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LEGAL NEWS FROM POLAND

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POLAND IS CONSIDERING EXPANDING THE DEPOSIT-REFUND SCHEME TO INCLUDE SINGLE-USE GLASS PACKAGING

Author: Michał Sobolewski, Attorney-at-law

At a press conference held on 2 June, the Ministry of Climate and Environment announced the current concept for transposing the SUP Directive into Polish law, including introducing a deposit scheme for product packaging in Poland. Meanwhile, the Ministry's idea goes beyond the guidelines in the Directive, by proposing expansion of the deposit-refund scheme to include single-use glass packaging, and some objections have been raised to this plan.

Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (SUP Directive) explicitly states that single-use glass packaging is excluded entirely from the scope covered by the Directive. The Directive stresses clearly the need to focus member state actions on the areas in which real reaction is most needed to produce an effective improvement in environmental protection. For that reason, point seven of the recitals states specifically that this *Directive should cover only those single-use plastic products that are found the most on beaches in the Union (...) Glass and metal beverage containers should not be covered by this Directive as they are not among the single-use plastic products that are found the most on beaches in the Union*.

In this context, the Directive makes several references to the principle of proportionality described in article 5(4) of the Treaty on European Union. According to this principle, the scope and form of the EU's actions do not exceed that necessary to achieve treaty goals. Organizations that operate within the legal system are informed well in advance of the deadline for transposition, and before legislative work commences at national level, of the content and resultant obligations of the Directive. This enables them to prepare for the new legal system in advance, before transposition (see J. Maśnicki, Metody transpozycji dyrektyw, EPS 2017, no. 8, pp. 4-13).

In this context, the proposal made by the Ministry of Climate and Environment to include single-use glass bottles of up to 1.5 L in the deposit scheme goes beyond the Directive. This proposed obligation could be considered an indication of excessive interference by a member state in a national legal system under the pretext of transposing EU law. Cases of this kind are known as *gold-plating* in European law, where a member state goes beyond the directive framework by introducing additional provisions or more stringent regulation than required by the law being transposed.

DOMINANT OR NOT, YOU NEED TO BE SUPER-CAUTIOUS IN THE FOOD SUPPLY CHAIN!

Author: Katarzyna Menszig-Wiese, PhD, Attorney-at-law

The use of unfair trade practices in the food supply chain is banned throughout Europe. Meanwhile, Poland was at the forefront of enforcement even before directive (EU) 2019/633[1] was passed by the European legislator. Thus it comes as little surprise that the Polish competition authority (UOKiK), which is the competent authority for monitoring compliance with these rules, takes an exceptionally stringent approach.

Strict rules restricting contractual freedom in this business area apply when there is a significant disproportion between the economic potential of the buyer and the supplier. Contractual advantage can be determined based on comparison of the turnover generated by the parties. Importantly, an undertaking does not need to be dominant or even hold a significant market share to be seen as having a contractual advantage, and thus special caution is needed when drafting and negotiating contracts.

Recently, UOKiK launched a number of investigations into alleged misconduct by food store chains in their relationships with suppliers. One area of concern is the relationship between the parties with respect to marketing. UOKiK has said that the scope of marketing activities is too vague for suppliers to identify what they are paying for. Moreover, UOKiK stated in an official press release that it sees charging suppliers fees for taking advantage of central warehousing as a potential infringement, saying that chains should not charge suppliers for transport of their commodity to individual stores, despite the obvious fact that suppliers save money by delivering the goods to a central warehouse instead of to multiple locations.

Any undertaking active in the food supply chain that wants to enter the Polish market should pay special attention to provisions on contractual advantage and UOKiK's recent enforcement practice.

[1] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

THE BUSINESS JUDGEMENT RULE IN AN AMENDMENT TO THE COMMERCIAL COMPANIES CODE

Author: Karolina Alicja Potrawka, Attorney-at-law

One of the most extensive amendments to the Commercial Companies Code will be in effect by October. One forthcoming amendment causing much concern is a change to article 293 which introduces the statutory notion of the business judgement rule.

This institution employed by lawmakers derives from the Anglo-Saxon system and is based on the assumption that any business decision can prove to be wrong even if a situation has been analyzed properly. In such a case, it has been proposed that liability of members of managing bodies making decisions concerning a company's operations be limited. This solution is a move towards a uniform liability model in individual capital companies. The change provides statutory recognition that risk is an inherent element of business operations. Assuming reasonable risk enables companies to generate profit, by introducing innovation or commencing activity in new areas.

Under the amendment, managing body members do not breach their duty of due diligence, if they act *in a loyal manner towards the company within the limits of reasonable commercial risk*, including on the basis of information, analyses, and opinions that should be considered when making a careful judgement in particular circumstances.

The proposed prerequisites are termed in a vague manner, and this causes numerous problems with interpretation in practice - assessing whether decisions made fall within the boundaries of acceptable commercial risk will be especially problematic. The rules being introduced are based on the precept that actions of managing body members can be assessed not only from the perspective of achieved results, but also of correct conduct of the decision-making procedure, and that risk is acknowledged to be an inherent element of commercial activity. The statement of reasons for the legislative proposal states that due to the rules being proposed managing body members *are given protection if it transpires that a decision was wrong and thus caused damage to a company*. On the other hand, this will be difficult to achieve due to particular prerequisites involving an element of judgement.

ENVISAGED NEW RULES ON CYBERSECURITY – LEGISLATIVE PROPOSAL FOR COMBATING ABUSES IN ELECTRONIC COMMUNICATION

Author: Agnieszka Wachowska, Attorney-at-law, Partner

On 15 June 2022, a proposal for a bill on combating abuses in electronic communication was published on the Government Legislation Centre website. The proposal is intended mainly to combat and counteract cyberthreats such as generation of artificial traffic, smishing, and CLI spoofing. To this end, specific obligations are envisaged under the legislation for telecommunications operators and e-mail providers. Public consultations have been completed and the document is currently undergoing an interdepartmental consultation process.

Aim and main points of the proposal

The aim of the bill on combating abuses in electronic communication is to protect individuals against the increasing number of attacks made using telecommunications services. The Regulatory Impact Assessment states that preventative measures for cases similar to those being addressed in the envisaged legislation have been introduced in the United Kingdom (maintaining a list of numbers from which connections are not initiated) and the United States (tools enabling authentication of connection address details).

Under article 15 of the bill on combating abuses in electronic communication, *abuse in electronic communication* is provision of a telecommunications service or use of a telecommunications device in a manner for which they are not intended or in an unlawful manner, with the aim of causing or resulting in damage to the telecommunications operator or end user, or gaining an undue benefit. This scope has been partly clarified in article 3, containing an open-ended list of types of breach considered to be abuses described above (generation of artificial traffic, smishing, and CLI spoofing).

To achieve the envisaged goal, lawmakers envisage placing new obligations on certain organizations.

Obligations and the role of CSIRT NASK

CSIRT NASK:

- will be required to monitor abuses in electronic communication,
- is to draw up a sample smishing message,
- is to launch, within three months of the bill being enacted, an IT system that provides samples of those messages, to which the National Police Headquarters, President of the Office of Electronic Communications, and telecommunications operators are connected.
- is to notify persons using the system that a particular sample has been unblocked once the need to block it ceases to exist,
- is to draw up, operate and maintain a publicly accessible list of warnings concerning internet domains used to fraudulently obtain data and funds of internet users.
- Under the bill, objections to a message being considered an abuse and placed on the list operated by CSIRT NASK will be reviewed by the President of the Office of Electronic Communications.

MORE ABOUT

Other obligations of e-mail providers

Some e-mail providers (with 500 000 or more users, for state entities or entities that operate 500 000 or more active accounts) will have an obligation to provide special e-mail authentication mechanisms. State entities will also only be allowed to use e-mail provided by an entity that fulfils the requirement described above. Compliance with these obligations can be monitored by the President of the Office of Electronic Communications.

Other obligations of telecommunications operators

Telecommunications operators will be required to:

- take proportionate technical and organizational measures to combat abuses in electronic communication; these can be provided for in an agreement between the President of the Office of Electronic Communications and operators,
- promptly block smishing, based on the sample provided by CSIRT NASK,
- block CLI spoofing connections or where an identification number is concealed from the end user (based on data on the list of numbers maintained by the President of the Office of Electronic Communications).

Penalties

The bill allows the President of the Office of Electronic Communications to fine telecommunications operators and e-mail providers that are in breach of their obligations.

Further proceedings

The bill is now in the opinion phase, while it is clear that many comments were submitted during the public consultations and await review, and thus the future of the legislation is not clear

POLISH DPA FINE FOR AUDIO SURVEILLANCE

Authors: Katarzyna Syska, Attorney-at-law and Dominika Nowak, Attorney-at-law

In May 2022, the Polish DPA issued a decision in which it imposed an administrative fine for recording audio together with video within a CCTV surveillance system. The fine was imposed on a sobering center. The CCTV system was used to monitor persons brought in to sober up.

The controller claimed that one of the purposes of the processing was to exercise continuous surveillance of persons brought in to sober up in order to ensure their safety. The controller stated that the legal basis for such a processing operation was the necessity to fulfill a legal obligation incumbent on the controller.

The DPA concluded that the data processing at issue – audio recording of intoxicated persons, together with video surveillance – had no legal basis. In the opinion of the DPA, the laws cited by the institution did not authorize it to process data in such audio recordings. The DPA also stated that recording the voices of intoxicated people who often cannot consciously formulate their statements or control the sounds they make was excessive and not justified.

The DPA added that audio recording is a competence that is primarily reserved for law enforcement, and only in specific situations.

In its decision, the DPA referred to the European Data Protection Board's Guidelines 3/2019 on processing of personal data through video devices. The EDPB stated that audiovisual recording undoubtedly constitutes a greater form of interference with the right to privacy than recording the image itself.

The fine was PLN 10,000 (around EUR 2,100). As the entity fined is a public institution, the amount of the fine is limited to PLN 100,000 (around EUR 21,000). In this case, the DPA imposed a lower fine citing as mitigating circumstances the degree of cooperation with the DPA and the fact that the institution ceased the processing of data at the start of the DPA's investigation (preventatively - until the decision was to be issued) and erased all registered data, which demonstrated consideration for the data subjects' rights.

Our comment:
This decision is very important as it shows the Polish DPA's approach towards audio recording. Controllers that use CCTV monitoring should take care not to record audio. Other instances of voice recording (e.g. on a customer hotline) should also be carefully analyzed as to the necessity of such a measure.

ANOTHER IN A SERIES OF PROPOSALS FOR THE WHISTLEBLOWER LAW HAS BEEN PUBLISHED ON THE WEBSITE OF THE GOVERNMENT LEGISLATION CENTRE

Author: Beata Baran, PhD, Habil. Attorney-at-law, Partner BKB and Łukasz Łaguna, Junior Associate - Managing Partner's Assistant BKB

The latest proposal does not entail major changes to the bill dated April 6, 2022, but the most important modifications include:

- clarification that a person who suffers harm due to a whistleblower's knowingly reporting or publicly disclosing false information is entitled to compensation from the whistleblower responsible,
- introduction of a standard whereby obtaining information that is reported or made public, or gaining access to that information, cannot be grounds for liability, except where obtaining or accessing that information is a criminal act,
- the obligation to establish channels in the internal whistleblowing procedure whereby a whistleblower can submit information, together with their postal address or e-mail address,
- the obligation to establish a system of incentives in the internal whistleblowing procedure when unlawful actions can be effectively remedied within the employer's organizational structure and the whistleblower believes that there is no risk of retaliation,
- the possibility of providing intelligible information within the internal whistleblowing procedures about the rules for safe and untraceable submission of information in an IT system, ensuring the privacy of the whistleblower,
- the rule that personal data and other information in the information submission records are retained for fifteen months after the end of the calendar year in which follow-up actions were completed or after an investigation prompted by these actions is completed,
- a requirement that in general an internal whistleblowing procedure must be established within two months from the date of entry into force of the bill,
- the bill enters into force two months after the date of promulgation.

The changes relative to previous versions of the draft are mostly editorial, which may suggest that the final form of the law may look very similar.

MORE ABOUT IT

A LEGISLATIVE PROPOSAL TO AMEND THE COPYRIGHT LAW AND POSSIBLE CHANGE IN COMPUTER PROGRAM LICENSING RULES IN THE POLISH IT SECTOR

Author: Agnieszka Wachowska, Attorney-at-law, Partner and Marcin Ręgorowicz, Attorney-at-law

On 20 June 2022, the Polish Ministry of Culture and National Heritage commenced public consultations on a proposal to amend the Copyright Law of 4 February 1994. The provisions being discussed are intended primarily to transpose Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Meanwhile, the proposed amendment also includes provisions that may change computer program licensing terms, and this could have significant implications for the Polish IT sector.

The amendment primarily concerns transposition of the above-described Copyright Directive. It requires major changes to Polish law with respect to use of works in the Digital Single Market. The key changes include for instance classification of online content-sharing service providers as entities that use content (including works) posted by their users, thus requiring them to obtain the relevant license. The resulting obligation for providers to monitor actively the content posted by users for potential copyright infringement is highly controversial.
The amendment introduces a range of major changes concerning permissible use, and in particular broadens the scope within which academic or cultural institutions can make lawful use of copyright, for instance giving them the right to reproduce works for the purpose of automated data analysis, or for educational activity purposes.

At the same time, the proposal includes changes to special rules on computer programs. The proposal with the greatest implications is exclusion of applicability of article 68 of the Copyright Law to computer programs. Section 1 of this article provides for a presumption that a license is indefinite and a statutory notice period for canceling the license (one year effective at the end of the calendar year). Meanwhile, in section 2, it states that a license granted for more than five years is considered an indefinite license after that period.

The provision described above, in particular section 2, is highly controversial in Polish practice, primarily as it is grounds for the view that a license for a particular work, including a computer program, may only be granted long-term for five years. Once that period ends, the licensor can cancel the license. This rule considerably hinders license holders, as it poses a major risk for highly frequent granting of licenses for longer periods or even granting of perpetual licenses. This is because it is common for parties to wish for a concluded license agreement to resemble a single transaction in which the buyer acquires an indefinitely established right to use a particular computer program for a single fee to the extent agreed upon – this also directly affects the business terms of the agreement (for example establishing the value of a specific license). Currently, article 68 (2) of the Copyright Law presents a substantial risk for the buyer, which is that after the five-year period the licensor will be entitled to terminate the license agreement. Of course, in trading practice, a number of solutions have been devised to mitigate that risk, but this provision continues to pose a significant risk to licensees.

The provision in question, in the amendment to the Copyright Law, which states that the provision described above does not apply to computer programs, could change the circumstances of trading practice in the Polish IT sector. Importantly, it is difficult to assess definitively what effect the legislation in question will have, as it could cause further doubts as to the period for which a license can be granted, especially as exclusion of applicability also includes section 1 of that provision. At the same time, it is not definite that this change will be included in the final proposal for the amendment.

Many comments can still be expected during the legislative works, especially as exclusion of applicability of article 68 of the Copyright Law to computer programs could have far-reaching implications for parties trading in computer programs on the Polish market.

MORE ABOUT Intellectual Property

IS POLISH INDUSTRIAL PROPERTY LAW ABOUT TO BE REVOLUTIONIZED?

Author: Anna Sokołowska-Ławniczak, PhD, Patent attorney, Partner

A proposal for a new industrial property law is now ready and has been published. The document is now undergoing public consultations, and has drawn a large number of comments from the professional intellectual property community. When the new law will take effect is not known, but the amendments will be extensive.

What is behind the envisaged amendments

Two **patent-related** issues are particularly noteworthy:

- The time limit for the Polish Patent Office to produce the compulsory report on the state of the art is to be reduced from nine to six months. In practice, this report provides the first indication of the likelihood that a patent will be granted – as it will be produced more quickly, this may give applicants more time to take the next steps before the priority date.
- A *provisional filing* system will be introduced - which is the option of stipulating the priority date once the simple procedure has been completed, with no danger of it losing its innovative features. Provisional registration will be a means of reserving priority for a patent. The legislative proposal envisages measures to make the procedure as simple as possible, such as ending the requirement to file patent claims, although drawings will have to be submitted at this stage. The aim is to enable patent claims alone to be filed at a later stage of the registration process.

The most controversial element of the changes concerns **utility models**. A registration, and not examination system, (as today) would come into effect (in the same way as for designs). Currently, the PPO examines the grounds for granting protection of a utility model. Following comments on this new system, the proposal now provides for a hybrid model - the right to a model is granted under a registration system, but to pursue claims, the PPO report on the state of the art has to be submitted. The intention is clear: if the report on the state of the art finds no innovative features, this insubstantial right cannot be grounds for claims. On the other hand, there are still no litigious remedies linking industrial property laws and laws on civil litigation in court.

The major changes, intended to streamline the granting of protection for trademarks, include replacing the current objection system with an opposition system, and a reduction of the time limit for filing opposition from three to two months from the date of publication of the application. In addition, the current compulsory two-month cooling off period will be abolished, and will be designated only if all parties wish it.

It is important from the perspective of representatives, and quick handling of cases, that the PPO will judge disputes in camera. A hearing will only be held when this helps to expedite proceedings or is a more effective means of resolving a case. A party will also be entitled to request a hearing. Some representatives are critical towards this system. In patent cases in particular, hearings will help a better solution to be reached, where cases are frequently complex.

There is an entirely new development, which is a PPO depositary. This will hold technical and technological information that constitutes a trade secret under Polish law. The depositary will be for digital documents, and the PPO will not conduct any form of examination of the document contents. The depositary may be an interesting means of protecting certain information, and above all demonstrating in a subsequent procedure of some kind that a specific entity placed certain information in the PPO depositary on a specific date.

The proposal will definitely still be revised significantly, but a new Industrial Property Law could be enacted by the end of 2022.

NEW APPROACH TO THE ELECTRONIC DEVICE FEE (REPROGRAPHICS LEVY)

Author: Arkadiusz Baran, Attorney-at-law

A proposal for a new Professional Artists Act was published at the end of June [1]. The main precept of the act is to specify conditions of artistic work and ensure minimum welfare safeguards for artists with the lowest incomes by providing access to social security and health insurance benefits. The new rules on the reprographics levy are equally as important.

The reprographics levy is a fixed fee intended as recompense, paid to artists by manufacturers and importers of electronic devices allowing *permissible personal use*, i.e. using works for personal purposes. Making permissible use of works for personal purposes certainly increases demand for electronic devices. In many cases, a special fee is incorporated into the price of devices and data carriers, and this is intended to be recompense for copyright holders for the *deficit* caused by the fact that users do not always buy works anew, but sometimes only make copies.

Device manufacturers and importers are required to pay the reprographics levy, while it is clear that the financial burden of the fee is commonly passed on to the end user.

The situation today

Currently, a reprographics levy is due for:

- audio cassette players, video cassette players, and similar devices,
- photocopiers, scanners, and similar reprographics devices that can be used to make copies in whole or in part of a published work,
- blank data carriers used for recording, for personal use, works or items protected by related rights using the devices listed in points 1 and 2.

At the moment, the levy is no more than 3% of the sale price for those device and data carriers.

When the amendments are enacted

The levy for permissible personal use of protected works or items protected by related rights will apply to placement on the Polish market of:

- electronic devices that can be used to record or reproduce, by any means, in whole or in part, for personal use, audio or audiovisual works in word or moving form, or in the form of graphic symbols or mathematical symbols, photographic or artistic works, and items protected by related rights;
- blank data carriers that can be used for recording or reproducing by any means, in whole or in part, for personal use, works and items protected by related rights using the devices listed in points 1;
- electronic devices that can be used to record or reproduce by photographic means or a different process of similar effect in whole or in part for personal use, works in word form or in the form of graphic symbols, photographic and artistic works, and multi-functional devices with a minimum of two out of the functions of copying, scanning, or printing, except devices listed in point 1;
- blank data carriers that can be used for recording or reproducing by any means, in whole or in part, for personal use, works described in point 3, except data carriers described in point 2.

MORE ABOUT

Specific types of devices will be specified in a separate ministerial regulation. In practice, the reprographics levy will apply to almost all devices designed for accessing video and music, in particular televisions, computers, laptops, tablets, audio-visual equipment with a facility for recording or replay of external media, and also mass storage media, decoders with a recording facility, e-book readers, and digital cameras. Interestingly, in terms of the products covered, the levy will probably not apply to smartphones, despite the fee already being dubbed smartphone tax, because smartphones were originally to be covered by the levy.

Placement on the Polish market is not only understood to mean the primary sale; it also means the first delivery or acceptance of a device for use. Use of a product may include in particular lease, rental, leasing, or similar agreement, or provision for personal use.

The levy is envisaged to be between 1 % and 4 % of:

- the gross receivable for the first sale of devices, or
- the market value of devices as at the day of the first delivery or acceptance for use.

The requirement to pay the levy will apply to:

- manufacturers, importers, or firms conducting intra-community acquisition of goods, which are business undertakings,
- firms conducting intra-community distance sale of goods from an EU member state other than Poland in Poland for a natural person who does not conduct business activity,
- firms conducting distance sale of goods imported from third countries in parcels of a true value not exceeding EUR 150 to private individuals within the EU.

[1] https://legislacja.rcl.gov.pl/projekt/12356152/katalog/12852470#12852470

ADVERTISING OF DIETARY SUPPLEMENTS: THE MORE CHARGES, THE HARSHER THE PENALTY?

Author: Katarzyna Menszig-Wiese, PhD, Attorney-at-law

At the end of April, the President of UOKiK announced initiation of proceedings for practices infringing the collective consumer interest against a trader dealing in dietary supplements. The list of allegations is considerable. And for each of these — under a new debatable fining method — the authority can impose a separate severe financial penalty.

The subject of the analysis in the aforementioned case is, among others, the manner in which the subject of the offer is communicated (subscription rather than one-off purchase), the incorrect labelling of the button serving to order the product (it should clearly indicate the obligation to pay), the use of fine print in the TV commercial to present the terms of the promotion, misleading actions in advertising, such as unlawfully referring to the authority of EFSA or stating that the supplement is recommended as part of the "National Prostate Health Campaign", which could suggest that it is run by public entities, although it was in fact carried out by the trader.
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If the allegations are confirmed in the course of the proceedings, the trader will have to face, among others, a severe fine of up to 10% of turnover. It is noteworthy that the President of UOKiK has recently started applying a new and controversial concept of imposing fines for infringement of collective consumer interests. Namely, he imposes independent fines for the individual charges and applies the maximum threshold to each charge separately. This means that the total amount of fines imposed on a trader in a single decision can significantly exceed 10% of the trader's turnover. As a result, the more consumer misconducts, the more severe the potential total fine.

Given the severity of the sanctions involved, as well as the current changes in consumer law related to the implementation of EU directives, it seems appropriate to review existing practices in the context of e-commerce. Indeed, failure to do so can have serious financial consequences.

THE TIME LIMIT FOR UNDERTAKINGS TO COLLECT DEBTS TO BE LONGER

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

The Polish Supreme Court has specified in a resolution of 13 May 2022 (case III CZP 46/22) how to correctly determine when an undertaking's claims against a consumer expire under the statute of limitations. This ruling may interest foreign undertakings that pursue claims against consumers in Poland, as it *de facto* extends the time limit under the statute of limitations, i.e. it provides more time for recovery of debts that had not expired under the statute of limitations as of 9 July 2018.

The Supreme Court resolution is connected with a change made on 9 July 2018 in an act of 13 April 2018 amending the Civil Code (Act Amending the Civil Code and Certain other Acts, Journal of Laws, item 1104). On one hand, this amendment reduces the basic period after which claims expire from ten to six years. On the other hand, under the new rules, claims expire under the statute of limitations on the last day of the calendar year, except where the statutory time limit for claims is less than two years. In Poland, periodical claims and claims related to business activity expire under the statute of limitations after three years.

In connection with this amendment to the Civil Code, there is concern whether the new rules apply to undertakings' claims against consumers that arose prior to the day on which the amendment came into force (9 July 2018) when the three-year limitation period continues beyond that date.

The Supreme Court found in the resolution that where an undertaking's claim against a consumer is subject to a three-year limit, and that period commences before and continues beyond the effective date of the amendment (9 July 2018), that period ends on the last day of the calendar year. Therefore, the Supreme Court ruled that the new provisions on expiry periods under the statute of limitations apply.

The ruling could have major practical implications for pursuit of claims, for instance when foreign undertakings pursue claims against consumers in Poland. This is because in numerous cases, this definitive determination of the date on which such claims expire will be very important when ascertaining whether a time limit has been stopped, and whether such debts can be collected effectively in Poland.

INDEXATION OF REMUNERATION IN PUBLIC TENDER CONTRACTS

Author: Agnieszka Wachowska, Attorney-at-law, Partner and Piotr Nepelski, Attorney-at-law

Changes in prices of materials and raw materials on international markets have a major effect on the Polish public procurement market. The May 2022 consumer price indices published by the Central Statistical Office show an increase in prices of goods and services in May 2022 of 13.9% (prices of goods by 14.9% and services by 10.8%) compared to the same month in the previous year.

The increasing costs of performing public contracts has led contractors to submit requests en masse to contracting authorities for remuneration to be indexed, i.e. for adjustment in real terms of the fee payable under a contract to account for a change in the purchasing power of money. Although this institution has been known for a long time, and this includes with regard to public procurement, it has rarely been used in the IT sector. As a result, it poses many problems for contractors, but also contracting authorities, as to the manner of indexation. The most problematic issue is selecting the appropriate remuneration index rates, and documenting the increased costs on the part of the contractor.

These difficulties are pointed out by the President of the Public Procurement Office, who announced in June 2022 that the Office plans to publish indexation clause templates for contracts in the construction industry and maybe for IT contracts. A working group has been established for this purpose, including representatives of Traple Konarski Podrecki & Partners.

The need for real adjustment of contract fees arises primarily in long-term contracts, and thus article 439 of the Public Procurement Law requires that indexation clauses be included in contracts for construction work or services concluded for a period longer than twelve months (this obligation does not apply to supply).

The question of indexation can be addressed in a number of ways. First, this can be in the form of an annex to the contract, although the contracting authority may also introduce a mechanism for automatic indexation (that does not require an annex to the contract). The automatic indexation solution is more advantageous for contractors. In most cases, contracting authorities link the fee to the average annual consumer price index published by the President of the Central Statistical Office in a statistical bulletin. However, reference may also be made to the index of the real average monthly gross remuneration in the national economy in the PKD "Information and Communication" section, also published by the President of the Central Statistical Office.

Finally, indexation may be made subject to a certain level of fluctuation. For example, if the index is higher or lower by at least 5% in relation to the corresponding period of the previous year, the remuneration is increased or decreased accordingly.

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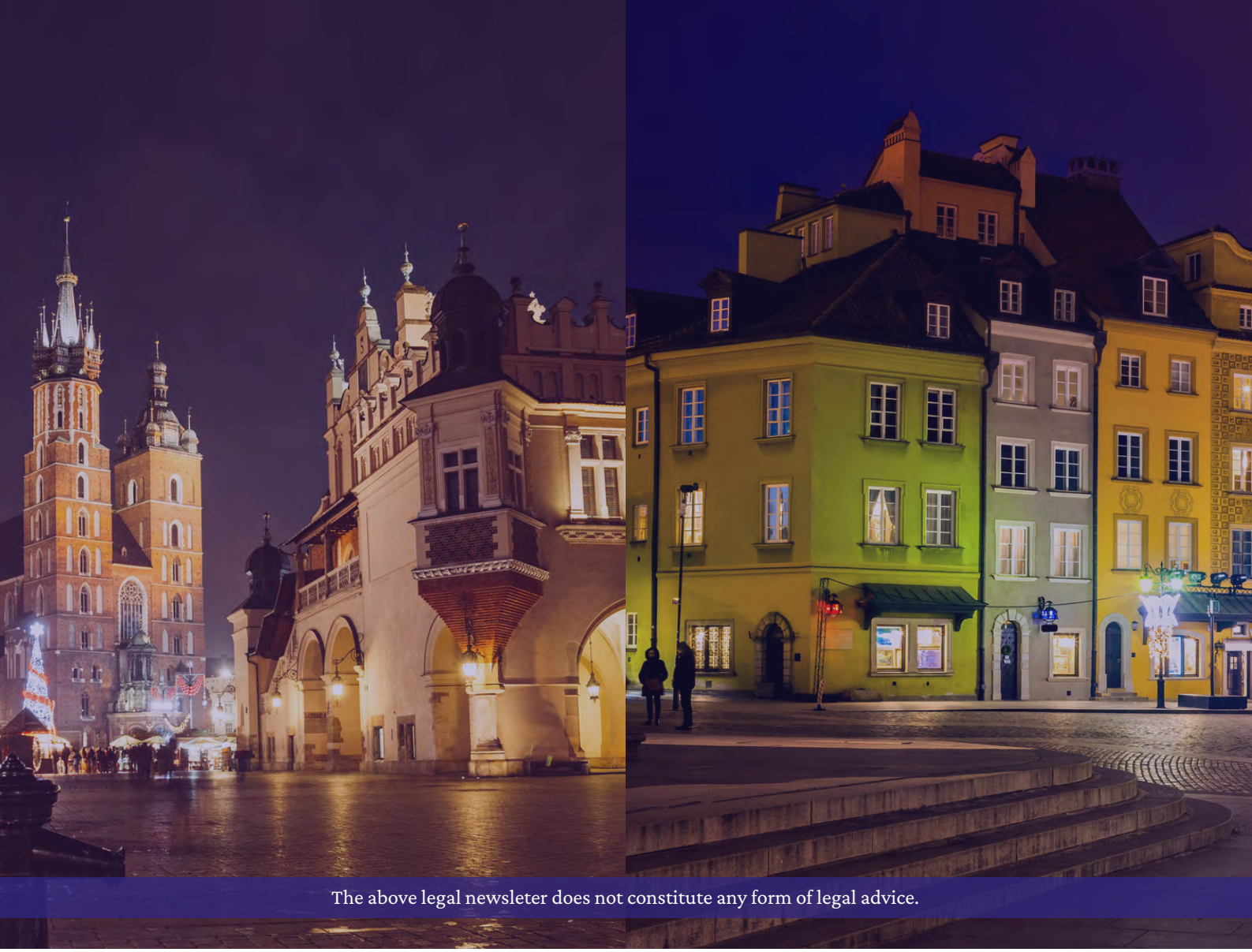

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