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LEGAL NEWS FROM POLAND

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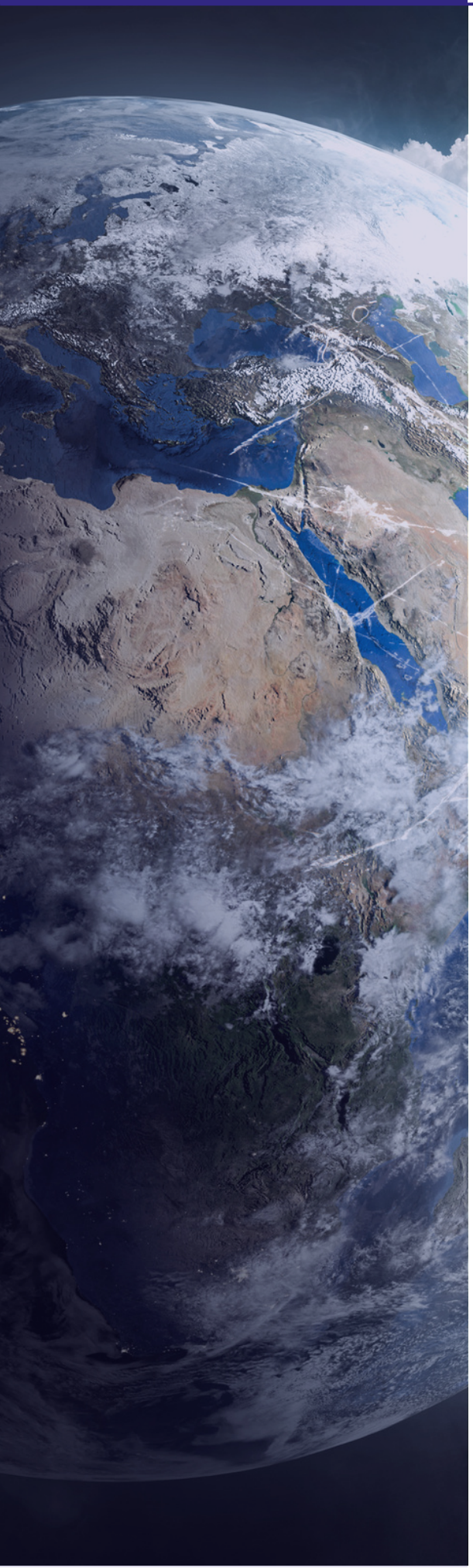


POLISH AUTHORITIES ADOPT MEASURES TO MITIGATE EFFECTS OF ENERGY CRISIS

Author: Maciej Toroń, Attorney-at-law

Upon the initiative of the Polish government, legislative works are ongoing to adopt measures aiming at mitigating the effects of an increase in energy prices caused by Russia's aggression against Ukraine.

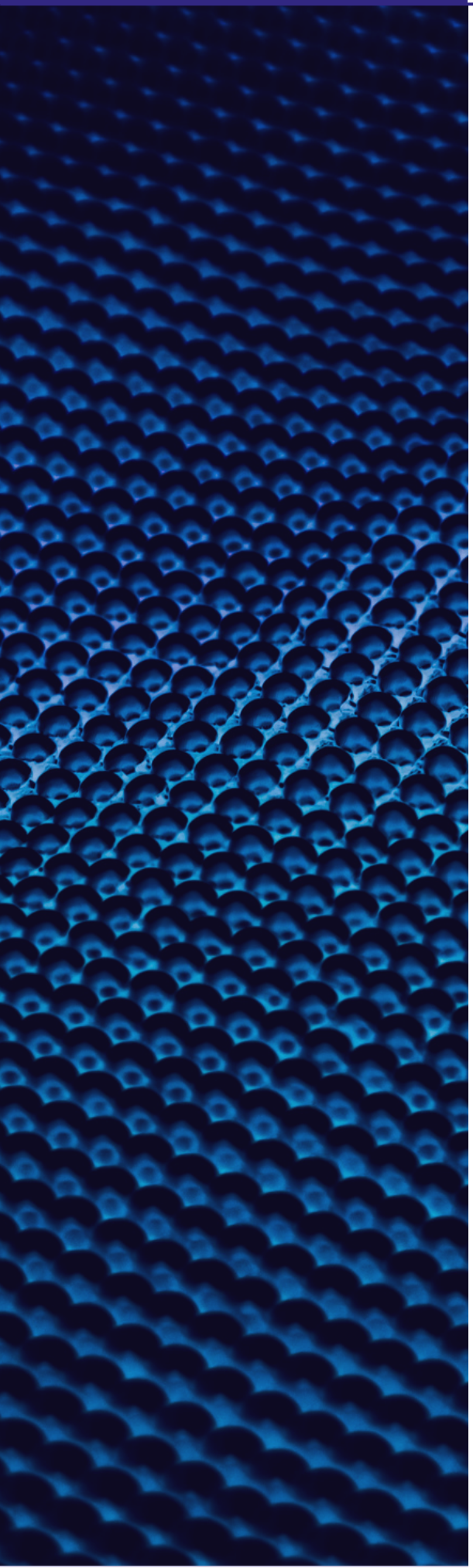
The outbreak of the war in Ukraine has caused a severe increase in energy prices in Europe. The energy crisis could exacerbate the economic crisis caused by the COVID-19 pandemic. The Polish government has undertaken steps to counter the effects of the rise in energy prices for Polish businesses.

On 13 October 2022, the Act of 29 September 2022 on principles of implementing business support programs due to the situation on the energy market in the years 2022-2024[1] came into force. This act **created a legal framework** for adoption of state aid schemes in accordance with the Temporary Crisis Framework[2] introduced by the European Commission. This regulation allows the Polish government to adopt aid schemes among other things granting aid to compensate for the additional costs due to severe increases in natural gas and electricity prices or aid for the decarbonization of industrial production. This aid will be provided **upon the prior approval of the European Commission**.

The Polish government has also submitted a bill to the parliament on extraordinary measures aiming at capping electricity prices and supporting some customers in 2023. This regulation **will cap electricity prices** for various types of energy consumers, **including small and medium-sized enterprises (SMEs)**. These price caps will apply **from 1 December 2022 until 31 December 2023**, and could apply retroactively in exceptional cases. The act **has not come into force yet**, but it is expected to be passed in the Polish parliament without undue delay.

The electricity price caps prices will constitute **a general support measure** addressed to SMEs from all sectors of the economy. The already adopted Act of 29 September 2022 gives the Polish government a legal framework to adopt **more specific aid schemes**, for example addressed to large industry enterprises in the energy-intensive sectors, which are most severely affected by the rise in energy prices.

[1] Journal of Laws, item 2088.
[2] Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 121I of 24.03.2022 r., as amended).



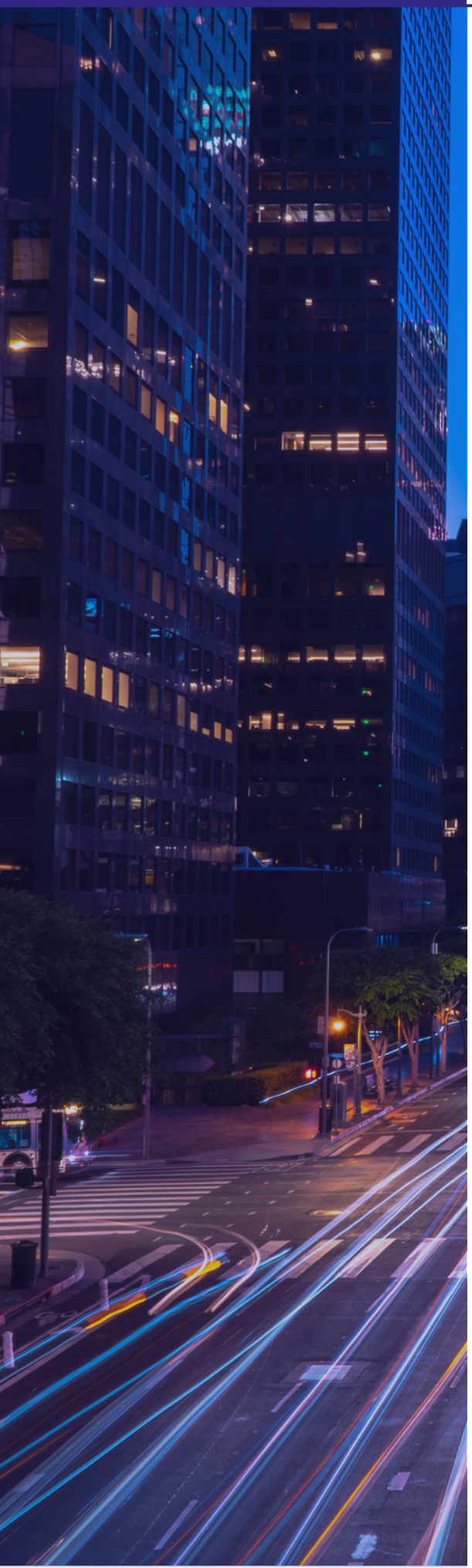
CONDITIONS FOR RESPECTING WARRANTIES UNDER SCRUTINY BY THE POLISH COMPETITION AUTHORITY

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

Certain motor vehicle importers who trade in well-known models in Poland have changed their approach toward automobile repairs under warranty as a consequence of the activities of the Polish Competition Authority (UOKiK).

UOKiK conducted a market study in the automotive sector which showed potential shortcomings as regards the conditions of warranties. Some car importers require that car buyers only have their cars maintained at authorized repair shops, failing which they lose their warranty. According to UOKiK, such conduct might be contrary to European and Polish laws and could even be classified as an anticompetitive agreement between car importers and authorized repair shops. UOKiK has raised this issue with several undertakings, paving the way for a change in the way importers handle warranty claims. UOKiK did not have to launch formal proceedings to achieve this goal. The undertakings in question adjusted their conduct voluntarily upon hearing about UOKiK's concerns.

This is a major development for both consumers and independent repair shops. It is also a clear warning for other market players that the Polish Competition Authority will not shy away from applying sector-specific regulation where needed. This development could not be more timely, as the European Commission is currently investigating the potential need to update its antitrust rules applicable to the motor vehicle industry.



POLAND TAKES ANOTHER STEP TO MAKE CROSS-BORDER REORGANIZATION OF COMPANIES EASIER

Author: Maciej Toroń, Attorney-at-law and Jan Potyrała, Trainee attorney-at-law

On 8 August 2022, a proposal for a bill amending the Commercial Companies Code and certain other acts was published. This act is to transpose EU Directives 2019/2121[1] and 2019/1151[2] and to implement the judgment of the Court of Justice of the EU in the case C-106/16 *Polbud*[3]. Consequently, the aim of the planned legislation is **to facilitate cross-border reorganizations of companies within the EU internal market**.

The proposal will make significant changes to Polish company law. First of all, two new reorganization processes **are to be introduced: cross-border transformation and cross-border division of capital companies**. The new laws **will provide instruments of protection** for creditors, minority shareholders and employees of companies participating in cross-border reorganization, e.g. a request for security.

The bill also introduces amendments related to domestic corporate reorganizations. The most important of these refers **to introduction of new procedures: a simplified merger** (possible if one shareholder holds all the shares of the merging companies or the shareholders hold the same proportion of shares in all merging companies) **and division by separation** (in which the shares will be obtained by the company being divided and not by its shareholders, as is the case in a division by spin-off).

Furthermore, in order to transpose Directive 2019/1151, the proposal **introduces solutions aiming at further digitalization of the functioning of capital companies within the EU**. The proposed regulations relate for instance to exchange of information about criminal records excluding natural persons from being appointed to corporate bodies.

The process of consultations with social partners and other governmental departments on the bill has been recently finalized. The bill has not been submitted to the Sejm (lower chamber of the Polish parliament) yet, but the regulation is expected to come into force **at the end of January 2023.**

[1] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Text with EEA relevance) (OJ L 321, 12.12.2019, p. 1).
[2] Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (Text with EEA relevance) (OJ L 186, 11.7.2019, p. 80).
[3] Judgment of the Court (Grand Chamber) of 25 October 2017 in case C-106/16 *Polbud*, ECLI:EU:C:2017:804.

A NEW VERSION OF THE NATIONAL CYBERSECURITY SYSTEM ACT CLOSE TO BEING PASSED

Author: Agnieszka Wachowska, Attorney-at-law, Partner and Jakub Chlebowski, Attorney-at-law

On 3 October, 2022, the Government Legislation Centre published what is now the eighth version of a bill amending the National Cybersecurity System Act. The bill does not make any changes to the previously proposed group of entities that form the national cybersecurity system or those entities' obligations. This group includes electronic communication undertakings and the Financial Supervision Authority, the President of the Office of Electronic Communication, and external SOCs. The new provisions on the national system of cybersecurity certification and instructions issued for security purposes also continue to be applicable.

According to media reports, government work on the amendment bill is nearing completion.[1] This is indicated by the proposed new ministerial regulations concerning the act, which were published together with the latest version of the bill:

1. ministerial regulations on thresholds for defining a telecommunications incident as a serious telecommunications incident;
2. ministerial regulations on the procedure for destroying materials that contain information obtained when CSIRT teams conduct security assessment and templates for the required documentation.

Under the new version of the bill – despite much criticism during public consultations – there will be no major change to the proposed procedure for classifying a hardware or software supplier as a high-risk supplier. A need to ensure national security or public safety and order will be a prerequisite for classification as a high-risk supplier. If particular products or services provided by high-risk suppliers are considered to pose a danger, the measures taken will include exclusion of those suppliers from the public tender system in Poland.

The most important difference compared to the previous version of the bill is that the company Polskie 5G will not be created. This company was intended to construct the nationwide 5G wholesale network, and was to be set up by the strategic security network operator, Polski Fundusz Rozwoju S.A. and telecommunications operators, who would be granted frequencies in the 713-733 MHz and 768-788 Mhz ranges.

Instead, the Minister of Digital Affairs is proposing that the 713-733 MHz and 768-788 MHz civilian frequency ranges be granted for providing wholesale services by way of the tender procedure specified in the Telecommunications Law.

The proposal was submitted on 6 October for review by the Cabinet Committee for National Security and Defense, and, once approved, will be submitted for approval to the Cabinet Standing Committee.[2] According to initial statements – the new National Cybersecurity System Act could be passed at the end of this year or in the new year.

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[1] Polityka Insight Technologia, *Czy 5G przyspieszy* https://soundcloud.com/pi-technologia/8-wrzesnia-2022 (accessed: 11.10.2022)
[2] CyberDefence24, Nagły zwrot akcji. *Co dalej z polskim 5G i projektem ustawy o KSC?* https://cyberdefence24.pl/polityka-i-prawo/nagly-zwrot-akcji-co-dalej-z-polskim-5g-i-projektem-ustawy-o-ksc (accessed: 11.10.2022)

THE POLISH DPA FINES A CONTROLLER FOR NOT VERIFYING A PROCESSOR AND FOR NOT CONCLUDING A DATA PROCESSING AGREEMENT

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

In September, the Polish DPA issued a decision fining a controller (a cultural institution) PLN 2500 for engaging a processor without concluding a data processing agreement in writing and without verifying whether the processor provided sufficient guarantees for the implementation of appropriate technical measures.

The fine was so low because under Polish law the maximum fine for infringement of data protection law that can be imposed on a public cultural institution is PLN 10,000. Thus, the fine imposed in this case was 25% of the maximum amount.

The DPA launched an investigation following a personal data breach notification by the controller. In the course of the investigation, it was established that the controller entrusted the processing of personal data to an accounting company without concluding a written data processing agreement. The processor was responsible for keeping accounting books, records, preparing reports about finance, taxes and social security and storing documentation.

The DPA's findings included:

- violation by the controller of article 28(1) GDPR by not vetting the processor as to whether it provided sufficient guarantees to implement appropriate measures so that processing met the GDPR requirement, and
- violation by the controller of articles 28(3) and 28(9) GDPR for not concluding a data processing agreement in writing, including in electronic form.

Our comment

This is yet another decision issued by the Polish DPA which shows how crucial it is for the controller to fulfil the obligation under article 28(1) of the GDPR, i.e. verifying whether the processor provides sufficient guarantees to implement appropriate technical and organizational measures so that processing meets the requirements of the GDPR. The DPA also underlined the importance of concluding the data processing agreement in writing, including in electronic form, to be compliant with article 28(3) and (9) GDPR.

RECENT LABOR LAW HIGHLIGHTS IN POLAND

Author: Paweł Krzykowski, Attorney-at-law, Partner BKB and
Łukasz Łaguna, Junior Associate - Managing Partner's Assistant BKB

1. Proposal for an Act on Employment of Foreigners

According to information provided by the Chancellery of the Prime Minister, the new regulations will be based on the same basic precepts relating to the access of foreigners to the Polish labor market. However, the proposal envisages some significant changes, including in particular:

- the bill allows rectification or deletion from the register of declarations that are entered in error or redundant, of employment of foreigners;
- the bill will abolish the prerequisite of the labor market test;
- the bill will define the rules of electronic handling of processes related to the employment of foreigners.

2. New application form for a national visa

On 7 September 2022, a regulation of the Minister of the Interior and Administration introducing a new template for the application form for a national visa, came into force.

The template includes the option of foreigners who reside in Poland to submit applications to the Minister of Foreign Affairs.

3. Amendment of the Law of Labor Unions

On September 14, 2022, the Committee on Digitalization, Innovation and Emerging Technologies considered a proposal by the Commission Bureau to take a legislative initiative to amend the Law on Trade Unions. According to emerging information, an amendment would be enacted requiring an employer to provide information on the parameters, rules and instructions on which artificial intelligence algorithms or systems are based which affect decision-making and which may affect working and pay conditions and access to employment and maintaining employment, including profiling.

4. The Ministry of Family and Social Policy plans to drop a provision allowing Russians to work in Poland on a simplified basis

According to a proposal published on the website of the Government Legislation Center, Russia is to be removed from the list of countries whose citizens are issued seasonal work permits on a preferential basis and to which the simplified procedure of declarations of the hiring of a foreigner may apply.

According to the proposed regulations, a citizen of the Russian Federation who is declared as hired as a foreigner in a declaration placed in the declaration register before the regulation takes effect, who works according to the conditions specified in the declaration, may continue to work for the validity period of the declaration.

The regulation is to enter into force on the day after it is announced.

REGULATOR (KNF) SCRUTINIZES LIMITED NETWORK PAYMENT INSTRUMENTS

Author: Prof. UEK Jan Byrski, PhD, Habil., Attorney-at-law, Partner and Karol Juraszczyk, Attorney-at-law

A process is underway to "reauthorize" entries in the Polish Financial Supervision Authority (KNF) register of payment instrument issuers on the basis of the limited network exclusion. This process follows adoption of European Banking Authority (EBA) Guidelines on the limited network exclusion under PSD2[1]. Under these Guidelines, issuers of payment instruments of this kind are required to submit the relevant notifications to regulators in each member state in which payment instruments are issued and in which the value of transactions executed over the preceding twelve months exceeds EUR 1 million.

As a rule, issuance of payment instruments (such as payment cards or mobile payment applications) is a regulated activity, and requires payment service provider status. One exception to this rule is issuing of payment instruments under the *limited network exclusion* specified in article 3(k) PSD2[2]. The EBA Guidelines are intended to provide clarifications concerning the practice of applying this exclusion and ensure that it is applied consistently in all EU member states.

The limited network exclusion applies to services based on payment instruments of limited use and which fulfill a minimum of one of the additional conditions referred to in article 3(k) PSD2, such as:

- they enable the holder to acquire goods or services only on the premises of the issuer or within a limited network of service providers under a direct commercial agreement with a professional issuer,
- they can be used only to acquire a very limited range of goods or services.

Applying the exclusion means that a service can be provided without obtaining payment service provider status (for example a payment institution, e-money institution). At the same time, the relevant notification must be submitted to the competent regulator (in Poland the KNF) once the value of transactions executed by the issuer over the preceding twelve months exceeds EUR 1 million. Under the EBA Guidelines, the value of transactions exceeding the threshold must be calculated independently for transactions executed using limited network payment instruments issued at member state level, and notification must be submitted in every member state in which the threshold is exceeded, as required under article 37 (2) PSD2.

[1] EBA Guidelines of 24 February 2022 on the limited network exclusion under the Second Payment Services Directive (PSD2), reference code EBA/GL/2022/02
[2] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC, and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 2015.

THE IMPORTANCE OF A QUALIFIED ELECTRONIC SIGNATURE IN THE CONTEXT OF COPYRIGHT TRANSFER IN THE IT INDUSTRY

Author: Agnieszka Wachowska, Attorney-at-law, Partner and Hanna Germanek

The conclusion of contracts using electronic signatures is a common practicein the ITindustry. Parties residing in different parts of the world are able to sign an agreement in a short time. The solutions that technology offers are ecological and convenient. Nevertheless, when using the options supplied by providers of platforms for signing an electronicdocument, the legal requirements for conclusion of such contracts must be borne in mind.

The legislation regulating the issue of electronic signatures includes for instance European Regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (**eIDAS**) which covers:

1. a simple electronic signature;
2. an advanced electronic signature, and
3. a qualified electronic signature.

The distinction made above is important inasmuch as eIDAS associates legal effects equivalent to a handwritten signature **only with the qualified electronic signature**, which is an advanced electronic signature, supplied by a certified provider.

A qualified electronic signature is individually assigned to the person who uses it, and confirms the integrity of the content contained in the document. Verification of the authenticity of the signature is ensured by a certificate, guaranteeing a high degree of security for the concluded contracts.

The fulfilment of the conditions concerning the form of signed agreement, as mentioned before, is particularly important when the subject of the contract is the transfer of copyright. **For such a contract to be effective, the Polish Act on Copyright and Related Rights requires the written form (which implies a handwritten signature). This means that forthe transfer ofthose rights it is not sufficient to affix a simple electronic signature or even an advanced electronic signature to the contract.** It is essential that the parties use a qualified signature provided by qualified trust service providers within the meaning of eIDAS. Otherwise, the contract will have not have legal effect of transfer of copyright.

In this context, the recognition of a qualified signature in one EU Member State implies its acceptance in all other EU countries (which also applies to third countries when trust services from that country are recognized in the EU under a separate agreement).

MORE ABOUT Internet & Media

RECOMMENDATIONS ISSUED BY THE PRESIDENT OF THE OFFICE OF COMPETITION AND CONSUMER PROTECTION (UOKIK) ON HOW INFLUENCERS SHOULD LABEL ADVERTISING CONTENT

Author: Arkadiusz Baran, Attorney-at-law and Agnieszka Karcz

At the end of September this year, the President of the Office of Competition and Consumer Protection (UOKiK) published recommendations on how influencers are to label advertising content on social media. The recommendations include a number of practical examples and illustrations. The document is intended as an aid to help content creators to label commercial content in the correct manner. The recommendations are a complete guide that not only advises influencers of important definitions, the legal regulations, and legal consequences that might arise for cryptoadvertising, but also provides specific examples of how advertising is labeled on various social media sites such as Instagram, Facebook, TikTok, YouTube, etc. It also contains a practical diagram showing the measures to be taken for each of them.

The main points made in the Recommendations are:

- advertising content may not be misleading for consumers
- all advertising must be distinct from independent content
- consumers must be informed whenever particular material is advertorial

Advertising content must be labeled in a way that is legible, clear, and intelligible for every user. The best way to do this is to place labels somewhere plainly visible, distinct from other content, in clear print of appropriate size, in Polish if the site language is Polish, in a manner clearly identifying a post as commercial.

Content can be determined to be commercial regardless of the form of reward obtained by the influencer, and this can be in pecuniary form or in kind (such as products, services, discounts, gains from affiliate links). A commercial relationship is formed regardless of whether the advertiser influences the ultimate contents of the produced material – if the content creator obtains a reward for posting information about a product or service on their channels, the relationship is a commercial one.

If the influencer has their own business/holds shares in a business and advertises that business on their channels, this is self-advertising, and must be identified as such.

If the influencer receives a PR package as a gift of nominal value but does not enter into a contract with an agency or advertiser, the agency or advertiser do not influence the content of the final post, and there is no obligation to produce a publication of any kind, then, if this is the first gift of this kind, it is sufficient to use the label #prezent, while any further gifts of the same brand or linked to the brand have to be labeled as #reklama.

In special cases, the circumstances in which particular content was created, for example during product testing or at invitation, must be fully disclosed to users.

It is not advised to use labels such as advertisement, *collaboration, commercial, ad, promo, spns, autopromo, rek, współpraca, materiał powstał we współpracy z @XY*.

Incorrect labeling will lead to a fine imposed by the President of UOKiK of up to 10 % of turnover, an order to cease the practice concerned, and an order to remedy the long-term effects of the violation.

WHEN IS THE DISCLOSURE SUFFICIENT? SUPREME ADMINISTRATIVE COURT JUDGMENT OF 26.04.2022, II GSK 1724/18

Author: Żaneta Zemła-Pacud, Phd, Attorney-at-law

The Polish Supreme Administrative Court has recently delivered a significant judgment in the context of the increasing discussion on sufficient disclosure of life science inventions. As a result of the decision, a patent for calcium-magnesium fertilizer was invalidated. The judgment concluded a seven-year dispute in which invalidation of the patent was sought in a filing made with the Polish Patent Office in 2015, presenting the following arguments:

- unclear terminology was used for the components listed in the description,
- the patent did not provide any experiment-related details from which vital information could be obtained concerning the size and composition of granules,
- there was no industrial applicability, and this was closely linked to insufficient disclosure of the invention,
- a comparison of the disputed patent with the state of the art demonstrated that the description of the method protected by the patent was fragmentary, and that a large amount of vital information about the required technological actions was not provided.
- information concerning conducting the granulation process in granulators is known and is common knowledge.

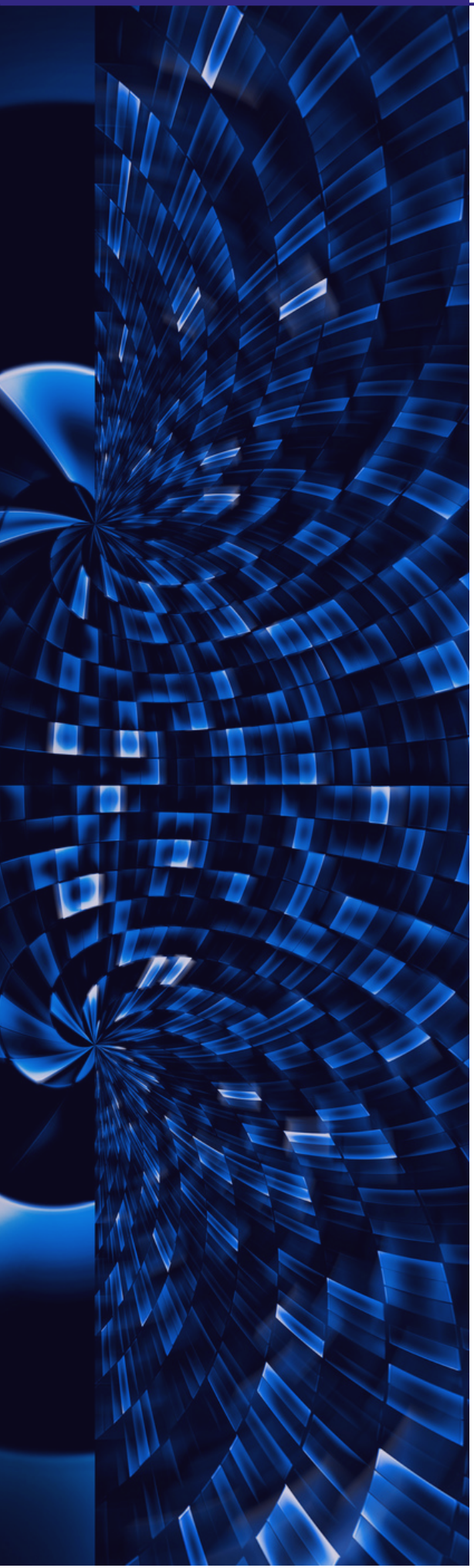
The Polish Patent Office invalidated the patent for the invention, and both the first instance and the Supreme Administrative Court shared this view.

The Supreme Administrative Court found that the first instance court had correctly explained why the invention in question had been found to be insufficiently disclosed and thus had no industrial applicability. The first instance court underlined that the description of the disputed patent was so vague and imprecise that a technology specialist would be forced to conduct experiments to:

1. determine the quantity, type, and form of raw materials,
2. determine the reacting substances and technical measures not mentioned in the disputed patent,
3. determine the procedural parameters for the individual steps in that method,
4. determine the devices to be used and how they were to be connected.

The arguments made by the holder to amend the patent did not resolve in any way the objection of no industrial applicability of the patent. The disputed invention was found to be an incomplete solution from which no result could be obtained without employing further solutions that went beyond the normal adaptation measures,

The judgment indicates that greater care is needed when applying for a patent, to ensure that the sufficient disclosure criterion is duly observed. The obvious advantage of not disclosing all the details of a technical solution in a patent application is the possibility of protecting them as know-how and building a competitive advantage on it, especially if the product is not susceptible to reverse engineering. However, the consequence of such a policy may be the invalidation of the patent, and thus the loss of protection resulting from a strong exclusive right.



PUBLIC PROCUREMENT MARKET IN POLAND

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

The Public Procurement Office (**PPO**) has released a report on the functioning of the public procurement system in 2021. The PPO's reports provide a lot of useful information to assess the state of the public procurement sector. This sector, like the economy as a whole, is going through a turbulent period, first caused by the COVID-19 pandemic, and currently by the war in Ukraine and high inflation.

However, as the report shows, public procurement is doing better than it was in 2020.

The most interesting points in the report are:

- the value of contracts awarded under the Public Procurement Law (**PPL**) in 2021 was approximately **PLN 184.6 billion** (an increase of approximately PLN 1.1 billion compared to 2020);
- the value of contracts awarded under the PPL constituted approximately **7.04% of the 2021 gross domestic product (GDP)**;
- the value of the public procurement market in 2021 (both contracts awarded under the PPL and exemptions from applicability of the PPL) amounted to approximately **PLN 297.8 billion** (an increase of approximately PLN 16.8 billion compared to 2020);
- construction works accounted for 39% (in 2020 - 43%) of the value of contracts awarded, supplies for 31% (in 2020 - 31%) and services for 30% (in 2020 - 26%);
- the number of appeals lodged with the National Appeals Chamber in 2021 was 3,811 (an increase of 266 on 2020), while:
    - 48% of appeals concerned judgments on the merits of the case;
    - 52% of appeals concerned formal matters (return, discontinuance, rejection of appeal).
- appeals in the IT sector accounted for 12.99% of the total number of appeals lodged with the National Appeals Chamber (this sector remains, along with construction works, the sector in which appeals are most frequent);
- in 2021, an average of 2.53 tenders were submitted in public procurement procedures with values above the EU thresholds;
- the average duration of public procurement procedures with a value below the EU thresholds was 39 days (the report does not address the issue of duration of public procurement procedures above the EU thresholds).

As we see, contractors should look very carefully at the public procurement procedures being announced, especially in the face of a possible forthcoming recession.

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

Climate

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

Competition & Antitrust

Paweł Podrecki, PhD, 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

Cybersecurity

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

Data protection

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

Grzegorz 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

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

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

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

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

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Traple Konarski Podrecki i Wspólnicy Sp.j.

Office in Cracow:
Królowej Jadwigi 170
30-212 Kraków
tel.: +48 12 426 05 30

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

Office in Warsaw:
Twarda 4
00-105 Warszawa
tel.: +48 22 850 10 10

Traple Konarski Podrecki & Partners