02

Issue No.

TKP LEGAL NEWSLETTER

Warsaw/Poland

February 2021

In this issue:

Traple
Konarski
Podrecki
& Partners

TKP

LEGAL NEWS
Poland

LEGISLATIVE DEVELOPMENTS

CHANGES IN TELECOMMUNICATION LAW

An amendment to the Telecommunications Law came into force on 21 December, 2020.

The amendment is the first stage of implementation of the Directive establishing the European Electronic Communications Code into the Polish legal system. Due to the number of changes required under the directive, the Polish Telecommunications Law will be replaced by the Electronic Communications Law.

A significant change effective from 21 December, 2020, is a subscriber's right to continued Internet access services when changing the service provider. The new supplier has an obligation to activate the service as soon as possible and at a time agreed with the customer, but no later than one business day after the end of the contract with the current supplier. The existing service provider is required to provide the service according to the existing terms until the new provider activates the service.

The Act of 14 May, 2020, amending certain acts regarding protective measures in connection with the spread of the SARS-CoV-2 virus (Journal of Laws of 2020, item 875).

CHANGES IN CIVIL LAW – EXTENSION OF LEGAL PROTECTION UNDER THE STATUTORY WARRANTY

From 2021, entrepreneurs running sole proprietorships will have certain benefits enjoyed to date only by consumers. This follows amendment of the Polish Civil Code and consumer rights legislation.

Act of 31 July, 2019, amending certain acts to reduce regulatory burdens (Polish Journal of Laws of 2019, item 1495)

NEW PUBLIC PROCUREMENT LAW

On 1 January, 2021, a new law regulating public procurement came into force.

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, and 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.

The Public Procurement Law of 11 September, 2019 - (Polish Journal of Laws of 2019, item 2019).

TEMPORARY RESIDENCE FOR POSTED WORKERS FROM UK

An amendment to the Act on entry to Poland and residence and departure from Poland of citizens of European Union countries and their family members came into effect on 1 January, 2021, and enables people from the United Kingdom to continue to live and work in Poland, to which they had the right so far as citizens of the European Union.

The Act of 10 December, 2020, amending the Act on entry to Poland and residence and departure from Poland of citizens of European Union countries and their family members and certain other acts (Polish Journal of Laws of 2020, item 2369).

LEGAL NEWS
Poland

LEGISLATIVE DEVELOPMENTS
planned

PROPOSAL FOR AMENDMENT OF THE PAYMENT SERVICES ACT

A proposal for amendment of the Payment Services Act provides for new obligations for small payment institutions, particularly with respect to these institutions' obligations under the AML (Anti-Money Laundering) Act. Upon implementation of the proposed changes, small payment institutions would be required to provide the Polish Financial Supervision Authority with information on the procedure for counteracting money laundering and terrorist financing when applying for entry into the register.

Proposal for amendment of the Payment Services Act

READ MORE

BILL ON FREEDOM OF SPEECH AND SEARCHING AND DISSEMINATING INFORMATION ON THE INTERNET

Under the bill, social media services will not be allowed to remove content or lock accounts if the content on them does not break Polish law. If content is removed or an account is locked, a complaint can be sent to the platform, which will have 24 hours to consider it. Within 48 hours of the decision, the user will be able to file a petition with a court for access to be restored. The court will consider complaints within seven days of receipt and the entire process is to be electronic. If a special court rules in favour of the plaintiff and the internet service does not obey the ruling, the internet service can be fined up to PLN 8 million (EUR 1.8 million) by the Office of Electronic Communications.

READ MORE

PROPOSAL FOR AMENDMENT OF THE ACT ON COMPETITION AND CONSUMER PROTECTION

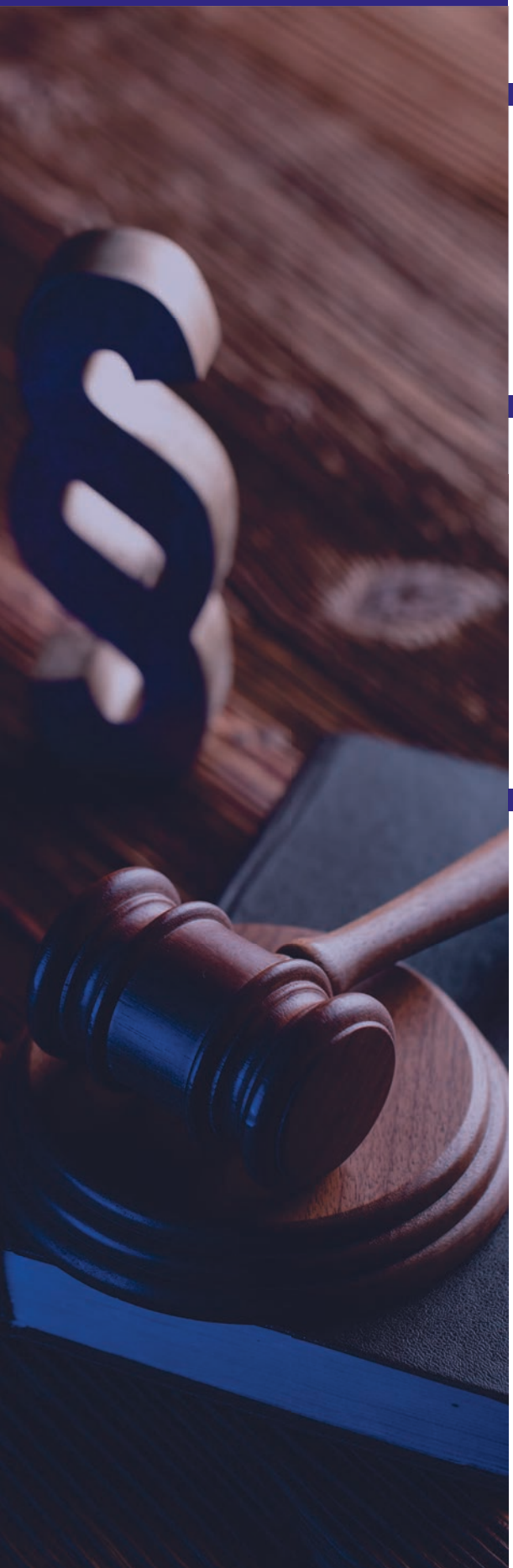
The bill provides for a total of several dozen different changes, under which, for example, the Office of Competition and Consumer Protection will be given the power to impose fines on associations of entrepreneurs if an infringement is related to the activities of its members.

Another new development will be the possibility of imposing periodic penalty payment to force entrepreneurs to fulfil their obligations by way of a decision .The method of determining the penalty will also change, because in practice the maximum amount will be replaced with a percentage of turnover.

The list of anticipated changes also includes issuing a statement of reasons for charges when proceedings are initiated, and the possibility of obtaining information from natural persons.

The proposal for amendment of the Act on Competition and Consumer Protection and certain other acts.

READ MORE



CASES AND JUDGEMENTS

MEDIA MONITORING AND COPYRIGHT INFRINGEMENT

In a judgment of 31 December, 2020, the Court of Appeal in Poznań ruled legally that media monitoring in the form of copying, reproducing and making available articles without concluding an appropriate license agreement with the publishers of these articles constitutes an infringement of copyright. (file ref. no. I AGa 92/20)

ENTREPRENEURS AND THE LOCKDOWN

The Voivodship Administrative Court in Opole decided that there are no grounds for entrepreneurs to pay penalties imposed by the Health Inspector for conducting business during the lockdown. The court ruled that companies cannot be prohibited from operating if no state of emergency has been declared. The judgment is not final.

READ MORE

COVID: AN EMPLOYER HAS THE RIGHT TO ASK ABOUT A STAY ABROAD

Due to the pandemic, an employer has the right to ask employees about their stay abroad. Providing false information in such a situation is a serious breach of employee duties and is grounds for termination of the contract without notice. This was the finding presented in a judgment of the District Court in Olsztyn of 29 January, 2021 (file ref. no. IVPa 79/20).

THE PRICE OF RETROACTIVE REBATES; UOKIK PLACES HUGE FINE ON GROCERY RETAILER FOR UNFAIR TRADING PRACTICES

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

Although the EU directive on unfair trading practices in the food sector is yet to be implemented in 2021, the Polish competition authority (UOKiK) is already taking significant measures to fight the fallout of imbalances in the food supply chain. The latest measure taken in this regard was a severe fine of EUR 160.6 million imposed in the run-up to Christmas on a well-known grocery store chain for alleged unfair trading practices.

According to an official press release, UOKiK found that the company, which is said to have a clear economic advantage over the suppliers, demanded that its suppliers give the chain retroactive rebates on goods already delivered and sold, which were rebates not agreed on in advance. Allegedly, the company demanded a discount only after the sales figures had been collected, and it threatened the suppliers with contractual penalties if they did not amend their invoices. These allegations are vehemently denied by the company, which, in a statement, decried the way the Authority conducted the proceedings, and announced that it would lodge a complaint with the Court for the Protection of Competition and the Consumers to fight off the charges.

Poland had its national provisions banning certain unfair trading practices in place before the EU directive was adopted. This as well as the latest developments show that the issue in question is perceived by the Authority as a priority. Thus firms in the food sector which have a major contractual advantage need to be aware when trading in Poland that their conduct could come under close trading practice scrutiny, even if they do not have a dominant position on the market. The overriding factor is unfairly benefitting from contractual advantage. This applies not only to the relations between suppliers and retail stores but to the whole food supply chain. In fact, most past decisions made by UOKiK were focused on relations between farmers and food processors. Other investigations into the practices of further grocery store chains are ongoing.

SET-OFF BETWEEN A CREDITOR AND INSOLVENT DEBTOR

Author: Michał Sobolewski, Trainee attorney-at-law

If two persons each become a debtor and creditor towards the other, they may declare that they mutually set off those claims. However, this general possibility can be significantly reduced when one of the debtors enters into bankruptcy proceedings.

Bankruptcy proceedings are a particular type of court proceedings carried out with respect to an insolvent debtor. The purpose of the proceedings is to satisfy creditors' claims as far as possible from the assets of a debtor who is no longer able to meet their current liabilities. Once bankruptcy proceedings are opened, the assets of the insolvent debtor become the bankruptcy estate, which is used to satisfy creditors. At that moment it is particularly important for a creditor to submit their claims against the insolvent debtor in good time, before the bankruptcy estate is used to satisfy the other creditors' claims and the debtor asks for their mutual claim to be satisfied by the creditor.

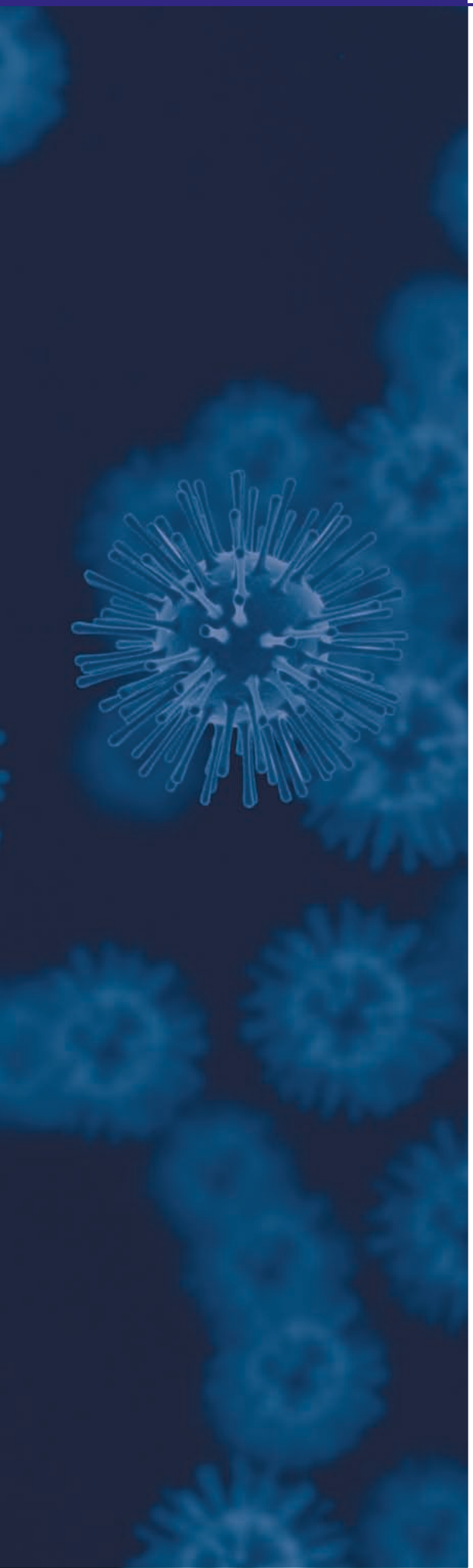
The general rule for setting off claims during bankruptcy proceedings is that both claims have to exist when bankruptcy is declared. It is not important whether each of the parties' claims have matured at that time. What matters most is the very existence of debt.

There are circumstances in which this rule cannot be applied. It is prohibited for a creditor to set off claims that were acquired during the last year before bankruptcy is declared, assuming that the acquirer was aware that the debtor became insolvent. The reason for this restriction is to prevent claims being purchased at a reduced price when there is a threat of bankruptcy, with a view to their subsequent set-off to the detriment of the previous creditors of the debtor.

At the same time, if the acquirer becomes a creditor towards the insolvent debtor as a result of the payment of the debt for which he was personally responsible (e.g. as a guarantor) or that was secured by their assets, they may still have grounds for a set-off. This is subject to the condition that the purchaser was not aware that there were grounds for declaring bankruptcy at the time responsibility was assumed for the debt against the insolvent person.

Set-off is also not permitted if the creditor becomes a debtor towards the insolvent after the declaration of bankruptcy.

Notwithstanding the above, set-off of claims does not happen automatically. In order to exercise this right, the creditor has to submit the claim to the trustee shortly after becoming aware of the declaration of bankruptcy. The creditor must also state clearly that it wishes to set off the claim against the claim of the insolvent person.



LIABILITY OF BOARD MEMBERS DURING THE COVID-19 PANDEMIC

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

Under Polish law, management board members are not liable for debts or obligations of a company, but there is one important exception to this rule. Management board members are jointly liable for a company's obligations when the following prerequisites are fulfilled:

- debt enforcement against the company proves to be ineffective; and
- no petition for bankruptcy was filed by the company or a company board member within the required time, except where a management board member is not at fault for the petition for bankruptcy being filed, or the creditor did not sustain any damage despite the fact that the petition for bankruptcy was not filed.

Under these rules excluding management board member liability, a petition for bankruptcy must be filed within the appropriate time. Under the Polish Insolvency Law the petition must be filed not later than 30 days from the moment when the company becomes insolvent. The company is insolvent when it is no longer able to pay its overdue debts, (which is assumed to be when the delay in payment exceeds three months) or becomes over-indebted. The company becomes over-indebted if its pecuniary obligations, excluding future and contingent liabilities and certain liabilities towards shareholders/stemming from loans and similar transactions, exceed the value of the debtor's assets, and if this situation exists continually for more than 24 months.

For purpose of the assessment of the legal risks faced by management board members it is essential to determine at what moment a petition for bankruptcy has to be filed. The main issue in the vast majority of court disputes pursued by a creditor against board members is proving that the petition for bankruptcy was filed late or was filed on time. This assessment often determines whether the debt of the company may be satisfied against the assets owned by board members.

Those are the reasons why special COVID-19 legislation was adopted to prevent a flow of petitions for bankruptcy during the COVID-19 epidemic. Under the new rules, the time limit for filing the petition for bankruptcy does not commence or is interrupted if:

- the grounds for filing the petition arise during the period of the COVID-19 epidemic declared by the appropriate Polish authorities;
- insolvency was caused by the COVID-19 epidemic.

Insolvency is presumed to have been caused by the COVID-19 epidemic if it occurred during the period of the COVID-19 epidemic. This assumption may be rebutted if the creditor proves that insolvency occurred due to reasons other than the epidemic. These rules protect board members of companies incorporated under Polish law against claims of the company's creditors and allow more time to recover from financial hardship caused by the COVID-19 epidemic.

THE POLISH APPROACH TO ISACS

Author: Joanna Jastrząb, Attorney-at-law

Information sharing on security matters.

A crucial element in cybersecurity is keeping up to date with potential and real threats and system and device vulnerabilities, and any incidents that have occurred. This information is provided by information sharing and analysis centres (ISACs) that operate in Europe and worldwide, and recently in Poland as well.

ISACs are usually operated on a non-profit basis within a PPP (public–private partnership). The members of the ISAC share information about threats and best practices, and also frequently conduct joint research and analytical projects. Most ISACs are specific to a sector, encompassing the entire sector, for example banking or the power industry, and operate domestically or internationally.

From the Polish point of view, the Cybersecurity Partnership (Partnerstwo dla Cyberbezpieczeństwa) program is significant. It is overseen by the Scientific and Academic Computer Network National Research Institute (NASK – Państwowy Instytut Badawczy) and is based on a model for collaboration that is typical of an ISAC. Under the scheme, cybersecurity information and know-how is exchanged between NASK-PIB and organizations that use ICT in their operations, and which could suffer economic or social harm if those operations were disrupted. The collaboration takes the form of a PPP, and takes place across sectors. NASK announced that as of the end of September 2020 almost 70 partners across various sectors of the economy received support under the scheme.

Meanwhile, the first Polish organization to be named an ISAC was ISAC-Kolej, set up by rail operators and NASK – PIB for the rail transport sector in October 2020. The principal aim of this ISAC was to continually share knowledge and know-how on cybersecurity incidents and thus improve rail transport security by developing a coherent set of standards, best practices, policies, and procedures in this area, and work more effectively with domestic and international cybersecurity teams.

Polish ISACS can be expected to expand their role in the near future, and more industries and sectors will probably create new organizations. This is important because each sector has its own specific characteristics, and its specific types of cybersecurity vulnerabilities and incidents. Specialization in this area therefore benefits the information-sharing members.

POLISH DPA IMPOSES TWO SIGNIFICANT FINES FOR FAILURE TO IMPLEMENT APPROPRIATE SECURITY MEASURES

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

In December 2020, the Polish Data Protection Authority (DPA) imposed significant fines on two entities for failing to implement appropriate measures to safeguard personal data in violation of Art. 32 GDPR. A fine was imposed on Virgin Mobile Polska (telecommunications operator) of PLN 1,968,524 (around EUR 437,000) and on ID Finance Poland (provider of short-term consumer loans) of PLN 1,069,850 (around EUR 238,000).

With respect to Virgin Mobile Poland, the DPA found that the company had not been conducting regular and comprehensive tests, assessments, and evaluation of the effectiveness of technical and organizational security measures. Such actions were undertaken only in connection with suspected vulnerability or organizational changes. Vulnerability related to data exchange between IT systems was exploited by an unauthorized person to obtain personal data of some of the company's customers. When imposing the fine, the DPA took into account **the serious character of the breach and the fact that the vulnerability had existed for a long time**.

In the case of ID Finance Poland, the personal data of its customers were compromised – they were publicly available on a processor's server. This was reported to the controller by an independent cybersecurity consultant. The company did not take immediate action to secure the data. A few days after receiving the information from the cybersecurity consultant, the customers' data available on the server were copied by a third party and then deleted by that party. The third party demanded a ransom for returning the personal data. The DPA concluded that the controller did not take sufficient action after receiving information about the breach. When imposing the fine, the DPA took into account, among other things, **the scope of the stolen data and the controller's delay in taking preventative measures**.

The Polish DPA has imposed a number of fines for lack of appropriate security measures, in breach of Art. 25 and 32 GDPR. The largest fine so far was imposed on the online store Morele.net in September 2019, and was PLN 2,830,410 (around EUR 630,000). Data controllers and processors should therefore pay particular attention to implementing appropriate security measures and regularly test their effectiveness.

ON 24 DECEMBER 2020, THE EUROPEAN UNION AND THE UNITED KINGDOM REACHED AN AGREEMENT IN PRINCIPLE ON THE EU-UK TRADE AND COOPERATION AGREEMENT.

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

The agreement will confer rights and obligations on both the EU and the UK, in full respect of their sovereignty and regulatory autonomy. This agreement concerns in particular free movement of persons, social security coordination, healthcare, and posted workers.

All movement after 1 January 2021 will be subject to the EU's and UK's existing immigration rules applicable to all third-country nationals. Persons who, as at 1 January 2021, were in a cross-border situation between the EU and the UK, are covered under the Withdrawal Agreement. This Withdrawal Agreement provides for their continued right to non-discrimination, protects their social security rights, rights to remain and work. There are also important clauses on social security. The agreement ensures that social security benefits will still be coordinated, and ensures that only one set of rules applies to a person at any given time. This will avoid the risk of a person paying double social security contributions or no legislation being applicable to them at a given moment, leaving them with no social security protection. From an employment law perspective, rules on posted workers are also noteworthy. The agreement does not include rules for the posting of UK workers in the EU, or vice versa. This means for example that a worker sent from the UK to the EU to work will have to pay social security contributions in the EU Member State and will be subject to the legislation of that country. During this period, posted workers will then pay their social security contributions through the organization that sent them.

This agreement on the rules for the UK's withdrawal from the EU is a key moment in the Brexit process. After a long wait, UK and EU citizens know the basic principles of Brexit. However, this agreement only provides certain guidelines and does not provide comprehensive regulation. As far as precise regulation is concerned, the positions of the individual countries will be of great importance. In conclusion, this agreement is a first step, but there is still a long way to go to reach a complete agreement.

BKB | BARAN KSIĄŻEK BIGAJ

MORE ABOUT FinTech

MOVES TO REGULATE CRYPTO-ASSET MARKETS

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

The end of September 2020 saw the publication of the first proposal for an EU regulation on markets in crypto-assets, and this will make up, along with three other legislative proposals, the Digital Finance Package. The three other proposals are: 1) a pilot regime on distributed ledger technology (DLT), 2) digital operational resilience, and 3) amendments to certain EU financial services rules.

The regulation is intended as a major step towards creating a uniform legal framework for issuing and trading in crypto-assets at EU level. As the regulation will be directly applicable, it will supersede the fragmentary laws adopted in individual member states to cover the areas where crypto-asset-related services are not covered by the current legislation. At the same time, the new laws are intended to ensure legal certainty, support innovation, ensure appropriate levels of consumer and investor protection, and guarantee financial stability on the market.

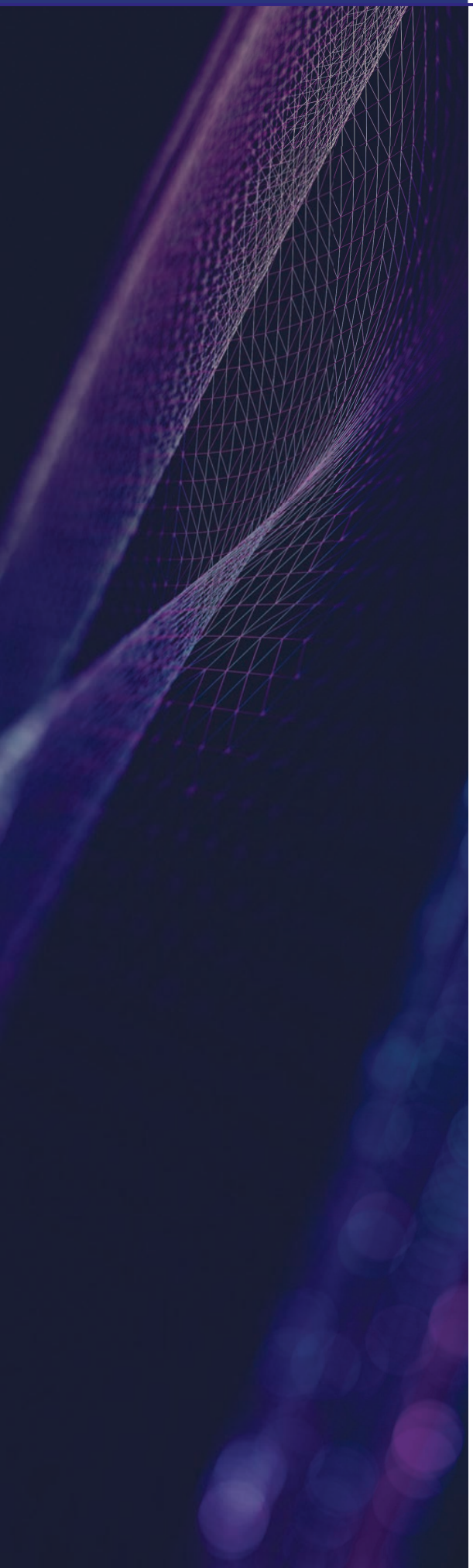
The main focus of the regulation continues to be crypto-asset issuers and service providers, who, in principle, will need to obtain authorisation to operate. Most likely, the authority issuing authorisation in Poland will be the Polish Financial Supervision Authority (KNF). The important issue for firms wishing to obtain authorisation is that once obtained in one member state, an authorisation will be valid throughout the EU.

The KNF has repeatedly drawn attention in Poland to the issue of the impact crypto-assets will have on the financial market, and has been consistent in warning against the various risks involved in crypto-asset investments, such as virtual currencies, since 2017. Recently, this topic has only become more popular, and in December 2020 the KNF released a long-awaited standpoint on issuance and trade in crypto-assets. Only a month later, on 12 January 2021, the KNF also published a warning on the risks involved in acquiring and trading in crypto-assets such as virtual currencies and crypto-currencies. Until the issue is regulated at EU level, the KNF's initiatives will be one of the key sources for formulating the legal framework for crypto-asset activities in Poland.

Notably, work is also currently underway to amend the AML and terrorism financing act, to introduce a new regulated activity, namely virtual currency activities. Firms will be required to register before commencing such activity, while there will be no licensing obligation if the activities of those firms do not constitute a regulated activity of some other kind for which authorisation has to be obtained, such as payment services. Meanwhile, this legislation will not apply to every crypto-asset services provider. Only those conducting virtual currency activities in the meaning of the act will be covered by the rules.

Although the proposal for an EU regulation on markets in crypto-assets is only in the early stages of the EU legislative process, even now it is worth starting to observe how work on the legislation proceeds.

MORE ABOUT



INTELLECTUAL PROPERTY

POLAND TAKES A STEP TOWARDS DEVELOPING ARTIFICIAL INTELLIGENCE (AI)

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

On 12 January 2021, the Council of Ministers published the 'Policy for Artificial Intelligence Development in Poland from 2020', aimed at emphasizing the opportunities that AI offers with respect to economic development and essentially in every area of the economy. The policy also lays down the framework and basic principles for putting to use the potential of AI in Poland.

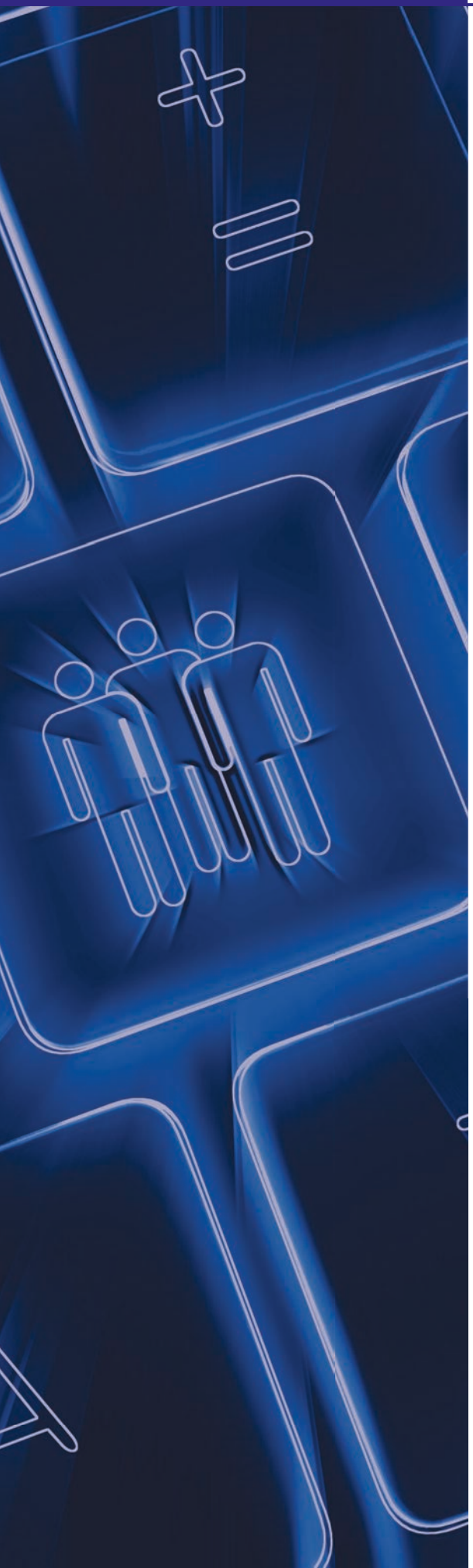
The document is a supplement to other papers such as the Responsible Development Strategy, the EC Coordinated Plan on Artificial Intelligence, and papers produced by international organizations such as the OECD, and specifies measures and objectives for Poland in the short term (up until 2023), medium term (up until 2027) and long term (2027 onwards).

The policy describes six strategic areas for development of AI in Poland:

1. **AI and society** – measures to make Poland one of the biggest beneficiaries of a data-based economy;
2. **AI and innovative firms** – providing support for Polish AI firms, for instance creating mechanisms to finance their development, and collaboration between start-ups and the government;
3. **AI and science** – providing support for the Polish scientific and research community in designing interdisciplinary AI challenges or solutions;
4. **AI and education** – measures ranging from primary education to higher education;
5. **AI and international cooperation** – measures to provide support for Polish business with respect to AI, and developing technology in the international arena;
6. **AI and the public sector** – providing support for the public sector in implementation of AI contracts, better coordination of measures, and continued development of programs such as GovTech Polska.

From the point of view of AI and intellectual property, the most important area among those listed above is AI and innovative firms, which is measures intended among other things to provide support for firms working on AI solutions. Measures will also be taken in this respect to facilitate investment in tech firms and eliminate the accompanying legal obstacles. As AI solutions become more popular on the market, uniform standpoints can expect to be formulated regarding the intellectual property concerns that this issue raises. Under the 'Policy for Artificial Intelligence Development in Poland', a government taskforce would be set up, attached to the Information Technology Minister, to monitor its implementation in Poland and coordinate the measures.

The document is available here in Polish:
https://monitorpolski.gov.pl/M2021000002301.pdf



CHANGES TO E-COMMERCE LAWS: CONSUMER RIGHTS FOR SOLE PROPRIETORSHIPS

Author: Arkadiusz Baran, Attorney-at-law

A law passed on 31 July 2019 to introduce amendments to ease certain e-commerce regulations took effect on 1 January 2021, affording special protection hitherto enjoyed solely by consumers to people running their own business as well.

The new legal regulation applies to some entrepreneurs - natural persons concluding a contract directly related to their business activity, when those contracts state that they are not of a “professional nature” with respect to those natural persons, resulting in particular from the subject of their business activity.

An agreement has no “professional nature” if it is not part of the daily activities involved in running a business according to the business classification categories that the individual registered for their firm in the Central Business Register (CEIDG), i.e. it does not fall within their professional area of expertise.

From 1 January 2021, persons fitting the description above will have, for instance, the following rights:

- rights under the statutory warranty for defects in an item in the same way as a consumer. In B2B relationships, including with people running businesses who enjoy consumer protection rights, it will still be possible to exclude or limit the statutory warranty for defective goods contractually;
- the right to withdraw from a distance or off-premises agreement for up to fourteen days for convenience and at no cost;
- they will not be bound by contractual clauses that are not agreed with them individually and provide for rights and obligations that are contrary to good custom and a gross breach of their interests (abusive clauses).

These changes mean that people running e-commerce businesses, for example online shopping sites, or platforms or websites, are also required to review and adapt their sales and complaint procedures and the relevant documentation (their templates, terms of service, disclaimers) accordingly. Above all, a person running a business that is a shopping website and who proposes an agreement to be signed will be required to ascertain whether the other party is a consumer, a business proprietor, or a business proprietor that has consumer rights. Undoubtedly, it will not be easy to determine whether a contract entered into by a sole proprietor has a " professional nature".

WHEN SOFTWARE IS A DUAL-USE ITEM

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

Even with no apparent military application, software can be a dual-use product. There are strict legal requirements for importing or exporting dual-use software.

Dual-use items are products that can have both a civil and military application, which makes them strategically important for state security. Foreign trade of such products is controlled and requires export permits, and import of dual use items has to be reported. It also involves other obligations, such as keeping internal records and annual reports. Specific obligations depend on the type of dual-use product and the country with which trade in the product takes place. Failure to observe these legal requirements may result in criminal liability.

Dual-use products are mainly armaments, including for example nuclear technologies, etc. Interestingly, however, software products can be also be dual-use items, despite having no apparent connection with defense or military technologies.

The key legal act applicable to dual-use products in the EU is Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. The comprehensive classification of dual-use items in this regulation, consistent with the American classification of these products, is the primary point of reference when assessing whether a given product is a dual-use item. There are also additional national Polish regulations in this regard.

The feature of a software product that may cause it to be classified as a dual-use product is a cryptographic function, i.e. encryption, even if it is not the main purpose or application of the software.

Producers of software that has encryption functions and that is exported from Poland or imported into Poland need to consider whether their product uses an encryption protocol with a symmetric key length exceeding 56 bits or equivalent (many commonly used protocols exceed this key length). If so, the software may constitute a dual-use product, unless it falls under the exclusions specified in Regulation 428/2009. Certain software products, sold universally and easy to use (typically COTS) may be excluded if they meet the following criteria: a wide range of buyers, universal availability in retail outlets, the possibility of self-installation, and a cryptographic function that cannot be modified.

THE POLISH PATENT OFFICE CHANGES ITS POLICY ON PATENTABILITY OF SOFTWARE, BIOTECH AND PHARMA

Author: Żaneta Zemła-Pacud

Despite the Polish Law on Industrial Property (LoIP) being almost fully harmonized with the European Patent Convention (EPC), until very recently the Polish Patent Office (PPO) has been reluctant to follow completely the EPO's policy on the patentability of the most controversial inventions: computer implemented inventions (CIIs), certain biotechnological inventions, and medicinal products' further medical uses. In 2020, however, the PPO substantially changed its policy on these issues.

According to the amendment of the LoIP of 16 October 2019, which has been in force since 27 February 2020, in order to meet the requirement of technical character it is no longer necessary for an invention to have a direct effect on the tangible world. Another amended rule reads that CIIs and other solutions that are not technical in nature are excluded from patentability only if claimed "as such".

Based on these changes, on 19 October 2020 the President of the PPO issued "General Guidelines on Inventions and Utility Models", a document binding for all of the PPO's examiners. According to these Guidelines, software inventions are patentable if they feature a further technical effect. The Guidelines do not specify what this effect might be, and only provide a broad range of examples, following the EPO's interpretation of the term. Most importantly, as a rule, software inventions are now explicitly named as a kind of patentable solution – a clear change in the PPO's approach.

As regards pharmaceutical inventions, the catalogue of therapeutical indications that may be protected by second medical use patents has been broadened. From now on this will also include new modes of administration and new dosage regimes/schemes – features that have not been deemed patentable in the past. Moreover, the Guidelines contain precise explanations concerning patentability of medical methods, biomarkers, transplants, implants, and tissues.

Where there was no official interpretation of several statutory notions in the past, this not only rendered the granting procedure more complicated, it also created the potential for inconsistency between judgments given by courts handling infringement cases. As regards the aforementioned types of inventions, the General Guidelines, issued for the first time under the LoIP, will help to increase legal certainty. Being more responsive to the developments of new technologies and life sciences, the Guidelines will also support both domestic and foreign businesses.

THE POLISH BAN ON ADVERTISING PHARMACIES IN LIGHT OF THE SUPREME ADMINISTRATIVE COURT (NSA) JUDGMENT IN CASE II GSK 3613/17. TRULY A MAJOR STEP FORWARD?

Author: Joanna Adamczyk, Attorney-at-law

In the judgment delivered in the case, the NSA addressed the issue of information about a pharmacy's opening times and location, and ruled that it did not fall under the national ban on advertising of pharmacies. It further stated in the judgment that regardless of the form and the intention behind providing that information, this did not constitute unlawful advertising of a pharmacy. The industry considers the NSA judgment a major step forward, as it means that the NSA takes a critical view of the distorted manner in which the advertising ban is interpreted by pharmaceutical authorities that impose fines for distributing information consisting exclusively of opening times and location details. The judgment is perhaps not a major turning point, but it will certainly play an important role in interpretation and application of the pharmacy advertising ban, and thus will have important implications for pharmacies' business practice, especially for newly opened pharmacies.

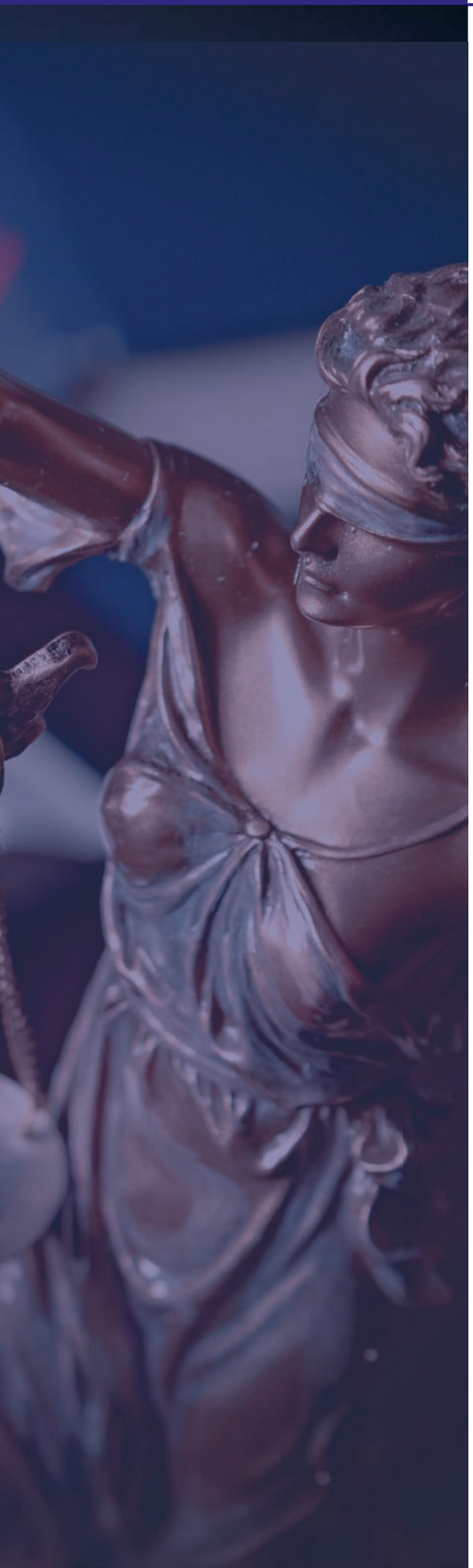
For members of the industry, the NSA judgment is a major breakthrough from the point of view of interpretation of the Polish ban on advertising pharmacies. This view of the judgment demonstrates expectations towards the highest judicial instance regarding the pharmacy advertising ban with respect to the rationale for the broad interpretation adopted by pharmaceutical inspectorates and administrative courts as to the meaning and scope of the pharmacy advertising ban. The NSA judgment is an interpretation of the ban on advertising of pharmacies, pharmaceutical outlets, and their activities that has been in effect in Poland since 1 January 2012 under art. 94a of the Pharmaceutical Law (PL). Under art. 94a(1) of the PL, it is prohibited to advertise pharmacies, pharmaceutical outlets, and their activities, while under the second sentence in that section, details as to opening times and location of a pharmacy or pharmaceutical outlet do not constitute advertising. Serious questions have been raised about EU law compliance of the ban and also whether it is constitutional, due to it being total and general.

In its analysis of the case, the NSA found that Polish lawmakers had not specified the permitted form, and the time and place in which the information can be distributed, and moreover they had not stated that providing information alone about a pharmacy's opening hours or its location could be prohibited advertising, due to the intentions behind it. Legislative wording of this kind therefore means that making public (as in the case at hand) information about the name, location, and opening hours of a pharmacy cannot be considered prohibited advertising of a pharmacy despite the purpose being to increase sales of medicinal products and medical devices on offer at a pharmacy.

The NSA considered that information about the name, location, and opening hours of a pharmacy, especially if newly opened, could evoke a wish to purchase a pharmacy's goods and services. The NSA therefore found this information to be pharmacy advertising, but stated that under the second sentence of article 94a(1) it is not covered by the ban on advertising.

The view taken in the industry is that according to the NSA judgment, regardless of the form in which it is conveyed, information about business hours and location of a pharmacy is not advertising prohibited under the PL, regardless of the intention behind it. Firms that have pharmacy chains describe the NSA judgment as a turning point due to the NSA's critical view of the distorted interpretation of the ban on advertising on the part of pharmaceutical inspectorates that impose fines for posting information being solely the hours of business and location of a pharmacy, for instance on notice boards, posters, and leaflets. The industry considered the judgment to be confirmation that actions of this kind by inspectorates are unlawful, and that it is clearly permitted to provide information about the business hours and location of a pharmacy regardless of form and the intentions behind it.

Meanwhile, we do not consider the NSA judgment to be a major development, contrary to the hopes of members of the industry, as it is not a turning point in interpretation of the ban on pharmacy advertising that limits the current broad interpretation of this provision. The judgment is important however because it confirms that if information is provided that is limited to the content specified in the second sentence of art. 94a(1) of the PL, distributing that information cannot be considered to be prohibited advertising of pharmacies, regardless of the form of that information, the time and place in which it is distributed, and the intentions behind it. The judgment is therefore important due to confirming explicitly that information that is limited to the location or business hours of a pharmacy is not prohibited activity under any circumstances under art. 94a(1) of the PL. Activity of this kind cannot be grounds for proceedings concerning prohibited advertising and fines for violating this rule. Thus while the judgment is not a major step forward because it confirms something that is evident under the law, it is a step in the right direction, should have a major impact on adjudicating practice of pharmaceutical inspectorates, and will check the current practice of broad interpretation of the ban on pharmacy advertising at least with regard to this specific issue.



QUESTIONS OF JURISDICTION IN CIVIL AND COMMERCIAL DISPUTES FOLLOWING BREXIT - BRUSSELS I BIS HAS CEASED TO APPLY TO THE UK

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

One area in which the effects of Brexit will be clearly visible is judicial jurisdiction. This is an issue that could be especially important with respect to resolution of disputes between UK firms and their customers in Poland.

The end of the Brexit transition period on 1 January 2021 means major changes in the law, affecting cross-border litigation cases pursued by firms operating in the UK, and thus this includes disputes between Polish and UK firms as well.

Up until the end of December 2020, jurisdiction, recognition, and enforcement of judgments in cross-border civil and commercial disputes was subject, including in the UK, to Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters (Brussels I-bis). This regulation lays down common rules on jurisdiction in civil and commercial matters, at the same time allowing judicial rulings to be recognized and enforced across various EU states.

The Brexit withdrawal agreement only provides that Brussels I bis will apply to court cases initiated before the transition period came to an end on 31 December 2020, and proceedings or matters relating to such cases. To date, however, the rules applicable to cross-border litigation cases subsequent to the transition period have not been established.

Jurisdiction post Brexit

Presently, the rules on jurisdiction in Poland-UK relations and enforceability of judicial judgments are governed by the respective legal systems. This could raise conflict of laws issues and lead to uncertainty, not least regarding enforcement and recognition of judicial judgments. In the Polish legal system, enforceability of judgments given by foreign courts, which a UK court would now be considered to be, is regulated under art. 1150 – 1152 of the Civil Procedure Code. Under art. 1150 of the Code, judgments given by foreign courts in civil cases which are suitable for realisation through enforcement become enforcement title once a Polish court has confirmed that they can be effected. Enforceability is confirmed upon the motion of the creditor, by issuing an enforcement notice for the judgment issued by the foreign court. The enforcement notice is issued by the regional court proper for the place of residence or registered seat of the debtor, and if there is no such court – the regional court in whose jurisdiction the enforcement proceedings are to be conducted. Enforcement on the basis of a judgment of this kind issued by a UK court can begin once the ruling issuing the enforcement notice becomes legally binding and final. Therefore, the procedure to implement a UK court judgment in Poland will now be longer and more complicated.

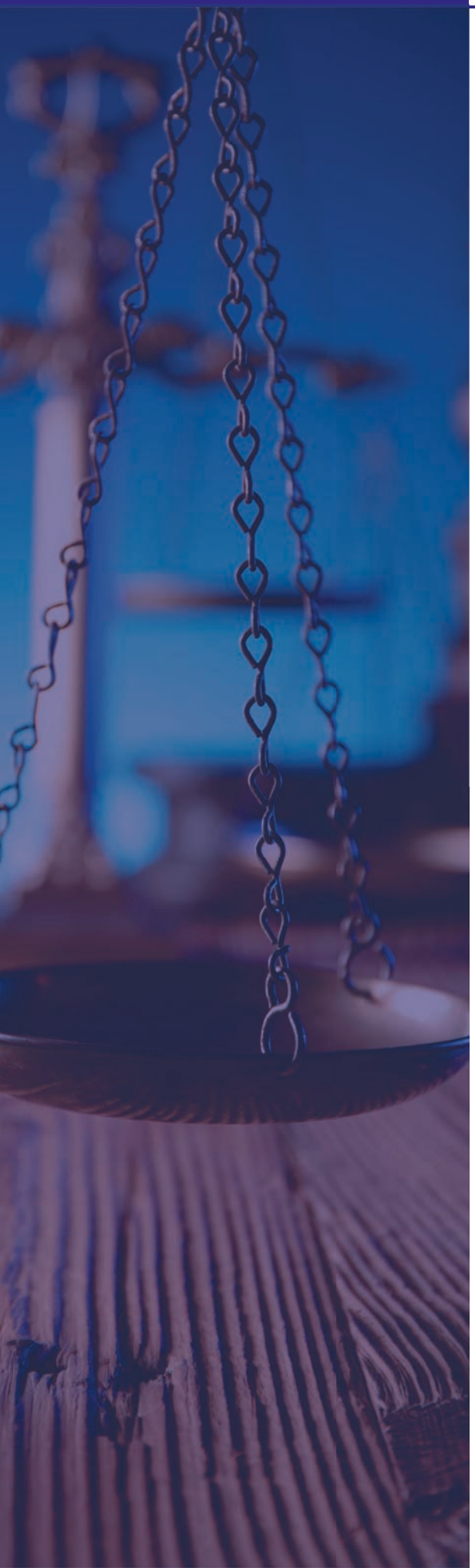
This situation could be resolved if the UK ratified the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on 30 October 2007 (Lugano Convention). Currently, despite having applied to accede to the convention as an independent party, the UK has not been admitted. Certainly, if the UK acceded to the Lugano Convention, this would be the best solution to the current problem, taking into account the rules provided for in the convention for determining jurisdiction and preventing the same cases being conducted in different countries, and the rules on enforceability of foreign court judgments in the signatory countries. Importantly, the Lugano Convention also covers for instance agreements on non-exclusive jurisdiction, disputes arising in contractual relationships where no agreement conferring jurisdiction has been concluded, disputes arising due to commission of an offence, and child maintenance matters.

What are the current options to facilitate pursuit of court disputes in which one of the parties is a UK firm?

The first option to be considered is use in UK-Polish relations of contractual exclusive jurisdiction clauses regulated under the Hague Convention of 30 June 2005 on Choice of Court Agreements. The UK ratified that convention on 1 October 2015 as a member of the EU, and currently it is a party to that convention as an independent country. It needs to be borne in mind that the Hague Convention only applies to agreements that provide for exclusive jurisdiction of courts in the other signatory states. It needs to be considered, therefore, whether agreements contain clauses of that kind, and, where necessary, non-exclusive jurisdiction clauses or clauses that are asymmetric need to be amended to make them exclusive jurisdiction clauses. This would mean that the Hague Convention was applicable. Also, the EU and UK take different views on applicability of the Hague Convention to agreements concluded after 1 October 2015 but before 1 January 2021. Without going into specifics regarding those differences, they could result in UK and EU courts taking different approaches to adjudication. In view of this, the best solution would be a review of such clauses, from 1 January 2021, in Polish-UK agreements concluded in the past.

Secondly, there is also the option of arbitration in disputes in Polish-UK contractual relations. The UK continues to be a party to the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards, which provides for an effective and simple procedure for recognition and enforcement of arbitration awards.

In conclusion, in the current situation, there is no clear solution for all of the conflict of law issues arising following Brexit. The fact that Brussels I bis will not be applicable to the UK will cause a range of problems, at least until the UK is accepted as a party to the Lugano Convention. Until then, it is advisable to insert into agreements with parties in the UK exclusive jurisdiction clauses subject to the Hague Convention, by which the UK is bound. There is also the option of signing an arbitration agreement, under which awards are recognised and enforced under the New York Convention, to which the UK remains a party.



PUBLIC PROCUREMENT PROCEDURES TO BE FULLY ELECTRONIC IN POLAND FROM THE BEGINNING OF 2021

Author: Tomasz Krzyżanowski, Attorney-at-law

As of 1 January 2021, a new version of the Public Procurement Law (PPL), passed on 11 September 2019, came into effect. The new PPL is a major overhaul of the previous legislation, and one of the most important changes is that tender proceedings will now be fully electronic. All procedures will be conducted electronically, and it will only be possible to bid electronically. Paper bids will essentially only be allowed in special cases.

Under the new PPL, all communication between contractors and contracting authorities will be conducted electronically, and this applies not only to bids, but also other submissions, documents, notices, powers of attorney, bid bonds, and so on. Electronically conducted proceedings are considerably more convenient for a foreign contractor, as they are no longer required to submit bids on paper at the seat of the contracting authority in Poland. On the other hand, this entails significant responsibility, because electronic communication involves a range of requirements, such as use of an electronic signature. Any contractor considering entering a tender governed by the new PPL (worth PLN 130 000 or more) is required to have an electronic signature. For tenders of a value below the EU thresholds, Polish legislators also provided for the option of using a 'trusted signature' and 'personal signature', which are effective only in Poland and are definitely less secure than the qualified electronic signature. We recommend only using the qualified electronic signature in the meaning of Regulation (EU) no 910/2014 of the European Parliament and of the Council of 23 July 2014 (eIDAS), as it will be recognized regardless of the procedure followed.

Bids must be submitted using a procurement platform, and may not be submitted by e-mail. Only the subsequent correspondence and exchange of documents may be conducted using e-mail, provided that the contracting authority has given consent in the tender documentation. There are state platforms (e-Zamówienia and miniPortal) and private platforms (such as MarketPlanet). It is up to contracting authorities to decide which platform they use, but these platforms differ, and therefore it is advisable for contractors to find out in advance what the precise bidding procedure is in the tender in question. The contracting authority has a duty to disclose this in the tender documentation. If an error is made when submitting the bid, the bid will be rejected.

RESTRICTION OF THE RIGHT TO ASSESS INCOME DURING RESTRUCTURING – CLOSING THE LOOPHOLES IN THE SYSTEM OR FURTHER HINDRANCE OF ACTIONS THAT ARE NOT AIMED AT TAX AVOIDANCE?

Author: Bartłomiej Pyka, Tax advisor

With effect from the 1st of January 2021 the Polish legislator has limited the possibility to reduce the subject of the taxation for the taxpayers of corporate income tax, who have made certain restructuring activities. As of the above-mentioned date it will be not possible to determine the income, constituting the tax base, taking into account the losses of the taxpayer if such taxpayer has acquired another company as a result of the acquisition or by purchasing it, if at least one condition specified in Article 7 paragraph 3 point 7 of the Corporate Income Tax Act of the 15th of February 1997 (hereinafter referred to as the "CIT Act") will be fulfilled.

First of all, the inability to take into account losses will occur if the subject of the actually conducted basic business activity by the taxpayer after such takeover or acquisition, in whole or in part, is different from the subject of the actually conducted basic activity by the taxpayer prior to such takeover or acquisition. Attention should be paid to the vagueness of the above premise, which may result in arbitrary interpretation of the provision by the tax authorities. It has to be stated that there is no statutory definition of "*basic business activity*", both in the CIT Act and in other legal acts, and the auxiliary use of the subject of the predominant activity disclosed in the National Court Register appears to be inappropriate, as not in every case the activity disclosed as predominant is the same with the actually performed basic activity of the taxpayer. Moreover, the justification of the amendment to the CIT Act does not answer the question as to the right interpretation of the concept of "*basic business activity*".

The second premise specified in the CIT Act is associated with the shareholding structure of the taxpayer. According to the above-mentioned provision, the loss of the right to take into account losses of the taxpayer in order to determine the income, will also occur if, as a result of restructuring activities, at least 25% of the taxpayer's shares will be owned by an entity that did not have such rights at the end of the tax year in which the taxpayer suffered such a loss.

The aim of the amendment to the CIT Act was to curtail economically unjustified activities aimed at merging or acquiring the entities which have been generating losses in the past, for the purpose of obtaining a tax benefit. However, as it was rightly postulated at the initial stage of legislative procedure, a more appropriate solution would be to link the right to lose the possibility of taking into account the losses of the taxpayer when determining the income with the premise concerning the lack of economic justification for a specific restructuring activity. It is also worth emphasizing that before the implementation of the analyzed provision, the activities indicated above could be questioned in the form of the tax avoidance clause referred to in the Tax Ordinance. In my opinion, the above-mentioned amendment should be assessed negatively as a further restriction of the taxpayer's rights, which is intended to meet legitimate objectives, although it poses a significant risk of exerting a negative impact on the rights of entities not seeking to avoid taxation.

NEW AMENDMENT TO THE POLISH TELECOMMUNICATIONS LAW

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

On December 21, 2020, a significant amendment to the Telecommunications Law (TL) entered into force in Poland, in partial 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).

All but one of the changes introduced apply to both consumers and non-consumer subscribers. None of the new regulations impose new obligations on subscribers, but they extend the scope of rights to include customers, and at the same time place new obligations on telecommunications undertakings. Telecommunications service providers are required to inform their subscribers about changes to the law, including the resulting obligations to modify contracts.

Number portability after termination of the contract

Currently, a subscriber's rights include the right to terminate the contract and transfer their phone number to the existing network of another operator. The amendment to the TL means that a request for number portability may also be submitted by the subscriber after the termination of the contract.

The right to continuity of Internet access

In the event of a change of Internet access service provider, the subscriber will have the right to service continuity. This is so that the existing provider of the Internet access service is required to provide the service to a given subscriber until the new provider starts to provide it, and so that the existing contract is not terminated if the new provider does not launch the new service within 30 days from the date on which that provider undertakes to do so.

Shorter notice period

If the concluded contract is automatically extended for a specified period following the expiry date, the subscriber will have the right to terminate it at any time with one month's notice.

Obligations before a contract is automatically extended. There are additional obligations imposed on service providers before a contract renews automatically. In particular, they are required to inform the subscriber:
a) that the contract will be extended,
b) how to terminate it,
c) about the most advantageous tariff packages they offer.

Termination and withdrawal from the contract in electronic form

If the service provider allows conclusion of the contract in electronic form, it is required to give subscribers the option of terminating it by electronic means as well. In practice, this means that if a given operator enables contracts for the provision of telecommunications services to be concluded by telephone or by exchanging e-mail / SMS / MMS messages, or via an online customer service portal, it is required to enable the subscriber to terminate the contract in this way as well.

The above-described provisions are to apply until the adoption of the Electronic Communication Law, which is to implement the EECC in full.

KEY CONTACTS

International Committee

If you have any questions, please do not hesitate to contact us by e-mail at: **international@traple.pl**

Xawery Konarski
Attorney-at-law, Senior Partner

Anna Sokołowska-Ławniczak, PhD
Patent and trademark attorney, Partner

Competition & Antitrust

Paweł Podrecki, Habil.
Attorney-at-law, Senior Partner
pawel.podrecki@traple.pl

Tomasz Targosz, PhD
Attorney-at-law, Partner
tomasz.targosz@traple.pl

Corporate

Wojciech Kulis
Attorney-at-law, Partner
wojciech.kulis@traple.pl

Covid-19

Wojciech Kulis
Attorney-at-law, Partner
wojciech.kulis@traple.pl

Cybersecurity

Agnieszka Wachowska
Attorney-at-law, Partner
agnieszka.wachowska@traple.pl

Data protection

Xawery Konarski
Attorney-at-law, Senior Partner
xawery.konarski@traple.pl

Gzegorz Sibiga, PhD, Habil
Attorney-at-law, Partner
grzegorz.sibiga@traple.pl

KEY CONTACTS

Employment

Paweł Krzykowski
Attorney-at-law, Partner BKB
pawel.krzykowski@ksiazeklegal.pl

Daniel Książek, PhD
Attorney-at-law, Partner BKB
daniel.ksiazek@ksiazeklegal.pl

FinTech

Jan Byrski, PhD, Habil.
Attorney-at-law, Partner
jan.byrski@traple.pl

Internet & Media

Xawery Konarski
Attorney-at-law, Senior Partner
xawery.konarski@traple.pl

Piotr Wasilewski, PhD
Attorney-at-law, Partner
piotr.wasilewski@traple.pl

Intellectual Property

Prof. Elżbieta Traple, PhD, Habil.
Attorney-at-law, Senior Partner
elżbieta.traple@traple.pl

Paweł Podrecki, PhD, Habil.
Attorney-at-law, Senior Partner
pawel.podrecki@traple.pl

Beata Matusiewicz-Kulig
Attorney-at-law, Partner
beata.matusiewicz@traple.pl

Tomasz Targosz, PhD
Attorney-at-law, Partner
tomasz.targosz@traple.pl

Anna Sokołowska-Ławniczak, PhD
Patent and trademark attorney, Partner
anna.sokolowska@traple.pl

Agnieszka Schoen
Attorney-at-law, Partner
agnieszka.schoen@traple.pl

KEY CONTACTS

InfoTechnology

Xawery Konarski
Attorney-at-law, Senior Partner
xawery.konarski@traple.pl

Agnieszka Wachowska
Attorney-at-law, Partner
agnieszka.wachowska@traple.pl

Life Science

Prof. Elżbieta Traple, PhD, Habil.
Attorney-at-law, Senior Partner
elżbieta.traple@traple.pl

Paweł Podrecki, PhD, Habil.
Attorney-at-law, Senior Partner
pawel.podrecki@traple.pl

Tomasz Targosz, PhD
Attorney-at-law, Partner
tomasz.targosz@traple.pl

Litigation

Paweł Podrecki, PhD, Habil.
Attorney-at-law, Senior Partner
pawel.podrecki@traple.pl

Beata Matusiewicz-Kulig
Attorney-at-law, Partner
beata.matusiewicz@traple.pl

Public Procurement

Agnieszka Wachowska
Attorney-at-law, Partner
agnieszka.wachowska@traple.pl

Telecommunication

Xawery Konarski
Attorney-at-law, Senior Partner
xawery.konarski@traple.pl

Agnieszka Wachowska
Attorney-at-law, Partner
agnieszka.wachowska@traple.pl

TAX

Wojciech Kulis
Attorney-at-law, Partner
wojciech.kulis@traple.pl

Traple Konarski Podrecki i Wspólnicy Sp.j.

Biuro w Krakowie:
ul. Królowej Jadwigi 170
30-212 Kraków
tel.: +48 12 426 05 30

e-mail: office@traple.pl
www.traple.pl

Biuro w Warszawie:
ul. Twarda 4
00-105 Warszawa
tel.: +48 22 850 10 10

Traple Konarski Podrecki & Partners