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2012 YEARBOOK

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The 2012 Yearbook does not constitute legal advice or a basis for making business decisions.

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Dear Readers,

It is with great pleasure that we present to you the second edition of our law firm's *Yearbook*. Like last year's edition, it is a collection of articles inspired by matters we have worked on for our Polish and international clients.

Our intention was to create a selection of texts in which both our legal colleagues and businesspeople may find something of interest. Thus in the *Yearbook* we raise issues that affect nearly all businesses, as well as issues specific to particular industries. We also discuss issues that are not necessarily strictly legal in nature but also involve Polish and international business practices.

The Polish economic climate continues to improve but still leaves much to be desired. To this, one must add the turmoil of the global economic slowdown. Under these conditions, the role of the lawyer as a long-term partner for the client's business, and a trusted adviser, becomes increasingly important. Knowledge on the part of the lawyer that can help the client avoid costly business disruptions becomes particularly valuable. This is the kind of knowledge that we wish to share with you.

The *Yearbook's* first edition was particularly well received. We hope that this year we will also meet your expectations.

Tomasz Wardyński

Business lunch: a corrupt invitation?

Dominika Stępińska-Duch

Janusz Tomczak

Entertaining a trading partner may be marketing, but if the gesture conveys to the guest an expectation of favourable treatment in awarding a contract, it may be regarded as a form of economic corruption.

The question posed in the title—on its surface unrelated to the law—has been raised with us on several occasions recently, by various clients and with respect to various situations.

They were concerned whether inviting a current or potential customer to lunch or dinner, and covering the costs of the meal, could subject them to an accusation of corruption (with the value of the meal treated as a benefit).

The clients who raised this question typically came from Anglo-Saxon countries, where efforts to stamp out corruption take a somewhat different form than in Poland. In the US or the UK, companies whose staff are involved in bribery face serious financial sanctions, apart from the criminal sanctions borne by the perpetrators themselves. And in both of these countries, there is particular emphasis on battling corruption involving public officials of foreign countries and affiliates of companies from the US or the UK. The goal of the US and UK regulations is transparency of operations when entering new markets and forming contacts with state institutions in new investment locations, as well as in dealings with all types of agents and intermediaries. An act of international law that reflects these goals is the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Thus the Anglo-Saxon businesspeople who raised this question were concerned not only about the legal consequences in Poland, but also—or even more so—the negative consequences in their home jurisdictions.

In Poland, meanwhile, the battle against corruption is primarily waged with the individual perpetrators. Practically speaking, companies are not held responsible, although formally the grounds for corporate liability do exist. The Act on Liability of Collective Entities for Punishable Offences has been in force since 2003, but is very rarely used.

It should be pointed out that the Polish Penal Code contains provisions concerning corruption in the public sphere, involving public officials and persons performing public functions, as well as "private" and economic corruption in violation of principles of fair competition. Acts which unfairly favour some participants in trade at the cost of others are defined in Penal Code Art. 296a.

In order to provide a proper analysis of the seemingly innocuous issue of the permissibility of inviting a person to lunch, it is first necessary to analyse the connection between the event and the nature of the guest's duties, and, in this sense, the purpose of the invitation. The amount spent on the guest is also material.

One argument that requires this issue to be taken seriously is the evolving concept of a person performing a public function, as a potential perpetrator of "passive" corruption (i.e. receiving bribes, Penal Code Art. 228 §1). The predominant view until about the mid-1990s was that performance of a public function was tied to the nature of the activities performed by a given person (if the activities were authoritative, decisional or public in nature), but under the current case law from the Polish Supreme Court, performance of a public function is quite uniformly tied not only to the authoritative nature of decisions taken within the public sphere, but also with control over public assets. This approach led the Supreme Court to hold that a member of the management board of a company wholly owned by the State Treasury was a person performing a public function, and to hold that it could not be ruled out that the CEO of a bank in which the State Treasury held shares could be found to be a person performing a public function.

Thus if you invite the CEO of a company controlled by the State Treasury out to lunch, you must deal with the possibility that the person will be treated as someone performing a public function for purposes of the Penal Code. Then it should be checked whether the company has established a policy covering corporate entertainment. This can help determine what is acceptable and what falls over the line.

Expenses incurred in connection with occasional business-related entertainment, such as taking a customer to lunch, may not exceed the standards customarily accepted within the given cultural circles. The costs must be properly described and documented, and must be appropriate to the circumstances of the event. The same applies to promotional gifts intended to implement the company's marketing strategy.

The purpose of the meeting will always be of crucial importance when determining the nature of the meeting, however, as well as how the purpose is tied to the specific actions and duties of the guest, for example organising a tender or selecting contractors. A suspicion of corruption would arise only if there were a cause-and-effect relationship.

In our legal practice, we more and more often encounter examples of private corruption, i.e. concerning persons who do not perform any public functions. Perhaps this is related in some way to the pressure felt by businesspeople during the economic crisis.

The mechanisms for private corruption are fairly simple. The perpetrators may be, for example, personnel whose compensation is based on commissions. Certain sectors in which there is particularly brutal competition, and signing a contract may make or break the business, also tend to foster corruption. This problem is particularly apparent in relations between small enterprises and major customers on whom they are dependent. An example could be retail chains, where suppliers may be willing to overstep the legal bounds in order to secure preferential treatment for their goods. It is not just small gifts like a box of chocolates that are involved, but foreign holidays and other expensive presents.

The greater the pressure to win the contract, the more the problem grows, particularly during a crisis. Meanwhile, with cost-cutting in non-revenue-generating areas, such as internal audit, it may be easier for abuses to go undetected.

The widespread occurrence of this phenomenon may partly be due to the fact that corruption in the non-public sphere is not strongly condemned in Poland. But corruption does not just violate honesty and morality. When a contractor who gave a bribe is selected over a competitor who made a better offer, the company employing the person who made the choice suffers a loss. Such losses can run into the millions of zloty, and in the final balance they are reflected in the market price of the end product.

There is also the issue of liability for abuses. Awareness on the part of management is relevant, as is the existence of more or less effective internal procedures, which may help determine whether liability should be borne only by the immediate wrongdoer, or the questionable practice is condoned by others—and if so, how far up the corporate ladder this awareness reaches.

It should be stressed that if there are no appropriate policies in place, the perpetrators' supervisors as well as persons managing the entire company may be liable. Polish law includes mechanisms providing for extensive criminal liability of persons managing companies, through the traditional concept of unintentional fault (negligence).

Returning to the original example, a distinction must be drawn between actions designed to build a relationship and those seeking preferential treatment of a given supplier.

In summary, face-to-face meetings over a meal help maintain good contacts between business partners—including those who are responsible for spending public funds. Thus there is no need to panic about potential criminal liability. It should be sufficient to use common sense and good judgment. A good rule of thumb is, "If you don't know what to do, do the decent thing."

Dominika Stępińska-Duch is an adwokat *and member of the Business Crime Practice*

Janusz Tomczak, adwokat*, heads the Business Crime Practice*

An overview of commercial activity in Poland

Natalia Kobyłka

The Polish system of law recognises the freedom of commerce. The main act governing this area of law is the Act on Freedom of Economic Activity. The act sets down the rules applicable to the activity of business entities. Under the act, an entity may undertake commercial activity upon submission of an application for entry in the Central Registration and Information on Business (Centralna Ewidencja i Informacja o Działalności Gospodarczej, CEIDG) or upon entry in the commercial register of the National Court Register (Krajowy Rejestr Sądowy, KRS). There are some exceptions to this general rule. For example, certain types of activity may require administrative permits.

Business forms that are not separate entities

The Act on Freedom of Economic Activity governs the commercial activity of individuals and the operation of branches and representative offices by foreign business entities in Poland.

A *sole trader* (or proprietorship) is an individual who owns and operates a business, earns all the profits, and has unlimited liability for all losses and debts. This type of commercial activity is often selected for small businesses primarily because the owner is personally liable for any losses incurred in the course of operations. This means that his or her personal assets are also taken into account in such circumstances. Another reason is that it involves considerably fewer legal and administrative formalities than other available forms of business (e.g. in principle, filing with CEIDG is sufficient to commence business). Sole traders can therefore commence activity in a relatively short time.

A *branch* is managed directly by a foreign business entity, which must appoint a representative at the branch. A branch may conduct business only within the scope of the foreign entity's activity. A branch is not a separate legal entity, and all actions of the representative are directly binding on the foreign entity. A branch may only start commercial activity after entry in the National Court Register.

A foreign business entity may also establish a *representative office* in Poland to engage in marketing and promotion. The representative office may commence activity upon entry in a register maintained by the Minister of Economy.

Partnerships and companies

Another way of engaging in commercial activity in Poland is to set up a partnership or a company through entry in the National Court Register. The fundamental law in this area is the Commercial Companies Code, which regulates the establishment, operation, merger and transformation of partnerships and companies.

Partnerships are autonomous entities with significant attributes. Above all, a partnership may acquire rights and incur obligations, as well as sue and be sued in its own name. Also, it operates an enterprise under its own business name. One of the most important characteristics is that partnerships own their property, but, with certain exceptions, the partners are liable for the partnership's debts if enforcement against the partnership proves ineffective. The Polish commercial law system distinguishes four types of partnerships: a registered partnership (*spółka jawna* or sp.j.), a professional partnership (*spółka partnerska* or sp.p.), a limited partnership (*spółka komandytowa* or sp.k.) and a joint-stock limited partnership (*spółka komandytowo-akcyjna* or SKA).

In contrast to a partnership, a *company* is entirely separate from its shareholders and there is no subsidiary liability of shareholders for company debts. For this reason, companies are often used for major ventures. The code distinguishes two types of companies: a limited-liability company (*spółka z ograniczoną odpowiedzialnością* or sp. z o.o.) and a joint-stock company (*spółka akcyjna* or SA).

Companies are governed by majority rule and proportionality of rights and obligations in relation to the number of shares held, whereas partnerships are in most cases subject to principles of equality and unanimity (unless specific provisions state otherwise). In a company, the management board is appointed to manage affairs and provide representation, whereas in a partnership each partner usually has the right and duty to conduct its affairs.

The Commercial Companies Code provides for a two-tier internal structure for companies by explicit separation of managerial and supervisory powers. Supervisory and management boards constitute two distinct bodies of the company and membership in both at the same time is forbidden.

It is important to consider the amount and type of formalities required by law when differentiating companies from partnerships. There are considerably more mandatory legal requirements in a company with regard, for example, to enacting and amending the articles of association or the company statute. For companies, there are minimum requirements for the share capital and other requirements regarding contributions to the share capital. Partnerships in most cases enjoy a certain leeway in this regard. Apart from these basic requirements there are many others, for example concerning convening and conducting shareholder meetings, preparing financial statements, changes in shareholding structure, and so on.

The right to undertake commercial activity, which is granted by the Polish Constitution as the supreme law of the land, may be subject to limitations (Constitution Art. 22). The Act on Freedom of Economic Activity makes certain types of activity dependent on obtaining a concession (the most restrictive requirement) or a licence, permit, consent, or entry in a register of regulated activity (the least intrusive measure).

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In every transaction, thorough due diligence is fundamental

Paweł Ciećwierz

How difficult is it to carry out a merger or acquisition under Polish law?

It really all depends on the complexity of the business model of the undertaking, and not just the legal aspects. Polish practice, much like the practice in other countries within the Continental legal system—such as France and Germany—has adjusted to solutions from the Anglo-Saxon legal tradition, which plays a dominant role in corporate transactions. The reason for this is that the most active investment banks and other institutions financing deals employ contract forms and legal institutions derived from the common law.

In this area, Polish law is founded on the principle of freedom of contract, which enables the parties to adapt the documentation to suit the needs of the specific transaction. Polish law does have certain provisions of mandatory applicability, however, which the parties are not permitted to modify. It is the role of Polish lawyers to draft transaction documentation in a way that achieves the ends sought by the parties but is consistent with mandatorily applicable regulations.

There are several problem areas that raise major issues of interpretation. One example would be liability for representations and warranties—particularly when they are made by a selling shareholder and are addressed to the legal, financial or factual condition of the company, which is formally a third party. Thus it is important to be sure that such liability is precisely defined, to eliminate discrepancies in interpretation which could lead to disputes between the parties.

When carrying out M&A deals, are there any risks specific to the Polish market that the parties need to be aware of?

Poland today is a member of the global economy, so the risks are essentially the same as on any other national market. The risks are commonly known, in any event—for example the risks related to foreign exchange fluctuations. These risks can be managed through proper drafting of contractual clauses.

But entirely new risks also arise that were not taken into consideration before. An example would be the risk of the collapse of the eurozone. Lawyers should now provide for appropriate clauses to deal with the issue of contractual payments defined in euro if at some time in the future the euro ceases to exist.

And in many instances the structure of the transaction, including the legal structure, may be dictated by tax considerations.

Are there any risks that are specific to certain industries?

When it comes to legal due diligence, there are no major differences in terms of the sector or the type of transaction. From a legal point of view, deals are fairly similar. Of course, there are certain differences typical for a given industry, but the due diligence as such is generally similar, and must include a thorough analysis of the legal status of real estate, contracts, title to shares, and so on. Familiarity with the specific sector certainly helps, but does not drive the conduct of the transaction itself.

In many sectors, environmental protection presents a serious investment risk. Here we can see that lawyers specialising in this area play a major role.

You said that transactions are similar from a legal point of view. But do surprising or unusual situations arise?

Yes, of course. For example: Once we were carrying out the privatisation of a large enterprise for the Polish Treasury. In the final stage, when there was already an investor onboard, our legal analysis determined that the Treasury had forgotten to nationalise the enterprise. As a result, in the late 1990s, relying on communist-era nationalisation decrees, the Minister of Economy issued a decision nationalising the enterprise, so that the Minister of Treasury could then turn around and privatise it.

Things like this turn up during due diligence. Failure to catch something of that sort could have far-reaching consequences. So, in every transaction, thorough due diligence is fundamental.

How does the M&A market in Poland look at this moment? Press reports paint a rosy picture.

As usual, this can be interpreted in different ways. Last year, it is true, there were several very large, high-profile deals, and the M&A market was very active, but at the moment forecasts are fairly conservative.

Poland continues to enjoy a good economy, and it is regarded as an excellent location for investment. Here, much depends on the initiative of the Treasury and the intensity of the privatisation process. Because in recent years a lot has already been privatised, there are really just a few enterprises remaining—the most strategic ones—and there is a debate about whether to privatise them or not. I have in mind energy in the broad sense, including the fuels sector, which continues to generate activity on the M&A market.

But in terms of classic private deals, in which the Treasury is not involved, I believe that the activity of private investors has decreased.

Meanwhile, however, Polish companies that have achieved notable success are receiving very favourable acquisition offers from foreign companies.

We very much look forward to the time when Polish companies will begin to invest abroad, but I think that will still take a while. Our businesses are not mature enough yet to invest elsewhere, but I expect that it will happen in the course of the next 10–15 years.

Wardyński & Partners has recently launched the Transactions Portal, designed for users who are interested in M&A deals.

We have great hopes for the portal. The concept behind this initiative is to create a flow of information between the law firm, which has great practical experience, and market participants: institutional investors, such as investment funds, as well as individual buyers and sellers, financial advisers and investment advisers. Our lawyers will certainly do their best to discuss issues that are of interest to all groups of readers.

We also expect that the permanent section of the portal, which contains basic information about mergers and acquisitions under Polish law, will be of interest. This section will also be updated periodically.

Our Litigation Portal has already attracted a sizable number of readers. We hope that the Transactions Portal will repeat that success.

Paweł Ciećwierz is an adwokat *and senior partner responsible for the M&A Practice*

Don’t buy a pig in a poke — use due diligence

Izabela Zielińska-Bałożek

Once upon a time, nearly every corporate share deal or asset deal was preceded by due diligence of the target. More recently, mainly because of the condition of the economy, some investors are waiving due diligence or severely limiting its scope—even in cross-border transactions. This approach is likely to have an adverse affect on investors in the near future.

Foreign investors sometimes assume they can adequately protect their interests by obtaining representations and warranties from the seller with regard to the shares or the assets and concerning the target company itself. Additional protection, they hope, will come from appropriate wording of the legal consequences that will follow if the representations and warranties are found to be untrue.

We have seen in our practice, however, that when buyers allege such representations and warranties have been violated, the disputes that arise tend to be complicated, time-consuming and costly. In part this is because there is no clear, unequivocal treatment in Polish law of seller’s representations and warranties, or of the legal consequences of violation of these. Furthermore, because the contractual clauses are typically based on a long series of negotiations by the parties, it may be difficult to glean the parties’ mutual intent from the wording of the agreement.

Recent years have seen a change in how due diligence is conducted. Instead of an exhaustive analysis running to hundreds of pages, there is an increasing trend for executive summary reports, presenting issues that the buyer should pay particular attention to in light of the type of transaction, the entities involved, and the nature of the target’s operations.

Legal risks identified during the course of due diligence are often reflected in the negotiated price and the structure of the deal, and may even lead to the investor withdrawing from the transaction.

Due diligence may also be helpful in developing a checklist of actions that should be taken by the parties before or after transaction closing.

For example, corporate consents may have to be obtained by the buyer or the seller (e.g. shareholder approval to sell the company’s enterprise or real estate). Indeed, the Polish Commercial Companies Code typically renders a transaction invalid if consents from corporate authorities required under the code are not obtained.

For transactions involving shares, it is important to know whether the sale of the shares requires the company’s consent (stipulated in the articles of association). Failure to obtain such consent may, in principle, result in the share sale being invalid.

Encumbrances on shares must also be checked. In the case of registered pledges, the pledge agreement will usually require consent from the creditor before the pledged shares can be transferred.

Consent from third parties may also be required. Due diligence would cover contracts concluded by the company in this regard, e.g. credit agreements and leasing agreements.

If a bank's consent to the transaction is required, failure to obtain it may lead to acceleration of the loan, and if the loan is not then repaid immediately the bank may be entitled to enforce its security.

Change of control clauses in commercial contracts entered into by a company whose shares are being sold may also be significant. Such clauses often provide for negative consequences (typically, termination of the contract) if the consent of the other party to the change in ownership is not obtained.

Below is an overview of some of the essential areas that must not be overlooked when conducting due diligence.

Shares

If the transaction involves shares in a company, it is crucial to analyse the corporate documents, particularly those under which the seller (and any previous shareholders) obtained title to those shares.

First, it is necessary to confirm the existence of the shares and to determine what rights the shares carry. The seller's title to the shares must also be verified. The seller's authority to dispose of the shares is crucial because as a rule there is no protection for good-faith purchasers (an exception provided for in Civil Code Art. 169 applies to the sale of shares in a joint-stock company where the stock certificates were delivered to the buyer).

The presumption that information entered in the National Court Register (the official register of Polish commercial companies) is accurate does not carry with it effects similar to those provided by the warranty of reliance on public records, as is the case, for example, with the land and mortgage register. This means that it is not enough to examine the information in the National Court Register to confirm that the seller owns the shares.

The method by which the shares were acquired in the past should also be checked. Under Commercial Companies Code Art. 180, the transfer of shares in a limited-liability company must be in writing with notarised signatures. Failure to comply with this requirement results in the transaction being invalid if it was concluded on or after 1 January 2001 (before that date, a transfer in writing was sufficient).

For shares in a joint-stock company, it is necessary to check whether the company issued stock certificates to shareholders and if the acquirer's name was duly entered in the ledger of registered shares: if the name is missing, this generally means that, as far as the company is concerned, the acquirer is not regarded as a shareholder and cannot exercise shareholder's rights. How the shares were paid for and the timing of the contributions for the shares are also important.

Assets and other issues

The typical due diligence also covers assets: checking title to real estate, and encumbrances on real estate and movables. Additionally, it would examine the company's title to intangibles, agreements related to financing of the company, employment issues, and regulatory matters (including compliance with environmental and competition regulations and the required licences and permits).

In asset deals, the scope of the due diligence will depend to a great degree on the type of assets involved (e.g. specific real estate or movables, or all or part of a production plant).

A review of encumbrances on movables will, for example, cover such items as registered pledge agreements. The sale of assets that are subject to a registered pledge in violation of a prohibition in the pledge agreement, if disclosed in the pledge register, will generally invalidate the sale.

If the company leases its real estate, and uninterrupted use of the property is essential for the company's operations, the terms of the lease should be analysed, including termination provisions. If it turns out, for example, that the lease was concluded for an indefinite period, and the termination notice period is not specified, then under the Civil Code the lease may be terminated with as little as one month's notice (if rent is payable monthly). If the lease was concluded for a definite (i.e. specified) period, then it is important to examine the early termination provisions. It is also important to see whether the lease was concluded with a so-called certified date, because only then will the tenant be sure that the lease will not be terminated (upon notice) if there is a change of landlord.

Among the employment issues to be covered are freelance contracts concluded by the company and the risk that they may be reclassified as employment contracts (which would have tax and social insurance implications for the company and could also give rise to claims from staff for additional benefits and from the Social Insurance Institution).

In today's world, checking to see whether there are environmental irregularities on the target side is becoming ever more vital: the consequences of such irregularities may involve severe fines and even result in closure of the installation.

Nor should the buyer forget to review the provisions of commercial contracts to which the company is a party, for compliance with competition law (especially clauses involving exclusive sales or purchasing, anti-competition clauses, and rebate policies). If competition regulations are violated, this may result in specific clauses or entire agreements becoming invalid, or can bring down a large fine from the Office of Competition and Consumer Protection—up to 10% of the business's revenue in the preceding year.

Summary

Polish law does not require due diligence to be carried out. But the risks of not doing so are too numerous to touch on here. Suffice it to say that if due diligence is eliminated or limited in scope, this may have negative consequences for the buyer and lead to unpleasant surprises after the deal is closed.

One final point: if the transaction involves shares, the buyer's potential warranty or guarantee claims generally concern the shares themselves and do not directly cover claims related to violation of representations and warranties with respect, for example, to the company's business. Furthermore, the seller will often seek to limit its liability for false representations and warranties, and the buyer may not be in a position to negotiate more favourable contractual clauses.

So, it is in the buyer's best interest to examine the target's legal situation sufficiently before taking a final decision to go ahead with a transaction.

Izabela Zielińska-Barłożek, legal adviser, co-heads the M&A Practice and heads the Environmental Law Practice

Is it easy to be a leniency applicant in Poland?

Antoni Bolecki

Sabina Famirska

The Polish leniency programme, which is modelled on the EU programme, was introduced on 1 May 2004, on Poland's accession to the European Union. The programme provides companies involved in illegal cartels with immunity from fines or a considerable reduction of fines if they report the cartel to the competition authority. This is intended as a major incentive to self-report, bearing in mind that the fine for participating in an agreement that restricts competition can be as much as 10% of the undertaking's revenues in the year before the fine was imposed.

Eight years on, the leniency programme continues to rouse considerable debate. The programme has not proved as popular as expected among Polish firms. In 2004–2010 only 28 leniency applications were made, while several hundred antitrust proceedings were conducted by the Polish competition authority—the president of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów, UOKiK)—during the same period.

One reason for this state of affairs may be that for a long time the criteria for participating in the programme were unclear. That changed recently when several decisions relating to leniency were issued, and in 2010 UOKiK published its own Leniency Guidelines, containing practical tips on how to file leniency applications and how these would be examined by the competition authority.

The basic conditions to qualify for the leniency programme are set forth in Art. 109 of the Act on Competition and Consumer Protection. Under this provision, to obtain complete immunity from fines a cartel member must fulfil all four of the criteria that are discussed in turn below.

1. **The applicant must be the first of the cartel members to supply evidence that allows proceedings to be instituted or an infringement decision to be issued**

   This condition is fulfilled if at the time the leniency application was filed the competition authority had no information or insufficient evidence to institute antitrust proceedings or to issue an infringement decision. What is important here is that information be provided about the illegal cartel in the form of a written description, supported by any possible type of document that confirms the existence of the cartel, such as copies of commercial or internal correspondence (in paper or electronic form), minutes or notes from meetings, internal memos between employees, text messages, diaries of employees involved in the cartel, a record of visits to a cartel member's offices for meetings relating to the cartel, bills documenting the costs of operating the cartel, and recordings of conversations about the cartel. In practice, significant weight is placed on written statements by persons actually engaged in the infringement, e.g. the company's managers and staff. The competition authority prefers evidence presented by the leniency applicant in documents created while the cartel was actually in operation. Significantly, after filing the leniency application, the applicant must show the initiative in passing on evidence confirming the circumstances of the infringement, since in practice fulfilment of the conditions is assessed during the course of the entire proceedings as a condition for cooperation with the competition authority.

   Nonetheless, a leniency application may also be effectively filed after the start of antitrust proceedings, if the applicant presents evidence that the competition authority previously did not possess and that is sufficient to allow an infringement decision to be issued, providing the applicant also fulfils the other criteria described below.

2. **The leniency applicant must terminate participation in the cartel before the application is filed**

   The applicant must cease participating in the infringing practice in reality, and not just make a hollow declaration. Prior to filing for leniency the applicant should terminate illegal contacts and negotiations, and should cease responding to proposals from other cartel members about the continued operation of the cartel. In the case of cartels involving price-fixing or setting of commercial terms it is crucial that as of the date the application was filed the applicant maintained independence in shaping its trading policy. The earlier practice of UOKiK suggests that "ceasing participation in the cartel" should be understood as eliminating the anticompetitive effects of the infringement; e.g. in the case of price-fixing, the applicant must cease applying the previously agreed prices. In any event, the applicant must take concrete steps to demonstrate that it has withdrawn from the cartel, and these steps should be easily recognisable to the authority.

3. **The leniency applicant must cooperate with the competition authority**

   The act does not contain a detailed definition of cooperation between the leniency applicant and UOKiK. It merely stipulates that such cooperation should include, specifically, supplying without delay all evidence that the applicant possesses or may obtain, and sharing without delay all information connected with the case on its own initiative or at the request of the competition authority.

   Although the conceptual scope of cooperation is defined in the law in very general terms, based on the case law and the Leniency Guidelines it is possible here to come to the following conclusions:

   - The leniency applicant's chief duty is to assist the competition authority in reaching a decision that establishes the existence of prohibited anticompetitive practices involving the remaining members of the cartel. Specifically, this involves providing evidence that allows the authority to establish in its decision, and subsequently before the court, (i) who participated in the cartel, (ii) over what period, (iii) which products were affected, and (iv) what specific activities by the various participants demonstrate that they were members of the cartel.
   - On its own, supplying such evidence is insufficient; the applicant should also describe the evidence in writing, clarifying the context and presenting a coherent history of the related events.
   - If such evidence is unobtainable, the leniency applicant may still obtain immunity, providing it precisely and accurately describes the scope of the cartel. Such clarifications are usually supported by written statements from employees involved in the infringement. The authority very rarely accepts evidence from employee interviews.
   - It should be borne in mind that what is required is a precise, detailed, but not over-extensive presentation of the facts.
   - UOKiK places more weight on evidence presented at the applicant's own initiative and new evidence, that is, concerning circumstances about which the authority was previously unaware or had incomplete knowledge.
   - The competition authority will take a negative view of any information that is misleading, unreliable, incomplete, unclear, or presented with unjustified

delay. The authority also takes a dim view of excessive quantities of undigested documents or other information which does not lead to specific conclusions and is not useful for establishing that an infringement took place.

- Public leaking of information about the filing of the leniency application, especially prior to the initiation of proceedings or before inspections are conducted, is also viewed negatively.

4. The leniency applicant cannot be the initiator of the cartel, nor can it have encouraged other undertakings to join the cartel

This condition is intended to avoid situations where an undertaking initiated a cartel and encouraged others to join it, and then reported on the other members on the assumption that it would ultimately escape a fine.

Polish law differentiates between the initiator of the cartel and an entity that encourages other undertakings to participate in the cartel. UOKiK practice, however, has tended to treat the two conditions jointly and treat as an initiator not only the entity that began the infringing practice, but also an undertaking that encouraged others to join it. Thus the "initiator" is understood to mean:

- the undertaking that initiated the illegal cartel, i.e. was the first to suggest to others that they should engage in an anticompetitive practice;
- the undertaking that acted as the organiser of the prohibited cartel, specifically by supervising and monitoring its implementation, maintaining contact with the members of the cartel, enforcing compliance with its terms, or suggesting ways to stabilise the cartel; or
- the undertaking that was the leader of the cartel, specifically the entity that took the initiative in certain activities, e.g. raising prices, suggesting that others adopt prices at the specified level, introducing sanctions or rewards for cartel members for specific actions, resolving disputes between cartel members, or inviting or urging other undertakings to participate in the cartel.

The concept of "initiator" should not be confused with "active participant". It is clear that most members of a cartel will promote their own opinions and interests during implementation of the cartel. This may take the form of active measures, such as admonishing others to comply with the agreed terms, opposing certain of the cartel's activities, proposing more effective solutions, or demanding compensation from others, e.g. for activities undercutting the infringing practice. Such actions do not necessarily indicate that the undertaking performing them was the initiator, especially if the actions were sporadic.

There was a good example of this in a recent case that involved vertical agreements to fix retail prices. UOKiK consistently held that a manufacturer which convinced its distributors to participate in the cartel, fixed the level of retail prices, and then encouraged the distributors to apply these prices was the initiator of the agreements. The manufacturer also drafted agreements containing anticompetitive clauses, remained in regular contact with its distributors, advising them of competitors' activities, and resolved conflicts between them. At the same time, the fact that some distributors took significant steps in the cartel (e.g. demanding discounts in exchange for participating in the retail price-fixing scheme, asking the manufacturer to intervene when other distributors undercut prices, or threatening to pull out of the cartel if the manufacturer failed to perform certain actions) was regarded as demonstrating that the distributor played an active role in the cartel, but not the same role as the initiator.

Satisfying conditions 1 through 4 guarantees complete immunity from fines. A reduced penalty can be expected by an undertaking that missed condition 1 (being the first to come forward) but was the second to satisfy the other three conditions, or which fulfilled only two of the conditions, namely presenting evidence which contributes significantly to a decision and ceasing to participate in the agreement no later than the date of the leniency application. In practice, any undertaking applying for leniency must cooperate with the competition authority during the course of proceedings in the same way as an applicant for full immunity, because the condition of full cooperation during the proceedings is examined in practice alongside the condition concerning the quality of evidence provided.

A second leniency applicant in a specific case, and each subsequent applicant, will receive a diminishing reduction of its fine. For example, the second applicant might be released from 50% of the fine that it would have faced had it not filed a leniency application, the third 30%, and each subsequent applicant only 20%.

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Commercial contracts in asset deals

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When does the acquirer of an enterprise step into the shoes of the seller as a party to existing commercial contracts?

In transactions involving transfer of the equity in a company, i.e. a share deal, the change in ownership of the company generally does not affect the legal relationships which the company is a party to. This is because the entity—the company—does not change.

The situation is different in an asset deal, when there is a transfer not of shares but of an enterprise (as defined in Art. 551 of the Polish Civil Code, which lists examples of types of assets that are regarded as integral parts of the enterprise). In that case, there is a change in the entity (i.e. the buyer) that was a party to existing contracts connected with the operations of the enterprise.

It is important to consider the consequences of the sale of an enterprise, defined in Civil Code Art. 551 as an organised set of tangible and intangible assets intended for conducting business operations.

The consequences of the sale of an enterprise are different for claims and obligations.

Under Civil Code Art. 551(4), the seller's claims connected with the enterprise being sold, including contract claims such as receivables in the form of claims for payment against customers for goods or services sold, or claims against suppliers for delivery of goods or services, are included in the enterprise. Thus, under Art. 552, they pass to the acquirer unless otherwise provided by specific regulations or transactional terms (e.g. in the agreement on sale of the enterprise).

Obligations are treated differently. Pursuant to a 2003 amendment to the Civil Code, obligations and encumbrances are no longer among the integral parts of an enterprise listed in Art. 551. However, under Art. 554, the acquirer of an enterprise is, as a rule, jointly and severally liable with the seller of the enterprise for the seller's obligations related to operation of the enterprise, unless at the time of the acquisition the buyer was unaware of the obligation despite due diligence.

This approach is intended to protect creditors, who may seek satisfaction of their claims from the acquirer of the enterprise without first having to challenge the sale of the enterprise under a fraudulent conveyance theory.

With respect to obligations under commercial contracts, such as the obligation to pay for goods or services received or the obligation to supply goods or services, this means that the acquirer joins the seller's existing obligation to the supplier or customer. There are then two entities jointly and severally liable to the other party.

Correspondingly, in order to assume the seller's obligations, replacing the seller, it is necessary to obtain the creditor's consent to release the seller from the obligation. Because under Civil Code Art. 554 the buyer joins the seller's obligations connected with the operation of the enterprise, it should be recognised that this applies to obligations existing at the time of the sale of the enterprise, and in consequence, obligations that have already fallen due as well as those that are not yet due (e.g. when the deadline for performance lies in the future and has not yet occurred).

In short, unless there is a non-assignment clause in commercial contracts concluded by the seller, the buyer of the enterprise acquires the claims under the contracts. However, in certain circumstances, the buyer will be jointly and severally liable with the seller for performance of existing commercial contracts.

The appropriate contractual arrangements between the buyer and the seller in the event that a claim is enforced against either party on the basis of the seller's existing contracts are a separate issue. Although the buyer and the seller remain jointly and severally liable to customers or suppliers for existing obligations, the buyer and the seller may agree between themselves (i.e. with no effect on third parties) which of them should ultimately be responsible.

Because commercial contracts (and other types of agreements as well, e.g. administrative agreements) often contain non-assignment provisions, to avoid any doubts as to the effectiveness of the buyer's assumption of the seller's contractual rights and obligations, it is worthwhile to obtain written consent from customers and suppliers, prior to the transaction, to the assignment of rights to the buyer of the enterprise and to release the buyer from liability for transactions occurring prior to the sale.

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Registering a pledge over a trademark is not enough

Anna Pompe

The guiding thought when entering into a pledge agreement must be to ensure that the value of the pledged asset is maintained. This is especially important in the case of pledges over trademarks, since if the correct steps are not taken, it is easy for trademarks to lose validity.

In recent years banks in Poland have become ever more willing to grant loans with intellectual property rights as collateral. This is not surprising, since the market value of brands belonging to Polish businesses is growing steadily, hand in hand with the rapid development of the Polish economy as a whole. Trademarks that have grown into valuable company property have naturally become an ideal pledged asset for financial obligations contracted while operating a business. They are all the more attractive since businesses are increasingly turning to professional trademark portfolio management to ensure that trademarks are appropriately registered and maintained.

A special form of collateral

A trademark is a very particular form of collateral, something that banks as lenders should bear in mind. Aside from the legal complexities, one of the things that make them so unusual is the increased uncertainty of maintaining the collateral's value over a lengthy loan term. In the modern business environment, a brand is vulnerable to many complex factors, and it can lose value rapidly.

Banks are fully aware that the market value of a trademark is created by the owner, which alone is responsible for managing the company and its public image. Such risks are taken into account in any credit analysis. But are banks fully aware of how great the borrower's actual influence over the collateral is?

Maintaining the pledged asset for the duration of the pledge agreement, regardless of the current condition of the trademark, is the most important thing for the bank to ensure when concluding the agreement. This is not as obvious as it may seem at first.

Two important issues need to be considered. First, a trademark is a temporary right with an expiry date; to maintain it, an application to extend the right must be submitted by the relevant deadline and the appropriate fee paid on time. Second, a pledge may be established not only on a registered trademark but also on a trademark registration application, i.e. a "pending trademark". Here, the borrower must demonstrate additional, particular diligence before the Patent Office to see the trademark registration process through to the end.

Trademarks are registered for successive ten-year periods, while the trademark registration process itself can take as long as two and a half years. Action on the part of the borrower to obtain the trademark and subsequently to maintain it will usually be required several years after the pledge has been established.

Pledge agreements, therefore, often include provisions requiring the borrower to exercise diligence in maintaining the collateral for the entire agreement term, including paying official fees and taking any other necessary procedural steps before the Patent Office.

Besides such contractual provisions, if the borrower fails to act, the bank may invoke Art. 330 of the Civil Code, which specifically allows a pledgee to take any action or pursue any claim that seeks to preserve the right on which the pledge was established. Thus, banks should be able to effectively conduct all formalities before the Patent Office that are required to extend a trademark registration, above all to pay the official fee for the subsequent protection period. Practically speaking, the bank should, of course, monitor the validity of the trademark itself, so that it can react before the protection period expires.

As regards a pledge over a "pending trademark", things look slightly different for the bank, in both practical and legal terms. The crucial moment in the registration process is when the Patent Office issues a conditional decision to grant the trademark, and calls on the applicant to pay the official fee for the first ten-year protection period. If the fee is not duly paid, the conditional decision expires and the registration process is discontinued. The bank will only learn of this from the borrower, who as the trademark applicant is the only entity called on by the Patent Office to take steps in the registration proceedings. If the formalities are not carried out, the bank will only find out afterwards, when it is too late.

Substantial doubts as to the admissibility of pledges over "pending trademarks" in Poland have now (it appears) been resolved, but a whole series of other legal issues require further examination.

A bank's right to act to maintain a trademark

It might seem that Civil Code Art. 330 secures a bank's viable interest in maintaining the pledged asset, as it gives the bank the statutory ability to take the steps necessary to maintain the validity of the trademark. However, in the light of the Industrial Property Law the Patent Office may perceive this issue differently.

IPL Art. 235(2) provides that when applying for a trademark the applicant acts as a party in proceedings before the Patent Office. Under administrative court precedent, Art. 235(2) constitutes a specific provision in relation to the general criteria for conferring the right to be a party to proceedings as set out in Art. 28 of the Administrative Procedure Code. This effectively means that the number of parties to the proceedings before the Patent Office is reduced solely to the applicant.

On this basis, the Patent Office has refused a bank the right to take formal steps instead of the applicant, even though the bank was listed in the trademarks register as a pledgee. In this particular case the pledge was established over both the trademark registration application and the registered trademark.

This Patent Office standpoint seems unjustified, and in reality does not touch upon the issue of examining the bank's rights (as pledgee) under Civil Code Art. 330. This is because Art. 330 cannot be considered in the context of registration proceedings, conferring party status to the pledgee on a par with the applicant. First, the pledgee's rights remain limited merely to actions conserving the existing right. Second, the pledgee does not act as a party, but only with the rights of a party executing its own statutorily guaranteed entitlements.

The issue raised here has not yet come before the courts and has barely been touched upon in the literature. Nevertheless, it would seem that the pledgee clearly has the right to pay the fee for subsequent protection periods of pledged intellectual property rights, and can rely on Civil Code Art. 330 as its basis for doing so.

Until case law from the administrative courts dispels the doubts and Patent Office practice is better established, care is needed at the stage of concluding a pledge agreement to ensure that the bank has the future power to act to maintain the trademark. A power of attorney granted by the trademark holder (or applicant) to the bank might be such an instrument. It should authorise the bank to take appropriate conserving actions under the law and clearly stipulate that it is irrevocable until the pledge agreement terminates. The admissibility of granting an irrevocable power of attorney in such cases has been confirmed by the Supreme Court of Poland (e.g. Case No. V CSK 223/10).

Summary

Practice shows that over the life of a long-term pledge agreement, when it comes to obtaining or maintaining a particular trademark, the interests of the bank and the borrower do not always coincide. In many cases it is not ill will, but simple lack of due care that leads to missed deadlines and expiry of the trademark (responsibility for the value of the trademark as such remains, however, solely with the holder). But, if pledges over trademarks are not to prove merely illusory security for bank loans, the banks need to be particularly vigilant about the specific features of the rights being pledged. They should also implement their own systems, independent of the borrower's, to monitor the validity of the rights throughout the entire pledge agreement term.

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The emergency arbitrator: a new tool for obtaining injunctive relief in arbitration

Paweł Mazur, Natalia Rutkowska

The ability to obtain effective interim relief to secure a claim is essential in any dispute resolution procedure, whether the case will ultimately be decided by the state court or in arbitration. But parties in arbitration have complained for years that the laws governing arbitration as well as the rules of permanent arbitration courts do not provide optimal solutions for obtaining interim relief sufficiently early in the case.

The need for interim relief to secure a claim generally arises first, often prior to official commencement of the main proceeding. But a claimant in arbitration may seek interim relief there only after the panel of arbitrators has been appointed, which may not occur until a few weeks—or more typically months, or even up to a year—after commencement of the arbitration proceeding. While it is true that the claimant may seek interim relief from the state court, this approach is not universal. Arbitration is largely international, and thus the parties may be concerned about having a proceeding pending before a court in an unfamiliar jurisdiction. When deciding on an arbitration clause, the parties generally seek to maintain the confidentiality of any disputes and to entrust decision-making authority to experienced experts.

International solutions

Several international arbitration courts, including the London Court of International Arbitration and the International Court of Arbitration at the International Chamber of Commerce, have tried to find a remedy for this problem, with varying success. Unfortunately, none of the proposed solutions significantly improved the security for claims in arbitration. The first effective tool was introduced on 1 January 2010 in the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in the form of the "emergency arbitrator". This concept could also be successfully introduced into the Polish legal system.

Under the Stockholm Rules, an emergency arbitrator may be appointed in any proceeding. A party may apply for appointment of an emergency arbitrator and issuance of interim relief even prior to filing the request for arbitration (the pleading commencing the arbitration proceeding). The authority of the emergency arbitrator is limited to issuing interim orders until the panel of arbitrators is appointed. An emergency arbitrator should be appointed by the SCC board within 24 hours after a request is filed by a party. The opposing party may challenge the appointment within 24 hours after it learns of the grounds for the challenge. An emergency decision should be issued within 5 days after the emergency arbitrator receives an application for interim measures from the party. However, if the arbitration is not commenced within a specified time after issuance of the emergency decision, it will cease to be binding. An emergency decision may be extended or amended by the emergency arbitrator, or later by the panel of arbitrators. The emergency arbitrator may not serve as an arbitrator in the arbitration proceeding.

The institution of the emergency arbitrator gained positive reviews during its first year in operation. During that time, the SCC received four applications for appointment of an emergency arbitrator. All of the cases involved international disputes, with amounts in dispute ranging from EUR 500,000 to EUR 100 million. In all four cases, an emergency arbitrator was appointed immediately.

Options under Polish law

No permanent arbitration court in Poland has decided so far to introduce the concept of an emergency arbitrator along the lines of the Swedish model, even though a move in that direction could have a beneficial impact on arbitration proceedings. The question arises whether the Polish Civil Procedure Code would allow interim measures to be ordered by an arbitration court before the panel of arbitrators is appointed. It appears that this would be permissible under current Polish law.

Under current law, claims pursued in arbitration may be secured in two ways. Interim relief may be granted by the state court under Civil Procedure Code Art. 1166 or by the arbitration court under Art. 1181.

The state court may grant interim relief before proceedings are commenced in the case. In such instances, the court will set a time within which the pleading commencing the arbitration proceeding must be filed, no longer than two weeks, or the interim relief will lapse (Art. 733).

Under Art. 1181 §1, if the parties have not agreed otherwise, a party that has substantiated its claim may apply to the arbitration court for an order granting such interim relief as the arbitration court deems appropriate in light of the nature of the dispute. The other party must be notified, because it is prohibited to conduct the proceeding *ex parte*. The arbitration court does not have jurisdiction to issue an enforcement clause for its order granting interim relief. The order is enforceable upon issuance of an enforcement clause by the state court. Issuance of an interim order by the arbitration court has certain advantages. The only prerequisite for issuance of the order is substantiation of the claim, and the arbitration court is not bound by the exhaustive list of interim measures that could be applied by a state court.

Because under Art. 1181 §1 interim relief may be granted by an "arbitration court", it must be determined whether an emergency arbitrator appointed prior to appointment of the actual panel of arbitrators may be regarded as an "arbitration court" for purposes of this provision.

Commentators in the legal literature take the view that in an ad hoc arbitration, "arbitration court" means the same thing as the "panel of arbitrators", i.e. one or more arbitrators appointed to resolve a specific dispute. However, in the case of dispute resolution in institutional arbitration, the term "arbitration court" should be understood more broadly to include the institution administering the arbitration proceedings, with its own authorities, fee schedule, and, often, established list of arbitrators. In such case, the "arbitration court" is permanent in nature, while the "panel of arbitrators" is temporary and is included within the concept of the "arbitration court". It should also be pointed out that Civil Procedure Code Art. 1181 §1 is a provision which the parties are permitted to contract around, which means that the parties may agree to modify or exclude the arbitration court's jurisdiction to order interim relief. Thus, according to the literature, the parties may provide for different rules on issuance of interim relief, to the same extent as the parties and the arbitration court are permitted to establish the primary arbitration procedure.

It follows that there is no legal barrier preventing the parties from freely establishing the rules for ad hoc arbitration to include the possibility of appointing an emergency arbitrator prior to commencement of the arbitration proceeding—defined by the parties as a one-person panel appointed to rule on the issue of interim relief. Similarly, an arbitration clause appointing a specific permanent arbitration court would mean that the parties accept the institution of an emergency arbitrator, if the permanent arbitration court provides for this institution as an element of the court's procedure.

Conclusions

When introducing the possibility of issuing decisions on interim relief (whether through a provision in the rules of a permanent arbitration court or as an element of the arbitration clause), it is important to consider the rules that should govern this institution. It may be sufficient to carry over into Polish law the main rules enacted in this respect by the Arbitration Institute of the Stockholm Chamber of Commerce. Certainly such orders should be issued by one person. Spreading this responsibility to more than one emergency arbitrator does not seem to be a suitable solution, because it would unnecessarily prolong the proceeding on interim relief. The claimant should be able to file the application as quickly as possible, and the procedure for selecting the emergency arbitrator must be very brief (24–48 hours). In line with the prohibition against *ex parte* proceedings in arbitration, the opposing party must be notified of the appointment of the emergency arbitrator and have a right to challenge the appointment, and then to present its position orally or in writing. It would be ideal if the entire procedure (from filing of the application, and appointment of the emergency arbitrator, through issuance of the order on interim relief) could be completed within the course of 7–10 days.

For these reasons, introduction of the possibility of appointing an emergency arbitrator into the rules of Polish permanent arbitration courts, and in ad hoc arbitration, appears to be desirable. It would not conflict with the Polish legal system and should significantly increase the effectiveness of arbitration proceedings in Poland, which would translate into increased popularity of arbitration as a method of resolving disputes. Now that a similar solution has been included in the ICC Arbitration Rules effective 1 January 2012 (Art. 29 and Appendix V), adoption of this approach in Poland would help show that the Polish arbitration system is competitive and state-of-the-art.

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Job guarantees scrutinised by the Supreme Court of Poland

Agnieszka Lisiecka

Guarantees of future employment, eagerly sought by Polish trade unions, are detrimental to the employer but also costly to consumers and the State Treasury. Granting job guarantees may also result in civil or criminal liability on the part of the employer or its managers.

There is no legal definition of job guarantees, nor are they covered by generally applicable provisions of labour law. They developed, in practice, during the process of privatisation of state enterprises in Poland following the fall of communism in 1989. Generally speaking, job guarantees are understood to mean a commitment not to terminate employment over a specific time in the future (for several years, a decade or more, or sometimes even for several decades).

Such commitments are agreed between the investor acquiring control of an enterprise undergoing privatisation and the trade unions operating at the enterprise, as part of a "social package" annexed to the privatisation agreement. They take various forms. They may, for example, involve a prohibition on terminating employment or modifying the terms of employment for reasons not attributable to the employee, or a prohibition on discharging any staff regardless of the reason. When exceptions are negotiated, they typically involve "disciplinary" firings (based on employee misconduct) or negotiated termination (by agreement of the parties). If a job guarantee included in the social package is violated, the employee is typically entitled to receive compensation equal to his or her salary from the date of termination through the end of the job guarantee period.

Job guarantees suffer various fates going forward. Sometimes the guarantees agreed with the investor are assumed by the privatised company as the employer's own obligation, and then implemented in collective bargaining agreements and employment rules. Then they become a source of employment rights. Other times they are binding only on the basis of the social package as such. For a long time, the Polish Supreme Court did not take a consistent position on whether a social package was a source of employment rights and thus could serve as the basis for employees to assert claims directly against the company employing them. Finally the view prevailed that commitments of this type by the investor are a source of employment rights and are binding on the employer.

In their most restrictive form, however, long-term job guarantees thwart restructuring and other changes that are necessary for the economic success of the company. They also act as a disincentive for efficient and productive employment. With their jobs secure, staff may do the minimum amount of work they can get away with, not bothering to display any commitment to the company. This can lead to a decline in discipline, as well as frustration and dissatisfaction among staff who are not covered by the guarantees, effectively poisoning the whole employment relationship. Work is no longer performed to the employer's expectations, and it is up to the employee to decide how efficiently he or she wants to work. Low productivity and the employer's dissatisfaction with the results of the work are not considered sufficient grounds to fire the employee for misconduct, and in practice are not enough to overcome the job guarantee. The alternative is to proceed with restructuring, but at the risk of claims for damages for violating the job guarantees.

For these reasons, job guarantees should generally be regarded as harmful. If the company is in poor financial condition, job guarantees make it necessary to maintain hidden unemployment, or give rise to claims for heavy damages, and in any case they prevent the employer from pursuing a healthy HR policy. They have no rational justification for the employer or for society. The cost of job guarantees is borne by the enterprise, by other staff, and finally by consumers. The State Treasury stands at the end of the chain of losses, because the investor typically factors the cost of job guarantees into the price it is willing to pay when it buys a stake in the enterprise from the state.

Job guarantees have also come under criticism from the Supreme Court. In the context of specific cases seeking high amounts of damages for violation of job guarantees, the court has found such claims to be inconsistent with the socioeconomic purpose of the law or contrary to public policy, or has permitted damages to be cut to a more reasonable amount. The court has also found that the amount of damages sought was disproportionate when compared to the actual loss, the average wage, the minimum wage, and the unemployment rate. The court has also upheld the fundamental principle of employment law that any employment contract may be terminated upon notice, so long as the employer complies with the statutory notice periods, protective periods, and compensation due for improper termination. Finally, the court has pointed out that the cost of such damages is ultimately passed on to the company's customers.

In its rulings, the Supreme Court focuses primarily on the employee's claims, and it questions those rather than the underlying obligation as such, which it generally regards as valid. The court does, however, admit that such an obligation may be questioned under applicable law, including the constitutional principle of proportionality (Polish Constitution Art. 2). This approach appears to be fully justified, because if the claims are contrary to public policy then the obligation itself is questionable. Otherwise, there would be a situation in which a valid obligation cannot be enforced because it is based on an invalid claim. This construction would be incoherent from a systemic point of view. For the same reason, such obligations, however established, must be subject to review in terms of compliance with applicable provisions of law, including principles of social policy, if they are regulated contractually.

Apart from employee claims, it is important to bear in mind potential civil or criminal liability of employers or individuals acting for them. This threat appears particularly realistic in light of the criminal proceeding brought recently, commented on in the media, against individuals who signed a termination notice issued by Energa-Operator SA to an employee protected by a job guarantee, which resulted in payment of damages to the employee on the order of a million zloty. The managers were charged with negligently causing a substantial loss to the company, which generally also entails a duty to make up the loss. While in this case the loss arose from termination of the employee's contract, such liability could also be justified by the mere incurrence of such an obligation. Employing a person for many years without any specific job that needs to be performed by the person is equally detrimental to the company, but in that case the loss might be harder to prove because it would be spread out over time in the form of salary for unnecessary work or the pretence of working.

The position of the Supreme Court and of law enforcement authorities should give employers and their managers pause and encourage them to exercise restraint when making concessions in the face of demands by trade unions to establish unreasonably long job guarantees. This could also be an effective argument in negotiations with the unions. The threat of a labour dispute or strike should not outweigh the duty to act in the best interest of the company and to comply with the law. Incurring or carrying out long-term job guarantees is thus not just a financial burden for the company, but in practice may also result in civil or criminal liability for the employer or its managers.

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New rules for exploring and extracting hydrocarbons

Radosław Wasiak

The new Geological and Mining Law, which went into effect on 1 January 2012, offers simplification and liberalisation of the previous regime, strengthening the position of mining operators and adapting Polish regulations to the requirements of EU law. Among the areas covered by the law are prospecting, exploration and extraction of hydrocarbons from unconventional deposits. In light of reports of major deposits of shale gas in Poland, the new regulations may have a major impact on the prospects for the country's economic growth, which is strongly dependent on access to natural resources.

Hydrocarbon deposits, like deposits of certain other minerals, are subject by law to mineral rights held exclusively by the State Treasury.

A business that is interested in exploration and extraction of hydrocarbon deposits is required to conclude a written contract with the State Treasury (represented by the Minister of the Environment) establishing a right of mineral usufruct, which is the only form for disposing of the mineral rights held by the state. The contract must be for a definite period of up to 50 years. A fee is charged for establishment of the right of mineral usufruct. The amount of the fee and the payment terms are specified in the contract. Within the bounds defined in the contract and by law, the company may make use of the area covered by the contract with priority over other persons, and more specifically may conduct geological work and extract minerals from the deposits in question.

A mineral usufruct contract for hydrocarbon deposits is concluded following a tender procedure for issuance of a concession for prospecting or exploration of hydrocarbon deposits and for extracting hydrocarbons from the deposits.

In addition to the mineral usufruct, an entity intending to conduct such operations must obtain a concession corresponding to the scope of the intended activity.

Concessions are issued for a definite period (from 3 to 50 years) and entitle the holder to conduct activity within a defined area. The decision issuing the concession specifies the type of activity and the manner in which it is to be conducted, the starting date, and other requirements, particularly concerning public safety and environmental protection. The terms of the decision depend on the type of activity. For example, concessions for extraction must state the boundaries of the area where the mining will be conducted and the areas that will be adversely affected by the mining.

The concession expires at the end of the period for which it was issued, or upon the death of an individual concession holder or liquidation of a corporate holder, or upon relinquishment of the concession. The licensing authority may also withdraw or limit the concession if the holder violates the law or the requirements of the concession.

If an entity obtains a concession, that does not release it from obligations imposed by other acts, including the requirement to obtain other decisions, consents or opinions (e.g. construction permits or environmental permits). Moreover, it is not permitted to conduct operations governed by the Geological and Mining Law if it would violate the designated use of the land pursuant to planning regulations for the area in question or other laws.

Issuance of hydrocarbon authorisations apart from instances specified in the Geological and Mining Law is preceded by a tender. The tender procedure is a consequence of enactment into Polish law of the requirements of the Hydrocarbons Directive (94/22/EC).

The licensing authority (i.e. the Minister of the Environment) publishes a notice of the intention to issue a licence in the Polish online public information journal *Biuletyn Informacji Publicznej* and in the *Official Journal of the European Union*.

The conditions of the tender must be non-discriminatory and give precedence to the optimal systems for conducting the concession operations. The criteria for evaluation of offers must include the technical and financial capabilities of the bidder, the proposed technology for conducting the work, and the proposed fee for mineral usufruct.

The licensing authority will issue the concession to the winner of the tender and promptly conclude a contract with the winner establishing mineral usufruct. The terms of the contract and the fee for establishing mineral usufruct may not vary from the terms set forth in the notice of intention to grant the concession. Hydrocarbon concessions are strictly tied to the mineral usufruct. Assignment of a hydrocarbon concession to another entity (permissible under certain conditions) entails an automatic assignment of the mineral usufruct established in connection with the concession.

Hydrocarbon concessions may also be granted upon application of interested parties. The licensing authority is required to publish a notice of applications it receives and enable other entities to file competing applications. The applications are then compared, based on criteria analogous to those used in a tender procedure, and the concession is issued to the entity whose offer was the most highly rated.

As an exception, a hydrocarbon concession may be granted without a tender. This applies to a concession granted to conduct operations in an area that is available on a permanent basis (based on a list of such areas), an area that was the subject of a tender that did not result in award of a concession, or an area covered by a concession which the holder has relinquished. The tender procedure also does not apply to a concession to extract hydrocarbons from deposits subject to a right of priority. Under the Geological and Mining Law, an entity that has explored mining deposits and documented them to a degree enabling preparation of a plan for extracting the deposits, and has also obtained a decision approving the geological documentation of the deposit, has a right for 5 years following service of such decision to demand that mineral usufruct be established in its favour for extraction of minerals from the deposit, with priority over other entities. Exclusion of the tender procedure because of the right of priority is of great importance for companies involved in prospecting, exploration and extraction of hydrocarbons. This solution guarantees those who incurred the costs to explore the deposits the opportunity to obtain a profit at the extraction stage.

An entity conducting prospecting and exploration of hydrocarbons will prepare geological documentation, including the results of the work and an interpretation, with an estimate of the degree to which the intended target has been achieved, and a justification. The geological documentation is then presented to the competent geological authority (here, the Minister of the Environment) for approval by way of a decision. As mentioned, approval of the geological documentation of a mining deposit gives the entity a right of priority.

The geological documentation is the source of the geological information needed for the process of extracting the minerals. The rights to the geological information are held by the State Treasury, and it may provide the information to interested entities for a fee. The operator which conducted the geological work which is the source of the geological information obtains the right to use the information without a fee, and, moreover, for a period of 5 years following expiration of the concession the same entity also has a right to exclusive use of the information.

The Geological and Mining Law also regulates in detail the rules for conducting operations involving extraction of hydrocarbons from deposits within a mining establishment. Extraction is subject to strict control and is based on a plan for the operations of the mining establishment approved by the mining regulator.

Conducting concession operations also requires the payment of fees, in an amount that depends on the area covered by the concession (in the case of a concession for prospecting and exploration of deposits) or the type and quantity of minerals extracted from the deposits (in the case of a concession for extraction). The fee schedule is promulgated as an appendix to the Geological and Mining Law.

The new Geological and Mining Law also strengthens the position of operators exploring and extracting minerals. For a fee, they may use real estate belonging to third parties necessary for conducting the regulated activity, demand the purchase of real estate located in a mining area to the extent necessary to conduct their operations, and, without a fee, may use mining waters to satisfy the needs of the mining establishment. The continuity of concessions issued under the law is also protected, in the sense that the concession may not be invalidated once the regulated activity under the concession has begun. Nor may concessions be vacated or amended as a result of reopening the proceeding once a year has passed following commencement of the regulated activity.

It is still too early to determine what will be the actual result of the new regulations, how they will be interpreted by the competent authorities, or how this will affect the profitability of investments in mining operations in Poland. Based on the legislative history and on declarations by the government administration, it is clear that support for initiatives of this type will be a priority task for the state in the upcoming years.

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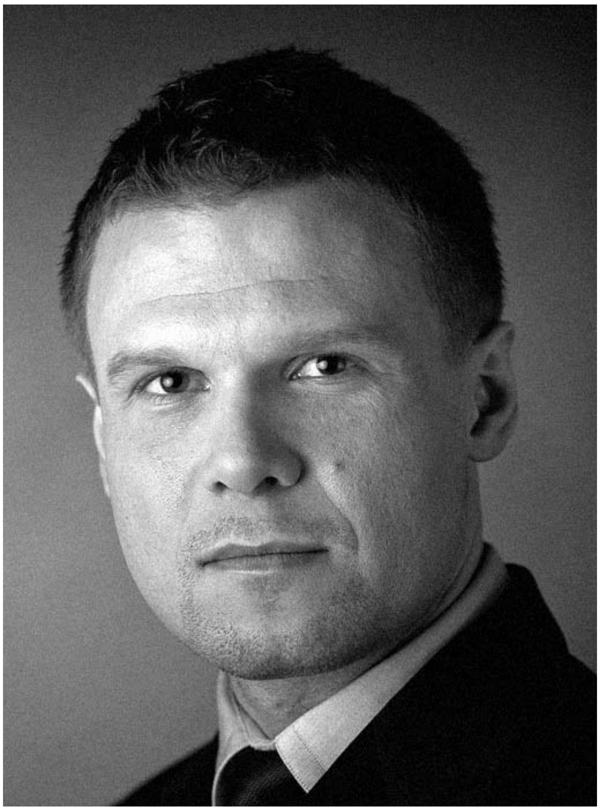
Managing employment law issues in a changing world economy

Dr Szymon Kubiak



Recession, lower inflation and a sharp rise in unemployment loom—a macroeconomic crisis. Attempts by governments to soften the effects of the crisis have, as of today, delivered very little, as macroeconomic indicators continue to be bad if not very bad.

The natural consequence of all this will be corporate bankruptcies. The mergers and acquisitions will differ from those we saw in the "good old days" of a booming global economy. In the shadow of crisis, M&A activity will be driven by low share and asset prices. And in the changing world economy, the inevitable cross-border investment activities of multinational corporations will continue to have a significant impact on labour markets.

These activities bear many legal risks. Some managers will be looking to exploit the climate of the crisis to carry out drastic actions, not all of them properly thought through as to their long-term consequences—downsizing management, squeezing suppliers, forcing them to change conditions of cooperation, or even colluding illegally with business rivals. Group dismissals will also become unavoidable.

Large employers around the world have announced or already implemented plans to reduce their workforce by several hundred thousand with more job cuts to come. Reuters has forecast the impact of the crisis on the labour market. Its analysts indicated that group dismissals in companies in the manufacturing and services sector worldwide had already affected a huge number of employees. Cuts have already been made or are planned by multinational giants such as Alcatel-Lucent, ArcelorMittal, AT&T, Barclays, eBay, Telecom Italia, Dow Chemical, Sony, Hewlett-Packard, Dell Computer, BT, Wyndham Worldwide, Citibank, Bank of America, and several major car manufacturers. Employment lawyers across many countries agree that this represents the tip of the iceberg. Many firms are planning to move their activities to regions where labour costs and salary expectations are lower.

In the new economic conditions, the people likely to be laid off first are those who were kept on in companies simply because better employees were hard to find. In today's labour market, employers once again have the upper hand, and it is no longer so difficult to recruit even highly qualified people.

Subsidiaries of multinationals are increasingly having to carry out group dismissals, necessitated by their parent company's financial difficulties. In such circumstances, on the basis of the law in many jurisdictions (including Poland), two situations need to be distinguished:

- If the local branch or subsidiary is an independent employer, then, in principle, that entity independently decides on redundancies. Yet often this is illusory. In practice, the interests of entities within a global corporation mesh together so closely that the parent company's situation often imposes restructuring on the subsidiary—even if its own results have been excellent. It is natural in this situation to ask questions about potential discrimination. To avoid the risk of accusations of discrimination when selecting employees of a subsidiary for dismissal, it is important to carefully compare individuals' situations within a given country (according to criteria set out below), and, to a lesser extent the situation of employees working for other companies belonging to the group.

- The legal situation is different if employees in a branch are employed directly by the parent company, i.e. if the branch does not have the status of an independent employer. If in such circumstances the branch is profitable and brings the parent company significant local benefits, then the risk of accusations of discrimination in the case of lay-offs is much greater. Depending on the choice of jurisdiction (the parent company's or the branch's), the risk of such accusations of discrimination would need to be assessed. Laws in most jurisdictions (and also EU law to a significant degree) prohibit discrimination on the basis of nationality. In such a scenario, it is worth taking into consideration the numbers of people employed across the individual subsidiaries or branches of the group.

An interesting case has arisen where a client, a large multinational, expecting lower demand for its products worldwide, decided pre-emptively to cut back production by around 10%. Compared to its factories in India and China, the Polish plant was relatively small (it continues to employ over 300 people). As a result, this decision meant that the Polish factory would have to close, despite its excellent financial results and current positive sales forecasts. Because it represented only around 10% of the size of the larger factories in the group, it fell within the "no-go" threshold and was earmarked for closure.

Although this article focuses primarily on labour and employment issues, in this case—from the perspective of an employment/M&A/corporate lawyer—it is impossible not to mention a significant company law issue that arises when a decision to close or limit a subsidiary's activity is made. The responsibility of management board members, who under Polish law are responsible for such decisions, is to act in the best interests of the local company. The question arises as to whether they should act also in the best interests of the parent company.

The decision of the management board to suspend or significantly reduce production of a profitable subsidiary could mean liability of board members, if such decision is to the detriment of that company's best interests. In the case of this client, because the company's main contractor (and shareholder) is considering sourcing from other companies within the group located in cheaper labour markets and terminating contracts with the subsidiary until further notice, such restructuring or even closure seems to be the only solution to protect the group from making losses. In reality, such a judgment needs to be confirmed by calculations prepared and discussed between the majority shareholder and management.

One can defend the notion that an employer has the right to carry out dismissals, including group dismissals, even in cases where a subsidiary is in first-class shape financially, because it is a sovereign economic decision within the scope of the employer's managerial duties. As long as the cause of the dismissals is real, and the selection of employees to be dismissed is not based on discriminatory criteria, then the decision will not be easy to overturn in the courts.

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Practical aspects of bancassurance in Poland

Michał Steinhagen Krzysztof Wojdyło

Insurance offered through bancassurance has become very popular in Poland over the last few years. From a business point of view, bancassurance is an attractive model for distributing insurance products. Indeed, for certain types of insurance (e.g. credit cards, consumer credit) it is probably the most common way of providing insurance protection.

The term "bancassurance" is used in a number of senses. It often refers to cooperation between insurance firms and banks, covering, at least, mutual promotion of products. Here we use it to mean a special form of such cooperation, namely distribution by a bank of an insurance firm's insurance products.

Three basic models of bancassurance

In analysing the development of bancassurance in Poland, we can identify three basic models of how banks distribute insurance products:

1. **Bank as the insuring party.** This model is based on Art. 808 of the Civil Code, which allows insurance contracts to be concluded on behalf of another party. Here, the bank acts as the insuring party, and concludes group insurance agreements on behalf of its customers with an insurance company. This model gives rise to a specific legal structure that provides for the involvement of at least three entities (insurance firm, insuring party, insured).
2. **Bank as an insurance intermediary.** This model sees the bank operating as an insurance intermediary (Polish law distinguishes two types of insurance intermediaries: agents and brokers). Here, the bank operates under the Insurance Intermediation Act of 22 May 2003, which implements Directive 2002/92 into Polish law. Since the activities of insurance intermediaries are monitored by

supervisory authorities, this model is favoured by the body supervising the insurance industry.

3. **Bank as both insuring and insured party.** This model can be used only for certain types of insurance, particularly for insuring repayment of customer debt from financial obligations contracted with the bank (e.g. consumer credit repayments). Here, the bank insures its own risk (failure to repay the debt), while the financing of the bank's insurance cover is transferred to the bank's customers, who in such cases are usually required to reimburse the bank for the insurance premiums.

Many entities that distribute insurance products seek to avoid formal monitoring by insurance supervision authorities as is required if the insurance intermediation approach is followed (Model 2). This means, in practice, that the setup described in Model 1 is a very popular solution. In addition, it is flexible because it allows an individually agreed contract to be signed with the insurance firm, governing mutual cooperation between bank and insurance company. It is this structure, however, which creates most practical challenges. Below, we describe examples of such problems.

The insuring party's fee

The bank undertakes to distribute insurance products for the insurance firm in return for a share of the insurance firm's revenues from the sale of such products. This objective is usually achieved by specifying in the contract between bank and insurance company that the bank's fee is dependent on the value of each written premium. In Model 1, this means, however, that an unnatural situation is created in which the bank, while being the insuring party (and so, formally a party to the insurance contract and the entity obliged to pay the insurance premiums—more on this later), should also receive a fee from the insurance company. According to the supervisory authorities, the bank's fee in this case may constitute a circumvention of the law on insurance intermediation. Insurance companies and banks often try to justify the remuneration payable to the bank by identifying the activities that the insurance firm commissions from the bank (often these are activities falling in broad terms within the administration of group insurance). Nonetheless, these are often activities which, under the Insurance Intermediation Act, can be performed by an insurance intermediary. This is an additional reason for suggesting that these agreements may be an attempt to circumvent the insurance intermediation provisions.

Payment of premiums

The Civil Code clearly states that when insurance is provided on another party's behalf, the insurance firm can only claim payment of the insurance premium from the insuring party. In Model 1, therefore, the insurance firm may claim the premium exclusively from the bank and not from the insured bank customer. This fact must be reflected in the agreement between the bank as the insuring party and the insurance company. Usually, this will also require a contract with the insured, under which the customer will have to reimburse the bank for premiums paid on behalf of the customer's insurance. The bank must adequately protect itself against the risk of having to pay premiums for a particular insured party in the event that it cannot enforce the equivalent of the premium paid from the insured customer. This payment scheme is further complicated by regulations that require a proportional refund of premium in the event of cessation of the insurance before the expiry of the period for which the contract was signed (Civil Code Art. 813). In this case, the bank has to guarantee to refund a proportion of the premiums that the insured customer has paid the bank. Addressing these issues requires special precision due to the large number of insured customers who usually participate in group insurance. It is worth pointing out that the proper settlement of premiums in group insurance is one of the most sensitive issues from the perspective of the insurance supervision authorities.

Termination of a bancassurance agreement

Entities that cooperate under bancassurance, particularly if they belong to the same group of companies, do not always adequately secure an exit mechanism in the contractual structure set up in Model 1. If cooperation has to be ended (e.g. as a result of the breakup of a group of companies) a number of difficulties may arise in practice, not least since with group insurance there may be many thousands of policyholders. As an example: in certain cases banks include provisions in long-term credit agreements which relate to particular group insurance contracts. The termination of such insurance contracts sometimes requires the amendment of many thousands of credit agreements. It is important to bear in mind that the termination must not interfere with the interests of the insured. Despite termination of the contract, a guarantee must be provided for the exercise of the insured customer's rights under the group insurance. Ensuring the exercise of those rights may require the bank and insurance firm to sign an additional agreement governing support for the insured customer after termination of the group insurance agreement.

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Perpetual usufruct: an obstacle race

Tomasz Zasacki

Most investors in Poland regard perpetual usufruct as equivalent, in practical terms, to freehold. There are many obvious similarities, but the special features of perpetual usufruct can make it an obstacle race for the unwary.

It is therefore wise to carry out in-depth due diligence prior to any investment involving real estate that is held in perpetual usufruct.

Perpetual usufruct is a right granting long-term use of real estate that belongs to the Polish State Treasury or a local authority. It is established for a period of 40 to 99 years, and is fully transferable, can be inherited and encumbered (e.g. by a mortgage), and is enforceable against all parties. Buildings and other structures purchased or constructed on the land remain the property of the holder (referred to as the "usufructuary").

The fact that investors are willing to pay the same price on the open market for perpetual usufruct as for freehold suggests that they believe their rights are the same. However, they often fail to take account of how the real estate will be used. There is, in fact, a fundamental difference between freehold and perpetual usufruct. Freehold provides a range of property rights limited only by acts of law and public policy (referred to in Polish law as "principles of social coexistence"). Perpetual usufruct is further restricted by the manner of use stipulated in the agreement or administrative decision by which it was established. This manner of use is also binding on the usufructuary's legal successors. Investors are often misled into believing that the local zoning plan or favourable development terms obtained for neighbouring properties will allow them to carry out trouble-free development. They are likely to be disappointed.

If, for example, the local zoning plan allows for "residential multi-family occupancy and commercial development", this may seem broad and flexible enough for the investor to construct an office block on a plot held in perpetual usufruct.

But this is not the case if the perpetual usufruct agreement specifies that the plot must be used for "residential multi-family occupancy development". On its own land, the usufructuary will only be able to construct a multi-family residential building, regardless of what the zoning plan allows. In other words, in this specific case, the usufructuary would not have the right to use the plot for building an office block, and therefore will not be able to obtain a permit to construct such a building.

The specified use of the land held in perpetual usufruct applies for the entire term of the usufruct and is binding on legal successors. Investors purchasing land held in perpetual usufruct that has already been developed often wrongly believe that the original usufructuary has discharged the contractual obligations concerning the permitted land use, and when they buy the plot the only restrictions on further development are zoning plans and similar regulations. Similarly, they may wish to redevelop the building in order to change its use, believing that they are subject only to limitations imposed by construction law and zoning law. This is, in fact, not the case, since the new usufructuary will continue to be bound by the original mode of use. A change in the use is possible by agreement between the landowner and the usufructuary. The problem is that local authorities (in larger cities) demand special fees from usufructuaries for consenting to a change of use. The Warsaw City Council, for example, charges a fee of no less than 12.5% of the value of the land.

Many businesses acquired perpetual usufruct properties as a result of Poland's political and economic transformations in the 1980s and 1990s, and they are now beginning to sell these properties on the open market. Although the great bulk of such administrative enfranchisement decisions did not specify how the real estate was to be developed, some commentators believe that the simple fact that the property is on the market can itself provide grounds for terminating the perpetual usufruct agreement, since plots which by definition were intended to serve a business (the original reason why the grants were made) are now being traded.

The agreement establishing perpetual usufruct normally specifies deadlines for the start and completion of construction work. The usufructuary and its successors are again bound by these deadlines. Special risks apply to investors who purchase the perpetual usufruct where the deadlines have already passed or are impossible to meet. They become liable to a special annual penalty equal to 10% of the value of the real estate (which may be cumulatively increased by a further 10%). Irrespective of this, if a usufructuary fails to construct buildings before the deadline specified in the agreement, the owner of the freehold may attempt to terminate the agreement in the courts. If a perpetual usufruct agreement is terminated in this way, the usufructuary is entitled to compensation only for any buildings constructed or acquired on the site. If no buildings have been constructed by the usufructuary or its predecessors and construction work has yet to commence, the usufructuary will receive no compensation at all.

When perpetual usufruct expires or is terminated, any encumbrances established on it, including mortgages, also expire. Mortgagees who lose mortgages as a result of such expiry are accorded statutory pledge rights on the usufructuary's compensation claims for any buildings acquired or constructed on the site. If perpetual usufruct expires on real estate where there are no buildings (purchased or constructed by the usufructuary), the mortgage for obvious reasons will not transform itself into a pledge right, but the mortgagee will lose all of its collateral.

It often happens that an investor develops a project on two (or more) plots of land, one of which is owned in freehold while the other is held in perpetual usufruct. If the investor builds an office block, this will not have serious consequences. But if it constructs a residential building on a "mosaic" of plots, both owned outright and held in perpetual usufruct, it will not then be able to establish separate legal title to the individual apartments within the building, since the building will be on real estate owned by different persons (the investor and either the city or the State Treasury). The consequences of being unable to establish separate ownership of residential units and therefore sell them are obvious.

A problem that is just starting to appear on the horizon is obtaining an extension of perpetual usufruct. Cases where perpetual usufruct has expired are currently quite rare, but the numbers will increase with time. Under current law, providing that the usufructuary applies within five years before expiry of the term stated in the agreement, it may request an extension of the agreement for another 40 to 99 years. The authorities can refuse to grant such an extension only when important public interests are at stake. In the handful of cases that have come to light so far, the main issue is the effectiveness of the extension when the application was filed before expiry of the term but the landowner consented only afterwards, and the extension agreement was thus concluded after expiry of the term. Fortunately, so far it is generally accepted that notarial deeds covering such extension agreements have a similar effect to those covering the registration of properties in the land and mortgage register, which have retrospective effect from the filing of the application. A similar situation applies to cases where the owner has refused to extend the term, but the usufructuary obtains a court judgment in its favour, which can be used as the basis for concluding the necessary notarial deed.

Perpetual usufruct can be a complex matter, and it would be quite wrong to regard it as conferring the same rights as freehold.

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Reprivatisation risk – an essential aspect of due diligence when acquiring Polish real estate

Krzysztof Wiktor

Leszek Zatyka

Before buying real estate in Poland, it is important to examine the legal status of the property thoroughly. This is the role of due diligence. In Poland, an additional aspect of due diligence is to assess reprivatisation risk: the likelihood that former owners may assert a successful claim for return of the property, and the effect such claims could have on the investment.

Nationalisation and expropriation

Following the Second World War, Poland experienced a radical change in its political and legal system. The communist authorities decided to nationalise almost all large rural landholdings, as well as forests, industrial sites, and real estate belonging to religious groups.

In the case of Warsaw properties, all land was seized, but the former owners could demand that "temporary ownership" (now known as perpetual usufruct) be established in their favour. The former owners of the land were allowed to retain title to the buildings erected on the land.

Properties not directly subject to nationalisation were expropriated through administrative decisions citing the necessity to carry out important social tasks.

Nationalisation of land in Warsaw was for the most part conducted in violation of the law in force at the time, which now enables the former owners or their legal successors to take legal measures seeking restoration of the properties.

Reprivatisation in Poland

After the fall of communism, the Polish state never implemented a process that would resolve once and for all the legal status of nationalised property or satisfy the claims of the former owners, and specifically did not decide to pay compensation for the property taken. Work on a reprivatisation act began in the early 1990s, resulting in a dozen or more legislative proposals, but none of them was ever enacted. The current Polish government halted efforts to draft a new proposal because of the global financial crisis. It is estimated that satisfying all valid claims of former owners could cost the state up to PLN 60 billion.

Meanwhile, the lack of a statutory solution to the issue of reprivatisation means that the legal status of numerous properties in Poland remains unclear. This cloud on title to real estate undoubtedly has a chilling effect on real estate development and on overall economic growth in Poland.

Consequently, reprivatisation continues to be pursued via administrative and judicial proceedings, and in many cases leads to property being restored in kind.

Reprivatisation risk

Issues related to reprivatisation and claims by former owners are vital from the investor's point of view. Ignoring them could even result in loss of rights to the real estate, not to mention involvement in many years of judicial and administrative litigation, directly impacting the feasibility and profitability of the development.

Reprivatisation risk is connected in the great majority of instances with acquisition of real estate or perpetual usufruct from the State Treasury, a territorial governmental unit, or a holder who obtained rights to the property through an administrative decision or by operation of law. Reprivatisation risk most often arises when acquiring real estate in conjunction with a former state enterprise, during the process of privatisation of state enterprises.

In some instances, particularly when the property belongs to a former state enterprise, the former owners may obtain a favourable reprivatisation ruling even after the property has been redeveloped. Then it is generally necessary for the investor to enter into negotiations with the former owners. In extreme cases, the former owners may regain land on which the investor has begun construction, and in consequence obtain title to the structures on the site, with only a duty to reimburse the investor for its expenditures on the project.

But some nationalised properties have been sold on, permanently and irrevocably. An example would be acquisition of title under a contract made in the form of a notarial deed, from an entity entered in the land and mortgage register as the owner or perpetual usufructuary of the property.

How to examine reprivatisation risk in Poland

Examination of reprivatisation risk requires not only determining the current legal status of the property in question, but also tracing its legal status back to the time it was taken over by the state.

This may involve collecting ownership documentation, files from the old mortgage register, the current land and mortgage register, archives or state offices, and a number of files from expropriation, communalisation or allocation proceedings. In the case of agricultural land and palatial estates, the analysis will include pre-war documents, sometimes stretching back to the 19th century, when Poland was partitioned by foreign powers and the documents are in German or Russian.

An investor planning to acquire real estate should determine whether claims have already been asserted to the property by the former owners or their heirs. As a rule, failure to assert such claims—or in the case of property in Warsaw, failure to file an application to establish temporary ownership of the land under Art. 7 of the Warsaw Decree of 1945—clears the way for effective acquisition of the real estate, even if such claims are asserted later.

The legal situation of agricultural real estate is somewhat more favourable for investors. The former owners may assert effective claims only to palaces or manor houses and the surrounding parks, but may not be restored to ownership of the rest of the landholdings of an agricultural nature.

Determining the reprivatisation risk is even more complicated when a transaction involves real estate that belonged to a corporate entity before the war. In such cases, the title or claims were vested in the company as a legal person, rather than individuals (unless the holder was a partnership). Persons holding rights to the shares in former companies may now revive the companies, register them, and then assert the company's claim to properties held by the company before the war.

In the case of corporate holdings, assessment of the reprivatisation risk thus requires a determination of whether it is possible for the company which used to own the property to be revived. Sometimes it cannot be determined whether the instruments evidencing ownership of the company (e.g. share certificates) still exist. Many such securities were destroyed during the war. After the war, holders of such securities were required to present them for entry in the appropriate register. Holding the securities is a prerequisite for commencing the process of reviving the company. Securities that were not registered after the war are now of interest only to historians or collectors. Despite these obstacles, some pre-war companies have been revived on the basis of old securities and then asserted claims for restoration of nationalised real estate. This resulted in certain abuses, which in turn led legislators to increase the state's involvement in proceedings seeking to revive pre-war companies.

It should also be borne in mind that claims of some pre-war companies were extinguished pursuant to indemnification treaties between the People's Republic of Poland and other countries, under which the communist state paid partial compensation to the pre-war owners of the companies.

Former owners of real estate expropriated for public purposes may now demand return of the property if the purpose stated in the expropriation order was not achieved or the property became unnecessary to achieve the stated purpose. If no application has been filed for return of expropriated property, and an investor is interested in acquiring it from the State Treasury or a territorial governmental unit, the seller is required to notify the former owners or their heirs of the planned sale, offering them an opportunity to exercise a right of first refusal to acquire the property.

Nonetheless, assertion of reprivatisation claims by former owners or their heirs does not necessarily mean that the risk associated with acquisition and subsequent development of the property is greater than the ordinary economic risk. A reprivatisation examination may determine, for example, that the claims are groundless, or that the claims may be satisfied only by payment of cash compensation by the State Treasury or the territorial governmental unit, without undermining the current title to the real estate. It all depends on the circumstances of the specific case.

Summary

Most real estate development is financed by banks and secured by a mortgage on the property. Before releasing the funds, banks typically require the investor to present at least one opinion from a law firm assessing the reprivatisation risk.

No one knows how many real estate projects have been halted or how many investors have withdrawn completely because of claims asserted against the property. But given the fact that most properties in Poland were nationalised or expropriated after the war, no doubt there have been many such instances.

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French reorganisation proceedings recognised in Poland under the EU's Insolvency Regulation

Michał Barłowski

Karol Czepukojć

The Supreme Court of Poland has held that recognition in Poland of French *sauvegarde* proceedings, which are covered by the EU's Insolvency Regulation (1346/2000), is consistent with Polish public policy. The ruling was issued in cases involving a Polish company that sought protection against insolvency in France. The Supreme Court upheld the debtor's argument that there was no basis for the lower courts in Poland to refuse to recognise the French proceedings.

Commencement of *sauvegarde* proceedings

In 2008, a Polish company sought protection from creditors in the French commercial court through the *procédure de sauvegarde*—a form of reorganisation proceeding provided for in the French Code de commerce (modelled on Chapter 11 of the US Bankruptcy Code) and one of the proceedings covered by the Insolvency Regulation, which governs jurisdiction and other issues related to insolvency proceedings with cross-border effects within the EU (apart from Denmark). Although the debtor had its registered office and a production plant in Poland, it belonged to a capital group made up of companies registered in different EU member states, headed by a French company. The French commercial court held that it had jurisdiction under the Insolvency Regulation because, the court found, the centre of the company's main interests was in France.

The *sauvegarde* proceeding was initiated by the company when it faced insurmountable difficulties which were likely to cause it to cease meeting its financial obligations. The purpose of the *sauvegarde* proceeding was to restructure the debtor's business and allow the company to remain in business and repay its debts.

Automatic recognition of *sauvegarde* proceedings

Under the Insolvency Regulation, the commencement of *sauvegarde* proceedings with respect to the company resulted in automatic recognition of the proceedings in Poland and essentially exerted the same consequences as under French law, as the law of the country where the proceedings were opened, without further formalities before the Polish courts. Under the Code de commerce, the company was prohibited from satisfying creditors whose claims arose before the *sauvegarde* proceedings commenced, and such creditors had no right to pursue their claims for payment before the courts.

Certain of the company's creditors did not accept these consequences; among them were the three creditors who were claimants in the cases before the Polish Supreme Court discussed here. They filed lawsuits against the company in the Polish courts. The crux of the dispute between the creditors and the company concerned recognition of the *sauvegarde* proceedings and their consequences in Poland.

Refusal to recognise the *sauvegarde* proceedings

The creditors claimed under Art. 26 of the Insolvency Regulation that the Polish courts should refuse to recognise the *sauvegarde* proceedings. They argued that recognition would lead to a result that is clearly inconsistent with Polish public policy, in particular the basic principles of Polish bankruptcy law and constitutionally protected property rights. In the creditors' view, the basis for instituting *sauvegarde* proceedings was the financial difficulties of the company's capital group and the French company heading the group. Meanwhile, the rule under Polish bankruptcy law is that insolvency proceedings are instituted against an insolvent debtor, and reorganisation proceedings against a debtor threatened with insolvency, but not for reasons attributable to a third party or a group of third parties. In the opinion of the creditors, the company was not in a financial situation that warranted its submission to *sauvegarde* proceedings, and the creditors would have to suffer the negative consequences of financial difficulties that concerned the debtor's capital group (including having their claims satisfied in instalments over a ten-year period, while the Polish company remained in good financial health). In particular, the creditors maintained that having their claims paid in instalments violated their constitutionally guaranteed property rights.

The debtor argued that a Polish court had no authority to re-examine on the merits its application for *sauvegarde* protection or the French court's decision to open *sauvegarde* proceedings. In particular, a Polish court was not authorised to reconsider whether the company met all the conditions for it to be subject to the *sauvegarde* proceedings on the date the proceedings were instituted (including whether or not it had financial difficulties). This follows from the Community principle of mutual trust between the courts of different EU member states. This principle is crucial to achievement of the aims of the Insolvency Regulation. A merits appraisal of the French court's decision to institute *sauvegarde* proceedings was permissible only within the framework of appellate review by higher French courts. The creditors failed to avail themselves of the opportunity for appellate review in France and thus waived the right to challenge the decision on its merits. The company argued that the standards of *sauvegarde* proceedings, when isolated from a specific case, comply with the standards of Polish bankruptcy law, particularly in relation to the limitations imposed on creditors' rights (e.g. spreading out the payment of claims owed by the debtor over time or restricting a creditor's ability to appeal against a declaration of bankruptcy) and the limitations on the grounds for instituting proceedings due to reasons involving a third party (which is prohibited in both the Code de commerce and the Polish Bankruptcy & Rehabilitation Law). In the company's view, the appearance of inconsistencies with Polish law does not provide sufficient cause to refuse to recognise the *sauvegarde* proceedings and their consequences under Art. 26 of the Insolvency Regulation. Such inconsistencies would have to strike at the foundations of Polish public policy and be obvious in nature (Supreme Court of Poland order of 21 April 1978, Case No. IV CR 65/78, published at OSNCP 1979, No. 1 item 12). A Polish court also cannot refuse to acknowledge *sauvegarde* proceedings on the basis of a potential violation by a French court of the Code de commerce or the Insolvency Regulation, since such examination is beyond the jurisdiction of the Polish courts.

In the company's view, the Code de commerce and the Insolvency Regulation gave no grounds to institute *sauvegarde* proceedings for reasons concerning a third party or a group of third parties. If the company had sought *sauvegarde* protection due to the financial difficulties of its capital group or the company heading the group, the French court would have had to dismiss the application as unjustified. The legal structure for *sauvegarde* proceedings is identical in this respect to the structure of Polish insolvency proceedings, which are regulated by the Bankruptcy & Rehabilitation Law of 28 February 2003.

The company also argued that the ruling by the French court to spread out the payments due to creditors in instalments is not a violation of their property rights. Under the Polish Constitution, property rights may be limited by law. Furthermore, the Polish Bankruptcy & Rehabilitation Law, Civil Code and Civil Procedure Code all provide for the possibility of a judgment ordering payments to be made in instalments.

Position of the Polish lower courts and the Supreme Court

The courts of first instance took divergent positions in the three cases mentioned here. The courts of appeal concurred with the position presented by the creditors and, on the basis of the public policy clause in Art. 26 of the Insolvency Regulation, refused to recognise the *sauvegarde* proceedings and their effects in Poland. The company filed cassation appeals with the Supreme Court of Poland against the decisions by the courts of appeal.

In judgments dated 16 February 2011 (Case Nos. II CSK 326/10, II CSK 541/10 and II CSK 425/10), the Supreme Court upheld the company's position and agreed in essence with the company's reasoning raised during the proceedings. The court concluded that there was no basis to refuse to recognise in Poland the *sauvegarde* proceedings opened in relation to the company in France.

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Dual listing on the Warsaw Stock Exchange

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Dual listing refers to trading of a company's shares on two (or more) stock exchanges at the same time. In recent years, companies from around Central & Eastern Europe have shown an increasing interest in the Warsaw Stock Exchange (WSE) as a market to list their shares, and this has raised the profile of the WSE in the region. There are now dozens of companies listed on the WSE that are based outside Poland, but for some of them the WSE is only one of two, or in some cases several, markets where their shares are traded.

The main reason companies seek a listing on multiple markets is to increase their ability to raise capital—often on a market that is larger than their home market. The legal procedure for listing on additional markets within the EU by a company that is already listed in a member state has also become easier. It should be borne in mind, however, that listing shares on two markets does carry a risk of reduced liquidity of the shares on one of the markets, possible price differences between the markets, and the need for the company to comply with specific legal regulations of both markets while maintaining equal rights for all shareholders (e.g. with respect to voting rights, participation in shareholder meetings, and dividends).

In order for shares of a foreign company to be listed on the WSE, a prospectus must be issued and approved. Steps must also be taken to dematerialise the shares and include them in the international deposit, clearing and settlement system, which is coordinated with the system of Poland's National Depository for Securities (Krajowy Depozyt Papierów Wartościowych, KDPW). The shares must also meet the conditions for admission to trading on the WSE, particularly with respect to the number of shares in circulation and the value of the issue. The whole process, including the prospectus itself, must reflect the legal conditions under the laws of the country where the company has its registered office (particularly if it is different from the markets where the shares are listed), as well as the laws of the countries where the markets on which the company's shares will be listed operate—including the country in which the prospectus is to be approved.

Prospectus—approval, notification, content

A basic condition that must be met by a company (Polish or foreign) for admission of its shares to trading on the Warsaw Stock Exchange is to prepare a prospectus and obtain approval of the prospectus by the relevant capital market regulatory authority.

The selection of the country in which the company intends to seek approval of its prospectus is a key decision affecting the procedure and scheduling of the whole process of listing the shares on the WSE.

A foreign company with its registered office in an EU member state which seeks a listing on the WSE may select from one of two scenarios:

- Preparing the prospectus and obtaining approval in the EU member state where the company has its registered office and then notifying the approved prospectus to Poland
- Preparing the prospectus and obtaining approval by a regulatory authority in an EU member state other than the country where the company has its registered office (if there is an agreement in place between the countries on forwarding of consideration of applications for approval of prospectuses), and then notifying the approved prospectus to Poland.

However, a company from outside the EU which seeks a listing on the WSE may prepare its prospectus and obtain approval in Poland by meeting the conditions provided by Polish law or prepare its prospectus and obtain approval in another EU member state and then notify the approved prospectus to Poland.

Below we limit our discussion to issues of particular relevance when the prospectus has already been approved in another EU member state and the company is considering a dual listing, including listing on the WSE, possibly combined with a public offering of shares in Poland.

One of the factors influencing the choice of the country where the prospectus will be approved is the language of the prospectus. If the prospectus, including the financial portion, is prepared in English, this excludes the necessity of translating the entire prospectus into Polish. In such case, a Polish translation of a summary of the prospectus is all that is required. This is one justification for companies to select a jurisdiction where prospectuses may be submitted and approved in English.

The prospectus of a company that is considering listing its shares on the WSE should include Polish aspects, particularly addressing the conditions for listing on the WSE and for entering the shares in the relevant securities depository system in a manner that enables KDPW to register and settle transactions occurring on the WSE. If the issuer is considering a public offering of shares in Poland, it is particularly important to identify risks relevant to the conditions and procedures for conducting an offering in Poland with respect to cancellation or suspension of the offering as well as rules for distribution and allocation of the shares.

The manner in which the prospectus and the translation of the summary are published is important from an organisational point of view. The Polish regulations provide for several methods of publishing the prospectus. The methods that are optimal for foreign companies are:

- Publication in electronic form on the company's website and simultaneously on the website of the financial institution offering the shares
- Publication in electronic form on the WSE website
- Publication in electronic form on the website of the regulatory authority in the issuer's home jurisdiction.

The Polish Financial Supervision Authority (Komisja Nadzoru Finansowego, KNF) must be notified in advance of the method of publication of the prospectus. The selected method will also apply when publishing annexes to the publication or communiqués.

Dual listing with public offering on WSE

In order to properly prepare a public offering of the shares of a foreign company on the WSE, it is important to determine the time at which the rights to newly issued shares arise, and particularly whether registration of the shares in the relevant commercial register is required in order for rights to the shares to be created. This is because trading of the shares on the WSE may only occur when the shares factually and legally exist. In the Polish legal system, creation of shares requires registration of the share capital increase in the court register. Not all jurisdictions have the same rule, and thus determining the actions and documents confirming the existence of the share rights is crucial from the point of view of the procedure for admitting the shares to trading on the WSE.

It is also important to ensure that the resolutions on issuance of the foreign company's shares contain the key elements enabling the WSE and KDPW to take a decision to admit the shares to trading and to dematerialise the shares.

Dual listing of shares on the WSE and another securities exchange thus requires advance coordination of the actions to be taken for admission of the shares to trading on both markets. For this purpose, it is recommended to begin the process of obtaining the required consents from the WSE and KDPW as early as possible.

Share depository—dematerialisation

Trading in shares on the WSE is conducted in dematerialised form, meaning that the shares are not in the form of a document and ownership of the shares is confirmed by entries in the securities accounts of the shareholders maintained by brokerages and trust banks.

To enable trading in its shares on the WSE, a foreign company must conclude relevant agreements to assure a dematerialised system of trading and settlement of transactions on both markets at the same time, including the possibility for investors to transfer the shares between the two markets. KDPW cooperates in this respect with the company's home depository and other foreign deposit, clearing and settlement institutions in order to assure smooth settlement of transactions and payment of dividends regardless of the market on which the shares were acquired.

Reporting obligations

In the case of a foreign issuer from the EU, the range of information and the dates for releasing it in Poland are generally defined by the regulations of the EU member state where the issuer has its registered office. A foreign issuer from outside the EU is subject to the requirements of the EU member state where it will conduct the public offering, or the country in which the shares will be admitted to trading on a regulated market, at the election of the issuer or the underwriter.

Issuer's election of regulatory authority with respect to acquisition of major stakes

Because a foreign company whose shares are admitted to trading on the WSE may be subject to various legal regimes with respect to the acquisition of significant stakes of shares and in some instances has a right to designate the applicable regulatory authority, the appropriate determinations on this issue need to be made as part of the process of preparing for the dual listing. Information on the election of a regulatory authority with respect to the acquisition of significant stakes of shares may be announced to investors in the prospectus.

Summary

Assessment of the market benefits of listing the company's shares on multiple markets and the opportunities for raising capital in this manner is a separate issue, but the legal framework for dual listings within the EU provides sufficient grounds for conducting this process effectively and efficiently in Poland.

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Parallel debt in Polish legal practice

Patrycja Jacaszek Łukasz Szegda

Parallel debt is a legal concept applied in international financing transactions that involve multiple lenders. In order to simplify the administration of security (for example, to avoid the need for retaking or reregistering security for a fluctuating group of lenders) and to reduce costs, the banks select a single entity from among them to administer the security. However, this creates a problem under Polish law: how to structure the secured claim and security instruments so that one bank can hold the security for the benefit of all the other lenders?

Security as an accessory obligation under Polish law

The purpose of security is to guarantee repayment of the debt which it secures (for example, a loan). As a result, security creates an accessory obligation which is incidental to the principal obligation, and that state is technically referred to as the "accessoriness" of security (in Polish *akcesoryjność*, or in German *Akzessorietät*). While it is subject to several exceptions and diverging interpretations, this rule nonetheless is a key feature of debt security. One of its effects is that the creditor under the principal claim is also the beneficiary of the security established to protect that claim.

The accessoriness principle is not spelled out in the law but rather follows indirectly from the provisions applying to specific forms of security. When establishing debt security it is theoretically possible under the principle of freedom of contract to have one agent represent several creditors. However, the risk of this solution being challenged is so high that in practice no creditor is willing to run it.

The Polish Parliament has recognised the problem of the maladjustment of Polish law to the intricacies of syndicated lending and, for selected types of security instruments, has introduced a system whereby several creditors can establish joint security. In the case of mortgages and registered pledges, it introduced the concept of the security administrator, to whom a single security for the claims of several creditors can be granted. Regrettably, in practice this turned out to be an insufficient remedy for the problems that arise when securing syndicated loans. First, the administrator handles only two types of security, while larger transactions normally require a wider range. Second, the practical use of security administrators is held back by drawbacks in the very rules that govern them. Therefore, a different solution was worked out in cross-border syndicated financing transactions involving Polish security instruments governed by Polish law, namely parallel debt.

Structure of parallel debt and its admissibility under Polish law

Parallel debt is a separate (parallel) obligation to pay to the security agent, economically equal to the total amount of all the secured obligations—the "primary" debts—owed to each creditor under the same legal transaction (e.g. a loan agreement). This effect is achieved by a covenant made by each of the obligors to pay the security agent sums equal to the total secured obligations owed to all creditors under the finance documents, as and when they fall due. Thus, instead of securing many primary debts owed to many lenders (and multiplying the security associated with these debts), a single debt to one security agent is established in parallel to the primary debts. Typically, to avoid double recovery, each reduction of the underlying debts also reduces the parallel debt.

As a single receivable, the parallel debt may, from the Polish law perspective, be freely protected with any type of security. This ensures consistency of administrative and enforcement measures associated with the security because it requires only one entity to handle a single aggregate set of security instruments.

In Polish practice, parallel debt commonly occurs as a receivable created under foreign law (mainly English law), but protected by a Polish security. The question therefore arises whether receivables created under a parallel debt clause governed by English law can be validly secured by Polish security.

Compliance with Polish law

First, we should examine whether the choice of foreign law for the secured claim is made in a manner consistent with Polish law. Second, we must consider whether the given parallel debt structure violates Polish public policy. Under Polish private international law, the application of foreign law to parallel debt will not be possible if its effects are contrary to fundamental principles of the Polish legal order. Moreover, pursuant to the Brussels I Regulation (44/2001), a foreign court decision, such as one ordering payment of parallel debt, cannot be recognised in Poland if recognition would be manifestly contrary to Polish public policy.

In light of this regulation the question arises whether the principle of accessoriness—which prevents the creation under Polish law of a structure analogous to parallel debt—may be recognised as a basic principle of the Polish legal order. Such classification does not appear to be justified. The fundamental principles of the legal order are the most basic rules bearing the weight of the entire national legal system, while the principle of accessoriness is merely a creation of civil-law doctrine, and even in Polish law it is subject to numerous exceptions and exclusions. Are there, therefore, other factors that increase the risk to parallel debt established under foreign law being challenged in Polish courts? An analysis of the case law would be helpful in this respect.

Case law on parallel debt

Despite the widespread use of parallel debt, the body of Polish case law in this area is not large. First to be mentioned is the ruling by the Supreme Court of Poland of 9 October 2009 (Case No. IV CSK 145/09). It was issued in a situation of actual use of parallel debt established under foreign law. The court did not bring this type of debt into question (it questioned the security itself, but on a different basis). However, in this case (which concerned bankruptcy issues) the parallel debt had not been challenged by the appellant and, as a rule, the Supreme Court considers cassation appeals only within the scope of the allegations raised. It is hard to claim, therefore, that this ruling finally dispelled the doubts associated with parallel debt.

There have been several cases in which the lower courts referred to parallel debt directly. Particularly noteworthy was a decision by a bankruptcy court which considered the admissibility of a parallel debt. The court explicitly accepted the validity of the parallel debt and recognised the validity of a security package established under Polish law to protect parallel debt arising under English law. In this decision, the Polish bankruptcy court allowed against the bankruptcy estate both claims payable under an English judgment: the primary debt and the parallel debt (each was entered as a separate claim, whereas the security agent's claim under the parallel debt was recognised as a secured claim). The court also explicitly acknowledged that the existence of a parallel debt alongside the primary debt did not violate the Polish legal order.

The court repeatedly emphasised in this decision that the repayment of one of the two claims (primary or parallel) automatically reduced the other debt by the same amount and, consequently, there was no possibility of double recovery. The court even suggested that this mechanism is comparable to the Polish mechanism of a joint and several receivable, but noted that in contrast to debts to joint and several creditors, the primary debt and the parallel debt were separate receivables.

It appears from our practice that the vast majority of provisions in the agreements we have come across provide for the automatic reduction of the parallel debt upon payment of the primary debt, and vice versa. This seems to be a natural consequence of the very purpose of parallel debt: to simplify the debt security scheme, rather than create yet another separately paid receivable.

It is also worth looking at the case law of other civil-law jurisdictions, because they also use parallel debt in establishing debt security. Particularly relevant here is the French Supreme Court's judgment of 13 September 2011 in the Belvédère case, where the debtor attempted to challenge the parallel debt mechanism by arguing that it may lead to double payment of the same receivable, which would be contrary to public policy. The French Supreme Court rejected this argument because the parallel debt clause expressly provided for automatic reduction of the primary debt as the parallel debt was paid off. This position is therefore consistent with the above decision of the Polish bankruptcy court.

To sum up, Polish rulings have generally accepted the parallel debt mechanism and, consequently, also the Polish security for repayment of such debt. Thus, a solution that has developed in practice to meet market expectations seems to have won the approval of the courts, helping to reinforce the certainty of financing transactions.

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Some risks associated with the use of injunctions in patent disputes

Włodzimierz Szoszuk

In theory, injunction proceedings are fast-track, simplified procedures aimed at provisionally regulating the parties' situations pending final court determination. In complex patent disputes, however, an injunction is often granted only after extensive evidence including expert opinions is filed, and this can significantly prolong the proceedings.

In intellectual property infringement disputes it is quite common for the parties to apply for an injunction.

Such injunctions regulate the parties' situation during the proceedings, guarantee the implementation of a future judgment, prevent irreversible effects that may arise during the proceedings.

Additionally, once an injunction is granted, if it is upheld on appeal this is usually a good indicator of the future court determination. It gives the patent holder the upper hand in negotiations and usually leads to a favourable settlement.

To obtain an injunction, the patent holder must demonstrate a legal interest and merely substantiate its claim. The claim must be credible—that is, it must indicate the circumstances in which it arose. An exception is cases that are factually complex, typically those involving pharmaceutical or biotechnological patents, where expert or specialist opinions are unavoidable.

In one recently handled case we were forced to go through nearly all the twists and turns possible in injunction proceedings. It proved to us that—even before the court examines the case on its merits—injunctions often compel the parties to undertake extraordinary measures and to be pro-active. They will often need to apply for further injunctions and to present extensive evidence. As a result, injunction proceedings can last several years.

The facts

In this particular case the patent holder was exporting large amounts of a protein used, among other things, as a beneficial additive to animal fodder, to various European countries. The protein is manufactured on an industrial scale using genetically modified bacteria. The development of this patented method required many years of research.

It turned out that the same fodder additive was also reaching the European market, including Poland, from China. This Chinese additive was being manufactured— he patent holder contended—by its patented method.

Injunction proceedings

One of the first steps taken by the patent holder was to apply for an injunction to ban the import into Poland of the fodder additive and prohibit its sale, and to temporarily seize a shipment of several hundred tonnes of the product. To support its claims the patent holder appended the relevant patents to the application, along with expert opinions and analyses performed by independent institutions, which were subsequently to serve as evidence in the case.

The injunction was granted, though not without appeals from the defendant, and the fodder additive was not allowed onto the market.

In the meantime the defendant imported a further shipment of several hundred tonnes of fodder additives in different packaging. To protect its interests, the plaintiff commenced enforcement proceedings based on the injunction order which permitted seizure of the disputed product.

At the same time, mindful of the risk that the enforcement activities might be cancelled and that the second shipment would be released, the plaintiff applied for a further injunction.

Detailed analysis of samples from the second shipment confirmed that, contrary to information on the packaging, it was also manufactured by the patented method. The court accepted this fact and issued an order to impound the second shipment. The court found that the plaintiff had adequately substantiated its claims, including their legal and factual basis, as well as appending the relevant documents to its application.

The defendant again appealed the injunction, submitting further expert opinions and analyses.

Faced with contradictory private evidence from equally reliable and reputable sources, the court refused to take a position. Ignoring the attached patents, the court concluded that it was not its place to make a pronouncement on the key issue. In the court's view, the examined material was highly specialised and the opinions submitted by the parties contradicted each other, and therefore the decision should be left to the experts during the main trial. The court indicated that in injunction proceedings, which are intentionally simplified, no substantive issues are to be resolved, and did not grant the injunction.

And so, after two years of litigation, the injunction collapsed in respect of both shipments of fodder additives.

The court's position essentially deprived the injunction of its *raison d'être*. It thereby rendered an important legal institution moribund, depriving the patent holder of the ability to protect its rights. This is all the more worrying in that patent disputes usually concern important commercial interests.

Meanwhile, in a factually similar case, on 11 February 2011 the Warsaw Appeal Court (Case No. VI ACz 125/11) took a completely different view. Having reached its decision primarily on the basis of the patents themselves, it held that the private opinions had convinced it of the application's legitimacy and granted an injunction. As its guiding principle the appeal court cited the Supreme Court judgment of 9 September 1961 (Case No. IV C54/61), which stated "the court should evaluate the whole of the evidence collected, insofar as it may be relevant for the manner in which the application is examined."

Summary

The course of the injunction proceedings in this case outlined above leads to the following conclusions.

First, experience shows that in complex patent cases it is not enough for the parties merely to substantiate the lawsuit to the degree required when applying for an injunction. The claim should essentially be proven already at the injunction proceedings stage, though not all the evidence need necessarily be filed. It is also important to do so in such a manner that the court can be easily convinced of the legitimacy of the claim.

Second, although injunction proceedings were designed to be quick, as the facts evolve they may become greatly protracted, transforming them into a separate and onerous subplot to the main case. With this in mind, reaching for the injunction option requires careful consideration.

Paradoxically, an institution designed to assist the patent holder may harm it, postponing its ability to begin the main proceedings and delaying the hearing of the dispute on its merits.

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Foreign investment funds can claim refunds of Polish income tax

Michał Nowacki Dariusz Wasylkowski

On 1 January 2011, a subjective exemption was introduced to the Corporate Income Tax Act for foreign investment funds established in the European Union or European Economic Area which meet certain additional requirements. This does not mean that non-EU/EEA investment funds did not have this right before 1 January 2011. Indeed, such funds have a number of reasons to claim refunds of tax paid before or after 1 January 2011.

Before the end of 2010, the Polish Corporate Income Tax Act allowed an income tax exemption only to investment funds operating under the Polish Investment Funds Act. On this basis, the Polish tax authorities ruled that only funds established under Polish law and based in Poland had the right to exemption from CIT, which covered all of the fund's income, including dividends and interest. The Polish tax authorities' past and present approach to the income of foreign investment funds (usually dividends and interest) was, therefore, that they do not qualify for tax exemption (such funds are mainly taxed at source through withholding tax collected by the entities paying the dividends or interest).

The European Commission has long (at least since March 2007) regarded Polish regulations in this area as incompatible with EU rules because of their discriminatory nature and their restriction of European liberties. The Commission therefore called on Poland to change these regulations. The result was the new regulations introduced by the Polish Parliament on 1 January 2011.

EU investment funds had and still have an exemption right

The new exemption (amended further by regulations that came into force on 4 December 2011) covers joint investment institutions established in the EU or EEA that meet all of several additional conditions. Despite the introduction of exemptions to the CIT Act for investment funds from the EU/EEA, the European Commission has once again called on Poland to amend its tax laws in this area, stating that it is discriminatory to grant exemptions to foreign funds only under specific conditions that do not apply to Polish funds.

Although these new exemption rules were not introduced until 1 January 2011, it seems clear that the EU-established funds should also have enjoyed an exemption on the basis of earlier legislation (including an exemption from withholding tax levied in Poland). This follows from the fact that foreign investment funds from the EU should be treated (for CIT purposes) as funds operating under the Polish Investment Funds Act, because this act also covers the rules of operation of foreign investment funds in Poland (understood as funds established in the EU). This view is also supported by the case law of the Polish administrative courts.

In addition, based on such an interpretation of the rules, it can be surmised that foreign investment funds established in the EU that do not meet the conditions introduced into the CIT Act from 1 January 2011 can also enjoy exemption on their Polish income on the same basis as investment funds established in Poland.

The discrimination against foreign investment funds compared to domestic funds has also been tackled by the European Court of Justice in a case against Portugal. The ECJ found that by reserving the income tax exemption only for pension funds established in Portugal, that country failed to fulfil its obligations under provisions ensuring the freedom of movement of capital. The ECJ ruling provides more ammunition for taxpayers in possible conflicts with Polish tax authorities.

What about revenues of investment funds from third countries?

The Polish CIT Act does not exempt non-EU/EEA investment funds from taxation. The question is, are such funds in general entitled to tax exemption in Poland?

Under EU legislation, the free movement of capital (which should be of fundamental significance for investment funds) also applies to entities from third countries. Thus, if the Polish authorities are unable to objectively justify the exclusion of investment funds from third countries from the CIT exemption (such as due to an overriding public interest), then this CIT Act restriction can be challenged on the basis of the free movement of capital.

This argument has been used effectively in other countries. In the Netherlands, for example, after a long dispute with a Canadian pension fund, the Dutch tax authorities accepted the taxpayer's contentions and refunded withholding tax levied on dividends paid to the fund. The Canadian taxpayer's reasoning was based primarily on EU legislation and the principle of the free movement of capital. Such reasoning may, therefore, also work in other countries, including Poland, for income tax levied on non-EU/EEA investment funds.

The reasoning in the ECJ ruling in the abovementioned case against Portugal may also be of help to these funds.

How to recover tax paid?

It would seem therefore that foreign investment funds established in the EU/EEA or in third countries that have paid income tax in Poland have the right and the grounds to recover this tax, providing it has not yet become time-barred (tax paid for 2006 became time-barred at the end of 2011, so no refunds can be sought for this and earlier periods).

To obtain a refund, a motion for establishment of tax overpayment should be sent to the Polish tax authority along with a request for a tax refund. Such requests should always be accompanied by a detailed analysis of the facts of the matter together with the records held by the taxpayer. However, applicants should be warned: do not expect a refund of this tax without a dispute with the tax authorities.

Note: This article deals only with foreign investment funds, but the same views apply, in principle, to the taxation of foreign pension funds.

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Public procurement: consortium as contractor

Anna Prigan

Firms often cooperate on large projects with partners, with whom they create consortia. What should be borne in mind when cooperating under such an arrangement?

Public procurement proceedings are only open to contractors who are able to perform the contract. They must possess the knowledge and experience required by the contracting authority, as well as the technical capacity, staffing and financial capability. If a firm does not meet all of the contracting authority's requirements, it may find a partner and establish a consortium.

The possibility of participating in a tender as a consortium arises directly from the law and need not be specifically permitted by the contracting authority in the procurement notice or the terms of reference. Under the Polish Public Procurement Law, contractors may apply jointly for the award of a public contract. The Polish act reflects the principle from Art. 4 of the "classic" Procurement Directive (2004/18/EC), as well as Art. 11 of the Utilities Directive (2004/17/EC), according to which bids may be submitted by groups of contractors, and contracting authorities cannot require such groups to take any specific form.

A consortium is the commonest form in which several contractors jointly pursue a contract. In Polish law, "consortium" is an unofficial term for an arrangement in which at least two contractors agree to submit a joint bid. Although this form of cooperation is well-known in Poland, the law does not regulate consortium agreements as a specific type of contract. In establishing a consortium, the members are free to frame their agreement and the range of issues covered by it in their discretion. A consortium agreement will generally regulate the duties and responsibilities of particular members in relation to achieving the consortium's objective, which is the joint submission of a tender and then the joint performance of the contract.

The aim of a consortium agreement is to achieve a common business goal through joint action by the consortium's members. No new legal entity arises as a result of the formation of a consortium, because the consortium has no legal personality, nor is it treated as a partnership. It should be noted that in pursuit of the consortium's goal, the members do not make financial contributions as would be the case in a company or a partnership, and the consortium obtains no assets separate from the assets of the consortium's members. In Poland, consortia are not entered in any registry. A consortium does not need to have a business name, a logo, or a separate bank account.

The Public Procurement Law requires the members of a consortium to appoint a representative to represent them in the tender procedure alone, or to represent them both in the procedure and in concluding the public contract. The representative signs and submits the required documents, signs the tender, and also receives any statements, notices and summonses which the contracting authority may send to the consortium. The obligation to appoint a representative for the consortium is designed to protect the interests of the contracting authority: if it has a duty to treat a consortium on an equal footing with independent bidders, then, from the contracting authority's perspective, it should not incur any additional burdens when contacting the consortium. A letter sent by the contracting authority to the consortium's representative is effective against all members of the consortium. However, the appointment of a representative does not mean that other members of the consortium may not also contact the contracting authority directly.

The representative of a consortium may be one of its members, but need not be. There are no legal obstacles for the representative to be a person who is not participating in the consortium. There may also be multiple representatives, but then the contracting authority will contact a particular representative of its choice in the particular case and not all of them. A consortium's representative is often referred to as the leader of the consortium. Most often the leadership role is assigned to the member of the consortium with the leading role in performance of the contract, assigned a greater share of responsibilities than other participants. The members of a consortium may decide otherwise, however.

Participants in a consortium enclose with the tender (or, in the case of a two-stage procedure, the request to participate in the procedure) the original power of attorney granted to the consortium leader. The power of attorney cannot be dated later than the date of submission of the tender (or request to participate). There is no obligation to enclose the consortium agreement with the tender, but if the consortium's offer is selected the contracting authority may request that the consortium agreement be presented before conclusion of the contract.

As a rule, members of a consortium should jointly meet the requirements for participation in the procurement procedure. Contractors who apply jointly for a contract award should be treated on an equal footing with contractors acting independently. Under the principle of fair competition, the contracting authority should not differentiate between contractors on the basis of whether they are individual firms or part of a consortium.

The members of a consortium must jointly fulfil the conditions concerning the right to conduct specific business, and possess the required knowledge, experience, technical capability, personnel and commercial capacity to perform the contract. Similarly, the condition for payment of the required security deposit should be met by all the members jointly, so that consortium members may agree that all of the required security deposit will be paid by only one of them, or that they will pay it in parts. This principle also applies to the method of payment of the security for due performance of the contract to be paid prior to conclusion of the contract: security in the form of a cash deposit, or a bank guarantee, may be submitted by each participant in the consortium individually, in proportion to its share in the consortium agreement.

It should be emphasised that there must not be any grounds for exclusion from the procurement procedure with respect to any member of the consortium. If any member of the consortium becomes subject to exclusion, this must result in exclusion of the entire consortium. For this reason, it is important to become well-acquainted with the partner with whom one intends to arrange a consortium, or at least determine whether there are any grounds for excluding it from the procedure. For example: Has it been black-listed? Did it have previous problems performing public contracts? Does it have tax arrears? Do any of its board members have a criminal record? The grounds for exclusion are listed in Public Procurement Law Art. 24.

Once a tender is submitted by the consortium, any changes in the consortium are prohibited. The composition of the consortium must be the same from the time of submission of the tender (or request to participate in the procedure) until completion of performance of the contract. If any member of the consortium wishes to withdraw from the consortium after submission of the request to participate in the procedure, it results in the withdrawal of the whole consortium from the procedure. This is because a public contract may be awarded only to a contractor who has participated in the procedure from the very outset. In a consortium, a defined group of firms constitute the contractor.

When acting in a consortium, the contractors are jointly and severally liable for the proper performance of the contract. Although the consortium is treated as one contractor, the joint and several liability of the consortium's members cannot be limited or excluded. If at the contract performance stage, one of the consortium's members wishes to withdraw from it, it may do so only on the basis of an internal agreement between the members of the consortium, in which the parties agree that the member will no longer continue to perform any obligations under the public contract. Formally, however, the entity will remain a member of the consortium, and if any problems arise, the contracting authority will have a right to hold it liable for improper performance of the contract. It is not possible to amend a public procurement contract so that one of the consortium members ceases to be a party to the contract with the contracting authority. This does not apply, however, to changes in the legal constitution of a consortium member; a change in legal form, sale of shares, merger or acquisition is possible, because the new entity is the legal successor of the original member. Another acceptable change in the composition of a consortium is the adoption of an additional member, who may join the public procurement contract by assuming the responsibilities under the contract as an additional obligor alongside the existing members of the consortium.

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Managing environmental transaction risks

Izabela Zielińska-Barłożek

Dominik Wałkowski

Infringements of environmental law lead to ever greater liabilities. So it is unsurprising that in recent years investors have been increasingly interested in assessing risks arising from environmental regulations.

Environmental risk assessments are necessary not just when acquiring a large industrial plant. The potential liability for soil contamination is important in any transaction involving real estate. Nearly all businesses are affected by packaging regulations, legal requirements for trading in electrical and electronic equipment, or general rules of waste management.

When negotiating the terms for acquiring real estate, or shares in a company which has an industrial plant, parties often overlook potential environmental problems. This is due to a mistaken assumption that the plant's buyer is not liable for previous owners' acts.

Underestimating environmental risks associated with acquiring an industrial plant or real estate may turn out to be very harmful for an investor, especially many years after the transaction, when most of the claims against the seller have expired. Costly remediation of contaminated soil may undermine the profitability of the transaction, especially if any claims of the buyer against the seller might go unsatisfied because the seller is insolvent.

The mere fact of infringement is sufficient for a fine

Environmental law primarily provides for administrative liability. Violation of the law is sufficient for liability. It does not matter that the operator's actions were not culpable or resulted from circumstances beyond its knowledge. This is clearly shown by the principle in environmental law under which an operator who runs a facility without a required permit must pay a higher fee for use of the environment.

Unlawful storage of waste is likewise severely penalised, and the fee levels have significantly increased. Moreover, there is no upper limit on charges, so a seemingly low rate multiplied by the number of tonnes of waste and storage time may translate into millions.

Relevant provisions of the Tax Ordinance apply to charges for use of the environment, largely putting them on an equal footing with tax liabilities.

Investors who are familiar with the conditions for operating a given business can quite easily identify violations of permit conditions or lack of required permits. However, other infringements are not so obvious, and may depend upon interpretations issued by the courts, in particular the Supreme Administrative Court. Additionally, licences associated with the use of the environment are issued by the public administration, whose officials do not have the same comprehensive knowledge of the law that judges have, and therefore it cannot be ruled out that a decision was wrongly issued.

During a review of the formal and legal situation of a plant, often no attention is paid to the date a permit was received. If a permit for a specific facility was obtained late, that does not eliminate liability for operating in the period before the permit was obtained. Furthermore, after a permit is issued, the facility may have been subject to substantial changes which were not reflected in the administrative decision. Finally, it is often overlooked that a permit expires not only at the end of the period for which it was issued, but also if the entity fails to conduct any business covered by the permit for two years—even though according to the letter of the permit it should remain valid.

Nature can prevent development

Development restrictions associated with nature conservation requirements cannot be ignored. Nearby Natura 2000 areas or other nature conservation sites may make later expansion or even current operation of an acquired industrial plant difficult, very costly or nearly impossible. Specific conditions for implementing a development project may also result from the environmental impact assessment. Therefore, when joining an ongoing project, the conditions for implementation of the project should be investigated, together with the possibility of amending the conditions specified in the decision on environmental conditions. Even if a project that was preceded by an environmental impact assessment has already been completed, it is worth checking whether the assessment was carried out properly. This is because operations of the built plant may negatively impact protected species or habitats, and these issues may not have been considered during the assessment. The plant operator may then be held liable for preventing and remediating environmental damage, even if the damage resulted from circumstances beyond its knowledge.

Liability for contamination caused by a third party

Liability for any potential contamination is of particular importance in transactions involving real estate. Above all, foreign investors stress the need for a reliable assessment of this aspect.

Although the current law provides for liability under the "polluter pays" principle, previous provisions apply to damage which occurred before 30 April 2007. In the case of soil, the prior environmental regulations apply, entailing liability of the landholder and so, usually, the owner of the real estate.

Each transaction must therefore be preceded by a thorough legal analysis of compliance with the provisions of environmental law. In transactions involving an industrial plant, environmental consultants must also be consulted with regard to soil testing. Only the joint efforts of lawyers and environmental consultants can provide assurance that environmental issues were comprehensively and sufficiently examined during the transaction, to produce a reliable assessment of possible risks.

Fluctuating legal environment spawns anomalies

The rapidly changing legal environment makes it easier for irregularities to occur. Businesses are burdened with new obligations under specific provisions which are either already in force (such as the REACH Regulation on chemicals, 1907/2006), or provide specific transition periods (such as the CLP Regulation on classification, labelling and packaging of substances and mixtures, 1272/2008), or are yet to come into force but will have a major effect on the operation of facilities which significantly impact the environment (such as the Industrial Emissions Directive, 2010/75/EU). Increasingly, therefore, the legal analysis must cover not only the current operations of an industrial plant, but also the legal issues that will affect the plant's operations in the future.

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When does a private company have to hold a public tender?

Mirella Lechna

The public procurement regime primarily applies to contracts awarded to private contractors by public authorities. But under certain circumstances it also applies to contracts awarded by entities that are not public authorities.

The rules for concluding contracts between private entities and entities from the public sector or other entities financed from public resources are set forth in the Public Procurement Law of 29 January 2004, which applies to supply and construction work as well as service contracts. The Public Procurement Law is mainly targeted to public authorities (state, regional and local authorities, public bodies, bodies governed by public law, and associations of such bodies)—referred to in the EU's procurement regime as "contracting authorities". Nonetheless, in line with EU procurement principles, it is also necessary to follow public procurement procedures when the contracting entity is not a public authority but there is a significant public element involved. As discussed below, this has to do with utilities—controlled by public authorities or exercising special, exclusive rights awarded by public authorities. The provisions of the Public Procurement Law in this regard are based on the EU's Utilities Directive (2004/17/EC).

Utility contracts

Entities must follow public tender procedures when they award contracts to perform activity in the water, energy, transport and postal services sectors. Utility contracts and the types of utility activities they cover are defined more specifically in Public Procurement Law Art. 132. The law will apply to utility contracts awarded by a contracting authority, or by a "public undertaking" (over which public authorities may exercise a "dominant influence"), or by non-public entities which are neither contracting authorities nor public undertakings but operate on the basis of "special or exclusive rights" granted by a public authority (Art. 3(1)(4)). Under the Utilities Directive, such non-public entities fall within the broader category of "contracting entities".

Dominant influence

Under Public Procurement Law Art. 3(1)(3), public undertakings are identified by the "dominant influence" that may be exerted over them, separately or jointly, directly or indirectly, by a public entity, which is presumed to be the case if the public entity finances the undertaking by more than 50%, holds more than half of the shares, holds more than half of the votes attached to the shares, supervises the undertaking's management board, or has the right to appoint more than half of the members of its management board. This test for identifying public undertakings tracks the criteria set forth in Art. 2(1)(b) of the Utilities Directive.

Special or exclusive rights

The other group of entities required to award utility contracts through a public tender are those that conduct utility operations on the basis of "special or exclusive rights". These are defined in Public Procurement Law Art. 3(2) as "rights granted by law or an administrative decision consisting in the reservation for one or more entities of the performance of a specific activity, where complying with the conditions for obtaining such a right as regulated by separate provisions does not result in an obligation to grant such right."

This definition does not exactly track the comparable definition in the Utilities Directive (Art. 2(3)), which refers to "rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities ... to one or more entities, and which substantially affects the ability of other entities to carry out such activity." Nonetheless, the Polish provision should be interpreted in light of the directive. Under the directive, special or exclusive rights are not limited only to those granted by law or an administrative decision, but also include any other form of restriction on performance of a certain activity, no matter the legal form under which such rights were granted (e.g. licence, concession, agreement or resolution). What is considered crucial is that the rights were granted by the authority discretionally (Explanatory Note to Utilities Directive Art. 2(3)).

Thresholds

A contracting entity that meets these criteria is not required to comply with public procurement procedures in the case of every utility contract, but only when the value exceeds specific EU thresholds. These are set in euro by the European Commission, and then the Prime Minister of Poland issues a regulation establishing the official equivalent amount in zloty. As of 2012, the threshold amounts are EUR 400,000 (PLN 1,607,840) net for supply and service contracts and EUR 5,000,000 (PLN 20,098,000) net for works contracts.

Award of a utility contract may be done by open tendering, restricted tendering, or a negotiated procedure with publication. These types of procedures are equivalent and allowed in all cases (Public Procurement Law Art. 135). To apply other types of procedures (for example a single-source procurement), statutory conditions must be met. Utility contracts are also characterised by other modifications from the basic public procurement regime, which generally can be described as a simplification of the procedure.

Intra-group exemption

In the case of utility contracts, there is a way to optimise the purchasing structure in terms of the operations of group companies in a way that allows them to limit the obligation to award contracts through a public tender.

In this respect, Public Procurement Law Art. 136 provides for an "in-house" exemption when a contracting entity awards a contract for the provision of supplies, services or building works exclusively to an affiliated entity (as defined in Art. 136(1)) and at least 80% of the average turnover of the affiliate relating to provision of such supplies, services or building works during the previous 3 years is derived from providing such to group companies. When a utility contract is awarded to an affiliate and the contract is totally exempt from application of the Public Procurement Law, the procurement procedures within the group may be significantly simplified.

Guidance from the EU supports the award of certain contracts other than by way of a public tender "to an affiliate whose essential purpose is to act as a central service provider to the group to which it belongs, rather than to sell its services commercially on the open market," recognising "the particular role of certain service activities in establishing the commercial advantage and common character of undertakings." The key criteria for reliance on the in-house exemption are the "commercial advantage" and "know-how to which the group has access and which it does not make available to others except through the activities of the group as a whole," in line with the group's common character, management, staffing and accounting (Explanatory Memorandum in the Proposal for a Council Directive amending Directive 90/531/EEC, COM(91)347, par. 20–22).

It is however stated that the acquisition of freely marketed services would not damage the commercial advantage or common character of a group and that these must be procured in an open, competitive context.

The affiliate must be actually capable of performing the contract awarded by the contracting entity, at least in part. A situation in which the affiliate merely subcontracts all of the tasks under the contract to third parties without following the public procurement procedure is regarded as an attempt to circumvent the law, according to an official interpretation issued by the Polish Public Procurement Office.

Summary

Entities operating in the water, energy, transport and postal services sectors are obliged to award a contract through a public tender when the contract to be awarded is regarded as a "utility contract", which means the contract is awarded in order to exercise utility activities. Whether the contract is awarded in order to exercise utility activities may raise questions of interpretation. This expression should be interpreted broadly. When the principal business of a company is utility contracts, there is no doubt that purchasing paper for printers, buying gasoline for cars, building new headquarters, or the like, is done in order to exercise the utility activity. The mere fact that a particular contract is concluded by a utility sector enterprise is not sufficient. The contract must be awarded for the purpose of the utility business. The Public Procurement Law applies when the value of a utility contract exceeds EU thresholds. In the case of companies operating in a group, the procurement structure may be optimised within the group, using the intra-group exemption, thus reducing the need to follow public tender procedures.

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The new rules of the game in the energy market

Weronika Pelc

Just before Christmas 2011, the government presented a gift to the Polish energy sector in the form of a long-awaited package of proposed new energy legislation, including a new Energy Law, the Gas Law and the Renewable Energy Sources Act. They are to replace the much-amended Energy Law, which currently regulates the energy sector in Poland, namely power generation, district heating, the gas sector, renewable energy sources and the licensing of trading in fuels. If adopted, the sector's operations will change, notably in the support of renewable energy sources.

The Polish energy sector is highly concentrated and dominated by Treasury-controlled companies. Due to the considerable income it generates, it is treated like the family silver, which must not be sold. This approach and the recent global financial crisis have effectively slowed, reduced or nullified the sector's plans for privatisation.

As a result, the electricity market is dominated by a small group of companies engaged equally in production, sales and distribution. The gas market is dominated by PGNiG, which, through various group companies, handles extraction, sales and distribution of natural gas. Apart from them, there are a number of other electricity and gas companies operating independently on the market, but they too are 100% controlled by the Treasury. The district heating and renewable energy sources segments have a greater diversity of ownership, with both Polish and foreign investors involved.

The sector is further affected by the EU's climate change policy, in particular the obligation to reduce greenhouse gas emissions and achieve a 15% gross final share of renewable energy in total energy consumption by 2020. In a country where power is almost 100% based on fossil fuels—mainly coal—the implementation of EU policy is driving changes in the way the sector operates.

The new Energy Law

The new Energy Law tidies up the wording of electricity and heat sector regulations in Poland. The key rules have not been altered, or at least only slightly. The sector continues to be governed by a system of licences, a requirement for approval of tariffs, with supervision by the Energy Regulatory Office (Urząd Regulacji Energetyki, URE). However, heating companies which meet efficiency requirements would not have to submit tariffs to the URE.

The bill sets the stage for further increases in the flexibility of the electricity market. Vulnerable customers, on social welfare, would be afforded protection. Energy companies would have to reduce electricity charges to these customers by a set amount specified in the act. Instead of being carried out by an official seller, emergency sales would be carried out by an emergency vendor specified in the general distribution agreement. Also, a metering system operator role would be created. This body would create a database of metering information and administer it. A computerised metering system would be built using smart meters. Distribution network operators are to install smart meters by 2020 at their own cost. Ultimately, all customers are to be billed for actual consumption rather than based on forecasts.

Only one entity would continue to be allowed to operate the electricity grid in Poland: a company 100% controlled by the Treasury and overseen by the Minister of Economy. The company also has an exclusive right to manage interconnections with the grids of other countries. Changes are made regarding capacity allocations of interconnections with grids of non-EU countries (the same rules on interconnections between EU countries are governed by Regulation (EC) No. 714/2009). An electricity transmission system operator would have to hold a certificate confirming its independence from entities involved in selling electricity. This is a requirement of EU law.

The bill would make life easier for closed distribution system operators, namely eliminating the requirement to prepare development plans and operating and maintenance manuals, submit tariffs for approval, connect new customers, and develop and update standard consumption profiles. This implements the requests of industrial power generators: firms which for historical reasons generate power in their establishments incidental to their core business.

The rules for supporting high-efficiency cogeneration are also to change. Energy trading companies would not be obliged to purchase electricity sourced from cogeneration. The system of certificates of origin for electricity from cogeneration and the obligation to purchase such certificates and present them for redemption are to remain in force. Companies which consume significant amounts of electricity where cogenerated energy accounts for 15% of the cost would obtain rights to independently settle obligations related to certificates of origin for cogenerated electricity. They would also be exempt from the obligation to purchase and present for redemption certificates of origin in respect of purchased and consumed energy in excess of 400 GWh per year.

The Gas Law

The proposed Gas Law regulates transmission, distribution, sale, storage, liquefaction and regasification of natural gas. The biggest advantage of the bill is that it separates out and organises the regulation of the gas sector. The act would apply only to gas supplied through the gas system. It includes arrangements to protect vulnerable customers through price reductions. The switching of gas suppliers by customers has been properly resolved. An emergency sale option has been introduced in the event that an existing vendor stops selling gas to customers. A protected category of customers has been introduced, namely household consumers and organisations which provide basic public services (such as education and healthcare). Protected customers' gas supplies would not be restricted, and entities selling to such customers would have to maintain reserves of gas to ensure security of supply. Generally, the system of licensing and tariffs is modified only slightly. The concept of gas trading is abandoned; only the selling of gas would be subject to licensing. Sellers who do not supply gas to households would be able to set gas prices without having to seek regulatory approval of their tariffs each time. Tariffs could include the costs of investment in the development of renewable energy sources or high-efficiency cogeneration, which demonstrates legislators' support for the construction of combined heat and power plants run on natural gas (using high-efficiency cogeneration). The requirement to hold a separate licence for importing gas from abroad is to be dropped.

The Gas Law implements the EU's Gas Directive (2009/73/EC) into Polish law. Certification of independence is introduced for transmission system operators. The gas transmission system operator in Poland would still have to be only one entity: a company 100% controlled by the Treasury. The bill also introduces rules for exempting new infrastructure, including interconnections, from the requirement for approval of tariffs and the need to provide access to third parties.

The Renewable Energy Sources Act

The proposed Renewable Energy Sources Act would introduce a significant change in the support scheme for electricity generated from renewable energy sources. If the act comes into force, enterprises in this sector will have to significantly adjust their business plans. Although the system of certificates of origin of energy from RES (green certificates) is to be maintained, the formula for calculating the substitution fee is to be amended. It would be PLN 470 per MWh less the average sale price of electricity per MWh in the preceding calendar year. The relentless rise in energy prices would therefore lead to elimination of the substitution fee, and thus reduce prices for green certificates. In addition, certificates of origin would be issued specifying a correction factor depending on the type of RES facility. These coefficients are to be on the order of about 0.7 for large wind farms and co-combustion facilities to 2.0 for photovoltaic facilities. Coefficients for micro-facilities would be 0.5 greater. In addition, certificates of origin would be available for only 15 years from the date the facility is put into operation. For systems that went online before 1997, it would be possible to obtain certificates for electricity generated in modernised sections of such plants, but only for 15 years from the opening of the modernised section. This considerably limits the possibility of obtaining certificates of origin for electricity produced in the largest hydroelectric power plants in Poland.

The obligation to purchase electricity generated from RES would be abolished, which means that renewables would have to compete with other electricity offered on the market. Nonetheless, the requirement to purchase electricity generated from RES micro-facilities would remain. Significant simplifications are also planned for entities operating micro-facilities for their own purposes, while selling up to 30% of the power they generate to outside customers. Such activity would not be treated as a business and would not require registration. At the same time, energy trading companies would be required to purchase electricity produced in such non-commercial micro-facilities for about double the average electricity price. Micro-facilities which, as a business, sell a greater proportion of the electricity they generate to outside customers would have to be entered in the register of micro-facility electricity generators maintained by the president of the URE. Electricity generation in micro-installations and agricultural biogas production would not be subject to licensing.

Entry into force of the new provisions

The proposals were intended to enter into force on 1 July 2012. Nonetheless, they must first complete the current public consultation phase. Then the final versions of the acts will have to be adopted by the government, passed by the Sejm and Senate, signed by the President and published. Because the essential interests of all energy companies will be affected, comments and discussions can be expected at each stage. This means that the package of laws will probably not take effect before the beginning of 2013.

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2012 Yearbook

This is the second edition of the Wardyński & Partners *Yearbook*. It is a compendium of texts written by the firm's lawyers, covering issues relevant to a broad range of businesses as well as issues affecting specific sectors.

In the *Yearbook*, we focus on certain problems connected with doing business in Poland and present solutions to help avoid complications in future. We also comment on selected issues concerning changes in Polish and EU law, and show how global best practice in business may be implemented here in Poland.

The first edition of the *Yearbook* was an attempt to replace the traditional firm brochure with a publication that is more useful to our clients. It was very well received. We hope that this year's edition will also prove a satisfying read.