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LEGAL NEWS FROM POLAND

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LEGAL NEWS
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LEGISLATIVE DEVELOPMENTS

NEW VOD TAX (POLISH JOURNAL OF LAWS OF 2020, ITEM 875)

At the beginning of July 2020, the so-called Netflix tax came into force, adopted as part of Anti-Crisis Shield 3.0 (third COVID-19 ant-crisis legislative package). Starting from 1 July VOD platforms operating in Poland are obliged to pay 1.5% of their local revenue (user fees or advertising, whichever is higher) to the Polish Film Institute (PISF), an institution supporting the Polish film industry.

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CHANGES IN CIVIL LAW – EXTENSION OF LEGAL PROTECTION UNDER THE STATUTORY WARRANTY (POLISHJOURNAL OF LAWS OF 2019, ITEM 1495)

Amendments have been passed to reduce regulatory burdens, namely:

- an amendment to the Civil Code of 23 April 1964 to grant individuals running their own business the right to consumer entitlements when concluding certain types of contracts; this relates to abusive clauses and extended statutory warranty for product defects; and
- the Act of 30 May 2014 on Consumer Rights; this relates to the right to withdraw from a distance or off-premises contract for up to 14 days.

Provisions on consumer rights will be expanded to include individuals who are self-employed in consumer provisions regarding abusive contractual clauses and rights under the statutory warranty for defects. Additional legal protection will be granted to people who are self-employed when they conclude a contract directly related to their business activity, provided that the contract states that it is not of a professional nature for that person.

The law entered into force on 1 January this year. However, a number of provisions which were originally intended to apply from 1 June 2020 will not enter into force until 1 January 2021, due to the epidemiological situation.

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NEW PUBLIC PROCUREMENT LAW (POLISH JOURNAL OF LAWS OF 2019, ITEM 2019)

The new Public Procurement Law was published in the Journal of Laws and will enter into force on 1 January 2021.

The act introduces a number of new institutions, which include:

- a threshold for trivial contracts of PLN 130,000
- new definitions of phrases such as innovation, supply chain, procurement documents
- a preliminary market consultation phase as a tool to help the contracting authority to procure the optimal solution,
- a catalogue of abusive (prohibited) clauses in public procurement contracts
- a single specialized court to examine complaints against decisions of the National Appeal Chamber.

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New requirements for 5G network operators: The regulation on minimum technical and organizational measures to be applied by telecommunication undertakings to ensure the cyber security of networks and services (Polish Journal of Laws of 2020, item 1130)

This regulation issued by the Minister for Digital Affairs unifies the processes and activities required to protect telecommunications networks and services against the latest cyber threats.
Under the regulation, telecommunications undertakings will be required to employ new, additional measures to ensure the security and integrity of the 5G network.

When selecting technical measures (equipment, software and services), they will have to take into account the recommendations of the government plenipotentiary for cyber security.

5G network operators will also now be required to take measures to make sure that they are not dependent on a single manufacturer of individual telecommunications network elements, while ensuring interoperability of services.

The 5G Toolbox defines security measures at strategic (regulatory) and technical level, and identifies actions that support the application of these measures to reduce cyber security risks in 5G networks.

The regulation was published on 29 June 2020 and will entry into force on 30 December 2020.

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CHANGES IN THE CONDUCT OF CLINICAL TRIALS IN POLAND (POLISH JOURNAL OF LAWS OF 2020, ITEM 1291)

On 1 January 2021, legislation amending the Act on the Professions of Physician and Dentist and certain other acts will come into force, following the amendment of 16 July 2020. The amendments concern the conduct of clinical trials of medicinal products in Poland.

The key changes in this respect include

- Lowering the age limit from 16 to 13 years for a minor to give cumulative consent (in addition to parental consent) to participate in a clinical trial.
- Consent (substitute or cumulative) for a minor's participation in a clinical trial will have to be given by both parents.
- Regulation of the conditions for giving by a partially incapacitated person (not under parental custody) of consent to a therapeutic experiment - the required consent of that person and their guardian.
- Introduction of additional guarantees concerning not limiting and not delaying necessary medical procedures; use of proven medical methods in the control group; limitation of placebo use.
- A ban on conducting clinical trials on persons with hierarchical dependency.

The amendment also introduces new requirements on additional information that must be disclosed to a person who is to undergo a medical experiment. Until now, this obligation was limited to information regarding the aims, methods and conditions of conducting the experiment, the expected therapeutic or cognitive benefits, and the risks and the possibility of withdrawing from the experiment at any stage. Under the Act, this catalogue will be significantly expanded and clarified.

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PROPOSAL FOR AMENDMENT OF THE ACT ON COMPETITION AND CONSUMER PROTECTION

The proposed amendment to the Act on Competition and Consumer Protection provides for the President of the Office of Competition and Consumer Protection to be granted new powers, including the right to block websites without initiating proceedings, making controlled purchases using hidden or assumed identity, and searching the trader in all proceedings and not just those concerning competition.

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PROPOSED AMENDMENTS TO THE NATIONAL CYBER SECURITY SYSTEM ACT AND THE PUBLIC PROCUREMENT LAW

The proposal for amendment to the Act of 5 July 2018 on the National Cyber Security System is aimed at enabling the most important entities in the Polish cyber security system to operate more efficiently and to implement EU telecommunications network security recommendations .

The key changes in this respect:

- expansion of the National Cyber Security System Act to cover electronic communications operators
- regulation of the Information Sharing and Analysis Center under the Act
- conferring on the Cyber-security Council the competence to assess the risk assessment performed by a supplier of hardware or software, where this affects cyber security of entities in the national cyber-security system
- direct regulation of rules of functioning of the Security Operations Center
- Clarification of sector-specific Computer Security Incident Response Team provisions

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LEGISLATIVE DEVELOPMENTS
planned

LEGISLATIVE PROPOSAL AMENDING CORPORATE INCOME TAX RULES

The Council of Ministers has announced a bill amending corporate income tax (CIT) rules, which may have far-reaching consequences for various businesses in Poland. The proposed amendments cover a wide array of tax aspects, including taxation of a partnership, tax deductibility of debt financing costs, the application of tax amortization, and transfer pricing rules.

The key changes in this respect include

- Introducing a principle that upon the disposal of shares of a real-estate-rich company, the obligation to pay tax will be borne by the company whose shares are being sold, rather than the shareholders.
- Treating limited partnerships (pol. spółka komandytowa) as taxpayers of CIT in Poland (that is, eliminating tax transparency of such entities). In a similar manner, general partnerships (pol. spółka jawna) would be subject to CIT in Poland where the partners in the partnership are not disclosed.
- Allowing the extension of the exemption from the minimum levy on commercial real estate if the state of epidemic (related to COVID-19) continues in Poland after 31 December 2020.
- Adjusting regulations regarding “Polish source income” to the wording of double-tax treaties as amended by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.
- Amending rules to make the distribution in-kind of liquidation proceeds a taxable event in Poland.

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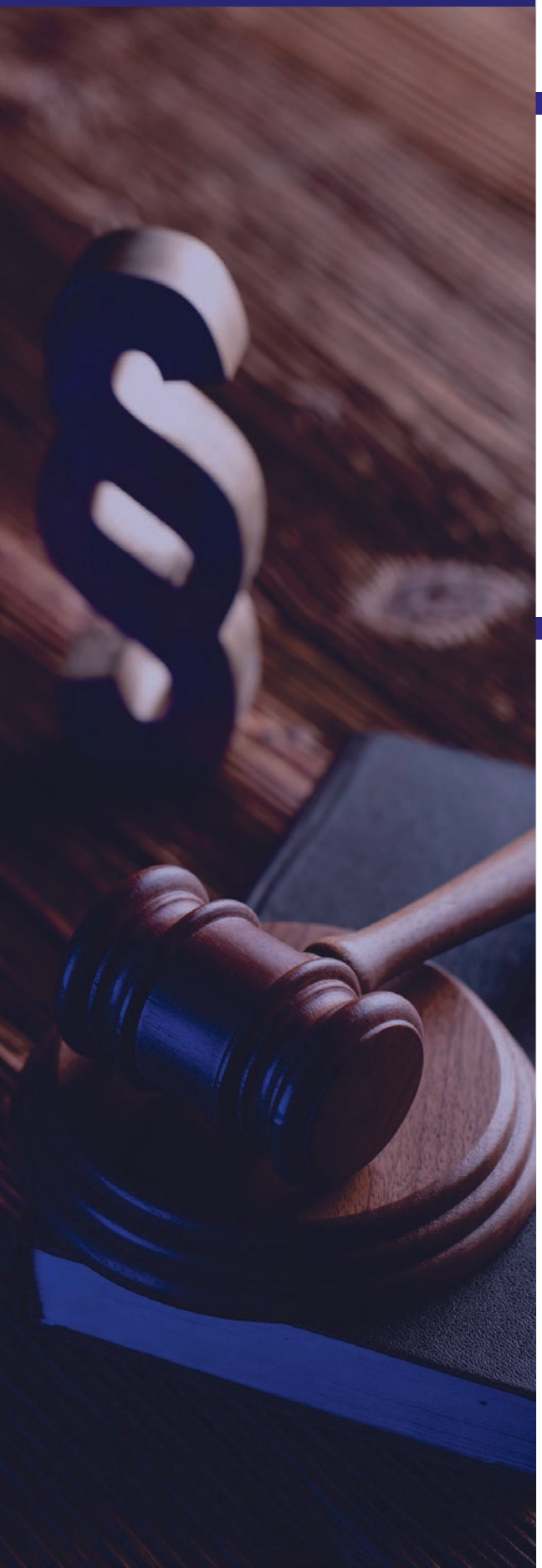

CASES AND JUDGEMENTS

PROVIDING A SUBSCRIBER'S DATA IN THE PROCESS OF INFRINGEMENT OF PERSONALITY RIGHTS

The Polish Supreme Court has adopted a resolution stating that a court hearing a case is entitled - pursuant to article 159 (2) (4) of the Telecommunications Law - to demand that an entity bound by telecommunications secrecy disclose information allowing a claim of infringement of personality rights to be verified.

Supreme Court judgment of 6 August 2020, Case No III CZP 78/19

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RECORD-BREAKING PENALTY FOR GDPR INFRINGEMENTS UPHELD

The Voivodship Administrative Court in Warsaw upheld a fine of over PLN 2.8 million imposed on Morela.net.

In September 2019, the President of the Personal Data Protection Office imposed the highest to date fine of PLN 2.830 million on Morele.net due to a hacking incident a year earlier. Customers of online shops belonging to the group started to receive text messages requesting payment of one zloty. A link in the message led to a substituted electronic payment gateway, through which a username and password to a bank account could be obtained and account funds accessed.

The company appealed the decision of the President to the court. The complaint was dismissed. The court found that Morele.net did not apply sufficient technical and organizational measures to secure its customers' data.

Voivodship Administrative Court judgment 30 September 2020, Case no II SA/Wa 2559/19

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LEGAL NEWS
Poland

CASES AND JUDGEMENTS

CHANGE OF TRADE MARK HOLDER IS NOT A VALID REASON FOR NOT USING A TRADE MARK IN TRADE

The MADARA trade mark was registered in 1997 in the name of "V.P.", and subsequently transferred to other entities. In 2009, the Bulgarian company V. applied for revocation, explaining that the Polish Patent Office had refused to grant protection for its internationally registered trademark MADARA, and that the disputed trade mark had never been used in Poland for the goods specified in the list. The current MADARA trade mark holder claimed, on the other hand, that there were important reasons for not using the disputed mark, such as the holder's bankruptcy or a delay in registration of the licensee by the Polish Patent Office,

The Polish Patent Office established that the disputed trade mark had not been used within five years from the date of registration, had expired. The trade mark holder challenged this decision in court.

The Voivodship Administrative Court in Warsaw and Supreme Administrative Court upheld Polish Patent Office decision. The court stated that important reasons for non-use of a trade mark within the meaning of article 169 (1) (1) of Industrial Property Law are events independent of the will of the trade mark holder , as well as exceptional and sudden events which qualify as force majeure, i.e. cannot be predicted or prevented. In the opinion of the court, change of the holder of the disputed mark cannot be considered as a valid reason for not using the mark, as this would make it impossible to consider the protection right for a mark, the owners of which frequently change, as expired. The purchaser of the trade mark has to reckon with the possibility of losing it, even just after it acquired it, if the seller has not used the trade mark for a period of time giving rise to expiry of the right.

Supreme Administrative Court judgment of 4 March 2020, Case No II GSK 3616/17

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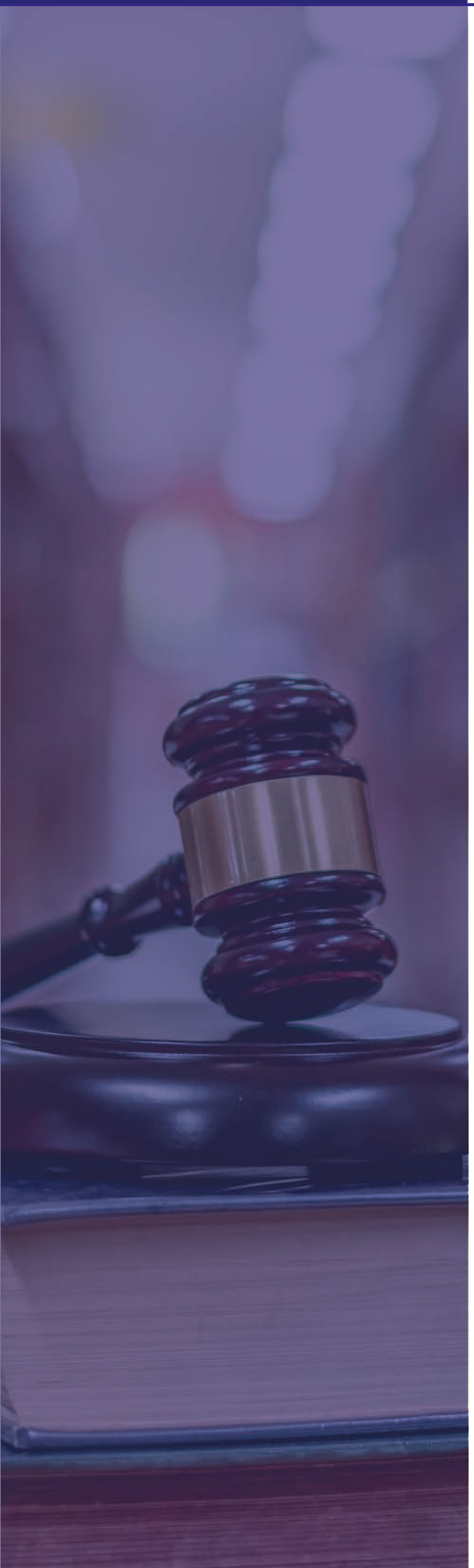
MUSIC CREATORS FOR FOREIGN FILMS ARE ENTITLED TO REMUNERATION

The Polish Supreme Court has ruled that there are no grounds for claiming that the right to remuneration does not apply to foreign film musicians and choreographers.

The Polish copyright collective management organization' association ZAIKS demanded that Monolith company provide information about the number of used and sold copies of works and their price between 2005 and 2007. The company refused to provide the information, saying that under article 70 of the Copyright Act, royalties are due only to Polish, not foreign, artists. Since ZAIKS was claiming royalties for foreign authors, it was not possible to pursue a claim for information which would result in a claim for payment of remuneration.

The courts of both instances found in favor of ZAIKS. In its judgment of 11 March this year, the Supreme Court dismissed the complaint of the defendant company as unfounded.

Supreme Court judgment of 11 March 2020, Case No I CSK 573/18 Not published yet.



POLISH COMPETITION AUTHORITY FINES YAMAHA MUSIC EUROPE FOR RESALE PRICE MAINTENANCE

Author: Katarzyna Menszig-Wiese, PhD, LL.M, Attorney-at-law

Vertical restrictions in distribution networks quite often come under close scrutiny of the President of the Office for Competition and Consumer Protection, but Yamaha Music Europe managed to escape the Authority's attention for many years before the competition watchdog caught up with it. The case is of particular importance as it shows that cooperation with the Authority pays off – the undertaking got away with a relatively small fine.

According to an official press release, the Authority found that for thirteen years Yamaha Music Europe had been setting minimum prices for musical instruments sold online by its distributors in Poland. In cases of departure from the arrangements, the undertaking would intervene to make sure the agreement was respected. Also, it could punish those breaking the rules by withdrawing benefits.

The undertaking was fined just over PLN 0.5 million, or approximately EUR 110 000. Considering the duration of the infringement and the fact that the Authority generally does not shy away from imposing heavy fines, the sanction might seem benevolent at first. This is however due to the undertaking choosing to cooperate with the Authority under the leniency programme. Though it did not qualify for total immunity from fines, it was granted a 50% reduction for provision of crucial pieces of evidence. The fine was further reduced on account of the undertaking's voluntary submission to a penalty.

One thing to bear in mind when doing business in Poland is that price-fixing in vertical relations is an area of particular interest to the competition watchdog, and the rules banning such practices are strictly enforced. Thus, any arrangements with regard to pricing policies require prior consultation with antitrust lawyers to ensure compliance. Unlike in EU competition law, when violations occur there is a chance to apply for leniency even in a vertical scenario.

SIMPLE JOINT-STOCK COMPANY – A NEW TYPE OF COMPANY UNDER POLISH LAW

Author: Wojciech Kulis, Attorney-at-law, Partner

In March 2021, it will be possible to incorporate a new type of company under Polish law. The main purpose of the new legislation is to simplify the process for startup companies to gain access to external funding. The flexibility envisaged in the provision governing simple joint-stock companies will allow the creation of custom-fit companies that combine the solutions that currently exist for limited liability companies and joint-stock companies.
Setting up a company using the S24 system on the internet will be a quick process. No share capital is needed - just 1 PLN instead of 5,000 PLN for limited liability companies, and 100,000 PLN for joint-stock companies.

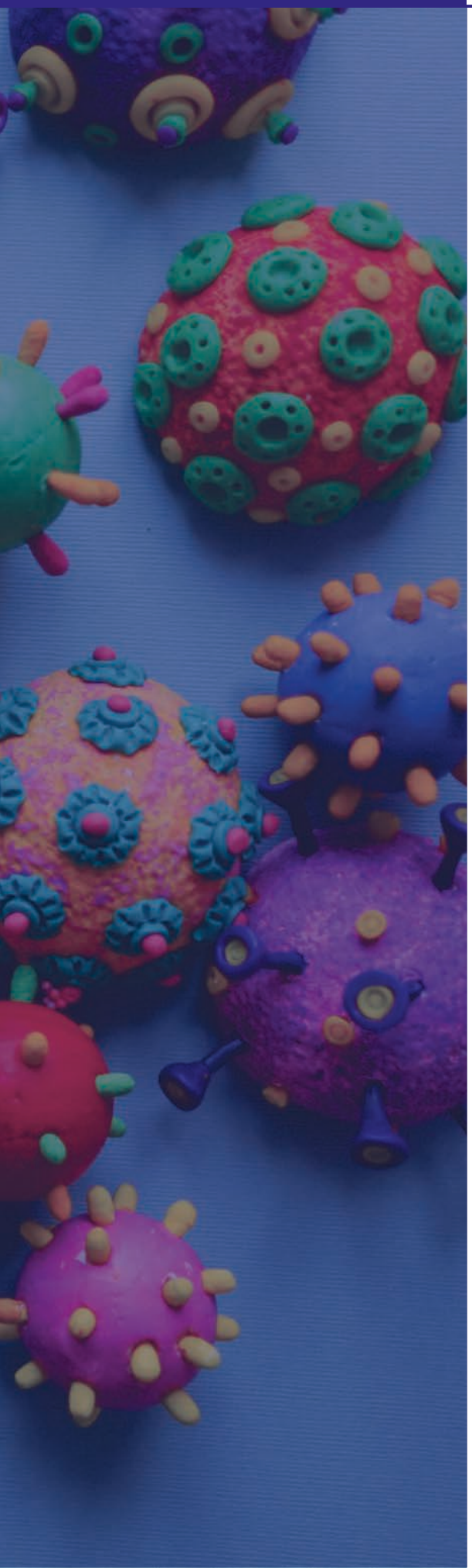
Stocks may be covered by money and different forms of in-kind contributions, including work provided by shareholders. Contributions have to be made within 3 years. The articles of association in simple joint-stock companies may provide for preferred stocks in a much broader scope than is currently possible in “full” joint-stock companies. Individual shareholders may be granted special rights, e.g. the right to appoint and dismiss directors.

The process to transfer stocks has been simplified as well - no special form of transfer agreement is needed. A list of stockholders will be kept by a public notary or brokerage office under an agreement concluded with the company. Investment in a company by creating new stocks that are acquired by new shareholders is planned to be fast. If a simple joint-stock company plans a public offering, new simplified procedures enable an uncomplicated transformation into a “full” joint-stock company.

Corporate governance may be regulated freely by creating a board of directors that would serve both as an executive and supervisory body. This model is designed to reflect corporate governance systems used under US and English laws. The new law provides the possibility to appoint executive or non-executive directors. This form of corporate governance may be used as an alternative for creation of management board and supervisory board.

If a company needs to be shut down quickly, the new provisions provide for: (a) a simpler procedure of liquidation, or (b) a company to be closed without liquidation if the shareholders embrace the company's assets and obligations.

In summary, a new simple joint-stock company will be easy to establish, flexible, and easy to govern, and, if needed, easy to shut down.



DIGITALIZATION OF CORPORATE GOVERNANCE DURING THE COVID-19 PANDEMIC

Author: Maciej Toroń, Attorney-at-law

The outbreak of the COVID-19 pandemic has affected the worldwide economy. Indeed, in response to the pandemic, countries have been forced into introducing administrative measures that have pushed many businesses to the verge of bankruptcy. Not only have these measures, e.g. lockdowns and travel restrictions, prevented many companies from conducting their daily businesses, but the restrictions have also hindered their internal functioning.

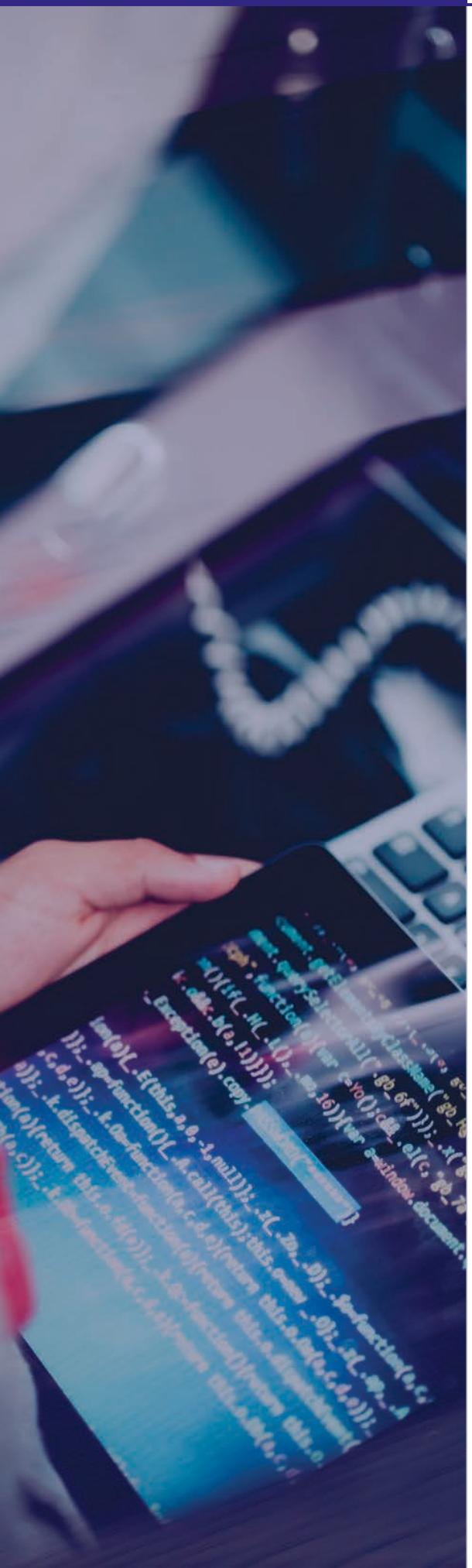
The challenging economic situation resulting from the pandemic has required businesses to adapt quickly. Travel restrictions have affected decision-making processes in commercial companies - preventing them from holding in-person meetings. The lockdown has placed more importance on the need to digitalize internal processes. This also refers to the use of electronic methods of communication to hold meetings of capital companies' corporate bodies: management boards, supervisory boards, and (general) shareholders' meetings.

Previously, the governing principle in Polish commercial law was that holding remote meetings for the corporate bodies of a limited liability company (*spółka z o.o.*) and a joint-stock company (*spółka akcyjna*) was possible **only if** such a course of action was foreseen in articles of association, or other intra-company regulations. This requirement to foresee the need to meet remotely - and the fact that many companies did not foresee this situation - deprived the majority of companies of the chance to take advantage of online meetings during the first lockdown in March and April 2020. This proved to be especially onerous because April, May, and June are months in which Ordinary Shareholders' Meetings usually take place to approve financial statements.

The above-mentioned rule was reversed by the 'Second anti-crisis shield'[1]. Currently, the use of electronic methods of communication to hold corporate body meetings **is allowed unless the articles of association stipulate otherwise**. This amendment is significant for the subsidiaries of the international holdings in which the company's officers are usually foreigners with a place of residence outside of the territory of Poland.

However, we must stress that the principle of holding a (general) shareholders' meeting in Poland **has not been repealed**; this means that at least one person participating in the meeting, advisably its chairman, should be present in Poland.

[1] The act of 31st March 2020 on amendment of the act on particular solutions connected with the prevention, counteracting and combating the COVID-19, other contagious diseases and crisis situation caused by them and other acts (Journal of Law, item 568, with amendments).



PROVIDING SERVICES FOR POLISH OPERATORS OF ESSENTIAL SERVICES

Author: Joanna Jastrząb, Attorney-at-law

In their national legislation implementing the NIS Directive[1], which puts in place a framework to ensure security of networks and services, individual member states identify the organisations that are 'operators of essential services' (OES). The implementing legislation is not uniform across the EU countries, and neither are the requirements for firms providing services to OES. Any firm active in the IT sector in Poland needs to know the current regulations to ensure compliance.

Under the NIS Directive, OES are those organisations that provide a service which is essential for the maintenance of critical societal and/or economic activities and depends on network and information systems. Moreover, any incident concerning the cybersecurity of the systems, would have significant disruptive effects on the provision of that service. Meanwhile, it is the member states themselves that formulate, in the secondary legislation implementing the Directive, the relevant provisions regulating OES. In Poland, this is dealt with in the National Cybersecurity Act, which provides that OES are identified in administrative decisions by the bodies named in the act, which are mostly ministers. This means that the OES are not required to meet the obligations specified in the act until they are served the administrative decision. From that point onwards, they have an obligation to ensure that the firms providing them with cybersecurity services (a term that is broadly understood in the act) fulfil the requirements specified in the act and the regulations issued on the basis of the act. In turn, those regulations place technical obligations on those service providers (the obligation to have the proper equipment and tools) as well as organisational obligations, such as having and keeping up to date an information security management system in line with Polish Standard PN-EN ISO/IEC 27001.

The obligations described above affect in particular firms that provide cybersecurity services in Poland. If they wish to be suppliers to OES, they have to ensure regulatory compliance, as this could be a major factor determining the choice of supplier by OES.

[1] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union

FAILURE TO COOPERATE WITH THE POLISH DPA MAY LEAD TO ADMINISTRATIVE FINES

Author: Katarzyna Syska, Attorney-at-law and Iga Małobęcka-Szwast, PhD, LL.M.

The Polish Data Protection Authority (DPA) has recently been imposing administrative fines for breach of the obligation to cooperate with the supervisory authority in the course of DPA proceedings and inspections.

Over the past few months, the DPA has imposed several administrative fines on controllers for failing to cooperate with the DPA properly in proceedings and inspections conducted under the GDPR and the Polish Data Protection Act.

Under article 31 of the GDPR, controllers and processors must cooperate with the supervisory authority when it is performing its duties. The DPA found the following to be a breach of this obligation:

- deliberately obstructing inspections;
- failing to provide inspectors with access to personal data and other information, as well as premises and equipment, which was necessary for the performance of their duties;
- failing to provide sufficient explanations and information necessary to review complaints made by data subjects;
- providing unclear and vague explanations, which led to excessive and unjustified prolongation of the proceedings;
- failing to provide access to personal data and other information necessary for assessing a data breach (either previously reported by the controller or a third party).

These DPA decisions demonstrate that the authority attaches particular importance to the obligation to cooperate with the authority, for example by providing the DPA with the requested information and with access to personal data, premises, equipment, etc., pursuant to articles 31 and 58(1) of the GDPR. Therefore, controllers and processors need to cooperate fully when the DPA:

- carries out investigations, including data protection audits;
- handles complaints made by data subjects;
- verifies data breach notifications.

This in turn requires controllers and processors to:

- reply to correspondence received from the DPA without undue delay and within the specified deadline, and if the deadline cannot be met, submit a motion for an extension, stating reasons;
- provide complete information addressing all the questions and doubts raised by the DPA (avoid evasive responses);
- make available all documents, information, materials etc. that are requested by the DPA and are essential for it to perform its duties;
- enable the DPA to conduct inspections, for example by allowing access to any premises and data processing equipment and means, as requested by the DPA.

REMOTE WORK - CURRENT RULES AND WHAT MIGHT CHANGE

Author: Paweł Krzykowski, Attorney-at-law, Partner BKB

Under the COVID Anti-Crisis Shield, employers may now instruct employees to work remotely. This is an interim measure, however, and the government has said that rules on working remotely might be incorporated permanently into the Polish Labour Code and replace current rules regarding tele-work.

Under the Anti-Crisis Shield laws, for the duration of the current state of epidemic and the subsequent three months, an employer may instruct an employee to perform, for a fixed period of time, the work specified in the employment contract in a location other than the fixed location in which work is performed (remote work).

In general, if an employee is instructed by an employer to work remotely, they have to comply. These instructions do not require any specific form or amendment of the employment contract. The instructions can also be cancelled at any time by instructing employees to return to the office. An employee must be paid the regular remuneration for the period for which they work remotely, and it is also possible for an employee to work remotely while in quarantine.

Instructions to work remotely may be issued if an employee has the skills and technical and local capabilities, and the type of work allows it to be performed remotely. In particular, direct means of remote communication can be used. Tools needed for remote work as well as logistic support for remote work should be provided by the employer.

An employee may use tools or materials not provided by the employer to work remotely, provided that this enables confidential information and other legally protected secrets to be respected and protected, including company or personal data. An employee working remotely is required to keep a record of the activities performed if so instructed by the employer.

In principle, there are no restrictions as to where the employee works remotely. This does not always have to be the employee's home, and may be any other location, but the employer is required to make sure that the location ensures that working conditions are safe and hygienic.

When employees work remotely, the employer continues to be bound by regulations on working time and the required rest periods. The employer also has an option of coming to an arrangement with the employee regarding use of devices and other work tools.

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LEGAL INSTRUMENTS THAT AFFECT GROWTH OF THE FINTECH SECTOR IN POLAND

Author: Jan Byrski, PhD, Habil., Cracow University of Economics Professor, Attorney-at-law, Partner and Michał Synowiec, Trainee Attoreny-at-law

The regulatory climate on the financial market in Poland is currently one of the main problems affecting implementation of modern technological systems in the sector. In practice, the constant advances being made in technology mean that a flexible approach is needed towards the current legal requirements on the part of regulators and legislator alike. This is a crucial issue not only for the financial institutions operating on the market at the moment, but also for firms contemplating launching operations of this kind.

Under the system in Poland, there are three main types of measures used to formulate the legal regime for the FinTech sector.

The first comprises the instruments that derive from generally applicable law, such as rules enabling the firms concerned to apply to the Polish Financial Supervision Authority (KNF) for an individual declaratory ruling on an innovative product or financial service being introduced. There are also provisions that create a new type of payment service provider, which is a small payment institution.

The next type is created by soft law, and this includes in particular KNF Office standpoints and communications recently released addressing issues such as crowdfunding, cloud computing, or robo-advisors. Most of the information posted is only available in Polish, which can be problematic for foreign firms looking to operate in Poland.

The final type of measure used in Poland to form the FinTech legal framework are the initiatives taken by the KNF Office directly. In particular, the regulator has said it plans to introduce Sandbox API. This is not intended to be a regulatory sandbox in the normal sense, but a virtual testing platform for FinTech companies wishing to test, free of charge, a system of theirs in a regulatory environment under KNF supervision. There is however a condition for admission to the tests, which is to register for Innovation HUB KNF, which is a scheme designated for firms that are in the process of introducing an innovative product or financial service based on up-to-date information technology.

For foreign businesses, the most important issue continues to be how to properly identify the Polish FinTech regulatory environment. Often, the legal instruments that are introduced in Poland aid, in operational terms, the launch of products and services targeting the financial market, making Poland a FinTech hub within the EU.

MORE ABOUT

INTELLECTUAL PROPERTY

DISCLOSURE OR HANDOVER OF EVIDENCE AS A NEW INSTITUTION IN INTELLECTUAL PROPERTY CASES

Author: Justyna Sitnikow, Attorney-at-law

An amendment of 13 February 2020 to the Civil Procedure Code introduced, as of 1 July 2020, intellectual property proceedings. These are proceedings in which, for instance, new procedural measures are specified intended to provide better protection of intellectual property rights. One of these measures is 'disclosure or handover of evidence'.

The institution of disclosure or handover of evidence exists in procedural provisions regardless of injunctive relief to secure evidence. The essence of this new institution is that a plaintiff can request that a court order a defendant to release certain evidence to the plaintiff, to which only the defendant has access. This entitlement is intended in particular to bring about disclosure of banking, financial, and commercial documents of the defendant. The name of this institution indicates of course that a plaintiff can gain access to evidence in two ways, depending on the action that the defendant is ordered to take in the court ruling. Handover of evidence relates to documentation, while evidence might be disclosed for example by providing access to a database (disclosure of certain data contained in the database).

The earliest moment at which this request can be made is the moment when the lawsuit is filed. This does not exclude the possibility to file a request already in the course of the proceedings. A court ruling ordering disclosure or handover of evidence is issued within an adversarial procedure, and constitutes an enforceable title. Therefore, the court before making that decision is required to give the defendant an opportunity to respond to this request, and must grant the defendant a period of minimum two weeks to do this. In response, the defendant may invoke the protection of the company secrets, and the court may take it into account when issuing its ruling in the matter.

If the defendant does not voluntarily comply with the court ruling, the plaintiff can initiate the enforcement proceedings. The enforcement of the court ruling ordering handover of the evidence is always carried out by a bailiff. If the ruling orders the disclosure of the evidence, the court enforcement procedure for non-pecuniary benefits is appropriate – the court can impose a fine in order to force the defendant to comply with the ruling.

This new institution will be of great importance in any cases in which proving an infringement of the intellectual property rights or demonstrating the scale of the infringement can be impeded. It is to be hoped that this new institution will contribute to a more effective pursuit of the claims, and on the other hand, that the defendant's business secrets will also be respected by the courts.

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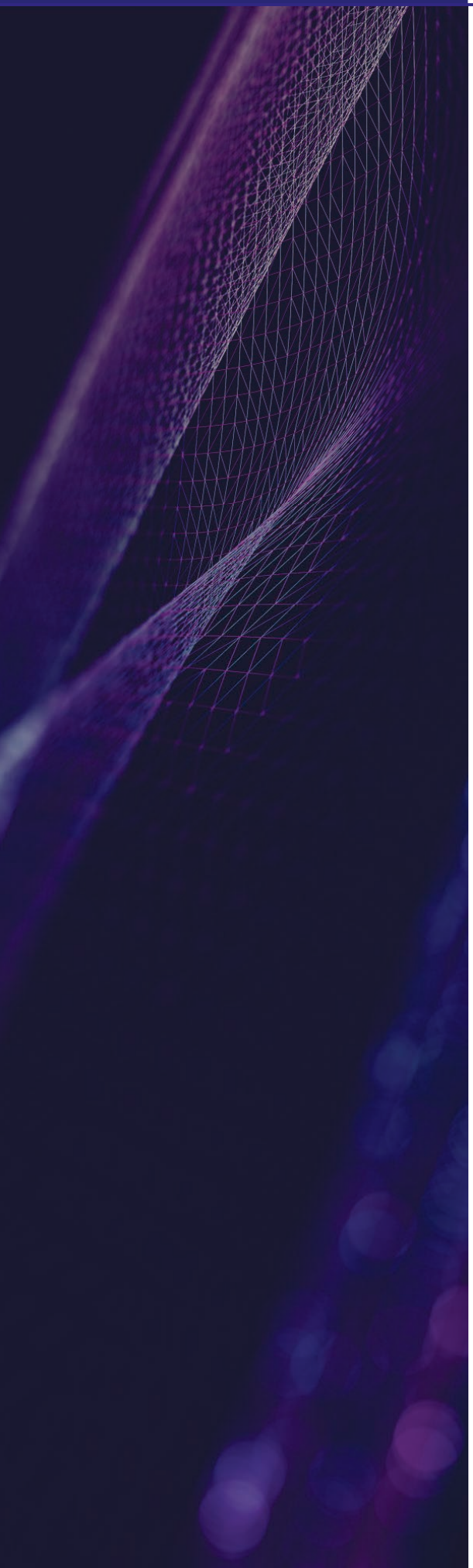


INTELLECTUAL PROPERTY

THREE REASONS WHY IT IS ADVISABLE TO REGISTER YOUR BRAND FOR PROTECTION DIRECTLY IN POLAND

Author: Anna Sokołowska-Lawniczak, PhD, Patent and trademark attorney, Partner

What advantages does registering a trade mark in Poland have over the European Union trade mark?

Registration of a trade mark with the Polish Patent Office might mean that the mark is only protected in Poland. A filing of this kind is cheaper than EU registration, and is less likely to be contested or invalidated, because less potentially conflicting marks are in circulation. In addition, the Polish Patent Office has greatly improved on its average processing time, which was 11.5 months in 2019.

According to the Polish Patent Office's annual report, there were more than 3500 trade mark filings made by foreign companies in 2019. This is approximately one quarter of the number of filings made by Polish companies. Why might registration in Poland be a more attractive proposition than registration in the EU? The main issue is the cost, as the average cost of registering a trade mark in Poland for three goods and services classes is just under half that of protection in the EU. This might be important if a company has a large number of trade marks. Secondly, the risk of a mark conflicting with a mark that is already registered is definitely lower in the case of registration in Poland than for a Community trade mark. When filing to register a trade mark in Poland, Polish trade marks, EU trade marks, and trade marks that have been applied for or registered internationally and are effective in Poland have to be considered, whereas in the case of a EU trade mark the territory in which conflict might arise is much wider. It encompasses all of the EU countries, and national laws in those countries. Lastly, there is the time taken to process the filing, which for a long time was a major drawback of proceedings in Poland. According to the annual report, in 2019, the average time for processing a filing was 11.5 months. Observation has shown that if the Patent Office does not have cause to deny an application on absolute grounds, protection can be obtained within eight or nine months. If the question of absolute grounds arises, the Polish Patent Office chases the EUIPO as regards a stringent approach to the ability to distinguish between trade marks. In particular, there is a rigorous process of analysis of word marks, and a shift in the standpoint of the Polish Patent Office has been noticed as to how it assesses the distinctive character required for registration to be successful.

A REVOLUTION IN INTERNET LAW, THE MAIN PREMISES OF A NEW DIRECTIVE – THE DIGITAL SERVICES ACT

Author: Arkadiusz Baran, Attorney-at-law

Work is currently underway at EU level on a new legal framework for providing digital services.

The European Commission has held consultations on a *Digital Services Act* (DSA) - a new legislative package to regulate the European digital services market more closely by expanding and harmonizing the obligations connected with digital services. The legal framework for digital services has remained unchanged since the adoption in 2000 of the e-Commerce Directive. Principally, under the DSA,

- the definition of 'online intermediary' will be expanded to include activities such as providing cloud computing, comparison tools, online advertising platforms, and suppliers of smart contracts;
- at least some regulations will be more broadly applicable, and include organizations based outside the EU but operating within it;
- a clear distinction will be made between illegally shared and harmful content, including with regard to liability;
- service providers will be subject to more obligations (for example with respect to reporting, transparency, or for instance auditing);
- rules on intermediary liability will be revised to unify them at EU level, in particular the rules governing online platforms and the ways in which commercial customers of sales platforms can be identified;
- a notice & action mechanism is to be introduced to enable users to object to a takedown notice regarding their content and to prevent content being removed wrongly;
- voluntary monitoring of illegal content will be encouraged ('good Samaritan rule');
- there will be greater enforcement of service providers' obligations, including creating new authorities / giving existing authorities more oversight (including as a single European regulatory authority), a system of 'trusted flaggers' and new penalties will be introduced, and there will be better access to compensation;
- there will be closer international and cross-border cooperation;
- there will be no intervention in recent sectoral changes, in particular laws on copyright (directive 2019/790) and audiovisual media services (directive 2018/1808) or at the most they will be supplemented, where applicable.

POLISH CLOUD COMPUTING SERVICES FOR PUBLIC AUTHORITIES – WHAT ARE: WIIP, ZUCH, AND SCCO?

Author: Magdalena Gąsowska-Paprota, Attorney-at-law

The single central system for cloud computing services for public authorities, which is currently being constructed in Poland, is an important development for cloud computing service providers that wish to provide services for Polish public authorities.

The Common IT State Infrastructure (WIIP) scheme, which has been under development in Poland since 2019, and was the responsibility of the then Ministry of Digital Affairs, is designed to form a central platform on which cloud computing resources will be available for public, government, and local government authorities. The legal basis for the scheme is Council of Ministers Resolution 97 of 11 September 2019 on the "Common IT State Infrastructure" initiative. The Polish WIIP can be regarded as part of the umbrella project of European Cloud Federation.

The essential elements of the WIIP are now in place, for instance the Cloud Computing Service System (ZUCH) and the Cloud Computing Cybersecurity Standards (SCCO), which were adopted as part of the WIIP.

The ZUCH is a platform that public authorities can use to purchase cloud computing services from external vendors. At the moment, it can only be used to search cloud computing services, i.e. to review the services that suppliers have on offer. It cannot be used as a medium for placing orders for services, which an authority has to do on its own. Eventually however, the ZUCH is intended to be a virtual market place for conducting the purchase process.

Only suppliers who have agreed to the ZUCH conditions, filled in the relevant form, and thus have been admitted to the system, may offer their cloud computing services. They have to meet requirements laid down in the WIIP resolutions and in the ZUCH and SCCO conditions. The SCCO sets four security requirement levels, and lays down the specific organisational and technical safeguards that are required.

The WIIP scheme is important from the point of view of cloud computing providers that wish to establish a presence on the Polish market, because the standards devised under the scheme will affect the entire cloud computing service sector in Poland. It is therefore advisable that the providers join the ongoing dialogue with the government, as the architect of the scheme, regarding the major and problematic issues, such as responsibility for unlawful data processing in a cloud, auditing, etc.

Information about the WIIP, ZUCH and SCCO is available here: https://chmura.gov.pl/zuch

MORE ABOUT Life Science

CJEU JUDGMENT IN CASE C-649/18 AND POLISH BAN ON ADVERTISING OF PHARMACIES

Author: Joanna Adamczyk, Attorney-at-law

A recent judgment given by the Court of Justice of the European Union (CJEU) has major implications with respect to Polish law. The judgment was issued in case C-649/1[1] , and concerns interpretation of the e-Commerce Directive[2]. Specifically, the judgment relates to freedom of provision of information society services such as online sales of OTC medicinal products, where advertising of the activities of pharmacies is prohibited under national laws. The judgment is thus vital to online pharmacies targeting Polish customers and operating in other EU member states. The CJEU judgment has major implications in view of the ban in Poland on advertising of pharmacies. The EC has stated before now that a ban on advertising of pharmacies is incompatible with EU law. The CJEU judgment in case C-649/18 provides further grounds for arguing that the ban in Poland on pharmacy advertising is a breach of EU law, and specifically the principle of freedom of provision of information society services provided for in the e-Commerce Directive.

The filing in case C-649/18 focuses on article 3 of the e-Commerce Directive in relation to French laws. It was made in connection with a dispute over a conventional pharmacy based in the Netherlands that also sells OTC medicinal products online via a platform intended for customers in France, regarding advertising and promotion of that sales activity. The CJEU found that the queries concerned EU law compliance of national laws in member states with respect to online sales of OTC medicinal products, where those laws restrict advertising or promotion with respect to a service provider with their place of business in a different EU member state.

The judgment in case C-649/18 reaffirms the standpoint taken in CJEU case law, this time in light of the freedom of provision of information society services (in the case in question selling OTC medicinal products online) under the e-Commerce Directive. A total ban on advertising of pharmacies, regardless of manner or scope, is a measure disproportionate to the means necessary to achieve the envisaged goals of national restrictions intended to safeguard public health. The CJEU judgment in case C-649/18 reinforces the view that the total ban in Poland on advertising of pharmacies regardless of form and scope is also a breach of the e-Commerce Directive. A general ban on advertising of pharmacies is also a prohibited restriction of the freedom to provide information society services, affecting foreign firms that sell medicinal products intended for Polish customers, with respect to advertising and promotion of such activities. Therefore, the CJEU judgment in case C-649/18 is important for activities of firms in other EU member states, where they encounter restrictions in advertising of online sales of OTC medicinal products intended for Polish customers.

[1] CJEU judgment of 1 October 2020, C-649/18, ECLI:EU:C:2020:764.
[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178 17.7.2000 p. 1 – 16.
[3] Article 94a of the Pharmaceutical Law (consolidated text, Journal of Laws 2020.944) of 6 September 2001 provides for a total ban on pharmacies, pharmacy outlets, and their activities.

MORE ABOUT Litigation

CHANGES TO LITIGATION PROCEDURES REGARDING COMMUNITY TRADE MARKS AND COMMUNITY DESIGNS IN POLAND

Author: Beata Matusiewicz-Kulig, Attorney-at-law, Partner

Up until 1 July 2020, disputes regarding infringement of a community trade mark or community design in Poland were only heard by one court – the Warsaw Community Trade Mark and Community Design Court. Under new rules, from that date onwards, a separate procedure will apply regarding disputes over protection of community trade marks and community designs, among other things. It will now be possible for disputes of this kind to be conducted in four other courts in Poland as well. These are specialist intellectual property courts, and different rules of procedure will apply.

These changes have been made to create a uniform and specialist intellectual property judicial system, and to make it easier to gather evidence of intellectual property infringement and to prove infringement, and the scope of infringement, in court.

The new IP courts in Poland will deal for instance with community trade mark and community design cases. To date, these cases were adjudicated by the sole specialist intellectual property court in Poland, and that is the XXII Division of the Regional Court in Warsaw, the Community Trade Mark and Community Design Court.

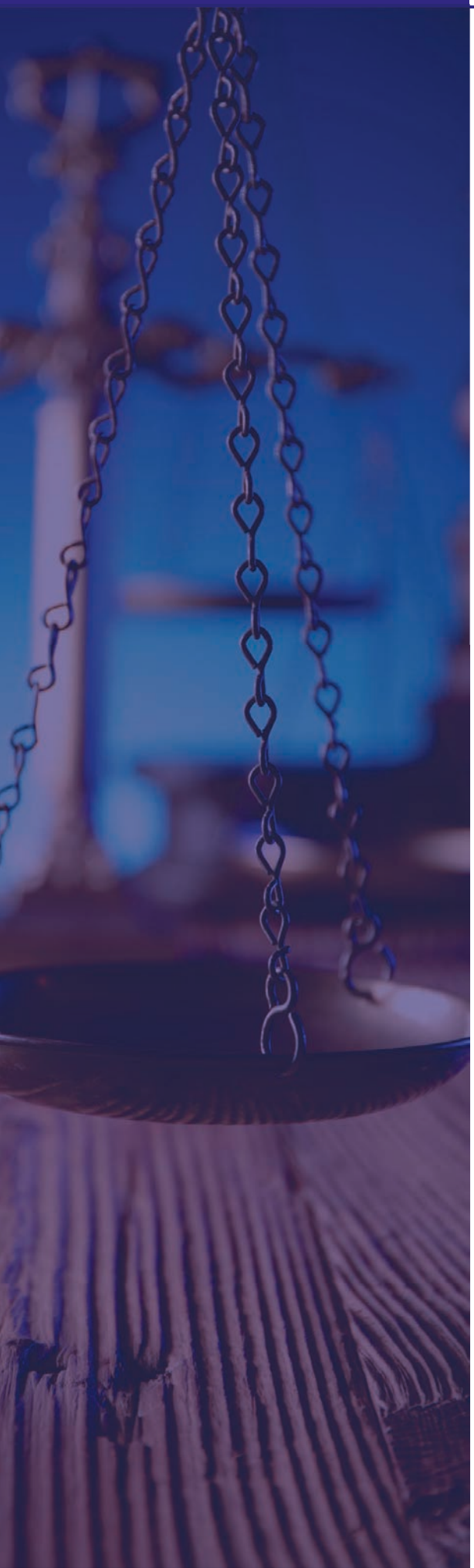
Currently, if a community trade mark or community design is infringed, and the case is pursued in Poland, it is dealt with by one of five IP courts, in Warsaw, Gdańsk, Lublin, Poznań, or Katowice.

The separate procedure for IP cases, applicable as of 1 July, also provides for a single system of procedural instruments that aid the preservation of evidence of infringement (of community trade marks and community designs, among other things) and the obtaining of evidence from the party in breach or a third party that holds that information or evidence.

Some of these instruments already existed in the Polish legal system, such as a motion for release of information, or for an injunction to secure evidence, but these regulations were inconsistent. The new IP procedure applicable to disputes over community trade marks and community designs i) makes it possible for persons seeking protection to obtain and gather evidence of infringement both prior to filing the statement of claim, and during the litigation proceedings, ii) allows information to be demanded regarding the infringement or evidence of infringement to be preserved with respect to a possible defendant/ party in breach, and a third party, and iii) provides for an instrument that is new to the Polish legal system, which is a court order for the defendant thought to be in breach of IP rights, including community trade marks and community designs, to hand over or disclose evidence.

The separate IP litigation procedure also includes instruments for the defendant to raise a defence against alleged infringement, for instance of a community trade mark and community design. A defendant will be able to i) file a counterclaim with the IP court for invalidation or expiry of a community trade mark, and ii) file a counterclaim for invalidation of a community design. At the same time, there will be an option of filing a special claim for the IP court to determine that there has been no breach of an exclusive right. This is special type of lawsuit for IP cases, to avoid uncertainty arising when new solutions are placed on the market and the saving of costs of an investment project which could be blocked in the future, while a legal interest has to be demonstrated in the manner specifically provided for in the regulations.

Also, in litigation concerning community trade marks and community designs, and other cases, where an amount in excess of PLN 20 000 is being sought, representation in IP courts by an attorney-at-law, legal adviser, or patent attorney will be mandatory.



NEW PUBLIC PROCUREMENT LAW IN POLAND AS OF 1 JANUARY 2021

Author: Tomasz Krzyżanowski, Attorney-at-law

As of 1 January 2021, the new Public Procurement Law of 11 September 2019 (PPL) will take effect, along with 18 pieces of secondary legislation implementing the amendment. Businesses active on the public procurement market in Poland therefore need to make preparations to comply with these completely new laws. The approach taken in the PPL to legal requirements is quite formalised, and therefore certain errors made during the bidding stage will not be rectifiable later. Therefore, it is important to know the new regulations.

The new PPL introduces a series of legal institutions that will be entirely new to the current public procurement regime. The act and the secondary legislation implementing it lay down requirements concerning documentation that contractors have to submit with a bid, or when requested by the contracting authority, to confirm that they meet participation criteria, and that there are no grounds for disqualifying them. New certificates, for example certificates of no criminal record, will have to be obtained for the management board members, supervisory bodies, or commercial proxies. Also, templates for a statement giving the grounds for designating a bid as a commercial secret or for a statement on use of another company's resources will have to be redrafted, and new self-cleaning policies will have to be implemented if there are potential grounds for disqualification from a tender procedure. In particular, from 1 January onwards, it will only be possible to submit bids electronically, and this will mean that a business enterprise will have to have a qualified electronic signature in line with Regulation (EU) 910/2014 of 23 July 2014 (eIDAS Regulation). Also under the new PPL, there will be important new rules on the content of public contracts, regulating issues such as abusive clauses and capped contractual penalties. There will be a completely new procedure for awarding contracts in tenders below EU thresholds, and this will allow among other things negotiation of the details of a bid subsequent to submission, which is something that to date was not permitted, and there will be a broader range of options for contesting decisions made by the contracting authority.

Importantly, work is currently under way in the Polish parliament to amend certain provisions in the new PPL, and new implementing legislation is being passed. Polish lawmakers might also decide to postpone entry into force of the PPL by a few months due to the difficulties caused by the COVID-19 epidemic.

MORE ABOUT TAX

SPECIAL INVESTMENT FUND - THE BENEFITS OF SIMPLE SOLUTIONS

Author: Bartłomiej Pyka, Tax advisor, Trainee Attorney-at-law

Changes to the Corporate Income Tax Act are envisaged to come into force in January 2021[1]. The amendments focus primarily on the possibility to use alternative taxation based on the Estonian model of a flat-rate tax. However, another pro-investment taxation institution – the Special Investment Fund (SIF) – is about to be introduced into Polish law.

Both institutions share an identical subjective premise, but the result is different – a flat-rate tax allows the date the tax is due to be postponed until the company's shareholders or stockholders obtain a dividend payment, while the SIF allows resources to be qualified (write-offs) as deductible expenses under an investment fund that is separately created in the reserve capital.

Regulation of a flat-rate tax is very complex. The clearing system would need to be thoroughly transformed and tax preferentiality will partially disappear, i.e. a reduced 9% 'small taxpayer' tax rate, a 5% preferential tax rate paid on qualified intellectual property rights income, research, and development tax relief. These seem to be major defects of this regulation since a flat-rate tax is aimed at small and medium entrepreneurs that already benefit from those tax reliefs.

The situation seems to be different when it comes to a SIF as a SIF allows a company to both keep the previous accounting system and tax preferences mentioned above, and enables the acceleration of tangible asset amortization in tax costs. The SFI aims to promote investment by permitting write-offs to be classified as deductible expenses, although in the case of a lack of investment-fund expenditure, the permission will be revoked leading to an increase in the tax base.

A taxpayer can implement the SFI in a cost-effective manner by concluding an agreement for a special settlement account and transferring funds (that cannot originate from loan facilities, grants, subsidies, or other forms of financial support) to the account. The transferred funds should be spent on investments within the time specified by the statute. The write-offs themselves should: (a) correspond to a taxpayer's profit achieved in the previous year, and (b) be comparable with the funds transferred. Therefore, this is a matter of the correlation between write-offs, the profitability of economic activity, and a taxpayer's investment objectives. It is crucial to remember about subjective premises that allow a taxpayer to benefit from SFI, in particular the prerequisites of achieving specified capital expenditure and achieving no more than 50% of the income from passive sources.

In conclusion, it can be reasonably expected that the SFI, because of its simplicity and the ability to maintain previously existing preferences, will be preferred among taxpayers. This solution is not a revolution in tax law, although it does constitute a significant advantage when it comes to tax-deductible cost recognition that can subsequently be incorporated into a company's daily operations.

[1] Act of 28 October 2020 amending Corporate Income Tax Act and other Acts.

MORE ABOUT TELECOM

IMPLEMENTATION OF THE EUROPEAN ELECTRONIC COMMUNICATIONS CODE TO THE POLISH LAW

Author: Xawery Konarski, Attorney-at-law, Senior Partner

21 December 2020 is the deadline for implementation of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code ("EECC"). In Poland, intensive works are underway to implement those provisions to the Polish legal regime.

The Polish legislator has decided to transpose the provisions of the EECC in a new statutory law titled the Electronic Communications Law. At the same time, the statutory law applicable to date, the Telecommunications Law (TL), which implemented the EU Directives creating the so called telecommunications regulatory package, is to be repealed.

Wide-ranging consultations have been conducted during works on the bill of the Electronic Communications Law (ECL). They have resulted in subsequent versions of the bill, the current one is dated 29 July 2020. So it is worth pointing to a few specific solutions chosen by the Polish originator of the bill.

First, we should emphasise that as the ECL replaces the TL, it also applies to issues that were regulated in the previous law but at the same time do not implement the EECC. We should mention here first of all the provisions relating to the secrecy of electronic communications, implementing Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), and the requirements for radio equipment, implementing the provisions of Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC.

First, we should emphasise that as the ECL replaces the TL, it also applies to issues that were regulated in the previous law but at the same time do not implement the EECC. We should mention here first of all the provisions relating to the secrecy of electronic communications, implementing Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), and the requirements for radio equipment, implementing the provisions of Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC.

Second, the Polish legislator has decided that the obligations set forth in Article 40 et seq. of the EECC will be implemented in the amendment to the Act on National Cybersecurity System of 5 July 2018 ("NCS"), implementing Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union ("NIS Directive"). At the moment, Article 1.2.1 of the NCS Act excludes directly its application to telecommunications economic operators with respect to the requirements relating to security and incident reporting. This is in conformity with Article 2 of the NIS Directive. Meanwhile, while working on the ECL, the Polish originator of the bill has decided that the provisions on the NCS will be applicable – contrary to what is stipulated in the NIS Directive – to electronic communications economic operators. Those changes were proposed in the amendment to the NCS Act on 7 September 2020. It was assumed that a new Chapter 4a would be added, specifying the obligations of electronic communications economic operators, also with respect to handling telecommunications incidents.

Those obligations will apply to all categories of entities providing electronic communications services, including number-independent interpersonal service.

Third, controversial is the manner of implementing in the ECL bill Articles 102 to 115 of the EECC, regulating among other things the issue of contracts with users, information obligations, changes to a contract, or a direct billing service. Pursuant to Article 101.1 of the EECC, requiring from Member States full harmonisation of the selected provisions of the EECC, Member States may not introduce national provisions that are less or more stringent than the contents of the above provisions of the EECC. However, this requirement has not been adhered to in the most recent version of the ECL bill dated 29 July 2020, as a number of solutions have been regulated differently than in the EECC. For example there is a requirement to present all contractual provisions to a consumer in one document, which is not stipulated in Article 102 of the EECC or, in the case of a direct billing service, to receive a subscriber's prior consent to the provision of such service, which is also not provided for in the EECC.

Implementation of the provisions of the ECL will be of fundamental significance for the Polish market of electronic communications services, also in respect of the launch of 5G technology. Because of the level of advancement of works on the ECL bill, we must say that the Polish legislator most probably will not meet the implementation deadline of the EECC on 21 December 2020, and it is planned to enact those provisions in the first quarter of 2021. At the same time, the introduction of vacatio legis longer than standard 14 days is expected, however, final decisions have not been made yet.

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