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The 2022 YEARBOOK does not constitute legal advice or a basis for making business decisions.

Contents

Dear Readers,

It's no secret that changes draw resistance, but in life they are unavoidable. Lawmakers stir up some changes themselves, but in other cases they seek to counteract external forces, such as climate change. We must adapt to all these changes, or at least monitor them, if we are to continue to operate effectively in new circumstances.

As we have traditionally done, we devote this, our 12th *Yearbook*, to trends and changes in the law. And there are more than enough of these to go around.

Certainly one strong trend is toward sustainable business, driven not only by legislative initiatives, but also by preferences of consumers and investors. The expectations are so high that some businesses rush to brag of their concern for the environment, even if their words are not matched by their deeds. But the days of "greenwashing" are numbered. Concern for migrating geese is no longer just a noble sentiment, but betrays an instinct for self-preservation. "Business as usual" is a short-sighted strategy, and unrealistic. It's also unrealistic to continue to rely on conventional sources of energy. Fortunately, there is hope that green hydrogen and wind farms will enable effective decarbonisation of the Polish economy. This year we devote several articles to these issues.

There's also a lot happening on the labour market. Employers have a harder and harder time hiring skilled staff. It is said that Poland needs to import five million workers from abroad if our economy is to continue growing at its current pace. Employees' expectations for the forms of work have also changed, which may pose certain challenges for employers.

The importance of issues related to healthcare and data protection continues to grow—including protection of healthcare data, as we discuss in an article on clinical trials.

On top of this, there are perennial themes. Tax regulations are internally inconsistent and increasingly resemble a Gordian knot. Individual interpretations may cease to protect taxpayers. Contact with the prosecutor's office can lead to loss of a firm's liquidity. And the risk of expropriation of investments is more than just hypothetical.

But if reading these articles suggests that life is tough for businesspeople, we suggest for balance an article showing that achieving fame as an artist can also have its downsides.

We hope you find it fruitful reading.
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What does blockchain have to do with planting forests? The shared path of FinTech and ESG

ESG has been a hot topic lately. So has FinTech. We examine these two trends more closely to see how they can work together and inspire new ways of conducting (sustainable) business.

What is ESG?

ESG—Environmental, Social, Governance—is a set of norms for the operations of an entity and for its products, which conscious investors consider when selecting potential investments.

On one hand we are speaking of **ESG factors** (or "sustainability factors" under the definition proposed in the Sustainable Finance Disclosure Regulation ((EU) 2019/2088))—environmental, social or governance matters which an entity takes account of (or doesn't) in its operations and which may have a positive or negative impact on its financial performance or solvency. On the other hand there are **ESG risks**, i.e. the risks of any negative financial consequences for an entity stemming from the current or prospective impacts of ESG factors on its operations, its counterparties, or invested assets (the European Banking Authority, for example, writes about ESG factors and ESG risks in the "EBA Report on Management and Supervision of ESG Risks for Credit Institutions and Investment Firms").

Environmental criteria define an entity's approach to issues such as depletion of resources, emissions of greenhouse gases, deforestation, climate change, and protection of wildlife. Social criteria are about how the entity treats people, and focus for example on human rights, labour relations, diversity, working conditions, local communities, health and safety. Governance issues involve shareholder rights, anticorruption policies, and management of the entity.

In recent years, ESG issues have gained in importance, particularly in the face of growing environmental problems and global financial scandals. ESG factors help investors avoid companies which in the future may pose

POSSIBLE REASONS FOR GREENWASHING

- "Premeditated" greenwashing
- Difficulty analysing and processing ESG data
- Inconsistency, and thus low comparability of existing methodologies
- High costs and time required to obtain ESG data
- Infrequent updating of ESG data

GREENWASHING

is when a firm or organisation does not truly implement ESG factors into its operations to the extent suggested for example by its marketing

RISKS FROM GREENWASHING

- Risk of loss of reputation by business involved in greenwashing
- Financial risk for investors who considered ESG factors when assessing their investment

increased risk (e.g. costly lawsuits or fines) due to their environmental, social or governance practices.

ESG—challenges, regulations, greenwashing

The ESG area has grown rapidly in recent years, and regulations affecting this area are multiplying at a surprising rate (the debate and legislation on the E component—environmental issues—are decidedly the most advanced).

The first regulations at the EU level involved non-financial reporting, and were limited to the biggest players on the market. The newly arising regulations, particularly affecting the financial sector, have an increasingly broader reach. They still mainly involve disclosures (although in a much wider range than originally), but initiatives are also appearing governing standards for green products (e.g. bonds), and further regulations are planned, e.g. in the area of ratings.

Despite stepped-up legislative initiatives, the ESG area still poses numerous challenges. One example is the risk of "greenwashing." Under greenwashing, a company or organisation devotes more time and money to promoting itself as sustainable than it does to actually implementing ESG factors into its operations. There are many causes of greenwashing. Some entities engage in it with calculating premeditation, wishing to create the illusion of being an organisation with high ethical standards. But greenwashing is also largely the effect of difficulties in analysing and processing ESG data.

Investors wishing to take ESG factors into consideration in their investments must rely on often inconsistent methodologies and many varied sources of ESG data, which gives these factors low comparability. In the EU, different approaches are to be reconciled by the Taxonomy Regulation ((EU) 2020/852, amending Regulation 2019/2088), but it focuses on development of a common understanding of environmentally sustainable activity, ignoring the S and G aspects of ESG (at least for now).

But a consistent understanding of "sustainability" is just one of the problems. Compiling and analysing ESG data is a costly and time-consuming process. In addition, such data are not very detailed and aren't updated very frequently. All of this hinders the battle with greenwashing, which carries reputational risk for entities implicated (often without their awareness) in greenwashing, as well as a financial risk for investors taking ESG factors into account when assessing risks and carrying out investments.

FinTech support for ESG

Broadly, FinTech means technological innovations that can change how financial services are delivered, stimulating the growth of new business models, applications, processes and products (firms operating in this area are also themselves sometimes called "FinTechs"). Innovation and new technologies intimately tied to this field attract the attention of EU bodies, which perceive in them opportunities for growth of ESG.

The importance of new technologies in the financial sector is stressed for example in the European Commission's "Action Plan: »

Financing Sustainable Growth" (2018) and the "European Green Deal" (2019).

The Action Plan is "part of broader efforts to connect finance with the specific needs of the European and global economy for the benefit of the planet and our society." Specifically, the Action Plan aims to:
– Reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth
– Manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues, and
– Foster transparency and long-termism in financial and economic activity.

In the European Green Deal, the Commission stresses: "Digital technologies are a critical enabler for attaining the sustainability goals of the Green Deal in many different sectors." The Commission undertook to "explore measures to ensure that digital technologies such as artificial intelligence, 5G, cloud and edge computing and the internet of things can accelerate and maximise the impact of policies to deal with climate change and protect the environment." This is a clear signal that financial and technological considerations, which merge within the FinTech sector, lie at the foundations of ESG and can greatly facilitate and provide conditions for sustainable operations.

Broadly, FinTech means technological innovations that can change how financial services are delivered, stimulating the growth of new business models, applications, processes and products.

FinTech and sustainable growth

First and foremost, FinTech can effectively contribute to the fight against greenwashing. Solutions based on artificial intelligence, distributed ledger technology, and big data can facilitate the processing of large quantities of ESG data and also improve the quality, transparency and reliability of such data. For example, Nossa Data provides a tool to compile and analyse data involving ESG within an entity and delivers pointers for improvement of the results in this respect. A quick and simple analysis of ESG data may encourage companies to reflect ESG factors in their business.

Another area where FinTech can serve ESG is tied to the veritable flooding of the financial market with new regulations requiring these companies to conduct a range of disclosures and to execute numerous reporting obligations. Ensuring compliance with the requirements imposed on the financial sector (but not only) through such legislation as the Taxonomy Regulation, the Non-Financial Reporting Directive (2014/95/EU), SFDR, and the proposed Corporate Sustainability Reporting Directive poses a tough challenge for participants in this market, but also for the supervisory authorities that must come along later and verify their compliance. FinTech companies providing solutions ensuring compliance (RegTech) and verification of compliance (SupTech) are expanding their product lines also to include monitoring of ESG regulations. An example is the data exchange platform created by ESGTech, which facilitates fulfilment of requirements involving disclosure of ESG information.

FinTechs can also contribute to the reorienting of capital flows towards sustainable investment called for in the Commission's Action Plan. Thanks to crowdfunding platforms, investors seeking to support entities committed to sustainability in their business can invest their funds in "green" projects. New green ventures, in turn, have opportunities to raise financing on more attractive terms. For example, the investment platform LITA.co accepts for funding only firms meeting one or more sustainability goals set forth in the United Nations' 2030 Agenda for Sustainable Development. Another interesting method of investing in sustainable business is proposed by Ekofolio, a blockchain-based platform enabling investment in forests by acquisition of tokens issued on the platform.

The FinTech sector also supports the battle against financial exclusion, thus pursuing one of the social aims of ESG. Entities such as OneFi, Pula, PalmPay and MoneyFellows operate across all sectors of the financial market—banking, insurance, payments, investments—while democratising access to such services by persons who have been denied access in the past, for various reasons. But to unleash the full potential of FinTech proposals in this area, first the problem of another type of exclusion must be solved: digital exclusion.

The impact of ESG on companies in the FinTech sector

The breadth of possibilities for FinTech to foster the development of ESG is readily apparent. But the impact of ESG on the operation of FinTechs is equally noticeable. Interestingly, the related changes ongoing in the world of innovative financial services are not a consequence of legal changes and new regulatory duties in the area of ESG imposed on financial market participants by EU or national legislative bodies. These

To unleash the full potential of FinTech proposals in the battle against financial exclusion, first the problem of another type of exclusion must be solved: digital exclusion.

changes arise primarily from the greater and greater interest in ESG on the part of consumers and investors, and their identification with businesses promoting these values. Market participants (including FinTechs) engage in ESG in response to the market expectations of their stakeholders.

ESG undoubtedly can accelerate the transformation of business models of entities from the FinTech sector in more sustainable directions. More and more companies in this sector base their operations on offering clients products that factor ESG into their construction. For example, Aspiration Partners (which will become the first publicly listed green FinTech) focuses on charitable activity, sustainable growth, and environmental protection. One of the initiatives of Aspiration Partners, called "Plant Your Change," allows clients of this digital bank to round up payments to the next dollar and plant trees from the resulting surplus. In the first year after launching this option (through April 2021), Aspiration Partners customers helped plant over 10 million trees.

Clearly, FinTechs also have their not-so-green sides. Technologies like AI and blockchain (particularly when based on a proof-of-work rather than proof-of-stake protocol) generate a vast demand for computing power, which translates into huge consumption of electricity. It is partly thanks to ESG considerations that blockchain solutions based on a proof-of-stake protocol, which is much more "eco," are gaining more and more popularity.

But, relatively speaking, E aspects are the most easily measurable and manageable component of ESG. Meanwhile, an increasingly noticeable risk associated with AI or robotics is the social consequences of these technologies. They carry a real threat of the loss of jobs on a sweeping scale, which in turn could cause unemployment to spike, and deepen existing inequalities. Undoubtedly, these risks should be taken into account when businesses implement solutions based on innovative technologies into their operations.

What will the future bring?

FinTech and ESG function very well together and mutually drive positive changes. FinTech can facilitate the green transformation of enterprises, and ESG can motivate FinTech firms toward more sustainable growth. Nonetheless, many issues must still be resolved if the synergies between these two fields are to be fully exploited. While the current technological limitations and regulatory uncertainty around various innovative business models may slow this process, they will not be able to stop it.

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Making sense of ESG, SFDR and taxonomy

Whether businesses operate ethically and responsibly is attracting greater and greater attention. These issues are also key for investors, and thus can shape the market. But for financial market entities this means new disclosure obligations and the need to comply with new regulations with mysterious names.

ESG, a new investment trend

In recent years, non-financial investment trends tied to ESG standards (Environmental, Social, Governance) have become more and more evident on the financial markets of developed countries. These standards draw attention to non-financial aspects of the operations of businesses—their environmental impact, their approach to social issues, and their corporate governance rules.

In practice, implementation of ESG by financial market entities combines current operations with adoption of internal initiatives promoting:

- Environmental protection, e.g. reduction of pollution and cutting carbon dioxide emissions
- Responsible treatment of people—rules governing employment (diversity of gender, ethnicity, religion, etc), ensuring appropriate working conditions, respect for employee rights, and relations with local communities
- Good governance—transparent compensation policies, composition of corporate boards, respect for shareholder rights.

Investors' rising expectations have caused fulfilment of ESG standards to be regarded as one of the most significant investment trends around the world. Investors increasingly prefer to invest their money in enterprises complying with the values they profess. ESG has become a measure of the contemporary and forward-thinking perspectives of companies evaluated by investors. ESG factors are also taken into account by financial institutions when providing funding for economic ventures.

ESG is the law

These new expectations have been enshrined in a legal framework to facilitate investment in entities that are aware of, and desire to keep up with, ongoing environmental and social changes.

With respect to financial entities and products, ESG is reflected in Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, known as the Sustainable Finance Disclosure Regulation or SFDR.

The SFDR applies to financial market participants, i.e. entities offering financial products and financial advisers providing investment and insurance advice. The SFDR reinforces the role of ESG standards as indicators of reliability for market entities, by imposing disclosure obligations on financial market participants involving both the participants themselves and the products they offer.

The new standards are designed to reduce information asymmetries between financial market participants and investors and customers with respect to risks and unfavourable consequences for sustainable growth, promotion of environmental or social aspects, and sustainable investments.

Financial market participants must disclose on their websites information concerning the impact of ESG factors on the value of investments. With respect to any financial products they promote, they must also provide information to customers, prior to conclusion of a contract, on how risks for sustainable development are reflected in investment decisions or the services provided.

The SFDR requires financial market participants to publish information concerning:
- The manner and scope in which a given financial product reflects environmental or social aspects or the aims of sustainable investment
- The methods applied for assessment, measurement and monitoring of environmental and social aspects or the impact of sustainable investment for the given financial product
- If a specific market index has been designated as a reference benchmark for a given product, information on whether and how the index is consistent with the foregoing characteristics
- Information on how the designated index is aligned with this objective, along with an explanation of why the designated index differs from the general market index
- The overall impact of the financial product on issues of sustainable development.

Since 3 September 2019 the Warsaw Stock Exchange has published the WIG-ESG index based on the values of a portfolio of shares of companies regarded as socially responsible, i.e. companies adhering to principles of socially sustainable business, in particular on environmental, social, economic and corporate governance issues. The WIG-ESG is an income-based index, meaning that in calculating the index, the values of transactions in the indexed shares as well as dividend income are taken into account.

Under the SFDR, "sustainable investment" means an investment in:
- An economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on:
  - Use of energy, renewable energy, raw materials, water and land
  - Production of waste
  - Greenhouse gas emissions
  - Its impact on biodiversity and the circular economy, or
- An economic activity that contributes to a social objective, in particular:
  - An investment that contributes to tackling inequality or fosters social cohesion, social integration and labour relations, or
  - An investment in human capital or economically or socially disadvantaged communities

provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff, and tax compliance.

Under the SFDR, these periodic disclosures entered into force on 1 January 2022. To ensure the reliability of information published on websites of financial market participants, such information must be kept up to date, and any change should be explained in an understandable manner.

Fulfilment of ESG standards is regarded as one of the most significant investment trends around the world.

"Taxonomy"—criteria for environmentally sustainable activity

The so-called Taxonomy Regulation (Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 » on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088) was adopted to supplement and clarify the SFDR. It sets forth criteria that must be met for a given activity to be regarded as environmentally sustainable. Thanks to these criteria, clients interested in financial products declared to contribute to climate objectives can compare specific products in these terms.

Under the Taxonomy Regulation, economic activity may be regarded as sustainable if it meets the following requirements:

– The activity contributes substantially to one or more of six environmental objectives:
  - Climate change mitigation
  - Climate change adaptation
  - Sustainable use and protection of water and marine resources
  - Transition to a circular economy
  - Pollution prevention and control
  - Protection and restoration of biodiversity and ecosystems.
– It does not significantly harm any of the foregoing environmental objectives.
– It is carried out in compliance with the technical assessment criteria indicated in the SFDR.
– It complies with minimum social and governance safeguards.

WHAT IS ENVIRONMENTALLY SUSTAINABLE ECONOMIC ACTIVITY?
(according to the Taxonomy Regulation, (EU) 2020/852)

Economic activity may be regarded as **sustainable** if it meets the following requirements:

- It **contributes substantially** to one or more of six environmental objectives:
  1. Climate change mitigation
  2. Climate change adaptation
  3. Sustainable use and protection of water and marine resources
  4. Transition to a circular economy
  5. Pollution prevention and control
  6. Protection and restoration of biodiversity and ecosystems.
- It **does not significantly harm** any of the foregoing environmental objectives.
- It is carried out in **compliance with the technical assessment criteria** indicated in the SFDR.
- It complies with **minimum social and governance safeguards**.

Impact of ESG on WSE listed companies

ESG trends are also evident on the Polish market. In March 2021 the Warsaw Stock Exchange adopted a new set of corporate governance rules, "Best Practice for WSE Listed Companies 2021," the latest version of the corporate governance rules applicable to companies listed on the main market of the WSE since 2002. The expansion of the WSE best practice to include ESG elements is a response to trends on global financial markets.

The best practice for listed companies' disclosure policy and investor communications now includes the rule that companies should integrate ESG factors into their business strategy, including in particular environmental factors, sustainable development, and social and employee factors, including among other things actions taken and planned to ensure equal treatment of women and men, decent working conditions, respect for employees' rights, dialogue with local communities, and customer relations.

Under the Best Practice 2021, proper communications should include publication on a company's website of information about the objectives of the company's ESG strategy. Among other things, the company should:

– Explain how the decision-making processes of the company and its group members integrate climate change, including the resulting risks
– Present the equal pay index for employees, defined as the percentage difference between the average monthly pay of women and men in the last year, and present information about actions taken to eliminate any pay gaps, including a presentation of related risks and the time horizon of the equality target.

WSE Best Practice is not a set of mandatory rules, and listed companies are not required to implement all of the rules. They must, however, explain any departures from the rules, under the principle of "comply or explain."

Based on the experience of developed markets, ESG requirements should be expected to assume growing importance when investors decide on investments in shares listed on the WSE. Consequently, these new trends should exert more and more influence over the information policy of public companies in Poland.

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Competition policy and the European Green Deal

The sixth report of the Intergovernmental Panel on Climate Change leaves no illusions: reliance on fossil fuels is why the planet has already heated up by 1.2°C, as a result of emissions of greenhouse gases like carbon dioxide and methane. The only way to slow and if possible reverse this warming is to cut greenhouse gas emissions. For this to be possible, cooperation by stakeholders in every field, including businesses, is essential. Competition policy certainly cannot replace environmental regulations, but can play an important supporting role, helping achieve common ecological goals.

What is the European Green Deal?

The European Green Deal, presented by the European Commission in December 2019, is a development strategy pursuant to which the European Union plans to achieve climate neutrality by 2050. It is a response to the climate crisis and strong processes of environmental degradation. The aim of the European Green Deal is to transform the EU into a just and prosperous society with a modern, resource-efficient and competitive economy. The European Green Deal also aims to implement the 2030 Agenda for Sustainable Development, a resolution adopted in 2015 by the United Nations General Assembly, and thus to implement economic and social change in compliance with principles of sustainable development.

The role of competition law in achieving the aims of the European Green Deal

The aims of the European Green Deal can be achieved only through the cooperation of all stakeholders from the private and public sectors—including competition authorities. Well-functioning markets, along with responsible competition policy to facilitate and safeguard them, are an integral element of a comprehensive approach. In this spirit, competition policy supports and complements European solutions at various levels, and for several reasons.

First, an ambitious environmental policy will be effective only when markets and undertakings respond to new regulatory circumstances not by disrupting competition, but rather when undertakings are encouraged to innovate through fair competition between one another. Second, dynamic » competition, bold innovations, and a well-functioning market are indissolubly linked. Together they constitute the heart of smart industrial policy, enabling European enterprises to become world leaders in green technologies, sustainable manufacturing processes, and ecological products. Third, competition policy fosters and supplements a just transformation, tailoring it to the EU's regulations and values and ensuring that no one is left behind.

Anticompetitive agreements

Art. 101 of the Treaty on the Functioning of the European Union prohibits agreements with the object or effect of restricting competition on the internal market. However, Art. 101(3) allows for exemption from this ban of agreements that, in short, generate certain benefits for the market.

The European Commission expresses the belief that to encourage undertakings to invest jointly and seek new solutions, it is necessary to clearly define when such cooperation is consistent with competition rules. Consequently, in its summary of public consultations conducted under the heading "Competition policy supporting the Green Deal," published in September 2021, the Commission stated that benefits of sustainable development constitute qualitative benefits that should be taken into account in assessing the permissibility of a given agreement (which absent such benefits would be deemed to restrict competition) under Art. 101(3) TFEU. The Commission also pointed out that such benefits need not be directly or immediately noticeable or necessarily generate savings. It may thus be assumed that the Commission's practice will tend to recognise that value in the form of actions in favour of the environment and sustainable growth will outweigh behaviour that could otherwise be found to infringe competition law.

The Commission plans to draft detailed guidance on the application of Art. 101 TFEU to agreements concerning issues of sustainable development. Significantly, the Commission also expresses a willingness to consider requests for individual guidance with respect to initiatives in the area of sustainability, involving new issues not previously raised by the Commission.

Merger control

The Commission's recent practice in the area of merger control demonstrates that it places great weight on sustainability and environmental issues. For example, the Commission has applied innovative theories of harm with the aim of preventing the loss of green innovations. Moreover, when issuing conditional consent to concentrations, the Commission has imposed conditions reflecting environmental issues and the need for continuation of innovations in the efficient generation of electricity (M.7278, GE/Alstom).

When determining the relevant market for undertakings participating in a concentration, the Commission recognises the need to include a factor differentiating consumer preferences for sustainable goods and services. It has also indicated that when evaluating a planned concentration, social and environmental aspects should be taken into account as long-term benefits.

Significantly, the European Commission currently has no authority to block concentrations solely because they will exert negative impacts on the environment.

State aid

Provisions of EU law support member states in developing effective means of financial support for undertakings, while minimising market distortions. On 21 December 2021 the European Commission presented the climate, energy and environmental state aid guidelines (CEEAG), which from early 2022 were to replace the guidelines on state aid for environmental protection and energy in force in 2014–2021. The CEEAG should enable support for all technologies contributing to achievement of the aims of the European Green Deal, including energy from renewable sources.

The CEEAG in its current form provides in particular for extension of the scope of the guidelines to include new areas of state aid (such as clean mobility, circularity, and biodiversity) as well as all technologies delivering the European Green Deal (e.g. renewable and low-emission hydrogen, and storage of electricity).

Well-functioning markets, with responsible competition policy to facilitate and safeguard them, are an integral element of a comprehensive approach to achieving the aims of the European Green Deal.

Best practice of national competition authorities

The transformation toward climate neutrality, founded on the transition to a low-emissions economy and moving away from an economy exploiting non-renewable natural resources, will affect every sector of industry and every country.

It may be expected that the activities of national competition authorities will evolve along with the "greening" of more areas of the law as well as national policies.

An example is the draft "Guidelines on Sustainability Agreements—Opportunities within competition law," published by the Dutch Authority for Consumers & Markets. The document provides examples of benefits which the regulator may regard as outweighing restrictions on competition arising out of agreements, thanks to which such agreements may be found to be legally permissible and consistent with the internal market.

Greece is taking a similar tack. In 2020–2021, the Hellenic Competition Commission conducted public consultations to launch the creation of a test environment for issues related to sustainable growth in the context of competition law, which the regulator calls the "Sustainability Sandbox." This is a controlled setting in which, upon prior approval of the competition authority, undertakings will be able to pursue initiatives that will contribute significantly to achievement of sustainability goals without significantly harming competition. The Greek regulator will assess the effects of these initiatives for competition and for sustainability, in order to increase legal certainty and reduce the regulatory risk of investments consistent with broader sustainability aims in the public interest.

Summary

The transformation toward climate neutrality, founded on the transition to a low-emissions economy and moving away from an economy exploiting non-renewable natural resources, will affect every sector of industry and every country. It will undoubtedly open up great opportunities for sustainable economic growth, new business models and markets, creation of new jobs, and technological development.

Entities not taking steps toward climate protection may soon find themselves exposed to the inability to raise funding from EU sources or external sources (due to investors' preferences and the related Taxonomy Regulation—more at page 10), or even consumer boycotts. Meanwhile, the European Green Deal may serve as a source of many advantages for business if it is treated not as a threat, but as a chance for a fresh start. In this process, the protection of competition will undeniably play an essential role.

Without doubt, enforcement of competition law is conducted in an increasingly complex environment. That is why it is so vital that competition authorities develop clear guidelines reflecting aims of sustainable growth and environmental protection. They offer undertakings certainty, and enable them to avoid antitrust risk with respect to the initiatives they pursue, and also to predict how the competition authorities may approach such initiatives. After all, the capacity of undertakings to promote sustainability is much greater when trade and investments are pursued in open, competitive, and well-regulated markets.

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Environment practice

Green hydrogen will drive Poland

In November 2021 the Council of Ministers adopted the Polish Hydrogen Strategy, which is designed to play a major role in building a new sector of industry. Although the global hydrogen market is still in an early stage of development, there are widespread hopes that this source of energy will find broad application in power generation, transport and heavy industry, and first and foremost will enable effective decarbonisation of the Polish economy. Meanwhile, the development of methods for production of zero-emission green hydrogen will noticeably contribute to improvement of the environment.

A good start

According to recommendations by the Team for Development of the Renewable Energy Industry and Benefits for the Polish Economy, Poland is one of the world's leading producers of hydrogen. It holds fifth place in the global ranking (third in the European Union), with annual production of around a million tonnes—about the same mass as the Eiffel Tower.

So the point is not for Poland to take its first steps on the hydrogen path, but to upgrade and dramatically increase the significance of the hydrogen economy, expand applications, and cut the costs of hydrogen technologies—in other words, to make these technologies more competitive.

The Polish Hydrogen Strategy adopted on 2 November 2021 calls for, among other things:

- Creation of conditions for operation of further means of transport driven by hydrogen (e.g. replacing diesel locomotives on hard-to-electrify routes with hydrogen-driven locomotives)
- Expansion of the base network by creation of new tanking stations
- Launch of installations for production of hydrogen from low- or zero-emission sources (e.g. renewables)
- Production of synthetic fuels (e.g. methane in a reaction of hydrogen with carbon dioxide)
- Gradual development of the network for transmission and distribution of hydrogen.

The document addresses every link in the value chain: production, transmission, storage, and use of hydrogen.

They require the implementation of carefully considered, efficient solutions enabling large quantities of low- or zero-emission hydrogen to be obtained cheaply, ensuring the appropriate transmission infrastructure and storage installations, as well as creating demand and conditions for use of hydrogen by end users.

The foundation for the planned actions is to be a new set of legal regulations, which should meet the needs of the hydrogen market and bring order to that market, rather than set up numerous barriers. Overregulation of the newly arising industry may make it necessary to introduce many legal modifications, resulting in disinformation and discouragement of businesses to invest in and implement innovative technologies. That would conflict with the efforts to generate demand on the hydrogen market.

Colour-coded

The methods for producing hydrogen differ not only in their material requirements and production costs, but first and foremost in their degree of environmental impact. Currently, this element is obtained in Poland primarily using fossil fuels, namely coal or natural gas. The product obtained in this manner is called "**grey hydrogen**" or "conventional hydrogen," and involves high emissions of CO_2 into the atmosphere.

Blue hydrogen has been viewed somewhat more favourably. Although it is generated from non-renewable sources, it is supposed to derive from a process ensuring lower emissions of greenhouse gases. This is possible thanks to capture and storage of CO_2, subsequently used for production of synthetic methane (in reaction with hydrogen). But the process of capturing CO_2 entails costs reducing the competitiveness of blue hydrogen. Additionally, research conducted by scientists at Cornell and Stanford universities published in the August 2021 issue of *Energy Science & Engineering* demonstrates that the process of obtaining blue hydrogen is energy-intensive and more harmful to the environment than the process of producing grey hydrogen. Moreover, it would still not ensure Poland's relinquishment of conventional fuels. For these reasons, the rationale for production of blue hydrogen, even on an interim basis, and supporting this technology from public funds, raises legitimate concerns.

Through its hydrogen strategy, Poland ultimately seeks to produce **green hydrogen**, i.e. hydrogen that can be obtained in a process using energy from renewable sources. The most often cited method uses electrolysis of water, in which the electrolysers are powered by electricity from sources that do not generate CO_2 (e.g. from wind farms). But for now, Poland lacks installations that could enable production of low-emission hydrogen, or on a broad scale. The low level of commercialisation of existing technologies is also an issue. Solutions enabling use of surpluses of electricity from renewables would be particularly helpful, e.g. using such surpluses to produce green hydrogen during periods of lower demand for power. To this end, the Polish Hydrogen Strategy calls for the launch of P2G (power-to-gas) installations in the near term (by 2025).

It may be wondered why Poland, as one of the leading current producers, has yet to create conditions for obtaining green hydrogen, considering that the industry has ready solutions available. But Poland is no exception in this regard, as most hydrogen in the world is still produced in high-emission processes of steam reforming or coal gasification. Barriers to implementation of mechanisms reducing CO_2 emissions in the production of hydrogen to date have included, for example, the high costs of electrolysers and the high demand for electricity from renewables in the electrolysis process. It is mainly these aspects that make this technology less attractive than the methods currently prevailing around the world but generating a large carbon footprint. But considering the anticipated increase in prices for CO_2 emission rights, the opportunities to reverse this trend seem more and more achievable.

GREEN HYDROGEN

- Most desirable form of hydrogen
- Environment-friendly
- Production process based on renewable energy
- Target form of hydrogen production for Poland

BLUE HYDROGEN

- Designed to be more environment-friendly—lower greenhouse gas emissions thanks to capture and storage of CO_2 in the process
- Based on non-renewable sources
- More energy-intensive than grey hydrogen and thus less beneficial to the environment
- High CO_2 emissions

GREY HYDROGEN

- Least environment-friendly—uses energy from fossil fuels, not renewables
- High CO_2 emissions
- Only type of hydrogen currently produced in Poland

Green is good

> **Use of low-emission hydrogen would reduce the emissions of sectors of the Polish economy that are hard to electrify, particularly heavy industry, where it is the hardest to achieve climate neutrality.**

Reducing the carbon footprint is just one of the identified effects that would flow from execution of Poland's hydrogen strategy. Abandonment of conventional fuels would also diversify the generation of electricity and cut Poland's dependence on fuel imports. All of this would increase the state's energy security. It must be remembered, however, that these benefits will not be achieved until Poland abandons production of conventional hydrogen and replaces it with low-emission hydrogen. And that will have to wait for a while.

The Polish Hydrogen Strategy is not a plan that can be totally executed at once. The hydrogen market faces barriers that must be gradually overcome. It is well known that the costs of low-emission hydrogen must be minimised for its production to become economically feasible, and for end users to gain access to cheap electricity. In the time horizon through 2025 this is to be enabled for example by the aforementioned launch of P2G installations. Further along, after 2030, it is planned to launch nuclear power plants capable of producing low-emission hydrogen in large quantities, which will translate into a relatively low price for hydrogen. If surpluses of power during night-time troughs in demand were used for production, green hydrogen could be obtained essentially cost-free.

The use of low-emission hydrogen would reduce the emissions of those sectors of the Polish economy that are hard to electrify. This applies in particular to heavy industry, where it is the hardest to achieve climate neutrality. In addition to the fairly obvious application of hydrogen in power and heat generation, we should also mention the possible applications of hydrogen technologies in transportation. It turns out that they can successfully replace conventional fuels particularly in urban transit (buses), road transportation (heavy and long-distance trucking), rail (locomotives and self-propelled vehicles equipped with fuel cells and batteries), as well as maritime transport, and in the longer term, aviation as well.

Hydrogen valleys to be created

Meanwhile, by 2030 at least six "hydrogen valleys" are to be founded in Polish regions:
- Lower Silesia Hydrogen Valley
- Masovia Hydrogen Valley
- Podkarpacie Hydrogen Valley
- Pomerania Hydrogen Valley
- Silesia Hydrogen Valley
- Wielkopolska Hydrogen Valley.

For several months, letters of intent have been signed for these initiatives. The hydrogen valleys are intended to contribute to the rapid growth of the hydrogen economy by bringing together businesses, scientists and others interested in conducting R&D, investments and implementations involving hydrogen technologies, taking into account the economic and scientific potential of the given region. The role of the hydrogen valleys is to integrate the hydrogen industry and ensure achievement of its ambitious plans.

Moreover, on 14 October 2021, thanks to efforts led by the Ministry of Climate and Environment, the Sectoral Agreement for Growth of the Hydrogen Economy in Poland was signed by 138 entities—representatives of the government administration, businesses, scientists, and NGOs. The document proposes initiatives for creation of institutional and legal conditions forming the foundations for stable and dynamic growth of the hydrogen economy in Poland. The future is thus shaping up to be quite green, but as usual the aims must be tested in practice.

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Siting of wind farms in Poland—today and tomorrow

Preventing threats to the marine environment through spatial planning, designating frameworks for the location of wind farms, is vital for Europe. The main factors for development of maritime zones are similar for all EU member states, while the differences arise mainly in the scale of planning. How does it look in Poland? What direction should Polish lawmakers turn?

Toward a blue economy

The EU regulations governing maritime spatial planning cover numerous facets. Deteriorating quality of waters can impact the entire European maritime sector. Spatial planning, including maritime planning, is the domain of the member states, and the European Commission can only encourage them to take initiatives in this direction. The first act of EU law in this area was the Maritime Spatial Planning Directive (2014/89/EU).

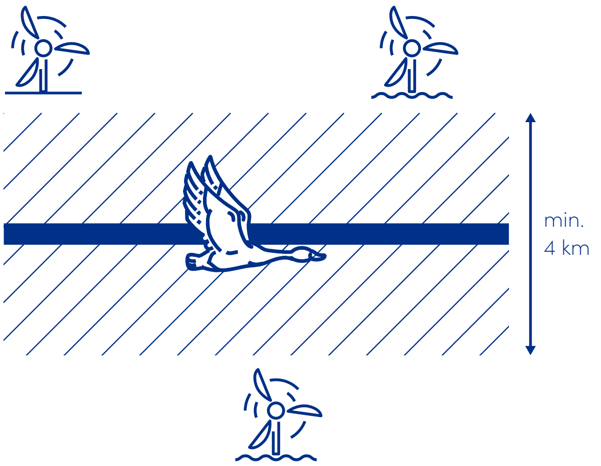
Polish variant—May 2021

Directive 2014/89/EU was transposed into Polish internal law by the Act of 5 August 2015 Amending the Act on Maritime Zones of the Republic of Poland and Maritime Administration and Certain Other Acts. Transposition occurred primarily by introducing authorisation for the Council of Ministers to adopt such plans by way of an executive regulation. Accordingly, the Regulation of the Council of Ministers of 14 April 2021 Adopting a Spatial Development Plan for Internal Waters, the Territorial Sea, and the Exclusive Economic Zone on a Scale of 1:200,000 entered into force on 22 May 2021.

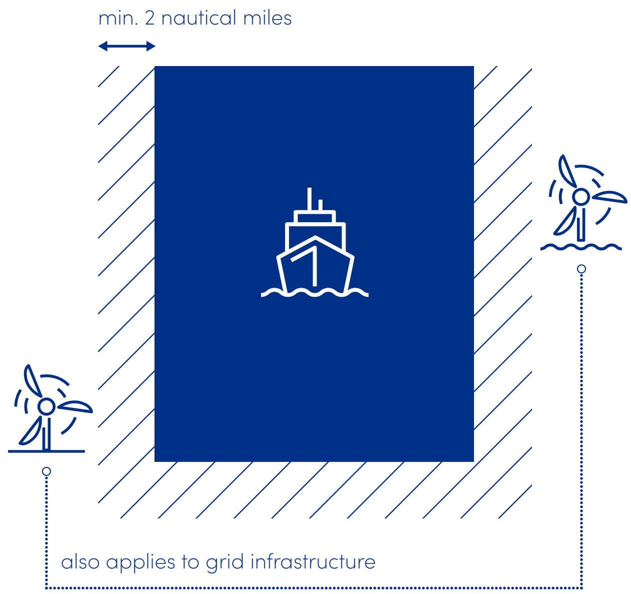
The spatial development plan for maritime areas is crucial for protection of the marine environment for two main reasons.

First, the plan is drafted by the director of the Maritime Office, who applies an ecosystem approach and takes into consideration support for sustainable growth in the maritime sector, in light of economic, social and environmental aspects. Thus the entire interaction between defence, infrastructure, »

FLIGHT CORRIDOR FOR MIGRATING BIRDS



MARITIME TRANSPORT BODY OF WATER



transport and environmental protection is essential. This ecosystem approach, under Art. 37b(1a) of the Maritime Zones Act, means joint fulfilment in managing human activity of the three following conditions:

– The impact of planned human activity on the ecosystem will be maintained at a level enabling achievement and maintenance of the environment in a good ecological condition.
– The ecosystem will maintain both the capacity for proper functioning and resistance to environmental changes arising as a result of human activity.
– Simultaneous, lasting and sustainable use of ecosystem resources and services by current and future generations will be enabled.

Second, plans for spatial development of maritime zones define zones and conditions for protecting the environment and obtaining renewable energy.

The Polish plan from 2021 permits erection of offshore power plants exclusively in bodies of water whose fundamental function is to obtain renewable energy. This function means obtaining, processing, transmission and storage in Polish maritime zones of energy from renewable sources, including erection of structures necessary for this purpose along with associated infrastructure. Undertakings can be implemented in bodies of water with this fundamental function after meeting the conditions set forth in the relevant permit or approval. This refers to a permit to erect or operate artificial islands, structures and equipment in Polish maritime zones. Approval, in turn, involves the location and means of maintaining cables or pipelines in the exclusive economic zone, and is reached with the minister for maritime economy.

With respect to issues of environmental protection, §6(2) of the Polish plan from 2021 should be noted. This provision indicates that if it is necessary to establish a flight corridor for migrating birds, the exact direction and dimension of the corridor will be determined as part of the assessment of environmental impacts of specific undertakings. But there is a recommendation that the width of such a corridor should be no less than 4 km, and its axis should be a straight line. It should be pointed out that environmental impact assessments are conducted as a standard matter, and include in particular verification of the report on the environmental impact of the project, obtaining opinions and approvals required by the Environmental Protection Law, and ensuring the possibility of societal involvement in the procedure.

§6(3) of the Polish plan from 2021 is relevant from the perspective of protection of the landscape. Under that provision, artificial islands, structures and equipment of offshore wind farms, including offshore wind power plants and internal connection infrastructure of offshore wind farms, cannot be located closer than 2 nautical miles from the boundary of bodies of water whose fundamental function is transport. Combining in a small maritime zone two functions intensively impacting the environment could prevent or excessively hinder maintenance of the characteristic features of the given landscape.

The most important strategic national document concerning spatial development of the country is the Conception for Spatial Development of Poland 2030. It also covers maritime zones. The third section of the conception, entitled "Vision of Spatial Development of Poland," points to rational management of maritime zones, along with coastal zones, with respect for biodiversity and principles of environmental protection. It also refers to the development of new forms of benefitting from maritime zones, such as renewable sources of energy, "mariculture" (cultivation of sea organisms) for ecological purposes, and maritime tourism.

Implementation of the principle of sustainable growth is particularly praiseworthy, as is noticeable for example in the diversity of planned uses of particular fragments of maritime zones.

News from Europe—September 2021

The German plan for spatial development of the exclusive economic zone on the North Sea and the Baltic Sea entered into force on 1 September 2021. In Germany, federated states decide only on spatial planning in the territorial sea, while the aims and rules for spatial development concerning the entire country and territorial waters are set forth in regional programmes taking the form of regulations. Spatial development plans for the exclusive economic zone, in turn, are prepared by the Federal Ministry of the Interior, Building and Community. The German plan from 2021 defines a zone for offshore wind farms with a total capacity of up to 40 GW, for which an area of 5,379 km^2 is reserved. The plan specifies concrete locations for particular uses of maritime waters, i.e. sailing, offshore wind energy, laying power cables, data transmission, siting of pipelines, extraction of minerals, fishing, scientific research, and national defence. A significant portion of the exclusive economic zone (over 40%) is designated for protection of maritime nature, e.g. corridors for migratory birds. Various methods for use of maritime space are separated from one another to avoid mutual interference.

Conclusions

The Polish planning conception seems to be in order. Implementation of the principle of sustainable growth is particularly praiseworthy, as is noticeable for example in the diversity of planned uses of particular fragments of maritime zones. What is particularly striking in the German plan from 2021 is efficiency combined with maximisation of achievement of defensive aims. It seems that our polluted Baltic Sea deserves a significant, and indeed predominant, involvement of environmental protection areas in maritime zones in upcoming years, which should be reflected in the plans.

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Protection of foreign investments in Poland and around the world

Investors today must take into account factors they may not have had to deal with in the past: increasingly assertive (or outright protectionist) governments, efforts to combat climate change, or restrictions due to the pandemic. These risks affect both domestic and foreign investors. But for foreign investors, the actions of "alien" authorities can pose special difficulties, resulting in a loss in value of their investments or in extreme instances rendering their ventures unprofitable or unfeasible. What can be done in such situations?

For about the last 20 years, international agreements on reciprocal encouragement and protection of investments, known as bilateral investment treaties or BITS, have been among the most common methods for protecting foreign investments. But as a result of recent rulings by the Court of Justice of the European Union, the possibility of benefitting from such treaties within the EU is becoming more and more limited. So how can foreign investors protect their investments today?

National law is the baseline

Clearly, the point of departure for protection of foreign investors is the legal system of the country hosting the investment. The contemporary rule is that foreign entities are formally entitled to the same means of protection within the national legal system as domestic entities. A general prohibition against discrimination arises out of a number of acts of international law to which Poland is also a party, including EU treaties, treaties under the auspices of the World Trade Organization, and the European Convention on Human Rights (which, contrary to what the title might suggest, also applies to legal persons, including ones not from states that are signatories of the ECHR). Acts of international law also establish universal standards for protection of ownership and other property rights, the right to resort to an independent and impartial court, and the right to a fair trial. Most often, similar principles are enshrined in national constitutions.

Every foreign investor has the right to seek protection of its rights before the common courts and the administrative courts in Poland against acts of the public authorities, essentially under the same rules as domestic businesses. Significantly, bodies of public authority (including the State Treasury and local government units) bear liability in damages for unlawful actions under Art. 417 and 417[1] of the Polish Civil Code. At least in theory, this liability is quite broad, as it applies to injuries caused by issuance of administrative decisions or judicial rulings, but also adoption of (or failure to adopt) a legal act. Because Art. 21 of the Polish Constitution enshrines the principle of protection of the right of ownership and the permissibility of expropriation for public purposes only for "just compensation," formally every foreign investor is protected by Polish law at the very least against direct expropriation, i.e. against deprivation of ownership or similar property rights by act of public authority.

Every foreign investor has the right to seek protection of its rights before the common courts and administrative courts in Poland against acts of public authorities, essentially under the same rules as domestic businesses.

The Polish legal system basically adheres to global standards, but just as is witnessed by the history of foreign investments in many other corners of the world, in practice this model has often proved inadequate to the needs of investors. Problems with the domestic system of legal protection can generally be divided into two types.

When national remedies prove inadequate

The first problem is the restrictions arising out of the substantive law in force in the host country, which usually vests the national authorities with broad discretion in setting internal policies (e.g. with respect to environmental, technical and hygienic standards), disposing of state assets, concluding public contracts, zoning and so on. Thus it may happen that the actions of the authorities—even if extremely detrimental to investors, not consulted with them, surprising and conflicting with earlier assurances, or otherwise unfair—fall within the bounds of applicable national law. Restrictions on legal recourse available under national law, such as short limitation periods or caps on damages, can also be a problem.

The second type of problem is not related to the substance of national law, but to the possibility for actual enforcement of the investor's rights in a dispute with the state before the state's own authorities and courts. Regardless of the procedural guarantees typically provided for in national laws and constitutions, foreign investors often have doubts whether these guarantees will actually be observed in their dispute with the public authorities of the host country, and whether the resolution will be founded solely on the merits. Even if these concerns are often exaggerated, the very fact that they arise can provide an additional reason for investors to waive the protections of national law in favour of other solutions.

Violation of international standards

A solution to these problems is to move the matter to an international forum. But this generally requires infringement by the host country of obligations under an international agreement to which the state is a party. Moreover, not all agreements provide for legal recourse that can be sought by the investor itself as a private party. The general rule is that obligations under international law are enforced by other states, or potentially by supra-national institutions appointed for this purpose. This is the principle under which, for example, the EU treaties operate, including the Treaty on the Functioning of the European Union. Art. 259 TFEU authorises only the European Commission or another member state to bring an action against a member state for infringement of an obligation under the treaties. Review of compliance with EU law in cases of private entities may generally be sought only via requests to the Court of Justice for preliminary rulings, submitted by national courts.

Similarly, only member states of the World Trade Organization can file claims for infringement of obligations under legal acts of the WTO, such as the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS).

Despite the difficulty in enforcing acts of this type, due to their fundamental importance for the structure of the European and global economy, they also must be borne in mind in the context of protection of individual investments. Even if complaints founded on WTO law or the EU treaties can be filed only by states, in commercial matters states do so after all in the interest of specific businesses, usually in response to issues raised by them. Protection of this type thus falls along the boundary between law and diplomacy, which nonetheless does not reduce its potential effectiveness.

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Best protection under BITs and the Energy Charter

Agreements providing for investor–state dispute settlement (ISDS) mechanisms include bilateral investment treaties as well as the Energy Charter Treaty. For this reason, these agreements serve as fundamental instruments for international protection of investments. They also apply to investments in Poland, which is a party to dozens of BITs (with such countries as Canada, China, India, Norway, Singapore, South Korea, Switzerland, and the United States) and a party to the Energy Charter Treaty.

Unlike BITs, the applicability of the Energy Charter is limited to the energy sector (broadly construed). The charter also differs because of its multilateral nature. It has 53 signatories, including the principal European countries, countries from Asia (such as Japan, Kazakhstan and Mongolia), and other jurisdictions such as Australia.

Both BITs and the Energy Charter were designed to fill gaps and address limitations on protection provided to investors under national legal systems.

Vitally important is the increased standard of treaty protection, which typically exceeds the level of "ordinary" legality of the actions of public authorities, by further requiring them to provide investments "fair and equitable treatment" (FET). As the arbitration case law has developed over the years, this broad term has taken on a specific meaning. Now a requirement has been derived from this notion of protection of the investor's "legitimate expectations" against negative and unforeseen actions of the state authorities—even when they are fully consistent with the national legal order. For example, arbitrary, surprising or disproportionate changes in state policy or law, e.g. by introducing a sudden ban on certain activity without a reasonable grace period, or imposing in this manner new and burdensome obligations, has been found to violate the FET clause.

Other actions regarded as violating this standard include discriminatory measures, although anti-discrimination is usually the subject of separate clauses of BITs. Such clauses may require the state signatories to treat foreign investors from the other state no worse than national investors (national treatment), or to treat investors from a given country no worse than investors from other countries (most-favoured-nation treatment). Investment agreements may also include other duties towards investors, e.g. information duties or duties concerning the physical security of the venture itself.

A key clause in BITs and in the Energy Charter is a ban on expropriation of the investment apart from instances of expropriation for public purposes and for fair compensation. These clauses are usually worded, or at least interpreted, broadly, so that they cover not only direct expropriation (i.e. a formal act stripping the holder of ownership) but also acts of public authorities indirectly resulting in expropriation, depriving the investment of value or economic feasibility.

For example, indirect expropriation of an investment in the form of a company involved in diamond mining would be for the host country to introduce a ban on diamond mining. Formally, the shares in the company would remain in the hands of the same investors, and the company would probably retain the same assets, but the ban on diamond mining would in practice "sink" all of the expenditures made in developing this business and deprive the investors of the profits they could legitimately have expected to generate. This would result in an indirect expropriation, i.e. a measure whose economic consequences are comparable to depriving the owners of the assets invested in the host country.

Moreover, because the ban on expropriation is interpreted broadly, it is usually recognised in practice that the state's violation of other obligations under a BIT (e.g. the duty of fair and equitable treatment and non-discrimination) which causes a detriment to the investor's assets or its anticipated profit from the investment constitutes an impermissible indirect expropriation enabling the investor to seek damages.

This level of protection is thus higher than that provided under national law, where the investor may seek damages only for unlawful acts (i.e. acts directly contrary to national law) by the public authorities, and compensation for expropriation for public purposes is generally available only for direct expropriation.

Another strength of the protection offered by BITs and the Energy Charter is the mechanism for resolution of disputes outside of the national courts, via international arbitration administered by a permanent arbitration institution or *ad hoc* arbitration by the parties without coordination by such institutions. The rules of arbitration procedure differ from agreement to agreement, but their common feature is strong guarantees of independence and impartiality of the arbitrators, particularly the lack of ties to the respondent state. Arbitration awards are enforceable under the same principles as final judgments of state courts, but, crucially, the national courts have no jurisdiction to reconsider the merits of the case. At most they can set aside an award for procedural errors or violation of fundamental principles of public policy.

Another advantage of arbitration for the investor is that disputes of this type can attract external financing from funds specialising in litigation finance, "investing" in high-value claims—and investment disputes against state authorities are typically of high value.

All of this speaks to the huge potential of the investment protection offered by BITs and the Energy Charter. This is also demonstrated by the statistics for disputes based on these instruments (maintained e.g. by the United Nations Conference on Trade and Development—UNCTAD). In the 1990s there were just a handful of such disputes every year, but since 2000 there has been clear growth, and now some 50–80 proceedings of this type are pursued annually (the actual number may be greater due to the confidentiality of arbitration). Statistically, Poland is one of the top 10 countries most often sued by investors.

Disputes within the EU

This picture is complicated in the case of disputes within the EU based on bilateral investment treaties between EU member states. In the landmark decision handed down on 6 March 2018 in C-284/16, *Achmea,* the Court of Justice held that BITs between EU member states were contrary to EU law. This led to wholesale termination of BITs between member states via a multilateral agreement dated 29 May 2020, which entered into force on 29 August 2020. A few countries (including Austria, Finland and the UK) did not sign the agreement, but in these cases BITs with other EU member states were terminated separately. This means that currently, it is generally no longer possible to initiate new cases against a member state seeking protection of investors from another member state on the basis of BITs, which are no longer in force.

The multilateral agreement from 2020 terminated only BITs concluded with other EU member states, but not with third countries. The multilateral agreement also expressly exempted the Energy Charter Treaty, to which the EU itself is a party, as are member states and a number of third countries. It was precisely due to its multilateral and supra-EU nature that the Energy Charter remained in force. The *Achmea* ruling applied only to bilateral agreements.

But this situation was further complicated by the recent ruling by the Court of Justice in C-741/19, *Komstroy*. Handed down on 2 September 2021, it held that the Energy Charter Treaty is also inconsistent with EU law insofar as it provides for the resolution of disputes between EU investors and member states by arbitration and not before the national courts. From the EU perspective, national courts are also courts of the European Union and—unlike arbitral tribunals—are bound by the interpretation of the EU treaties by the Court of Justice.

So far, the ruling in *Komstroy* has not led to withdrawal from the Energy Charter Treaty by EU member states, but it may be anticipated that soon a systemic solution will be proposed to this end, similar to the multilateral agreement terminating BITs within the EU. Until then, the Energy Charter Treaty remains binding between members of the EU, and the ruling in *Komstroy* will probably not in itself induce arbitral tribunals to decline to hear intra-EU disputes (which also did not happen following the ruling in *Achmea*). Nonetheless, national courts of EU countries might refuse to recognise and enforce arbitration awards issued in such cases, and if such arbitration cases are conducted within the EU such awards could even be set aside by the local courts.

Thus reliance on the Energy Charter Treaty in intra-EU disputes is not excluded, but requires a careful approach to litigation strategy and preparation for the possible need to enforce such awards outside the EU.

A shield for investors

In summary, while a private investor is clearly the weaker party when facing off against the apparatus of a foreign state, it is not a foregone conclusion that the investor is in a losing position. Apart from the protection offered by impartial national courts, there are a range of international instruments the investor can deploy on its own or with the assistance of its home country. Currently the most popular means of legal protection, and also the most appropriate in the majority of cases, is international arbitration based on an investment agreement such as a bilateral investment treaty or the Energy Charter Treaty. Thus if a foreign venture poses unusual difficulties, and even if the project fails, there is still hope that the investor can return home bearing its shield, and not on its shield.

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Solidarity Transport Hub: Ambitious plans, but too little time

Construction of a huge airport in central Poland could contribute to the growth of the country and transit links within Central & Eastern Europe. But completion of the project is a long way off. The main difficulty appears to be reconciling the interests of the state and of numerous local communities, whose rights should be respected and taken into account.

One of the largest and most legally, organisationally and financially complicated projects in the Third Polish Republic is construction of the Solidarity Transport Hub (Centralny Port Komunikacyjny—CPK), which has been planned for several years and is to be located between Warsaw and Łódź. CPK is intended to serve as an air and rail hub or transfer point for the CEE region. During the first phase of operation it is expected to serve 45 million passengers per year, and in the event of further growth in air traffic, it would be expanded to increase its capacity. CPK is also intended to serve as a cargo airport for shipment of goods. Construction of the hub is to be linked with reorganisation and expansion of the road and rail network throughout Poland. The plan is to acquire 3,500 hectares of land for construction of the Solidarity Transport Hub—most of it now privately owned.

Completion of construction is still slated for 2027, but many experts claim this is an unrealistic deadline. Under the timetable, the final determination of the site for the hub, issuance of siting decisions, and commencement of the process of expropriating the real estate, were all supposed to occur in 2020. But as of the start of 2022, the final location for the project has yet to be determined, and the entities responsible for conducting the overall development and construction process have yet to be appointed.

Potential benefits but numerous claims

Apart from a positive contribution to national and local economic development, construction of CPK would also give rise to numerous claims on the part of private entities operating in the area covered by the project. In addition to financial detriment caused by expropriation of real estate and loss of rights to property, various types of claims would arise connected with:

– Depriving owners of development opportunities in the zone of the planned project
– Depriving owners of the possibility of continued operation of commercial, agricultural and service activity in the zone
– Closing of plants operating on the local market and beyond
– Reservation of the site at the planning stage
– Termination of various types of contracts, giving rise to an obligation to pay contractual penalties
– The need to account for financing from EU funds, subsidies and credit previously obtained by entities operating in the area of the planned project.

Creation of a major airport also exerts a negative impact on the functioning of the local community, shredding social bonds. The siting of the airport would eliminate a dozen or more villages, forcing a large number of people to move. Such a significant project will not only impact economic issues, but also leave lasting social and emotional scars on the inhabitants.

The siting of the airport would eliminate a dozen or more villages, forcing a large number of people to move.

Legal basis

Planning such a complex project required the adoption of special rules. In a country where conducting the development process for projects can take many years, due to overlong and complicated administrative procedures, including expropriation procedures, a project of this scale would not be feasible in practice under the existing regulations. With the aim of carrying out the CPK project efficiently, the parliament passed the CPK Act of 10 May 2018, which specified the entity implementing the project (a special-purpose vehicle of the State Treasury) and laid out the entire development process and the rules for acquiring the land.

Based on Art. 28 of the CPK Act, an executive regulation was issued by the Council of Ministers on 17 June 2021 on the communes where special rules for development of real estate, planning and zoning will be applied for a period of two years, and on implementation of the public development project for CPK. The regulation provides in particular for:

– The right of pre-emption on the part of the SPV to plots of land indicated in the regulation
– The right of the SPV to purchase real estate on market terms, and
– The right to enter the site to conduct studies and measurements.

The regulation covers an area several times larger than the site ultimately to be occupied by the airport, along with related infrastructure, the final location of which is still the subject of studies and analyses. While the SPV did issue a communiqué in December 2021 identifying the preferred site for the project, these measures have yet to taken under the procedure set forth in the CPK Act. Notably, the site of the development has not been reserved (Art. 32), and there is still a long way to go before a decision determining the location of the CPK project is issued (Art. 38).

Reservation of development site

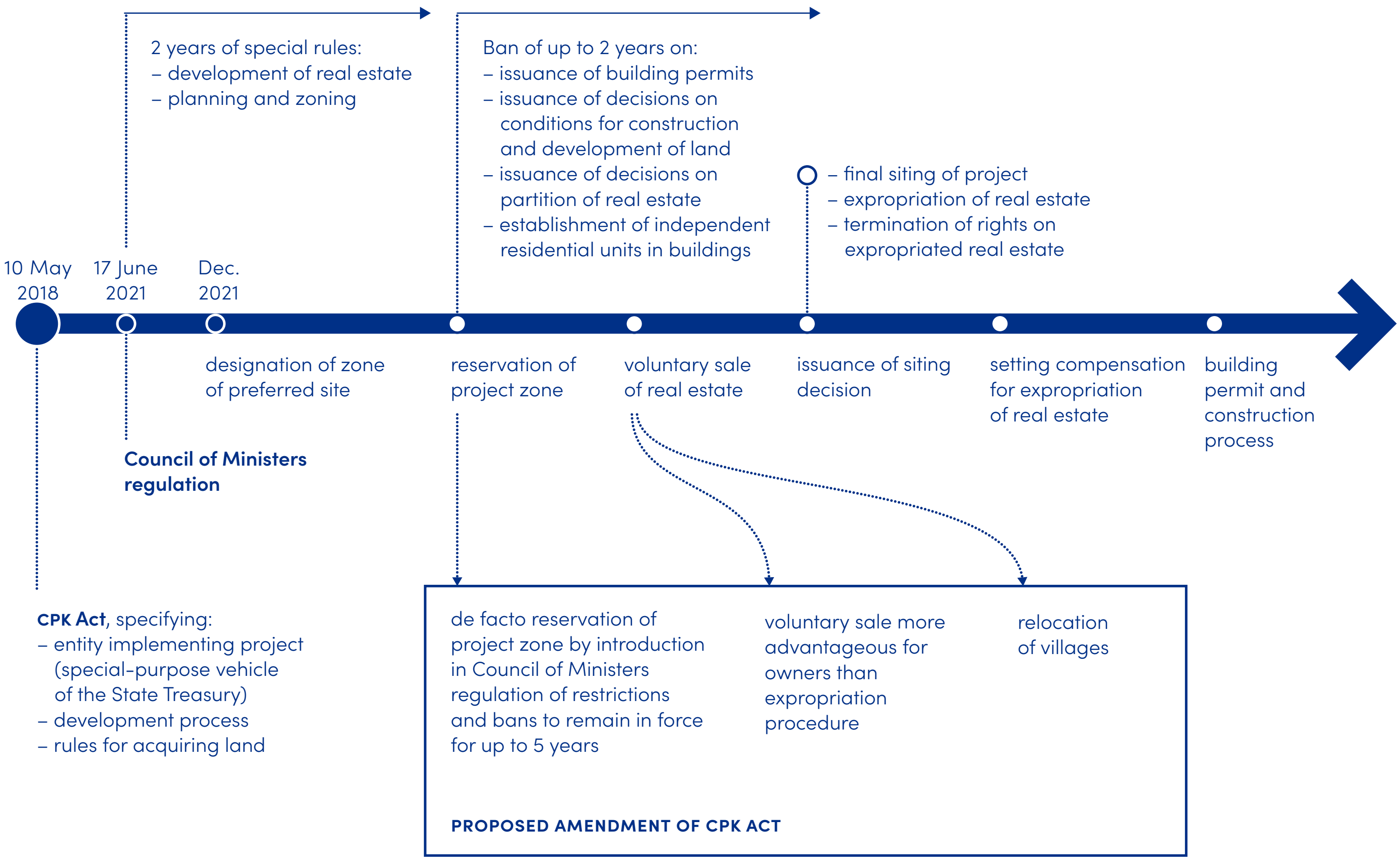
The CPK Act provides for a procedure for reservation of the project area, within the zone specified in the regulation, in order to secure proper preparation and implementation of the project. The reservation would be made by decree of the province governor for a period of no longer than two years, and would impose significant restrictions on rights to the real estate (Art. 33), such as:

– A ban on issuance of building permits
– A ban on issuance of decisions on conditions for construction and development of the land
– A ban on issuance of decisions on partition of real estate
– A ban on establishment of independent residential units in buildings.

Reservation of the area does not mean that the hub will finally be built on all or part of the reserved area, but nonetheless it greatly limits ownership rights to the real estate in question.

Project siting decision

The next phase of the project provided for in the CPK Act is siting of the project based on a decision by the province governor »



designating the location for the CPK development. That decision will:

- Define the final development zone
- Constitute the basis for obtaining a building permit
- Require turnover of the expropriated real estate, and vacating of the premises located on the site of the planned development
- Constitute the basis for entry of the State Treasury into the land and mortgage registers
- Constitute the basis for limitations on the manner of use of the real estate, not requiring expropriation but necessary to carry out the project.

On the date when the siting decision becomes final, all rights to the expropriated real estate, such as perpetual usufruct and easements, as well as tenancy agreements and the like concerning the property, will lapse. Issuance of this decision will also launch the process of setting the compensation for expropriation of the real estate covered by the decision, as well as settlement of other types of claims.

Compensation

The CPK Act provides that compensation may include cash or substitute property. Compensation is to be based on an expert report on the real estate market, commissioned by the SPV for the entire zone covered by the siting decision. However, the SPV would also be entitled to purchase the property in lieu of expropriation. Indeed, the SPV has already introduced a voluntary buyout programme, but it has not met with much interest on the part of property owners. For the most part, local residents oppose execution of the project at the planned location, and the process of buying out or expropriating land for the airport has encountered resistance from the local community.

Proposed amendment

Reality has shown that the CPK Act is not a legal instrument enabling execution of the project in accordance with the assumed timetable. For this reason, work began in 2021 on amending the act and a number of other laws. If the amendments are adopted, they will introduce significant changes in the development process for the Solidarity

Transport Hub, including with respect to the rights and entitlements of owners of properties on the site. But an analysis of the proposed regulations shows that their aim is primarily to speed up the development process, which doesn't necessarily go hand-in-hand with fully securing the rights of property owners.

The bill proposes to abandon the separate procedure of "reserving" the development zone based on a decree of the province governor, which has been criticised by the local community. However, it would be replaced by introduction of even further-reaching restrictions and prohibitions, via an executive regulation of the Council of Ministers, which would also remain in force for a longer period of four or even five years.

The proposed changes would introduce greater entitlements for the province governor, the government plenipotentiary for CPK matters, and the SPV, with respect to any activity of entities other than the SPV in the zone of the planned project. The bill also includes preferential rules for determining the value of properties necessary for the CPK project as part of voluntary sales, more advantageous for the owners. This would make voluntary sale more favourable for owners than the expropriation procedure. On the other hand, the expert report on the real estate market commissioned by the SPV would take on greater importance in valuations for purposes of expropriation, as appraisers would have to take into account the findings in the expert report when estimating the value of properties. This would undoubtedly lower the valuations of expropriated properties, as it would be the SPV that would be responsible for commissioning the expert report.

In some instances the amendment would also limit the State Treasury's liability for matters related to the development. Originally, the CPK Act provided for full damages for termination of perpetual usufruct, easements and the like, and permanent administration of the expropriated real estate. But the amendment stipulates that damages would extend only to actual loss.

Possible relocation of villages

An interesting solution is the proposal to conduct an organised relocation of villages or parts of villages in connection with the CPK project. In agreement with local government authorities, after consultation with residents, the SPV could propose to recreate the village or part of the village on a new site agreed with the stakeholders. Such a solution was successfully used, for example, on a smaller scale, in connection with construction of the Racibórz Dolny anti-flooding retention basin in Silesia. The village of Nieboczowy was completely rebuilt on a different site, along with residential and other structures—including the church and cemetery. The result was creation of a modern, new town, with complete infrastructure and a range of conveniences for residents, while preserving the bonds among the local community.

Generally, the decision to build the Solidarity Transport Hub should be assessed positively. But implementation of the project is lasting longer than originally assumed. In light of the experiences of the village of Nieboczowy discussed above, it may be expected that an organised relocation (after obtaining the approval of the local community) would be an opportunity to reconcile the interests of the state with the needs of the local community, and would have a positive impact on the overall CPK development process and how it is viewed. But while the example from Silesia involved only one village, in the case of the CPK project, this procedure would have to cover a dozen or more localities, which from the very start would make this process harder and more time-consuming to execute. It thus appears that the special-purpose vehicle company should re-examine the projected deadline for completion of the construction process and opening of the Solidarity Transport Hub.

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Foreign workers: Unexploited opportunities for the Polish labour market

For years, the figure of "five million" foreign workers who must be absorbed into the Polish labour market within the next decade or so if the Polish economy is to keep growing at its current pace has kept cropping up in the press and in public debate.

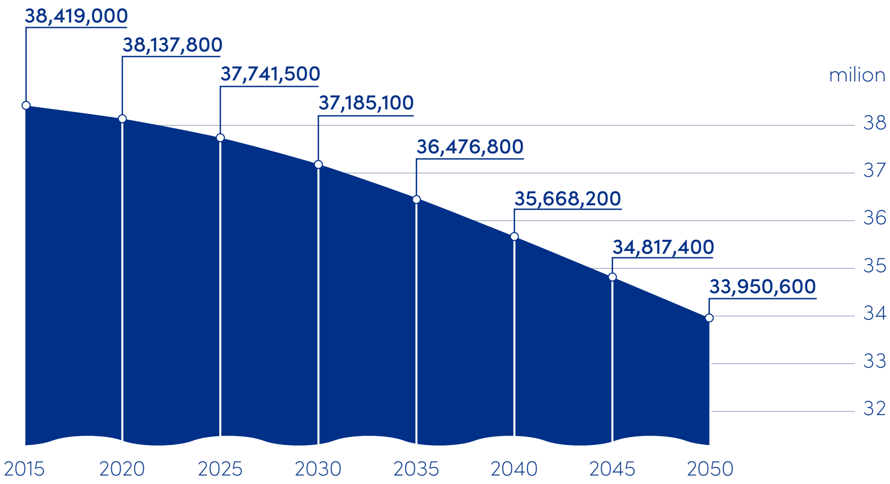
Five million? Really?

This number doesn't seem to be exaggerated if we look at the demographic projections from Statistics Poland (GUS) for the country for 2014–2050. They anticipate a decline in the population to 33.1 million in 2050, 5.4 million fewer people than in 2016. On top of that, the rapid increase in the proportion of people in their "post-productive" years must also be factored in.

No one knows exactly how many foreigners are already working in Poland. According to the first, experimental report of this type by Statistics Poland, as of the end of 2019 there were over two million foreigners living in Poland. But this number includes all persons without Polish citizenship, regardless of when they settled in Poland or for what purpose. It thus seems more relevant to rely on the statistics maintained by the Social Insurance Institution (ZUS), according to which at the end of 2020 there were over 725,000 foreigners registered for social insurance and paying contributions. This was a record-high figure, up nearly 75,000 year-on-year. At the end of June 2021 this number had jumped to nearly 820,000 foreigners.

For years, Ukrainians have predominated among foreigners working in Poland, accounting for about 70% of foreigners registered with ZUS. Further down the list are citizens of Belarus and Georgia. Poland also draws workers from India, Vietnam, Russia, Moldova, China, and South Korea. There are also significant groups of German, Italian, and British citizens living in Poland.

POPULATION OF POLAND



FOREIGNERS REGISTERED WITH THE SOCIAL INSURANCE INSTITUTION (OCTOBER 2021)

It's still not enough

But all of this is still too little. The demand for foreign workers is steadily growing—and this is a trend not only in Poland but across Europe. And the influx of foreign workers is not keeping up with this demand. In June 2021 there were 142,800 jobs open in Poland (up 29.6% from March 2021), and 81% of businesses declared that they had difficulty filling vacancies. This situation is worsened by the noticeable and continuing outflow of economic emigrants from Poland to neighbouring countries due to competitive employment conditions and lower barriers to obtaining working papers there. For most Polish employers, using the work of foreigners has already become a common occurrence and a necessity. The rest will join this group within the next few years.

Foreign workers find jobs in Poland primarily in industrial processing, construction, transport, and warehousing, which struggle with the highest shortages. Foreigners still perform mostly less-skilled labour in Poland, as operators and installers of devices, and as industrial workers and craftsmen. But many professions from the IT sector (e.g. app programmers) and healthcare have appeared for years on the lists of professions suffering labour shortages.

State uninterested, law unencouraging

Although the problem of the shortage of workers on the labour market is nothing new, for many years the government has not taken steps to make it easier or more attractive to hire foreign workers in Poland.

Not much was changed by the publication in July 2021 and distribution for inter-ministerial comment of a resolution of the Council of Ministers on adoption of a document entitled "Poland's migration policy: Directions for actions in 2021–2022." This much-awaited policy is another attempt to coordinate the state's actions with respect to migration processes. Earlier, in 2012, the Council of Ministers adopted a document entitled "Poland's migration policy: Current state and calls for action," which was subsequently repealed in 2016. In 2018 the Council of Ministers adopted "Socio-economic priorities of migration policy," but that document never led to any specifics.

It is hard not to notice that the policy currently being drafted covers a very brief period, a big chunk of which had already elapsed before the draft even appeared. Moreover, the document does not provide many solutions to the multiplicity of issues raised by employers. This manifests the lack of a clear, long-term vision for Poland's migration policy, and even suggests that the government's interest in this area is illusory. Instead, realistic legal solutions streamlining processes for hiring foreigners should be adopted as soon as possible if Poland wishes to avoid squandering the potential of foreign workers.

No rush

For years, the biggest problem for foreigners and employers has been the significant delays in handling of matters by the administrative authorities, and more specifically the province governors (*wojewoda*).

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This applies in particular to temporary residence and work permits (documents allowing foreigners to legally work as well as reside in Poland, without the additional need to obtain a visa). As of 25 June 2020, the average time it took to resolve a case of this type in Poland was 238 days. This is several times longer than the periods provided for in the law. One reason is the growth year after year in the number of permit applications (in 2018, 165,000 applications were filed for temporary residence and work permits, and in 2021, nearly 327,000), and another reason is the shortage of officials and the lack of procedures (including internal procedures) for efficient handling of these applications.

It generally takes much less time, although still too long (from several weeks to several months), to obtain a work permit, which only authorises the holder to work and generally requires the foreigner to obtain a visa abroad. It should be mentioned, by the way, that despite obtaining a work permit, there is no guarantee that the consulate will issue a visa to the foreigner allowing them to exercise the permit and actually begin working in Poland. In practice, there are many instances where consulates have failed to issue visas to foreigners holding a work permit, due to the large number of applications received, or did not manage to schedule meetings with applicants.

In the case of a work permit, as well as a permit for temporary residence and work, in a situation where it is new work for the foreigner, the long waiting time means that the foreigner cannot begin work until obtaining a permit. In the case of a permit for temporary residence and work, this also means that as a rule (certain modifications were introduced for the duration of the pandemic), if the foreigner leaves Poland before issuance of the permit, it is not permissible to re-enter Poland without a visa (or without the right to visa-free travel). In many instances, these inconveniences are great enough to discourage employers from seeking foreign workers, or to encourage foreign workers to seek work in other neighbouring countries instead. Certain possibilities do exist for expediting consideration of these cases, but they require experience and an intimate knowledge of the procedures.

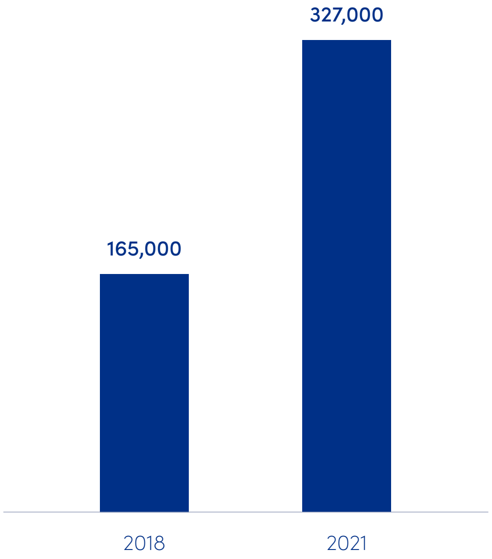
Only in Polish

It is not just the waiting times that discourage foreigners and employers. Communication barriers between the foreigner and the office pose a major problem, particularly in proceedings involving legalisation of the foreigner's stay (where the employee himself is the party, not the employer as in the case of legalisation of work).

Phone lines of province offices handling applications are often busy, and some of them are permanently suspended. Email correspondence often goes unanswered, and when a response is sent, it is usually just standard information, not addressing the specific circumstances of the case, telling applicants what they already know. Submissions of letters and documents by post often require the sender to wait weeks for a response.

Another problem is the language barrier. Even if the foreigner manages to get through to an official, that person usually cannot use the foreigner's native language, and English can be an inadequate substitute when fluency is lacking on both sides. The same applies to the sometimes extensive summonses from offices to fix formal deficiencies in applications already filed, which are sent to foreign applicants in Polish. Summonses often employ standard content, not adverting to documents already filed and not explaining why the existing documents are insufficient or stating exactly what the foreigner needs to submit. Sometimes summonses are sent out needlessly because the officials have overlooked materials already provided. Over recent years, deciphering such requests has become a skill requiring special experience.

NUMBER OF APPLICATIONS FILED FOR TEMPORARY RESIDENCE AND WORK PERMITS



It seems that misunderstanding on the part of foreigners of correspondence sent to them, or in communications in other forms, may be the main reason for issuance by offices of the relatively high number of denials of applications (according to government migration statistics).

Is there any hope?

A new prospect has recently appeared, as the parliament has adopted a long-awaited amendment to the Foreigners Act and other acts.

It makes a number of changes in the existing procedures for legalisation of work and stay of foreigners in Poland, including with respect to the requirements imposed on foreigners and the deadlines for deciding their cases.

The maximum permissible period of work on the basis of a declaration has been extended to 24 months.

It also introduces a 60-day period for deciding cases by the administrative body of first instance, generally starting to run from the time when any formal deficiencies in the application for issuance or amendment of a temporary residence permit have been fixed, and the foreigner has fulfilled his obligation to appear in person at the administrative office. If the authorities actually meet these deadlines, the change will be revolutionary.

A significant change, long called for, is also introduced with respect to declarations registered with the labour office on entrusting work to a foreigner. These declarations can cut red tape and allow for quick legalisation of work by citizens of countries including Ukraine, Belarus and Russia (the declarations should be registered within 7–14 days). Under the prior rules, the period of performance of work on the basis of such a declaration could not exceed 6 months within a period of 12 successive months, regardless of the number of entities entrusting work to the given foreigner. Under the new regulations, the maximum permissible period of work on the basis of such a declaration has been extended to 24 months, which should greatly increase the usefulness of this solution and unburden other proceedings, at least for some time.

The amendment also gives priority in considering applications for work permits to businesses conducting activity of strategic importance for the national economy. A list of such businesses is to be drawn up by the minister for economy through an executive regulation.

The amendment also allows authorities to exchange information via electronic channels on whether a foreigner's entry or stay in Poland could pose a threat to state defence or security or public order and safety. At least in theory, this should greatly expedite this stage in the procedure for issuance of residence permits, sparing the various state offices the trouble of exchanging the physical case files.

A major practical problem which employers hiring foreigners struggle with on a daily basis is that permits for residence and work are tied to a specific employer, without the possibility for another employer to rely on the permit, as well as the limitation on the possibility of changing certain working conditions. The amendment provides for the possibility (not existing before) to amend a permit for residence and work in the case of a change in employers. In such cases it is no longer necessary to apply for a new temporary residence permit. Additionally, the catalogue of circumstances not requiring amendment of a temporary residence and work permit, or amendment of a work permit, has been expanded to include:

– Change in the name of the position at which the foreigner works, where the scope of duties remains unchanged
– Increasing the working time while increasing the foreigner's remuneration proportionally.

Polish opportunities

It is hard to predict how the practice of applying the new regulations will shape up, but the aim of the changes should be assessed positively and regarded as a turning point in the government's approach to the employment of foreigners in Poland. Any instruments that can expedite the consideration of immigration cases and increase their predictability, as well as the efficiency of the system, will contribute to improvement of the situation of foreigners and their employers (current and potential), and consequently enable the growing gaps in the labour market to be filled. But much will depend, as usual, on the correct application of the new regulations (or not) by the authorities, and this in turn will largely depend on the state's policy towards employees from abroad. It is ultimately that policy that will determine whether Poland takes advantage of the opportunities and undoubted advantages offered by hiring foreigners.

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Employee's unilateral relocation abroad

An employee working remotely could theoretically work from anywhere in the world. Such employees sometimes feel that because their physical presence at the workplace is not required, they can freely decide on the place where they will perform their duties. But a change in working location—particularly leaving for a different country—can cause serious legal consequences for the employment relationship between the parties. Thus employers need to be aware of these consequences and carefully regulate the location of remote work, as well as enforce the solutions they adopt.

Unilateral change in working location—most important potential consequences

One of the key issues with an employee's relocation (not only abroad, but also within Poland), which in practice typically goes unnoticed until an unfortunate accident arises, involves **the employer's occupational health and safety obligations**. Apart from certain exemptions under the regulations on telework, the employer bears responsibility for occupational health and safety. If the parties have not established a place for remote work, the employee may choose a place where the employer will not be capable of performing its occupational health and safety obligations, or performance of those duties will be at least greatly hindered. For example, it may be problematic to conduct a potential accident investigation, which employers are not exempt from carrying out in relation to remote workers, regardless of the location where they perform work.

Relocation of an employee abroad may also result in a **change in the law governing the employment relationship,** regardless of the clauses on this issue in the employment contract. Under the rules in force in the European Union, a choice of law must not have the result of depriving the employee of the protection afforded to him or her by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of a choice of law. Under the basic rule, an employment contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his or her work in performance of the contract (Art. 8(2) of the Rome I Regulation (593/2008)). A temporary or brief unilateral relocation by the employee to another EU country thus should not result in a change in the governing law. But in the case of a long-term or permanent relocation, or relocation

Under the general rules, the place of work must be indicated in the employment contract, and a change generally requires agreement between the employer and the employee.

to a country outside the EU, the risk of a change in the governing law cannot be excluded. A change in the governing law would be significant, as it would require compliance with the minimum conditions for employment in the given country, particularly involving such matters as minimum wage, working time, entitlements to leave, and the procedure and requirements for terminating employment.

Another issue that should be considered is the risk of a **change in jurisdiction over employment disputes**. In certain situations, the employer could be sued in a court in a country different from the one in which the employer has its domicile or registered office. Based on the EU regulations, the employee may choose to sue the employer in the courts for the place where the employee habitually carries out his or her work, or last did so (Art. 21(1)(1) of the Brussels I-bis Regulation (1215/2012)). Although it is difficult to image that an employee could exercise this privilege in a situation where they decided on their own to move to a different country, if the employer is aware of the relocation but does not object, or expressly accepts it, such a possibility cannot be ruled out.

Performing work abroad may also exert certain effects under **tax law** and social insurance law. From the perspective of tax law, the place where the employee has tax residency, and thus is subject to taxation on all their income regardless of source, will be crucial (the Polish regulations provide for tax residency in Poland in the case of an individual who is present in Poland for a total of at least 183 days in the year or has the centre of their life interests in Poland). Apart from this, there may also be limited tax liability, i.e. being subject to taxation in a given country on income earned in that country. Here, apart from the national regulations, the provisions of the applicable treaty on avoidance of double taxation would also have to be considered (if there is a tax treaty in force between Poland and the other country).

The rules for **social insurance** work somewhat differently. As a rule, particularly in the case of countries with which Poland has not concluded a social security agreement, an employee can be subject to social insurance from the very first day of performing work in the given country. As an exception—although this applies only to EU member states and countries with which Poland has concluded a social security agreement—an employee may continue to be subject to social insurance in Poland if they hold the relevant document (in the case of EU countries, this is the "A1 certificate").

Especially in the case of countries outside the EU, for performance of work in those countries it may also be necessary to complete formalities under **immigration law**, in particular to obtain a residence permit as well as a work permit.

Place of performing remote work—what the law says

To minimise the risk of having to struggle with the consequences discussed above, employers should exercise due diligence in regulating the place of remote work by employees. Under the general rules, the place of work must be indicated in the employment contract, and a change in the place of work generally requires agreement between the employer and the employee. But the regulations on remote work introduced in connection with the COVID-19 pandemic, and the Labour Code provisions on telework (i.e. currently the only regulations governing remote work), contain specific rules concerning the place of work which can often generate problems in practical application.

The regulation introduced in connection with COVID-19 is silent on determination of the place of work, only defining remote work as work performed "away from the place of regular performance of the work." Although the regulations are not clear in this respect, the employer undoubtedly has a right to designate the place of performance of remote work, and even more so to set restrictions in this area. Also in the case of telework, the issue of establishing the place for performance of the work is not precisely regulated. The regulations state that telework is work "regularly performed away from the workplace." This could thus be any place established by the parties to the employment relationship. It is recognised that this place can be established not only affirmatively, by designating one or more places for performance of the work, but also negatively, by indicating places where performance of telework is impermissible.

The vague working of these regulations, which do not require establishment of a specific place of work, often result in practice in failure by the parties to regulate this »

In light of the consequences of relocation abroad, it should be recognised that even if the location of remote work is not adequately regulated, the employee should consult with the employer on the intention to perform work abroad.

essential issue adequately, or at all. Meanwhile, the consequence of failure to specify the place for performance of remote work or telework, or defining it only negatively, is to leave the choice in this respect to the employee. If the employee then decides to work abroad, this can lead to the various serious consequences described above. Therefore, employers should strive to establish a specific location for performance of remote work and expressly address the issue of performance of remote work abroad.

To some extent, these problems could be resolved by the regulation on remote work currently being drafted to replace the regulations on telework. Remote work is to be defined as work performed "wholly or partially at a place indicated by the employee and agreed with the employer, including the employee's place of residence…." This proposed wording confirms the rule of agreeing on the location of remote work, but the precise definition of the location will still be up to the employer.

Unilateral relocation by an employee—what the employer can do

If the employee's unilateral relocation abroad does not violate the rules in force at the given employer, and is acceptable to the employer, the employer can take steps to verify and if necessary comply with duties related to legalisation of the employee's work in the given country. But, understandably, in the vast majority of cases, employers are not inclined to accept this state of affairs. Then the possible steps to be taken will depend on whether (and how) the issue of the place of performance of remote work was regulated by the parties to the employment relationship.

If the employee directly violates the established rules, the employer may, depending on the circumstances of the case, instruct the employee to perform at the agreed location, warn or reprimand the employee, or even terminate the employment, including with immediate effect.

In light of the consequences of relocation abroad discussed above, which may entail significant costs and additional obligations on the part of the employer (at least connected with the need to verify the law in force in another country), it should be recognised that even if the location of remote work is not adequately regulated, the employee should consult with the employer on the intention to perform work abroad. But if the employee fails to consult with the employer, and the location of remote work was not regulated (i.e. the employee has not broken the established rules), employers should exercise caution in exacting potential consequences against the employee—although in this case as well, under certain circumstances, a violation by the employee could even warrant termination.

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If not temporary work, maybe “external workbench”?

One of the biggest challenges for Polish businesses in the reality of the pandemic and rising inflation is to recruit qualified staff. It doesn’t help when they have limited budgets with which to seek out talent to fill growing job vacancies. For this reason, one solution gaining popularity is outsourcing of employees—or indeed a whole panoply of forms of employee outsourcing.

Hiring immediately—but there’s no one to hire

The shortage of workers is particularly hurting companies from the sectors of IT, trade, manufacturing and construction. According to various estimates, across the European Union there is a shortfall of about 600,000 programmers, and in Poland alone about 50,000 IT specialists. With this number of unfilled vacancies, the Polish economy cannot achieve the growth it is capable of, and companies cannot unleash their full potential. There are examples, also in Poland, where to find skilled staff, entities (mainly foreign ones) have acquired entire companies suiting their desired operating profile.

But at the same time, the increasing instability of the economic situation and constant changes in law, causing uncertainty as to the scale of increases in operating costs, discourage even optimistic businesses from increasing their rolls of regular employees. Particularly in an age of pandemic, a more and more commonly applied solution is outsourcing of personnel—in all of its forms.

HR outsourcing under Polish law

On the HR market, outsourcing occurs under various mysterious names, such as employee or staff leasing, “employer-of-record,” “external workbench,” “resource sourcing,” “pooling of experts,” simply “staffing,” or more generally, “consulting services” in the given field. The key feature for all these arrangements is that one firm (the recipient of the services) manages the work of “borrowed” staff and benefits from the results of their labour, while formally these individuals are employed by another entity, which bears all the legal and administrative (payroll) duties associated with employment (i.e. there is no direct contractual relationship between the beneficiary of the services and the borrowed workers).

In this respect, we don't believe that Polish law is keeping pace with what is already a common market practice. The only arrangement regulated under Polish labour law which provides for benefitting from the work of employees or contractors formally employed by another company is "temporary work," governed by the Act on Employment of Temporary Workers of 9 July 2003. From the perspective of the labour market, this is a somewhat outdated law. The statutory notion of "temporary work" is characterised by apparently excessive time restrictions (the employer-user can use the work of a given temporary worker, as a rule, only for a total of 18 months within a period of 36 consecutive months), as well as burdensome formalities on the part of employer-users associated with the use of temps.

Advantages of outsourcing

Unlike temporary work, HR outsourcing is attractive for businesses. The reasons include the following:

- There are no time restrictions on use of services performed by the borrowed staff.
- Services are settled between the companies based on payments for working hours and any costs incurred (time and material basis), which allows for better planning and monitoring of the budget for each project.
- Within outsourcing, companies can lend persons having individual businesses (freelancers or independent contractors), which is particularly relevant in the IT sector, where this is currently the predominant model for cooperation.
- The rules of cooperation between the beneficiary of the services and the entity lending its staff are the subject of negotiations between the parties, and the law does not impose minimum conditions or content for their contract. Unlike temporary work, which is highly regulated, companies lending their staff are not restricted to work agencies, or even entities whose business model (principal operating profile) involves lending qualified staff. (There are already internet platforms facilitating contacts between firms seeking specialists for specific projects and other businesses interested in lending their personnel.)

Businesses using external staffing support point out that another advantage of outsourcing is the possibility of drawing from a larger, more diverse pool of talent (for example, IT specialists are sceptical of working as temps, and the most sought-after specialists often reject out of hand the notion of being tied to a single employer by a traditional employment contract). This fosters knowledge-sharing and contributes to the creation of innovative solutions. On top of this, users can obtain higher-quality services at lower cost, and the available services and organisational solutions can be more narrowly tailored to the needs of the specific customer or project, particularly projects closely tied to local conditions.

There are already entities operating on the Polish market relying mainly on personnel borrowed from other entities. This obviously gives rise to a risk that if the cooperation breaks down (e.g. because the lender of staff is acquired by a competitor of the service recipient), the beneficiary of the services might not be able to continue its business as before, or to meet its obligations to its own customers.

When advising our clients, we see how diverse models of cooperation function in Poland. Often this is not just one-off cooperation solely for the needs of one project, but an economic bond running over many years, with a carefully planned strategy, where staff outsourcing is a key element for the service recipient to quickly enter the Polish market and gain a competitive advantage.

During an enterprise's growth phase, outsourcing can allow it to quickly obtain personnel with the qualifications needed to expand operations, and then to train the best of the borrowed staff to suit its own needs. As an example, one of our law firm's clients, together with an external HR outsourcer, even created a special training programme in which, through outsourcing, the enterprise could identify the best candidates and then, at a later stage of its development, offer them permanent employment directly with the enterprise.

Outsourcing and temporary work

The services of firms offering staff outsourcing typically meet the criteria for regarding them as "temporary work" under the statutory definition. But outsourcing firms consistently reject this term, and classify what they offer as outsourcing of services.

The realities of the pandemic, including less-frequent inspections by state authorities (particularly the overburdened State Labour Inspectorate) and the spread of remote work, as well as the more and more refined models for cooperation between businesses, have contributed to a further increase in the popularity of outsourcing. But this does not mean that entities offering or using outsourcing can feel completely safe. We are aware of instances where as a result of an inspection, or more often, a complaint by a disgruntled (most often former) outsourced worker, businesses using outsourcing services have been held responsible for infringing the regulations on temporary work, or have had to admit that there is an immediate employment relationship between them and the workers previously borrowed.

Outsourcing of services is not expressly regulated in Polish law. It differs from temporary work primarily in that the subject of the contract between the businesses is not delivery of workers with the requested qualifications and experience, but delivery of specific services performed only by qualified employees of the given entity.

Thus, in many instances the line between temporary work and outsourcing of services is thin indeed. The criteria usually considered in determining whether a given service may be regarded as outsourcing of services, and not temporary work, include in particular:

– **Subject of contract.** In the case of outsourcing of services, the borrowed staff should be, as it were, "invisible" in the contract. That is, the contractual provisions and the practical method of performing the contract should not directly refer to external personnel or their professional skills, experience, or other personal attributes, and the manner of settling payment for the services should not be based on working time (person-hours) by a specific number of persons at specific positions. In simple terms, it should appear from the contract for performance of outsourcing of services that the beneficiary of the services is interested only in performance of services in compliance with certain quantitative, qualitative or technological parameters, and not in who actually performs the services for the supplier. This does not prevent specifying requirements in the contract as to the quality and scope of the services which indirectly (in practice often very effectively) requires the involvement of persons with relevant qualifications or even certain specific individuals (although in that case the parties are entering a zone of increased risk). Appropriately drafting the provisions of an outsourcing contract and the practices applied can enable the parties to achieve a result similar to temporary work, but with a limited risk that the cooperation model will be found to constitute temporary work.
– **Management of borrowed personnel.** In the case of outsourcing, the workers supplied remain under the exclusive supervision of the entity formally employing them, and not the beneficiary of the services. Thus in the outsourcing model, the recipient of the services should generally refrain from issuing instructions to the borrowed workers or managing their work on an ongoing basis. But in many instances this approach will not meet the needs of the enterprise using external staff. One solution functioning on the market is for the entity lending its personnel to designate a contact or coordination manager devoted to the specific client, who, on a day-to-day basis, at the client's location, will direct the work of the borrowed staff and serve as the contact person for the client.

The future of outsourcing

It is apparent from the example of the IT sector how rapidly the market for HR outsourcing is growing. This is a result of progressing digitalisation (which has accelerated even faster during the pandemic), and demand for IT services combined with a limited number of specialised professionals.

The model of temporary work does not meet the challenges of the market or the needs of businesses. This portends further growth of outsourcing and the development of new, more refined models for cooperation between firms, including cooperation involving the use of work by persons provided by an outsourcer (agency), where those persons may even be located on a different continent, and the results of their work are delivered via cloud solutions. In that arrangement, the insourcer (customer) has no physical, legal or even email contact with the persons performing the work for the customer.

Aggregation and anonymisation of data can even make it impossible to tie the results of the work to any specific worker. This obviously creates a highly complex landscape, the full assessment of which would require analysis across such areas as conflict-of-law rules (private international law), taxation, and data protection. In such complicated sets of facts, it may pose a major challenge for the labour inspectors (for example) to reach a correct assessment, and depending on the approach adopted could mitigate or elevate the risk for the customer and the agency—but that would be a topic for another article.

If lawmakers decide to regulate outsourcing, it can only be hoped that the legislative solutions adopted, while maintaining essential protections for workers, do not limit the ability of businesses to quickly source personnel with specific qualifications. Otherwise, efforts at regulation might throw out the baby with the bathwater.

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Business Crime practice

How do prosecutors "look after" corporate funds?

It is not just the perpetrator of a crime who can be punished by forfeiture of assets deriving from the offence. How is this possible? It is enough if assets constituting the gains from a criminal offence are transferred through any means to another person who under the circumstances surrounding acquisition of the assets could assume that the assets derived from a prohibited act. Then the recipient can be subjected to a blockade on their bank account or attachment of their assets, or in the worst case could forfeit their assets and be stripped of ownership.

The accountant rings in the morning and says she could not transfer this month's payroll to the company's employees. The bank received a fax from the prosecutor's office requesting that the bank block all of the company's accounts because of a suspicion of money laundering. You contact the prosecutor (easier said than done) and learn that the blockade of funds will remain in place for six months, and an order to that effect will soon be served on the company—but not to worry, because the order can be challenged in court. That's all the prosecutor can reveal—any more would compromise the secrecy of the investigation.

Sound abstract? Not necessarily. The prosecutor's office and the police have been vested with a range of tools enabling them to deprive commercial entities of their funds, and they are more and more ready to use those tools.

Blockade of bank account and the connection with money laundering

The Anti-Money Laundering and Counter Terrorist Financing Act (the AML Act) enables prosecutors to halt transactions or block an entire bank account. This freezing of funds can be ordered for a maximum of six months. Significantly, it is sufficient for the prosecutor to "suspect" that a given transaction or funds in an account "may have a connection" with money laundering or financing of terrorism.

The AML Act does not specify what that connection might be, which in practice allows prosecutors to act with great latitude.

Money laundering is understood to mean:
- Acceptance
- Possession
- Use
- Forwarding
- Export
- Concealment
- Transfer or conversion
- Assisting in transferring ownership or possession, or
- Taking other actions

with respect to funds, with the aim of preventing or greatly hindering:
- A determination of the criminal origin of the funds or their location
- Detection
- Attachment or seizure, or
- Forfeiture.

Thus it is not hard to imagine a situation in which a company obtains funds with some "connection" to money laundering.

Blockades serve their function when they affect bank accounts of perpetrators of criminal offences. Then they deprive the perpetrators of the gains from their crime, and also secure the interests of the injured party, enabling them to recover the lost funds.

We see this in the case of business email compromise fraud, where the perpetrator (or a straw man) opens an account at a bank in Poland for himself or a company. Then, through various actions (e.g. hacking into email accounts, or sending spoof emails claiming that a supplier has a new bank account), the perpetrator causes funds to be sent not to the true creditor, but to a fraudulent account. If the defrauded company quickly realises that it has fallen victim to fraud (or the bank itself, through its internal procedures, manages to halt the transfer of funds), a freeze on the fraudulent bank accounts can make it possible to recover the loss.

But this reveals a significant aspect—that the effectiveness of a blockade depends on the effectiveness of actions of law enforcement authorities as well as the banks. Often it is the bank, not law enforcement, that notifies the interested parties, including injured parties, that a blockade has been imposed.

Practical problems with blockades

Imposing a blockade on a bank account causes lots of problems in practice, and the consequences of this measure can be far-reaching. This applies in particular to blockades on accounts belonging not to the perpetrators, but to third parties.

The first problem relates to the time when the blockade is executed. This may occur by suspending a transaction or freezing the account. In this respect, the bank most often acts at its own initiative, not at the request of the prosecutor. The problem is that the owner of the bank account usually is not informed immediately of the blockade, but learns about it only when for example it attempts to execute a transaction and the

WHAT IS MONEY LAUNDERING?

→ Acceptance…

→ Possession…

→ Use…

→ Forwarding…

→ Export…

→ Concealment…

→ Transfer or conversion…

→ Assisting in transferring ownership or possession…

→ Taking other actions…

with respect to property derived from criminal activity, with the aim of preventing or greatly hindering

…determination of the criminal origin of the property

…detection

…seizure

…forfeiture

request is denied, or when the owner is served with the order imposing the blockade on the account.

Second, sometimes "oversecurity" occurs. Banks cannot verify or dispute the amount of the blockade indicated in the prosecutor's order. If the amount of the blockade is greater than the injury caused by the perpetrator, this is obviously an argument for appealing against the prosecutor's order. But nonetheless, the bank will continue to block the amount indicated in the order until the appeal is heard by the court (assuming the court upholds the appeal and reduces the amount of the blockade), or until the prosecutor "self-corrects" the order.

Third, errors can happen in applying blockades. If a company maintains several bank accounts, and the prosecutor does not know which account holds sufficient funds, the prosecutor will order a blockade against several accounts. Every bank receiving such an order will have to comply with it and freeze those accounts. Due to such multiple blockades, the actual amount of the frozen funds may greatly exceed the amount of the loss. In such a situation, the owner should promptly apply to the prosecutor to amend the order and block only the indicated account.

Fourth, even if the company receives the blocking order, due to lack of access to the case file the company may have difficulty understanding the grounds for the blockade or showing that it was not aware of the illicit origin of the funds. Meanwhile, as mentioned above, to order a blockade, the prosecutor does not have to prove that the funds are connected with illegal activity—a "suspicion" will suffice.

Consequently, a company that had no inkling of the illicit origin of funds may be suddenly and unexpectedly deprived of access to some or all of its own funds, and this could cause the company to lose its liquidity.

Extended blockade —possible or not?

As a rule, a blockade can be ordered for a maximum of 6 months, but the regulations provide for the possibility for the prosecutor to extend it by a further 6 months. Funds can be attached for a further period only when the prosecutor issues an order securing the assets or deems the funds to be tangible evidence in the proceeding.

Issuance of an order securing assets requires charges to be filed against the alleged perpetrator. This is difficult in money laundering cases, where the perpetrators are very often foreigners backed by organised criminal groups. Aware of these difficulties, and afraid of losing the secured funds, prosecutors have begun issuing orders deeming funds in bank accounts to be tangible evidence, to be released to the owner only when they become "unnecessary for the proceeding," which is determined by the prosecutor, or at a later stage by the court. When the funds are deemed to be tangible evidence, that results in attachment of the funds indefinitely.

The Supreme Court of Poland has criticised this practice. In its resolution of 13 October 2021 (case no. I KZP 1/21), the Supreme Court held that Art. 86(13) of the AML Act should be interpreted narrowly, in light of the surety-like nature of the law enabling property of others to be blocked only for a definite time. The court found that the

PROBLEMS WITH FREEZING FUNDS

TIMING OF BLOCKADE

The bank typically doesn't inform the customer that it has blocked a payment or account. (The customer doesn't realise it until attempting for example to withdraw or transfer funds.)

ERRONEOUS BLOCKADES

The prosecutor may issue an order blocking all accounts, assuming that the balance in any one account may not be high enough to cover the loss.

OVERSECURITY

The bank cannot dispute or verify the amount of the blockade, which may result in blocking funds exceeding the amount of the loss.

FRUSTRATED DEFENCE

The company typically does not receive access to the case file, because formally it is not a party. This greatly impedes the defence and the company's ability to show that it did not know of the criminal origin of the funds.

practice of issuing orders deeming funds in a bank account to be tangible evidence in proceedings is erroneous and groundless. Thus a freeze on a transaction or bank account will lapse if an order on securing the assets or on tangible evidence is not issued within 6 months. The court also held that "funds in a bank account do not have the characteristics of tangible evidence within the meaning of Art. 86(13) of the AML Act, because they do not exist as a thing, but are merely entries in an IT system." By contrast, items such as banknotes, for example, have the characteristics of tangible evidence within the meaning of the AML Act.

But soon after that ruling was issued, the parliament stepped in, and a new provision of the Criminal Procedure Code entered into force on 12 January 2022, expressly stating that funds in an account also constitute a thing or object within the meaning of the chapter on seizure of things, and can be deemed to be tangible evidence in a proceeding. Thus it currently appears that the practice of attaching funds in a bank account indefinitely as evidence in the case will continue.

It appears that the practice of attaching funds in a bank account indefinitely as evidence in the case will continue.

Security against property of a third party, and forfeiture

As a rule, security against property may be applied to assets of the alleged perpetrator, in order to secure specific contingent claims associated with the alleged acts. Security is applied for the purpose of:

- Fines
- Monetary performance
- Forfeiture
- The obligation to redress injury or pay compensation or exemplary damages
- Restitution to the injured party (or other entitled person) of a material gain obtained by the perpetrator from commission of the offence, or the equivalent value.

However, security may also be imposed on assets of a third party against forfeiture or restitution to the injured party.

This is possible if property constituting a gain obtained from an offence has been transferred to another natural or legal person, and under the circumstances surrounding acquisition of the property that person could suspect that the property derived, even indirectly, from a prohibited act.

Thus it is possible that during the investigation against a specific person, the prosecutor will issue an order securing assets in the possession of a third party, and in consequence when the court issues a judgment of guilt, it will also order that the secured assets of the third party be delivered to the injured party (or that the gain be forfeited).

If a company enters into possession of secured funds with knowledge that they derive from a criminal offence, the necessity to return the funds is justified. But what if the company did not know that it had received "dirty money"?

The burden of proving that at the time of acquisition of such property the company could not have assumed that they derived from a prohibited act will rest with the company (and not the prosecutor). In our view, in such a situation the company can pursue an effective defence, participate in the proceedings, move for admission of evidence, and if necessary also appeal against a ruling ordering forfeiture or restitution to the entitled entity of an amount equivalent to the gain. These procedural rights are guaranteed by Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, and the need to ensure these rights in criminal trials has been upheld numerous times by the Court of Justice of the European Union (e.g. in C-393/19, *OM*, and C-845/19, *DR*). The possibility of exercising these procedural rights is fundamental, as the measures discussed above interfere deeply in property rights enshrined in the Polish Constitution and the European Convention on Human Rights.


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A new regime for corporate groups

Subsidiaries will be able to lawfully act in the interest of a corporate group. The law will also regulate parent-company liability for injury to creditors or shareholders of a subsidiary caused by following the parent company's instructions.

On 15 December 2021, the Extraordinary Committee for Codification Changes submitted a government bill amending the Commercial Companies Code for a second reading in the Polish parliament. The purpose of the bill is to set forth the rules for functioning of corporate groups in Poland and to modify certain principles of operation of corporate bodies.

The need for special regulation of corporate groups

The amendment to the Commercial Companies Code is designed to regulate systemically the operation of corporate groups, which until now has been subject only to general legal provisions.

The lack of a specific statutory regulation has made it difficult for a subsidiary to follow the interests of a corporate group when managing the affairs of the subsidiary, if the subsidiary's interests diverge from the interests of the group or the parent company. The existing regulations require a company's governing bodies to act in the best interests of the company, and provide no direct basis to take into account the corporate group's interests when conducting the subsidiary's affairs. This situation is partially offset by the case law of the civil courts, holding that the interests of a corporate group are part of the broadly defined interests of a company that is a member of the group.

The current provisions of the Commercial Companies Code give the parent company only limited access to information on the affairs of the subsidiary. At the same time, there are no provisions on how to resolve conflicts in the competences of the bodies of individual companies operating within a capital group. Nor do the current regulations contain any separate rules on the parent company's liability for injury suffered by the subsidiary and its creditors, apart from Art. 7 of the Commercial Companies Code, which is a dead letter (this provision speaks of the obligation to notify the registry court of the rules of such liability as set forth in the agreement on the management of the subsidiary or on the transfer of profits). As a result, protection of the interests of creditors and shareholders of the subsidiary (including minority shareholders) is incomplete.

The amendment is intended to allow the parent company and subsidiaries to follow a common business strategy to further the interests of the corporate group. It will also enable the parent company to exercise uniform management over subsidiaries. These objectives are to be served by a new institution in the Polish legal system, known as "binding instructions" issued by a parent company regarding the conduct of the subsidiaries' affairs. Members of the subsidiary's corporate bodies will not be liable for injury to the company caused by carrying out binding instructions. The amendment also covers specific rules for a parent company's liability for injury caused by the parent company to creditors and shareholders of a subsidiary.

Proposed rules for operation of corporate groups

The amendment provides that shareholders of a subsidiary will be able to adopt a resolution on affiliation of a subsidiary to a corporate group by a qualified majority of ¾ of votes. From the adoption of the resolution and disclosure of the dominance relationship in the commercial register, the parent company will be able to issue binding instructions to the subsidiary regarding the conduct of the subsidiary's affairs. Also, from that moment on, the management board of a subsidiary will be able to follow the interests of the capital group when managing the subsidiary's affairs, as long as this does not aim to harm the subsidiary's creditors or shareholders (including minority shareholders).

To be valid, binding instructions will have to be issued in either written or electronic form. A subsidiary will be able to refuse to carry out an instruction only if execution of the instruction could lead to its insolvency or a threat of insolvency. Subsidiaries that are not wholly owned by the parent could also refuse to execute a binding instruction if they reasonably feared that the instruction was contrary to the subsidiary's interests and could cause the subsidiary irremediable harm.

The amendment provides that the parent company will be able to obtain full information on the company's affairs and have unrestricted access to its books. Therefore, the rights of the parent company will be greater than those of other shareholders, whose access to information about the company is to remain on the existing basis, and in many cases will be limited.

The management board of a subsidiary participating in a corporate group will be required to prepare a report on the contractual relationships with the parent company, including binding instructions issued to the subsidiary.

Remedy for injury to a subsidiary

The amendment contains special rules for the parent company's liability for injury caused to the subsidiary, its creditors and shareholders when issuing binding instructions. This liability will exist concurrently with liability for damages under general principles.

Under the proposed provisions, a parent company will be liable based on a presumption of fault for injury caused by issuing a binding instruction to a subsidiary. At the same time, the amendment imposes an obligation on the parent company to act with loyalty to the subsidiary in connection with issuance and execution of a binding instruction. It is to be presumed that this duty will set the standard of the parent company's nonculpable conduct in determining liability on its part for injury caused by issuance of the instruction. The principle of loyalty is left undefined, and its normative meaning will have to be worked out in the course of applying the law.

Also, it seems that the proponent's intention is to create grounds for liability of the parent company towards minority shareholders of a subsidiary for indirect injury manifested by a decrease in value of shares held by them in the subsidiary, if the injury results from issuance of a binding instruction to the subsidiary. Under the amendment, a minority shareholder would have to prove the occurrence of a loss on its part and a connection between the loss and the binding instruction issued to the subsidiary.

If enforcement against a subsidiary proves ineffective, a creditor of that subsidiary will be able to seek payment of the debt from the parent company unless the parent company proves that it is not at fault or that the injury did not arise from the subsidiary's execution of a binding instruction. As a result, the proposed provisions, using legal presumptions, would allow a parent company to be held liable for the unsatisfied debts of a subsidiary solely on the basis of evidence resting with the creditor that the subsidiary was at the relevant time carrying out binding instructions and was unable to satisfy its obligations. This evidence would not be difficult to admit, as the relevant circumstances would be subject to disclosure by the companies involved in the group.
It should be expected that the situation of parent companies with respect to their liability to creditors of the subsidiary will

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The amendment to the Commercial Companies Code has a chance of systemically regulating the conflict between the interests of a company and the interests of its corporate group.

be substantially the same as the situation of the members of the subsidiary's management board with respect to unsatisfied liabilities of the subsidiary.

Strengthening the protection of minority shareholders

Minority shareholders representing at least 10% of the share capital could demand that the registry court appoint an auditor to examine the accounts and operations of the corporate group. Also, once per financial year, they could request inclusion in the agenda of the next shareholders' meeting or general meeting of a resolution on compulsory redemption of shares of minority shareholders by the parent company. This solution is intended to provide an exit option for shareholders whose rights may be marginalised in practice. The amendment would also provide the parent company a right to squeeze out shareholders representing no more than 10% of the shares of a subsidiary. The company's articles of association could raise this threshold to no more than 25% of the shares.

The amendment would not allow public companies to participate in a corporate group as subsidiaries. This is intended to protect equal access of shareholders of a public company to information about the company and ensure the confidentiality of information that may affect share prices. However, public companies will be able to form capital groups as parent companies.

The principle of formalism

The amendment to the Commercial Companies Code has a chance of systemically regulating the conflict between the interests of a company and the interests of its corporate group. Such discrepancies are common, and the current provisions do not contain rules for resolving these conflicts.

The proposed modification of the rules of liability imposed on members of the corporate bodies by codifying in the Commercial Companies Code the body of judicial decisions regarding acting within the scope of reasonable business judgment as a condition excluding the unlawfulness of causing injury to the company by members of the corporate bodies while performing their functions should be assessed positively. The same applies to the part of the proposed provisions related to strengthening the position of supervisory boards in companies and vesting supervisory boards of parent companies with the power to oversee the pursuit of group interests by subsidiaries.

But the rationale for imposing criminal sanctions for failure to provide the supervisory board with information or documents requested by the supervisory board in a timely manner is questionable. Moreover, a literal interpretation of the amendment requires that all the proposed provisions be applied only to those corporate groups where a shareholders' resolution on participation in a group has been adopted and formation of the group has been disclosed in the commercial register. Only in such groups will it be possible to issue binding instructions to the subsidiary, and the amendment links the issuance of binding instructions to the regime of special liability of the parent company to the subsidiary, its creditors and shareholders.

Making application of the special rules on liability of the parent company conditional on acts under the exclusive control of the parent company should be considered erroneous. If the law is enacted in its current form and the wording is not corrected through systemic interpretation, it should be anticipated that the vast majority of capital groups will refrain from formalising relationships within groups, to limit the parent company's liability to creditors and shareholders of subsidiaries. As a result, while largely useful, the proposed provisions would not be applied in practice.

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The business judgment rule in Poland

The management board conducts the affairs of the company, represents the company externally, and under certain circumstances can be liable to the company and its creditors. Management board members should act with due care, which in the case of a limited-liability company generally corresponds to the standard of care that would be observed by a conscientious merchant in dealings of a given sort. Failure to observe due care can lead to liability of members of the corporate authorities —and conversely, compliance with due care can release them from such liability. A proposed amendment to the Commercial Companies Code would update these rules.

On 15 December 2021 a bill amending the Commercial Companies Code was submitted to the Polish parliament for a second reading. Apart from changes designed to regulate dealings between parent companies and subsidiaries (which we write about on page 44), certain rules for action by company authorities are to be revised, including the rules for liability imposed on members of corporate bodies.

One of the proposed changes concerns the standard of due care. It would reflect that management board members act within the bounds of justified economic risk. It seems that this change will be advantageous to members of corporate bodies. This clarification of the notion of due care would lower the existing standard of care required in the action of the members of bodies of limited-liability companies. In certain situations, that would allow members of company authorities to avoid liability.

Due care—meaning what?

A management board member is liable to the company for injury caused by an act or omission contrary to law or the articles of association, unless the member was not at fault (Commercial Companies Code Art. 293 §1). This is one of the fundamental principles of liability of members of the bodies of a limited-liability company, which also applies to members of the supervisory board or audit committee and to liquidators. The discussion below will thus apply as relevant to all these persons, even when we refer only to members of the management board or other bodies.

In performing their duties, members of corporate bodies are required to exercise the care arising from the professional nature of their activity.

COMMERCIAL COMPANIES CODE ART. 293 [CULPABLE ACTS OF CORPORATE AUTHORITIES]

§ 1. A member of the management board, supervisory board or audit committee, or a liquidator, shall be liable to the company for injury caused by an act or omission contrary to law or the articles of association, unless he or she was not at fault.

TO BE REPEALED § 2. In performing their duties, a member of the management board, supervisory board or audit committee, or a liquidator, shall exercise the care arising from the professional nature of their activity.

TO BE ADDED § 3. A member of the management board, supervisory board or audit committee, or a liquidator, does not violate the duty to exercise care reflecting the professional nature of the activity if, proceeding in a manner loyal to the company, he or she acts within the bounds of justified economic risk, including on the basis of information, analyses and opinions which under the given circumstances should be considered in making a careful assessment.

In light of the foregoing, a management board member shall be liable if by an act or omission, contrary to law or the articles of association, he or she causes injury to the company, although there must be an adequate causal connection between the act or omission and the injury. It is up to the company to prove these circumstances. The management board member will be liable if his or her behaviour is culpable. But the company does not have to prove that. It is up to the management board member to prove that he or she was not at fault for the injury caused by the act or omission.

While conducting commercial activity, it is obvious that management board members often operate within the bounds of certain risks, and take various business decisions whose consequences cannot be foreseen at the time they are taken. These can generate significant gains for the company, but also significant losses. But in maintaining a high standard of due care, it is harder to demonstrate a lack of fault.

The standard degree of care is due care, i.e. exercising the care **required in relations of a given type**. But management board members are held to a greatly elevated degree of care, as they must exercise the care **arising from the professional nature of their activity**. This is generally an objective standard, which cannot be reduced by the articles of association. It may be raised, however, for example by requiring management board members to possess certain educational attainments.

It is also clear that one level of care will be necessary in the case of small companies, or companies conducting little or no commercial activity, and another, higher level in the case of big companies operating on a large scale.

A management board member will be liable if his or her behaviour is culpable. But the company does not have to prove that. It is up to the board member to prove that he or she was not at fault.

There are certain common requirements, however, that always apply. This can be depicted by citing three examples from the case law.

The first involves the duty to file a bankruptcy petition if the grounds for it arise. In that situation, it is no defence for the management board member to claim that the company was functioning within certain commercial relationships, including affiliation and dependence, which in the member's view prevented filing of the bankruptcy petition. The management board member also cannot shift the blame for failing to perform this obligation to the parent company or its authorities. The mere subjective belief of a management board member that they cannot file a bankruptcy petition due to relations with the parent company does not remove the obligation to file a petition under the Bankruptcy Law. Such a belief thus does not demonstrate a lack of fault and is insufficient for the management board member to escape liability. Acting with due care means not just protecting the company, but also exercising care to protect the interests of creditors threatened by the company's insolvency. To avoid personal liability, the management board members would have to show that, while maintaining due care, they did everything on their part to ensure that the bankruptcy petition was filed, but there were objective grounds preventing the filing (Supreme Court of Poland judgment of 27 May 2009, case no. II UK 373/08).

The second example involves attempts to shift liability to other persons acting within the company. The requirements imposed on management board members are rigorous. A management board member must be equipped with knowledge of organisational and financial regulations, the principles of managing human resources, and familiarity with applicable laws. Clearly, a board member may consult colleagues, employees and advisers with relevant knowledge and experience, but the board member is still responsible to the company for exercising due care. Merely entrusting an issue to a person professionally involved in the specific domain and with the relevant training is not tantamount to exercising due care (Gdańsk Court of Appeal judgment of 29 July 2014, case no. V ACa 781/13). As a rule, a management board member, vested with the competence to conduct the affairs of the company, cannot shift the responsibility for taking decisions to the board member's subordinates or agents, although such persons may bear independent liability to the company, usually arising out of a contract between them and the company. However, it is possible to introduce a structure within the company in which certain persons possessing relevant competencies are responsible for certain types of matters. This allows for a certain division of responsibility within the company between persons holding managerial positions.

The third example involves the management board member's lack of actual knowledge of the company's situation. A management board member cannot plead ignorance of company affairs, in particular concerning the company's financial standing. The board member must take the active initiative to acquire that knowledge. Due care (and thus a lack of fault) might potentially be demonstrated in exceptional situations, such as a long illness, or where the board member was barred from obtaining information about the company, despite taking actions seeking to obtain it. Only a factual situation which actually and objectively prevents participation in management of the company's affairs would justify the conclusion that the board member was not culpable in those circumstances (Supreme Court judgment of 15 May 2014, case no. II CSK 446/13; Szczecin Court of Appeal judgment of 5 March 2019, case no. I AGa 234/18).

As these examples from the courts demonstrate, a high degree of due care is demanded of management board members.

New regulations—introduction of the business judgment rule

The proposed amendment, drawing among other things on the views developed in judicial decisions and legal scholarship, would introduce a version of the "business judgment rule" for assessing situations and determining when due care has been exercised. Under the proposed new wording of Commercial Companies Code Art. 293, a management board member would not violate the duty to exercise the care reflecting the professional nature of the activity, if, proceeding in a manner loyal to the company, he or she acted within the bounds of justified economic risk, including on the basis of information, analyses and opinions which under the given circumstances should be considered in making a careful assessment.

The existing wording of the regulations does not directly reflect that management board members actually take decisions within the bounds of economic risk. It is clear that doing business means assuming risk, and due care means that the risk should be examined, calculated, and weighed before taking any action carrying a risk. But in acting, a manager cannot exclude the risk of failure. Failure as such has not, and still will not, automatically render a management board member liable. The proposed new wording clarifies when due care is exercised, and thus when management board members will not be liable to the company if their decision proves erroneous and causes a loss to the company. Management board members would be deemed to exercise due care if they:

- Act loyally toward the company
- Act within the bounds of justified economic risk
- Act on the basis of information, analyses and opinions relevant to the given situation, and
- Make a careful assessment on that basis.

The new wording would thus introduce what is known as the business judgment rule. The drafters have stressed that loyalty to the company is essential, as is acting within the bounds of justified risk, after careful examination and assessment of the situation.

Justified economic risk is to be assessed after thoroughly taking into account the circumstances of the given matter. Certainly risks typically assumed in the commercial dealings in which the given company participates would fall within the bounds of justified economic risk. In the particular situation, this could also extend to atypical or above-average risks, but as always, it would be necessary to weigh the benefits associated with the decision and the potential negative consequences, as well as the likelihood of each, taking into consideration possible factors increasing or decreasing the risk. There could certainly be said to be excessive risk if the decision would very likely generate negative consequences for the company and there was little chance of achieving the intended goal.

Certainly it would not be possible to develop a single definition of justified economic risk, as it depends on the circumstances. It may nonetheless be expected that after these changes enter into force, the civil courts will have to interpret this notion. So far, while pointing out that it is the management board's duty to conduct the company's affairs, the Supreme Court of Poland has stressed that in taking decisions » involving the company's affairs, the board should be guided by the company's interests, and culpable actions exceeding the bounds of economic risk conflict with the company's interests and warrant liability of the management board member (Supreme Court judgment of 24 July 2014, case no. II CSK 627/13).

The subsidiary will be able to refuse to carry out instructions in situations where following the instructions could lead to insolvency or a threat of insolvency.

The assessment of whether economic risk is justified is to be backed by the analyses, information and opinions which under the circumstances should be considered when making a careful assessment of the situation. This would include, for example, information, analyses and opinions of colleagues or staff of the company, employed by the management board specifically to support the board in taking certain decisions for itself or taking decisions based on authorisations issued by the board. It appears that this could also include analyses and opinions prepared by the management board itself (particularly if the members have the experience or qualifications needed in the given matter). These could also include opinions from external advisers, such as legal and tax advisers, consulted by the board in taking its decisions.

However, it does appear that instead of the conjunction used in the bill (analyses *and* opinions), it would be more apt to employ the alternative (analyses *or* opinions), as sometimes an analysis alone, or an opinion alone, might suffice. In any event, neither of these terms is defined, and they could overlap.

Corporate groups, binding instructions, and due care

The standard of due care will be relevant in the case of corporate groups and issuance of binding instructions. The new regulations allow shareholders to adopt a resolution on a subsidiary's membership of a corporate group. This type of control will be subject to disclosure in the commercial register, and the parent company will be able to issue binding instructions to the subsidiary involving the subsidiary's affairs.

In certain instances, the subsidiary will be able to refuse to carry out the instructions. This involves situations where following the instructions could lead to insolvency or a threat of insolvency. In the case of companies that are not wholly owned, the basis for refusal to carry out instructions from the parent company would include a justified concern that the instruction was contrary to the interests of the subsidiary and would expose it to a loss that could not be redressed.

If the subsidiary carries out the instructions, alongside the existing rules for liability, liability would also arise on the part of the parent company for injury caused to the subsidiary, its creditors and shareholders. The new regulations expressly state that a member of the management board of the subsidiary shall not be liable for injury caused by executing a binding instruction if in the member's act or omission the member exercises due care arising from the professional nature of the activity, bearing in mind the business judgment rule set forth in the new wording of Commercial Companies Code Art. 293.

Assessment of the proposal

The exercise of due care will remain decisive for the management board in order to demonstrate a lack of fault in connection with a business decision, if it later proves to be erroneous and causes the company to suffer a loss. In acting (or failing to act), the management board should proceed with loyalty to the company and within the bounds of justified economic risk, preceded by a careful assessment, including an assessment of relevant information, analyses and opinions. What this boils down to is that in taking a decision, the management board members could consciously, and with discernment, assume that they were acting in the interest of the company.

The proposed new wording does not expressly state, like the prior wording, that in performing their duties, management board members must exercise the care arising out of the professional nature of their activity. In this respect, it seems that Commercial Companies Code Art. 293 §2, which expressly states this obligation, could remain unchanged. Nonetheless, the proposed new Art. 293 §3 maintains this obligation, while clarifying the situations in which the standard is met. Consequently, the earlier rigorous requirements for exercising due care will remain in place—but with an exception reflecting the business judgment rule. By acting within the bounds of the business judgment rule, management board members should be in a position to demonstrate that they were not at fault, because they exercised due care, and therefore will not be liable under Art. 293 §1 if the company suffers a loss.

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Online legal commentary on Poland's new Public Procurement Law, updated in real time. We explain what has changed with entry into force of the new act and how to understand its provisions.

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A brief history of the digitalisation of corporate law

For a long time, Polish corporate law stubbornly resisted the progress offered by digitalisation, from the regulatory sphere to dealings with administrative authorities and everyday commercial practice. Recently this has changed for the better—largely due to circumstances forced by the COVID-19 pandemic.

Although in practice, technological innovations in commerce have always been introduced successively and on an ongoing basis, for quite a long time there was a belief among Polish businesspeople that more serious documents always require handwritten signatures and plenty of seals and other powerful attributes.

This was partly due to a lack of adequate regulation, and thus uncertainty as to whether an action performed electronically, without adhering to traditional requirements (or simply rituals), would exert the expected effect.

In 2002 the Civil Code equated an electronic signature with affixing a handwritten signature to a document, but in practice, the use of a "secure electronic signature verified with a valid qualified certificate" (as the act originally read) did not become widespread, for various reasons, for many years.

Similarly, the treatment of actions performed in professional dealings by electronic means (e.g. by email) posed certain problems. On one hand, a rule that continued in force unchanged provided that, in the absence of other statutory or contractual provisions, legal acts (such as concluding a contract) could be carried out in any form. But on the other hand, concluding contracts (especially more important contracts) by email, or earlier by fax, raised certain doubts and concerns (not necessarily justified, but that is a separate issue).

By introducing a directly regulated documentary form for legal acts in 2016, lawmakers finally came to the rescue of all sceptics, while allowing submission of declarations of will in the form of a document, in a manner enabling determination of the person making the declaration (thus, in principle, regulating the conclusion of agreements via email).

For a long time Polish businesspeople believed that more serious documents always require handwritten signatures and lots of seals.

Evolution of registers

Although the first provisions of corporate law in Poland (the general provisions under which companies operate) digitalising the process of collecting company data were introduced more than two decades ago, it took a long time for companies to take advantage of the benefits offered by digitalisation.

A good example would be the commercial register (*rejestr przedsiębiorców*), part of the National Court Register (KRS), the central, electronically maintained register of companies and other entities which replaced the age-old "Commercial Register B" (RHB) in 2001. Until 2007, the only way to obtain data from the KRS commercial register was to visit the nearest registry court and, after paying a fee, order a printout of information about the entity of interest. It was not until 2012 that computer printouts downloaded directly from the register by users were given the same power as hard copies obtained from the registry court.

It took even longer to allow companies to submit applications for entries in the commercial register electronically. Replacement of paper applications with electronic ones was introduced in July 2021 with the launch of the Court Registers Portal (PRS).

In the long run, a consequence of this change will be the availability of documents in the registry files (created or filed after entry into force of the new regulations) available in the electronic repository. (Before, viewing a company's files required a personal visit to the registry court keeping the files.)

Remote incorporation of companies was allowed earlier than electronic filing of applications for entries in the National Court Register. That happened in 2012, when the "S24" system was introduced into the Commercial Companies Code, allowing a new company to be formed online using standard articles of association available in the IT system. This did not happen without some difficulties, and the appeal of this solution was limited for a long time (and in some cases still is), mainly because, in adopting the S24 system, lawmakers apparently paraphrased Henry Ford's philosophy—you could have your articles of association painted any colour you want, so long as it was black. The founders of a company had to use the model articles, and could not adjust the parameters of the company to suit their individual expectations or the requirements of a planned transaction.

Digital financial reports

In 2018, another convenience came into play, namely the possibility (and later the obligation) to file financial statements electronically (previously, hard copies of financial statements had to be filed with the registry court and the tax office).

This amenity was served with a pretty big spoonful of tar (actually several spoons). First, the financial statements had to be prepared in the legally prescribed format (logical structure), which made them completely unreadable, especially for non-Polish-speaking board members. Second, all management board members had to sign such documents with qualified electronic signatures or trusted profiles. As a rule, foreign members did not have trusted profiles (unless they had previously obtained a PESEL personal identity number—here we could mention an episode of mass applications for PESEL numbers by various foreigners who often had never even been to Poland). Thus it was necessary for all members of the management board of a company (often foreigners scattered around the world) to obtain Polish qualified electronic signatures. In theory, they could have used signatures compliant with the eIDAS Directive (e.g. issued in other EU member states). But in practice, the use of such signatures often caused problems or made it impossible to sign documents in a manner enabling them to later be uploaded to the dedicated IT system (known as the Financial Document Repository (RDF)).

It was not until the beginning of 2022 that lawmakers allowed an entity's financial statements and management reports to be electronically signed by only one member of the management board.

Register of beneficial owners

When discussing electronic records, we cannot fail to mention the Central Register of Beneficial Owners (CRBR), which was launched in 2019. Among other things, it required all companies to submit electronic filings identifying their ultimate owners. Unfortunately, this requirement, while basically in line with current trends (and requirements) in the European Union, was not implemented in the best possible way, as there was a requirement that the data submission must be signed electronically in accordance with the rules of representation in force at a given company (or by its proxy). Here again, a practical problem arose, particularly for companies with foreign capital and foreigners on their management. Not only were they once again forced to sign documents electronically (without the possibility to delegate this task e.g. through a power of attorney), but they have to sign them "blindly," as both the CRBR system and the applications submitted to it function solely in Polish.

Side effects of uncoordinated change

At this point, we cannot overlook a negative effect of the "rolling" digitalisation, which was that the individual aspects of digitalisation were not sufficiently synchronised with each other. As a result, there are now several unrelated (or not very closely related) systems in operation, serving similar (and sometimes the same) functions. For instance:

– Applications for entry in the National Court Register are submitted through the PRS system (although in the case of S24, a different system must be used).
– Financial data are submitted through the RDF system (but if problems occur submitting the data, the S24 system must be used instead).
– Data regarding beneficial owners is reported through the CRBR system.

For added spice, in some cases, a letter submitted via the S24 system is answered in the PRS system. And obviously each of these systems has a completely different structure, and none of them allow non-Polish-speakers to use them.

DIGITALISATION OF CORPORATE LAW IN POLAND

2001
→ Launch of the National Court Register (KRS)

2002
→ Civil Code equates electronic signatures with handwritten signatures on a document

2007
→ Remote downloading of printouts from KRS enabled

2012
→ Electronically downloaded printouts from the register given legal validity equal to paper KRS transcripts
→ Remote formation of companies enabled (S24 system)

2016
→ Notion of document form for legal acts introduced

2018
→ Enabling electronic filing of financial statements

2019
→ Central Register of Beneficial Owners launched in electronic form
→ Shareholders meetings allowed to be held using electronic communications

2021
→ Electronic KRS applications replace filing of paper applications
→ Dematerialisation of shares of non-public joint-stock companies (replacing paper share certificates with electronic register entries)

A negative effect of the "rolling" digitalisation was that the individual aspects of digitalisation were not sufficiently synchronised with each other.

Digitalisation of company management processes

Introduction of the most practical (and long-awaited) changes coincided with the outbreak of the COVID-19 pandemic and the associated restrictions on movement, often not only preventing participation in shareholder meetings but also disrupting day-to-day management of companies "on the ground."

Such changes include the possibility to hold shareholder meetings using electronic communications, introduced in 2019. Importantly, from 2020 onwards, it has been assumed that the statutory provisions (allowing remote participation in meetings) apply unless the company's articles of association provide otherwise. As the vast majority of articles of association did not address this issue (as the possibility of holding meetings remotely was debatable), this meant that, generally, this possibility was introduced into Polish companies across the board.

The issue of the parallel possibility of holding remote meetings of management boards and supervisory boards was similar. Especially during the periods of lockdowns and restrictions on travel between countries, this greatly facilitated the day-to-day management and supervision of companies.

Other conveniences

Finally, we must mention other conveniences related to the digitalisation of commerce introduced recently. In particular, this refers to the possibility (and in the case of joint-stock companies, the obligation) to publish announcements concerning the company on its website. This solution not only allows important announcements to be published faster (e.g. in connection with convening a shareholders meeting, or corporate transformations, mergers, divisions, etc), but also avoids the considerable cost of announcements in the official journal *Monitor Sądowy i Gospodarczy*.

Another example of changes related to digitalisation of commerce is the dematerialisation of shares of non-public joint-stock companies, finally introduced in March 2021 (shares of public companies were dematerialised earlier), i.e. replacing traditional paper share certificates with entries in an electronic register.

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Undoubtedly, the progressive digitalisation of corporate law in Poland should be evaluated positively, despite the deficiencies and delays in implementation. On one hand, it supports communications between the company and the authorities (e.g. the register), and on the other hand, it facilitates access to data that should be not just formally public, but actually easily accessible to interested parties, regardless of location (thus, travelling to the registry court to read corporate documents is becoming a thing of the past).

Nonetheless, it would be desirable for the changes to be better coordinated, and for the IT tools to function more intuitively, so that using them does not require special training.

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Electronic tenders and the intricacies of e-signatures

Public procurement procedures in Poland are conducted in electronic form. This doesn't just mean that contractors and contracting authorities must communicate by electronic means. Tenders and requests to participate in procedures are also submitted in electronic form, as a file bearing a qualified electronic signature of the person authorised to represent the contractor.

The qualified electronic signature is the main electronic signature that can be used in any procedure for award of a public contract. In addition, in procedures below the EU thresholds, a tender can be submitted in electronic form bearing a "trusted signature" or "personal signature."

Whenever we mention tenders below, we are also referring to requests to participate in procurement procedures and to preliminary declarations, including those filed using the European Single Procurement Document (ESPD).

"Electronic manner" vs. "electronic form"

In procedures over the EU threshold values, tenders are filed in **electronic form** (*forma elektroniczna*). In procedures below the EU threshold values, a tender may be filed in an **electronic manner** (*postać elektroniczna*) bearing a trusted signature or personal signature. Only a qualified electronic signature gives a tender "electronic form." Affixing another electronic signature to a tender enables submission of the tender "in an electronic manner," but that does not constitute "electronic form." A tender submitted as a file is submitted "in an electronic manner."

For a tender to exert legal effect and be considered in the procedure, it must be signed with the appropriate electronic signature of the proper person. A defective electronic signature on a tender cannot be cured. An incorrectly signed tender is subject to rejection. The same applies to a request for participation. However, a preliminary declaration, including one using the ESPD, can be corrected at the summons of the contracting authority.

It is also worth knowing that when a qualified electronic signature is affixed to any documents created in paper form and submitted in a contract award procedure as scans (such as certificates from state offices, letters of reference, and insurance policies), those documents become certified authentic copies of the originals.

For a tender to exert legal effect and be considered in the procedure, it must be signed with the appropriate electronic signature. A defective electronic signature on a tender cannot be cured. An incorrectly signed tender is subject to rejection.

Moreover, if an electronic document in the procedure is transmitted in a format compressing the data, affixing the file containing the compressed documents with a qualified electronic signature (or in the case of procedures below the EU thresholds, a qualified electronic signature, trusted signature, or personal signature) is equivalent to affixing all of the documents contained in the file with a qualified electronic signature, trusted signature or personal signature (as the case may be).

Qualified electronic signature

Under the eIDAS Regulation ((EU) 910/2014), a "qualified electronic signature" is defined as "an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures."

A qualified electronic signature is a **set of data** enabling verification of the signature and the data of the person making the signature, as well as a declarative date of submission of the electronic signature (i.e. the date derived from the computer or IT system on which the signing process was carried out), and, optionally, also a date certain, if the signature possesses a time stamp.

A special characteristic of a qualified electronic signature is the "hash value," computed on the basis of the signed data and the previously ascribed attributes, which enables the integrity of the signature and the signed data to be secured. Based on the hash value, the signature also has the computed value of an electronic signature, creation and verification of which are carried out using encryption functions. A qualified electronic signature is submitting using a qualified electronic signature creation device (QSCD), which, based on the stored data for submission of the electronic signature, computes the value of the signature.

Validity of a qualified electronic signature

A valid qualified electronic signature is first and foremost one which:

- Has a certificate valid at the time of making the signature, issued by a qualified provider of trust services, in accordance with Annex I of the eIDAS Regulation
- Can be validated based on data for validation of the signature as well as a unique set of data representing the signatory in the certificate
- Was created by a qualified electronic signature creation device
- Does not compromise the integrity of the signed data
- At the time of signing, meets the technical requirements for an advanced electronic signature set forth in the eIDAS Regulation.

A validly made signature does not cease to be valid when the validity of the certificate expires. If the signature bore a qualified electronic time stamp, it enjoys a presumption of validity. If there was no such time stamp, the date of the signature may be proved.

Validation

The notion of validation refers to verifying the validity of an electronic signature. The legal effectiveness of the signature depends on the possibility of positively validating it through a reliable application or service. The most reliable method, enjoying a presumption of correctness, is a qualified validation service offered by a trusted provider (an entity authorised to issue qualified electronic signatures).

Validation does not establish the identity of the person making the signature, or the signatory's authority to sign for someone. The name and personal identity number (PESEL) of the owner of the signature are included in the certificate. The signatory's authority will arise from separate documents, such as a registration file, power of attorney, or register excerpt. However, validation results in generation of a report on whether the signature made is correct or not. The signature might also contain certain errors, and as a result of validation the signature will be assigned the status of "indeterminate." In public procurement procedures, validation of the signature is done by the contracting authority, and the documents submitted by the contractor (including the tender) are deemed valid if the validation confirms the correctness of the signatures.

It should be borne in mind that in the case of companies, the effectiveness of a signature often requires two or more people to act together. In such case, both signatures must be included in the tender.

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LEGAL CONCEPTS RELATED TO ELECTRONIC FORM OF PUBLIC TENDERS

ELECTRONIC MANNER

= any electronic file, including a document scan or recording

Signing an electronic file with any signature other than a qualified electronic signature does not give it "electronic form." A file with a personal signature or trusted signature of the person authorised to represent the contractor is still made only in an "electronic manner" (i.e. not on paper).

TRUSTED SIGNATURE

Advanced electronic signature **issued to persons with a trusted profile** on the Electronic Platform for Public Administration Services (epuap.gov.pl)

Manner of authentication	Electronic seal of the minister for digital affairs
Use	Only in procurement procedures below the EU thresholds, for signing offers, applications or ESPD

PERSONAL SIGNATURE

Advanced electronic signature included in the digital layer of the personal ID card, if a request for a digital layer was included in the application for a new ID card. Use requires purchase of a special reader.

Manner of authentication	Personal ID card certificate
Use	Only in procurement procedures below the EU thresholds, for signing offers, applications or ESPD

ELECTRONIC FORM

= file with a qualified signature

Electronic file bearing the qualified electronic signature of the person authorised to represent the contractor

QUALIFIED ELECTRONIC SIGNATURE

Advanced electronic signature:

- Submitted using a qualified device
- Based on a qualified certificate
- Issued by entities listed on the website of the National Certification Centre

Manner of authentication	Qualified certificate of electronic signature
Use	All actions in all tender procedures

Appointing a proxy with a qualified electronic signature

If a contractor does not hold a qualified electronic signature but must quickly file a tender, the contractor may authorise a person possessing such a signature to do so on its behalf. But for purposes of procedures for award of a public contract, the power of attorney must also be issued in electronic form. This is because under civil law, a power of attorney to perform an action should be issued in the form in which the action is to be carried out. Moreover, a power of attorney must be submitted in the original, and a scan of the paper original of a power of attorney, even if the scan bears the qualified electronic signature of the principal, is only a copy and not the original. This would seem to lead to the conclusion that the principal (the issuer of the power of attorney) must also hold a qualified electronic signature.

This situation can be dealt with, however, by issuing the power of attorney in written form, on paper. Then the original power of attorney should be submitted to the notary, and the notary should be requested to prepare an electronic copy of the notarial power of attorney. The notary attests to the signature on the power of attorney by affixing to it the notary's qualified electronic signature. As a result, an electronic file is generated with the power of an original power of attorney in electronic form.

When a qualified electronic signature is not required

The "trusted signature" (*podpis zaufany*) and the "personal signature" (*podpis osobisty*) also function within the Polish legal system. These are also electronic signatures—advanced but not qualified. Thus they are authenticated through different mechanisms than a qualified electronic signature with the security features described in the eIDAS Regulation.

Thus a trusted signature is an electronic signature whose authenticity and integrity are assured using an electronic seal of the minister for digital affairs, containing:

– Data identifying the person, including:
    - First name(s)
    - Last name
    - PESEL number
– Identifier of the means of electronic identification used to place the signature
– Time of placement.

A personal signature, meanwhile, is a signature included in the digital layer of the personal identity card, and authenticated using a personal signature certificate. To place such a signature remotely, a special reader is required.

An undoubted advantage of the trusted signature is that it can be obtained free of charge. But neither a trusted signature nor a personal signature can result in obtaining "electronic form." Thus these signatures can be used only for certain activities in public procurement procedures, and for signing tenders only in the case of procedures with values below the EU thresholds. Hence the importance of using a qualified electronic signature.

In the case of companies, the effectiveness of a signature often requires two or more people to act together. In such case, both signatures must be included in the tender.

How to obtain a qualified signature?

A fundamental element of the procedure for obtaining a qualified signature is verification of the data and identity of the person for whom the signature is issued. This is done through a personal meeting. All providers of trust services offer different varieties of qualified signatures and the possibility of purchasing certificates valid for one, two or three years. The cost of obtaining a qualified signature valid for one year is about PLN 200–300 (+ VAT).

To sign electronically or not?

In the case of procedures for award of public contracts, there is no choice: the contractor must use a qualified electronic signature if it intends to take part in procedures with values above the EU thresholds. Obtaining the signature can be a bit of a hassle, but using the signature can facilitate many matters. It must be remembered always to check (validate) your signature before transmitting the tender file to the contracting authority, at least using the application for submitting the signature. This is because an erroneous signature cannot be cured in the case of documents that are not subject to supplementation, such as a tender or a request to participate in a procurement procedure.

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Successfully delisting a public company

Admission of a company's shares to trading on the stock exchange is typically associated with success—here is a prospering business that has the opportunity to raise additional capital for further expansion.

But in an age of increasing regulatory constraints, imposing new informational and reporting obligations on public companies, while simultaneously increasing the penalties for noncompliance, more and more companies ponder the overall advantage of their shares being publicly listed.

For several years the Warsaw Stock Exchange has been affected by the problem of companies leaving the trading floor. This is confirmed by the publicly accessible statistics. According to information published on the WSE website, as of 7 January 2022 there were 429 companies listed in Warsaw (329 on the main market and 100 on the alternative market). This means that since the peak of its popularity in terms of the number of listed companies (488 in November 2016), nearly 60 companies had withdrawn from the market. (In 2018 alone, the record year in this respect, 25 companies left the WSE.)

But the burgeoning regulations affecting public companies are not the only reason for companies to withdraw from the market. Delisting is often an element of transactions targeting listed companies, where the investor acquiring the company is not interested in keeping the company public. We will take a closer look at these transactions in this article.

Long path away from the trading floor

It should first be pointed out that the process of delisting (i.e. withdrawing a company's shares from trading on an organised market) differs depending on whether the process concerns a company listed on the regulated market or in an alternative trading system (in particular concerning the need to announce a takeover bid for the delisting company's shares—more on this below).

WHERE TO START?

When preparing the structure for a transaction that will include delisting of a company from the WSE, the formal requirements should first be considered, namely:

- Announcing a takeover bid for the company's shares
- Calling a general meeting of shareholders in order to adopt a resolution on delisting the company's shares from trading on the regulated market or in an alternative trading system
- Filing an application with KNF for permission to withdraw the shares from trading on the regulated market or in an alternative trading system.

In any event, withdrawal of a company from public trading is a multi-stage process, structured in this way due to the desire to protect the interests of minority investors in a public company. For simplicity, the delisting procedure can be divided into two phases:

– **Corporate transaction phase**, involving announcement and conduct of a takeover bid, calling and holding a general meeting of shareholders to adopt a resolution on delisting, as well as a possible squeezeout of minority shareholders
– **Administrative phase**, i.e. obtaining the consent of the Polish Financial Supervision Authority (KNF).

Announcement of takeover bid for the company's shares

In the transactional process, delisting is preceded by a takeover bid to acquire the shares of a public company, which is the main element of the transaction of acquiring control, as a stake of shares in a public company exceeding 33% or 66% of the total votes in the company can be acquired only by way of a takeover bid. (In this respect, a change is planned which would consist of eliminating the division of takeover bids into prior and subsequent, and also modifying the threshold beyond which a takeover bid would have to be announced. The bill provides for one type of mandatory takeover bid, which would be conducted after the fact and would have to be announced within three months after exceeding 50% of the total number of votes in the company. The bill to amend the rules and thresholds for announcing takeover bids is currently at the consultation stage.)

The percentage of shares which the acquirer may obtain in a takeover bid will determine in part the structure of the acquisition transaction being considered. In particular, it is relevant whether as a result of the takeover bid, the threshold of 95% of votes in the company will be achieved, which will give rise to the ability to "squeeze out" minority shareholders from the company by way of a compulsory buyout.

A key element of every M&A transaction, including transactions by way of a public takeover bid, is to establish the price of the acquired shares. In the case of a takeover bid for all of a company's shares listed on the regulated market (apart from the shares belonging to the offeror), the price proposed in the takeover bid cannot be less than the average market price during the 6 months preceding the announcement of the takeover bid, or if the company's shares have been traded on the main market for a period of less than 6 months, then the average market price for that period. If it is not possible to establish the price in that manner, the price cannot be lower than the fair market value.

The share price proposed in the takeover bid also cannot be lower than:

– The average market price from the period of 3 months of trading in the shares on the regulated market preceding announcement of the takeover bid; nor can it be lower than:
– Either the highest price paid for the shares that are the subject of the takeover bid by the offeror or its parent or subsidiaries or parties in concert with them under agreements on acquisition of shares in the public company during the 12 months prior to announcement of the takeover bid, or
– The highest value of the noncash consideration which the aforementioned entities provided in exchange for the shares that are the subject of the takeover bid during the 12 months prior to announcement of the takeover bid.

During the period between announcement and completion of the takeover bid, the offeror may acquire shares in the company which is the subject of the takeover bid only as part of the takeover bid and in the manner specified in the takeover bid.

After completion of the takeover bid—depending on whether as a result the investor has obtained at least 95% of the company's shares—the investor may be forced to decide on further measures. If this threshold is reached, it will be possible to conduct a squeezeout, which will greatly simplify the delisting procedure (more on squeezeout below).

If this threshold is not achieved, but the investor has sufficient voting power in the company, it may attempt to launch the

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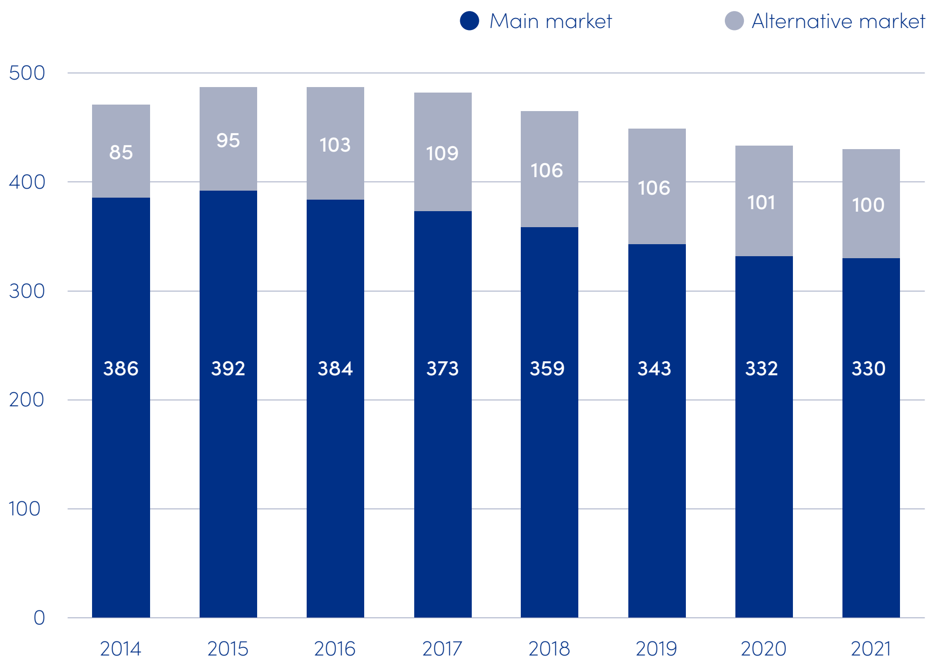
delisting process without first squeezing out the minority shareholders, but in that case the process may prove much more complicated and take a lot longer.

If despite failing to reach the 95% threshold in the takeover bid the investor still seeks to involuntarily squeeze out the minority shareholders, the investor can buy up the remaining portion of shares enabling it to cross the threshold in transactions on or off the market after completion of the takeover bid. But in that case, the price set in the takeover bid may affect the price at which the investor buys up additional shares from the market. In particular, if in subsequent transactions on or off the market within 6 months after completion of the takeover bid a price is set that is higher than the price provided in the takeover bid, the investor will have to make up the difference in the share price to the shareholders who decided to sell their shares in response to the takeover bid.

Moreover, the price from the takeover bid will also determine the price of shares in a potential squeezeout occurring immediately after conducting the takeover bid for all outstanding shares of the company, as a result of which the threshold of 95% of the votes was achieved. Then the price for the compulsory buyout cannot be lower than the price proposed in the takeover bid.

In light of the foregoing risk, it is particularly important to build appropriate relations with the brokerage that will support the investor in the delisting process. The brokerage will not only provide the support required by law in conducting the takeover bid, but can also help identify shareholders interested in selling their shares in the company (as part of the takeover bid or after it is completed), which can greatly increase the investor's chance of reaching the desired ownership thresholds in the company's share capital.

NUMBER OF COMPANIES ON THE WSE (2014–2021)



To squeeze out or not?

To conduct a delisting, it is generally not necessary to squeeze out the minority shareholders. Moreover, the majority required to adopt a resolution on withdrawal of the shares from trading is lower than the threshold provided for conducting a squeezeout.

However, first obtaining 100% of the shares in the company will significantly limit the risk associated with an attempt by minority shareholders to block the plan to remove the public company from the stock market.

Minority shareholders are vested with numerous rights to protect their interests, which in certain circumstances can be used to delay or even block the delisting procedure. Minority shareholders can, for instance, challenge resolutions by the general meeting on delisting (this could lead for example to issuance of a temporary injunction by the court preventing execution of the resolution for the duration of the litigation, which under the realities of Polish civil litigation could translate into a delay of many months in carrying out the delisting plan), or they could try to block the proceeding before the Financial Supervision Authority.

For these reasons, if one of the aims of a transaction is to withdraw the company's shares from public trading, the investor should try to structure the transaction so that before the delisting itself begins, the investor obtains at least 95% of the votes in the company, in order to conduct a compulsory buyout of the minority shareholders. This can allow the investor to avoid further complications and conduct the delisting process smoothly.

Shareholders' resolution

Another step is adoption by the general meeting of shareholders of the public company of a resolution on withdrawal of the shares from trading on the regulated market or in an alternative trading system. This resolution must be adopted by a nine-tenths majority of votes cast in the presence of a quorum of shareholders representing at least half of the share capital. This item may be included in the agenda only at the request of one or more shareholders representing at least a twentieth of the share capital of the company to be delisted (although the articles of association may entitle shareholders representing a smaller proportion of the share capital to make such a demand). This determines the sequence of actions taken by the investor, who will generally request to convene a general meeting with this item on the agenda after completion of the takeover bid.

Consent to leave the market

After the takeover bid is conducted and a resolution on delisting is adopted, the company will file an application with KNF for permission to withdraw the shares from trading on the regulated market or in an alternative trading system.

In the decision granting permission to delist, KNF will set a time limit, no longer than one month, after which the shares will be withdrawn from trading.

Without delisting?

As a side note, it should be pointed out that the procedure described above applies only in the event of total withdrawal of the company's shares from organised trading in Poland (also in the sense of the company's move to a regulated market in another country). This means that the regulations on delisting do not apply in a situation where the company withdraws its shares from trading in an alternative trading system, on condition of admission of the shares to trading on the regulated market, i.e. when the company moves from the alternative trading system to the main market of the Warsaw Stock Exchange.

WHO NEEDS TO BE INVOLVED?

It is essential for a number of entities supporting the company and the investors at various stages of the process to be involved in delisting a public company from the stock exchange. These include primarily the brokerage house, legal adviser and transactional adviser, who must cooperate closely in order to lawfully and effectively conduct the transaction ending in successful delisting.

The brokerage house will be responsible for a number of activities, connected primarily (but not only) with announcing the takeover bid and compulsory buyout of minority shareholders. Assistance from the legal adviser may prove essential at the stage of planning and establishing the transaction structure, to include delisting, as well as negotiating the terms of the transaction with significant shareholders. The legal adviser will also ensure that the entire process is conducted in accordance with the timetable, and will serve as the coordinator of the various stages and actions. In turn, the transaction adviser will apply its knowhow to integrate the business elements of the transaction with its regulatory aspects. All of this will allow the transaction to be organised in a manner meeting not only the market requirements, but also the individual needs of the client, which may differ depending on the various aims and conditions under which the specific transaction is to be conducted.

Summary

Considering the complexity of the delisting procedure, the investor or the public company itself which is planning to withdraw its shares from trading on the market should establish the main aims of the transaction and plan the transaction structure accordingly, a part of which will include withdrawal of the company's shares from trading.

Apart from the mandatory elements of this process, i.e. the takeover bid, adoption of a resolution of the general meeting, and permission from KNF, it is important for the investor also to take into account other elements of the transaction that may affect the possibility of achieving the intended aims and executing the plan, including particularly the possibility of conducting a squeezeout of minority shareholders.

Moreover, because of the need to engage external entities, particularly the brokerage house and legal adviser, relationships should be established with them reasonably far in advance. Their engagement in the process from the earliest stages can greatly improve the structuring of the planned transaction, as well as the efficiency and speed of the delisting process.

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Restructuring and transfer pricing

Major changes in the rules for cooperation between related entities may be deemed to be restructuring for purposes of transfer pricing. This may require a detailed explanation for the tax administration and sometimes payment of higher tax.

The regulatory hullabaloo has continued unabated for several years in the world of transfer pricing (prices set in transactions between related parties). This has resulted in numerous, extensive amendments to the regulations and many recommendations, guidelines and clarifications issued by the tax authorities and by advisers and commentators. Unsurprisingly, the impact of the COVID-19 pandemic on the operations of multinational enterprises has led the way among the topics discussed recently in the arena of transfer pricing—an issue we wrote about in the 2021 *Yearbook*.

The importance of restructuring in the overall set of transfer pricing issues has steadily risen. The body of case law from the administrative courts in Poland in this area is still modest, as is the number of advance pricing agreements concluded by the head of the National Revenue Administration (KAS). According to data published by KAS, through 30 September 2021 restructuring was the subject of only six advance pricing agreements out of a total of 156 issued.

However, the growing attention tax auditors are paying to restructuring is indicated by the statistics presented at the end of 2020 by the National Revenue Administration. They indicated that in the area of transfer pricing, irregularities related to restructuring of businesses are the second most frequent reason for assessment of additional tax (20% of cases), just behind the use of intangible assets (33% of cases). News reports indicate that there were nearly 400 transfer pricing audits in Poland in 2020, demonstrating the scale of the challenge. It can be expected that as the number of audits increases, the number of administrative court rulings on restructuring as an aspect of transfer pricing will also gradually increase.

The Transfer Pricing Forum expressed the opinion that events such as the following should not be classified as restructuring:

- An adjustment of transfer pricing policy not involving a transfer of functions, assets or risks
- Creation or liquidation of a company or branch not accompanied by a reorganisation involving the transfer of functions, risks or assets in other entities
- Mergers and divisions of companies governed by separate regulations, but in the case of divisions the consequences following the transaction should be examined.

In the transfer pricing game, what is at stake is the right of individual tax jurisdictions to tax income.

The growing popularity of restructuring among taxpayers is indicated by the progressing wave of individual interpretations regarding recognition as a tax-deductible expense of consideration paid in connection with restructuring.

How to identify restructuring

Significant changes in dealings between related parties should set off a warning light.

In Poland, the regulation on transfer pricing in corporate income tax identifies restructuring as a reorganisation meeting both of two criteria. First, the reorganisation should significantly affect business or financial relationships, e.g. by terminating or modifying significant provisions of existing contracts. Second, the reorganisation must involve a transfer of functions, assets, or categories of risk between related parties, and the transfer must have a material effect on the taxpayer's operating profit (earnings before interest and taxes). This change is calculated over a three-year period following the transfer and must constitute at least 20% of the projected average annual EBIT over that period had the transfer not been made.

While the first criterion contains a broad and undefined catalogue of events having a material impact on the taxpayer's business, the second criterion explicitly requires this event to be reflected in the functional analysis (constituting a key part of the transfer pricing documentation) and in the financial result.

The Transfer Pricing Forum, an advisory panel to the Minister of Finance, has developed a list of examples of potential restructuring in its recommendations on interpretation and application of restructuring provisions. The list includes, for example:

- Conversion of a manufacturer performing extensive functions and bearing significant risks into an entity providing a manufacturing service (change of functional profile)
- Reduction or expansion of the regional operation of one entity at the expense of another entity
- Transfer of a team of employees between entities, even when it is done by terminating their employment contracts and entering into new contracts
- In-kind contribution of a business.

The general interpretation by the Minister of Finance issued at the end of last year on definition of a controlled transaction also indicates that restructuring may take the form of an economic event extending over time. An example given is the transfer of assets, where the assets are then made available to the transferor under a contract, release of the subject of contracts, and change in the functional profile of the related entity participating in the restructuring.

What is at stake

In the transfer pricing game, what is at stake is the right of individual tax jurisdictions to tax income. If related parties transact on terms deviating from the arm's-length principle, the parties may be accused of mismanagement, but from the perspective of a group of related parties such an aberration will remain neutral. However, any departure from market conditions may affect the tax base reported in the tax jurisdictions of the individual parties to the transaction. As a result, the state coffers of the country whose resident sold too cheaply or overpaid will be depleted. While in the case of a sale transaction, intuition may dictate what and how much it should cost, in the case of complex restructuring the calculation can be more complicated.

Consideration for restructuring

The restructuring regulations place at the heart of the matter the determination of

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whether consideration is due for restructuring, and if so, what the amount of the consideration should be. Some specific obligations have been imposed on taxpayers to document their decision-making process in this respect. The documentation should show that the taxpayer is participating in the restructuring on terms advantageous to the taxpayer.

The analysis accompanying restructuring should examine the causes and planned economic effects of the restructuring, alternative scenarios, and an assessment of the tax consequences. Against this background, an assessment should be made of the extent to which the restructuring contributes to the transfer of the potential to generate profits. Referring to the examples of a potential restructuring cited earlier, an assessment should be made of whether a change in functional profile, modification of target markets, transfer of a team of employees, or in-kind contribution of a business results in a party acquiring or losing the ability to earn income that may contribute to the tax base.

The consideration received in restructuring should be commensurate with the value of the profit potential transferred. Such consideration may result from the very nature of the restructuring carried out. For example, in the case of in-kind contribution of a company, the shares issued in exchange for the contribution may sometimes be regarded as the consideration paid to the transferor. If consideration is due and is not otherwise accounted for, the need to make a payment may arise.

If the taxpayer doubts whether an event should qualify as restructuring, and determines that it does not, it is useful to memorialise these deliberations in the form of a simplified analysis, sometimes including projections.

The regulations provide enigmatic guidance on the rules for calculating consideration. It seems a safe solution to rely on the transfer pricing verification methods provided by law, and valuations prepared in accordance with sound professional judgment.

Restructuring differs from other intra-group transactions

For related-party transactions carried out by taxpayers in the ordinary course of business, such as the sale of manufactured goods, the taxpayers often do not verify until after the end of the fiscal year whether the prices they applied were consistent with the arm's-length principle. Such a pattern of behaviour may result from a combination of years of experience in conducting a given type of business, the pricing policies in place, and ongoing monitoring of business profitability. In such situations, applying one of the transfer pricing verification methods for the purpose of preparing transfer pricing documentation is just a formality.

But by its nature, restructuring is one-off, and this means that the decision-making process preceding the restructuring, and the data and projections taken into consideration in the course of that process, should be documented prior to the restructuring. The tax authorities examining restructuring may give great weight to assessing whether the analyses were carried out contemporaneously to the decision on restructuring, and whether the taxpayer consciously decided on a certain course of action. If the analysis is done after the fact, the taxpayer may be exposed to an allegation that the analysis was secondary to a decision already made. A late analysis may also involve late identification of the obligation to pay consideration, which may prove to be an unexpected incidental restructuring cost.

Ultimately, if the taxpayer doubts whether an event should qualify as restructuring, and determines that it does not, it is useful to memorialise these deliberations in the form of a simplified analysis, sometimes including projections. The statistics on the number of restructuring irregularities identified among taxpayers during audits indicate that this topic will be the subject of numerous audits in the future. Several years after the event, such an analysis may prove to be a valuable source of information.

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Double invalidity? How the courts interpret internally inconsistent tax regulations

An inconsistent amendment to the Excise Tax Act opened the door for taxpayers to seek a refund higher than the tax they had actually paid. What approach do the courts take to deal with internally inconsistent tax regulations, and can the tax authorities resolve doubts in their own favour?

The end of 2021 and the beginning of 2022 have been marked by the "Polish Deal." This hastily processed package of changes has turned the rules of the Polish tax system on their ear. It is also disrupting the life of tax practitioners, as the package is full of contradictions and gaping loopholes—even though the package was amended more than once before entering into force.

The situation has forced lawmakers to take extraordinary measures. Thus provisions of tax statutes are being modified at a lightning pace by executive regulations, and press releases from the Ministry of Finance are being treated almost as a source of law.

But this is not an unprecedented situation. Rapid legislative initiatives do not encourage reflection on the potential consequences of the regulations. It would be worthwhile to take a look back at how similar problems have been approached in the past by the parliament, the tax authorities, and the administrative courts. To this end we will examine the seemingly niche issue of the refund of excise tax to energy-intensive industries.

Can the refund be higher than the tax?

At the end of 2018, rising power prices led the Polish government to cut the rate of excise tax on electricity from PLN 20 to PLN 5 per megawatt-hour. But when introducing this change, one minor detail was overlooked which would soon have loud repercussions.

The Excise Tax Act contains a mechanism for exemption from excise tax on electricity used by "energy-intensive facilities." An energy-intensive facility is entitled to an exemption if it meets a number of conditions, in particular that is operates in one of the industries referred to in the act and that the cost of the electricity consumed by the facility accounts for more than 3% of the value of the facility's sold production.

The situation has forced lawmakers to take extraordinary measures. Provisions of tax statutes are being modified at a lightning pace by executive regulations, and press releases from the Ministry of Finance are being treated almost as a source of law.

Significantly, this exemption is implemented in an unusual fashion, through a refund of a portion of the excise tax incurred by the energy-intensive facility. Thus, the taxpayer first incurs the cost of the excise tax (typically indirectly, as an element of the purchase price it pays for electricity). The amount of the refund is calculated using a formula reflecting, among other things, the share of electricity costs in the value of production as well as the total consumption of electricity.

Upon entry into force of the reduced rate of excise tax, on 1 January 2019, one of the components of the formula for this calculation was the amount of PLN 20, presumably reflecting the rate of the excise tax. But this amount was a fixed element of the formula, and there was no express reference to the base rate of the excise tax. At the same time, this fixed value was not revised to reflect the reduction in the tax rate.

Can a decision finding invalidity itself be invalid?

When in 2020 the time came to settle the refund of excise tax for the previous year, some taxpayers clung to the literal wording of the regulation and applied for a refund based on the rate of PLN 20 per MWh. Interestingly, some tax authorities made the refund in this higher amount, which in turn met a response from the higher-level authorities. In a matter decided by the Province Administrative Court in Szczecin (case no. I SA/Sz 298/21), the director of the Szczecin Revenue Administration Chamber, acting in an appellate capacity, held that the decision awarding the refund was invalid.

The director of the chamber indicated that the basis for the finding of invalidity was a gross violation of law. In simple terms, following the case law and the legal literature, a characteristic of gross violation of law is that the substance of the decision in question is clearly and obviously inconsistent with the substance of a regulation. This inconsistency should be evident at first glance. Thus it is hard to say that a decision in which the tax authority directly applies the law (here, the formula for the amount of the refund) at the same time grossly violates the same law.

To square this circle, the director of the Szczecin chamber decided that the gross violation of law did not involve application of the formula for refund of the excise tax. Rather, the regulation that was violated was Art. 89(3) of the Excise Tax Act, i.e. the provision establishing the rate of excise tax on electricity.

But this logic works against the tax authority. As the director of the revenue chamber issued a decision refusing to apply the formula as written in the act, is that decision clearly inconsistent with the substance of the regulation governing the manner of determining the amount of the refund? This leads to a more general reflection: Can there be said to be a gross violation of the law in an instance of application of internally inconsistent provisions of the act? Or do both decisions—the initial decision setting the amount of the refund, and the appellate decision setting aside the initial decision—equally violate the law?

It fell to the province administrative court to overcome this impasse. The court upheld the position of the tax authorities, but approached the problem from a different side, raising several types of arguments.

First, the court pointed out that a linguistic interpretation is only one type of interpretation of a legal text, and in certain situations a functional and systemic interpretation may take precedence over the literal wording of the text. This approach is not often encountered in the case law from the Polish courts, which tend to rely on the primacy of the literal text of a statute. This resolution is also hard to reconcile with the rule codified in the Tax Ordinance that irremovable doubts as to tax law shall be resolved in favour of the taxpayer. A situation where the provisions of the statute itself cannot be unequivocally applied seems to be a textbook example where this rule should apply.

Second, the court pointed out that under the Excise Tax Act, the refund concerns "a portion of the excise tax *paid.*" In effect, in applying the higher excise tax rate, the refund exceeds the amount of the excise tax previously collected on the electricity delivered to the energy-intensive facility. In the court's view, such an interpretation would lead to unjust enrichment of the taxpayer applying for a refund. The question then

The judgment of the province administrative court is not yet legally final, but will still be examined by the Supreme Administrative Court.

is whether this conclusion should warrant refusal to apply the formula as set forth in the act. In light of the aforementioned principle of resolving doubts in the taxpayer's favour, it may be asked whether in this context the regulations on unjust enrichment should set the limit of a permissible refund. In other words, should the regulations on unjust enrichment be interpreted to mean that the amount of the refund is limited by the amount of the excise tax charged on the electricity supplied to the facility?

It should be pointed out, by the way, that in the case of excise tax, the energy-intensive facility need not be the taxpayer for purposes of excise tax. If it does not have this status, because it is an "end customer," the tax is remitted ("paid") by the seller of the electricity, indirectly charging the buyer. Following the logic of the foregoing argument, in a situation where the supplier of the electricity fails to perform its obligation to remit the excise tax, is its customer (the energy-intensive facility) not entitled to obtain a refund at all?

The judgment of the province administrative court is not yet legally final, but will still be examined by the Supreme Administrative Court. We do not know how the higher court will view the matter. The court's task will probably be somewhat easier in cases where the tax authority of first instance refused to refund the excise tax in the full amount sought. Then the panel of judges will "only" have to assess a judgment conflicting with the literal wording of the regulation.

In the situation described above, where the tax authority of first instance issued a decision granting the taxpayer's request for a higher refund, an additional factor in the dispute is the correctness of the decision invalidating the initial decision.

P.S.

The legislative coda to this problem includes not only a change in the formula for calculating the amount of the refund (it no longer refers to a specific numerical value, but to the current tax rate), but also the justification for the change. The justification refers to updating of the formula as of 1 January 2020, to adjust it to the reduced rate of excise tax.

How to assess the impact of this change on settlements involving 2019? As admission of a mistake on the part of the tax authorities or as a mere clarification? Regardless of how this matter is ultimately resolved, once again businesses had to struggle with the effects of a feverish legislative process. If the first weeks of 2022 are a predictor for the tax landscape in the months and years to come, it will not be the last situation of this kind.

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Does an individual interpretation protect the taxpayer if the law has changed?

Thanks to an individual tax interpretation, the taxpayer gains certainty as to whether, in a given situation, it must pay tax, and if so, in what amount. Doubts about tax law are a common occurrence in Poland. A taxpayer obtaining and following an individual interpretation may feel safe. But what if the law changes?

Polish tax law is complicated, and taxpayers must calculate basic taxes on their own. This poses a threat to the legal and economic security of taxpayers, as well as tax remitters and other stakeholders. This makes it vital for taxpayers to follow the principles of legal certainty and tax fairness. This heightens the requirements for the quality of tax law.

But the tax system is far from ideal, and one of its shortcomings is its instability. This is reflected in the recent package of tax amendments known as the "Polish Deal," which indeed constitutes a thorough overhaul of the Polish tax system, especially income taxes.

In addition, administrative courts rule on tax cases after some delay, and their rulings are based on the law as it stood at some time in the past. This limits the ability to apply the case law from the courts to interpret current tax law.

This is why tax interpretations (general and individual) play such an important role in Poland, filling the gaps between legislation and administrative court rulings and helping unify the law.

Individual interpretations of tax law

GENERAL INTERPRETATION	INDIVIDUAL INTERPRETATION
Issued by the Minister of Finance	Issued by the Director of National Tax Information
Issued at the minister's own initiative or upon a taxpayer's request	Issued only at the request of the taxpayer or other interested party
Issued to ensure uniform application of tax law by the tax authorities	Issued only in relation to a specific set of facts or future event presented in the application

Under Art. 14b §1 of the Tax Ordinance, at the request of an interested party (in particular, a taxpayer), the Director of National Tax Information will issue an interpretation of tax law regulations in the taxpayer's individual case (an individual interpretation).

The applicant for an individual interpretation must present the state of facts or future event comprehensively, and indicate the applicant's position on legal assessment of that factual state or future event.

Then the wording of the application is reflected in the individual interpretation when it is issued. In addition to a comprehensive description of the facts or future event presented in the application, the interpretation also contains an assessment of the applicant's position, together with a legal justification (Art. 14c §1).

If the tax authority does not uphold the applicant's position, the correct position and the legal justification for it will be set forth in the individual interpretation (Art. 14c §2).

The protective power of an individual interpretation

When an individual interpretation is issued, it protects the addressee, but the protection of an interpretation depends on many factors.

Under Art. 14k of the Tax Ordinance, the basis for this protection is that if the applicant complies with the individual interpretation before it is amended or held to have expired, and before the tax authority is served with a legally final ruling of an administrative court repealing the individual interpretation, compliance with the interpretation cannot be detrimental to the applicant, even if the individual interpretation was not taken into account in resolving the tax case.

With respect to compliance with an interpretation that has been amended or held to have expired, or not included in resolution of a tax matter, proceedings for tax crimes or petty offences shall not be initiated, and proceedings initiated in such cases shall be discontinued and no interest charged on arrears.

This means that the protection of an individual interpretation depends on whether the question asked in the application concerned a situation that had already occurred (state of facts) or a planned activity (future event). The cut-off date is the delivery of the individual interpretation (response from the authority). The scope of protection is greater in the case of an interpretation delivered before occurrence of the facts that are the subject of the interpretation.

Art. 14e of the Tax Ordinance refers to the repeal and finding of expiration of an individual interpretation. But it does not mention a change in the law that was the basis for issuance of the interpretation.

There was such a reference in the law in force prior to 1 July 2007, when a condition for amendment or repeal of an individual interpretation by an appellate body was unlawfulness of the interpretation resulting from a change in regulations. Currently, due to the lack of a direct regulation, an interpretation may become obsolete, and thus cease to offer protection, even if a change in law does not render the interpretation unlawful.

In practice, it is recognised that a change in law sets the time limit for the protection resulting from an interpretation. Although this does not have a clear legal basis, an individual interpretation becomes obsolete in the event of a change in the legal status. For this reason, the Polish Deal, which may not modify most of the standards for corporate income tax and personal income tax but does modify a significant portion of those standards, may throw into doubt the protective power of individual interpretations issued pursuant to an application submitted before the changes came into force. The same applies to other changes in tax laws, which are so frequent in the Polish tax system.

It should be mentioned, by the way, that a condition for taking advantage of the protection arising under an individual interpretation is that the established state of facts be the same as the state of facts or future event described in the application for the interpretation. Under Art. 14na of the Tax Ordinance, the provisions describing the protective power of an individual interpretation will also not apply if the

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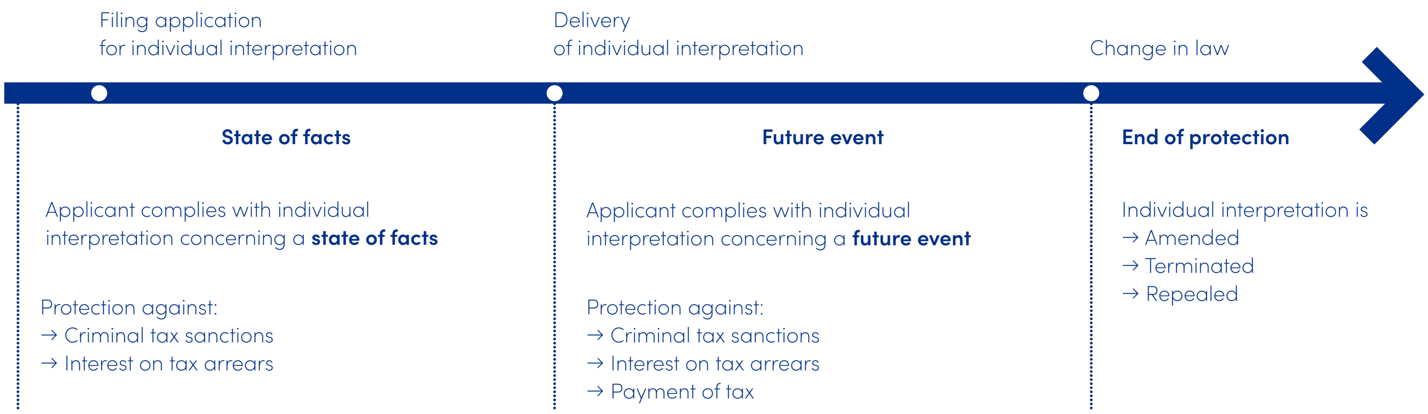
PROTECTION OF AN INDIVIDUAL TAX INTERPRETATION



state of facts or future event which is the subject of the interpretation is an element of actions covered by a decision issued under the clause on circumvention of tax law, related to an abuse of law or the use of measures limiting contractual benefits.

Protection of an individual interpretation and changes in law

It is debatable, but important in view of the frequent changes in tax law, whether any change in the wording of the provisions of law constituting the subject of an individual interpretation renders the interpretation obsolete and eliminates its protection. In practice, two approaches can be considered: formal and substantive.

Formal approach

The subject matter of an individual interpretation is the specific legal regulations indicated in the application, the specific sections of tax law which, according to the authority issuing the interpretation, are applicable to the matter which is the subject of the individual interpretation at the date of issuance. The legal provisions are the basis for assessing the applicant's position and are an element of the legal justification for the individual interpretation.

Under the formal approach, since provisions of tax law constitute a formal element of an individual interpretation, any change to those provisions requires a new interpretation and assessment of their application to the state of facts or future event described in the application. This may be carried out through a process of re-interpretation, which would require a new interpretation, and therefore a new application.

Such a formal approach would also seem to apply to:

– Removal of a provision constituting the subject matter of the interpretation, even if removal of the provision is accompanied by addition of another provision with the same or substantially similar content—because that would be a different section of tax law not cited in the existing individual interpretation
– Addition of new legal provisions that were not taken into consideration when issuing the individual interpretation.

EXAMPLE 1
PRESERVED PROTECTION OF AN INDIVIDUAL INTERPRETATION

Until the end of 2010, no provision of law contained a legal norm imposing a tax obligation on a natural person in connection with his or her contribution of assets in kind to a partnership.

By virtue of the amendment of 25 November 2010, Art. 21(1)(50b) was added to the PIT Act, clearly stating that income on this account is free of income tax. This was not a normative change in the legal provisions, but an editorial change clarifying the existing provisions (see resolution of seven-judge panel of the Supreme Administrative Court of 14 March 2011, case no. II FPS 8/10).

Such a purely editorial change in the provisions would not result in loss of the protection of an individual interpretation issued pursuant to an application based on the prior state of law—regardless of whether this issue were considered under the formal approach or the substantive approach.

This formal approach could also be justified by the notion that the protection afforded by an individual interpretation is exceptional. Only the taxpayer (or remitter or other interested party) who is the addressee of the individual interpretation, with which the addressee complied, may benefit from the special protection rules provided by the Tax Ordinance. Such protection is not available to other taxpayers who have not obtained an individual interpretation, or who have not complied with an individual interpretation they did receive, a general interpretation or tax explanations (except in the case of compliance with an established interpretive practice). Therefore, only a restrictive approach to the conditions for obtaining an individual interpretation can guarantee the protection stemming from the individual interpretation.

EXAMPLE 2
PROTECTION PROBABLY LOST, BUT NOT NECESSARILY

Until the end of 2021, pursuant to Art. 12(4)(25)(b) of the CIT Act, the in-kind contribution of an enterprise or an organised part of an enterprise benefited from a CIT exemption. Under that provision, revenue did not include the value of a contribution specified in the articles of association (or other document of a similar nature) if the subject of the in-kind contribution to the company or cooperative was an enterprise or an organised part of an enterprise.

The Polish Deal introduced a new condition for application of this exemption: the company or cooperative receiving an in-kind contribution in the form of an enterprise or organised part of an enterprise will have to accept for tax purposes the assets or components of the enterprise or organised part of an enterprise at the value resulting from the tax books of the entity making the contribution, i.e. to carry over the tax valuation of such assets.

Taking a formal approach, this amendment would result in termination of the protection of an individual interpretation issued on the basis of Art. 12(4)(25)(b) of the CIT Act in the wording in force until the end of 2021, even if the applicant met the new condition imposed by the wording of the Polish Deal. However, taking the substantive approach could possibly lead to preservation of the protection of an individual interpretation issued based on the pre-2022 state of the law.

Additionally, recognising that any change in the provisions constituting the subject matter of an individual interpretation terminates the protection stemming from compliance with the interpretation serves in its own way to reduce uncertainty as to the protective function of the individual interpretation. Under this view, generally, the addressee of an interpretation will always know whether or not the interpretation continues to provide protection.

Substantive approach

Under this view, the content of an individual interpretation results from an assessment of whether the substantive tax law can be applied to a factual situation or future event, and to what extent the legal position presented by the applicant in the request for an interpretation is justified.

This assessment is based on the substance of the legal standard set forth in a given legal provision. Therefore, a change in a legal provision that does not alter the legal standard (e.g. a mere editorial change) should not render the individual interpretation obsolete (since it does not affect the legal justification for the interpretation as issued).

However, a change of a normative nature alters the legal basis for the interpretation. In such a case, it should be considered whether any change in the legal basis renders the individual interpretation obsolete, or only a change resulting in a different assessment of the factual state or future event presented in the application and the applicant's legal justification.

Since an individual interpretation relates to the individual case presented in the application, it seems that a change in the legal state should render such an interpretation obsolete only if the assessment of the applicant's position would be different if the authority issuing the interpretation made an assessment on the basis of the changed legal state.

Currently, an authority that has issued a tax interpretation is not required to respond to a change in law. Also, there is no legal mechanism automatically depriving an individual interpretation of its protective function. The only basis for challenging the protective function of an interpretation is the taxpayer's inability to comply with the interpretation it has received.

Taking into account the general rules of conduct of tax authorities, which should inspire the trust of taxpayers, it seems justified to seek an understanding of »

The only basis for challenging the protective function of an interpretation is the taxpayer's inability to comply with the interpretation it has received.

“compliance” with an individual interpretation that best fulfils the protective function of the interpretation. Also, the principle *in dubio pro tributario* (doubts shall be resolved in favour of the taxpayer) leads to the conclusion that from the perspective of the taxpayer or other interested party, the substantive approach is more favourable, as it strengthens the protective function of the interpretation. From this perspective, the essence of the interpretation is also important, i.e. eliminating as unequivocally as possible the legal uncertainty in interpretation of tax law and its application in the context of an individual taxpayer’s case. The ban on creation of illusory rights for taxpayers, remitters and other interested parties should also be taken into account.

It seems that when resolving doubts, we should apply the broadest possible understanding of the protective function of the individual interpretation.

Summary

The impact of a change in regulations on the scope of protection of the taxpayer (or other interested party) arising from an individual interpretation is not clear, particularly because the issue is not directly addressed in the law. It seems that when resolving doubts, we should apply the broadest possible understanding of the protective function of the individual interpretation, which is to implement the principle of promoting trust in the tax authorities and protecting the justified expectations of taxpayers.

However, it will always be necessary to carry out a detailed analysis of the subject of each interpretation (and indeed the application, as the legal basis for the individual interpretation as of the date of filing the application is indicated in the application) from the perspective of legislative changes, even if we assume that only a normative change (i.e. a real change in the law) affecting the assessment of the application of a tax-law standard in an individual case will render the individual interpretation obsolete and cut off the protection stemming from it.

In light of the constant changes in tax law, this task may require significant involvement, but it may be necessary to confirm the security of a taxpayer founded on an individual interpretation. This can apply to both day-to-day issues and one-off events (such as a corporate reorganisation). As a result, it may be necessary to apply for a new individual interpretation (subject to the limitations on the protective power of an interpretation issued with respect to an existing state of facts, rather than a future event), or, if possible, to supplement an application already filed.

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Consent required in clinical trials

The legal protection of subjects in clinical trials is grounded in the concept of patients' autonomy in relation to their healthcare providers. This notion began to become widespread only in the mid-20th century, but has now achieved the status of a principle firmly established in the legal regulations. This principle applies to both participants in clinical trials and persons who may be directly affected by the consequences of medical experiments. A manifestation of application of this principle is the universal requirement of informed consent to participate in a clinical trial as well as the duty to ensure the privacy of participants based on the General Data Protection Regulation.

"The rights, safety, dignity and well-being of subjects are protected and prevail over all other interests": that is the first point in the general principle enshrined in Art. 3 of the EU's Clinical Trials Regulation (536/2014). The second point identifies the aim of clinical trials, which is "to generate reliable and robust data."

In a clinical trial, it is necessary to disclose personal data of the subjects, including sensitive data (also known as "special categories of data"). The data can in some respects be processed under a pseudonym, and will be treated as confidential in all circumstances, but in Poland such data cannot be processed without the personal consent of the trial subject.

1 / Informed consent to participate in clinical trial

Participants cannot be treated like passive parties to the clinical trial, even though they are subjected to medical procedures applied by the investigator. For these procedures to be applied, the participants must be informed of them in detail each time, and must express their informed consent to use of the procedure. This is an absolute requirement before it is possible to conduct a clinical trial.

Obtaining of the subjects' informed consent is verified at various stages of the clinical trial. The form for informed consent to participate in the trial is confirmed by the bioethics committee in the process of obtaining consent to conduct the trial, and its compliance with Regulation 536/2014 is confirmed by the authorities of the countries in which the trial is to be conducted. During the course of the trial, the correctness of the informed consent as provided by the participants is verified by the trial monitor and trial inspectors. Any material change in the protocol of the trial requires a revision to the form and obtaining the participant's consent to the change. In Poland, conducting medical experiments, including clinical trials, without the legally required consent is punishable by up to three years' imprisonment.

Process of expressing informed consent

The concept of "informed consent" should not be understood as just a one-time act. It is rather a process of providing potential participants with information in the appropriate quantity, type and form so they can analyse it and ask follow-up questions, to weigh for themselves the benefits and risks associated with involvement in the study. This process ends in formal expression of consent to participate in the trial, through the subject's handwritten signing and dating of the consent form, confirmed in the documentation for the trial.

Under the definition in the regulation, "informed consent" means "a subject's free and voluntary expression of his or her willingness to participate in a particular clinical trial, after having been informed of all aspects of the clinical trial that are relevant to the subject's decision to participate."

The other party in the process of obtaining informed consent is a member of the team conducting the trial, and thus the investigator or other healthcare professional from the research team.

Under the regulation, each potential participant must also be provided with the EU trial number (known as an "EudraCT number") and informed that a summary of the study will be made available in the EU database in terms understandable to a layperson.

How the investigator communicates with potential participants is also crucial. First and foremost, the patient must not in any way be cajoled into taking part in the study, e.g. by promising them a health benefit. A decision taken under undue influence would not be voluntary and independent, and thus would not be informed consent.

The investigator must provide information about the trial clearly, comprehensively but concisely, so that participants know what sort of study they will undergo. The information must be presented in a manner understandable to a layperson, as only an understanding of the risks and implications of the trial allows the subject to make an informed decision whether or not to take part in the study. The regulation expressly requires that in the interview with the prospective subject, it must be verified that the subject has understood the information provided.

The patient must also be given adequate time to consider the decision on whether to take part in the clinical trial.

A HEALTHCARE PROFESSIONAL FROM THE RESEARCH TEAM HAS A DUTY TO INFORM THE POTENTIAL PARTICIPANT OF:

- The nature and objectives of the trial
- The benefits, implications, risks and inconveniences of the trial
- The subject's rights, including the right to withdraw from the trial
- The conditions under which the clinical trial is to be conducted, including the expected duration of the subject's participation
- The possible treatment alternatives, including follow-up measures if the subject's participation is discontinued
- The damage compensation system.

Contents of informed consent document

The final step is submission by the subject of consent to participate in the clinical trial, by signing and dating the informed consent document.

The document contains statements by the subject, including that the subject:
– Has examined the information about the trial and understands it
– Is aware that participation in the trial is voluntary, and the subject can withdraw from the trial at any time
– Is aware of the medical procedures that will be used in the trial
– Is aware of the terms of the sponsor's and investigator's insurance
– Grants the investigator the right to examine the subject's medical documentation from prior to commencement of the trial.

The form may also include other statements, e.g. on consent to collect information on the course of the subject's pregnancy and on the newborn child.

A clinical trial may encompass various medical procedures, such as tests of the subject's general state of health in the process of enrolling the subject in the study. The subject must be informed of all such procedures and must consent to them either in one informed consent document or in separate consents also given during the course of the trial (e.g. for additional tests).

Biological material collected from the subject may also be used in other scientific research, for which separate informed consent should also be obtained from the person who is the source of the material.

In anticipation of difficulties in conducting the clinical trial, e.g. during the pandemic, the subject may also be requested to consent to participate in the trial via remote doctor's visits or home administration of the medicine being studied.

If a person who cannot provide informed consent is to be the subject of a trial (a minor or an incapacitated person), the informed consent document is signed by the subject's legally designated representative under the relevant regulations.

Where the subject is unable to write, consent may be given and recorded through alternative means, e.g. video or audio recording, in the presence of at least one impartial witness (the Polish regulations require the presence of two witnesses). In that case, the witness(es) will sign the informed consent document.

The informed consent document shall also be signed by the investigator who has interviewed the patient and answered the patient's questions.

The subject or the subject's representative shall receive one copy of the signed informed consent document, in writing or in an alternative medium.

Consequences of withdrawal of informed consent

One of the rights of subjects in a clinical trial is to withdraw from the trial at any time without any resulting detriment, in particular any detriment in the healthcare required by the subject. Data obtained in the study prior to withdrawal by the subject can be used in the analytical materials of the trial, as is expressly permitted by Regulation 536/2014. However, it is up to the subject to decide on biological material taken from the subject. The subject may decide that the material should be destroyed, or may withdraw prior consent to use of the material or leave that consent in place so that biological samples can be used for future research.

Informed consent of a person who may be directly affected by the trial

Under the regulation, the subject is an individual taking part in a clinical trial, being administered the medicinal product being tested or included in a control group. But the implications of administration of the medicinal product to the subject may also extend to other persons, particularly when it comes to fertility and reproduction.

Therefore, in trials for certain medicinal products, subjects are informed for example that if their partner becomes pregnant, they will be requested to provide informed consent for access to the medical documentation on the course of the pregnancy and the health of the newborn child, in order to expand the knowledge of the action of the tested medicinal product. Under the definition, such a person is not a subject of the trial, but if they are to provide their health data, they must give informed consent.

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2 / Processing of personal data in clinical trials

All processing of personal data during the course of clinical trials, including data of subjects, the staff leading the study, and third parties who may be directly affected by the study, must be conducted in compliance with the EU's General Data Protection Regulation.

Consent to processing of personal data

The form for consent to processing of the subject's personal data should be enclosed with the application to commence the trial. But this is not the only data processing consent to be obtained. It may prove necessary to process the personal data of persons other than the subject, for example if the spectrum of the trial expands to include the subject's spouse, parents or children, including unborn children or minors.

Regardless of who needs to provide consent, the manner of expressing it and the grounds for legality of the consent are the same as in the case of consent of the subject. Consent of a person other than the subject will need to be expressed separately and explicitly (in certain situations by the person's legal representative), and then properly archived by the sponsor or investigator.

The sponsor or investigator must inform persons whose data are processed of the manner of processing of the data, in particular the purposes for which they will be used, whom they will be disclosed to, how long they will be retained, and the rights such persons have in connection with processing of the data.

Consent as grounds for processing data in clinical trials—controversies and legislation

There are controversies surrounding the issue of whether consent is a proper basis for processing personal data of subjects of clinical trials. This is because the requirement that consent be "freely given" under the GDPR may not be met, particularly in light of the imbalance between the subject and the sponsor of the clinical trial.

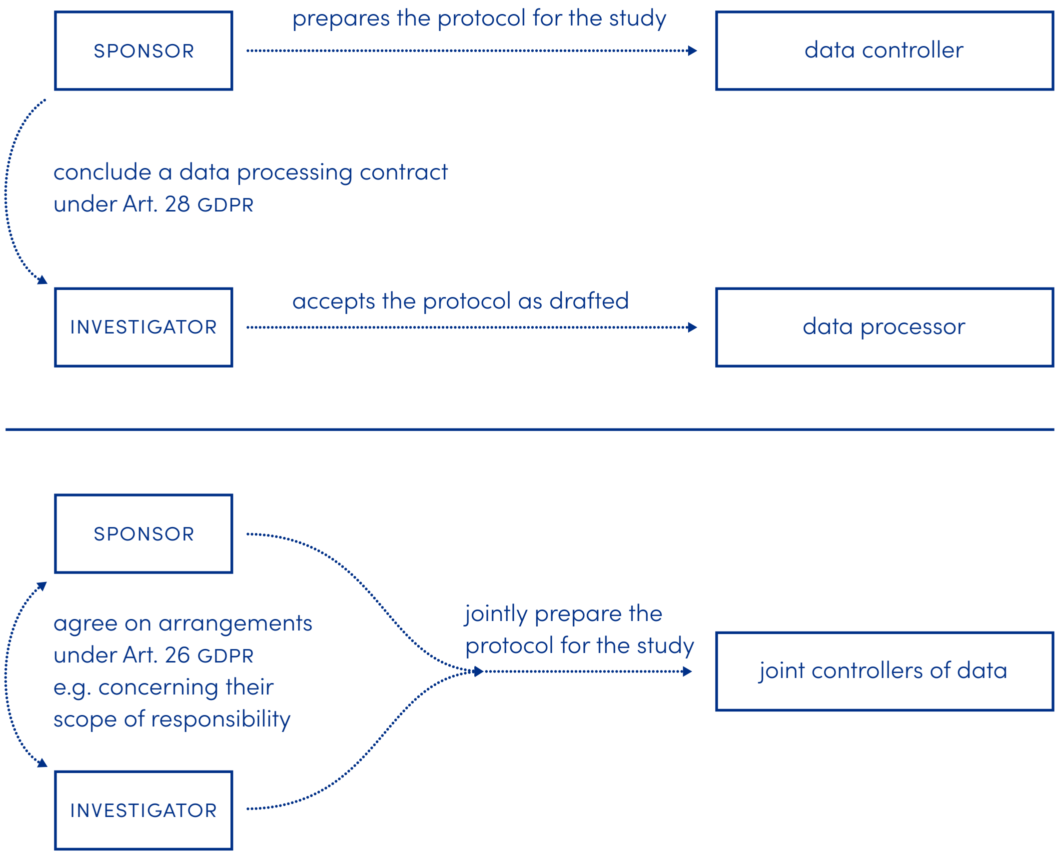
On the surface, this seems inconsistent with the notion of voluntary participation in studies discussed earlier, but it must be borne in mind that the notion of the balance between the parties is understood more broadly under the GDPR, to refer to the socio-economic aspects of the person's life. Thus consent to data processing cannot be said to be "freely given" when, for example, participation in a trial is dictated by the subject's health condition (e.g. experimental therapy for an incurable chronic disease).

But basing the processing on grounds other than consent does not release the data controller from the duty to inform the data subjects of the details of the data processing and to indicate the proper basis for processing of the data.

According to Opinion 3/2019 of the European Data Protection Board concerning the

PURPOSE OF PROCESSING	BASIS FOR PROCESSING: ordinary data	BASIS FOR PROCESSING: sensitive data
Processing operations directly related to ensuring reliability and safety* e.g. submission of safety data, archiving, and disclosures to national authorities during inspections	• compliance with legal obligation to which the controller is subject	• public interest in the area of public health
Research activity	• legitimate interests of the controller • public interest • consent (after a thorough analysis of the circumstances)	• processing necessary for scientific or statistical purposes • public interest in the area of public health • consent (after a thorough analysis of the circumstances)

* concerns operations expressly provided for in Regulation 536/2014 and national regulations



preparing the protocol for the study
e.g. objectives, methodology, data to be gathered, and criteria for participation in the trial

data processor
entity hired by data controller to process data

Q&A on the interplay between the Clinical Trials Regulation and the GDPR, depending on the nature of the processing activity, there may be different legal grounds for the data processing.

In January 2022 the Ministry of Health presented a revised version of the draft Act on Clinical Trials of Medicinal Products for Human Use, designed to bring the laws in Poland into line with the Clinical Trials Regulation and the GDPR. It would also repeal the current forms for research protocols and best clinical practice.

This change will have a major impact for the practice of clinical trials. It will eliminate the only legal obligation of the sponsor to obtain consent from the patient/subject to processing of personal data within the trial. Thus consent will generally no longer be the proper basis for processing of personal data in clinical trials. Moreover, as indicated in the justification for the bill—correctly, in our view—up until now consent has also not been adequate to the intended purpose of the sponsor acting as the data controller.

Therefore, after entry into force of the proposed changes, we will have the opportunity to observe the interesting and instructive efforts by sponsors to make the proper selection of the basis for processing of data, and to deal with the consequences of these choices.

Flow of personal data

In connection with the conduct of a clinical trial, personal data of the subject will flow between a number of entities, particularly the sponsor, the investigator, and the research centre (medical facility). The practice generates many doubts on the roles played by these different entities. It is essential to assign them their proper roles in order to determine the duties imposed on particular entities and minimise legal risks.

Relations between sponsor and investigator

Again based on the guidance from the European Data Protection Board, there may be two scenarios, depending on the involvement of the sponsor and the investigator in drawing up the protocol for the clinical trial.

In practice, the first variant (in the diagram above) occurs most often. This means that the sponsor must conclude a data processing contract with the investigator. The terms of such contracts are strictly set forth in the GDPR. A range of other duties will rest on the sponsor as the data controller, including the duty to properly regulate any flow of personal data outside the European Economic Area.

Relations between the sponsor and the institution (hospital) or third party

The hospital has the status of a controller of personal data insofar as it processes patient data in connection with healthcare provided to the patient (the hospital processes data for its own purposes, as regulated by law).

It may nonetheless happen that the hospital processes personal data of subjects in a clinical trial under contract to the sponsor. That will be the case, for example, if the hospital agrees to archive documentation arising during the course of the clinical trial (this is not a statutory duty imposed on the hospital, and thus it may undertake to do this under a contract with the sponsor).

In that case, the parties must conclude a data processing contract under Art. 28 GDPR. The contract must specify the nature of the processing (typically archiving) as well as the duties of the parties, so there is no doubt which role is played by each entity.

This applies accordingly to processing of data on behalf of the sponsor or investigator by external entities, e.g. accounting and payroll providers settling the costs of cooperation with the research team.

Transferring personal data outside the EEA

Entities engaged in clinical trials must remember that the GDPR imposes additional obligations on them in the event of transfer of personal data outside the European Economic Area, which will happen for example if the sponsor of the trial is based outside the EEA. These requirements are relaxed in the case of countries as to which a decision has been issued by the European Commission confirming that they ensure an adequate level of protection of personal data transferred there. But it must be borne in mind that such a decision has not been issued in relation to the United States, Australia or India, among other countries.

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In short, obtaining consent from subjects in clinical trials, for participation in the trial and processing of personal data, is a complicated undertaking. It is an area where it is easy to make a mistake that could have far-reaching consequences. This should be borne in mind particularly in light of the planned changes in Polish law.

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The food sector and green transition

The European Commission has adopted a new "farm to table" strategy. Food is to be not only safe, but also increasingly healthy and based on sustainable production and distribution mechanisms. For businesses, this means difficult decisions on long-term investments at a time of global crisis. But due to the irreversible changes in consumer attitudes caused by the pandemic, this is the only way for the sector to grow in the future.

Food is one of the few sectors little affected by COVID-19. The EU food sector is still the largest exporter (and importer) of food, and Poland occupies one of the key positions there.

However, a good global position does not mean that companies in the sector are free from challenges. At present, in particular, these concern ensuring a continuous supply of raw materials (e.g. sourcing from distant parts of Asia or Africa), a sufficient number of employees in production facilities, and greater automation of processing. Added to this is the need to capture new export markets, or at least hold onto the current ones, such as the post-Brexit UK, or China, due to restrictions imposed by that country.

Although large, the domestic market in Poland is not as absorptive as it was before the pandemic, primarily due to numerous disruptions in the hospitality sector (HoReCa) caused by repeated lockdowns and a significant increase in production costs and product prices due to inflation. Retail chains, which are major buyers of food products, are imposing conditions on their suppliers that are harder and harder to meet. The products supplied are to be environment-friendly and inexpensive, which is exactly what the consumer expects today. The European Union argues that these seemingly conflicting expectations can, and should, be reconciled.

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“Farm to table” strategy: Where are we and where are we going?

In May 2020, the European Commission published the “farm to table” strategy. It aims to introduce a fair, healthy and environment-friendly food system, which will also be more resilient to future crises. This is a key element of the European Green Deal being implemented in the EU to achieve the UN Sustainable Development Goals.

The diagnosis of the current state is unfavourable. Food production, processing, retailing, packaging and transportation are major contributors to air, soil and water pollution, as well as greenhouse gas emissions. In an age of pandemic, the links between our health, ecosystems, supply chains, consumption patterns and resource constraints have become evident.

These links are increasingly recognised not only by scientists, but also by consumers, who pay closer attention to the health-promoting nature of the products they purchase (as evidenced by the rapid growth of superfoods) and how they are produced (hence the growing interest in natural products and certified organic food). In addition, there is sensitivity to social and ethical issues, resulting in partial abandonment of meat or dairy, replacing them with plant-based alternatives, or avoiding certain ingredients such as palm oil or GMOs.

The declared consumer expectations translate into specific purchasing decisions, and thus revenue for companies from the sector. Despite the unfavourable economic situation, all this creates a clear impetus for profound changes in the food sector, at all levels, from farmers to processors, distributors, and retailers.

The goals set by the Commission are ambitious. For example, in terms of sustainable agricultural production, the use of antibiotics in animal husbandry and chemical pesticides in crop cultivation is to be halved by 2030. The use of fertilisers is to drop by one-fifth, bringing the total to one-quarter of agricultural land used for organic production.

Producers are being encouraged to shorten supply and distribution chains and change their packaging, in particular to reduce the amount of plastic and other artificial materials and replace them with biodegradable, or at least recyclable, materials.

European consumers are also being increasingly educated to change their eating habits, as average intakes of sugars, salt, fats, as well as red meat and total calories still exceed scientific recommendations. The pandemic has exacerbated the problem of obesity and other diet-related diseases. Losses and the widespread phenomenon of food waste are to be eliminated throughout the food chain.

A wave of new regulations is coming

To achieve these ambitious goals, comprehensive regulatory changes in the area of food law are essential. As it stands, the current food law system already comprises hundreds of pieces of legislation. Businesses from the food sector face a big change in the legal environment, as existing regulations are reviewed for sustainability. It is possible that there will be new legislation as well. A total of 27 legislative initiatives are planned.

For example, Regulation 1169/2011 on the provision of food information to consumers is to be amended. The goal is to improve labelling information, so consumers can make healthier and more sustainable food choices and combat food waste. For this reason, it is planned to:

– Introduce standardised, mandatory front-of-package nutrition value labelling
– Extend the obligation to provide information on the origin for certain products
– Revise the provisions for “consume before” and “best before” date labelling.

Consumer research carried out on a European scale has shown that consumers do not distinguish an absolute order to consume by such-and-such date (“use by”) indicated on perishable products (e.g. milk or eggs) from the recommendation “best before” such-and-such date, which means that after that date, some of the organoleptic properties of the food may change (e.g. lighter colour for coffee, less intense aroma for tea), but the food will still be safe. The misunderstanding of these messages

SELECTED EU LEGISLATION REGARDING THE FOOD SECTOR

- Regulation 178/2002 laying down the general principles and requirements of food law
- Regulation 1308/2013 establishing a common organisation of the markets in agricultural products
- Regulation 1169/2011 on the provision of food information to consumers
- Regulation 1924/2006 on nutrition and health claims made on foods
- Regulations laying down hygiene requirements for specific types of agri-food production
- Regulation 2017/625 on official controls of food

leads to inadvertent food waste in households, so changes in product labelling can effectively reduce this phenomenon.

Also, some significant changes are underway in animal welfare legislation, including transport and slaughter, as well as authorised feed additives and plant protection products. We can also expect stricter supervision over the applied standards.

From the technical point of view, the announced changes will concern mainly existing laws, but in the long-term perspective, an EU super-regulation comprehensively governing the principles of sustainable development in the food sector is also being considered.

Failure to comply with the heightened regulatory requirements will risk not only imposition of administrative penalties for violating the new standards, but also reduced sales opportunities.

Carrot-and-stick policy versus voluntary industry action

In addition to tough legislative changes involving stricter requirements for production processes and products offered on the Community market, some indirect market impact mechanisms are planned.

In relation to farmers obtaining subsidies on the basis of aid mechanisms administered by the National Support Centre for Agriculture (KOWR), measures taken to switch to organic production are already rewarded. These changes should result in greater availability and lowering of prices for expensive organic raw materials.

Basic food products are to be subject to a 0% VAT rate. This would be a mirror image of fees imposed on producers of unhealthy food (in Poland, first of all the sugar tax).

Failure to comply with the heightened regulatory requirements will risk not only imposition of administrative penalties for violating the new standards, but also reduced sales opportunities, as changes are planned in public procurement, the European programme for schools (in Poland, implemented with respect to, among other things, what can be sold at school stores), as well as participation in EU programmes for food promotion on the internal and export markets.

Despite the announced support mechanisms, the changes towards sustainable agri-food production will be expensive, and these costs will affect all market participants. However, companies that reorganise ahead of time for sustainability will gain a competitive advantage. Therefore, more than 100 companies from the food sector have already signed up for the EU Code of Conduct for Responsible Food Business and Marketing Practices, which was adopted in July 2020. The code is a voluntary set of sustainability principles that individual companies or industry associations may adopt or adapt to their own needs. Businesses can voluntarily commit to actions consistent with the goals outlined in the code and then report back on what they have actually accomplished.

Thus, the path to sustainable development may be individual and tailored to the company, and not necessarily enforced by an EU or national regulator. Businesses will have to account for implementation of voluntary commitments by publishing appropriate reports. However, at the same time, they will also be able to carry out marketing communications pointing to real actions taken in pursuit of sustainable development. This can be appreciated by consumers, and seems like an attractive incentive to apply changes early.

Therefore, it is worthwhile to follow the proposed legal regulations and adapt to them before they become compulsory. This can help businesses prepare for the avalanche of new food regulations and growing expectations of more and more aware consumers.

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Can an anonymous artist defend against plagiarism?

In the field of copyright, the right of authorship is one of the key moral rights. But what if the artist is anonymous or hides behind a pseudonym, and then the artist's works are plagiarised? Can artists conceal their identity and at the same time seek protection against infringements through the courts? Can the right to anonymity be squared with the protection of creativity?

For a time, it appeared that a solution in the case of works of visual art might be to register them as trademarks. But recent decisions in cases involving registration of works by Banksy show that when artists decide to conceal their identity, they can expect to encounter barriers to enforcing their rights, or may even have to drop their mask.

Pseudonym and recognition of an artist

Many artists court publicity and fame. Name recognition can add to artists' popularity and the prices of their works. But some artists decide to conceal their identity under a pseudonym, thus protecting their privacy. Yet using a pseudonym can be a canny ploy, adding to the artist's market success by creating an air of mystery.

That's what happened in the case of Banksy, creator of some of the best-known works in public spaces around the world. Although his first works of street art were created over 20 years ago, the artist has succeeded all that time in maintaining his anonymity. The aura of secrecy surrounding his works only adds to their popularity. Banksy's drawings are reproduced in thousands of copies, on gadgets, postcards, and even tattoos. Banksy long tolerated this situation, even writing in the book *Wall and Piece* that "copyright is for losers." But in 2014, via the company Pest Control Office Ltd, he acted to register certain of his works as trademarks. It can be assumed that in this manner he sought to prevent their commercial exploitation by third parties.

ARTIST	WORK	PROTECTION	PROPRIETOR
Vermeer	*The Milkmaid*	EU trademark EUTM-010625143	Société des Produits Nestlé S.A.
	Girl with a Pearl Earring	EU trademark EUTM-011363645	Food Investments Group B.V.
Rembrandt	*The Night Watch*	EU trademark EUTM-016613903	Chiever B.V.
Munch	*The Scream*	Trademark registered under the Madrid System, no. IR. 1187098, protected as an EU trademark	City of Oslo

Registration of an artwork as a trademark

It isn't just Banksy who has hit on the idea of registering an artwork as a trademark. There are well-known instances of registration of famous paintings or sculptures as trademarks after expiration of the protection provided by copyright law (in Europe, generally for the life of the artist plus 70 years following the artist's death). Trademarks have been registered at the European Union Intellectual Property Office for paintings by such figures as Vermeer, Rembrandt and Munch.

But efforts to register sculptures by Gustav Vigeland as trademarks at the Norwegian Industrial Property Office failed. The office found that registration of trademarks for two sculptures by Vigeland, sought by the City of Oslo, would conflict with public policy. In its ruling, the appellate chamber of the office stated that while as a rule a work of art can be registered as a trademark, in exceptional circumstances registration may be contrary to public policy. It was also pointed out that trademark registration of a work already in the public domain could unjustifiably prolong the period of protection provided by copyright against certain types of actions. A similar argument was raised in the cases seeking to register trademarks for Banksy.

The Banksy case

The Banksy case differs from the other cases discussed above. First, it involves the works of a living artist continually protected by copyright. Pest Control Office Ltd was established among other purposes to protect works by Banksy while allowing the artist to maintain his anonymity. Pest Control Office Ltd registered 12 of the artist's most recognised drawings as trademarks protected in the European Union, and also made filings in other jurisdictions.

Banksy had long opposed the system of enforcement of intellectual property rights, and did not pursue any litigation in this respect. But in 2018 he decided to sue the organiser of an exhibition in Milan entitled *A Visual Protest: The Art of Banksy*, alleging trademark infringement, copyright infringement, and unfair competition. The dispute arose because the gift shop offered unauthorised goods bearing reproductions of Banksy's works. An injunction was issued in the litigation commenced in Italy, ordering the organiser of the exhibition to cease and desist the sale of items not authorised by the artist, due to trademark infringement. The organiser, the Mudec Museum of Cultures, asserted as a defence that the trademark filing was made in bad faith. As it was examining an application for interim relief, the Italian court did not consider these arguments, nor did it uphold the copyright claims asserted by Pest Control Office Ltd.

But soon after this success, the validity of the trademark rights registered by Pest Control Office Ltd was challenged by Full Colour Black Ltd, which alleged in its application to the EUIPO that the trademark registration was made by Pest Control Office Ltd in bad faith.

In the invalidation proceedings, Full Colour Black Ltd raised two possible aims of »

Trademark registration of a work already in the public domain could unjustifiably prolong the period of protection provided by copyright against certain types of actions.

A copyright transfer agreement, licence agreement, or agreement entrusting a work to another entity and authorising it to pursue litigation must contain information enabling identification of the author of the work.

the registration which it said were in bad faith. First, Banksy could use this filing to circumvent copyright law and monopolise images of his works without disclosing his identity. Second, a successful registration in the EU could be used as grounds to register the trademarks in the US, also in bad faith.

After the invalidation applications were filed, Banksy launched a shop known as Gross Domestic Product. The shop was not open to the public, but allowed clients to view a window display and buy products online after undergoing a verification procedure to ensure that they were not art dealers and did not intend to resell the items. Banksy and his representatives admitted publicly that the motivation for this venture was the trademark dispute, and the effort to show that the trademark was actually used for the goods for which it was registered.

The EUIPO, much like the Norwegian office in the Vigeland case, took the position that as a rule, copyright protection and trademark protection need not be mutually exclusive, but serve different aims. Nonetheless, the EUIPO held that the trademarks had been filed by Banksy's company Pest Control Office Ltd in bad faith, with the aim of circumventing copyright law and without the intention of actual use of the goods or services for which the trademarks were registered. The EUIPO also observed that enforcement of copyright would require Banksy to reveal his identity—concealment of which is his hallmark. As a result of these proceedings, the EUIPO invalidated five trademarks for the time being.

Conclusions

The Banksy case demonstrates that by insisting on anonymity, an artist forfeits the right to enforce the economic copyright to his or her own works through the courts. As a rule, litigants cannot appear in court under a pseudonym, and any copyright transfer agreement, licence agreement, or agreement entrusting a work to another entity and authorising it to pursue litigation must contain information enabling identification of the author of the work in question.

It can be stipulated in a contract that the work is to be disseminated anonymously or under a pseudonym, and a high contractual penalty can be provided for disclosing the artist's true identity, but this does not change the fact that if an anonymous author wishes to pursue his or her rights through the courts, the author must disclose his or her identity. Under the existing system, there are currently no mechanisms enabling enforcement of economic copyright through the coercive power of the state without prejudice to the artist's moral right to disseminate works anonymously or under a pseudonym.

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