentation of the phases of work on the format from the very start will also be helpful.

Execution of an audiovisual work based on a format whose conception is subject to protection will be important evidence to show authorship. This could take the form of a pilot episode or an entire series. But undoubtedly licensing the format for use by other entities will carry the greatest weight for effective protection of the format. In that case, it can be shown that the format is the subject of trade and functions on the market as a subject of copyright.

Conclusions

Although legal protection of a television format may be sought on several grounds, effectiveness of the protection depends to a great extent on factual steps taken by the creator of the format. It is no exaggeration to say that protection of the format should begin at the time the concept for the show pops up in the author's head. Every creative element of the production should be appropriately documented, and the course of work on the format should be subject not only to business aims, but at the same time to the available means of legal protection. In this sense a TV format may be compared to know-how in an enterprise, which is important to protect in dealings with outsiders and also within the same organisation.

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Taxation of foreign musicians performing in Poland

Dariusz Wasylkowski
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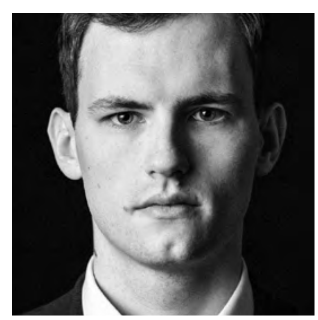

Foreign artists appearing in Poland and the agencies they cooperate with typically don't take all their earnings with them when they leave the country. A portion of their fees goes to the Polish treasury, as event organisers are required to withhold tax at the source.

Every month Poland is visited by foreign groups, individual musicians, conductors and orchestras, appearing at festivals, concerts and private events. Music is a global industry, so it is no surprise that musicians come from all corners of the planet. In pursuing their ventures, Polish and foreign impresarios and agencies cooperate in scheduling performers and negotiating the terms for individual appearances.

The complexity of the relations and conditions accompanying appearances by foreign artists needs to be translated into contractual language by the participants in this collective effort. Contractual language in turn must be translated into the language of taxation.

Local view of personal and corporate income tax

Musicians not residing in Poland are subject to taxation here only on income earned in the territory of Poland. The same applies to payers of corporate income tax not having their registered office or management in Poland.

This income includes income from activity performed in Poland. In the case of individuals, this covers personal performance of artistic activity. In that case, the remitter is required to withhold income tax at a flat rate of 20% of revenue.

Such income also includes fees paid by entities located in Poland for services involving shows and entertainment performed by natural or legal persons residing or having their registered office outside Poland as part of events organised via entities doing business in Poland involving artistic and entertainment events. The regulations require the remitter to withhold tax equal to 20% of revenue.

Because foreign artists may also be taxed in the country where they permanently reside, there is a risk of double taxation of the same income. Therefore Polish law requires these rules to be applied in compliance with treaties on avoidance of double taxation of income and capital concluded by Poland.

This means that Poland's right to tax income may be limited as a result of application of provisions of international law. A basic condition for applying tax treaties is that the remitter can show that for tax purposes, the taxpayer is a resident of a country with which Poland has concluded a relevant agreement.

The global view

The standard for provisions of international tax law are set by the Model Tax Convention on Income and on Capital, promulgated by the Organisation for Economic Co-operation and Development (OECD). But in reality, the tax treaties Poland has concluded with specific countries differ considerably.

The first rule under the Model Convention is that income of a person residing outside of Poland, earned for artistic activity, for example as a theatre, motion picture, radio or television artist, or as a musician or sportsman, performed personally in Poland, may be taxed in Poland.

This means that a musician who has concluded a contract with a Polish festival organiser to appear in Poland will be taxed in Poland in accordance with national law.

The second principle expressed in the Model Convention is that income connected with activity personally performed by an artist, but going not to the artist but to another person, may be taxed in the country where the artist performs the activity.

This means that income connected with an artist's activity which goes to another entity may be taxed in the country where the artist actually performs. Historically doubts were raised as to whether a musician is an artist for purposes of the Model Convention. But it now appears clear that a musician is to be regarded as an artist not just colloquially, but also legally.

The devil in the details

It is important to be aware of the principles set forth in the Model Convention, but not to become overly attached to them. Modifications adopted in specific tax treaties mean that each tax treaty must be examined in detail, with an eye to their current and historical interpretation.

Below we devote a few sentences to each of several scenarios, related to application of the treaties concluded by Poland with Japan, Germany, the United States, and Canada.

Example 1: A Japanese artist conducting commercial activity in his home country involving services consisting of giving concerts has concluded a contract with a Polish foundation involved in the promotion of music. Under the contract, the artist is to perform services involving presentation of a show.

In this case, the Polish act calls for taxation of this activity in Poland. Because the Japanese artist conducts commercial activity, the tax treaty with Japan permits this income not to be taxed in Poland and to be taxed only in Japan. In tax rulings, this rule is derived from the specific language of the provision of the tax treaty concerning taxation of artists, which does not directly state the rule that international norms concerning taxation of artists (generally allowing taxation of income in the source country—Poland) take priority over the norms concerning commercial activity (generally allowing taxation of income in the country of residence—Japan). This interpretation is based on that specific tax treaty and is derived from the historical wording of the regulations.

The current wording of the Model Convention also does not expressly indicate that rule, and the official commentary to the Model Convention derives that rule from another provision, concerning the conduct of commercial activity.

Example 2: A German orchestra organised in the form of a legal person has signed a contract under which the orchestra is to give a concert in Poland. The contract does not provide for a division of the fee payable to the orchestra between the individual musicians or between the musicians and the legal person.

In this case, Polish law again calls for taxation of such activity in Poland. The possibility of not charging tax in Poland would have to arise from the provisions of the tax treaty with Germany. But in this case the provision of the tax treaty concerning taxation of artists indicates that income connected with personally performed activity of an artist or sportsman which goes to another person (a legal person) may be taxed in Poland because the concerts with which the income is connected occur in Poland.

The tax treaty with Germany contains an additional provision, also appearing in some other treaties concluded by Poland. It states that if the artist's stay in Poland is entirely or chiefly paid for from public funds of Poland or Germany, a federal state, or other selected entities, then the tax treaty is applied omitting the provisions concerning taxation of artists.

Example 3: An American musician travels to Poland for a festival. He appears at the festival for a fee paid by the institution organising the festival.

Once again, Polish law calls for taxation of the musician in Poland. The tax convention in force between Poland and the United States, signed in 1974, does not contain any provision concerning taxation of artists. Thus the other provisions of the convention will apply. The practice of the tax authorities points to application of provisions concerning practice of the free professions and income from commercial activity, which as a rule allow for taxation of an artist's income only in his country of residence—outside Poland.

In 2013 Poland concluded a new convention with the US on avoidance of double taxation, but this convention has not yet entered into force. When that happens, and the same American musician returns to Poland for the next festival, he may expect that Polish law will still call for taxation of the musician in Poland. The convention will contain the rule that Poland has a right to tax the artist also in a situation where the income earned by the artist is connected with commercial activity pursued by the artist or work performed by him. However, Poland's right to impose tax will be limited if the amount of gross receipts of such an artist, together with reimbursed expenses or expenses incurred on his behalf, does not exceed USD 20,000 per year.

Example 4: State institutions established in Poland and Canada to handle cultural matters decide to strengthen their cultural exchange involving regional song and dance groups. Consequently, a quartet of folk musicians along with dancers from Quebec travel to Poland to give a series of concerts, in exchange for which they receive a fee.

Again, Polish law calls for taxation of the musicians' income in Poland, and the basic rules under the tax treaty will confirm Poland's right to charge tax. However, the tax treaty with Canada contains an additional provision that artistic activity performed as part of a cultural exchange between Poland and Canada may be exempt from taxation in Poland.

The deeper you go, the more complicated it gets

The examples given above involve simple scenarios, but they hint at the multiplicity of variations that can arise when applying tax treaties in cases involving taxation of artists—both when foreign musicians visit Poland and when Polish musicians go on foreign concert tours.

The complications may be connected with the involvement of a greater number of entities, such as intermediaries or promoters. Greater finesse may also be required in assessing the taxation of fees paid to artists for allowing dissemination of their image, exploitation of copyright, or granting interviews.

The subtle but substantial differences in wording of the provisions, as well as the imagination of the tax authorities when it comes to seeking new areas for raising revenue, requires great care on the part of taxpayers.

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Environmental police?

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Recent changes to the regulations have greatly increased the powers of the Environmental Protection Inspectorate. Inspectors have gained expanded possibilities to conduct inspections without prior notice, the right to conduct activities around the clock, including non-working days, and the right to demand that representatives of inspected entities submit statements under penalty of perjury. The aim is to increase the effectiveness of inspection activities and shorten the response time for reported environmental violations. What can businesses expect as a result of these changes?

The Environmental Protection Inspectorate is appointed in Poland to monitor compliance with environmental regulations and to study and assess the state of the environment. It exercises oversight of entities who exploit the environment as part of their commercial activity, meaning that they emit gases or particles into the atmosphere, manage waste, or use water services.

These changes undoubtedly were needed. The growing regulatory burden on enterprises exploiting the environment, the increasing number of requests for intervention from residents, and disturbing media reports on fires at landfills, illegal shipments and environmentally harmful handling of waste required stepped-up controls and enforcement of compliance with environmental laws. The growth of an underground market for handling of waste also contributed to a need for increased authority on the part of inspectors.

Task: enforcement

Environmental inspectors have thus been equipped with new powers similar to those at the disposal of law enforcement authorities. Formally, the tasks of the Environmental Protection Inspectorate include prosecution of offences against the environment set forth in the Criminal Code and the Code of Petty Offences, including filing and supporting indictments. New positions have also been created and additional funds have been allocated to the operation of the inspectorate within the new legal environment.

Inspectors have gained the authority to conduct inspections 24 hours a day, 7 days a week, while employing new measures of control. They can conduct inspections without providing 7 days' advance notice. Measurements and tests may be conducted using drones. Inspectors can also demand start-up of installations or devices as necessary to conduct tests.

Many actions may be conducted by inspectors outside of a formal inspection, upon presentation of identification, which may come as a particular surprise to businesses. Inspectors have been vested with additional powers in the event they form a justified suspicion of commission of an environmental offence. These include observing and making an audiovisual record of events, and gathering and securing evidence of commission of a crime or petty offence. Inspectors can demand written or oral information and interrogate individuals. They can also conduct a site inspection of commercial premises and other locations, seize and search vehicles transporting goods, and examine documents connected with the transport of goods, if there is a suspicion that waste is being transported.

Under the new regulations, during an inspection the province environmental protection inspector may issue an order to cease and desist activity posing a threat to human life or endangering the environment. Such a decision is immediately enforceable. The regulations exclude the possibility of staying enforcement of the decision, even by the administrative court reviewing the decision. This is an entirely exceptional solution.

Providing information under penalty of perjury

During the course of an inspection, inspectors may demand presentation of documents, including financial documents, and access to any data connected to the issue under inspection. They may also demand written or oral information, and summon and interrogate persons as necessary to establish the state of facts, while instructing them of criminal liability for providing false testimony under the Criminal Code. Under prior law, inspectors had a similar right, but it did not include the condition of instructing the witnesses of potential criminal liability. This difference is not a mere question of phrasing. A proper instruction is a necessary condition for facing liability for perjury under Art. 233 of the Criminal Code. This means that making false statements to an environmental inspector can be a crime. The penalty for perjury is severe, as anyone who makes false statements or conceals the truth when providing testimony as evidence in a judicial proceeding or other statutory proceeding is subject to 6 months to 8 years in prison.

How does this look in practice? The rule in inspection proceedings is to obtain information from representatives of the enterprise being inspected, in the form of written or oral statements. It might seem that the risk of criminal liability for perjury would arise only in extreme instances, where representatives intentionally mislead inspectors, present falsified data, or flatly lie.

But the reality often tests that picture, and the risk of criminal liability is more realistic. The stress and haste accompanying an inspection can lead to errors. Sometimes employees of the enterprise who are aware of irregularities attempt to frame their statements to avoid disclosing information they regard as unflattering, and thus to keep from harming their employer. More often, employees do not have the necessary knowledge at their disposal concerning a given aspect of the facility's operations. Concerned about possible job-related consequences, they wish to conceal these gaps by providing unverified information or subjectively describing the facts. This phenomenon may be intensified when unannounced inspections are conducted, as in the absence of competent representatives of the entity, information may be provided by random employees with scant knowledge of the functioning of the installation, or, under the shock of facing an unannounced inspection, they may provide improper information.

Caution and training

It is therefore essential to properly train persons who may be required to provide information to inspectors, and to determine who is responsible for providing information, and under what circumstances. During the course of an inspection, it is worthwhile to present only data the representative is certain of, which can be verified, and if necessary the source for the information can be reconstructed on the basis of documents, monitoring recordings, official notes, internal correspondence or the like. It is best to ensure immediately that the source of documentation from which the data are taken is appropriately secured and if necessary can be reconstructed, even several years after the end of the inspection.

It is thus better to take the conservative path and not provide information or data whose accuracy is not certain.

At the same time, it must be borne in mind that hindering the conduct of an inspection by a body of the Environmental Protection Inspectorate is punishable by a fine of PLN 10,000 to 100,000. Where doubts arise or the persons providing information are not certain that the information at their disposal is accurate, they should expressly indicate this. When information given orally is recorded by the inspectors, it is essential to verify their minutes.

The new solutions are also much more dangerous for managerial staff of a facility when a draft of the information is prepared by an employee but the actual document is signed for example by a management board member. The person signing the document may *de facto* assume responsibility for its accuracy. An attempt to avoid responsibility by asserting that the document was drafted by someone else could fail.

Consequences of misleading inspectors

Providing false information to inspectors can not only lead to criminal liability, but can also have negative consequences in proceedings that may be commenced following the inspection. If erroneous information suggests the existence of irregularities, the statement by the inspected entity, memorialised in the form of a document, may prove sufficient to commence a proceeding against the enterprise. The statement itself will be used as evidence in the proceeding. Correcting the statement may prove very difficult, and showing that erroneous information was provided by an oversight may not be persuasive for the authorities. In most cases, it will be necessary to seek out documents confirming the actual state of affairs and showing that the earlier statement was mistaken. That may be impossible if evidence has not been secured.

The new regulations increase the authority of inspectors from the Environmental Protection Inspectorate. On the surface the changes appear aimed only at increasing the effectiveness of inspection activities and eliminating violations of environmental law. But the consequences of the changes should be examined from a deeper perspective. They place entities subjected to inspections in a more difficult situation. It is therefore necessary to prepare far enough in advance for inspections, properly document actions taken, prepare staff organisationally and substantively, introduce procedures for contacts with officials from the Environmental Protection Inspectorate, memorialise information about exploitation of the environment, and perhaps even revise the compliance policies in force at the enterprise in order to avoid the risks discussed above.

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#SustainableFinance: How to cut financing costs while supporting sustainable growth

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In the face of the global ecological crisis, the financial industry is also seeking methods to support initiatives for sustainable growth. Banks are more and more actively granting loans that motivate borrowers to step up such measures. On the Polish market as well. We recently witnessed the first loan agreement linked to ESG (environmental, social and governance) criteria with a leading energy company as the borrower.

The scale of investments needed in the upcoming years to achieve the EU's ambitious environmental targets far outstrips the capacity of the public sector. Thus, apart from a number of measures at the level of the European Union, including regulatory initiatives, the financial industry also has a significant role to play. Industry organisations, including the Loan Market Association (LMA), which is a key player in the syndicated loan markets in EMEA, are becoming involved in the process of stimulating such changes. Following publication of its Green Loan Principles (GLP), the LMA decided to continue the green trend. Global challenges require a global response, and thus the LMA has developed recommendations on Sustainability Linked Loan Principles (SLLP) along with its counterparts in other regions of the world—the Loan Syndications and Trading Association (LSTA) in North America and the Asia Pacific Loan Market Association (APLMA).

Sustainability-linked loans and other pro-ecological financing methods

The aim of including such products in banks' offerings is similar to the case of green loans. They should encourage borrowers to pursue environment-friendly activity and achieve other socially responsible aims. For achieving these targets, borrowers are to be "rewarded" by a reduction in the margin (which is not a key element in green loans). Unlike classic green loans, the proceeds from sustainable loans do not have to be used for green projects. Nor is it necessary to separate the proceeds of such loans into dedicated accounts and monitor their use (as in the case of green loans). They can be used for the borrower's general corporate purposes. It is not excluded, though, that a given loan may be structured as SLLP-compliant and aligned with the Green Loan Principles at the same time.

For a complete picture, in addition to GLP-compliant loans, there are also loans supporting environmental considerations (e.g. mass transit) but not fully aligned with the LMA's Green Loan Principles.

The SLLP recommendations can apply to all types of loan products, but mainly revolving loans, and to a lesser degree term loans (including leveraged transactions), as well as contingent facilities (e.g. guarantee lines or letters of credit).

As evidenced by the increasing number of market examples, sustainability-linked loans are applied across a range of industries and sectors, such as energy (as in the example mentioned of the first Polish transaction), utilities, telecommunications, agriculture, fashion, packaging, chemicals, shipping, aviation, education, hotels, and real estate development.

Aims of SLLP

The key aim of SLLP is for the potential borrower to meet selected sustainability performance targets (SPTs), metrics to be maintained at a pre-determined level during the loan term. Examples of SPTs are listed in an appendix to the SLLP. The proposed targets include water saving, improvement in energy efficiency, increases in the amount of renewable energy generated or used, and reduced greenhouse gas emissions. Some of the targets are not immediately related to environmental protection, such as development of affordable housing units and improvement in occupational health and safety conditions.

The appendix only gives examples, and in a specific transaction the parties can agree on other targets, such as reductions of unprocessable waste. Once SPTs satisfactory for the borrower and the lender are set, meeting the targets during the term of the loan is primarily incentivised by reduction in margin. Over the longer term, this will also allow business models to be adapted to environmental standards, attracting new investors and positively contributing to the reputation of businesses and banks.

Components of SLLP

SLLP comprises four main components which should be displayed by businesses in their efforts to achieve sustainable growth:

- **Relationship to borrower's overall CSR strategy**

The first step is presenting the borrower's overall corporate social responsibility strategy (or environmental, social and governance (ESG) strategy) and demonstrating how the SPTs correspond to the adopted CSR/ESG aims. Borrowers are also encouraged to identify any sustainability standards or certifications they are seeking to attain.

- **Setting sustainability performance targets**

The SLLP recommendations assume that the SPTs will be negotiated and set between the borrower and lenders for each transaction. A borrower may arrange its sustainability-linked loan product with the assistance of a sustainability coordinator or sustainability structuring agent, typically appointed from among the consortium banks. Targets may be set based on the borrower's internal strategy or with the advice of an independent external entity, with regard to market criteria. Such an independent opinion confirming the appropriateness of the adopted SPTs may be indicated in the loan agreement as a condition precedent to utilisation of the loan. This is a crucial part of the process and requires knowledge of the benchmarks typical for the targets relevant to the industry in question. Difficulty in identifying proper targets and setting realistic levels may be a factor discouraging borrowers from seeking loans of this type.

Confirmation that an SPT has been achieved during the loan term triggers reduction of the loan margin (initially set at a level similar to other loans on the market). Conversely, failure to achieve a target may result in an increase in the financing cost. The latter case may raise the question whether failure to achieve a target is a result of insufficient efforts by the borrower or is due to setting overly ambitious targets. As stated in the SLLP, "By linking the loan terms to the borrower's sustainability performance, borrowers are incentivised to make improvements to their sustainability profile over the term of the loan."

- **Reporting**

During the course of repayment, the borrower must present its progress in achieving the adopted targets (such as any external ESG ratings). To ensure transparency and credibility, businesses are encouraged to report their results publicly to the market. But if confidentiality is required, the borrower should at least share its results (together with the methodology and assumptions) privately with all of the lenders.

- **Review**

The manner of assessment of achievement of the indicated SPTs is determined on a transaction-by-transaction basis. If the borrower does not publish its market data and does not have staff qualified to make such assessments, it is desirable to engage an external, independent consultant to assess the borrower's performance against the adopted targets at least once per year. In most transactions of this type, the banks have required the engagement of an external expert.

An alternative could be to develop an internal performance report comparing the targets set and achieved. Particularly in the case of public companies who share their market data, a communiqué from the company based on an internal review may be sufficient for the bank. In any case, it must fairly present the methodology for the calculations. On this basis the bank will assess the borrower's effectiveness in fulfilling the lending conditions, which is the basis for determining the cost of the credit.

SLLP recommendations and the Polish market

As we suggested in the introduction, the market for transactions of this type in Poland is still in its infancy. The first transaction on the Polish market involving an ESG-linked revolving credit facility was conducted in September 2019. The borrower was one of the country's largest power companies, and the PLN 2 billion loan was granted for five years by a consortium of five banks. Santander Bank Polska, one of the lenders, acts as the ESG coordinator and agent. The agreed ESG targets will be evaluated by an external ratings agency, and the ESG rating will be provided to the banks. If it confirms compliance with the targets, the margin will be reduced. The proceeds of the loan may be used for purposes including renewable energy and increased energy efficiency, but in no case for purposes related to generation of power from coal.

We hope that this transaction encourages other Polish banks and borrowers to carry out further transactions financing the achievement of targets for sustainable growth.

Summary

The Sustainability Linked Loan Principles discussed above are intended to set a market standard that will consolidate the practice and spread the basic framework for functioning of sustainability-linked loans to a broader group of market participants. While the LMA standards are only non-binding recommendations, compliance with which is not enforced in any manner, due to the renown of the LMA its initiatives have a great impact on the market. Measures of this type at the level of lending institutions complement broader governmental and regulatory measures, particularly at the level of international institutions.

Loans fostering sustainable growth expand the set of pro-ecological products offered on the financing market. The market for loans of this type is at the early stage of growth and requires further measures aimed at standardising the product and methods for assessing attainment of sustainability performance targets (including taxonomy regulation). Nonetheless, even before obtaining key regulatory support, the value of loans of this type issued by lenders in international markets is growing quickly, and in 2019 already exceeded the value of "green loans" made. We hope that along with increasing awareness by companies and investors of the environmental impact of their operations, loans of this type will be used more extensively in Poland as well.

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Tokenisation of assets

Krzysztof Wojdyło

Despite last year's spectacular collapse in value of many cryptocurrencies, blockchain technology continues to grow. One of the most interesting phenomena observed in the world of blockchain in recent months is the increasingly bolder attempts to tokenise successive types of assets. This phenomenon has the potential to transform many areas of the economy and business models.

What is tokenisation?

When speaking of tokenisation in the context of blockchain technologies, we most often have in mind the process of using the standardised format of an entry in a decentralised ledger in order to create a digital carrier of certain value. The entry in the decentralised ledger itself is content-neutral, constituting only a technological solution, whose significance flows from other sources.

Cryptocurrencies are an example of a certain type of token, whose significance often derives from a convention established more or less formally by the community using the given type of token. In the case of other tokens, we can imagine situations where the significance of the given token is defined by a contract, declaration of will, or statute.

Does tokenisation make sense?

Tokenisation has many potential advantages. First and foremost, it can greatly increase the accessibility of a given asset. Using decentralised technologies (particularly public blockchains), after tokenisation a given asset becomes accessible to any user of the decentralised ledger. Secure and efficient trading in the asset on a global scale ceases to be a technological challenge.

This opens up a space for entirely new models of the economy. Investing in many types of assets could become much more democratic. The role of intermediaries animating traditional markets for trading in assets may be entirely reconfigured. Markets for some assets can gain a new liquidity. From this perspective, tokenisation is a very interesting solution, particularly for assets that so far have not been digital or which for various reasons have been subject to great practical limitations on trading.

Can everything be tokenised?

The process of tokenisation obviously has certain limitations. These involve to the highest degree types of assets that are already regulated in detail under existing legal systems. The regulations often define the form of such assets and set the rules for trading in them. These rules don't necessarily suit the nature and peculiarities of blockchain technology. Tokenisation of such assets may thus require changes in existing laws.

In other instances, tokenisation may be possible in technological and regulatory terms, but the significance of specific actions performed with the tokens will be defined by local laws, which may impose additional requirements and limitations on such actions. In that case, the technology will often have to adapt to the existing legal frameworks.

Relatively speaking, it is easiest to tokenise assets that are weakly regulated. In that case, the technology has practically unlimited room to manoeuvre.

Below I present examples of three types of assets which are currently the subject of efforts at tokenisation. Each has its own peculiarities, and this carries over to the details of the solutions applied and highlights the variety of challenges facing tokenisation processes.

Tokenisation of financial assets

The earlier model of digitisation of financial assets, particularly securities, assumed controlled digitisation, performed with the help of lawmakers and regulations. This was primarily because digital technologies functioned within a paradigm of centralised technologies (based on a central administrator). It was also necessary to ensure an adequate level of trust in the digital system. Thus a condition for digitisation of financial assets was prior creation of a legal framework and an appropriate system of oversight of institutions playing a critical role in the system (e.g. depositories of digital securities, clearinghouses and the like). Consequently, in developed economies financial assets already take a digital form in many instances. But they function within a highly centralised and regulated infrastructure. As a result, despite the existing technical possibilities, financial markets are still not fully globalised, at least from the perspective of the ordinary consumer. In many fields there is a high entry barrier, and the low added value generated in an era of low interest rates is largely consumed by intermediaries.

> A change that will potentially be brought by decentralised technology is the possibility of ensuring a comparable level of trust through cryptographic technologies, without the need for oversight of trading by intermediaries.

Thus technologically it is becoming possible to create truly global markets, open to practically every consumer, with a vastly reduced role for intermediaries.

This is such an appealing vision that it comes as no surprise that one of the most visible trends in recent months is attempts to tokenise traditional financial instruments. Further reports on companies' withdrawal from traditional exchanges are accompanied by increasing news of security token offering (STO) projects consisting of public offering of tokenised traditional financial assets. This doesn't have to do only with digitisation of such assets (as mentioned, most such assets are already in digital form), but first and foremost with extracting the added value potentially generated by decentralised technology but not offered by the existing infrastructure of financial markets.

In this context I must mention a very interesting solution that will soon be introduced into the Polish legal system: the regulations governing the simple stock company (PSA). They will permit the register of shareholders of such companies to be maintained using blockchain technology. This opens up the possibility of conducting interesting experiments aimed at the first attempts to tokenise the shares of Polish companies. Starting from January 2021, there will also be an analogous possibility for ordinary privately held joint-stock companies.

Tokenisation of IP rights

The digitalisation of intellectual property rights is even less advanced than in the case of financial assets. While digital registers of IP rights do exist, fully digital and efficient trading in IP rights (at least analogous to trading in shares on the stock exchange) remains impossible in practice. Among other factors, this is due to regulatory limitations setting the rules for trading in such rights.

> The disproportion between the current possibilities for conducting trading in IP rights and the potential flowing from tokenisation of such rights is thus even greater in the case of IP rights than for financial assets.

Additionally, the dominant business models connected with IP rights (at least in the music industry) are spurring a quest for alternative solutions.

There is an evident trend toward creating services enabling secure digitisation of certain content. An example is the German platform Bernstein (www.bernstein.io), which allows digital certificates of origin of content to be generated. Such solutions can facilitate and increase the security of many actions performed in connection with IP rights, such as confidentiality agreements and licensing agreements.

Another visible trend is creation of systems for managing IP rights in creative industries. The aim of many of these solutions is to break the monopoly of big streaming systems and create a space for direct interaction between creators and consumers of content. These solutions most often provide for the possibility of creating digital identities for works and base the administration of IP rights on smart contracts. This approach ensures a high level of automation (e.g. with respect to administering income from the sale of works, royalties etc) and greatly reduces the need for intermediaries. In such systems, IP rights can be easily transferable. An example of such a project is the American service eMusic (https://token.emusic.com).

These systems also facilitate the development of alternative models for interaction between content creators and audiences. Audiences can become joint holders of rights to the work, while using the work, promoting it, or supporting the artist via crowdfunding. Tokenisation also enables the creation of alternative systems for evaluating works. An example of a solution exploring such alternative models is the Singapore-based platform MusicLife (https://www.musiclife.io).

Because IP rights are currently strongly regulated, full tokenisation of such rights, opening up an efficient global market for trading in IP rights, would require legislative changes. Before that happens, we may expect to see many solutions supporting the management of IP rights that will not require legislative intervention.

Tokenisation of data

One of the most interesting tokenisation projects involves data—and not exclusively personal data. The projects I have in mind also involve, for example, machine-generated data, an area in which they are particularly intriguing. This is after all a highly promising market (given the growing importance of the "data economy"), which at the same time is practically unregulated. The fundamental legal issues involving non-personal data remain unresolved (the ownership of such data, their legal status, and so on).

The absence of excessive regulations means that tokenisation of data provides a huge space for technology to develop innovative solutions. It may even turn out that the framework for functioning of the data economy imposed by technology may have an overwhelming influence on the shape of future regulations of this market.

Projects for tokenisation of data most often involve creation of a shared standard for digitisation of data which will also enable efficient trading in such data, and development of new business models around the base infrastructure for this type of trading. One of the many advanced projects seeking to build the appropriate infrastructure for exchange of data based on blockchain technology is Ocean Protocol (https://oceanprotocol.com). It is ultimately intended to facilitate an almost entirely automated process for purchasing data or using data for example to develop algorithms.

In turn, projects like MetaMe (https://metame.com) attempt to change the paradigm for management of personal data by subjecting the data to the complete control of the data subject and making personal data into a kind of personal asset which, thanks to tokenisation, could become a source of passive income. Thanks to such solutions, data subjects could each create a set of data (often generated automatically, for example merely by using the internet), but remaining under their own control, which data subjects could then, in their discretion, make available (including commercially) to other interested parties under rules established by the data subjects themselves.

The next phase of the blockchain (r)evolution

The next stage of the blockchain revolution, tokenisation of assets, will not be an easy process. In many cases the technology will clash with existing, often inflexible regulations. But the added value blockchain can create may ultimately bring about changes in the legal system. This process will probably take a long time, but at least with respect to certain assets it seems inevitable.

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Antitrust problems of artificial intelligence

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The law firm was approached by a start-up creating software for monitoring and comparing prices of competitors in the e-commerce sector. The software enables analysis of large quantities of market data and automatic response to changes in the competition's prices and product line. It also uses elements of machine learning, where the software improves the operation of its own system. The startup wanted to commercialise its project, but was concerned whether it might be exposed to antitrust liability.

Price algorithms

Artificial intelligence has recently been a hot topic in the antitrust literature. Particular interest surrounds the issue of computer pricing algorithms used for automated comparison and adjustment of prices for goods or services in real time. The fundamental problem identified by the European Commission, the German competition authority, and others is the possibility of generating the effect of market coordination, which is one of the basic forms of anticompetitive arrangement. Application of such an algorithm could lead to reduced market uncertainty in the area of prices applied by competitors, unification of prices, or artificial raising of prices. This is because price algorithms make the market highly transparent. This allows a balance of prices to be achieved at a level higher than the market price, and also rapid response to any departures from the coordinated price level (systems can be configured to respond themselves to any departures in this respect).

In the context of antitrust liability, price algorithms used to enforce arrangements previously made by competitors are distinguished from those that have not been the subject of a concerted practice (or there is no evidence thereof) but can incidentally bring about the effect of price coordination.

An anticompetitive arrangement may include, in particular, knowing and intentional use of the same or similar price algorithm with the intention of unifying prices of products, adjusting prices to those charged by competitors, applying the same level of discounts, or the like. An intention of concluding an arrangement may be ascribed to competitors when there is evidence showing a joint intention of competitors (e.g. in the form of email correspondence). The main anticompetitive problem in this respect is not the mere fact of using a price algorithm, but that it is used to implement a previously agreed price arrangement.

Such secondary application of price algorithms was attacked for example in decisions by the European Commission issued in July 2018 in the cases *Asus*, *Denon & Marantz*, *Philips* and *Pioneer*. In those decisions, over EUR 111 million in fines were imposed on manufacturers of home electronics (kitchen appliances, notebook computers, and hi-fi equipment) for fixing product resale prices with online stores. The producers also monitored execution of the arrangement using specialised software. A particularly negative impact of this practice on the market was found to result from the fact that most online sellers used software based on price algorithms, automatically adjusting the seller's prices to competitors' prices. The increase of prices by players covered by the resale price maintenance schemes constructed by the electronics manufacturers also affected prices of other competing retailers.

Another example is a decision by the British competition authority issued in August 2016, involving online stores operating on the Amazon platform. It was found that Trod Ltd and GB eye Ltd had violated the prohibition on anticompetitive arrangements by agreeing that they would not compete on price (would not undercut each other's prices) when selling goods via Amazon UK. For implementation of this arrangement, the parties used specialised programming, exploiting a function through which prices applied by companies could be ignored, and prices set instead at a level somewhat lower than other online stores. In this case as well, application of the price algorithm was secondary, and intended to execute arrangements previously made by Trod and GB eye.

Hub and spoke

Doubts may also arise in a situation where there is no direct evidence that the undertaking using software agreed to fix prices using a price algorithm.

It may also happen that information between competitors on the use of the algorithm is exchanged via the administrator of the programming. In that case, competition law allows for a finding of antitrust liability based on the concept of a hub-and-spoke arrangement. Hub and spoke is an anticompetitive arrangement with a mixed vertical/horizontal character. It is used when competitors operating on the same level of trade (the spokes) formally have no contact with one another, but are linked by a conveyor of price information (the hub). For example, a manufacturer might convey price information to members of a network of retailers or distributors of a product. Vertical arrangements between the manufacturer and individual members of the sales network are used to implement a horizontal arrangement between the members of the network.

The antitrust authorities may also rely on a concept of tacit approval, according to which the lack of express distancing from involvement in an illegal arrangement (e.g. by express refusal or by notifying the competition authority) means implicit involvement in the arrangement. Thus the addressee of correspondence transmitted by the administrator of the programming containing a proposed price arrangement, or an entity using the functionality of a price algorithm for consolidation of prices, may be accused of joint participation in the arrangement because it failed to distance itself.

The Court of Justice of the European Union cited these conceptions in the context of computer programming in C-74/14, *Eturas* (judgment of 21 January 2016). The court was responding to a request for a preliminary ruling by the Lithuanian court considering an alleged arrangement concluded by the owner of an online travel booking system called E-TURAS with travel agencies using the system. The arrangement consisted of unification of the level of discounts via this programming. Information about limitations on discounts, coming from the administrator of the programme, appeared in the booking system. A software function limiting discount levels was also implemented. The Court of Justice held that in such case, it could be found that the travel agencies participated in the agreed practice from the time they learned of the discount information transmitted by the administrator of the system.

Liability of programmers

In the context of the startup seeking the firm's advice, the key issue was the liability of the creator and owner of software for contributing to the existence of a concerted practice, when there is no evidence that the software developer proactively organised a system for coordinating prices or intermediated in the exchange of information between users of the system, e.g. by including a function in the software limiting the level of discounts in online prices. This could apply to cases where the startup grants licences to use software for analysing competitors' prices, but does not interfere in operation of the algorithm by users of the programming or have any contacts with them concerning how it is used.

In this instance, it would be hard to apply the concept of a hub-and-spoke arrangement. But it is a thin line. The concept of an arrangement under antitrust law is broad, and also covers situations where there are common economic interests between the participants in the arrangement (European Commission decision of 19 December 2007 in *MasterCard*, COMP/34.579). From this position, it is not far to assigning liability to the owner of programming who benefits from the sale of licences.

In this context, the decision by the Luxembourg competition authority of June 2018 may be relevant. The case was initiated against Webtaxi, owner and operator of a platform allowing users to book a taxi via telephone, internet, or a mobile app. The Webtaxi platform assigned the nearest taxi to the customer and set the price of the service using a uniform algorithm covering price per kilometre, distance, traffic conditions, and an initial fee. The price set by the algorithm was binding on the passenger and the driver and not negotiable. Ultimately the Luxembourg authority decided that even though the Webtaxi system technically constituted a price arrangement, it qualified for an individual exclusion from the ban on anticompetitive arrangements. This was because of the benefits generated by the system for consumers and businesses, consisting primarily of low prices for trips and a shorter waiting time (for the customer waiting for a taxi and for the driver waiting for a fare). But it should be stressed that in this case it was the system as such that was questioned, not the use of an algorithm by competing businesses.

Legal liability of AI

Another relevant issue is the possibility of ascribing liability to the developer of programming for potential consequences of the action of the machine-learning system which were hard to predict when creating the system. This is connected with the issue of AI as a legal entity and legal liability of an AI as such. AI could be regarded for example as a representative of a legal person or as vested with a separate legal personality, comparable to that of a natural person or legal person (see Aleksander Chłopecki, *Sztuczna inteligencja – szkice prawnicze i futurologiczne* (Artificial intelligence: Legal and futurological sketches)).

The answer to this question seems to have secondary importance for antitrust liability. The competition authorities will probably find that even if the creators of programmes did not have complete control over the effects of a machine-learning system, one way or another they will bear responsibility for its actions. Antitrust liability is essentially independent of the undertaking's fault, and will attach to both intentional and unintentional actions. In public statements in 2016, European Commissioner for Competition Margrethe Vestager said that undertakings employing an automated system should know how it works, and will be regarded as fully responsible for the effects of its operation.

It is apparent that price algorithms can encourage coordination and consolidation of prices, and in certain instances may be regarded as an impermissible anticompetitive arrangement. Commercialisation of such algorithms is therefore not free of antitrust risks, even for a seemingly neutral entity such as the software developer.

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Data protection and new technologies

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The EU's General Data Protection Regulation has been in force for a year and a half, but some issues under the regulation remain controversial. Since the initial wave of implementation of the GDPR, interest in this topic has dropped, but when national supervisory authorities began to impose the first fines for infringement of the GDPR there was a renewed interest in adapting businesses' internal documentation and operations to the new rules. This trend has not spared entities in the new technologies sector, particularly FinTech. In this article we signal some of the key issues relevant for examining the correctness and completeness of GDPR implementation in the tech industry.

Peculiarities of personal data protection in new technologies

In all projects based on processing of large quantities of personal data by numerous entities, it is vital to establish the roles of these entities in data processing operations. It may be particularly challenging to determine precisely which companies within a corporate group are acting as a data controller and which as a data processor. If personal data collected by a Polish entity are transmitted to another entity with which it has capital ties, this will often involve entrustment of processing of personal data to the other entity, which requires conclusion of a data processing agreement containing elements specified in the GDPR.

Another issue that must be considered when assessing the correctness of implementation of the GDPR in entities operating in the tech industry is the need to conduct a data protection impact assessment pursuant to Art. 35 GDPR. Under Art. 35(1), "Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data." Poland's data protection authority, the president of the Personal Data Protection Office (PUODO), issued a communiqué on 17 June 2019 outlining examples of data processing operations which in the authority's view require the controller to conduct a data protection impact assessment. This communiqué can be helpful in analysing whether processing of personal data in a specific instance requires an assessment. For example, PUODO takes the view that an assessment must be made by:

- Social media and marketing firms profiling users of social media sites and other applications with the aim of transmitting commercial information
- Lenders assessing borrowers' creditworthiness using artificial intelligence algorithms and requesting data from data subjects not directly connected with an evaluation of their credit capacity
- Online shops offering promotional prices for specific groups of customers, if they use systems for profiling customers' purchasing preferences and automatically set promotional prices based on such profiles.

The GDPR precisely lays out the minimum elements that must be included in a data protection impact assessment. These include:

- A systematic description of the envisaged processing operations and the purposes of the processing
- Assessment of the necessity and proportionality of the processing operations in relation to the purposes
- Assessment of the risks to the rights and freedoms of data subjects
- Measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with the GDPR.

Conducting such an assessment requires not only in-depth knowledge of the company's specific operations and the flows of personal data, but also preparation of a justification demonstrating that the planned processing operations are proportionate to the purposes of the processing. Failure to comply with the requirements of Art. 35 GDPR may lead to imposition of administrative fines.

> It should be borne in mind that not only tech companies, but anyone who maintains a website and conducts online marketing of their own goods and services should have in place a transparency policy on collection and storage of customers' consents to marketing and use of cookies.

The cookie policy is an often-overlooked area, as presenting extensive information on how cookies are used on a site can interfere with the seller's efforts to create a user-friendly online experience. By way of illustration, in October 2019 the Spanish data protection authority imposed a fine of EUR 30,000 on a company that did not allow users of its website to block the collection of their data by cookie files. It may be expected that supervisory authorities in other EU member states will follow the lead of the Spanish authority in the area of cookies.

Data protection regulations and industry regulations

Implementation of the GDPR at entities operating in the new technologies sector requires not only an analysis of the GDPR provisions affecting the specific operation of such entities, but also consideration of other regulations that may apply to them.

With respect to FinTech companies, anti-money-laundering regulations, the Payment Services Act, the Banking Law, and regulations governing consumer credit may prove particularly relevant.

With respect to AML provisions, it should first be pointed out that they apply to entities with the status of "obligated institutions." These include national payment institutions, national electronic money institutions, small payment institutions, and financial institutions with their registered office in Poland. For these entities, the AML provisions may constitute a basis for processing specific types of personal data in the manner provided for in the regulations. Conversely, processing of personal data in compliance with the AML regulations by entities that do not have the status of obligated institutions may result in violation of the GDPR. This conflict is evident for example in the regulation authorising obligated institutions to copy customers' identity documents for the purpose of applying financial security measures. But an entity copying its customers' identity documents without such statutory authorisation would be violating the data protection regulations.

In turn, the Payment Services Act contains provisions under which payment service providers must process personal data to the extent necessary to prevent fraud in the use of payment services and to facilitate discovery and prosecution of frauds of this type by the competent authorities. It is up to the payment service provider to determine the "essential scope" of such data processing for its own operations and how to reconcile the scope of such personal data with the requirements of the GDPR, particularly the principle of data minimisation.

The special nature of the regulations introduced in the Banking Law and the regulations governing consumer credit in connection with entry into force of the GDPR also deserve attention. This has to do in particular with the regulations under which banks and other institutions statutorily authorised to issue credit shall provide to credit applicants (natural or legal persons, or organisational units without legal personality but with legal capacity) a written explanation of the lender's assessment of the prospective borrower's credit capacity. This explanation includes information on the factors, including personal factors, impacting the assessment of the borrower's credit capacity. Thanks to these regulations, persons applying for credit can monitor whether the factors considered in assessing their creditworthiness are factually correct, and if not they can exercise their rights under the GDPR, e.g. the right to rectify their data. These regulations are particularly relevant for entities using algorithms for automated decision-making in the process of assessing prospective borrowers' credit capacity. These entities must have a thorough understanding of the mechanisms applied by the algorithms they use and be in a position to respond precisely to requests from data subjects concerning how their data are processed in making credit decisions.

More challenges ahead

Undoubtedly the thickening regulatory environment for tech companies will generate new difficulties in implementing the GDPR in their organisations. This makes it all the more essential for organisations to have procedures and mechanisms in place enabling them to monitor the processing of personal data and continually adapt to further regulatory changes.

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Professional secrecy and the sale of receivables

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Trading in receivables, including securitisation, is a fairly common method for raising financing or at least clearing up an enterprise's balance sheet. But receivables are a specific type of asset, containing information about third parties—the debtors. Due to its sensitivity, this information is subject to legal protection on numerous levels—and not just as personal data. Participants in the market for sale of receivables are also covered by a regime of various forms of professional secrecy, constructed in a range of different ways.

Enactment of the EU's General Data Protection Regulation sparked a broad discussion of personal data. The popularity of this topic may instil an erroneous belief that protection of information concerning contracts, customers, suppliers and receivables is comprehensively covered by regulations governing the protection of personal data. But alongside those regulations, regimes governing professional secrecy also function, and they vary depending on the entities and industries involved. While the personal data protection system generally does not impact the possibility of trading in receivables, professional secrecy rules can hinder or effectively prevent the transfer of receivables or monitoring of their payment. While no regulations on protection of information expressly prohibit the transfer of receivables, the inability to share certain data with third parties can hamper the identification of the subject matter of the contract, i.e. the receivables and the debtors associated with them.

Access to information and sale of receivables: secrets of the original creditors

- **As secret as a bank?**

Banking secrecy, one of the best-known forms of professional secrecy, covers all information concerning banking activity obtained during negotiations and in the course of conclusion and performance of contracts under which the bank carries out such activity.

> In other words, as a rule a bank cannot share with third parties information that could identify its debtors, or data concerning credit issued to them, including the recoverability and outstanding balance of the credit.

The duty to maintain the confidentiality of this information is not absolute, and the regulations provide for exceptions. Some of these exceptions are hugely important for transactions involving the sale of receivables, affecting the subject matter of the transaction, requirements for the legal status of the buyer, or the manner of conclusion of the transfer agreement.

Information is excluded from the duty to maintain secrecy when sharing the information is essential for conclusion and performance of:

- Contracts for sale of receivables classified as bad debts under the regulation of the Minister of Finance on the rules for creation of provisions against banking risk—the bank may apply this exception only with respect to receivables that are not being repaid (non-performing loans)
- Contracts for assignment or sub-participation of receivables, if such contracts are concluded with a securitisation fund or an investment fund company creating a securitisation fund, or in the case of transfer of a receivable to a company issuing securities secured by securitised receivables—the legal status of the acquirer thus determines the possibility of the bank's conclusion of a contract transferring receivables other than those classified as bad debts.

It should be pointed out, by the way, that permission to disclose information covered by banking secrecy is also found in the Act on Financial Restructuring of Enterprises and Banks with respect to public sale of due and payable obligations. It is thus apparent that regulations on professional secrecy can affect not only the type of entities taking part in the transaction and the subject of the sale, but also the procedure for conclusion of the contract.

By contrast, it should be pointed out that non-bank loan firms and leasing firms are not subject to comparable restrictions of professional secrecy.

- **More secret than a bank: insurance companies**

The Act on Insurance and Reinsurance Activity contains regulations on insurance secrecy. An insurance company and its employees, as well as individuals and entities assisting an insurance company in performing insurance activities, are required to maintain secrecy concerning specific insurance contracts. It is recognised that all data identifying an insurance contract, including the fact that the contract has been concluded, are covered by insurance secrecy. Thus an insurance company cannot disclose to third parties information on a concluded insurance contract, the contents of the contract, the amount of the premiums, or the identity of the debtor.

Although the regulations governing insurance secrecy and banking secrecy may appear similar, the list of exceptions allowing disclosure of information to third parties differs greatly. In particular, despite the extensive list of entities with respect to which insurance secrecy does not apply, the act does not contain an express provision concerning an insurance company's sale or securitisation of receivables arising out of insurance contracts. This has caused the topic of trading in receivables by insurance companies to be accompanied by controversy for many years.

- **Telecommunications secrecy**

The broad area of telecommunications, covering primarily telephone, internet and television operators, is highly sensitive when it comes to users' data.

The Telecommunications Law devotes much more space to professional secrecy than do the banking and insurance laws discussed above, but telecommunications secrecy is framed differently. Telecommunications secrecy covers:

- Data concerning the user, provided however that data of users who are natural persons are processed on the basis of the Personal Data Protection Act
- The content of individual communications
- Transmission data, i.e. data processed in order to convey communications within a telecommunications network or calculate fees for telecommunications services
- Location data, apart from data essential to transmit a communication or issue a bill
- Data on attempts to make a connection between end users of the network.

Due to the sensitivity of data gathered by telecommunications service providers, the law regulates in great detail the access to such information by various entities.

However, there is no separate regulation governing the trading in telecommunications receivables. This may raise problems at the stage of sale of receivables or subsequent proof of the amounts, particularly if the acquirer of the receivable has to resort to data concerning for example phone calls made by the debtor.

Secondary creditors may also have secrets

- **Entities involved in servicing receivables**

Acquisition of receivables does not end the deliberations on limitations on circulation and use of information concerning the receivables. Whether information about sold receivables will be subject to protection under regulations different from those previously covering the same receivables will be determined by the legal status of the acquirer of the receivables, i.e. in practice whether the acquirer is a securitisation fund (a closed-end securitisation investment fund operating under the Act on Investment Funds and Management of Alternative Investment Funds) or a commercial-law company.

If the acquirer of a portfolio of receivables is a securitisation fund, all information about its assets will be protected (under the Investment Funds Act) as professional secrets, covering information concerning legally protected interests of entities performing activities related to the operation of an investment fund. This is regulated similarly to banking secrecy.

The set of persons who may access information about receivables included in the portfolio of an investment fund is limited. One of the groups to whom an investment fund company (TFI) managing a securitisation fund may provide such information is entities performing services for the fund or TFI, when necessary for performance of the services. Firstly these are entities to whom the TFI has entrusted the management of all or part of its investment portfolio, handling among other things administration and enforcement of the fund's receivables. This group also includes advisers and other entities providing services related to the securitisation process. The catalogue of such services is open-ended, but the Investment Funds Act lists among them for example insurance services, including insurance against the risk of the debtors' insolvency, as well as granting surety for the fund's obligations or guarantees issued to the fund.

The regulations governing professional secrecy arising under the Investment Funds Act do not apply to the further flow of information about receivables if the acquirer of the receivables is a company rather than a securitisation fund. In that case the information will be governed only by the regulations on protection of personal data.

- **Investors financing securitisation transactions**

In securitisation transactions, another group that may be interested in information about a portfolio of receivables acquired by an issuer is the investors financing the acquisition, particularly investors operating in the industry of collection of receivables or financing all or most of a securitisation transaction. Situations where securitisation is performed through a securitisation fund are subject to limitations.

> The investors' access to information about a securitisation fund's portfolio of receivables will depend on the number of investors and the type of bodies representing investors in the fund.

If the fund has only one investor, and its statute permits, the investor may obtain full access to information about the fund, including information about the receivables found in its investment portfolio and other assets. However, the information obtained must be maintained in confidence. If participants in the fund are entities belonging to the same capital group, the group is treated as a single participant, which enables the flow of information about the fund's receivables between the group's members.

If the fund has several unaffiliated investors, they may obtain access to information about the fund's assets through participation in bodies of the fund representing the interests of investors, i.e. the assembly of investors or the council of investors. In that case, the scope of information about the fund provided to the investors acting within the bodies of the fund must be suited to the scope of the bodies' entitlements and the needs of the investors exercising those entitlements. Much will therefore depend on how the competencies of the bodies representing the fund's investors are framed in the statute. The Investment Funds Act allows for certain leeway in this respect, but it must be borne in mind that investors' access to information about the fund's assets via the fund's bodies will be narrower than the access permitted to the sole participant of a fund.

Even a cursory glance at the issue of professional secrecy shows that this is an area that can influence the structure and type of entities participating in transactions involving trading in receivables, and is one of the key elements shaping this practice. Significantly, the scope of the regulations on professional secrecy that may apply to a given transaction will depend in each instance on the identity of the creditor. Moreover, the regulations are not mutually consistent, and rarely do they expressly address the disclosure of protected information for the purpose of trading in receivables. Therefore, the solutions applied in specific types of transactions will differ depending on the type and role of the entities participating in the sale and servicing of the receivables.

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Arbitration of corporate disputes

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A long-awaited change to Polish arbitration law enables disputes arising out of corporate relationships to be resolved in arbitration. A shareholder in a limited-liability company or joint-stock company may challenge a shareholder resolution before an arbitral tribunal. Polish law has generally become friendly to arbitration of corporate disputes.

The July 2019 amendment of the Civil Procedure Code expanded the jurisdiction of arbitration courts and introduced the possibility of resolution of corporate disputes before arbitral tribunals, including disputes alleging defectiveness of resolutions by company authorities.

The change in Polish arbitration law expanded the set of entities bound by an arbitration clause in a company's articles of association. Such an arbitration clause involving corporate relationships is binding not only on the company and its shareholders, as was previously the case, but also on the company's bodies and their members (Civil Procedure Code Art. 1163 §1).

We view this change as advantageous, and it was anticipated for a long time by both the business community and the arbitration community.

> The inability to arbitrate disputes involving setting aside or invalidation of corporate resolutions had no justification. It also made Polish arbitration law stand out from other legal systems, and not in a good way.

Previously a dispute arising out of a corporate relationship was arbitrable only if the dispute could be the subject of a judicial settlement (Civil Procedure Code Art. 1157; Supreme Court of Poland resolution of 7 May 2009, case no. III CZP 13/09), which automatically eliminated the arbitrability of disputes over corporate resolutions.

Corporate disputes, not only between the company and its shareholders, but also between the bodies managing the company and their members, often involve the soundness or validity of the most important decisions taken within the company. Such disputes require particular confidentiality in order to protect trade secrets, and for business reasons also require rapid and reasonable resolution. In corporate arbitration, a shareholder can directly exercise the right to challenge corporate resolutions as provided for in the Commercial Companies Code (Art. 250(1) and 422 §2, and Art. 252 and 425).

But for an arbitration clause to be effective in cases seeking to set aside or declare the invalidity of a resolution of the shareholders' meeting of a limited-liability company or the general meeting of a joint-stock company, the clause must provide for the obligation to announce commencement of the proceeding in the manner required for announcements in the specific type of company (Civil Procedure Code Art. 1163 §2). The company or the claimant has one month after commencement of the arbitration proceeding to make the announcement. Importantly, in cases of this type any shareholder may join the proceeding on one side or the other, thus avoiding an unnecessary proliferation of proceedings. The deadline for joining the proceeding is one month after the announcement.

Strengths of corporate arbitration

Corporate arbitration offers an opportunity to have a dispute resolved by a professional arbitrator or arbitrators selected by the parties, who will determine, in strict confidence, whether decisions by company bodies were taken in compliance with the law. Speed is undoubtedly an advantage arbitration has over the state courts in cases of this type, which by their nature require efficient resolution (as any lingering uncertainty as to resolutions adopted by the company, particularly those essential to the company's operations, is highly undesirable). Unfortunately, the award by the arbitral tribunal will also have to be recognised by the state court, and a party dissatisfied with the award can file an application to set aside the award. Hopefully when the state courts are relieved of the burden of resolving corporate disputes on the merits in at least two instances, they will efficiently decide post-arbitration cases (as a rule at only a single instance) seeking to recognise or set aside the arbitration award, and consequently there will be an overall savings of time due to this change.

Although the arbitration fee (even in the case of a hearing by a single arbitrator) will be higher than the court costs in a similar case before the state court, we expect corporate arbitration to gain popularity in Poland, just as it has for example in Sweden and Germany. Considering the professionalism and speed of resolution of corporate disputes by arbitral tribunals (and the absence of appeals in post-arbitration proceedings), it appears that the level of arbitration fees will be of secondary importance.

Multiple proceedings over a single resolution

If the subject of a corporate resolution is particularly sensitive or the interests of the shareholders conflict, it is easy to imagine that several arbitration proceedings might be commenced over a single resolution. In that situation, the arbitral panel appointed in the earliest-filed case will also hear all other cases seeking to set aside or invalidate the same shareholders' resolution. This solution is laudable due to the savings of time in resolving the dispute. But how it will affect the costs of the arbitration remains an open question. Perhaps arbitral institutions should consider introducing provisions in their fee schedules allowing fees paid in successive cases to be applied to the fees in the earliest-filed case, with a portion of the fees then refunded to the claimants pro rata in the award (or earlier). There is no justification for accumulating the fees incurred by all claimants and increasing the arbitration fee for the proceeding in which the award will ultimately be issued on setting aside or invalidating the corporate resolution.

Unanimous appointment of an arbitrator

If an arbitration claim is asserted by more than one person (or more than one respondent is named in the case), all persons on each side must name an arbitrator unanimously, unless otherwise provided in the arbitration clause (Civil Procedure Code Art. 1169 §2[1]). This practice is familiar to the arbitration community in the case of multiple parties on each side of arbitration proceedings, but this approach can prolong the phase of appointing arbitrators, and consequently the entire proceedings, or lead to an increase in substitute appointments. This is because if one side of an arbitration comprising multiple parties cannot agree jointly on a single arbitrator, the authority to appoint the arbitrator passes to the arbitration court's nominating body (e.g. Art. 17 of the SCC Arbitration Rules (Stockholm), Art. 12 of the ICC Arbitration Rules (Paris), §19 of the SAKIG Arbitration Rules (Warsaw)).

Which set of arbitration rules are binding on the parties?

Arbitration institutions around the world more and more frequently update their arbitration rules. This can cause confusion as to the procedural rules to be applied by the participants in the arbitration—arbitrators, parties, and counsel. The amendment to the Polish Civil Procedure Code introduces a solution drawn from international arbitration practice. Unless otherwise agreed by the parties, they are bound by the rules of the permanent arbitration court in force as of the date of filing of the claim seeking arbitration (Art. 1161 §3). An advantage of this approach is certainty and clarity on the rules of procedure under which the dispute will be heard.

Before the amendment, unless otherwise agreed by the parties they were bound by the arbitration rules in force on the date they made the arbitration agreement. That could prevent the use of improved solutions adopted in the rules current as of the commencement of the proceeding, and also led to a conflict between this provision of the Civil Procedure Code and the rules of arbitral institutions which provided that unless otherwise agreed by the parties, the rules in force upon filing of the claim would apply.

Expansion of arbitrability in disputes over property and financial matters

The amendment also introduces a new rule affecting arbitration of all types of disputes, not just corporate disputes. It expands arbitrability to cover all disputes over property and financial matters (*spory majątkowe*), with the exception of alimony and support (*alimenty*) (Civil Procedure Code Art. 1157). The parliament took this opportunity to clarify that the condition of settleability (the requirement that the dispute could be the subject of a judicial settlement) applies only to disputes not involving property or financial matters (*niemajątkowe*). Consequently, the condition of settleability does not apply to disputes over property and financial matters.

In short, we regard last year's amendment as beneficial to Polish arbitration law, particularly the changes extending the set of cases that can be heard by arbitral tribunals. This brings Poland closer to the standards adopted in other arbitration systems around the world and eliminates unjustified restrictions in this respect. Moreover, expansion of the jurisdiction of arbitration courts should help unburden the state courts, thus helping achieve the overall aim of the amendment, which was to improve the efficiency of the judicial system in civil cases.

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When can a shareholder demand judicial dissolution of a limited-liability company?

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A situation where a shareholder decides to seek dissolution of the company typically involves a conflict between a minority shareholder and the majority shareholders or members of the management board. The position of a minority shareholder is complicated, as he has certain corporate rights guaranteed by the law or the articles of association, but must face the fact that decisions by the majority of shareholders will not always be acceptable to him. When there is a conflict between shareholders over what is happening in the company, shareholders often seek legal advice. This raises the question of when a shareholder can apply to the court to dissolve the company, and whether this is always the right solution to a conflict.

Corporate crisis: what next?

When establishing a company, the shareholders typically approach their cooperation enthusiastically, counting on business growth and future profits. At this stage they usually don't think about what might happen if they form differences of opinion, or even fall into a lasting conflict preventing their continued cooperation. A stalemate often arises when there are two shareholders in the company with an equal number of votes or with the same rights to appoint management board members. In such cases, the existence of an ongoing conflict may lead to a decisional impasse at the level of both the shareholders and the management board.

Another example of a conflict is where the majority shareholders minimise the role of a minority shareholder by stripping him of any influence over the company's affairs. Theoretically the minority shareholder could sell his shares, but in practice it can be hard to find a buyer. Clearly, a minority stake that significantly influences the distribution of votes in the company may have great value for the other shareholders. But when the other shareholders can already take key decisions on their own by outvoting the minority shareholder, it will be more difficult for the minority shareholder to identify a prospective buyer of his shares.

The reverse can also happen, when a minority shareholder seeking to force the majority shareholders or the company itself to buy out his shares at a favourable price employs corporate blackmail by threatening to file an application with the court to dissolve the company. We had the occasion to handle the case of a prosperous company against which a minority shareholder had filed an application for dissolution. The shareholder had ceased to work at the company and was dissatisfied with the dividend policy, as the profits were retained for the purpose of financing capital expenditures. Ultimately, after several years of litigation, the shareholder realised he would probably lose and withdrew the application. Nonetheless, during that time the company was exposed not only to litigation expenses, but also business difficulties due to reduced confidence among customers and suppliers in the stability of the company's existence.

Regardless of the reasons for the dispute between the shareholders, it would be best to resolve it amicably. First the opportunities for achieving this should be examined. But sometimes emotions run so high that cooperation cannot continue and must be brought to an end.

Is conflict sufficient grounds to dissolve a company?

The regulations provide that the court may issue a judgment dissolving a company, upon application of a shareholder or a member of the company's authorities, if it has become impossible to accomplish the purposes of the company or other important grounds have arisen out the corporate relationship (Art. 271(1) of the Commercial Companies Code). The code thus employs general terms that require analysis on a case-by-case basis.

Nonetheless, decisions from the courts have developed certain principles to follow when considering cases of this type. In the judgment of 16 April 2019 (case no. II CSK 66/18), upholding an existing line of decisions, the Supreme Court of Poland held that inability to achieve the purpose of the company must involve all of the activity provided for in the articles of association which the company was established to pursue, and must be of a lasting and objective nature. Ending the legal existence of the company at the initiative of a shareholder should be treated as a solution of last resort, when it would be difficult or impossible to apply other measures that could improve the situation in the company. The court stated in the justification for the ruling that not every exploitation of their position by a majority shareholder, or marginalisation of a minority shareholder, provides grounds for dissolving the company. It cannot be assumed that the mere existence of a conflict with one shareholder, involving a difference in the vision for conducting the company's affairs and its operating strategy, justifies dissolution of the company over the clearly expressed wishes of the other shareholders.

The court may dissolve the company at the request of a shareholder when there is a crisis in the company and the conflict between shareholders is not manifest in the minority shareholder being outvoted, but in the company authorities grossly exploiting the majority of the shareholders to deprive the minority shareholder of important contractual or statutory entitlements (Supreme Court judgment of 12 January 2018, case no. II CSK 207/17). Thus the mere fact that a shareholder is outvoted at the shareholders' meeting cannot be regarded as depriving the shareholder of his rights in the company. After all, when a minority shareholder joins a company he must accept the possibility that decisions taken in the company may not be to his liking.

In one judgment in which dissolution of the company was ordered, the court pointed to the existing relationships in the company, which displayed a strong aversion and mistrust between the shareholders, which consequently excluded their further cooperation and prevented normal and proper functioning of the company (Wrocław Court of Appeal judgment of 13 February 2015, case no. I ACa 1608/14). But the court also found that given the relations between the shareholders, the existing breakdown of votes for passage of resolutions made it objectively impossible to overcome the decision-making impasse.

Thus the emergence of a conflict between the company's shareholders does not necessarily mean that there are sufficient grounds to dissolve the company. That would be the case only if an existing conflict significantly and persistently impacts the functioning of the company, for example when due to disputes between the shareholders with an equal number of votes it is not possible to adopt resolutions, hindering the proper functioning of the company.

Conflicts over money

All shareholders, including minority shareholders, have a corporate property right to participate in the company's profits. The decision on allocation of the profit earned during the financial year rests with the shareholders, who will adopt a resolution on this matter. If a resolution on allocation of the profit is adopted with the aim of causing detriment to a minority shareholder, he may pursue his rights before the court through a claim to set aside the resolution. Sometimes shareholders don't receive dividends because the profit is retained within the company, which may stir opposition by minority shareholders, particularly if the majority shareholders draw other benefits from the company by serving on corporate bodies.

Considering a case of this type, the Supreme Court held that the fact that other shareholders exercise management and supervision over the company, appointed and operating in compliance with the articles of association, does not in itself constitute an infringement of the rights of a minority shareholder. This also includes conclusion by the company of contracts with shareholders conducting their own business activity (Supreme Court judgment of 16 April 2019, case no. II CSK 66/18).

But it is also worth noting the Supreme Court judgment of 22 April 1937 (case no. IC 1868/36), which continues to be cited by the courts today. There it was held that depriving a shareholder of a share in the profits for a number of years may constitute valid grounds for dissolving the company at the request of the injured shareholder if these profits are divided among shareholders employed by the company in the form of various benefits supplementing their pay. As the court stressed in the judgment cited above from 16 April 2019 (case no. II CSK 66/18), the relevant issue is whether the benefits obtained by the other shareholders are equivalent to the services they provide the company, and whether the company's cooperation with the shareholders is conducted in the interest of the company or to its detriment. This applies to compensation received from the company for serving as a member of the corporate authorities. A finding that there is a gross disparity in the benefits obtained by a minority shareholder compared to those obtained by the other shareholders must be based on a professional analysis by a person with specialised knowledge, which in practice often requires the court to appoint an expert to make this determination.

Another problematic situation that may lead shareholders to seek dissolution of the company against the will of the majority is losses incurred by the company. There the shareholders fear a loss in value of their shares due to the company's losses. In this case as well, the mere occurrence of a loss cannot be found to be sufficient grounds for dissolving the company, if the company has prospects for improving its results. In one case the court held that temporary or even longer-lasting economic difficulties do not justify dissolving the company if they are not insurmountable. It is irrelevant whether the reasons for this state of affairs can be blamed on shareholders or the company's authorities. Ultimately, the financial results of any enterprise only partially depend on its own efforts, as in a market economy they are also greatly impacted by external conditions (Białystok Court of Appeal judgment of 25 January 2018, case no. I AGa 27/18).

Grounds for judicial dissolution of a limited-liability company: summary

It is asserted in the legal literature that grounds justifying dissolution of a company include, among other things, the inability to reach decisions in the company, the absence of corporate authorities and the inability to appoint them, violation of the principle of equal rights of shareholders under Art. 20 of the Commercial Companies Code, a lack of interest in the company's affairs, a majority shareholder's notorious exploitation of its position, and loss of the company's capacity to act as a result of an ongoing conflict between the shareholders.

A shareholder demanding dissolution of the company by the court must show that he has no other way to exit the company. In that situation, measures ensuring the continued functioning of the company on the market should take priority. The procedures for dissolving a company offer a final resort, which should be applied only when the injury to the minority shareholder or the conflict between the shareholders cannot be cured in any other way, for example by sale of the minority shareholder's shares or challenging a resolution the minority shareholder disagrees with.

Establishment of the company is another extremely important stage that should be mentioned here. It is worthwhile to include mechanisms in the articles of association enabling a dispute between the shareholders to be resolved without having to apply the procedure for judicial dissolution of the company.

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Transfer of employees is not always automatic

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A Polish company, part of an international capital group, experienced a period of internal changes. One department that had previously carried out certain business processes was divided between different entities—two newly established Polish subsidiaries. These entities will continue to provide services to the parent company under an intragroup transition service agreement (of a long-term or short-term nature). During the preparations for this manoeuvre, it turned out that the only "asset" the client wanted to transfer to the newly established company was employees. Is this solution possible at all?

Clients often want to transfer employees automatically to a new entity. But this effect occurs only when the change in structure entails the transfer of all or part of the workplace to another employer within the meaning of Art. 23[1] of the Labour Code. Verifying that this is actually the case can be very difficult, and an incorrect assessment of the situation can generate numerous problems—particularly when the group includes a complex structure of entities that are employers operating in various locations, and under the contracts between the employers work is *de facto* performed for a different company in the group than the one that is formally the person's employer, or cross-employment is involved.

Transfer of workplace independent of the parties' intent

In practice, the transfer of a workplace (or part of a workplace) need not be connected exclusively with the sale by the prior employer of its enterprise or an organised part of its enterprise (or other transaction generating a comparable effect, such as lease of an enterprise). The list of activities that result in transfer of a workplace (i.e., actions causing "automatic" transfer of employees) is much broader. But it does not necessarily include a bilateral contract between the existing employer and an entity that would like to take over its employees. This is because the effect provided for in Labour Code Art. 23[1] is independent of the parties' intention, and cannot be caused by submission of mutual declarations by these entities with the intention of transferring the employees. Under Polish law an employment contract is binding on the parties who concluded the contract, and a change in the contract (including a change to the parties) should also reflect the wishes of the employee.

The assessment of whether there can be an "automatic" transfer of employees in a specific case is also difficult because the concept of transfer of a workplace or part of a workplace is not defined in the Polish Labour Code (Art. 23[1]), nor in its EU "original," Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the Transfer of Undertakings Directive).

Thus in such cases all the factual circumstances must be considered, in accordance with the test formulated by the Court of Justice in its judgment of 18 March 1986 in 24/85, *Spijkers* (and supplemented and expanded in a series of later rulings). There the court held that in determining whether there has been a transfer of an undertaking, it is necessary to consider "the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred," and—perhaps above all—"the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended."

Key role of supervisors

In our many years of practice, we have dealt with numerous cases involving HR-based sectors, where a group of employees can in itself constitute an autonomous economic unit subject to transfer. We can see from this perspective that in assessing whether a given situation may result in transfer of a workplace or part of a workplace, it is increasingly important to examine the extent to which the management structures and roles of the old (and new) supervisors are preserved.

For example, according to the judgment of the Court of Justice of 29 July 2010 in C-151/09, *UGT-FSP*, which is important in practice, a transferred economic entity preserves its autonomy within the meaning of Art. 6(1) of Directive 2001/23/EC if the powers granted to those in charge of the entity within the organisational structures of the transferor remain essentially unchanged within the organisational structures of the transferee. This refers to "the power to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organisational structures of the employer."

As the court explained, "The mere change of those ultimately in charge cannot in itself be detrimental to the autonomy of the entity transferred, except where those who have become ultimately in charge have available to them powers which enable them to organise directly the activities of the employees of that entity and therefore to substitute their decision making within that entity for that of those immediately in charge of the employees."

Risk of erroneous determination

If the employer erroneously assumes that employees have been "automatically" transferred to another entity, it can have far-reaching consequences. In one aspect, this involves social insurance contributions and advances against personal income tax, which the old employer continues to be responsible for if there has not been a transfer under Labour Code Art. 23[1]. In addition, if the new employer terminates the employment contract of an "acquired" employee, it is very likely that the employee will challenge the correctness of the termination in the labour court. This is because if the employee was never actually "acquired" by the new employer, the new employer also cannot terminate that employee, and any notice to this effect can be disputed before the court.

Difficult and costly individual transfers

So what should the employer do when there cannot be an "automatic" transfer of employees in the given situation? In that case, the transfer of employees may be achieved by dissolving the employment contract with the old employer and concluding a new employment contract with the new employer. But this solution also has its drawbacks.

First, it requires a great amount of administrative effort. Documents must be prepared for each employee in connection with the end of his employment (e.g. agreement dissolving the employment, final accounting, employment certificate), as well as documents required for commencement of the new employment (e.g. new employment contract, notice of terms of employment, notice on processing of personal data).

Second, if the restructuring covers a larger number of staff, it may meet the conditions requiring compliance with the burdensome procedure for group layoffs. This applies to an employer employing at least 20 people which in a period of 30 days or less delivers a notice of termination of employment contracts to 10 employees (if total employment is less than 100), 10% of employees (if total employment is 100 to 299), or 30 employees (if total employment is 300 or more). Significantly, employees whose employment is dissolved by mutual agreement, at the employer's initiative, as part of a group layoff, are also counted towards these limits if this affects at least five employees. Therefore, in a change of employers through dissolution of the old employment relationships and formation of new employment relationships, it is essential to plan and schedule the entire process, properly and in great detail, and to include appropriate provisions in the agreements signed with the employees, to ensure that if there is a labour inspection the employer is not exposed to an allegation of failure to comply with the Group Layoffs Act.

Third, apart from the risk of non-compliance with the group layoff procedure, there is also a risk associated with the obligation to pay severance benefits. Regardless of whether the employer is required to follow the formal procedure for group layoffs, if it employs at least 20 people there is a risk that it will have to pay severance benefits even if it has concluded an agreement with the departing employee. The amount of the severance pay ranges from one month's to three months' salary, depending on seniority (those employed less than 2 years are entitled to one month's salary; from 2 to 8 years, two months' salary; 8 years and up, three months' salary). However, the severance pay may not be higher than 15 times the minimum monthly wage (thus the maximum severance in 2020 is PLN 39,000). This risk can be minimised, however, by including appropriate provisions in the agreements concluded with employees dissolving their employment contracts.

Fourth, it should be borne in mind that departing employees will also be entitled to receive an equivalent for accrued but unused annual leave, which in some cases can greatly increase the cost of the entire operation. An equivalent for unused leave is a benefit treated the same as salary, meaning that the employee cannot waive the equivalent he is entitled to. This also applies where the new employer undertakes to provide the employee additional leave in an amount corresponding to the leave accrued under the old employer.

Conclusions

In short, when planning internal restructuring and division of business units, it must be borne in mind that the transfer of employees to another entity doesn't always depend solely on the intention of the employer. "Automatic" transfer of employees occurs as a result of transactions causing the transfer of the workplace or part of the workplace. If it appears from the circumstances of the case that the continuity of the operations and identity of the workplace will not be preserved after the planned restructuring, the employees will not be automatically transferred. In that case, transfer may be achieved by dissolving the existing employment contracts and concluding new ones with the new employer, but that may prove a more complicated and costly solution.

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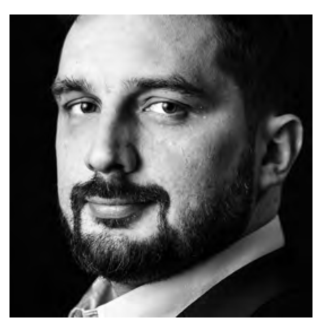
Protection of human rights in sports arbitration

Stanisław Drozd



Arbitration is a dispute resolution method particularly advantageous in the sports sector, especially in light of the principle of the autonomy of sport, which holds that sport should be managed by non-governmental institutions and function outside the authority of state bodies. This is justified by the significant potential for social impact inherent in sport. Sport can unite people and bring them closer, as well as divide and antagonise social groups or entire nations. Thus sport should operate free from the corrupting influence of political authorities.

The autonomy of sport and the principle of non-intervention by state authority (including the judiciary) in sports activity also arises out of the peculiarities of sport itself. Excessive involvement of the state judicial system in resolving disputes involving sports rules can distort the essence of athletic rivalry and undermine its supranational character. This is why sports disputes have traditionally been resolved through a private system of dispute resolution organised by international sports federations.

Human rights in sport

But sport is undergoing a revolution. In the era of digitalisation and automation of the economy, sport is becoming a major field in the leisure economy and attracting huge investments. Consequently, sport is wrestling with problems that have long affected other sectors of the economy (disputes over a just division of economic benefits between market participants, economic exploitation, discrimination, and fair competition).

But unlike state institutions handling traditional sectors of the economy, NGOs managing sport, particularly those operating under the traditional European organisational model for sport, were not designed to resist the tensions and conflicts of interest arising out of the commercial dimension of sport. Thus at every step sport stumbles over various scandals, and sports management institutions are losing the trust of society.

> There is increasing discussion of the need for greater respect for human rights and good governance in sport. This also applies to the sports justice system.

The best proof of this is the recent, well-publicised judgments of the European Court of Human Rights involving the right of access to the courts and the right to a fair trial in the sports sector (e.g. *Mutu and Pechstein v Switzerland*, applications no. 40575/10 and no. 67474/10). Whether the sports justice system rises to these challenges may determine whether sport remains an institution open to the global civil society or falls victim to populists seeking to subject it to strict governmental regulation.

Rebuilding trust in arbitration

International commercial arbitration as a whole faces similar challenges. Material determinism, consumerism, and abuse of economic freedom have led to a crisis in confidence in institutions of the global economy. One institution affected is international arbitration. This throws into doubt whether international commercial arbitration truly fosters fair and sustainable growth. Attention is drawn to the exclusivity and lucrativeness of this type of arbitration. There is criticism of the lack of mechanisms ensuring truly equal and fair treatment of parties to arbitral proceedings coming from different groups of stakeholders and guaranteeing due consideration for the rights of weaker participants in trade. Finally, it is alleged that arbitration serves the interests of the rich and influential, creating for them a bubble of a well-functioning justice system in a world where users of ordinary state judicial systems are more and more deprived of the right to a fair trial—whether due to the incapacity of the institutions that should implement this right or due to intentional abuse of authority.

The only just response to these challenges and method for rebuilding trust in arbitration is to increase its social responsibility and engagement.

Hague Arbitration Rules

A key step in this direction was the adoption in December 2019 of the Hague Rules on Business and Human Rights Arbitration. This is a set of arbitration rules drafted by a team from the Center for International Legal Cooperation especially with a view to ensuring a fair forum for resolution of disputes involving alleged violations of human rights by multinational enterprises (MNEs). The aim of the drafters of the Hague Arbitration Rules was to achieve the goal formulated in the UN Guiding Principles on Business and Human Rights: ensuring everyone impacted by the actions of an MNE the right to effective judicial or non-judicial remedy mechanisms. The drafters of the Hague Arbitration Rules correctly take the view that arbitration and the arbitration community can and should play an important role in realising this aim.

The Hague Arbitration Rules provide a range of solutions ensuring the weaker party to an arbitration dispute (assumed to be the party allegedly injured by the MNE) an effective opportunity to present its case (Art. 5 and 33(2)). They allow the arbitral tribunal to organise the procedure so as to protect the party from reprisal by the adversary (Art. 18 and 33(3)) or excessive financial burdens of the arbitration (Art. 53 and 54). They also allow the party to draw on the litigation support of non-governmental organisations (Art. 28). Transparency provisions of the rules allow the tribunal to recognise the legitimate public interest in the arbitration (Art. 38–43). The rules allow claimants to join forces and pursue arbitration together with others basing their claims on the same or similar facts (Art. 19).

The rules stress the possibility of issuing specific rulings in arbitration conducted under the rules furthering the protection of human rights (e.g. identifying and condemning unlawful practices), whether in the final award (Art. 45(2)), in a ruling on interim measures (Art. 30(1)), or in evidentiary rulings (Art. 32(2) and (4)). The rules include a Code of Conduct for Arbitrators, which according to the drafters provides more exacting standards than in ordinary commercial arbitration for examining conflicts of interest and disclosing information that could demonstrate the existence of a conflict of interest.

Advantages for sport

Similar solutions are needed in sports arbitration, particularly as such arbitration can be *de facto* and often *de jure* compulsory in nature, and often one of the parties approaches the dispute from a much stronger position (e.g. in disputes between a player and a club, or between a player and a sports federation).

> The rules of arbitral tribunals for sport and the procedures of sports disciplinary bodies lack basic provisions protecting the rights of weaker participants in the sports market.

Players are often deprived of the opportunity of asserting collective claims or grievances and the right to be represented or supported by a professional organisation. Clubs and federations often have various instruments of practical reprisal at their disposal, which can effectively discourage players from pursuing their rights individually.

And to pursue their rights, players must often pay high fees on claims or grievances, without the opportunity to seek relief from such fees, not to mention any recourse to free legal aid. If they turn to state authorities for assistance, they may expose themselves to various sanctions from the federation. From the state authorities, in turn, they often encounter a lack of understanding of their issues and rights, ineffectiveness, or an absence of good will.

Systemic solutions needed

Many representatives of the arbitration community have displayed social engagement and responsibility for years. This is evidenced by the numerous cases pursued *pro bono* by representatives in arbitration. A noteworthy example is an initiative by a fund involved in financing litigation (including arbitration), which created a foundation financing socially important litigation on a non-profit basis.

Many examples of activity of this type can also be observed in the sports justice system. It is enough to mention the programme for free legal assistance for players created by FIFA, or the cooperation of a group of five leadings sports lawyers with the International Ice Hockey Federation, in which the lawyers provide legal assistance for players in disciplinary proceedings.

But measures of this type founded on the good will of individual representatives of the arbitration community are not enough. Systemic and rule-based solutions are required. An example of an attempt to introduce solutions of this type in international commercial arbitration is the creation of the Hague Rules on Business and Human Rights Arbitration. Given the peculiarities of sports arbitration, it especially needs initiatives of this type.

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Judicial instructions humans can understand

Joanna Duda

The right of access to the courts, grounded in international law and the Polish Constitution, is secured by the right to procedural fairness. This is realised among other things by providing essential instructions on procedural initiatives to parties and other participants appearing without representation by professional counsel. The court thus may explain and inform the parties of actions that may be taken by the party. The court's failure to provide such instructions, or providing erroneous instructions, must not prejudice the parties' litigation position. But instructions will not achieve their intended aim if they are not understandable to the recipients because of their difficult wording or the professional jargon they employ.

Two judgments were handed down in late 2018 and early 2019 by the European Court of Human Rights in Strasbourg involving Poland's violation of Art. 6(1) of the European Convention on Human Rights, specifically the right of access to the courts. In the view of the ECtHR, the Polish courts deprived the applicants of access to the courts by failing to provide them appropriate instructions, even though the applicants were not represented by professional counsel.

Judgments by the ECtHR must be properly implemented at the national level, which imposes on the national authorities an obligation to take adequate measures to prevent further infringements of the right of access to the courts.

The appeal was inadmissible…

In *Parol v Poland* (Application no. 65379/13), the applicant (and plaintiff in the case before the Polish courts) was a prisoner who sought damages against four penal institutions for the conditions of his confinement. The court refused to appoint legal aid for the plaintiff. Then, after hearing the case on the merits, the court denied the plaintiff's claim for damages. Seeking to appeal the ruling against him, the prisoner applied for service of a copy of the judgment with a justification. The court served him with this, along with a written instruction on the deadline and means of filing an appeal (stating that the appeal must be filed directly with the court or through the post), but did not state how many copies of the appeal the prisoner must enclose.

The plaintiff filed the appeal within the designated period, but it had formal defects as it did not indicate the amount in dispute on appeal, as required, and did not enclose a copy of the appeal (for service on the respondent). Thus the court summoned the plaintiff to cure these defects.

> But the prisoner no longer had the original appeal in his possession, as he had sent it to the court, and thus could not prepare the identical copy demanded by the court.

He did try to fulfil the court's demand by requesting that the court send him a copy of the appeal at his own cost. Then he could make an identical copy of the appeal as required. That application was not considered, and so the prisoner prepared a pleading similar in content to the appeal previously filed, but not identical. Consequently, the court of second instance found the appeal to be inadmissible, as it was not filed in two identical copies (i.e. with the same content).

…because there weren't enough copies

In *Adamkowski v Poland* (Application no. 57814/12), the applicant (and plaintiff before the Polish courts) was also a prisoner, who sought damages for housing him in an overcrowded cell. After considering the case, the court denied the claim, and served a copy of the judgment on the plaintiff along with instructions.

The prisoner in this case also decided to appeal against the judgment. As in the other case, *Parol v Poland*, the prisoner did not enclose the required number of copies with the appeal, as the court had not instructed him in advance of this obligation. The court then summoned the appellant to file two copies of the appeal in accordance with the formal requirements. But as in the other case, the appellant no longer had a copy of the appeal, and thus wrote out by hand two copies of a pleading also titled an appeal, with content similar but not identical to the appeal as originally filed. For this reason, the court decided to reject the appeal as it did not meet the formal requirements.

Excessive formalism blocks access to the courts

In both of these cases, the ECtHR did not dispute that the requirement to submit appeals together with copies is set out in Art. 368 §1 in connection with Art. 128 §1 of the Civil Procedure Code. It also agreed with the representatives of Poland that the aim of enclosing copies of pleadings is the proper organisation of the justice system, and in particular to facilitate service of a copy of the pleading on the other party.

Nonetheless, in the view of the Strasbourg court, the national courts should avoid such excessive formalism, and instead seek a balance between the rigour designed to ensure fair procedure and flexibility within the bounds established by statute.

Moreover, the court found in both of these cases that the applicants had exercised the diligence that could be required of them, as each took the measures available to him to comply with the obligation imposed on him by the court to file copies of their pleadings. Given these facts, the ECtHR held that the decisions by the national courts displayed excessive formalism, which resulted in depriving the applicants of access to the appellate courts, thus violating Art. 6(1) of the convention.

Ombudsman raises the alarm

In February 2013 the Ombudsman submitted a statement to the Minister of Justice (ref. no. RPO-712911-IV/12/JP) in which he raised the problem of implementation of the courts' informational obligations. The Ombudsman pointed out that insofar as executive regulations pursuant to the Civil Procedure Code exist, the instructions under those regulations are worded exhaustively and do not raise doubts. However, he added, "In other instances the content, scope and form of instructions depends on the practice adopted in the given court, … and the greatest discrepancies in practice concern instructions on the deadline and method for filing appellate instruments," which in turn may result in depriving the party of "the possibility of obtaining appellate review of the ruling issued on the merits of the case." Identifying the need for uniform instructions to avoid the negative consequences of this problem, the Ombudsman requested that the Minister of Justice take a position on this issue.

But this problem was not solved at that time, as the Minister of Justice did not agree with the Ombudsman's position.

In light of the judgments of the Strasbourg court discussed above, the Ombudsman decided to submit another request to the Minister of Justice in this respect on 2 August 2019 (ref. no. IV.510.26.2019.KB). There the Ombudsman stressed that the right of access to the courts, regulated in the European Convention on Human Rights and in the Polish Constitution, includes the right to appropriate framing of judicial procedure, and this right is realised among other things by providing exhaustive instructions to the parties to litigation.

In the Ombudsman's view, the recently adopted overhaul of the Civil Procedure Code provides for the possibility of solving the problem of incomplete and dubious instructions issued to parties not represented by counsel.

Amendment for laymen

The reform of the Civil Procedure Code introduced by the amending act of 4 July 2019 expands Art. 5 of the code by adding the new Art. 5 §§ 2 and 3. These contain a statutory delegation authorising the Minister of Justice to issue a regulation specifying patterns for instructions required by the Civil Procedure Code to be issued in writing. In this respect, the minister should bear in mind the "need to ensure that the message is communicative." In the justification for the amending act, the drafters explained that "communicative" means that the instruction should "be worded in a manner more understandable to non-lawyers than has been the case." Moreover, the drafters indicated that "these patterns will be edited in cooperation with scholarly institutions involved in adapting professional vocabulary (in this case legal language) to the conceptual apparatus of the average Pole."

Patterns for such instructions, along with translations into foreign languages, should also be posted on the Ministry of Justice website.

Instructions will be more understandable from August 2020

In response to the Ombudsman's request, the Ministry of Justice stated that conceptual work has already been taken up on drafting of the regulation setting forth pattern instructions. The letter (ref. no. DLPC-V.053.3.2019) stressed that a priority in drafting the patterns is to make the instructions more understandable than they have been in the past, which the ministry seeks to achieve through cooperation with relevant scholarly institutions.

But some patience is required before the results of the work on the pattern instructions are seen, as the Minister of Justice has 12 months from the date of publication of the act amending the Civil Procedure Code (6 August 2019) to issue the executive regulation.

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Distribution of pharmaceuticals after legal changes

Joanna Krakowiak

Entities involved in distribution of medicines in Poland have had to deal with restrictive regulatory provisions for years. The latest amendment to the Pharmaceutical Law has tightened the restrictions even further. This does not help companies operating on this market, who face increased regulatory risk, or patients, whose access to treatment has worsened, not improved. How should outsourcing contracts in the pharmacy industry be framed, and can the statutory contractual model be modified?

Businesses on the Polish pharmaceutical market

Imagine a pharmaceutical company that offers its medicines in various countries, including Poland. This is an important market for the company, given the country's population, but not vital, because production occurs outside of Poland and, under pressure from the Ministry of Health, the prices for drugs covered by reimbursement from the health service are among the lowest in Europe.

For these reasons, the firm is forced to limit its operating costs, functioning as a representative of the marketing authorisation holder (MAH). To ensure the availability of drugs offered on the Polish market, it cooperates with a specialised logistics platform responsible for distribution of products to specific pharmaceutical warehouses. This type of business model is dictated by the economic realities. The firm has managed to create a system for supplying the market, complying with the regulations, smoothly operating and cost-effective, based on a contract with an external entity.

Trade subject to special oversight

As is commonly recognised, medicines are a special type of consumer product and thus trading in medicines in Poland, as in other EU countries, may be conducted only under strictly defined conditions. As stated in the preamble to Directive 2001/83/EC, "It is necessary to exercise control over the entire chain of distribution of medicinal products, from their manufacture or import into the Community through to supply to the public, so as to guarantee that such products are stored, transported and handled in suitable conditions." For this reason as well, every entity involved in wholesale distribution of medicinal products must be licensed.

In Poland, control over trading in medicines is conducted on two levels: trade is licensed, and the permitted direction of trade is defined. Licensing of trade requires that only licensed entities can appear in the distribution chain. As a rule, this licensing may take the form of a wholesale distribution licence (WDL), applicable to pharmaceutical warehouses, or retail distribution licences (RDLs) of various types, applicable in particular to pharmacies.

The permitted direction of distribution means that trade in a drug may be conducted only in one direction: from the MAH to the warehouse, and from the warehouse to the pharmacy, and then to the pharmacy's customer (in Poland this means essentially to the patient or healthcare provider). Thus, as a rule, medicines intended for trade by the MAH onto the Polish market cannot leave that market, and products leaving one link in the distribution chain (e.g. the warehouse) as a rule cannot return to that link. Additionally, a bone of contention for years has been the issue of the scope and rules for cooperation with logistics platforms and the wording of contracts for cooperation with them.

Vigilant regulator

In 2019 work was underway in Poland on another amendment of the Pharmaceutical Law. This time the drafting was caused by the need to ensure proper application of Commission Delegated Regulation (EU) 2016/161 of 2 October 2015 (known as the Safety Features Regulation).

> This regulation imposes on MAHs, manufacturers and participants in pharmaceutical trade a number of obligations intended to protect the market against entry into legal circulation of falsified products.

It also provides for an exemption from these obligations applicable to pharmaceutical wholesalers acquiring drugs from wholesalers designated by the MAH for distribution of drugs on its behalf. Additionally, there is a constant battle against the reverse distribution chain for medicines, i.e. the procedure of buying up drugs on the retail market with the aim of reselling them abroad at a price many times higher than the Polish price. Such trade is illegal, as it causes shortages on the retail market and unavailability of medicines in Poland. This applies primarily to drugs covered by the reimbursement scheme, including vaccinations. Along the way, while working on amendment of the regulations governing these issues, Art. 77a was added to the Pharmaceutical Law. Since 6 June 2019 this provision has regulated the issue of conclusion of contracts for storage and distribution of medicinal products.

A new approach to outsourcing contracts in the pharmaceutical industry

After many discussions, rules were adopted for entrusting the performance of certain activities to external entities on the basis of outsourcing contracts. During the debate, the complicated structure for distribution of medicines was criticised. Arguments appealing to reason were also raised, claiming that the drug market cannot function without outsourcing. Without it, undertakings operating on this market would suffer, but those who would suffer the most would be patients, whose welfare should be the foundation for any change in the Pharmaceutical Law.

- **Outsourcing only to the warehouse**

A contract for storage or delivery of medicinal products must be concluded between the MAH for the given drug and a pharmaceutical wholesaler holding a licence to store medicines and deliver them to third parties. Thus such a contract cannot be concluded by an entity that is the representative of the MAH or, for example, the manufacturer. The parties to the contract must be the MAH and the pharmaceutical warehouse.

- **Outsourcer must be the MAH**

Storage or delivery must take place on behalf of the MAH for the medicinal products, and additionally the contract must indicate the owner of the medicinal products as well as the address and unique identifier of the pharmaceutical warehouse where the medicinal products covered by the contract will be stored.

- **Wholesaler responsible for product**

Responsibility for quality assurance during storing and distribution of medicinal products that are the subject of the outsourcing contract is to be borne by the wholesaler. This means it is essential to define specifically in the contract the moment of passage of the risk of accidental loss or damage to the product.

- **Ban on subcontracting**

It was decided that the wholesaler cannot subcontract the activities specified in the contract (storage or delivery). This ban is probably the most burdensome, because in practice it eliminates the possibility of hiring specialised external firms to conduct the transport. For this reason, entry into force of this ban was postponed until 1 July 2020. Until then, undertakings must modify their business model to ensure that the need to subcontract certain activities is eliminated from the distribution chain.

- **Formal requirements**

To be valid, the outsourcing contract must be made in writing, and the wholesaler is required to transmit a copy of the contract to the Main Pharmaceutical Inspectorate (GIF) by email within 7 days after conclusion of the contract. (The copy transmitted to GIF does not have to include data on the method or terms for financing and settlement of the contract.)

Summary

In light of the aim of regulating outsourcing contracts under Regulation (EU) 2016/161, we may wonder whether it is possible to conclude an outsourcing contract framed differently than provided for in Art. 77a of the Pharmaceutical Law. It is clear that departure from the statutory model would result in the inability to take advantage of the exception allowing cooperating warehouses to avoid the obligations intended to protect the legal market from entry of falsified products (because such a warehouse would not have the status of a warehouse designated by the MAH). It remains an open question, however, whether within the restrictive confines of the Pharmaceutical Law there is room to apply contracts for any other type of logistics cooperation, or any departure from the regulated model would be regarded as an attempt to circumvent the regulations, not fitting within the increasingly tight rules for trading in medicines in Poland.

Meanwhile, to limit the regulatory risk associated with operating in this sector, undertakings must adapt their business models to suit the new outsourcing rules. They must also adhere to all the legally required measures of care and appropriately document them. These measures include not only basic issues such as verifying the release into trade of a series of products, the expiry dates and the storage conditions, but also regular review of the scope of their own authorisation and the authorisation of partners participating in trade (whether the licences are still valid and whether the planned transaction falls within the scope of the licence). In connection with the amendment, attention should also be devoted to internal procedures for verification of the status of buyers and the quantities of products purchased, as well as training of employees on the practical application of these procedures.

The amendment presents challenges not only for undertakings operating on the pharmaceutical market, but also for pharmaceutical inspection authorities. The new regulations will require appropriate interpretation, so as not to lose sight of the purpose of the amendment, which is to combat illegal export of drugs at risk of shortages, and not to impose severe punishment on any departure from the new regulatory requirements, particularly when it does not cause a real risk of illegal export of products.

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Another look at sobriety testing of employees

Katarzyna Żukowska
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In industries with a heightened responsibility for the safety of the public, employers have implemented preventive sobriety testing for employees entering the workplace, thus mitigating the risk of incidents involving employees who are intoxicated or under the influence of alcohol. The permissibility of such testing has become the focus of increased interest of employers since June 2019, when the Personal Data Protection Office issued the position that employers cannot conduct such testing.

We believe that the position taken by the Polish Personal Data Protection Office (UODO) is in principle incorrect. This is because there are situations where an employer is not only entitled but indeed obligated to conduct precautionary sobriety testing of employees. However, when conducting such tests, the employer must pay attention to issues involving protection of employees' personal data.

Entities authorised to conduct sobriety testing of employees

The law does not expressly provide for a right of employers to conduct preventive sobriety testing of employees. Nor does it expressly forbid such tests.

Under Art. 17(1) of the Sobriety Act, the director of a workplace or person authorised by the director is required to refuse admittance to work of an employee for whom there is a justified suspicion that the employee has appeared at work under the influence of alcohol or has consumed alcohol during working time. And under Art. 17(3), at the request of the director of the workplace or authorised person, or at the request of the employee, a test of the employee's sobriety shall be conducted by an authority appointed to protect public order (a blood sample is taken by a professional from the health service).

Art. 17 (1) and (3) of the Sobriety Act thus imposes on both the employer and the authority appointed to protect public order an obligation to take specific action under the indicated circumstances. In the case of the employer, this is an obligation to remove the employee from work, and in the case of the authority the duty to test the person if requested by an authorised person. But in no respect do the regulations exclude the right, or even the obligation, of the employer to take further-reaching actions in order to ensure safe working conditions, including preventive sobriety testing.

Nor does it appear that the legislature had the intention of introducing such a ban. According to the justification for the amendment to the Sobriety Act (in force from 1 July 2011) instating the current wording of Art. 17(3), the change only "introduced the possibility for an authority appointed to protect public order to test an employee's sobriety at the request of the director of the workplace."

The Supreme Court of Poland did hold in its judgment of 4 December 2018 (case no. I PK 194/17) that "from 1 July 2011 sobriety tests of an employee may no longer be conducted by a security official employed by the employer (or other person authorised by the employer), but this can be done only by a competent authority appointed to protect public order." It may be concluded from this that an employee's sobriety may be tested only by a public authority. However, in light of the reasoning presented in the justification for this judgment, the holding should be interpreted to mean that only a sobriety test conducted by a competent authority has full evidentiary capacity. This does not mean that an employer cannot conduct such a test on its own, but it must assume the risk that the evidentiary value of the result may be questioned. Therefore, if the test by the employer shows that the employee has been drinking, the employer should summon the competent authority to conduct a formal test.

Information on sobriety as personal data

The regulations do not specify whether information about an employee's sobriety or intoxication constitutes his or her personal data, or if so, whether it is treated as ordinary data or falls into a special category. In our view, such information does constitute personal data under Art. 4(1) of the EU's General Data Protection Regulation, which provides that personal data means "any information relating to an identified or identifiable natural person…."

In this respect, we also share the view of the president of UODO (https://uodo.gov.pl/pl/138/1076) that information on one's state of sobriety (or being intoxicated or under the influence of alcohol) constitutes personal data concerning the person's health. As recital 35 of the preamble to the GDPR states, "Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject." This includes, among other things, any information on "the physiological or biomedical state of the data subject" from sources such "a medical device." A person's "physiological state" is a broad concept, as physiology refers to functions and mechanisms within a living organism, and that includes functions and mechanisms related to consumption of alcohol.

Legal basis for processing personal data concerning sobriety

Data concerning health fall within a special category of personal data. In general, processing of such data is prohibited (Art. 9(1) GDPR), unless one of the conditions provided for in Art. 9(2) is fulfilled.

We believe that personal data about sobriety obtained by an employer as a result of conducting sobriety tests may be processed primarily on the basis of:

- Art. 9(2)(b) GDPR in connection with Art. 15 and 207 of the Labour Code (i.e., processing of the data is necessary for the purposes of carrying out the employer's obligations to ensure safe and hygienic working conditions, including protection of employees' life and health)
- Art. 9(2)(h) GDPR in connection with Art. 15 and 207 of the Labour Code (i.e. processing of the data

is necessary to assess the employee's ability to perform work).

The existence of such "necessity" is an essential condition for basing the processing of data concerning sobriety or intoxication on these grounds. This means that the situation of office workers should be viewed differently than staff performing, for example, work directly connected with rail or road transport, or handling substances hazardous to the life or health of other people or the environment. The employer may also be subject to industry regulations imposing further obligations on the employer, and these should also be considered when determining whether there are grounds for obtaining information about employees' sobriety or intoxication.

For the processing to be lawful, it is also necessary to comply with the principles set forth in Art. 5 GDPR (and to be able to demonstrate this), in particular the principles of purpose limitation; lawfulness, fairness and transparency; and accuracy. This means, among other things, that the rules for conducting preventive sobriety testing should be set forth in the employer's internal rules and made available to employees.

Art. 88 GDPR allows the member states to provide for more specific rules to ensure the protection of rights and freedoms in respect of the processing of personal data in an employment context, including discharge of obligations laid down by law as well as health and safety at work. We believe that under Polish law, such specific rules include Art. 22^1, 22^{1a} and 22^{1b} of the Labour Code. Art. 22^{1a} and 22^{1b} involve processing of employees' (and candidates') personal data on the basis of their consent. Given the risk of challenging employee consent as a valid basis for processing personal data, we believe that consent cannot be (safely) adopted as the basis for processing information on an employee's sobriety or intoxication (and for this reason we do not discuss that basis in more detail here). However, under Art. 22^1 §4 of the Labour Code, the employer may demand that the employee provide data other than that indicated in Art. 22^1 §§ 1 and 3, when necessary to exercise rights or discharge obligations arising out of Art. 22^1 §§ 1 and 3.

Employer's obligations laid down by law

The Labour Code imposes on employers an obligation to provide employees safe and hygienic working conditions (Art. 15), and the employer is required to protect employees' life and health by providing safe and hygienic working conditions applying relevant scientific and technological advancements (Art. 207 §2). The employer is also responsible for the conditions of health and safety at the workplace (Art. 207 §1).

Under §39(1)–(2) of the general regulations on occupational health and safety, the employer is required to ensure employment health and safety in particular by combatting threats connected with the work performed by employees, proper organisation of work, application of necessary preventive measures, and informing and training employees. This obligation should be carried out among other things by combatting threats, conducting assessments of risks associated with dangers that cannot be excluded, and eliminating threats at the source.

Employer's entitlements and burden of proof

If an employee reports to work under the influence of alcohol or has consumed alcohol at work, the employer may terminate the employee's contract, including with immediate effect due to the employee's fault, in connection with the employee's serious violation of his fundamental duties (under the procedure of Art. 52 §1(1) of the Labour Code). This is because according to the established line of decisions from the Supreme Court, maintaining sobriety during work and at the workplace is one of the employee's fundamental duties. The court has held that the employee bears this duty not only when he is performing work at the employer's location, but also when the employee is present at any other location during the time designated for performing work. There can be no margin of tolerance for the employee's use of alcohol during the time set aside for performing work, even if consumption of alcohol is practised or condoned by the employee's superiors. The employee's presence at the workplace in a state of intoxication excludes both the possibility of performing work but also remaining in readiness to perform work.

It should be pointed out, however, that in the event of termination of employment because the employee has worked under the influence of alcohol, and also when the employee is charged with a disciplinary fine or damages are sought against the employee for causing a loss related to such behaviour, the employer bears the burden of proof.

Proving that the employee was under the influence of alcohol is also relevant for the obligation to establish the employee's right to benefits under insurance covering on-the-job accidents. This is because proof of the insured's violation of health and safety regulations, caused by the insured intentionally or through gross negligence, deprives the insured of the right to accident-insurance benefits (Art. 21 of the Act on Social Insurance for Work Accidents and Occupational Diseases).

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The limits of contractual penalties against subcontractors and imposition of penalties when the contract is renounced

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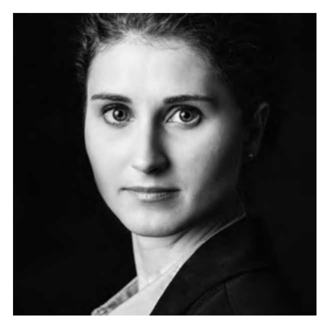

The general contractor hired to prepare a construction design concluded a contract with a subcontractor to perform survey work, including preparation of certified and uncertified design maps. The subcontractor was late performing these services and thus the contractor charged it with contractual penalties and then, due to further breaches, renounced the contract. In that situation, is there any rationale for the existence of a contractual penalty for delay?

The general contractor for a public project charged the subcontractor with contractual penalties for failure to make timely delivery of uncertified design maps, and also for delay in delivering certified maps. Both types of maps had to be returned several times for correction or supplementation, which under the subcontract provided grounds for charging contractual penalties. Due to the subcontractor's delay, the general contractor did not deliver maps to the contracting authority, for which the contracting authority charged the general contractor with a contractual penalty, limited to untimely delivery of uncertified maps. With respect to the certified maps, the contracting authority did not charge the contractor with any contractual penalties because the main contract did not provide for this possibility.

In the subcontract, §11(7) provided that "the general contractor shall not charge contractual penalties if the contracting authority does not charge analogous penalties to the general contractor." The subcontractor therefore argued that the general contractor could not charge it with a contractual penalty for untimely delivery of certified maps, as the contracting authority did not charge the general contractor with a penalty in this respect. The subcontractor did not dispute the possibility of charging it with a contractual penalty for failure to deliver the uncertified maps on time, but only claimed that such penalty could not exceed the amount of the penalty for the same delay imposed on the general contractor by the contracting authority. The subcontractor also argued that if the general contractor charged a higher contractual penalty, the subcontractor could apply to the court for mitigation of the penalty as grossly excessive.

During the further course of performance of the contract, the general contractor accused the subcontractor of further breaches of contract, and consequently renounced the contract with the subcontractor. In that situation, the subcontractor argued that due to renunciation of the contract, the only contractual penalty owed to the general contractor was the penalty for renunciation of the contract due to the fault of the subcontractor. This was an advantageous position for the subcontractor, because the contractual penalty provided in the case of renunciation of the contract was lower than the penalties imposed on the subcontractor for delay in delivering the maps.

Possibility of charging subcontractor penalties in light of contractual provisions

Under §11(7) of the subcontract, the general contractor could charge the subcontractor penalties only with respect to a breach (in this case delay in completing a stage of the contract) for which the contracting authority could also impose penalties on the general contractor. The general contractor thus had no right to charge penalties for delay in delivering the certified maps for design purposes, because penalties were not charged for this by the contracting authority.

But damages for the loss suffered by the general contractor due to the delay in delivering the certified maps could be sought under general rules, as late completion of the maps by the subcontractor contributed to the general contractor's delay in completing further stages of the main contract. Because of those further delays, the general contractor could be charged with further penalties or could face claims by other subcontractors.

Amount of penalties charged to subcontractor

In the subcontract, the amount of the contractual penalties which the general contractor could charge the subcontractor for delay in performing a portion of the contract was not conditioned on imposition on the general contractor of penalties in the same amount. The amount of the penalties for delay was regulated separately in the subcontract. The fact that this issue was regulated differently between the contracting authority and the general contractor did not limit the general contractor's ability to charge the subcontractor penalties in the amount provided for in the subcontract. However, imposition by the general contractor of penalties higher than it was required to pay the contracting authority could be considered in possible mitigation of the penalty by the court.

Damages under general rules—over and above contractual penalties

The general contractor could impose contractual penalties for late delivery of the uncertified maps, but the subcontract did not provide for the possibility of further imposition of penalties by the general contractor exceeding the indicated amount, in the event that there was consequent delay in performance of further stages of the main contract. However, the general contractor could pursue against the subcontractor damages in the amount of the costs incurred as a result of the subcontractor's delay exceeding the amount of the imposed penalties, under general rules, i.e. under Art. 471 of the Civil Code. Then the general contractor would have to prove that there was an adequate causal connection between the subcontractor's delay in performing a portion of the subcontract, and the circumstances constituting injury to the general contractor, within the meaning of Civil Code Art. 361 §1, which provides, "A person liable to pay damages shall be responsible only for the ordinary consequences of the act or omission from which the injury arose." This means that the costs incurred by the general contractor must be a further consequence flowing from the sequence of events arising out of the subcontractor's late delivery of the uncertified maps.

Contractual penalties despite renunciation of the contract?

Under the first sentence of Civil Code Art. 395 §2, "In the event of exercise of the right to renounce the contract, the contract is deemed not to have been concluded." Renunciation of the contract exerts effect *ex tunc* ("from the outset"), meaning that the legal fiction is adopted treating the contract as never having been entered into. This entails the need to recreate, as far as possible, the legal state that existed prior to conclusion of the contract (*restitutio in integrum*). This means eliminating all consequences occurring during performance of the contract, including the contractual penalties for delay. The claims for payment of contractual penalties for improper or untimely performance of the contract must therefore be regarded as a nullity, as they are secondary to a contract that has been eliminated. The only exception could be a contractual penalty provided for in the event of exercise of the right to renounce the contract, e.g. as a result of missing the deadline for delivering the work (see Supreme Court of Poland judgment of 5 October 2006, case no. IV CSK 157/06). Such a claim for payment remains in force because it is not connected with the performance of the eliminated contract as such, but is an element of the arrangements agreed by the parties under the principle of freedom of contract, specifically in the event of renunciation of the contract.

Thus under the facts presented, in the absence of contractual provisions to the contrary, the subcontractor should indeed be released from payment of contractual penalties for delay in delivering the maps in question. The general contractor could demand only a contractual penalty for renunciation of the contract due to the subcontractor's fault.

Renunciation *ex tunc* and *ex nunc*

Under these facts, the parties did not modify in their contract the default statutory effect of renunciation (*ex tunc*). It should be added, however, that parties can contractually modify the consequences of renunciation from those provided for in Civil Code Art. 395 §2. In practice, parties often exercise this possibility by providing in the contract that renunciation shall exert effect *ex nunc* ("from now on"), i.e. it will affect only the portion of the performance not yet fulfilled by the parties. The possibility of renunciation of the contract with effect for the future is a consequence of a recognition in the given instance that the performance under a contract to perform a specific work is divisible, because if it were indivisible the contract could be renounced only in its entirety. It should be pointed out that renunciation of a contract effective *ex nunc* is essentially similar to the institution of termination of a contract upon notice.

Difference between "retroactive effect" and "future effect"

The same method of settlement in the case of both consequences of renunciation does not mean, however, that there is no practical difference between them. The differentiation between *ex tunc* effect and *ex nunc* effect of renunciation is relevant for claims for contractual penalties as well as interest on delay accrued up until the date of renunciation.

> In the case of renunciation with future effect, there is no doubt that the duty to pay assessed contractual penalties and interest remains in force.

Either party may also pursue damages for improper performance of the contract by the other party. It should be pointed out, however, that accrued penalties and interest should not be wiped out in the event of retroactive effect if the parties agreed otherwise in the contract. It appears proper to maintain them in force, as otherwise a party breaching its contractual obligations for a certain time could unfairly avoid responsibility as a result of renunciation *ex tunc*.

In summary, if the parties provide for a contractual right of renunciation, it is also worthwhile regulating in the contract the specific issues related to exercise of this right. The law leaves most of these issues to the discretion of the parties (under the principle of freedom of contract). The only aspect that cannot be effectively modified by the parties is the necessity to set a backup date by which the right to renounce the contract must be exercised. It is also important, although not mandatory, to define the effect to be exerted by the renunciation—*ex tunc* or *ex nunc*—as well as the rules for settlements between the parties, including the possible right to maintain demands for payment of accrued contractual penalties and interest on delay.

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Abuse of procedural rights as an infringement of competition law

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The amendment of the Civil Procedure Code from November 2019 introduced Art. 4[1], under which parties and other participants in proceedings must not exercise a right provided for in the procedural regulations in a manner inconsistent with its intended purpose (abuse of process). This provision codifies the view long present in the legal literature and court rulings that misuse of procedural measures is an unlawful act. Abuse of process occurs when a party takes a legally permitted procedural action for purposes other than those foreseen by the legislature. An action that formally complies with the letter of the law, but violates its spirit, will not be protected.

It is also clear that if abuse of process—an unlawful act—causes an injury, the perpetrator can be held liable in damages under the general rules set forth in the Civil Code.

Examples of abuse of process

The literature and judicial decisions offer the following examples of abuse of process:

- Initiating numerous judicial or administrative proceedings for an aim other than protection of the litigant's own rights (vexatious litigation)
- Instituting legal measures despite lacking a legal interest in the case
- Serious, intentional violations of procedure taken to the detriment of the other party
- Exploiting procedural regulations to achieve improper aims
- Intentional delay of proceedings
- Filing unjustified claims in order to block others' entry onto the market, force them to withdraw from the market, or limit their presence on the market
- Involvement in proceedings aimed at obtaining undue rights to the injury of third parties
- Involvement in proceedings with the aim of unjustifiably imposing additional obligations on competitors
- Involvement in proceedings by sham public-interest organisations with the aim of hindering issuance of an administrative decision to competitors of the organisation's members
- False allegations made with the aim of worsening a competitor's situation.

Abuse of process and competition law

Competition law steps in when actions such as those described above are taken to injure a competitor.

Under competition law, this situation may essentially be classified as one of the following:

- Abuse of a dominant position (Art. 9 of the Competition and Consumer Protection Act)
- An act of unfair competition (Art. 15 of the Unfair Competition Act)
- A specific type of conspiracy, if the procedural measures are pursued by several undertakings in an agreed manner (Art. 6 of the Competition and Consumer Protection Act).

The courts have taken the view that the pursuit of legal measures by an undertaking may constitute abuse of a dominant position if two conditions are met: "an undertaking in a dominant position brings an action (i) which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party, and (ii) which is conceived in the framework of a plan whose goal is to eliminate competition" (*ITT Promedia NV v Commission*, Case T-111/96, judgment of the Court of First Instance of 17 July 1998).

> Abuse of process also constituting abuse of a dominant position is threatened not only with civil liability for damages, but also fines imposed by the Office of Competition and Consumer Protection (UOKiK) of up to 10% of annual turnover.

The case is similar if the abuse is the result of a conspiracy between two or more undertakings. Significantly, in either instance (abuse of a dominant position or conspiracy), the Act on Claims for Redress of Loss Caused by Violation of Competition Law of 21 April 2017 is also applicable. That act greatly facilitates the pursuit of claims for damages due to a conspiracy or abuse of a dominant position.

Conversely, abuse of process that qualifies only as an act of unfair competition (and thus does not arise from a conspiracy or abuse of a dominant position) is threatened only with civil sanctions (Unfair Competition Act Art. 18). In that case, the injured party cannot benefit from the Act on Claims for Redress of Loss Caused by Violation of Competition Law.

When is abuse unlawful?

A major problem in practice is how to distinguish between legal measures actually pursued to protect legitimate legal interests from those pursued with the aim of unfairly injuring a competitor.

The decisions from the courts do not provide unequivocal guidance on this issue. In my own view, two fundamental, universal criteria should be examined: good faith and due diligence. We may depict the application of these principles using a hypothetical example.

An undertaking applies for a licence (administrative decision) to sell a product whose sale without the licence is restricted. An association applies to participate in the proceeding as a public-interest organisation, but the members of the association are competitors of the undertaking applying for the licence. The undertaking objects, alleging that the organisation's aim is to hinder its access to the market. The organisation claims for its part that the product in question is harmful, does not meet the applicable standards, and also infringes the rights of third parties. In support of its allegations, the organisation submits a range of documents and other evidence. The organisation's joining the proceeding causes delay in issuance of the decision by the authority, and the decision is negative. Ultimately the decision is set aside by the court as clearly contrary to substantive law. The court also finds that there was no basis for admitting the organisation as a party to the proceeding.

Was the action taken by the putative "public-interest organisation" in furtherance of its procedural rights (Art. 31 of the Administrative Procedure Code)? Or was it an abuse of that right? Who is responsible for the loss suffered by the undertaking as a result of the delay and defectiveness of the administrative decision: the organisation, or the administrative body issuing the decision?

To answer these questions, it should first be established whether the organisation was acting in good faith and with due diligence.

The organisation could be found to be acting in good faith if its joining the proceeding was caused by a genuine belief that the undertaking's products were bad and harmful for users, and thus the organisation had to defend the public interest. To determine whether this genuine belief existed, the standard of due care can be applied. The organisation would act with due care if, for example:

- Before joining the proceeding it sought to clarify disputed issues with the undertaking
- It engaged independent technical, legal and security experts to reliably confirm the organisation's concerns
- It added value to the proceeding by raising substantive arguments
- It gathered objective, reliable evidence to back its claims.

Good faith should also be tested by examining the general circumstances of the case: the context in which the case arose, who had the greatest interest in obtaining a certain result, whether the organisation took similar action in other comparable situations, and the like.

If the organisation passed these tests, it could be found that its actions fell within the bounds of the law and were not an abuse of process—even if ultimately the authority or court did not uphold its position. That would mean proper exercise of the legal measures at its disposal.

However, if it were found that by acting in bad faith, the organisation misled the authority or court or hindered its activity, then liability for the loss caused by the erroneous or delayed administrative decision would be borne by the organisation, and not the State Treasury (for the court or administrative body). If the fault or liability for abuse of process were *de facto* imposed on the public authority or court which failed to deal with the abuse, then the institution of abuse of process would serve no purpose, as the consequences would not fall on the party to the proceeding which abused its rights.

Considering the foregoing example, it could also be considered whether the action by the self-proclaimed public-interest organisation whose members are market rivals might also constitute a form of conspiracy, i.e. a prohibited arrangement between competitors. If so—and there are rulings providing grounds for such a classification—then the organisation's actions could be treated as a violation of Art. 6 of the Competition and Consumer Protection Act. Such treatment would in turn enable application of the Act on Claims for Redress of Loss Caused by Violation of Competition Law. In practice, this would greatly improve the litigation stance of the undertaking in question and increase its chances of winning a trial seeking damages for the loss it suffered as a result of abuse of process which also constituted an infringement of competition law.

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Corporate participation in criminal proceedings as an injured party

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Companies and partnerships can fall victim to criminal offences. The most typical involve actions to the detriment of the firm by board members or managers, fraud, embezzlement, and detrimental actions by debtors. In such situations the firm may initiate criminal proceedings against the suspected perpetrators. In the trial, the firm has the status of an injured party.

Who is an injured party?

A company or partnership whose legal interests have been directly threatened or infringed by a criminal offence can be an injured party. A legal interest is a value protected by law, e.g. financial interests, property or reputation. Infringement of a legal interest means that the offence violates that interest. A legal interest is threatened when it is exposed to a risk of infringement. An infringement of, or threat to, a legal interest must be direct; that is, the offence must impact the legal interest or immediately threaten it.

For example, if the former CEO of company A misused the powers vested in him and caused a financial loss to company A, the party injured by the action causing a loss to the company is company A—not company B, its majority shareholder.

Another example: the purchasing director of company C accepted a bribe in the form a hidden commission from a representative of company D in exchange for a decision to purchase goods of company D, even though the goods were more expensive and of lower quality than goods offered by its competitor, company E. In this situation, the entity injured by the manager's corruption is company C, as it has suffered a direct financial loss: as a result of the decision by the manager inspired by the kickback, company C has purchased more expensive goods of lower quality. Company E is not regarded as an injured party, although it has indirectly suffered a loss (i.e. its offer was not selected).

Directness is an element differentiating a party injured by a criminal offence, which may pursue its rights in a criminal trial, from a party injured by an impermissible act (tort), which may pursue its claims in a civil trial even if the claim arose indirectly from the tort but has an adequate causal link with the tortious act.

How to initiate criminal proceedings?

Typically, acts causing injury to companies occur in situations and commercial relationships which law enforcement authorities are unaware of. Often they are discovered as a result of an audit or internal investigation. Thus prosecution of such offences usually requires initiative of the company: submission of a notification of suspected offence to the authorities. This may be done in writing, or orally and memorialised in a protocol. Written form is recommended in the case of commercial offences because they tend to be complex and involve extensive documentation.

Written notification of an offence to some degree resembles a statement of claim in a civil proceeding. Mainly the circumstances are described, and the act is analysed in terms of fulfilment of the statutory elements of an offence, accompanied by requests to take testimony from persons connected with the case and enclosure of documents supporting the circumstances described in the notice.

The notice should be exhaustive, because a criminal proceeding will not be initiated unless there is a justified suspicion that a crime was committed. Thus the suspicion of an offence must be substantiated.

Who acts as the company's representative?

In a criminal case, procedural actions are taken for a firm by the authorities authorised to act for it. Partnerships are thus generally represented by the partners, and companies by the management board. It is also accepted that a commercial proxy may represent a firm in a criminal case as a person authorised to act for the firm. So much for theory. In the case of bodies with multiple members, the question naturally arises who in particular should represent the firm in the proceedings. This requires two issues to be addressed.

First, the personal configuration of the firm's representatives should reflect the rules for representation of the firm as established in the articles of association or the law (also taking into account in the case of partnerships the inability for partners to represent the partnership when they have been deprived of this right). For example, if joint representation by a management board member and commercial proxy is provided for in the case of a company, those persons should sign the documents filed by the company in the case, such as the application for prosecution of the perpetrator or the application for a ruling requiring the perpetrator to redress the injury to the company.

Second, it is worthwhile for the firm to be represented by the partners or management board members who oversee the aspect of the firm's operations affected by the act causing injury to the firm. That individual usually knows the most about the company's operations in this area, any irregularities that have occurred, and any remedial measures taken. For example, if materials disappear from the company's warehouse and there is a justified suspicion that the materials have been misappropriated by the warehouse manager, who answers to the sales division overseen by the company's vice president for sales, it is usually advantageous for this member of the management board to represent the company in the case.

Difficulties arise when the individual partner or management board member representing the company is himself a potential suspect. In that case, as far as possible the rights of the injured party should be pursued by the other partners or management board members, after excluding the partner or management board member in question from representing the firm in a manner provided by law (e.g. by recalling the person from the management board).

Apart from these possibilities, the firm may also appoint an attorney. Unlike in a civil proceeding, this cannot be an employee (unless the employee is an attorney-at-law). In criminal cases, the set of possible attorneys is limited to professional counsel, primarily advocates and attorneys-at-law.

How companies can act in a criminal trial

A company's participation as an injured party involves the engagement of its representatives in certain procedural activities, such as testimony of its representative as a witness. It should be pointed out that the person testifying in this capacity does not have to be a person representing the company.

Often employees or collaborators not serving on the board, e.g. a lower-level manager who has uncovered the irregularity in question, have more extensive knowledge of the matter, and they are the ones asked to testify to the circumstances of the case and the acts covered by the notification of suspected offence. This is one of the first actions taken in the case after filing of the notification.

The potential inconvenience associated with involvement in the hearing is made up for by the extensive rights the firm has when it appears in the case as an injured party. For example, the firm may apply for admission of evidence and actively participate in other activities in the case. In terms of evidence, the firm may submit documents (such as invoices, contracts, findings of internal investigations, and detectives' reports) and other materials (e.g. surveillance camera recordings) demonstrating commission of an offence, and request analysis of such submissions by law enforcement authorities. The company may also request that certain data or documents be obtained by law enforcement authorities from institutions (such as banks) or request interrogation of specific persons. Participation in the case generally means attendance during interrogation of witnesses, experts and suspects, and the possibility of putting questions to them.

Can civil claims be pursued in a criminal trial?

A special entitlement of the injured party is the right to pursue civil claims in the criminal proceeding arising out of the offence. In the case of firms, this generally involves the possibility of seeking redress of the loss caused by the offence.

Such damages cover both the immediate loss (e.g. the value of misappropriated property) and lost benefits (e.g. the value of the fee under a contract which could not be performed because of misappropriation of assets that would be used to perform the contract). It should be pointed out that the duty to redress loss includes statutory interest on delay (and thus it is important to summon the perpetrator to redress the loss and set a deadline for performance—even before submitting a notification of suspected offence).

The company should apply for redress of loss suffered due to the offence up until the closing of the judicial hearing in the principal trial (generally, until admission of evidence before the court of first instance is closed). The duty to redress the loss is ordered if the perpetrator is convicted by the court. The unsatisfied portion of the claim may be pursued by the injured party in civil proceedings.

Prosecution: alongside or in place of the public prosecutor?

The involvement by a corporate injured party need not be limited to the preliminary proceedings by law enforcement authorities. It may also pursue its rights in the proceedings before the court.

If the public prosecutor submits an indictment to the court, at any time up until commencement of the main trial before the court (the prosecutor's concise statement of the allegations against the accused), the injured party may file a statement that it will act as an auxiliary prosecutor. Then it will appear in the trial alongside the public prosecutor against the accused.

In certain situations, when the public prosecutor does not file an accusation, the injured party may also prepare its own indictment and appear against the accused in place of the prosecutor. Then the injured party itself will exercise the accusatorial rights in the proceedings before the court as a subsidiary prosecutor.

Why get involved in a criminal trial?

It is worth posing the question of whether involvement in criminal proceedings can generate any added value for a company, given that the firm's principal aim is to earn a profit.

First, such involvement demonstrates that the company wants to clarify the circumstances connected with unethical actions causing it to suffer a loss. In particular, this involves circumstances whose clarification exceeds the company's own possibilities and requires the exercise of compulsion on the part of law enforcement authorities (e.g. obtaining documents subject to legally protected confidentiality, or hearing certain individuals). Initiation of this process may also be demanded by partners, shareholders, or supervisory bodies.

Second, filing a notification of suspected offence is a social obligation and also an expression of refusal to condone actions targeting the company or dishonest business practices. This shows lack of tolerance for such actions and has a deterrent effect on potential perpetrators of future offences.

Third, criminal proceedings can bring about redress of the loss suffered as a result of the offence. When losses are suffered due to a criminal offence, a significant advantage of pursuing damages within the criminal proceedings is that it can be more economical, as it does not entail the high filing fees charged in civil proceedings.

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Transparency between companies and shareholders: New rules

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Dematerialisation of shares in joint-stock companies, mandatory share registers, identification of shareholders, and the need to establish a remuneration policy for corporate authorities: these are among the changes awaiting companies in 2020. Among other things, these changes implement the EU's Directive on encouragement of long-term shareholder engagement.

An increasingly clear trend has been observed in the EU recently toward heightened transparency of public companies and protection of investors, while toughening oversight mechanisms and the legal basis for corporate governance rules. In Polish law, this is reflected in the Act of 30 August 2019 Amending the Commercial Companies Code and Certain Other Acts, and the Act of 16 October 2019 Amending the Act on Public Offerings and Conditions for Introduction of Financial Instruments into an Organised System of Trading and on Public Companies and Certain Other Acts. These changes include implementation of Directive (EU) 2017/828 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (known as Shareholder Rights Directive II or SRD II). The changes mainly involve dematerialisation of all shares, facilitating companies' identification of shareholders, the obligation for companies to adopt remuneration policies, rules for conclusion of related-party transactions by public companies, and the activity of proxy advisors.

Universal dematerialisation

From 1 January 2021, all shares in joint-stock companies will have to be dematerialised (no longer taking the form of a document), and new shares will have to be issued solely in dematerialised form. Shares issued in document form before that date will have to be submitted to the company (including public companies, if they issued such shares in the past) for the purpose of dematerialising the shares, i.e. entering them in the register of shareholders.

> To fulfil this obligation, companies will have to conclude a contract on operation of the register with an entity authorised to maintain securities accounts, and then summon shareholders five times to submit their share documents.

The first summons will have to be issued by 30 June 2020. Selection of the entity to be contracted to operate the register must be made by a resolution of the company's general meeting.

Share documents will lose force from 1 January 2021, and from that date entries in the shareholders' register will be in force. Shareholders who fail to submit their shares to the company by that date will have until 1 January 2026 to present their share documents to the company and thus prove their rights to the shares.

Mandatory dematerialisation will also apply to subscription warrants, utility certificates, founders' certificates, and other instruments involving participation in a company's profit or division of its assets. This expansion of the scope of the new regulations will be relevant among other things for management stock-option programmes, in which documentary subscription warrants are often used, subsequently converted into shares. Under the new rules, issuance of warrants will require registration in a securities account, which should be reflected in the timetable and costs for implementing such programmes.

Shareholders' register

Dematerialised shares in a non-public joint-stock company will be evidenced in an electronic register of shareholders, which will be freely accessible to the company and the shareholders. The selection of the entity operating the register will be made by the general meeting of shareholders, or by the founders in the case of a newly established company.

The shareholders' register will contain the principal data of each shareholder, information on the payment for the shares, restrictions on disposition of shares, and obligations to the company. Proof of shareholding will be a named share registration certificate issued by a brokerage at the shareholders' request.

Date of sale of shares

A significant change is that the effectiveness of a disposal of shares will be conditioned on entry of the acquirer in the shareholders' register. Acquisition or encumbrance of shares will occur upon making of an entry in the shareholders' register indicating the acquirer (or pledgee or usufructuary, as the case may be) as well as the quantity, type, series and numbers of the shares. The entity operating the register may make such an entry within one week from receipt of an application for the entry. This will cause a split in time between the actual acquisition of the shares and the parties' signing of the sale agreement. Thus the parties will need to remember to allow for the time required for actual passage of rights to the shares. Transfer of ownership of shares must be documented in a manner providing a valid basis for making the relevant entry in the shareholders' register.

This means that trading in bearer shares will be similar to trading in shares listed on the stock exchange. Under the old rules, the person in possession of the share document is regarded as the shareholder; under the new rules, the person entered in the shareholders' register will be regarded as the shareholder. There will be exceptions for acquisition of shares in an issue of new shares, when entry in the shareholders' register will occur after entry of the issue in the National Court Register, and for passage of ownership of shares occurring by operation of law.

Identification of shareholders

From 3 September 2020, entities operating securities accounts or collective accounts will be required to provide a listed company or persons authorised by the company information enabling identification of the company's shareholders and the number of shares held by each shareholder. This information will be collected via the Central Securities Depository of Poland (KDPW), which is a departure from the existing rules, under which a company's shareholders in the possession of bearer shares have not been known to the company, apart from exceptions arising from the obligation to report the acquisition of a significant stake of shares or to announce the shareholders' identity in order to participate in the general meeting of shareholders.

Remuneration policy

Previously, it was considered good market practice for a company to have a formal remuneration policy. Now, thanks to the 16 October 2019 amendment of the Public Offering Act, which adjusted Polish law to Regulation (EU) 2017/1129, the remuneration policy is to become a mandatory tool for realisation of a public company's business strategy and securing its long-term interests and stability. It will also increase the company's transparency.

This remuneration policy will apply solely to members of the management board and supervisory board, and will not cover key managers who are often treated in market practice as equivalent to management board members (as confirmed for example by the Best Practice for WSE Listed Companies, which expressly mentions key managers among the persons covered by listed companies' compensation rules). Nonetheless, the lack of a statutory obligation will probably not change companies' approach to corporate governance best practice, and thus remuneration policies for WSE listed companies will continue to cover managers as well as board members.

The remuneration policy adopted by the general meeting must contain, in particular, information concerning:

- Fixed and variable elements of compensation, bonuses, and other cash and non-cash benefits
- The duration of contracts with board members and the conditions for termination of their contracts
- Financial and non-financial performance criteria connected with the award of variable elements of board members' compensation.

The remuneration policy must also explain how the pay and employment conditions of employees of the company were taken into account when establishing the remuneration policy.

The supervisory board is required to prepare an annual compensation report presenting a comprehensive breakdown of all benefits received by or payable to members of the management board and supervisory board in the given financial year. The first such report, which will be subject to review by the auditor, must be prepared jointly for 2019 and 2020. The company will be required to post the report on its website for the following 10 years.

Proxy advisors

An interesting new institution being recognised in Polish law is the profession of shareholders' proxy advisor. This is an entity providing services involving analysis of information disclosed by a public company to help shareholders reach voting decisions on company matters. An entity wishing to act as a proxy advisor will have to fulfil a range of statutory obligations, involving for example publication on its website of information on the methodology used in its analyses and its code of ethics.

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We have discussed in this article only a few of the changes recently introduced in the Commercial Companies Code and regulations on public offerings and trading in financial instruments. Most of the changes enter into force in 2020. One of the key changes, involving dematerialisation of shares, will enter into force on 1 January 2021, but will require companies to implement a number of measures this year in preparation for the change.

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Public information: Essential even if inconvenient

Dr Maciej Kiełbowski

Access to public information is natural in a democracy governed by the rule of law. Public information should be accessible to a broad range of persons without imposing high administrative barriers. In practice, access to public information works well, but there are certain visible trends marring this attractive picture.

What is public information for?

We may wonder why anyone would need the right to public information. But it is regarded as essentially an obvious institution for contemporary democracies, one of the mechanisms for ensuring the transparency of operations by public authorities, institutions, and state-owned companies. As indicated in the legal literature, access to public information is designed to ensure societal oversight of public authority. And indeed that is the case in practice, as nongovernmental organisations and authorities such as the Ombudsman use requests for public information to pursue their fundamental tasks. Ordinary citizens also make freedom of information requests, as do businesses, for whom it may be relevant whether a contractor or competitor is benefiting from state aid or has obtained an administrative permit or approval.

Right to public information in the Constitution

The right to obtain public information was considered important enough to enshrine it in the Polish Constitution, Art. 61(1) of which provides: "A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury."

Even before adoption of the current Act on Access to Public Information, the administrative courts had held that this provision of the Constitution is a fully sufficient basis for obtaining public information.

What is public information?

Art. 61(2) of the Constitution provides in turn: "The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings." These issues might seem obvious, as anyone can attend sessions of the local council or the Sejm or Senate.

In practice, this constitutional clause has been clarified by a line of rulings by the administrative courts exercising oversight of public administrative bodies refusing to provide access to certain information. These rulings address what is public information as well as the form in which it is made available. This has given rise to a range of views on recognition of specific types of information as public information.

The following are examples of public information that may be particularly relevant for businesses and their operations in Poland:

- Information concerning amounts of funding through public monies and the entities receiving such funding (judgment of Province Administrative Court in Gorzów Wielkopolski of 14 November 2018, case no. II SAB/Go 98/18)
- Information concerning contracts for delivery of telecommunications services, including stationary, mobile and internet service, as well as bills and invoices issued under such contracts and lists of connections covered by such contracts in the possession of a public authority (judgment of Province Administrative Court in Gdańsk of 9 May 2018, case no. II SAB/Gd 12/18)
- Information in the form of an administrative decision granting a building permit, as well as the construction design (Supreme Administrative Court judgment of 10 January 2018, case no. I OSK 204/16).

What limits access to public information?

The right to public information is not absolute. The Constitution itself recognises certain limitations on access to information. Art. 61(3) provides that limitations on these rights "may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State."

> In practice, businesses often stipulate that contracts with public entities should be protected as trade secrets. Such reservations are often effective, although it is recognised that they are sometimes abused.

Such abuses are opposed by rulings from the administrative courts. Claiming trade secrets cannot be a universal tool for concealing any and all types of information. For example, as the Province Administrative Court in Poznań held in the judgment of 11 January 2018 (case no. IV SA/Po 1035/17):

> A reservation of secrecy is an exception to the rule of openness, and for this reason a public entity may not rely solely on the declaration by a business as to existence of a trade secret, but must make its own assessment of the reservation asserted by the business for the existence of a trade secret for purposes of the Unfair Competition Act. Assertion of a reservation may be effective only if the entity obligated to disclose information conducts an appropriate examination and makes a positive

> finding that the reserved information qualifies as a trade secret within the meaning of Art. 11(4) of the Unfair Competition Act. If this review shows that the reserved information does not constitute a trade secret, the asserted reservation becomes ineffective.

Another useful restriction developed through court decisions and the legal literature is the defence of abuse of the right to public information. This enables authorities to combat vexatious freedom of information requests unnecessarily engaging the time of officials involved in providing access to public information. An interesting example of such actions was addressed in a recent ruling by the Province Administrative Court in Kielce (judgment of 20 March 2019, case no. II SAB/Ke 6/19):

> The request for public information in this case, dated 29 November 2018, was the 18th request (letter) seeking information, each containing some dozen or more demands. They concerned details of the hiring of the chief accountant, deputy director, and director of the county labour office, including the details of the competition, CVs, documents confirming the candidates' education and essential qualifications, employment certificates, opinions from previous workplaces, employment contract, employment history, scope of duties, and certificate of a clean criminal record and lack of ban on holding an office related to the use of public funds. The petitioner also demanded to be provided the number of staff employed at the county labour office, broken down into employment contracts and civil contracts, detailed information on the list of attendance, a list of official automobiles and whether they are assigned to staff members, information on the internship involving the Youth Activation project, the number of applications for contracts to organise the internship in 2018, a statement of the number of persons pursuing the internship under each contract, a list of firms providing legal services to the county labour office, invoices issued by those firms, and the office's internal rules. … In the court's view, the content and quantity of the applications, as well as the coincidence in time between the termination by the director of the county labour office of the reimbursement agreement concluded with the petitioner's mother and the filing of applications for release of public information, nearly every one of which demanded extensive and detailed information, indicates that the petitioner is attempting to exploit the institution of the right to public information to achieve an aim other than concern for the public good of the right to transparency of the state and its structures, compliance with the law by entities of public life, and openness of administrative bodies. It appears from the totality of the case files that the request filed in this case is aimed at causing difficulty on the part of the addressee and hindering the operation of the county labour office. There is no doubt that the application in question objectively does not further any common good; it not only does not aim toward improvement in the functioning of the office, but to the contrary, is intended to cause it annoyance. Thus essentially the application does not further improvement in the performance of public tasks by the authority, but conflicts with performance of those tasks. The petitioner's behaviour rather endangers the right to information under Art. 61(1) of the Polish Constitution of persons seeking to enforce it in accordance with its purpose. This is because the abuse described above would absorb the authority and its forces and means, which could delay fulfilment of requests that do not constitute an abuse of the law.

Actions of this type are contrary to the purpose of the existence of the right to obtain public information.

Summary

From the perspective of over a decade of experience both seeking public information from a range of authorities and advising entities providing such information, my assessment of the functioning of this institution is positive. But more and more often applicants may be met with refusal to provide access to information due to an assertion of trade secrets.

If this claim is to avoid becoming synonymous with abuse, it should be analysed thoroughly by the authorities in each instance. For example, it would be hard to regard a contract concluded for a certain period as a trade secret when the authority itself has released scans of analogous contracts for another period in the public information bulletin (*Biuletyn Informacji Publicznej*).

As held by the administrative courts, a reservation of secrecy may be challenged. Thus parties should not hesitate to request public information, particularly when the information may assist them in some decision-making process or provide them with important knowledge.

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Due diligence: A commodity or a high-end service?

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In recent years there are louder and louder claims that legal due diligence preceding an M&A transaction is little more than a technical exercise, a repetitive, non-innovative service—in other words, a commodity. That may sometimes be the case, but it doesn't have to be, and indeed should not be. Smart planning and conducting of due diligence can deliver a high-end service properly securing the interests of the investor.

Due diligence is usually understood to mean an analysis of the legal status of the subject of the transaction, as well as the legal circumstances affecting the transaction itself, including the structure of the deal, the specific requirements concerning the parties to the transaction, and the steps that must be taken in connection with the proposed deal (including obtaining third-party approvals and regulatory decisions).

The common denominator for all of these areas should be the effort to identify essential issues, including risks, that may arise either in connection with the contemplated transaction or after it is completed. The latter area involves in particular issues connected with business operations using assets included in the transaction.

From train car to data room

Growth in technology over the last decade or so has radically changed how the typical due diligence is conducted. Even near the end of the first decade of the 21st century, due diligence usually involved the need to personally review originals (less often copies) of documents in the headquarters of the target company. In practice, this meant many days (or even weeks) of visits by a large team of lawyers, sometimes nearly paralysing the companies being analysed, which not only had to host the lawyers but also keep them supplied with documents and clear up any doubts as they arose. The process was thus not only costly and time-consuming from the perspective of the investor for whom the due diligence was conducted, but also extremely burdensome for the companies being analysed (particularly when the advisers from several interested bidders took turns conducting due diligence of the same target).

Today, just over a decade later, analysis of this type is almost entirely a thing of the past. It has been replaced by processes conducted using electronic tools (documents delivered remotely in virtual data rooms). This has not only reduced the costs on the part of the companies and investors (avoiding at least the expenses connected with shipping teams of lawyers across the country for a couple of weeks), but also enforced greater discipline on the part of the target companies (in the case of legal due diligence, their own lawyers and law firms). In the course of this change, a large number of activities not strictly connected with analysis of the supplied documents have been eliminated.

Identifying risks, not cataloguing documents

Finally (it seems) the approach to due diligence aimed at precise description of the legal status of the target and (which today seems crazy) each individual reviewed document has been abandoned. Now the aim of due diligence is rather to identify key issues from the perspective of the planned transaction, and issues relevant to operating the business after the closing.

Due diligence today

Undoubtedly, the due diligence process sometimes degenerates due to major limitations in scope and time of the review (whether imposed by investors seeking to hold down the costs of review, or by sellers adopting a "take it or leave it" attitude). An inadequate sample of material for review does not allow proper examination of the legal status (or sometimes also the factual status), and thus such an examination may not deliver reasonable results and findings of practical importance for the investor. It then becomes just another formality to be checked off the list in the runup to the transaction. That such an examination fails to serve a larger purpose is another matter.

An alternative to legal due diligence?

Meanwhile, some claim that a sufficient alternative to due diligence is to address issues of the seller's liability for any irregularities (or risks) involving the subject of the transaction in the sale agreement. Another solution is to purchase warranty and indemnity insurance to cover the seller's representations and warranties.

These solutions are not ideal, although on the surface they may be attractive to the investor (as it saves the costs of examination) as well as the seller and the company (avoiding costs on their side, limiting the risk of leaks of confidential data, and so on). It is primarily from the investor's perspective that they do not offer a realistic alternative to take the place of due diligence.

Why?

It comes as no surprise that buyers of a used car or a home on the secondary market (an entirely appropriate analogy, as M&A deals generally involve "used" entities, already operating on the market) will take a number of steps to ensure that the item they are buying has the characteristics they expect, is free of defects, and so on. Of course, legally they could merely rely on the protection offered to buyers by statutory warranties, but no one buying a car wants to follow up the purchase by entering into a long battle with the seller and litigating before the courts the existence and seriousness of defects in the vehicle.

So why wouldn't the same principle apply by extension to the acquisition of a company or its enterprise? The difference is that unlike a home or a car, a company is not a physical object. The company exists, operates its business, possesses property and so on only via certain legal institutions. Thus without legal analysis of a company, the prospective buyer cannot know whether the company actually exists, and whether it holds certain rights or assets (e.g. real estate or key elements of the production line).

Contractual instruments aren't enough

The contractual forms of security mentioned above, such as representations and warranties, offer a solution, but it is inadequate. First, they are always limited in time (up to a few years after the closing, at most) and value. Second, the effectiveness of such security will depend on the future condition of the seller. Will the seller have sufficient funds to satisfy potential claims by the buyer, and will its legal existence even survive long enough to face such claims?

Finally, it should be remembered that the aim of legal due diligence is not only to identify problems, but also to provide the buyer with important knowledge on the legal conditions surrounding the business operated by the acquired company (e.g. based on administrative decisions and licences it holds, or contracts concluded by the company). This knowledge is essential for planning the future operations of the target, its integration into the existing assets of the buyer and its capital group, etc. Contractual instruments alone (such as the seller's representations and warranties) may help acquaint the buyer with the legal and factual situation of the target, but do not do so completely. Their aim is not to serve as a substitute for proper examination of the target by the buyer itself.

Examples from practice

Many examples could be found showing that conducting legal due diligence makes sense. To illustrate this article, we selected a few particularly colourful examples that well illustrate the rationale for due diligence. In most cases, of course, the examination does not lead to findings of this sort, but it is up to investors to determine whether they are willing to assume the risk of not conducting due diligence and suffering potentially dangerous consequences.

- **Title to shares**

A conclusion that comes up surprisingly often in legal due diligence is that the seller essentially does not hold legal title to the shares being sold. As a possible defect in one of numerous prior transfers of share rights may result in the defectiveness of subsequent transfers, a scrupulous analysis of this issue is virtually indispensable. All too often the legal analysis shows that many years before, a transaction was made in an improper form (e.g. shares were sold without notarisation of the signatures), or that administrative approvals or spousal consent required under the circumstances was not obtained.

- **Title to real estate**

In one transaction, the investor was buying shares in a company providing engineering services. Key assets in this field include renown, experience (necessary to enter public tenders), tenders already won (concluded public contracts), and people. In this case, however, the company subjected to due diligence also owned real estate. Or to be more precise, it thought that it owned real estate. Essentially, as a result of the complex process for acquiring the property during the immediate post-communist era, the company had not actually acquired legal ownership of the property. Because the real estate was situated in a prime location, it represented a major portion of the price that the investor was planning to pay for the company. The finding that the company did not own the real estate allowed the investor to negotiate a significant price reduction and shift to the seller the obligation (and cost) of curing the defective acquisition of the property, in exchange for the prospect of receiving an additional payment (retained portion of the purchase price).

- **Occupational diseases**

Dramatic results were also obtained from an analysis of a plant used for manufacturing asbestos products. At the time the due diligence was conducted, the plant no longer manufactured such products, but it turned out that year on year there was an increasing number of employees (and former employees) complaining of symptoms characteristic for persons working in contact with asbestos. These findings allowed for securing of the investor's position by getting the seller to agree to share in the unavoidable costs of claims by persons who had once worked at the plant under conditions hazardous to their health.

Automated examination?

The growth in technology discussed above has greatly changed how due diligence is conducted, but another even further-reaching change lies ahead. This of course involves the use of artificial intelligence in the process of digesting and analysing documents. Work on the relevant technologies is already well advanced, but it will still be some time before they displace lawyers from involvement in the due diligence process to any great degree. Searching text based on key words and phrases is already steadily reducing the costs connected with review of documents. But this is no substitute for analysis of the identified materials by professional advisers. It is one thing to scan documents and determine their content, but something else entirely to properly read and interpret them (in light of knowledge of the regulations and relying on the experience essential for professional analysis). Only when professional know-how is applied can due diligence be regarded as a high-end, specialised service.

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A legal fiction for choice of law: A little-known but useful institution in cross-border inheritance cases

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The EU's Succession Regulation (650/2012), applied since 17 August 2015, introduced significant changes in determination of the controlling law and jurisdiction in international inheritance cases. It also provides the special mechanism of a legal fiction of choice of law, enabling the continued effectiveness of dispositions of property upon death made before 17 August 2015 by persons who died on or after that date. As the practice shows, this mechanism is not yet well-known to the courts and state offices, but relying on it may prove advantageous in international inheritance cases.

A client requested that we handle proceedings involving the estate of a friend of the family who had named the client in his will to inherit his entire estate, which included real estate in Poland. The friend of the client's family died in 2017 in the United Kingdom, where he resided at the time. But in 2011 he was residing in Poland, where he made the will in question before a notary. The decedent had dual citizenship, Polish and British. In his British documents he appeared under the English equivalents of his Polish forenames, and his surname was written without using Polish diacritical marks. His Polish passport, containing the Polish version of his name, expired in 2015, and before his death he had not applied for issuance of a new passport.

During the proceeding in Poland to confirm the inheritance pursuant to the will, the court had several doubts. Thus the court submitted inquiries to state offices and the Polish consulate concerning the decedent's possession of Polish citizenship in 2017, and also requested the Ministry of Justice to indicate the law of succession that should apply in the case. The responses greatly complicated the case, and the conclusions drawn from them could significantly prolong the proceeding.

The Ministry of Interior and Administration was unable to confirm the testator's Polish citizenship at the time of his death, but also said there was no indication that he had ever lost his Polish citizenship.

Nonetheless, as a precaution, the ministry suggested that the court suspend the inheritance case for our client to conduct an administrative proceeding to confirm that the decedent held Polish citizenship at the time of his death.

Meanwhile, the Ministry of Justice, citing the EU's Succession Regulation, stated that the law governing the decedent's succession should be British law as the law of the state where the decedent had his habitual residence at the time of his death. That ministry also found that British law should govern the formal validity of the will from 2011.

Fiction of choice of law in succession cases for persons dying on or after 17 August 2015 who made dispositions of property upon death before that date

The governing law under the EU's Succession Regulation is determined either under the general rule mentioned above (place of habitual residence at the time of death) or pursuant to a choice of law for succession matters made by the future testator in the disposition of property upon death. That choice of law is limited to the law of the state of which the testator was a citizen at the time of making the choice of law or at the time of death.

An integral part of the EU provisions on choice of law for succession matters is Art. 83(4) of the regulation involving the legal fiction of a choice of law—a provision completely ignored here by the Ministry of Justice but vital under the circumstances of our client's case. It states: "If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession." This mechanism covers all of the consequences arising from such an implied choice of law. If the conditions for adoption of this legal fiction exist, the governing law will be the law of the state under which the disposition of property upon death was made, so long as that is a law which the testator could have chosen under the Succession Regulation. Thus it could be the law of the state of which the testator was a citizen either at the time he made the will or at the time of death, if that is the law according to which the disposition of property upon death was made.

Consequently, the law governing succession from the friend of our client's family should be Polish law, because in this case, relying on Art. 83(4) of the Succession Regulation, there is a presumption of choice of Polish law as the law governing the inheritance. This legal fiction arose because in 2011, when the decedent made his notarial will, he lived in Poland and made a testamentary disposition of property in accordance with Polish law—that is, in accordance with the law of a state of which he was a citizen at the time he made the will.

Polish law as the law governing the formal validity of the will

The Ministry of Justice also cited the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, made at The Hague on 5 October 1961. Poland and the UK are both parties to this convention, and under Art. 75(1) of the EU's Succession Regulation, the provisions of the convention thus take precedence in establishing the law governing the formal validity of testamentary dispositions.

The provisions for determining the law governing the formal validity of testamentary dispositions under both the Hague convention and the EU regulation are based on the same construction, maximally enabling determination of the law governing the formal validity of testamentary dispositions. Under the rule favouring the validity of wills (*favor testamenti*), this is intended to facilitate respect for the final will of the testator and upholding of the will's validity. Thanks to the alternative nature of the grounds referred to in the convention, fulfilment of the formal requirements under at least one of the legal systems indicated in the convention allows the formal validity of the will to be upheld.

Under the situation described here, each of the links arising under the convention enabled a finding of Polish law as the law governing the assessment of the formal validity of the will. These links refer to the law of the place where the will was made, or of the testator's citizenship, domicile or habitual residence at the time the will was made, and, so far as immovables are concerned, the law of the place where they are situated. The possibility of applying British law in connection with the decedent's also holding British citizenship and residing in the UK at the time of his death does not necessarily mean that the formal validity of the will from 2011 had to be assessed under British law. Because each of these links could point to Polish law, and in addition this law was determined to be the law governing the succession from the testator, Polish law should be proper for assessing the formal validity of the will. Thanks to this, a uniform set of legal standards (all arising under Polish law) could be applied to all aspects of this inheritance case.

Holding Polish citizenship at the time of making the will—the decisive factor in this case

The need to clarify the issue of the testator's citizenship at the time of death, suggested by the Ministry of Interior and Administration, ultimately had no bearing on the case. Even if it were assumed that after 2015 (when his Polish passport expired) the testator lost his Polish citizenship and at the time of death was no longer a citizen of Poland, this finding would still be legally irrelevant. The key under the circumstances of this case was that the testator held Polish citizenship at the time he made the will, which in turn was officially confirmed on the basis of the testator's Polish passport valid in 2011. Because the testator held Polish citizenship at the time he made the will, and the testamentary disposition was made in accordance with Polish law, the legal fiction of a choice of Polish law as the law governing the succession should be applied. A hypothetical lack of Polish citizenship at the time of death would not in any way impact the finding of the law governing the succession or the law governing the formal validity of the will from 2011. Similarly, assuming that the testator held only British citizenship at the time of his death would in no manner be decisive of the law governing the formal validity of the 2011 will, as all of the links under the Hague convention enabled an indication of Polish law.

Summary

In light of the statements obtained from the Polish ministries, we presented an in-depth argument to the court on the need to apply the legal fiction of a choice of Polish law as the law governing the succession in this case. Consequently, the court rejected the erroneous conclusions and suggestions from the ministries on the application of British law in this case and the need to pursue a proceeding to confirm that the testator held Polish citizenship at the time of his death. This enabled rapid completion of the case, without the complicated process of determining the substance of British inheritance law or suspending the inheritance case until the question of the decedent's citizenship as of 2017 could be resolved.

Thus it is important to bear in mind the legal fiction of a deemed choice of law under Art. 83(4) of the EU's Succession Regulation, which may prove useful in many situations. This mechanism will continue to be applied for at least the next few decades, as it involves succession from persons dying on or after 17 August 2015 who made dispositions of property upon death before that date. This still little-known institution ensures that such dispositions remain valid and effective after entry into force of the EU's Succession Regulation.

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How to contain the growing costs of electricity?

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Enterprises have already felt the effects of the increase in electricity costs, but the worst is yet to come. This doesn't mean just the price of power as such, but also various fees charged in connection with power consumption. Fortunately these increases have been met by various forms of relief for enterprises, particularly from energy-intensive industries. Savings on power bills can be achieved not just by raising production efficiency and lowering total energy consumption.

Relief from the need to redeem green and blue certificates and RES fees

In their electricity prices, enterprises pay the cost of support for renewable energy sources based on issuance of certificates of origin (commonly known as "green" or "blue" certificates). They are received by generators of electricity from agricultural biogas (blue) and other renewable sources (green). In turn, sellers of electricity to end users are required to redeem the issued certificates, thus creating a system of trading in certificates, the platform for which—both bilateral transactions and exchange transactions—is the Polish Power Exchange (TGE).

Only producers who began generating green energy before 1 July 2016 are eligible to participate in the certificate-based system. From that date, the certificate system is replaced by a support system based on auctions, the costs of which are also shifted to customers (including enterprises) in the form of the "RES fee." The amount of this fee depends on the quantity of electricity consumed by the customer.

The legislature has created the possibility of relief for certain enterprises, known as "industrial customers." This relief consists of limiting the quantity of electricity for which certificates must be redeemed or the RES fee paid.

This status is held by an electricity end user which conducts its predominant commercial activity under certain codes of the Polish Classification of Activities (PKD) (the same code must be indicated as predominant in the commercial register). Moreover, such a customer must demonstrate an electricity consumption intensity factor of no less than 3%. This factor represents the share of total electricity purchase costs in gross added value, and is calculated according to guidelines set forth in an executive regulation. Electricity purchase costs may only include costs of electricity consumed for the enterprise's own needs (not, for example, costs of electricity reinvoiced to other entities).

The extent of the relief from the obligation to redeem certificates and pay the RES fee depends on the value of this factor:

- If the factor is no less than 3% and no more than 20%, then 20% of the quantity of electricity purchased for the enterprise's own use is exempt from the obligation.
- If the factor is more than 20% and no more than 40%, then 40% of the quantity of electricity purchased for the enterprise's own use is exempt from the obligation.
- If the factor is more than 40%, then 85% of the quantity of electricity purchased for the enterprise's own use is exempt from the obligation.

If an enterprise has also purchased electricity not for its own use, then the obligation for that electricity must always be performed on the total quantity of such electricity.

If an enterprise's electricity consumption exceeds 100 GWh annually, it is required to purchase and settle certificates on its own (they are no longer included in the price of the electricity, but the enterprise has the same obligation to purchase and redeem certificates as a seller mentioned above). If consumption does not exceed 100 GWh annually, the cost of settling the certificates together with the relief applied remains within the price of the electricity, and the certificates are still settled by the seller of the electricity. Independent purchase and settlement of certificates has certain advantages (they can be purchased at any time, e.g. when their price on the exchange falls), but is also connected with reporting obligations and the need to redeem them on time, under penalty of fines and a ban on enjoying relief for a period of 5 years. Relief from payment of the RES fee is always applied by the distributor of the electricity (who is the remitter of the fee), and thus it is crucial for the enterprise to notify the distributor when it acquires the status of an industrial customer and obtains the right to the relevant relief.

The savings of an enterprise using about 100 GWh per year, with relief at 40%, was about PLN 1 million in 2018, while in 2018 the RES fee was zero. The situation was similar for 2019 and is expected to remain so for 2020, but this state of affairs cannot be regarded as permanent, because of the need to finance further growth of renewable energy sources.

Relief from cogeneration fee

An electricity invoice also lists a cogeneration fee, financing support for sources generating heat and electricity in high-efficiency cogeneration. As in the case of the RES fee, the amount depends on the customer's consumption of electricity. The conditions for obtaining relief from the cogeneration fee are the same as for the RES fee, and the amount of this fee in 2019 was PLN 1.58/MWh. The estimated benefit for users consuming 100 GWh with relief at 40% is over PLN 60,000 per year.

Relief from capacity fee

From 1 October 2020, electricity bills will include a capacity fee, financing the Polish capacity market, i.e. support for generators of electricity for maintaining their power plants in readiness and building new ones, and also for customers for reducing their demand when necessary. The amount of this fee will also depend on the quantity of electricity consumed by the specific customer.

In simple terms, this relief will be available to industrial customers, but only those consuming no less than 100 GWh annually. The scale of this relief depends on the intensity factor, as in the case of the RES fee. Currently there is a proceeding underway before the European Commission on approval of this relief.

As of now the rate for the capacity fee is not yet known, but considering that the costs of maintaining the capacity market are higher than projected, this may be a significant charge for enterprises.

Freezing of electricity prices

In 2018 Poland experienced a sudden and steep increase in electricity prices, mainly due to an increase in coal prices and greenhouse gas emission rights, which strongly impacted Poland's coal-dependent power industry. Consequently, the Polish government and parliament decided to take extraordinary action, originally intended to apply to all electricity customers. The solution for runaway electricity prices was to be a price freeze at the level in force for specific customers as of June 2018. The act passed in December 2018 required power companies to adjust electricity prices they would charge customers in 2019 to the prices from the previous year. This obligation was to be realised by leaving electricity tariffs at their existing level or by reducing the prices included in contracts renewed or newly concluded for 2019.

These regulations, adopted in haste, largely did not survive their confrontation with EU rules on state aid, and were challenged in the consultation procedure between the Polish government and the European Commission. Thus it was necessary to amend the act again in mid-2019. As a result of that amendment, the group of customers benefitting from the freeze in electricity prices was greatly reduced, to households, small and micro enterprises, as well as entities from across the public sector (including hospitals and units of the public finance sector).

For many enterprises, the freeze in electricity prices was withdrawn as of 1 July 2019. In its place, the amended act provides for the possibility of obtaining supplemental funding for growth in electricity prices for the period from July through December 2019. This funding is calculated as the product of unit subsidy rates, set by the Minister of Energy at PLN 15 per MWh, and the volume of electricity purchased by the customer through 31 December 2019 and consumed between 1 July and 31 December 2019. This subsidy constitutes *de minimis* aid. The total amount of *de minimis* aid awarded by a member state to a single enterprise may not exceed EUR 200,000 over three calendar years. The application for funding is filed for the calendar quarter using a form available on the electronic platform created for this purpose by the price settlement administrator. Applications must be filed by 30 June 2020 or the right to receive the funding will be forfeited (applications filed after that date will not be considered). The settlement administrator will confirm with the electricity enterprise the volume of electricity indicated in the application. Then the administrator will verify the correctness of the application, and if there are no remarks will approve the application and pay out the subsidy within 40 days from receipt of a proper application. The price settlement administrator will issue and deliver by email a certificate on grant of *de minimis* aid.

Reimbursement for energy-intensive enterprises

Another mechanism for reducing electricity costs is reimbursement of costs for purchase of emissions rights applied to the price of electricity used to create products in energy-intensive sectors or subsectors, adopted by the Parliament in July 2019. This reimbursement is targeted to a limited group of enterprises operating in selected sectors of the economy characterised by high electricity demand. This support covers, among other things, the production of aluminium, cast iron, steel, iron alloys, copper, paper, cardboard and selected chemicals. Significantly, the support covers only the process of manufacturing the selected product, and not the entire business of the enterprise.

An additional condition for obtaining this reimbursement is implementation of an environmental management system as referred to in the EMAS II Regulation (1221/2009), an ISO 14001 certified environmental management system, or an ISO 50001 certified energy management system.

An application for reimbursement for a calendar year must be filed by 31 March of the following year. The application is then reviewed and approved by a decision of the President of the Energy Regulatory Office, which should be issued by 30 September.

It should be mentioned that an application for payment of reimbursement for 2019 may be filed only by entities which previously waived the right to support due to the act freezing electricity prices described above.

The exact amount of reimbursement paid to energy-intensive enterprises will change, but it is estimated that it will be about PLN 40/MWh. Funds for this support mechanism are to come from the proceeds of auctions of CO_2 emission rights, and the mechanism is to remain in force through 2028.

Relief from excise tax

By the way, the existing exemptions and refund of excise tax on electricity for selected groups of enterprises and production processes should also be mentioned.

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No time limit on owner's claim for buyout of land with a pipeline

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The owner of a plot on which a building or transmission equipment (gas pipeline, water line, transformer, power tower, or the like) with a value exceeding the value of the plot has a claim for buyout of the plot which is not subject to the statute of limitations. This greatly strengthens the rights of property owners and their ability to pursue claims even years after erection or installation of such facilities.

It often happens in Poland that elements of various types of transmission lines installed during the communist era by transmission enterprises (gas, electricity, water, or telephone lines, and so on) without the consent of the owners of the plot are found on private land. Lines of this type were mainly installed on agricultural properties, which at the time did not greatly reduce their value. The problem arises now, when many such plots are reclassified for development. The fact that a transformer station or power tower has been installed within the boundaries of the plot can greatly limit planned development (particularly residential), if not block it entirely, particularly when removal of the structures is legally or economically difficult (e.g. due to acquisition of a transmission easement by prescription, or too-high demolition costs). This creates a serious burden for the owner of the plot, who would usually prefer to sell the plot, but it is difficult to find a buyer for such useless real estate.

A solution could be to exercise the possibility set forth in Art. 231 §2 of the Civil Code, which provides that an owner of land on which a building or other equipment has been erected with a value greatly exceeding the value of the plot occupied for this purpose may demand that the person who erected the building or other equipment acquire ownership of the plot for an appropriate fee. Unfortunately, until recently the predominant view was that a claim for buyout of real estate by a transmission enterprise became time-barred 10 years after erection of the building or installation. In practice this rendered this section of the code a dead letter in many situations, as the structures were erected several decades ago.

Gas pipeline on the plot

One of our clients found herself in a similar situation. A gas pipeline had been installed on her land in the 1980s without the consent of her legal predecessors. Given the unfortunate placement of the pipeline (running diagonally across the property), the plot zoned for construction had lost its character and was rendered unfit for commercial exploitation, which also greatly hindered any effort to sell the plot. The client demanded that the transmission enterprise buy out the property, but it refused. The case wound up in court.

Based on an appraiser's opinion, it was found that the value of the plot without the transmission line would be about PLN 1.5 million, but with the transmission line it was worth about PLN 500,000, while the value of the gas installation itself was about PLN 1 million. Consequently, the court of first instance found that the conditions set forth in Civil Code Art. 231 §2 existed, as there was no contractual relationship between the parties and the value of the equipment erected by the transmission enterprise exceeded the value of the real estate. At the same time, however, the court upheld the defence of the statute of limitations raised by the gas company, and ultimately denied the claim to buy out the property. We filed an appeal, which was pending at the same time as consideration by the Supreme Court of Poland of a legal issue concerning a similar case. As we wished to wait for a ruling in that case, we obtained a stay of the appellate proceeding. The Supreme Court case was subsequently decided in the resolution of 16 May 2019 (case no. III CZP 109/18).

Claim for buyout: subject to time bar or not?

Until the Supreme Court adopted the resolution cited above, there was a split in the case law and the legal literature on the permissibility of imposing a time bar on claims by an owner of land based on Civil Code Art. 231 §2 for acquisition of the land by the entity that had erected a building or installation on the plot greatly exceeding the value of the plot occupied for this purpose.

The first view (prevailing in the case law, and unfavourable to owners of real estate) recognised that such claims were subject under general rules to the 10-year limitations period for property and financial claims (Civil Code Art. 117 and 118). The exceptional rule under the Civil Code where no statute of limitations controlled (Art. 223) could not be applied to such claims because there was no provision expressly allowing this. It was argued that owners neglecting their real estate and not responding when someone erects a building or installation on the property should not be rewarded. It was also explained that enterprises building transmission facilities are typically not interested in buying out the property, especially entire plots, because they are not in the business of commercial operation of such properties but only have an interest in occasional access to their own installations. Transferring real estate to such enterprises along varied transmission routes would essentially degrade many valuable plots in urban areas and distort their structure. It would be a more rational and socially useful solution to establish transmission easements while awarding the owners appropriate compensation (Civil Code Art. 305^2).

Opponents (who were in the minority) claimed that this view was irrational on socio-economic grounds. After all, it was uniformly accepted that claims to establish an easement for a necessary road (Civil Code Art. 145), a transmission easement (Art. 305^2) and a ground easement in the event of encroachment of a boundary in erection of a building or other equipment (Civil Code Art. 151) were all exempt from the statute of limitations. They also pointed to the "ongoing renewability" of such claims, which cannot become time-barred in light of the permanent nature of the factual state they are based on. The same argument should apply when determining whether claims provided for in Civil Code Art. 231 §2 can be time-barred.

Not subject to the statute of limitations after all

In its resolution of 16 May 2019, the Supreme Court recognised that in general, an exclusion of claims from the operation of the statute of limitations arising directly from the nature of the claims is possible, despite the lack of an express legal basis, if warranted by sufficiently weighty arguments. In the court's view, the owner has no legal obligation to eliminate a state of infringement of its ownership. This is only an entitlement, failure to exercise which may lead to sanctioning of discrepancies through passage of the right of ownership to the infringer (particularly through prescription). There are no grounds for accepting that the owner's voluntary sufferance of a state of infringement resulting from the erection of a building or equipment should be temporary, and if the defence of the statute of limitations is raised it should result in forfeiture of the claim to require the infringer to submit a declaration on acquisition of the occupied portion of the property. In that situation, the owner would be left with a further-reaching claim for the infringer to restore the prior lawful state (Civil Code Art. 222), thus leading to a result which the parties to the conflict would certainly prefer to avoid (removal of the building or installation). Moreover, the legal measures available to the owner vary in the manner in which the claims are pursued and the effects that can be achieved by pursuing them. Selection of the manner and timing of pursuit of legal protection by the owner based on the rights it holds should be left exclusively to the owner's discretion.

Favourable ruling and buyout of plot

The Supreme Court's adoption of this resolution was highly relevant for the interests of our client and the litigation conducted on her behalf. During the appellate procedure we cited the holding adopted in the resolution and explained the nature of the claim held by our client and its direct connection to protection of the right of ownership. This claim arises from the right to dispose of a thing (in this case real estate) and thus cannot be limited in time. We also explained that the extent of the burden from suffering the encumbrance of the land by a building or installation erected by a third party (transmission enterprise) can vary. Assertion of a claim based on Art. 231 §2 of the Civil Code many years after the plot is occupied could result from a change in legal or factual relationships, making it urgent to end the unlawful legal and factual state of the property, as well as a lack of desire on the occupier's part to resolve the problem by concluding a contract transferring ownership (as in fact occurred in this case).

The court of second instance agreed with this reasoning and issued a favourable ruling, in which the court held that our client's claim for the transmission enterprise to buy out the land had not become time-barred.

Thanks to this ruling, the dispute came to an end, and our client could finally rid herself of real estate that was of no value to her and which no one wanted to purchase from her.

Summary

The phenomenon of construction of unwanted buildings and transmission installations on plots of land is fairly common throughout the country. Until recently, the owners of such plots were more or less left to their own devices due to the predominant position in the case law that their claims were subject to the statute of limitations. The courts often denied applications seeking to force transmission enterprises to buy out such properties, at most ordering establishment of a paid transmission easement, but the owners could not find buyers willing to acquire their properties. The Supreme Court resolution broke this unfavourable trend and encouraged a number of persons to assert claims against transmission enterprises. The owners obtained a new tool for protecting their interests, which will allow the legal status of plots to be cleared in many cases. Paradoxically, this solution may also prove advantageous for the transmission enterprises themselves, as they will no longer be forced to remove existing buildings and installations (under Civil Code Art. 222), which usually was economically irrational.

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Rating of food companies: An additional benefit from inspections?

Dr Ewa Butkiewicz

Food is a crowded market. It's hard to stand out from such a huge number of larger and smaller producers of agri-food items, distributors and retailers. Thus businesses actively promote themselves using a range of marketing tools. They boast of their products, underlining that they are made with the greatest care, contain the finest ingredients, or are free of ingredients regarded by consumers as undesirable in foods. They also seek certificates or quality marks issued to products by various institutions and organisations operating under individually formulated assessment criteria. Such certifications can be meaningful for advertising messages, but don't provide an adequate basis for objectively comparing the quality and safety of food products.

This is why it is worth paying attention to the new Official Controls Regulation, in force since mid-December 2019 (Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products). It provides for an entirely new tool, with certain marketing aspects, although primarily a method for furthering the principle of transparency in official controls of foods conducted on the basis of a unified legal framework across all EU member states. This is the rating of food producers based on their fulfilment of criteria set forth in the regulation (not based on financial data, such as annual revenue, which would allow a list of the largest food companies to be drawn up). Art. 11 of the regulation provides for the possibility for the competent authorities to publish, or otherwise make available to the public, information about the rating of individual operators based on the outcome of one or more official controls, upon fulfilment of certain conditions with respect to the criteria and procedure for the rating.

The rating is not meant to be mandatory, but appears to be an instrument worthy of interest and implementation from the perspective of the control institutions as well as entities operating in the food industry. Publication of the results of the rating by authorities conducting official controls would incentivise entities from the agri-food chain to comply with the food law regulations governing their specific activity. For these entities, a high rating would raise consumers' confidence in their products and thus lead to an increase in sales. But building a rating complying with the requirements of the regulation will not be easy, and it will probably be some time before we see the first list of the "top 500" food companies.

How to create the rating

According to the regulation, the rating criteria must be objective, transparent and publicly available, and the control authorities must ensure the fairness, consistency and transparency of the rating process. The entity subject to control has a right to make comments on the information which the controllers would like to publish, and the comments must be reflected in the published rating.

It should be pointed out that the European lawmakers stress transparency in both the criteria and the rating procedure. Transparency in action is intended to further the ambitious aim of creating comparable patterns of procedure which over time can become a pattern followed in controls throughout the EU.

While the regulation does allow an entity to be rated on the basis of a single control, the fairness of the controls and objective verification of compliance of the controlled entity's operations with the regulations will probably require more than one control. But on the other hand, frequent controls can be burdensome for companies, interfering with normal work and requiring the payment of inspection fees.

> Thus in the general provisions on official controls, the regulation requires that "controls shall be performed as much as possible in such a manner that the administrative burden and operational disruption for operators are kept to the minimum necessary."

With respect to fees, the member states can reduce the amounts, in an objective and non-discriminatory manner, charged to operators not found to have irregularities during earlier controls. The practical implementation of these principles may persuade companies to participate in procedures qualifying them for a public rating.

Further characteristics of the rating procedure—fairness and consistency—cannot be achieved without ensuring the impartiality, quality and consistency of the entire official control system. To achieve consistency, the regulation establishes a uniform legal framework for conducting official controls across all regulated agri-food areas. The member states are thus required to introduce uniform control procedures, adequately train their staff conducting controls, establish procedures verifying the effectiveness of controls, and conduct corrective measures.

Easier said than done

This task may prove particularly difficult for Polish inspectorates. The agri-food chain is subject to six of them: the Veterinary Inspectorate, the Agricultural and Food Quality Inspectorate, the State Plant Health and Seed Inspection Service, the State Sanitary Inspectorate, the Trade Inspectorate, and the Environmental Protection Inspectorate. Each of these inspectorates operates under separate regulations which do not make up a coherent system. The competencies of the various inspectorates sometimes overlap, their inspection authority is exercised differently with respect to controlled entities, and irregularities uncovered during inspections are subject to sanctions whose justification and seriousness are not always logically explicable. It should be pointed out that the individual inspectorates are subject to oversight by either the Minister of Agriculture and Rural Development, the Minister of Health, or the president of the Office of Competition and Consumer Protection. Over the past few years several proposals have been considered at the government level for merging at least some of these inspectorates, but so far none of these drafts have been finalised.

The EU regulation introduces harmonisation of the approach to official controls in the agri-food industry, and thus the procedures of all inspectorates must be adjusted accordingly. It is hard to predict how long it will take to implement new procedures, train staff, build a register of controlled entities, and prepare inspection plans and other elements of the system designed to ensure its consistency and effectiveness. Thus it would be worthwhile to consider once again the possibility of consolidating the food control authorities by reducing the number of inspectorates or creating a single control authority. This could improve the efficiency and effectiveness of controls and also reduce the burden of controls for businesses. At the same time, the positioning of operators successfully passing inspections by a consolidated control authority would take on an objective value, to the benefit of the operators themselves and consumers.

In the current state of affairs, where individual inspectorates are required to implement the new EU regulation, their desire to create a rating of controlled entities will probably be pushed to the back burner. That would be a loss to both entities operating within the agri-food chain and to Poland as a major exporter of foods.

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The need to apply the look-through approach for withholding tax

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Following changes introduced from 2019 in the system for collection of withholding tax in Poland (with certain rules postponed until mid-2020), a number of doubts arose in connection with the situation in which an exemption or reduced rate of withholding tax may be applied. In particular, when determining when the recipient of a payment is the beneficial owner of the payment, it is not clear whether and to what extent entities higher up in the corporate structure (e.g. the shareholder of the recipient of the payment) may be analysed.

Polish entities making payments to foreign entities for dividends, interest, royalties, and fees for certain intangible services are, as a rule, required to collect withholding tax.

In certain circumstances, a payment to a foreign entity may be eligible for an exemption from withholding tax or taxation at a preferential rate. In addition to the formal conditions, a fundamental basis for applying such a preference is that the recipient of the payment is the beneficial owner of the payment, and therefore meets the three following conditions:

- The recipient obtains the payment for its own benefit, decides on its use, and bears the related risks.
- The recipient is not an intermediary obliged to pass on the payment in whole or part to another entity.
- The recipient conducts genuine commercial activity at the place where it has its registered office.

Failure to meet any of these conditions leads to a finding that the recipient of the payment cannot enjoy a reduced rate of withholding tax or exemption from the tax.

This applies in particular to a situation where the recipient acts as a conduit company, i.e. an entity not performing any economic function apart from passing on the payment to its beneficial owner.

The aim of introducing the notion of beneficial owner into tax-law doctrine is to ensure that entities that are not the economic owners of a payment cannot rely on the protection arising under a treaty on avoidance of double taxation or national regulations implementing EU regulations allowing an exemption from withholding tax.

Intermediaries

Under commercial realities, the recipient of a payment often acts as an intermediary for reasons with a valid business or economic justification. Such situations may arise out of participation in a joint commercial venture (for example, a consortium of banks grants credit to a Polish company and one of the banks acts as the agent receiving interest payments from the borrower and distributing them among the consortium members). Another reason could be to limit business risks (e.g. a special-purpose-vehicle company created to acquire or finance a Polish company). The intermediary might also be a trustee.

Taking a literal reading of the definition of a beneficial owner, it should be concluded that in each of these examples the Polish remitter should collect withholding tax in the maximum amount, because the immediate recipient of the payment is not its beneficial owner. At the same time, introduction of an intermediary in the payment chain may not result from an intention to obtain a tax advantage.

A response to this problem is to adopt the "look-through approach." This leads to a recognition that in a situation where the immediate recipient of a payment is an entity that is not the beneficial owner, and this entity passes on the funds to the beneficial owner, it is still possible to apply a reduced rate of withholding tax or an exemption from withholding tax if the beneficial owner of the payment meets the conditions for enjoying an exemption under Polish law or is a resident of a country with which Poland has concluded a tax treaty eliminating withholding tax or reducing the rate.

An example would be a situation where the dominant company in an entire international capital group with its headquarters in country A creates a holding company registered in the same country for the purpose of acquiring a Polish company and then providing it financing in the form of loans. In such a structure, none of the parties obtains an advantage it would not have obtained if the dominant company directly held shares in the Polish company and directly granted loans to it.

However, the look-through rule must not result in creating a tax advantage that would not occur without the existence of the intermediary.

In a draft tax clarification concerning the new rules for collection of withholding tax, issued in mid-2019, the Ministry of Finance stated that in principle the look-through approach should be accepted by the Polish tax authorities with respect to certain payments. But apart from the issue of the binding force of such clarifications, the draft is laconic and leaves open many doubts. Moreover, the practice presented in the interpretations issued by the tax authorities are not entirely unequivocal. It should also be borne in mind that this rule falls within the broad reform of withholding tax introduced from the start of 2019.

Applying the look-through approach presents a number of practical problems, particularly arising from:

- The absence of regulations on this rule in national law
- Potential conflict between national regulations and the provisions of international agreements
- Practical application of this approach when the new system for collection of withholding tax fully enters into force.

The need for regulation and potential conflict between national law and tax treaties

Introduction of the look-through approach in Polish law (whether based on changes in legislation or through interpretation of the existing regulations) will be subject to evaluation in terms of consistency of the Polish regulations with EU law, and from the perspective of treaties on avoidance of double taxation concluded by Poland. Some of these treaties contain provisions granting a treaty privilege only in a situation where the beneficial owner of the payment is also the recipient (in other words, excluding intermediation in passing on the payment). Some of the individual tax interpretations issued by the tax authorities give precedence to a literal interpretation of the treaty in such situations.

Such a literal approach to the provisions of the tax treaty was reflected for example in interpretations issued in 2019 under the tax treaty between Poland and the Republic of Korea. The interpretations involved payments made to a Korean trustee bank acting for a tax-transparent fund (operating in a form similar to a trust). The receipts were then distributed among the fund's investors. Significantly, these interpretations concerned an investor who was a Korean tax resident.

The authority issuing the interpretation took the position that the literal wording of the Polish/Korean tax treaty prevented the application of a reduced rate of withholding tax. This was because there was no identity between the recipient of the payment (the trustee bank) and the beneficial owner (the investor). In principle the authority did not exclude the possibility of applying a look-through approach, but it found that in this case precedence had to be given to a literal interpretation of the tax treaty.

This approach defeats the purpose of the tax treaty. If the beneficial owner is a tax resident of the same country as the recipient of the payment, and the intermediary's involvement has a legal and business justification, then application of the preferential rate will not result in erosion of the tax base; in other words, there are no grounds for questioning the treaty privilege. Moreover, the possibility of applying a treaty rate in similar situations is expressly stated in the commentary to the OECD Model Tax Convention.

The case law of the Court of Justice also favours the possibility of taking a look-through approach under provisions implementing EU regulations (exemption from withholding tax). There it is indicated that the mere fact that a company that receives a payment in a member state is not the "owner" does not necessarily mean that the exemption is not applicable. In such case, the payment may be exempt from withholding in the source country if the company receiving it passes it on to the owner with its registered office in the EU and also meeting all the conditions established for enjoying such exemption (see judgment in Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1*).

Who applies the look-through approach?

In 2019, alongside the change in the definition of a beneficial owner, the system for collection of withholding tax underwent an extensive reform. Full entry into force of this reform has already been postponed three times and it cannot be ruled out that the ultimate shape of the reform may still change.

In the simplest terms, in the case of payments exceeding PLN 2 million per year, a pay-and-refund system is introduced in which the remitter collects the withholding tax at the basic rate, and then the recipient (or the remitter, if a gross-up clause is used) seeks a refund based on the domestic regulations or the tax treaty.

This rigorous system was equipped with a number of safety valves. In particular, the members of the management board of the Polish company may submit a statement that in their view the recipient of the payment is its beneficial owner.

If this claim is effectively refuted, the management board members are exposed to criminal liability (up to and including prison), and an additional tax liability will be imposed on the company they represent.

For the look-through approach to have a chance of taking hold in practice, it must be possible to apply it at the stage of collection of the tax, and not just at the stage of seeking a refund. In particular, management boards of companies making payments should be authorised to submit a statement enabling the use of a reduced rate or exemption at the time the payment is made, relying on the look-through approach.

Who is the target of regulations?

Withholding tax is intended to combat erosion of the tax base in Poland through transfers of payments abroad. At the same time, the conflict-of-laws rules included in international and EU law are intended to protect against double taxation of such payments.

If there is no tax advantage resulting from introduction of an intermediary into the payment chain, there is no reason to question the right to apply a preferential rate of withholding tax or an exemption from the tax. It should also be remembered that although the Polish company acts only in the role of a remitter, in practice the cost of withholding tax is often effectively shifted to the company through a gross-up clause. This is because as a rule, in the case of cross-border payments, Polish companies find themselves in a weaker position and must agree to the conditions imposed on them. Thus toughening the system of withholding tax exerts the opposite of the intended effect: instead of increasing the burdens on international corporations, it saddles Polish entities with higher costs. Although the battle with structures facilitating undue tax advantages should remain a priority in the measures pursued by the tax authorities, excessive rigour in these measures may ricochet against honest taxpayers.

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