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NON-SOLICITATION CLAUSES IN M&A TRANSACTIONS

PAWEŁ MARDAS

Every manager and business owner knows the importance of people and talent in an organisation.

In M&A (mergers & acquisitions), the human factor also plays a crucial role.

One of the main motivations for M&A transactions is to gain value from the acquisition.

And behind this are usually the people who are guaranteed to further enhance the performance and value of the business.

People: the most valuable asset in business

Among the risks that can arise in an M&A transaction is the risk of poaching key employees and other individuals critical to the operation of the acquired business.

This risk is all the greater as the deal may ultimately fail and the potential buyer, having access to the critical personnel of the divested business, may seek to persuade them to consider cooperation, thereby inducing them to leave the current business.

The seller, left with an unsold business that has lost its most valuable employees, may therefore have a very serious problem. Both in running the business and in attracting new buyers.

What you need to know about non-solicitation clauses

One way to mitigate this risk is via a non-solicitation clause, which provides that the buyer will not solicit or encourage the employees and associates of the divested business to terminate their relationship with the seller. For such clauses to be effective, they must be properly incorporated into the contract and properly secured, e.g. via liquidated damages for any breach.

Non-solicitation clauses should be carefully drafted, with their manner of incorporation in the contract depending on which party has more influence over the final content.

From the seller's point of view, a non-solicitation clause should have a broad scope, i.e. it should restrict the potential solicitation of employees and associates of the seller's business to join the buyer or its related parties.

On the other hand, from the buyer's perspective, it is important that any non-solicitation clauses do not prohibit instances where the employees of the divested business themselves terminate their existing relationship with the business on their own initiative and either approach the buyer for employment or respond to a general recruitment advertisement.

Non-solicitation & non-compete

Non-solicitation clauses may also include a prohibition on soliciting customers, suppliers and other business partners of the divested business or the seller and in this respect are closely related to non-compete clauses concerning the non-competition of the buyer.

In the case of non-compete clauses, it is important to draft the relevant contractual provisions carefully and to ensure that they are respected.

AMENDMENTS TO LAWS CONCERNING TRADING IN STATE TREASURY'S AGRICULTURAL PROPERTY

MALWINA JAGIEŁŁO

JULIA MAJEWSKA

On 5 October, two important amendments came into force: the Act on the Management of Agricultural Property of the State Treasury and the Act on the Structuring of the Agricultural System ("ASAS").

The new regulations will streamline the trade of private agricultural real estate and facilitate the operation of companies in the renewable energy market. This is a response to changing economic, social and environmental conditions in Poland. We look at what has changed.

Exclusion of the application of the Act on the Structuring of the Agricultural System

Previously, the ASAS applied to agricultural properties of more than 0.3 ha, regardless of the area of agricultural land within the property.

The amendment has introduced a positive change in that the ASAS will not apply to agricultural real estate with an agricultural land area of less than 0.3 ha (such area to be determined on the basis of data from the land register).

In other words, the ASAS, including the right of first refusal in favour of the National Support Centre for Agriculture (Krajowy Ośrodek Wsparcia Rolnictwa, 'KOWR'), will not apply to an agricultural property larger than 0.3 ha, as long as the area of agricultural land within such property is less than 0.3 ha.

Pre-emptive right for the National Support Centre for Agriculture

The rules regarding the pre-emptive right enjoyed by KOWR in the case of the sale of shares in a capital company have changed.

The new legislation has introduced the principle that KOWR has a pre-emptive right to purchase shares not only in a capital company that is the owner or perpetual usufructuary of a single agricultural property with an area of at least 5 hectares or of several agricultural properties with a total area of at least 5 hectares, but also in the parent company (within the meaning of the Commercial Companies Code) that holds shares in such a capital company.

This change significantly expands the scope of KOWR's potential involvement in share trading and means that a company's legal due diligence when intending to sell its shares will need to go much deeper. This is in order to eliminate potential pre-emption rights and thus the risk of invalidity of the share purchase agreement.

Renewable energy sources

The amendment to the Act on the Management of Agricultural Property of the State Treasury has introduced facilitations for entities operating in the RES market, including by expanding the list of properties that KOWR may sell or lease to such entities.

The amendments have abolished the previous rule that agricultural real estate is allocated primarily for the expansion or establishment of family farms.

The exemption applies to agricultural properties that consist of at least 70% of non-arable land or agricultural land of classes VI and VIz, leased for the purpose of producing energy from renewable sources and located outside nature conservation areas.

This is a positive change aimed at supporting RES and photovoltaic installations. Previously, KOWR was not able to lease this type of land to renewable energy operators without a tender process.

Other procedural changes

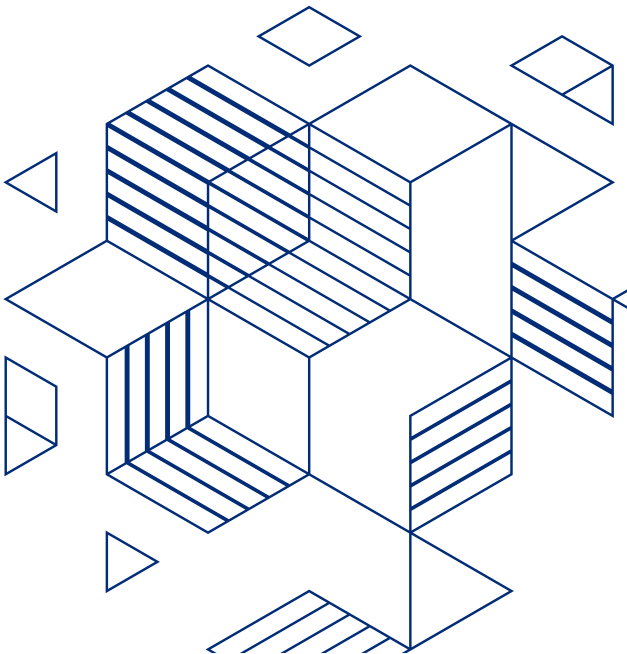
The amendment has also added an additional requirement to the list of conditions for obtaining the approval of the National Support Centre for Agriculture for the purchase of agricultural real estate by a person who is not an individual farmer – the sale price of the agricultural real estate may not be lower than 95% of the price published in the announcement of the intention to sell on the portal erolnik.gov.

In addition, the reform introduced restrictions on the period of validity of the approval of the Director General of KOWR for the acquisition of agricultural property. Previously, the decision, once issued, was binding indefinitely; under the new regulations, it will have an expiry date, i.e. one year from the date on which the decision becomes final.

The provisions on the prohibition of sale and transfer of possession of agricultural real estate to third parties have also been amended.

The act extends the list of properties that are exceptions and can be sold or transferred within 5 years of acquisition. One of these is land for which a local zoning plan has been adopted after its acquisition and in accordance with which the land has been designated for non-agricultural purposes.

The reform will also regulate the level of fluctuation of rents for agricultural property.



ESTABLISHING A RELATIONSHIP WITH CUSTOMERS AT A DISTANCE: IS IT STILL A CHALLENGE OR IS IT ALREADY THE NORM FOR FINTECHS

JAN ZIOMEK

The use of modern solutions to establish business relationships without the physical presence of the customer has become extremely important in recent years, especially in the context of the restrictions caused by the Sars Cov-2 pandemic.

Although such solutions already existed and the Office of the Polish Financial Supervision Authority (UKNF) had issued a position in this regard, it was only the pandemic that prompted financial institutions to take a greater interest in remote identification solutions using smartphones and new technologies (e.g. OCR, ML).

As a result, at least as of 2019, a large proportion of them have implemented video verification solutions for account opening. At the same time, there is a clear trend towards reducing the number of physical branches.

The expectations of the Office of the Polish Financial Supervision Authority – 2019

The UKNF's position paper on the identification and verification of customer identity based on video verification, published in June 2019, clarified the requirements to be met when implementing this form of customer onboarding.

Particular emphasis was placed on:

- Preparing institutions to implement this type of identification
- Analysing the potential risks (in terms of business model, technology and operational risks)
- Possible measures to counter the identified risks

The authors of the paper emphasise that the use of video verification services should be accompanied by the application of enhanced security measures to minimise the risk of misidentification of the customer (e.g. checking the identity against the PESEL (personal ID numbers) or RDO (ID cards register) databases, checking that a person is acting alone).

Clearly, it is the institution that bears the risk arising from the application of the new form of customer identification. Therefore, its implementation should be preceded by a period of testing, training of operational staff in the relevant institutions, extensive consultation and ongoing supervision leading to continuous review of procedures and processes.

UKNF's position paper on proper identification – 2023

It is worth starting at the end of the position paper, where the UKNF expresses its expectation that supervised entities will follow good practices in relation to the use of solutions for the remote establishment of customer relationships.

The UKNF also expects these firms to carry out an analysis of their compliance with the requirements of the position paper and to make appropriate changes to their processes, practices and internal rules without undue delay.

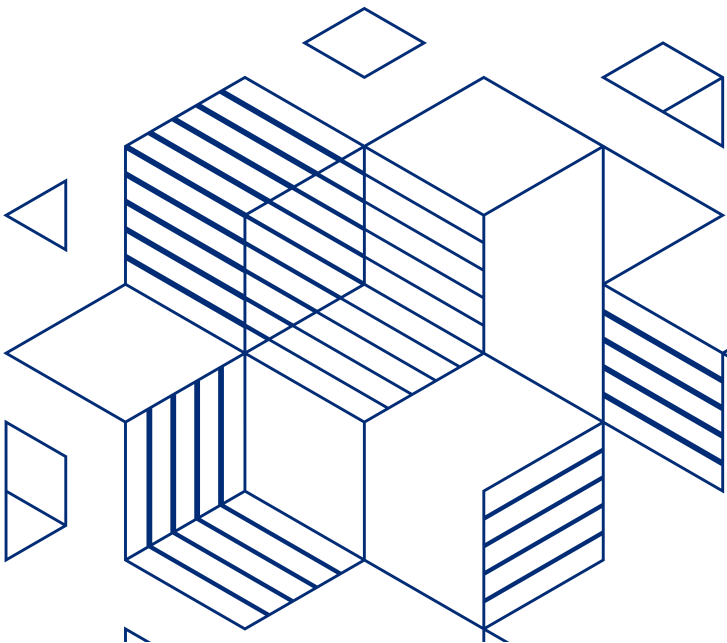
This means that as part of its inspection activities, the Authority has reviewed selected implementations and identified areas for improvement.

Considerable attention has also been given to the ongoing review and updating of policies, strategies and procedures and to the issue of risk analysis and assessment, including the ongoing monitoring of the operation of the customer video verification process.

The role and specific responsibilities of designated managers (AMLRO) responsible for ensuring that the institution's activities comply with the Anti-Money Laundering Act were also highlighted. Such persons should ensure that documents (e.g. procedures, policies, strategies) are effectively implemented, and should review and update them.

Failure to comply with good practices may be a reason for the UKNF to issue recommendations, which may include taking certain measures to comply with the regulations or to reduce risks in the entity's activities. In addition to the issuance of such recommendations, the AML Act provides that a fine of up to PLN 1,000,000 may be imposed on the entity and the AMLRO if the obligations are not fulfilled.

This means that entities using or intending to use video verification tools should review them immediately in order to avoid potential adverse legal consequences.



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'WARZYWNIAK' ACT FOR BUSINESS OPERATORS

ANETA SEROWIK

On 29 September, the Act amending certain acts in connection with ensuring the development of the financial market and the protection of investors ('Warzywniak' Act) entered into force.

The amendment covers 41 acts, including the Banking Act, the Public Offering Act, the Financial Instruments Trading Act, the Bonds Act, the Investment Funds Act, the Payment Services Act, the Capital Market Supervision Act and the Financial Market Supervision Act.

Let's look at the most important changes.

The Banking Law

The Act has introduced a number of changes to outsourcing.

Outsourcers to whom banks have directly outsourced certain activities may now sub-outsource these, subject to the bank's consent.

It is possible to outsource and sub-outsource activities related to the conclusion of contracts not only for cards, but also for other payment instruments or e-banking services.

The list of documents and information to be submitted to the Polish Financial Supervision Authority (KNF) in connection with outsourcing and sub-outsourcing has been extended.

Banks are no longer required to obtain a separate brokerage licence. They may now extend the scope of their activities to include brokerage by amending their articles of association.

The amended Article 141 of the Banking Law allows the KNF to impose fines also on former management and supervisory board members if the violations listed in the said provision were committed during their term of office.

The Bonds Act

The possibility to offer corporate bonds to retail clients outside of regulated markets, alternative trading systems (ATSs) and crowdfunding platforms has been limited.

The minimum nominal value of a bond that can be offered is at least EUR 40,000.

The sale of bonds to retail clients may only take place via investment firms.

The nominal value limit does not apply to bonds admitted to trading on regulated markets or ATSs, which is justified by the greater transparency of issuers on these markets.

The Act has introduced transition bonds, i.e. bonds issued to finance new investments that promote the acceleration of the country's sustainable economic development.

The nominal value of a single transition bond is PLN 1,000 and the maturity cannot be shorter than five years. The bond issue can be made via a public offering.

The total value of the issue, calculated at the issue price, may not be less than PLN 20,000,000 or its equivalent in another currency.

The Investment Funds Act

The amendment has introduced a number of changes to the marketing of alternative investment companies (AICs) to retail clients. As of 29 September, natural persons may be considered professional clients if the value of their AIC contribution is no less than the PLN equivalent of EUR 60,000.

This does not apply to companies listed on regulated markets or admitted to an ATS, as expressly stated in the joint communiqué of the KNF and the MF of 1 September 2023.

It is now prohibited for AICs to enter into loan or other similar agreements with natural persons who are not recognised as professional clients or to issue bonds or other securities that are not AIC participation rights in favour of such persons.

The Public Offering Act

The amended Article 68 of the Act has extended the powers of the KNF to obtain information and explanations, including reports and documents, as part of its supervision of issuers.

The new obligations apply to issuers whose securities have already been delisted and to any entity, other than a supervised entity, that has been or is a party to a contract, transaction or agreement with an issuer or a company seeking admission to trading.

Shareholders are now required to submit a notice of change in the threshold of the total number of votes, as referred to in Article 69(1) of the Act, via the ICT system available on the KNF website. If the system cannot be used, it will be possible to submit the notice via the email indicated on the KNF website.

Article 83a of the Public Offering Act has been amended to allow shareholders holding less than 5% of the total number of votes at the General Meeting to request the buy-back of shares in public companies that have been excluded from trading via sanctions. The right of buy-back is granted to the shareholders of ATS-listed public companies.

As a result of the amendment, special auditors appointed by the General Meeting of public companies pursuant to Article 84 of the Act may now audit not only the public company, but also its subsidiaries. The subject of the audit must be specified in a resolution.

The Capital Market Supervision Act

The Polish Financial Supervision Authority Office (UKNF) has been authorised to disclose information subject to professional secrecy (from inspection reports describing detected irregularities and final administrative decisions) to capital market participants, who are natural persons, for the purpose of pending or planned civil proceedings against a financial institution.

The UKNF may, subject to court approval, disclose information at the request of a natural person requesting the information, provided that the person substantiates their request, demonstrates a legitimate interest in receiving such information, and the information does not relate to third parties who are not parties to the proceedings.

The amendment has also introduced Article 47a, under which the KNF may – by decision – impose a fine of up to PLN 20 million on the person under inspection if that person prevents or obstructs the commencement or conduct of the inspection.

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CERTIFICATION OF ECONOMIC OPERATORS IN PUBLIC PROCUREMENT

DR JAKUB KRYSA

MICHAŁ WARAKSA

According to a report by the President of the Public Procurement Office, the average duration of a procedure for awarding a public contract with a value below the EU thresholds was 40 days in 2022. This is a slight increase compared to the previous year, when the procedure took 39 days, but it is still present.

At the same time, the share of bids from SME economic operators increased in 2022, reaching approximately 81 % (compared to 58 % from the previous year).

In an effort to facilitate and speed up procedures, and to increase the participation of SME economic operators, Polish legislators have decided to start work on the certification of public procurement.

What is the certification of economic operators in public procurement

One of the main activities carried out by contracting authorities in the course of their procedures is the verification of the eligibility of economic operators (qualification). In this context, contracting authorities check whether a given economic operator is subject to exclusion from the procedure and whether it fulfils the conditions for participation (if the contracting authority has specified the latter in its documentation).

For the purpose of verifying eligibility, economic operators are required to provide many different types of documents, such as:

- Certificate of good conduct
- Certificate of no arrears in the payment of taxes and other public charges
- Lists and references
- Self-declarations

The certification of economic operators for public contracts is intended to simplify the verification of eligibility: the certificate will confirm the absence of grounds for exclusion from the procurement procedure or the capacity of the economic operator to perform the contract properly – or both. The scope of the certificate will depend on the economic operator concerned.

The submission of a certificate in a public procurement procedure will be understood as confirming the information contained therein. It should only be possible to challenge this information in the event of 'reasonable doubt'.

In accordance with the bill, certification will be carried out by bodies designated by the minister in charge of economic affairs and accredited by the Polish Centre for Accreditation (Polskie Centrum Akredytacji).

Will the certification of economic operators in public procurement contribute to the development of the public procurement market in Poland, in particular to the simplification and acceleration of procedures and the increase in the number of bids? Only time will tell. However, it seems to be a step in the right direction.

SLAPP: WHAT'S NEW

BARTŁOMIEJ GALOS

MATEUSZ KOC

The EU Council's new measures in the Directive on protecting persons who engage in public participation aim to better protect public participants from manifestly unfounded or abusive court proceedings.

Work on the SLAPP Directive continues and it is difficult to predict when it will be finalised.

One thing, however, is certain – Poles, and primarily those who serve civil society, need regulations to protect their participation in public life more than any other EU citizens, with Poland notorious for leading the pack in the number of SLAPPs filed, according to the CASE Foundation report.[1]

As a reminder, SLAPPs (Strategic Lawsuits Against Public Participation) are frivolous lawsuits brought by public authorities, state-owned companies and entities, most often linked to the executive branch, aimed at stifling criticism and silencing those acting in defence of the public interest.

These actions are designed to have a 'freezing' effect, as those targeted individuals who are active in public life, including journalists, foundations and even influencers – are preoccupied with 'dealing' with often completely unfounded accusations, rather than serving civil society.

Despite the fact that the deadline for transposing the Directive into national law has been set at three years from the date of its entry into force, it is worth noting that there are already positive signals indicating that the draft will not be blocked and will be a real source of harmonisation of existing rules.

One such signal is the request made by the EU Council in May, inviting Coreper to confirm its agreement to the text of the proposal for a new version of the Directive and to recommend that the Council reach a general approach on the text.

Joint EU Council proposal

Article 3 of the draft Anti-SLAPP Directive provides protection for persons concerned with matters of public interest. This means any matter that is of legitimate public interest and relates to areas such as fundamental rights, public health, safety, the environment, the climate or the actions of public figures. This list is illustrative and open-ended.

The Anti-SLAPP Directive aims to effectively combat SLAPPs via introducing specific procedural safeguards in cross-border cases. For the time being, it is only intended to apply to proceedings where the defendant and the claimant are domiciled in different EU Member States.

Article 5 of the Directive provides for common procedural safeguards which are:

- A security for procedural costs required from the claimant
- An early dismissal of manifestly unfounded proceedings by the court
- Procedural costs awarded against the claimant
- The possibility for the court to impose dissuasive penalties or other appropriate measures on parties bringing abusive court proceedings

At the same time, the Council points out that such procedural safeguards should be applied with caution, in line with the right to an effective remedy and to a fair trial as enshrined in Article 47 of the Charter of Fundamental Rights, leaving the court with the discretion to adequately examine the case and thus allowing for the prompt dismissal of manifestly unfounded actions without restricting effective access to justice.

Victims of SLAPPs will be able to claim damages for the harm caused by such conduct.

In addition, in order to make it more difficult for the claimant to choose the court, defamation cases will be decided exclusively by the defendant's national courts to avoid situations where such cases are decided by a more lenient court.

The Directive also requires Member States to ensure that legal practitioners are suitably qualified to deal with SLAPP cases.

The current outlook suggests that this regulatory package contains just the bare minimum to combat SLAPPs. It is now clear that the biggest problem with the draft is its limited impact, with only 10% of cases meeting the cross-border criterion, according to the CASE Foundation report.

This means that those operating in only one state will be deprived of any protection. MEPs are therefore calling for the Directive to be extended to cover national proceedings.[2]

Unfortunately, there are no visible proposals or initiatives in this area in the Polish Parliament. This is certainly worrying, given the above CASE Foundation report.

Polish regulations vs the SLAPP Directive

Polish law provides for adequate instruments to ensure the effective transposition of the Directive, in particular Article 1911 of the Code of Civil Procedure,[3] which was introduced by the 2019 Amendment Act.

The article provides that the court may dismiss a claim in closed session if the content of the claim, its appendices, the circumstances of the case, the facts in the public domain and those known to the court ex officio make it clear that the claim is unfounded.

The explanatory memorandum to the draft Code of Civil Procedure of 2019 states that "a claim should be deemed to be manifestly unfounded if, on the basis of its content, it is foreseeable that it has no chance of being granted, so that it would be a waste of the court's time and work to hear it".

Unfortunately, despite the existence of this provision, its wording is rather unfortunate, as it assumes that the court will decide on the chances of success of a particular claim at the stage of the preliminary examination. This may lead to a breach of the right to a fair trial.[4] In practice, therefore, this provision is rarely applied.

We should also not forget about Article 5 of the Civil Code, which could provide protection for individuals against SLAPPs. In fact, it is not difficult to imagine situations in which the court, upon noticing a SLAPP-type action, e.g. in a case of infringement of personal interests, would find a personal right to be non-compliant with its socio-economic purpose and, on this basis, would dismiss the unjustified action.

In conclusion, the proposed draft Anti-SLAPP Directive is a step in the right direction. However, its entry into force is scheduled for the end of 2023 and its transposition will take a further three years. Faster action by the Council is clearly needed to ensure effective protection against SLAPPs.

The proposed Directive itself could form the basis for a citizen-initiated draft at the national level. Such action would allow a public spirited initiative to be used and implemented without having to wait for European legislation. Unfortunately, however, there have been no signals from MPs or civil society organisations that such solutions are being planned. Considering the statistics, it is Polish citizens themselves who should be interested in such regulations being introduced.

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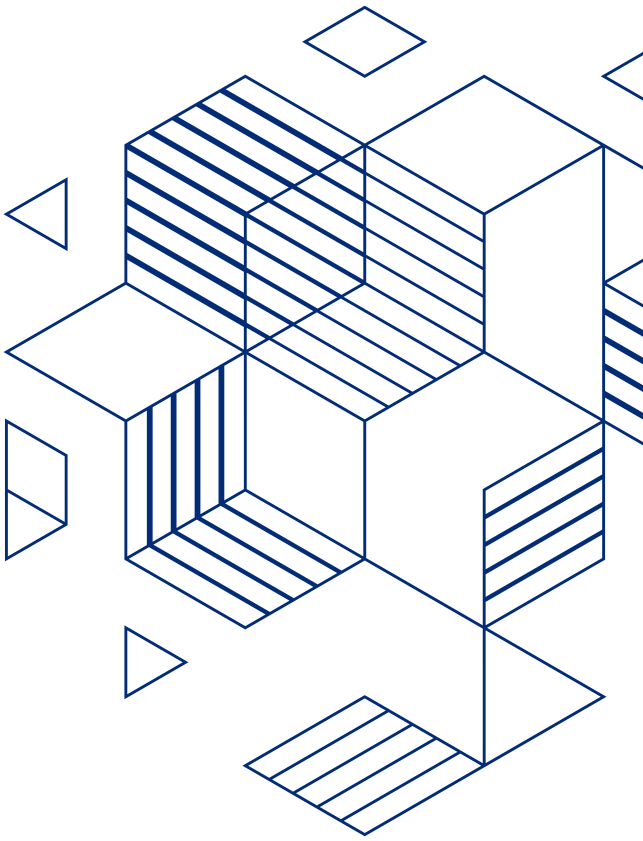
[1] CASE Foundation report/ access date: 02.10.2023
[2] E. Rutkowska, Dziennik Gazeta Prawna, Dyrektywa anty-SLAPP. Trudniej będzie nękać media pozwami/ access date: 03.10.2023
[3] Act of 17 November 1964 – Code of Civil Procedure (uniform text: Journal of Laws of 2023, item 1550, as amended).
[4] O. M. Piaskowska [in:] M. Kuchnio, A. Majchrowska, K. Panfil, J. Parafianowicz, A. Partyk, A. Rutkowska, D. Rutkowski, A. Turczyn, O. M. Piaskowska, Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz aktualizowany, LEX/el. 2023, Article 191(1).
[5]The Civil Code Act of 23 April 1964 (uniform text: Journal of Laws of 2023, item 1610, as amended).



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LEGAL PROJECT MANAGEMENT

WHY YOU NEED A LEGAL PROJECT MANAGER

MAGDALENA PAPIERNIK-KÖNIG

The globalisation of legal services, changing market realities and increasing competition have led to a project-based approach in the delivery of legal services, i.e. Legal Project Management (LPM), a standard in law firms around the world.

This is particularly evident in the UK and the US, but LPM is also gaining ground in continental Europe.

Legal Project Management

LLPM involves the application of project management principles and practices to enhance the delivery of legal services.[1]

LPM is a necessary response of modern law firms to the changing business expectations of clients, particularly in multi-faceted disputes, including international arbitration. Why?

The answer is simple: LPM brings tangible benefits to clients.

LPM: benefits for clients in their dispute resolution process

Legal services deliver real value by meeting expectations on price, time and quality of work, with clients receiving ongoing progress and budget utilisation information. Today's businesses are looking to mitigate the risk of high legal costs and make more informed decisions about whether to proceed with legal action. In times of crisis and spiralling inflation, LPM provides stability and predictability in the cost of quality legal services.

LPM involves a professional expert, a legal project manager, who combines substantive knowledge and experience in a particular area of law with innovative project management techniques, often using the latest technological tools.

Such a manager works within or alongside project teams, ensuring that they adopt best management practices to maximise their efficiency and productivity.

Legal project managers reduce the administrative burden on their teams by carefully planning and monitoring schedules, milestones and risks to ensure operational efficiency.

LPM enables lawyers to work on the most strategic aspects of a case and focus on the elements that create real value for clients and the firm.

The legal project manager: a great asset to clients and their cases

The involvement of a legal project manager ensures a proactive approach to the client's case and needs, with the procedural objectives being agreed with the client and monitored throughout the proceedings.

From the legal project manager's perspective, it is not the verdict that is of most value, but the business rationale and importance of the case to the client and its business interests. For this reason, great emphasis is placed on the transparency and quality of communication throughout the project.

Another benefit is the budget transparency referred to above. Using LPM techniques, the scope of work and the required budget can be more precisely defined, and following from this, processes can be planned to allow an efficiently changing of this scope as the project progresses and the expectations of the parties involved evolve in real time.

LPM guarantees clients continuous budget and resource monitoring throughout the project (dispute) cycle, as well as influence over any changes to the scope of work and risk allocation.

This is particularly important in adaptive disputes, such as international arbitration, where procedural flexibility and the will of parties often lead to changes in the original scope of work or even in the key assumptions agreed with the client.

Similar benefits can be seen in any multi-faceted dispute that is cross-border, involves a number of stakeholders (often from different jurisdictions) or requires the active involvement of the client and its law firm or the cooperation of lawyers from different law firms.

In addition, shared familiarity with project methods and techniques facilitates mutual communication and increases the efficiency of working with clients and other organisations. This is particularly appreciated by clients for whom project work is an organisational standard.

Every dispute, including international arbitration, should be viewed as a project that requires a full assessment of the expectations and objectives of parties and other stakeholders, whose proper management, including appropriate project team leadership, will enable those objectives to be achieved most effectively.

LPM at Kochański & Partners

The use of LPM techniques and methods in disputes enables real time and cost savings to be made during proceedings (whether litigation or arbitration). It also ensures that the objectives of the proceedings and the expectations of the client, who is a party to the proceedings, are met.

As one of the first in the market, our Dispute Resolution Practice offers a comprehensive management of pending litigation and arbitration proceedings with a project-based approach.

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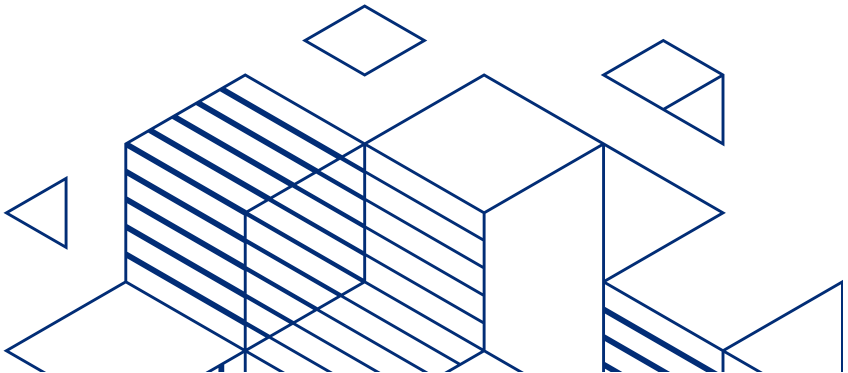
[1] This definition is most often referred to by the International Institute of Legal Project Management; "IILPM".



TAX AUTHORITIES SCRUTINISE SERVICES PROVIDED BY MANAGEMENT BOARD MEMBERS

MIROSŁAW MALCZESKI

JAN JANUKOWICZ

Management board members who also provide services to companies need to exercise caution, as the tax authorities have changed their previous positive attitude and are increasingly refusing to issue tax rulings for this type of arrangement.

The Director of the National Revenue Administration Information Centre (KIS) is now frequently refusing to issue tax rulings regarding the taxation of non-management services provided to a company by its management board members acting as sole traders.

Taxpayers are appealing against the refusals, and the cases end up before administrative courts. And the courts, to the surprise of the taxpayers, are upholding the decisions of the Director of the KIS. We examine the possible consequences for taxpayers of such a 'line of jurisprudence'.

Change in the approach of the National Revenue Administration Information Centre

Firstly, it is important to consider who may be affected by this situation. The circumstances in which the Director of the KIS is refusing to issue a tax ruling have certain common elements, namely:

- The applicants are natural persons running sole proprietorships
- The applicants wish to change the form of taxation of their business to tax on registered revenue without deductible costs
- The applicants are shareholders and management board members of capital companies to which they will provide services as sole traders

This raises the question of why the KIS is refusing to issue tax rulings in such clearly defined circumstances. The main reason seems to be that the scheme in question results in tax advantages for both the board members and the company itself.

The authorities state that the amount of the actual dividend, which is subject to the 19% flat-rate income tax, is reduced.

In return, this 'reduced portion' will be paid to the applicant in the form of remuneration for the provision of services under a B2B contract, which will be taxed, by way of a tax on registered revenue without deductible costs, at a rate that is always lower than the above-mentioned 19% (e.g. 15% for consultancy services or 8.5% for service activities, sales intermediation, etc.).

The tax advantage will also accrue to the company itself. Since the company will benefit from the services provided by the sole trader (the applicant) and will pay them remuneration for these services, this remuneration will constitute a tax-deductible cost.

In summary, the reason for refusing to issue a tax ruling is the suspicion that the activities in question are aimed at tax avoidance.

Refusal procedure

A refusal to issue an advance tax ruling on the basis of a reasonable suspicion of tax avoidance requires a prior request to the Head of the National Revenue Administration (KAS) for an opinion on the matter. Importantly, the Director of the KIS is bound by such an opinion and may not issue a tax ruling if the Head of the KAS confirms that the actions taken or planned may be aimed at tax avoidance (which happened in some of the cases that were the subject of a tax ruling request).

This is also the reason why the courts approve of the actions of the Director of the KIS, pointing out that the provisions on issuing tax rulings are structured in such a way that the opinion of the Head of the KAS is binding on the authority issuing tax rulings, with the latter then being unable to take any action other than refuse to issue a ruling.

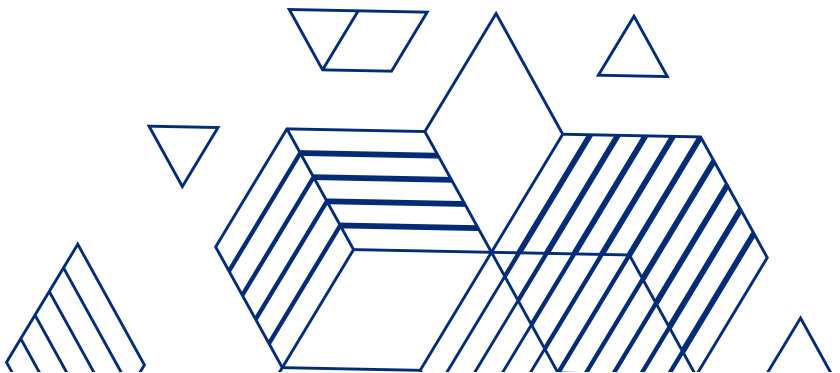
What does this mean for taxpayers?

It should be noted that no hasty conclusions should be drawn from the aforementioned judgments. First and foremost, it is still possible for board members to provide non-management services to the company in which they exercise their functions, on the basis of a B2B contract concluded as sole traders, and the tax rulings obtained to date in this respect remain in force.

In addition, tax rulings may still be requested to confirm the tax treatment of such a cooperation model.

However, taxpayers who are members of the management board and at the same time shareholders of the company should exercise caution, especially if they provide services to the company that are subject to tax on registered revenue without deductible costs.

In their case, the provision of non-management services on the basis of a B2B contract is in principle also permissible if there is a predominant economic or business justification for doing so. However, it will not be possible to secure the applied tax treatment by means of a tax ruling, as has been the case up to now.



In order to exclude the possibility of application of a tax avoidance clause, taxpayers should consider applying to the Head of the KAS for an advance protective opinion, which is a more time-consuming and costly procedure than a standard application for a tax ruling (requiring up to 6 months to obtain the opinion and a fee of PLN 20,000).

However, without such an opinion, there is a risk that the service model used may be challenged in the future on the basis of a tax avoidance clause (GAAR). In addition, depending on the fulfilment of other conditions (apart from the tax advantage, which is beyond question), these taxpayers may also be required to notify the cooperation model as an MDR scheme.

Conclusion

In conclusion, the situation outlined above should not generally be a cause for concern for board members or managers who are not also shareholders in the company to which they provide services under a B2B contract.

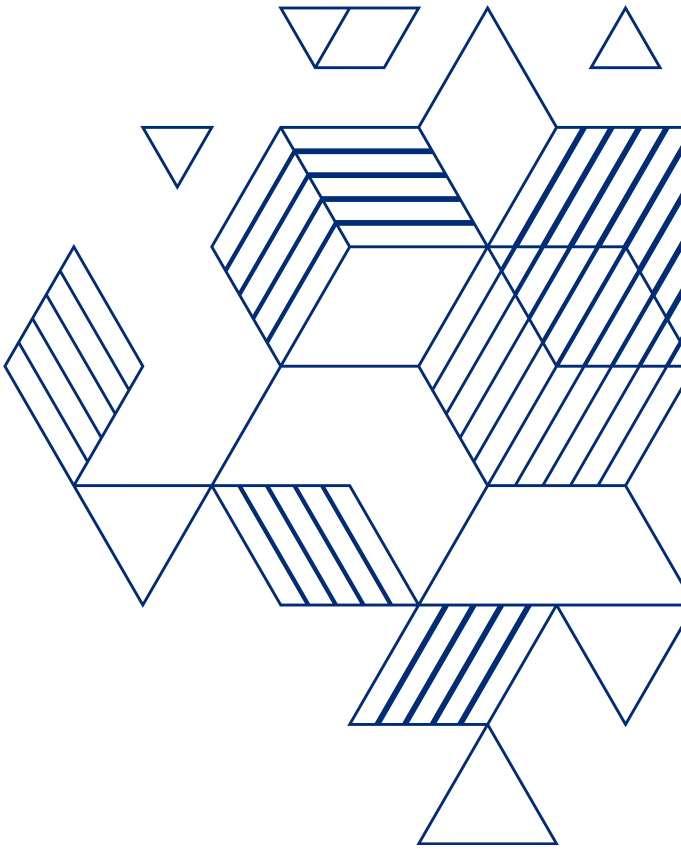
However, it does show that the increasing number of managers who switch to providing services under B2B contracts is accompanied by a greater interest on the part of the tax authorities in the legitimacy of the use of this form of cooperation.

Therefore, particular attention should be paid to the justification of such a switch, to the correct separation of the services provided on this basis from the management services and to their documentation.

It should also be remembered that, in the case of individuals related to the company (e.g. management board members), the value of the services provided should correspond to the market price.

On the other hand, board members who are also shareholders and who provide B2B services to the company, in particular those subject to tax on registered revenue without deductible costs, should review the commercial/economic justification for such separation of services from the company's structures, review their obligations regarding MDR and consider requesting an advance protective opinion from the Head of the KAS.

In certain situations, it may also be appropriate to change the existing cooperation model.



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