THE RIGHT FOCUS

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TABLE OF CONTENTS

CJEU ORDER / PENALTIES IMPOSED BY THE PRESIDENT OF THE ENERGY REGULATORY OFFICE IN RELATION TO CERTIFICATES OF ORIGIN ARE UNLAWFUL AND COMPANIES MAY SEEK REIMBURSEMENT

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The Court of Justice of the European Union (CJEU) has ruled that the penalties imposed by the President of the Energy Regulatory Office (ERO) on undertakings for breaching the obligation to purchase and submit for redemption certificates of origin or pay a replacement fee (this obligation was introduced in Poland in 2005 to support renewable energy producers) are unlawful.

The order in this case was published on 4 March this year. According to the wording of the order, the penalties for the above-mentioned breaches which occurred prior to the EC's decision to approve the state aid (i.e. before 2 August 2016), are contrary to the EU Treaties.

The value of unduly paid penalties can amount to hundreds of millions of zlotys. In fact, in 2016 alone, the President of the ERO issued 18,021 certificates of origin from RES with a total capacity of 18,618,037.970 MWh for production in 2013-2016 and 1,707 certificates of origin from cogeneration with a total capacity of 28,110,148.736 MWh, which shows the scale of the case.

The order was issued in response to a request for a preliminary ruling from the Court of Appeal in Warsaw, which heard an appeal against a judgment of the Court of Competition and Consumer Protection annulling a penalty imposed by the President of the ERO on an electricity trading company. The case concerned a penalty imposed for the period during which the system of redemption of certificates of origin operated without a relevant EC decision declaring it to be state aid compliant with Article 107 of the Treaty on the Functioning of the European Union (TFEU). The period in question is from 1 October 2005 (when the system was introduced) to 1 August 2016.

In fact, on 2 August 2016, the EC adopted a decision declaring the scheme as state aid compatible with EU law. Similar principles also apply to the provisions imposing an obligation to redeem cogeneration certificates of origin or pay a replacement fee for the period prior to the relevant EC decision of 28 September 2016.

In the order, the CJEU stated that:

- The Polish legislation on the redemption of certificates of origin in the period prior to the EC's decision declaring the scheme to be state aid breached the obligation to notify state aid and is invalid.
- The EC's decision does not have retroactive effect and therefore does not convalidate the obligation to redeem certificates of origin up to the date of its adoption.
- The imposition of the penalty violates the obligation to notify state aid and is therefore contrary to EU law.

Effect of the CJEU order

The ECJ's order opens the way for the reversing or varying of all decisions of the President of the ERO imposing penalties for failure to comply with the obligation to purchase and submit for redemption certificates of origin or to pay a replacement fee in the period between 1 October 2005 and 1 August 2016.

However, in determining the temporal scope, the date of the alleged breach should be taken into account, not the date on which the decision was issued.

This means that in practice, decisions of the President of the ERO issued after 2 August 2016 may also be reversed or varied. It cannot be ruled out that the order may also be the basis for a claim for reimbursement of replacement fees paid for the aforementioned period.

Given the variety of remedies available in the context of the CJEU Order, the choice of remedy will depend on the nature and facts of each case and the content of the ERO President's decision.

However, it should be noted that, as a result of the announcement of the Order on 4 March 2024, the deadline for certain administrative actions by companies already expires on 4 April 2024.

Therefore, it is necessary for companies to take immediate action to obtain the reimbursement of funds for unduly paid penalties. It is therefore worth making good use of this time by carefully analysing the details of each case and preparing the most appropriate strategy.

AN IMPORTANT STEP TOWARDS GENDER EQUALITY, OR A FEW WORDS ON THE DIRECTIVE ON IMPROVING THE GENDER BALANCE AMONG DIRECTORS OF LISTED COMPANIES

URSZULA WÓJCIK

Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures was drafted at the end of 2022, but it has been a long time in the making since November 2012.

At the European level, Directive 2022/2381 is a key piece of legislation as a first step towards ensuring equal opportunities for women and men and gender balance in top management positions.

Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to implement the Directive by 28 December 2024.

We take a look at the key changes businesses can expect to see as a result of the implementation of Directive 2022/2381.

Scope of Directive 2022/2381

The new EU rules will only apply to listed companies, i.e. companies which meet the following two conditions together:

- Have their registered office in a Member State; and
- Their shares are admitted to trading on a regulated market within the meaning of Article 4(1)(21) of Directive 2014/65/EU in one or more Member States

Micro, small and medium-sized enterprises are excluded.

Objectives of Directive 2022/2381

Member States, including Poland, are required to ensure that listed companies meet either of the following objectives by 30 June 2026:

- Ensure that women hold at least 40 % of non-executive director positions, or
- Ensure that women hold at least 33 % of all director positions, including both executive and non-executive directors

Listed companies that are not required to meet the 33 % threshold must set individual quantitative objectives to improve the gender balance among executive directors and aim to achieve them by 30 June 2026.

The targets for the number of director positions held by women, as set out in the Annex to Directive 2022/2381, have been made dependent on the total number of director positions in the relevant listed company.

Clear criteria for comparing candidates

Listed companies that do not comply with the objective of Directive 2022/2381 will be required to implement a specific selection process for candidates for director positions.

Under the new rules, a key element of this process will be a comparative assessment of the qualifications of each candidate on the basis of clear, neutral and unambiguous criteria formulated in a non-discriminatory manner.

In addition, where there is a choice between candidates with equivalent qualifications in terms of suitability, competence and professional performance, priority will generally be given to the candidate of the underrepresented sex (i.e. a woman).

Performance reporting and penalties for failure to achieve objectives

Listed companies will be required to report annually on the gender representation on their boards, distinguishing between executive and non-executive directors, and on the measures taken to achieve the equality objectives of Directive 2022/2381.

Member States will determine the penalties applicable to infringements of national provisions adopted pursuant to Directive 2022/2381.

2024 UNDER THE SIGN OF ESG / THE TAXONOMY AND ITS DELEGATED ACTS

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The year 2024 will be marked by increased corporate preparation for sustainability reporting.

In addition to the much-discussed requirements of the Corporate Sustainability Reporting Directive (CSRD) and the related European Sustainability Reporting Standards (ESRS), the obligations under EU Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation) should not be forgotten.

Taxonomy Regulation – what obligations and challenges await businesses

The Regulation was developed as part of the European Green Deal to direct business activities and investments towards greater environmental sustainability, in line with the EU's 2030 climate and energy targets.

According to the Taxonomy Regulation, for an activity to qualify as environmentally sustainable, it must:

✔	Contribute substantially to one or more of the six environmental objectives, including: • Climate change mitigation • Climate change adaptation • The sustainable use and protection of water and marine resources • The transition to a circular economy • Pollution prevention and control • The protection and restoration of biodiversity and ecosystems
✖	Not cause significant harm to any of the other environmental objectives
✔	Be in compliance with the minimum safeguards (OECD guidelines, UN guiding principles, ILO conventions)

Detailed assessments of whether an activity contributes to or harms environmental objectives are made in accordance with technical screening criteria set out in Delegated Acts that have been developed and implemented in recent years. In 2022, a delegated act covering the first two environmental objectives, i.e. climate change mitigation and adaptation, entered into force.

And since 1 January 2024, acts have been in force to establish additional technical screening criteria for the remaining four environmental objectives (Regulation 2023/2486) and to extend the list of activities covered by the taxonomy (Regulation 2023/2485).

Who is covered by the EU Taxonomy

The entities required to report are:

- Large undertakings which are public interest entities such as listed companies, banks, insurance companies, or parent undertakings of a large group with more than 500 employees, and are subject to the obligation to disclose non-financial data in accordance with the requirements of Directive 2014/95/EU (NFRD, which was transposed into Polish law in 2017 as part of the amendment to the Accounting Act)
- Entities in the financial sector that offer investment products described as sustainable
- From financial year 2024, companies obliged to provide sustainability information in accordance with the updated CSRD

Under the CSRD, some companies (and more in subsequent years) will have to start reporting as early as 2025, depending on their size and on whether they meet certain criteria.

And this is not just about taxonomic issues, but also about more detailed sustainability information, including climate aspects and topics that have not been required so far, such as:

- Presenting the organisation's plans of transformation and transition towards a low-carbon future
- Presenting due diligence mechanisms on the organisation's environmental impacts
- Reporting on double materiality – the impact of climate change and physical risks on the organisation's financial performance and situation
- Reporting on the organisation's impact on the environment

This means that the necessary solutions should be prepared and developed immediately.
At the same time, the range of reportable activities has expanded with the adoption of new delegated acts.

The EU Taxonomy Regulation and delegated acts in the area of environmental objectives cover dozens of business activities or types of investment that have the greatest impact on climate change, including in the energy, manufacturing, forestry and transport sectors.

In addition, taxonomy reporting includes an obligation to indicate the percentage of revenue, capital expenditure (CAPEX) and operating expenditure (OPEX) related to environmentally sustainable products and services.

In practice, CSRD obligations will also include taxonomy reporting. The two pillars of corporate 'greening' – Taxonomy and ESG reporting – will thus meet in one place.

Taxonomy reports, prepared on the basis of delegated acts, will become part of CSRD reporting and their scope will be extended to other groups progressively covered by the Directive.

In addition, financial institutions are required to report the share of their investment portfolios that are Taxonomy-eligible and Taxonomy-aligned. These portfolios include both companies that are required to make taxonomy reports and those that are not.

Financial institutions can therefore ask non-reporting companies about their Taxonomy eligibility and alignment, irrespective of the requirement to publicly report this information. Voluntary reporting can give a company a competitive advantage with investors.

Benefits of reporting

The expanding range of Taxonomy-reported activities and market expectations make it necessary to adapt to regulatory requirements, and to do so well in advance.

The effect of taxonomy reporting is that the business environment (customers, suppliers, investors) has access to structured data presented by the company according to standardised criteria, identifying sustainable activities. Taxonomy reporting shows not only what sustainable activities a company is currently engaged in, but also how it plans to increase sustainability in the future.

With this in mind, companies should already be taking the necessary steps to align or improve their processes in line with the reporting requirements associated with the EU Taxonomy.

DON'T MISS CRBR NOTIFICATION AND UPDATE DEADLINES

ADAM CZARNOTA

The Anti-Money Laundering and Counter-Terrorism Financing Act (Act) requires the notification and updating of information on the beneficial owners of partnerships and companies (and other entities referred to in Article 58 of the Act) to the Central Register of Beneficial Owners (CRBR).

Any natural person exercising control over such an entity (directly or indirectly), with such control being conferred by the power to exercise decisive influence over the acts or activities of that entity, should be identified in the notification as a beneficial owner, i.e. any person who:

- Is a shareholder with the rights of ownership to more than 25% of the total number of shares
- Holds more than 25% of the total number of votes in the governing body of that entity
- Controls one or more legal persons which together hold more than 25% of the total number of shares or votes in their governing bodies
- Exercises control over a legal entity by holding the powers referred to in Article 3(1) (37) of the Accounting Act of 29 September 1994 (Journal of Laws 2023, items 120 and 295)

In exceptional cases where beneficial owners cannot be identified or where their identity is in doubt, a natural person holding a senior management position (e.g. a management board member) should be identified in the notification as a substitute beneficial owner.

CRBR notification deadline

New entities should notify the CRBR no later than 14 days after their registration in the National Court Register (KRS). For subsequent notifications, the deadline is calculated from the actual date on which the event triggering the need to notify the CRBR occurred.

The date on which the event occurs will differ, depending on whether registration in the KRS is required for a change in information to become effective (e.g. constitutive changes, such as an increase in share capital and subscription of new shares) or whether an action becomes effective at the moment it is performed (e.g. changes in the management board, sale of shares) – being the date of registration in the KRS in the first case and the date of the specific action in the second.

The deadline for making an update notification is 14 days after that date.

Penalties for failure to notify

Non-compliance with the CRBR notification requirements is subject to severe sanctions.

A fine of up to PLN 1 million may be imposed for:

- Failure to notify or update information in a timely manner, or
- Submitting factually inaccurate information

The initial notification and all subsequent updates must be made by electronic means here >>

The notification should be signed with a qualified or trusted signature by a person authorised to represent the entity concerned, in accordance with the rules of representation.

TAXATION OF CRYPTOCURRENCIES IN A FAMILY FOUNDATION

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The recent rulings of the administrative courts have confirmed that those planning to set up a family foundation with the intention of trading in cryptocurrencies should very carefully analyse the issue.

Trading in cryptocurrencies not falling within the scope of activities of family foundations

A harbinger of a negative stance for taxable persons was the tax authorities' previous positions expressed in tax rulings, which uniformly recognised as incorrect the view that family foundations could benefit from tax preferences (subjective CIT exemption under Article 6(1) (25) read together with Article 6(7) of the CIT Act[1]) when trading in virtual currencies[2].

These positions have been confirmed by a recent judgment of the Provincial Administrative Court (WSA) in Poznań[3].

The taxable person requested a tax ruling, stating the intention to establish a family foundation to which he and the other shareholder would contribute all shares of a limited liability company for the purpose of reinvesting family assets.
As a result, all assets previously accumulated in the limited liability company, including virtual currencies, were to be transferred to a newly established family foundation.

One of the doubts was whether the scope of activities of a family foundation, referred to in Article 5(1) (4) of the Family Foundations Act, could include the acquisition and disposal of virtual currencies, and thus exempt these activities from CIT under Article 6(1) (25) of the CIT Act.

According to the taxable person, virtual currencies are similar in nature to securities and derivatives (as referred to in Article 5(1) (4) of the Family Foundations Act), meaning that the scope of activities of family foundations would cover the acquisition and disposal of virtual currencies.

However, the tax authority issued a tax ruling[4] stating that the taxable person's position was incorrect.

The reasoning was that virtual currency is not a financial instrument, nor can it be considered a right similar in nature to securities and derivatives, nor is it a foreign means of payment (as referred to in Article 5(1) (6) of the Family Foundations Act).

The tax ruling was challenged by the taxable person and referred to the WSA in Poznań for review, which agreed with the tax authority and stated that virtual currencies could not be considered rights similar in nature to securities and derivatives.

As a result, trading in virtual currencies by family foundations cannot be covered by a CIT exemption.

The Court also noted that, unlike securities or derivatives, virtual currency is not a financial instrument, but rather an electronic means of payment.

In addition, cryptocurrencies are not controlled by a central institution, which precludes their classification as a right similar to securities or derivative.

Doubts about the scope of activities of family foundations

The WSA judgment is not yet final. However, given its reasoning and the provisions in question, it is highly likely that it will be upheld, even if an appeal is lodged with the Supreme Administrative Court.
As can be seen, the inclusion of family foundations in the Polish legal system almost immediately raised numerous doubts among taxable persons as to the scope of their activities.

As far as virtual currencies are concerned, the doubts of taxable persons stem mainly from the use of the vague phrase "rights of a similar nature" in Article 5(1) (4) of the Family Foundations Act, which has raised hopes among crypto-asset holders. In our view, the rulings of the tax authorities and the administrative courts should effectively cool down these expectations.

[1] Corporate Income Tax Act of 15 February 1992 (uniform text: Journal of Laws of 2023, item 2805, as amended, "CIT Act").
[2] Cf. tax rulings of 4 August 2023, No. 0114-KDIP2-1.4010.312.2023.1.KS, and of 31 October 2023, No. 0114-KDIP2-1.4010.426.2023.2.KS.
[3] Judgment of the WSA in Poznań of 22 February 2024, case file I SA/Po 895/23.
[4] Tax ruling of 31 October 2023, No. 0114-KDIP2-1.4010.426.2023.2.KS.

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