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THE RIGHT FOCUS

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GREEN LEASES IN THE CONTEXT OF THE REAL ESTATE MARKET AND ESG

MALWINA JAGIEŁŁO

JULIA MAJEWSKA

According to the Polish Green Building Council, the use or operation of buildings accounts for around 40 % of global energy consumption and 36 % of carbon dioxide emissions, making this a major factor in greenhouse gas emissions.

The real estate industry is one of the world's largest energy consumers and accounts for a significant proportion of total energy consumption.

In order to address this issue and steer Member States towards a green transformation, the European Union has adopted a number of legislative measures and policy initiatives related to environmental, social and corporate governance (ESG) issues.

One of the elements of this strategy which real estate market players, including primarily commercial property owners, have been obliged to implement is the creation of so-called green leases.

What are green leases

Green leases are standard leases with additional provisions on ESG issues. The 'green' clauses are either included directly in the agreement, or are drawn up in annexes setting out the framework for parties working together towards the sustainable use of the property.

For many operating in this market, sustainability is already a key part of the business, and as a result green leases are becoming increasingly popular. However, such leases are not yet legally regulated in any way, and there is also no established standard for drafting such clauses.

In contrast, other European countries, such as Germany, the UK or France, already have standardised rules that can be used as a benchmark for green leases. Some governments also use various types of incentives to encourage parties to enter into green leases. This is the case in Belgium, for example.

However, it is clear that green leases are also becoming more popular in Poland. There are also many signs that such leases will become standard in the property market in the future.

The will of the parties and green financing

As there is no standard for green clauses, their content and insertion in agreements depends entirely on the will of the parties and their intention to cooperate. Practice shows that the approach to this issue varies widely.

Green clauses are usually drafted and included in the lease at the initiative of the landlord, i.e. the building owner. However, some tenants, particularly global corporations, have developed their own list of provisions that should or must be included in the lease, according to their group policies. This is largely due to the non-financial reporting requirements introduced by the CSRD as part of the implementation of the EU Green Deal.

Landlords, on the other hand, are keen to 'green' their leases. This is not only because of reporting, but also due to increased competitiveness and the possibility of obtaining so-called green financing linked to sustainability. This depends precisely on the use of green clauses in agreements, and property finance banks often specify ESG requirements and can refuse financing to those who do not meet them.

How green is your annex? 'Light Green' vs 'Dark Green' clauses

In terms of binding force, two types of green clauses can be distinguished. These are light green clauses, which are basically just a declaration of the parties' willingness to apply green clauses without imposing sanctions for non-compliance, and dark green clauses, which have the nature of obligations and impose specific responsibilities on the parties with the risk of sanctions for any non-compliance.

At present, it appears that in most leases the parties limit themselves to the light green variety. Perhaps this is because there is not yet a developed market standard for obligations relating to the sustainability of real estate, so that parties work out green clauses through dialogue rather than imposing them.

The most common green clauses in leases

As green clauses in leases are not common, their content may be specific to a particular industry, type of property or even region.

Typically, green clauses refer to provisions relating to ecology or sustainability. From our practice, it appears that the greatest attention is paid to the introduction of environmentally friendly practices and the promotion of measures to protect the environment.

Several main categories of green clauses are beginning to appear in leases. These are:

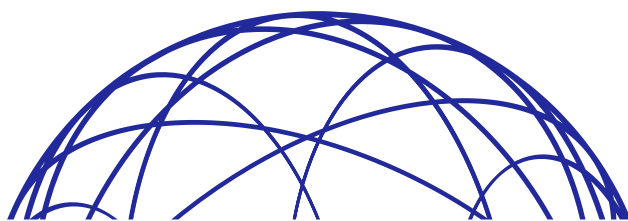
Green building certification

It has become almost standard in the commercial property market for a building to have a common energy certification such as LEED, BREEM or WELL. A green certification indicates that the building was designed and constructed with environmental criteria, energy efficiency, indoor air quality and other sustainability factors in mind.

Interestingly, in 2022, Poland had as many as 1,100 eco-buildings[i], making it the leader in Central and Eastern Europe in terms of property certification.

Reducing greenhouse gas emissions / energy efficiency

Reducing greenhouse gas emissions/energy efficiency - green leases often include provisions for the use of energy-efficient solutions such as solar lighting, thermal insulation or low energy heating systems. In addition, landlords are increasingly carrying out energy monitoring and carbon assessments, requiring tenants to provide information on their water and energy consumption, waste generation or the data needed to produce a carbon footprint.



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This sometimes causes controversy among tenants who do not understand the basis for such an obligation. On the other hand, tenants often expect landlords to introduce eco-friendly solutions, such as the installation of charging points for electric vehicles, which may require large investments that are not included in landlords' budgets.

This is why dialogue and awareness of the mutual benefits of optimising energy consumption are so important.

Waste management / closed-loop economy

Green clauses aim to minimise the consumption of raw materials, reduce the amount of waste produced and maximise the use of resources. The most common provisions in this area are, of course, commitments by the parties to systematic and appropriate waste management and recycling.

We also often see provisions encouraging the repair and maintenance of equipment or systems rather than their complete replacement, thereby promoting their long-term use. There are also leases where the parties encourage each other to use furniture and equipment made from recycled materials and to use local suppliers, which helps to reduce the environmental footprint by, for example, reducing transport.

Fit-out

Although it has long been market standard to take the materials and equipment used in the fit-out of pre-owned premises into consideration, there is now an increasing tendency to regulate this issue in the lease. Depending on the particular situation, either party may want this, e.g. the tenant, if the landlord is preparing the premises for the tenant's needs, or the landlord, if the tenant is the one who will be renovating or modernising the premises.

The parties often stipulate in the lease that the contractors carrying out fit-out work must use materials that are considered to be environmentally friendly and energy efficient, taking into account a life cycle assessment.

They also refer to various EU directives (e.g. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment) or to ISO standards (e.g. Type I environmental label as defined in ISO 14024). Landlords often indicate to tenants which materials are safe for health and the environment and which must or should be used, for example, when renovating a premises

Green leases are good for everyone. Landlords, tenants and the environment

Including green clauses in leases is good for the environment and good for business. This is because it helps to create a more sustainable and friendly place to live and work. However, we find that despite the growing popularity of green leases, economic and financial issues are often a source of contention between landlords and tenants in the drive to meet ESG requirements.

Tenants may argue that they need to generate additional funds to meet the requirements introduced by green clauses, and the reverse is also often true - landlords need to budget for adapting buildings to a changing world. Indeed, today's tenants are increasingly environmentally aware and tend to choose properties whose owners are committed to sustainability initiatives. This is why dialogue between the parties and the development of an acceptable compromise is so important.

The commitment of the parties (especially the landlord) to implement educational programmes for staff and tenants to promote sustainable property practices is also very important, as even the best written clauses will not produce the desired results if they are not applied in practice.

[1] Report: Certyfikacja zielonych projektów w liczbach – 2021

EU GREENWASHING BAN MOVES CLOSER

JOANNA BARBRICH

Customers, investors and business partners are increasingly interested in products and services that respect the environment. This is driven not only by their own convictions, but also by legal requirements. But at the same time, the phenomenon of greenwashing is on the rise.

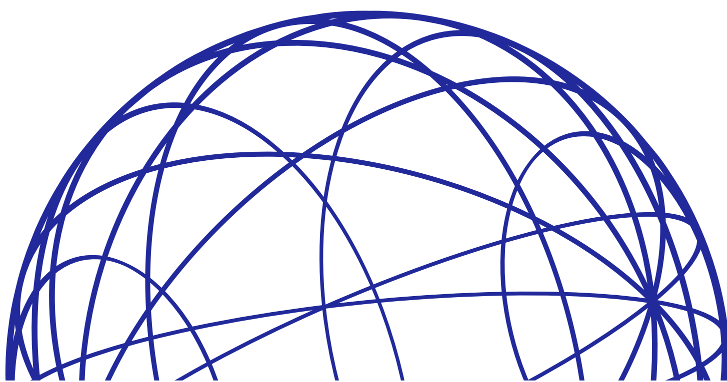
What is greenwashing and how to combat it effectively

Greenwashing is the unsubstantiated claim that a product or service is environmentally friendly, produced in an environmentally safe way, in harmony with nature, or less harmful to the environment. This phenomenon can apply to any activity, such as communication, ambiguous labelling or packaging.

According to research conducted by the European Commission, a significant proportion - that is, more than 50% - of claims across the EU contain unclear, misleading or unsubstantiated information about the environmental properties of products, and as many as 40% are completely unsubstantiated.

In September this year, the European Parliament and the Council of the European Union reached a preliminary agreement on new rules that will guarantee consumers reliable product information and ban misleading advertising.

The aim is to protect consumers from misleading practices and help them make better choices by introducing truthful and verifiable metrics.



European Union fights greenwashing – what will be banned

Parliament and Council have decided to prohibit the following:

- Generic environmental claims, such as "environmentally friendly", "natural", "biodegradable", "climate neutral" or "eco", without proof of recognised excellent environmental performance relevant to the claim
- Commercial communications about a product with a feature that limits its durability if information is available on the feature and its effects on the durability;
- Claims based on emissions offsetting schemes that a product has a neutral, reduced or positive impact on the environment
- Sustainability labels not based on approved certification schemes or established by public authorities
- Durability claims in terms of usage time or intensity under normal conditions, if not proven
- Prompting the consumer to replace consumables, such as printer ink cartridges, earlier than strictly necessary
- Presenting software updates as necessary even if they only enhance functionality features
- Presenting goods as repairable when they are not

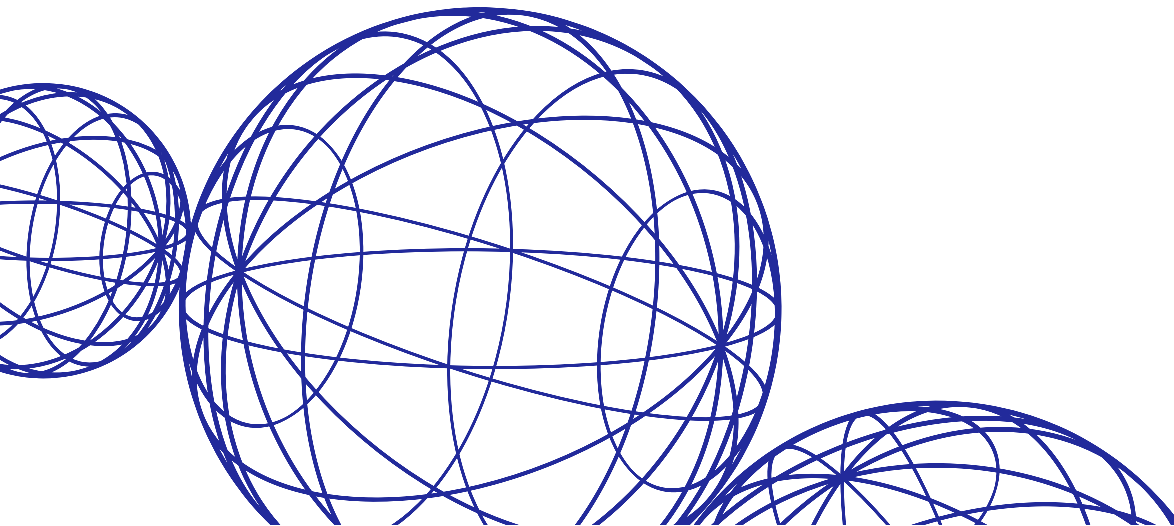
It is likely that the agreement will be put to a final vote in November and will receive final approval from both the Parliament and the Council. Once the directive enters into force, Member States will have 24 months to incorporate the provisions into national law.

UOKiK one step ahead of the European Union

This year, the President of the Office of Competition and Consumer Protection (UOKiK) has launched several investigations into whether companies using environmental claims in their marketing communications may be harming the collective interests of consumers.

The President of the Office is collecting evidence to evaluate the actions taken.

For harming the collective interests of consumers, companies may be fined up to 10% of their turnover in the financial year preceding the year in which the fine is imposed Separately, the President of UOKiK may impose a fine of up to PLN 2 million on a person managing a business who intentionally harms the collective interests of consumers.



DEFENCE-SIDE LITIGATION FINANCE

DOMINIKA DURCHOWSKA

Third-party funding (TPF) has been used successfully in arbitration and litigation for many years, and in our experience, has recently been increasingly used by Polish companies.

What is it all about?

In a nutshell, TPF is the payment by a specialised investment fund of costs related to the proceedings.

Third-party funding in practice

Before deciding whether or not to fund a case, the fund considers the risks involved in the dispute and assesses the likelihood of winning. If it decides that the likelihood of winning is high and the risk is limited, it will cover the costs of the proceedings in return for an agreed fee (which may be a multiple of the amount invested or a percentage of the amount awarded).

Third-party funding minimises the economic risk for the company in dispute. In fact, the company does not bear the costs of the litigation, even if it loses. Funding also has another important benefit. Often the mere information that litigation funding has been obtained can induce the opponent to change its position and settle.

Third-party funding is most often considered from the perspective of the claimant, i.e. the entity initiating the proceedings.This is because the claimant, when deciding to commence a dispute, takes into account the need to incur costs and secures its own funds in advance or makes use of external funding.

The situation is very different for the defendant, who is often surprised by the prospect of years of expensive litigation. Regardless of whether the other party's claim is justified, the defendant must quickly find the resources to successfully defend its rights.

Litigation funds – support for the defendant

Defence-side litigation funding, although increasingly common, is still the exception rather than the rule. There are two reasons for this.

The first is a lack of awareness - defendant companies simply are not aware of the possibility of obtaining funding from litigation funds. The second is that defendants have to meet additional conditions. This is because it is not enough for the fund to believe that the chances of a successful defence outweigh the risk of losing the case. The funding structure is somewhat more complicated and requires more creativity in identifying potential sources of profit for the fund.

Who can benefit from third-party funding

In what situations can defence-side funding be used? Most commonly, when the fund will be able to receive remuneration as a result of monetising the defendant's success. There are many examples of such situations.

In our experience, funding can be obtained by a defendant who has a legitimate and substantial counterclaim against the claimant. Another example would be disputes over revenue-generating assets and rights, such as property leases or intellectual property rights.

Funding may also be available, for example, in disputes over shareholdings in companies, multi-year exclusive distribution agreements, energy supply contracts or intellectual property rights. Funds are also interested in disputes over the establishment of rights to an asset of significant value.

ARTIFICIAL INTELLIGENCE
A GLOBAL COMMITMENT TO SAFE AND RESPONSIBLE INNOVATION

MACIEJ KURANC

Artificial intelligence (AI) permeates every aspect of our lives, from everyday communications to global security systems.

The interest of leading countries in AI issues in this era of digital transformation is no coincidence but reflects the growing awareness that AI is not only a technological breakthrough, but also a catalyst for change in many areas of social and economic life.

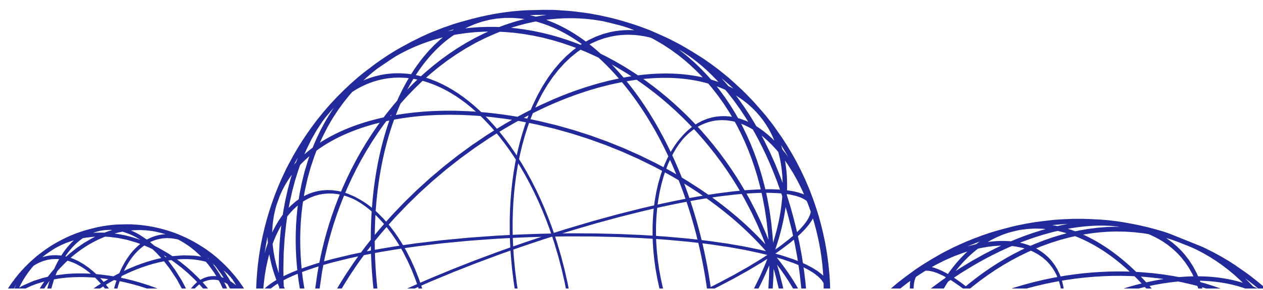
This is evidenced by recent events such as the AI Safety Summit or the resolutions on advanced AI systems adopted by the G7 in Hiroshima. This trend is also confirmed by intensive regulatory work, including the AI ACT, which has been in the works for some time.

World leaders speak with one voice on the risks of artificial intelligence

The G7 recently published two documents aimed at harmonising the approach to advanced AI systems: the 'Guiding Principles for Organisations Developing Advanced AI Systems' and the 'Code of Conduct for Organisations Developing Advanced AI Systems'.

The position developed by the Group is based on eleven fundamental principles, which emphasise:

- The need to identify and mitigate risks associated with AI
- Transparency of AI vulnerabilities
- Incident reporting
- Investment in cybersecurity; and
- Protection of personal data and intellectual property



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At the beginning of November, the AI Safety Summit 2023 took place in the UK, bringing together politicians, representatives of leading AI companies, social organisations and researchers from nearly 30 countries in Europe and around the world.

Experts discussed the risks of artificial intelligence and how to effectively mitigate their impact through coordinated international action.

Summit participants also adopted the so-called Bletchley Declaration, which underlines the urgent need to identify and address AI threats. The document notes the importance of security, transparency, accountability and privacy in relation to AI. The declaration also highlights the need for international cooperation to minimise risks and harness the potential of AI for the public good, in line with the UN Sustainable Development Goals.

The organisers, who are particularly keen to develop global dialogue and concrete work on AI security, are announcing further meetings and events on the topic.

European Union announces regulation of artificial intelligence

Meanwhile, work on the European Union's AI regulation, known as the AI Act, is approaching a critical point.

Following recent negotiations, which focused on the issue of classifying high-risk AI systems, a further meeting is planned for December to finalise the shape of the regulation.

Discussions are expected to include the use of AI by law enforcement, prohibited practices in the use of AI, and potential impacts on fundamental human rights and the environment.

The issue of remote biometric identification is controversial and the positions of the various negotiating parties continue to diverge.

What aspects of AI need special attention

Looking at the work on AI ACT to date, several key areas emerge, such as:

- Accountability of decisions made by AI systems
- Transparency and explainability of algorithms
- Data protection and privacy

More recently, however, the issue of security has come to the fore, as reflected in an executive order issued by US President Joe Biden.

The order includes a call for the creation of new security standards, requiring companies developing AI systems to share the results of security testing with the US government.

The decisions that will be made in the coming weeks will have a significant impact on the global approach to the technology and the future direction of AI.

The Bletchley Declaration, the findings of the G7 and the US government's order show that security is an integral part of the innovation process, and the most important aspect to emerge from the work and discussions on AI is the need for a balanced approach to new technologies. One that promotes the development and implementation of novelty on the one hand, and addresses security and its ethical, social and legal aspects on the other.

LEGAL FRAMEWORK TO PROTECT 3D PRINTED DESIGNS MOVES CLOSER

TOMASZ SZAMBELAN

The EU Council recently adopted a position on the proposed revision of the Directive on the legal protection of designs.

Why is this important?

Because the new law will govern the protection of industrial designs produced by 3D printers, which are increasingly being used in virtually every sector of the economy.

Change driven by progress

3D printers can now be used to print almost anything: food, clothing, simple or highly complex spare parts, houses, cars and even human organs. 3D printers are even being used to build space rockets.

However, uncertainty over interpretation makes it difficult to determine who should own the rights to the industrial designs produced by these machines.

An industrial design is the external appearance of a product, and one of the main factors influencing consumers' decisions to buy a product is how attractive it looks. There is no doubt that a good, original and eye-catching design is an important competitive advantage and adds significant value to a product. The purpose of the proposed Directive and Regulation will therefore be to update the existing legislation.

This is all the more necessary as the current legislation is nearly 25 years old (with the Directive and Regulation dating from 1998 and 2002, respectively)! The revision also aims to simplify the procedure for registering designs at EU level and to introduce greater procedural harmonisation between the European and national systems.

The main idea behind the draft Directive is the rapid popularisation and growth of 3D printing, driven by both the advancement of the technology itself and the possibility of using the platform for new projects.

The 3D printing market is expected to grow by more than 30% per year over the next 10 years, reaching a value of ca. USD 8 billion by 2033.[1]

Broad regulatory needs

One of the consequences of this dynamic growth is the challenges facing design right holders today, such as preventing the illegal and easy copying of their protected intellectual property.

The aim of the new legislation, which would meet the interests of the parties concerned, would be to make it clear that the creation, downloading, copying and distribution of any media or computer software capturing the design in question for the purpose of making a product infringing the protected property is tantamount to requiring the authorisation of the owner.

It can be assumed that the legislative work that has begun is the beginning of a whole series of changes relating to the determination of who owns the rights to a product printed with a 3D printer. We should not forget about software developers, entities printing a certain product or producers of raw materials for printing. No doubt they would also like to share in the rights to the printed products and the potential profits.

The full 3D printing market report is available here

ERROR AS A DEFECT IN A DECLARATION OF INTENT

ADAM CZARNOTA

The Civil Code provides for a number of situations in which a defective declaration of intent is invalid or its effects can be avoided. These include ignorance or lack of freedom when making the declaration of intent, the ostensible nature of the declaration or a situation in which the declaration was made as a result of an error, deception or threat.

The conditions for the occurrence of a specific defect are strictly defined in the regulations and, depending on them, the declaration of intent will either be invalid or the person making the declaration of intent will be able to avoid its effects. Below is a brief analysis of the reasons why a declaration of intent may be considered to have been made in error.

No legal definition of error

The law does not provide a legal definition of error, but refers to the colloquial understanding of the word. An error as a defect in a declaration of intent consists in a misconception or lack of understanding on the part of the person making the declaration of intent, whether as to the content of the declaration of intent made or as to the actual state of affairs.

An error therefore means a discrepancy between reality and its reflection in the mind of the person making the declaration of intent. For an error to be considered a defect in a declaration of intent, two conditions must be met: the error must be material and it must relate to the content of the transaction.

The right to avoid a declaration of intent does not apply to every type of error, but only to subjectively and objectively material errors.

Subjective and objective assessment of the materiality of errors

The subjective materiality of an error is assessed by considering how material the provision to which the error relates is to the person making the declaration (in most cases, an error relating to the characteristics of the subject matter of the performance will be material).

The objective assessment of materiality boils down to a consideration of whether, in the same circumstances, a reasonable person would have made a declaration of intent with the same content if they had not acted under the influence of the error.

It is irrelevant whether the error relates to facts preceding or accompanying the transaction or to its effects. The misconception of the person making the declaration of intent may therefore relate to any element of the transaction. It may be an error as to the facts or an error as to the law. In order for the error to have legal significance, the person making the declaration of intent must be under its influence at the time of making the declaration.

It is important to note that an error may not be invoked if the person making the declaration of intent did so in a reckless manner, i.e. did not exercise due diligence in examining the factual circumstances, e.g. did not read the contents of the documents to be signed.

Declarations to third parties

The rule providing for the possibility of avoiding a declaration of intent made under the influence of an error is, however, subject to limitations in a situation where the declaration of intent was made to another person. In such a case, its legal effects can only be avoided if the error was caused by that person (even if it was not their fault), or if that person was aware of the error or could easily have noticed it.

It should be noted that if a declaration of intent is made to a third party, the avoidance must be made in writing. It is also important to observe the statutory time limit, i.e. one year after the discovery of the error at the latest.

INVALIDITY OF A TRANSACTION VS. DEDUCTION OF VAT

JAKUB DITTMER

JAN JANUKOWICZ

According to the Supreme Administrative Court (Naczelny Sąd Administracyjny, NSA), a taxable person may not be deprived of the right to deduct VAT simply because a legal transaction is invalid from a civil law perspective.

In this article, we will try to explain the NSA's decision and what it means for taxpayers.

Right to deduct VAT

On 7 September 2023 (I FSK 897/19), the NSA ruled that transactions that are invalid under civil law due to non-compliance with form requirements may be subject to VAT. The NSA pointed out that it is the economic aspect of the transaction that is decisive, and not compliance with civil law.

The current NSA judgment is a consequence of the CJEU judgment of 25 May 2023 (C-114/22). In the latter, the Court of Justice stated that that authorities may not refuse the right to deduct VAT on the grounds of the fictitious nature of an economic transaction or a breach of civil law, unless they prove that certain conditions are met, i.e. that the transaction is to be regarded as fictitious or, in the case of a transaction actually carried out, that it is the result of VAT fraud or an abuse of the law.

Decision of the Revenue Administration Chamber on a contract concluded 'with oneself'

The case concerned a lease entered into between a limited liability company and a married couple who owned a plot of land. Crucially, the spouses have joint ownership of assets and, at the same time, are the sole shareholders of the company and, as members of the Management Board, with the sole power to represent the company.

The Director of the Revenue Administration Chamber (Izba Administracji Skarbowej, IAS) noted that the building permit had been issued in favour of natural persons who were both the owners of the land and the sole shareholders of the company.

In addition, the Director of the IAS noted that the source of financing for the transaction was the own funds of the shareholders of the company, who were also the owners of the land, and that the transaction itself did not make economic sense. Therefore, he denied the company the right to deduct input tax.

In our opinion, the tax authorities' refusal of the right to deduct input VAT is based on two grounds. First, the authorities argued that the lease agreement, having no economic sense, was contrary to the rules of social conduct, since the company, while bearing the cost of leasing the property, would not receive any remuneration for the construction of the building, which was an investment of the spouses. As a second argument, the authorities contested the lease agreement, pointing out that it had been concluded with 'oneself'.

Invalid civil law transactions may have VAT consequences

As a basis for denying the right of deduction, the authorities referred to Article 88(3a)(4)(c) of the VAT Act, which states that taxable persons may not reduce the amount of tax due if an invoice issued confirms activities to which Articles 58 and 83 of the Civil Code apply - in the part relating to those activities.

Article 58 of the Civil Code provides for "nullity" in cases where a legal transaction is contrary to the law, is intended to circumvent the law or is incompatible with the rules of social conduct. Article 83 of the Civil Code, on the other hand, defines a legal transaction that is deemed to have been made under false pretences.

The NSA rightly pointed out that the issue of deducting VAT on transactions affected by a legal defect under civil law has been the subject of CJEU case law. Moreover, the NSA's reasoning was based on a CJEU judgment (C-114/22), according to which taxable persons cannot be deprived of the right to deduct input VAT merely because a transaction is considered to be fictitious and invalid under national civil law and not at the level of EU legislation.

The operative part of the CJEU judgment was based on the principle of neutrality, which is a fundamental principle of the common VAT system.The CJEU pointed out that, in order to deny taxable persons the right to deduct input tax, the authorities must prove that the transaction in question was carried out in connection with fraud or abuse.

According to the CJEU, it is one thing to abuse a right in order to obtain a tax advantage under VAT and another to carry out a transaction that is invalid under national law. Therefore, if the transaction has in fact been carried out, the authorities cannot deny the right to deduct input tax.

In addition, it is for the tax authority to prove that a taxable person has committed fraud and that the transaction itself is the result of such fraud. Only if the tax authority proves that the transaction is artificial or does not reflect reality within the meaning of EU legislation is it entitled to deny the taxable person the right of deduction.

From the perspective of VAT regulations, it is not the civil law conformity of a transaction that is decisive, but its economic aspect – a transaction that is invalid under civil law may have VAT consequences and thus a taxable person may be entitled to deduct input VAT, provided that the goods or services purchased have been used to carry out taxable transactions.

What does this mean for taxable persons?

The NSA's judgment confirms the changing trend in case law initiated by the CJEU. This may lead to a change in the provisions of the VAT Act. The key question, however, is what form this change may take.

There are two scenarios: either the lawmakers develop new definitions of the terms "fictitious transaction" and "transaction invalidity" for the purposes of tax regulations, or refer to the definition contained in EU legislation.

Nevertheless, it should be borne in mind that each case is different and requires detailed analysis. Our tax team can provide full assistance in this area.

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