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Dear Readers,

The law changes. Customs, the economic environment, the social and political situation—they all change. Some of these changes seem to offer advantages while others appear to create risks, but our accuracy at predicting how change will affect us can vary wildly.

In this liquid reality, businesses must seek a modicum of stability they need for their commercial ventures to flourish. They must keep their eyes and ears open if they are to take optimal decisions when adjusting their operations to deal with ongoing changes.

Paradoxically, it can be easier to adjust to big changes. They are extensively analysed and commented on. A greater threat may be posed by matters that on the surface seem trivial, or thoroughly familiar, but can escape scrutiny and be overlooked.

In our publications we point out areas it is worth paying attention to in the upcoming months. We write about opportunities and threats, about changes in legislation and in rulings from the courts. Sometimes we raise questions to which no clear answer yet exists. This can also shed light on the situation, and that is what we hope to achieve with this, the fifth edition of our *Yearbook*.

Tomasz Wardyński

The law and the Internet of Things

Krzysztof Wojdyło

A world in which every move is noted, measured and analysed in a thousand ways is slowly becoming reality as the Internet of Things boldly touches our daily life. Over the next few years, many of the devices we use every day are expected to be continuously connected to the internet. An OECD report estimates that by 2020, there may be 500 billion devices of various sorts that are online at all times, including 50 billion mobile devices. What legal challenges are presented by this radically increased presence of the internet in our lives?

The term "Internet of Things" refers to the phenomenon of connection to the internet of an increasing number of devices (mainly various types of sensors and meters, but also for example household appliances) to enable remote transmission of data from these devices to other devices. This phenomenon is often referred to also as "machine-to-machine" (M2M) communication.

It is generally recognised that this represents another major stage in growth of the internet, giving the web new and previously unknown functionalities. Now there are not just PCs, tablets and smartphones connected to the internet. Online connection is becoming the norm for refrigerators, thermostats, lawnmowers and various types of sensors, particularly in vehicles. Connected devices measuring various biological functions, such as activity bands for runners or sensors measuring sleep phases, are a tech hit. Many of them are mundane gadgets providing little added value. But many solutions based on the concept of the Internet of Things are already displaying vast potential. Without doubt in the near future they will offer interesting new and useful applications.

Several key but distinct applications of the Internet of Things can already be identified. Connecting equipment to the web enables the creation of safer and more efficient solutions for transportation (such as vehicle fleet management, logistics, and automatic transmission of information about road hazards). With smart meters connected to the internet, the costs of power consumption in homes and factories can be more effectively managed. Devices monitoring biological functions may improve the delivery of healthcare and even save lives by issuing warnings of declining health indicators.

A threat to privacy

The Internet of Things and M2M communications largely rely on ensuring the transfer of data gathered by devices equipped with the relevant sensors. The data are transferred to analytical centres where reports are generated for end users. It may be assumed that the process of gathering, transfer and processing of the data will be automated and generally not include the human factor. Systems for transmission of data collected by sensors installed in automobiles are an example. Ensuring appropriate communications channels for transmission of such data will enable them to be supplied to manufacturers and other interested parties. Transportation officials, for example, can use such data to obtain information in real time about the conditions of roads, atmospheric conditions on specific sections of highways, and barriers to traffic flow. Such data could also be used as a source of information about the location and behaviour of individual drivers.

It is readily apparent that depending on how the data are transmitted and who has access to them, the Internet of Things may, alongside its undeniable benefits, also present a huge threat to our privacy. These threats are becoming more widely recognised and have been identified in opinions issued by the Article 29 Working Party, a panel of national data protection authorities advising the European Commission on data protection and privacy policy.

Much of the data recorded by devices operating in M2M communications may seem purely technical, but nonetheless turn out to be a concrete source of information about individuals' habits and behaviours. This is the case for example with devices monitoring energy consumption. The new approach to data protection recognises that data of this type may constitute personal data and be subject to the legal regime for personal data protection even if the data are anonymised and do not appear to be assignable to specific individuals. This is of fundamental significance because as a result of this approach, business models of entities using the internet will have to ensure compliance with rights and obligations arising out of the data protection regime.

In practice this means, among other things, the need to ensure access to data by the persons whose data are being processed, and in specific instances the right to demand deletion of the data. Ensuring the exercise of these rights when there are a huge number of individuals involved, often spread across different jurisdictions, may present a massive challenge. It should also be borne in mind that an entity processing personal data must have an appropriate legal basis for performing data processing activities. In many cases the consent of the data subject may be required for processing of the data. In the case of sensitive data, such consent will have to be in writing. Given the breadth of what is considered sensitive data, it may turn out that many entities involved in M2M communications are in fact processing sensitive data.

This means that manufacturers and users of devices in the Internet of Things will face new obligations never encountered before on this scale. This could apply for example to automobile manufacturers installing M2M solutions, who will be required to ensure drivers the ability to exercise their data protection rights. This will in turn require the creation of new infrastructure solutions (e.g. in the area of IT) as well as introduction of appropriate new legal solutions.

Regulatory and contractual compliance

There is no one single universal technology standard used for M2M communications between devices. Numerous different standards are used in practice. The greatest legal challenges are related to communications channels that are an element of regulated and supervised markets. This applies in particular to the use of communications channels based on wireless mobile networks, which are expected to be used for M2M communications with particularly increasing intensity in the upcoming years.

From the perspective of regulation of the telecommunications market, the dynamic growth in the Internet of Things may make it necessary to release additional frequencies to ensure efficient transmission of a radically increased quantity of data. Many regulators have already conducted public consultations in this area or are doing so now.

Another vital issue regulators will have to face sooner or later is the need to develop an appropriate regulatory model offering attractive operating conditions to entities that produce and use large numbers of devices involved in M2M communications. This applies for example to auto makers who in order to take advantage of M2M communications will be required to install millions of SIM cards in vehicles and ensure telecommunications connections with the SIM cards. With such a huge scale of operations, the question arises whether such manufacturers should be treated different from ordinary users of telecom services. Now such manufacturers cannot participate in the wholesale telecom market (e.g. with respect to roaming) without obtaining the status of a telecom operator—or some new regulatory status, which some legal systems are already considering introducing in connection with the Internet of Things.

On top of that, the number of devices connected to the internet creates challenges because of the need to correctly identify all of these devices. Many of them will use IP addresses for this purpose. But the number of unallocated addresses under the current version of the Internet Protocol (IPv4) is already nearly depleted. Perhaps the growth rate of the Internet of Things will lead to faster implementation of the new version of the protocol, IPv6.

For manufacturers of devices that must be connected to the web, a major challenge requiring a thorough regulatory analysis in each instance is to ensure that the devices have access to the internet. In many cases producers will install SIM cards in their devices which will then be supplied to end users when the products are distributed. Then the question may arise whether by supplying end users with devices equipped with SIM cards and providing these users with access to the internet, the producer is not performing regulated telecommunications activity. If it were determined that producers are conducting telecom activity, a number of requirements under the Telecommunications Law would then have to be applied.

Smooth functioning of the Internet of Things also requires creation of appropriate contractual relations, which may involve several entities or even a dozen or more. In the standard scheme for a service based on the Internet of Things concept, there is the producer of the device, the telecom operator providing data transmission, the producer of the application providing data processing, the user of the device, and the final recipient of the processed data. This requires conclusion of a series of contracts to resolve such issues as:

- Duties connected with providing internet access (in the case of mobile devices this also involves regulated roaming)
- Rules for use of applications
- Rules for processing of personal data
- Duties involving the security of data and telecom connections
- Liability rules in the case of data distortion or substandard service
- Rules for allocation of costs (e.g. who pays for the services of the telecom operator and under what rules).

It is clear that the benefits offered by the Internet of Things will bring about rapid growth in this market within the upcoming years. The market will also be covered by dynamic changes in regulations and various types of industry standards. This means that the Internet of Things can also be expected to generate new and unpredictable legal issues.

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

Arbitration or state court? A timeless dilemma

Dr Marcin Lemkowski

Clients often ask whether to include an arbitration clause in contracts. There is no easy answer, as it depends on a number of factors. Some of the key considerations are discussed below.

The civil procedure literature says that arbitration as an alternative method of dispute resolution is more advantageous for the parties because cases are heard more quickly and at lower cost to the parties. Unfortunately, this is only a generalisation and not always true.

How quickly?

The speed of arbitration depends on how efficiently all of the phases are conducted. There are more stages than in state court cases. First the arbitral tribunal must be empanelled—a stage that does not occur in state court. The arbitrators who are nominated must be independent of the parties, and if a party challenges an arbitrator's independence the case can be delayed at the outset.

The stage of hearing the merits of the case, i.e. examining the allegations of the parties and taking evidence, generally does go faster in arbitration. This is because the hearing dates are typically scheduled closer together than in Polish state courts, where there may be as long as 6 months between hearings. In arbitration this depends on the availability of the arbitrators, but a smoothly functioning tribunal should reconvene every month or two. Moreover, in arbitration it is much more common to schedule back-to-back sessions over several days, which greatly expedites the proceeding.

Arbitration has only one instance, i.e. no appeal, which in practice cuts out about 6 months from the time required for the parties to obtain a final ruling, because that is typically how long it takes to have an appeal decided in the state court system.

But arbitration is exposed to abuses by the parties during post-arbitration proceedings, first and foremost an application to set aside the arbitration award. If such an application is filed, it may result in a stay of enforcement of the award and thus prolong the entire case. The court's decision on the application to set aside the award may be appealed, and the decision on appeal may be further challenged by a cassation to the Supreme Court, all of which in practice can add years of uncertainty surrounding the ultimate resolution, even though statistically few litigants are successful in having the arbitration award set aside.

Costs

Generalisations about the expense of arbitration can also be misleading. There is a common notion that arbitration is cheaper than litigating in the state courts, but in fact it depends on the specific case.

When agreeing on an arbitration clause, the parties should compare the anticipated costs in the event of a dispute before the state court and before the arbitration court. But this requires the parties to anticipate what type of dispute might arise between the parties and the value of the dispute, which will determine the filing fees.

Obviously this is difficult to do because when they are signing a contract the parties generally do not assume that any dispute will arise between them. Nonetheless, experience may hint at the most likely bones of contention. For example, if the parties enter into a framework agreement under which separate orders for the supply of goods will be submitted, disputes might arise concerning lack of payment or the quality of goods, or failure to make timely delivery. The amount in dispute would then depend on the value of specific orders. But if the contract involves real estate, it may be assumed that a future dispute will involve an amount related to the value of the property.

The maximum court fee in the Polish state courts is PLN 100,000. The fees charged by arbitration institutions may be higher than that. The parties should be sure to avoid any surprise at the amount of the fee when a dispute is submitted to arbitration.

The rules for the losing party's reimbursement of the winning party's attorneys' fees differ. In Polish state courts there are certain minimum rates specified by regulation, and the court may award attorneys' fees up to six times the minimum rate. In arbitration, each institution has its own set of rules on this issue.

Arbitrators

In the approach most often followed in Polish arbitration practice, each of the parties appoints one arbitrator and then those two arbitrators appoint a third arbitrator as the presiding arbitrator. Having an influence over who sits on the panel deciding the case is an invaluable advantage of arbitration over the state courts, where there is no such possibility. A party can appoint as an arbitrator a distinguished specialist, an expert in the area under dispute, with great experience and authority. This is undoubtedly one of the greatest advantages of arbitration.

State court judges are always highly trained in the law, but legal knowledge alone may not be sufficient to resolve a thorny technical matter. Unlike arbitrators, judges cannot specialise in any one specific type of cases, because the rules require cases to be assigned according to the order of filing rather than the subject of the dispute.

Which arbitration court?

In the arbitration clause, the parties decide which arbitration court will resolve disputes: a permanent arbitration institution or an *ad hoc* panel for the specific case. This indirectly influences as well the place of arbitration, the language of the proceedings, and the rules that will be applied.

Again, this is a possibility not offered by the state courts, where all issues are governed by procedural regulations. It is true that the plaintiff will often be able to elect between courts in different places where venue would be proper, and the parties can also agree in advance that disputes will be heard by the common courts in a specific city, but no variation is possible when it comes to issues such as the language of the proceeding and the procedural rules. The case will be heard in Polish in accordance with the Civil Procedure Code.

Some general tips

Thus before deciding on arbitration—as the public court system is the default option—the parties should consider the issues discussed above, which should assist them in determining whether it would be better to sign an arbitration clause in the specific case or not. In addition, the following rules of thumb should also be considered:

If absent an arbitration clause a party could be sued in another country, and the other party is willing to agree to arbitration in your country, arbitration would be a good choice because litigating abroad is always inconvenient.

In cases where the other party is a public entity (for example the Polish State Treasury or local governmental units, or companies controlled by them), insisting on an arbitration clause is a good strategy when the bargaining situation permits because it ensures a private, neutral forum.

Once a dispute arises, that is also a good time to consider arbitration. Sometimes both parties, when they are aware of the actual nature of the dispute, will conclude that arbitration is a better solution.

If the dispute will require minute and detailed determination of the facts using experts and witnesses, arbitration may be better because the evidentiary hearings are more concentrated. Continuity can be lost if the hearings are too spread out over time.

Also remember that it is permissible to submit only certain disputes to arbitration, leaving other types of disputes to the jurisdiction of the state courts. This solution may be the best under the circumstances.

The dilemma remains

Even after considering the tips discussed above, the reader probably still wants to know: So which is better, arbitration or the state courts?

The truth remains that in some cases it is better to sign an arbitration clause and in other cases it is better to stick with the state courts. In a high percentage of cases, even the most careful weighing of all the pros and cons will not provide a clear answer to this question, because what will be preferable when hypothetical disputes actually arise cannot always be predicted or planned. From this perspective, the selection of arbitration or the state courts may nonetheless come down to a degree of intuition which cannot be verified at the time the contract is signed.

Dr Marcin Lemkowski, adwokat, *Dispute Resolution & Arbitration Practice*

Which country's law governs inheritance?

Aldona Leszczyńska-Mikulska Tomasz Krzywański

This will be a year of major changes across most of Europe for anyone involved in estate planning, as the EU's Succession Regulation (650/12) enters into force on 17 August 2015. The regulation introduces uniform rules for applicable law, jurisdiction, and recognition and enforcement of rulings in inheritance cases.

"Applicable law" may seem like a technical issue of interest only to lawyers, but it deserves some attention because it can have a decisive influence on what happens to our assets after death.

The matter is simple if the decedent was born, lived and died in the same country and left all of his or her property there. The situation can become much more complicated if the pieces of this puzzle are spread across different countries. Then succession must be planned carefully, because the issue of the applicable law may determine, for example, the validity of the will, the amount of the forced share for family members not included in the will, the scope of liability for debts of the estate, and, finally, who can inherit from the decedent and to what degree.

Current law

The issue of choice of law in inheritance cases has been dealt with in Europe up to now by national regulations. If a court in a given member state of the European Union found that it had jurisdiction—the power to consider the case—it then examined domestic regulations to determine which country's law to apply in the specific inheritance case. In Poland this issue is governed by the Private International Law of 2011.

The common rule across most of the member states—including Poland—has been that the law applicable to inheritance cases, including for determining the validity of dispositions upon death (i.e. the decedent's will) is the law of the decedent's nationality. If the decedent had dual citizenship and died intestate, a Polish court hearing the case would give precedence to the decedent's Polish citizenship. If the decedent did leave a will, the matter was different, because under Polish regulations the decedent could elect the law that would apply to the inheritance from among native law, the law at the testator's place of residence, or the law at the place of the testator's habitual abode, as of the time the testator made the will or at the time of death. But the possibility of making a given disposition upon death (e.g. a will) and its validity was always determined by native law.

This has caused major barriers in practice for Polish citizens, even if they have been living abroad for many years—for example if they wanted to make a joint will together with their spouse (invalid under Polish law), not to mention doubts concerning the use of trusts (in the event of death), which are popular in English-speaking countries. Similarly, if a Polish citizen entered into an agreement on succession before death, the agreement would be invalid under Polish law even though the person was a foreign resident.

The complexity and variety in the regulations across different member states has presented additional difficulties for potential heirs. At a time of growing cross-border migration of both persons and property, legal problems have become more frequent and more complicated. In many cases this has made it difficult to determine the applicable law, referring interested parties from one legal system to another.

Changes from 17 August 2015

Faced with these issues, it was decided to change things and introduce uniform rules for the entire European Union for determining the applicable law in inheritance cases.

First, it was decided that in light of the growing mobility of citizens, the main link for determining the applicable law should be the place where the deceased had his or her "habitual residence" at the time of death. To determine the habitual residence, an overall assessment will be made of the life circumstances of the decedent in the years leading up to death, in particular the duration and regularity of the decedent's presence in a given country and the reasons and conditions for being there. In other words, what counts is not the decedent's intentions but where the person actually woke up every morning and went to bed at night.

Significantly, the law determined to be applicable based on the Succession Regulation need not be the law of an EU member state. Thus, for example, if a Polish citizen moved to the United States or Thailand, the inheritance law of that country could apply—also to assets of the estate located in Poland. Nonetheless, it must be pointed out that the matter is not unequivocal in the case of succession to real estate. Often the regulations of the country of habitual residence require the law of the place where the real estate is located to be applied to the issue of succession to the real estate.

Some doubts may arise in determining the applicable law for persons who travel a lot and often change the place where they are staying, such as sales reps, managers or professional athletes. It appears that in such cases, the place of habitual residence will be evaluated in a manner similar to tax residence, taking into account such factors as where the person had his or her main centre of family, social and economic life. If the decedent moved to another country shortly before death, the court hearing the case will be empowered to apply the law of the state with which the person "was manifestly more closely connected" at the time of death.

The regulation will continue to permit testators to select in their will which state's law will govern their succession as a whole. That law may be the law of the state of which the person is a citizen at the time of making the selection or at the time of death, which in the case of a person with multiple nationalities may be the law of any state of which the person is a citizen.

The will and the way

It must be borne in mind that if a person makes a will, regardless of the contents it is also important how the will is drawn up. The correct form must be followed.

In this respect, the new regulation refers to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, to which Poland is already a party. This means that if one decides to draw up a will, it must comply with the form required by the law of the place where the will was made, the law of the testator's nationality, or the law of the place of the testator's domicile or habitual residence, or in the case of real estate, the law of the place where the property is located. If the proper form is not complied with, the will is invalid!

It should also be mentioned that Polish law permits wills to be handwritten (holographic) or made in the form of a notarial deed. In certain instances, it is also permissible to make an oral will in the presence of public administrative officials or other witnesses. A will drafted on a word processor and subsequently printed out and signed by the testator will not be treated as a valid holographic will. Interestingly, however, the most recent legal literature in Poland admits the possibility of preparing a holographic will on a tablet computer, so long as the handwriting requirement is met—using a stylus, not the keyboard.

Exceptions to the rule

The Succession Regulation will apply throughout the European Union, except for the United Kingdom, Ireland and Denmark. Thus if a court in any of these countries has jurisdiction to consider an inheritance issue, it will follow the internal regulations of that country rather than the rules set forth in the Succession Regulation.

Because of the close personal ties so many Poles have with the UK, we should point out a few basic rules under the law there. Under English law, the law governing succession is determined by the rule of domicile. Domicile means the place where a person intends to return and live, even if the person currently resides somewhere else. In practice it can therefore be difficult to determine someone's domicile, because it is not so much the place of residence as the place with which the person has a particularly close connection. Hence the UK will probably not be the domicile of persons who emigrate there primarily for purposes of gainful employment—even if they plan to stay in the UK for several years, or a decade or more.

Therefore, under English choice-of-law rules, the law applicable to succession will generally be the law of the domicile. But different rules apply to real estate. If the decedent's estate includes real property in another jurisdiction, the law for the location of the property should be applied to determine succession. This issue affects many people who reside permanently in the UK but have second homes on the Continent, typically in France. Until now, the law governing succession to such property has been French law. This caused many problems because the *réserve* in French law—like the *zachowek* in Polish law—imposed on the heirs a system of forced shares (referred to in English as *legitime*) which derives from the civil law and is not provided for in English law (it is on the contrary in Scottish law). When the Succession Regulation enters into force, this problem can be avoided by choosing either the testator's national law (e.g. English law) or the law of the place of habitual residence.

Summary

The Succession Regulation is clearly a step forward and will simplify estate planning for persons whose personal life or assets extend across multiple countries. Although it will not fully enter into force until August 2015, individuals can apply the regulation when drawing up their wills prior to that date.

When preparing for property succession by the next generation, it is good to bear in mind the new regulations, particularly as they introduce changes not only in the applicable law, but also in the jurisdiction of the courts and in recognition and enforcement of foreign rulings in inheritance cases. It will also be possible to obtain a new document, the European Certificate of Succession, which is issued in one EU member state but can readily be used in other member states to prove succession.

Persons who already have a will may consider with their legal advisers whether the existing will should be amended to comply with the new regulations. And for those who have not drawn up a will, it could be a signal that it is time to consider appropriate estate planning.

Aldona Leszczyńska-Mikulska, legal adviser and tax adviser, Private Client Practice

Tomasz Krzywański, Private Client Practice

Does cybercrime present a real threat to commerce?

Janusz Tomczak

Nearly every day there are stories in the press about cyber threats around the world. Not a week goes by that a newspaper doesn't publish an article about computer surveillance, hacker attacks, a new type of malware, or the consequences of transmitting unencrypted messages and documents. But is the risk blown out of proportion? Does an enterprise in Poland really have anything to fear?

All the news reports about threats in cyberspace share a common denominator. Computer incidents are primarily international in nature, and it is incredibly difficult to trace the entire chain of events. Attacks may be aimed at stealing data, or crippling critical infrastructure such as energy, transport and banking. And the complex, multilayered methods of attack indicate that the persons behind them are not the maladjusted tech-savvy teenagers typically imagined, but sophisticated intelligence services of various countries.

For some time a hot topic in the media was the discovery in 2010 of the Stuxnet computer virus, which was most likely deployed to seize control over the industrial infrastructure of Iran, in particular its nuclear power plants. Now Symantec is warning users against a malicious program called Regin. Detected in computers in Russia and Saudi Arabia, it was probably designed to seek out vital strategic information.

Without a doubt, the fascinating descriptions of these incidents, reminiscent of what once could only be regarded as science fiction, encourage lawyers to reflect about what help the country's legal system can now offer to victims of a complex cyber attack.

How should a manager respond when he realises that for a long time his company has been the target of an "advanced persistent threat"—a deliberate campaign, lasting for many months and operating on multiple levels, seeking to steal corporate data? Such attacks are characterised by careful planning, often involving probes of the organisational structure and security system of the target in order to insert malware into the system through the weakest link, such as a staff member making careless use of a mobile device.

The first question could be whether ordinary businesspeople or consumers are in a position to identify and describe the computer event in which they have been victimised. Can they identify and understand by themselves the negative consequences of the incident? Perhaps the individuals in the IT department responsible for the security of the computer system will be capable of quickly pointing to the cause and effects of the event, but it may also be necessary to seek the assistance of an outside firm handling forensic IT.

Second, if the "illness" has been diagnosed, the question is what to do next. Can we find the appropriate remedies in the legal system? Are law enforcement authorities, such as the police and the prosecutor's office, capable of reacting quickly and effectively? Can we bring the potential perpetrator before the justice system to face the proper response of the law? Unfortunately, as I see it, the answer now is No.

The oft-repeated statement that the legal system does not keep up with the changing reality is particularly true in cybersecurity cases. While information is being exchanged beyond state borders in tiny fractions of a second, international lawmakers toil to develop a framework for cooperation in the area of cybersecurity. Then, when treaties have been negotiated, it takes years to wait for ratification of the treaties by the signatory states. This is what happened in the case of the Council of Europe's Convention on Cybercrime. It was opened for signature in Budapest on 23 November 2001. Poland did not ratify it until 13 years later, when on 28 October 2014 the President of Poland signed acts on ratification of the Convention on Cybercrime and the Additional Protocol to the convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

Moreover, the main legal tools for combating threats from cyberspace are found in the field of criminal law, and it must be acknowledged that this field has traditionally been the hardest to harmonise at the level of the individual member states because of its cultural and historical underpinnings. One of the main features of advanced computer attacks is their cross-border character. Meanwhile, essentially all national criminal law systems include the principle of territoriality, which means that justice authorities are competent to act only within the boundaries of the given state. Thus in most cybersecurity-related cases it is necessary to cooperate with the justice authorities of other countries to gather evidence through the institution of legal assistance. Sometimes, because of imperfections in the procedures, it takes months to obtain legal assistance. In practice, the response time and the skill at cooperation of the countries' law enforcement authorities prove to be crucial for the case—as witnessed for example by the success of specialised police units cooperating across Europe to combat internet child pornography.

Hopes for improvement in the safety of the web in Europe are tied to the Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union, which is currently being debated at the European Parliament. It would impose a number of security maintenance obligations on private-sector entities. Also of great importance is the Cybercrime Directive (2013/40/EU)—implementation deadline 4 September 2015—which introduces such measures as liability of the legal persons for whom violators act.

For now, however, when it comes to Poland, taking into consideration the response time, the technical and financial means at the disposal of the law enforcement authorities, and the formalism and time-consuming nature of the procedures that must be followed to obtain justice, we must unfortunately conclude that the inability of the legal system here to keep pace with reality is particularly stark. This is reason enough alone for Polish businesses not to trivialise the potential dangers.

There is a lot of talk about critical infrastructure, the IT security of the state, liability of businesses operating in this area, and the threats carried by access to mobile devices.

The IT services market is developed to such an extent that businesses can readily find solutions to meet their needs. Unfortunately, the same cannot be said about the legal system. Moreover, the solutions available to companies will not be accessible to ordinary citizens for purely financial reasons.

In this respect it is difficult to ignore the deafening silence of voices speaking up for the interests of the "man on the street" in this discussion. While the topic of protection of personal data against current threats does arise, the regulatory sphere, where solutions are frequently proposed, will not suffice. Everyone should be provided with instruments they can use quickly and effectively to enforce their rights.

If we consider the degree of complexity of the actions taken by perpetrators of cyber attacks and the technical means at their disposal, the answer to the question posed in the title must unfortunately be Yes. Cybercrime presents a real threat to commerce, and the legal system at this time does not adequately protect commerce against cyber attacks. Perhaps this explains the stepped-up legislative initiatives in this area at the EU level in recent years.

For now, because key issues connected with cybercrime and cybersecurity have not been adequately regulated at the EU or national level, and in the face of problems with the reaction time of law enforcement authorities, the greatest stress needs to be placed on prevention. Tools for encrypting email and data transmissions should be employed ruthlessly. Staff must be trained and made aware of the risk connected with on-the-job use of mobile devices and social media. It must also be borne in mind that in practice, once something has been released onto the web it will stay there forever. Sometimes the source of huge problems of the world's biggest companies is a seemingly trivial human oversight. People are the weakest link.

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

All colours of the rainbow: Support for innovation in Poland

Joanna Prokurat

Through funding, R&D and tax policy, Poland continues to expand the range of instruments for encouraging innovation across its economy—including innovation based on foreign investment.

Alongside direct financing out of public funds—from Poland or the European Union—innovative initiatives can also qualify for special tax incentives. These instruments can be deployed in various proportions to achieve the optimal effect. Below we present the key incentives for innovative projects.

Funding at the national level

Poland is the largest beneficiary of EU funds in the new financial perspective (2014–2020). Support for projects directly or indirectly generating innovation is one of the main areas of financing, as demonstrated for example by the programme of horizontal support for R&D and innovation. Among the programmes administered at the national level, the greatest role in terms of innovative activity will be played by the regional operational programmes prepared for each of the provinces (EUR 31.28 billion) and the nationwide Smart Growth Operational Programme (about EUR 8.6 billion).

In allocating funds under these programmes, projects will be promoted which lead to an increase in private investments in research and development and growth of "smart specialisations" (key fields of research and areas of the economy providing potential for growth of the country and the regions). Comprehensive innovative ventures "from idea to implementation"—i.e. from basic and applied research through development work to market launch—will be preferred, as will projects seeking to create and develop R&D infrastructure within enterprises.

At the national level, businesses planning investments in priority sectors, such as R&D, biotechnology and digital services, may also apply for government grants for job creation or qualified investment expenditures under the Programme for Support of Investments of Vital Significance for the Polish Economy in 2011–2020.

Funding at the EU level

Innovative projects will also be eligible for support from programmes administered at the European Union level, in particular:

- The Horizon 2020 Framework Programme for Research and Innovation (about EUR 80 billion)
- The Competitiveness of Enterprises and Small

and Medium-sized Enterprises (COSME) programme (about EUR 2.3 billion).

Under these programmes, funds are to be assigned through debt and equity instruments, including loans, guarantees and reguarantees, as well as capital, mezzanine and hybrid financing.

Tax instruments

- **Relief for new technologies**

Tax relief for technology entitles the taxpayer to deduct up to 50% of the expenditures incurred on acquisition of new technologies (enabling the production of new or improved goods or services and not applied globally for longer than the last 5 years, as confirmed by an independent scientific unit), recognised in the initial basis for income-tax purposes, while retaining the right to recognise 100% of depreciation deductions as revenue-earning costs.

The effective savings of 9.5% under this relief applies to all intangibles, and covers among other items the acquisition of copyright and related rights, licences, patents and other rights specified in the Industrial Property Law, and knowhow, as well as the costs of in-house development work successful in creating a result that can be used for the taxpayer's business purposes.

Acquisition of new technology (other than development work) should be made on the basis of an agreement on transfer and use of rights, which means that it should involve a purchase and sale agreement or other agreement disposing of the new technology and authorising the use of the new technology. Acquisition may also occur by operation of law, including as a result of cooperation between the business entity and the inventor, e.g. an R&D unit.

The expenditures subject to deduction under this relief are those incurred during the year the new technology is booked among intangibles or the preceding year. If the taxpayer generates a tax loss for that year or income too low to take the full deduction, the deduction (in full or the unused portion) may be taken in the tax returns for the next three tax years.

Although currently technology relief is aimed at taxpayers acquiring new technologies, it may be used by entities independently conducting their own R&D work or those cooperating with them. The missing element of acquisition of the new technology may be filled in through cooperation with a research unit or a cooperating entity. Finally, offering of a product meeting the conditions for treatment as a new technology and entitling the acquirer to apply the technology relief should enable maintenance or reduction of the sale price (for the acquirer, less the benefit obtained from applying the relief). There is also a bill pending in the Sejm to amend the Polish income tax laws to directly apply this relief to taxpayers conducting activity in the sector of new technologies and not only acquiring new technology.

- **Costs of in-house R&D**

Taxpayers independently conducting their own research work may control the time at which they recognise tax-deductible costs by adjusting it to suit their needs based on the level of taxable income or tax loss they are currently generating.

The costs of such work, as a specific category of intangibles created by the taxpayer itself and independent of the expected period of use, may be settled through amortisation deductions. In the case of research work completed with a positive result which may be used for the taxpayer's business purposes, where also:

i. the product or production technology is strictly defined and the costs of the work are reliably determined,
ii. the technical usefulness of the product or technology was properly documented and on that basis the taxpayer decided to produce the products or apply the technology, and
iii. the documentation demonstrates that the revenue from sale of the products or application of the technology will at least cover the costs of the research work;

the costs may then be amortised, at the taxpayer's election, within 12 months, starting from the month following the month in which they were booked, or over any extended period chosen by the taxpayer.

If the research work is completed with either a negative or positive result but not all of the foregoing conditions are met, the expenditures may be booked directly to tax-deductible costs in the month in which they were incurred, pro rata, beginning from the month they were incurred, in equal portions over a period of no longer than 12 months, or all at once during the tax year in which the work was completed. Applying the rule of equal treatment of taxpayers, these solutions should also be available with respect to research work completed with a positive result and meeting the foregoing conditions.

- **R&D centres**

Payers of corporate income tax independently taking up innovative activity may obtain the status of an R&D centre.

R&D centres may create an innovation fund to cover R&D costs or costs connected with obtaining a patent for inventions. Upon fulfilment of statutory conditions, an R&D centre may deduct provisions for the innovation fund as revenue-earning costs at the time the provisions for the fund are taken (up to 20% of the revenue in the given month), without waiting until the money set aside in the fund account is spent, which should occur by the end of the tax year. Moreover, on a *de minimis* basis, R&D centres may take advantage of an exemption from real estate tax and agricultural and forestry tax with respect to taxable facilities occupied for purposes of research and development work conducted by the R&D centre, up to EUR 200,000 in a period of up to 3 years.

R&D centre status may be obtained more specifically by businesses conducting research and development work and achieving net income from sale of goods and services and financial operations in the prior financial year of at least EUR 1,200,000. At least 20% of this amount should be net revenue from the sale of the taxpayer's own R&D services.

- **Special economic zones**

CIT payers that incur a minimum of PLN 100,000 in investment costs or hire at least 50 new employees (the specific value is determined by the location and the unemployment rate in the given county) may enjoy an exemption from CIT if they operate in the territory of a special economic zone pursuant to the relevant SEZ operating permit.

Taxpayers investing in innovations or operating in the R&D sector (specified in section 72 of the Polish Classification of Goods and Services) may count on preferential criteria for taking over private land in a special economic zone.

Taxpayers operating in a special economic zone may also enjoy relief from local taxes comparable to that enjoyed by R&D centres.

- **50% revenue-earning costs for creative individuals**

The Personal Income Tax Act permits creators, including engineers, programmers and members of many other professions, to deduct 50% of their income as tax-deductible costs, up to PLN 42,764 per year (instead of standard costs of PLN 1,335 per year) with respect to the creative part of their work and for disposal of copyright.

This allows "creatives" to increase their net income without paying additional social insurance premiums.

Which to choose?

Innovation paints a new picture of the world. But to develop it takes a range of solutions—a palette of colours.

Recognising the importance of innovation, lawmakers have introduced a number of support instruments. Entities conducting activity in innovative areas may combine the available funds to best meet their needs, so long as they remember to comply with state-aid rules and tax regulations.

Joanna Prokurat, tax adviser, Tax Practice and New Technologies Practice

Supreme Court of Poland v Court of Justice of the European Union

Agnieszka Kraińska

Polish courts don't always remember that they are bound by the fundamental principles of EU law developed through the case law of the Court of Justice of the European Union, and that national courts have an obligation to interpret EU law uniformly. Sometimes the lower courts handle this problem better than the Supreme Court, as demonstrated by the issue of technical notification.

The internal market functions throughout the territory of the European Union, without internal frontiers, where the free movement of goods, persons, services and capital is ensured. Under the case law from the Court of Justice of the European Union (CJEU), beginning with the famous "Cassis de Dijon" judgment, the free flow of goods has required every member state to accept products legally produced in other member states. Exceptions are permitted only in order to secure the fundamental interests of the state, such as public order, public safety, protection of life and health of persons and animals, and consumer protection—overriding requirements of the general interest.

Because the member states have a great tendency to rely on such overriding requirements to justify barriers to the EU's internal market freedoms, the European Commission exercises preventive control over legislation from the member states in terms of regulations creating barriers to trade in goods and the flow of certain services. The technical notification procedure is governed by the Technical Standards & Regulations Directive (98/34/EC).

Rules for technical notification

The directive divides technical regulations into four groups:

- Technical specifications (required characteristics of products, such as quality and packaging)
- Other requirements (i.e. conditions significantly influencing the composition, nature or marketing of products, affecting their life cycle after they are placed on the market)
- Prohibitions on manufacture, importation, marketing or use of a product
- Rules on information society services (i.e. general rules related to taking up and pursuing certain data-related services).

Under the directive, member states are required to notify the European Commission of draft technical regulations or amendments and to suspend work on the regulations for a standstill period of three months, which may be extended.

During the standstill period, the Commission and other member states may comment on the draft regulation. Notifications can be tracked at the Commission's website (ec.europa.eu/enterprise/tris/en/). When a legal act has undergone the technical notification procedure, the member state is required to include a reference in the act to Directive 98/34/EC.

Sanction for violation of notification obligation

Failure to comply with the technical notification requirement carries a threat of serious sanctions. As the CJEU held in the *CIA Security* and *Unilever Italia* cases, technical regulations with respect to which the member state did not conduct technical notification or violated the notification procedure (i.e. the standstill clause) are regarded as "inapplicable."

The CJEU has further held that private parties may rely on the provisions of Directive 98/34/EC and raise non-notification or improper notification of a technical regulation in a dispute before a national court, including in cases involving rights and obligations under a contract between the parties. Then, according to the CJEU, the national court must decline to apply the national technical regulations that were not properly notified. The CJEU's reasoning is that this is the only way to ensure the effectiveness of EU law.

Implementation in Polish law

Directive 98/34/EC was implemented into the Polish legal system by the Regulation of the Council of Ministers on Operation of the National System of Notification of Legal Standards and Regulations.

With respect to the correctness of the implementation of the directive, Polish courts—including the Supreme Court in its judgment in Case I KZP 15/13—have pointed out that §5(5) of the regulation, which excludes from the notification obligation regulations intended to protect public morals or public order, is not supported by any provision of Directive 98/34/EC, which under the principle of the supremacy of application of EU law prevents Polish lawmakers from relying on this provision.

Interpretation by Supreme Court

Two recent rulings by the Supreme Court of Poland, in cases I KZP 15/13 and IV KK 183/13, have generated great puzzlement in the context of Poland's compliance with the technical notification requirement.

In Case I KZP 15/13, the Supreme Court held that a violation of the notification requirement for technical regulations under Directive 98/34/EC constitutes a violation of legislative procedure whose constitutionality may be reviewed solely in proceedings before Poland's Constitutional Tribunal. The court also held that if in a specific proceeding the court finds that the legislative procedure was defective because of violation of the notification requirement, it can only stay the proceeding and submit a legal question on the constitutionality of the act in question to the Constitutional Tribunal. Under this holding, until review is sought and the Constitutional Tribunal issues its ruling, there is no basis to refuse to apply the regulations in question.

In Case IV KK 183/13, the Supreme Court upheld the ruling in the prior case and further held that if the notification requirement was not complied with, there is no express provision of Directive 98/34/EU or in the EU treaties preventing application of the dubious regulation. The Supreme Court also held that judgments of the Court of Justice of the European Union are binding on the national courts only in the same case, and in other cases such judgments may be relied on only as persuasive precedent. Hence the Supreme Court of Poland refused to apply the CJEU's rulings in *CIA Security* and *Unilever Italia*.

Effects of Supreme Court interpretation

The Supreme Court's understanding of these issues presented above means that it does not regard the fundamental principles of European Union law developed in the case law of the CJEU as binding—in other words, it rejects the principles of primacy and direct effect. In the view of the Supreme Court, the duty on the part of the national courts to interpret EU law uniformly throughout the EU, which follows from the principles of primacy and direct effect and is based on case law from the CJEU, also does not apply to Polish courts. This view undermines the entire legal order of the European Union and in practice threatens the functioning of the organisation.

Contrary to the reasoning of the Supreme Court of Poland, there is a fundamental treaty principle in EU law contradicting its interpretation. This is the principle of "sincere cooperation" set forth in Art. 4(3) of the Treaty on European Union, which imposes on all authorities of the member states—courts included—a duty to ensure the effectiveness of EU law and requires them to refrain from taking any measures that could threaten the achievement of the purposes of the EU.

So why not wait until the Constitutional Tribunal rules on each regulation? The problem is that this would be contrary to the principle of effectiveness and uniform application of EU law. The CJEU held in the *Simmenthal* case that a national court is under a duty to refuse of its own motion the application of any provision of national legislation which is inconsistent with EU law and it should not wait for such regulations to be repealed by legislative means or set aside through any other constitutional procedure.

State Treasury liability

It should also be stressed that for purposes of the third paragraph of Art. 267 of the Treaty on the Functioning of the European Union, the Supreme Court of Poland is one of the country's courts of last resort, which are required to seek a ruling from the CJEU if an issue of interpretation of EU law arises in a national proceeding. In the Supreme Court cases I KZP 15/13 and IV KK 183/13 discussed above, such an issue did arise but no preliminary ruling was sought, and now the two judgments stand in contradiction to the established case law of the CJEU.

These actions may lead to liability in damages on the part of the Polish Treasury for violation of European Union law. In the *Köbler* case the CJEU clearly held that the principle of state liability for actions contrary to EU law also covers instances where a national court of last resort issues a ruling contrary to EU law.

Consequences

The two judgments of the Supreme Court of Poland discussed above have met with well-justified criticism from some of the regional courts, which have consequently refused to follow them (e.g. the Gliwice Regional Court in Case VI KA 1080/13). Also notable is the order issued by the Płock Regional Court on 25 September 2013, which sets forth exhaustive argumentation in the context of the rules for application of EU regulations on technical notification (Case V Kz 190/13).

Nonetheless, there is a risk that the understanding by the Supreme Court will become well-established in Polish jurisprudence, which could generate consequences for the State Treasury in the form of cases filed before the national courts seeking damages, or could become the subject of proceedings by the European Commission against the Republic of Poland.

The issue of technical notification may serve as a fascinating example of problems of interpretation of European Union law which the Supreme Court of Poland also struggles with.

Agnieszka Kraińska, legal adviser, EU Law Practice

Some things can't be commercialised

Marzena Białasik-Kendzior

Anna Pompe

A market observer might conclude that practically everything today has some commercial purpose or other. Businesses have always been eager to use geographical names and various symbols, including national and historical symbols. Over 3,000 trademarks have been filed with the Polish Patent Office containing the word "Polska" or a foreign translation (most often "Poland" or "Pologne"). Trademarks using the names of localities are also popular, from the largest cities (Warsaw is used in about 350 trademarks, Gdańsk in over 200) down to the tiniest towns. There are trademarks beyond counting that use arms, crests or flags. But the Patent Office may quickly put a damper on businesses' desires for such devices, even though there has been no change in the legal regulations in this respect.

Under Art. 131(2) of the Industrial Property Law of 30 June 2000, there are groups of designations and symbols that are statutorily barred from registration. These include, for example:

- Designations containing the name or an abbreviation of the name of the Republic of Poland or its symbols (coat of arms, colours or anthem), names or arms of Polish provinces, cities and towns, symbols of the armed forces, paramilitary organisations and peacekeeping forces, reproductions of Polish orders, decorations and honours or central or local government administrative distinctions, or social organisations pursuing worthy public interests
- Designations containing abbreviations or symbols (arms, flags and emblems) of foreign states and international organisations, as well as official designations adopted in foreign countries, and hallmarks indicating control and warranty when prohibited by international agreement.

It should be pointed out, however, that such designations may be registered if the applicant presents authorisation, in particular permission from the relevant authority or consent of an organisation to use its designation in trade. But this provision does not give the Patent Office and applicants a free hand. In many instances, permission cannot be obtained from the relevant authority because there are no legal regulations identifying what authority that would be. No state or local governmental body is vested with the authority to issue permits to use the name "Polska" in commerce. The same applies to the name of Warsaw and many other cities, as well as Polish national symbols.

Previously the Patent Office had taken a fairly liberal approach, as demonstrated by the great number of registered trademarks containing such verbal or graphic elements. But this approach was disputed by the administrative courts hearing cases involving use of the name "Polska." According to the Supreme Administrative Court, the gap in the law mentioned above does not prevent the Patent Office from applying the regulations requiring denial of registration if the applicant does not hold the relevant consent.

Influenced by these court rulings, the Patent Office changed its approach to registration of trademarks with national or geographical elements, as it has officially announced at public events. This means that until the issue of the authority to grant such permission is properly regulated (e.g. through an anticipated amendment to the Industrial Property Law), many negative decisions by the Patent Office concerning such designations should be expected.

Not the name of the country…

An example of the change in approach was the refusal to register as a trademark "GEO Globe Polska"—the same name the applicant operated under.

The basis for denial of registration was use in the trademark of the word "Polska." The Patent Office found that use of the name of the country in the noun form is impermissible, even though use as an adjective meaning "Polish"—as in "Polska Szkoła Filmowa" for a Polish film school or "Instytut Polskiej Myśli Ekonomicznej" for a Polish economics think-tank—does not fall under such a restriction.

In this case, the Supreme Administrative Court referred in its judgment of 23 July 2013 (Case II GSK 544/12) to two major issues. First, the fact that there are a great many registered trademarks functioning in the country using the word "Polska," as the applicant pointed out, is no basis for registering any more of them. Second, the court held that it is not only the name of the Republic of Poland—Rzeczpospolita Polska—that is excluded from registration, but any variation or abbreviation referring to the country. The court stressed that consumers must not be misled into thinking that the entity using a given designation "enjoys legitimacy or some special recognition from the Polish state."

Although not expressly required by the Industrial Property Law, attempts to register trademarks using foreign-language versions of the name of the country are also being refused. The Patent Office and the administrative courts are in agreement that the English word "Poland" is commonly used as an official designation of the Republic of Poland, and even persons unfamiliar with English would associate it with the name of the country.

This position does not leave much chance for registration by the Patent Office of such marks as "Jaguar Klub Polska," "Travel to Poland.pl," "Employers of Poland"—or "Parker Poland," which was registered by the EU's Office for Harmonisation in the Internal Market (OHIM) as a Community trademark, effective in the territory of Poland.

The practice of OHIM is beyond the scope of this article, but it is subject to restrictions concerning registration of state symbols. (This does not concern the names of countries, cities or provinces, but registration of such items as "armorial bearings, flags, and other State emblems" and "official signs and hallmarks indicating control and warranty," via Art. 7(1)(h) and (i) of Council Regulation (EC) 207/2009.)

...nor the name of a city...

The Polish restrictions on registration also apply to designations containing the names of cities, towns and provinces. In a case involving the trademark "Casino Palace Konstancin," the Patent Office demanded that the applicant present the relevant permission, because—as the office found—"Konstancin is a village in Łódź province, Łęczyca county, Góra Świętej Małgorzaty commune. Konstancin is also the colloquial name of Konstancin-Jeziorna, a town in the province of Masovia." The Patent Office did not indicate whether in this situation the consent should come from the local authorities in both places or it would suffice to have the consent of either one of the localities. Even if there were no doubts on that point, obtaining consent from the relevant authority would present a serious barrier to the applicant for the reasons already mentioned.

The use of the name of a city or other locality also prevented registration of the trademark Aquarella Konstancin Jeziorna, as well as the marks below:

...nor EU symbols...

A business seeking to register a trademark using elements of a state flag should also expect refusal by the Patent Office, based on the judgment of the Supreme Administrative Court of 18 September 2012 concerning the trademark for a shop, "euro sklep" (Case II GSK 1156/11).

When opposition was filed by the European Community, the Patent Office invalidated the trademark, finding that, in heraldic terms, the five characteristic yellow stars in an arc against a blue field plainly imitated the official symbol of the EU. "Any differences in the colours, as well as the additional elements in the mark, are irrelevant from the heraldic point of view," the office found, and thus the mark "creates a likelihood of evoking among average buyers of goods and services an impression of the existence of a connection between this mark and the European Union." The court upheld the position of the Patent Office in this case.

...nor the national colours

The issue of commercial use of Polish national symbols, which are subject to special protection under the Act on the Coat of Arms, Colours and Anthem of the Republic of Poland of 31 January 1980, deserves a few remarks. The act prohibits their placement on items intended for trade. It is permissible, however, to use the coat of arms or colours of the Republic of Poland in a stylised or artistically treated manner. It is difficult to specify how far artistic creation can go to avoid exposing the user to a charge of treating the national symbols without due respect. Based on the legislative history, it was accepted that a "stylised or artistically treated form" should be understood to mean a form differing from the official form set forth in the annexes to the act, "but still rousing associations with the symbols of the Republic of Poland."

This probably doesn't clarify much for businesses that would like to commercialise the national colours and arms in a form that is legally permissible. This issue becomes particularly topical around the time of major national events like sports championships. Then all sorts of products hit the market alluding somehow or other to the flag, the coat of arms and the name of the country, from sports gadgets and clothing items to mugs, pens, and even red-and-white wigs.

There may be concerns about whether businesses can register designations created for such occasions. In this respect the policy of the Patent Office seems inconsistent with the Act on the Coat of Arms, Colours and Anthem of the Republic of Poland. This conclusion is prompted by the reasoning presented in the decision refusing registration of a trademark that contained an image of a white eagle in its graphics. The image in question was not directly copied from the arms of Poland protected by the act, and clearly fell within the notion of an artistic treatment of the symbol. Nonetheless, the Patent Office found that the applicable regulations are designed to guarantee the state and its authorities and institutions a monopoly on the use of state symbols and also to allow the average consumer to be confident that state symbols encountered in trade are being used by duly authorised state institutions. In the judgment of 21 April 2010 (Case II GSK 555/09), the Supreme Administrative Court upheld the Patent Office's position in this case.

Community trademark the only solution?

It is hard to agree with all of the rulings discussed above. It does not seem correct to take the position that use of the word "Polska" in a trademark will always be associated—as the court thought—with legitimacy backed by the Polish state. Often the name of the country is associated not with the authority of the state but more with the location of the enterprise or other obvious economic connections to Poland. In most instances consumers correctly gauge the intentions of businesses, because they are aware of commercial realities and are used to encountering the word frequently in the names of businesses and their products.

While national symbols should be protected, that does not mean that registration of trademarks alluding to them should be automatically refused. A determination should be reached after considering all of the elements of the trademark and whether there is any abuse of the authority standing behind the symbol. Unintended associations could more easily occur in the case of certain symbols, but when it comes to the names of countries, cities or provinces this will rarely occur.

The call for amendment of the Polish law to clarify who can grant consent to commercial use of national, regional and local designations also appears to be justified by the fact that lawmakers have not completely excluded the possibility of businesses using designations alluding to national symbols. In the meantime, applicants can take their chances using the EU system for trademark protection.

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Assignment of procurement contracts is not allowed

Mirella Lechna

Poland's Public Procurement Law makes it difficult to change contractors under an existing public contract, even within the same capital group.

A growing number of large-scale outbound construction projects are taking place in Poland as the Polish construction industry experiences a boom with help from EU funding. The main players in the Polish construction industry are public bodies, which means contract awards must contend with the complex requirements of the Public Procurement Law (PPL).

Foreign contractors can take part in Polish public tenders on the same conditions as Polish contractors. This means they can participate directly from abroad without having a representative or subsidiary in Poland. But they may realise only after the contract is awarded that operating through a local subsidiary could optimise their activity in commercial, tax or economic terms. However, under the strict rules of the current PPL, such decisions have to be taken before submitting a bid.

One of the fundamental goals of the public procurement process is to ensure that public contracts are awarded to contractors taking part in an open proceeding and subjected to the rigours of the tender procedure, including verification that they meet the conditions for participation in the procurement proceeding.

This principle is reflected in numerous provisions of the law, the most important of which is PPL Art. 7(3), which provides that a public contract may be awarded only to a contractor selected in compliance with the PPL. This provision is interpreted to mean that it is prohibited to award a public contract to a contractor which did not participate in the tender.

Therefore it is not permissible to change contractors for a contract concluded pursuant to a public tender. This has been confirmed numerous times in the Polish and European case law. Replacing the contractor to which the contracting authority originally awarded the contract with a new contractor is regarded as awarding a new contract.

This rule under the PPL thus limits the civil-law principle of the freedom of contract, excluding the possibility of free choice of the contractor in the case of public contracts. The purpose of this rule is to eliminate situations that could breed corruption in the spending of public funds.

Therefore, an assignment of the rights and obligations under a public contract to a third party on the basis of an agreement between the assignee and the contractor—referred to in civil law as a "singular succession"—is prohibited. Such an agreement would result in a public contract being obtained by a third party, avoiding the tender procedure and circumventing the PPL, and thus is invalid.

Nonetheless, under the developed practice of applying the PPL, it is recognised that Art. 7(3) is not absolute, and currently, in strictly defined instances, there is a possibility of changing the contractor after a public contract has already been awarded.

These instances are discussed in more detail below.

Assumption of debt and sale of enterprise

There is no rule in the PPL excluding the possibility of a third party entering into a public procurement contract as an additional obligor alongside the existing contractor, also required to perform the contract.

Thus it is permissible to modify the party structure of an existing public contract so that the existing contractor and a new entity are jointly responsible for performance of the contract. Joint assumption of the obligation modifies the party structure on the contractor's side while improving the position of the contracting authority, which obtains an additional new obligor.

The obligation of the existing contractor becomes also the direct obligation of the party assuming the obligation, and thus they become jointly and severally liable under the contract. As a result, the contracting authority can demand performance in whole or in part by the original contractor and the party assuming the obligation, jointly or only against the existing contractor or the new obligor, and only performance of the contract by one of these entities will release the other from the obligation. However, as a result of such transaction, the third party does not obtain the status of a contractor for purposes of the PPL.

Consequently, it is permissible to change the party structure of a procurement contract on the side of the contractor as a result of conclusion by the contractor of an agreement on sale of its enterprise or an organised part of its enterprise.

Even though from the point of view of the Civil Code, obligations—including obligations under a public procurement contract—do not constitute a part of the sold enterprise, the acquirer is jointly and severally liable with the seller for the seller's obligations connected with operation of the enterprise. This liability arises under Art. 55^4 of the Civil Code and cannot be excluded or limited without the consent of the creditor. Such liability also applies, among other things, to obligations under a public procurement contract.

The effect of the joint and several liability of the seller and the acquirer of the enterprise is tantamount to the acquirer's assumption of the debts arising out of obligations connected with operation of the enterprise, an element of which is the public procurement contract, under the principle of cumulative accession to the debt arising out of the procurement contract. The contracting authority gains an additional entity obligated to perform the contract, which at the same time does not release the existing contractor from the obligation to perform the contract.

Universal succession

The prohibition against changing the contractor in a public procurement does not apply to transactions which result by operation of law in the acquirer's acceding to the entirety of the seller's rights and obligations—in other words, universal succession. This consists of the new entity stepping into the legal shoes of the predecessor, and in this respect also into the rights and obligations of the contractor in the public procurement.

The transformation of the party structure on the side of the contractor in the case of universal succession occurs by operation of law at that very time, and therefore in order to be effective it does not require any amendment to the procurement contract or the consent of the contracting authority.

Transactions resulting in universal succession include merger, division and conversion, regulated in detail by the Commercial Companies Code.

Change in consortium members

In the case of contractors jointly seeking the award of a public contract, changes in the party structure might involve a transaction resulting in a change on the part of one of the consortium members, or a change in the structure of the consortium which could consist of a change in the membership through the joining of a new member or departure of an existing member.

It should be stressed that even though a consortium is not a separate legal entity—only the members of the consortium are legal entities and continue to be legal entities—nonetheless for purposes of the contract award procedure the consortium is treated as a single contractor under PPL Art. 23(3), and in this sense it is necessary for the composition of the consortium to remain unchanged to ensure that the contract is awarded in compliance with PPL Art. 7(3).

Because each of the contractors entering a proceeding for award of a public contract jointly with other contractors incurs obligations and acquires rights in its own name, transactions resulting in modification with respect to one member of the consortium bear the same legal consequences under the PPL as in the case of the contractors acting independently—specifically, the prohibition against assignment of rights and obligations under the procurement contract to another entity will apply.

Therefore, because every consortium member incurs an obligation to the contracting authority which it cannot be released from through assignment, the exit of one member from the consortium cannot be contractually agreed within the consortium. The inability to remove a member of the consortium is further reinforced by PPL Art. 141, which provides for joint and several liability of all consortium members, lasting through complete performance of the contract. This means that a new entity cannot join the consortium with the effect of releasing any of the existing consortium members from liability for performance of the contract.

Clearly, however, the members of the consortium may agree to limit the activity of a member and thus, de facto, exclude that member from performance of the contract, but from a legal point of view that member will continue to be jointly and severally liable to the contracting authority for performance of the contract.

It should be pointed out that because it is possible to join the tender proceeding only up to a certain date specified by the contracting authority, permitting the membership of the consortium to be expanded after that date would in practice be tantamount to extending the deadline for the new member to file a bid in the tender. Therefore, joining a consortium late, as a member of the consortium, is impermissible, as it would violate the principle of equal treatment and fair competition.

However, a change in the party structure in a consortium consisting of assumption of the obligation by an additional new entity from outside the consortium is permissible, whether through a separate contractual undertaking or as a result of sale of the enterprise of one of the members of the consortium. The third party will then become jointly and severally liable to the contracting authority for performance of the contract along with the members of the consortium. Such a change does not result in removal of the member in question from the consortium and does not release it from liability to the contracting authority for performance of the contract.

Any changes in the parties arising out of transactions resulting in accession by a new entity to the rights and obligations of the contractor under conditions of universal succession permitted under the PPL are permissible in the case of any of the contractors who are members of the consortium. This means that in the event of merger, division or conversion of a member of the consortium, that member's legal successor will continue to participate in the consortium in place of the previous member.

New directives

New versions of the EU's procurement directives—the Classic Directive (2014/24/EU) and the Utilities Directive (2014/25/EU)—were published on 28 March 2014, repealing the existing directives (2004/18/EC and 2004/17/EC) effective 18 April 2016.

The new Classic Directive reflects developments in the public procurement market. Drawing from the practice of applying public procurement law, it introduces new rules for the permissible modification of public contracts. Specifically, Art. 72(1)(d) of the new directive accepts instances where a new contractor replaces the one to which the contracting authority had initially awarded the contract. Such modification cannot occur through a sale of the rights and obligations under the public contract on the free market, however, but must result from the organisational needs of the contractor. It must not entail other substantial modifications of the contract or be aimed at circumventing the application of the directive.

The member states have until April 2016 to implement these rules. The amendment of Poland's Public Procurement Law connected with transposition of the new directives is expected to introduce an express regulation indicating the permissibility of changing the contractor for a public contract, thus allowing optimisation of the contractor's operations. Until then, however, changing contractors under a public contract governed by Polish law is severely limited. This requires bidders to exercise caution when planning their bidding structure.

Mirella Lechna, legal adviser, partner in charge of the Infrastructure & Transport Practice and the Public Procurement & Public-Private Partnership Practice

Liability when using outsourcing

Danuta Pajewska

Outsourcing is mainly used to reduce costs, but it also offers access to the knowhow of specialists in a given field without having to create a dedicated in-house unit. Sometimes the motivation is the opposite, when businesses outsource simple, routine tasks for which contractors can easily be located without having to hire fulltime staff and managers to oversee their work. Just sign a service contract and the matter is dealt with. But is it really so simple?

A wide range of services are outsourced today. Most commonly they involve IT, HR (recruitment, payroll, training, and employment documentation), sales and marketing, customer service (call centre), accounting and administration, including bookkeeping, invoicing and purchasing, and logistics (shipping, distribution, warehousing, storage, and order fulfilment).

In the process of planning and implementing outsourcing, it is crucial to identify the goals of the procedure and analyse the costs, benefits and risks, as well as the legal security of the procedure for retaining the outsource service provider (OSP), that is, establishing in detail the scope of the services, selection of the OSP, and proper negotiation and drafting of the contract terms. It is important for the outsourcing contract to ensure the possibility of monitoring performance by the OSP and the conditions for approval of the work, protection of personal data and other information, establishing the terms for use of space and equipment, and specifying the conditions and procedures for termination of the contract.

The rules for liability are also important, because they are tied to corporate responsibility of the management board for hiring outside contractors to perform company operations. The management board cannot assign its own duties and responsibilities to an outside firm, and when the management board does rely on outsourcing to support the company's operations it must do so in the safest possible manner for the company.

When outsourcing is regulated on the side of either the OSP or the buyer of the outsourcing services, and monitored by competent authorities, strict compliance with the regulations must be ensured. Specific regulations on liability associated with outsourcing of services are set forth in laws governing the activity of banks, brokerages, insurers, and investment funds. In the case of these entities, an agreement for outsourcing of services that are connected with services performed for customers cannot limit or exclude the financial institution's liability for losses suffered by the financial institution's customers as a result of outsourcing of the services. Contractual provisions purporting to impose such limitations on liability are contrary to law and invalid.

Such legal rigours on liability issues do not arise in the case of other types of businesses. The scope of liability is determined by the terms of the outsourcing contract, subject only to restrictions under the civil law, which prohibit a contractual exclusion of liability for a loss caused by the OSP intentionally. Otherwise, the parties are free to define liability for non-performance or improper performance of the services, and possibly provide for contractual penalties, so long as the penalties are set at a reasonable level. A contractual penalty must be paid regardless of the actual amount of the loss, but to maintain the right to seek actual damages exceeding the amount of the penalty this right must be provided for in the contract (otherwise, once the contractual penalty is paid, the injured party cannot seek additional damages under general rules). The amount of the contractual penalty cannot be grossly inflated, because then the OSP may seek a reduction in the penalty, particularly when it has properly performed its obligations to a significant degree.

Laws have recently entered into force in Poland liberalising access to the practice of certain regulated professions, thus lifting a number of restrictions on performance of specialised services that had been in force. On one hand this means an increase in the supply of services available on the market, but on the other hand requires greater care in selection of contractors, because a poor choice may bring negative consequences to the company and its management. The risks of using outsourcing primarily include risk to reputation and the connected risk of losing customers, as well as the risk of civil and criminal liability for both the company and the members of its management board. The use of outsourcing does not eliminate the buyer's responsibility for the consequences of the services performed by the OSP. On the contrary, it increases the need for monitoring the risk of liability to the company's customers or employees for actions by third parties.

Apart from the regulations discussed above applying to outsourcing by financial institutions, the issue of liability is most clearly regulated by the Accounting Act, which provides that the director of the unit shall be responsible for performance of accounting duties, including supervision, even when certain duties are entrusted to another person or business. If the director of the unit is a body with multiple members and no responsible person has been designated within the group, the responsibility is borne by all members of the body.

The Personal Data Protection Act provides criminal sanctions for unauthorised access to personal data and for failure to secure or register personal data. Apart from criminal liability, there is also a risk of civil liability for violation of data subjects' moral rights. It is therefore essential to determine the scope in which the OSP will have access to legally protected customer data, and to adequately protect such data. The outsourcing agreement should contain an express provision entrusting the processing of data only for the purpose indicated in the contract and requiring the OSP to fulfil the organisational and technical requirements applicable to data controllers. A company hiring an outside contractor is responsible for the processing of data by the contractor.

Adequate security must also be provided for information that is protected as a trade secret, classified information, or privileged professional information. If performance of the services makes it necessary to provide such information, it should be done cautiously, only to the extent justified by the type of outsourcing services, and with the possibility of monitoring how such information is protected.

The larger and more complicated the project for outsourcing of services, the more important it is to ensure that the contract with the OSP guarantees that the services will be maintained with the effectiveness and continuity needed for secure achievement of the buyer's commercial goals. The contract should be made in writing to eliminate potential disagreements on the scope of the services and the liability of the parties. Depending on the nature and scope of the OSP's activity, such an agreement may be regarded under Polish law as a contract of mandate, a service contract, or a contract to perform a specific work, which means that the contract will generally be governed by the Civil Code. But not all provisions of the Civil Code are mandatorily applicable, which means that there is a great deal of latitude for the parties to specify the terms of the contract, particularly the terms governing liability, the grounds for immediate termination of the contract, and the conditions for performance of services during the termination notice period.

It is important for the scope of the entrusted activities and the parties' related rights and obligations to be precisely defined in the contract. This is essential for determining whether the contract is regarded as requiring the contractor to make its best efforts or whether the contractor is required to deliver a specific result. If the services are performed poorly, it will generate a risk to the operations of the company outsourcing the services, because in most instances it will not be able to rely as a defence on the fact that it hired a third party which caused the events for which the company faces a risk of liability. For this reason, the buyer must reserve the ability to monitor the services on an ongoing basis, receive current information about performance, and, depending on the nature of the services, also establish a backup plan if there is any interruption in performance of services by the contractor. It should also be agreed whether or not the OSP may subcontract performance of the services, and if so, under what conditions and who bears responsibility for the actions of the subcontractor.

Careful attention to the wording of the outsourcing contract and ensuring the ability to monitor performance will help the company minimise risks and liabilities connected with entrusting some of its tasks to an outside contractor.

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

The risk of buying brownfields

Bartosz Kuraś

Izabela Zielińska-Barłożek

New liability rules for historic soil contamination require a new approach to transactions. The latest changes seem to be a step in the right direction.

The Act of 11 July 2014 Amending the Environmental Protection Law and Certain Other Acts entered into force on 5 September 2014. The act introduced major changes in Polish regulations governing the issue of liability for environmental harm, including liability for past contamination of soil.

The changes mainly concerned the system of permits for exploitation of the environment by business entities, in particular holders of integrated permits. The need for the changes arose out of the requirement to implement the Industrial Emissions Directive (2010/75/EU) into Polish law. One of the goals of the directive is to ensure that the operation of industrial plants does not result in deterioration of soil quality. Polish lawmakers used this occasion to straighten up the existing legal system for protection and recultivation of the earth's surface.

IED and baseline reports

The Industrial Emissions Directive imposes additional obligations for protection of soil and groundwater on operators of installations where substances causing a risk of contamination are used, produced or released. The most important of these appears to be the obligation to submit a baseline report before beginning operations, with information on the existing state of soil and groundwater pollution, and then, after operations cease, to reassess the state of soil and groundwater contamination and take any necessary measures to return the site to the baseline state, not posing a significant threat to human health or the environment.

Baseline reports are to be filed together with the application for issuance or amendment of an integrated permit. They should contain information about current and future operations as well as the state of contamination of soil, land and groundwater.

In light of the restrictive provisions on liability for environmental harm that were in force prior to 5 September 2014 and the new obligations concerning baseline reports and soil and groundwater contamination, it was decided to modify the regulations governing liability for environmental harm. The changes discussed below bring greater order to the system of liability for pollution, and with respect to liability for historic soil contamination the changes liberalise the duties connected with cleanup of past contamination. This will be sure to have an impact on assessment of the risk to potential investors acquiring real estate or companies holding real estate, particularly industrial and post-industrial sites.

Liability for soil contamination prior to 5 September 2014

The system of liability for soil contamination prior to the amendments presented a quite complicated and inconsistent set of regulations from various legal acts. Different regulations applied to contamination and recultivation of soil depending on the type of harm to the surface of the land, the time when the contamination occurred, the perpetrator of the contamination, and the category of soil affected (agricultural and forest land, land connected with mining, land connected with activity posing a risk of environmental harm). It was particularly burdensome to follow regulations from the Environmental Protection Law that were repealed in 2007 but still applied under the transitional regulations.

Under those regulations, the "controller" (most often the owner or perpetual usufructuary) of the surface of land on which there was contamination of soil or earth caused prior to 30 April 2007 was generally required to conduct recultivation, even if the controller was not the perpetrator of the contamination. However, with respect to soil contamination caused from 30 April 2007 forward, it was the entity exploiting the environment whose action caused the harm which as a rule was—and still is—required to redress the injury caused by the contamination.

Historic soil contamination under the new regulations

There are major changes particularly concerning liability for soil contamination caused prior to 30 April 2007. A definition of "historic contamination of the earth's surface" has been introduced which had previously been used among legal practitioners and theoreticians. This concept generally covers injuries caused or resulting from activities completed prior to 30 April 2007.

The controller of the surface of land on which there is historic contamination of the earth's surface is obliged to conduct remediation. Remediation is defined in the act to mean applying measures to the earth's surface with the purpose of removing or decreasing the quantity of hazardous substances, or controlling or limiting their spread, so that the contaminated site ceases to pose a threat to human health or the environment, reflecting the current use and (if possible) planned future use of the site. In justified instances, remediation may consist of natural regeneration, if this brings about the greatest environmental benefit.

"Remediation" has replaced the earlier duty of "recultivation," which generally consisted of bringing the soil into compliance with quality standards set forth by regulation. It is expected that remediation will be easier and less costly than the recultivation that was previously required.

If remediation proves necessary, a remediation plan will be required. In the remediation plan, the feasibility of removing the contamination should first be considered, at least down to the permissible level in soil and ground of the substance causing the risk. The contamination will not have to be removed, however, if it does not pose a threat to human health or the environment and the cleanup costs would be disproportionately high compared to the achievable environmental benefits.

Who is responsible for conducting remediation?

The controller of the surface of the earth may be released from the duty to conduct remediation if, for example, the controller demonstrates that historic contamination of the earth's surface occurring after it took control of the property was caused by another identified person. Then the duty to conduct remediation will rest on the perpetrator. Unfortunately, the controller of the surface of the earth still cannot be released from the duty to conduct remediation by identifying the perpetrator of the contamination if the contamination occurred before the controller took over the property.

Identification of historic soil contamination and pollution register

The amending act introduced additional regulations designed to identify properties where there is historic soil contamination. The General Director for Environmental Protection is now required to maintain a register of such properties. There was an obligation to maintain a register under the law in force prior to 5 September 2014, but it was disputed whether the register should cover historic contamination.

The current regulations now expressly provide that a separate register must contain, among other items, information concerning potential and actual historic contamination of the earth's surface, including information about the nature of the contamination, the location, the date of the occurrence and the current status of the site.

In real estate transactions, it will thus be necessary to check whether the given property has been identified in the register as real estate where there is actual or potential historic soil contamination, and whether remediation has been or is being conducted. Such an entry may affect the value of the transaction. But the lack of an entry does not exclude this risk, because the property could be contaminated but not listed.

The environmental protection authorities are obliged in this respect to identify potential historic contamination of the earth's surface, including through identification of activity that was highly likely to cause historic contamination and was conducted on the given site prior to 30 April 2007.

The head of the county or a person appointed by the head of the county is authorised to enter a site to examine contamination of the soil and earth, and the controller of the site must enable the examination to be carried out. Upon request of the head of the county, the controller of the land must provide any information in its possession concerning potential historic contamination of the earth's surface and potential sources of the contamination.

The owner or perpetual usufructuary of the real estate is also obliged to notify the regional director of environmental protection promptly if it finds that there is historic contamination of the land under its control.

Finally, in certain circumstances the environmental protection authority may order an entity to perform tests of contamination of soil or earth. This applies to sites where operations highly likely to have caused historic contamination of the earth's surface were performed prior to 30 April 2007. In this respect, there must be grounds for suspecting the existence of historic contamination of the earth's surface. Entities exploiting the environment but holding an integrated permit specifying how testing for contamination of soil and earth are to be conducted are exempt from this obligation.

The takeaway

The new regulations introduce quite detailed rules for identifying historic soil contamination and for preventing contamination. An overall assessment of the new rules will not be possible until the missing executive regulations are issued.

The changes that have been introduced are heading in the right direction, however. One of the most important changes is replacement of the quite severe obligation to conduct recultivation with the obligation to conduct remediation. Unfortunately, the Parliament did not decide to introduce a possibility for the acquirer of real estate where historic soil contamination has already occurred to be released from this obligation by identifying the perpetrator of the contamination. This possibility exists only in the case of contamination that occurred after taking control of the site.

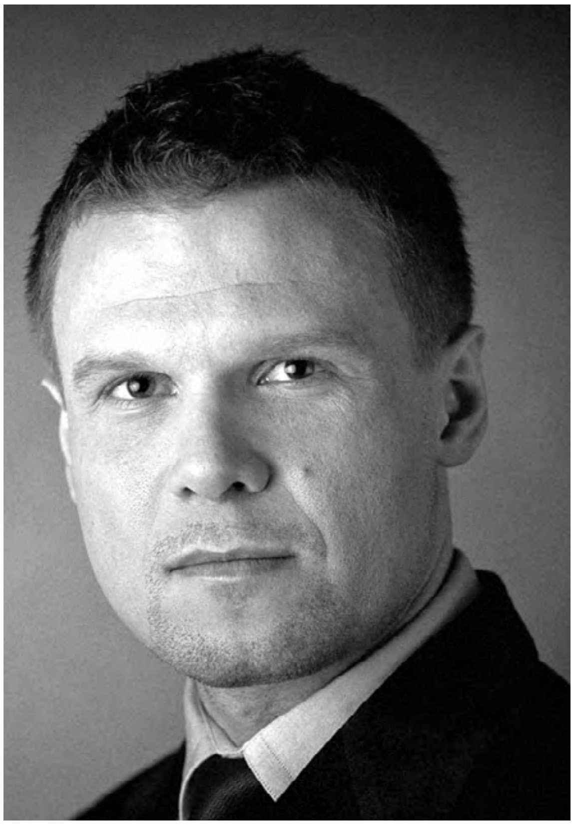
Notwithstanding these changes, it is still recommended to take account of the risk connected with contamination of real estate in transaction documents and regulate the rights of the parties to the transaction accordingly.

Bartosz Kuraś, Environmental Law Practice

Izabela Zielińska-Barłożek, legal adviser, partner in charge of the Environmental Law Practice

Reductions in employment in joint ventures by competitors

Dr Szymon Kubiak



In today's knowledge-based economy, consolidations of enterprises are common—sometimes even between competitors. Employment reductions are a natural part of any consolidation, but are a source of legal risks for merging competitors. Such risks are hard to eliminate, but does it have to end in stalemate?

Imagine a joint venture planned between enterprises that have so far been competitors. In numerous jurisdictions, including Poland, each company plans to consolidate its main line of business with similar activity conducted by a competing firm.

It may come as a surprise to many people to learn that in such a case, the most interesting and most problematic issues may not lie in the field of competition law, but in the field of employment law. This occurs particularly when at the level of the holding companies whose subsidiaries are creating the joint venture a global transaction framework agreement is entered into specifying such items as the maximum number of employees from each of the entities who can join the newly created joint entity in each country covered by the agreement. In the case of our hypothetical client, let us suppose that this number is smaller than the number of persons currently working at the Polish subsidiary. The fate of the rest of the workers is then pretty much sealed.

What is allowed before consolidation?

The hypothetical fact situation described raises a number of questions. The most important of them is whether such a global agreement can effectively define the number of employees who will be "transferred" (whether automatically, i.e. under Polish law pursuant to Art. 23^1 of the Labour Code, or on the basis of offers of employment presented and accepted, which in practice results in dissolution of their employment relationship by agreement of the parties in connection with receiving an offer of employment from a new employer).

The answer to this question is generally negative. Pursuant to the established case law of the Supreme Court of Poland under Labour Code Art. 23^1 and of the Court of Justice of the European Union under the Transfers of Undertakings Directive (2001/23/EC), contractual specification or modification of the number of employees subject, in this case, to transfer by operation of law to the newly established employer should be regarded as ineffective against the employees. In Poland, conducting layoffs of employees under these conditions will carry a high risk of violation of Labour Code Art. 23^1 §6, under which transfer of the workplace or part of the workplace cannot provide grounds justifying termination of employment by the employer.

Nonetheless, the business and operational purposes of the newly established joint venture typically require conclusion of an agreement structured in this way. This is because the optimal business operations of the newly established entity will require a certain number of people employed at specific positions, and not one person more.

Risk reflected in costs

So is there any room for manoeuvring? Certainly. One avenue to consider is termination of employment e.g. by agreement of the parties, ideally at the request of the employee (which typically requires additional financial incentives). Even that is not a risk-free approach, however (for reasons that go beyond the scope of this article).

The stated grounds for termination could be entirely unrelated to transfer of the workplace or part of the workplace, but if the employee appeals to the labour court it may be difficult indeed for the employer to defend these grounds.

Even lawyers with many years of practice can be surprised at their clients' willingness to accept a high level of risk in this respect. They treat the risk as entirely secondary to the business targets of the transaction. This clearly depicts the demands and realities of the contemporary economy.

Traps in selection of employees

The next question we must ask under these hypothetical facts is whether, prior to establishment of the joint-venture company, each of the existing employers can select which of its own employees will be laid off (including through group layoffs) based on specified "business and operational needs," that is, using criteria determined independently by each of the employers.

The answer is not obvious, and the problems only escalate. We should bear in mind that competing entities are involved, which means that difficulties in communicating should be expected, as well as a lack of trust and a disinclination or inability to share employment procedures (e.g. in terms of the employee evaluation systems applied by the employers). On top of that, the systems and criteria for employee evaluation applied in the past by each group may be entirely incompatible.

Lawyer and HR consultant

So the situation does seem to be heading toward stalemate. Even the most skilfully conducted process for establishing the criteria for selecting employees to move to the newly created employer (which for the staff not chosen will mean de facto group layoffs) will be subject to a substantial risk of being found to be illusory, because the only authentic criterion would be the business and operational needs of the newly created company, not those of the existing employers.

Here an additional challenge arises for legal advisers involved in such transactions. They need to balance the risks that have been signalled with the proposal (if possible) of innovative and creative solutions enabling the client to implement its ultimate business model. Such measures often extend beyond the traditional understanding of legal advice and shade more into the field of HR consulting. But lawyers handling employment matters must have this knowhow in order to meet the demands of today's clients.

So what options are there? Either conducting layoffs before establishment of the joint-venture company, but based on uniform and consistent selection criteria established by all of the employers, or conducting such layoffs after creation of the new employer (the longer after it is created the better), only after all of the staff of the existing employers become employees of the new company. The latter solution is optimal in terms of the ability to make an objective comparison of the usefulness of the employees for the company that is now in operation, considering the synergies as well as any problems connected with combining several groups of staff in a new entity.

Permissible external support

It should be borne in mind here that an employer conducting layoffs for economic reasons (not attributable to the employees), and thus for example in the case of a merger of the operations of companies through creation of a joint-venture company, must be able to prove that it applied fair and objective criteria in selecting staff for layoffs and considered all employees affected by the reasons forcing it to terminate employment. If rules for proceeding are established, particularly criteria for selecting staff to be laid off, they should also be applied consistently to all employees. Any departures from the adopted rules require strong and persuasive justification.

Particularly interesting and helpful in this context is the judgment of the Supreme Court of Poland of 1 June 2012 (Case II PK 258/11) concerning the employer's right to establish criteria for selection of employees for termination in group layoffs.

This ruling was issued in a situation where, in connection with a planned reorganisation and consolidation of the sales departments of two companies, an evaluation of the competencies of the employees of the two companies was conducted for the purpose of selecting staff to be laid off. In the area analysed by the court, there were three sales reps working for each of the consolidating companies. The consolidation resulted in duplication of coverage of their regions, requiring a reduction in the number of sales reps accordingly. The evaluation programme was conducted by an outside firm, which prepared the methodology for assessment of the employees based on its own knowhow in this field. The external advisers decided to use an assessment centre approach.

The court permitted the employer to use as the sole criterion for selection of staff to be laid off an assessment of the employees' competencies that were relevant from the point of view of the employer, ignoring other criteria deemed less important, such as their previous career path, length of employment, professional experience or formal qualifications (education).

This means that an employer is entitled to establish criteria for selecting staff to be let go in group layoffs so that the employees possessing the characteristics (competencies, attitudes and skills) most desired by the employer under the new, post-consolidation circumstances are retained.

The court's positive assessment of the role of external firms in this process is hugely important in practice, particularly when it comes to external firms offering services such as assessment centre, enabling a comprehensive and objective evaluation of employees and selection of staff for layoffs in a manner that is uniform across both of the merging entities. Based on this ruling, an employer choosing staff to be laid off may rely if it wishes exclusively on an assessment by professional advisers specialising in evaluation of employees' competencies and capable of conducting an objective evaluation based on a developed methodology.

An additional advantage of this approach is the confidentiality offered by an outside service provider—essential when the new employer is being established by companies who are currently strong competitors on the same market. The employers involved would naturally expect the external advisers to sign a strongly worded non-disclosure agreement.

Practice will show whether the use of assessment centre services gains in popularity in such cases. As the reader may surmise, the considerations are not entirely theoretical.

Dr Szymon Kubiak, legal adviser, partner, Employment Law Practice

Fewer problems with processing of personal data

Sylwia Paszek Agnieszka Szydlik Katarzyna Żukowska



The amendment to the Personal Data Protection Act that went into force on 1 January 2015 introduced a number of changes, the most important of which involve the method of registering personal data filing systems, the role of data protection officers, and the rules for transfer of data to third countries.

One of the purposes of the new data protection rules, part of a broader set of changes known in Poland as the Fourth Deregulation Act, was to eliminate red tape and make life easier for businesses.

Competencies of data protection officer

The amended act regulates in detail the position of data protection officer (DPO). From now on DPOs will be registered with Poland's data protection authority, the Inspector General for Personal Data Protection (GIODO). DPOs have also gained new competencies, including maintaining their own register of filing systems, which previously had been done exclusively by GIODO.

Until the end of 2014 the Personal Data Protection Act required data controllers to appoint a DPO to supervise compliance with rules for protection of personal data processed by the data controller. There was an exemption from this requirement only for data controllers who personally performed the duties provided for DPOs (and the position taken in the legal literature was that this exemption applied only to data controllers who were natural persons).

From 1 January 2015, data controllers are no longer required to appoint a DPO. However, if they do appoint a DPO and enter the DPO in the register maintained by GIODO, they generally will not be required to register their filing systems of personal data with GIODO (with the exception of filing systems containing sensitive data). If they do not appoint a DPO, the data controllers themselves will have to perform the DPO's duties, except for maintaining a register of filing systems.

Under the transitional provisions, data protection officers appointed under the rules in force through the end of 2014 can continue to serve as DPOs under the new rules until they are entered in the register of DPOs at GIODO, but only until 30 June 2015 at the latest. Apparently DPOs who are not registered with GIODO can serve until that date under the previous rules that were in force when they were appointed.

Requirements for data protection officers

To be eligible to serve as a DPO under the amended act, a person must:

- Have full legal capacity and full public rights
- Have appropriate knowledge in the area of personal data protection, and
- Not have been convicted of an intentional criminal offence.

These requirements must also be met by a deputy DPO, if appointed.

The law does not specify how the DPO's "appropriate" knowledge of data protection will be verified, but seems to rely on market mechanisms. Nor are DPOs required to be Polish citizens. A foreigner could thus be appointed as a DPO in Poland, and whether he or she has legal capacity and public rights would then be determined according to the person's home jurisdiction.

Moreover, the act requires the data controller to provide the DPO with the means and organisational separation needed to perform the DPO's tasks independently (previously this was only regarded as best practice). The DPO should report immediately to the director of the organisational unit, and if the data controller is a natural person, then directly to that person. Data controllers must therefore review their organisational structure and if necessary modify it to meet the new requirements.

It is also expressly permitted to entrust other duties to the DPO, so long as they do not interfere with proper performance of the duties reserved to the role of data protection officer.

The data controller has 30 days to notify GIODO of appointment or removal of the DPO. It is not clear, however, whether this notification is declarative or constitutive; in other words, whether appointment or removal of the DPO is effective on the date of appointment by the data controller or only upon registration with GIODO. The first of these options seems to be justified, but the issue has not been finally resolved.

Registration of filing systems

The previous rules required data controllers to register at the GIODO office nearly all filing systems (i.e. databases, whether in electronic or paper form), regardless of the type and the scale of operations. This obligation could have covered even the Rolodex on someone's desk, if the data there did not fall within an exemption from registration (e.g. for employee data or publicly available data).

The amendment lifted the requirement to register filing systems with GIODO if they do not use IT systems and do not contain sensitive data.

Data controllers who have appointed a DPO and registered the DPO with GIODO are not required to register filing systems with GIODO (unless they contain sensitive data). Instead, upon registration with GIODO, the DPO is required to maintain a register of filing systems.

The register maintained by the DPO should contain a description of the characteristics of the filing system essentially corresponding to the notification for registration of the filing system with GIODO. The register is public. The amended act provides in this respect for the regulations for the openness of the GIODO register of filing systems to apply as relevant to registers maintained by individual DPOs. This generally means that any person has a right to review the register maintained by the DPO.

If the register is maintained in electronic form, the DPO is required to provide access to the register on the website of the data controller or make it available for review to any interested person on the IT system at the data controller's registered office. If the register is maintained in paper form, the DPO must enable any interested person to review the register at the data controller's office.

These requirements mean that in practice it may prove simpler for data controllers to continue registering filing systems with GIODO than to have the DPO maintain a register within the organisation.

With respect to sensitive data, the regulations have essentially not changed. Before processing sensitive data, the filing system must be registered with GIODO.

Currently registered filing systems

It is unclear whether existing registrations of filing systems at GIODO by data controllers who decide to appoint and register a DPO will be deleted. An interpretation requiring such entries to continue to be updated, or requiring an application by the data controller to delete the entry, is conceivable, but not consistent with the spirit of deregulation behind the amendment.

It would be more desirable to recognise that release from the requirement to register filing systems with GIODO based on maintenance of a register by a DPO who has been registered with GIODO should also release the data controller from the obligation to update earlier entries in the register maintained by GIODO. The practice will show which of these approaches the regulator decides to follow.

Transfer of personal data to third countries

The amendment has significantly changed the rules for transfer of personal data to third countries, i.e. outside the European Economic Area.

As before, personal data may be transferred to third countries if the destination country ensures an adequate level of protection of personal data in its territory. This means that without following any individualised administrative procedures, it will still be possible to transfer data to third countries for which the European Commission has issued a decision recognising that they provide an adequate level of protection—such as Switzerland—and to entities in the United States which are registered in the Safe Harbour system.

A new aspect, however, is the ability to transfer personal data to an entity located in a third country, without obtaining the consent of GIODO, despite the lack of prior evaluation or qualification in terms of ensuring an adequate level of protection. Such transfer will be possible if conducted pursuant to an agreement between the transferor and the recipient of the data based on (i) standard contractual clauses approved by the European Commission pursuant to Art. 26(4) of the Data Protection Directive (95/46/EC) or (ii) "binding corporate rules," i.e. internal policies and codes of best practice adopted by international corporate groups and approved by GIODO.

Previously, conclusion of a data transfer agreement by the parties, undertaking to comply with the highest standards of data protection, was not acceptable in Poland as a separate basis for transfer of personal data to a third country. It was only one of the factual elements evaluated by GIODO when decided whether or not to permit the transfer.

Polish lawmakers essentially reviewed the existing construction and, according to the justification presented for the amending act, reached the conclusion that "in light of the decisions of the European Commission, application of standard contractual clauses is recognised as ensuring adequate guarantees of the rights and freedoms of data subjects; therefore, in the case of use of standard contractual clauses in the process of transfer of data to a third country there is no justification for conducting administrative proceedings to obtain the approval of the data protection authority."

Similar recognition of a separate basis for transfer has been given to binding corporate rules, under the condition that they are first approved by GIODO. Binding corporate rules are a legal instrument of a general character to be applied to all international transfers of data within a capital group of enterprises. If the specific binding corporate rules are approved by GIODO and the transfer is conducted in compliance with those conditions, then GIODO does not have to consent to specific transfers of data. The wording in the act was drafted so that it also covers international corporations entrusted by others to process their data under a contract referred to in Art. 31 of the Personal Data Protection Act.

In the procedure for approving a specific set of binding corporate rules, GIODO will need to consult with other data protection authorities in the EEA which have already reviewed or approved the same rules. GIODO is required to take their rulings into consideration but is not bound by them. This appears to be a major defect in this solution. It would be reasonable to create a system for mutual recognition of approvals issued by other data protection authorities in the EEA, and indeed there are already plans to create such a system. Authorities in the member states would be required to mutually recognise decisions by other authorities approving binding corporate rules, subject to a right of refusal only in instances provided for by law, with a specified degree of materiality.

Notwithstanding the existing imperfections, the formal liberalisation of the rules for transfer of personal data represents a significant relief for multinational corporate groups. Given the large number of data transfers within groups, with new subsidiaries frequently being created and existing members of the group sometimes changing the subject of their business or closing down, the ability to transfer data within the group without waiting months for approval from GIODO should significantly streamline the operations of large organisations.

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Are electricity prices too high?

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The answer to the question posed in the title depends primarily on whether you are an electricity customer, or a producer or seller. Customers naturally think that electricity costs too much. But producers and sellers take the view that electricity prices in Poland are too low and discourage a desirable level of investment in energy infrastructure.

Electricity customers always think prices are too high. This is particularly true for large industrial users, for whom electricity is a major cost item, running sometimes to millions of zloty annually. Industrial customers argue that high electricity prices hold them back from competing effectively on global markets.

Producers and sellers of power claim that prices are so low that they do not enable energy infrastructure to be adequately maintained. Lenders may regard investments in the power industry as too risky and not ensuring a return on investment because the potential revenue of companies selling electricity is too low.

These issues do not affect the Polish power industry alone. They are increasingly debated throughout the European Union. It is turning out that with increasingly greater generation of energy from subsidised renewable sources, power generated through burning of gas or coal is needed only at certain hours of the day, e.g. when the sun isn't shining or the wind isn't blowing. But the costs of intermittent start-up of a gas- or coal-fired power plant are so high that the prices of such electricity would be much higher than the current market prices. Otherwise, such power plants would have no reason to exist.

In Poland, production of energy from renewable sources, supported by significant additional funding, is not yet driving traditional electricity production from the market. But the relatively high supply of energy, produced mostly from old and depleted carbon sources, means that prices are not rising but are even falling periodically.

This situation resembles the price competition among taxi-cab companies with a 20-year-old fleet of vehicles. The old cars are still running, and passengers are happy because fares are low, but price competition does not enable the companies to save for the purchase of new cars or service the debt if they borrowed to buy a new fleet. It is clear that most of the cars will stop running in a few years, and then passengers will have to walk.

How much does electricity really cost?

In recent years, the prices of electricity in Poland have not increased, but have indeed decreased periodically. According to figures published by the Polish Power Exchange, weighted average monthly prices for electricity on the commodities exchange for day-ahead spot transactions were:

- PLN 179/MWh in January 2012
- PLN 171/MWh in January 2013
- PLN 150/MWh in June 2013
- PLN 162/MWh in January 2014
- PLN 180/MWh in October 2014.

According to a communiqué from the President of Poland's Energy Regulatory Office, the average sale price of electricity on the competitive market in 2013 was PLN 181.55/MWh, a decline from 2012 when the average price was PLN 201.36/MWh. The regulator has information about all transactions on the market (not only those made on the power exchange) and on this basis calculates and publishes the average price.

At the present time electricity prices are not regulated, with the exception of prices for household customers, known as tariff group G. For this category of customers, tariffs approved annually by the President of the Energy Regulatory Office are still in force. When approving tariffs for group G, the regulator takes into consideration the need to protect households from excessive and unjustified price increases.

Expensive certificates

It should be borne in mind that electricity prices are made up not only of the cost of the electricity itself. The final price of each megawatt-hour is also influenced by the costs of various support systems. Entities selling electricity to end users are required to purchase green, yellow, purple, red and white certificates in proportions established by law. The proceeds from the sale of certificates go, respectively, to enterprises generating power from:

- renewable energy sources (green certificates)
- high-efficiency gas-fired cogeneration (yellow)
- high-efficiency methane-fired cogeneration (purple)
- other high-efficiency cogeneration (red)

and enterprises carrying out energy efficiency projects (white certificates).

In October 2014 the cost of certificates was about:

- PLN 170/MWh for green certificates
- PLN 104/MWh for yellow certificates
- PLN 60/MWh for purple certificates
- PLN 10/MWh for red certificates.

Because the mandatory purchase of certificates applies only to a statutorily defined portion of the total volume of power sold to end users, the prices of certificates do not carry over directly to the price of each megawatt-hour delivered. The cost of the support systems—the "colours"—is allocated so that each unit of electricity sold to end users bears the same amount of this cost. This is a significant cost item. For this reason, one of the amendments to the Energy Law introduced the possibility of offering relief to the largest industrial customers with respect to the need to cover the cost of purchase of the various coloured certificates. The purchase of electricity by such industrial users is to be partially exempt from the mandatory financing of the "colours."

As of January 2015, this relief for industrial customers had not yet entered into force because the amendment was notified to the European Commission as a state aid programme and had not yet been approved by EU officials. Approval may come in 2015 after certain modifications to the programme.

What is behind the cost?

The amount of an electricity bill is influenced not only by the cost of electricity alone (active power and sometimes also reactive power) and the cost of purchase of coloured certificates. Fees charged by companies transporting electricity from the producer to the user are also included. Enterprises transporting electricity are the transmission system operator (TSO) and distribution system operators (DSOs).

The TSO (Polskie Sieci Elektroenergetyczne S.A.) charges fees for transport of electricity (transmission services) in accordance with tariffs approved by the President of the Energy Regulatory Office. The tariffs are drawn up under rules set forth in the Energy Law and executive regulations issued under the Energy Law. Under these tariffs, the transmission fee charged by the TSO includes the following elements:

- Grid fee for transmission of electricity physically taken from the transmission grid, with two components:
    - Fixed component corresponding to the costs of ongoing maintenance of the grid proportional to the contracted capacity
    - Variable component based on the quantity of electricity transmitted
- Quality fee for use of the national electricity transmission system, corresponding to the costs of maintaining the quality, reliability and security of electricity supplies, e.g. power reserves, as well as assuring deliveries on the balancing market
- Market fee, corresponding to the compensation costs for exchange of electricity between the Polish electricity system and the electricity systems of countries outside the EU.

The TSO also charges a transition fee to recoup the costs of energy enterprises that were “stranded” as a result of termination of long-term contracts for sale of capacity and electricity. This fee is collected directly from customers connected to the transmission grid, or via DSOs (who collect and remit the fee) in the case of other end users.

At the retail level, DSOs charge distribution fees similar to transmission fees. The distribution fees comprise the following elements:

- Grid fee for distribution of electricity, comprising two elements:
    - Fixed component corresponding to the costs of ongoing maintenance of the grid, apportioned in accordance with the customers’ contracted capacity, or in the case of households (tariff group G) depending on the metering and settlement system
    - Variable component based on the quantity of electricity transmitted
- Quality fee determined on the basis of the costs of purchase of electricity transmission services from the TSO, in the portion concerning use of the national electricity system
- Subscriber fee for reading and ongoing control of meters and settlement systems.

Apart from the foregoing fees, DSOs also collect the transition fee referred to above from customers and remit it to the TSO.

Finally, sellers of electricity may charge a sales fee for customer service, e.g. invoicing.

The Renewable Energy Sources Act passed by the Parliament provides for an additional fee, known as the RES fee, designed to cover the costs of functioning of the new RES support system. It is to be collected from end users connected to the transmission or distribution grid in an amount based on the quantity of electricity taken off the grid. The legislative process for the new RES Act had not been completed when this article went to press, but based on the latest figures the RES fee is supposed to be PLN 2.51/MWh.

On top of that, the sale of electricity is subject to VAT at the rate of 23%, and retail sales are subject to excise tax of PLN 20 per megawatt-hour.

Decoding an electric bill

Thus the standard electricity bill of an average enterprise in the net amount of PLN 20,650.42 is made up of the following components:

% of the bill	component		fee
79	sale of electricity	sales fee	PLN 181.09/month
		active power sold	PLN 16,062.54
21	distribution of electricity	fixed grid fee	PLN 1,675.00 (calculated on the basis of contracted capacity)
		variable grid fee	PLN 1,489.51 (calculated on the basis of the quantity of active power consumed)
		quality fee	PLN 805.89 (calculated on the basis of the quantity of active power consumed)
		subscriber fee	PLN 13.10/month
		transition fee	PLN 410.00 (calculated on the basis of contracted capacity)
		reactive power consumed	PLN 13.29 (calculated on the quantity of electricity)

Whether that looks like a lot or a little all depends on the point of view. But it should be borne in mind that short-term savings can end up costing a lot in the longer term.

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Assignment to Poland: An appealing proposition for foreign employers

Magdalena Świtajska

Employment, migration and social insurance rules make assignment abroad an attractive solution for foreign employers to leverage human capital for quick and effective launch or growth of operations in Poland.

Poland is a popular destination for foreign investors to establish shared services centres for intra-group outsourcing of functions such as accounting, distribution and call centre.

Entities created in Poland to perform such services rely for their operations mostly on labour and knowhow rather than physical assets. This means they have to recruit the right staff and provide them the knowledge and skills they need to achieve business results in line with the standards of the group. The process of recruitment and training of staff, particularly in the case of entities that plan to hire dozens or hundreds of people, is time-consuming and labour-intensive, which generally rules out the possibility of developing new structures relying solely on the local labour force.

This means that foreign employers are increasingly interested in assignment of their current employees to serve in newly established subsidiaries and branches in Poland for short periods of several months to a few years. These employees, equipped with knowledge, skill and experience in the business conducted by their foreign employer, are responsible for creating the local structure, implementing internal procedures, recruiting and training local workers, and supervising the operations of the new entity until it becomes self-sufficient. With this approach, it is possible to launch such an entity within just a few weeks after it is established and registered.

But assignment of staff to Poland by foreign employers is an attractive solution not just businesswise, but also legally.

Working and salary conditions during assignment

Unlike the case of assignment by Polish employers to work abroad, assignment by foreign employers of their employees to work in Poland does not require compliance with all regulations of Polish employment law with respect to the assigned employees. The terms of assignment must only meet the “minimal” conditions of employment set forth in Chapter II of the Labour Code (Art. 67^1–67^4). The foreign employer is required to provide an employee assigned to Poland conditions of employment no less favourable than those arising out of the Labour Code and other regulations governing the rights and obligations of employees in Poland with respect to:

- Norms and periods of working time and daily and weekly periods of rest

- Periods of annual holiday leave
- Minimum wage
- Overtime pay
- Occupational health and safety
- Parental entitlements
- Employment of youth
- Non-discrimination, and
- Work by temporary employees.

In practice, compliance by foreign employers with these minimal conditions for employment of staff assigned to Poland does not present great difficulties. The terms of assignment are established in agreements with the assigned staff or assignment letters. Polish regulations do not expressly require such documents to be prepared, but nonetheless an assignment letter or agreement confirming at the least the fact and period of assignment will be necessary to obtain a work permit if required in the specific instance.

Legalisation of work and stay

The rules and procedures for legalisation of work and stay of staff assigned to Poland by foreign employers also help make assignment an accessible and relatively easy solution for foreign employers launching or continuing operations in Poland. One reason assignment is such a fast and easy method for deploying foreign staff in Poland is that the position does not have to be offered to local job candidates first.

Citizens of countries from the European Union or the European Economic Area or Switzerland assigned to work in Poland by foreign employers are not required to obtain a work permit, stay permit or visa at all in order to perform work and stay in Poland for the period of assignment—without time restrictions. Such employees must register their stay in Poland, however, if the period of their assignment and related stay in Poland exceeds 3 months. This obligation should be fulfilled the day following the end of 3 months from the date of entry into Poland. But this is a formality, and the province governor's office will typically register the stay and issue the relevant certificate on the spot, without a fee.

The regulations impose somewhat greater requirements for assigned employees who are not citizens of EU or EEA member states or Switzerland. The recent new Foreigners Act of 12 December 2013 did not introduce any significant changes in this respect. Employees from such third countries assigned to work in Poland by foreign employers must still hold two documents: a work permit and a stay document (i.e. a visa or temporary stay permit), without the possibility of substituting a unified permit for both stay and work. In practice, however, these documents can be obtained easily and in a relatively short time. While the foreign employer must obtain a work permit for the assigned employee, which is issued in Poland by the province governor for the place of assignment, the employer may conduct the entire procedure through an attorney. Obtaining a permit requires essential information about the foreign employer, the entity in Poland and the employee, and basic supporting documents (registry documents, a copy of the employee's passport, and the assignment letter). The permit is generally issued within one month after filing of a complete application, for a fee of PLN 50–100.

Additionally, an assigned employee who is not a citizen of an EU or EEA member state or Switzerland must obtain a Polish work visa, issued on the basis of the work permit. However, employees who are citizens of the US, Canada, South Korea and other countries enjoying this exemption may begin work in Poland pursuant to their assignment on the basis of the work permit alone, without a visa, for the first 90 days of their stay in Poland. The obligation for them to obtain a visa (or temporary stay permit) applies only when their assignment in Poland continues beyond 90 days.

Social insurance

EU and international regulations also provide for easier social insurance arrangements for employees assigned to Poland by foreign employers. These regulations allow assigned employees to remain within the coverage of the social insurance systems of their assigning countries, particularly when they are assigned for short periods of up to a few years.

Thus, for example, under a set of European regulations on coordination of social security systems (1408/71 (EEC), 574/72 (EEC), 883/2004 (EC) and 987/2009 (EC)), staff assigned to work in Poland by employers operating in an EU or EEA member state or Switzerland who were covered by social insurance in the assigning country for at least a month before their assignment to Poland will continue to be covered by the social insurance system of the assigning country for an assignment period not exceeding 24 months. To confirm this entitlement, the foreign employer must obtain a Form A1 from the social insurance institution in the assigning country certifying that social insurance premiums for the employee are paid to the relevant institution in the country of employment and thus the employee is insured there. Holding this certificate provides an exemption from payment of social insurance in Poland.

Similar solutions are provided for in treaties between Poland and other countries, such as the Social Security Agreement between the United States and Poland and the Social Security Agreement between Canada and Poland, both signed on 2 April 2008. The US agreement provides that an employee will continue to be covered by the US social security system if sent by his or her US employer to work in Poland temporarily for a period not expected to exceed 5 years. Employees covered by the Canadian social security system will continue to be covered by that system during a period of assignment to Poland not exceeding 60 months. As in the case of assignment within the EU or EEA, the foreign employer is required to obtain a certificate for the assigned employee confirming that he or she is covered by the US or Canadian system.

In addition to provisions concerning social insurance, there are also numerous tax treaties in place allowing assigned employees to avoid double taxation of the income they earn while assigned to work in Poland.

All of these aspects together make assignment of employees an attractive solution for foreign employers seeking to quickly develop their business in Poland.

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Payment guarantees in construction contracts

Michał Wons

Not every bank guarantee or insurance guarantee provides adequate security to construction contractors. How should the document be worded so it truly ensures that the contractor will be paid?

A payment guarantee, as referred to in Art. 649[1] §1 of Poland's Civil Code, is a legal instrument securing a contractor's claim against the investor for payment of its fee for performance of construction work. The investor may select the form in which payment will be secured: a bank guarantee, insurance guarantee, letter of credit, or surety issued by the bank at the instruction of the investor. In practice, bank guarantees and insurance guarantees are the most frequently encountered forms. They are used extensively and well-established in commercial practice in Poland, ensuring that transactions are undertaken safely and effectively.

But not every bank or insurance guarantee properly secures the contractor's interests.

Concern for the contractor

The institution of payment guarantees was introduced by a separate law, the Construction Work Guarantees Act of 9 July 2003. In 2006 the Constitutional Tribunal struck some of the provisions of that act as unconstitutional, however. In 2010 the act was repealed and regulations governing these guarantees were reintroduced by an amendment to the Civil Code.

The reason these regulations exist is to protect construction contractors, who often, before receiving payment themselves for large construction projects, had to pay for materials and pay the fees of their own subcontractors, forcing the contractors into bankruptcy. Under current law a contractor (which should be understood to mean also a general contractor) has a right to demand a guarantee of payment from the investor at any time—i.e. when the construction contract is in force (the work need not have commenced yet)—up to the amount of the contractor's possible claim for its fee under the construction contract as well as additional or necessary work approved in writing by the investor.

The subsequent articles of the Civil Code provide that if the contractor does not obtain the requested payment guarantee within the time it has set, no less than 45 days, it may withdraw from the contract for reasons attributable to the investor, effective upon notice of withdrawal. If the investor seeks to withdraw from the contract because the contractor has demanded a payment guarantee, the investor's notice of withdrawal is ineffective.

However, the Civil Code does not specify the minimal terms that must be included in a payment guarantee in order to effectively secure the contractor's claim.

It may happen in practice, for example, that an investor presents a bank guarantee or insurance guarantee that does not permit the contractor to effectively enforce payment from the guarantor if the investor refuses to make due payment. Then the contractor's only line of defence is to prove that the document does not in reality constitute a payment guarantee within the meaning of Civil Code Art. 649^1.

The three most important features the document must have in order to truly ensure that the contractor is paid are discussed below.

Irrevocable

A purposive interpretation of Civil Code Art. 649^1 leads to the conclusion that a payment guarantee must realistically secure payment of the fee owed to the contractor. After all, the drafters of this provision did not permit exclusion of the application of this provision under the principle of freedom of contract or permit the investor to withdraw from the construction contract because the contractor has demanded a payment guarantee.

A guarantee that may be revoked at any time in its entirety, even with respect to security for the fee for construction work already completed or for work not yet completed but subject to performance under a binding contract between the parties, does not serve the fundamental guarantee function.

A bank guarantee or insurance guarantee therefore must not provide that it may be revoked before the end of the term for which it is issued. The wording that a guarantee is "irrevocable" was carried over from common-law usage to bank or insurance guarantees issued under Polish law. While it is true that under general principles of civil law, a declaration of will that is submitted to the addressee may not be revoked without the consent of the addressee (Civil Code Art. 61 §1, second sentence), considering how important it is to the contractor to ensure that the undertaking to pay the guaranteed amount can be enforced at any time after conclusion of the contract, it is, in any event, expressly stated in the document that the undertaking is irrevocable.

The essence of the contractor's legal protection under Civil Code Art. 649^1 is the certainty that it will be paid its fee. This is also the civil-law understanding of the notion of a "guarantee" (whether it is a bank guarantee or, for example, a guarantee of quality), which always refers to securing the claims of one of the parties to a civil-law relationship.

It appears that a guarantee would comply with the requirements of Art. 649^1 despite being revocable, but only with respect to construction work that has not yet been performed and will not have to be performed in the future. For example, the guarantor acting for the investor could exercise the right to revoke the payment guarantee in a situation where one of the parties has withdrawn from the construction contract or the scope of the work has been amended in an annex to the construction contract, resulting in a change in the amount of the contractor's fee. Nonetheless, Art. 649^4 §3 should be borne in mind, providing that the investor may not refuse to pay the fee despite failure to perform the construction work if the contractor was ready and able to perform but was prevented from performing for reasons attributable to the investor.

The absence of a statutory legal specimen for payment guarantees generates many doubts concerning their proper wording. Thus the reasoning set forth above may not be obvious in a situation where the investor required to present a payment guarantee is the State Treasury, acting through organisational units created for the purpose of carrying out development projects (such as the General Directorate for National Roads and Motorways). In our practice we have encountered the situation where a contractor received a bank guarantee from a public investor stating that it may revoked at any time. The contractor served notice of withdrawal from the construction contract pursuant to Civil Code Art. 649^4, asserting in the statement of withdrawal that a revocable bank guarantee does not constitute a payment guarantee within the meaning of Civil Code Art. 649^1. The investor responded that the withdrawal was an abuse of law because in the case of a public investor the contractor should not worry about getting paid.

But it is hard to deny the justice of the contractor's statement that it must be certain that the guarantor will really pay the amount due and not just guarantee that it will pay it. This leads to the second essential feature of a bank or insurance guarantee.

Unconditional

In the bank or insurance guarantee document, the guarantor should undertake not only irrevocably, but also "unconditionally" to pay the specified amount to the beneficiary of the guarantee. This provision is important for two reasons.

Firstly, this makes it much easier to obtain payment of funds from the guarantor.

In legal practice, cases are encountered where payment is made conditional on enclosure with the demand for payment of specific declarations (e.g. a statement that the investor has failed to make timely payment of the amount demanded despite receipt of a written demand for payment), or submission of certain documents (e.g. a copy of the demand for payment issued to the investor, a copy of the protocol certifying that the structure was delivered without defects, or a statement by the contractor that the amount is undisputed). The fewer such "conditions" (in the informal sense of the word) that must be fulfilled for the guarantor to pay out the funds, the better it is for the contractor.

Furthermore, this highlights an essential characteristic of a bank or insurance guarantee: the "abstract"—separate and distinct—nature of the undertaking stated in the guarantee. The guarantee should not contain any conditions which the beneficiary must fulfil in order for the demand for payment to be honoured by the guarantor. Payout of the funds under the guarantee may not depend on whether, for example, the amount is disputed or the investor and contractor differ in their assessment of the civil-law relationship between them. In the case of an ideally abstract obligation, the guarantor will pay out the funds even if they are not due—which does not exclude subsequently seeking reimbursement.

Most guarantees offered by banks and insurance companies in Poland include a requirement that the contractor first must seek payment from the investor, and must include proof of submission of such demand together with a statement by the beneficiary that the investor failed to pay the amount demanded on time. However, much more extensive requirements that must be met by the beneficiary are also sometimes encountered. The more such requirements there are, the greater is the likelihood that the guarantor will find some formal shortcoming in the demand for payment and refuse to pay.

Payable on first demand

The guarantor's undertaking to pay "upon first demand" means that the guarantor must pay within the time specified in the guarantee, counting from the date of receipt of the demand for payment, regardless of whether the result secured by the guarantee has occurred. A seven-judge panel of the Supreme Court of Poland held in the resolution of 16 April 1993 (Case III CZP 16/93) that the guarantor (bank or insurer) issuing a guarantee with a "first demand" clause, as with an "unconditional" clause, may not exclude or limit its obligation to pay by asserting defences arising out of the underlying relationship in connection with which the guarantee was issued.

The purpose of clauses of this type in a bank guarantee includes securing the beneficiary not only against the risk of the insolvency of the counterparty (here, the investor), but also against the risk of protracted and difficult enforcement of claims, which is particularly important in the case of a construction contract.

Only a guarantee that is "irrevocable, unconditional and payable upon first demand" provides the contractor the comfort of knowing that if the investor does not perform its monetary obligations on a timely basis, the contractor will not lose its own financial liquidity but can obtain payment of the amount due from the guarantor.

There are many more potential traps in the wording of bank or insurance guarantees beyond those discussed above. For example, it is important to note the period in which the guarantee is in force, the method in which the demand for payment should be issued and delivered to the guarantor, and the scope of the claims covered by the guarantee.

Every draft of a payment guarantee for construction work must be carefully checked prior to acceptance, so that the contractor does not end up committing significant funds to performance of a contract for which it subsequently does not receive the fee it is owed.

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Gun-jumping: A risky false start in M&A transactions

Andrzej Madała

Companies planning major mergers and acquisitions must notify the competition authority in advance. Before obtaining regulatory approval, actions must not be taken aimed at de facto implementation of the transaction, coordination of the companies' operations, or exchange of confidential information. Violations are subject to stiff penalties.

This ban remains in force throughout the interim period, from legal and financial due diligence through conclusion of the operative agreement and closing of the transaction.

What is gun-jumping?

In M&A, as in athletics, "jumping the gun" means a false start. This term was borrowed by EU competition law from the long antitrust practice of agencies in the United States, i.e. the Department of Justice and the Federal Trade Commission. Gun-jumping refers to various actions seeking to expedite the economic integration between participants in mergers and acquisitions during the period prior to issuance of approval by the competition authority and actual closing of the transaction.

Premature integration of enterprises and full transparency between them prior to closing of the transaction may threaten competition on the market. If the transaction is ultimately not approved and carried out, the parties will know too much about one another, hindering their future rivalry and creating a risk of collusion between them.

These concerns are not merely theoretical. In practice, it sometimes happens that despite the parties' serious commitment to closing the transaction, the deal ultimately does not go through. An example in Poland was the planned acquisition of Polpharma S.A. by the Hungarian pharmaceutical group Gedeon Richter. Despite issuance by the President of the Office of Competition and Consumer Protection (UOKiK) of a decision (DKK-52/2008, 3 July 2008) approving the concentration, the deal never closed because the Polish side withdrew.

The competition authorities assume that until consent to carry out the concentration (closing) the enterprises must remain competitors (or independent contractors), and the state of competition (or independence) between them must not be weakened to facilitate the concentration.

Gun-jumping may be broken down into two main types of behaviour by enterprises:

- De facto implementation of the concentration before obtaining approval of the competition authority (if there is an obligation to provide notification of the intended concentration), e.g. by exercising de facto control over the target

- Exchange or unilateral sharing of confidential commercial information by the undertakings participating in the concentration in order to coordinate their economic activity.

Grounds for the ban on gun-jumping under Polish and EU competition law

Premature coordination of economic activity by the participants in a transaction or premature integration of their businesses violates prohibitions set forth in competition law and leads to further negative legal consequences. The undertakings must bear in mind that the transaction process does not exclude liability for gun-jumping.

Polish and EU competition regulations provide for two analogous legal grounds prohibiting actions by undertakings constituting gun-jumping. The first basis is the prohibition against conducting a transaction (concentration) prior to obtaining approval from the competition authority. The other basis is the prohibition against two or more independent undertakings entering into agreements restricting competition.

Merger control

Only transactions large enough that they could potentially have a significant effect on competition are subject to notification for purposes of merger control (to the President of UOKiK in the case of the Polish market or to the European Commission in the case of the EU market). In practice, transactions subject to notification of the antitrust authorities may take various legal forms but nonetheless constitute a "concentration" for purposes of national law, under the Competition and Consumer Protection Act of 16 February 2007, or under EU law pursuant to the EC Merger Regulation (139/2004).

The measure of the size or significance of a concentration is the turnover of the undertakings participating in the transaction. Both Polish and EU law refer in this regard to established thresholds of turnover generated by the undertakings in the financial year preceding the concentration.

Polish law refers to the combined turnover of the participants in the concentration exceeding the equivalent of EUR 1 billion worldwide or combined turnover in Poland exceeding the equivalent of EUR 50 million (Art. 13(1) of the Competition and Consumer Protection Act). Concentrations conducted abroad that may exert effects in Poland are also subject to notification of the President of UOKiK (Art. 1).

A concentration is generally regarded as having a "Community dimension" and must be notified at the EU level if the combined worldwide turnover of the participants exceeds the equivalent of EUR 5 billion and the turnover in EU member states of each of the undertakings exceeds the equivalent of EUR 250 million. Art. 1 of the EC Merger Regulation contains additional thresholds of turnover and further rules that must be applied to reach a final determination of whether the concentration requires notification of the European Commission. If the transaction does have a Community dimension, notification of the Commission is mandatory, and as a rule this excludes the obligation to notify the competition authorities of the member states (e.g. in Poland the President of UOKiK), under the "one-stop shop" rule.

When there is an obligation to notify an intended concentration to the antitrust authorities, it follows that there is a statutory requirement for the undertakings to refrain from implementing the concentration until approval of the relevant authority is obtained (Art. 97 of the Polish act and Art. 7 of the EC Merger Regulation).

Significantly, implementation of the concentration means not just closing the transaction in formal legal terms (for example, performance of a share purchase and sale agreement transferring ownership of 100% of the shares of the target to the acquirer), but also any other actions by the parties resulting in effective exercise of control (e.g. the acquirer's de facto control over the target prior to the final acquisition of shares). This is because Polish and EU competition law defines "control" to include obtaining rights in any form, directly or indirectly, which under all of the circumstances confer the possibility of exercising decisive influence on another undertaking.

Anticompetitive agreements

One of the principal rules of competition law is the prohibition against agreements by independent undertakings restricting competition, i.e. agreements and practices with the object or effect of preventing, restricting or distorting competition on the market. This prohibition applies equally to arrangements between horizontal competitors and vertically between undertakings operating on different levels of trade (e.g. between manufacturers and distributors).

The prohibition on anticompetitive agreements is set forth in Art. 6 of the Polish act and Art. 101 of the Treaty on the Functioning of the European Union. Both of these laws provide identical examples of anticompetitive agreements, including in particular directly or indirectly fixing purchase or selling prices or other trading conditions, or sharing markets or sources of supply. These rules are fully applicable to undertakings participating in M&A transactions regardless of whether the transaction is a concentration that is subject to notification under the merger control regime.

Sanctions for gun-jumping in the decisional practice of antitrust authorities

If undertakings take actions—even unknowingly—that constitute gun-jumping, it may result in imposition of serious sanctions by the competition authorities. And they can be punished whether or not the concentration itself ultimately wins approval.

In such cases, the European Commission or the President of UOKiK may fine undertakings in an amount of up to 10% of their total turnover in the preceding business year (under Art. 23 of Council Regulation (EC) 1/2003, which is an implementing regulation under TFEU, as well as Art. 14 of Regulation 139/2004, or under Polish law pursuant to Art. 106 of the Competition and Consumer Protection Act).

So far there do not appear to have been any decisions issued by EU or Polish antitrust authorities imposing fines for anticompetitive exchange of information or premature coordination of market activities as such. But this does not mean that the authorities do not monitor such measures by undertakings. An example from the practice of the European Commission was the "dawn raid" in December 2007 at the companies Ineos and Kerling (a subsidiary of Norsk Hydro), even though the inspection did not ultimately result in sanctions for gun-jumping (see Commission press release of 13 December 2007, MEMO/07/573; the merger was finally approved by the Commission, Decision COMP/M.4734).

Numerous instances may be mentioned where sanctions were imposed for failing to provide notice of the intended concentration (total lack of notification or notification after the fact), probably accounting for all of the decisions issued by the regulator in this area in Poland. Every year the President of UOKiK issues at least a handful of such decisions. So far the fines imposed in Poland for non-notification or notification after the fact have not exceeded EUR 20,000. (A fine of PLN 75,000 was imposed on coal company Kopalnia Węgla Brunatnego Konin S.A. for creation of a joint venture with Global Wind Energy Poland Sp. z o.o., Decision DKK-78/2012.)

The fines at the EU level tend to be much higher. Among noted recent cases, the Commission imposed fines of EUR 20 million on the Belgian company Electrabel for exercising de facto control over the French Compagnie Nationale du Rhône (Decision COMP/M.4994, 10 April 2009) and on the Norwegian company Marine Harvest for premature exercise of control over Morpol (Decision COMP/M.7184, 23 July 2014).

The amount of the fines makes it clear that before obtaining antitrust approval, the undertakings should suspend all actions that could be regarded as seeking to implement the transaction, coordinated activities, or exchange of confidential information. Acting too quickly on these fronts can prove to be a costly mistake.

Andrzej Madała, Competition Law Practice

"Pay me my lodging allowance for spending the night in my sleeper cab"

Łukasz Lasek
Agnieszka Lisiecka

The Supreme Court of Poland recently held that providing a truck driver with a berth in a sleeper cab in the vehicle for use during international transport does not constitute "free lodging" and thus requires the employer to pay the driver a lodging allowance. This interpretation may prove costly not only for transport companies.

This ruling, issued by a panel of seven judges on 12 June 2014 (Case II PZP 1/2014), means that the truck driver's employer is not released from the obligation to pay the driver a lodging allowance, based on the amount payable to public employees on official travel abroad (EUR 25–40 per night, depending on the country), even though the truck is equipped with a sleeper cab. This ruling was repeated by the Supreme Court in a subsequent resolution of 7 October 2014 (Case I PZP 3/2014).

As soon as they were published, these resolutions unleashed a flood of claims against transport companies, often encouraged by various associations claiming to defend the rights of drivers. Current and former employees are seeking allowances in arrears for nights spent in their sleeper cabs over the past 3 years (the limitations period on such claims). The claims could prove more than many transport companies can bear, possibly even forcing them into bankruptcy. The total estimated value of claims that are not time-barred is some PLN 2.5 billion.

The view of the Supreme Court, even if guided by valid concerns, is dubious. First, the reasoning stated in the resolution raises a number of legal doubts and is not very persuasive. Second, rather than improving the sleeping conditions of drivers and thus road safety, the resolution could have the opposite effect in practice. Drivers would continue to sleep in their cabs, treating the lodging allowance as an additional element of their pay, and their employers would see no point to investing in vehicles with sleeping areas or in overnight bases in Europe.

Thus drivers could gain from this interpretation only on the surface. Ultimately they could lose out in terms of both lodging standards and their very jobs. Polish companies could lose also as they become less competitive on the European market for transport services. This is why the view presented by the Supreme Court should be reconsidered and the issue of "free lodging" for drivers should ultimately be resolved by the Parliament.

Controversies and (un)expected consequences

Under current regulations of employment law, an employee (including a driver) on business travel is entitled to reimbursement of lodging costs upon presentation of a hotel bill (in an amount limited by the regulations) or a lump-sum allowance for lodging if the employee does not present a hotel bill and is not provided free lodging. The employee is not entitled to reimbursement or an allowance if the employer provides the employee with free lodging.

Previously, the Polish courts had permitted a berth in a sleeper cab to qualify as "free lodging" if it was equipped to an appropriate standard ensuring a safe night's rest. Through the resolution in Case II PZP 1/2014, the Supreme Court has now deprived the courts of this discretion. The Supreme Court has taken the view that "free lodging" can be provided only in a hotel, which categorically disqualifies lodging in sleeper cabs.

The Supreme Court offers surprisingly unpersuasive arguments in favour of its view. It bases its arguments on outdated language from repealed regulations of the Minister of Labour and Social Policy establishing the rules for reimbursement of costs of official travel by public employees (which stated that "an employee is entitled to reimbursement for lodging in the amount confirmed by a hotel bill"). The court deduced from this language that the minister required "free lodging" to be offered at a hotel standard.

A good night's sleep = road safety

The Supreme Court's interpretation deviates from the ordinary understanding of "lodging" as "overnight rest away from home." It is also inconsistent with the EU regulation on driving time and rest periods (Regulation (EC) 561/2006), which expressly provides that "daily rest periods and reduced weekly rest periods away from base may be taken in a vehicle, as long as it has suitable sleeping facilities for each driver." It follows that a well-equipped sleeper cab assures the driver proper rest and road safety.

The Supreme Court justifies its failure to consider the EU regulation in its interpretation by claiming that the rules concerning "free lodging" do not involve the issue of road safety. This is an erroneous argument. There is no doubt that the provisions of the national regulation on amounts owed to public employees for official travel are not intended solely to provide compensation for travel-related expenditures. They also serve to ensure drivers safe and comfortable rest and a proper level of safety on the roads. Paradoxically, while asserting that the national regulation does not address occupational health and safety issues, the Supreme Court refers to these very issues in its argumentation and uses them to justify its position.

It should be pointed out that empirical studies confirm that berths in sleeper cabs provide comfortable rest. This was the conclusion reached by a team of researchers at the Centre for Sleep Research at the University of South Australia. Their study of Australian drivers compared the quality of their sleep (the time it took for them to fall asleep, the length of their sleep and the number of times they woke during sleep) at home and in their sleeper berths. The study found no material differences in these locations (D. Darwent, G. Roach & D. Dawson, "How Well Do Truck Drivers Sleep in Cabin Sleeper Berths?" *Applied Ergonomics* 43 (2012), pp. 442–446).

The Supreme Court also ignores the discussion of the relevance of applying this lodging standard in the transport sector, whose employees conduct foreign travel incomparably more often than public employees. The nature of drivers' work means that they spend most of their time on "business trips" and sleep "on the road" in various locations around Europe. But they rarely use hotels or their employers' overnight bases, mainly because of the difficulty in coordinating their routes with the locations of overnight bases. Moreover, common experience shows that hotels offer different standards, just as there may be differences in standards among sleeper berths and among the parking areas where the drivers lay over for the night. Lodging at a hotel does not necessarily guarantee a higher standard than a properly equipped berth in a sleeper cab.

Who loses on allowances?

It should also be pointed out that most of the instances of claims asserted by employees do not further their justified expectations (payment of benefits the employees felt they were entitled to) but are an attempt to gain a windfall they never felt they deserved before, particularly since most of them accepted lodging in sleeper cabins without complaint.

In consequence, the position of the Supreme Court is not only inconsistent with the requirements of Regulation (EC) 561/2006, but also reduces the competitiveness of Polish shippers on the European market and reduces road safety. When lodging allowances are paid even when the drivers sleep in properly equipped cabins, they become an additional element of the drivers' pay, increasing Polish employers' costs. Meanwhile, employers will lose their incentive to continue equipping drivers' cabs with proper sleeping facilities, but drivers may continue to sleep in their cabs while pocketing the lodging allowance as a bonus. So employers will end up paying more, drivers will get a worse night's sleep, and road safety will suffer.

Change in law needed

The issue of lodging for drivers should be resolved through legislative intervention and a definition of the concept of "free lodging," which would eliminate doubts and provide a clear understanding. At the same time, the regulations should set the technical specifications that must be met by sleeper cabs to ensure that they provide proper sleeping conditions. This is an area that deserves statutory treatment rather than being resolved at the level of interpretation of executive regulations for reimbursement of expenses for official travel by public employees.

Until lawmakers intervene on this issue, it requires a careful analysis on a case-by-case basis. Currently it appears correct to take the view that cases involving lodging allowances for nights spent in sleeper cabs cannot be resolved without considering the sleeping conditions in the trucks. Ignoring this aspect cannot be reconciled with a literal, systemic or purposive interpretation of the current regulations.

The proposed direction for changes should mobilise transport companies to raise the standards of the sleeper cabs in their vehicles, which would much more effectively improve occupational health and safety standards for drivers and raise the overall level of road safety.

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Recommendation U and its effect on the bancassurance market in Poland

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In June 2014 the Polish Financial Supervision Authority issued Recommendation U, concerning best practice in bancassurance. The goal was to raise the operating standards of banks offering insurance products tied to banking services. Banks and the insurers cooperating with them will have to comply with the new rules, although they contain many controversial provisions. Will Recommendation U spell the end of the bancassurance market in its current form, or encourage stable growth of these products?

The Financial Supervision Authority took up the issue of bancassurance among other reasons due to the number of complaints by customers concerning irregularities in the functioning of insurance products distributed by banks. Adoption of Recommendation U was preceded by consultations with the market, which theoretically should have led to development of a consensus among the various stakeholders.

The introduction to Recommendation U states that it is directed to banks cooperating with insurance companies to offer various types of insurance as part of their business. It should be pointed out that it applies first and foremost to entities operating under

Polish law. Nonetheless, the Financial Supervision Authority clearly underlined that it also expects branches of foreign lending institutions operating in Poland to comply with the new standards.

Concern for the customer ends up hurting the customer?

A key reform from the perspective of banks is the bank's remuneration connected with bancassurance products. The regulations in force do not directly address this issue. In practice, various approaches are applied. Sometimes the bank takes out insurance for third parties under a group insurance policy in which there are numerous insureds (i.e. acts as the insuring party), but also collects a fee from the insurance company for its services connected with concluding and administering the insurance agreement. Typically the bank would not formally act in this respect as an insurance intermediary, but in practice it was performing activity characteristic of an insurance agent.

In this manner, first, the bank managed to avoid the regulatory requirements imposed on insurance intermediaries (insurance agents and insurance brokers). Second, the bank received a fee (sometimes very high) from the insurance company, financed out of the insurance premiums paid by the bank's customers. Third, although the customer paid the premium most often in order to take out an insurance policy, the rights under the policy were assigned to the bank anyway to secure the risk connected with credit granted at the same time (e.g. assignment of property insurance to the bank).

Because in effect only a portion of the insurance premium actually reached the insurance company, many doubts arose concerning the scope of the insurance offered in bancassurance, which sometimes defined the insurer's liability more narrowly than would be the case in an individual insurance policy.

Under the new rules, it is impermissible to act at the same time, even merely de facto, as an insurance intermediary and as the insuring party. The bank should clearly inform the customer whether it is acting as an insurance intermediary or as the insuring party. This is a major change. And, as with the other provisions of the recommendation, it does not just clarify or interpret existing regulations, but de facto introduces new regulations.

Moreover, under Recommendation U, a bank acting as the insuring party (and not an insurance intermediary) may receive its fee only from the customer, and only to cover costs connected with conclusion and administration of the insurance agreement. Banks will thus not be able to collect any fees from the insurance company, and the customer will be required to cover only costs actually incurred. This is a major change, because in practice it limits the possibility for the bank to profit from this service, thus making it much less attractive for banks to use the common construction of taking out insurance for third parties (i.e. acting as the insuring party).

A natural alternative solution would be for banks to begin performing insurance mediation activity. The recommendation provides in this respect only that the bank's fee for the insurance products it offers must be established in light of the costs incurred by the bank. A fundamental difficulty presented by this solution, however, is the number of additional obligations which must be fulfilled by insurance intermediaries subject to oversight by the Financial Supervision Authority under the Insurance Mediation Act.

As mentioned, insurance mediation may be performed by either insurance agents (which can only be natural persons, and thus individual employees of the bank) or insurance brokers (which under certain conditions may operate as legal persons). In either case, detailed requirements must be met, such as obtaining an entry in the relevant register maintained by the Financial Supervision Authority, taking out civil-liability insurance (in the case of multi-agents and insurance brokers), undergoing training, and in the case of brokers also passing a state exam.

Fulfilment of these conditions will decidedly increase the bank's costs for bancassurance, while reducing the fees obtainable from sale of insurance products. These costs should also include the costs of adapting the sales system and IT system of the bank to suit the new structure (moving from the sale of cheaply administered group policies to the sale of individual insurance policies).

In order to halt the drop in the banks' fees, it would be necessary to increase their fee for the sale of insurance. It appears that fees could be raised through (i) an increase in insurance premiums by insurers, (ii) a reduction in the scope of coverage, or (iii) an increase in other fees incurred by customers. Regardless of the model adopted, this will mean in practice that the costs of implementing Recommendation U will in reality be paid by customers.

Encouraging honest growth or unfair competition?

Further provisions of Recommendation U are aimed at guaranteeing customers greater freedom in the choice of insurance products. Practices applied by some banks requiring customers to take out insurance with a specific insurer were already questioned in the past. Under Recommendation U, the bank must accept insurance cover taken out by the customer without the bank's participation (an individual insurance policy) also in a situation where the bank offers its customers the same coverage as the insuring party under an insurance agreement for third parties. At the same time, however, the recommendation permits banks to refuse to accept such an individual policy if, for example, it does not fulfil the scope of coverage required by the bank or specific provisions of the policy do not meet the bank's requirements for limiting credit risk.

Contrary to the intention of the Financial Supervision Authority, these changes may actually encourage anticompetitive activity. Because the recommendation clearly states the rules for when a bank may impose coverage by an insurer designated by the bank and not selected by the customer, it encourages the bank (in collusion with the insurer) to set requirements for coverage that are not met by policies issued by other insurance companies. One can only hope that such attempts (if any) will be extremely rare. But this does show how dangerous recommendations can be when they unnecessarily seek to excessively regulate the market.

Informational obligations

An increase in informational obligations is another solution intended to protect customers under Recommendation U. Banks are to provide more information about the products they offer. It is also stressed that they should provide information in the most understandable form.

The Financial Supervision Authority is also seeking, through informational obligations, to combat the practice of offering hidden products. There have been frequent incidents where a bank customer learned after the fact that when taking out one product, such as a credit card, an insurance product was added which was not clearly presented at the time the agreement was concluded.

Deadline

Banks should comply with Recommendation U by 31 March 2015.

This deadline may prove problematic for many entities, and entirely unrealistic for fulfilment of all of the requirements. The need to adapt IT and sales systems must be considered, as well as fulfilment of the regulatory requirements of the Insurance Mediation Act in the case of banks which previously have acted solely as the insuring party under the construction of group insurance for third parties.

Summary

The ideals which led the Financial Supervision Authority to issue Recommendation U are laudable. But the specific recommendations raise a number of doubts. As indicated above, sometimes it may result in overregulation of certain issues or have an effect that is the opposite of what was intended. For example, even though one of the reasons for adoption of the recommendation was concern for the welfare of consumers, they could potentially end up losing, at least financially, as a result of the changes.

Another issue that requires separate analysis is the de facto creation by the Polish Financial Supervision Authority, through Recommendation U, of a new legal order which will directly impact millions of participants on the market for financial products and services.

For now it is hard to predict whether Recommendation U will bring stability to the market and encourage growth, or generate more doubts in the area of bancassurance.

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State Treasury liability for improper implementation of EU directives

Paweł Mazur

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In today's economy, where legal regulations have a significant influence on the functioning of markets, businesses often suffer damage as a result of malfunction of state institutions. Even if the losses are great, compensation cannot always be effectively pursued. One of the instances where the law permits assertion of claims against the Polish State Treasury is improper implementation of EU directives.

Directives are European Union acts of law addressed to the member states. To be fully effective they require transposition into the national legal system, which means that they obligate the member states to adopt certain domestic implementing regulations. If this obligation is not complied with, directives still bind the member states and entities that are considered to be member states' "emanations." This is the so-called vertical effect of a non-implemented directive—it still affects dealings between the state and individual entities. However, for a provision of a directive to be vertically effective it must confer specific rights on individual entities which may be asserted in dealings with the state. Moreover, non-implemented directives do not operate horizontally, i.e. they do not create rights and obligations in relations between individuals.

When does the state have to pay damages?

The inability of businesses to rely in their mutual dealings on favourable solutions set forth in directives that have not been timely and properly implemented may seriously worsen their financial situation. Moreover, although such directives are binding on the state, their effectiveness in relations with the authorities is not always assured. If norms exist in the national legal system that are inconsistent with directives, the state authorities often give priority to the national regulations, ignoring the non-implemented EU regulations.

In this situation, entities may seek damages from the state for losses suffered as a result of failure to implement EU regulations on time. The possibility of pursuing such claims has been confirmed under EU law and Polish law.

Under the case law of the Court of Justice of the European Union, a member state may be held liable in damages if:

- The lack of implementation of a given directive constitutes a sufficiently serious breach of Community law
- The directive is intended to confer rights on individual entities which they cannot exercise as a result of the act or omission of the member state, and
- A loss has occurred and there is a causal relationship between failure to implement the directive and the loss.

The grounds for liability in damages are regulated somewhat differently under Polish law. Pursuant to Art. 417 of the Civil Code, a claimant seeking damages from the State Treasury must prove that:

- There was an unlawful act by a public authority, and
- A loss occurred and there is a causal relationship between the act of public authority and the loss.

Additional requirements are imposed by Art. 417^1, which differentiates between a loss caused by issuance of a normative act (§1) and a loss caused by failure to issue a normative act (§4). In the former case, to obtain damages requires a finding in a relevant proceeding that the given legal act was contrary to norms of a higher rank, and thus requires a preliminary finding or precedent confirming the unlawfulness of the actions by the state. The code does not specify what kind of ruling may serve as a preliminary finding. This requirement does not apply to determination of the State Treasury's liability for a legislative failure to act.

Considering that the grounds for liability of the State Treasury under EU law and under Polish law differ, the question of the interconnection of these grounds arises. The CJEU has indicated that damages should be pursued in accordance with the procedure in force before the national court, so long as the rules in force under national law are no less favourable to individual entities than the rules set forth in EU law.

Just losses? What about benefits?

When pursuing claims for damages for failure to make timely implementation of a directive, it can be particularly difficult to prove the amount of the loss suffered.

To achieve this requires proof of what the hypothetical state of affairs would be if the national regulations were consistent with the directive. This is typically complicated and requires the use of numerous assumptions. Because the member states have latitude to determine how to implement a directive, it is not obvious what would be the substance of the regulations introduced into the national legal system. It is possible, however, to indicate a minimum level of protection of the individual entity which arises out of EU law and which should be afforded under the state's internal law.

Moreover, proper implementation of a directive sometimes will radically change the functioning of an entire sector of the economy. It may be an arduous task to make calculations to show the approximate amount of a loss where the relevant data are missing. Fortunately, the standard of proof is somewhat relaxed by Art. 322 of the Civil Procedure Code, under which if precise proof of the amount of a claim is impossible or unduly difficult, the court may award a sum which it finds to be appropriate.

In calculating the amount of the loss, it should also be taken into account whether a business injured by the lack of proper transposition of a directive gained any benefits as a result of non-implementation. Such benefits would offset the financial detriment and thus affect the amount of damages that can be awarded.

Cause and effect

Even if the amount of the loss may be reliably estimated, the courts often take an excessively rigorous approach to the obligation to prove causation between non-implementation of the directive and the loss. The Supreme Court of Poland has held in several cases that if the causal connection is too remote, and thus requires too many assumptions to be made in order to demonstrate the financial detriment, the loss may be held to be contingent upon these assumptions and therefore not entitled to redress under Polish law.

Such a restrictive approach raises doubts in light of the principle of the effectiveness of EU law, which is of fundamental significance for the legal system of the European Union. The member states, including their courts, are required to take all necessary measures to assure compliance with EU regulations. Limiting the amount of damages for failure to implement a directive encourages the member states to delay implementation of new measures which may be financially disadvantageous to the member states.

An opportunity for rail carriers

An example that may be given of an event potentially giving rise to liability in damages of the Polish State Treasury is Poland's failure to transpose correctly the rules for levying of charges for use of rail infrastructure set forth in Directive 2001/14/EC (part of the First Railway Package) as amended by the Railway Safety Directive (2004/49/EC). In a judgment issued on 30 May 2013 in *European Commission v Republic of Poland* (Case C-512/10), the Court of Justice of the European Union held that the Regulation of the Minister of Infrastructure on Conditions for Access to and Use of Railway Infrastructure of 27 February 2009 did not comply with the criteria set forth in the directives.

This judgment by the CJEU could serve as a preliminary finding for purposes of Civil Code Art. 417^1 §1. Although issuance of the CJEU judgment places rail carriers in an advantageous procedural stance, for their claims to be upheld it is still necessary to fulfil all of the other grounds discussed above for liability in damages.

Tough cases, but with potential

Currently proceedings against the State Treasury in connection with Poland's violation of its duty to implement EU directives are relatively few and far between, and tend to be precedent-setting.

These are cases requiring that counsel be knowledgeable about EU law, and often also require cooperation with experts in economics and with law firms in other member states where similar infringements of EU law have occurred. All of these factors make such cases expensive to litigate. But faced with losses running to many millions, the game may well be worth the candle.

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Restructuring beats the bankruptcy blues

Michał Barłowski

2015 is undoubtedly a breakthrough year for businesses seeking to restructure their operations. This is the year when the new Restructuring Law and the amended Bankruptcy Law are expected to enter into force in Poland. Meanwhile, following the economic crisis, all EU member states have implemented or are rethinking their existing preventive regulations exemplifying today's "rescue culture."

If preventive measures are pursued in time, they should help businesses avoid bankruptcy, under the theory that it is less harmful to the overall economy if an enterprise survives difficulties than if it fails. This philosophy is also expressed in the EU's amended Insolvency Regulation (1346/2000), the text of which has just been accepted. Entering into force in two years' time, it will sanction the application of preventive and restructuring proceedings where secondary insolvency proceedings will no longer have to be liquidating proceedings.

How it has been

The preventive regulations in force in Poland since 2003—the recovery section of the Bankruptcy & Recovery Law—have not proved themselves in practice. Businesses and managers have not resorted to these provisions, instead allowing the enterprise to become insolvent, which in the great majority of cases makes the enterprise ineligible for recovery proceedings. The new regulations are supposed to address this and solve a number of other problems practitioners have wrestled with.

Under the bill submitted to the Sejm by the Polish government in late 2014, a new act would be adopted entitled the Restructuring Law, the recovery provisions would be removed from the 2003 act, and the 2003 act would be renamed the Bankruptcy Law.

The problems that have been identified in practice should be resolved, among other measures, through:

- Separating the Restructuring Law from the Bankruptcy Law, so that restructuring proceedings are not associated in the business community with liquidation and the stigma and negative consequences that entails
- Introducing new types of restructuring proceedings available to both solvent and insolvent debtors, which should enable the restructuring of enterprises with prospects for a return to solvency, departing from the current obliga-

tion to apply the procedure that should satisfy creditors to the greatest degree

- Simplifying the regulations, which should make it easier to file cases with the court and shorten the duration of the proceedings
- Granting new rights to creditors, reflecting the approach that the deeper the difficulties the debtor is threatened with, the less influence the debtor should have on the operation of its business, while in three of the four restructuring procedures (excluding reorganisation proceedings) the debtor in possession would continue to manage its business
- Expansion of the entitlements of the creditors committee.

It does not appear, however, that the great influence that the judge-commissioner and the bankruptcy court would continue to exert over insolvency proceedings—particularly the more complicated types, i.e. arrangement and reorganisation proceedings—has been sufficiently dealt with.

Four flavours of restructuring

The solutions most eagerly anticipated by the market are the new (and modified) restructuring procedures. They are designed to serve one goal: to prevent the declaration of the debtor's bankruptcy.

Four different types of restructuring proceedings are to be introduced:

- Proceedings for approval of an arrangement (*postępowanie o zatwierdzenie układu*)
- Expedited arrangement proceedings (*przyspieszone postępowanie układowe*)
- Arrangement proceedings (*postępowanie układowe*)
- Reorganisation proceedings (*postępowanie sanacyjne*).

Proceedings for approval of arrangement

The procedure offering the greatest freedom to the debtor and the least interference by the court will undoubtedly be proceedings for approval of an arrangement. They can be used to supplement standstill agreements commonly applied in practice between debtors and lenders. A debtor undergoing financial difficulties has a right to approach its creditors with a proposal to conclude an arrangement. To this end, the debtor itself solicits the consent (votes) in favour of concluding the arrangement and presents the conditions for performance of the arrangement. To ensure objectivity in the proceeding and provide assurance of proper performance of the measures, the debtor hires a restructuring adviser to provide an opinion on the proposed arrangement.

After the debtor gathers as many written votes as possible in favour of the resolution (a majority of eligible creditors holding at least two-thirds of the total claims must support the arrangement, with disputed claims not exceeding 15% of total claims), the court will confirm acceptance of the arrangement. Hence this is a less formal procedure which in practice would appear to fill a gap in the existing regulations. But a drawback to this procedure is the debtor's inability to request a stay of enforcement proceedings against the debtor's assets even for a short time if the execution would prevent conclusion of the arrangement.

Because it is the debtor that decides on initiation of the procedure and selects which restructuring procedure to follow, proceedings of this type should work well for debtors which are conducting or could conduct profitable core operations, but are only prevented by temporary difficulties from satisfying their financial creditors on a timely basis. A creditor's written vote in favour of the resolution accepting the arrangement would be valid for 3 months after filing with the court, which appears to ensure that the proceeding will be conducted with the speed that is a vital element when concluding an arrangement.

In proceedings for approval of an arrangement and expedited arrangement proceedings, it is also possible to conclude an arrangement only with creditors whose claims have a fundamental influence on the functioning of the enterprise, i.e. a partial arrangement. Because execution by secured creditors would be limited to their collateral, a partial arrangement could apply to an *in rem* creditor without its consent, if as a result of the arrangement the creditor will be satisfied to a degree comparable to what the creditor would obtain from sale of the collateral.

Creditors committee

Another anticipated change is expansion of the rights of the creditors committee. Under the new regulations, upon application of the debtor, three creditors, or one or more creditors holding at least 20% of the total claims, the judge-commissioner would be required to appoint a creditors committee. The competence of the committee would be expanded, and not only in relation to the list of actions that need to be approved by the creditors committee to be valid. It would extend for example to permission to sell assets with a value greater than EUR 100,000, to establish security against elements of the bankruptcy estate for claims not covered by an arrangement, and to conclude credit or loan agreements to enable satisfaction of the current costs of the restructuring proceeding. One power which could influence the entire restructuring proceeding is the right to replace the judicial supervisor or administrator. However, this would require a unanimous vote of the committee if it has three members, or a four-fifths majority if the committee has five members.

A major change is to enable new financing for the debtor, with the consent of the creditors committee, in order to cover the current costs of the proceeding, without the risk of the action being held ineffective against the bankruptcy estate, resulting in a "clawback," if the arrangement is not successful and bankruptcy follows.

Insolvency from when?

A clear advantage of the new solutions in the case of the Bankruptcy Law is elimination of the rigorous rule that an insolvent business is required to file a bankruptcy petition within 14 days after it becomes insolvent. The period is to be extended to one month. Nonetheless, the problem would remain as it would still be necessary to determine at what point in time the business becomes insolvent. This is currently practically an impossible task in the case of the second test for insolvency, i.e. when the obligations exceed the value of the assets. In terms of the liquidity test for insolvency, the debtor would be deemed insolvent if it has become incapable of performing its obligations as they fall due. A presumption is to be introduced that a debtor is insolvent if it is over 3 months late in performing its obligations. Under this test, it would not be sufficient for a debtor to be deemed insolvent simply because it has failed to pay two invoices to two creditors, as is the case under the current Bankruptcy & Recovery Law. The point is rather that the debtor is objectively incapable of satisfying its creditors. To rebut the presumption, the debtor would have to demonstrate that even though it is more than 3 months behind, it is still solvent.

With respect to the second basis for insolvency (that the debtor's assets are worth less than the amount of its obligations), it is now to be accepted that the sale value (not the balance-sheet value) of the debtor's assets may fall temporarily below the total of its obligations, but it is presumed that if this state continues for longer than 24 months the debtor should be deemed to be insolvent.

Maintaining two bases for finding insolvency in the Polish regulations is consistent with the solutions adopted by other EU member states.

Notwithstanding the changes which in practice should resolve the dilemmas raised above primarily through extension of the periods and the ability to rebut the presumption of insolvency, the method for determining the second basis for insolvency would remain unresolved—in particular, determination of the value of the debtor's enterprise on any given day.

The current discrepancy between the letter of the law and the practice in declaring bankruptcy has also not been addressed. On one hand both of the two tests for insolvency are formally of equal standing, but when it comes to declaring bankruptcy it is mainly the liquidity basis for insolvency that is taken into consideration.

Liability of debtor's representatives

It should be stressed that the new regulations shift to the debtor's representatives the burden of proof that they filed a bankruptcy petition on time. But even if they failed to do so, they will still have a defence if previously the representatives filed an application to open expedited arrangement proceedings, arrangement proceedings or reorganisation proceedings, and the injury to creditors is insignificant. The proposed new law expands the application of regulations under which the debtor's representatives may be prohibited from conducting business activity or serving on corporate authorities, to include also persons who do not formally represent the debtor, i.e. de facto directors, if they contributed significantly to the failure to file a timely bankruptcy petition.

Just on the basis of these few examples, it is apparent that new possibilities for reaching agreement with creditors should open up to businesses experiencing difficulties. But the new restructuring regulations will be not just an opportunity, but also a challenge for businesses. Selection of the optimal procedure for the specific case may have a great influence on the success of restructuring, as for most of them, there will not be a second chance if restructuring fails the first time around.

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Cross-border telemedicine: A distant vision or the immediate future?

Dr Ewa Butkiewicz

The rapid development of information technology has opened the doors wide to telemedicine. But the ability to provide medical services at a distance still lacks a legal framework. Without that, doctors and patients cannot be sure that the services are legal and safe and comply with the required standards.

Telemedicine is not new. The first services that we would today call telemedicine appeared nearly 60 years ago, and the first reported successful teletransmission of medical data in Poland involved an EKG report in Lvov in 1935. Telemedicine also grew during the space race of the 1960s. The health and vital signs of astronauts and cosmonauts were monitored via communications links using the technologies available at the time.

Telemedicine services have become widespread thanks to growth of the internet and digitisation of societies, and particularly the exceptionally rapid dissemination of mobile phones, including smartphones, but also smartwatches and other forms of wearable tech, such as sensors installed in bracelets. Thousands of apps have been developed for these devices to apply or assist in prevention, diagnosis and treatment of illnesses, rehabilitation and monitoring of users' health condition.

Creating the legal framework

Medical services are a regulated activity in nearly every country in the world. This is one reason that new technologies are absorbed more slowly in medicine than in unregulated sectors and it takes longer to create legal regulations to keep up with changes in technology.

Creation of the legal framework for the functioning of telemedicine as a full-fledged medical practice is commonly regarded as a necessary condition for the spread of this method of delivering medical services. Regulations clearly defining the rights of the patient who decides to use telemedicine services, and providing the patient with certain protective measures if the regulations are not complied with, increase the level of trust in such medical procedures. These are after all new-generation, digital services, provided without direct contact between doctor and patient. Patients, particularly older ones, may not have confidence in this form of examination, diagnosis or treatment. This is why it is so important for obtaining broader social acceptance for these services that the legal regulations directly govern telemedicine services as legal, safe, and performed in accordance with the required standards.

In turn, medical professionals providing services at a distance also need the certainty offered by legal regulations, to know that they are operating legally, in compliance with codes of ethics, respecting the rights of patients and their privacy, and also in compliance with the requirements of the medical arts, based on standards and confirmed procedures, using electronic equipment assuring compliance with these standards and procedures.

With increasingly broader acceptance and use of telemedicine services in various forms (tele-diagnosis, e.g. tele-radiology, tele-consultation with a doctor, tele-surgery using medical robots, tele-rehabilitation or tele-care with tele-monitoring), they are perceived not as services that will drive out and in the future replace the currently functioning model of treatment based on direct doctor/patient contact, but as services supporting the work of doctors and making their work easier, unburdening healthcare institutions and equalising the access to healthcare benefits.

The groundwork has already been laid

It may be said that with adoption of the Cross-border Patients' Rights Directive (2011/24/EU), a critical point in creation of legal regulations for telemedicine was passed.

- **Access to telemedicine services**

Directive 2011/24/EU establishes rules for ensuring citizens of EU member states access to cross-border healthcare, which should be safe and of high quality, with the costs reimbursable. The directive applies to the provision of healthcare to patients regardless of how it is organised, delivered and financed (Art. 1(2)).

One form for delivering healthcare is telemedicine. It is defined in documents from the European Commission as "the provision of healthcare services, through the use of ICT, in situations where the health professional and the patient (or two health professionals) are not in the same location. It involves secure transmission of medical data and information, through text, sound, images or other forms needed for the prevention, diagnosis, treatment and follow-up of patients."

Directive 2011/24/EU expressly refers to telemedicine in two of its provisions. The directive defines the concept of the "Member State of treatment." Under the general rule, this means "the Member State on whose territory healthcare is actually provided to the patient," but in the case of telemedicine, "healthcare is considered to be provided in the Member State where the healthcare provider is established" (Art. 3(d)). The directive also includes telemedicine as one of the forms of delivery of cross-border healthcare entitling the patient to reimbursement of the costs of treatment, if the relevant conditions established by the law of the member state are met (Art. 7(7)).

- **Free flow of telemedicine services**

Directive 2011/24/EU therefore confirms the status of telemedicine as a service which is covered by the EU treaty principle of the free flow of services. This means that citizens of member states may take advantage of this form of delivering medical services and healthcare professionals may provide such services.

Telemedicine services are provided under the same rules as other healthcare services, that is by licensed physicians and other healthcare professionals. Reimbursement of treatment costs may be available, and the requirement to respect the rights of patients applies. These rules are established individually by the member states. This means that in practice, performance of certain services may be subject to limitations, for example with respect to reimbursement.

- **Protection of sensitive data**

Because telemedicine employs ICT and involves provision of services for a fee, at a distance and upon the individual request of the recipient, telemedicine also constitutes an information society service. This makes it subject to numerous directives, including the E-Commerce Directive and the Electronic Communications Directive (2002/58/EC).

In cross-border telemedicine services, transmission and processing of data concerning health status—i.e. sensitive data concerning the patient—is unavoidable. Therefore the providers of these services must ensure the security of such data using appropriate technologies and methods preventing unauthorised access to the data. The European Commission is still working on consolidation of the rules for protection of personal data across the EU and on the functioning of new IT solutions such as cloud computing. Without doubt, increased security standards and introduction of effective technical measures for protecting data are among the key conditions for growth of telemedicine services. Otherwise, the risks connected with leaking or loss of patient data, e.g. from hacking into IT systems, is too great for healthcare providers to develop broader telemedicine procedures, particularly across borders.

And how is it in Poland?

In Poland there are no regulations directly governing provision of healthcare services at a distance. Nor are there any express prohibitions in force in this area. Despite the gaps in the law and the conservative approach in Poland to regulating the practice of medical professions, some research institutions and universities have launched projects based on telemedicine solutions. But apart from a cardiology project (tele-consultation and tele-rehabilitation) and an audiology project (tele-consultation and telecare), these projects are of local scope.

Another barrier to provision of telemedicine services is major delay in implementing the healthcare information system. The current target for launch of certain programmes is 2017.

But the current proposal to amend the Healthcare Information System Act does contain a major clarification of the method in which physicians practise their profession, specifying that they are permitted to act via ICT systems (Art. 4 of the Act on the Professions of Physician and Dentist) and via nursing staff (Art. 11(1)). The proposal would also introduce a provision in the Healthcare Activity Act concerning the ability to provide healthcare services via ICT systems (Art. 3(1)). These changes would undoubtedly remove certain concerns that healthcare professionals now have about the legality of practising telemedicine.

This leaves the patient, who needs to be educated to accept telemedicine and also needs to be assured that the costs of such procedures will be reimbursed. The National Health Fund now does not provide reimbursement for these services. Because of the limited use of telemedicine in Poland, there is a lack of research on the effectiveness and conditions for use of telemedicine procedures among patients, particularly in tele-consultation and tele-surgery, and without a positive evaluation of the effects of such examinations the service cannot be included in the basket of healthcare services for which reimbursement is provided.

In the context of removing barriers to telemedicine, the recent changes to the Personal Data Protection Act should also be mentioned. They make it easier to transfer personal data within a group of companies or to a provider of outsourcing services, based on approval by Poland's Inspector General for Personal Data Protection of binding corporate rules for the group, where the members of the group come from different member states. This solution should make it easier to provide cross-border healthcare services generally, including telemedicine services.

As legal uncertainties are gradually eliminated, the vision of broad use of telemedicine, including cross-border telemedicine, draws nearer. However, without reimbursement of healthcare expenses and without the use of adequately secure technologies, compatible with the relevant systems in other EU member states, telemedicine could remain but a small part of the healthcare picture despite its economic efficiency and other advantages.

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(R)evolution in reporting obligations of public companies

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Companies listed on the main market of the Warsaw Stock Exchange and NewConnect will face major changes in reporting requirements—particularly concerning release of information about current events and periodic reports. The changes follow from continuing consolidation of the rules in EU member states for the flow and use of price-sensitive information on the securities markets.

The main source of these changes is the EU's Market Abuse Regulation (596/2014), known as "MAR," which will begin to apply to listed companies from 3 July 2016. MAR will apply in the member states directly, without the need for implementation into Polish law.

Nonetheless MAR will make it necessary to amend some regulations now in force in Poland, particularly the provisions of the Financial Instruments Trading Act of 29 July 2005 dealing with inside information.

Current reports

Changes should also be expected in the regulation of the Minister of Finance on current and periodic reporting by issuers, in the section containing a list of information for current reports.

On the effective date of MAR, the duty for issuers of securities to publish current reports in the form for which a fixed list of events is now set forth in the

Polish regulation on current and periodic reports (e.g. information on conclusion of major contracts, sale or loss of significant assets, and issuance of significant judgments and other judicial decisions) will disappear.

Instead, under the new rules, listed companies will be required to release on an ongoing basis any information about the company or its shares regarded as "inside information" for purposes of MAR.

What is inside information?

The definition of inside information in MAR generally differs little from the current definition. It will be defined as "information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments."

There will continue to be two key elements of the definition of inside information, namely:

- The **preciseness** of the information, defined by MAR to mean that the information "indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments"
- The **price relevance** of the information, meaning that it is "information a reasonable investor would be likely to use as part of the basis of his or her investment decisions."

The new rules directly regulate the issue of how to deal with information based not on a one-off event but a "protracted process" occurring in "intermediate steps" over time (such as a corporate acquisition carried out in multiple stages). Any stage of a transaction—i.e. each intermediate step—may itself constitute inside information if, individually, it meets the criteria to be regarded as inside information. For example, a company will have to consider whether signing a letter of intent qualifies as inside information, even though at this stage the overall transaction may never actually be carried out. It appears that in this respect MAR confirms the current practice of courts and regulators.

New obligations for listed companies

These changes mean that to a greater degree than now, public companies will have to monitor and analyse events within the company and information about the company on an ongoing basis in terms of their preciseness and likely ability to affect the prices of securities. All events and circumstances will have to be evaluated separately because there will no longer be a list of events more or less presumed by the regulations to be inside information.

These changes are of particular concern to companies listed on NewConnect, the alternative market in Warsaw, which so far have not been required to report inside information but in terms of reporting obligations have been subject only to the rules of the NewConnect market. Under MAR, companies listed in an alternative trading system, such as NewConnect, will also be required to release inside information.

It is expected that the European Securities and Markets Authority will help listed companies deal with the new rules by issuing guidelines containing an exemplary open catalogue of information that may be regarded as inside information, before MAR actually enters into force.

On the other hand, one may wonder whether these changes will significantly change the current practice on the market in terms of listed companies' compliance with current reporting obligations. It should be stressed that now the regulations concerning release of inside information are already of primary importance when it comes to properly informing the market about events affecting the company, extending to all events material to the company's operations, including information currently identified in the regulation of the Minister of Finance on current and periodic reports. The fact that certain events which must be announced in a current report are expressly listed in the current regulation does not release companies from the requirement to evaluate other events (such as contracts with a value only slightly below the threshold for materiality set forth in the regulation) to determine whether they nonetheless meet the criteria for inside information which must be reported.

Periodic reports

The changes in periodic reporting by public companies should also be noted. Amendment of the Transparency for Listed Companies Directive (2004/109/EC) by Directive 2013/50/EU will result among other things in elimination of the duty to publish quarterly reports and extension of the deadlines for publication of the remaining periodic reports. Interim reports will have to be published within three months after the end of the first half of the year, i.e. by 30 September. The period during which periodic reports will have to remain available will be extended from 5 years to 10 years.

This means that annual and mid-year reports will continue, but as a rule quarterly reports will no longer be published. As an exception, the home jurisdiction may decide to retain the requirement to publish quarterly reports, but only under the condition that it does not pose a disproportionate financial burden on the reporting companies, particularly small and medium-sized issuers, and the required content of the additional reports is proportionate to the factors that contribute to investment decisions by investors in the member state. In other words, quarterly reports may be required, but only if it is not an excessive financial burden and will truly provide added value for investors. Notwithstanding these restrictions, member states may require financial institutions based in their jurisdiction to issue quarterly reports.

Under the directive, EU member states have until November 2015 to implement these rules.

Although there is still some time left before the new reporting rules enter into force, listed companies should already begin to prepare for compliance and implement internal procedures for dealing with inside information. The guidelines expected to be issued by the European Securities and Markets Authority, as well as recommendations which the Polish Association of Listed Companies has already begun work on, should be helpful in developing these procedures.

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The end of tax optimisation in Poland?

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Recent years have witnessed numerous measures, increasingly organised and synchronised on an international scale, to limit optimisation of income taxes. What do these initiatives mean for tax optimisation in Poland? What legal solutions combating tax optimisation are expected to be adopted in the near future?

A direct impetus for governments to seek to limit tax optimisation was the financial crisis, which forced countries to seek additional public revenues. Meanwhile, reports on the scale of tax optimisation employed by multinational corporations (like the recent reports on tax savings by large companies paying income tax in Luxembourg—the "Lux Leaks" scandal) rouse the understandable ire of the international community, thus giving decision-makers a stronger mandate to take action against such tax optimisation.

For businesses, income tax is an additional cost item, so it is understandable that they would pursue measures to minimise this cost so long as they fall within the bounds of applicable law. This is also how tax optimisation should be understood in this article: lawful measures intended to reduce tax burdens, for example taking advantage of favourable treatment under tax treaties or the tax solutions offered by specific jurisdictions. Tax optimisation understood in this way cannot be combated through criminal sanctions, which is also why efforts are made to prevent or limit tax optimisation through enactment of legal solutions.

An ambitious set of measures seeking to limit tax optimisation is being pursued under the banner of "BEPS"—base erosion and profit shifting. The BEPS Action Plan is a project of the OECD and the G20 group designed to develop model solutions limiting optimisation of income taxes. In particular, these solutions are intended to limit shifting of income to countries with low tax rates and to ensure that income is taxed at the place where the taxpayer's actual business is conducted and where the value is created. Under the BEPS project, 15 "actions" have been outlined, such as addressing the tax challenges of the digital economy, re-examining transfer pricing rules, and strengthening regulations governing controlled foreign companies (CFC). These actions also indicate the need to apply both general and specific anti-avoidance rules.

Contrary to initial concerns, the BEPS Action Plan is being implemented quickly, and its effects are already or will soon be visible in the form of concrete legal solutions. It appears that the countries involved in the BEPS Action Plan will gain from the programme and implement the proposed solutions, which in the upcoming years may significantly impact optimisation opportunities.

In the European Union, a new weapon in the fight against tax optimisation is allegations of impermissible state aid granted by some member states in the form of tax privileges (again, Luxembourg). This approach definitely poses a danger from the perspective of companies that enjoyed such privileges.

Tax optimisation in Poland

The concept of tax optimisation arises mainly in the context of income tax, particularly corporate income tax (CIT). From the point of view of Poland and its CIT revenues, it is not the most important tax. In the 2015 budget CIT accounts for only about 9% of all tax revenue (PLN 24.5 billion out of PLN 269.8 billion). Personal income tax (PIT) is a much larger revenue item (PLN 44.4 billion, i.e. over 16% of tax revenue). Yet the main sources of revenue for the Polish state budget are VAT (PLN 134.6 billion, nearly 50% of tax revenue) and excise tax (PLN 63.5 billion, over 23% of tax revenue). Moreover, an analysis of the annual state budgets in recent years shows that the share of CIT is steadily dropping in favour of indirect taxes. It is therefore understandable that the state apparatus, including legislative initiatives, is largely directed at ensuring proper settlement of indirect taxes and eliminating the possibility of abuses in these taxes. In the area of VAT there are a particularly high number of abuses of a criminal nature (such as the "VAT carousel"), which the state must respond to strongly.

But this does not mean that Polish lawmakers are ignoring income taxes and will not follow the path indicated by the OECD and G20. In recent years, limiting income tax optimisation has been a priority for the Ministry of Finance, and changes furthering this end are implemented on a fairly regular basis. These measures are particularly targeted to eliminating the simplest optimisation solutions.

What is Poland doing?

The first line of defence against tax optimisation in Poland is renegotiation of a number of tax treaties, providing a relatively easy way to generate tax savings. For instance, tax treaties with such countries as Cyprus, the Czech Republic, Luxembourg, Malta, Singapore and Slovakia have been amended. Apparently the Ministry of Finance is seeking to identify popular optimisation scenarios based on the opportunities offered by foreign tax regimes combined with the regulations in the relevant treaties for avoiding double taxation.

Another tool for limiting tax optimisation may be regulations concerning controlled foreign companies introduced into the CIT and PIT acts. The CFC rules in force since 1 January 2015 are an entirely new solution unheard of before in the Polish tax system. These are regulations that will tend to affect Polish entrepreneurs who hold foreign entities in countries with preferential tax burdens, through which they realise income from business operations, especially passive income (such as capital gains, dividends and interest). The concept behind the CFC regulations is taxation in Poland of income earned by a controlled foreign company, in the portion in which the income is not taxed in the jurisdiction where the CFC is registered. The first couple of months these rules have been in force already show that they are not entirely clear, as doubts have arisen with respect to the method and scope of their application. On the other hand, contrary to the lawmakers' intentions, these rules do not seem comprehensive enough to significantly limit tax optimisation involving for example shifting of income to countries with more advantageous tax regimes.

Currently the main goal of the Ministry of Finance is to introduce into Polish law a general anti-avoidance rule (GAAR). Under the current plan, a GAAR would be in force from 2016 (but with a risk that it could be applied also to events prior to 2016 if they give rise to consequences or tax savings after the effective date of the GAAR). Currently, apart from several specific anti-avoidance rules (SAAR) of limited application, the Polish tax authorities do not have at their disposal a legal instrument enabling them to effectively challenge real transactions by taxpayers conducted in compliance with the law, even if they are conducted with the sole purpose of generating tax savings. Introduction of a GAAR is justified among other grounds by recommendations of the European Commission.

But the GAAR is no stranger to the Polish tax system. Such a clause was in force from 1 January 2003, but in a judgment issued on 11 May 2004 (Case K 4/03) the Constitutional Tribunal held that it did not comply with constitutional standards for proper legislation, and thus violated fundamental elements of the principle of trust in the state and the law, and also failed to meet the requirement of proper statutory identification of tax obligations. The fact that this ruling by the Constitutional Tribunal remains on the books makes it difficult for the Parliament now to propose the wording of a clause that would avoid constitutional doubts. It is partly for this reason that the GAAR work has continued for much longer than planned (it was originally stated that the GAAR would enter into force in mid-2014). It is still not certain that these rules will enter into force in 2016.

The planned introduction of a GAAR raises understandable concerns on the part of businesses and their advisers. In order to live up to its role, the GAAR must to some extent employ concepts that are not thoroughly defined, leaving the tax authorities room for interpretation. The experiences of Polish taxpayers in this respect have not been auspicious: Frequently the tax authorities, guided by fiscal interests, interpret the regulations inconsistently with their wording. In this respect, the GAAR could be a dangerous instrument if used in the hands of the tax authorities to challenge real transactions justified by business considerations but with incidental tax savings.

What's ahead for tax optimisation in Poland?

It appears that Poland will follow other countries that have taken up the battle against tax optimisation, and will successively introduce solutions designed to limit this phenomenon. In particular, Poland will count on the preventive value of such approaches as CFC rules and the GAAR. And measures pursued under the new regulations against specific taxpayers will probably be based on knowledge gained through the exchange of tax information, which will play an increasingly important role.

Yet the experiences of other countries with much more highly developed tax laws, including in the area of combating tax optimisation, show that it is hardly possible to effectively halt actions by taxpayers seeking to optimise their tax burdens. In the years to come Poland should continue to be perceived as a jurisdiction where tax optimisation in the broadest sense is possible, although the face of this optimisation will change. An end will slowly come to simple and cheap solutions that are artificial from an economic point of view and not backed by any economic substance (e.g. foreign companies without any real operations), and the time will come for solutions combining tax savings with economic substance of the transactions and events (e.g. shifting real operations to foreign companies and equipping them with the tools they need to conduct those operations, such as employees). In many instances, reorganisation of the current model for tax-optimal business operations may also be indicated, so that the operations remain secure in an evolving legal environment.

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Transparency of reports from clinical trials

Joanna Krakowiak

Data from reports on clinical trials of new drugs are gradually beginning to be released to the public—not just to pharmaceutical regulators. This new approach by the European Medicines Agency and pharmaceutical companies is designed to meet the expectations of patients, doctors and researchers. But it raises issues on the scope of data disclosure and the rules for use of the disclosed data.

The value of data obtained in clinical trials is determined not only by the millions of euro spent to finance the trials but first and foremost by the health risk assumed by everyone taking part in the trial. The risk must be proportionate to the anticipated therapeutic benefits, but risk always does exist because a clinical trial is a medical experiment and can have unpredictable results. When providing informed consent to participate in a trial, the patient accepts the risk of yet-unidentified adverse events.

Disclosure of clinical reports makes it possible to review the detailed course of particular adverse events. This in turn enables better diagnosis and treatment of difficult clinical cases after registration of the medicine, improved protocols in further trials, and the development of tailor-made drugs through personalised medicine.

Full disclosure of clinical data carries a risk that confidential information will be released: trade secrets of sponsors organising clinical trials and personal data of participants. It is essential to protect both types of information; otherwise, companies will be unwilling to finance expensive research on new drugs and patients will not consent to participate in trials when their privacy is not respected.

EMA Policy

The European Medicines Agency decided to take a proactive approach to release of reports from clinical trials by publishing a document in 2014 entitled *European Medicines Agency policy on publication of clinical data for medicinal products for human use.* The EMA Policy governs the rules for access to reports from clinical trials.

From 2015, after the European Commission issues marketing authorisation under the centralised procedure, sections of the clinical reports which do not contain trade secrets will be published by EMA on its website.

In order to obtain access to the data, an individual or firm will have to register on the EMA site. After logging on and accepting the terms of use for the

EMA database, users will be able to review the data on their computer screen. Moreover, researchers and national medical technology agencies making reimbursement decisions about drugs will be able to save the data on their own media, edit the data using the copy/paste functions, and print out the data.

The purpose for use of data from clinical trials

Under the EMA Policy, access to published data may be used only for non-commercial purposes, i.e. for purposes other than obtaining marketing authorisation for medicines.

In practice, the situation cannot be avoided in which the original purpose for accessing the data is non-commercial research, but during the research the information is processed or supplemented by the user's own tests to create a commercial research project for a new medicine, followed by an application for registration of the medicine.

The boundary between commercial and non-commercial use of data cannot be precisely defined in advance. The manner of use of publicly available data may thus be the source of numerous disputes between pharmaceutical companies and the researchers they work with.

Seemingly anticipating this hotbed of future disputes, the EMA has declared that it will not be liable for users' violation of the terms of use of the EMA database. Pharmaceutical firms injured by such use will thus have to pursue their rights under fair competition regulations directly against the persons who have violated their rights.

Commercial confidentiality

The EMA Policy defines "commercially confidential information" as any information contained in the clinical reports submitted to the EMA by an applicant or marketing authorisation holder that is not in the public domain or publicly available and the disclosure of which may undermine the legitimate economic interest of the applicant or marketing authorisation holder. This is a broad definition, but could generate disputes over what interests are regarded as legitimate.

Drawing on its past practice, the EMA indicates which portions of clinical reports may contain commercially confidential information. These include, for example, detailed data concerning selection of samples, 3D presentation of molecules, and strategic plans for the research programme in which trials are conducted.

But these EMA guidelines do not release applicants or marketing authorisation holders from providing a detailed justification of why specific sections of a report should be treated as confidential and consequently redacted from the publicly accessible version of the report.

If the EMA disputes the scope of information identified by the applicant as commercially confidential, the applicant has the right to seek a stay of publication from the court. This will commence litigation over the permissible scope of publication of the data. When litigation is pending, the EMA will release only the data for which access is undisputed.

Personal confidentiality

Personal data collected during clinical trials are regarded as sensitive data because they concern the subjects' state of health. The mere fact that the subject is participating in trials of a certain drug may be enough to reveal the illness the patient is suffering from. And in the case of genetic research, the results can convey information not only about the participant, but also about family members. If such data were revealed for instance to employers or insurers, it could have negative consequences for the patients and expose them to an immediate loss.

The well-being of the participants and respect for their rights are fundamental principles for conducting clinical trials. Therefore any disclosure of data concerning individual participants must occur only in compliance with their fundamental right to privacy. Before disclosure, data must therefore be redacted so that the data subject cannot be identified even indirectly.

The current version of the EMA Policy does not regulate the manner of disclosure of data concerning individual participants, but the EMA has said that it intends to address this challenge in the second section of the policy, concerning disclosure of personal data.

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What reprivatisation is not—and where real reprivatisation risk lies

Stefan Jacyno

Poland has been praised for its remarkably successful shift from a socialist system to a free-market, capitalist economy. Yet Poland is the only country from the former Eastern Bloc where the issue of restitution of nationalised property, primarily real estate, has never been resolved by adoption of specific legislation.

Despite the absence of a reprivatisation act—or rather because of this absence—there are numerous reprivatisation cases pending in Poland, reprivatisation is a constant topic among commentators in the press, and the spectre of "reprivatisation claims" worries investors. But does this situation create unpredictability, or genuine uncertainty about ownership, effectively hampering normal economic growth?

What reprivatisation is not

Before describing what reprivatisation is in Poland, we must be clear on what it is not. The essence of reprivatisation in Poland is not annulling or reversing nationalisation, but reviewing and verifying it. The point is to check whether the nationalisation process was conducted lawfully—in accordance with the law in force at the time of the act of nationalisation. The point of reference must be the law that was in force then, and not today's standards.

As lawyers, regardless of our personal views, we must acknowledge the position taken by Poland's Constitutional Tribunal in the order it issued on 28 November 2001 (Case SK 5/01):

"The Constitutional Tribunal ... takes the position that the matter of the legality of the actions of state authorities imposed on Poland in 1944 today belongs to the sphere of historical and political assessment. Such assessment cannot be carried over directly to the sphere of the legal relationships formed at that time. The lack of a constitutional legal foundation for such bodies as the Polish Committee of National Liberation [1944], the State National Council [1944–1947] and the Provisional Government [1945], as well as the doubtful legitimacy of later bodies, must not carry the consequence of ignoring the fact that effectively they did exercise state authority. The normative acts of these bodies were the basis for individual determinations which among other things shaped the ownership structure in the area of agricultural property, as well as legal relations across many areas in the life of the society. The passage of time, which is not irrelevant from a legal point of view, endowed these relations with permanence, and today they are the foundation for the economic and social existence of a significant section of Polish society."

Review legality—not dispense justice

The fact that there was a transformation in the system in 1989 did not in and of itself invalidate acts of nationalisation. Legal acts issued immediately after the Second World War make up part of the current legal system, whose continuity dates back to the rebirth of the Polish state in 1918. The authorities that arose at the end of the Second World War did not reject the system of the Second Polish Republic. They established new law, but within the framework of the existing legal system of the Republic of Poland. Similarly, the legal system of today's Third Polish Republic is not new, but is a continual development of the same system.

The enforcement of reprivatisation claims is not an act of dispensation of justice, but a review of the legality of the actions of state authorities, that is, actions based on the law and within the bounds of the law, applied in accordance with its content and in compliance with commonly accepted principles of legal interpretation. The point of the exercise is to verify whether the proceedings in individual cases were conducted with respect for the rights of the parties guaranteed by regulations of administrative procedure.

An understanding of this principle can help properly assess, on the one hand, what persons affected by nationalisation can hope to achieve, and on the other hand what the current owners of property that underwent nationalisation should be concerned about. Appearances to the contrary notwithstanding, a real and direct conflict between these two groups of persons occurs very rarely. This is because both the first group and the second group dealt only with the state. It was the state that performed the act of nationalisation, depriving the existing owners of their property, and then it was the state that performed acts disposing of the same property.

What can be restored

Former owners can expect return of real estate in kind only if the unlawfully nationalised property was not subsequently sold, exchanged, or contributed in-kind to a capital company. As held by a seven-judge panel of the Supreme Court of Poland in the resolution of 15 February 2011 (Case III CZP 90/10), the warranty of public reliance on land and mortgage registers protects the acquirer of the right of perpetual usufruct also in the event of erroneous entry in the land and mortgage register of the State Treasury or a territorial governmental unit as the owner of the real estate. This prevents the former owner from regaining the property in kind also when the nationalisation was conducted defectively but a contract was subsequently concluded establishing the right of perpetual usufruct of the property. This rule is a manifestation of consistent protection of rights acquired in good faith, and supports the certainty of transactions.

When there was a violation of the owner's rights but the property cannot be restored in kind, the owner may seek compensation from the state for the lost property.

If therefore a defectively nationalised property was already acquired in the past by someone else under conditions of good faith, applications for reprivatisation filed now cannot affect the legal situation of the property and do not present any threat to the current owner or perpetual usufructuary. Such applications may only lead to a determination through the relevant proceeding (administrative or judicial, depending on the type of case) that there was a violation of nationalisation regulations, which determination then constitutes grounds to seek compensation from the state. Because, as noted at the outset, there is no specific reprivatisation legislation in force, compensation is payable in the full amount. This is undoubtedly costly, but entirely consistent with universally accepted principles of law.

For this reason as well, both reprivatisation and reprivatisation claims are essentially relations between the former owners (or realistically, through the passage of time, the heirs of the former owners) and the state—and not between the former owners and the current owners.

Assets of state enterprises

There is one sphere, however, which must be clearly distinguished and which is characterised by high risk and thus the need to maintain particular caution. This has to do with acquisition of shares in companies created as a result of commercialisation of state enterprises. Such companies are the perpetual usufructuaries of land and the owners of buildings erected on the land, but their title to the property arose not through a civil-law transaction conducted in good faith but through a decision of state authorities.

By way of explanation: Until 1989, the State Treasury was the owner of all state-controlled real estate, including nationalised real estate. State enterprises merely administered certain properties for the State Treasury.

Then, on 5 December 1990, an act went into force under which state enterprises obtained the right of perpetual usufruct of the real estate in their possession and administration—a step commonly referred to as the "enfranchisement" of state enterprises. This right had to be ratified by a decision of the province governor, which decision then provided the basis for entry in the land and mortgage register.

If after assuming title to property under the enfranchisement act such an enterprise was converted into a commercial company—i.e. a joint-stock company (S.A.) or a limited-liability company (sp. z o.o.)—the creation of the company meant only a change in the form of the legal entity. The state enterprise became a company, but the legal status of the assets of the legal person did not change at all.

The enfranchisement act provided, however, that acquisition of the right of perpetual usufruct could not infringe the rights of third parties. Therefore, if the former owner demonstrates that the nationalisation process was defective, this may lead to overturning the decision of the province governor ratifying the acquisition of the right of perpetual usufruct. In this manner, the company loses its title and is forced to return the real estate to its rightful owner.

But if the company sells the right of perpetual usufruct—even if it was defectively obtained—the person who acquired this right from the company in good faith will not be threatened at all by the rightful claims of the former owner. Even if the former owner subsequently files a reservation in the land and mortgage register, or other applications, this will have no legal effect on the acquirer. Nonetheless, for purely technical reasons, this can be a hindrance if the acquirer wishes to resell the property, or for example take out a loan against the property, because the bank will be (unjustifiably) concerned about the risk of loss of the collateral. We have all too commonly encountered cases where the former owners persistently file entirely groundless applications with the land and mortgage register court.

It must be stressed that the warranty of public reliance on the land and mortgage register protects good-faith acquirers of real estate and the right of perpetual usufruct, but does not protect the acquirers of shares in companies.

True reprivatisation risk—in the sense of the possibility of assertion of effective claims to the detriment of the acquirer—arises only in the case of acquisition of shares in a company that was created through conversion of a state enterprise. Such cases are rarely encountered today.

Priority for former owners

Finally, we should touch upon the risks surrounding acquisition of real estate from public entities in auctions. The current Agricultural System Development Act and Real Estate Administration Act both provide former owners a right of priority in acquiring real estate, regardless of the manner in which they lost ownership of the property—even if it was on the basis of properly conducted nationalisation.

These former owners must be notified of the possibility of acquiring real estate designated for auction, at the opening price for bids. If this procedure is not followed, the former owner may effectively seek a judgment from the court invalidating the sale contract. This is not typically regarded as a reprivatisation claim, but it does require examination of the manner in which the State Treasury or territorial governmental unit became the owner of the real estate put up for auction and whether the required procedure with respect to the former owners is being followed, in order to eliminate the risk of invalidation of the purchase agreement.

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Trademarking the shape of a product

Dr Monika Żuraw

The shapes of products, even for things we use every day, are becoming increasingly imaginative. This makes product shape a marketing tool as visual appeal is vital to market success. A good illustration is the race among producers of mobile devices who surprise their customers every few months with new and highly stylised designs to encourage them to upgrade their devices frequently. Product shapes sometimes become so readily recognisable that they automatically convey who is the manufacturer of the product—as in the case of a certain curvaceous cola bottle. Product shapes thus serve many functions, often overshadowing the mere utility of the product.

Product shapes may embody several intellectual property rights. They may be protected as a work if they display a creative character, a utility model if they perform a certain practical function, an industrial design if their external form differs significantly from other forms available on the market, and even a patent if connected with a specific technical solution.

Cumulative protection across multiple fields of intellectual property law is usually permitted, and the regulations in one field do not exclude application of regulations governing some other form of intellectual property. From a practical point of view, cumulative protection is beneficial for the holder of IP rights because it reinforces the protection, enabling the holder to select the most advantageous strategy to protect the holder's rights in the given factual situation.

Each type of protection is awarded under different circumstances and has a different time dimension. Obviously, not all sets of IP regulations can always be applied to the protection of a specific shape, but seeking the broadest possible protection for product shapes from the design stage forward is usually worth the manufacturer's effort and expense.

Can shape be a trademark?

There has recently been a lively debate over the possibility of registering the shape of a product as a trademark. The rule is that a three-dimensional mark may be registered the same as other marks if it has distinguishing power, that is, it indicates that the product originates from a certain producer. Now in most instances it is necessary to prove "secondary" distinguishing power, that is, to show that the shape has become recognisable to customers through a long presence on the market and intense promotional efforts. In the case of truly well-known shapes this is not difficult to show.

Registration of a trademark creates a broad monopoly on the use of the mark in commerce, which means that other businesses cannot use similar marks, or in this case similar product shapes. Moreover, trademark protection is unlimited in time. Trademark protection can easily be extended for successive 10-year periods, even if the patent or industrial design associated with the same feature expires. This is another reason it is highly advantageous for the holder to obtain trademark protection. On the other hand, it is clear that trademark protection of product shapes does limit competition.

Other intellectual property rights are all temporary. At the end of the periods set forth in the relevant regulations, those other attributes become available to all market participants, which is intended to further the technological and cultural development of the society. With respect to product shapes, this also corresponds to the rule of free imitation, which encourages lively competition and is thus beneficial to consumers, who can select from a wider and cheaper range of substitutable goods.

For these reasons, trademark protection of product shapes is subject to restrictions. The regulations expressly exclude registration of marks that are made up only of a shape that "results from the nature of the goods themselves," a shape "necessary to obtain a technical result," or a shape that "gives substantial value to the goods." Taking these rules literally, it may be understood that they apply only to shapes that bear those characteristics, e.g. obvious shapes, shapes that serve only a technical function, and shapes that constitute works of art.

CJEU protects competition

But recent rulings by the Court of Justice of the European Union on product shapes that are icons on the market and surely have distinguishing power lead to different conclusions. In *LEGO Juris A/S* (Case C-48/09 P) it was held that although it was undisputed that LEGO bricks are distinctive and that there are alternative shapes, the shape of LEGO bricks nonetheless could not be registered as a Community trademark because it would prevent other manufacturers from using the same technical solution. Cult loudspeakers from Bang & Olufsen met a similar fate before the CJEU (Case T-508/08) because the characteristic tall, slender shape of the speaker contributes substantial value to the product, and it is impermissible to award a permanent monopoly to a single enterprise to use such attractive shapes. The court stressed that a balance must be maintained between the temporary protection awarded to innovations and the indefinite protection afforded to features distinguishing the origin of the goods. It is in the general interest for innovations to enter the public domain when the period of protection ends. The court took a similar tone in a judgment concerning the well-known Tripp Trapp children's chair (*Hauck GmbH & Co. KG v Stokke A/S*, Case C-205/13). In that case, the inability to register the shape of the chair as a trademark was also based on the aesthetic value of the shape and the fact that the shape is to some extent typical for goods of this type.

In none of these cases was the shape of the product solely determined by characteristics that would exclude registration of the shape under the regulations. The position taken by the CJEU greatly narrows the possibility of registering shape as a trademark through a broad interpretation—perhaps contrary to the wording of the law—of the grounds for denial of registration. As a rule, most shapes will have some greater or lesser connection to the functionality, usefulness or aesthetic value of the product for which registration is sought. This means that in many instances product shapes will not be registered, or their registration will be invalidated, even when there is no doubt that they have distinguishing power. This approach seems contrary to the fundamental rule that shape may serve such function, and in reality it often does serve this function in the case of well-known products.

Narrower and narrower protection

The CJEU case law fits within a current trend toward narrowing the range of protection of trademarks. The general interest in freedom of competition takes priority. This interest justifies attempts to prevent using trademark registration to award trademark holders a monopoly on practical or aesthetic solutions which consumers could also seek out among competing goods.

The court also stresses that the exclusive and permanent rights provided by a trademark should not be used to effectively extend the validity of other rights indefinitely.

On the other hand, the court ignores the fact that denial of trademark protection to famous shapes encourages competitors to copy these designs rather than seeking equally attractive but original solutions. In this sense, the case law does not foster the increased competition among substitutable goods which the court claims to seek.

A surprising twist

The latest ruling concerning the shape of Rubik's Cube (*Simba Toys GmbH & Co. KG*, Case T-450/09) sets a different tone than the other judgments from the CJEU. In that case, the court did not find that the shape of the toy was solely of a functional character, as was held in the case of LEGO bricks. In the LEGO case, the analysis by the CJEU led to the conclusion that the circular studs sticking out of the bricks are necessary to achieve the intended technical effect, i.e. assembling the bricks. In the *Simba* case, however, the General Court held that there is no connection between the thick black line along the edges separating the blocks on a Rubik's Cube and the ability to rotate the pieces.

This ruling is expected to be revised by the Court of Justice on appeal, whether it decides to vacate the judgment of the General Court or extend it even further to find that the shape of Rubik's Cube may be a trademark in its own right, which would effectively prevent competitors from producing similar toys.

No labels in Poland?

The Polish case law concerning trademark registration of product shapes does not extend very far back and does not take a clear line. Recently the Polish courts have tended to rely solely on the trends set by the CJEU.

Recent cases of note include the dispute over the container for Danone's Fantasia yogurt, with two compartments, and the shape of the green bottle for Unilever's cleaning liquid Domestos. Both of the cases were pending for several years before the Polish courts.

In the Danone case, registration of the container as a three-dimensional trademark was invalidated basically because of the obviousness and functionality of the shape, and in this case the ruling generally appears correct.

The Domestos ruling appears dubious, however. In that case the trademark was deemed to have expired because of non-use, rather than being invalidated because it was functional or obvious. It was held in that case that the bottle itself is not sold in the form of a purely three-dimensional shape, as it was filed for registration, but always with labels. It is hard to agree with that decision. Practically speaking, this would present another circumstance preventing the holder from maintaining registration of a product shape as a trademark. This is because products whose shapes are registered as a trademark will always have some other features as well, such as a label.

It appears that it will be increasingly difficult to register the shape of a product as a trademark. Under these circumstances, producers should pay greater attention to other types of protection. In particular, they should waste no time in seeking to register the shapes of their products as an industrial design. Copyright is taking on greater significance as well, and it is also an effective form of protection from the holder's perspective.

It is also important to recognise the overall principle that when awarding protection to specific attributes, all of the various competing interests should be taken into account. The issue discussed here illustrates how difficult this can be in practice and how subjective the evaluation of a specific state of facts can be.

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How closely can shareholders interfere in company affairs?

Maciej Szewczyk Anna Dąbrowska Izabela Zielińska-Barłożek

The owners of a company may have an entirely different vision from management of how the company should operate its business. But under the law, the management board is charged with conducting the affairs of the company and representing the company. What influence can shareholders exert over the actions of management, and what consequences can follow if the management board follows the shareholders' instructions?

Under Polish law, a capital company—i.e. a limited-liability company (sp. z o.o.) or a joint-stock company (S.A.)—is a legal person, and thus is vested with legal capacity. Nonetheless, a company is not an entirely independent and self-sufficient creature. The nature of a capital company presupposes the existence of capital belonging in defined proportions to entities other than the company itself—namely its shareholders. And the creation and existence of a capital company is closely connected with the defined purpose assigned to it by the founders or established during the operation of the company by its shareholders.

Furnished with certain means—capital in particular—the company should then pursue that purpose. But because it has separate personality, the company does not act through its shareholders, but through bodies created for this purpose—primarily the management board and the supervisory board. The members of these authorities have a legal duty to act in the interest of the company, rather than in the interest of the shareholders who appointed them. This duty is backed up by liability for acting to the detriment of the company—not to the detriment of the shareholders.

This means that the shareholders and the managers may have an entirely different vision of how the company should pursue its purposes. Moreover, the interests of the company as a legal person may not coincide with the interests of the shareholders with capital in the company—even if the shareholders are unanimous and persistent on this issue.

This raises the question of the bounds within which the shareholders may interfere in the affairs of the company they own.

Basic rules in the articles of association

A basic method for intervention by the shareholders is in how they word the articles of association. By this route they can define (and subsequently modify) the corporate purposes, the subject of the company's business and the rules for distribution of profit, and, as we will discuss below, set limits on the decision-making autonomy of the management board. As long as the terms of the articles of association are in compliance with the law, the permissibility of such interference by the shareholders does not generate any particular doubts.

Interference by the shareholders in the actual conduct of the company's affairs is a more complex issue.

Pursuant to the Commercial Companies Code, the body that conducts the affairs of a capital company and represents the company is the management board. However, the management board does not act with complete discretion, because the bounds in which it can act are established by regulations of law, the articles of association, and resolutions of the shareholders.

Passive control by the shareholders' meeting

Certain actions by the management board require the consent of the supervisory board or the shareholders' meeting, as specified in the articles of association and also in cases listed exhaustively in the law (e.g. sale of the company's enterprise).

The list of actions requiring consent, particularly at the level of the shareholders' meeting, may be drawn up in such a way that the shareholders can exert de facto influence over actions taken by the management board. But it is nonetheless a passive form of influence, because the possibility of the shareholders' taking a position on a specific matter will not arise in practice until the management board decides that it wishes to take an action and seeks consent to carry it out.

Therefore this is not a tool that allows the shareholders to impose their will on the management board and dictate the actions it should take.

Moreover, as indicated in the legal literature, the range of matters requiring consent of the supervisory board or shareholders must not be overly broad. It cannot extend to petty actions in the ordinary course of business, because this would practically paralyse the functioning of the management board (and indirectly the company itself) and reduce the management board to the role of puppets, only superficially appearing to take decisions for the company.

Finally, except for matters for which the law requires consent, if the management board acts without obtaining consent that is required only by the articles of association, failure to obtain consent will not invalidate the management board's action (although the members might be internally liable for acting without consent).

What's OK in a limited-liability company is not OK in a joint-stock company

But can the shareholders exert active influence over the operations of the management board, issuing instructions to the management board to behave in a specific manner?

Art. 375^1 of the Commercial Companies Code expressly prohibits issuance of binding instructions to the management board of a joint-stock company. However, the comparable provision of the code applicable to limited-liability companies (Art. 219 §2) does not include such a prohibition.

The main reason for this difference lies in the fundamental construction of the two types of companies.

A limited-liability company is regarded as a kind of intermediate form between a partnership and the archetype of a capital company, which in the Polish system is the joint-stock company. Unlike in a joint-stock company, but similar to the solutions applied in partnerships, the shareholders of a limited-liability company have extensive rights to exercise personal supervision of the company (unless otherwise provided in the articles of association)—including the right to demand explanations from the management board (Commercial Companies Code Art. 212 §1).

It is generally accepted in the commentaries and in the case law (although not unanimously) that the statutory regulation submitting members of the management board to restrictions established in shareholder resolutions (Commercial Companies Code Art. 207) means in practice that unless otherwise provided in the articles of association, restrictions established by the shareholders may take the form of either prohibitions or commands (instructions), or specific requirements that must be fulfilled when the management board performs certain legal acts.

Not every instruction is binding

Art. 201 §1 of the code, mentioned above, providing for a presumption of the authority of the management board in conducting the affairs of the company and representing the company, appears to be the key to determining whether a given instruction issued to the management board of a limited-liability company by the shareholders' meeting falls within the bounds permitted by law. It is clear that issuing instructions to the management board covering an excessively broad spectrum of matters is incompatible with the nature of a capital company—whose affairs are not handled by the shareholders.

Therefore it cannot be accepted that any and all instructions issued to the management board by the shareholders' meeting can be binding on the management board. Even so, if a non-binding instruction is not carried out, a management board member who refused to go along may be dismissed by the shareholders' meeting pursuant to the general authority of the shareholders' meeting in this respect (Art. 203 §1).

Nonetheless, the question should be addressed of the consequences of the management board's violation of an affirmative instruction imposed on it by the shareholders' meeting, and the related liability of the management board members.

It appears that the fundamental criterion determining whether the management board is free to refuse to carry out an instruction from the shareholders is whether the instruction is consistent with the law, the articles of association and good practice. If under the circumstances any of these criteria is not met, the management board is not only released from the obligation to comply with the instruction, but indeed must refuse to carry it out. The same applies to instructions whose performance could result in violation of the law.

If the shareholders' meeting adopts a resolution contrary to the articles of association, the law or good practice imposing a specific requirement on the management board to act, the management board should challenge the resolution pursuant to Commercial Companies Code Art. 249 §1 or 252 §1 in order to remove any doubts about the legality of the resolution.

When the company suffers as a consequence

The greatest doubts are generated in practice by the scope of liability of members of the management board for the consequences of actions taken in performance of instructions issued by the shareholders' meeting or, conversely, the consequences of failure to carry out such instructions.

Under the Commercial Companies Code, members of the management board bear civil liability to the company for a loss caused to the company by a culpable act or omission contrary to law or the articles of association of the company (Art. 293). Thus if a member of the management board carries out an instruction from the shareholders' meeting (assuming that the resolution is not susceptible to challenge under the procedure mentioned above), and as a consequence the company suffers a loss, it appears that the management board member's act could not be considered culpable, and thus there would not be grounds for the company to pursue the management board member to make up the loss.

Conversely, if the refusal to carry out an instruction results in a loss to the company, under these circumstances the refusal could be regarded as a culpable act of the management board member providing grounds for the member's liability to the company to make up the loss.

It should be pointed out, by the way, that there are no grounds for finding that a management board member's compliance with an instruction issued by the shareholders' meeting (consistent with the foregoing requirements) will release the member from liability to the company's creditors pursuant to Commercial Companies Code Art. 299 (i.e. personal liability to the creditors if execution against the assets of the company is ineffective). This provision is mandatorily applicable and cannot be rendered inoperative by a decision of the shareholders, including a decision in the form of a resolution instructing the members of the management board how to act.

Shareholders can do a lot—within moderation

To sum up this discussion, it may be accepted that in a limited-liability company, in particular, the shareholders have considerable ability to influence how the company's affairs are conducted. This is important because it is specifically this type of company that is most often used to conduct operations in Poland within a corporate group (e.g. under a holding company structure). Such structures are created for individual subsidiaries to carry out tasks entrusted to them by the parent company. The legal differentiation and separate legal personality of the subsidiaries in such structures is not so much an end in itself as a means to achieve a certain end.

It must be borne in mind, however, that too liberal an attitude toward the issue of influence over the company's operations exerted by the shareholders may undermine the concept of the company as a legal person and thus give rise to a risk that the exertion of such influence will be held to be an impermissible abuse of law.

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Access to a public road is not so obvious

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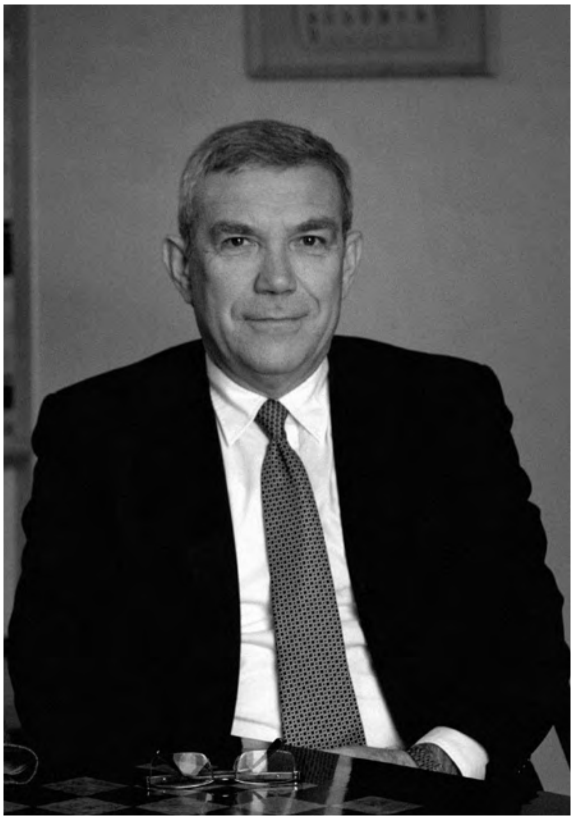
Tomasz Zasacki



Hardly anyone needs convincing how important it is to have access to a road. Real estate without a proper road connection may prove useless to the investor regardless of any other strengths the site may offer. A road means the possibility of connection to the world and transportation. Ideally the road may be used by anyone, without the risk that the owner will seal off the road at any time or otherwise prevent its use. A public road meets these criteria.

Only convenient and unhindered access to a public road guarantees an investor that it can properly develop the property and operate on the site. Access to a public road is not just a practical necessity for development of a site, but is also required by the legal regulations governing the real estate development process.

If there is no local zoning plan in force for the site of the project, the conditions for development are established through individual planning permission. Pursuant to Art. 61(1)(2) of the Planning and Zoning Act, access to a public road is one of the conditions for issuance of a decision on construction conditions.

At the stage of acquiring the property, it may be necessary to partition the real estate in order to separate out the development site. Under Art. 93(3) of the Real Estate Administration Act, partitioning of real estate is permissible if the intended separate plots have access to a public road.

Under the Construction Law, when designing a structure, not only the investor's access to a public road should be considered, but also third parties' access to roads. Structures must be designed so that third parties are not deprived of access to a public road.

The construction design must include, among other items, confirmation by the road administrator for the location that it is possible to connect the plot to a public road in accordance with the regulations governing public roads.

It should be pointed out in this regard that under Art. 16(1) of the Public Roads Act, construction or reconstruction of public roads necessitated by a non-road project is the task of the investor for the non-road project.

What is a public road?

A public road is defined by the Public Roads Act as a road falling into one of the categories of roads provided for in the act which may be used by anyone for their intended purpose, subject to the restrictions and exceptions set forth in the act or other specific regulations.

National roads are owned by the State Treasury. Province, county and commune roads are owned by the relevant local governmental unit.

The Public Roads Act provides that a road is assigned to a particular category of roads on the basis of a regulation issued by the minister for transport (in the case of national roads) or resolutions of the competent authorities of the relevant local governmental unit.

Roads, cycle paths, parking lots and other areas intended for vehicular traffic but not included in any of the categories of public roads or located on the right-of-way of public roads are deemed to be internal roads.

Therefore not every road functioning as a route of transit qualifies as a public road. To obtain that status, it must be included in one of the categories of roads under the procedure established by the Public Roads Act. It must also be capable of public use.

In our practice, we have often encountered roads which met the technical requirements for a specific category of roads, and also fulfilled the requirement of public accessibility, because they were owned by the specific commune, but were not regarded as public roads because they were not covered by the appropriate resolution.

It should also be borne in mind that within cities, there is a common practice of treating internal roads like streets and naming them like streets. In Warsaw, for example, a section of ul. Włodarzewska in the Włochy district, as well as ul. Marii Rodziewiczówny in Praga and ul. Szwarc-Bronikowskiego in Ursynów, are actually internal roads, not public roads.

How to determine if a road is a public road?

Theoretically, the information from the register of land and buildings should be sufficient to determine the status of a road. The register of land and buildings includes such information about plots of land as their location, boundaries, surface area, utilisation, soil classification, and land and mortgage register numbers.

From the survey map, the location, boundaries, utilisation and plot numbers can be determined. The plot register, in turn, which is the descriptive portion of the land register, should contain information on whether a given plot is a public road. The category and number of the road should be provided.

We should explain that the lack of entries in the relevant rubrics of the land register does not automatically mean that the road in question is an internal road rather than a public road. The land registers are not always kept up-to-date in this respect.

If for whatever reason the register of land and buildings is inaccessible, the information included in the survey map may be determined on the basis of geodetic and cartographic reports available online, such as an orthophotomap, satellite photos, topographic maps and so on.

If the register of land and buildings cannot be used and the survey data need to be verified, the status of the road may be determined using the right of access to public information. To this end, an application should be filed with the competent administrator of public roads (from the relevant local governmental unit, the minister, or organisational units appointed to administer roads, such as the Municipal Road Authority in Warsaw or the General Directorate for National Roads and Motorways). To determine the appropriate administrator, information from the websites of the relevant units, as well as legal acts (decrees and resolutions) published in official journals (national or province) and available from online legal resources, can be helpful.

Securing access to a public road

Real estate directly adjacent to a public road has assured access to that public road in a legal sense. But this is not necessarily the same as the ability to connect directly from the project to that road. The investor must reach agreement with the road administrator on the location of the entry and exit to and from the property. It may prove during those consultations that a site that is theoretically attractive for development in reality has more drawbacks than advantages.

Consider the example of a petrol station on a national road, in an area that was practically not built up at all. The location might have seemed ideal. But in conjunction with a planned expansion of the road, it was necessary to install acoustic screens along an extended section of the road, which would cut the station off from the right-of-way. There would be a connection to the national road, but no direct access. Access would require drivers to follow a circuitous route of several kilometres of local roads. Under those circumstances, it would be pointless to build a petrol station at that location.

Another example involves development of a residential estate. The planned construction was consistent with the local zoning plan. The site was adjacent to a public road. But it turned out that the conception for development of the site called for the entrance to the estate to be built at a place earmarked in the zoning plan for a bus stop. Not surprisingly, the road administrator did not accept the proposal. The developer had to change the layout and reduce the number of buildings—coincidentally cutting the forecast profit from sale of units.

Conversely, the lack of immediate vicinity to a public road does not necessarily exclude having direct access to a public road. The applicable regulations provide that in the event of a lack of direct access to a public road, if an internal road is laid out, together with establishment of relevant easements for the partitioned plots, or other road easements for these plots are established if an internal road cannot be laid out, it is also regarded as access to a public road.

In practice, not only easements are encountered, but also leases or other types of agreements. It is another problem to persuade the owner to encumber its property with an easement. If the owner does not agree to establish an easement, relief may be sought from the courts.

The State Treasury and local governmental units are a special type of owner. An order from the province governor or a resolution from the relevant local council is required to encumber publicly owned properties with an easement. The draft resolution is prepared by public officials, examining in detail the property that is to be encumbered. These measures are generally time-consuming, unless the potential investor is attractive to the community, for example because it plans to create jobs or satisfy other local needs. Then the authorities typically proceed more expeditiously.

The issues signalled here demonstrate how important it is to conduct a technical examination of the real estate in order to identify potential problems with access to a public road prior to the transaction. What seems obvious at first glance may not prove to be the reality.

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Certificates of good conduct in Polish public procurement

Anna Prigan

Contractors taking part in public tenders in Poland must prove their good conduct by showing that they have not been barred from seeking public contracts and that their management authorities have a clean criminal record.

Bidders in Polish public procurement proceedings prove their good conduct through two different types of documents. The first involves the company and the second involves the individuals authorised to represent the company.

Polish bidders obtain both types of documents from the same institution. The National Criminal Register issues certificates for both individuals and legal persons stating that they have not been convicted of offences. It may be more difficult for foreign bidders because their home countries do not always have a system for issuing such certificates, or the system is different from the one in Poland.

Certificates for board members

A company is automatically excluded from participation in a tender if a member of its management board has been convicted of certain offences in a final judgment. To confirm that the company is eligible to take part in a tender in Poland, each member of the management authority must obtain a good-conduct certificate from the country where he or she resides. The certificate must be no more than 6 months old and issued at the latest on the deadline for filing bids (or applications to participate in the procurement proceeding).

The duty to present these certificates can be a great inconvenience in completing an offer, particularly for large companies with numerous board members. An additional difficulty is that in most countries such individuals themselves must seek information about their own criminal record, thus requiring the top management of the company to become personally involved in this paperwork. Unfortunately, the duty to present good-conduct certificates for the company's representatives is unavoidable. It applies to all currently serving members of the managing body.

The Polish Public Procurement Law requires proof of a clean criminal record only with respect to certain categories of offences. Namely, legal persons may not participate in a proceeding for award of a public contract if any of the active members of their managing body has been convicted in a final judgment of an offence committed in connection with a contract award proceeding, an offence against the rights of workers, an environmental offence, bribery, a commercial offence or other offence committed for financial gain, a fiscal offence, or an offence of participation in an organised group or conspiracy seeking to commit a criminal or fiscal offence.

Bidders are also barred from participating in a tender if a current management board member has been convicted in a final judgment of an offence under Art. 9 or 10 of the Act on the Consequences of Hiring Foreigners Unlawfully Present in Polish Territory of 15 June 2012, for a period of one year after the judgment becomes legally final. These offences involve illegal hiring of foreigners—primarily hiring foreigners who do not hold a valid document for their stay in Poland.

The types of offences covered by the good-conduct requirement all bear some apparent relevance to performance of public contracts. Thus the fact that a board member has been convicted of a traffic offence, for example, will not affect the company's eligibility to participate in the tender.

It should be stressed that a certificate from the relevant office presented by a management board member who does not reside in Poland need not expressly refer to all of the offences referred to in the Polish Public Procurement Law. The certificate should have the form and content provided for under the local regulations in the jurisdiction where the person resides. It may happen, for example, that a specific register does not display at all a certain category of offences that would be entered in the Polish criminal register. Such differences do not affect the correctness of the certificate presented, so long as it was issued by the competent judicial or administrative authority which handles such matters in that jurisdiction.

The good-conduct certificates required for management board members apply only to currently serving board members. If board members in the past were convicted of offences but they are no longer members of the board, this does not affect the company's eligibility to seek award of the contract. But if a current member of the management board has been convicted in a final judgment of one of the listed offences, the only option if the company wants to take part in the tender is to remove that person from the board.

There is no obligation to submit good-conduct certificates for the shareholders of the company or the members of its supervisory authority. The criminal records of members of the management board of other companies in the bidder's capital group are also irrelevant. If a bid is submitted by a subsidiary, and members of the management board of the parent company have been convicted of these offences, it does not affect the subsidiary's eligibility to participate in the tender. Similarly, the criminal record of members of the management board of one subsidiary does not affect the eligibility of another subsidiary to participate in the tender.

A conviction that has been wiped from the records due to the passage of time in accordance with the applicable national regulations is also irrelevant to the Polish tender proceeding.

Corporate good conduct

Apart from the need to demonstrate the good conduct of the members of the management board, the bidder must also demonstrate the good conduct of the company.

Companies are ineligible to participate in a tender if an order has been issued against them prohibiting them from seeking the award of a public contract under regulations governing the liability of collective entities for punishable acts. Thus if the competent authority in the jurisdiction where the company has its registered office has prohibited the company from seeking the award of public contracts, it is also barred from tenders in Poland. The time of issuance of the good-conduct certificate for the company is the same as for certificates of individuals (no earlier than 6 months before and issued no later than the deadline for filing offers or applications to participate in the tender).

The criminal register in Poland issues good-conduct certificates for both individuals and companies. In other countries, there is typically some such register for individuals, but it is not always possible to obtain a good-conduct certificate for companies.

When certificates are not available

Under the general rule for verification of the capacity of foreign entities to perform public contracts in Poland if there is no authority in the country where the contractor has its registered office or where the individual resides that issues the certificates required in Polish tender proceedings, the missing certificate can be replaced by a declaration.

Thus if good-conduct certificates are not issued by a judicial or administrative authority in the country where a given management board member resides, the board member may instead present an individual declaration, made before a competent judicial or administrative authority, professional or commercial self-regulatory body, or notary in the country of residence. Declarations made before a notary are the most commonly used of these forms. Thus the management board member in such circumstances should appear before a notary in the country of residence and make a statement that he or she has not been convicted in a final judgment of any of the offences referred to in the Polish Public Procurement Law.

The rule for substitution of declarations in place of good-conduct certificates for individuals also applies to certificates that the company has not been prohibited from seeking public contracts. If there is no institution in the country where the bidder has its registered office that issues such certificates, the company's authorised representatives should make a declaration to this effect for the company. For this purpose, as with individual declarations, the company's representatives should appear before a competent judicial or administrative authority, professional or commercial self-regulatory body, or notary in the country where the company is registered and make a declaration that the company has not been prohibited from seeking the award of public contracts.

It should be stressed that these declarations by the interested parties may be substituted for certificates issued by the competent authorities only if it is not possible to obtain such certificate in the given jurisdiction. Declarations taking the place of certificates are made in the declarant's own country, that is, in the jurisdiction where the company has its registered office in the case of declarations for the company, or in the jurisdiction where the individual resides in the case of a declaration by an individual.

Notarial requirements

As mentioned, notarial declarations are most frequently used. For such a declaration to be valid, the declaration must be made in the presence of the notary, and not merely confirmed by the notary. Because different jurisdictions have different rules for the form in which notaries certify documents, this requirement generates various issues of interpretation.

For a notarial declaration to be acceptable when submitted in a Polish tender, it should be clear from the notarial certification that the person making the declaration appeared before the notary and made the specific declaration. Consequently, the certification by the notary must be made on the same date as the declaration.

Anna Prigan, legal adviser, Infrastructure & Transport Practice and Public Procurement & Public-Private Partnership Practice

Will a sportsman be taxed like a business?

Kazimierz Romaniec

2014 brought an unexpected change in what had been the uniform approach of the courts and administrative authorities in Poland to taxation of income from competing in professional sports. The administrative courts had previously ruled that such income should be treated exclusively as income from activity performed personally, but the Minister of Finance found that it can also be included in business income.

In a general interpretation issued on 22 May 2014, Poland's Minister of Finance found that a taxpayer earning income from activity performed personally on the grounds listed in Art. 13(2)–(8) of the Personal Income Tax Act may include this income for tax purposes among income from business activity, so long as the income was earned under conditions meeting the definition of business activity under PIT Act Art. 5a(6) and the negative grounds set forth in PIT Act Art. 5b(1) do not also obtain.

This means that if a professional athlete performs services for a sports club consisting of practising sport for pay, the revenue from this activity may be taxed at the flat rate of 19% for business income if:

- The activity is conducted in the athlete's own name without regard to the result
- The activity is conducted in an organised and ongoing manner
- The revenue from the activity is not included among other revenue from sources listed in PIT Act Art. 10(1) points (1), (2) and (4)–(9)
- At least one of the following conditions is met:
    - The performer assumes liability to third parties for the results of these activities
    - The activities are not performed under the direction of, or at the place and time indicated by, the person hiring the services
    - The performer of these activities bears the economic risk connected with the activity.

This position was maintained in an interpretation issued for the football club Lechia Gdańsk with respect to football players performing services consisting of playing professional sports, and trainers performing services of coaching football players for the professional football club.

Businessman on two wheels

The foregoing position is the fallout from the closely watched case of the former individual Polish champion in speedway motorcycle racing. The Supreme Administrative Court denied him the right to include revenue from professional sport, treated as activity performed personally, among revenue from his business activity.

The taxpayer, professionally performing motorcycle races on a speedway track, included the revenue from participation in competitions and the racing team organised by himself among his business income. He argued that his personal activity consisted not only of practising the sport, but also organising the sports activity of the speedway racing team as part of the enterprise he conducted as a sole trader entered in the local business register.

The taxpayer conducted business in his own name and for his own account, bearing exclusive responsibility for its results. This responsibility primarily included civil liability to third persons. The taxpayer independently decided on the manner, time and circumstances in which the services would be performed. He provided services to more than the one club for which he performed business activity. He conducted his activity in an organised and continuous manner, characterised by stability and repetition under changing conditions for performance of the activity. The purpose for conducting the activity was to earn money, although the intermediation of other persons in performing the services was a constant element.

Activity performed personally and business activity constitute separate sources of income and are taxed under different rules. The PIT Act exhaustively lists the types of income that are regarded as deriving from activity performed personally—including income from performance of sport, sports stipends, and income of referees overseeing sports competitions.

In the case at hand, the doubts surrounded how to assign the income to the proper source when the taxpayer's income was listed among types of income from activity performed personally but at the same time the taxpayer's activity met the conditions set forth in the definition of business activity.

Against previous interpretations and rulings

The general interpretation issued in May 2014 and the interpretation issued for Lechia Gdańsk stand in contradiction to what had been the uniform position of the administrative courts, which held that income from the performance of sport must be classified exclusively among income from activity performed personally. The administrative courts stressed first and foremost the literal definition of business activity. In their view, income cannot be regarded as income from business activity if the income can be attributed to other sources of income listed in the PIT Act. Thus, because Art. 13(2) of the PIT Act lists income from the performance of sport as income from activity performed personally, it cannot be included among income from business activity.

However, as the Minister of Finance pointed out, "The administrative courts are not always consistent in interpreting the definition of business activity for income-tax purposes. In the case of sporting activity they have drawn from Art. 5a(6) and Art. 13(2) of the PIT Act an absolute legal norm excluding the possibility of including revenue from the performance of sport in business activity, but in the case of other professional groups earning income also listed in the catalogue of types of income from activity performed personally, they do not apply a strictly linguistic interpretation of these regulations."

The Minister of Finance cited the case law from the administrative courts concerning classification for income-tax purposes of income of attorneys defending clients in court-appointed cases and the income of referees overseeing sports competitions, which "are also listed in the catalogue of types of income from activity performed personally, like income from performance of sport, but nonetheless the view is presented in the judgments of the administrative courts that such income may be attributed to the source of business activity if it is earned as part of business activity."

The grounds for this interpretation may also be found in the wording of the PIT Act, under which:

- The regulation concerning activity performed personally does not apply to income obtained for performance of services on the basis of a contract of mandate or a contract to perform a specific work, concluded as part of the business activity conducted by the taxpayer
- Among the types of income earned on the grounds indicated in PIT Act Art. 13(2)–(8), only income earned under contracts for management of an enterprise, managerial contracts or contracts of a similar nature is always classified as earned through activity performed personally, even if such contracts are concluded as

part of the business activity conducted by the taxpayer
- Tax remitters are not required to withhold tax from amounts payable on the grounds listed in Art. 13 (2) and (8) if the taxpayer provides a statement that the services fall within the scope of business activity conducted by the taxpayer.

Binding force of general interpretation

General interpretations do not operate retroactively and are not binding. Taxpayers, tax authorities and fiscal audit authorities are bound only by laws, not interpretations of laws. Publication of general interpretations is nonetheless important for determining the consequences of compliance with the interpretation and when a general interpretation has not been followed in resolving a tax dispute.

Compliance with a general interpretation before it is amended cannot work to the detriment of the person who complied with the interpretation. If an authority fails to reflect a general interpretation when ruling on a tax case, the addressee of the ruling is protected. But this applies only to a situation where the taxpayer is dissatisfied with the ruling and asserts the general interpretation which the authority did not apply in the taxpayer's case.

General interpretations are not binding on courts or other tribunals, but within the scope set forth above they apply only to the public tax administration. An administrative court—unlike tax authorities issuing individual tax interpretations—is not bound by a general interpretation by the Minister of Finance published in the official journal of the Ministry of Finance. This is particularly important when the general interpretation is inconsistent with a judgment of the Supreme Administrative Court, as happened in the case of the speedway motorbike racer.

From the perspective of taxpayers and remitters, when following an understanding of the law presented in a general interpretation by the Minister of Finance, they are acting in compliance with the principle of trust in state authorities, which the Constitutional Tribunal has deduced from fundamental principles of the rule of law. (Similarly, the Tax Ordinance refers to the principle of trust in tax authorities.)

A tax authority's failure to follow an official interpretation of law issued by the Minister of Finance represents a gross violation of the principle that tax proceedings be conducted in a manner fostering the citizen's trust in the law and the tax authorities, which in turn provides grounds for the taxpayer to appeal. In such a case, the taxpayer would have a good chance of prevailing.

What next?

The interpretations discussed above may prove revolutionary for the sports business. By finding that income of the types listed in PIT Act Art. 13(2)–(8) may be attributed to business activity if earned under conditions meeting the definition of business activity, the Minister of Finance gave athletes, referees and coaches, as well as others such as artists, writers and journalists, the possibility of paying income tax at the flat rate for business income. In practice such taxpayers could thus pay personal income tax at the flat rate of 19% instead of the marginal rate of 32%.

This general interpretation clearly underlines that there is no justification for differing interpretations of the same regulations in relation to different professional groups. It should nonetheless be stressed that taking advantage of the possibility presented by this interpretation will depend on consistent fulfilment of the conditions presented in the interpretation. The extent to which this is feasible under the rules governing the operation of sports bodies should be revealed within the near future. The inconsistency between the general interpretation and the recent ruling by the Supreme Administrative Court in the case of the speedway racer is also significant.

Certainly it is vital to bring to an end this form of discrimination against a certain group of taxpayers because they perform sport—a profession that fulfils a social function today similar to that of an artist or craftsman.

Kazimierz Romaniec, legal adviser, Tax Practice and Sports Law Practice

A new era for Polish coal?

Radosław Wasiak

The proposal for Poland's Energy Policy through 2050 presented by the Minister of Economy shows that coal will continue to be the main raw material for the power industry in Poland. This is also supported by the EU's climate and energy policy for 2020–2030. But the economic, technological and legal conditions make one wonder whether Polish power stations are going to be burning Polish coal.

Poland's Energy Law imposes a number of obligations on the Minister of Economy as the head administrative authority in matters of energy policy. One duty is to draft a proposal for the country's energy policy for approval by the Council of Ministers. The goal of the energy policy is to ensure the country's energy security, increased competitiveness of the economy, and energy efficiency, while also caring for the environment. Such a policy document for the development of Poland's energy industry is drafted every four years and should include growth forecasts over a horizon of no shorter than 20 years.

In 2014 the Minister of Economy issued for social comment a draft document entitled "Poland's Energy Policy through 2050." One of the priorities of the new long-term state policy for the energy industry will be the effort to achieve energy independence through efficient management of domestic resources of solid fuels. Local deposits of bituminous coal and lignite are regarded as stabilisers of energy security.

The Minister of Economy calls for long-term development of the Polish energy industry according to a scenario regarded as "sustainable." This will involve, among other items, maintaining a significant share of solid fuels in Poland's balance sheet of raw materials for power production. This share should decline, however, in connection with the growth in the number of installations using renewable energy sources (including "prosumer" installations) subsidised by state support mechanisms, development of infrastructure for delivering natural gas from abroad (interconnectors and the LNG terminal in Świnoujście), and the introduction of atomic energy with planned capacity totalling 6,000 MW. Notwithstanding the anticipated growth in the quantity of energy produced from competing raw materials and sources, it is projected that coal will retain its dominant position in the domestic Polish energy system for many years to come.

The plans presented by the Minister of Economy should have a positive impact on the Polish coal industry. The reserves of bituminous coal in Poland are estimated at 66 billion tonnes. They are located mainly in two areas: the Upper Silesian Coal Basin and the Lublin Coal Basin. Due to the geological characteristics of the deposits, operation of existing facilities and development of new facilities in Lublin province now appear particularly promising. The deposits there are relatively shallow. They are also located in non-urbanised areas, so investments are not burdened with extra costs which are particularly severe in heavily built-up and densely populated areas.

But when considering the prospects for growth of the Polish energy sector based on domestic raw materials, there are a number of risks that must be reflected that have a negative impact on extraction of coal in Poland.

EU climate policy

One of the main challenges for the Polish energy sector (including the mining industry) is compliance with the climate requirements established by the European Union. These include reductions in emissions of CO_2 and other substances harmful to the atmosphere.

In October 2014 the EU ordered a further reduction of greenhouse gas emissions from their 1990 levels of at least 40% by 2030. This target will certainly affect the condition of the Polish energy sector, as the need to reduce emissions will undoubtedly be tied to limitations on the use of coal.

To limit the potentially negative consequences for the national economy, Polish government officials have sought to obtain additional privileges for Polish energy enterprises. One of them is extension of the system of free emission rights until 2030. The system now in force was supposed to expire in 2019. Moreover, Polish enterprises may obtain access to the proceeds from sale of emission rights that have accumulated in the modernisation reserve. This could represent an additional PLN 7.5 billion for modernisation of generation facilities. But these arrangements concerning privileges for Polish enterprises are still unclear. For example, it is not known yet which entities will be able to take advantage of them—only electricity producers, or also other enterprises. It has also been pointed out that the additional amount that may be available for modernisation is tiny compared to the costs of carrying out development projects in the energy industry.

New investments and technologies

Basing the Polish power industry on coal will require a number of investments in upcoming years to build or modernise existing coal-fired generating units. But this is not dictated only by the EU's requirements to limit emissions of greenhouse gases. Another major factor is the age of the currently operating generating facilities. Nearly half of them were built more than 30 years ago, and another 25% are over 20 years old. As the anticipated operating life of these generation units is about 40 years, during the next two decades it will be necessary to build new sources with a capacity of well over 10 GW just to maintain the current generating capacity.

A significant portion of investments in new generating capacity are already being carried out. The burden of these projects was assumed by the largest Polish power companies, which continue to be majority-owned by the State Treasury. The biggest projects currently underway include construction of new coal-fired units at Kozienice (capacity of 1,075 MW), Jaworzno (910 MW) and Opole (two units of 900 MW each). Further projects are expected to launch in the upcoming years, including those carried out by private investors and in conjunction with coal companies. One example of such a promising project is construction of the Czeczot power plant in the town of Wola (1,000 MW), to be carried out in cooperation with the coal group Kompania Węglowa.

The newly built coal-fired units at Polish power plants should cut CO_2 emissions by at least 20%. Further reduction of emissions of the greenhouse gases characteristic of production of electricity from bituminous coal should be achieved through the development of new technologies for combustion of this fuel, referred to collectively as "clean coal technologies." Besides improvement in the efficiency of processing for conversion of energy during combustion of coal, these technologies are focused also on solutions designed to improve the quality of the coal fuel itself (e.g. by reducing the ash and sulphur content), as well as direct removal of contaminants from the fuel. Demand for Polish coal should be increased over the longer term by the growth of such technologies as surface and underground coal gasification, coal fuel chain, and carbon capture and storage technologies.

Protection of domestic producers

To reach the goal set by the Minister of Economy of

Poland's achieving energy security and self-sufficiency based on generation of electricity from bituminous coal, it is necessary to guarantee the possibility of supplying power plants with fuel from domestic deposits. If extraction of these deposits is halted or significantly reduced, it may lead to a result opposite to that intended by the creators of Polish energy policy. A shortage of domestic coal would make the Polish power industry dependent on coal imports.

When considering the prospects for further growth of this sector, it must be pointed out that there has been a steady decline in the quantity of bituminous coal extracted from domestic deposits. In the weakest year so far, 2011, Polish mines produced 76.4 million tonnes of coal, and the increase in subsequent years has been minimal. Over the next 20 years, this will mean a decline in the amount of coal mined by half. Meanwhile, imports of coal are growing, mainly from Russia but also from such distant countries as Australia. Reversing this trend may be difficult and will certainly require action across various fields.

In 2014 a series of legislative initiatives were launched with the purpose of increasing the competitiveness of Polish coal on the domestic market. But they ignore the biggest problem of the Polish coal sector, which is the high cost of extracting Polish deposits, connected among other things with labour costs. Protection is supposed to be provided to Polish coal producers through an amendment to the Act on the System of Monitoring and Control of Fuel Quality, which originally applied only to liquid fuels but since November 2014 has also applied to bituminous coal. It can be traded and burned on the Polish market only if it meets appropriate technical conditions established by the Minister of Economy. Another solution designed to protect domestic coal producers is to be concessions for trading in coal and for trading in coal from abroad. Obtaining such a concession would require payment of a high fee for financial security. Additionally, the regulator could refuse to grant a concession on the basis of a threat to the interests and security of the state. Requiring concessions for trading in coal should make it less profitable to import coal from abroad.

But these solutions may prove counterproductive. The experts point out that the quality specifications of coal imported into Poland do not differ from those of the coal offered by Polish producers. In turn, concessions for trading in coal (if they turn out to be consistent with EU law) could result in an increase in the price of this commodity, and thus an increase in the price of electricity generated from coal. This would surely have an impact on the competitiveness of the sector, which could then turn to other fuels, particularly increasingly cheaper and more accessible natural gas.

Poland's coal-based energy industry has prospects for continued stable growth. But the number of risks and threats facing the industry are equally great. Stable growth of this sector will depend in large measure on the ability to ensure supplies of coal from domestic sources at competitive prices.

Radosław Wasiak, adwokat, *Energy Law Practice*

Debt-for-equity swap as a method of restructuring

Piotr Wcisło Krzysztof Libiszewski

Converting indebtedness into shares in the debtor company to be subscribed for by the creditor is a useful method of debt restructuring which is gaining in popularity. But the conversion may be conducted by various methods entailing different legal consequences.

Swapping debt for shares of the debtor is a method of restructuring that can take several different forms. These may include a conversion occurring automatically, by operation of law upon fulfilment of certain conditions, a conversion on the basis of an arrangement by the debtor with its creditors adopted in bankruptcy or restructuring proceedings, or a conversion conducted pursuant to an agreement by the parties under general principles of civil law.

Statutory conversion

Polish corporate law provides for automatic conversion of debt into share capital in one circumstance. If a company is declared bankrupt within two years after conclusion of a loan agreement with a shareholder as the lender, the claim for repayment of the loan is shifted to the borrower's share capital. This legal effect occurs directly through operation of law, and this regulation is mandatorily applicable.

The purpose of this regulation is to protect the company's share capital and indirectly also to protect the creditors of the company who are not shareholders by reducing the amount of the company's outstanding obligations. This should ensure that any funds the company holds are not depleted to satisfy the claims of the company's own shareholders who have lent money to the company, at the expense of the company's other creditors.

Conversion pursuant to arrangement

Restructuring of a company's debt by converting debt to shares in the company is also regulated by Polish bankruptcy law. In this case, conversion is made pursuant to an arrangement adopted in a bankruptcy proceeding. In practice, the arrangement typically also provides for other methods of restructuring the remaining portion of the debt, such as discharge of a portion of the debt, scheduling payment in instalments, or extending the payment deadline.

Conversion in a bankruptcy proceeding occurs by operation of the arrangement itself, without the need for corporate acts by the company or its shareholders. More specifically, when an arrangement has been adopted by the assembly of creditors and confirmed by the bankruptcy court, and the court's decision confirming the arrangement becomes legally final, the arrangement substitutes for a shareholders' resolution increasing the debtor's share capital, as well as a share subscription agreement. Moreover, conducting a conversion pursuant to an arrangement adopted in a bankruptcy proceeding does not require issuance of a prospectus when the conversion leads to issuance of shares meeting the conditions for a public offering, nor is it subject to notification to the competition authorities of an intended concentration (unless the conversion would result in taking over control of a market competitor).

Under general rules of corporate law, to become effective conversion requires entry in the commercial register pursuant to the decision of the registry court applicable for the debtor company, issued in an ordinary registry proceeding. This is because conversion consists of an issue of shares to the existing creditor in exchange for converted debt and increase of the debtor's share capital by the par value of the shares.

Conversion of debt to equity in the case of conclusion of an arrangement in restructuring proceedings is conducted analogously to conversion under an arrangement in a bankruptcy proceeding. It should be pointed out, however, that restructuring proceedings are carried out on the brink of the debtor's insolvency, i.e. before it becomes bankrupt, and legally are not a type of bankruptcy proceeding. Consequently, an arrangement in a restructuring proceeding that includes a debt-for-equity swap does not provide an exemption from the duty to issue a prospectus if the issue of shares meets the criteria of a public offering, and it will also require notification of the competition authority if the turnover of the entities participating in the conversion reaches the levels indicated in merger control regulations.

Conversion under general principles of civil law

Under the principle of freedom of contract, it is also possible to conduct a conversion of indebtedness into shares of the debtor outside of a bankruptcy or restructuring proceeding if agreement is reached between the creditor and the debtor and its shareholders. In that case, the cooperation of the debtor's shareholders is required, because a resolution of the debtor's shareholders on increase in the share capital must be adopted in order to issue the shares intended to be subscribed for by the creditor accepting the conversion of its claim.

In practice this type of conversion will be conducted through a private subscription for shares, because then only qualified entities, i.e. specific creditors of the company, will be permitted to subscribe for the new shares. This means that the debtor's existing shareholders will be excluded from taking up the shares issued as a result of the conversion, as opposed to a "closed" subscription when only they can subscribe for new shares by exercising their subscription rights. It should be pointed out, however, that a shareholder may also be a creditor of the company and participate in a conversion conducted through the procedure of a private subscription, but then it will take up shares only as a creditor and not as an existing shareholder. During a debt-for-equity swap, shares cannot be subscribed for by undetermined addressees; they can subscribe for shares only during an "open" subscription directed to the general public.

Conducting a debt-for-equity swap through a private subscription will require exclusion of the pre-subscription rights of existing shareholders to take up newly issued shares. For this purpose it is necessary to adopt an appropriate resolution of the debtor's shareholders. It should be stressed that under corporate law, a condition allowing exclusion of pre-subscription rights is that it lies in the company's interest. Generally it may be assumed that exclusion of subscription rights to allow debt to be converted to equity will be in the company's interest because it reduces the company's obligations, particularly if the existing level of obligations threatens the debtor's solvency. Nonetheless, it is possible to imagine circumstances when exclusion of subscription rights may be found not to be in the company's interest, for example if the conversion could lead to a hostile takeover of the company by a market competitor.

Conversion of debt to equity may be conducted by an in-kind contribution of the converted claims to the share capital of the debtor. Corporate law does not deny claims against the company of the capacity for in-kind contribution. In-kind contribution of claims to the company cannot be regarded as contrary to the interests of the company or a threat to satisfaction of the company's creditors because it results in reduction of the company's obligations through an automatic setoff. In consequence, the condition of the debtor's balance sheet improves and the company's liquidity improves through a reduction in its total indebtedness.

It is also permissible to conduct an indirect conversion through a contractual setoff of the debtor's claim for payment to cover the newly issued shares with a cash contribution by the converting creditor. It should be pointed out, however, that in the practice of the tax authorities, an indirect conversion will generally be treated as a de facto direct conversion consisting of in-kind contribution of the converted claim to the debtor's share capital, with all of the related tax consequences.

Example of successful debt-to-equity restructuring: Polimex-Mostostal

An important example for the Polish market of debt restructuring conducted under the general rules of civil law, i.e. a debt-for-equity swap through a private subscription, was the restructuring of Polimex-Mostostal S.A., which is listed on the Warsaw Stock Exchange. In the conversion, new shares were issued to a group of banks, including PKO Bank Polski, Bank Pekao, Bank Ochrony Środowiska, Bank Zachodni WBK and Bank Millennium.

As a result of the conversion of the banks' claims, they took up a total of 2,863,571,852 Series R shares, issued by the debtor for a total issue price of PLN 501,125,074.10. According to a current report issued by Polimex-Mostostal, the issue price of the Series R shares was paid by the creditors through a contractual setoff of the banks' claims against the company against the company's claim for payment of the issue price of the Series R shares. The increase in the share capital of Polimex-Mostostal S.A. in connection with the conversion was registered on 22 October 2014 by the Warsaw District Court, 12th Division of the National Court Register.

This swap transaction was one element of a broader restructuring programme by Polimex-Mostostal, which also included the company's issuance of convertible bonds with a total face value of PLN 81.5 million and ordinary bonds with a total face value of PLN 58.5 million, i.e. a total of PLN 140 million, which were taken up among others by Poland's Industrial Development Agency (advised during the restructuring process by Wardyński & Partners).

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Krzysztof Libiszewski, legal adviser, partner in charge of the Corporate Law, Restructuring, and Commercial Contracts practices

The AIFM Directive and its effect on the Polish private equity market

Katarzyna Wójcik-Bąkowska

The much-delayed bill to implement the Alternative Investment Fund Managers Directive in the Polish legal system has finally been released. We should soon learn how the directive will affect the private equity market in Poland.

In November 2014 the European Commission summoned Poland to implement the Alternative Investment Fund Managers (AIFM) Directive as quickly as possible, as the deadline for transposing the directive into national law expired in July 2013. In March 2014 the Minister of Finance issued guidelines for a bill amending the Investment Funds Acts and other acts toward this end, and in January 2015 a draft of the act was released.

The reason for adoption of the AIFM Directive was the financial crisis of 2008, which was partly blamed on various forms of alternative investment funds. Afraid that history might repeat itself, the European Commission decided to impose greater discipline on the financial sector and subject it to extensive regulation and supervision. It was stressed that a legal framework was necessary at the EU level regulating internal and external supervision and functioning of alternative funds in order to minimise risks to financial stability, investors and other participants in the financial market.

Along the way, various types of funds were thrown together in the same regulatory heap: from aggressive hedge funds applying complex investment algorithms, and derivatives and short selling, to private equity and venture capital funds which operate under an entirely different and less risky investment strategy. Naturally, this drew objections from these funds and the trade groups representing them.

What is the AIFM Directive all about?

Following the AIFM Directive, the proposed act defines alternative investment funds (AIFs) as collective investment undertakings which raise capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors, but do not require authorisation under other regulations. Under the categories in place in Poland, AIFs will include specialised open investment funds and closed investment funds. Alternative investment fund managers (AIFMs), in turn, are legal persons (i.e. entities with legal personality) whose activity consists of managing one or more AIFs.

In order to extend the coverage of the act to as many entities as possible, the Minister of Finance made a rather torturous interpretation of the directive, regarding funds themselves as fund managers if the legal form of the AIF permits internal management and the management body of the AIF has not appointed an external AIFM. Consequently, the proposed act covers capital companies within the meaning of the Commercial Companies Code—including European companies—on the grounds that they have legal personality, which is not controversial, as well as limited partnerships and joint-stock limited partnerships, which indisputably do not have legal personality but are a highly popular operating vehicle for private equity and venture capital funds. Limited partnerships and joint-stock limited partnerships would be covered by the proposed act if the sole general partner of the partnership is a legal person which is responsible for managing the investment portfolio of the fund and risk management. In such case, the general partner would be treated as an external AIFM.

An interesting feature of the proposal which is not drawn from the directive is that legal persons of churches and other religious denominations would be expressly exempted from the regulations.

Is the bark worse than the bite?

A fundamental change is that an authorisation from the Polish Financial Supervision Authority (KNF) would be required for operation of private equity and venture capital funds.

The most important exception to this rule from the perspective of most funds is a *de minimis* exception. AIFMs managing smaller funds with assets in their portfolio not exceeding EUR 500 million—and not employing financial leverage or exercising the right to exit the investment within the first 5 years after establishment of the AIF—would be excluded from the obligation to obtain an authorisation, but would have to register with KNF. The duties imposed on such funds would mainly involve corporate governance and the scope of information to be provided, concerning among other things the main financial instruments in the portfolio and the investment strategy. As usual, the devil is in the details. In order for take advantage of the benefits offered by the new regulations, particularly a "passport" permitting funds to raise investments and provide services all over Europe, smaller funds would nonetheless have to obtain an operating licence.

Under the proposal, AIFMs conducting activity supervised by KNF would have to comply with requirements involving:

- Capital, with a duty on the part of AIFMs to increase their own funds by an additional amount adequate to the risk of claims against the AIFM for professional negligence connected with management of AIFs—or, as an alternative, the AIFM could take out professional indemnity insurance to cover this risk
- Operating methods, including the compensation policy for personnel of the AIFM, avoidance of conflicts of interest, and establishment of a separate organisational unit monitoring legal compliance as well as an internal audit unit
- Risk management
- Appointment of a depositary for each AIF under management
- A wide range of informational requirements covering such matters as the investment objective, policy and strategy, investment risks and management of liquidity risk.

Following the directive, the draft also places great emphasis on the role of the depositary—an entity whose role and responsibility are growing significantly on the financial services market. From the effective date of implementation of the directive, AIFMs will be required to have in place a depositary for the assets of AIFs, to maintain a register of the assets and perform control functions. Institutions subject to prudential regulation, such as banks, brokerages or the Central Securities Depository (KDPW), would be eligible to serve as depositaries. The depositary would operate under a separate contract with the AIFM. Significantly, depositaries would be liable for lost assets of the funds, which would be certain to affect the cost of their services.

The proposed act introduces a stunningly broad—and, from the perspective of private equity and venture capital funds, highly controversial—list of duties connected with acquiring control of private companies through acquisition of significant positions in their shares. In each instance the AIFM would be required to notify KNF when the fund reached the threshold of 10%, 20%, 30%, 50% or 75% of the votes in an unlisted company.

When obtaining control over a company (i.e. more than 50% of the total number of votes), the AIFM would be required to notify KNF, the company and the company's shareholders. In addition, the AIFM would be required to inform KNF of the sources of the funds for financing the acquisition, and to notify the company and the shareholders of its intentions with regard to the future business of the company. These duties cover extremely sensitive information with a significant impact on issues such as employment, working conditions and salaries in the company.

The draft also provides for restrictions designed to prevent stripping of the assets of acquired companies. For 24 months after acquiring control of a company, the AIFM could not permit the company to carry out distributions, capital reductions, share redemptions or acquisition of its own shares, or repay surcharges.

It is not clear, nor objectively justified, why the drafters would create legal instruments interfering in the management of companies in the funds' portfolio, which are the private assets of the funds. The companies in question are not public companies, but the proposed scope of restrictions approaches or even exceeds those provided in the case of listed companies.

Where you stand depends on where you sit

Commenting on the earlier guidelines for the bill, KNF stressed that the increased range of its supervisory competencies and the expanded list of duties on the part of participants in the financial market should bring about increased certainty and security when investing, because ongoing monitoring of the activity of market players should prevent crises similar to the one in 2008.

An undoubted advantage of Poland's implementation of the AIFM Directive will be the unified European "passport" for fund managers. Using the passport, AIFMs from anywhere in the EU who are licensed to operate in their own country will, upon fulfilment of certain conditions, be authorised to sell participation units or shares in the AIFs they manage among industry investors not only in the home jurisdiction, but in other EU member states as well.

But in the view of private equity and venture capital funds, the planned regulations will negatively impact the funds and their competitiveness on the market.

First, there is a great objection to treating alike funds with different characters and different operating methods. They argue that the aggressive, risky and short-term investing by hedge funds cannot be compared to the approach of standard PE/VC funds, which do not use financial engineering products, and thus their activity carries much less investment risk.

Second, it is not consumers who invest through these funds, but professional private entities with deep knowledge of the rules and risks associated with their investments who do not need such far-reaching regulatory protection.

Third, the introduction of such an extensive catalogue of duties and limitations on PE/VC funds will worsen their market position compared to industry investors not subject to such restrictions, thus interfering with market competition. In effect, the funds may no longer offer as attractive a vehicle for investing.

The range of informational and reporting obligations, particularly concerning the financing of acquisitions and business plans, raises huge concerns about unauthorised disclosure to third parties who could torpedo the entire investment venture.

Capital requirements and the potential need to take out professional liability insurance, as well as the costs of the depositary, could drastically increase the operating costs of PE/VC funds which ultimately would have to be borne by investors.

To examine more closely the effect that the proposed act has on the Polish PE/VC market, we must wait and observe how it is applied in practice. It will also be interesting to see what level of zeal KNF exercises in monitoring compliance or non-compliance with the act by fund managers, as well as the economic and market consequences of such behaviour.

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