THE RIGHT FOCUS

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ANOTHER VERSION OF THE WHISTLEBLOWER BILL IS NOW BEFORE THE SEJM

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The 8th of January saw the submitting to the Sejm of a further bill on the protection of whistleblowers. The bill is intended to implement Directive 2019/1937 of the European Parliament and of the Council (EU) of 23 October 2019.

As the deadline for aligning Polish legislation with EU law expired more than two years ago (i.e. on 17th December 2021), the Ministry of Family, Labour and Social Policy (which drafted the bill) requested that the bill be considered as a matter of urgency. The consultation phase is currently underway, and social organisations and the Ombudsman, among others, have already presented their positions.

Let us take you through the main changes in the new bill.

Limited requirements for becoming a whistleblower

Compared to the previous version of the act, the list of persons entitled to protection in connection with their reporting or public disclosure of irregularities, i.e. the so-called whistleblowers, has not changed. What has changed are the conditions for such protection.

Whistleblowers will be able to benefit from the protection if they have reasonable grounds to believe that the information they provide:

- Is true at the time it is reported or publicly disclosed; and
- Evidences a breach of the law

However, having reasonable grounds to believe that the information relates to the public interest will no longer be a requirement for potential whistleblowers to qualify for protection.

Reduced time limits in internal reporting procedures

Internal reporting is the oral or written communication by a whistleblower of a breach of law, reported to a business with at least 50 people working for it (literally: "persons performing or providing work for the business"). At the same time, the bill does not further clarify the definition of such persons.

This threshold does not apply to undertakings engaged in:

- Financial services, products and markets
- Prevention of money laundering and terrorist financing
- Transport safety
- Protection of the environment

which fall within the scope of the Union acts listed in Parts I.B and II of the Annex to the Directive.

Within one month of the act coming into force, companies will be required to develop internal reporting and follow-up procedures. These procedures will be set out in internal company documents in accordance with the detailed rules set out in the legislation.

In addition, companies will be obliged to consult the trade unions or representatives of persons providing work on the content of these procedures within a period of not less than 5 days and not more than 10 days from the date on which the draft was submitted to them. The internal reporting procedures will enter into force 7 days after they have been made known to the persons performing work, in the manner customary to the employer concerned.

Businesses will still have an obligation to keep records of breaches and will be the controllers of the personal data in those records.

Modified procedure for external reporting

External reporting occurs when a whistleblower reports a breach to a public authority.
Instead of the State Labour Inspectorate, as before, it will be the Ombudsman who will be responsible for receiving such reports and providing support measures.

The Ombudsman's main tasks will be to:

- Establish a procedure for receiving external reports
- Receive these reports
- Conduct a preliminary review of external reports and forward them to the appropriate authorities for follow-up
- Keep a record of external reports
- Ensure public access to information and provide advice on rights and remedies

The Ombudsman will be the only public authority responsible for receiving external reports from whistleblowers.

The obligation to report crimes to the police or the public prosecutor's office has been completely removed. According to the bill, after an initial review the Ombudsman will decide to which authorities the reports received should be referred.

Personal data and documents processed in this connection will be kept by the Ombudsman for a period of 12 months from the end of the calendar year in which the report was referred to the competent authority.

Planned date of entry into force of the new provisions

According to the bill, the new provisions will enter into force within one month of their promulgation. However, the enactment of the law in the wording proposed by the Ministry of Family, Labour and Social Policy is uncertain.

Indeed, the Ombudsman's Office has criticised the proposed shortening of the deadline for the entry into force of the act, stating that this is too short a period for the proper launch of a whistleblower protection system that meets the envisaged criteria and thus ensures the proper performance of the Ombudsman's duties.

In addition, the Stefan Batory Foundation, in cooperation with the Helsinki Foundation for Human Rights, the Institute of Public Affairs Foundation, the Anti-Corruption Academy Foundation, Citizens Network Watchdog Poland and Solidarność '80 Trade Union, has submitted its own alternative bill for the implementation of EU legislation on the protection of whistleblowers.

However, due to the planned shortening of the vacatio legis, companies should consider taking early action to develop internal procedures and documents for reporting breaches.

SME FUND 2024 / FUNDING FOR TRADE MARK AND DESIGN PROTECTION UNDER THE EU FUND FOR SMES

TOMASZ SZAMBELAN

From 22 January, applications can be submitted for funding under the next edition of the SME Fund 2024 scheme which will enable Polish and Ukrainian businesses to obtain reimbursement of official fees such as those for registering trademarks and designs.

The SME Fund is a project supported by the European Commission and the European Union Intellectual Property Office (EUIPO) that provides tangible support to small and medium-sized enterprises in the protection of intellectual property. Importantly, it makes it possible to subsidise much of the cost of filing an application, which is often the main obstacle to securing intellectual property protection.

Applications can be submitted on an ongoing basis until 6 December 2024. However, there is no time to lose. The funds are limited and will be allocated on a first-come, first-served basis.

Up to EUR 1,000 in funding

The scheme provides vouchers to cover part of the official fees for selected activities.

Any small and medium-sized enterprise wishing to file a trade mark and/or design application can be reimbursed up to EUR 1,000 for:

- Fees charged by intellectual property offices (including the Polish Patent Office – UPRP and the European Union Intellectual Property Office – EUIPO) such as trademark and/or design application fees, additional class fees and examination, registration, publication and deferment of publication fees at EU and national levels **(reimbursement of up to 75%)**

- Fees charged by the World Intellectual Property Organisation (WIPO) such as trade mark and/or design basic application fees, designation fees, and subsequent designation fees outside the EU (with restrictions) **(reimbursement of up to 50%)**

For example, if a company wants to register a mark in 4 classes at the Polish Patent Office, the total official fee will be PLN 2,500 and the amount of the grant will be PLN 1,875.

In the case of an EU trademark application to the EUIPO for the same number of classes, the company will pay EUR 300 and save as much as EUR 900 (the total fee is EUR 1200).

Who can benefit from the SME Fund 2024

The SME Fund 2024 is intended for small and medium-sized enterprises based in the European Union. In the case of Polish companies, these include:

- Sole traders
- Commercial law companies and partnerships such as general partnerships, professional partnerships, limited partnerships, limited joint-stock partnerships, limited liability companies, joint-stock companies and simple joint-stock companies

They all must qualify as small or medium-sized enterprises, i.e. have fewer than 250 employees and an annual turnover of up to EUR 50 million or a balance sheet total of up to EUR 43 million.

The procedure for obtaining and redeeming the grant is transparent and the application must be accompanied by:

- The company's bank statement
- VAT certificate or NIP (tax ID number) certificate
- Declaration of honour – if the application is filed by a representative

The SME Fund 2024 is also open to SMEs that are established in Ukraine and have a TIN. Grants will be awarded on a first-come, first-served basis and funding cannot be requested for services that have previously received national or EU support.

When to apply

Applications will be accepted until 6 December 2024. Grants will be available throughout the year until all funds have been exhausted.

Importantly, the 2024 SME Fund is the final initiative of this edition. This means that it is likely to be the last opportunity to receive grants on such preferential terms.

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THE NEED TO OBTAIN THE CONSENT OF THE COMPANY'S BODIES FOR A LEGAL TRANSACTION

ADAM CZARNOTA

Obtaining the consent of the company's bodies (e.g. the General Meeting or the Supervisory Board) is one of the obligations that is most often overlooked by company representatives in the course of doing business. Why is this so important? In some cases, failing to obtain the appropriate consent may render a transaction invalid. The Commercial Companies Code provides for two different consequences in the event of a breach of this obligation, depending on whether the obligation arises from statutory provisions or from the company's articles of association.

Consent required by law

Where the obligation is imposed by law, the consequences of failing to obtain consent for a transaction are far-reaching, namely that the transaction is invalid.

For example, in a limited liability company, the consent of the shareholders, expressed in the form of a resolution, is required for, but not limited to:

- The disposal or lease of the enterprise or an organised part thereof and the establishment of a limited right in rem thereon (Article 228(3) of the Commercial Companies Code, KSH)
- The acquisition or disposal of real property, perpetual usufruct or an interest in real property, unless the articles of association provide otherwise (Article 228(4) of KSH)
- The reimbursement of additional payments (Article 228(5) of KSH)

It should be noted that the consent may be given before the company makes a declaration, or subsequently, but not later than two months after the declaration is made. Consent given after the declaration has been made has retroactive effect from the date of the transaction.

Importantly, the requirement to obtain the appropriate consent to act extends to all representatives of the company, not just its management board.

Therefore, such consent will also be required if the company is represented in some other way, e.g. by an attorney or a holder of a commercial power of attorney.

Consent required by the Articles of Association

The situation is different in the event of a breach of the obligation to obtain consent arising from the company's articles of association. In such a case, the legal transaction is valid, but this does not exclude the liability of the management board members to the company for breach of the articles of association.

In capital companies, a relatively common procedure is to include in the articles of association a list of matters requiring consent of the shareholders or the company's supervisory board.

This solution allows shareholders to exercise ongoing control over, for example, significant agreements that the management board intends to enter into. In such a case, the list of matters should be adapted to the nature of the company's business, its size and its ownership structure.

In practice, it is very common for consent to be required if the value of a particular transaction exceeds a certain threshold or is outside the ordinary course of the company's business.

Company representatives must be aware that if they carry out a transaction without the consent required by the articles of association and this results in a loss/damage to the company's assets, they may be held liable for damages to the company.

LEGAL REMEDIES AGAINST SLAPPS

MATEUSZ OSTROWSKI

MATEUSZ KOC

We have already written about the changes we can expect at EU level. Today, we look at whether Polish law, as it currently stands, offers any protection against SLAPPs.

Put simply, SLAPPs (Strategic Lawsuits Against Public Participation) are lawsuits brought to intimidate or silence people who criticise the actions of public authorities, companies or other entities. Their aim is to discourage public participation and restrict freedom of expression.

In Polish reality, SLAPPs most often take the form of:

- Actions for infringement of personal interests (Articles 23 and 24 of the Civil Code)
- Actions for unfair competition (Articles 3 and 14 of the Act of 16 April 1993 on combating unfair competition, uniform text: Journal of Laws of 2022, item 1233)
- Private indictments for defamation and insult under Articles 212 and 216 of the Criminal Code, respectively
- And, in extreme cases, public indictments for offences against religious sentiments under Article 196 of the Criminal Code

Code of Civil Procedure vs. SLAPPs

In our view, with greater public awareness and bold application of existing legislation by judges[1], the current regulations could potentially protect against SLAPPs.

In particular, we draw attention to Article 191(1) of the Code of Civil Procedure, which allows courts to dismiss a lawsuit in camera if it appears from the claim and the evidence, from the circumstances of the case, from generally known facts and from facts known to the court ex officio that the claim is unfounded.

This looks very simple in theory, but in practice is more complicated. How do you know beyond reasonable doubt that a lawsuit is a SLAPP and should be dismissed as manifestly unfounded? We will discuss this in the next issue.

Manifestly unfounded lawsuits

When introducing the above regulation into the Polish legal system, the lawmakers defined a manifestly unfounded lawsuit in a completely different manner. One of the reasons given was that it would relieve the courts of the burden of recognising cases that would be a waste of the court's time and work.

However, such a justification is unfortunate, to say the least, as it assumes that the court decides on the chances of success of a particular lawsuit at the preliminary examination stage, which may lead to a breach of the right to a fair trial[2].

Judicial practice has shown, however, that the definition of a manifestly unfounded lawsuit is moving in the right direction, as a lawsuit may also be considered manifestly unfounded when it can be seen to be of a bogus nature, that is to say, it does not seek to obtain a judicial determination of rights or obligations, but it uses legal and procedural institutions to satisfy a different, ulterior purpose.

This can refer to situations where a party bringing an action does not seek to obtain a favourable ruling or to prejudice their opponent, but merely to initiate legal proceedings for the sake of taking part in them. The manifest unfoundedness of a lawsuit must therefore be apparent from the claim itself, possibly taking into account facts which are common knowledge and known to the court ex officio[3].

Paradoxically, the courts make use of the institution of dismissal for manifest unfoundedness in camera, noting, first, that this is not the case in SLAPP cases and, second, that appealed judgments are in most cases reversed and remanded for reconsideration after an appeal has been heard.

In our view:

- The lack of in-depth awareness
- The lack of training for lawyers, including judges, in identifying SLAPPs, and
- The willingness of lower courts to adjudicate so as not to have their judgement overturned and remanded for reconsideration

will result in judges remaining reluctant to reject potential SLAPPs as being manifestly unfounded for a long time to come.

Notwithstanding this, we should not lose sight of Article 5 of the Civil Code and Article 4(1) of the Code of Civil Procedure, designed to protect not so much against SLAPPs as against extremely unfavourable judgments. And that is only after the taking of evidence has been completed, when it becomes clear in the course of the proceedings that a party bringing an action has no intention of obtaining the legal protection sought, but only of harassing their opponent.

Anti-SLAPP criminal regulations

The Polish criminal law system provides, inter alia, for private prosecution for defamation under Article 212 of the Criminal Code.

In our professional practice to date, this regulation is repeatedly used to stifle public participation and is directed against those who exercise their freedom of expression.

This is a European phenomenon. Currently, according to the recommendations of the Council of Europe[4], the signatory states of the European Convention on Human Rights are obliged to work towards the abolition of prison sentences for defamation.

The European Commission is also calling for a similar solution.

Recommendation 2022/758 of 27 April 2022[5] states:

"In order to prevent a chilling effect on the public debate, Member States should ensure that penalties against defamation are not excessive and disproportionate. They should pay particular attention to the Council of Europe's guidelines and recommendations addressing the legal framework for defamation, in particular criminal law.

In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. The Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) (16) has called on its Member States, which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay".

The Commission goes one step further and encourages Member States to support the use of administrative or civil law to deal with defamation cases, provided that this has a less punitive effect than criminal law.

Where SLAPPs take the form of private indictments, the court hearing a case may, usually at the request of the defence, consider discontinuing the proceedings on the basis of Article 17 of the Code of Criminal Procedure (listing circumstances that prevent the proceedings from continuing).

These circumstances are called conditions of admissibility of criminal proceedings or procedural conditions[6].

Of particular importance is Article 17(1) (2) of the Code of Criminal Procedure, which provides that proceedings shall not be instituted and proceedings instituted shall be discontinued if a particular act does not bear the hallmarks of a prohibited act or if the law provides that a perpetrator has not committed an offence.

If the court comes to the conclusion that the act does not bear the hallmarks of a prohibited act, the proceedings may be discontinued prior to the trial at a hearing pursuant to Article 339(3) (1) of the Code of Criminal Procedure only if it is clear from the indictment that the act charged against the accused does not bear the hallmarks of a prohibited act.

Does Polish law offer protection against SLAPPs?

Polish criminal law allows for cases to be discontinued, which happens quite often. In addition, unlike in civil procedure, decisions to discontinue a case are upheld on appeal.

Judicial practice shows that discontinuance is often used by the courts, and not only because the cases involve private indictments bearing the hallmarks of a SLAPP.

By contrast, in civil proceedings, when it comes to dismissing a lawsuit on the grounds that it is manifestly unfounded, the protection against such suits appears to be purely theoretical and illusory.

Instead, it happens, albeit very rarely, that personal interest lawsuits are dismissed on the grounds of abuse of the rules of procedure by claimants.

In personal interest cases, the courts are extremely cautious when it comes to respondents exercising their freedom of expression. This is probably related to the peculiarities of Polish civil procedure, where the rule is to go through the proceedings to take evidence in order not to be accused of not examining the merits of the case in the event of an appeal.

Therefore, it would be appropriate to postulate the creation of a regulation along the lines of the regulations proposed by the EU, which would allow Polish courts to decide freely on the merits of legal actions that are SLAPPs.

In fact, there is currently no sign of any anti-SLAPP bill coming from either the government or parliament. Or at least an amendment to existing criminal or civil law.

[1] Z. Nowicka, Polskie prawo może chronić przed SLAPP-ami. Prawnicy powinni przekonać do tego sądy >> LINK >> access date: 05.10.2023.
[2] 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, art. 191(1).
[3] Judgment of the Court of Appeal in Łódź of 30.10.2020, I ACa 1050/20, LEX No. 3108148.
[4] Towards decriminalisation of defamation, Resolution 1577 (2007), para. 17.1.
[5] Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') (OJ L.2022.138, p. 30).
[6] M. Kurowski [in:] Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, ed. D. Świecki, LEX/el. 2024, art. 17.

EU TO ACCELERATE DEVELOPMENT OF SMRS IN NUCLEAR INDUSTRY

WOJCIECH WROCHNA

BARTOSZ BRZYSKI

On 6 February 2024, the European Commission published a Communication,[1] launching a public debate on the European Union's 2040 climate targets. The European Climate Law[2] sets an ambitious goal for the EU to become climate neutral by 2050.

By then, interim targets (for 2030 and 2040, respectively) are also to be achieved[3], with a gradual reduction in greenhouse gas emissions. According to the Communication, new investments in nuclear energy, among other things, can contribute to achieving these targets. In this context, the Commission has announced measures to develop small modular reactors (SMRs) in the EU.

SMRs: what they are

Nuclear technology has been evolving for several decades, with new design solutions to increase reactor efficiency, whilst reducing reactor size. SMRs are expected to be the next step in this evolution.

SMRs offer:

- Significantly smaller size compared to conventional nuclear units
- The possibility of being assembled often from prefabricated components, which can reduce production time and costs
- The possibility of using nuclear energy in completely new locations, e.g. directly on industrial sites, and of combining several reactors to match energy demand

From an environmental perspective, small reactors, like their larger counterparts, generally produce no greenhouse gas emissions during operation[4]. They can therefore be a tool contributing to the decarbonisation of the energy industry, providing stable supply and low prices of energy.

SMRs: what the EU is planning

According to the Communication, all zero- and low-carbon energy technologies (including nuclear) are essential to decarbonise the energy system by 2040.

To stimulate investment in SMRs, the Commission plans to set up an Industrial Alliance to facilitate cooperation between all stakeholders in the deployment of this technology.

The EU aims to ensure a robust supply chain of components for SMRs and an associated skilled workforce. These measures are expected to accelerate the deployment of the first reactors by as early as 2030.

What an EU small-scale nuclear industry can expect

The Communication does not yet introduce specific legal mechanisms for the development of a small-scale nuclear industry in the EU. However, it undoubtedly heralds new work and legislative directions at European level that may assist the implementation of SMR projects in the coming years.

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Securing our future. Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, equitable and prosperous society', COM(2024) 63 final, 6 February 2024 [accessed: 7 February 2024].

[2] See Article 2(1) of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (OJ L, 2021, No. 243, p. 1).

[3] See Article 4 of the European Climate Law.

[4] How can nuclear combat climate change?, World Nuclear Association [accessed: 7 February 2024].

WHAT'S THE PRICE OF THIS COMPANY? A WORD ON M&A VALUATIONS

PAWEŁ MARDAS

Money is King. These three words mean everything. This is especially true in M&A transactions, which are primarily 'for the money'. In this context, the valuation of a company being sold, i.e. the way of setting the share price and any post-purchase adjustments, is crucial.

EBITDA

The fundamental measure of a company's value, most often used in M&A transactions, is EBITDA which in a nutshell shows the profitability and liquidity of a business, i.e. the cash flow achieved or achievable.

The choice of EBITDA as a measure of the price of shares to be sold allows the value of a company to be easily calculated and adjusted according to objective criteria.

Briefly, EBITDA is defined as:

- Earnings (E) – revenue minus operating costs
- Before (B) – the following cost items are not costs deducted from company revenue:
- Interest (I) – the cost of a company's debt financing
- Taxes (T) – income taxes paid by a company
- Depreciation & Amortisation (D+A) – write-offs that reduce the value of selected assets of a company for accounting purposes, rather than for actual costs incurred by the company

Interest, which represents the cost of a company's debt financing, income taxes and accounting depreciation & amortisation do not reduce its valuation but, on the contrary, 'add to the bottom line'. This is because all these elements (I, T, D&A) can change completely or substantially after a transaction and are therefore not treated by buyers as being permanently linked to the business.

In other words, the cash a company spends on financial interest, income taxes and depreciation & amortisation is not deducted from its revenue. In fact, each of these items (I, T, D&A), which are demonstrated as 'expenses' in company accounts, may be treated quite differently by a buyer than by a seller prior to a transaction.

For example, financial interest may 'disappear' as a result of the repayment of company loans, which is common at the closing of a transaction.

This is because, in most cases, a buyer will require that a company's existing financial debt be repaid by the company itself or by a seller, either before or at the time of closing.

The same applies to tax liabilities. A new owner may reorganise a company, resulting in a taxation change and lower tax paid.

The depreciation & amortisation of fixed assets and other selected assets of a company are treated in a similar way. These are not real operating costs and do not need to be continued after a transaction. Therefore, when calculating EBITDA, the above items are not deducted from company revenue.

Multiples in M&A transactions

EBITDA alone is not sufficient to determine the share sale price. It is also necessary to apply an appropriate multiple, i.e. a multiple of the annual EBITDA value. The size of the multiple depends, among other things, on the sector in which a particular company operates, its sales and its EBITDA.

Higher multiples are applied to companies with higher revenues.

For example, if a buyer agrees to pay the price set at 10 times EBITDA, where EBITDA is calculated for a given financial year, a company will present this value to the buyer, taking into account the assumed investment horizon and the expected payback period.

The absence of a multiple would result in the sale price, set as one year's EBITDA, being disproportionately low compared to the true value of a company, understood as the potential for the company to deliver EBITDA at a similar or higher level in subsequent years, with its buyer being a 'beneficiary' of the company's EBITDA growth.

Adjusted EBITDA

Standard EBITDA is also insufficient to determine the share price, as certain allocated costs included in the calculation of standard EBITDA should be excluded when determining the true (objectified) value of a company.

These include, in particular, one-off (extraordinary) costs resulting from completely exceptional situations, which should therefore not be allowed to unduly prejudge the value of a company. Litigation costs, for example, are an extraordinary expense not treated as a fixed, recurring cost of a company affecting its valuation.

Personal expenses paid out of company funds are treated in a similar manner. A shareholder paying for their holiday from the company account is unlikely to be a normal business expense and also one unlikely to be continued by a new owner, especially if it is a company.

Similarly, Adjusted EBITDA does not include any non-recurring revenue that is atypical for a company, such as compensation payments or other similar but infrequent transactions.

To avoid problems with the calculation of Adjusted EBITDA, transaction documents should accurately describe the types of costs and revenues by which a company's valuation will be adjusted.

Each M&A transaction requires an appropriate approach and level of effort to establish the valuation of a company and the mechanism for its potential adjustment.

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EXONERATION OF A MANAGEMENT BOARD MEMBER FROM JOINT AND SEVERAL LIABILITY: THE IMPLICATIONS FOR BUSINESSES OF A JUDGMENT OF THE PROVINCIAL ADMINISTRATIVE COURT IN WROCLAW

JAN JANUKOWICZ

Polish courts frequently resolve disputes concerning the liability of members of a company's management board for tax arrears. These cases are extremely complex, as they require consideration of both tax and bankruptcy law.

The courts have to take into account various factors such as financial management, timeliness of filing documents and possible restructuring measures, as the issue at stake is the liability of board members for the company's tax debts.

In this context, it is worth considering the recent judgment of the Provincial Administrative Court[1] in Wroclaw (Case No. I SA/Wr 337/22) [2], which highlighted a certain important issue relating to the joint and several liability of management board members under Article 116 of the General Tax Code[3].

Management board members are jointly and severally liable for the tax arrears of a limited liability company

A company had corporate income tax arrears. The first-instance tax authority found that the management board had not filed for bankruptcy on time and had not provided evidence that any restructuring measures or actions related to the arrangement approval procedure had then been taken.

It also found that there were grounds for declaring bankruptcy at the time of the management board member's term of office, however the manager failed to provide any documents explaining the reasons for his failure to do so. Therefore, the tax authority decided that the company's management board member was jointly and severally liable for the company's tax debt.

However, it is worth pointing out a key element of the case at hand. At the time of the proceedings, the company had only one creditor, the Tax Office.

One or more creditors – what is the basis for the joint and several liability of management board members?

In order to understand the nature of the problem, it is necessary to refer to Article 116 § 1 of the General Tax Code, which states that "the members of the management board of a limited liability company are jointly and severally liable with all their assets for the tax arrears of the company [...] if the enforcement of the company's assets proved to be wholly or partially ineffective and no management board member proved in due time that a bankruptcy petition had been filed or that reorganisation proceedings had been initiated at the time".

The legislator thus refers us to legal norms that go beyond the tax sphere. The part of the provision that deals with the situation in which a management board member has failed to prove the filing of a bankruptcy petition in due time is particularly relevant here.
This is because, in accordance with Article 2(1) of the Bankruptcy Law[1], "bankruptcy proceedings shall be conducted in such a way as to satisfy creditors' claims to the greatest extent possible".

The key word here is the term "creditors", which is used in the plural.

Therefore, at least two creditors are required for the opening of bankruptcy proceedings. This assumption is also confirmed by case law, which indicates that bankruptcy proceedings must be a collective procedure that serves the interests of at least two creditors.

How to avoid joint and several liability for a company's tax debts

In order for a management board member to avoid joint and several liability under Article 116 of the General Tax Code, the company must file for bankruptcy.

However, if the company has only one creditor, this is not possible. And even if the company were to file such a petition, it would be rejected.

It is therefore clear that there is a legal loophole in this respect.

On the one hand, tax legislation provides for the possibility of being released from joint and several liability. However, if a management board member tries to exercise this right, their bankruptcy petition may be rejected as it does not meet the formal requirements.

It is therefore positive that the PAC sided with the management board member and ruled that he was not obliged to file for bankruptcy.

Importantly, the court held that such action could not lead to liability for the company's debts, as the incompleteness of the legal system should not lead to tax liability.

However, it is important to remember that every tax case is different and Polish case law is not a binding source of law.

And although another court may take these judgments into account in a subsequent case, it is not obliged to do so. So it's always worthwhile consulting expert advisers, to help you navigate the maze of options at such a critical stage of the business life cycle.

[1] Provincial Administrative Court, hereinafter: PAC.
[2] Judgment of the PAC in Wroclaw of 21 December 2023, I SA/Wr 337/22, LEX no. 3667578.
[3] General Tax Code Act of 29 August 1997 (consolidated text in: Journal of Laws of 2023, item 2383, as amended), hereinafter: General Tax Code.
[4] Bankruptcy Law Act of 28 February 2003 (consolidated text in: Journal of Laws of 2022, item 1520, as amended) hereinafter: Bankruptcy Law.

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