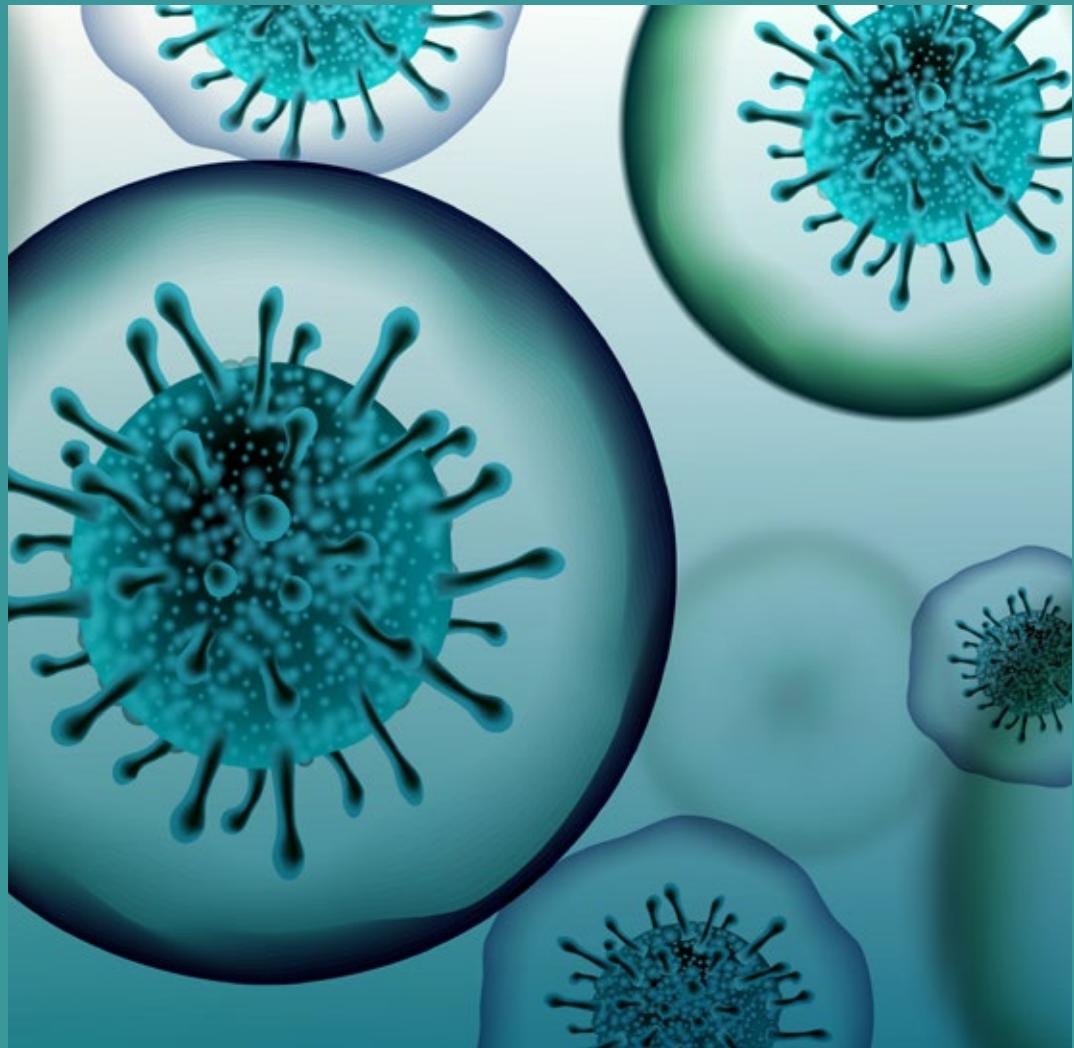


REPORT

CORONAVIRUS AND THE LAW IN POLAND



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CORONAVIRUS AND THE LAW IN POLAND

CONSTRUCTION INDUSTRY



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1 Coronavirus and the legal position of construction companies

Comparing the impact of SARS-CoV-2 on the construction industry and on other sectors of economy, it may seem that the effects of the epidemic haven't yet reached construction sites — especially those where big construction projects are carried out. Although the streets of Poland have emptied, construction workers haven't abandoned the construction sites, and many construction projects are still underway. Even if the construction industry isn't experiencing the effects of the pandemic right now, it's hard to expect that the ubiquitous impact of the virus and of the legal regulations aimed at combating it won't leave their mark also on the domain of construction project contracts.

Will the epidemic curb the booming construction industry?

Construction industry, like all other sectors of economy, is also exposed to the effects of the pandemic and of the legal measures adopted in response thereto. The law and economy as we know them seem to chop and change by the day. Right now it's hard to predict the range of the problem and the legal regulations that could be possibly applied to address it. Today, one thing is certain — the construction industry won't get through the situation unscathed at all.

While the impact of the SARS-CoV-2 epidemic isn't that noticeable in Poland if we take the construction and infrastructural projects underway into consideration

(especially big projects), the construction industry in other European countries has already considerably slowed down. For instance, Strabag, the biggest Austrian construction company, has suspended its operations on over 1,000 construction sites. The further fate of construction projects carried out in Italy, Belgium, and France is also up in the air. Taking the current situation into account and given the significant range of the problem, it's hard to expect the Polish construction industry to manage to come out of trouble unharmed in any way.

The greatest threat to construction industry is that involving a shortage of labour. Another challenge is to provide construction workers with working conditions that do not expose them to any risk of becoming infected and protect them from the consequences of supply chain failures. These factors will have an effect, in turn, on punctuality — in the area of both contract performance and timely payment for the performed work. Construction companies have big problems with staffing their construction sites fully and with arranging for sufficient amounts of construction materials. Understaffing has already been a problem, and further regulations regarding mandatory quarantine, restrictions of free movement, and the absence of staff members who have to now take care of their children while schools and kindergartens remain closed make the situation even worse. The links of the supply chains in construction industry are about to break. In these circumstances, delays in the performance of construction contracts and late payments are natural consequences that can't be avoided. In the face of the gravity of these problems, it's hard to believe they will be solved amicably, without engaging courts in the contractual relations.

Epidemic as an act of force majeure

There are many problems and changes in the construction market ahead of us, but contractors do have some tools to fend for themselves at their disposal. The occurring delays in contract performance may be excused if circumstances bearing the hallmarks of "acts of force majeure" are referred to. The Polish legal system does not offer a legal definition of this notion. Every contract — including every works contract — may feature an own specific definition of the notion in

question. But if a contract does not contain any provisions on the subject matter, we can make use of the extensive body of the Supreme Court's decisions. According to the established and uniform standpoint, which should be also taken into consideration when defining "force majeure" on the grounds of every contract, events that can be considered as "acts of force majeure" are external events which are unforeseeable (which encompasses also the low likelihood of their occurrence in a given situation) and non-preventable (which may actually mean the inability to prevent not the occurrence of a given event itself but the consequences of such an event). Examples of events fitting in the category of "acts of force majeure" are fires, floods, earthquakes, volcano eruptions, and epidemics. The consequences of the occurrence of any of such events must lead to contracting parties being completely unable to fulfil their contractual obligations — every time such an event occurs. "Acts of force majeure" may also include actions of state authorities acting on the basis of and within the law, involving establishing surprising, unusual legal regulations.

Taking the above into account, the SARS-CoV-2 epidemic, as an external event that could not have been foreseen or prevented, and making it completely impossible for certain entities to fulfil their contractual obligations, and the resulting measures taken by state authorities may certainly be considered "acts of force majeure", which becomes a strong argument in disputes between contractors and project owners. A contractor trying to prove they could not have performed some construction work according to the contract will be obliged to indicate the circumstances of occurrence of an "act of force majeure" and to show the cause-and-effect relationship between the said circumstances and their inability to perform their duties and — as a result — to fulfil their contractual obligations.

If the contractor proves they have failed to perform their work in line with the contractual provisions on account of occurrence of an "act of force majeure", they shall be in principle exempt from the liability resulting from failure to perform the contract. As a result, the contractor will not be obliged to pay their client any liquidated damages for delay in contract performance, nor any damages if their client has suffered losses. In the event of occurrence of an "act of force majeure",

which, by definition, is a phenomenon non-attributable to any of the parties, it's impossible to attribute any fault to contractors, where the attribution of fault is one of the factors determining the existence of liability.

In case of occurrence of events bearing the hallmarks of "acts of force majeure", contractual relationships may also be subject to Article 495 § 1 of the Civil Code, according to which "if one of the reciprocal performances becomes impossible due to circumstances for which neither party is liable, the party which was to make the performance cannot demand the reciprocal performance, and, if it had already received it, it is obliged to return it according to the provisions on unjust enrichment". The above means that if a contractor has already been paid for the performance of a contract, they will be required to return the payment in the event of permanent inability to fulfil their contractual obligations. This is about returning the amount being an equivalent for non-performed construction work, and not the entire contractual amount.

Epidemic and the *clausula rebus sic stantibus*

While proving that the SARS-CoV-2 epidemic and the legislative activity that follows can certainly be considered "acts of force majeure", the case of acknowledging these events as instances of occurrence of unforeseeable extraordinary contractual circumstances, which may lead in effect to a construction contract becoming dissolved by a court, is not that obvious any more. The legislator has incorporated a clause on extraordinary change in circumstances, referred to as the *clausula rebus sic stantibus* (Article 357¹ of the Civil Code), into the Polish system of law. According to this clause, "if, due to an extraordinary change in circumstances, a performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when executing the contract, the court may, having considered the parties' interests, in accordance with the principles of community life, designate the manner of performing the obligation, the value of the performance or even decide that the contract be dissolved. When dissolving the contract, the court may, as needed, decide how accounts will be settled between the parties, being guided by the principles set forth in the preceding sentence".

When it comes to legal considerations, the clausula *rebus sic stantibus* and circumstances bearing the traits of an “act of force majeure” differ most of all in their effects – while the occurrence of events connected with the clausula *rebus sic stantibus* involves significant difficulty in the fulfilment of one’s obligation or a prospect of a serious loss, an “act of force majeure” makes the fulfilment of one’s contractual obligations completely impossible.

It seems that in the light of the current situation, contractors may raise claims on the grounds of occurrence of unforeseeable extraordinary contractual circumstances. But they need to bear in mind that taking advantage of the clausula *rebus sic stantibus* requires them to meet certain conditions without which claiming that unforeseeable extraordinary contractual circumstances have actually occurred won’t be effective.

First and foremost, it shall be stressed that contractors may not change the terms and conditions of contracts concluded with project owners on their own by making use of the clausula *rebus sic stantibus*. This can be done only by a court, after a contractor brings an action against the project owner. Depending on the contractor’s demands, the court has the right to determine the manner of fulfilment of an obligation (e.g. in the area of the deadline), to change the amount to be paid (payment for the performed work), and even to dissolve a contract. In such proceedings, the court will also consider the legitimacy of the interests of the parties and the common principles of community life. Therefore, the outcome of a court battle is very difficult to predict. We should remember that the effects of the epidemic are severe not only for contractors but also for project owners, who are bound by numerous contracts.

If a request for intervention in a construction contract is to be effective, there needs to be an existing valid obligational relationship. A contractor needs also to bring an action to court within a period in which the grounds to acknowledge that unforeseeable extraordinary contractual circumstances have actually occurred remain still valid. Contractors need to be alert in this respect, and if they want a court to intervene in the terms and conditions of the contracts

they have concluded, they should already be weighing an option of bringing an action to court.

Basing an action on the grounds of occurrence of unforeseeable extraordinary contractual circumstances in the situation of the current epidemic and the legislative measures accompanying it is not as simple as it may seem. According to many of the existing judicial decisions, the occurrence of unforeseeable extraordinary contractual circumstances must change the contractual relations of the parties to a contract in a permanent manner. It is currently highly debatable whether the SARS-CoV-2 epidemic and the many regulations issued in response thereto (adopted by their nature for the period of the epidemic) change the relationships between contractors and project owners with a permanent, lasting effect.

Public utility projects set to take a blow as well

The pandemic and the taken legislative measures also affect the construction projects carried out pursuant to the Act of 29 January 2004 – Public Procurement Law. In principle, contractors and contracting authorities are not entitled to amend contracts concluded on the grounds of the provisions of the said act.

One of the exceptions thereto, provided for in Article 144 section 1 item 3 of the PPL act, is a situation when the necessity to amend the contract results from the circumstances which could not be predicted by the contracting authority despite acting with due diligence. The value of the amendment does not exceed 50% of the contract value defined originally in the contract. Amendments made on the grounds of the above provision may become a facilitation to contractors who upon consulting the contracting authorities (who also want the project to be delivered properly and successfully) amend their contract in a way satisfactory to both parties, e.g. in the scope of deadlines or remuneration.

It's also reasonable to point out that according to the draft act on the so-called "anti-crisis shield" support package, construction companies will be able to request project owners to e.g. change the term of completion of a contract, suspend

the performance of a contract, or change the range of services rendered. It is a 'lifesaver' the legislator has offered to contractor, acknowledging — already by virtue of law — epidemic-related circumstances as a circumstance not foreseen at the moment of conclusion of a contract, granting contractors additional rights compared to the regulation under Article 144 section 1 item 3 of the PPL act, especially the right to temporarily suspend the performance of a contract. But it's still hard to tell the final form of the "anti-crisis shield" act, i.e. the form in which it will enter into force, and whether the draft provisions are going to remain as they are.

Increasing the flat-rate remuneration

As shown above, the effects of the epidemic and of the legislative changes this epidemic entails cannot be fully predicted. One possible scenario is that the economic changes happening will significantly change the purchasing power of money, and the prices of construction materials will skyrocket. This involves a big threat to contractors, whose construction contracts stipulate, in principle, that the agreed flat-rate remuneration doesn't change.

In such circumstances, I believe that apart from an action based on the occurrence of unforeseeable extraordinary contractual circumstances, contractors will also have the right to claim to have their flat-rate remuneration changed pursuant to Article 632 § 2 of the Civil Code. The judicial decisions of the Polish courts show, however, that the issue is not that clear-cut. There are two mutually exclusive approaches in this respect. According to one, the range of application of the legal norm under Article 632 § 2 of the Civil Code is narrower than the legal norm under Article 357¹ of the Civil Code and acts as a special regulation with respect to the *clausula rebus sic stantibus*. This makes it inapplicable in line with the *lex specialis derogat legi generali* principle (see: judgement of the Supreme Court of 29 March 2012, file I CSK 333/11). According to the opposite standpoint, in turn, the scopes of application of the above legal norms overlap, and the quoted provisions are two completely different bases for a court's intervention in a contract (see: judgement of the Supreme Court of 5 December 2013, file V CSK 2/13) — if only for the different conceptual framework used by the legislator.

In order to make use of the regulation provided for in Article 632 of the Civil Code, a contractor will have to prove that they are exposed to the risk of a serious loss as a result of the occurrence of circumstances that could not have been foreseen (but not "extraordinary" circumstances, as in the case of the clausula *rebus sic stantibus*). And like in the case of the clausula *rebus sic stantibus*, contractors may not amend contracts unilaterally. It will be necessary to bring an appropriate action to court. If this happens, the court will be able to decide to increase the agreed flat-rate remuneration or to dissolve the contract concluded by the contractor and the project owner.

The domino effect

The current situation is very uncertain, for both contractors and construction project owners alike. And both should display a great degree of flexibility and understanding towards each other's problems. Nevertheless, where big money comes into play — which is the case of construction projects, a conciliatory attitude may not be enough.

It is quite likely that we're on the verge of an intense period of companies arming themselves with arguments to fight battles in court. Many court cases concerning construction works being delayed because of the SARS-CoV-2 epidemic and the legal and actual consequences resulting therefrom will see the epidemic being referred to as an "act of force majeure" which has made it impossible to keep the contractual deadlines, or the clausula *rebus sic stantibus* being quoted as the reason for a significant hindrance in the performance of work. In the light of the expected consequences, it's hard not to consider such arguments valid from the point of view of both legal considerations and the principles of community life.

Right now we can be sure about one thing – the SARS-CoV-2 epidemic and the legal regulations adopted as a result thereof will affect the construction industry to a considerable degree as well. It's hard to resist the impression that the epidemic itself is just the first domino to fall, triggering highly unpredictable

events to impact the construction industry. In such circumstances, both contractors and project owners should consider the measures they can take to prepare themselves best for the new legal and market reality to come. They should also think about the ways to face the challenges looming on the horizon. This will surely make it easier for construction companies to maintain continuity and let them retain their market position and renown in the construction market they have been building up for years.

CORONAVIRUS AND THE LAW IN POLAND

CYBERSECURITY



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2 Cybersecurity in the times of epidemic

The following part of the report aims to address the consequences of the pandemic on entrepreneurial activity and the possibility of adapting business models to the current threats, taking into account the challenges that are distinctive for cybersecurity. Apart from referring to basic legislation regarding cybersecurity, this chapter describes also the main threats, discusses guidelines for safe remote working and provides recommendations for entrepreneurs how to run business while migrating to a new model of work.

One cannot resist the reflection that the threat of the COVID-19 virus in many aspects resembles the danger caused by cybercrime. Although the risk of loss of life is still relatively low in the case of cyber-attacks, the other elements such as - the global nature of these threats, the impossibility to effectively eliminate them and their disastrous impact for businesses and the economy - are similar.

While some hacker organizations have declared a "ceasefire" during a pandemic, the vast majority of them perceive the crisis as an extraordinary opportunity to quickly increase their profits¹. At a time when for many companies the only solution to mitigate the plummeting revenues is to work online, ransomware attacks that might cut off the possibility of remote working on both company and corporation-wide scale may come upon a breeding ground.

The same is true regarding social engineering phishing attacks. Entrepreneurs should be aware of the fact that they face well-organised and paid-for criminal organisations that are often financially supported by various governments.

¹ An attack conducted against a hospital in Brno may serve as an excellent example for such practices as it took place at a time of pandemic and prevented sending COVID-19 test results to the database

The current “hope it works” strategy (a recent report published by Kantar has revealed that the budgets of the vast majority of Polish companies do not include separate budget headings for expenditures related to cyber-security of their operations) may thus prove to be insufficient.

Legal Regulations:

1. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
2. Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act)
3. The Act on the National Cybersecurity System (ANCS) of 5 July 2018
4. The Crisis Management Act of 26 April 2007
5. The Telecommunications Law Act of 16 July 2004

Cybersecurity issues are also addressed in regulations that are specific for a given industry, such as the Banking Law of 29 August 1997 and by other related guidelines and positions of supervisory authorities, such as Recommendation “D” of the Polish Financial Supervision Authority, the so-called “Cloud Position” – Position of the Office of the Polish Financial Supervision Authority on the use of cloud computing services by supervised entities or the EBA Guidelines on ICT and security risk management of 28 November 2019.

Of course, under current circumstances, the mere reading of these regulations (if we have not implemented them so far) will not come in handy. However, one should bear in mind that:

1. infringement of the regulations may lead to the imposition of an administrative penalty whose amount may turn out to be significant, e.g. in the ANCS

- a penalty of up to PLN 1 million is provided for persistent infringement of the Act that causes direct and serious cybersecurity threats or serious impediments to the provision of key services, in GDPR, the most serious infringements may result in penalties in the amount of up to EUR 20 million, or in the case of companies up to 4% of their total annual global turnover²;
2. it is sensible to visit the websites of the regulators to seek practical advice on how to deal with the surge in online communication related to remote work.

Any pandemic, as well as other socio-political phenomena that affects human behaviour, make us uncomfortable which in turn increases the security vulnerabilities of entire organisations. This occurs because the weakest link in well-designed cybersecurity policy is usually the human being. We are still being preyed upon by popular scams (frauds most often committed on the Internet), which is confirmed by the following number: \$700,000 - the number of losses incurred by Americans in 2018. Those losses resulted from one of the most popular scamming techniques - Nigerian prince³. The scale of the threat is also confirmed by the current Bank of America's report entitled "Are cybercriminals targeting your company"⁴ from which one can infer that 94% of malware is still being sent by the most common form of communication in business, i.e. e-mail, and the vast majority of attacks (as much as 81% of them), are directed against companies.

Types of the most common threats:

The most popular cyber threats considering their use in the current state of pandemic will be pointed out below.

Phishing - impersonating another person or organization by using a false e-mail address or website to persuade the attacked person to behave in a certain way.

² The amount of the penalty is stipulated in Art. 73 of ANCS and Art.83 of the GDPR

³ https://twitter.com/prywatnik/status/1240192050265493505?ref_src=twsrc%5Etfw%22%3EMarch (access: 25.03.2020)

⁴ https://www.bofaml.com/content/dam/boamlimages/documents/articles/ID19_1032_WP_08_19_0611_f.pdf (access: 25.03.2020 r.)

Such behaviour may consist in providing the attackers with unauthorised data (e.g. sensitive personal data or credit card number), or undertaking other activities (e.g. participating in a charity event), or in settling obligations that do not exist. In the current situation, phishing is very often used to gain financial benefits under the guise of supporting infected persons, medical services, and even by offering to buy coronavirus drugs or taking vaccination without a queue⁵.

Ransomware (this word comes from the combination of two words: ransom and software) is one type of malware which, blocks access to it or encrypts the data available on it by installing on an attacked device, and, demands a ransom payment in the form of cash or, increasingly often, in virtual currency for releasing access. Such an attack can be particularly dangerous due to the possibility of hindering or completely thwarting any remote operation conducted by a company.

3) RaaS (ransomware as a service) - attacks on a massive scale carried out by organised criminal groups on a specific order. Such attacks may consist of different types of attacks. For example, by using a phishing campaign related to helping victims of coronavirus to gain financial benefits and to simultaneously install malicious software on the attacked device;

4. Trojan Horse - a popular Trojan horse, is software that impersonates applications that are viewed as attractive by users and additionally install unwanted and hidden functionalities on their devices. Currently, applications that can track or steal users' data under the guise of providing them with up-to-date information about the pandemic can be popular;

5. DoS/DDoS (distributed denial of service/denial of service) - these are types of attacks on a computer system or network services that are conducted to hamper company's operation by overloading servers caused by sending data packets in bulk. DDoS differs from the DoS attack in that it is dispersed and consists

⁵ <https://niebezpiecznik.pl/post/oszustwa-na-koronawirusa-to-klasyka-phishingu-i-wyludzen-danych-edukujcie-znajomych/> (access: 25.03.2020)

of directing the attack simultaneously from many devices (so-called zombies). Often overtaken computers are used for attack, e.g. infected with a previously mentioned trojan.

Basic rules of minimizing risk in remote work

In the Internet we can find materials to suggest what security measures should be implemented to address the increased level of risk resulting from the intensive use of remote working. The guidelines have been published by the European Network and Information Security Agency (ENISA)⁶ and the US Federal Agency - National Institute for Standardization and Technology (NIST)⁷

The President of the Personal Data Protection Office⁸ has also presented its position, which is based on the position of DPC Ireland, and raised the issues of devices and software provided for remote work, use of company e-mail and access to the network and the cloud.

The ENISA guidelines should also be taken into consideration as the Agency has distinguished in them general rules for employers, advising them:

1. the use of VPN, which is scalable and handles a large number of calls;
2. providing secure video conferencing for customers;
3. accessing business applications through encrypted channels (mentioned in more detail in NIST guidelines: SSL, VPN, IPsec VPN);
4. securing access to application portals through multi-factor authentication;
5. mutual authentication for accessing corporate systems (client to server and server to client);
6. providing their employees with devices that have an updated system and antivirus software;

⁶ <https://www.enisa.europa.eu/tips-for-cybersecurity-when-working-from-home> (access: 25.03.2020 r.)

⁷ <https://csrc.nist.gov/publications/detail/itl-bulletin/2020/03/security-for-enterprise-telework-remote-access-and-byod/final> (access: 25.03.2020)

⁸ <https://uodo.gov.pl/pl/138/1459> (access 25.03.2020)

7. checking the security of employees' private devices;
8. providing adequate IT resources to support employees on an ongoing basis;
9. providing policies for responding to information and personal data security breaches;
10. ensuring that processing of personal data complies with the EU data protection legal framework;

and for employees recommending:

1. the use of the company and not personal computers, unless the private devices have been checked by the employer;
2. not combining work-related and leisure activities on the same device;
3. caution when dealing with correspondence concerning coronavirus (phishing warning);
4. connecting to the Internet by using secure networks and avoiding open Wi-Fi networks
5. avoiding the exchange of confidential corporate information by e-mails; (it is advisable to use internal Intranets to share work files);
6. encrypting data at rest, e.g. on local drives;
7. presence of an up-to-date system and antivirus software;
8. blocking of the screen when working in a shared space (incidentally, it is reminded that one should beware of working in such an environment due to the risk of virus infection);
9. not sharing URLs for video conferences in social media or other publicly available channels.

The NIST guidelines enable us to identify a few basic principles that organisations should follow when implementing a remote working model. Thus it is necessary to:

1. limit the storage of confidential data on devices dedicated to remote working or for customers;

2. use multi-component authentication at the stage of access to the organization's resources;
3. protect against the risk of eavesdropping, interception or modification of communication in external networks by using encryption technology to protect processed data and secure end-to-end devices;
4. use such technical means that allow encrypting data by using approved encryption technologies and in cooperation with certified suppliers;
5. secure the remote access servers effectively and ensure their compatibility with other devices;
6. protect yourself against malware on your employees' devices or devices made available to customers by implementing anti-virus software, auditing your supplier and customers, respectively, or by providing a separate network for devices made available to customers whose possible will not affect the organization's strategic network;
7. develop a remote work security policy that defines its basic principles and the type of devices that are allowed for such a work model. It is advisable to provide different levels of access to the organization's data, e.g. by assigning full access to resources for users with a specific position and having company equipment and separating this resource for users with a lower level in the organization, or users working on private equipment.

NIST also distinguishes the following four methods of remote access to the organization's resources:

1. Tunnelling: Organizations can establish a so-called secure tunnel to connect a device designed to work remotely with a remote access server; the recommended method in this respect is to use the virtual private network (VPN); such tunnels can also be implemented for users' authentication and limiting the access only to the previously selected data resources. According to NIST, the most frequently used VPNs for remote operation are Internet Protocol Security (IPsec) and Secure Sockets Layer (SSL);
2. Portal - consists in accessing the resources by a server that provides access to one or more applications using a central interface. Employees use the portal

on their device. Most portals are web-based and employees simply use a web browser as a connection tool. The portal's task is to secure communication between the devices of employs who are working remotely and the portal. The portal can also be used to identify users and manage the scope of their access to internal resources of the organization. Similarly, most of them are certified VPNs and the majority of VPN SSL is a portal, not a tunnel, which is nowadays emphasized by NIST.

3. Direct access to applications. This model does not involve using software designed for remote access. An employee working remotely obtains individual access to the application that independently guarantee security by encrypting the communication, user authentication, etc. In this model, the employee turns on the browser and uses the HTTPS protocol to access the web server that provides access to an e-mail account and the employee's authentication server. Due to the direct access to the application, such a model guarantees high flexibility and can be used on almost every employee's device.
4. Remote desktop: such a solution allows an employee to remotely control the desktop of a computer located in the organization's network (usually it will be the employee's computer in the office). The employees can control the keyboard or mouse and see the screen of that computer on the screens of their home devices. This solution is based on Microsoft Remote Desktop Protocol or Virtual Network Computing (VNC) and should be used only in exceptional cases, after conducting a thorough security analysis, because the previously described measures provide a far greater level of security than this solution.

From the guidelines published by the Office of Personal Data Protection, we can infer the rudimentary recommendations that in the vast majority of cases has been already mentioned above. According to the guidelines, you should comply with the following rules:

1. do not install applications or software that are incompatible with your organization's security procedures;

2. ensure that operating system, software, and antivirus on the used devices have the necessary updates.
3. provide yourself with a workspace that protects you from external threats and block the access to the device before you walk away from it.
4. secure your computer by using strong passwords and multi-factor authentication,
5. use a company e-mail address and encrypt attachments,
6. avoid referring to personal data or confidential information in the subject of the message;
7. verify if the recipient of the message has been correctly typed;
8. carefully check to whom you send a message;9. beware yourself of phishing, i.e. do not open attachments or click on links in the message that have been sent from unknown or suspicious addressees;
10. pass on the password for encrypted attachments in a different way and separately from messages with such attachments;
11. use only trusted access to the network or cloud;
12. ensure the security of data archiving.

Communication and education

Even the most efficient conduct of a security or IT department may prove to be insufficient in the absence of proper communication, education and strict enforcement discipline. If the change management is to be successful, it should be combined with internal communication that includes in particular:

1. awareness-building and education of employees in the field of basic legal obligations related to the processing of personal data and confidential information;
2. using of the employer's own hardware and software (including the employer's own hardware and software rules);
3. methods of data handling (encryption, creating passwords and double authentication, secure e-mail reading)

4. responding to incidents and breaches;
5. Business continuity planning

During the training sessions, which may end with a kind of internal certification, it is worthwhile to acquaint employees with the possible negative consequences of non-compliance with security rules when they use ICT infrastructure. It is obvious that a blatant breach of these rules may involve various disciplinary actions, and sometimes may also result of far-reaching consequences and penalties that are stipulated in the criminal code⁹.

Employees (including management) should bear in mind that insufficient protection of data processed in the organization (especially personal data) can lead to significant financial consequences and reputational damage. Such consequences may affect the organisation itself and, e.g. its customers who would be targets of a phishing campaign. The case of a company running a shop under the domain of morele.net may serve as a perfect example¹⁰. Although that case concerns the rules of the GDPR, it is also significant from the point of view of cybersecurity. During its inspection the Office of Personal Data Protection found irregularities in the organizational and technical means of personal data security. The authority also concluded that the company had not applied appropriate data access authentication procedures and had not implemented procedures to effectively monitor the potential risks arising from suspicious online behaviour¹¹. A penalty has been imposed on the company and, although that case has not met its end, this example shows how important are both the security by design approach and the precise fulfilment of legal obligations regarding securing the company's data.

⁹ Such a responsibility can be found in the crime described in Article 296 of Criminal Code that penalize causing considerable material damage to an organization by exceeding granted powers or by failing to perform duties.

¹⁰ <https://niebezpiecznik.pl/post/3-miliony-kary-dla-morele-net-od-uodo-za-naruszenie-rodo/> (access: 26.03.2020)

¹¹ Decision of President of the Personal Data Protection Office, <https://uodo.gov.pl/decyzje/ZSPR.421.2.2019> (access: 26.03.2020 r.)

Public-private cooperation

It is worth mentioning that an important element, which is somewhat underestimated in the ANCS is the cooperation between the public and private sector. Challenges such as the current state of pandemic can stimulate this area to activity. A good practice is the cooperation of state administration with technology and telecommunications companies. In Austria, one of the telecommunications operators has provided (most probably metadata) of all its users in order to provide the government with the movement patterns of the society¹². Taking such steps seem to be an ideal solution in the context of controlling people who are in quarantine and thus ensuring more efficient and sensible management of epidemic in a specific territory.

Estonia is also a good example. This country has already declared a state of emergency on 12 March. Subsequently, in cooperation with the private sector, the government has organised a hearing called Hack The Crisis¹³ to address the problem. In April the next stage of public-private cooperation is to be initiated. The President of Estonia herself is to participate in the online accelerator for startups aimed at resolving the crisis and continuing the post-crisis activities. The project will be implemented together with the European Commission and Mistletoe Singapore¹⁴.

In Poland, no less good example is the Ministry of Digitization in cooperation with the Scientific and Academic Computer Network (NASK), the Office of Electronic Communications and four telecommunications companies: Orange, Polkomtel, P4 and T-Mobile¹⁵.

¹² https://twitter.com/prywatnik/status/1240192050265493505?ref_src=twsrc%5Etfw%22%3EMarch (access: 25.03.2020 r.)

¹³ <https://www.newyorker.com/news/our-columnists/why-estonia-was-poised-to-handle-how-a-pandemic-would-change-everything> (access: 25.03.2020)

¹⁴ <https://estonianworld.com/technology/addressing-the-coronavirus-crisis-like-the-estonian-start-up-community/> (access: 25.03.2020)

¹⁵ <https://uke.gov.pl/akt/uke-przystapil-do-porozumienia-chroniacego-abonentow,300.html> (access: 25.03.2020 r.)

These entities have reached an agreement under which they are to cooperate in combating phishing sites designed for data theft and conducting fraudulent payments. This cooperation will consist in putting a domain on a black list if its contents seems suspicious at the moment of registering, which will later allow to block it or warn users about phishing attempts Furthermore, NASK maintains a "warning list" that available at the following address: https://www.cert.pl/ostrzezenia_phishing/, and malicious domain can be reported by anyone at the address: <https://incydent.cert.pl/domena>.

Activity of the state administration; anti-crisis shield

Many companies and organisations have faced because of pandemic a dilemma: digitalisation or closure. Hasty actions do not go hand in hand carefulness, especially in areas that require knowledge and experience. No wonder that many of these companies and organisations have trouble adapting to rapidly changing conditions. The situation before the last remote session of the Sejm proves it when a politician who is not a member of the current term of the Sejm had received necessary login data. A full analysis of the vulnerability resulting from the imperfect implementation of the Sejm's remote voting application can be found on the [truanatrzeciastrona.pl](https://zaufanatrzeciastrona.pl) portal¹⁶.

In this context, one should mention the draft regulatory package that is called by the public debate 'as anti-crisis shield' In the explanatory memorandum to the bill, the drafter indicates that there is a need to respond to the economic consequences of the spread of the COVID0-19 virus. The draft includes numerous new solutions, some of which are related to digitalisation and consequently to cyber-threats. In the light of economic turnover, solutions concerning the possibility of corporate decisions to be made electronically by commercial law companies deserve attention. Justifying his decision, the Authors of the project indicated that he aims to rescue nearly 500,000 capital companies forming the Polish

¹⁶ <https://zaufanatrzeciastrona.pl/post/5-powodow-dla-ktorych-system-zdalnego-glosowania-w-sejmie-powinien-przejsc-audyt/> (access: 26.03.2020)

economy¹⁷ from decision-making paralysis. By proposing changes, the project initiator allowed meetings of management boards and supervisory boards of spółka z o. o. (an equivalent of LLP in Poland) and spółka akcyjna (an equivalent of the joint-stock company in Poland) in particular by using of video- or teleconferences. The proposed legislation also includes the possibility to make resolutions in spółka z organiczoną odpowiedzialnością . and spółka akcyjna by direct remote communication and do not require companies to amend their contracts or statutes.

On the other hand, each of these solutions raises operational and technological challenges, which was exemplified by the above-mentioned session of the Sejm. It is worth remembering this, because some disruptions in the course of corporate body meetings may lead to invalidation of the made decisions, not to mention the fact that the vulnerability of technological solutions used to virtualize such meetings maybe lead to risks of losing company's confidential information that often determines the company's ability to function effectively on the market.

Technical, organisational and legal dilemmas

Many organisations that try to run their business online nowadays may face several logistical, organisational, technical and legal challenges if they have not implemented adequate solutions so far. The recommendation of equipping all employees with company computers will remain a fantasy and bringing in an office line (will be impossible. The use of a private computer and company software may be associated with many dilemmas, ranging from the fact that it is difficult to prohibit employes from using their private devices for non-work-related purposes to a possible licensing problem related to the use of a license on a third party's computer. Conducting an initial technical-organizational-legal analysis is an obvious demand, but entrepreneurs will often be forced to choose the lesser evil.

¹⁷ [http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-124-2020/\\$file/9-020-124-2020.pdf](http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-124-2020/$file/9-020-124-2020.pdf) (acess z dnia 26.03.2020)

The selection of the right partner or service provider may be particularly important. The implementation of cloud solutions, which have been criticised many times in the past for the lack of a matching security profile, may turn out to be an answer allowing for a rapid increase of security necessary in the new working model.

Therefore we have to ask ourselves the following questions when planning to take adequate measures to ensure cybersecurity:

1. what data are we obliged to protect and what kind of data do we want to protect;
2. what organisational and technical measures will be optimal in terms of legal requirements and best practices;
3. how will we respond to possible incidents and how will we ensure the continuity of our company in the event of a successful hacking attack;
4. whether we can implement all measures alone or do we need support from third parties.

Summary

The challenges related to ensuring the security of processed information should not be new for Polish companies, bearing in mind that almost two years have passed since the implementation of ANSC. However, the reality, especially for small and medium enterprises, is different. It is namely difficult to implement ISO standards in a situation of growing crisis, however, complete disregard for the risk related to the increased threat of hacking attacks may have as dramatic consequences as payment gridlocks. Cybersecurity does not resemble running for short distances. It is rather similar to a marathon - or even a super marathon and as in any other marathon, the most important is to take the first step.

CYBERSECURITY



CORONAVIRUS AND THE LAW IN POLAND

MEDIA, FILM AND TV



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3 The impact of the coronavirus epidemic on media, film and TV

The COVID-19 epidemic will result in major changes on the audiovisual market. We offer a few tips to the producers on what to do and how to build relations with their partners anew, as well as what legal tools they can use in the times of crisis.

The progressing coronavirus pandemic is about to change the Polish film industry. It is much too early to predict a lasting collapse of the sector. Nevertheless, we should expect that photo shoots for movie and TV productions will be on hold at least until June 2020, and the fear of attending public places will continue to affect cinema attendance for a long time afterwards.

While looking at the situation from the perspective of end users – transferring cinema premieres to streaming platforms under TVOD and SVOD, intensified purchase of licences for existing content by broadcasters and platforms wishing to fight for their current audience and win new subscribers – the following changes seem positive¹⁸. However, a change in the model of distribution from cinema to home video entails far-reaching consequences for producers themselves. Some of them are already trapped and cannot recover the money they invested, since traditional forms of distribution were restricted, while others already feel they will not be able to meet their deadlines.

¹⁸ https://www.press.pl/tresc/61023,serwisy-vod-w-marcu-ze-znacznym-wzrostem_-zyskaja-klientow-na-dluzej

According to the data provided by the head of the Polish Film Institute¹⁹ (status as at 22nd March 2020) and obtained from the producers²⁰, since the onset of the epidemic in Poland, a total of 182 productions have been discontinued - 69 feature films, 51 series, 34 advertisements, 22 documentaries and 6 other film productions. This text sets out to present certain recommendations on how to arrange relations with partners in this difficult period and when further actions are impossible, how to use the existing legal tool for protection against losses associated with business activity.

What problems is the audiovisual industry facing in the light of the COVID-19 epidemic?

- » the need to renegotiate distribution agreements – as regards deadlines, broadcast windows, holdback provisions and searching for new ways to optimise distribution;
- » withholding payments – loss of liquidity among the major stakeholders (especially in the cinema sector) is highly likely and will be manifested in the accounting of funds assigned to those productions that are already completed;
- » the need to cancel photo shoots, consequences with regard to subcontractors (locations, crew, actors), co-producers or broadcasters;
- » changes in the schedules, the related unavailability of film crews and artists, guaranteeing the option to resume the discontinued photo shoots;
- » the need to renegotiate cost estimates – possible increase of production costs (some preparations cannot be shifted to another date without a loss);
- » increased cost of production insurance;
- » renegotiating agreements related to the lease of locations and equipment;
- » expiry of financing commitments and agreements;
- » one of the negative results of the closure of cinemas is also an increase in pirated content, so even more intensified actions will be necessary to eliminate it from the Internet.

¹⁹ <https://wyborcza.pl/7,101707,25814701,kryzys-w-kinie-prawie-200-przerwanych-produkcji-wyra-na-2.html>

²⁰ Through przerwanezdjecia@pisf.pl

Legal solution

In the current legal situation producers have three options as regards the legal aspect of shaping further relations with their subcontractors and partners – *force majeure* regulations, the doctrine of *rebus sic stantibus* (Article 357¹ of the Civil Code) in order to introduce an amendment to the agreement in court in the event of unexpected and extraordinary circumstances, or provisions related to the inability to fulfil one's obligations (Article 495 of the Civil Code). In any case, however, the first way we recommend is discussing the situation openly with your partner. The current situation affects all the entities in the industry; reaching an agreement and coming up with a new schedule (and in some cases also a cost-estimate) will in most cases let you finish the work and continue your activity.

Epidemic as a force majeure event

Force majeure, mentioned in numerous legal provisions, has not been expressly defined in any of them. No legal definition makes it possible to apply such rules of interpretation under which specific circumstances could be classified as *force majeure*. It is widely accepted that *force majeure* is an external event of random nature, and as such impossible or difficult to predict, and beyond human control also in that it is impossible to prevent its effects. In our opinion, the COVID-19 epidemic can be classified as a *force majeure* event, whereas its actual impact on specific contractual relations and obligations may vary and may be subject to a different legal assessment.

Force majeure regulations are virtually a standard element of agreements concluded with international partners; therefore we should first make sure they were included in the discussed agreement. *Force majeure* clauses are included mainly in order to relieve a party from its liability for damage resulting from a failure to perform or improper performance of its obligations towards the other party and to foresee the mutual obligations of the parties towards one another for the duration of a *force majeure* event.

However, if an agreement does not include a *force majeure* clause, this does not mean we cannot invoke it with regard to liability for damages. In this case,

the liability of a party for a failure to perform the agreement will normally be fault-based. Therefore, if a producer, as a party to an agreement, cannot perform its part of the agreement because of the epidemic and its consequences – restriction of movement, meetings, performing specific activities, then it will not be possible to assign fault-based (and in some cases also risk-based) liability to it. As it is, we should definitely remember to document all the activities performed, because it is the party which failed to perform its part of the agreement that has to prove the failure was caused by circumstances beyond its control.

Still, even in the face of a threat of epidemic, there must be an actual relationship between the results of the epidemic and the discussed agreement; this is why considerable significance is attached to the so called due diligence activities. Due diligence activities involve securing the plan, restricting the participation of infected people (or those with suspected infection), introducing job rotation or remote working, so that those tasks that can objectively be completed are actually done. In this case, cancelling a photo shoot in June and invoking *force majeure* will not be effective at this moment, because a producer will not be able to prove whether there were substantial grounds for this at the moment when the decision was made. However, the situation will be different when e.g. the leading actor cannot make it to the plan because the borders are closed for foreigners or a forced quarantine is imposed on those who return from abroad. This is something the producer could not have foreseen, but he/she should try and look for a substitute whenever possible and if not, immediately notify the parties he/she has liabilities towards: the broadcaster, distributor, financing entities. We should bear in mind that as a rule, the mere existence of a *force majeure* event (epidemic) does not alter or dissolve an agreement.

What options arise from extraordinary change in circumstances – *rebus sic stantibus*

As a party to an agreement, we should also consider using the clause on extraordinary change in circumstances stipulated in the Civil Code - this is the so called doctrine of *rebus sic stantibus* as described in Article 357¹ of the Civil Code.

According to this clause, you can request that the court designate the manner of performing the obligation, define the value of performance or even dissolve the agreement altogether. In this case, it is necessary to prove that because of an extraordinary change in circumstances, the performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when executing the agreement. This will apply to particularly difficult cases or even extreme situations, when we already know that it will be impossible to engage the same artists and subcontractors on new dates or the increase in their rates will be incompatible with the actual budget.

Impossibility to perform in the event of epidemic or because of its consequences

If the consequences of the epidemic make it completely impossible to carry out the work and fulfil the obligations, we can also invoke the consequential performance impossibility as defined in Article 475 of the Civil Code. According to this provision, the debtor is not liable if the performance becomes impossible due to circumstances beyond his/her control, in which case the obligation expires. At the same time, the party that invokes performance impossibility cannot demand counter-performance (e.g. a payment) from the other party. It should be noted, though, that such situations can be assessed only after some time has passed, when it is obvious how exactly the epidemic affected the specific production. At the moment we can speak of considerable difficulties and delays in performance, but in most cases there are no grounds to claim that it is impossible to perform the agreement.

What remedial actions can and should be taken if it is indeed impossible to perform an agreement?

First of all, it is a dialogue with your partner. The current situation is obvious for everybody, so it should not come as a surprise that certain deadlines must be shifted, the crew and artists may change, and each modification will generate extra costs. Only open attitude can become the basis for adjusting previous terms and conditions to the new reality. The requirement to adjust the terms

and conditions becomes an obligation of each entity operating on the market – in particular broadcasters who hold the funds, especially that they benefit from the current situation in a way – the increase in viewing figures, one-off transactions and subscriptions is all too visible nowadays. At the same time it should be considered that discontinuing mutual performance by both parties with immediate effect is not a good solution, because it could even lead to insolvency among smaller and economically weaker entities, which would then be forced to close down their business. In this case, we might be faced with a domino effect. For example, if an entity that contracted the production demands that photo shoots be discontinued and limits the payments, then the producer will have to withhold the payments towards his/her subcontractors, who are also in a difficult financial position. In this situation it will be very difficult, if impossible, to resume the work. It will also entail an update of cost estimates each time.

What work can be performed during the restrictions on (free) movement of people

The regulation on declaring epidemic in Poland, introduced by the government on 25th March 2020, includes a ban on meetings, events, gatherings and assemblies. The restriction related to the number of people does not apply to a workplace. Another amendment in the provisions regulating the restrictions, orders and bans related to the COVID-19 epidemic includes an explanation of certain doubts arising with regard to the organisation of film, TV and advertisement productions during the epidemic. As per the Regulation of the Council of Ministers, effective as of 31/03/2020, it should be assumed that it is possible to continue with previously planned photo shoots, post-production and operations of audiovisual producers, since these activities were not restricted. Entities dealing with cinema production, video recordings, TV programmes (TV series, documentaries) and TV advertisements are classified under PKD (Polish Classification of Businesses) codes 59.11 and 59.12 ["Motion picture, video and television programme production activities" and "Motion picture, video and television programme post-production activities" respectively].

However, there is a temporary restriction of activities of motion picture or video tape projection in cinemas, in the open air or in other projection facilities, e.g. activities of cine-clubs (PKD code 59.14.) and artistic activity related to collective forms of culture and entertainment – organising theatre shows, opera, ballet and concerts (PKD code 90.0).

However, each employer should remember to provide his/her employees with additional safety measures: individual workstations must be at least 1.5 metre apart, and employees must use gloves or have access to disinfectants.

How to talk to distributors/broadcasters?

The relations between distributors and producers were shaped over the years, but they will definitely be put to the test over the next few months. Payment gridlocks are expected, since the cost of running a cinema is relatively high and the drop in revenue is dramatic.

It should be remembered that if one party to the agreement fails to perform the contracted service, the other party has a right to refrain from performing mutual obligation (Article 490 of the Civil Code) until the other party offers the mutual performance or provides security.

In the event of productions that are already commenced and those that are about to start over the next few months, it will be necessary to renegotiate the dates related to the performance of the agreement – starting dates of photo shoots, date when source masters are to be delivered, as well as dates of completion of individual episodes. We would also like to point out that contrary to the previous agreements, this time it is reasonable to adopt less definite performance deadlines for producers or include an option to extend the deadlines if further difficulties arise from the COVID-19 epidemic and its aftermath. At the moment it is hard to tell when social and business life will go back to normal – to the reality we are familiar with.

In order to guarantee incoming funds in the amount sufficient at least to cover the production costs – and this may refer to both ready and pending productions – we would also like to point out the possibility to renegotiate emission windows and to adopt flexible approach towards so called “holdback”. We already know that as a result of restrictions on the movement of people and performing certain business activities, we cannot count on revenue related to cinematographic marketing. This situation might continue for the next few months: even when the cinemas are open again, people may still be afraid of attending public places. This forced change of the distribution model accounts for a shift in premiere dates on TVOD and SVOD platforms. In this case, producers together with distributors and broadcasters should adopt some mechanisms which can already help them change the distribution model at this moment. The agreements should also impose more obligations on distributors, as regards anti-piracy content protection and activities related to debt enforcement.

More than ever before, distributors are obliged to look for new distribution channels, to ensure additional or speedy marketing windows. This should be done through renegotiating license agreements with broadcasters and platforms, as well as dynamic search for recipients not only on the national market, but also abroad.

Public aid

At the moment, the significance of public funds from operational programmes and the so called “incentives”, managed by Polish Film Institute, will continue to increase. We have positive signals from the Institute as regards continuous allocation of funds and support, especially during the production shutdown related to development works. Furthermore, the Institute also announced²¹ the following facilities for producers:

- » extending the effective period of financing commitments;
- » cancelling the obligation of cinematographic marketing;

²¹ <https://pisf.pl/aktualnosci/podsumowanie-pierwszej-narady-zespolu-kryzysowego/>

- » introducing a mandatory classification of all films as difficult, which makes it possible to increase the public aid threshold to 70%;
- » deferring payments under Article 19 of the Films Act due from cinema operators;
- » speeding up the process of examining requests and concluding agreements related to subsidies, as well as the settlements and payments of subsequent instalments of the subsidies;
- » the Institute announced it would be flexible as regards extending project schedules;
- » the idea to create a special film fund is being considered, which would provide rapid aid to those artists who need it most.

Another response to the needs of Polish entrepreneurs is also the Anti-Crisis Shield announced by the government. It stipulates such solutions as for example exemption of the smallest business entities (up to 9 people) from social security contributions for a period of 3 months (March–May) – the exemption refers to the contributions for the entrepreneur and people working for him/her; it is also available for self-employed people whose revenue is no higher than 3 times the average salary, possibility to defer the tax payments (Personal Income Tax, Corporate Income Tax, VAT, property tax) without extra fees, extending working capital credit facilities, state subsidy in the amount of 40% of the employee's salary when the company suffers a drop in turnover. Medium-sized enterprises can count on such measures as: state subsidy in the amount of 40% of the employee's salary when the company suffers a drop in turnover, state co-financing the salaries during the economic downtime, expanding the surety and *de minimis* guarantee scheme offered by BGK [Bank Gospodarstwa Krajowego], possibility to defer the payment of social security contributions – without extra fees and interest. However, the government rejected quite a few suggestions reported by entrepreneurs, which means that the protection offered by the Shield and applicable also to the entertainment industry (film and TV) may prove insufficient.

Summary

The authors of this publication believe that before resorting to legal steps, it is good to focus on open and partnership approach to the current situation and to

encourage such attitude among all the members of the audiovisual industry. On the other hand, it is also advisable to use this difficult situation and the related withholding of photo shoots as an opportunity not only to renegotiate the terms and conditions of relevant agreements, but also to engage in development and work that can be done remotely, such as e.g. castings, work on the screenplay and looking for funds to continue projects, so that we are better equipped to face new challenges that will appear in the audiovisual production market when life goes back to normal.

However, it is with great prudence and caution that we should approach all the urgent amendments to the agreements, especially those that involve a waiver of mutual claims related to the current situation. Although such clauses may seem symmetrical and positive, it is good to stop and think which party will have to incur the actual costs related to amended schedules and interrupted productions. Only after a thorough analysis of the situation and effective contractual provisions can we think of concluding subsequent formal agreements.

MEDIA, FILM AND TV



CORONAVIRUS AND THE LAW IN POLAND

HR



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4 HR law in the face of epidemic

Coronavirus epidemic has strongly impacted the HR market in Poland. In this chapter we discuss the most important, in our opinion, aspects of HR law, relevant to the businesses in our country.

1. Problems of employers in the first phase of coronavirus spread

In the beginning of the report we present the issues which have raised a number of controversies in the first phase of coronavirus spread in Poland. Some of them have been addressed in the new legislation related to COVID-19 epidemic, whereas others have not been resolved and have caused many difficulties to employers.

Sick leaves over the phone

Employers have serious doubts about the necessity to accept sick leaves granted to employees over the phone. Although this solution was introduced several years ago, there exist no detailed guidelines on remote granting of sick leaves (*L4*). The Social Insurance Institution (*Zakład Ubezpieczeń Społecznych – ZUS*) and the government have confirmed that it is possible to use this solution during the coronavirus spread.

Thus, employers have become concerned that as a result of ‘panic’ caused by coronavirus in the society, this solution will be abused, as doctors issuing sick leaves over the phone cannot actually examine the patient. The legislation has not provided for any specific tools enabling the employers to verify the validity and use of such leaves. Unfortunately, the scale of abuse will never be verified.

However, this shows how important it is to look into the validity of such solution in the future and regulate it properly, if necessary.

Remote work for the first time in Polish regulations

The Act on special arrangements associated with preventing, counteracting and combating COVID-19, other contagious diseases and the crisis situations they cause of 2 March 2020 is the first legal act in Poland which uses the term 'remote work'. Soon after the above act had entered into force, the National Labour Inspectorate (*Państwowa Inspekcja Pracy*) has recommended that remote work should be advised to employees whenever possible.

Despite the fact that the term 'remote work' has been introduced to the legislation, such matters as the manner and form of referring employees to remote work, the place of performance and the possibility of its controlling or protection of data on the devices used by employees working from home have not been specified. This has caused problems for employers who have not regulated the remote work in their internal regulations. Thus, what has been a minor issue so far, has become one of the key aspects in the HR management, and the remote work regulations should be one of the basic internal regulation at the organisation, not only during the coronavirus epidemic, but also in the future. It can be assumed that the current mass use of remote work will make it widespread in the future.

Application of OHS regulations to persons working on other basis than a contract of employment

The occupational health and safety regulations in connection with the coronavirus outbreak directly refer only to employees employed under contracts of employment. In our opinion, the application of the same rules to individuals working under e.g. civil law contracts is necessary, taking into account the aim of these regulations in such extraordinary circumstances as the coronavirus epidemic. The standards of safety, health and life protection should not be differentiated depending on the type of contract concluded between the employer and an individual.

Under the labour law provisions, an employer is obliged to ensure safe and hygienic conditions to the individuals working on other basis than a contract of employment, including to the self-employed. In many cases, it is aimless to apply increased safety and health measures only to some workers. Thus, each person performing work in the organisation is obliged to follow the OHS recommendations and guidelines given by the employer. Otherwise, it would be impossible to ensure safety and effectively prevent the coronavirus spread in a work establishment.

Qualifying non-performance of work due to coronavirus as a layoff

Prior to the outbreak of coronavirus epidemic, the Polish legal system had not implemented any explicit regulations that could be applied in the situation where a work establishment may not temporarily operate due to the COVID-19 epidemic.

The majority opinion is that this is a layoff and an employer should pay to employees a so-called 'layoff salary'. In our view, this is not a layoff, at least it will not always be so. It all depends on the interpretation of Article 81 of the Labour Code and the conditions specified therein which should be met to classify a given situation as a layoff. There is a view that to consider a discontinuation of activities by a work establishment or its part as a layoff, it is sufficient if it occurs for reasons beyond the control of an employee. However, in views of some legal academics and commentators, a reason for temporary inability to conduct business must not only be beyond the control of an employee, but also must relate to the employer. This explicitly results from Article 81(1) of the Labour Code.

If we accept the interpretation that the layoff relates to any situation caused by reasons unrelated to employees, treating such situations as the layoff would lead to an excessive burden on businesses and could cause considerable financial problems for many companies. Such a situation has constituent elements of force majeure. Thus, employees' salaries should be rather funded by ZUS, from the money (contributions) of the whole society. We believe that the state support granted to employers should be considerably greater than the one provided for in the latest regulations described further in the report.

Incapacity to perform work

An alternative solution to the layoff regulated in the Labour Code would be the application of Article 6 of the Act of 25 June 1999 on the money benefits from social insurance in case of illness and maternity. It stipulates that in case of incapacity to perform work by an employee as a result of a decision by a competent authority or other entity issued under the Act on prevention, counteracting and combating contagious diseases, an employee is entitled to sickness benefits (the same as in case of incapacity to work). However, we are facing such extraordinary circumstances that have not occurred in the past, hence this provision has not been applied in such a context.

Above all, the requirement to issue an administrative decision raises doubts. The act does not specify whether this must be an individual decision relating to an individual employee or that the provision also applies to the administrative decision relating to the whole work establishment (e.g. closing of a shop or medical facility due to epidemic). In our opinion, both literal and purposive interpretation of this provision are in favour of its application also in such situations, i.e. in the case of the decision relating to the employer, not to an individual employee. The effect of the decision is the same – an employee may not perform work as a result of the decision of a competent administrative authority.

Can the right to use the care allowance be refused and when they can be refused?

Additional days of care allowance for parents whose children cannot attend educational facilities as a result of their closure due to coronavirus have been introduced to the legislation.

However, the legal situation of businesses of special economic and defence significance (e.g. companies operating in the energy or pharmaceutical sectors) has not been regulated. These companies, due to a special nature of their businesses (such as the manufacture of medicines) cannot stop carrying out business even in crisis situations. This would involve serious legal consequences for them, and

would mean an even bigger crisis for society (e.g. a break in the manufacture of medicines or supply of electricity).

In this context, a question arises whether maintaining the manufacture of medicines during the epidemic is more important than the right of an employee to use a leave and allowance to take care of a child. In our view, such circumstances justify a refusal to use the care allowance by essential employees, without whom the operations of the business of special economic and defence significance would be threatened. Reasons for this include not only the public interest, but also the fact that certain entities have been granted a special status. Nevertheless, this issue raises a number of controversies and should be reflected in the regulations.

Inability to carry out medical examinations

A great number of medical facilities offering occupational medicine examinations have decided to suspend their activities in this scope for the time of coronavirus epidemic. Thus, other facilities providing such services have not been able to admit the sufficient number of employees intending to perform initial or periodic examinations which are theoretically necessary to be admitted to work. It is even more difficult, taking into account the fact that currently it is necessary to question the employee over the phone to check whether he/she has symptoms of coronavirus before admitting him/her to examination. It was only later confirmed by the National Labour Inspectorate that the obligation to perform periodic examinations should be suspended for the duration of epidemic.

This matter has been finally regulated in the 'anti-crisis shield' which entered into force as of 1 April 2020. You can find out more about it further in the report.

2. Special measures introduced due to the state of coronavirus epidemic

Below, we present selected key arrangements which are crucial for the HR law, provided for in the Act dubbed the 'Anti-crisis Shield'.

Firstly, it is important to state that the special measures created by the law-makers due to the coronavirus outbreak do not exclude the possibility for the employers to use the arrangements set forth in the Labour Code. What is more, some of the arrangements specified in the new act are based on the arrangements already existing in the labour law for many years.

The aim of the 'Anti-crisis Shield' was to ensure that employers can use the 'Rapid Response Mechanisms' (RRMs). Has this aim been in fact achieved? In our view, any arrangements requiring an agreement with trade unions or employees' representatives to be implemented do not respond to the employers' needs in the current situation and are not the RRM. Finally, the initially proposed mechanism has not been introduced. Under this mechanism the employer who has not reached an agreement with a trade union or employees' representatives may decide to implement solutions to rescue the company without the agreement of these entities. Such a solution was included in the first draft of the act. The withdrawal from this mechanism should be assessed negatively. As a result, the arrangements intended to be the RRM in some workplaces will not even be possible, particularly when social partners refuse to discuss them already in the beginning of consultations, without giving substantive reasons and understanding the economic situation of the employer.

However, enabling the consultations on particular mechanisms with employees' representatives appointed earlier for other purposes, if it is not possible to appoint the new ones due to the COVID-19 epidemic, should be considered as a positive feature of the solutions. Nevertheless, it has not been taken into account that there are employers without any employees' representatives selected and have not provided for a simplified selection procedure. We think that extraordinary circumstances call for extraordinary measures. Thus, any actions taken by employers (also relating to the selection of employees' representatives) should be carried in the simplest and most convenient form (e.g. online), taking care of employees' health and safety.

Economic downtime

Under the 'Anti-crisis Shield' the employer may introduce an economic downtime and reduce remuneration of employees, but by no more than 50%. This remuneration cannot be lower than the minimum wage (in 2020: PLN 2,600 gross), taking into account the working time.

What is important, the law-maker's new draft does not specify how to understand the term 'remuneration', referred to above, i.e. which components should be taken into account in its calculation. The answer to this question is crucial, as remuneration systems often include a number of different components (bonuses, commissions, allowances). A lack of precise regulation complicates applying for salary subsidies.

Salaries paid to employees during the economic downtime are subsidised from the Guaranteed Employment Benefit Fund in the amount of 50% of minimum wage determined on the basis of minimum wage regulations, taking into account the working time. This means that in the case of an employee working on a half-time basis, the employer will be entitled to a subsidy of PLN 650 gross (half of PLN 1,300). The use of subsidy is clearly dependent on the fall in turnover as a result of COVID-19 outbreak.

The term 'fall in turnover' means in the act a fall in economic turnover:

- » of at least 15%, calculated as the ratio of the total turnover in any two consecutive calendar months in the period after 1 January 2020 until the day preceding the day of applying for benefits from the Guaranteed Employment Benefit Fund, compared to the total turnover in the corresponding two consecutive calendar months of the previous year. Months do not need to cover full calendar months – they may start during a calendar month and then the month is counted as 30 consecutive days;
- » of at least 25%, calculated as the ratio of the total turnover in any calendar month in the period after 1 January 2020 until the day preceding the day of applying for benefits from the Guaranteed Employment Benefit Fund,

compared to the total turnover from the previous month. Months do not need to cover full calendar months – they may start during a calendar month and then the month is counted as 30 consecutive days.

Reduction of working time

Employers can reduce the working time of employees by 20%, but no more than to a half-time basis. An employee whose working time has been reduced, should be paid remuneration which cannot be lower than the minimum wage (proportionally to the working time basis).

If an employer experienced a fall in economic turnover as a result of COVID-19 outbreak, the employees' salaries may be subsidised from the Guaranteed Employment Benefit Fund up to the half of the salary, but not more than 40% of the average monthly salary announced by the President of the Central Statistical Office for the previous quarter on the basis of the provisions on pensions from the Social Insurance Fund, applicable as of the date of application. As at the date of entering into force of the provisions, the amount relating to the 3rd quarter of 2019 applies, as data for the 1st quarter of 2020 will be announced in the second half of April 2020.

Rules of granting subsidies

The discussed arrangements apply not only to persons employed under contracts of employment, but also to individuals performing work under a mandate contract or services contract to which the provisions on commissioning work apply.

The subsidy will be granted only to employers who are not in arrears with any contributions for social security, health insurance, the Guaranteed Employment Benefit Fund or the Labour Fund or Solidarity Fund until the end of 3rd quarter of 2019.

The subsidies referred to above can be granted only for 3 months. This period may be extended by way of the Regulation of the Council of Ministers, if the period of the state of epidemic or associated effects extends.

The subsidies cannot be granted to the salaries of employees who in the month preceding the application earned 300% of the average monthly salary announced by the President of the Statistics' Poland for the previous quarter on the basis of the provisions on pensions from the Social Insurance Fund, applicable as at the date of application (i.e. as on 1 April 2020: PLN 15,595.74 gross).

Job protection

The employer who receives salary subsidies related to the economic downtime or reduction in the working time (referred to above) is obliged to maintain the subsidised jobs, in the period of using the subsidies and for 3 months after the end of receiving the state aid. Therefore, the employer may not terminate a contract at that time for reasons unrelated to an employee. However, this restriction relates only to the jobs which have been subsidised. If the contract of employment is terminated in the period when the subsidy was granted and 3 months after that for reasons unrelated to the employee, the employer will be obliged to return the subsidy granted for the dismissed employee with calculated interest.

Required agreement

Working conditions and the way of performing work during the economic downtime must be agreed on in the course of consultation with trade unions or employees' representatives. In case of difficulties in selecting the employees' representatives due to coronavirus, the agreement with representatives selected earlier (who have general competences relating to all labour law-matters, requiring agreement with the employees' representatives).

The act has also a provision indicating that in the scope of and for the time specified in the agreement on specification of working conditions and the way of performing work during the economic downtime or reduced working time, the requirements under the contracts of employment and other acts which are the basis of employment relationship shall not apply. The provision relates to collective agreements, but there are also doubts about the remuneration components resulting from other internal sources of labour law.

This provision is not clear. In particular, it has not been specified what specific components of remuneration will be suspended/reduced or whether it can be assumed that all of them are suspended (like in the case of a layoff on the general terms under Article 81 of the Labour Code). Certainly, however the conditions subject to agreement are suspended.

Application procedure

To apply for subsidies in the case of reduction of the working time or economic downtime, an application should be submitted to the Voivodeship Marshal through the Director of the Voivodeship Employment Office relevant for the entrepreneur. For this reason, the platform for submission of applications with necessary documents in the electronic form has been launched. In the same way the grant agreement is concluded. Applications can be submitted via website praca.gov.pl and must be signed by a qualified electronic signature or signature confirmed by the ePUAP trusted profile.

The list of employees which must be attached to the application is subject to controversy. This list should name each employee covered by the support with the amount of salary for the month preceding the application with the amount of salary during the economic downtime or reduced working time. As we mentioned above, neither the act nor any guidelines do specify what 'salary' means, especially the one of the previous month. In our opinion, it should include fixed remuneration components which are the basis of calculation of reduced salary covered by a subsidy. However, there are no guidelines in this regard which leads to uncertainty among the entities applying for subsidies.

Simultaneous use of the arrangements regarding downtime and working time reduction

Having in mind the current wording of the new provisions ("[...] payment from the funds of the Guaranteed Employment Benefit Fund of benefits to subsidise salaries of employees subject to either the economic downtime or reduced working time – previously the draft had the conjunction 'and/or' therefore this matter has been deliberately specified) and purposive approach, we are convinced that

the employer cannot apply at the same time the arrangements associated with downtime and working time reduction to the same persons (i.e. first to reduce their working time by 20% and then announce the economic downtime). This could lead to a paradoxical situation where the employer would not have to pay for the employee salary of out-of-pocket.

Example:

If an employee earning PLN 6,500 had his/her working time reduced by 20%, the employee's salary after such reduction would be PLN 5,200. The employer could receive a subsidy of additional PLN 2,000.

Then, if the economic downtime was declared and the salary of PLN 5,200 was reduced by 50%, it would amount to PLN 2,600 (which is equal to the minimum wage), and the state would finance the next PLN 1,300 of the salary. Thus, with both arrangements combined, the salary would be covered in full by the state, while the employer would even make profit on this (as the total subsidy would be PLN 3,300). The introduction of such mechanism was certainly not planned by the law-makers.

Aid received from the *starosta*

Salary subsidy

Salaries paid to employees may be also subsidised by a *starosta* (head of *powiat*, second-tier administrative unit in Poland). This solution may be used only by micro-, small and medium-sized entrepreneurs. However, the company may not receive a subsidy in the part in which the same business costs are covered from other public funds, not necessarily as part of the anti-crisis shield. Subsidies cover not only salaries, but also associated social security contributions. Only the employer who experiences a fall in economic turnover may benefit from the aid of the *starosta*.

A subsidy from the *starosta* may be granted for the period no longer than 3 months. However, the Council of Ministers can extend this period, by way of a regulation, taking into account the duration of the state of epidemic threat and the state of

epidemic and the effects they cause. Subsidies are paid monthly, after the entrepreneur has submitted a declaration on employment in a given month, providing the information on the employees covered by the agreement and the remuneration costs of each of these employees and associated social security contributions, as on the last day of the month for which the subsidies are paid.

In the context of this solution, a fall in turnover means a fall in the sale of goods and services in terms of quantity or value, calculated as the ratio of the total turnover in any two consecutive calendar months in the period after 1 January 2020 until the day preceding the application for subsidies, compared to the total turnover in the corresponding two consecutive calendar months of the previous year. A month means also 30 consecutive calendar days, in the case that the 2-month-comparable-period starts during the calendar month, i.e. on the day other than the first day of a given calendar month.

The discussed regulation applies also to individuals performing work under a mandate contract or other services contract to which the provisions on commissioning work apply. Subsidies apply also to individuals performing work on other basis than employment, under a contract for an employer being an Agricultural Production Cooperative or other cooperative engaged in agricultural production, should they be subject to mandatory pension insurance.

The following table presents a mechanism for calculating the subsidy amounts.

Fall in turnover by at least 30%	Fall in turnover by at least 50%	Fall in turnover by at least 80%
Subsidies may be granted in the amount not exceeding the amount constituting the total of 50% of individual employees' salaries included in the application for subsidies with associated social security contributions, however, no more than 50% of the minimum wage, plus social security contributions of the employer, in relation to each employee.	Subsidies may be granted in the amount not exceeding the amount constituting the total of 70% of individual employees' salaries included in the application for subsidies with associated social security contributions, however, no more than 70% of the minimum wage, plus social security contributions of the employer, in relation to each employee.	Subsidies may be granted in the amount not exceeding the amount constituting the total of 90% of individual employees' salaries included in the application for subsidies with associated social security contributions, however, no more than 90% of the minimum wage, plus social security contributions of the employer, in relation to each employee.

The employer who will benefit from the aid of the *starosta* must keep in employment employees included in the agreement for the subsidised period and for the period equal to the subsidised period after the end of receiving benefits. If the employer does not fulfil this obligation – he/she must return subsidies, but without interest and in proportion to the period of not keeping the employment.

The subsidy will be granted only to employers who are not in arrears with any contributions for social security, health insurance, the Guaranteed Employment Benefit Fund, the Labour Fund or Solidarity Fund until the end of 3rd quarter of 2019.

Loan granted by the *starosta*

Under new provisions, the *starosta* may grant a one-off loan from the Labour Fund to cover current business costs of a micro-business. The loan can be granted only up to PLN 5,000 gross, and its repayment period cannot, as a rule, exceed 12 months. It can, however, be extended by way of a regulation issued by the Council of Ministers where it is justified by COVID-19-related circumstances.

What is important for micro-entrepreneurs – a loan with interest shall be redeemed at the request of the company, if for the period of 3 months of granting the loan, the company has not decided to reduce the headcount in relation to the headcount as of 29 February 2020.

Downtime benefit

Individuals entitled to a downtime benefit under the provisions of the new act are individuals carrying out non-agricultural business and individuals employed under an agency contract, contract of mandate or other contract to which the provisions on a contract of mandate or contract of specific work apply (hereinafter referred to jointly as 'civil law contracts'). However, a number of criteria should be met in order to obtain this benefit.

Individuals who have benefited through their principal from other solutions provided in the new act may also use a downtime benefit. However, if the right to more

than one downtime benefit cumulates, the person is entitled to only one benefit. What is more, income limits have been introduced. If the limits are exceeded, a contractor or an individual carrying out business may not use the benefit.

To receive the benefit, all of the conditions described below must be met.

- 1) the benefit can be granted, if as a result of the COVID-19 outbreak, there has been a downtime in the business (run by an individual carrying out non-agricultural business or by an entity hiring a person under a civil law contract);
- 2) the downtime benefit cannot be granted if the income from business or a civil law contract (in the case of individuals not carrying out business) in the month preceding an application was higher than 300% of the average monthly salary announced by President of the Central Statistical Office for the previous quarter on the basis of the provisions on pensions from the Social Insurance Fund, in force as on the date of application (i.e. PLN 15,595.74 gross).
- 3) individuals hired under civil law contracts will be entitled to the benefit only if these contracts were concluded no later than on 1 February 2020,

If the total income from civil law contracts within the meaning of the regulations on personal income tax earned in a month preceding the month in which the application for downtime benefit was submitted is lower than 50% of the minimum wage applicable in 2020, individuals are entitled to the downtime benefit to the amount of total fees for the performance of these civil law contracts.

Whereas individuals carrying out non-agricultural business are entitled to the downtime benefit only if they have not suspended non-agricultural business before 31 January 2020 and if the income from non-agricultural business within the meaning of the regulations on personal income tax earned in the month preceding the month of application for downtime benefit was at least 15% lower than the income earned in the month preceding this month.

The Council of Ministers may, to counteract COVID-19, by way of a regulation, grant another payment of a downtime benefit to individuals who have previously

received this benefit, taking into account the duration of the state of epidemic threat or the state of epidemic and the effects they cause (previously the President of ZUS had this right).

Individuals carrying out non-agricultural business are entitled to the downtime benefit of 50% of the minimum wage. Other individuals mentioned above (i.e. individuals hired under civil law contracts, not carrying out business) are entitled to the downtime benefit of 80% of the minimum wage.

In the case of individuals employed under civil law contracts, the application is submitted through the principal or contracting party. In our assessment, the entrepreneur-principal/contracting party who receives an application, cannot refuse to submit it (similarly as in the case of applications for certain social security benefits).

Additional time of care allowance

The new act provides for additional 14 days of care allowance associated with the closure of schools and pre-primary school. This is 14 days more than previously. The parents who used this allowance under the first act on combating coronavirus are also entitled to this additional 14 days of allowance.

In accordance with new regulations the care allowance can be granted also in the case that 'a nanny cannot take care of a child'. However, it has not been specified how this inability should be documented (e.g. whether it should be a declaration that a nanny has been put into quarantine).

Parents taking personal care of children with disabilities up to 18 years of age are also entitled to this allowance. The Council of Ministers can specify a longer period of the allowance, if the educational facilities remain closed for an extended period due to coronavirus.

Limitation of uninterrupted rest, equivalent system, longer settlement period, suspension of labour law provisions

Under the drafted provisions, the employer affected by a fall in turnover as a result of COVID-19 may:

- 1) Limit the period of daily uninterrupted rest to not less than 8 hours, while the weekly rest period may be limited to 32 hours.

In such a case an employee is entitled to an equivalent rest period counted as a difference between 11 hours and the number of hours of a shorter rest period. The employer must grant this equivalent rest period to the employee within 8 weeks;

- 2) Conclude an agreement on introduction of the equivalent working time system where it is allowed to extend the daily working time, however, by no more than 12 hours, in the settlement period not exceeding 12 months. Under this system, a daily working time is extended on some days, while an employee works shorter on other days or is granted a day off to balance longer hours.
- 3) Conclude an agreement on application of less favourable employment conditions than those resulting from contracts of employment concluded with these employees, in the scope and for the period determined in the agreement.

The agreement relating to the equivalent working time or application of less favourable employment conditions should be concluded with trade unions (if there are several unions, then only with the representative ones, and if there is only one – with this union). If there is no trade union, the agreement is concluded with employees' representatives selected by the staff.

The agreement on application of less favourable employment conditions may be concluded also by the employer who is covered by the collective labour agreement (in accordance with general terms under the Labour Code, in such case these issues should be regulated in the collective agreement, not in the agreement on

the equivalent working time or application of less favourable employment conditions).

Although the reduction in daily and weekly rest is novelty, the equivalent working time system may be introduced on the basis of general Labour Code provisions. Moreover, the settlement period in such system may be extended to 12 months. Finally, an agreement on deterioration of the employment conditions may also be concluded (Article 23^{1a} of the Labour Code in conjunction with Article 9¹ of the Labour Code). We believe that the detailed regulations provided for in the new law do not exclude these general terms. They only specify that the fall in turnover as a result of COVID-19 justifies their application, yet they still can be applied on general terms.

Such solutions may be used, in accordance with the Anti-crisis' Law only by employers who are not in arrears with any contributions for social security, health insurance, the Guaranteed Employment Benefit Fund, the Labour Fund or Solidarity Fund until the end of 3rd quarter of 2019. However, we think that conditioning the use of these solutions on not having any arrears in payment of e.g. ZUS contributions is incomprehensible. It is also incomprehensible and inadequate to link the possibility of using these solutions with the situation of entrepreneurs as a result of COVID-19. Not to mention that, as previously stated, the expression 'as a result of COVID-19' is too narrow. Generally, such a condition is invalid in this case. In our opinion the above requirements relate only to the solutions which may not be introduced on the general terms of the Labour Code.

Suspension of the obligation to perform periodic examinations

Under new regulations, the obligation to perform periodic examinations has been suspended. What is more, the employer may admit to work an employee who does not have a current medical opinion confirming a lack of contraindications to work at a specified position.

Outstanding examinations must be performed in the period no longer than 60 days of the cancellation of the state of epidemic.

However, the Act does not resolve the issue of OHS training. Periodic OHS training may be conducted remotely (on-line), whereas e.g. initial OHS training should be conducted on site. In our opinion, a temporary possibility of conducting initial OHS training remotely should be allowed, as it was allowed for initial medical examinations.

Remote conducting of sanitary and epidemiological examinations has also not been regulated in this act. There is an uncertainty about what to do in the case of lack of such examinations.

Initial and control examinations

The provisions of 'Anti-crisis Shield' state that when initial examinations cannot be performed due to the unavailability of a qualified physician, they may be performed by another physician – irrespective of their specialty. In our opinion, however, the phrase 'unavailability of a qualified physician' should be clarified and the term 'unavailability' should be explained.

The medical opinion issued by such a physician loses its effectiveness after 30 days from the cancellation of the state of epidemic threat or from the cancellation of the state of epidemic.

The legislator indicates that these examinations can be carried out via ICT or communication systems (e.g. by telephone). However, the Act does not specify in what form medical opinions should be issued if examinations are performed remotely. Moreover, the way in which the employer obtains access to the opinion issued as a result of such examinations should also be regulated.

3. Coronavirus and personal data protection in the HR law

Personal data processing by employers

With a growing threat of outbreak and spread of SARS-CoV-2, employers have started to take actions to prevent its negative consequences, including in particular to prevent spreading of the virus in the workplace and infecting of employees and other individuals working or staying in the workplace. The most common

preventative measures that have become applicable are the following: asking employees about their recent foreign travels, possible contact with an infected person or a person suspected of infection, the occurrence of symptoms that may indicate infection, and finally, measuring the body temperature of people entering the workplace. The possibility of informing the staff members about the fact that their co-worker is suspected of infection or is infected with the virus also began to raise doubts. The state of epidemic threat was declared in the country by the Regulation of 13 March 2020 and a number of restrictions in operations of work establishments and other institutions have been introduced. In connection with the threat, on 2 March 2020 the special act was passed. It also addressed labour law aspects, introducing among others a possibility to advise employees to perform work remotely. With the subsequent preventative solutions being introduced, the questions about the lawfulness of such actions, also in the context of personal data protection and provisions regulating these issues, in particular the GDPR and the Labour Code, have been raised.

How is it regulated?

First, the issues of personal data processing by employers are regulated in the legal acts mentioned above – the GDPR and the Labour Code.

Article 22¹ § 1-3 of the Labour Code indicates a basic list of data which an employer may request from an employee. What is important, the employer requests providing other data, when it is necessary for the exercise of rights or duties resulting from a legal provision. An imperative nature of this provision, due to the term 'requests' shows that the employer does not have an option and it is their obligation to request providing these data.

In this context, Article 207 of the Labour Code sets out basic obligations of employers; § 2 of the above provisions states that 'an employer is obliged to protect the health and life of employees by ensuring safe and hygienic working conditions to his/her employees' and they have been specified in further sections. Therefore, an employer has an absolute obligation to organise work in such a way as to protect the health and life of employees and may apply measures adequate to the threat.

One of the basic employee obligations is to cooperate with the employer and superiors in the fulfilment of occupational health and safety obligations.

Having in mind the above duties of employers and employees, taking adequate actions to prevent the coronavirus spread is not only allowed, but also necessary. When analysing particular actions of employers in this perspective, it is clear that an employer can ask an employee whether he/she stayed in the areas at risk of infection or had contact with an infected person or person suspected of infection. It is more doubtful whether it is possible to obtain information about the symptoms of the disease, take temperature measurements or communicate to other staff members that an employee has been put in quarantine or is infected. Such data are considered as a special category of data relating to a health condition which should be processed in accordance with the special requirements specified in Article 9 of GDPR. The Labour Code does not prohibit from obtaining information on employees relating to their health. Contrary to the claims of some, a condition of obtaining such information is not an employee's consent bearing an additional requirement of providing these data at his/her own initiative which is set out in Article 22^{1b} § 1 of the Labour Code. This provision only indicates two matters – that the consent may be a basis of processing these data and that there are special conditions of granting such consent. This does not mean, however, that it is the only basis of processing data which in this case is primarily the fulfilment of the employer's legal obligation to protect such fundamental values as life and health, both of the employees and other individuals staying in the workplace.

As a result of the above, an employee may not evade providing information requested by an employer, even if it relates to his/her health. An employee who refuses to provide such information or to be measured a temperature acts against his/her employee duties by refusing to follow the order of the employer and to cooperate to ensure safe and hygienic working conditions. In case of refusal, such an employee may not be allowed to enter the workplace and his/her absence may be considered unjustified. Moreover, in each specific case it will possible to take disciplinary measures, including to terminate the contract of employment. Furthermore, informing staff members of a suspected coronavirus infection or

infection should be considered acceptable if it is not possible in any other way to 'warn' employees of the potential risk of infection. In many cases, only informing that one of the co-workers is infected without naming this person may not bring an expected result, as persons who could have had contact with the infected person should be able to verify whether such contact occurred recently. Thus, the protection of life and health justifies providing information on infection or suspicion of infection of another employee.

Furthermore, the GDPR does not prohibit from taking such actions by employers. First of all, we need to answer the question whether GDPR applies at all. The material scope of application of this legal act was specified in Article 2(1) which states that its regulations shall be applied to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system. If information obtained from employees is not recorded in any way (e.g. an employee answers questions or has his/her temperature measured before entering the workplace without recording this information in the report or in any other way), such action will not be subject to the GDPR provisions.

Even if this information is recorded and stored for some time by an employer, the GDPR is not an obstacle preventing from taking such actions. In accordance with Recital 4 'The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality'. It is difficult to agree with the claim that the protection of human life and health may be less important than the personal data protection. When balancing these rights, such values as human life and health should be given an absolute priority. Then, Recital 46 which can be more specifically referred to the coronavirus epidemic states that 'The processing of personal data should also be regarded to be lawful where it is necessary to protect an interest which is essential for the life of the data subject or that of another natural person. [...] Some types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance

when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters'.

The recitals referred to above are reflected in the proper interpretation and application of the relevant GDPR provisions. Therefore, if processing of personal data which are subject to its regulations takes place, the legal grounds of such actions are set out in Article 6(1) and Article 9(2). In relation to data which are not a 'special category' of data (they are not data concerning health), the legal basis, apart from a legitimate controller's interest, is also the necessity of their processing to fulfil the employer's legal obligation, perform tasks in the public interest and even the protection of the vital interests of other persons. As regards data concerning health, the basis is the necessity of processing for reasons of public interest in the area of public health, the fulfilment of the employer's obligations to protect the life and health of employees as well as the protection of the vital interests of other persons. Thus, the GDPR regulations read in conjunction with the Labour Code provisions on employers' obligations and principles relating to personal data specified in the Labour Code confirm that the actions taken are justified and allowed.

However, other principles of data protection under the GDPR should be observed, if obtaining information results in its application. Above all, the data collected should be limited to the minimum necessary for the purposes of the protection of life and health and, if stored, this period should be as short as possible. In addition, the conditions under which data are collected and further processed in a way that guarantees their confidentiality should be ensured, so that only authorised persons have access to them. Moreover, the circle of persons authorised to collect and access this information should be limited to as few people as possible, so that they should be only persons whose access to the data is absolutely necessary for their functions. Taking into account the requirement set out in Article 22^{1b} § 2 of the Labour Code, each person who processes data concerning health should be authorised in writing to process these data, specifying the scope of data and the purpose of their processing. Another GDPR requirement is the fulfilment of the information obligation in relation to data subject, and if data are

collected by the security company's employees, also ensuring relevant provisions in the entrustment agreement for data processing.

Remote work and data protection

Working remotely, the so-called 'home office', requires employees to take special care to ensure the protection of personal data, as well as any other data and documents related to the performance of their duties. These principles should be communicated to employees, preferably in the form of remote work rules or other document specifying the principles of working 'from home'.

Above all, it should be remembered that remote work does not relieve employees from the rules applicable at the company, including the data security policy or other documents specifying the principles of processing personal data and company information. When working remotely, an employee is fully responsible for data security and should ensure it.

The basic security principles apply to the company's equipment, using the company's e-mail, documents stored in the 'cloud', using the internet as well as handling hard copy documents. Examples of such security principles are an obligation to use only secured networks (connecting to generally available or unsecured networks should be prohibited), not to send any data from or to a private e-mail box, work only on the secured company equipment or not to take any documents out of a place indicated as home office (unless it is necessary given the nature of tasks). Ensuring confidentiality of data is equally important – it is not only about preventing access by third parties, but also by household members who have to be treated in this context as unauthorised persons.

A failure to follow these rules may result in taking disciplinary measures towards such an employee, both in the form of disciplinary penalty and the possibility of dismissal, including a dismissal on disciplinary grounds, if the breach was through employee's fault. The breach of data security principles does not need to result in causing any damage to the employer – the fact of breach is sufficient and the possibility to cause damage may be a factor determining the application of relevant measures.

IT

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5 Impact of the COVID-19 pandemic on the IT sector – legal aspects

The real impact of the COVID-19 pandemic on the IT sector is still unknown. The state of ‘economic freeze’ does not last long enough to discuss clear trends. In our view, two areas of activity within the IT sector will be most affected in the short term by a pandemic – implementation projects as well as delivery and service of IT equipment – i.e. projects where the sole remote working is not possible. In the longer term, however, the pandemic may increase demand for IT solutions.

Implementation projects

Implementation projects that required large implementation teams may be delayed or discontinued. This is particularly the case for those projects that require visits to the client or close cooperation with the client.

Delay in the projects’ execution often entails liquidated damages. Therefore, the question arises whether delays caused by the current situation (state of epidemic, the need to work only remotely, restrictions on movement, closed borders) give rise to liquidated damages.

Force majeure, frequently invoked in this context, has not been defined in civil law provisions. One should also bear in mind that the primary purpose of ‘a civil law force majeure’ is to limit the strict liability rather than a regular contractual liability (on fault basis), which occurs in the vast majority of IT contracts.

Therefore, the first step is to verify whether the parties have agreed to invoke force majeure in the contract.

Some examples of clauses (actual quotes from existing implementation contracts) are indicated below:

'[...] an extraordinary and external event, the effects of which could have been foreseen or prevented by neither Party.'

The concept of Force Majeure does not include events that result from the Party's negligence, including the Party's failure to exercise due diligence required under the Contract or based on established law.

Force Majeure Event means an event the occurrence of which is beyond the reasonable control of either party to this Agreement, including (without limitation) explosion, earthquake, act of terrorism and / or war and state of emergency.'

The mere occurrence of a contractually defined force majeure event does not release any party from the performance of its contractual obligations, however, it limits or excludes the liability of the party which was unable to fulfil its obligations as a result of the force majeure event.

A party which is unable to act due to a pandemic must inform the other party (the sooner the better) of the occurrence of a force majeure event and must demonstrate (and ultimately prove in court) that the event it refers to falls within the adopted definition of force majeure and has a real, objective impact on the ability to perform contractual obligations. A party invoking a force majeure will also have to demonstrate – within the limits of the adopted standard of diligence – that it has made reasonable efforts to avoid the adverse effects of force majeure.

One should note that a force majeure event does not automatically suspend the obligation to perform a contract, therefore obligations which can be performed despite the occurrence of force majeure, must be performed.

What specific pandemic situations can be considered as force majeure events?
For instance:

- » Persons involved in the performance of a contract:
 - » who got ill with COVID-19;
 - » who are in quarantine due to COVID-19;
 - » who are relieved of work as they are taking care of their children due to school closures;
 - » who do not work or are absent from work for their fear of threat to health or life due to COVID-19;
- » the Chief Sanitary Inspector or the Prime Minister imposed on a supplier an obligation to perform specific actions and commands;
- » deliveries of products, components and materials have been suspended;
- » there are difficulties in accessing the equipment necessary to perform the contract;
- » there are difficulties to render transport services;
- » the sub-supplier or further sub-supplier was affected by the above-mentioned circumstances.

By bringing this into the practical situations of IT projects – delay of actions that would require the presence of the integrator's or supplier's employees at the client's premises (or vice versa – the personal participation of the contracting staff) should rather not be qualified as a culpable delay and should not be the grounds for imposing liquidated damages.

However, such activities as development work, documentation related work and other work that can be performed remotely should be continued and its delay should not be qualified as not attributable to supplier unless the parties to the contract agreed otherwise.

This situation undoubtedly does not justify reducing the quality of IT work (e.g. conducting fewer tests, lowering Key Performance Indicators [KPI] of software, etc.).

Also, the obligation to pay (unless it is related to the delivery of products or project stages) is not affected by the COVID-19 pandemic. The failure to pay on time cannot therefore be justified by the pandemic. Under the Polish law, the payment as a counter obligation may, however, be suspended, if the corresponding counter-performance is not provided (Article 488 § 2 of the Civil Code).

The government bill amending the Act on special solutions preventing, counter-acting and combating COVID-19, other infectious diseases and the ensuing crises and some other acts, provides for specific solutions regarding public procurement contracts, which will also apply to IT projects implemented within this procedure. Pursuant to those provisions, if it is ascertained that the circumstances related to the occurrence of COVID-19 affect or are likely to affect the proper performance of the contract, the contracting entity may amend the contract, in particular by changing the date of the contract performance or temporarily suspending its performance, changing the manner of performance, as well as changing the scope of the supplier's performance and their remuneration.

The aforementioned government bill also introduces facilitations in refraining from imposing liquidated damages on suppliers if the non-performance of the contract is linked to the occurrence of COVID-19.

At the time of drafting this chapter, the final content of these provisions is unknown – in the light of the current stand, the introduction of the described amendments to the contract or withdrawal from imposing liquidated damages depends on the decision of the contracting entity, which in practice may lead to minor significance of these regulations.

A delay caused by an event falling within the definition of force majeure will not constitute a basis for contractual or code-based (Articles 630, 640, 491 of the Civil Code) withdrawal from the contract. However, it should be noted that in a large number of contracts, the parties provide for the possibility of terminating the contract if a state of force majeure preventing the performance of a contract lasts longer than the agreed period.

What is more, even if there is no force majeure clause in the contract, the party which is unable to perform its duties due to the pandemic is not liable for damage caused by such non-performance, if, despite exercising due diligence, it was not able to perform the contract in accordance with its provisions. It is important to note that the absence of liability for damage does not automatically release the party from the performance of the contract. Therefore, if the project execution is delayed due to a pandemic, the supplier may avoid the liability for damage caused by the delay, yet still has to execute the project.

Finally, please note that mere use of the term 'delay' instead of 'culpable delay' in the provisions on liquidated damages does not automatically exclude liability based on fault unless the parties have expressly regulated their liability on a strict liability basis. If the delay is the direct result of a pandemic, there are no grounds for charging liquidated damages.

Employees / contractors

It is also debatable whether it is possible to reduce the headcount in a company or at least reduce the salary. At this point, we will not analyse the labour and legal aspects of the current situation, yet we will look into the contractual relationship between a company employing IT experts and self-employed persons (so-called contractors).

Such relationships are governed by regular cooperation agreements. Naturally they may vary, although usually the contractor is entitled to a fixed remuneration (lump sum) paid on a monthly basis in arrears.

Without the contractor's consent, it is not possible to reduce their remuneration, and the contract may be terminated solely upon the agreed notice period.

Unless the parties have agreed otherwise, the state caused by the COVID-19 pandemic will not constitute the basis for terminating the contract with immediate effect (no orders on the part of the client is not, in itself, the basis for terminating the contract).

Entrepreneurs may, however, consider invoking provisions on extraordinary change of circumstances (*rebus sic stantibus clause*) – in Article 357¹ of the Civil Code, the legislator provided for the following provision:

"If owing to an extraordinary change of circumstances, the performance of an obligation would entail excessive difficulties or would threaten one of the parties with a glaring loss, which the parties did not predict at the moment of the conclusion of the contract, a court of law may, having weighed the parties' interests, according to the principles of community coexistence, determine the manner of the obligation's performance, the amount of the obligation or it may even rule on termination of the contract. When terminating the contract, a court of law may, where necessary, rule on the settlements between the parties, bearing the principles set out in the preceding sentence in mind."

As in the case of a force majeure, the mere occurrence of an extraordinary change in relations (e.g. the outbreak of the COVID-19 and the resulting restrictions) does not in itself justify invoking the above provision. The entrepreneur must demonstrate that this situation can effectively and objectively lead to a gross loss on their part, provided that the contract with a self-employed person is not to be changed (e.g. by reducing or suspending the payment of remuneration).

Such reason may be (this is to be considered on a case by case basis) suspension or cancellation of IT projects due to the situation caused by COVID-19, for which a given IT specialist was employed.

Further digital transformation of the economy

The pandemic and necessity to work remotely involving virtually all sectors of the economy and social life will certainly constitute another impulse for further digital transformation. We are convinced that IT companies support other companies in such a transformation and supply appropriate tools will see an increase in demand for their services. This applies not only to remote work, but also to the establishment of data processing centres and all services based on cloud

computing. Investments in this area will be related to the demand for both IT services and equipment.

The electronic signature is one of the basic services of the digital economy. It has not enjoyed much interest so far, however, we expect that this will change significantly.

Electronic signature

To improve documenting activities carried out as part of the projects, in particular signing of acceptance protocols, the parties may use electronic signatures. If the contract does not require any special form for these activities under pain of nullity, an e-mail acceptance or a simple electronic signature is sufficient – they meet the requirements of the documentary form.

However, if the contract provides for a special form, e.g. in writing under pain of nullity – which constitutes the standard of contracts in Poland – the parties may use a secure qualified electronic signature, even if it is not explicitly indicated in the contract. The provisions of the Civil Code equate written form with the electronic form, and this equivalence works both ways – the written form requirement will be met if the party to a contract uses electronic form and vice versa.

The pandemic is an impulse that will cause providers of electronic signature services – after years of stagnation and offering their services in practically unchanged form – to reach for new forms, including identification of persons to whom certificates are issued. Owing to this, it will be possible to obtain a qualified electronic signature remotely, after undergoing video verification or verification via e.g. a bank, and to use such an on-line signature without the need to use a permanent certificate carrier in the form of a pen drive.

Supply and service of IT equipment

The large number of IT components is produced by Asian manufacturers. With the outbreak of the COVID-19 pandemic (epidemic at that time), China in particular

introduced far-reaching restrictions preventing millions of employees from travelling to their workplaces. As a result, many factories were closed during the pandemic.

Production downtime combined with restrictions in air transport has negatively affected the supply chains of electronic equipment and components, including IT.

Therefore, entrepreneurs who are not able to deliver the ordered equipment or, due to the lack of components, are not able to perform repairs under the Service Level Agreements (SLA) agreed with customers in contracts, may invoke a force majeure to release themselves from the liability caused by the non-performance of a contract. However, such entrepreneurs must remember to demonstrate objective, adequate impact of the situation on the specific, individualized obligation.

It is therefore not enough to make a general announcement that due to COVID-19 dates for all deliveries and repairs are suspended for a month or until further notice. Entrepreneurs in each case must show that the equipment, despite being ordered on time, was not manufactured or delivered specifically due to restrictions imposed in connection with COVID-19, and the given obligation could not be performed otherwise.

Public service contracts for IT services and equipment

Many large IT projects are projects implemented based on contracts concluded under the Public Procurement Law (PPL).

Currently, the public procurement system in Poland is in a specific state of suspension. On the one hand, the procedures are pending, on the other hand, the contracting entities do not announce new procedures or decide to significantly extend the duration of activities in the course of ongoing procedures while waiting for the situation to normalize.

The fact that the National Board of Appeal suspended hearing of cases from 16 March 2020 to 27 March 2020 (which period will probably be extended) This

does not have a suspensory effect on time limits for appeals, therefore it can be expected that after reinstating the hearing of cases, there will be a significant increase in the number of appeals to be heard and the duration of appeal proceedings will be extended.

However, at the same time, pandemic regulations have been introduced, which may be relevant to the increasing the demand in the IT industry.

In accordance with Article 6 of the COVID-19 Act, provisions of the Public Procurement Law do not apply to contracts for goods or services necessary to combat COVID-19 if there is a high probability of rapid and uncontrolled spread of the disease or if it is required by the public health protection. This provision authorizes the contracting entity to refrain from applying the provisions of PPL in situations specified therein.

The statement of the President of the Public Procurement Office (UZP) of 24 March 2020 (Statement on Article 6 of COVID-19 Act), indicates that Article 6 of the COVID-19 Act may apply to public contracts for the supply of IT equipment or services. As currently due to the epidemic situation, the employers (including public entities) are instructing their employees, under Article 3 of the COVID-19 Act, to work outside the place of permanent work (order to perform remote work), Article 6 of the COVID-19 Act may, in the opinion of the Office, be applied to public contracts for equipping workstations(e.g. purchase of laptops, telephones) for remote work, or the adapting the contracting entity's IT infrastructure to introduce and perform remote work.

Such an interpretation of Article 6 of the COVID-19 Act may give impetus to the IT equipment supply market.

Cloud services (IaaS, PaaS, SaaS)

It seems that business impediments caused by COVID-19 should not affect the services provided in a cloud computing model. The market standard for such

service providers is to ensure that continuity plans are executed with no interruption and are resilient to external threats, including pandemics. These services are largely automated and remote (they do not require direct human participation).

In our view, cloud service providers will not have grounds for invoking the force majeure in the current situation, or at least they will be unable to demonstrate a real, objective and unforeseeable and impossible to prevent the impact which the situation in question has on the services provided.

IT



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CORONAVIRUS AND THE LAW IN POLAND

HR AND PAYROLL



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6 HR and payroll management during the coronavirus pandemic

Companies are faced with numerous business, organizational and legal challenges amongst the fear of a growing number of COVID-19 cases. Let's take a closer look at the employer's responsibilities towards the people employed at the organization.

Every year, March is a very important period for companies operating in Poland. It is a crucial month of key tax and reporting deadlines for entrepreneurs. However this year is especially difficult for businesses due to the coronavirus pandemic.

In connection with the first infection cases appearing in Poland, the Act of 2 March 2020 on special arrangements for the prevention, response and countermeasures against COVID-19, other infectious diseases and the resulting crisis situations (Polish Journal of Laws of 2020, item 374) entered into force on 8 March 2020 and was subsequently amended on 31 March 2020 (Polish Journal of Laws of 2020, item 568).

Important information for entrepreneurs

Entities covered by the abovementioned statutory instrument include, but are not limited to employers and employees who are or may be infected with the coronavirus. Below is a summary of its key provisions:

1. Working outside the permanent workplace (remote work)

According to Article 3 of the Act, an employer may order an employee to perform the work specified in their employment contract outside of the permanent

workplace (remote work) in order to prevent coronavirus infection. Such an order may be issued for a specified period.

Legal regulations however do not specify any rules nor conditions for performing work in this mode (except for telework, which has been defined in the Labor Code), therefore it is up to the employer to make the decision in each individual case and select the appropriate tools (both technical and legal) to ensure compliance of remote work with labor law.

As not every type of work can be done remotely, this is another matter to consider. Working outside the office is possible for such professions as accountants, translators, graphic designers or software developers. The Act will not apply to many industries, where employees must be present at the workplace. It would be hard to imagine that a driver or a cashier could work remotely (even though such people have a high chance of coming into contact with the coronavirus).

2. Use of outstanding leave

The coronavirus-caused epidemic impacted the operations of many companies. Many employers struggle with its consequences and are forced to limit their activities or even temporarily close employing establishments. Reduced workloads are noted in many industries, which leads entrepreneurs to seek ways to optimize costs of employment. Some are considering compulsory annual leaves for their employees.

It should however be borne in mind that the employee generally has the right to choose the time of their annual leave on their own. This rule does not apply to outstanding leave, i.e. a leave not taken by the employee during the period prescribed in the applicable statute. This period is explicitly set forth under Article 168 of the Labor Code: *"Leave not used within the period determined under Article 163 (author's note: schedule of leaves determined in accordance with employee applications) must be granted to an employee at the latest up to 30 September of the following calendar year (...)"* Therefore, it may be assumed that this provision actually requires the employer to grant outstanding leave to the employee within the statutory

period, and granting leave after this deadline does not require the employer to obtain the employee's consent and such a leave is compulsory for the employee. No additional governing principles that could limit the decision-making power of the employer have been defined in the Labor Code for such cases.

To summarize, it is the employer's right to independently set a date for the leave and send the employee for any outstanding leave, ideally providing them with written notice. If the employee appears at work despite having been sent off on such leave, the employer should not allow them to work.

3. Compulsory quarantine after crossing the border

The Regulation of the Minister of Health on the announcement of an epidemic emergency in the territory of the Republic of Poland (Polish Journal of Laws of 2020, item 491), hereinafter referred to as the "Regulation", entered into force on 20 March 2020. It stipulates a compulsory 14-day period of quarantine for individuals who crossed the national border. Such quarantine shall commence on the next day after crossing the border.

Under these circumstances a person who has sickness coverage, e.g. an employee (compulsory insurance) or a contractor (voluntary insurance), is entitled to sickness benefits. That benefit constitutes remuneration paid for the time of sickness by the employer under Article 92 of the Labor Code or sick pay paid by the employer or contracting party that is a payer of benefits or directly by the Social Security Institution.

Amounts due for sickness shall be paid pursuant to a *Compulsory post-border crossing quarantine declaration*, a template for which was published on the Social Security Institution's website. The quarantined person should submit such a declaration to their contribution payer (employer, contracting party) within three working days from the compulsory quarantine end.

If a sick benefit is paid by the Social Security Institution, the contribution payer (employer/contracting party) shall submit the insured's declaration to the Social

Security Institution as soon as possible (no later than within seven days). This may be done via the Social Security Institution's Electronic Services Platform (Platforma Usług Elektronicznych, PUE). In this case, a scan or photograph of a certified copy of the declaration is to be attached to the Z-3/Z-3a certificate.

One should also keep in mind that pursuant to the Regulation, the employer or contracting party has the right to request the State Sanitary Inspection of competent authority to verify the information included in the declaration. The purpose behind this is undoubtedly to confirm the reliability of an employee's or a contractor's declarations, which will be an important tool when making decisions about the payment.

Moreover, the State Sanitary Inspector may decide to shorten the quarantine period or exempt an individual from the quarantine obligation. In such a case the individual should inform the entity disbursing their sick pay (employer/contracting party).

4. Quarantine under a sanitary inspector's decision

As per the applicable legal provisions (Act of 5 December 2008 on preventing and counteracting infections and infectious diseases in humans, Polish Journal of Laws of 2019, item 1239 as amended), the State Sanitary Inspector or State Border Sanitary Inspector may issue a decision on placing an individual staying in the territory of the Republic of Poland in quarantine or isolating such an individual if they are infected, have an infectious disease or are suspected to be infected or have an infectious disease or had contact with a biological pathogen source.

Such circumstances entitle the employee to receive sick remuneration and sick benefit. Other individuals, such as a contractor with voluntary sickness insurance, will also be entitled to sick benefit in this situation. To receive sickness benefits, the employee or contractor should submit the sanitary inspector's decision to their employer or contracting party.

If the sick benefit is paid by the Social Security Institution, the contribution payer shall submit to the Social Security Institution the decision issued to the insured.

This may be done via the Social Security Institution's Electronic Services Platform (PUE) – a scan or photograph of a certified copy of the inspector's decision should be attached to the Z-3/Z-3a certificate.

5. Additional childcare benefit for a parent

Pursuant to Article 4 of the "special act", should the nursery, children's club, kindergarten or school attended by a child be closed due to the coronavirus outbreak, an insured person who is released from work duties due to the necessity to personally provide care for a child up to 8 years of age shall be entitled to an additional childcare benefit for a period no more than 14 days. The amendment adopted on 31 March extends the period when it is possible to receive an additional childcare benefit, and stipulates that *in order to prevent COVID-19, the Council of Ministers may decide to extend the additional childcare benefit entitlement period beyond the period set forth under section 1 and 1a* (authors' note: i.e. 14 days) *by means of a regulation, accounting for the period for which nurseries, children clubs, schools, day care facilities and other facilities are closed or the period for which nannies or day care workers are unable to provide care.*

This benefit is not included in the basic childcare benefit. In order to receive it, one only needs to submit a declaration to the employer, a template for which is published on the Social Insurance Institution's website. The standard Z-15 form that is used to confirm entitlement to the "regular" childcare benefit is not applicable here.

At this point it might be useful to summarize the essential matters related to the documentation needed to receive childcare benefit and sick benefit (see table below).

Importantly, in the case of any of the following types of absences, the employee is required to immediately notify their employee/contracting party about their work absence and the reason. Terms and conditions of employment should stipulate the deadline and manner for submitting such notification.

Type of absence	What documents must be submitted	Notes
Providing care for a healthy child up to 8 years of age because of the closing of: § a nursery § a kindergarten § a school § a children's club due to the coronavirus threat	Declaration on providing care for a child up to 8 years of age because of the closing of a nursery, children's club, kindergarten or school due to COVID-19 outbreak	§ A template of the declaration is available on the Social Insurance Institution website § No other documents are necessary except for the Z-3/Z-3a form, if the Social Insurance Institution is the benefit payer
Medical leave for a sick child up to 14 years of age or another sick family member	Z-15A – sick child care Z-15B – sick family member care e-ZLA – the employer will download it independently from the Social Insurance Institution's PUE	Where the Social Insurance Institution is the benefit payer, the employer/contracting party should submit a Z-3/Z-3a form
Employee's sickness	e-ZLA – the employer will download it independently from the Social Insurance Institution's PUE	
Compulsory quarantine or isolation due to the coronavirus	Sanitary Inspector's decision and/or e-ZLA	§ A physician is responsible for assessing whether the person's health justifies issuing a medical certificate (e-ZLA) § If the Social Insurance Institution is the benefit payer, the employer/contracting party should submit a Z-3/Z-3a form
Compulsory quarantine after crossing the border	Declaration on undergoing compulsory quarantine after crossing the border	§ A template of the declaration is available on the Social Insurance Institution website § No other documents are necessary except for the Z-3/Z-3a form, if the Social Insurance Institution is the benefit payer § The contribution payer who disburses the benefits or the Social Insurance Institution may request the competent State Sanitary Inspection authority to verify the information included in the declaration.

New Chief Labor Inspector's recommendations

Employers should also be aware of the Chief Labor Inspector's (Główny Inspektor Pracy, GIP) current recommendations relating to the obligation to refer employees to medical examination, which reflect the provisions introduced by the amendment of 31 March 2020. Special attention should be paid to two related matters:

If a state of an epidemic threat or state of epidemic is announced, the performance of duties related to the performance of periodic and follow-up medical examinations is suspended as of the day of such an announcement.

This means that the employer may refrain from referring an employee to such examinations. According to the Chief Labor Inspector, once the state of epidemic threat is cancelled and if a state of epidemic is not announced or after the state of epidemic is cancelled, the employer and employee are required to immediately undertake the performance of the suspended duties mentioned herein and perform them no later than within 60 days from the date of cancelling the applicable state.

One should also be aware that medical certificates issued as for pre-employment, periodic or follow-up medical examinations, that expired after 7 March 2020, remain valid, but no longer than for 60 days from the date of cancelling the state of epidemic threat or epidemic.

Despite the recommendation to conduct examinations after the threat is over, an employer may not allow an employee to perform work without pre-employment medical examinations. Such examinations may however be carried out under certain circumstances by a physician other than a physician authorized to perform this type of examinations.

Should a physician authorized to perform a pre-employment or follow-up medical examination not be available, such examinations may be carried out and an appropriate medical certificate may be issued by another physician. Such a medical certificate expires after 30 days from the date of cancelling the state of

epidemic threat, if no state of epidemic was announced, or the date of cancelling the state of epidemic. It should be filed in the employee's personal file.

Moreover, according to a position statement published by the Chief Labor Inspector, when under separate provisions the performance of specific activities or obtaining specific authorizations needed to carry out professional activities is conditional on holding a relevant medical or psychological certificate, such a certificate should be issued immediately and no later than by the end of the 60th day from the date of cancelling the state of epidemic threat or epidemic.

Other important information provided by the Chief labor Inspector include the fact that basic induction training and periodic refresher Health and Safety training may be provided in electronic format and the periodic refresher training exam may be conducted after the state of epidemic threat is cancelled.



CORONAVIRUS AND THE LAW IN POLAND

COMPETITION AND CONSUMER PROTECTION



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7 Competition and Consumer Protection in the context of COVID-19

The overriding purpose of competition protection law is to ensure uninterrupted and fair competition fostering growth on the principles of rivalry based on innovation and enhanced efficiency. Meanwhile, consumer regulations aim to protect consumers against the consequences of unfair, exploiting and burdensome business practices. Those tasks remain valid in the face of a global epidemiological threat. Moreover, they take on greater weight given that the time of significant social and economic challenges may tempt some entrepreneurs to take advantage of the situation in order to unfairly lock their competitors out of the market, restrict mutual competitiveness or engage in the practices violating consumers' interests.

This chapter presents a practical summary of key areas of competition and consumer protection law of special relevance in the current economic and legal context. Among other things, we answer the following questions:

- » Is it allowed to engage in competition-restricting activities?
- » Can product prices be increased at will?
- » Am I allowed to co-operate with other entrepreneurs, including competitors, in the initiatives launched to combat the COVID-19 outbreak?
- » Can the existing terms and conditions of consumer contracts be changed?
- » Can marketing communication relating to the COVID-19 outbreak be adjusted?
- » What rights do consumers have?

The President of the Office of Competition and Consumer Protection (UOKiK) is the state authority in charge of overseeing entrepreneurs' compliance with the regulations of competition and consumer protection law.

Recognising the key role of competition and consumer protection during this extraordinary time, the UOKiK President is currently taking a number of related measures, among other things, by taking legislative initiatives, maintaining its control activities or educating consumers.

Furthermore, the association of competition protection bodies of the EU member states, the European Competition Network (**ECN**), of which the UOKiK President is a member, issued a joint statement indicating that, although activities directly linked to the need to ensure availability and sale of selected products and services critical to the combat against the outbreak may enjoy certain exemptions, the antitrust bodies will actively monitor and counteract any attempts by entrepreneurs at cartelising or abusing their dominant position, thus preventing them from taking unfairly advantage of the current situation to restrict competitiveness in the markets.

The primary assumption underlying the current regulations governing the COVID-19 outbreak is full application of competition and consumer protection regulations consistently with the existing practice.

Therefore, combined with the approach declared by the UOKiK President, it should be assumed that the practice pursued in the area of antimonopoly and consumer protection law will remain unchanged. It may even be argued that in the light of the present legal and social environment, that practice may become stricter in key areas of distribution and sale of products critical to public health and consumer protection.

1. Anti-competitive agreements

Under the Act of 16 April 2007 on Protection of Competition and Consumers (hereinafter "**UstOKiK**") and the Treaty on the Functioning of the European Union

(hereinafter "**TFEU**"), any agreements which have as their object or effect the prevention, restriction or other distortion of competition within the relevant market shall be prohibited. This applies to the arrangements having impact both in Poland only and in the territory of the European Union.

The current epidemiological situation does not change the scope of application of the basic competition protection regulations. This means that any agreements aiming to (see Article 6 of UstOKiK):

- » fix resale prices of products and services;
- » determine availability or volume of production of products and availability of services;
- » share market for the sale of goods and services between entrepreneurs;
- » restrict access to the market or eliminate other entrepreneurs;
- » limit development or investment;
- » introduce uniform contractual terms varying the terms of competition;
- » exchange competitively sensitive information; or
- » influence the outcome of public and private tenders; are prohibited.

According to the invoked ECN joint statement, antitrust bodies reserve the right not to intervene actively against selected potentially anticompetitive activities such as distribution arrangements or arrangements relating to production volumes, however solely if such measures are temporary and put in place in order to avoid shortages of supply or scarcity of the products essential to the health of consumers. This course of action is based on the existing legal solutions (see Article 8 of UstOKiK, Article 101(3) of TFEU), i.e. the institutions that are applied rarely and solely under exceptional circumstances. Nonetheless, the ECN joint statement confirms that this exceptional procedure may apply to the current situation and that antitrust bodies shall consider the epidemiological situation in their work.

Meanwhile, entrepreneurs must note that the exclusion envisaged in the regulations should not apply to products and solutions other than those essential to

public health and functioning of the society nor may it serve to impose non-competitive terms, specifically prices, or introduce mechanisms with the purpose other than to assure the supply of goods.

The above means that the UOKiK President, the European Commission and other antitrust bodies of the Member States shall take all necessary measures counteracting cartelising and conclusion of agreements that go beyond the aforesaid frameworks. The epidemiological situation must therefore not provide an incentive or inspiration to engage in activities restricting competition.

A breach of the ban on conclusion of anticompetitive agreements may result in the imposition of a financial penalty in the amount of up to 10% of the entrepreneur's annual turnover.

Are entrepreneurs free to raise prices jointly or divide markets between themselves in order to protect their liquidity and continued existence of their respective businesses?

No. The current situation does not justify taking anticompetitive measures and epidemic-related regulations do not stipulate changes in the application of competition protection regulations. In particular, entrepreneurs should not engage in any activities aimed at taking advantage of the current developments in order to achieve an unjustified (e.g. by innovation or efficiency) increase in revenue or market coverage.

Are entrepreneurs free to set the rules of supply, sales or planned activities for key product categories (e.g. health and personal care products, personal protective equipment and essential foodstuffs)?

Exchange of information may constitute a form of a prohibited agreement if it involves competitively sensitive data and data that are not usually or by law readily available in a given market. However, according to the current ECN joint statement and under the applicable law, if that practice is temporary and necessary to maintain availability of products considered essential to the health of consumers covered by co-operation, it may be acceptable subject to conditions. Otherwise,

, by engaging in such activities, entrepreneurs may lead to concluding a prohibited agreement . Confirming compatibility of such practices with the applicable laws is recommended in each case.

2. Controlling the conduct of undertakings with dominant position

The second pillar of competition protection policy is preventing the abuse of a dominant position by entrepreneurs (see Article 9 of UstOKiK and Article 102 of TFEU).

According to the views of scholars and commentators t a dominant undertaking is the one capable of defining independently the conditions of competition in the selected relevant market and thus preventing or impairing effective competition. It is assumed that an entrepreneur holding a market share of over 40% is an undertaking with a dominant position within the meaning of the competition protection regulations (see Article 4(10) of UstOKiK).

The relevant market is defined while taking into consideration two elements (see Article 4 (9) of UstOKiK):

- » the market's product scope (understood to mean the set of products deemed substitutes);
- » the market's geographic scope (understood as the area in which conditions of competition are sufficiently homogeneous, e.g. cost of transport, barriers to market access, consumer preferences, significant differences in prices or cost factors, and regulatory restrictions).

Markets may cover individual products (e.g. sales market for medicinal products for treating specific conditions) and entire product categories (e.g. market for FMCG products) and local areas (e.g. urban area, area within a maximum radius of a 15-minute car/public transport trip, voivodship or country) or international territories (e.g. continent or the world).

An entrepreneur with a dominant market position cannot abuse it (see Article 9 of UstOKiK and Article 102 of TFEU), i.e. they cannot engage in any activities impairing or restricting competition, for instance, by:

- » excessive or predatory pricing;
- » limiting production or sales volume to the prejudice of consumers or business partners;
- » making conclusion of a contract (e.g. sale of goods) subject to the signing of another unrelated contract;
- » dividing the market or differentiating business partners or customers;
- » establishing loyalty-based obligations; and
- » otherwise restricting competition.

The regulations governing the ban on abusing a dominant position apply exclusively to entrepreneurs holding such position (see the definition above). This means that exclusively the strongest entrepreneurs in a given market shall be subject to that ban.

Thus, entrepreneurs in highly-competitive markets (multiple competitors, dynamically developing markets) even if they engage in the practices described above (the catalogue envisaged in Article 9 Clause 2 of UstOKiK) shall not be subject to the ban.

According to the communications from competition protection bodies, the present situation does not envisage exemptions from or changes to the practices for assessing the abuse of a dominant position by entrepreneurs. The assessment of lawfulness of the practice relates to the negative competitive effects for market participants and consumers, the possibility for justifying potentially abusive practices is limited.

A breach of the ban on abusing a dominant position may result in the imposition of a financial penalty in the amount of up to 10% of the entrepreneur's annual turnover.

Am I free to change product prices at will?

An entrepreneur planning significant price changes (e.g. a substantial increase or sale below costs) must each time confirm its position in the market relevant to its business. If the examination reveals that the entrepreneur holds a significant market position, it will be necessary to assess the actual market position and determination of legitimacy of the introduced changes is necessary. That risk may be substantial especially for entrepreneurs doing business in narrow markets or markets with small geographic coverage. We recommend carrying out an individual assessment of market force and confirming each time compatibility of application of planned commercial practices. Furthermore, price increases should be economically justified at all times to avoid the charge of implementing measures incompatible with competition law.

We wish, however, to point out that, pursuant to the applicable laws and planned changes to the legal environment, certain products categories may be subject to pricing restrictions (maximum prices, maximum margins) for all entrepreneurs, regardless of their market position. At present, the product categories whose prices may be set by the Minister of Health, include selected medicinal products, medical devices and foodstuffs intended for particular nutritional uses. Part 4 discusses a possible expansion of those regulations and sanctions.

May I render the sales of selected products conditional upon the purchase of other products or services?

If an entrepreneur holds a dominant position, such conduct shall be deemed a prohibited practice.

3. Consumer protection

Consumer protection refers to two areas, namely individual protection of consumer rights and protection of consumers' collective interests.

As regards the individual consumer protection, the regulations of the Polish Civil Code, the Act of 30 May 2014 on Consumer Rights and Selected Industry Acts (e.g.

Act of 24 November 2017 on Tourist Events and Related Travel Services) are of key importance. Protection of individual interests depends each time on the subject-matter of the contract, the provisions binding the parties, the process of their negotiation and additional arrangements, if any.

In the face of significant impediment to the performance of contracts or outright inability to perform the same due to sanitary restrictions, entrepreneurs should verify, in the first place, what powers have been reserved in the contracts, whether the provisions in question are valid, whether a given performance can be made or whether modifications of or amendments to the contract satisfactory to both parties may be introduced. The pending legislative work may change this state of affairs by imposing restrictions on the applicability of certain contractual provisions, for instance with respect to financial products (for more information see Part 4).

The second area of consumer protection is the protection of consumers' collective interests and assessment of the template contracts used by entrepreneurs (respectively, Article 24 and Article 23 of UstOKiK). Both those areas relate to entrepreneurs' practices that involve the entirety of consumer rights and interests. This means that, for instance, advertising practices, sales models, adopted quoting practices and applied template contracts shall be subject to the control by the UOKiK President.

During the epidemic, the consumer protection is of particular importance for efficient counteracting both the spread of the epidemic and the entrepreneurs' attempts at taking advantage of public mood to the detriment of consumers.

The primary area where the UOKiK President's practice may become stricter is assessment of entrepreneurs' advertising practices. The conduct consisting in ascribing to certain products anti-viral properties (not present in the products) shall constitute both a violation of consumers' collective interests and, possibly, a breach of industry regulations (e.g. applicable to food products, medicinal products, health and personal care products or cosmetics).

The above shall apply also to the advertising practices other than advertising. In particular, entrepreneurs must retain good practices consisting in reliably and fully informing consumers about prices and terms of sale of products, valid promotional and standard offers, as well as terms and conditions and policies governing distance selling. The growing importance of distance selling and the entrepreneurs' shift of focus to the online channel may result in the dissemination of practices restricting consumer rights, for instance establishing vague terms and conditions of standard or promotional offers or failure to protect consumer rights.

A violation of consumers' collective interests may result in the imposition of a financial penalty in the amount of up to 10% of the entrepreneur's annual turnover.

Can reference be made to the COVID-19 outbreak or prevailing epidemiological conditions in advertising materials, incentives, communication or product descriptions?

Use of communications associated with consumer health or current health situation may be a source of material legal and business risk for entrepreneurs. Having regard to the practice of consumer rights' protection bodies and the prevailing public mood, even referring to COVID-19 alone, especially in a manner that increases anxiety and when not justified by the character of the offered products or the entrepreneurs' business profile, may amount to a breach of the aforesaid regulations.

Additional restraint and ongoing assessment of used materials and consumer communication is recommended even for the health-related industries. Arousing consumer fear or anxiety, even in relation to health or health promoting products, may be deemed misleading or unjustified and, consequently, subject to a penalty imposed by the UOKiK President.

Can the terms and conditions governing operation of online stores be amended in terms of consumer rights?

No. The existing and proposed statutory solutions associated with counteracting the COVID-19 outbreak do not stipulate suspending or restricting consumer

rights associated with online trade and other forms of distance selling. Although travel restrictions and the closure of selected premises may hinder the pursuit of the entrepreneurs' business, restricting consumer rights (e.g. limiting their options for rescinding a contract) shall be prohibited unless it stems directly from the adopted legal regulations.

Am I allowed to conduct selected marketing campaigns or hold online promotional offers in order to encourage consumers to buy my products?

The regulations in force do not currently restrict the possibility of trading online and conducting promotional campaigns. It is therefore crucial in order to ensure the entrepreneur's safety that the terms and conditions provide for properly formulated rules of promotional campaigns, that the campaign is feasible and that the consumer communication is not misleading or otherwise constitutes a prohibited advertisement (see the question above)..

Can major price increases be deemed as actions incompatible with the consumers' interests?

Consumer protection regulations do not stipulate, save for a few exceptions in consumers' individual cases, that free pricing of the offer for consumers is unlawful.

However, the recommendations from Parts 2 and 4 should be kept in mind. If an entrepreneur holds a dominant position, legal risk accompanying price increases may even be substantial. Furthermore, the introduction of regulations associated with the so-called "Anti-crisis shield" in their currently proposed wording will enable the state authorities to set the maximum product prices and margins, with businesses violating the law likely to face financial penalties. Thus, reviewing the planned changes to the terms of business and pricing in terms of protecting consumer rights shall be indispensable each time to ensure the entrepreneurs' legal safety.

4. Proposed measures and restrictions

Maximum product prices

The Act of 31 March 2020 amending the Act on special arrangements associated with preventing, counteracting and combating COVID-19, other contagious diseases and the crisis situations they cause and certain other acts (hereinafter **UstCOVID**) provides for the expansion of the competences of state authorities in managing maximum prices of and margins on selected product categories (these currently include medicines, medical devices and foodstuffs intended for particular nutritional uses) for the goods or services of essential importance to protection of human health or safety or to households' upkeep costs (Article 1 Clause 6 of UstCOVID). The list of covered goods and services as well as the level of maximum prices or margins may be defined in a regulation issued by a competent minister.

A breach of the obligation to apply the maximum prices and margins may result in a financial penalty ranging from PLN 5,000 to PLN 5,000,000 and, in the case of re-offending or a large-scale operation, a financial penalty imposed by the UOKiK President in the amount of up to 10% of the entrepreneur's annual turnover.

Consumer financial products

The special COVID-19 act comprises the regulations governing the charging of non-interest expenses under consumer loans. Pursuant to Article 8d, introduced in Article 1 Clause 6 of UstCOVID, as proposed by the UOKiK President, those costs shall be statutorily defined in proportion to the amount of the consumer loan and shall represent the maximum expenses chargeable to consumers.

CORONAVIRUS AND THE LAW IN POLAND

CONSTITUTION



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8 Constitutional law in the face of the coronavirus pandemic

The coronavirus pandemic affected the entire Polish economy. This chapter discusses solutions for such circumstances provided for in the Constitution of the Republic of Poland.

1. Introduction

A mass spread of COVID-19 may result in a situation in which public authorities would no longer be able to respond adequately to on-going developments within their regular remits. The Constitution of the Republic of Poland provides for the concept of the 'states of exception' (*stany nadzwyczajne*) for such turn of events, as described in Chapter VIII thereof. They apply to those situations where the organisation of public power is changed in order to ensure an effective and swift fight against a threat. Very often the states of exception are referred to as the 'times of the executive' as it is the executive branch that acts as *spiritus movens*, holding the largest set of powers. The state of exception is also a period in which civil rights are radically limited so that the efficient functioning of the State's institutions may be ensured.

2. States of exception: General principles

Article 228(1) of the Constitution of the Republic of Poland specifies three states of exception: martial law (*stan wojenny*), a state of emergency (*stan wyjątkowy*) and a state of natural disaster (*stan klęski żywiołowej*). It is a closed and, according to

the case-law of the Constitutional Court,²² an exhaustive list of measures to be applied, which means that it is prohibited to introduce to the legal system any other analogical measures.

As the functioning of the State during the states of exception is modified and the executive branch gains several new competences, the Constitution provides for certain safeguards to prevent a change of political system and to secure the position of citizens.

Article 228(5) and (6) are of paramount importance in this regard. They stipulate that during the states of exception no changes are allowed in regulations governing essential systemic areas, namely the Constitution, electoral laws applicable to the elections to the Sejm, the Senate and the bodies of local government, the Act on Elections to the Presidency of the Republic of Poland, as well as the acts on the states of exception. The provisions also prohibit the holding of elections in the period from the announcement of the state of exception to the 90th day after its termination.

As it has been already noted, the authorities gain far-reaching tools to limit rights and freedoms of individuals as a result of declaring the state of exception. General principles in this respect are specified in Article 233 of the Constitution. It establishes a general prohibition of discrimination when limiting rights and freedoms, but it also provides a list of rights that **cannot be limited** during martial law and the state of emergency, i.e. rights and freedoms related to human dignity, citizenship, protection of life, humane treatment, criminal liability, access to court, personal rights, conscience and religion, petitions, as well as family and children's rights. In the case of a state of natural disaster, in turn, law-makers used an opposite approach and indicated specific rights that may be limited, which means that any freedom not covered by the list stays beyond the scope of legislators' allowed interventions. The economic and social rights that may be subject to such interventions during the state of natural disaster include: freedom of economic

²² Judgment of the Constitutional Court of 21 April 2009, Case File No. K 50/07.

activity, personal freedom, inviolability of the home, freedom of movement and stay within the territory of the Republic of Poland, the right to strike, the right of ownership, freedom to work, the right to safe and hygienic conditions of work, and the right to rest.

3. Prerequisites for declaring the states of exception

There are two types of prerequisites that lead to the declaration of the state of exception:

- » general – applicable to all states of exception and provided for in Article 228(1) of the Constitution, namely a particular threat and insufficiency of ordinary constitutional measures. In one of its judgments, the Supreme Administrative Court²³ emphasised the importance of such prerequisites by referring to the infamous flood of 2001 and stated that not any particular threat (e.g. natural disaster) was meant, but only such particular threat that necessitates the use of extraordinary measures;
- » special – regulatory conditions that must occur for a specific state of emergency to be declared. They are described in Articles 229, 230 and 231 of the Constitution respectively and explained in detail in specific acts dedicated to particular states of exception:
 - » the Act of 29 August 2002 on Martial Law and the Competences of the Commander-in-Chief of the Armed Forces and the Rules of his Subordination to the Constitutional Authorities of the Republic of Poland (Journal of Laws of 2017, item 1932);
 - » the Act of 21 June 2002 on the State of Emergency (Journal of Laws of 2017, item 1928);
 - » the Act of 18 April 2002 on the State of Natural Disaster (Journal of Laws of 2017, item 1897).

²³ Judgment of the Supreme Administrative Court (until 31 December 2003) in Krakow of 10 January 2002, Case File No. I SA/Kr 2180/01.

4. State of natural disaster

Against the backdrop of the global coronavirus pandemic, a state of natural disaster deserves a careful analysis as the most relevant one. Pursuant to Article 2 read in conjunction with Article 3(1)(2) of the Act on the State of Natural Disaster, this state of exception may be declared as a result of, *inter alia*, a natural catastrophe (e.g. mass occurrence of infectious diseases among people), whose effects pose a threat to life or health of a significant number of people, large-scale property and the environment, within significant territories, while aid and protection can be provided effectively only with the use of extraordinary measures undertaken in cooperation by various bodies and institutions under a unified command.

The state of natural disaster is declared by means of a regulation of the Council of Ministers for an area in which a catastrophe (emergency) occurred or for the entire country. It lasts 30 days by default and it may be extended repeatedly if this is necessary to fight the emergency (e.g. virus), but the Senat's approval for such extension is required.²⁴

In a regulation declaring the state of natural disaster, the Council of Ministers specifies only some general rules on limitations and indicates what types of interventions in rights and freedoms may be established. The Act on the State of Natural Disaster provides for the following allowed types of restrictions:

- » **In the area of economic activity** – suspension of economic activity carried out by specific entrepreneurs; order to carry out or prohibition on carrying out a specific type of economic activity; full or partial rationing of specific goods; temporary prohibition on raising prices for certain types of goods or services; order to apply administered prices for goods and services of essential importance for the consumers' cost of living.

24 The Sejm (Lower Chamber of the Parliament) makes a decision in this regard by a simple majority of votes and the Sejm's resolution is published in the Journal of Laws, see Article 190 of the Sejm's Standing Orders (Polish Monitor 2019, item 1028) and Article 9(2)(8) of the Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws of 2019, item 1461).

- » **In the area of hygiene and health** – obligation to undergo medical examination, treatment, preventive vaccination and other preventive measures or procedures necessary to fight against infectious diseases or the effects of chemical or radioactive contamination; obligation of quarantine; obligation of using plant protection products or other preventive measures necessary to combat organisms harmful to humans, animals or plants; obligation to apply specific measures ensuring the protection of the environment; obligation to apply measures or procedures necessary to combat infectious diseases among animals.
- » **In the area of labour law** – employer's obligation to delegate employees to a body managing the activities aimed at preventing the effects of a natural disaster or removing them; restriction of or derogation from specific health and safety regulations, as long as this does not pose an immediate threat to employees' life or health; prohibition to strike for specific categories of employees or within specific areas; order to modify the system of work, number of hours and operating hours, including the extension of settlement periods up to 12 months, under the rules specified in the Labour Code; imposition of an obligation to work on Sundays and banking holidays and other days free from work under the schedule of work for 5-day working weeks, including the extension of settlement periods up to 12 months, under the rules specified in the Labour Code; obligation to entrust employees with other responsibilities than those arising from their employment relationship with the right to remuneration being retained.
- » **In the area of property and logistics** – obligation to empty or secure residential premises or other rooms; obligation to perform mandatory demolition of buildings and other structures or parts thereof; order to evacuate specific places, areas and buildings within the time set; order to stay or prohibition of staying in specific places and buildings and within specific areas; order to follow specific instructions concerning movement or prohibition of movement; use of immovable and movable property without consent of the owner or another person entitled thereto.
- » **In the area of the obligation to perform in person** – obligation imposed on natural persons and legal entities to provide performance in person or

provide goods, including the obligation to carry out specific works; handing over immovable property or movable property possessed for use; providing access to rooms for evacuated people; use of real property in a specific manner and to a specific extent, as well as the obligation to accept, deposit and secure the property of injured or evacuated people.

As already mentioned, a decision on the ultimate and specific form and scope of such restrictions is made by local government bodies. Local authorities impose certain obligations and restrictions on entities by means of a decision, instruction or the head of province's ordinance, all enforceable immediately. If urgent, such decisions, instructions or ordinances may be issued orally. They may be appealed against within 3 days of receipt or oral announcement. Each of such legal acts must include:

- » legal grounds,
- » scope and type of restrictions,
- » entities bound by the legal act,
- » place, date and hour of personal appearance or execution of other restrictions,
- » duration of restrictions,
- » caution on criminal liability or other legal consequences of a breach of such ordinance, instruction or decision.

It is only based on the acts issued by local government bodies that specific entities have obligations placed upon them. The Council of Minister's regulation as such does not impose any obligations on citizens and entrepreneurs directly.

Failure to adhere to the obligations imposed on a natural person or a legal entity under the regulation declaring the state of natural disaster is subject to the penalty of detention (*kara aresztu*) under the Petty Offence Code from five days to one month or a fine from PLN 20 to PLN 5,000.

5. Compensating property losses

Pursuant to Article 228(4) of the Constitution, the Act of 22 November 2002 on the Compensation for Property Losses Arising from Limitations of Freedoms and Rights of Humans and Citizens Introduced during the State of Exception (Journal of Laws of 2002, No. 233 item 1955), which provides for the procedure of obtaining a compensation from the State Treasury (to a certain extent) for losses caused by restrictions introduced during the state of exception.

Pursuant to the Act, an individual who wishes to receive compensation may claim it only to the amount of actual loss and it is prohibited to seek for lost revenue. To this end, an application must be submitted to the head of the province in which the loss occurred (if the loss occurred within the territory of two or more provinces, than the claim should be addressed to the head of province with whom the application was lodged earlier, and if it is impossible to determine which head of province is competent to decide on the compensation, the decision is issued by the Head of the Mazowieckie Province). An injured party has one year from the date on which they became aware of the property loss to submit the application, but no longer than 3 years after the date on which the state of exception is lifted.

The head of province issues a decision on compensation within three months after the application is submitted. Even though such decision is final, an injured party may bring a case against the State Treasury before the competent common court if the compensation is refused or if the amount granted is insufficient.

6. The state of natural disaster and the state of epidemic

It should be pointed out that the state of epidemic declared by means of the Minister of Health's Regulation of 20 March 2020, subsequently amended by the Minister of Health's Regulation of 31 March 2020, is not a state of exception within the meaning of the Constitution. Therefore, the rules described above do not apply.

The legal ground for the declaration of the state of epidemic is the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans (Journal of Laws of 2019, item 1239). An epidemic is defined in this Act as the occurrence, within the specific area, of infections or infectious disease cases whose number is clearly higher than in the preceding period or the occurrence of infections or infectious diseases that have not been recorded before. If there is a threat of such situation or if such situation actually exists, the Minister of Health is entitled to declare the state of epidemic threat or the state of epidemic.

A list of rights that may be restricted under the two measures is narrower than in the case of **the state of natural disaster** as the interventions of public authorities (under Article 46 of the Act on Preventing and Combating Infections and Infectious Diseases in Humans) may only apply to:

- » temporary restrictions concerning movement;
- » temporary restrictions of or prohibitions on trading in and using certain goods or food products;
- » temporary restrictions in the functioning of specific institutions or places of employment, prohibition of organising performative events and other gatherings of people;
- » obligations to perform specific sanitary procedures if their performance is related to the functioning of specific manufacturing facilities, service facilities, commercial facilities and other buildings;
- » orders to make real property, premises or land available and to provide means of transport for the purposes of antiepidemic actions provided for by anti-epidemic plans;
- » obligations to provide preventive vaccination.

Apart from the state of epidemic threat and the state of epidemic, the law-makers have recently gained the possibility of declaring a 'qualified' variation of such state, as introduced on 8 March 2020 by Articles 46a and 46b. The new provisions state that if the nature and scale of an epidemic threat exceeds the capabilities of competent government administration and local government bodies, the Council

of Ministers may extend the scope of restrictions set by the Minister of Health by means of a separate regulation. Besides, pursuant to Article 46b of the Act on Preventing and Combating Infections and Infectious Diseases in Humans, the following measures may be introduced:

- » temporary limitation of specific areas of economic activity;
- » temporary rationing of specific products;
- » obligations to undergo medical examination or to use other preventive measures and to follow procedures imposed on people who are infected or suspected of infection;
- » temporary limitation of the use of premises or lands and obligations to restrict access to such premises or lands;
- » obligations to empty specific places, lands and buildings within the time set;
- » order to stay or prohibition of staying in specific places and buildings and within specific areas;
- » prohibition of leaving a zero zone by people who are infected or suspected of infection;
- » order to follow specific instructions on movement.

Unlike in the state of natural disaster, in the case of the state of epidemic threat or the state of epidemic, local governments are deprived of any competences in terms of imposing restrictions of rights and freedoms; these are imposed by the Minister of Health in the minister's regulation.

The law-makers did not provide for any specific procedure for claiming compensation for losses incurred as a result of such restrictions of the state of epidemic threat or the state of epidemic. This means that general rules apply, namely the State's responsibility for so-called legislative unlawfulness (*bezprawie legislacyjne*) defined in Article 417¹ of the Polish Civil Code (Journal of Laws of 2019, item 1145).

It should also be noted that the law-makers did not provide for any temporal limitations for the state of epidemic threat and the state of epidemic. This means that they apply in the period for which they are declared or until revoked.

The Act of 31 March 2020 amending Certain Other Acts on the Health Protection System in relation to Preventing, Counteracting and Combating COVID-19 (Journal of Laws of 2020, item 547) introduced Article 48a to the Act on Preventing and Combating Infections and Infectious Diseases in Humans. This article provides for sanctions in case obligations imposed on individuals during the state of epidemic are violated. These are administrative fines ranging from PLN 5,000 to PLN 30,000 imposed by means of an administrative decision by sanitary officials. The administrative decisions are immediately enforceable, which means that public authorities may demand the payment of the fine as soon as the decision is served. The decisions may be appealed against under general rules before a higher-instance authority within 14 days of their receipt, and if such administrative appeal is unsuccessful, a case may be brought before the administrative court.

CONSTITUTION



CORONAVIRUS AND THE LAW IN POLAND

HEALTHCARE



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9 Coronavirus pandemic and its impact on the healthcare system

The coronavirus pandemic exerts a deep impact on the healthcare system. This impact is visible at almost every stage of using healthcare services. In this chapter, we will attempt to discuss the most important legal aspects of the pandemic from the perspective of the healthcare system.

1. Introductory remarks

On the one hand, the spread of the coronavirus necessitates infection prevention, while on the other hand the need to provide healthcare to patients with COVID-19. Factors important for the treatment of patients are both the availability of healthcare services and methods of financing them, as well as the availability and reimbursement of medicinal products and medical devices. Access to medical devices is important not only due to the treatment processes, but also to ensure protection for medical staff.

Against the background of the developing pandemic, there are patients who require medical care for other reasons. This group includes, among others, patients with chronic diseases who are especially prone to contracting the coronavirus. Their ongoing access to healthcare is limited due to the measures implemented to prevent infections, which includes more and more outpatient clinics operating with limitations or closing down.

Certain solutions implemented in the healthcare system or used in medicine will turn out to be especially important in such a hard time. Other, however, require

changes to the coordination effort or legislation. These solutions are discussed in detail in the further part of this report.

A question arises as to how the pandemic-related experiences will impact the healthcare system in the long run.

2. Telemedicine

2.1. Field description

Telemedicine constitutes a remote form of providing healthcare services. By using telemedicine, a physician may, among other things, collect a patient's medical history and assess their health status remotely. Telemedicine is not always enough to replace a traditional physician visit, but as technology progresses, it proves useful in many situations.

2.2. Short-term impact of the pandemic on telemedicine

Introducing a state of epidemic threat constitutes an exceptional situation where remote healthcare becomes a necessity. Telemedicine constitutes one of the tools that ensure access to healthcare during the pandemic, at the same time limiting the risk of spreading the coronavirus. Telemedicine constitutes a beneficial solution for COVID-19 patients, persons in their proximity and physicians providing healthcare services. In case of telemedical services, the physician providing the service is at no risk of contracting the coronavirus. Moreover, telemedicine plays a key role in providing healthcare to patients with chronic diseases whose options of using classic care are limited due to the epidemic situation.

In light of the above, the growing popularity of services provided via ICT or communication systems is visible. The Ministry of Health, National Health Fund and the Patient's Rights Ombudsman are among those who encourage remote visits.

A hotline for patients who suspect that they are infected with the coronavirus was launched by the National Health Fund. Through medical telephone consultations patients may obtain appropriate recommendations, an electronic sick

leave certificate, electronic prescription and a suggestion to report for a visit at the facility or contact a sanitary and epidemiological station, if needed.

The National Health Fund admitted the possibility to perform and settle specialist outpatient services provided via ICT or other communication systems. This solution allows specialists and primary care physicians to provide medical telephone consultations. Until now specialist medical telephone consultations were not financed from public funds.

Specific principles for providing telemedical services during the pandemic are set forth in the State of Epidemic Regulation²⁵. This regulation governs the manner of verifying the identity of the service recipient who is seeking telemedical services. Entities providing healthcare services through ICT or communication systems confirm the identity of the service recipient based on the data provided by the service recipient via such systems, including by phone. If the service recipient's right to receiving healthcare services is not confirmed, they may submit a declaration on their right to healthcare services through telemedical systems, including by phone.

2.3. Long-term impact of the pandemic

Experiences accumulated with the coronavirus will probably increase the awareness of physicians and patients when it comes to the potential behind telemedicine and the benefits to be reaped from remote provision of healthcare services. It is highly likely that telemedicine will become a permanent element of specialist outpatient services as a service financed from public funds.

An accelerated pace of telemedicine implementation will also be possible through the use of more advanced technologies, i.e. medical devices, e.g. in the form of telemonitoring of patients after cardiological incidents.

²⁵ The Regulation of the Minister of Health on the announcement of a state of epidemic in the territory of the Republic of Poland **of** 20 March 2020 (Polish Journal of Laws of 2020, item 491, hereinafter referred to as the "State of Epidemic Regulation").

3. Healthcare informatization

3.1. Field description

Among its other aspects, healthcare informatization consists in using e-health solutions, which include e-prescriptions, electronic sick leave certificates, e-referrals, e-recommendations and the introduction of electronic medical records.

3.2. Short-term impact of the pandemic

As the coronavirus spreads, it is extremely important to effectively implement e-health solutions, e.g. due to the necessity to provide telemedical services.

Some IT solutions, e.g. e-prescription and electronic sick leave certificates, have already been effectively implemented in the healthcare system. Others e.g. the e-referral, are to be issued in electronic format starting from 8 January 2021. Currently, only some medical treatment entities are using these electronic solutions.

Medical treatment entities that have introduced and are using IT solutions are able to provide effective and complex healthcare services remotely. However, patients will not be able to obtain certain documents through telemedical services at those medical treatment entities that failed to implement such solutions to a sufficient extent or where such solutions failed in practice. The Ministry of Health recently introduced solutions ensuring the option to verify entitlements over the phone, but this is a temporary solution.

Electronic medical records allow for fast and contact-less exchange between medical treatment entities, if needed and in the cases set forth in the provisions of law. The importance of this solution is especially clear for counteracting the pandemic.

3.3. Long-term impact of the pandemic

Experience accumulated in connection with the COVID-19 pandemic will probably draw attention to how important informatization of the healthcare system is, so as to ensure that it could be implemented more efficiently and extensively.

4. Artificial intelligence

4.1. Field description

Artificial Intelligence (AI) refers to machines or systems that try to replicate the way the human mind works. Artificial intelligence is based on algorithms, i.e. sets of steps applied to solve a specific problem. Artificial intelligence is starting to become visible in almost every area of life. Medicine is a special field of its application. For example it facilitates diagnostics by "learning" based on large sets of medical data.

4.2. Short-term impact of the pandemic

Searching for solutions to prevent the coronavirus from spreading leads to increasing the importance of artificial intelligence in medicine. Artificial intelligence algorithms are currently used on a massive scale in connection with counteracting the COVID-19 pandemic.

Artificial intelligence is used in search of a cure for the coronavirus. One of the pioneers in the artificial intelligence market are the United States of America, where many AI projects are being pursued. In the middle of March, it only took one day for the scientists using the Summit supercomputer to select 77 candidate substances from among eight thousand different compounds that may block the coronavirus ability to penetrate into human respiratory system. These results significantly narrowed down the search for substances that could be used to develop a cure for COVID-19. Plans are also made in the USA to develop artificial intelligence algorithms that could help analyze approximately 30 thousand scientific papers on the coronavirus.

In Poland, artificial intelligence supports the hotline operated by the National Health Fund. The National Health Fund launched a voicebot on its hotline to help when the number of incoming calls spikes. The voicebot responds to basic questions that do not require specialist consultation.

4.3. Long-term impact of the pandemic

Using AI solutions to counteract COVID-19 will most probably contribute to increasing financial outlays for the development of artificial intelligence in medicine. Legislative changes are necessary and probable to ensure e.g. working with medical data of appropriate quality, setting forth standards of use and regulations regarding the financing of algorithms used in the public healthcare system.

5. Coordinated healthcare

5.1. Field description

Coordinated healthcare (CH) includes medical services managed and provided to persons in a manner that ensures: continuous health promotion, prevention of diseases, receiving diagnosis and treatment, management of diseases, receiving rehabilitation and palliative medical services, at different levels and in different places throughout the healthcare system, according to demand, throughout the entire lifetime and in the form of continuous, active contact with patients²⁶.

5.2. Short-term impact of the pandemic

In light of the spreading coronavirus, coordinated healthcare is especially important for patients with chronic diseases. It sets out a path for treating the patient, supervised in terms of quality and the timelines of healthcare services by a coordinator. Coordinated healthcare limits the inefficiencies of the healthcare system. Implementation of this model ensures that patients with chronic diseases receive continuous care and should further restrictions in access to medical treatment entities be imposed, the coordinator will manage the treatment process. Coordinated care is employed e.g. in cardiology (KOS-zawał [CH-MI]) and as part of the POZ Plus [Primary Care Plus] pilot program.

²⁶ Infarma, Report: VBHC. Droga do Value Based Healthcare. VBHC w teorii oraz praktyce [Paving the way towards Value Based Healthcare. Theory and practice of VBHC], <https://www.infarmy.pl/raporty-raporty-infarmy/raport-VBHC.pdf>, last accessed 25 March 2020.

During the COVID-19 pandemic, coordinated healthcare is faced with many problems and challenges. There is a risk that healthcare services will not be available to all those in need.

One of the problem areas is coordinated healthcare for patients with chronic diseases who are not enthusiastic about new technologies (telemedicine) and whose ability to report for a visit at a facility is limited or who do not attend visits for fear of getting infected.

Strategic solutions must therefore be implemented to effectively ensure access to health care for such patients. Options available for this are limited due to the current circumstances.

It is also important to minimize the risk of COVID-19 infection as part of coordinated healthcare. Many patients with chronic diseases who are currently high-risk due to the coronavirus infection receive medical care provided as part of CH. Reorganization is necessary in coordinated healthcare in order to prevent infections. However the lack of public resources hinders such reorganization.

5.3. Long-term impact of the pandemic

The pandemic clearly shows that patients with chronic diseases are especially at risk, hence in the future the need for optimizing healthcare through coordination will be growing. It is very likely that efficient innovations will have to be implemented faster into the healthcare system.

6. Financing healthcare

6.1. Field description

Appropriate financing, matched to healthcare needs, is necessary to ensure healthcare that is effective, in line with current knowledge and ongoing.

6.2. Short-term impact of the pandemic

The COVID-19 pandemic, as in other countries, may lead to a profound insufficiency of the healthcare system. Financial problems may affect hospitals providing care to coronavirus patients and units providing other healthcare services.

The healthcare system has been struggling with financial difficulties for many years. In consequence, patients have limited options to obtain specialist services and use other life-saving procedures. During the COVID-19 pandemic, even the best financed healthcare systems are unable to meet the expectations of the society.

The President of the National Health Fund signed a resolution on the rules for reporting and conditions for settling costs of healthcare services related to the prevention, response and countermeasures against COVID-19. These new solutions are to guarantee that an entity providing services related to the prevention, response and countermeasures against the coronavirus may obtain funding at a level comparable to those currently received under contracts for the provision of healthcare services.

Nevertheless, the funds designated for the prevention, response and countermeasures against the coronavirus may not be sufficient. The pandemic revealed profound healthcare underfinancing and the funds assigned to combat the pandemic are only temporary.

6.3. Long-term impact of the pandemic

Experiences related to the COVID-19 pandemic will probably spark off a discussion on financing healthcare and the actual healthcare needs of the society, as well as future ones in case of another pandemic. Moreover, due to the under-financing of healthcare, a discussion may be started on the topic of changing the healthcare financing model and introducing other solutions, e.g. patient copayments or introducing additional health insurance.

7. Distribution

7.1. Field description

The greatest challenge in the field of distribution during the pandemic is to ensure appropriate availability of medicinal products.

7.2. Short-term impact of the pandemic

The first signal of a clear impact exerted by the pandemic on the distribution was a change of the so-called “export ban list”, i.e. the list announced by the Minister of Health that includes medicinal products, foodstuff intended for particular nutritional uses and medical devices that may be in short supply in the territory of the Republic of Poland (“Announcement”). In the announcement of 5 March 2020 the list of products threatened with supply shortages was extended to include approximately 1000 additional items compared to the previous version of the Announcement²⁷. Subsequent lists are being extended to include ever more items²⁸.

This imposed an extension of the range of products that must be reported to the Chief Pharmaceutical Inspector (“CPI”) if they are to be exported outside the territory of the Republic of Poland or sold to an entity operating outside the territory of the Republic of Poland. Importantly, the Announcement is not the only regulation that limits export (including within the EU) of products that may support coronavirus countermeasures. A number of limitations have been imposed for medical devices (see item 5 of this report) and personal protective equipment²⁹.

27 Announcement of the Minister of Health of 13 February 2020 on the list of medicinal products, foodstuff intended for particular nutritional uses and medical devices that may be in short supply in the territory of the Republic of Poland (“Announcement”).

28 Announcement of the Minister of Health of 10 March 2020 and 17 March 2020 on the list of medicinal products, foodstuff intended for particular nutritional uses and medical devices that may be in short supply in the territory of the Republic of Poland (“Announcement”). We are not referring to the Announcement of the Minister of Health of 16 March 2020, because it was quickly replaced by the version of 17 March 2020.

29 One of the instruments introducing such limitations was the Regulation of the Minister of Health of 13 March 2020 on the announcement of a state of epidemic threat in the territory of the Republic of Poland and then the Regulation of the Minister of Health of 20 March 2020 on the announcement of a state of epidemic in the territory of the Republic of Poland. However, at the EU level, it is important that the Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation.

Notwithstanding the limitations imposed on exportation, the Special Act³⁰ introduced a number of regulations that may impact distributors operating in the pharmaceutical market, including but not limited to:

- » authorization for the Minister of Health to establish maximum prices for certain medicinal products, medical devices and foodstuff intended for particular nutritional uses;
- » option to extend the obligation of reporting to the Integrated Monitoring System for the Marketing of Medicinal Products (Zintegrowany System Monitorowania Obrotu Produktami Leczniczymi, „**ZSMOPL**”) by way of a regulation of the Minister of Health – which for some entities may mean an obligation to connect to the ZSMOPL immediately (the Special Act sets forth a deadline of 24 hours from the moment when such an obligation is imposed);
- » authorization for the Minister of Health to announce a list of products that may be sold by pharmaceutical wholesalers only to other pharmaceutical wholesalers, limited service pharmacies and treatment units of medical treatment entities operating in the territory of Poland, whereby a violation of this obligation is punishable by a financial penalty in the amount of between PLN 10,000 and 5,000,000 PLN;
- » authorization for the President of the Council of Ministers to issue binding instructions for enterprises;
- » authorization for the sanitary inspection authorities to order pharmaceutical wholesalers to distribute medicinal products, foodstuff intended for particular nutritional uses or medical devices.

7.3. Long-term impact of the pandemic

Decision-makers have been focused on the problem of availability of medicines for a long time. The current situation related to the pandemic may create even greater pressure on seeking new solutions in this respect. Unfortunately, the tools used previously, such as reporting to the ZSMOPL or inclusion

30 The Act of 2 March 2020 on special arrangements for the prevention, response and countermeasures against COVID-19, other infectious diseases and the resulting crisis situations (Polish Journal of Laws of 2020, item 374; hereinafter referred to as the “Special Act”)

in the SENT system³¹, failed to eliminate the problem of unavailability of medicinal products. In our opinion, the search for an effective solution requires an open discussion between representatives of the government and the industry – pharmaceutical companies, wholesalers and pharmacies. We hope that the pandemic will not lead to an illusion that the problem may be solved with provisional measures.

It should also be mentioned here that some solutions introduced to counteract the pandemic became a “permanent” part of the Polish law, which means that those regulations will not automatically expire after a specific time as of their adoption. This refers in particular to the possibility to extend the obligation of reporting to the ZSMOPL (new Article 37azg section 1 of the Pharmaceutical Law Act³²) and the list of products that may be sold by a pharmaceutical wholesaler only to pharmacies, limited service pharmacies and treatment units of medical treatment entities (new Article 85a of the Pharmaceutical Law Act).

8. Medical devices

8.1. Field description

Uninterrupted access to medical devices is key for preventing the spread of the coronavirus.

8.2. Short-term impact of the pandemic

Decision-makers did not focus on medical devices – contrary to medicinal products – when it comes to securing their availability in the territory of Poland (at least not to the same broad extent). Under the current circumstances these devices constitute the basic means of counteracting the coronavirus. Almost every information service, both local and nationwide, provide extensive coverage

31 System for the monitoring of road and rail commodity transport and heating fuels trade mentioned under the act of 9 March 2017 on the system for the monitoring of road and rail commodity transport and heating fuels trade.

32 The Pharmaceutical Law Act of 6 September 2001 (consolidated text Polish Journal of Laws of 2019, item 499, as amended, hereinafter referred to as the “Pharmaceutical Law Act”)

on problems with the availability of medical masks or gowns. Some of those products are medical devices.

In this situation, the Minister of Health decided to include some medical devices in the Announcement (which provides a list of products that may be in short supply in the territory of Poland – see item 7.2 of this report). This covers such devices as e.g. medical caps, surgical and non-woven gowns, surgical masks and oxygen masks, surgical gloves and electronic thermometers. A precedent is therefore formed.

Export limitations were also imposed by means of other instruments – both in Poland and in the European Union. For example the Epidemic Threat Regulation³³ introduced a ban on the export or sales of ventilators and cardiac monitors outside the territory of the Republic of Poland. However, when it comes to other products (that may constitute medical devices or personal protective equipment), the Epidemic Threat Regulation introduced an obligation to inform the voivode about the intention to export or sell such items outside the territory of Poland. Such limitations are also repeated in the State of Epidemic Regulation. Similar regulations were adopted at the European Union level – these include, but are not limited to the Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorisation. This Regulation covers export outside the European Union and refers in particular to all personal protective equipment (“PPE”). We are highlighting these limitations, because some masks may be classified as a medical device or PPE, depending on the intended purpose.

At the same time, supervisory authorities communicate initiatives undertaken in order to facilitate the marketing of certain medical devices. Firstly, the Communication from the President of the Office for Registration of Medicinal Products of 17 March 2020 indicates that medical devices accompanied

³³ The Regulation of the Minister of Health on the announcement of state of epidemic threat in the territory of the Republic of Poland of 13 March 2020 (Polish Journal of Laws of 2020, item 433, hereinafter referred to as the “Epidemic Threat Regulation”)

by documentation compliant with the Regulation 2017/745 may be marketed without notifying the President of the Office for Registration of Medicinal Products. Grounds for such an approach are provided by the fact that even though the Regulation will apply as of 26 May 2020, the requirements stipulated in its provisions may be met earlier, whereas there are still no national provisions governing the registration of such devices. Secondly, in accordance with the Commission Recommendation (EU) 2020/403 of 13 March 2020, Member States may admit the marketing of medical devices that failed the compliance assessment. The Council of Ministers intends to adopt such a solution in line with the Draft Resolution of the Council of Ministers on special solutions for providing personal protective equipment that are necessary to prevent the SARS-CoV-2 virus from spreading, published on the website of the Chancellery of the Prime Minister of Poland.

Except for the limitations introduced, it is vital to highlight the possibility to issue orders for the provision of medical devices using ICT systems and communication systems (§ 9 the State of Epidemic Regulation and § 7a of the Epidemic Threat Regulation).

8.3. Long-term impact of the pandemic

Most of the solutions currently implemented in the field of medical devices are temporary. An example would be the inclusion of some devices in the Announcement or the ban on the export and sales of ventilators and cardiac monitors. We hope that patients who are in need of medical devices will benefit from the increased importance of telemedicine. Even though the procedure for issuing and confirming orders via ICT systems and communication systems was introduced under the temporary regulations, we hope that the current situation will inspire future drive in this direction.

At the same time, it is vital to remember that the Regulation 2017/745 on medical devices, which will enter into force as of 26 May 2020, requires many processes on the side of manufacturers and distributors to be adjusted. In the current situation, works related to adjusting to the new reality play a less important part.

Therefore, MedTech Europe, a society of medical device manufacturers called the European Commission to postpone the Regulation entering into force.

9. Reimbursement

9.1. Field description

Reimbursement allows patients to obtain products (medicines, foodstuff intended for particular nutritional uses and medical devices) financed or co-financed from public funds. This applies both to prescription products available at pharmacies and products administered or dispensed as part of hospital treatment services under medicine and chemotherapy programs.

9.2. Short-term impact of the pandemic

9.2.1. Issuing reimbursement decisions

Inclusion of a product into the reimbursement system requires a reimbursement decision, which is preceded by proceedings conducted before the Minister of Health, which include, but are not limited to price negotiations with the Economic Commission. Reimbursement decisions are issued for a specific time – currently for 2 or 3 years. A list of reimbursed products is published by means of a public announcement of the Minister of Health every 2 months.

As part of adjustments to the current situation, the Minister of Health amended the order regarding the Economic Commission³⁴ to allow conducting remote negotiations. According to the new wording of § 8a: “[in] *the case of extraordinary circumstances, meetings of the Commission and negotiations conducted by the negotiating teams may be conducted by electronic means of remote communication that enable direct contact in real time.*” This provision entered into force on 15 March this year and according to the information at our disposal, the Ministry of Health

³⁴ Order of the Minister of Health of 14 March 2020 amending the order on the Economic Commission (Official Journal of the Minister of Health of 2020, item 21).

contacted applicants to obtain their consent for negotiations to be carried out in accordance with this procedure.

Moreover, a bill³⁵ amending, among others, the Special Act on reimbursement decisions and announcements, was submitted to the Sejm on 26 March. According to the bill, announcements made by 1 March are to remain binding until 31 August, and the validity dates of decisions that expire before 1 July are to be prolonged until 31 August. Hence it will not be necessary to issue a new announcement that would be applicable as of 1 July. At the same time, the date of entry into force of reimbursement decisions that have been issued so far and were supposed to enter into force on 1 May is to be amended to 1 September.

Additionally, any and all proceedings instigated and not completed before 15 August this year will be suspended by operation of law until 31 August this year. Whereas during the suspension period the Minister of Health may undertake any and all actions meant to complete the proceedings and issue decisions.

To the best of our knowledge, once the state of epidemic was announced, the Minister of Health continued activities as part of pending reimbursement proceedings, e.g. negotiations concerning the contents of medicine programs were continued. It should however be stressed that providing reimbursement for new products is currently not a priority and many proceedings will probably be postponed.

9.2.2. Ensuring access to therapy for patients

When it comes to providing safe access to therapy for patients, a core issue are medication programs and chemotherapy programs, under which the product (medicine or foodstuff for particular nutritional uses) is administered or dispensed by the service provider. Until recently this meant that the patient had to

35 The government's bill on amending certain acts on the system of healthcare related to the prevention, response and countermeasures against COVID-19 (Sejm's paper no. 301) <http://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=2D7894851469D6D4C1258537003A81B5>.

report to an outpatient clinic or a hospital department of a specific medical treatment entity in order to receive therapy.

Due to the epidemic, on 13 March the Minister of Health issued a communication³⁶, recommending the following to service providers:

- » when prescribing medicines as part of medicine programs that do not require the patient to be present – authorization to dispense an amount of medicinal product that, in the opinion of the treating physician, will secure the patient's therapeutic needs for the maximum possible time period without the need to report for a visit, however for no longer than 6 months;
- » where the patient's status is stable and a visit with the service provider is necessary only to secure the patient's continued therapy for a subsequent treatment cycle – the medicine should be delivered by the hospital directly to the patient at their place of residence or to their statutory representative, and where this is not possible or significantly hindered, it may be dispensed from the authorized hospital pharmacy to the patient, their statutory representative or a designee;
- » where the facility providing services as part of a medicine program transforms into an infectious diseases facility – it is recommended that another facility executing the medicine program takes over the patients, which applies especially to patients requiring immediate administration of a medicine due to a pre-determined treatment cycle;
- » since intermittent interruptions are possible in the planned patient admission schedules related to the administration/dispensing of medicines as part of a pre-determined treatment cycle, including also the necessity to perform diagnostic tests stipulated in the service descriptions:
 - » in stable cases that pose no threat to the life or health of the patient, medical consultations may be provided using ICT tools;

36 The communication of the Minister of Health to medical treatment entities performing Hospital treatment – medicine programs and Hospital treatment – chemotherapy contracts and to patients receiving such treatment <https://www.gov.pl/web/zdrowie/komunikat-ministra-zdrowia-dla-podmiotow-leczniczych-realizujacych-umowy/>.

- » where the patient's condition is stable and postponing the follow-up has no influence on the health and safety of the patient, a follow-up scheduled in the medicine program may be postponed;
- » in the case of a mandatory visit – if possible, patients should be admitted in the ambulatory setting in separate rooms;
- » in the case of a mandatory visit – if possible, the service provider should divide rooms in such a way that the "patient's path" to the place of providing the service is as short as possible;
- » in the case of a mandatory visit – the service provision organization should ensure safety for the patients, their statutory representatives and medical staff.

At the same time it was indicated that every service provider should develop detailed solutions, considering the standards and recommendations for the therapy of patients in particular clinical conditions, ensuring safe and efficient therapy.

9.3. Long-term impact of the pandemic

Changes pertaining to reimbursement are incidental and temporary, hence they should not have any considerable impact in the long run. After the pandemic, reimbursement quotas may be increased for new products and new indications that were postponed due to a shift in priorities. However, this increase should be treated as "catching up", rather than a permanent trend resulting from the pandemic.

There is a chance that after the end of the pandemic the previous implementation of ICT solutions used to conduct negotiations via electronic means of communication will also lead to the introduction of a more permanent remote communication option (holding meetings, negotiations) between the authority and applicant.

Also the possibility to provide medical consultations using ICT as part of implementing medicine programs and chemotherapy programs may enhance the role of telemedicine in such services.

10. Competition law

10.1. Field description

Competition law prohibits activities that are meant to or result in a violation of the market equilibrium. Competition law applies to all industries, including enterprises from the pharmaceutical, cosmetics or chemicals market.

In connection with the pandemic we are hearing about a significant increase in prices of goods and services, as well as of enterprises providing unreliable information about the products offered, including their properties. In response to the signals, the President of the Office for Competition and Consumer Protection implemented measures to control such behavior. Moreover, when faced with uncertainty about the future of their operations, enterprises are getting involved in risky cooperation with their competitors, sharing sensitive information or – since their services have been digitalized – providing information that otherwise should have been protected. Enterprises are also in doubt as to whether under such circumstances they may refuse service and to whom, what criteria should be applied to the decision-making process in this respect, and how to limit the volume of orders in a situation where the market demand is higher than their manufacturing and distribution capacity.

10.2. Short-term impact of the pandemic

In this extraordinary situation enterprises must remember that even though COVID-19 undoubtedly exerts an impact on their business, the current “quarantine” in Poland cannot be extended to competition law. The following are still prohibited and potentially entail severe sanctions: (i) dominant position abuse, (ii) agreements restricting competition and (iii) practices detrimental to the interests of consumers (including, but not limited to providing unreliable or misleading information). One should also consider that the pandemic situation generally will not constitute an effective defense against any alleged violations of competition rules. In their previous decision-making practice, the President of the Office for Competition and Consumer Protection has yet to decide (though from the formal perspective this would be possible, of course depending on whether or not

the enterprise proves that they met specific prerequisites) that a violation of law related to an economic crisis was justified.

Under the present circumstances enterprises should receive clear guidelines regarding what they can and cannot do. Competition law still applies irrespective of the epidemic and severe penalties may be imposed as a consequence of such violations.

Enterprises should also bear the following in mind:

- » Cooperation with other enterprises cannot be aimed at nor lead to eliminating any entity from the market.
- » Imposing minimum and fixed resale prices on counterparties is prohibited.
- » Enterprises are prohibited from exchanging information constituting trade secrets, such as bid prices, resale margins, discounts received, terms and conditions of tender bids, detailed terms and conditions of cooperation with an individual business partner.
- » It is prohibited to consult the terms and conditions of tender proposals with competitors.
- » Economically unjustified, discretionary differentiation of terms and conditions of cooperation with clients may constitute a violation of law.
- » When operating under market domination conditions, it is prohibited to take action abusing the market position, such as increasing prices without justification in the form of cost increase and resulting from the fact that competitors are currently unable to supply a given commodity that is in higher demand.
- » It is prohibited to mislead consumers, in particular by providing false information on the properties of products offered.

Except for the abovementioned prohibitions, there are also actions that may be legally and economically justified and that will not constitute a violation of the law as such. These include:

- » Increasing prices due to an increase of manufacturing costs.

- » Using prices at the level set forth in the provisions of law (e.g. in the Special Act).
- » Refusing to contract if refusal is applied uniformly to all counterparties (or counterparties failing to meet specific criteria).
- » Treating counterparties differently, if the criteria for differentiation are economically justified and applied on a uniform and non-discriminatory basis towards all business partners.
- » Limiting sales to a counterparty in a specific territory or to a particular group of clients restricted as exclusive for another counterparty.
- » Sharing aggregated, historical data.
- » Cooperation as part of group purchasing organizations, if no sensitive information is exchanged as part of such cooperation.

10.3. Long-term impact of the pandemic

Due to the fact that some enterprises are using the pandemic to violate competition principles (increasing prices) and misleading consumers, the President of the Office for Competition and Consumer Protection is constantly monitoring the market and encourages the public to report any inconsistencies, investigates red flags, collects information and evidence. These may be used even after the end of the epidemic against the enterprises that violated the provisions of law during that time.

Sanctions include fines of up to 10% of the enterprise's turnover for practices restricting competition and anti-consumer practices. Managers of the enterprise may also be liable for cases of anti-consumer agreements and practices. In such a case the maximum penalty is PLN 2 million.

HEALTHCARE



CORONAVIRUS AND THE LAW IN POLAND

ADVERTISING AND MARKETING



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10 Coronavirus in the advertising and marketing industry

The crisis caused by announcing the epidemic is now a fact. Every day we receive more and more information on how the pandemic will impact the global economy. And although the worst is yet to come – as the experts claim - it is advisable to prepare for it now, as we speak. And the worst-case scenario will be experienced by the advertising and marketing industry rather quickly. It is a known fact that if there are any financial problems, the first cutbacks and reductions are made in the budget for marketing and advertising.

Although as a consultant for the broadly understood creative industry (including advertising and marketing) I see the black scenario looming over this industry, I am perfectly aware that the last thing my clients expect of me is a presentation of problems. My clients already have more than a fair share of those.

What our clients need from us, lawyers, is a set of suggested solutions. And today I will try to present some of them, based mostly on intellectual property law.

Better (commercial) use of the potential offered by intellectual property

Online environment, which is increasingly popular as the medium of work and contact with clients (even more than before) is in this difficult situation a perfect space for growth and for commercial use of intellectual property. Intellectual property law is a special domain of law, which protects the rights to intangible

property, so it is just the right domain to match the online environment. Intangible property can be created and commercialised without the need for any tangible medium.

In the event of small and medium companies, the knowledge of the protection and, what is even more important, commercialisation of intellectual property rights is particularly important.

Intellectual property law in times of crisis

Basic categories of intellectual property law include copyright and industrial property right. The former – copyright – protects “any manifestation of creative activity of individual character, established in any form.” In practice, copyright protects any result of creative activity since its determination, regardless of its value, purpose or manner of expression. A work understood as intangible property should be distinguished from an object (medium, the so called *corpus mechanicum*) in which it is incorporated and which can be used by another person to inspect it without the need to contact the author directly. This is why a work fits in well with the virtual world – no tangible medium is needed in order for it to be created and to exist.

In order for a work to be protected by copyright (on top of the creative activity element),

it must be established in any way, i.e. it must be externally manifested, so that it can be appreciated by any third party, apart from the author.

Undervalued right to salary

When the work is established, the author obtains (automatically, without the need to complete any formalities) two types of copyright – moral rights and economic rights. The latter are subject to trade; this is the category that the author should bear in mind, especially now that most of economic trade has shifted to the virtual world.

As per Article 17 of the Act of 4th February 1994 on Copyright and Related Rights, economic rights include:

- » the right to use the work;
- » the right to manage the work;
- » the right to receive remuneration for the use of the work.

Apart from remuneration for creating a design for the client, the author (agency) has a right to additional remuneration by virtue of the law, for authorising the use of the work or for transferring the author's economic rights onto the client.

It is the author's right to remuneration for the management of his/her copyright should be drawn upon frequently these days, when we look for additional sources of income.

Commercialisation of intellectual property rights

The other category of intellectual property rights – industrial property right – is a total of intangible property protected under the Act of 30th June 2000 - Industrial Property Law. Among industrial property rights we can mention i.a.: patent right, exclusive rights for a utility model, right of protection for a trademark or right granted upon industrial design registration.

Trade mark is the most popular subject of intellectual property rights. Apart from the fact that it protects the holder of the rights from third parties using his trademark, this right can also become an additional source of income for the entitled holder. It follows from my experience that entrepreneurs are aware of the need to protect the trademark as an economically significant component of an organisation, but when it comes to commercialisation, they are a bit lost and tend to resort to classical sales models, i.e. sales of a design rather than of relevant rights.

And yet it should be said that trademark licensing is one of the most popular ways to make money in the world. And all this without having to leave your home.

Trademark license

Trademark licensing (just like the licensing of any other intangible property protected by intellectual property right) means that the owner of the trademark (licensor) authorises another entity (licensee) to use the subject of the intellectual property right (in this case - a registered trademark) for consideration, following certain terms and conditions. Remuneration for granting the license may be defined in various ways. It could be a flat rate – fixed monthly payment for the possibility of using the trademark following the terms and conditions as defined in the relevant agreement, or a percentage of revenue - the licensee undertakes to pay a certain percentage of the gross or net revenue earned by using the trademark.

One of the largest licensors in the world is Walt Disney Company. It was in 2015 alone that the global retail sales figures related to products licensed by Walt Disney Company reached a staggering amount of 52.5 billion USD. However, it is not only large corporations, but also individual entities that can successfully license their intellectual property. A good example of an entrepreneur who not only managed to build a strong personal brand, but also mastered the art of merchandising is... the current President of the United State of America – Donald Trump.

Back when he was an entrepreneur, Donald Trump knew that as he is becoming increasingly popular, his own trademark – “Trump” – was becoming more and more attractive and strong. This is why he was so willing to license it. We know from the financial statement Trump filed when he was a presidential candidate that over 18 months – from January 2014 to June 2015 – he earned as much as 36 million USD from license revenues.

Crisis or opportunity?

Informed management of intellectual property is important not only if you wish to guarantee the security of your organisation and protect it against any claims from the clients, but also if you consider all the possibilities related to earning additional income. The crisis is not a good time for “sharing content free of

charge", which is a frequent complaint heard from those clients whose income comes from the sales of valuable content. What is more, this is not a good time to discontinue your sales altogether ("because it is not an ethical thing to do during a crisis").

The crisis is a good moment to stop and analyse the bulk of intangible property produced and sold by the organisation. It is an opportunity to build an effective strategy focused on protecting and commercialising one's own intellectual property, which will help you find additional sources of income.

Financial aid for advertising and marketing agencies

What about those agencies whose financial situation is particularly dramatic because of the epidemic? The Act of 31st March 2020 on the amendment of the Act on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations (the so called Anti-Crisis Shield), includes solutions addressed to both self-employed people and companies employing up to 9 people. These solutions are aimed at protecting employment and maintaining the financial liquidity of entrepreneurs. The proposed solutions are far from perfect and they will definitely not be enough for the organisations to make it through the foreseen couple (or dozen) of months of this crisis. However, they stipulate certain financial support for specific professional groups and for this reason it is good to be familiar with them. Financial aid foreseen in the Anti-Crisis Shield is addressed mainly to smaller organisations which may face insolvency due to a shortage of orders.

According to the new provisions, micro-entrepreneurs who employed up to 9 people before 1st February 2020 and self-employed people (registered before 1st February 2020) whose revenue was no more than 3 times the average salary may be exempt from social security contributions for three months.

In practice, it means that each self-employed entrepreneur (registered no later than on 1st February 2020) or an entrepreneur employing up to 9 people (at least

since 1st February 2020) may be exempt from social security contributions for three months, provided his/her revenue is no more than 15 681 PLN gross.

What about those who decided to suspend their business activity for the duration of the epidemic?

Self-employed people as well as those employed on the basis of civil-law contracts (a contract of mandate, specific work contract) continuously for at least 30 calendar days before the month in which the application for the downtime pay was filed, provided that the contract itself was concluded no later than on 1st February 2020, may claim a one-off downtime pay (non-taxable and not subject to social security contributions). The amount of such downtime pay is supposed to be ca. 2000 PLN gross. In order to receive the one-off downtime pay, an entrepreneur has to suspend his/her business activity or prove that his/her revenues dropped by at least 15% in the month preceding the month in which the application was filed. What is important, in both cases, the entrepreneur's revenue cannot be higher than 300 per cent of the average monthly salary as published by the Main Statistical Office (ca. 15 500 PLN).

In the event of people employed on the basis of civil-law contracts who want to apply for the one-off downtime pay, the salary for performing the contracted work as indicated in the contract cannot be lower than 50 per cent of the minimum salary mandatory in 2020, i.e. it cannot be less than 1300 PLN gross.

The right to the downtime pay is to be determined upon to the request filed by the entrepreneur who decided to suspend his/her business activity, and in the event of a person employed on the basis of a civil-law contract - upon the request of the contracting/ordering party.

Social aid for artists and authors

Regardless of the abovementioned solutions stipulated in the so called Anti-Crisis Shield, authors and artists may apply for financial aid provided by the Fund for

the Promotion of Culture. In order to claim social aid, it is necessary to complete the "Application for social aid from the Fund for the Promotion of Culture" (in legible handwriting) and append the required documents as indicated in the application form.

The documents to be appended include evidence that proves the existence of circumstances justifying the claim for social aid. Relevant documents should prove the legal and financial situation of the applicant. It can be, for example, a specific work contract or a contract of mandate, pursuant to which the author or artists was supposed to perform specific work and receive specific remuneration, but since the cultural institution closed down, the contracted work cannot be completed. For more details, please visit the website of the Ministry of Culture and National Heritage.

CORONAVIRUS AND THE LAW IN POLAND

MICE (MEETINGS, INCENTIVES, CONFERENCES, EVENTS



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11 The impact of coronavirus on the MICE industry

It is hardly possible to identify an industry that will come out unaffected by the coronavirus pandemic. However, for the broadly understood MICE industry, which comprises the organisation of events and concerts, transport, accommodation and supporting logistics, #stayathome means that all operations will certainly have to be suspended or even ceased altogether.

The MICE industry is particularly vulnerable: personal and legislative disturbances or adverse weather conditions are likely to disrupt the industry almost overnight. While MICE businesses can prepare ahead for certain developments (e.g. the risk of rainfall at an outdoor concert can be addressed by building a roofed stage), one cannot reasonably expect them to be prepared for force majeure events such as an epidemic. The majority of available insurance policies list epidemics among circumstances where the insurer's liability is excluded. Meanwhile, the MICE industry, with its core proposition to organise personal experience through broadly understood professional and social meetings as well as entertainment, will cease to earn any money under conditions of an epidemic. Remote operation, an option available to other industries, is objectively impossible for MICE businesses. The situation will seem particularly serious if we consider that approx. 95% of MICE businesses in Poland come from the SME sector, with local capital, resources and know-how.

The realities of Poland's MICE industry in the face of SARS-CoV-2

The MICE market in Poland is worth an estimated PLN 3 billion, and employs over 30,000 people.³⁷ In 2018, the global event industry generated USD 621.4 bil-

³⁷ Source: The position of the MICE industry in the face of the current situation in the industry in view of the developing coronavirus crisis: thinkmice.pl.

lion and thus contributed USD 1.5 trillion to the global GDP, which means that if the sector were a country, it would rank 14th in the world, outperforming, e.g., Australia and Spain in terms of GDP.³⁸ The MICE market around the world generates 25.9 million jobs.³⁹

The year 2020 did not start well and the prospects are rather glum. The list of events that have been cancelled or temporarily rescheduled since March 2020 is very long, and gets longer each day during the state of epidemic. According to the trade press,⁴⁰ the situation has put multiple businesses on alert, including all event agencies and incentive programmes, travel agencies and tour operators, Polish DMCs and inbound tourism, fairs and all related businesses, festivals and concerts, hotels, guest houses and other accommodation services, catering businesses, restaurants, coach carriers, freight forwarding, airlines, inland navigation, tour guides, simultaneous interpreters, training providers, stage technicians and stage designers, performing artists, impresarios, culture workers, arts, musicians and their broadly understood subcontractors. The cancellation rate for most of these entities reaches up to 100%.⁴¹

The above is related to a number of problems: some have already materialised and others are related to the operation of the MICE industry in the near future. MICE businesses often rely on an extensive supply chain, and each entrepreneur must enter into multiple agreements, whether with clients (e.g. organising an event under the client's brand), consumers (ticket sales), artists (those who were supposed to perform at the event) or subcontractors (e.g. photography, filming, catering, music, technical support, etc.). Each of these agreements contains a number of provisions governing liability, contractual penalties, etc. One must also mention dilemmas concerning employees and taxation. Finally,

38 https://cdn.ymaws.com/www.iasbweb.org/resource/resmgr/resources/eic_business_events_industry.pdf; accessed on 19 March 2020.

39 *Ibidem*.

40 <https://eventowablogerka.pl/raport-specjalny-mice-koronawirus-zabija-branze-mice/>.

41 A survey conducted among members of the Event Industry Association (SBE) shows that over 97% of all planned events were cancelled in March and April 2020.

it should be stressed that the MICE industry is characterised, in particular, by an irregular commitment of resources and a fluctuating demand for services. During the year, the industry executes orders with varying intensity, depending on business objectives, available resources and clients' schedules. Thus, MICE operators cannot rely on long-term contracts that would guarantee continuity of service over a longer period of time.

As can be seen from the foregoing, the MICE industry is facing the risk of a painful collapse and a difficult rebound. What can be done to minimise losses and avoid losing contractors, and how to get ready to return to the playing field? What kind of instruments does Polish law offer to entrepreneurs and what kind of tools does the government provide?

The coronavirus pandemic and contractual obligations: What is force majeure?

There is no doubt that MICE businesses must brace themselves for more challenging times. On 10 March 2020, Polish Prime Minister Mateusz Morawiecki announced the cancellation of all mass events in Poland (i.e. those bringing together more than 1,000 people in one place at a time). This was the first government announcement that directly impacted the event industry. Then, on 13 March 2020, the Polish government decided to introduce a state of epidemic threat, which banned meetings involving over 50 people. On 20 March 2020, a state of epidemic was introduced, with further restrictions announced on 24 March 2020, this time limiting outdoor presence to the absolute minimum. Does this situation represent a force majeure event?

The concept of force majeure has no legal definition. Consequently, one should invoke the case-law of common courts and the views of legal academics and commentators. It is commonly accepted that force majeure is an external event that is impossible (or almost impossible) to predict, with consequences that cannot be prevented. Classic cases of force majeure include natural disasters (acts of God), such as fires, floods, volcanic eruptions, earthquakes or epidemics. In

addition, force majeure events include situations related to uncontrolled collective behaviour, such as strikes or riots with significant magnitude or intensity. Force majeure can also include acts of government, i.e. specific prohibitions, orders, blockades, etc.

It should be stressed that it is the circumstances of the case that determine whether or not an event qualifies as a force majeure event. This means that each situation must be reviewed separately to check the objective impact of the event on the possibility of taking or abandoning a particular action. For example, when Prime Minister Mateusz Morawiecki announced a government communique cancelling all mass events in Poland, there is no doubt that a rock concert which was expected to gather 50,000 fans could not take place due to force majeure. However, the organiser of a lecture by a business guru for an elite group of 50 selected people will not, in principle, be able to invoke force majeure vis-à-vis the potential participants. Nonetheless, let us consider a more complicated situation and assume that the guru lecturer stayed in China for the last two months and has just managed to return to the country and is therefore obliged to undergo a 14-day quarantine (following the official orders by the authorities). In that case, the lecturer's absence will, in principle, have been caused by a force majeure event. However, if the lecturer had not travelled but decided to cancel their attendance at the lecture, out of their own free will, and motivated by concern for their own health, this event cannot be easily classified as resulting from force majeure. Of course, these reflections do not take into account any contractual provisions to the contrary (see below).

As can be seen, the assessment of whether or not we are dealing with force majeure is multi-faceted and should take a number of circumstances into account, such as due diligence. Indeed, the definition mentioned above implies that a person who wants to invoke force majeure as preventing them from providing a service should prove that they could not have objectively predicted this occurrence. Thus, let us take a hypothetical situation of a vocalist who is going to perform at a concert on Monday (assuming that no restrictions on gatherings have been imposed in the concert venue and the situation is stable). If the vocalist takes

a weekend break in Italy, where the epidemic is at its peak, we cannot talk of exercising due diligence. If the vocalist starts to feel unwell on Monday, invoking force majeure should be considered dubious in this case.

To sum up, one should emphasise that a distinction should be made among (i) cases of objective force majeure and (ii) far-reaching caution in view of the possibility of a potentially dangerous event or (iii) lack of due diligence when taking action. When referring to force majeure, it is certainly difficult to list situations which will always, under all circumstances, result in the impossibility to render performances for any economic operator.

It has to be emphasised that, contrary to the solutions adopted, e.g., in China, where an eligible applicant can be granted a dedicated force majeure certificate, i.e. a document to confirm its occurrence, the arrangements available in Poland are different: common courts remain competent to resolve the dispute on whether a case of force majeure has occurred in a given contractual relationship or not. Importantly, the party in default will bear the burden of proving that the failure to perform occurred due to force majeure. Thus, Polish entrepreneurs have no possibility of using a certificate in a commercial dispute. At this point, it is important to signal the need for the meticulous archiving of data and documenting the events (e.g. information provided to the other party to the agreement or received from state authorities). This can be viewed as collecting evidence for preventive purposes.

Consequences of force majeure

Regardless of whether a situation can be classified as a case of force majeure or not, it is a good idea to point out the consequences of force majeure for contractual relations and the steps to be taken to review one's own factual and legal situation.

For the sake of clarity, one should first point out that the principle that agreements must be kept (once you have signed a contract, you must fulfil your obligations) is

among the overarching principles of civil law, regardless of how the contract was concluded. In case of non-performance or improper performance of a contract, the party in default is obliged to repair the damage, unless the non-performance or improper performance is a consequence of circumstances that this party is not responsible for. However, the rules of liability for non-performance or improper performance of a contract by the parties may be shaped in various ways in contracts, within the constraints imposed by applicable legislation.

Thus, in the current situation, the first step to be taken by all entrepreneurs should be to review the relevant contractual provisions. It is not forbidden, i.a., to impose liability on the other party to the contract for non-performance or improper performance also in case of force majeure. If contracts contain such broad provisions regulating the parties' liability in a contract, i.e. covering force majeure events as well, the contracting party will be obliged to redress the damage caused to the other party by non-performance or improper performance of the contract as a result of the state of epidemic. Importantly, when reviewing contractual provisions, it is also a good idea to note the definitions of force majeure adopted by the parties. The definition may be narrow (regulating very specific events referring strictly to the subject-matter of the contract) or broad (in line with the definition quoted above), depending on the parties' will. When signing their contract, the parties may have also provided for specific strategies in the event of force majeure (payment of a specific part of remuneration, suspension of specific works, etc.). Thus, there are many possibilities to modify contractual relations with respect to force majeure, which is why the first step to be taken by entrepreneurs is to review the content of their existing contracts.

However, what can be done in a situation where our contract, either verbal or written, does not regulate the consequences of a force majeure event? In that case reference should be made to the provisions of the Polish Civil Code (PCC).

First of all, it should be stressed that failure to perform a contract due to a force majeure event results in no liability for the resulting damages (Article 471 of

the PCC). In principle, this includes, *inter alia*, no obligation to pay contractual penalties or indemnity. Of course, as mentioned above, a party which invokes force majeure is obliged to prove the relationship between the damage and force majeure (in case there are no contractual provisions stating otherwise).

Importantly, the occurrence of force majeure alone (in this case: a pandemic) does not, in principle, amend or terminate the contract. Thus, if an entrepreneur is the subject of a contract which they cannot perform since a state of epidemic has been introduced, this does not automatically mean that their contractual obligation towards the other party will expire. In principle, the obligation expires only when there is an objective, so-called consequential impossibility for a party to perform, for which the party is not responsible. At the same time, this party to the contract may not demand the performance from its counterparty (pursuant to Articles 475 and 495 of the PCC). However, these PCC provisions regulate a definite impossibility to perform an obligation. The state of impossibility means that not only the debtor, but no one else is able to render the performance under the circumstances. Moreover, this condition must be permanent. Temporary difficulties in the performance of an obligation tend to be classified as improper performance and, in fact, represent a default or a delay on the part of the debtor, depending on whether this is caused by circumstances that are attributable to the debtor or not. In view of the above, the COVID19 pandemic certainly leads to difficulties in the performance of obligations, but they will be temporary in most cases. Thus, at this stage, it may be difficult in many cases to demonstrate that the performance has become impossible as a result of the COVID19 pandemic. It is therefore not appropriate to assume that force majeure always leads to an automatic termination of obligations, although this will be much more common in the MICE industry than in many others.

Incidentally, it should be pointed out that pursuant to Article 121(4) of the PCC, force majeure interrupts the statute of limitations with respect to all claims if, for this reason, the entitled person cannot pursue them before the court or another body appointed to hear cases of a particular type for the duration of the obstacle.

What can the parties do in case of force majeure?

If the contract pertained to the execution of an event which cannot objectively be organised beyond the contractor's fault, and if the parties have not yet incurred any expenditure to organise the event, it can be argued that the obligation expires, in line with the rules described above.

In the current situation, entrepreneurs should also consider invoking the clause of the extraordinary change in circumstances provided for in the Civil Code (*rebus sic stantibus*, Article 357(1) of the PCC). Pursuant to that clause, if, due to an extraordinary change in circumstances (e.g. a state of epidemic under certain circumstances), the rendering of a performance would entail excessive difficulties or would create a risk of a major loss for one of the parties, which the parties had not anticipated when entering into the contract, the court may, after considering the interests of the parties, and in accordance with the rules of social coexistence, determine the manner of performance, the amount of the performance or even rule that the contract should be terminated. Thus, the entrepreneur may request the court to modify the manner of performing the obligation or the amount of the performance, or even to terminate the contract. It should be emphasised, however, that this clause is applied in exceptional and special cases.

Naturally, the parties are generally not limited when it comes to amending their contracts (within the applicable laws), i.e. they are free to regulate their mutual relations again, in a loyal manner, taking account of the special circumstances. For example, it is possible to postpone the date of performance, i.e. to organise the event when it becomes possible and objectively safe to do so.

What if the entrepreneur has already incurred certain costs under a contract?

Obviously, the organisation of activities in the MICE industry rarely occurs overnight. They are usually preceded by lengthy preparations and, consequently, also involve certain costs, often running very high. Can the organiser of an event

that has been cancelled due to a coronavirus pandemic claim reimbursement of the costs incurred before force majeure occurred and before the other party decided to cancel the event?

When entering into a contract, each party always bears some risk. The contracting party should take into account that in case of force majeure it may be obliged to reimburse the contractor for the expenditures already made towards the performance of the contract. In turn, the contractor who accepts an order must acknowledge that in such a case they will not, in principle, be entitled to claim payment of the lost profits (the outstanding or total remuneration, depending on the contract, or remuneration that the contractor could have earned by entering into a contract with another contracting party).

Three types of contracts are most common in the Polish MICE industry: contracts for specific work (*umowa o dzieło*), contracts of mandate (*umowa zlecenia*) and contracts for the provision of services (*umowa o świadczenie usług*) (regulated, accordingly, by the provisions on mandate, pursuant to Article 750 of the PCC). Of course, there are also other contracts that can be signed, i.e. pertaining to rental, hotel services, transport, etc.). In the context of the events that have taken place in Poland since March 2020, and in the case of contracts for specific work, it is interesting to look at Article 639 of the PCC, which provides that the contracting party may not refuse to pay remuneration despite non-performance if the contractor was ready to render the performance but experienced a hindrance attributable to the contracting party. In such cases, the contracting party may deduct the amount the contractor has saved because of non-performance. As mentioned earlier, it should also be pointed out here that a detailed factual analysis will be required for this provision to be applied. In particular, it must be verified which party has been objectively affected by force majeure, and the parties' conduct before its occurrence must be thoroughly analysed. In a classic case, the event could have taken place legally (it was not affected by any restrictions arising from the state of epidemic threat or the state of epidemic) and the contractor was ready to perform but the contracting party eventually decided to cancel the event because of its internal decisions or concerns.

As regards the contract of mandate, in turn, Article 742 of PCC can provide some guidance for interpretation. It provides that the principal should reimburse the contractor for the expenditure the latter has incurred in order to properly execute the mandate, including statutory interest, and the principal should also relieve the contractor from the obligations the latter has incurred for this purpose on their own behalf. Thus, the reimbursement of expenditures incurred by the contractor in order to ensure proper performance (i.e. in compliance with objectively existing rules and the contract) is the principal's primary obligation. This obligation is independent of whether the contract was against payment or not, and of whether the performance of the mandated activity has produced the expected result for the principal or not.

In any case, however, consideration must be given to the provisions on unjust enrichment (Article 405 of the PCC) as a basis for claiming reimbursement of the costs incurred in connection with the performance of the contract before the force majeure event. Pursuant to the provisions of the PCC, anyone who, without legal grounds, has obtained a financial benefit at the expense of another person, shall be obliged to release the benefit in kind or, should this be impossible, to reimburse its value. It seems that while the occurrence of force majeure excludes the liability for damages, it does not release the parties from settling the expenditures incurred, especially when the contract has expired due to the so-called consequential impossibility of performance, as described above. It should be noted that the obligation to release a benefit or return its value expires if the person who received the benefit has used it or lost it in such a way that this person is no longer enriched (unless, when giving away or using the benefit, the person should have considered the obligation to return it). Again, it should be noted that an unequivocal assessment of the situation depends on the results of a detailed analysis of the facts.

At this point, it is worth emphasising that contracting authorities are in a relatively good position at present. The Public Procurement Law, in its Article 145, contains a specific regulation, which may provide a basis for withdrawal from the contract in certain cases. Pursuant to Article 145, "[i]n the event of a material change

of circumstances which causes that the performance of the contract is no longer in the public interest, and which could not have been foreseen at the time of concluding the contract, or where further performance of the contract can pose a threat to a material security interest of the state or public security, the contracting authority may withdraw from the contract within a period of 30 days from the date on which it became aware of these circumstances.” [translator’s note: translation available on the website of the Polish Public Procurement Office at: https://www.uzp.gov.pl/_data/assets/pdf_file/0019/40177/Public_Procurement_Law_2018 Consolidated.pdf] The state of epidemic seems to meet all the premises set out in Article 145. It should be stressed, however, that if the contracting authority withdraws from a partially performed contract, the contractor has the right, in certain circumstances, to demand remuneration due for the performance of a portion of the contract.

Entrepreneurs should remember about consumers

The MICE industry often involves the sale of tickets and invitations, which entails contracts with consumers, who are subject to particular protection in the Polish and European legal system. It should be emphasised that according to the official interpretation by the Polish Office of Competition and Consumer Protection (UOKiK), purchasers of admission tickets to events that get cancelled have the right to claim refund of the full amount paid. In the opinion of the UOKiK, refunds for tickets for mass events cancelled due to this new coronavirus will be regulated, in principle, by Article 495(1) of the PCC, which provides that if a party is unable to render a performance, the party is obliged to return the money in accordance with the legal provisions on unjust enrichment. This entails the obligation to provide a refund for a ticket to a concert that has not taken place, as explained by the UOKiK.

Raising spirits TUgether

The actions taken by the MICE industry to minimise the negative consequences of the introduction of the state of epidemic should be commended particularly

highly. Representatives of the Polish MICE industry decided to join forces and act in a difficult reality under the common name of *TUgether*. They clearly presented the singularities of their business and needs that must be satisfied for them to survive the crisis and return to the market. *TUgether* points to the crucial role of partnership, mutual understanding and communication between government agencies, principals and contractors.

TUgether has issued an official position of the MICE industry on the situation triggered by the coronavirus (SARS-CoV-2) outbreak, calling for the following:

- (1) Business partners, contractors and suppliers should be actively included in internal crisis teams and task forces to develop solutions for sales, marketing, procurement and other sectors affected by the crisis. Alternative solutions for sales and communication with consumers should be sought together with suppliers, both during the pandemic and in the period that follows.
- (2) Projects already completed in 2020 should be settled instantaneously.
- (3) Payment terms should be made more realistic to help maintain financial liquidity: up to a maximum of 30 days (whereas the current payment terms range, on average, from 60 to 90 days).
- (4) Justified costs of project cancellations should be covered, with the remuneration to the agency and the supplier (pro rata to the progress of the work). The MICE industry is not in a position to cancel projects in a completely cost-free manner due to commitments that have already been made (this applies to suppliers, subcontractors, hotels, group/air transport, etc.), including labour costs incurred (human teams).
- (5) Cancelled or partially completed projects should be settled efficiently, without undue delay.
- (6) Postponed projects should be settled in the form of protective tranches for suppliers, to be assigned for the maintenance of the partner's resources and staff during the crisis situation in order to carry out the orders at a later date.
- (7) Advance payments against projects planned by commercial companies and public institutions for the third quarter of 2020 should be made now.

- (8) Companies which do not apply advance payments should set new rules to finance projects and events, with guaranteed pre-financing.
- (9) A fixed monthly budget should be allocated during the crisis in order to maintain the partner's resources and teams ready to carry out orders once the difficult time is over. Otherwise, the MICE industry will be unable to protect its employees and guarantee smooth, high-quality performance in future.
- (10) Projects should be maintained and postponed until another date, where possible, without the need to run new competitive bidding / tendering procedures. It is possible to guarantee the scope of works and the costs of postponed orders by making new arrangements and signing separate contracts. This will also protect clients by ensuring continuity of marketing and MICE-related services and by maintaining prices once the pandemic is over. It will also help to quickly restore communication with consumers and to rebuild the sales dynamics.
- (11) Outcomes of completed tenders should be maintained, without cancellation, even if the project is postponed by up to one year. This will also protect clients by ensuring continuity of marketing and MICE-related services and by maintaining prices once the pandemic is over. It will also help to quickly restore communication with consumers and to rebuild the sales dynamics.
- (12) Mutual obligations and guarantees related to the performance of contracts should be reaffirmed in the form of agreements, annexes, letters of intent and promises, without compromising the previously agreed terms and conditions. They should pertain to the period after the pandemic, once the circumstances preventing the parties from taking action have ceased to exist.
- (13) In the context of the coronavirus crisis and potential economic recession, new business commitments should be assumed only with full awareness and mutual liability.
- (14) A flexible and partnership-based approach should be taken when settling mutual obligations (e.g. payments made in instalments, settlements split into stages) so that businesses can regain financial liquidity and stability.

MICE entrepreneurs should monitor the current activities of their industry and get involved wherever possible. What the industry needs now is solidarity. Given

the gravity of the situation, the actions taken today are likely to shape the MICE industry for the next few years to come.

The government's anti-crisis measures as the main weapon?

The Polish government's anti-crisis measures (known as 'the Anti-Crisis Shield') are supposed to address the concerns of Polish entrepreneurs. It took a relatively long time to legislate the measures, which should be assessed particularly negatively given the current circumstances of the MICE industry in connection with the coronavirus pandemic. In the course of work on the Anti-Crisis Shield, the MICE industry joined forces and presented their own demands which they believe will ensure real and effective support for the industry. According to the MICE industry, the Anti-Crisis Shield should incorporate the following:⁴²

- I. FINANCIAL LIQUIDITY TOOLS: by (i) creating a mechanism of instant loans from commercial banks to MICE businesses, e.g. through 100% collateral provided by BGK, in the minimum amount of 15–20% of annual sales, with a minimum lending period of 3 years, minimum grace period of 6 months; (ii) raising the upper threshold of working capital loans (EUR 500,000 is insufficient for large companies that immediately lose liquidity); (iii) top-down introduction of 'credit holidays' in the repayment of loans and leases by MICE companies, without interest or any extra charges;
- II. RELEVANT SOLUTIONS REGARDING SOCIAL SECURITY CONTRIBUTIONS / VAT / PIT / CIT / TAX ON REAL PROPERTY by offering a tax amnesty on VAT / CIT / PIT / SOCIAL SECURITY CONTRIBUTIONS for a minimum of 6 months, starting from 1 March 2020, with a possible extension to three months after the end of the state of epidemic (duration/amount of benefit corresponding to the degree of stagnation in the business; for example, a company which has not received 100% of its revenue will be entitled to 100% of possible

⁴² https://www.thinkmice.pl/index.php?option=com_content&view=article&id=2181:oficjalne-stanowisko-branzowego-sztabu-kryzysowego-dotyczace-pakietu-pomocowego&catid=47:news&Itemid=141.

benefits), as well as an accelerated VAT refund introduced immediately, and the immediate suspension of VAT split payments until the end of 2020; an exemption from real property tax or reliefs in this tax (real property, hotels, etc.) / related reimbursement from central government to local authorities on this account (the degree of reliefs/exemptions corresponding to the rate of sales decline in the facility/hotel), as well as the abolition of the road tax on coaches until the end of 2020;

- III. SUBSIDIES FOR SALARIES AND SUPPORT FOR SELF-EMPLOYED PERSONS / THOSE WORKING UNDER CONTRACTS OF MANDATE AND CONTRACTS FOR SPECIFIC WORK through relevant subsidies, i.e. salaries (contract of employment): subsidising 80% of the minimum wage for a minimum period of 6 months from 1 February 2020, especially in larger companies; reducing the entry thresholds for this instrument and making adjustments for the most affected subsegments of the MICE industry (an agreement with trade unions, maintaining employment and salary levels, etc.); self-employed persons / contracts of mandate and contracts for specific work: extending and increasing subsidies to 100% of the average national wage for a period of 6 months starting from 1 March 2020 (duration/amount of benefit to correspond to the degree of 'stagnation' experienced by the entrepreneur, for example, a person with 100% of their revenue not received will be entitled to 100% of possible benefits);
- IV. REFUND WITHIN 180 DAYS / A 365-DAY VOUCHER FOR ALL SECTORS OF THE TOURISM AND ENTERTAINMENT INDUSTRY by introducing facilitating solutions for the return of concert tickets / event tickets / tourist advances / hotel advances / fair advances within 180 days of the end of the state of epidemic + a 365-day voucher for all MICE subsegments; and a no-return policy / restricted returns policy in cases where the planned event/concert/festival has been rescheduled;
- V. AN AID FUND by creating a fund for entrepreneurs to cover documented losses caused by the pandemic (as in the case of a natural disaster) for companies which have recorded monthly sales declines of at least 60% since 1 February 2020.

On 31 March 2020, the *Act amending the Act on special solutions for preventing, counteracting and combating COVID-19, other infectious diseases and the resulting*

crisis situations and certain other acts was signed. This Act provides for aid mechanisms for businesses in times of crisis, including, e.g. the possibility for local councils to waive the real property tax for a portion of 2020 for businesses which lost financial liquidity due to the coronavirus pandemic, an exemption of micro-businesses employing up to 9 persons from social security contributions for 3 months, a stoppage benefit in the amount of up to approx. PLN 2,000 for contractors (contract of mandate, agency, for specific work) and selfemployed persons with a revenue below the tripled average wage, as well as subsidising salaries/wages of employees up to 40% of the average monthly wage, and introducing more flexible working hours for businesses in dire straits.

The anti-crisis measures set out in the aforementioned act are by far not sufficient, especially in view of the demands formulated by the MICE industry itself. Entrepreneurs talk about these measures as a kind of 'drip' rather than genuine aid for businesses. Thus, it is postulated, quite rightly, that another 'anti-crisis shield' (or perhaps even a third and a fourth one) should be devised.

The legislator provided for specific solutions for the tourism industry in the *Act of 2 March 2020 on special solutions for preventing, counteracting and combating COVID-19, other infectious diseases and the resulting crisis situations and certain other acts*. Under Article 13 of that Act, tour operators will be able to obtain reimbursement of contributions paid to the Tourism Guarantee Fund for tourist events which were abandoned or terminated for reasons directly linked to the pandemic outbreak. Importantly, according to the new regulations, the contribution to the TGF will not be applied towards future tourist events but it will be returned directly to the tour operator in case of events cancelled due to the pandemic outbreak. The aforementioned act also introduces a provision of importance for carriers. Under that provision, airport operators, railway station operators, as well as air, rail or road carriers are not liable for damage caused in connection with legitimate actions taken by public authorities to prevent COVID-19, in particular for the absence of transport possibilities (Article 14(1) of the Act). It seems that this provision will apply when the public authorities issue an order to designate closed zones, to shut down airports, railway stations, etc.

Conclusion: Final recommendations

There is no doubt that the coronavirus will have a tsunami effect for the MICE industry. What can be done now is to minimise the losses (by reviewing contracts, adding amendments, settling expenses that have been incurred, applying for a change in rent due to an extraordinary change of circumstances, etc.) and secure a return to business (by monitoring the activities of other players in the industry, using tools made available by the government, etc.). It is also important to remember that case-by-case assessments should be made since the MICE industry in Poland involves dozens of various activities and hundreds of different contracts and legal relationships.

CORONAVIRUS AND THE LAW IN POLAND

REAL PROPERTY



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12 Real Property Market Amidst Epidemic

The impact of coronavirus epidemic on the real property market in Poland has been significant. In this chapter we will describe the most important, in our view, legal aspects, vital for entrepreneurs in our country.

The COVID-19 epidemic and its economic implications have led to numerous changes in the Polish legal system. The COVID-19⁴³ Special Act and, in particular, the ordinance proclaiming the state of epidemic throughout the country,⁴⁴ have set up conditions conducive to slowing down the spread of the epidemic. However, what their effects were manifested by, was diminished operating capacity across virtually all sectors, which will also impact the operations of real property lease market. With numerous entrepreneurs confronted with liquidity risk and tremendous adverse consequences of COVID-19 epidemic, on 28th February 2020 the Seym [Polish parliament's lower house] passed amended COVID-19 Special Act⁴⁵ the purpose of which includes the protection of entrepreneurs against negative effects of the epidemic.

In the context of real property market operations, the legislation adopted in particular:

- » interferes with contracts' provisions by enabling the lessees to extend the lease term and suspending the option to terminate a lease contract or to raise the lease payment;

43 Act on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations dated 2nd March 2020, Journal of Laws of 2020, item 374.

44 Ordinance of the Minister of Health on Announcing the State of Epidemic in Poland dated 20th March 2020, Journal of Laws of 2020, item 491.

45 Act Amending the Act on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and Certain Other Acts.

- » in the case of premises in commercial facilities with a sales area over 2000 m², provides for expiry of obligations of a party to the lease contract for the period of closure of such commercial facilities;
- » provides for remitting, deferring or breaking down the instalments of amounts due for leasing or using the real property of the Treasury or a local government unit;
- » significantly simplifies the investment and construction process in the case of projects aimed at counteracting COVID-19;
- » extends the deadlines for payment of real property tax, minimum commercial real property tax and perpetual usufruct fees, as well as provides for introducing real property tax exemptions.

Nevertheless, it should be pointed out that in the event of a protracted state of epidemic as well as in the event of an extension of prohibitions and restrictions imposed on business, public authorities may choose to intervene even more in the real property market, in particular, as regards the lease of commercial premises in other commercial facilities and office buildings.

1. Lease Market

The COVID-19 epidemic and the business prohibitions imposed by the state will have a significant impact on the operations of the lease market. However, this impact must be examined at least in two ways:

- » prohibitions to carry out business operations in commercial facilities with a sales area of more than 2000 m² and prohibitions to carry out certain types of business operations⁴⁶, which prevents the lessee from using the leased premises as intended in the lease contract;

46 As at 1st April 2020, the sectors affected include food services (except take-away), MICE (organization of meetings, conferences and other events), culture, entertainment, sports, recreation, gambling, hairdressing and cosmetic services, tattooing and piercing, tourism and hotel industry, as well as religious worship.

- » in formal terms, it is possible for the lessee to carry out business operations, however, in view of the prohibitions for its customers to carry out business or a change in consumer behaviour, revenues from the lessee's operations have been significantly reduced. Consequently, the lessee loses the economic capacity to pay the amounts due under the lease contract.

In the first case, as at the date of this report, the legislature chose to significantly interfere with lease contracts in commercial facilities with a sales area of more than 2000 m², while for lease contracts in other facilities a mechanism for lease term extension alone was introduced. In case of expanding certain business operations, similar regulations may well be introduced for office buildings.

In the other case, the measures proposed by the legislature are aimed at providing assistance to the entrepreneur, while the interference with the premises lease contracts is limited to a mechanism for lease term extension. In the absence of other solutions, it cannot be ruled out that lessees will invoke the force majeure clause arising from the lease contract or the Civil Code, as well as the Code's *clausula rebus sic stantibus* which provides for requesting the court to amend a contract in view of a change in circumstances, the change causing excessive difficulties in the performance of the lessee⁴⁷.

2. Protection of Lessees

Significant changes also apply to the market of lease contracts for residential and commercial premises. It is worth noting, however, that the provisions of the Special Act govern all the lease contracts for premises, whether they are commercial premises in shopping malls or office buildings, or premises in single or multi-family residential buildings. A general rule introduced by the Act holds that, by the lessee's declaration of intent, the term of lease ending before 30th June 2020 would be automatically extended until that date on the existing terms and conditions. A number of exceptions to this rule have been introduced, including, if

⁴⁷ More details under section 2

the lessee has been in default for at least one settlement period with lease payment or the payment of other charges; uses the premises in a manner contrary to the contract or contrary to its intended use, or has neglected the lessee's obligations, which gave rise to damage affecting the premises, or leases, subleases or lends the premises or a part thereof for gratuitous use without the required written consent of the lessor. The Act does not provide for the form in which the declaration should be made, so the lessee is free to make it in any form. The declaration may be submitted on the day of expiry of the original lease term at the latest.

The amended COVID-19 Special Act has also introduced a temporary prohibition on terminating a lease contract or the amount of lease payment in commercial premises. At the moment this prohibition is to remain in force by 30th June 2020. It cannot be ruled out, however, that it will be extended in the event of a protracted epidemic or an extension of restrictions regarding business operations. What the provision literally holds is that the lessor may, in accordance with the provisions of the lease contract, increase charges other than the rent. The prohibition to terminate the contract does not apply to cases where the lessee is in breach of the provisions of the lease contract or where it is necessary to demolish or renovate the building in which the premises are located.

Notwithstanding the changes introduced by the legislature, it is also Article 357¹ of the Civil Code that provides a legal basis for judicial interference in lease relationship. The rationale behind is, first of all, an extraordinary change in circumstances which should be understood as a change that is sudden, surprising and that the parties did not foresee when executing the contract. Both the COVID-19 epidemic and the extraordinary legal measures applied by the State (such as the restrictions introduced with the announcement of the state of epidemic and the solutions introduced by the COVID-19 Special Act) fall in with this category, and so does economic crisis that may emerge as an aftermath of the epidemic. In order to exercise the *clausula rebus sic stantibus*, the lessee would also have to demonstrate that the performance entails excessive difficulties and exposes the lessee to a blatant loss. It is worth noting, however, that the court will first

seek to amend the lease contract, e.g. by lowering the lease payment, and only as a last resort will it decide that the contract be terminated.

3. Lease of Premises in Commercial Facilities with a Sales Area of More than 2000 m²

As the retail sales and services performed in commercial facilities with a sales area of more than 2000 m² have been completely prohibited, the legislature has taken a particular approach towards the corresponding lease contracts⁴⁸. Contracts for the lease of premises not affected by the prohibition from business operations, but still suffering from restrictions affecting a commercial facility have also received a particular treatment, much as it is not expressly provided so in the legislation.

Notwithstanding the contracts stipulating for lessees being unable to carry out business operations or force majeure occurring, the amended COVID-19 Special Act provides for an “expiry” of mutual obligations of the parties to a lease contract in the period business operations are prohibited in such commercial facilities. There are doubts as to the provision’s interpretation, however, it seems to relieve the parties from their lease contract obligations. In real terms, the lessor is not able to charge lease payments, maintenance fees, marketing fees nor claim reimbursement of other costs incurred under the lease contract.

Under another mechanism introduced in shopping malls, the lessees are obliged to submit to the lessor an unconditional and binding offer to extend the duration of the lease contract as per the existing terms and conditions by the period of the prohibition from business operations, the said period being extended by six months. If the lessee fails to submit an offer within three months from the date the prohibition is lifted, the provisions concerning “expiration” of the lease

48 As at 1st April 2020, such restrictions apply to retail sales, lessees of retail space, excluding lessees whose core objects involve the sales of: (i) food, (ii) cosmetic products, (iii) toiletries, (iv) cleaning products, (v) medicinal products, (vi) medical devices, (vii) dietary food for special medical purposes, (viii) newspapers, (ix) construction or renovation products, (x) pet products, (xi) fuels.

contract cease to be binding, which may consequently be construed as an obligation to make lease payments and pay other charges for the prohibition's duration. On the other hand, if it is the lessor to reject the lessee's offer, no such consequences will arise.

In real terms, the extension of lease may prevent the obligations under another lease contract (pertaining to providing access to or transferring given space to another entity) from being performed.

In the course of discussions on the amended COVID-19 Special Act, yet another concept emerged to reduce by 90% the lease payment due from lessees whose operations in shopping malls with a sales area of more than 2000 m² have been prohibited by law or restricted for the duration of the state of epidemic emergency or epidemic. Ultimately, it was decided to extinguish the mutual obligations of the parties to a lease contract, nevertheless, the foregoing shows that in the event of an extended state of epidemic, a statutory reduction in lease payment is possible for lease contracts in other facilities.

4. Lease of Residential Premises

The amended COVID-19 Special Act has also provided for certain solutions specific for residential premises only. The lease term extension mechanism is similar, but it does not apply if the lessee has a legal title to other residential premises in the same or nearby location, if the premises meet substitute accommodation conditions, unless the lessee cannot use the accommodation for reasons beyond the lessee's control.

In the event residential premises lease contract or the amount of lease payment are terminated, and if the notice period expires before 30th June 2020, the notice period is extended until 30th June 2020 by a unilateral declaration of the lessee. The prohibition does not apply if the lessee is in breach of the lease contract or if it is necessary to demolish or renovate the building in which the premises are located.

The prohibition to terminate a lease contract or the amount of lease payment and the mechanism for extending the notice period exclude cases in which a lessor terminates the contract under Article 11 (2) of the Act on the Protection of Tenants' Rights, Municipal Housing Stock and Amending the Civil Code dated 21st June 2001⁴⁹, as well as the circumstances in which a lessee has a legal title to other residential premises in the same or nearby location, if the premises meet substitute accommodation conditions, unless the lessee cannot use the accommodation for reasons beyond the control of the lessee. The COVID-19 Special Act has also restricted the execution of enforceable titles to vacate residential premises during the state of epidemic emergency or the state of epidemic.

5. Real Property of the State Treasury and Local Governments

Special rules also govern the liabilities from the use of real property owned by the State Treasury or local government units. The Special Act introduced provisions that make the rules of granting reliefs in the payment of civil law liabilities to public authorities more flexible. A staroste will be able to waive the recovery of monetary debts for the management of State Treasury real property which the staroste manages, with respect to a lease or use of the real property, falling due for the duration of the state of epidemic emergency or the state of epidemic. A staroste will be able to do so at the request of an entity whose liquidity has deteriorated due to COVID-19 epidemic adverse implications. In order to significantly expedite the relevant decision making process by starostes, it is not necessary for the province governor to consent beforehand to the reliefs in the repayment of liabilities. Also, the competent minister will be able to waive or authorise a waiver of recovery of debts falling due for the duration of the state of epidemic emergency or the state of epidemic, the debts pertaining to real property in the minister's housing stock.

⁴⁹ i.e. Journal of Laws of 2019, item 1182

As in the case of liabilities to the State Treasury, a provision for the principles for remitting and deferring payment deadlines or breaking down into instalments the payments of civil law liabilities to local government units was put forward. As requested by an entity whose financial liquidity has deteriorated due to COVID-19, a local government unit will be able to waive the recovery of such debts. The principles for granting reliefs will be specified in the local law act.

6. Transactions on the Real Property Market

Numerous technical problems may affect the legal aspect of structuring a real property transaction, quite apart from economic and financial factors which may give rise to a lower number of such transactions. Many land and mortgage register courts have considerably restricted access to review land and mortgage files (except in urgent situations), which will actually prevent the key element of legal due diligence, i.e. examination of the legal title to real property, from being performed.

Numerous restrictions have also been provided in offices of public administration bodies issuing certificates necessary to execute real property sale contracts. In most cases, offices prefer contact via post, which entails extending the deadline to obtain a certificate. Certificates may obviously be applied for via an electronic incoming correspondence register box, although in certain cases (e.g. excerpts and drawings from the land register) some authorities in fact do not provide for issuing documents in electronic form. Such certificates may also be sort of challenging for notarial transactions, although relatively early adaptation is to be expected in this respect.

Transactions that are more complex in terms of taxation will also be affected by a prolonged waiting time required to obtain advance tax rulings. The time limit for advance tax rulings to be issued has been extended from three to six months, no matter if the relevant request was submitted to the authority before or after the Special Act came into force. What is more, the Special Act provides that the Minister of Finance may extend this time limit by additional three months, which may be the case in the event of a protracted state of epidemic.

7. Investment and Construction Process

A separate issue is that the majority of legal provisions governing the construction and investment process with respect to construction, alteration, renovation, maintenance, demolition of buildings, as well as the change of use, if associated with counteracting COVID-19, has been completely excluded. Thus, in real terms, it will be possible to carry out investments inconsistent with the local spatial development plan or those for which no location decision may be obtained. When performing a project aimed at counteracting COVID-19, an investor is exempt from the obligation to develop a construction design, notify the construction, change the use of a work or to obtain a building permit. Interestingly, the Special Act has not excluded or restricted in any way the application of the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments, which may in fact require an opinion on the environmental conditions of project implementation.

The Special Act introduces a very simplified mechanism for rationing works. In such a case an investor will be obliged to inform the relevant architecture and construction administration body about the type, scope and manner of performing the construction works and the date of their commencement. As regards the manner of use, information on the current and intended use must also be provided. The obligation to inform should not be equated, however, with the notification of the construction or construction works. Hence, the architecture and construction administration body is not competent to raise an objection preventing the commencement of construction works.

The provision introduced is very laconic, however, it seems that the construction supervision authorities cannot exercise their supervisory powers arising from the construction law. Instead, the legislature has provided for two solutions to actually supervise the construction process:

- » in the case of investment plans which, under the construction law, require a building permit, an investor is obliged to ensure that the management and

- supervision of the construction works are taken over by a person with appropriate building licences;
- » in the case construction works pose a human life or health hazard, the architecture and construction administration body, by way of an immediately enforceable decision and without undue delay determines the requirements for necessary safety measures for construction works.

The solutions implemented may raise doubts. In the first case, it is not entirely clear whether the provision requires that the inspector of investor supervision be involved. On the one hand, there are grounds for such an interpretation in that a verification mechanism must be guaranteed, especially when project commissioning will not be in any way controlled by the construction supervision authorities. On the other hand, the obligation to obtain a building permit also applies to investment projects with a low degree of complexity, in which case the obligation to provide investor supervision may be unreasonable.

In the other case, it seems to be wrong that the powers to supervise construction works in view of human life and health protection have been passed on to the architecture and construction administration bodies. Under current law, these bodies exercise powers related to the protection of spatial order, while it is the construction supervision bodies to control the construction works.

An assessment of the regulation provided by the Special Act should highlight the risk of investors using the actual lifting of the restrictions for purposes other than those assumed by the legislature. In particular, this may concern investments which will concomitantly serve to counteract COVID-19 (and other purposes), as well as investments which will serve to counteract COVID-19 in the short term, but may pursue completely different commercial objectives in the long term, not necessarily in accordance with the purpose under spatial planning acts.

8. Taxes and Charges

There have been numerous solutions provided in the area of tax law, real property perspective. What is worth pointing out is that municipal councils have been granted the powers to enforce, for part of 2020, real property tax exemption for land, buildings and structures pertaining to business operations. The exemption may apply to groups of entrepreneurs specified in a resolution of entrepreneur groups whose financial liquidity has deteriorated on account of adverse economic implications of COVID-19 epidemic.

Next to the real property tax exemption, a municipal council may also provide for extending the payment deadlines for real property tax instalments payable in April, May and June 2020 for specified groups of entrepreneurs, but no longer than by 30th September 2020. A similar solution has been applied for the payment of perpetual usufruct fees, as well as charges for the transformation of the right of perpetual usufruct into ownership. The charges for 2020, which were in principle due by 31st March, may be paid by 30th June 2020.

In the case of the minimum tax on commercial real property, the payment deadline for March–May 2020 has been extended by 20th July 2020, but only for taxpayers whose year-on-year monthly revenues will be at least 50% lower due to COVID-19. The same rule will apply to taxpayers who did not generate any revenues in the previous year, but suffered adverse economic implications due to COVID-19 in a given month.

If the state of epidemic persists or the Polish economy falls into recession, it may be expected provisions will be enacted that will exempt the taxpayers from a portion of their public law liabilities or will defer the payment of the liabilities.

CORONAVIRUS AND THE LAW IN POLAND

COMPANY BODIES



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13 The Impact of COVID-19 on the Operation of Company Bodies

This chapter presents some practical information intended to ensure continuity of operation of company bodies. In these difficult times, ensuring that managers take decisions efficiently is of significant importance. We trust that you will find the following considerations helpful and that they will facilitate the operation of company bodies.

Introduction

The spread of COVID-19 and the protective measures which have been applied to mitigate the ensuing risk give rise to a substantial deadlock risk for nearly 500,000 companies, including listed ones, which make up Polish economy. The imposed quarantine or restrictions on free inter-continental movement isolate great numbers of people, including members of company bodies, such as representatives of foreign investors⁵⁰. Those returning home after a foreign business trip are now required to undergo a mandatory 14day home quarantine.

In the light of current economic situation, it proves necessary to provide members of company bodies with the possibility of taking decisions remotely and with the use of new technologies, so that there is no need for them to appear in person. It is not merely dictated by the current situation, as it constitutes an important solution that may permanently streamline the operation of collective

50 See page 70 of the explanatory memorandum to the draft of 25 March 2020 amending the Act on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and some other acts.

company bodies. At present, it is not uncommon for those inside corporate structures to participate in managing or supervising other entities, which is a particularly popular arrangement in holding structures. By the same token, such persons could have the possibility of taking decisions remotely, without the need for constant travel.

At the time of the COVID19 epidemic, it is particularly important to provide collective company bodies with the possibility of efficient and undisturbed operation so as not to put the health of its members at risk. Bearing the foregoing in mind, below we present functional corporate law concepts, which should facilitate the operation of business bodies and the most important related issues.

Management Board

The management board is the sole body which the lawmakers did not grant the possibility of deliberating through means of direct remote communication. As a rule, any decision of the managers which exceeds the scope of ordinary activities of their company must be set out in a resolution. Such a resolution needs to be adopted by an absolute majority of votes at a meeting which was convened in advance. Should any management board member oppose another management board member handling a matter within the scope of ordinary management activities, a resolution concerning this matter would also be required.

As noted above, resolutions should be adopted at meetings, with all the members being physically present in one location. However, there are no provisions governing the admissibility of adopting resolutions without a meeting, i.e. in writing or with the use of means of remote communication, or even circulating resolutions. In practice, as such a situation can paralyze a company, it is important to include appropriate "emergency" provisions in management board bylaws or articles of association. The two documents need to provide for a procedure of adopting resolutions remotely, be it in writing or with the use of means of remote communication. Only then would it be possible to organize a videoconference for

the management board to hold an official meeting and take lynchpin decisions for their company to help it survive the crisis.

The cure to the above problems will come in the form of an urgent amendment to the Act of 15 September 2000 of the Commercial Companies Code. On 25 March 2020, a draft act amending the Act on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations ("AntiCrisis Shield") was published on the website of the Government Legislation Center.

The proposed new Articles 208 (5¹) to (5³) of the Commercial Companies Code⁵¹ provide for the possibility of participating in management board meetings with the use of means of remote communication, and adopting circulating resolutions. Management board members will also be able to use the services of a proxy and vote through another management board member. It is important that it will be possible to exclude these legal concepts by virtue of articles of association. Nonetheless, in the event that a company's constitution contains no provisions to this effect, management board members will be presumed to be empowered to take decisions in the above manner.

It is also significant that companies which have more than one representative may face problems when trying to have both decisionmakers present during one legal transaction. Two solutions to this situation are available. The first one suggests that it would be admissible to make declarations of will on behalf of a given entity in the circulation mode (e.g. one management board member signs a contract and then sends it to another management board member to have it signed). The second solution allows for authorizing one management board member to perform certain transactions on behalf of the company – such authorization may come in the form of a specific power of attorney or a power of attorney to perform certain categories of legal transactions.

⁵¹ Cf. Article 13 of the Anti-Crisis Shield.

It is also admissible to have special committees appointed in a company – internal bodies of the management board. Such committees may be authorized to perform certain activities of a company. In such a case, however, the bylaws of a given committee should ensure that it has the capacity of taking decisions remotely.

Supervisory Board

As opposed to the management board, the supervisory board is equipped with mechanisms that allow it to officially adopt decisions without its members attending meetings in person. This may stem from the fact that the lawmakers were of the opinion that company managers and supervisors should be present at the company's offices at all times, as they handle its daytoday affairs.

Firstly, we need to be mindful of the fact that any exceptions from members of the supervisory board attending its meetings in person are allowed only if such a solution is provided for in its memorandum and articles of association.

When holding meetings, supervisory board members can vote in writing or with the use of means of remote communication. Relevant provisions to this effect have to be included in the memorandum and articles of association and they are normally set out in detail in the bylaws of this body. The means of remote communication are most often understood as meetings held over the telephone or Internet lines (videoconferences). Supervisory board resolutions adopted in writing or with the means of remote communication are valid provided that all members of the body were informed of the content of the resolution in advance. However, it should be noted that this decisionmaking process is not allowed when electing the chairperson and the deputy chairperson of the supervisory board or when appointing, dismissing and suspending management board members.

The AntiCrisis Shield introduces significant changes in this regard, specifically outlining two essential aspects. Firstly, the lawmakers departed from the rule that any form of holding meetings by the supervisory board other than a standard meeting of its members needs to stem from the memorandum and articles

of association. With the passing of the AntiCrisis Shield, this becomes a power of the supervisory board, unless explicitly excluded in the articles of association. Secondly, the supervisory board will be able to adopt circulating resolutions or resolutions with means of remote communication, which will also apply to resolutions regarding the election of the chairperson and the deputy chairperson of the supervisory board as well as the appointment, dismissal and suspension of supervisory board members.

General Meeting of Shareholders

The most complex issue, especially as regards listed companies, is the adoption of resolutions by their owners. However, it seems that it would be most advisable for company management boards and shareholders to refrain from holding any meetings of shareholders during the state of epidemic emergency until the situation has stabilized. Nonetheless, this only serves as a recommendation, and convening general meetings when there is the threat of contracting COVID19 cannot provide standalone grounds for refusal to participate in them. It is in the company's sole discretion to decide whether to gather its owners in order to resolve matters.

Moreover, the ban on gatherings of more than 50 people does not apply to general meetings of shareholders. The ban referred to in §9 of the Regulation of the Minister of Health of 13 March 2020 on the Announcement of an Epidemic Emergency in the Republic of Poland refers solely to gatherings within the meaning of Article 3 of the Act of 5 July 1990 - The Law on Assemblies and, as such, does not apply in the aforementioned case.

Option to Cancel Previously Convened Meetings

The provisions of the Commercial Companies Code allow for the cancellation of previously convened meetings without any consequences in the case of private limited companies [*spółka z ograniczoną odpowiedzialnością*] (cf. Articles 235 and 236 of the Commercial Companies Code). Even though the lawmakers did not

provide for an identical solution in the case of public limited companies [*spółka akcyjna*], we should accept a view that an entity convening a general meeting of such a company has the right to cancel the same. Nonetheless, the company should make every effort to ensure that no cancellation or adjournment of a general meeting would prevent or otherwise impair the right of participation. General meetings of shareholders have to be cancelled in the same manner as they are convened.

Participating in a Company Meeting with the Use of Means of Remote Communication and Adopting Circulating Resolutions

In order to convene a general meeting of shareholders with the means of remote communication, the right to do so has to be stipulated in the memorandum and articles of association. Participating in and holding such a meeting needs to include, in particular: (i) realtime broadcast, (ii) realtime twosided communication, which allows the participants to speak during the meeting, while being in a location other than the venue of the meeting, and (iii) exercising the right to vote before or at the meeting in person or by proxy. The detailed manner and procedure of holding such a virtual meeting has to be set out in detail in the bylaws for such meetings.

It should also be noted that in the case of private limited companies⁵² whose ownership structure is not too dispersed, it may be more advisable to adopt circulating resolutions (in writing). In this regard, resolutions may be adopted without a meeting of shareholders being held provided that all shareholders consent in writing to the provision to be adopted or to a written vote. However, one should remember to duly review the provisions of the memorandum and articles of association, which often require a specific manner of holding a meeting in the case of certain types of resolutions – in such a case, the circulating procedure

⁵² This does not apply to public limited companies, as the Commercial Companies Code essentially requires a notarial deed for their validity.

is excluded. For circulating resolutions, a draft resolution has to be signed by each shareholder in order to come into effect. Therefore, each shareholder signs the resolution and then sends it to another shareholder, until the last signature is placed. This form is particularly appealing for those outside Poland since meetings of shareholders, regardless of their form, have to be held in Poland; however, this requirement does not apply to resolutions adopted in a written form (circulating resolutions). What makes this issue easier is the fact that the lawmakers have authorized the circulating procedure for adopting resolutions concerning annual general meetings of shareholders (such resolutions have to be adopted no later than 30 June 2020 by companies whose financial year overlaps with the calendar year).

In the case of a single-shareholder company, the issue is not so relevant, and the sole shareholder may hold a meeting at any time without the same being formally convened. Yet again, such a meeting must be held in Poland.

Appointing a Proxy to Attend Meetings

A solution for companies with a relatively smaller ownership structure is to appoint an "oncall" proxy who will represent the interests of all the owners should it prove necessary to hold a meeting. In such a case, each shareholder needs to include appropriate instructions for voting in a proxy instrument, as all the votes of the owners will be in the hands of one person. Consequently, this will preserve and safeguard the rights of each owner. For safety reasons, when the proxy is one and the same person, such a proxy instrument needs to exclude self-dealing referred to in Article 108 of the Civil Code. Importantly, a proxy instrument to attend the general meeting may be granted in an electronic form.

What about AGMs?

We are quickly getting closer to the time when companies prepare and hold AGMs. Companies whose financial year overlaps with the calendar year have to adopt resolutions to this effect by the end of June 2020. Private limited companies can solve this problem by voting on each resolution in the circulation mode,

provided that the articles of association do not reserve it to the discretion of the general meeting of shareholders. Public limited companies will be required to use means of remote communication.

However, it should be noted that the AntiCrisis Shield provides for the addition to the Act of 2 March 2020 on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Ensuing Crisis Situations of Article 15zze under which, in the event of the state of epidemic emergency, the minister competent for public finance matters may specify, by way of a regulation, other time limit for compliance with record-keeping obligations, and obligations to prepare, approve, disclose and file the statements or information referred to in the Accounting Act of 29 September 1994 with the relevant register, entities or authorities. If such a regulation specifies a new time limit for compliance with the obligations to approve financial statements, which falls later than six months after the financial year has ended, the AGM should be held on or before the date referred to in this regulation.

General Meetings in Listed Companies to Have Obligatory Video Broadcast

A significant difference, introduced in the final version of the AntiCrisis Shield, is that listed companies will be required to broadcast general meetings in real time. It is a substantial novum, as the majority of listed companies have never allowed its shareholders to attend meetings with the use of means of remote communication.

We should be mindful of the fact that the regulation will apply to all meetings, also those convened prior to its enactment.

COMPANY BODIES



CORONAVIRUS AND THE LAW IN POLAND

PERSONAL DATA PROTECTION



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14 Coronavirus and the GDPR

Effective prevention of the coronavirus pandemic requires the processing of personal data to protect against infection, particularly in employment relationships. Large-scale remote working has also created new challenges in ensuring information security.

Introduction

The coronavirus pandemic did not suspend the application of data protection legislation. As Andrea Jelinek, Chair of the European Data Protection Board (EDPB) said: "even in these exceptional times, the data controller must ensure the protection of the personal data of the data subjects" (statement of 16 March). At the same time, the same Chair of EDPB stresses that "data protection rules (such as GDPR) do not hinder measures taken in the fight against the coronavirus pandemic". The President of the Personal Data Protection Office also speaks in the same spirit in an official announcement made on the 13 March: "Data protection rules do not hinder measures taken in the fight against the coronavirus pandemic". So when, if not now, we should recall Recital 4 of the GDPR which starts with very meaningful words: "The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality." Therefore, the situation in which we find ourselves is in some way provided for by law, by means of general clauses (weighing of interests) and recitals indicating the direction of interpretation. Thus, although we do not find in the GDPR any provisions on the coronavirus itself, we have sufficient legal

measures to interpret the provisions of the GDPR according to the situation and not to hinder the fight against the pandemic by enforcing data protection law.

The observations contained in this study remain valid as at 1 April 2020 and may lose their validity, particularly a state exception – one of those provided for in the Constitution – is introduced.

1. Employer and employee

1.1. Introducing special safety measures in the workplace

Introducing special protective measures in the workplace, mainly measuring the body temperature of employees and other people entering the workplace premises, was the first problem related to the application of personal data protection regulations during the pandemic. It comes down to answering a simple question: does the employer have the right to measure the body temperature of persons entering the workplace premises?

The information related to a person's elevated body temperature is personal information. This is personal information that is considered as Special Categories of Personal Data because it relates to a health condition of that person. According to Recital 35 of the GDPR, personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. Elevated body temperature is a physiological condition in which the body's temperature is increased, and in the current situation, it is also one of the symptoms of coronavirus disease.

Neither in the provisions of the GDPR nor in the Polish Labour Code, is there a specific legal basis for the employer to process this type of personal data. Moreover, according to Article 22^{1b}(1) of the Labour Code, the processing by the employer of Special Categories of Personal Data, for which there is no statutory basis for the processing, may take place with the employee's consent only if the processing of such data is at the employee's initiative. Therefore, if these regulations were to be interpreted

in a strictly linguistic sense, measuring the body temperature of all employees and other persons entering the workplace premises would not be possible.

However, it should be remembered that, in accordance with Article 207 of the Labour Code, the employer has a legal obligation to protect the life and health of employees. In this context, this very provision should be considered as the legal basis for the processing of health-related personal data in order to combat the coronavirus pandemic. And, especially, in order to protect the life and health of employees by shielding them from being infected by other workers and persons entering the workplace premises. This provision is in line with Article 9(2)(b) of the GDPR, according to which processing of sensitive data is permitted if the processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment law and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject. In this context, the Irish supervisory authority has introduced the possibility for the employer to process such data by invoking Article 8 of the Safety, Health and Welfare at Work Act 2005, which states that *every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees*. As it can be easily noticed, this is a situation analogous to the one we are dealing with in Poland. Appropriate reasoning based on Article 207 of the Labour Code should be used to legitimize measuring the body temperature in persons who are not employees.

A seemingly similar problem exists with regard to preventive sobriety testing of employees – seemingly, because in the context of a test for sobriety, it seems that the decisive importance should be attributed to the provision resulting from Article 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism. According to this provision, the manager of the workplace or a person authorised by them is obliged to prevent an employee from work if there is a reasonable suspicion that the employee arrived at work under the influence of alcohol or consumed alcohol while working. However, the employee's sobriety shall

be examined by competent law enforcement authority, whereas, with regard to measuring the body temperature, the legal system does not provide for an analogous, specific regulation. Thus, it is possible to apply the general provision of Article 207 of the Labour Code.

A more stringent interpretation, which would not recognise the basis for the employer's actions presented in Article 207 of the Labour Code, excludes the possibility of employee testing because during the testing of an employee, their health-related data is collected, and this data can only be provided by the employee at their own initiative. Hence, there will be no such legal basis if the basis for the processing of the data is not sought in Article 207 of the Labour Code. However, even in such a case, it is possible to use a procedure that involves the anonymous testing of every person who intends to enter the workplace premises. Anyone with an elevated body temperature would be forbidden from entering. Such an approach implies no processing of personal data during the testing phase and, therefore, the provisions of GDPR do not apply in this respect.

In order to remove any doubts in this respect, the employer, as the controller of personal data, may apply to the Chief Sanitary Inspector or the competent National Regional Sanitary Inspector for a decision on the basis of Article 8a(5) of the amended Act on the National Sanitary Inspectorate. In particular, this possibility is explicitly mentioned by the President of the Personal Data Protection Office in his communiqué of 12 March 2020. The decision may, for example, impose an obligation to "take certain preventive or control measures", which in practice involve, in particular, measuring the body temperature of employees and other persons entering the workplace premises. Moreover, in a communiqué of 27 March 2020, the President of the Personal Data Protection Office emphasised the practical importance of decisions issued under the provision mentioned above, suggesting that the Chief Sanitary Inspector and other sanitary authorities should use the assistance of "their" data protection officers when issuing decisions.

Experience gained so far has shown that decisions based on Article 8a(5) of the amended Act on the National Sanitary Inspectorate are not issued frequently.

It is worth noting that the initiative for such a decision to be issued should come from the employer who should prove in the application for a decision why, from the perspective of their organisation, such a decision is needed to prevent the spread of the epidemic. In particular, the reason invoked may be the type of business activity carried out, e.g. passenger transport and measuring drivers' body temperature, or a reference to a large number of external visitors coming to the workplace premises, e.g. a large format retail store, and taking shop assistants' body temperature. In practice, once the application is received, decisions are issued promptly.

The solution whereby employees are required to inform the employer about their visits to countries where the risk of coronavirus infection is higher, e.g. Italy, is also intended by its proponents as a measure that serves to protect the life and health of employees. Such information, by its nature, also represents personal data, but it may be questionable whether it is health-related information – in particular as it does not refer to an employee's health condition in any way but indicates a risk of a certain disease. In this context, the assumption that such information represents regular personal data means that the employer could request it from the employee on the basis of Article 22¹(4) in connection with Article 207 of the Labour Code and in connection with Article 6(1)(c) of the GDPR. However, if it were to be assumed that such information is health-related, then – like data concerning body temperature – the basis for its processing was Article 221(4) in connection with Article 207 of the Labour Code and in connection with Article 9(2) (b) of the GDPR. The Italian supervisory authority has formulated such a stance allowing employers to process directly the information on the visits of employees to countries where the risk of coronavirus infection is higher, although without specifying the exact legal basis.

1.2. Collecting and processing of additional data.

In addition to the introduction of specific protective measures at the workplace, employers have also developed solutions to facilitate contact with the employee during the pandemic. In particular, consideration is given to the acceptability of collecting employees' telephone numbers in order:

- » to inform an employee about the risk of contracting coronavirus when such an infection is diagnosed among persons with whom the employee has worked and interacted on a daily basis,
- » to inform an employee about the fact that the employer has resumed business activity after it was suspended due to the epidemic.

As a rule, the employer is entitled to process the employee's contact details, pursuant to Article 22¹(1) of the Labour Code. However, these are the contact details provided by the employee, so the employer may not request the employee's telephone number if the employee provides, for example, an e-mail address. In this context, therefore, the employer cannot require every employee to provide a telephone number.

If the employer asks the employee for a telephone number and the employee provides it, then the basis for the processing of such data by the employer will be a provision of law, namely Article 22¹(1) of the Labour Code, if these are the only contact details of the employee, or the employee's consent under Article 22^{1a}(1) of the Labour Code. Such consent may be expressed by an explicit affirmative action, which will be the provision of a telephone number by an employee who has been informed of the circumstances related to the processing of such information. Thus, employees do not have to provide declarations of consent to the processing of their telephone numbers. In order to ensure accountability of such a data processing process, it is recommended that the employer keeps evidence confirming the fulfilment of the information obligation towards employees – for example, copies of information displayed on a noticeboard or e-mails sent to employees, together with a description of the entire data collection procedure.

2. Remote working

2.1. Internal aspects: organisational measures, authorisations, internal documentation, risk assessment

The rapid expansion of the coronavirus epidemic encourages all entities to organise so-called distance working, i.e. performing work for that entity from a location

other than their standard business locations. In other words, the idea is to work from home and use various means of remote communication such as telephone, email, instant messaging, etc. Such a solution aims to limit the possibility of people assembling in larger gatherings in order to stop the spread of coronavirus. Remote working is provided both by employees (employed on the basis of an employment contract) and collaborators (persons providing services on the basis of civil law contracts as well as the self-employed).

However, such circumstances the question arises as to how these new rules for employees and collaborators impact the organisation's procedures and internal documents in terms of the processing of personal data.

In particular, the question is whether such a change in the organisation of work forces the controllers to:

- » implement new technical and organisational measures on data security (Articles 24(1) and 32(1) of the GDPR),
- » change their internal documentation concerning the processing of personal data (change of security policy or modification/implementation of specific policies, instructions),
- » modify or grant new authorisations to process data (Article 29 in connection with Article 32(4) of the GDPR),
- » modify the agreements on the entrustment of data processing (Article 28 of the GDPR),
- » carry out a new risk assessment as part of a data protection impact assessment (Article 35 of the GDPR).

The answer to such a question will be negative only if the controller has already anticipated, within the framework of their previous activities, the provision of remote work by employees or collaborators and has established appropriate rules (procedures, instructions) for the provision of remote work in internal documentation, authorisations or entrustment agreements, and has carried out (as part of the data protection impact assessment) an assessment of the risk of

infringement of data subjects' rights or freedoms while taking this circumstance into account.

Otherwise, the controller should assess the need to take appropriate action to modify the measures and documents they use. The following section of the paper will discuss aspects of such situations.

2.1.1. Technical and organisational measures

Pursuant to Article 24(1) of the GDPR and similarly in Article 32(1) of the GDPR, the controller shall implement appropriate technical and organisational measures to ensure that data processing is performed in accordance with the GDPR (ensuring an appropriate level of security). These measures should take account of the nature, scope, context and purpose of processing and the risk of infringement of the rights and freedoms of natural persons. As the studies highlight, "In practice, this means that the safeguards implemented need to be adapted to, *inter alia* (...) the way in which the data is processed (whether the data is processed on a separate closed network or via the public Internet) and the risks involved in the processing."⁵³

Those measures should also be subject to review and update. If remote working is introduced in the organisation (in particular through the storage and transmission of data in a public telecommunication network), the context of data processing may change, in the first place, and the rights or freedoms of data subjects may be more likely to be infringed. As a result, the measures applied by the controller should be updated. According to the literature on the subject, "this requirement extends to maintaining an adequate level of safeguards and formal, organisational and technical measures within the other specific obligations during the entire data processing cycle."⁵⁴ In such a situation, the review of the measures implemented by the controller should result in their amendment

⁵³ P. Fajgielski, *Ogólne rozporządzenie o ochronie danych. Ustawa ochronie danych osobowych. Komentarz*. [General Data Protection Regulation. Personal Data Protection Act. Commentary], Warsaw 2018, p. 317.

⁵⁴ D. Lubasz in: E. Bielak-Jomaa, D. Lubasz (ed.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz*. [GDPR. General Data Protection Regulation. Commentary], Warsaw 2018, p. 594.

or the introduction of new ones. A risk assessment (likelihood and seriousness of the risk) of infringement of the rights or freedoms of the data subject is also part of the data protection impact assessment (see comments below). The implementation of appropriate technical and organisational measures should include an obligation for persons authorised to process data to use these measures (cf. the comments on the authorisation below).

A possible processor should be involved in the process of determining technical and organisational measures to ensure data security (Article 28(3)(f) of the GDPR). The recommended technical and organisational measures to ensure an adequate level of security of data processing when using means of remote communication will be discussed in the following sections.

2.1.2. Internal documentation

The technical and organisational measures implemented by the controller to ensure the processing of data according to the GDPR shall be indicated in the controller's internal documentation (Article 24(1) of the GDPR).

The obligation to update the internal documentation concerning data processing (security policy, instructions/internal policies) will apply when the controller has not yet foreseen (i.e. before the introduction of a change in the organisation of work) that employees or collaborators will perform remote work – data processing by means of remote communication, in other locations or with the use of mobile/portable devices.

Such an update can be implemented by modifying existing documentation or introducing new instructions for remote working. It is important to ensure that employees or collaborators can familiarise themselves with modified internal documentation or new remote working instructions. As far as employees are concerned, this documentation should be implemented as part of the work regulations or other instructions that constitute an element of the employer's internal regulations with which the employee must be familiarised (Article 104 of

the Labour Code). This is important because they can be held responsible for possible data protection infringements in connection with the new work organisation. The change of internal documentation or the introduction of new remote working instructions and their implementation should be made by the controller (bodies acting on the controller's behalf) in accordance with the internal rules existing in the organisation. If a Data Protection Officer is appointed within an organisation, they should also participate in these activities (Article 39(1)(a) and (b) of the GDPR).

2.1.3. Authorisations

The purpose of authorising employees or collaborators to process data is to define the scope of their powers to process data. According to the literature on the subject, "(...) the authorised person is, from the perspective of the personal data protection system, located within the structure of the controller or processor."⁵⁵ Therefore, granting authorisations refers to persons operating within the structure of a given entity – with access to its data processing facilities or its IT systems, regardless of the legal basis for performing operations on personal data (the type of legal relationship between them and the controller). Although the obligation to grant authorisations does not arise directly from the legislation, as it is commonly accepted in the literature, it is a consequence of the obligation to act on the controller's instructions (Article 29 and Article 32(4) of the GDPR). It is also necessary to determine the possible liability of persons involved in the processing of personal data within an organisation. Therefore, ensuring that the content of authorisations is updated is crucial for the controller's activity.

In practice, the authorisations to process data determine mainly:

- » the scope of data which one is entitled to process (e.g. by specifying the systems, files/databases, categories of data to which one has access, the form of filing systems – either paper-based or electronic),

⁵⁵ K. Witkowska-Nowakowska in: E. Bielak-Jomaa, D. Lubasz (ed.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz. [GDPR. General Data Protection Regulation. Commentary]*, Warsaw 2018, p. 657.

- » the types of data operations that one is authorised to perform (e.g. collecting, modifying, recording).

In consequence, only in the case when, as a result of remote work, the scope of the individual's power to process data would change (e.g. the employee would be granted access to new systems/databases, would be able to perform new operations on the data, such as collection, temporary recording), an obligation arises to change the content of the authorisations – granting new authorisations.

However, a change in the content of the authorisation does not imply an obligation to change the content of the confidentiality statement or to obtain a new confidentiality statement from the employees or collaborators (the employee's or collaborator's obligation of confidentiality is the result of an interpretation of the controller's obligation pursuant to Article 5(1)(f) of the GDPR or results directly from Article 28(3)(b) of the GDPR). This depends on the content of the specific confidentiality statement (e.g. the extent to which it refers to the content of the authorisation).

2.1.4. Entrustment agreements

Concluding entrustment agreements relates to persons providing services in the form of remote work (operations on data) outside the controller's structure (for example, without access to the controller's IT systems).

According to Article 28(1) of the GDPR, when entrusting data processing, i.e. when data processing is done on behalf of the controller by another entity, the controller may only use the services of such processors which provide sufficient guarantees to implement appropriate technical and organisational measures to ensure that the processing meets the requirements of the GDPR and protects the rights of the data subjects. Although, as a rule, under this regulation, the assessment of the processor's compliance with regard to providing guarantees in terms of appropriate technical and organisational measures is prior to the conclusion of the entrustment agreement, it must be assumed that a change in the factual

circumstances related to the performance of this agreement (introduction of remote work by the processor's employees) may necessitate a change in its provisions.

According to Article 28(3) of the GDPR, the entrustment agreement should specify the nature and purpose of the processing. According to the literature on the subject⁵⁶, "The determination of the purpose and nature of the processing and of the type of personal data should be limited to specifying which categories of data and why are entrusted for processing and how they are to be processed". As a consequence, in the case of introducing remote working in the processor's organisation, it may be necessary to amend (annex) the entrustment agreement, e.g. in the scope of defining the area of data processing in the processor's organisation (if it was defined), as well as in the scope of technical and organisational measures for personal data protection applied in the processor's organisation (if changed).

An amendment to the entrustment agreement (conclusion of an appropriate annex) is of significant importance due to the necessity to document the instructions given to the processor (Article 28(3) in connection with Article 28(10) of the GDPR), which is of fundamental importance for the scope of the processor's liability for breaching the scope of the instruction and authorisation for processing.

2.1.5. Data protection impact assessment - risk assessment

The introduction of the possibility for employees or collaborators to work by means of remote communication as a part of the controller's business activities may increase the risk related to an infringement of the rights or freedoms of data subjects. In accordance with Article 35(1) of the GDPR, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data.

⁵⁶ K. Witkowska-Nowakowska in: E. Bielak-Jomaa, D. Lubasz (ed.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz [GDPR. General Data Protection Regulation. Commentary]*, p. 639.

However, according to Article 35(11) of the GDPR, the controller shall carry out a review to assess if processing is performed in accordance with the data protection impact assessment in the situation where the risk resulting from processing operations is changed. The data protection impact assessment shall include, inter alia, an assessment (analysis) of the risk of an infringement of the rights and freedoms of data subjects (Article 35(7)(c) of the GDPR). The GDPR directly determines one group of cases where a review is mandatory, i.e. when the risks arising from data processing operations change (in terms of the level or type of risk).

As a result, it must be assumed that the mere fact of working remotely (processing of data using the public telecommunications network and mobile devices) does not automatically trigger a reassessment of data protection impacts. These data processing operations have not been listed in the provisions of the GDPR or in the amended list of types of personal data processing operations requiring the data protection impact assessment of 17 June 2019, published by the President of the Personal Data Protection Office (announced on 8 July 2019 in *Monitor Polski*)⁵⁷.

The review of the compliance of the processing with the data protection impact assessment does not necessarily have to result in the data protection impact assessment being carried out again. Reassessment will be necessary when the introduction of new work organisation rules will increase the risk of an infringement of data subjects' rights or freedoms.

If a Data Protection Officer is appointed within an organisation, they shall carry out the monitoring of the data protection impact assessment and be involved in any re-assessment (Article 39(1)(c) of the GDPR). In the event that a new data protection impact assessment is needed, a possible processor should be involved (Article 28(3)(f) GDPR).

However, it is not excluded (although in most cases unlikely) that a new data protection impact assessment would lead to the conclusion that a change in

⁵⁷ <http://monitorpolski.gov.pl/MP/2019/666>

the organisation of work would result in a high risk of an infringement of the rights or freedoms of data subjects. In such a situation, if the controller has not taken measures to mitigate that risk, a prior consultation with the President of the Personal Data Protection Office will be required (Article 36 (1) of the GDPR).

2.2. Measures to safeguard the processing of personal data in remote work setting

It can be difficult to use new technology to perform professional duties, especially in organisations that have not previously allowed their employees to work outside the office or have done so only occasionally. The secure organisation of remote work depends on the employee's attitude and sometimes even their vigilance, but it is also a major burden on the employer. Good technical preparation and arrangement of remote work will help eliminate the risk of problems once the situation stabilises, and the coronavirus becomes just an unpleasant memory of the past.

The preparations for remote working should be considered directly in response to the sources of risks that will affect the security of personal data processing. The virtual environment remains the same, whether the work is done in the office or at home. However, external circumstances change significantly. Due to this change, working outside the office generates additional sources of risks, and in response to them, the controller should consider implementing additional technical and organisational measures to protect personal data. The introduction of remote working can also provide an opportunity to review and assess the effectiveness of measures already implemented.

The security of the devices to be used for remote working should be assessed. The equipment used by an employee in the performance of their professional duties should meet certain security requirements. Obviously, such conditions are difficult to impose when an employee has to use private equipment for remote working. However, regardless of whether the equipment is owned by the employer (company) or by the employee, it will be necessary to set minimum security requirements in order to use it for professional duties.

The most basic principle should be to keep the software up to date. Errors and vulnerabilities in older versions of software, both in the operating system and in individual programs used to secure hardware (antivirus and antispam software) or communication tools (e-mail clients) pose a significant threat. Patches released by software manufacturers are designed to eliminate known issues and, consequently, ensure secure use of supplied software and the devices on which it is used. An important factor in maintaining high-security standards is keeping the software up to date, as the President of the Personal Data Protection Office has already pointed out many times. "Working on the up to date operating system is all the more important because some of the patches do not only concern the security of this software but also "patch" the gaps detected in the design of computer components. There are solutions which, due to errors, e.g. in the CPUs of our computers, provide the ability to take control over the machine (...) That is why, from the point of view of personal data security, it is so important to use up to date software, both commercial and those used under an open-source license."⁵⁸ At the same time, the requirement to have up to date software is not an exaggerated expectation, even if it is to apply to an employee's private equipment. In the vast majority of cases, there are no cost-related consequences either, as updates and patches of software are provided under licenses already in use.

An antivirus program is an obligatory, minimum part of necessary software for the computer used for remote work. This is also not an exorbitant requirement, even if such a requirement is imposed on the employee's private devices. Antivirus software helps to filter out the dangerous content of various origin. Whether it is a small and seemingly harmless worm or complex spyware, a good antivirus program will provide effective protection against direct attacks. An employee's vigilance will not replace the antivirus software.

Antivirus software alone does not guarantee data security. The software must be configured accordingly and, above all, must be up to date. Just as social engineering is evolving, newer and newer versions of unwanted software are appearing

⁵⁸ <https://uodo.gov.pl/pl/138/1359>, accessed: 22 March 2020

on the Internet. Therefore – coming back to the issue of software updates mentioned above – if an employer requires the hardware to be equipped with an antivirus program, the employer should also specify how such software should be configured and require its updating, including the update of virus signature database.

In addition to the issues related to the required software and its configuration, attention should also be paid to the actions taken on the devices used to process personal data when working remotely, which are not directly related to performing work. As the President of the Personal Data Protection Office advises, “do not install additional applications and software that do not comply with the organisation’s security procedure.”⁵⁹ However, prohibiting the use of the device for private purposes should be approached with great rationality. Such a rule may be unenforceable, especially if the employee’s private equipment is used for remote working. When arranging remote working, it is necessary to think realistically and rationally. Introducing unrealistic requirements will increase the risk for information security – if one of the requirements can be bypassed without consequences, so will the others. Nevertheless, it is highly recommended to pay attention to not installing any software not related to remote work on the equipment provided by the company or used for business purposes, and refrain from using it for private activities, in particular when connecting remotely to the controller’s systems and resources.

Most security risks arise during the transmission or transfer of information between devices or between an information system and a device connected to it. In particular, when it is impossible to establish a remote connection with the controller’s IT systems, it will be necessary to transfer personal data and confidential information on physical storage media, e.g. flash drives, which are very small and can be easily lost without noticing it. It is important to remember that the portable computer drive is also a storage medium and although the loss of a computer happens relatively less often than losing a flash drive, it can cause the same or

⁵⁹ <https://uodo.gov.pl/pl/138/1459>, accessed: 22 March 2020

even more severe consequences (a perfect example of such a case is the situation that took place at the Warsaw University of Life Sciences⁶⁰). The loss of devices or external storage media can be very dangerous for an organisation, and due to the fact that the mobility of devices and media on which personal data is stored is necessary, the risk of such loss increases. The solution to these threats may be storage media encryption. Organisations in which it is possible to connect remotely to the controller's IT systems and network resources will need to implement connection encryption, e.g. using VPN or tokens. Other security methods, such as multi-level authentication may also be considered.

If the security rules have been implemented in the procedures and policies adopted in the organisation, it is advisable to remind that remote working does not exempt compliance with internal security procedures. The arrangement of remote working can be a good moment to tighten internal security systems, also in terms of organisational security measures, procedures and policies.

Working from home does not exempt the employee from the obligation to use passwords and screen savers. The regulations for the application of these technical measures should also not be limited to business equipment only. The security requirements should cover all equipment used to carry out business tasks, in particular those related to the processing of confidential information and personal data. When developing or updating security measures in connection with the arrangement of remote working, it is important to understand that the terms "device" or "equipment" are not limited to computers only. Mobile phones, tablets – all such items will be included in the definition of a device or equipment; therefore, the implemented security rules should not be limited to the use of a computer only.

The physical security of the device with which the work is performed is also very important. Working at home can seem secure – after all, no one unwanted will

60 More broadly: <https://www.sggw.pl/aktualnosci/komunikat-o-naruszeniu-danych-osobowych>, accessed: 22 March 2020

take over the device in our own home. However, it should be remembered that a daughter, son, spouse or roommate are also persons who are not authorised to process personal data, therefore, they should not have access to the equipment and documents used by the employee and to the information that is stored on such equipment. The controller should implement such organisational measures which will force the employee to organise the workplace properly and securely, also when they work from home. The obligation to secure the equipment or documents that an employee uses when working cannot be limited to the area of data processing defined in internal policies.

It is also very important that the employee is aware that a data protection infringement or security incident that occurs while working at home is still the same incident or infringement as those occurring during normal working conditions. Despite the change in the way of performing the work duties, the implemented procedures for reporting security incidents and infringements also apply when performing remote work. The same applies to the implemented retention rules: copies made in connection with data transfer on external memory devices or created on an employee's private devices that are used for remote work are subject to the same retention rules as any other copy made by the controller.

Particular reference should be made to the use of business mail or the use of private e-mail addresses for business purposes. When working remotely, employees primarily use business e-mail addresses. Public domains do not have such security features as private mail servers. If an employee does not have a business e-mail address or for some reason cannot use business mail, it will be necessary to implement rules for the use of private e-mail addresses for the performance of business duties, such as encrypting attachments. It should be remembered that if a decision is made to encrypt attachments in messages sent, the password necessary to decrypt the content cannot be provided through the same communication channel. Therefore, employees using private email addresses during remote working should be instructed to send passwords to the recipient via SMS messages, for example.

The current chaos and the fact that many employees have never worked remotely are used to develop effective social engineering techniques to steal confidential information. An example is the sending of an e-mail with information about blocking remote access to e-mail and network resources. Please imagine the effectiveness of such an attack: an employee away from the IT department and other collaborators receives a message saying "Dear mail user, due to increased traffic on the mail server we have to update all active mail accounts. Thanks to this, we will be able to block inactive users and restore access to the server. If you still want to use your e-mail account, please verify your account immediately. Click here to verify your account: [URL] Please note! Any e-mail account holder who refuses to update their account will permanently lose the opportunity to use it. Best regards, IT department." At the URL, seemingly being in the domain of the employer, there is a redirection to a subpage automatically downloading, e.g. encryption software. Simple, isn't it? Unfortunately, even a very vigilant employee may be subject to such an attack. After all, access to electronic mail is essential for the performance of business tasks. Circumstances also match: internal and external communication has been redirected to e-mail, increased traffic can cause server problems. This is a new way of scamming that has emerged recently, replacing the already obvious scam with "VAT invoice attached/available at URL". You can never be sure what form the social engineering used by criminals will take. Therefore, it is very important to set system requirements that will have a chance to protect information and data even when facing the most effective and creative attacks targeting employees. Thus, it is crucial for security reasons to provide the employee with up-to-date information and to create good practices, such as not opening attachments and not clicking on links in the emails unless the identity of the sender is fully verified.

Finally, it is worth noting one more very important thing. Even the best and most thought-out system solutions will remain ineffective if the employee is reckless. More and more employees place their photos of the workplace while performing remote work on social networking sites. Some employees do not pay attention to the content of the photos, so some of them show, for example, a computer screen that displays confidential information and personal data. As part of developing

good practices, it is highly advisable to point out to employees that remote work is still work. Since it is not known how long a period of social distancing will last and how long employees will continue working remotely, it is advisable to constantly **remind** everyone that the obligations of confidentiality and integrity apply regardless of where they perform their business duties. A poster prepared by the President of the Personal Data Protection Office, available on the website of the Personal Data Protection Office, may be helpful as a reminder⁶¹.

2.3. Use of popular instant messengers for internal communication and contact with customers

In remote work setting the privacy of communications and confidential conversations is put to the test. Everything that we can normally pass on to another person – without any traces, intermediary devices, software or intermediaries – requires a transmission under social distancing conditions, so the medium that will transmit the information is required. Many employers face a huge challenge: how to organise internal and external communication in order to minimise the risks associated with transmitting information?

The basic criterion for selecting tools and software for remote communication should be end-to-end encryption. It is worth paying attention to whether the software the controller wants to use provides end-to-end encryption and, more importantly, whether it is enabled (as this is not always the default setting). End-to-end encryption consists in encrypting the message directly on the sender's device and decrypting it only when it is delivered to the recipient. Other types of encryption usually decrypt and re-encrypt the message on the software provider's server, which means that at least hypothetically the content of the message is accessible to a third party. In addition to this basic requirement, other requirements can also be imposed, e.g. that the instant messenger has an additional authentication layer, preventing it from reading the content of the message even if the device falls into the wrong hands and is unlocked by an unauthorized person.

⁶¹ Available at <https://uodo.gov.pl/pl/138/1459>.

There are many end-to-end encryption tools available that can be successfully used to communicate when working remotely. One of them is Signal developed by Signal Messenger, LLC (previously: Open Whisper Systems). It is an open-source instant messenger which, apart from high-quality encryption, also offers additional functions, e.g. setting the retention period for individual conversations, after which messages disappear permanently. The instant messenger also enables voice and video calls and group calls.

Another instant messenger that uses this type of encryption and allows video and audio calls is WhatsApp; however, due to its provider (Facebook), it is not trusted. However, WhatsApp supports message encryption by default (as long as encryption is supported by the device on which the application is installed). Facebook is also responsible for the Messenger app, but Messenger is inferior to WhatsApp, due to lack of default message encryption. Messenger allows to enable end-to-end encryption by changing the call settings to "confidential", but the fact that this is not the default setting is a serious drawback.

Apple device users can choose to use iMessage. An important disadvantage, in this case, is that the recipient or caller must also use an Apple device as the software is not compatible with other devices.

Among popular software providers Microsoft is also worth mentioning. Skype, developed by this software manufacturer, is no longer taken into account due to its vulnerabilities and deficiencies and because of the wide range of data it collects from the user. Microsoft itself is gradually withdrawing from promoting this application. Nevertheless, the manufacturer does not give up solutions developed during the Skype era. Microsoft Teams has become an alternative to this application, having many additional features that support not only communication itself but also the arrangement of remote work (such as the possibility of grouping employees into work teams). The advantage of Microsoft Teams is that the client or caller does not have to create a Microsoft account or buy a license to use the software; sometimes, they do not even have to download it. Microsoft Teams offers the possibility to work both as a desktop application as well

as a web-based application. Moreover, a significant advantage of Microsoft as a manufacturer and supplier is the fact that, despite being based in the USA, all issues relating to data transfer and possible entrustment agreements are dealt with by Microsoft itself. In the case of other providers, the controller often has to make additional efforts, sometimes unrealistic under current conditions, to ensure the legitimacy of the transmission, including in particular the conclusion of appropriate entrustment agreements.

There are obviously many more technical solutions and instant messengers on the market. The choice depends primarily on the controller's needs and requirements. Before deciding on an appropriate solution, it is worthwhile to learn first of all about the terms and conditions of service provision, security features offered within or in addition to specific software, rules of service provision or other documents regulating data transfer and security and responsibility for the data transmitted as part of the communication.

3. Processing of personal data in the era of the coronavirus, legal basis for data processing

3.1. Legal grounds for processing data concerning coronavirus infection and data of persons who may have come into contact with infected persons, and conditions for transferring such data to authorised entities

Information about a person being infected with the coronavirus constitutes personal data concerning health, i.e. data of special categories within the meaning of Article 9(1) of the GDPR, according to which processing of personal data concerning health is in principle prohibited. However, there are a number of grounds for empowering certain entities, such as medical facilities, infectious disease hospitals, physicians and competent sanitary and epidemiological authorities, within the limits of their competence and in the performance of their obligations under national legislation, to process personal data of persons infected with the coronavirus, including the disclosure and transmission of personal data concerning the infection to certain entities. The General Data Protection Regulation also

contains the legal basis for empowering competent sanitary and epidemiological authorities and employers to process personal data about the infection in the face of an epidemic.

According to Article 9(2)(g) of the GDPR, it is lawful to process personal data concerning health where processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law, which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

Further, Article 9(2)(i) of the GDPR provides for a legal basis for processing of data of special categories where the processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy.

In the context of medical professions, the Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman⁶² provides explicitly that a patient has the right that information related to the patient and obtained in connection with the provision of medical services be kept confidential by medical professionals, including those providing medical services. However, the Act on Patient Rights and the Patient Rights Ombudsman introduces several important exceptions to the obligation to keep data about a patient confidential – in particular, Article 14(2) thereof states that the obligation to keep patient information shall not apply where keeping confidentiality may endanger the life or health of the patient or other persons. In such special circumstances, justified by the possible danger to the life or health of the patient and others, there is an exceptional right to disclose information, which may be of particular importance during a pandemic.

62 Consolidated text: Journal of Laws of 2019, item 1127.

and the spread of coronavirus. However, this possibility should be approached with great caution. Each case should be assessed individually in relation to the specific facts and the possibility of a threat to life or health of the patient and others. Taking into account the rapid spread of coronavirus and ongoing breaches of the quarantine and hospitalisation rules, it may be appropriate, in certain situations, to use the exception of disclosure of data related to the infection.

The legal basis for the processing of data on infection may also be found in Article 9(2)(c) of the GDPR, which entitles the processing of data concerning health when processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent. In the era of coronavirus, recital 46 of the GDPR is applicable, referring to epidemics, which entitles to some types of processing which may serve both important grounds of public interest and the vital interests of the data subject as for instance when the processing is necessary for humanitarian purposes, including the monitoring of epidemics and their spread, or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters. Moreover, recital 46 indicates, to some extent with reference to Article 9(2)(c) of the GDPR, that processing of personal data should also be regarded to be lawful where it is necessary to protect an interest which is essential for the life of the data subject or another natural person. According to the recital, processing of personal data based on the vital interest of another natural person should, in principle, take place only where the processing cannot be manifestly based on another legal basis. Grounds for disclosing information on the infected person to certain third parties, e.g. persons who had contact with a person who contacted the infected person, namely persons who had no direct contact with the infected person, can be found in the provisions of the GDPR and recital 46. Certainly, the purpose of transferring personal data concerning the infected person in such cases is to protect the interests of the third party, and thus the disclosure of data concerning the infected person is justified in such cases and coincides with the objectives set out in the regulations mentioned above and, consequently, the protection of the interests of the third party.

In the case of medical professions, the physician is entitled to provide information about the infection in a situation when the examination was carried out at the request of the bodies and institutions authorized on the basis of separate legislative acts; then the physician is obliged to inform only these bodies and institutions about the patient's state of health, e.g. the district sanitary and epidemiological station decides to carry out a coronavirus test and refers the person to the examination. Pursuant to Article 27 of the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans⁶³, a physician who suspects or diagnoses an infection, infectious disease or death due to an infection or infectious disease is obliged to report this fact to the relevant National Sanitary Inspectorate immediately, no later than within 24 hours from the moment of suspecting or diagnosing an infection, infectious disease or death due to an infection or infectious disease.

Any information about an identified case or suspicion of infection shall be reported immediately to the National County Sanitary Inspector or other National Sanitary Inspectorate body competent for the place where the suspicion has appeared. The competent National County Sanitary Inspector takes further action within the framework of the conducted proceedings and establishes a list of persons with whom the person infected with coronavirus may have had contact. Pursuant to Article 32a of the Act on Preventing and Combating Infections and Infectious Diseases in Humans, the National Sanitary Inspector or the Chief Sanitary Inspector, in connection with the conducted epidemiological investigation, may request information, inter alia on persons who may have had contact with: infected persons or persons suspected of being infected, persons suffering from or suspected of being infected with an infectious disease, persons who have died of or are suspected of having died of an infectious disease. Therefore, the collection of personal data of persons who have been in contact with infected persons is justified and complies with the provisions on the protection of personal data, but the data don't belong to special categories. In this case, the processing of personal data which are not

⁶³ Consolidated text: Journal of Laws of 2019, item 1239, 1495, of 2020, item 284, 322, 374

of special categories may be based on Article 6(1)(d) and (e) of the GDPR, so that processing is necessary in order to protect the vital interests of the data subject or of another natural person and processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

The grounds for the disclosure of personal data in situations indicated in the special provisions concern situations on the basis of which authorised persons or entities exercise their rights under the provisions and do not constitute the disclosure of data concerning an infection to public space. Disclosure of "ordinary" personal data as well as data concerning health on the basis of regulations within the scope of the powers granted and in the performance of statutory tasks does not infringe the principles of personal data processing protection. In particular, as indicated above, the provisions of Article 32a of the Act on Preventing and Combating Infections and Infectious Diseases in Humans provide that the National Sanitary Inspector or the Chief Sanitary Inspector, in connection with the epidemiological investigation they conduct, may request information on, *inter alia*, infected persons or persons suspected of being infected, persons suffering from or suspected of being infected with an infectious disease, persons who have died of or are suspected of having died of infectious disease, persons who may have had contact with the persons referred to in point 1 – from anyone in possession of such data or public administration units which may establish such data. The data of the persons referred to in point 1 include first and last name; date of birth; PESEL number or, if the person has not been assigned this number, the series and number of the passport or other document on the basis of which personal data can be established; gender; address of residence; current location; contact telephone number and e-mail or other means of electronic communication; clinical diagnosis of the infection or infectious disease and description of the main clinical symptoms and the pathogen; exposure circumstances, with particular reference to risk factors; route of national or international travel and means of transport used by the sick person or infected person during travel; as well as the places where the infected person stayed during the period of incubation.

The scope of the data that may be processed in the course of the proceedings by a sanitary and epidemiological authority in the context of both the infected person and the “casual contact” persons is broad but essential in order to achieve the purposes of the processing for the protection of the vital interests of the data subject or of another natural person and for the performance of a task carried out in the public interest in the performance of public tasks. The provisions of the aforementioned Act correspond to recital 46 of the GDPR and the provisions of the GDPR which provide for situations related to health protection and prevention of the spread of infectious diseases (Article 9(2)(i) of the GDPR and Article 6(1) (d) of the GDPR), i.e. considering the processing of personal data as lawful also in cases where it is necessary to protect an interest which is essential for the life of the data subject, e.g. when the processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread.

The data subject during a coronavirus epidemic should be provided with transparent information on the processing activities carried out in relation to their data, including the storage period of the data collected and the purposes of processing. The information provided should be easily accessible and presented in clear and simple language. The adoption of appropriate confidentiality policies to ensure that personal data is not disclosed to unauthorised persons is a guarantee for the protection of the privacy and the protection of personal data, whether of infected or “contact” persons. It is obvious that in the current epidemiological situation in the country, an overly restrictive approach to satisfying information obligations is not the most important; however, the principles of respecting the protection of patients’ personal data and privacy should be respected without exception.

3.2 Selected examples of the processing of personal data and the conditions for their transfer to authorised entities as laid down in the legal instruments adopted in connection with the COVID-19 epidemic
The obligation to make personal data of persons sent for mandatory quarantine available to the bodies of the National Sanitary Inspectorate, the National Health Fund, the Social Insurance Institution, the Agricultural Social Insurance

Fund, province governors, the Police, the Command Support System for National Emergency Medical Services and the operator designated within the meaning of the Act of 23 November 2012 – Postal Law is also worth noting.

Initially, the above legislation was defined in the Regulation of the Minister of Health of 20 March 2020 regarding the announcement of the state of epidemic threat in the territory of the Republic of Poland⁶⁴, which states that from 20 March 2020 until further notice, the state of epidemic is announced on the territory of the Republic of Poland in connection with SARS-CoV-2 virus infections. Currently, the provision for making data available to designated entities is contained in the Regulation of the Council of Ministers of 31 March 2020 on establishing certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic⁶⁵.

Initially, the regulation of 20 March 2020 contained an inaccuracy in the context of determining whether only data of persons who crossed the border and are obliged to undergo mandatory quarantine are to be made available to the indicated entities, or whether data of persons quarantined on a different basis than crossing the border are also to be made available. In fact, the regulation provided that only the data referred to in paragraph 3 shall be made available, while paragraph 3 referred only to the persons crossing the border. Additionally, paragraph 3 stated that information on persons crossing the border should be forwarded to the Centre of Health Information Systems by the Border Guard. However, the system may also process data of other persons subject to mandatory quarantine in relation to the state of epidemic, so the imprecise wording of the rules raised the question whether also personal data of persons placed in quarantine on other grounds than those referred to in paragraph 2(1) (e.g. following a decision of a local National Sanitary Inspector) may be lawfully made available to the entities mentioned in paragraph 5. Obviously, in the intention of the legislator the reference in paragraph 4 to paragraph 3 was aimed at indicating

⁶⁴ Journal of Laws of 2020, item 491

⁶⁵ Journal of Laws of 2020, item 566

that the purpose is to provide the said entities with access to the information contained in the Health Information System, in which personal data of persons placed in quarantine, received from County Sanitary and Epidemiological Stations and the Border Guard, are also processed⁶⁶. Such an interpretation of the already repealed regulations seemed to be logical, taking into account the purposeful interpretation of the indicated regulations, i.e. acquiring by the relevant services the knowledge about all persons under quarantine, not only those who have returned from abroad.

All doubts related to the interpretation have been resolved by virtue of the Regulation of the Council of Ministers of 31 March 2020. The regulations on restrictions to certain modes of mobility have been moved to §2 of the Regulation of 31 March 2020. Pursuant to §2(2)(1) of the discussed regulation, a person crossing the state border, in order to return to their place of residence or stay on the territory of the Republic of Poland, is obliged to provide a Border Guard officer with information about the address of the place of residence or stay where the mandatory quarantine will take place and a contact telephone number. Whereas, pursuant to §2(2)(2), that person is obliged to undergo the mandatory quarantine referred to in Article 34(5) of the Act on Preventing and Combating Infections and Infectious Diseases in Humans, lasting 14 days from the day following the day of crossing the border.

On the basis of paragraph §2(3) of the discussed provision of the Regulation of 31 March 2020, personal data referred to in paragraph 2(1) shall be transferred to the Centre of Health Information Systems by the Border Guard. According to §2(4), the system may also process data of other persons subject to mandatory quarantine in connection with the epidemic referred to in §1, as well as persons subject to self-isolation at home, persons for whom it has been decided to perform a test for SARS-CoV-2 infection and persons infected with this virus.

66 Source: <https://www.nfz.gov.pl/aktualnosci/aktualnosci-centrali/przekazywanie-poprzez-ewus-informacji-o-kwarantannie,7669.html> accessed: 27 March 2020

Paragraph 5 has been amended, and it now clearly states that the data referred to in paragraphs 3 and 4 shall be made available to the bodies of the National Sanitary Inspectorate, the National Health Fund, the Social Insurance Institution, the Agricultural Social Insurance Fund, province governors, the Police, the Command Support System for National Emergency Medical Services and the operator designated within the meaning of the Act of 23 November 2012 – Postal law. On the basis of the foregoing, these entities have been granted access to personal data relating to persons who are in compulsory quarantine after crossing the border, as well as persons who are quarantined on other grounds.

Incidentally, it should be pointed out that the very fact that the rules of providing access to information and personal data are determined by a Regulation, i.e. a normative act that is of lower rank than a parliamentary Act, raises significant doubts. Pursuant to Article 51(5) of the Constitution of the Republic of Poland of 2 April 1997⁶⁷, principles and procedures for the collection of and access to information shall be specified by a parliamentary Act. Therefore, the introduction of provisions whereby data are made available to certain entities by means of a regulation, raises concerns, even in the current epidemic.

Notwithstanding the above, the provision to make information concerning quarantined persons available to the entities listed in the Regulation seems to be justified on the basis of recital 46 of the GDPR, but the decision to make this information available to the postal operator may appear controversial at first sight. At this point, it should be noted that the recitals provide only interpretative guidance for understanding the content of the GDPR. As a regulation of the European Union, directly affecting the legal system in Poland, GDPR occupies a lower position in the hierarchy of sources of law than the Constitution of the Republic of Poland, although it must be stated with certainty that GDPR does not show any non-compliance with the overriding principles indicated in the Constitution of the Republic of Poland in this respect. Therefore, applying some distancing from the GDPR itself, it is necessary to approach the assessment of a solution, such

⁶⁷ Journal of Laws No 78, item 483

as the introduction of provisions on data sharing by an implementing regulation, with great caution, in view of the current wording of Article 51(5) of the Constitution of the Republic of Poland.

Attention should also be drawn to Article 11d(1) of the Act of 31 March 2020 amending the Act on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and certain other laws⁶⁸, according to which the Police, in order to ensure proper performance of the obligations referred to in Article 34(2) and (3) of the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans, may perform activities resulting from statutory powers, except for activities referred to in Articles 19-19b of the Act of 6 April 1990 on the Police (Journal of Laws of 2020, item 360). According to the law, the Police, within the scope of their statutory powers, are to supervise and ensure control over the correct implementation of the obligation to stay in quarantine or under epidemiological surveillance. Therefore, the Police obtain access to data, e.g. concerning the quarantine of a specific person, whereas at the same time the Act provides that all information, including personal data, obtained in the course of performing the activities referred to in paragraph 1, shall be erased or destructed within one month after the expiry of this Act. Therefore, the legislator intends that the appointment of the Police to control the implementation of quarantine obligations, and consequently access to information and personal data, is to control compliance with the quarantine rules and thus prevent the spread of coronavirus within the country. According to the legislator, there will be no legal basis for the Police to process personal data collected in the exercise of the powers imposed by the Act and related to the surveillance of the quarantine longer than one month after the Act expires.

3.3. Public disclosure of personal data and information concerning the coronavirus infection in the light of protection of privacy.

Disclosure of personal data, either in the form of transmission, dissemination or any other form of communication, is one of the forms of data processing. The

68 Journal of Laws 2020, item 568

main ground for the right to process data in the form of disclosure, dissemination of information concerning an infection to the public domain, is the explicit consent of the data subject, as expressed on the basis of Article 9(2)(a) of the GDPR. In this case, explicit consent is required in order to disclose information about an infection of a particular person. In the case of data concerning health, unlike a "simple" consent, the consent must be explicit, i.e., there must be no doubt that it is an unequivocal declaration of intent and must be expressed for one or more specific purposes. The above prohibition on disclosure of personal data concerning the infection applies to physicians, hospital directors, as well as to the relevant sanitary inspection bodies. The provisions also stipulate the possibility to process data concerning health, in particular the dissemination of information on the infection, where the processing relates to personal data which are manifestly made public by the data subject (Article 9(2)(e) of the GDPR). As a rule, this applies to public persons, known to the public, who make information about the infection available to the public on their own initiative. The dissemination of such information after it has been made public by the data subject shall not constitute an infringement of personal data protection.

Despite the fact that the confidentiality of health information and information provided by a patient in connection with the provision of health services has been addressed to the medical profession, the obligation to maintain the confidentiality of information concerning a patient's health should also be respected by the relevant health and epidemiological bodies in connection with the provisions of the GDPR and with respect for the right to privacy.

The patient's right to privacy, and in particular, the right not to disseminate information not only about the infection but also about the circumstances of the infection, private life, personal relationships, remain protected by civil law. In the event of unlawful disclosure of information concerning private life, the victim has a right to protect their personal rights. The obligation to respect the privacy of the infected person applies not only to healthcare professionals, healthcare providers, persons serving in public administration bodies but also to any person who, either anonymously or publicly, disseminates information concerning

the infected person or details of their private life. The latter situation is particularly visible on the Internet. Dissemination of information in Internet forums facilitates the identification of infected persons, their families and loved ones. The purposes of disclosure of such information vary, but the majority of the disclosures are unauthorised.

Respect for the privacy of infected persons or so-called “casual contact” persons should be a general principle; therefore the relevant administrative bodies, which are responsible for the implementation of tasks carried out in the era of coronavirus, the broadly understood healthcare service, employers and other entities, are obliged to respect the privacy and dignity of these persons and protect their personal data in every situation.

4. Positions of the European supervisory bodies in the face of an epidemic/pandemic

In times of a raging epidemic that poses a global threat not only to a large part of the population but also to public order, the flow of information is extremely important. Rapid and efficient transmission of information is the key to dealing properly with crisis situations – this applies not only to citizens but also to public services of all kinds. An emergency situation often requires extraordinary measures and practices, which are not always typical, day-to-day solutions. Having people's lives and health first and foremost in mind, the right to privacy and personal data protection must not be forgotten. To what extent, however, should the existing rules be respected? Does an emergency situation justify not complying strictly with them? The General Data Protection Regulation, as a general legal act, respecting the principle of technological neutrality, does not contain specific provisions for extreme situations such as a pandemic, but this does not mean that no tools are foreseen in case of extraordinary circumstances. It is sufficient to mention the recitals of the GDPR that provide only interpretative guidance for understanding of the normative part of the Regulation, where the word “epidemic” appears. Therefore, the lack of specific provisions does not constitute an obstacle – a proper interpretation of the current regulations in the light of

the general principles and objectives of the GDPR, as well as a rational approach to them, will make it possible to balance the interests of individuals in relation to the protection of their personal data with public interests, especially in the field of public health. It is sufficient to recall recital 4 of the GDPR, quoted in the Introduction of this paper, which refers to the social function of the right of personal data protection and the obligation to have it balanced against other fundamental rights, in accordance with the principle of proportionality. An important question is where to look for information and guidance on how to process data in these exceptional circumstances in order to combat the virus effectively, while maintaining certain standards of personal data protection.

In view of this epidemic state of affairs, discussions on the correct interpretation of the data protection provisions in this unusual and unexpected situation have been intensified. It did not take long for the European Data Protection Board and national data protection authorities to react. So let us take a look at the recommendations of the EDPB and the bodies of several European countries.

4.1. European Data Protection Board

On 16 March 2020, the European Data Protection Board (EDPB) issued its first announcement – the President of the Board, Andrea Jelinek, underlined that, even in these exceptional times, the data controller must ensure the protection of the personal data of the data subjects⁶⁹ Following this line of thought, on 19 March 2020, the EDPB issued an official statement on the processing of personal data in the context of the COVID-19 outbreak. It was highlighted that the main objective for the moment should be the fight against infectious disease, but personal data that will be processed during the activities undertaken should not be disregarded. It was also indicated that: "Emergency is a legal condition which may legitimise restrictions of freedoms. provided these restrictions are proportionate and limited to the emergency period."⁷⁰ The following section addresses two

69 Statement by the President of the EDPB on the processing of personal data in the context of the COVID-19 outbreak; source <https://uodo.gov.pl/pl/138/1458> accessed: 22 March 2020

70 Statement on the processing of personal data in the context of the COVID-19 outbreak adopted on 19 March 2020; source: <https://uodo.gov.pl/pl/138/1463>, accessed: 22 March 2020

main issues in relation to data processing that arise in the context of coronavirus – the basis for processing and processing of data by employers, as well as location data.

It is commendable that EDPB has indicated the basis for processing that can be applied in the event of an epidemic. The authority emphasises that this does not always have to be a consent of individuals – both Article 6 of the GDPR, concerning ordinary data, and Article 9 of the GDPR, regulating the processing of special categories of personal data, contain grounds for empowering public authorities, including healthcare authorities, as well as employers, to process personal data without consent in situations where there is a substantial public interest in the field of public health. As far as employers are concerned, the processing of special categories of employees' personal data may be necessary for compliance with a legal obligation to which the employer is subject such as obligations relating to health and safety at the workplace. Another reason may be the public interest, such as the control of diseases and other threats to health. As underlined by the EDPB, the GDPR also foresees derogations to the prohibition of processing of certain special categories of personal data, such as health data, where it is necessary for reasons of substantial public interest in the area of public health (Article 9(2)(i) of the GDPR), on the basis of Union or national law, or where there is the need to protect the vital interests of the data subject (Article 9(2)(c) of the GDPR).⁷¹ Recital 46 of the GDPR was also rightly referred to, relating to the processing of data in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters. The analysis of the above issue on the grounds of the Polish labour law regulations has been presented in a separate chapter of this study.

An important issue highlighted by the EDPB is the processing of telecom data, including specifically location data. In connection with the epidemic, many countries have introduced restrictions on mobility, and a large number of people have been placed in quarantine – in many cases, self-isolation at home. Location data

⁷¹ Ibid.

can be used to verify that these persons comply with the restrictions imposed on them and stay in specific locations. The EDPB argues that attention should also be paid in such cases to the provisions implementing the ePrivacy Directive, however, in principle, location data can only be used by the operator when made anonymous or with the consent of individuals. In its declaration, the EDPB underlines that the Member States may introduce legislative measures to safeguard public security. However, such exceptional legislation is only possible if it constitutes a necessary, appropriate and proportionate measure within a democratic society⁷². In Poland, Directive 2002/58/EC was implemented by means of the Act of 16 July 2004 – Telecommunications Law⁷³. The Act provides for situations in which the disclosure of data protected by telecommunication secrecy will not be considered an infringement of the law, especially in the case of access by authorised services for reasons of national defence and security, as well as in situations necessary for saving lives, e.g. in the case of calls to emergency numbers.

Also worth noting is the recent amendment to the Telecommunications Law, made by means of the Act of 2 March 2020 on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations⁷⁴, which expanded Article 161 of the Telecommunications Law by adding paragraph 4 with the following content: "4. The Operator shall process end users' personal data to the extent necessary to perform the obligations referred to in Article 21a of the Crisis Management Act of 26 April 2007 (Journal of Laws of 2019, item 1398 and of 2020, items 148 and 284)". The Crisis Management Act has also been amended by the Act of 2 March 2020 on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations – Article 21a(3) and (4) have been amended in connection with the imposition of an obligation on mobile public telecommunications network operators to "(...) immediately, free of charge, send or forward messages to all or the groups of end-users, in particular those within an area

⁷² Ibid.

⁷³ Consolidated text: Journal of Laws of 2019, item 2460, as amended.

⁷⁴ Journal of Laws of 2020, item 374

specified by the Director of the Government Centre for Security, on a single occasion or for a period specified by the Director.⁷⁵ The amendment to the provision focused on the frequency of transmission of messages (now they can be sent for a certain period, not just once), and the possibility to determine a target group by geolocating the user groups to which the message is to be sent. This is the solution also mentioned by the EDPB in its statement – the use of location data to send text messages to individuals in a specific area. However, as underlined by the EDPB, these data should be anonymously processed by state authorities, in a way that individuals cannot be re-identified. If it is not possible to process these data anonymously, appropriate steps should be taken on the basis of the ePrivacy Directive to introduce appropriate legislative measures to allow the processing of non-anonymised location data after applying “adequate safeguards, such as providing individuals of electronic communication services the right to a judicial remedy”⁷⁶. The EDPB also stresses the importance of the proportionality principle, with which the planned solutions should be implemented.

The Polish application called “Home Quarantine” (“Kwarantanna domowa”), prepared at the request of the government, can also be mentioned in this case. It allows verifying the place of residence of a person subjected to home quarantine by downloading the GPS location of the device (with the user’s consent) and puts the user under the obligation to take his/her photo when so requested via SMS. Article 9(5) of the application service regulations says: “The processing of personal data processed in the Application and in the System supporting the operation of the Application by the controller and entities to whom the data have been made available is performed due to important public interest, i.e. the existing crisis situation related to the spread of SARS-CoV-2 virus (Article 9(2)(i) of the GDPR) and in connection with the data processing entrustment agreements concluded

⁷⁵ The Crisis Management Act of 26 April 2007, consolidated text of 5 July 2019 (Journal of Laws of 2019, item 1398) as amended.

⁷⁶ Statement on the processing of personal data in the context of the COVID-19 outbreak adopted on 19 March 2020; source: <https://uodo.gov.pl/pl/138/1463> accessed: 22 March 2020

with entities providing technical support and maintenance services for the said Application and System.⁷⁷

The Act of 31 March 2020 amending the Act on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and certain other laws⁷⁸, which is one of the laws forming part of the so-called "Anti-crisis shield", changed the nature of the Home Quarantine application – it has become mandatory. Until now, it has been an auxiliary tool that people in self-isolation could use voluntarily. The Act of 2 March 2020 on Special Solutions Preventing, Counteracting and Combating COVID19, Other Infectious Diseases and the Ensuing Crisis Situations⁷⁹ introduced Articles 7e and subsequent articles, specifically concerning smartphone applications. In the explanatory memorandum to the bill, one concise sentence was devoted to this amendment, without any argumentation: "The regulation concerning mobile application is important for counteracting COVID-19 – Article 7e of the amended act".⁸⁰ According to that provision, only persons who are blind or partially sighted and those who have declared that they are not users or subscribers of the telecommunications network or do not have a mobile device which enables them to install the software are exempt from the obligation. This declaration is made under pain of criminal liability for making a false declaration. It should also be remembered that in accordance with the rules of service provision, data processed in connection with the use of the service will be stored for the period of limitation of claims, i.e. six years from the moment of "deactivation from the application" (Article 9(11) of the application service regulations). Imposing an obligation to use the application on all persons under quarantine is a controversial

⁷⁷ Source: <https://www.gov.pl/attachment/f0b9c5d5-0622-4b2e-ae0d-f72d70ea83b6> accessed: 24 March 2020

⁷⁸ Journal of Laws of 2020, item 567

⁷⁹ Journal of Laws of 2020, item 374

⁸⁰ Explanatory memorandum to the bill amending the Act on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and certain other laws, form No 301, source: <http://orka.sejm.gov.pl/DrukI9ka.nsf/0/985BF1E49CA2D-51AC12585370038D2A6/%24File/301.pdf> accessed: 31 March 2020

solution, which is also widely commented on by NGOs, such as Panoptikon, expressing concerns about the privacy of application users.⁸¹

As regards the processing of data in employment in connection with COVID-19, the EDPB stresses the need to respect national law in this respect for all processing operations to be carried out in compliance with those provisions. Furthermore, the European Data Protection Board underlines the requirement to respect the general principles of personal data processing, in particular concerning specific purposes, respecting the principle of communication and applying appropriate security and confidentiality measures.

4.2. The Personal Data Protection Office

How does the Polish Personal Data Protection Office (UODO) compare to the European Data Protection Board? The first statement in the context of COVID-19 was published at the end of February⁸² – as a response to a request from the Ministry of Digital Affairs regarding the possibility of sending messages to mobile phones of people who enter Poland. The Ministry expressed doubts as to whether the provisions of the General Data Protection Regulation (GDPR) would not be an obstacle to such planned activities. In the opinion of the President of the Personal Data Protection Office, with strict application of the procedures defining the mode of sending messages by SMS (the said Crisis Management Act), such actions will not constitute an infringement of the provisions of the GDPR.

Another communiqué of the President of the Personal Data Protection Office on the coronavirus appeared on 12 March 2020. The published information is a response to a number of questions addressed to the Office concerning the processing of health-related data. As the President of the UODO emphasises: "Provisions on the protection of personal data must not be presented as an obstacle to the implementation of the measures in connection with the fight against

⁸¹ The Home Quarantine application – mandatory does not mean effective, source: <https://panoptikon.org/aplikacja-kwarantanna-domowa-obowiazkowa-krytyka>, accessed: 31 March 2020

⁸² The Personal Data Protection Office dispels doubts of the Ministry Digital Affairs regarding the coronavirus; source: <https://uodo.gov.pl/pl/138/1445>; accessed: 22 March 2020

coronavirus⁸³. In addition, it refers to specific provisions, including the Special Act on preventing COVID-19. Article 17 thereof sets forth that the Chief Sanitary Inspector may issue decisions, including to employers, imposing specific obligations in relation to the prevailing epidemic situation. The President of UODO also draws attention to the possibility for the Prime Minister to issue instructions to entrepreneurs in the form of an administrative decision, to be implemented immediately upon its delivery. Although the communique does not contain specific instructions, it indicates the institutions and bodies from which information concerning the tasks and responsibilities, as well as the related data processing, should be sought – it indicates the Chief Sanitary Inspector as the competent authority. However, the President of the UODO rightly notes that the measures taken and initiated in connection with the epidemic correspond to the grounds for processing data in the GDPR in the context of the public health (Articles 6(1) (d) and 9(1)(i) of the GDPR).

In response to the widespread deployment of employees to work remotely at home, the President of UODO issued another communication on the principles of personal data protection when undertaking such remote work⁸⁴. It should be noted that the leaflet prepared by the UODO is quite succinct and contains only general security rules, which should also be applied in everyday work using various IT systems. The UODO has not attempted to propose specific secure software solutions which could support communication between employees and the employer in this emergency situation.

4.3. The Information Commissioner's Office

On 12 March 2020, the UK data protection authority, the Information Commissioner's Office (ICO), published a communique in connection with the spread of coronavirus, in which it stressed that electronic communication laws do not stop authorised public bodies from sending public health messages to people

⁸³ Statement by the President of UODO on coronavirus; source <https://uodo.gov.pl/pl/138/1456>; accessed: 22 March 2020

⁸⁴ Protection of personal data during remote working; source <https://uodo.gov.pl/pl/138/1459> accessed: 22 March 2020

as these messages are not direct marketing.⁸⁵ The ICO noted that public bodies might require additional collection and sharing of personal data to protect against serious threats to public health. It was also underlined that the safety and security of the public remain its primary concern and that this aspect will be taken into account when dealing with the processing of personal data.

In addition, a message addressed to data controllers has been published, stating that the ICO recognises the emergency in which everyone find themselves and does not intend to take regulatory action if it detects that standard data protection procedures are not being followed in relation to this situation. For example, this is the case of the extended timescales for a response on the exercise of data subjects' rights under the GDPR.

It was also noted that the rules do not prevent workers from working remotely, even on their own equipment, provided that the same kinds of security are in place as in normal circumstances.

One of the most common questions, which the UODO has also tried to answer, is whether it is possible to inform employees that one of their colleagues has been diagnosed with an infection. The ICO says it is acceptable to provide such information, but it should be limited to the necessary information only. It is not necessary to name the individual who is diagnosed with the virus.

Attention was also paid to collecting additional information about employees and visitors to the organisation. The ICO concluded that it is possible to obtain information from employees on whether they have recently visited a particular country or whether they are experiencing COVID-19 symptoms. It is essential to protect workers' health, but this does not mean it is necessary to collect a lot of data about them – it should be limited only to the requisite data and appropriate safeguards should be applied. It is recommended that potential visitors are informed

⁸⁵ Data protection and coronavirus; source <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/03/data-protection-and-coronavirus/> accessed: 23 March 2020

of the situation and that they re-consider their planned visit, taking government advice into account before they decide to come.

The last issue raised by the ICO is the possibility for the employer to make employees' personal data available to the relevant services. As the UK data protection authority emphasises, this is unlikely to be the case, but if it were to happen, data protection law would not stop the employer from doing so.

As it can be seen, the position adopted by the ICO differs slightly from the EDPB and UODO messages discussed above – first and foremost, a rational approach to the situation is at the forefront, but there is no indication of any precise proposals for solutions that would strike the right balance between the public interest and the protection of individuals' data and privacy.

4.4. French Data Protection Authority – CNIL

The French data protection authority, Commission Nationale de l'Informatique et des Libertés (CNIL), also issued a statement in response to the epidemic. The first statement was published on 6 March 2020 and reminded of the need to respect the personal data protection laws, as well as other national legislation on public health.⁸⁶ The Authority points out that employers, in particular, should refrain from the systematic and widespread collection of data on employees' health, as well as through individual enquiries of workers about the occurrence of symptoms of the disease, and in particular employers should refrain from the mandatory body temperature measurements of all workers and visitors to be sent to their superiors, as well as the collection of questionnaires concerning health data provided by all these persons.

At the same time, the CNIL specifies the recommended measures which employers may take in the event of an epidemic. The authority indicates that the provisions of the French Labour Code impose certain obligations on the employer: the employer is responsible for the health and safety of employees in connection

⁸⁶ Coronavirus (Covid-19): les rappels de la CNIL sur la collecte de données personnelles; source <https://www.cnil.fr/fr/coronavirus-covid-19-les-rappels-de-la-cnil-sur-la-collecte-de-donnees-personnelles> accessed: 23 March 2020

with the provisions of the Labour Code and laws governing the civil service. Therefore, the employer has to implement measures to prevent risks that may be associated with work and should conduct appropriate training and information campaigns. In the context of the fight against coronavirus, the CNIL recommends that employers should encourage employees to take appropriate measures, such as informing the competent public health authorities about their health condition, and recommend employees to work remotely if possible. If a case of infection is diagnosed, the employer has the right to record the date of the event and the identity of the employee, as well as information on organisational measures taken, e.g. isolation, remote working or contact with an occupational health professional. At the request of authorised services, the employer should also provide information on the circumstances of the infection if they are necessary for the medical treatment of the infected employee. Employees also have to exercise due care with regard to their own and their colleagues' health and safety and should, therefore, inform their employer about possible contact with the virus.

As one of the other obligations that may be imposed on companies and other entities, the CNIL indicates the need to implement a business continuity plan aimed at maintaining the organisation's core business. It should include measures to ensure the safety of employees and indicate the basic actions to be taken to maintain continuity of service.

At the end of the statement, the CNIL reminds that health data can be collected by the competent health authorities, as they are authorised to do so. Data concerning the symptoms of the disease and recent mobility of persons may be processed on a similar basis.

In a separate statement, the CNIL decided to dispel the doubts about operators sending on behalf of the government text messages containing safety instructions in connection with the epidemic.⁸⁷ The statement of 19 March 2020 explains

⁸⁷ Le gouvernements'adresse aux Français par SMS : le cadre légal applicable; source: <https://www.cnil.fr/fr/le-gouvernement-sadresse-aux-francais-par-sms-le-cadre-legal-applicable>; accessed: 23 March 2020

that such operations are provided for in both national and EU law and are in line with the GDPR.

The statement of the French Data Protection Authority is not substantially different from the ones analysed so far. The idea of a business continuity plan should certainly be assessed positively.

4.5. The German Federal Commissioner for Data Protection and Freedom of Information

The last authority whose reaction to this situation will be reviewed is the German Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragte für den Datenschutz und die Informationsfreiheit – BfDI). It is a federal authority, operating beside the authorities of the individual federal states (Länder). The statement of 13 March 2020 issued by the Data Protection Conference (Datenschutzkonferenz) – the body of independent German data protection authorities that supervise the federal government and state governments – adopted a common approach for employers and employees regarding the processing of data in connection with the coronavirus epidemic⁸⁸. It was underlined that the personal data protection laws do not preclude appropriate measures to prevent the spread of the virus. Detailed instructions were contained in a separate communication⁸⁹. Among the general concerns, the importance of taking into account the principles of proportionality and the legitimacy of the processing – even when processing health data in the event of an outbreak of disease – was emphasised once again. As examples of such authorised measures, the federal authority provides for the possibility for employers to collect sensitive employee data in specific cases, such as the detection of an infection or contact with an infected person, as well as staying in a risk area (classified as such by the Robert

⁸⁸ DSK gibt Hinweise zu Datenschutz und Corona; source: https://www.bfdi.bund.de/DE/Infothek/Pressemitteilungen/2020/07_Empfehlungen_Datenschutz_Corona.html; accessed: 23 March 2020

⁸⁹ Datenschutzrechtliche Informationen zur Verarbeitung von Personen bezogenen Datendurch Arbeitgeber und Dienstherren im Zusammenhang mit der Corona-Pandemie; https://www.bfdi.bund.de/DE/Datenschutz/Themen/Gesundheit_Soziales/GesundheitSozialesArtikel/Datenschutz-in-Corona-Pandemie.html?nn=5217154, accessed: 23 March 2020

Koch Institute) for a certain period of time. The collection and processing of visitors' data is also permitted in these circumstances. It was also pointed out that it would only be lawful to disclose the identity of persons who are infected or suspected of being infected if disclosure of this information is essential for the contact persons to take appropriate precautions.

It is worth noting that the statement indicates the specific legal grounds for the processing of personal data – based on Article 6(1)(c), (e) and (f) of the GDPR and Article 9(2)(b), (g) and (i) of the GDPR in connection with federal law – which should be applied to the identified employee groups in specific situations. It was also specified that the employer's obligation is to ensure an adequate level of health protection for workers, also during an epidemic which requires specific measures to be taken, but these measures should be proportionate and that the processing of personal data in this context, if any, should respect the confidentiality principle and have strictly defined purposes. Once processing is completed, these data should be erased immediately. However, the consent of the persons subject to the safeguards measures should only be taken into account as a basis for the processing if the persons concerned have been adequately informed about the processing and can voluntarily give their consent to the measure. It was also underlined that there might be some obligations for employees arising from the current legislation, for example, the obligation to inform about an infection for the sake of third parties.

The statement of the BfDI mainly repeats the instructions published by other European bodies, but the indication of the specific legal basis on which personal data should be processed in relation to the prevention of an epidemic should be positively assessed.

4.6. Summary and future outlook

After analysing the positions of the EDPB and the national data protection authorities, it can be concluded that, in principle, the steps taken with regard to data processing in the context of the control of the coronavirus epidemic are convergent. Every statement emphasises that an effective fight against a pandemic does not

mean that the fundamental rights of individuals – the protection of privacy and the protection of personal data – have to be neglected, but that these issues have to be properly balanced: it is necessary that the guiding principles will be those of proportionality and respect for the law in a context of public interest with the connection of interest of the individual.

Only a few statements or communiqués published by European data protection authorities have been discussed above. According to UODO⁹⁰, the Global Privacy Assembly – the global organisation of Data Protection and Privacy Commissioners – has published on its website (<https://globalprivacyassembly.org/covid19>) a list of statements of data protection authorities from around the world published in connection with the fight against coronavirus. The aim of gathering all the information in one place is to facilitate the mutual exchange of information, the sharing of experience and joint action to combat the epidemic while processing personal data, while respecting the universal principles of different countries' legislation.

In conclusion, it is worth mentioning the latest press reports concerning the activities of the European Commission. According to information published by the Reuters News agency⁹¹, eight European mobile operators (Orange, Vodafone, Deutsche Telekom, Telenor, Telia, A1 Telekom Austria, Telefonica and Telecom Italia) have agreed to provide the European Commission with the location data of their users, as requested by Thierry Breton, European Commissioner for Internal Market and Services. The target is to designate one operator in each EU Member State. The data collected would be used to monitor the spread of coronavirus in Europe and to help determine where there is the greatest demand for medical supplies.⁹² The data received from operators would be anonymised and

⁹⁰ Global cooperation for data protection and the fight against coronavirus [Globalna współpraca na rzecz ochrony danych i walki z koronawirusem]; source <https://uodo.gov.pl/pl/138/1460> accessed: 23 March 2020

⁹¹ Source: <https://www.reuters.com/article/us-healt-coronavirus-telecoms-eu/vodafone-deutsche-tel-ekom-6-other-telcos-to-help-eu-track-virus-idUSKBN21C36G> accessed: 26 March 2020

⁹² Source: <https://www.politico.eu/article/european-commission-mobile-phone-data-thierry-breton-coronavirus-covid19/> accessed: 26 March 2020

aggregated in such a way that no specific individuals could be identified on their basis. It was also underlined that any data collected in this way would be erased after the end of the epidemic. However, in view of the most recent reports on the scale of the pandemic, it is difficult to judge when the pandemic may actually end, and it will be quite a challenge to determine when the officially taken measures will become unnecessary. The European Commission does not clarify this matter. The scope of the data to be transmitted to the Commission and the specific purposes for which the data will be used may also be questionable. The European Data Protection Supervisor (EDPS), Dr Wojciech Wiewiórowski, also drew attention to this issue in a letter addressed to Director-General Roberto Viola (Directorate-General for Communication Networks, Content and Technology)⁹³. As the EDPS notes, the structure of European data protection law in its broadest sense allows for some exceptions in order to take effective measures to combat a pandemic, and effectively anonymised data are not subject to personal data protection laws. At the same time, the EDPS demands that the Commission should clearly define the dataset it wants to obtain and ensure transparency towards the public, to avoid any possible misunderstandings. It also stresses that even anonymised data will be subject to Commission Decision 2017/46 of 10 January 2017 on the security of communication and information systems in the European Commission, and that these data should be processed under appropriate confidentiality rules. The need to provide appropriate safeguards also applies to the transfer of data from telecommunication operators, while it would also be preferable to limit access to the data to authorised experts in spatial epidemiology, data protection and data science. The EDPS also emphasises the aspect of data retention. In EDPS's view, the solutions adopted should be recognised as extraordinary in view of the current situation and the Commission should, as declared, aim at their deletion as soon as the current emergency comes to an end. At the end of the letter, the European Data Protection Supervisor stresses how important for the public is the transparency of the measures and procedures adopted. He also stresses that if the Commission felt compelled at any point in

⁹³ Source: https://edps.europa.eu/sites/edp/files/publication/20-03-25_edps_comments_concerning_covid-19_monitoring_of_spread_en.pdf accessed: 26 March 2020

the future to change the envisaged modalities for processing, a new consultation of the EDPS would be necessary.

Despite the assurances of the Commission on the measures taken to ensure secure aggregation and processing of data, there are concerns about the privacy of mobile users. The scope of the data that operators will be obliged to provide, as well as the way they will use it, is not entirely clear. There is also a risk that, contrary to what has been declared, the data will not be deleted as soon as the epidemic comes to an end. Although the current crisis situation justifies taking such decisive and extraordinary steps, which could encroach on civil liberties and rights, obviously to the extent permitted by law, the most important aspect is that these measures should continue to be restricted only to such extreme circumstances and not become our everyday life, even after the epidemic has ended.

PERSONAL DATA PROTECTION



CORONAVIRUS AND THE LAW IN POLAND

TAXES



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15 COVID-19 and tax law

The coronavirus epidemic has strongly impacted the tax situation in Poland. This chapter discusses the most significant, in our opinion, tax issues, important for economic entities in our country.

1. The impact of coronavirus on tax audits and tax proceedings

SARS-CoV-2 virus enormously affects the functioning of most economic entities, public authorities and institutions in Poland. Among those there are also tax administration authorities and administrative courts which, among other things, review the cases of taxpayers in disputes with the authorities. To counter the negative effects of the spreading of SARS-CoV-2 virus it was necessary to implement far-reaching protection measures almost overnight and reorganize the operations of all institutions. The changes also affected the domain of taxes, including pending tax audits, customs and tax audits, court proceedings and administrative court proceedings, and many other proceedings pending under administrative enforcement and criminal regulations.

The course of legislative work and its final effect

At the initial stages of drafting the so-called anti-crisis shield⁹⁴ the draft assumed optional suspension of audits and proceedings by conducting authorities. By statutory delegation, the Minister of Finance was also conferred the power to

⁹⁴ The Act amending the Act on Special Solutions of Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and Certain Other Acts of 31st March 2020

optionally suspend all proceedings pending in the country or within a given area most affected by the epidemic.

In the final version of the draft and in the act ultimately enacted, an option for the Minister of Finance to suspend audits and proceedings was excluded, however leaving in place an option or indeed even requirement to suspend the course of procedural and judicial time limits in the following cases:

- 1) court proceedings, including administrative court proceedings,
- 2) enforcement proceedings,
- 3) criminal proceedings,
- 4) criminal fiscal proceedings,
- 5) petty offences proceedings,
- 6) administrative proceedings,
- 7) proceedings and audits conducted under the Tax Ordinance Act of 29th August 1997,
- 8) customs and fiscal audits,
- 9) proceedings in the cases referred to in Article 15f(9) of the Gambling Act of 19th November 2009 (Journal of Laws of 2019, item 847 and 1495 and of 2020, item 284),
- 10) other proceedings conducted under acts in the law.

On the other hand, time limits which have not yet started running are not initiated at all.

What does the suspension of procedural and judicial time limits in the above cases mean?

Many people confuse the concept of suspension of audit or proceedings with suspension of procedural time limits. So, what is the difference?

The suspension of proceedings or audits (which ultimately was not included in the regulations) would mean a complete suspension of all running time limits of a given case pending e.g. before tax authorities. In such case, no action is taken

in the suspended case, except those aimed at reopening the proceedings or securing evidence (Article 202 of the Tax Ordinance⁹⁵). Under the Tax Ordinance Act, suspended tax proceedings are reopened ex officio or at the request of the party by way of decision when the grounds justifying the suspension have ceased to exist. At present, this would be revoking the state of epidemic. As mentioned above already, this solution was not ultimately included by the legislature.

However, the procedural and judicial time limits were suspended. This means that during the epidemic (and the state of epidemic emergency) tax and tax and customs audits and tax proceedings, as well as other cases relating to taxes (and not only taxes) will continue. On the other hand, the suspension of procedural time limits means that some actions concerning a given case, e.g. time limit for lodging an appeal against a decision, remedying formal deficiencies of an application, drawing up a reply to authority's summons, will be suspended. Given an example of an appeal, if on the day of announcing the anti-crisis shield (which suspends running of these time limits) the time limit for lodging an appeal was pending, the taxpayer does not have to observe the exemplary time limit of 14 days to lodge the appeal. The time limit is suspended ex officio, which means that the taxpayer has the time necessary to perform a certain procedural action until the epidemic emergency ceases.

However, actions taken by taxpayers, also during the epidemic, will still be effective. Both tax authorities and the party may remain in justified inaction, but they do not necessarily have to. If a decision is issued by a tax authority, and the taxpayer wants to appeal against such a decision and lodges an appeal with the authority of the second instance, such an action would be allowed and effective. In fact, without an explicitly designated time limit, the taxpayer may do so at any time because, as indicated above, the time limit for performing such is suspended.

⁹⁵ The Tax Ordinance Act of 29th August 1997 (i.e. Journal of Laws of 2019, item 900 as amended).

The taxpayer may as well agree with the authority's decision. In such a case it is best not to wait for the epidemic to cease, because at the back of every taxpayer's mind there must be the interest on arrears accruing.

Advantages and disadvantages of the solution

Advantages (which may prove to be in fact disadvantages for some) depend mostly on the legal and tax situation of the party to such proceedings, audit, or court case. For some it would be advantageous to resolve the matter as quickly as possible, which could, for example, bring about a change in the decision of the first instance authority and ultimately result in, after a few months (and sometimes years), the desired refund of unduly collected tax together with interest due. On the other hand, the very ruling on the case aside, it is beneficial that taxpayers can, in a financially difficult (and probably not only financially) time of epidemic, deal with other matters than audits or proceedings. Perhaps this will allow the taxpayers to focus more on employee matters, on reorganizing the workflow, etc. The temporary absence of requests to provide extensive documentation for audit purposes may indeed prove to be a true salvation for some. We must also remember that due to the virus spread concerns such actions as witness hearing, inspections or clarifications of the parties would not be performed regardless, so in some situations it is a fully justified and in fact the only solution available.

The practice

It is probably every day that attorneys from all over Poland who handle tax cases for their clients receive similar notices: "due to the coronavirus epidemic I hereby notify you that the planned action will not take place." Currently tax authorities are willing to take the opportunity not to initiate certain actions. Sometimes, as in the case of witness hearing, this is fully justified. However, sometimes the justified inaction stretches a little too far. In most tax cases the scope of audits or proceedings is limited to exchange of documentation only which would still be possible with appropriate precautions applied. Perhaps an attempt should be made to select the most urgent cases or cases conducted for the longest and try to resolve them? Currently the *in dubio pro tributario* principle (ruling in taxpayer's favor when in doubt) should be taken into consideration and given particular

prominence. The research thus far, conducted by, among others, the Ombudsman for Small and Medium-Sized Enterprises, has shown that this principle is practically not applied at all by the authorities. Let us hope that something will change in this matter during the time of epidemic.

2. Changes effective as of 31st March 2020

In case of applications for tax relief with respect to deferring or breaking down the payment of tax or tax arrears into installments, the legislature decided not to provide for default charge (currently 4 percent of the amount of tax or tax arrears). The exemption covered only those taxes which are state budget revenue (PIT, CIT, VAT, excise duty). In case of local taxes and fees the default charge will apply.

The default charge exemption regards also contributions due for the period starting from January 2020, collected by the Social Insurance Institution that has been obliged accordingly.

To enjoy the default charge exemption, it is necessary to file a relevant application during the state of epidemic or within 30 days after it has ceased. The information provided on the website of the National Revenue Administration reads that the **directors of Revenue Administration Chambers have received guidelines with respect to granting tax reliefs. Pursuant to the guidelines, if the taxpayer has not previously benefited from public aid and has no other debts, it is not necessary to audit the taxpayer's financial standing, and whether the relief is to be granted should be assessed only in the context of taxpayer's statement contained in the application.** The same principles apply to:

- » annual CIT or PIT tax liabilities for 2019, however, provided that the taxpayer complies with the above conditions and that the taxpayer's primary objects are industries which are directly impacted by the coronavirus (transport, tourism, culture, gastronomy, hairdressing and beauty services, physical culture, fitness, wellness establishments, etc.),

- » a taxpayer whose application concerns liabilities due in March and previous arrears, but the proportion of March liabilities amounts to over 50 percent in regard to the previous liabilities, and the taxpayer has no other debts and has not applied for public aid previously.

The guidelines also provide that the above cases are to be considered first, without undue delay and without a complex evidence procedure, in the good faith of external client principle and building confidence in tax authorities and the Business Constitution which provides for actions of administration suitable for the situation. The applications of other taxpayers, whose liabilities originated before 1st March 2020 in full or in a proportion of more than 50 percent, are to be reviewed according to examination of taxpayer's property (the taxpayer files a declaration of financial interests and assets owned) and public aid (it is also examined whether the taxpayer has previously benefited from public aid).

All applications may be submitted in paper, by electronic means (e-PUAP or electronic signature) or even by electronic mail, however, in the latter case, subject to a statement that the original paper application will be filed with the tax office after the epidemic ceases. Tax refunds and tax overpayment occurring before the day of tax arrears will not be credited to tax arrears deferred or broken down into installments. Such will be refunded directly, unless applied otherwise by the taxpayer.

New rules on donations

In case of dedicating resources to combat the coronavirus by 30th April 2020 taxpayers may deduct even 200 percent of aid value from the taxable income.

Donations made between 1st January 2020 and 30th September 2020 to counter COVID-19 to:

- » entities performing therapeutic activities included in the list referred to in Article 7 of the COVID-19 Act, i.e. entities performing therapeutic activities

included in the list drawn up by the locally competent Director of the NHS Regional Branch, in consultation with the regional governor; these are mainly hospitals (the list is published in the official journal by regional governors and in the NHS Public Information Bulletin);

- » Agency of Material Reserves;
- » Central Base of Sanitary and Anti-Epidemic Reserves

will be deductible by CIT and PIT payers from taxable income pursuant to the below, very favorable rules:

- 1) for donations made by 30th April 2020 – an amount equivalent to 200% of the donation value is deductible;
- 2) for a donation made in May 2020 – an amount equivalent to 150% of the donation value is deductible;
- 3) for donations made by 30th September 2020 – an amount equivalent to 100% of the donation value is deductible.

Zero VAT rate

On top of the above preferences, as of 1st February until 31st August 2020, a zero VAT rate applies to donations of the below items made to the aforementioned entities:

- 1) medical devices;
- 2) medicinal products and active substances;
- 3) biocidal products (disinfectants only);
- 4) laboratory glass and laboratory equipment;
- 5) diagnostic tests;
- 6) personal protective equipment (masks, face shields / screens, goggles, safety goggles, overalls, shoe protectors, caps and gloves only).

Zero percent VAT rate may only be applied if a relevant donation agreement between the donor and the donee is concluded in writing, where such an agreement must provide that the goods supplied will be used to combat COVID-19 (in

case of donations made between 1st February 2020 and 25th March 2020 it is only required to confirm the donation in writing).

The solutions introduced are beneficial for taxpayers because:

- 1) they allow for the deduction of (also) "retroactive donations" made before the date the Act entered into force;
- 2) there is a donation value multiplier;
- 3) 19% flat rate PIT payers and those taxed with lump-sum tax on registered income may also enjoy the deduction;
- 4) deductions for donations may be included in calculating the amount of current advance payments – as early as in 2020 (in case of natural persons, this applies to revenue from business, rent or lease).
- 5) the preference relating to donations in kind also applies to VAT.

The new regulations may serve as an incentive to support hospitals. However, in order to benefit from the introduced preferences, one should note that in the case of medical institutions, donations may only be made to the institutions included in the list of the Director of NHS Regional Branch. Moreover, in cash donations must be documented with proof of payment to the bank account of the donee. Expenses borne for the above purposes will not be deductible from taxable income if previously classified as deductible costs.

Possible non-collection of interest

The new provisions vested the Minister of Finance with the power to issue an ordinance not to collect default interest on tax arrears. However, these provisions do not directly affect the situation of economic entities.

Having in regard the duration of the state of epidemic emergency and the state of epidemic due to COVID-19 as well as the ensuing implications, the Minister of Finance was granted a discretionary power to refrain in full or partially from collecting interest on tax arrears by way of an ordinance. For now, no such ordinances have yet been issued. Undoubtedly, the disadvantage of the solution in

question is that it merely broadens the powers of the Minister of Finance, and that it has no direct effect of automatic non-collection of interest. Thus, it does not solve the emerging payment problems, nor does it bring the discussed preference into existence. This solution is certainly not satisfactory for economic entities which advocated for partial tax collection suspension as early as at the moment of the Act entering into force. It is comforting, however, that the legislature has provided for such an option.

Loss deduction

The new regulations provide for deducting 2020 loss from income earned in 2019 if the taxpayer's revenue in 2020 is at least 50% lower than that generated in the previous year. In 2021, after having established the amount of loss for 2020, taxpayers will be able to amend their returns for 2019 and to reduce the income generated in 2019 by the amount of the loss, on one-off basis, however, not more than by PLN 5 million. If this option is not used, the loss may still be settled under the existing provisions. Therefore, exercising this right is possible by amending the tax return for 2019.

For example, in 2019, the taxpayer reported revenue of PLN 30 million and income of PLN 10 million. Therefore, the taxpayer paid PLN 1.9 million in tax. In 2020, the taxpayer reported revenue of PLN 3 million and a loss of PLN 1 million. Therefore, the taxpayer may amend the tax return for 2019 and settle the loss of PLN 1 million in 2020 with income of PLN 10 million generated in 2019.

Much as the regulation provides for the deduction of tax loss from income generated in 2019, which has some positive aspects, reservations arise with respect to making the deduction conditional on the fall in income and the setting of the 50 percent limit of the fall. Due to the effects of COVID-19, economic entities not at all have to experience fall in revenue, even more so not a fall of 50 percent which threatens their liquidity. This is because such entities may, in order to secure the source of revenue and to operate in the long term, waive their margin, therefore experience significant decrease in income. The

legislature has also failed to indicate the grounds for the limit of maximum loss deduction of PLN 5 million.

Deferred PIT advance payments

Advance payments collected in March and April this year on account of service, employment, outwork or cooperative employment and social security allowances are payable by 1st June.

PIT advance payments collected in March and April 2020 are payable until 1st June 2020. This regulation applies to revenue generated on account of service, employment, outwork or cooperative employment and social security allowances.

This solution is beneficial for economic entities since deferred payments of liabilities to the treasury will allow the businesses to maintain their liquidity, at least in this short period, i.e. by 1st June 2020. This regulation applies to tax bearers who suffered negative economic consequences due to COVID-19.

Bad debt relief at the debtor's side

A taxpayer who suffered at least 50 percent year -on-year fall in revenue has the right not to reveal outstanding liabilities when calculating the amount of income tax advance payments.

New regulations provide that the debtors are not required to include outstanding liabilities when calculating income tax advance payments. The cumulative conditions to fulfill in order to benefit from this preference is a year-on-year fall in revenue of at least 50 percent and suffering negative economic consequences due to COVID-19. Creditors' rights with respect to bad debt relief remain unchanged.

This preference is beneficial for taxpayers who experience serious disturbances caused by COVID-19 pandemic and who struggle with liquidity. Although this will not resolve the issue of indebtedness of businesses, it will slower the pace of debt increase, at least the debt owed to the treasury.

This relief applies to taxpayers who:

1. have suffered negative economic consequences due to COVID-19 in the taxable period;
2. in the taxable period generated revenue in an amount at least 50 percent lower year-on-year. In the case of taxpayers who started business in 2019, the relation of fall in revenue of 50 percent is established in relation to average revenue generated in the year of starting the business. This condition does not apply if the taxpayer:
 - » in 2019 was subject to taxation in a form that does not require establishing the amount of revenue generated;
 - » started business in the last quarter of 2019 and did not generate any revenue throughout this period;
 - » started business in 2020.

Payments to accounts outside the “white list”

During the state of epidemic emergency and the state of epidemic, the time limit for notifying a payment made to a bank account outside the so-called white list was extended to 14 days. This time limit counts from the date of transfer order. Taxpayers are not allowed to deduct the cost in the portion in which the payment in a transaction of over PLN 15 thousand, made between economic entities, was transferred to an account outside the white list as at the date of the transfer order. Additionally, in such a situation, the economic entity is at risk of being jointly and severally liable for tax arrears together with the contractor if the contractor fails to pay output VAT on the transaction. However, the above sanctions can be avoided. If the taxpayer has paid the due amount by transfer to an account outside the white list, the taxpayer may notify the head of the tax office competent for the issuer of the invoice. Until now the taxpayer has had three days from the date of the transfer order to submit such a notification (ZAW-NR). Currently this period is longer, since it is 14 days. The benefit of the solution implemented is stretching the time limit for notifying a payment made to a bank account outside the so-called white list, from three to 14 days. At the same time, it seems that

in the context of staff shortages and other, additional burdens imposed on economic entities during the epidemic, the most beneficial solution would be to suspend the above mentioned notification requirement for the duration of the epidemic.

Social allowances with new exemption limits

New exemption limits have been introduced for PIT exemption items:

- » assistance aid paid with the funds of a company or an inter-company trade union organization to employees who are members of such an organization – up to no more than PLN 3,000 in 2020 (an increase versus the current limit of PLN 1,000);
- » assistance aid received in case of individual random events, natural disasters, long-term illness or death paid from other sources – up to no more than PLN 10,000 in 2020 (an increase versus the current limit of PLN 6,000);
- » in cash and in kind benefits received by an employee with respect to financing of social activities referred to in the provisions regarding the Company Social Benefits Fund (ZFŚS), financed entirely from the ZFŚS or trade union funds – up to no more than PLN 2,000 in 2020 and 2021 (an increase versus the current limit of PLN 1,000); the exemption does not apply to vouchers, coupons and other notes allowing exchange for goods or services;
- » subsidies from sources other than the social fund and the ZFŚS allocated for recreation of children and young people up to the age of 18 in the form of holidays, summer and winter camps, including those related to education, sanatorium treatment, treatment in healthcare and sanatorium facilities, rehabilitation and training facilities and treatment and care facilities, as well as journeys associated with such recreation and treatment organized by entities operating in this area of business – up to an amount of no more than PLN 3000 in 2020 and 2021 (an increase versus the current limit of PLN 2000).

In the difficult time of epidemic, granting broadly construed social allowances will certainly be particularly appreciated by employees. All the more so if a larger than usual portion of these benefits will be exempt from PIT.

The scale of changes is relatively large, because if a person is granted all the benefits covered with increased exemptions in the maximum non-taxable amount, the exemption will cover the amount of PLN 18,000 (in 2020) and 12,000 (in 2021), while in 2019, under the same exemptions, the amount of non-taxable benefits was PLN 10,000.

It is difficult to find flaws among the discussed solutions, however, they are temporary in nature. Assistance aid paid with the funds of company or inter-company trade union organization to employees who are members of such an organization and assistance aid received in case of individual random events, natural disasters, long-term illness or death paid with funds from other sources than the ZFŚS, trade union funds or in accordance with other provisions will be subject to tax exemption up to the increased limit only in 2020. In cash and in kind benefits financed with the funds of the ZFŚS or trade union funds and subsidies for recreation of children and young people up to the age of 18 financed with funds from sources other than the social fund and the ZFŚS will in turn be subject to increased exemption limits in 2020 and 2021. The form of granting the indicated benefits has not changed. Therefore, in order to benefit from the increased exemptions, it is enough just to account for the new exempted amounts when calculating the amount of PIT liabilities due.

Layoff allowance, food and accommodation exempt from PIT

In the case of persons operating non-agricultural businesses, those who work under agency agreements, contracts of mandate or other agreements for the provision of services, the layoff allowance paid out in 2020 will be exempt from income tax. The condition is that these persons are not subject to social insurance under other titles.

Similarly, in the case of benefits provided by employers to employees in 2020, where such benefits consist in ensuring accommodation and food necessary for employees to perform their duties, the income tax exemption will apply.

The layoff allowance was introduced into the Special Act as one of the solutions to support people affected by business shutdown. Since its purpose is to

help people in financial distress, this allowance will naturally be non-taxable in order to maintain the highest possible net value. The second of the discussed PIT exemptions concerns the value of benefits provided by employers in ensuring accommodation and food necessary for employees to perform their duties. Under the Special Act, employers whose objects involve ensuring the operation of critical infrastructure systems and facilities, subcontractors and suppliers, as well as undertakings that ensure the operations of liquid fuel stations and natural gas stations may change employee work scheme or schedule in a manner necessary to ensure the continuity of operations of the undertaking or station. They may also instruct employees to work overtime within the scope and to the extent necessary to ensure the continuity of operations of the undertaking or station. However, if so is decided, they will have to provide the employees with previously mentioned accommodation and food. Exempting these benefits from taxation should be considered a positive change. It is hard to indicate any faults in regard to both of those exemptions.

In order to apply the preferences, it is enough not to include tax-exempt benefits when calculating due PIT liabilities.

One-off depreciation write-offs

The new regulations allow for one-off amortization write-offs on the initial value of fixed assets acquired to produce goods related to countering the effects of COVID-19, i.e. protective masks, ventilators, disinfectants, and which were included in the register of fixed assets and intangible assets in 2020.

This solution is to assist those economic entities which purchased new fixed assets to produce goods related to combatting COVID-19 since they have the right to one-off depreciation write-offs. Pursuant to the regulations adopted, goods used to counter COVID-19 epidemic include, but are not limited to, protective masks, ventilators, disinfectants, medical protective clothing, shoe protectors, gloves, glasses, goggles, sanitizers and hand hygiene products. By using the phrase "including, but not limited to" in the act, the legislature has not ruled out one-off depreciation write-offs on fixed assets used to produce goods employed in

countering COVID-19 epidemic other than those explicitly listed in the act. The act contains a non-exhaustive list of goods, which in real terms means that the goods explicitly listed therein are not the only to be employed to counter COVID-19 epidemic, and thus, the fixed assets used to produce these goods are not the only to be depreciated with a single write-off.

Since the provisions in question are special provisions, they do not affect the general rules for one-off depreciation limits. In other words, if a taxpayer uses the option to make a one-off depreciation write-off under the anti-crisis law, this will not affect the limits of one-off depreciation specified in general regulations (CIT/PIT). Still, the taxpayers will be able to make one-off depreciation write-offs under the existing rules if they decide not to employ the newly implemented regulation. It is difficult to find flaws with the solution in question, however, it might entail negative consequences. It may happen that ultimately tax authorities will contest the right to one-off depreciation write-offs on fixed assets purchased to produce goods related to countering COVID-19. The authorities may hold that the goods produced (other than those listed in the act) were not used in countering the epidemic.

Under the solution adopted, in order for taxpayers to benefit therefrom, the taxpayers should:

- » acquire fixed assets used in the production of goods related to countering COVID-19;
- » include these assets in the register of fixed assets and intangible assets in 2020.

The new regulations implemented allow for making one-off depreciation write-offs on the initial value of fixed assets acquired to produce goods related to countering the effects of COVID-19, i.e. protective masks, ventilators, disinfectants and included in the register of fixed assets and intangible assets in 2020.

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Opting out of simplified advance payments scheme

Small taxpayers, if suffering from negative economic consequences due to COVID-19, have the right to opt out of the simplified scheme for income tax advance payments due for the period March to December 2020. The advance payments will be based on the income actually generated in 2020. Taxpayers should notify of their intention to opt out of the simplified scheme in the annual return for 2020.

The decision to opt out of the simplified advance payment scheme should be considered by those taxpayers who generated significantly more revenue in the year based on which the amount of advance payments is calculated than they expect to generate in the current year. If such is the case, opting out of the simplified advance payment scheme should result in improving taxpayers' liquidity (since there will be no need to freeze the funds until annual settlement).

The only condition to opt out of the simplified advance payment scheme is experiencing negative economic consequences due to COVID-19 epidemic. On their intention to opt out of the simplified advance payment scheme the taxpayer should notify in the annual tax return for 2020.

R&D relief

Companies carrying out research and development to combat coronavirus may settle their expenses before the deadline for submitting annual returns arrives. They can benefit from the relief as early as at the stage of income tax advance payments. The R&D tax relief may be applied as early as at the stage of income tax advance payments. This right is vested in economic entities conducting research and development to develop products used to counter COVID-19.

The preferential 5 percent rate under the so-called IP Box has been provided as early as at the stage of advance payments for tax levied on income from qualified intellectual property rights used to counter COVID-19.

Improved liquidity of entities engaged in combating the virus is a clear advantage of this solution. A limited number of entities who can benefit from this solution can be considered a disadvantage. In view of an imminent recession (and in order to prevent it) it would be reasonable to include all R&D companies, whether their R&D effects in fact help in combating COVID-19 or not, among the beneficiaries of IP Box and R&D reliefs applied in income tax advance payments. Those taxpayers whose R&D works concern products/intellectual property rights related to countering COVID-19 could be additionally privileged, e.g. by a still lower tax rate in case of IP Box or increased level of cost deductibility in the R&D relief.

In the case of R&D relief, the eligible costs incurred for R&D aimed at developing products necessary to counter COVID-19 may be deducted from the income which is the basis for tax advance payments.

In the case of IP Box, the first advance payment at the 5 percent tax rate is calculated on total income from eligible intellectual property rights earned as of 1st

March 2020. Advance payments for subsequent taxable periods are calculated as the difference between the tax calculated at 5 percent rate on income earned as of 1st March 2020 and the total amount of advance payments due for previous taxable periods.

The IP Box preference may also be used without qualified intellectual property nor prospects of obtaining it, on the condition of notifying of such or applying to obtain it within six months following the end of the month in which IP preference is applied.

Changes to time limits

The new regulations postponed to 20th July 2020 the time limit for payment of tax levied on income from buildings due for the period March to May 2020. In this case, the collective conditions to satisfy are as follows:

- » at least 50 percent year-on-year fall in revenue, and
- » suffering negative economic consequences due to COVID-19.

CIT-8 by the end of May or July

The time limit for submitting CIT-8 returns and payment of tax by CIT payers has been extended to 31st May 2020. In case of taxpayers who have only been earning income subject to exemption, or whose revenues generated from public benefit activities comprise at least 80 percent of their total revenue, the time limit for filing tax return and for tax payment has been extended to 31st July 2020.

The actual extension of the time limit to submit CIT-8 return and to pay the corporate income tax is an unquestionable benefit of the solution provided by the Ordinance of the Minister of Finance on Extending the Time Limit to Submit Tax Returns on the Amount of Income Earned (Loss Incurred) and to Pay Due Tax by Corporate Income Tax Payers of 27th March 2020 (Journal of Laws of 2020, item 542). Under the present circumstances (which should be considered extraordinary) it is necessary to adopt solutions that cater for the broadly understood interest of taxpayers.

Thanks to this solution, CIT payers will be able to actually use the funds that should normally pay CIT liabilities to settle the liabilities towards e.g. employees instead. Thus, they will secure both jobs and the workplace as well. This regulation does not mean that it is possible not to pay tax liabilities, however, it effectively postpones the obligation to pay and to timely file a tax return.

A disadvantage of the adopted solution is that if most of the funds (including those allocated to pay income tax) are used to settle current liabilities, taxpayers may end up still lacking the resources to pay CIT on the expiry of the time limit on 31st May/July 2020.

Preparation and provision of certain information

The time limit for preparing and providing information on contracts concluded with non-residents as construed by the foreign exchange law is extended to the fifth month after the end of tax year (the extension applies from 31st March to 31st May 2020). On the other hand, the time limit for tax bearers to provide non-residents with information on payments made and lump-sum income tax collected has been extended to the end of the fifth month of the year following the tax year (the extension applies to entities whose tax years end in the period from 31st December to 31st January 2020).

Pursuant to the Ordinance of the Minister of Finance on the Extension of Time Limits for Preparing and Providing Certain Tax Information, time limits for preparing and providing ORD-U by legal persons (i.e. information concerning contracts concluded with non-residents) have been extended. The time limit for providing IFT-2R (i.e. information on payments made and lump-sum income tax collected) has also been extended.

An advantage of this solution is that it postpones disclosure obligations and thus enables economic entities to focus on properly safeguarding the undertaking and employees against the effects of COVID-19 epidemic.

Transfer pricing

The time limit for transfer pricing reporting (TPR) has been extended by 30th September 2020 for related parties whose financial year (under CIT Act) or tax year (under PIT Act) started after 31st December 2018 and for which the originally set 9-month time limit for transfer pricing reporting is 29th September 2020 at the latest.

For other related parties, i.e. for related parties whose financial year (under CIT Act) or tax year (under PIT Act) started after 31st December 2018 and for which the original 9-month time limit for transfer pricing reporting expires on 30th September 2010 or later, the 9-month time limit still applies.

Taxpayers will gain more time which they can use primarily to take actions to protect their business against the effects of coronavirus crisis.

On 16th March this year the Ministry of Finance published specimens of transfer pricing reporting electronic documents (TPR-C and TPR-P). However, the Ministry's works on publishing interactive transfer pricing reporting forms are still pending, therefore, regardless of the epidemic situation, the technical solutions are still being developed.

Changes in the VAT

Changes to the provisions of the VAT Act and changes to provisions amending the act include:

- » postponement of the obligation to send new JPK_VAT file [*Standard Audit File*] (return together with records) from 1st April 2020 to 1st July 2020, which applies to all taxpayers,
- » postponement of the date on which the new VAT rate matrix enters into force – to 1st July 2020 (until 30th June 2020 the existing VAT Act provisions and VAT Act implementing provisions concerning the application of reduced VAT rates apply),

- » postponement of time limits related to issuing and the protection on account of Binding Rate Information to 1st July 2020,
- » a possibility to issue a receipt for sale recorded at the cash register in paper or electronic forms (there is obviously no requirement to print out a receipt issued in an electronic form).

Postponing the date of entry into force of the provisions amending the VAT Act with respect to the reduced rates of taxation and JPK_VAT file [*Vat Standard Audit File*] is beneficial, however, the postponed period is too short.

Therefore, the negative element of the solutions implemented is insufficient postponement of time limits concerning the new JPK_VAT file and the new VAT rates matrix.

Implementing necessary changes requires not only carrying out certain works, but also often significant expenditure related to changing or updating accounting software. In addition, due to the risk of extended coronavirus epidemic period, the legislature should also extend the time limits specified, for instance, to 1st January 2021.

An option to issue and send receipts electronically is an advantage, although it may entail expenditure related to accounting software update and the purchase of new devices.

Failure to timely pay tax due to COVID-19 and fiscal-criminal risks

The Tax Ordinance Act contains provisions that allow taxpayers to be granted tax reliefs, either by non-collection of tax or by limiting the collection of advance payments. Most of the time the taxpayers and tax bearers decide to apply for the relief in payment of tax liabilities in a form of deferred payment of tax or tax arrears or of payment of tax arrears broken down into installments (Article 67a). Whether the relief will be granted is conditional on the existence of public interest or an important interest of the taxpayer (tax bearer).

Case-law shows that both concepts are of evaluative nature. However, in its judgment of 2nd July 2019, II FSK 2238/17, the Supreme Administrative Court clarified that:

"An important interest of a taxpayer is a situation in which, due to extraordinary and random events, the taxpayer is unable to settle tax arrears. This would be a loss of income-earning capacity, random loss of property, but also the economic standing of the taxpayer".

It is clear that the state of epidemic provides grounds to grant taxpayers' applications.

It is necessary to highlight that a refusal to defer the payment of tax (or tax advance payment) will entail charging default interest. In the current state of epidemic, there is a real risk that the majority of tax payment time limits (PIT advance payments, annual CIT, VAT) will expire during the assessment of whether to grant tax relief to a taxpayer by tax authorities (especially in cases of applications concerning February 2020). On top of that, the said risk poses a jeopardy of fiscal-criminal liability emerging.

In the Fiscal-Criminal Code it is indeed difficult to specify provisions that would exculpate the taxpayer (tax bearer) on account of a negative decision on taxpayer's application for relief in payment. The fiscal-criminal liability is independent of liability arising from a failure to perform levy obligations or undue performance thereof. However, it should be noted that one-off failure to pay tax in a timely manner should not ultimately result in imposing penalties upon the taxpayer, provided tax return is filed within the time limit prescribed. Only persistent failure to pay taxes (Article 57 of the Fiscal-Criminal Code) entails fiscal-criminal liability. The point is how to understand "persistent failure to pay".

Case-law shows that the occurrence of persistent failure to timely pay taxes may be indicated both by the regular nature of taxpayer's actions, as well as by one-off failure to pay tax that is to be paid once, with the omission lasting for a long period and after the expiry of the time limit prescribed for payment of the tax (decision

of the Supreme Court of 28th November 2013, I KZP 11/13). During the epidemic, a scenario that a taxpayer completely fails to pay taxes or pays them with significant delay is probable due to taxpayer's unfavorable economic situation. In consequence, the decision not to punish the taxpayer may only be made by the taxpayer's filing active regret and paying tax arrears promptly, together with interest due. The absence of active regret will give rise to the fulfillment of the elements of a prohibited act and will provide grounds for initiating fiscal-criminal proceedings.

Undoubtedly, many economic entities will indeed be financially affected by the coronavirus pandemic and the related shutdown of, *inter alia*, large surface stores (shopping malls), movie theaters, gyms, restaurants, bankruptcy of travel agencies, limited operation of transport and forwarding companies, and the fall in turnover of hotels and many other public utility facilities. While awaiting the arrival of the announced legal anti-crisis solutions, the issue of culpability on account of untimely payment of public law liabilities, assessed with regard to extraordinary circumstances which we are facing today, should be discussed. A principle of criminal liability, including fiscal-criminal liability, is the principle of individual nature of guilt. Thus, everyone is liable for their own actions or omission to perform actions which by law they are required to perform. In this context, failure to pay taxes may not in itself serve as grounds for unlimited fiscal-criminal liability if it is an aftermath to extraordinary circumstances, unforeseeable by the taxpayer. The assessment of guilt should also take account of the manner in which the taxpayer responds to adverse economic circumstances, since even if an application for relief in payment of tax liabilities is not accepted by tax authorities, the filing of application itself affects the assessment of taxpayer's conduct. After all, the issue concerns an entity that by pursuing available legal measures responds to temporary, as is hoped by such an entity, financial difficulties. It is obvious that should insolvency continue, at some point (in principle after 30 days from the moment on which insolvency emerged) a petition for bankruptcy of an undertaking should be filed, the grounds including the undertaking being unable to pay public law liabilities which tax authorities are unwilling to defer.

CORONAVIRUS AND THE LAW IN POLAND

EMPLOYEE CAPITAL SCHEMES (PPK)



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16 Employee Capital Schemes (PPK) and Employee Pension Schemes (PPE) in the face of the coronavirus epidemic

The consequences of the coronavirus are also noticeable for the entities keeping the work based pension schemes. In the following text, the authors discuss changes in the legal situation regarding the Employee Capital Schemes (PPK) resulting from the coronavirus spread. They also present a detailed overview of legal solutions, which could enable employers to optimise the expenditures on the Employee Capital Schemes and the Employee Pension Schemes.

Enterprises have already suffered negative consequences of the general quarantine related to the coronavirus spread in Poland. In these specific circumstances, it is perfectly normal and understandable to seek for possible spending cuts to help minimise losses. Employers appealed to the government for urgent protective measures regarding, among others, liberalising their obligations arising from Employee Capital Schemes. At the time of the epidemic, both paying employees' contributions to the Employee Capital Schemes and the effort of establishing the Employee Capital Schemes within the statutory deadline would be an enormous organisational and financial challenge. This, in turn, could affect the enterprises' financial situation. Amendments adopted in recent days meet these expectations, however, their scope will be much narrower than the one requested by the entrepreneurs.

Spring 2020 was supposed to be the time of implementing the Employee Capital Schemes for employers from the so-called second tranche, that is, for these employers who are subject to the Act of 1 January 2020 on Employee Capital Schemes. The deadline for them to conclude the agreements for managing Employee Capital Schemes with a chosen financial institution responsible for managing the collected funds was 24 April 2020. Thereafter, by 11 May 2020, they were to conclude agreements for the operation of Employee Capital Schemes on behalf and to the benefit of persons who intend to set aside money under the Employee Capital Schemes. First payments to the Employee Capital Schemes, depending on when remuneration is paid, were to be made in June or July 2020.

The time of choosing financial institutions to manage the Employee Capital Schemes and negotiating agreements for managing and operating the Employee Capital Schemes is a very intensive period for businesses based on the experience gained from implementing Employee Capital Schemes in the biggest entities which were obliged to establish the Employee Capital Schemes first. It would be difficult to reconcile the implementation obligations with unforeseeable challenges emerging due to the coronavirus pandemic which are different than any previous challenges. It may even seem impossible for businesses which did not set aside additional time. It should also be stressed that a breach of the deadlines for creating the Employee Capital Schemes leads to criminal liability. Late conclusion of an agreement for managing the Employee Capital Plan can result in a fine up to 1.5% of the payroll fund.

Postponing the deadline for implementing the Employee Capital Schemes

The government noticed the need for legal intervention postponing the deadline for obligatory Employee Capital Schemes implementation. Under the 'Anti-Crisis Shield', the deadlines for concluding agreements for managing Employee Capital Schemes and agreements for operating Employee Capital Schemes for the so-called second tranche employers were postponed in accordance with the requests of the National Development Fund. In practice, the implementation of Employee Capital Schemes

by the second and third tranche employers will be accumulated at the same time. Consequently, the maximum deadline for concluding agreements for managing Employee Capital Schemes was postponed till 27 October 2020 and for agreements for operating Employee Capital Schemes – by 10 November 2020.

It is worth adding that the deadline postponement only concerns employers who are subject to the Act of 1 January 2020 on Employee Capital Schemes (that is, employing over 50 people as at 30 June 2019). The deadlines for the remaining employers did not change and the remaining part of the Employee Capital Schemes implementing schedule progresses as originally expected.

Importantly, employers, who have already chosen a financial institution and want to approve this choice, can already conclude agreements for managing Employee Capital Schemes. It does not automatically impose the obligation of earlier payments to Employee Capital Schemes. There is nothing to prevent concluding agreements for operating Employee Capital Schemes launching payments at the last possible date. In such an event, first payments to Employee Capital Schemes would be made in December 2020 or even as late as January 2021 (depending on the date of remuneration payment).

Payments to Employee Capital Schemes unchanged

At the same time, despite entrepreneurs' requests, there is no reasonable prospect of statutory 'top-down' suspension of the obligation to contribute to Employee Capital Schemes in view of the situation caused by the coronavirus. Therefore, this will be obligatory for employers who have already launched their Employee Capital Schemes. Timely fulfilment of this obligation is all the more important given that in the case of its infringement the employer or a person obliged to act on behalf of the employing entity is subject to criminal liability and a fine from PLN 1,000 up to PLN 1,000,000.

However, we should remember that the currently effective Act on Employee Capital Schemes provides for some optimisation measures. Namely, in certain specific

cases related to deterioration in employer's financial situation, both the employer and the Employee Capital Scheme participant may benefit from a temporary exemption from the obligation to contribute to the Employee Capital Scheme. It is allowed not to make payments to Employee Capital Schemes in particular:

- 1) in times of economic downturn referred to in Article 2 (1) of the Act of 11 November 2013 on Specific Arrangements Regarding Job Protection and in times of reduced working hours referred to in Article 2 (2) of the abovementioned act,
- 2) where there are the preconditions of insolvency of an employer referred to in the Act of 13 July 2006 on the Protection of Employees' Claims in the event of Insolvency of an Employer.

Suspending a participant's contributions to the Employee Capital Scheme is non-compulsory. Therefore, they have the right to continue making contributions to the Employee Capital Scheme that they pay for (both the basic and additional payment, as per their choice). The participant's decision does not affect the employer's possibility to benefit from the exemption. This means that even if participants decide to continue making contributions to the Employee Capital Scheme, employers may benefit from the exemption from contributions they make.

A potential form of optimising the expenditures of the employer financing the additional contribution may also be the reduction of this contribution or complete abandonment thereof. This requires amending the agreement for managing the Employee Capital Scheme. Importantly, the amended amount of the additional contribution is applicable from the month following that in which the change was made.

Suspension of the transfer of the Employee Pension Scheme contributions

Employers keeping the Employee Pension Schemes have wider opportunities for suspending or deciding not to finance contributions to these schemes.

Firstly, the employer may unilaterally suspend the transfer of the basic contributions for the maximum total period of 3 months in each period of 12 consecutive calendar months. In practice, such suspension may be reintroduced every 12 months.

An enterprise-level agreement may stipulate a longer suspension period, but not longer than 6 months.

An enterprise-level agreement should stipulate specific conditions for unilateral suspension of transferring basic contributions.

Suspension of transferring basic contributions is a unilateral decision of the employer, which does not have to be consulted with the social side. It is also not required to amend the agreement establishing the Employee Pension Scheme (e.g. an agreement for making employees' contributions to an investment fund by an employer) or to register in the register maintained by the Polish Financial Supervision Authority. The employer does not have to comply with any particular conditions in order to suspend basic contributions. The reason for such a decision may be, in particular, the employer's financial situation connected with the coronavirus.

The decision to suspend transferring basic contributions is made by the employer's management board or other body (person) authorised to represent the body (person) in accordance with their organisational rules. The decision should lay down the period of suspension of transferring basic contributions. It is not necessary to present the justification. The decision has to be communicated to employees, Employee Pension Scheme participants, in a manner usual for the employer.

Suspension means that the employer will not make basic contributions to Employee Pension Scheme participants' accounts maintained by the financial institution managing the funds accumulated in Employee Pension Schemes within the period indicated in the decision. However, the employer is still obliged to charge basic contributions in the due amount as the suspension concerns making

contributions only for a limited period of time. After the suspension period, the employer is obliged to make full contributions to the accounts of participants which were charged during the suspension period. No interest is accrued during the suspension period.

It is worth pointing out that the suspension concerns only basic contributions financed by the employer. If Employee Pension Scheme participants declared additional contributions, they are not subject to suspension. The employer is therefore obliged to charge and make additional contributions during the suspension period.

Reducing the amount of the basic Employee Pension Scheme contribution

Another employer's right is the unilateral, temporary reduction of the amount of the charged basic contribution by specifying the rule of its charging during this reduction period. The employer may thereby reduce the amount of the basic contribution, which has to take into account the manner of determining the basic contribution stipulated in the enterprise-level agreement.

The amount of the basic contribution can be determined:

- 1) on the basis of a percentage of the remuneration
- 2) in the same amount for all participants, or
- 3) on the basis of a percentage of the remuneration, indicating the maximum amount of the contribution.

The legislators did not clearly specify the minimum amount of the basic contribution. Therefore, this may theoretically be a very small contribution, but it cannot be zero.

The reduction rules correspond to the ones for suspending the basic contribution. The enterprise-level agreement determines specific conditions of the unilateral,

temporary reduction of basic contributions implemented by the employer, including the period of the restriction and the amount of the reduced rate.

The employer's decision needs to specify the period of reduction under the conditions of the enterprise-level agreement. However, in the case of a temporary reduction of the charged basic contributions the employer still charges and pays basic contributions, but at a lower amount, contrary to the suspension of the basic contribution. It is also not required to supplement the basic contribution to its initial amount after the reduction period.

Specific situations

The employer is also entitled not to pay the basic contribution in the following situations:

- a) during economic downturn referred to in Article 2(1) of the Act of 11 November 2013 on Specific Arrangements Regarding Job Protection and during the period of reduced working hours referred to in Article 2(2) of the above-mentioned statute,
- b) in the case of the fulfilment of the preconditions of insolvency of an employer referred to in the Act of 13 July 2006 on the Protection of Employees' Claims in the Event of Insolvency of an Employer.

In the abovementioned cases, the employer's decision is also unilateral and does not require consultation or the consent of the social side. Importantly, if the employer exercises this right, basic contributions are not required to be charged or paid.

Additional agreements with the social side

After the period of unilateral suspension of transferring of basic contribution, the employer may, as long as this is justified by their financial situation, conclude an agreement with the social side on:

- 1) suspension of charging and transferring of basic contributions, or
- 2) temporary reduction of the amount of basic contributions through specifying the rule of charging during this reduction period.

The conclusion of the agreement has to be preceded by a unilateral suspension of transferring of basic contributions by the employer.

The employer submits the agreement to the Financial Supervision Authority as soon as possible after its conclusion.

The total duration of the agreement may not exceed 24 months within a period of 48 consecutive calendar months. The duration of the agreement may be longer if further charging and payment of basic contributions would result in a necessity of filing a bankruptcy petition. In such a case, the agreement may be concluded for no longer than 24 months. It may be renewed, if justified by the employer's situation.

The employer is obliged to terminate the agreement in the event when the reasons underlying its conclusion cease to apply, e.g. in the event of an improvement of the financial situation.

Upon termination of the agreement, the employer is obliged to start charging and transferring basic contributions, from the month following the month of the termination of the agreement. The same obligation arises in the case of expiry of the agreement in due course.

The employer also has to inform the supervisory authority of the termination of the agreement within two weeks after the starting day of charging and transferring of basic contributions.

Employee Pension Scheme termination

It is always possible to terminate the Employee Pension Scheme thanks to its voluntary nature and the fact that it is created on the basis of an agreement with the social side.

Employee Pensions Schemes may be terminated:

- 1) with the consent of the social side expressed under the agreement on terminating the enterprise-level agreement concluded between the employer and the social side;
- 2) by an employer's unilateral decision on terminating the enterprise-level agreement, provided that the 12-months period of notice was kept, in the event where the payment of basic contributions was previously suspended or their amount was reduced for a period of at least 3 months. During the notice period the scheme functions normally and the employer is obliged to continue charging and transferring contributions.

Detailed rules concerning Employee Pension Scheme termination are specified in the enterprise-level agreement.

Employee Capital Scheme and Employee Pension Scheme expenses organisation

It should be noted that employers' decisions focused on minimising the burdens related to transferring contributions to the Employee Pension Scheme or even terminating the Employee Pension Scheme may lead to the obligation of establishing the Employee Capital Scheme. Hence, each decision to this effect should be preceded by a thorough impact analysis under the Act on Employee Capital Schemes.

As a general rule, the employer may benefit from the exemption from the application of the Act on Employee Capital Schemes if the employer is keeping the Employee Pension Scheme on the date from which the Act on Employee

Capital Schemes would apply to this employer, the participants of the Employee Pension Scheme constitute at least 25% of employees and the employer also charges and transfers basic contributions of at least 3.5% of the remuneration. However, the statute is applied to the employer keeping the PPE starting from the day of:

- 1) suspension of charging and transferring basic contributions to the Employee Pension Scheme for more than 90 days;
- 2) reduction of the amount of basic contributions transferred to the Employee Pension Scheme under the 3.5% of the remuneration;
- 3) termination of the Employee Pension Scheme.

Over 90 days of delay in transferring basic contributions to the Employee Pension Scheme resulting from a wilful act of the employing entity has the same effect.

Fulfilling one of the abovementioned preconditions means that the time limit for the employer for concluding the agreement for managing the Employee Capital Scheme begins. The prospect of such a result can cause that the optimisation measures for keeping the Employee Capital Scheme, however theoretically possible, may prove unprofitable or pointless.

It seems that currently the only actual relief for the employers keeping the Employee Pension Schemes is the possibility of suspending the charging and transferring of basic contributions to the Employee Pension Scheme for no more than 90 days. It is worth mentioning that the literal interpretation of the Act on Employee Capital Schemes suggests that this is not about the unilateral suspension of transferring of contributions to the Employee Pension Scheme, but about the suspension of transferring and charging of contributions to the Employee Capital Scheme on the basis of agreement with the social side. In turn, this leads to the conclusion that unilateral suspension of transferring and charging of contributions to the Employee Pension Scheme by the employer, which has to precede the conclusion of such an agreement, is ambivalent in terms of the Employee Capital Scheme, irrespective of the duration. Such an interpretation is in line

with the strict interpretation of the Act on Employee Capital Schemes and can be justified by the idea of such a unilateral suspension of contributions, which in fact is limited solely to the postponement of the date for their payment, and not to a complete exemption from the obligation of transferring of contributions. It remains to be seen if this will be the application of the provisions in practice.

CORONAVIRUS AND THE LAW IN POLAND

CRIMINAL LAW



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17 COVID-19 and criminal law

This work discusses the pandemic's impact on substantive criminal law, criminal procedure and the enforcement of criminal sanctions.

Introduction

The coronavirus outbreak will not be without consequences for criminal law and criminal procedure. Due to the state of epidemic having been declared and significant restrictions imposed on the operation of the courts, considerable backlog is to be expected in the criminal caseload. With court activity reduced to the bare minimum, in practical terms this means that only cases admitting of no delay will proceed — such as pretrial detentions, detention extensions and appeals against them.

The state of epidemic and mandatory quarantine will also contribute to increased incidence rates in specific types of crimes and infractions (e.g. exposure to COVID infection, breach of quarantine). New methods of committing common offences are being invented, such as all sorts of COVID fraud or data theft by dedicated phishing attacks with the coronavirus in the contents of the message.

Methods of enforcement of sanctions can also change and so can the approach taken with pretrial measures such as especially pretrial detention and Police supervision.

I. SUBSTANTIVE CRIMINAL LAW

1. Justification of otherwise criminal conduct due to the epidemic situation

1.1. Necessity

One of the statutory justifications excluding the unlawfulness of conduct is necessity. In accordance with Article 26(1) of the Criminal Code, a person acting with the purpose of averting an imminent danger to any 'good' (interest) protected by law, if such a danger cannot be avoided otherwise and the sacrificed good is less valuable than the good saved, does not commit an offence. As the literature highlights, a conflict of legally protected interests ('goods') of varying value requires a determination of the, 'profitability of sacrificing the one for the other,' which, in consequence, determines the legality of the conduct falling within the scope of necessity.⁹⁶ As for the 'imminence' of danger, it is worth noting that this means the danger realistically exists and justifies the taking of immediate action.⁹⁷

It must be emphasized that the element of a state of necessity in the form of objective danger may arise from a situation spread over time and unfolding gradually, the further development of which — from a certain point in time — intrinsically involves an increased, 'probability of an adverse consequence arising,' for the protected interest.⁹⁸ Hence, the progressing SARS-CoV-2 pandemic doubtless must qualify as an 'imminent danger' threatening the legally protected goods interests of life and health, thereby being a fact capable of constituting necessity as a justification of conduct.

⁹⁶ R. Stefański (ed.), *Article 26* in: *Kodeks karny. Komentarz [Criminal Code. Commentary]*, 24th ed., LEGALIS Legal Information System [accessed: 23 March 2020].

⁹⁷ W. Wróbel (ed.), A. Zoll (ed.), *Article 26* in: *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52 [Criminal Code. General Part. Volume I. Part I. Commentary on Articles 1-52]*, 5th ed., Wolters Kluwer 2016, LEX Legal Information System [accessed: 23 March 2020].

⁹⁸ W. Wróbel (ed.), A. Zoll (ed.), *Article 26* in: *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52 [Criminal Code. General Part. Volume I. Part I. Commentary on Articles 1-52]*, 5th ed., Wolters Kluwer 2016, LEX Legal Information System [accessed: 23 March 2020].

In the context of the SARS-CoV-2 pandemic crisis the following in particular must be regarded as conduct justified by necessity:

- » imposing mandatory isolation on unwilling infected subjects;
- » distributing ventilators and other life-support equipment to patients according to the probability of survival, if in short supply.

1.2. The risk of innovation

In accordance with Article 27(1) of the Criminal Code, one who acts for the purpose of accomplishing a cognitive, medical, technical or economic experiment does not commit an offence if the expected benefit is of material cognitive, medical or economic significance and the expectation of success, expediency and method used are justified in line with current knowledge. This rule becomes essentially important in the context of the dynamic spread of COVID-19 worldwide and the associated studies into a possible vaccine or cure. For tests on human subjects are an inevitable part of any such research, always involving a certain degree of risk for the participants. This raises the issue of the permissibility of hypothetical exposure of the participants to the hypothetical risk, of their awareness of possible consequences of the tests, and of the evaluation of the researchers' activities through the lens of criminal law.

The risk of innovation is one of several statutory justifications. Also in this case will there be a conflict of legally protected interests — on the one hand experiments are necessary for the potential achievement of tangible benefits for the common good (e.g. curing thousands of victims of the disease, preventing its further spread, and in consequence defeating the pandemic), and on the other hand they can involve a significant threat to the welfare of the tested individual (e.g. adverse side effects, permanent complications, even death in the most extreme scenario). The justification we are discussing here will apply if the researchers' activities in the experimental testing of a vaccine or cure for SARS-CoV-2 fulfil the elements of a criminal offence in general and of an offence against human life or health in particular. A mandatory prerequisite for participation in experimental tests is the subject's express voluntary consent, given (in principle) in writing before

any activities take place, after being informed of the expected benefits and possible ill effects, along with the probability of their occurrence, as well as of having the option to withdraw from the experiment at any stage (Article 27(2) read in conjunction with Article 24(1 and 2) and Article 25(1) of the Act of 5 December 1996 on the Professions of Physician and Dentist). In consequence, the experiment will be lawful when the probability of obtaining a benefit for society exceeds the probability of harm arising in a voluntary informed participant.⁹⁹

Hence, any experiments currently pursued on human organisms with a view to procuring an effective and safe vaccine or cure for SARS-CoV-2 carry the risk of innovation. Where all of the above-discussed requirements are met, the justification will apply. The contrary would impose considerable limitations on medical research and hamper progress in the treatment and prevention of the coronavirus; in the long term, this could have catastrophic consequences for the general population in the face of the dangerous virus that SARS-CoV-2 unquestionably is.

2. Examples of crimes relating to the epidemiological threat

2.1. Exposure to harm

Article 160(1) of the Criminal Code penalizes conduct consisting in the exposure of a human being to the imminent danger of loss of life or severe damage to health. It protects human life and health already before any actual adverse effects touch them.¹⁰⁰ One of the elements of this offence is a result in the form of an, ‘objectively existing potential for the loss of health or severe damage to health.’¹⁰¹ As the Supreme Court points out, the danger must be imminent, which

⁹⁹ P. Kozłowska-Kalisz, *Article 27*, in: M. Mozgawa (ed.), *Kodeks karny. Komentarz aktualizowany [Criminal Code. Updated commentary]*, LEX Legal Information System [accessed: 23 March 2020].

¹⁰⁰ A. Zoll, *Article 160* in: W. Wróbel (ed.), A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a [Criminal Code. Specific Part. Volume II. Part I. Commentary on Articles 117-211a]*, Wolters Kluwer Polska, 2017, LEX Legal Information System [accessed: 23 March 2020].

¹⁰¹ Supreme Court order of 26 January 2016, V KK 342/15, LEX no. 1977834.

means, 'either the inevitability of further developments dangerous to human life or health or a high probability that they will occur.'¹⁰²

The offender is liable to up to 3 years' imprisonment. In accordance with Article 160(2) of the Criminal Code, which defines the aggravated type of this offence, an offender who owes a special duty of care to the victim is liable to imprisonment for 3 months to 5 years. Articles 160(3) of the Criminal Code, on the other hand, provides that an unintentional offender is liable to a fine, restriction of liberty or up to one year's imprisonment.

In the face of an epidemiological threat Article 160 unquestionably gains more importance and should find universal application in the penalization of socially harmful conduct, particularly of a person who:

- » breaches the rules of a mandatory quarantine specifically imposed on such a person;
- » escapes the hospital to which such a person has been admitted with because of the suspicion of COVID infection;
- » conceals information about facts increasing the risk of infection (for example with regard to previous contact with an infected subject, stay in a country with a high infection rate or identified symptoms of the disease);
- » while being a member of medical personnel, reuses single-use protective equipment.

Bearing in mind the dynamic and uncontrolled increase in infections, as well as the transmission routes, the above list of examples of conduct fulfilling the elements of the Article 160(1) crime bring about a realistic and imminent threat of danger to health and even to life for an inestimable number of people who can potentially come into contact with the potential offender.

102 Supreme Court order of 26 January 2016, V KK 342/15, LEX no. 1977834.

2.2. Exposure to infection

In accordance with the existing wording of Article 161(2), any person who, while being aware of carrying a venereal or contagious disease, severe incurable disease or realistically life-threatening disease, directly exposes another to infection with such a disease, is liable to a fine, restriction of liberty or up to one year's imprisonment. The Act of 31 March 2020 Amending the Act on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and Certain Other Acts (hereinafter the '**Act**') changes these sentencing limits to 3 months to 5 years.¹⁰³ The *ratio* for this amendment is found especially in the objective increase of social harm inflicted by conduct fulfilling the elements of this crime in the face of the progressing pandemic of the contagious disease caused by SARS-CoV-2. The amending act also provides for the penalty of 1 to 10 years' imprisonment for an offender who exposes a great number of people to infection. This offence, defined in the amended § 3 of Article 160, will be prosecuted *ex officio* — unlike the offences defined in §§ 1 and 2.

In the context of the epidemiological situation caused by SARS-CoV-2, it must be stressed that COVID is both a contagious and a life-threatening disease, in particular for those belonging to so-called high-risk groups, i.e. elderly people and people with chronic diseases.¹⁰⁴

Moreover, it should be noted that the subjective (personal) and objective scopes of, respectively, the offence of exposing a human person to harm under Article 160(1 and 2) of the Criminal Code and of the offence of exposure to infection defined in the provision now being discussed are similar. For both of these offences are defined by the result and include 'direct exposure' of another as

103 Act of 31 March 2020 Amending the Act on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations and Certain Other Acts, source: http://orka.sejm.gov.pl/proc9.nsf/ustawy/299_u.htm [Prints no. 299 and 299-A] [accessed: 1 April 2020].

104 Source: <https://www.nfz.gov.pl/aktualnosci/aktualnosci-oddzialow/infolinia-nfz-najczesciej-zadawane-pytania-zwiazane-z-koronawirusem,387.html> [accessed: 23 March 2020].

a constituent element. It is, however, also worth noting that, unlike the offence under Article 160(1 and 2) of the Criminal Code, the offence defined in Article 161(2) of the Criminal Code can only be committed intentionally and may only be prosecuted if the victim chooses to press the charges.¹⁰⁵

Voices in the literature highlight that the conduct of a person who exposes another to infection with one of the diseases mentioned in Article 161(2) of the Criminal Code while not being infected oneself can fulfil the elements of the Article 160(1-3) offence.¹⁰⁶ Such a situation may arise especially for members of medical personnel, for example when such a person:

- » reuses single-use personal protective equipment, such as gloves;
- » omits to disinfect equipment used in providing care to an infected patient;
- » commits a non-infected patient to the same hospital room with an infected subject.

Article 161(2), on the other hand, will apply when a person fully aware of being infected undertakes such activities as might directly expose others, e.g.:

- » escaping the hospital after becoming aware of having tested positive for the coronavirus;
- » mingling with others (e.g. in public transport, in church or in the office);
- » coughing or sneezing on others or provoking direct physical contact.

2.3. False alarm

An important matter from the perspective of the events of the latest weeks are beyond any doubt false alarms causing not only a universal panic and disorientation but also a wholly unnecessary mobilization of the relevant services in

105 M. Budyn-Kulik, *Article 161* in: M. Mozgawa (ed.), *Kodeks karny. Komentarz aktualizowany [Criminal Code. Updated commentary]*, LEX Legal Information System [accessed: 23 March 2020].

106 A. Zoll, *Article 161* in: *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a [Criminal Code. Specific Part. Volume II. Part I. Commentary on Articles 117-211a]*, Wolters Kluwer Polska, 2017, LEX Legal Information System [accessed: 23 March 2020].

response to a threat that does not actually exist, *de facto* preventing the services from being used for their intended tasks. This type of conduct is penalized in Article 224a of the Criminal Code. In accordance with this provision, whoever — while knowing that the danger does not exist — reports an event threatening to the life or health of a great number of people or property of significant value or creates a situation capable of creating the apprehension of such a threat, therewith provoking the activity of a public utility or of a body responsible for security, protection of the public order of health with a view to averting the threat, is liable to imprisonment for 6 months to 8 years.

In the context of the current epidemiological situation, the following conduct in particular will fulfil the elements of this offence:

- » reporting the presence of an allegedly infected subject in a given location (e.g. school, clinic or public office), as a result of which medical services arrive to assist such a person and sanitary services take action to identify others present in the same location with the alleged infected subject with a view to quarantining such persons, disinfecting the buildings, etc.;
- » reporting the alleged escape of an infected subject from the hospital, as a result of which sanitary services, state or municipal police patrols are deployed to search and retrieve such a subject back to the hospital.

3. New forms of crime relating to the SARS-CoV-2 pandemic

The significant increase in infection rates due to the spread of SARS-CoV-2, significant limitations on the capacity of health-care services, as well as the imposition of the state of epidemic along with the accompanying restrictions have undoubtedly contributed to the emergence of new forms of crime directly relating to the prevailing serious socio-economic situation.

The following in particular should be mentioned among the examples of criminal activity directly relating to the progressing SARS-CoV-2 epidemic:

- » theft (Article 278(1) of the Criminal Code) — e.g. through impersonation of sanitary officials to gain access to private residences under the pretext of disinfection, while in reality the proprietors are robbed of all sorts of valuables;¹⁰⁷
- » fraud (Article 286(1) of the Criminal Code) — e.g. through the marketing of products allegedly protecting from SARS-CoV-2 infection by business entities not licensed for health-care activities and the provision of health-care services, while the products sold do not in fact have such properties;¹⁰⁸ impersonation of state institutions for the purpose of selling products with allegedly disinfecting properties, while the products sold do not in fact have such properties;¹⁰⁹ fake online fundraising allegedly to support hospitals in combating the coronavirus;¹¹⁰
- » phishing (Article 287(1) of the Criminal Code) — e.g. through sending out fake text messages (SMS) or e-mails containing links to fake websites with bank login pages under the guise of needing to transfer funds to the National Bank of Poland's reserve in connection with the COVID threat, while in reality the extorted data are used for syphoning cash away from the accounts;¹¹¹
- » exploitation (Article 304 of the Criminal Code) — for example by entering into contracts of sale without an economic justification, e.g. charging extortionate

107 Source: <https://zielonagora.wyborcza.pl/zielonagora/7,35182,25804608,koronawirus-zlodzieje-nie-znaja-granic-przebieraja-sie-w-kombinezony.html> [accessed: 23 March 2020].

108 Source: <https://zielonagora.wyborcza.pl/zielonagora/7,35182,25779044,sprzedaja-cuda-na-koronawirusa-policja-ostrzega-przed-oszustami.html> [accessed: 23 March 2020]; <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/skoordynowane-i-natychmiastowe-dzialania-prokuratury-podjete-w-walce-z-przestepczoscia-gospodarcza-bazujaca-na-zagrozeniu-epidemicznym/> [accessed: 23 March 2020].

109 Source: <https://zielonagora.wyborcza.pl/zielonagora/7,35182,25779044,sprzedaja-cuda-na-koronawirusa-policja-ostrzega-przed-oszustami.html> [accessed: 23 March 2020].

110 Source: <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/skoordynowane-i-natychmiastowe-dzialania-prokuratury-podjete-w-walce-z-przestepczoscia-gospodarcza-bazujaca-na-zagrozeniu-epidemicznym/> [accessed: 23 March 2020].

111 Source: <https://alebank.pl/koronawirus-w-polscie-uwaga-na-nowe-oszustwo-banki-ostrzega-przed-falszywymi-smsami/> [accessed: 23 March 2020]; <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/skoordynowane-i-natychmiastowe-dzialania-prokuratury-podjete-w-walce-z-przestepczoscia-gospodarcza-bazujaca-na-zagrozeniu-epidemicznym/> [accessed: 23 March 2020].

prices for disinfectants and personal protective equipment in the face of their universal shortage.¹¹²

In response to the rising rates of white-collar crime in connection with the epidemiological situation, by order of the National Public Prosecutor (*Prokurator Krajowy*) of 16 March a special team of prosecutors was appointed within the structure of the National Prosecutor's Office to co-ordinate the fight on white-collar crime in connection with the state of epidemic threat. The team is composed of prosecutors from the National Public Prosecutor's Office. Their tasks include co-ordination of proceedings conducted in the various units of the prosecution service in relation to economic abuse in the following forms:

- 1) sale, without an economic justification, of goods at extortionate prices, especially of food, medicines, medical products and disinfectants;
- 2) fraud in relation to the actual value, quality and fitness for purpose of goods purchased;
- 3) online scams consisting in the extortion of funds under the guise of epidemic threat;
- 4) scams consisting in disinformation about the activities of sanitary, inspection and public-order-keeping services;
- 5) entering into disadvantageous contracts through the exploitation of the victims' hardship.¹¹³

The team's area of responsibility also includes gathering and analysing information about proceedings already initiated and subsequently evaluating the nature, dynamics and scale of criminal activities relating to the epidemiological threat caused by SARS-CoV-2. The goal of the investigative guidelines issued by this team along with the evaluation of the merits of the procedural activities in such

112 Source: <https://tvn24bis.pl/z-kraju,74/allegro-i-olx-z-zakazem-sprzedazy-maseczek-zelow-antybakterijnych-i-srodkow-do-dezynfekcji,1008739.html> [accessed: 23 March 2020].

113 Source: <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/prokurator-generalny-powolal-zespol-do-spraw-koordynacji-walki-z-przestepczoscia-gospodarcza-w-zwiazku-z-epidemią-koronawirusa/> [accessed: 23 March 2020].

investigations (e.g. the use of pretrial measures) is to harmonize prosecutors' activities and increase the effectiveness of the fight on this particular type of crime.¹¹⁴ As the National Prosecutor's Office communicates on its official website, the prosecutorial team for co-ordinating the fight on white-collar crime in connection with the state of epidemic threat co-operates actively and closely with other institutions and state authorities, such as the Patients' Ombudsman and the Bureau for Combating Cyber-Crime of the National Police Headquarters.¹¹⁵

II. CRIMINAL PROCEDURE

1. Restrictions on procedural activities in criminal proceedings

In consequence of the dynamic spread of SARS-CoV-2 and the imposition of the state of epidemic on the whole territory of the country, the activities of law enforcement and the judiciary have been either suspended or at least significantly restricted, and especially those of the courts and the public prosecution service. Before the legislature could enact appropriate legislation, presidents of courts and hierarchically superior prosecutors issued orders to safeguard, as far as practicable, the safety of all participants to pending proceedings and the continuity of operation. An analysis of the most important and the most effective of such measures follows below, with special emphasis on changes arising from the COVID-19 Act.

1.1. Restricting activities to the absolute minimum

Reorganization of the activities of courts and of the public prosecution service for the duration of the epidemic threat rightly included restricting the number

¹¹⁴ Source: <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/prokurator-generalny-powolal-zespol-do-spraw-koordynacji-walki-z-przestepczoscia-gospodarcza-w-zwiazku-z-epidemią-koronawirusa/> [accessed: 23 March 2020].

¹¹⁵ Source: <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/skoordynowane-i-natychmiastowe-dzialania-prokuratury-podjete-w-walce-z-przestepczoscia-gospodarcza-bazujaca-na-zagrozeniu-epidemicznym/> [accessed: 23 March 2020].

and type of activities performed in pending criminal proceedings to the absolute minimum, e.g. by:

- » cancelling scheduled court dates for a large part of hearings;
- » restricting hearings only to so-called urgent cases (such as motions to apply, extend or lift pretrial detention, other detentions, pretrial measures, European Arrest Warrants, publications of decisions), it being worth noting that in line with the Act the president of the competent court will be empowered to order any case to be heard as an urgent case if failure to hear it could result in danger to the life or health of human or animal beings, serious harm to a protected social interest, or due to the threat of irreparable economic harm, or where the administration of justice so requires;
- » limiting prosecutors' activities in the field solely to cases admitting of no delay (e.g. urgent detentions, visual inspections, investigation of fatalities);
- » limiting evidentiary activities requiring direct contact with third parties (e.g. interrogations of suspects (defendants), witnesses or experts, confrontations between such persons, identity parades, body inspections, community interviews);
- » suspending the operation of physical service desks and filing offices.

1.2. The power to suspend criminal proceedings

In accordance with Article 22(1) of the Code of Criminal Procedure, if there is a long-term obstacle preventing the conduct of the proceedings, and in particular if the defendant cannot be apprehended or cannot participate in the proceedings due to a mental illness or any other severe illness, the proceedings have to be suspended for the duration of the obstacle. The list of suspension grounds provided in the Article is not exhaustive, as its language clearly confirms. The 'long-term obstacle' ground, which is a general clause, has been defined in Supreme Court decisions as an, 'obstacle of which the terminal date is either impossible or difficult to ascertain or at least so far remote in time as to exceed any rationally permissible duration of a continuance.'¹¹⁶

¹¹⁶ Supreme Court judgment of 24 April 1980, II KR 54/80, LEX no. 471024.

Bearing in mind the significant restriction of the procedural activities of the courts and of the public prosecution service, as well as the impossibility, at the current stage, of providing a precise estimate of the time needed to overcome or at least mitigate the effects of the progressing coronavirus pandemic, the current epidemiological situation must be recognized as a long-term obstacle preventing the conduct of criminal cases. In consequence, it seems justified to consider the suspension of at least some of the pending proceedings, thereby reducing the justice system's workload in this area.

2. Changes to procedural provisions

2.1. Suspension of time-limits

With a view to supporting the operation of the justice system and protecting the rights and interests of participants in criminal and fiscal-criminal proceedings in a day of epidemiological crisis, the Act suspends procedural time-limits in such cases (excluding so-called urgent cases) and time-limits regulated by substantive criminal legislation (e.g. statutes of limitations for imposing and carrying out penalties).¹¹⁷ In practice, time-limits already running are suspended for the duration of the pandemic, while those not yet commenced are prevented from beginning to run pending the pandemic.

This approach should be considered fully justified given the current shortage of staff resources in courts and in the public prosecution service, as well as the limited operation of postal services and of the filing offices of competent authorities. Indeed, it can largely prevent adverse procedural consequences for the parties, as well as the highly probable mass-scale filing, by the entitled parties, of motions to reinstate time-limits for the various procedural activities, something which — from the perspective of significantly reduced activity of the procedural bodies — could quickly result in a total clogging and prevention of normal operation due to the need to hear such motions.

¹¹⁷ Source: <https://www.gov.pl/web/sprawiedliwosc/nadzwyczajne-przepisy-ustawowe-dla-wymiaru-sprawiedliwosci?fbclid=IwAR1DrQjQilpfZUktAVp4ss3-MaYnjpDeOuDqqrMb9x2CKORui7bs6Z8T-J9k> [accessed: 24 March 2020].

2.2. Stopping outbound court mail

Another measure taken by the authorities is for the various courts and units of the public prosecution service to withhold the sending out of letters and notices affecting the time-limits for appeals or other procedural or judicial time-limits (except for those sent in urgent cases). This issue was addressed in the recommendations given by the Ministry of Justice on 17 March 2020 to the presidents and directors of courts.¹¹⁸ The purpose of the above solution is also for the justice system to safeguard, in so far as possible, the interests of the participants to the proceedings in the face of the difficulties imposed by the coronavirus pandemic. One ought to remember, however, that it is only successful in the short term, for when the epidemic ends and the courts resume their operations, the simultaneous dispatch of all letters and notices accumulated over the critical period can pose a challenge, including those triggering time-limits, which will undoubtedly result in their massive accumulation making the work of trial counsel more difficult in criminal cases.

2.3. Delegating activities to another court

Another solution having made its way into the Act is the power to delegate to another court of the same tier within the same appellate circuit those urgent cases that cannot be heard in the court of competent venue due to the court's operations having stopped altogether because of the epidemic situation. These decisions will be the purview of the president of the Court of Appeals. The appointment of such a court is to be made for a definite period of time, appropriate for the expected duration of stoppage of operations by the court of competent venue, and with account being taken of the courts' organizational circumstances. Furthermore, the Act also empowers the First President of the Supreme Court to appoint a court of the same tier located in so far as possible in a neighbouring circuit, should all courts of the relevant appellate circuit stop their operations altogether. Circumstances justifying a 'stoppage of operations' include, for example, staff shortages or mandatory quarantine imposed on the court by

¹¹⁸ Letter by an Undersecretary of State in the Ministry of Justice of 17 March 2020, ref.: DNA-II.510.20.2020, p. 2, source: http://www.adwokatura.pl/admin/wgrane_pliki/file-ms-do-sadow-002-29750.jpg; http://www.adwokatura.pl/admin/wgrane_pliki/file-ms2-29749.jpg [accessed: 24 March 2020].

sanitary services.¹¹⁹ The *ratio* of this regulation is to enable the rational staffing of the various courts while safeguarding the right of access to courts and continued examination of cases admitting of no delay. Additionally, it is worth considering similar powers to be introduced in respect of the operations of the public prosecution service.

2.4. Delegating a judge to another court

While discussing the above amendments, attention should be turned to the COVID-19 Act power of delegating a judge of a district court, regional court or court of appeals, with the judge's consent and for a definite period of time, to exercise the duties of the office in another district court, regional court or court of appeals if, due to the epidemiological situation, the administration of justice so requires. This will certainly arise where there is an insufficient number of judges capable, especially in terms of health, of hearing urgent cases.¹²⁰ This solution could also be applied to prosecutors. It is justified by a rationale analogous to the one behind the above-described transfer of a case to another court — i.e. procedural economy and the fullest possible utilization of staff resources available to the justice system.

III. PRETRIAL MEASURES

1.1. Consequences of the coronavirus for pretrial measures

The state of epidemiological threat, and the state of epidemic, will have a tangible impact on the shape of pretrial measures. This change will in part arise directly from the wording of the provisions of the Code of Criminal Procedure and will otherwise be compelled by functioning in the existing circumstances. Other

¹¹⁹ Source: https://www.gov.pl/web/sprawiedliwosc/nadzwyczajne-przepisy-ustawowe-dla-wymiaru-sprawiedliwosci?fbclid=IwAR10Ycjj6QT2O-ZnPS8MmSghOj-PGpV5UV6Hm864TOOakxh-hwMQ_ie3hmY [accessed: 24 March 2020]; <https://www.prawo.pl/prawnicy-sady/zawieszenie-biegu-termi-now-katalog-spraw-pilnych-pomysly-ms-na,498908.html> [accessed: 24 March 2020].

¹²⁰ Source: https://www.gov.pl/web/sprawiedliwosc/nadzwyczajne-przepisy-ustawowe-dla-wymiaru-sprawiedliwosci?fbclid=IwAR10Ycjj6QT2O-ZnPS8MmSghOj-PGpV5UV6Hm864TOOakxh-hwMQ_ie3hmY [accessed: 24 March 2020]; <https://www.prawo.pl/prawnicy-sady/zawieszenie-biegu-termi-now-katalog-spraw-pilnych-pomysly-ms-na,498908.html> [accessed: 24 March 2020].

than in the case of pretrial detention, health issues are not taken into account in the application of pretrial measures, which means that this issue will heavily depend on judicial discretion.

1.2. Non-custodial measures — practical aspects

In the face of the progressing epidemic lawyers hope that the number of pre-trial detentions ordered against suspects will decrease in favour of non-custodial measures. It is beyond any doubt that the risk of coronavirus infection is significantly higher while incarcerated pending trial. Even assuming that the facility will introduce additional safety measures such as supplying disinfectants or reducing risks associated with visits, for example, staying in a closed facility, in a cluster of several dozen to several hundred inmates, still objectively presents a heightened risk. However, the general grounds for ordering pretrial measures make no account of the circumstances of the suspect's health, nor of any other exceptional circumstances such as might shift the scale toward non-custodial rather than custodial measures in particularly justified cases, such as an epidemic outbreak. In this respect, however, reference can be made to the directive of minimizing the use of pretrial measures set out in Article 257(1) of the Code of Criminal Procedure, which provides for the exceptional nature of the use of pretrial detention. The wording of the provision, however, is so general that it allows the courts, when deciding which pretrial measure would be appropriate, to take into account also such extraordinary circumstances as the state of epidemiological threat or state of epidemic imposed on the whole country.

A non-custodial measure deserving of particular attention is Police supervision, the exercise of which can generate practical challenges in the realities of an epidemic threat. In accordance with Article 275(4) of the Code of Criminal Procedure, a suspect placed under supervision is required to report to the designated Police unit at specific times. The Code imposes no specific limit on the number of such visits. The extent of this obligation depends solely on the court's or the prosecutor's discretion and is usually one day or several days a week. Some part of literature is of the view that a requirement to report daily would be excessive,

while weekly visits would be moderate.¹²¹ Hence, it would be expedient to restrict the frequency to the absolute minimum, for example a biweekly visit, in order to limit the suspect's appearance in public places with the resulting constant exposure to infection. It is worth noting, however, that state authorities are taking more and more far-reaching steps to contain the spread of the virus. Heightened quarantine, essentially meaning one can leave the house only for necessary reasons, still permits compliance with the requirement of mandatory visits but invites reflection as to whether the Police supervision is not becoming an excessive burden on the suspect. Perhaps the authorities could introduce a different form of 'reporting' at a Police station with the use of means of mass communication or Police officers themselves could verify that the supervised person is present at the person's residence address, as they do when verifying compliance with mandatory quarantine.

1.3. The coronavirus and pretrial detention

Pretrial detention is the sole pretrial measure for which there is statutory regulation permitting its application to be waived in strictly defined cases. This, of course, means Article 259(1) of the Code of Criminal Procedure, which lists two bars to the application of this measure: serious danger to the suspect's (defendant's) life or health, and exceptionally severe consequences for the suspect (defendant) or members of the suspect's (defendant's) closest family. Additionally, the provision mentions, at the very beginning, such 'special circumstances' as must not be allowed to prevent its application.

The practice of the application of this provision shows that it is applied only extraordinarily and usually in reference to the suspect's health condition (Article 259(1)(1)). It ought to be noted that in the face of the coronavirus threat this provision supplies the basis for avoiding the use of pretrial detention, and such rulings are already forthcoming. For hypothetical infection with the virus indeed constitutes a serious danger to human life or health within the meaning of the provision,

¹²¹ *Komentarz do Art. 275 KPK* [Commentary on Article 275 of the Code of Criminal Procedure] Skorupka (ed.) 2020, 32nd ed./J. Kosonoga, access: legalis.pl

though it seems that merely the threat of it will not suffice. With regard to the suspect there must exist additional reasons relating to the suspect's health. This provision should be applied to anyone who is in a high-risk category — the elderly and those with chronic diseases.

The first order citing Article 259(1)(1) of the Code of Criminal Procedure Proceedings as basis was entered on 13 July 2020 in the Regional Court in Warsaw (case IX Kz 237/20, unpublished). The court granted the defence counsel's complaint against the suspect's pretrial detention and applied non-custodial measures. In the facts of that case the suspect had for years received treatment for more than one chronic illness. In the statement of reasons for its decision the Court referred to the view presented by the Ministry of Health, viz.: 'The elderly, those with impaired immune systems or with concomitant diseases, especially chronic ones, are the most vulnerable.¹²² The Court also found that a person from a high-risk group required special care.

Media reports indicate that the Regional Court's ruling has set a certain decision-making standard for other courts, as there have been at least several other cases of lifting pretrial detention by now.¹²³ If this trend continues, it should be seen in an exclusively positive light — for our circumstances are extraordinary and the courts pragmatically take advantage of whatever options the law leaves before them. The aforementioned principle of minimization of pretrial measures and the principle of humanity warrant a decision to lift pretrial detention if health reasons support such a decision.

In the context of this provision there is also one more question arising, which concerns the elderly in pretrial detention. Although such persons may well be in good general health, because of their age they still take medication for their various medical conditions. In the light of current medical knowledge seniors belong

¹²² <https://www.gov.pl/web/zdrowie/co-musisz-wiedziec-o-koronawirusie>;

¹²³ <https://www.prawo.pl/prawnicy-sady/sady-uchylaja-areszty-z-powodu-koronawirusa,498834.html>,

to a high-risk group and because of their age alone the virus poses a serious danger to them, threatening their life and health.

One should also consider the possibility of compensation being awarded for 'clearly unwarranted' detention under Article 552(4) CCP. The question arises whether such claims could be filed by those infected while in custody if at the time of their pretrial detention such circumstances relating to their health were discovered as indisputably qualified them for a high-risk group. In the Supreme Court's view, pretrial detention will be 'clearly unwarranted' when it violates Chapter 28 of the Code of Criminal Procedure, no matter what the final decision in the case may be — and hence also if Article 259(1) CCP is violated.¹²⁴ Moreover, the Supreme Court has also expressly ruled that the use of pretrial detention when there is a serious risk to the defendant's life or health, will be clearly unwarranted unless supported by special circumstances.¹²⁵ It needs to be remembered that state authorities have a duty to ensure the safety of those in custody. The taking of such a risk, therefore, necessarily entails the possibility of holding the state liable, especially where there is a danger to human life or health.

1.4. Pretrial detention in a medical facility

The Code of Criminal Procedure also allows for pretrial detention in a medical facility (Article 260(1) CCP). The application of this provision may be a sort of compromise between the two extremes of normal pretrial detention and no detention whatsoever. For it applies to situations in which the suspect cannot be detained for health reasons but 'special circumstances' under Article 259(1) CCP prevent pretrial detention from not being used.

This provision could be a window of opportunity in those cases in which the court did not agree with the defence counsel's arguments against the use of pretrial detention or in favour of release in relation to SARS-CoV-2 infection — during the detention or extension hearing or while hearing a complaint — despite

¹²⁴ Supreme Court judgment of 8 May 2018, II KK 452/17, access: lex.pl.

¹²⁵ Supreme Court judgment of 4 November 2004, V KK 133/04, access: lex.pl.

the existence of medical contraindications under Article 259(1) of the Code of Criminal Procedure.

The accepted view in the literature is that Article 260 CCP is the consequence of the legislature's assumption that in some exceptional cases detention will have to be used even against those in ill health. The necessity of use of the most severe pretrial measure against is, in turn, compelled by the severity of the crime charged or unacceptable conduct in the proceedings so far.¹²⁶ This assumption could prompt the conclusion that where health reasons, the sort of charges brought and exemplary conduct in the proceedings so invite, waiving pretrial detention still takes precedence before detention in a medical facility.

1.5. Motion to waive (lift) or modify a pretrial measure

The present situation of an epidemiological threat has to a greater or lesser extent affected every citizen. As SARS-CoV-2 is a relatively new virus for which no single cure has been discovered so far, nor any vaccine to protect those not yet infected, the danger brought by the resulting COVID-19 diseases presents a new circumstance capable of justifying the waiver, lifting or modification of a pretrial measure.

In the case of pretrial detention, in addition to the already discussed health reasons, a motion to lift should find support in realistic concerns for one's safety in a correctional facility. By its very nature a closed facility is a place in which the risk of infection with a contagious disease will be elevated. It is no secret that prisons and detention facilities are overcrowded and the circumstances often impose limitations on personal hygiene. If some additional circumstances also exist, that is the detainee's attitude and conduct are favourably received and the detention has already lasted several months, hence the law enforcement should by now have gathered and secured the evidence, one can assume that non-custodial measures will suffice to safeguard the proper conduct of the proceedings. It is worth noting

¹²⁶ Stefański Ryszard A. (ed.), Zabłocki Stanisław (ed.), *Kodeks postępowania karnego. Tom II. Komentarz do art. 167–296* [Code of Criminal Procedure. Vol. II. Commentary on Articles 167–296]; published: WKP 2019, access: lex.pl

that in the face of the progressing pandemic states resort to such extreme precautions as closing their borders to foreigners. This eliminates any risk of the suspect's successful escape abroad, as it will simply not be physically possible.

A motion under Article 253(1) could also be warranted in respect of non-custodial measures. In the context of the already discussed Police supervision, depending on the reporting frequency ordered, a motion to modify the exercise of this measure is something worth considering. On the basis of the existing regulation the optimal solution would be to restrict that frequency to a minimum. Together with the use of appropriate safety precautions at the Police station, such a modification would significantly reduce the risk of coronavirus infection. One could, however, go a step further and imagine a situation in which the officers themselves verify that those under supervision are in fact present at their residence address, as is the case with those placed in mandatory quarantine.

The spread of the disease will also have adverse consequences for the general economic situation of the citizens and may affect those placed on bail. Due to the state of epidemic now declared, the suspect could suddenly be placed in a very difficult position economically, with the amount of the bail far exceeding the suspect's means. In accordance with Article 266(2) the amount of bail set should, among other things, take the defendant's economic situation into account. We need to remember that a persisting state of epidemic could drastically affect the situation of business owners in particularly affected business sectors, as well as many employees facing either loss of employment or reduction in pay. As the state of epidemic will certainly affect suspects' economic situation, it is worth considering that perhaps a motion to reduce the bail would be in order.

1.6. Changes under the COVID-19 Special Act

The COVID-19 Act introduces new solutions relating to the use of pretrial measures. Of the new additions is an application directive worth citing in whole:

'Article 258a. [of the Code of Criminal Procedure] If the defendant frustrates or obstructs the enforcement of the pretrial measure ordered or has intentionally

breached an obligation or prohibition relating thereto, the court or public prosecutor shall be under a duty to apply such pretrial measure as to guarantee the achievement of the purpose thereof.'

The redaction of the new provision gives rise to multiple doubts and interpretative ambiguities. Firstly, it refers to the 'intentional' breach of an obligation by the suspect which prompts the need to prove that the conduct was in fact intentional. Secondly, the provision does not equip the court or public prosecutor with new options but places them, 'under a duty.' Hence, the provision *de facto* forces courts and public prosecutors to act *ex officio*. Moreover, it employs the general clause of, 'such pretrial measure as to guarantee the achievement of the purpose thereof,' subject only to the procedural authorities' discretion. In this context the placement of this provision in the Code of Criminal Procedure between the special grounds for the use of pretrial detention and bars to its use is also interesting to note. Canons of systemic interpretation prompt the concern that precisely pretrial detention can be such a, 'measure (...) to guarantee the achievement of the purpose thereof,' under this new provision.

The act also introduces a new pretrial measure in the form of a ban on approaching or contacting or making publications with regard to the victim where the defendant is accused of a crime committed against a member of medical personnel in connection with the provision of medical care (Article 276a CCP). The purpose of this measure is to extend additional protection to broadly understood medical personnel who, in the special circumstances of the ongoing epidemic, face additional exposure; this should be viewed as a positive development.

IV. ENFORCEMENT OF CRIMINAL SANCTIONS

From the perspective of the epidemiological threat, the Code of Criminal Enforcement (CCE) provides for a number of institutions of which convicts may — and, in the light of a realistic danger to their life and health, should — avail themselves. One of the overriding rules of the enforcement of criminal sanctions is the constitutional principle of humanity. Though the Code does not quote the language

of the constitutional definition of this principle, there can be no doubt that in reference to the general concept of humanity along with its historical context, the humane enforcement of a criminal penalty means that the severity of the distress inflicted on the convict must be reduced to the absolute minimum required by the purpose of the punishment. Hence, extraordinary circumstances accompanying the enforcement of the penalty — and the state of epidemiological danger followed by the state of epidemic imposed in the whole country doubtless is one such circumstance — should have a bearing on the situation of persons convicted of criminal offences.

1.1. Stay to the enforcement of a decision; discontinuation or suspension of enforcement proceedings

The Code of Criminal Enforcement provides for the possibility of ordering a stay to the enforcement of a decision in, 'particularly justified cases,' (Article 9(4) CCE). This provision is an exception from the general principle that decisions must be enforced. According to an established line of decisions, a stay can be ordered, 'only on an exceptional basis, when new circumstances emerge indicating that immediate enforcement will have irreversible and irreparable consequences for the convict.'¹²⁷ The decision is wholly discretionary. Epidemiological threat or the state of epidemic alone may be insufficient grounds on which to grant a motion for a stay and will be more likely to succeed in respect of convicts belonging to groups with a heightened risk of infection.

This provision could be successfully applied in a supplementary way together with other motions in enforcement proceedings. A motion for a stay could be included with a motion for an interruption or deferment, in a single pleading. In such a situation a stay should be sought until such time as the ruling to be made on the other motion becomes final. A stay could also help those convicts who remain at liberty but have received summons to report at a corrections facility, while — for example — proceedings are pending in parallel for approval for serving the time in electronic supervision instead of incarceration and health reasons

¹²⁷ Supreme Court — Criminal Chamber order of 26 September 2012, V KK 241/12, access: legalis.pl.

support non-incarceration. In such a case a stay of enforcement until such time as the ruling on electronic supervision becomes final would be justified.

The Code of Criminal Enforcement also provides for the discontinuation or suspension of enforcement proceedings. While discontinuation will not apply in the context of SARS-CoV-2 infection, for the provision refers to procedural bars entailing mandatory discontinuation of the enforcement proceedings (statute of limitations and death as expressly included in the language of the provision but also abolition, amnesty, pardon, decriminalization entailing *ex-officio* expungement of record),¹²⁸ the question arises whether the state of epidemic can provide a ground for suspension.

From the language of Article 15(2) CCE it follows that enforcement proceedings are to be suspended in whole or in part if a circumstance preventing the conduct of the proceedings arises, especially if the convict cannot be apprehended or the penalty cannot be enforced due to a mental illness or some other severe chronic disease.

A motion for suspension appears to be justified with regard to persons having tested positive for the coronavirus. The disease caused by it is extraordinarily difficult in therapy either in isolation or in a prison hospital, and its course and prognosis will depend on the general health of the infected subject. It is difficult to estimate how long recovery will take, which may pose a long-term obstacle within the meaning of Article 15(2) CCE. Additionally, infected inmates pose a serious threat to their fellow inmates and to corrections officers. Infected persons sentenced to restriction of liberty will not be physically capable of rendering their community service, and the obstacle will continue until they are cured or even until the epidemiological threat comes to an end.

¹²⁸ *Komentarz do art. 15 KKW* [Commentary on Article 15 of the Code of Criminal Enforcement], ed. by Lachowski 2018, 3rd ed. /Zgoliński, access: legalis.pl

An interesting question, however, is one of the applicability of a motion for suspension of enforcement proceedings to a convict sentenced to imprisonment or restriction of liberty in the form of unpaid community service with a chronic disease other than COVID-19, due to the state of epidemic throughout the country. The state of epidemic with the resulting risk would alone pose a long-term obstacle to the enforcement of the penalty in this scenario. As is already known, those with chronic illness are a high-risk group, with increased probability of developing severe symptoms of COVID-19 and even death. Those in a high-risk group can rightly fear becoming infected in a corrections facility or while performing community service in public places. Enforcement courts also must acknowledge such a fear as a realistic concern, given the media reports of more and more SARS-CoV-2 infection cases, including the American film producer, Harvey Weinstein, currently serving time in prison in New York.¹²⁹ This argument also finds support in the redaction of the provision at hand, not enumerating a closed list of long-term obstacles but only using the term 'in particular'.

Suspension could also apply to a convict becoming infected with a coronavirus disease while incarcerated.¹³⁰ In the Supreme Court's opinion a suspension of enforcement proceedings on such facts is possible and should not be misidentified with interruption. Interruption, in the Court's view, is to be granted where the convict has become ill with a disease that is not chronic and does not pose a long-term obstacle. Otherwise a suspension of the proceedings will be justified.

For the time being, it is difficult to decide whether COVID-19 is a severe chronic disease posing a long-term obstacle in the understanding of this judgment, but it is beyond any doubt that, for those in high-risk groups, it does pose an imminent threat to their life and health, with the therapy potentially to take multiple weeks and the risk of death being high. The evaluation will belong to experts, who in turn will at each time have to face the question whether, in the light of COVID-19, the convict's health has a positive prognosis or not. The affirmative will support

¹²⁹ <https://www.bbc.com/news/world-us-canada-52000173>

¹³⁰ Supreme Court resolution of 28 January 1971, VI KZP 71/70, access: lex.pl.

the granting of an interruption rather than suspension, though this decision will have to be made on a case-by-case basis. In the light of current medical knowledge about the coronavirus, it appears that while COVID-19 has no long-term health consequences for those in good health, infection in those with numerous concomitant diseases will deteriorate their health to a point where their life is seriously threatened and it is difficult to predict how the recovery period will unfold.

1.2. Suspension of a fine

It is also worth emphasizing that suspension of enforcement proceedings may apply to those sentenced to a fine. There is a view in the literature that a fine may be suspended if the obstacle to paying it is transient.¹³¹ One such example could be the economic hardship faced by a business owner due to the state of epidemic. Business operators in numerous industries, especially hospitality, catering and the cosmetic industry, are banned from conducting their operations, which means that, in essence, they lost their source of income overnight. In such a case, at least in the beginning, this type of obstacle will be transient, as it creates a situation in which business owners are in a state of suspension, though it is difficult to estimate how long this will continue. If this sort of suspension persists for a longer period of time, it can have lasting consequences (here, for example, insolvency, significant debt, etc.), which may be grounds for waiving the fine ('discontinuing' it in the language of the Code).

1.3. Fine — other aspects

It is worth remembering that the epidemiological threat also affects the situation of those sentenced to a fine. The state of epidemic in the whole country creates an exceptional factual situation that entails serious consequences not only in the area of health but also for the economy. Both employers or business owners and employees in many business sectors have now found themselves in a very difficult economic situation potentially making the payment of a fine impossible

¹³¹ Komentarz do art. 51 KKW [Commentary on Article 51 of the Code of Criminal Enforcement], ed. by Lachowski 2018, 3rd ed. /Gensikowski, access: legalis.pl.

or significantly more difficult for them. The Code of Criminal Enforcement contains two institutions that can either facilitate the payment of the fine or enable the convict to avoid it altogether.

The former consists in spreading the fine into instalments (Article 49 CCE) if the consequences of immediate enforcement would be too severe for the convict or the convict's family. In principle, a fine can be broken into instalments for a period not exceeding one year, though in exceptional cases, especially if the value of the fine is significant, this period is extended to three years. It could turn out that in the face of the epidemic the convict is now suddenly in a dramatic economic situation making it impossible to pay the whole fine at once without hardship to oneself and one's family. It is not without significance that the legislature also included family members here, due to considerations of humanity.¹³² The provision at hand refers, therefore, to a situation which prevents the convict from being able to pay the fine right now, rather than indefinitely.

Where the impossibility of paying the fine is general in nature and results from a generally poor economic situation, the convict may apply for the fine to be wholly or partially waived (Article 51 CCE). This provision contains several grounds to be evaluated by the court. Firstly, this refers to non-payment due to independent causes. This means situations beyond the impact of the convict's will or influence.¹³³ Secondly, it must prove impossible or inexpedient to enforce the penalty. This requirement is a general clause subject to discretionary evaluation by the court. Furthermore, as mentioned above, there is a view in the literature that the grounds for which discontinuation is granted, as opposed to suspension, must be of lasting nature.¹³⁴ Their fulfilment will not in itself be sufficient, however, as discontinuation of enforcement will only be granted, 'in particularly justified cases.' While the grounds mentioned previously are discretionary and subject to a case-by-case evaluation of the facts, in the case of this particular ground

¹³² Court of Appeals in Katowice, order of 20 August 2003, II AKz 608/03, access: [lex.pl](#).

¹³³ K. Postulski, *Gloss on the SC order of 1 September 2010*, p. 164

¹³⁴ *Komentarz do art. 51 KKW* [Commentary on Article 51 of the Code of Criminal Enforcement], ed. by Lachowski 2018, 3rd ed. /Gensikowski, access: [legalis.pl](#).

existing court decisions will be of assistance to us, permitting the conclusion that the state of epidemic is a particularly justified case within the meaning of this provision. According to the rationale of the order of the Court of Appeals in Lublin of 11 May 2011, a particularly justified case if there is a, 'sudden event comparable to a natural disaster (e.g. fire, flood, some other disaster or severe illness or severe disability) resulting in a drastic deterioration of the economic situation — and posing a serious threat to the livelihood of — the convict and the convict's close ones.'¹³⁵

1.4. Impact of the epidemiological threat on restriction of liberty

Enforcement of the penalty of restriction of liberty in the form of unpaid community service poses in the realities of an epidemic a realistic threat to the life and health of those sentenced to it. For it means, in the majority of cases, having to present in public places or large clusters of people (e.g. a workplace). In the context of state authorities restricting the public life to an absolute minimum and imposing stricter and stricter terms of quarantine, it appears expedient and reasonable to suspend the enforcement of a penalty of restriction of liberty due to a long-term obstacle in the form of the state of epidemic, on the initiative of the corrections authorities and especially probation officers. Where there is no such intention, however, the convicts themselves, whether not yet having begun to serve their sentences or already in the process of serving them, could reach for a number of options provided to them by the Code of Criminal Enforcement.

A convict not yet having begun to serve the sentence may apply for it to be deferred by a maximum of 6 months if, 'the consequences of immediate enforcement would be too severe for the convict or the convict's family.' (Article 62(1) CCE). In the light of this provision it appears to be evident that this requirement will be met in respect of those convicts who, for health reasons, belong to a high-risk group, since the enforcement of the restriction of liberty (in the form of community service) could pose a serious threat to their life or health. It appears,

¹³⁵ Court of Appeals in Lublin, order of 11 May 2011, II AKzw 412/11, access: lex.pl.

however, that also those convicts who are in good health could apply for deferment, solely on the grounds of the existence of a high risk of infection. Hypothetical infection involves a high risk of such symptoms as for which there is no specific therapy or vaccination available at present, and this makes COVID-19 dangerous even to those currently in good health. Moreover, continued enforcement of the penalty would unnecessarily expose the convict to infection along with the risk of passing the virus on, especially among the closest family members.

Article 62(1) specifies the maximum duration of a deferment, but in the case of an epidemic threat the question arises whether 6 months is a sufficient period of time to contain the spread and eliminate the threat. This is an important question, for it is the accepted view in the literature that in circumstances lasting longer than this period a motion for suspension of the enforcement proceedings would be appropriate.¹³⁶

Convicts already serving the sentence could move for an interruption pending the duration of the state of epidemiological threat/epidemic. The court must grant such an interruption if the convict's health condition prevents the continued enforcement of the penalty. In the context of the issue at hand, granting an interruption would evidently be necessary in the case of persons having tested positive for SARS-CoV-2 but showing no symptoms or mild symptoms, as well as persons belonging to a high-risk group. For practical reasons, it appears that the court should also grant an interruption to those placed under mandatory quarantine in connection with a risk of infection. A breach of quarantine would entail severe financial consequences for them, hence they should be granted an *ex-officio* interruption of their sentences.

The court may also, at its discretion, decide to grant an interruption where the consequences of continued enforcement of the restriction of liberty would be too severe for the convict or the convict's family, which is the same ground

¹³⁶ K. Dąbkiewicz, *Kodeks karny wykonawczy. Komentarz* [Code of Criminal Enforcement. Commentary], 4th ed., published: WKP 2018, access: lex.pl.

as in the case of an optional deferment. According to the provision being discussed here, an interruption is to be granted until such time as the obstacle is expected to cease, which should be specified in the motion. However, in the case of the epidemic threat no estimated time-frame could possibly be provided, hence — similarly to deferment — suspension of the proceedings until such time as the obstacle may cease will be appropriate, or even releasing the convict from the remainder of the sentence pursuant to Article 64 CCE. Release will also be appropriate whenever the convict's health and realistic epidemiological threat prevent the continued enforcement of the penalty of restriction of liberty.

The above-cited release, on the other hand, is an option available to a convict who ceases to perform or otherwise comply with the obligation imposed by the sentence through no fault on the convict's part. Article 64 CCE provides for the possibility of deeming that the sentence has been served where it has been served less than fully and it is inexpedient to activate an alternative penalty. It is conceivable that the convict has stopped complying with the sentence in order to comply with the Ministry of Health's recommendation to stay home for the time the virus spreads. It would be hardly possible, in this context, to regard such a convict as evading the penalty, for such conduct in the face of the existing threat ought to be regarded as not only justified but even desirable from the perspective of civic responsibility. Perhaps the court, having examined the service of the penalty to date, will be inclined to agree that there are grounds for considering the penalty to have been served. In the contrary case the convict sentenced person may still apply for an interruption.

Though the above arguments refer to community service, they can also apply to restriction of liberty in the form of attachment of earnings. As the state of epidemic could even take several months, it puts a large part of society in dire economic straits. Preventive measures taken by public authorities have significantly restricted and occasionally outright precluded certain professions from gainful employment. Attachment of earnings should also comply with the principles of humanity and follow the same rules as restriction of liberty imposed in the form of unpaid community service.

1.5. Imprisonment — risks and limitations

On 13 March 2020 the Ministry of Justice for the first time shared information about the presence of the coronavirus in corrections facilities. As the Ministry reported: '(...) as regards corrections officers, there are 58 cases of possible suspicion of infection; 41 cases refer to inmates, and 17 to officers and employees of the Corrections Service.'¹³⁷

The spread of a contagious disease in isolation conditions would pose an enormous problem for the entire corrections system in Poland. Accordingly, steps had to be taken to mitigate the risk. Thus restrictions were gradually imposed on visits, and with effect since 19 March 2020 visits have been banned altogether. A natural consequence of this should be for inmates to be allowed telephone contact, as the Ministry itself recommends.¹³⁸ As at this writing there is no ban on granting leaves and consents for employment outside the corrections facility.¹³⁹ Inmates returning to the facility are only subjected to preventive temperature checks, hence further restrictions in this regard are expected in the face of growing COVID-19 incidence rates. There is a large probability of guidelines being introduced in this regard shortly, for on 23 March 2020 the first orders were issued to stop the employment of inmates outside the facility by the directors of individual facilities such as those in Płock or Racibórz.¹⁴⁰ The directors cite Article 247 CCE, which, in particularly justified cases — which include sanitary reasons — empowers them to impose temporary restrictions or prohibitions on the inmates with regard to e.g. employment, visits, walks, participation in religious services and receipt of parcels. This provision can also supply the basis for further restrictions.

Article 110(2a)(1 and 2) CCE provides that an inmate may be placed for a period of up to 90 days in a residential cell smaller than 3 m² but larger than 2 m² per

¹³⁷ <https://www.gazetaprawna.pl/artykuly/1459907,koronawirus-w-polsce-wiezienie-liczba-zakazonych.html>;

¹³⁸ <https://www.gov.pl/web/sprawiedliwosc/ograniczenie-odwiedzin-we-wszystkich-zakladach-karnych>;

¹³⁹ As at 24 March 2020.

¹⁴⁰ <https://www.sw.gov.pl/aktualnosc/zaklad-karny-w-plocku-komunikat2>; <https://www.sw.gov.pl/aktualnosc/zaklad-karny-raciborz-komunikat-sluzby-wieziennej-3>

person e.g. if the state of natural disaster has been declared or if the state of epidemiological threat or state of epidemic exists at the facility. This provision is paradoxical in how excessive density in a small space is conducive to the spread of the coronavirus, which is droplet-borne. The probability that it will be used in the present situation appears to be low.

Steps taken by the corrections service, however, have proven insufficient, as on 24 March 2020 the *Gazeta Wyborcza* reported the first inmate infected with SARS-CoV-2.¹⁴¹ According to media reports the person had been admitted to the corrections facility while already diagnosed. As the Corrections Service Spokeswoman, LtCol Elżbieta Krakowska, announced: 'The officers were aware of the diagnosis when booking the inmate in and were prepared.' The inmate has been isolated from others, resides in a separate building and is said to be in a good condition.

The admission of an inmate infected with the coronavirus should be viewed in a negative light. Corrections units are conducive to the spread of the virus — due to being locked facilities gathering together large clusters of people. Even staying in a separate building, in isolation, poses too great a risk. The law provides for instruments that should be used precisely in situations such as this one. From media reports we are already aware of a first deferment of the enforcement of imprisonment with regard to a convict — and one who did not seek it. This refers to the situation of 10 March 2020 in the Pretrial Detention Facility in Świdnica, when an inmate escorted there by the Police for the purpose of serving the sentence was refused admission due to suspected coronavirus infection. The court, taking all of the circumstances into account, made the reasonable decision to defer the enforcement of the sentence.¹⁴²

This situation shows that inmates' fears for their life and health in the face of the progressing epidemic are not only justified but realistic in the first place.

¹⁴¹ <https://wyborcza.pl/7,75398,25816120,pierwszy-wiezien-z-koronawirusem-czy-zaklady-karne-sa-gotowe.html>;

¹⁴² https://portalplock.pl/pl/11_wiadomosci/25086_koronawirus-jak-wyglada-sytuacja-w-plockim-wiezeniu.html;

This primarily confirms that, at best, adequate admission rules for inmates have not been implemented to date. Supplying the facilities with disinfectants and hygienic products is by far not sufficient. The Corrections Service Spokeswoman has announced that special screening criteria have been prepared in order to select persons for further activities to be taken with regard to them in connection with a potential risk of coronavirus infection. 'These procedure applies to those reporting or escorted to corrections facilities while meeting the clinical criteria (showing symptoms of the disease) or the epidemiological criteria (having travelled or stayed in a region in which coronavirus transmission is suspected, having had contact with persons confirmed infected, or stayed in a health-care facility providing treatment to infected patients'¹⁴³ In reality, the only safe solution — both for the convict and the corrections officers and fellow inmates — in respect of infected would be to grant deferrals at least until recovery, so that they can serve their time at a later date. As for those with even the slightest suspicion of infection, they should be tested for the coronavirus prior to being admitted to a corrections facility. This solution appears to be difficult to implement, for a variety of reasons, but it is the state authorities' responsibility to ensure the safety of tens of thousands of inmates.

1.6. Options available to inmates

The Code of Criminal Enforcement provides two options for temporarily leaving the corrections facility, viz. deferment and interruption of the enforcement of imprisonment.

There are two forms of deferring the enforcement of imprisonment — a mandatory and an optional one. In the context of the epidemiological threat the court will be required to defer the enforcement of the sentence where special medical reasons warrant such a decision. Although the Code does not define what health condition it regards as a 'severe illness' within the meaning of Article 150 CCE, Article 150(2) provides a certain interpretative hint — '*a severe illness shall be construed as the convict's condition of such a kind that, if placed in a corrections facility,*

¹⁴³ <https://ino.online/post/5833/koronawirus-sluzba-wiezienna-w-gotowosci.html>;

could be life-threatening or pose a serious threat to health.' The COVID-19 disease, having caused a global state of pandemic, should beyond any shade of doubt be regarded as a 'severe illness' within the meaning of this provision, at least until such time as a vaccine or successful therapy is invented. In its context all such conditions as qualify a person for a high-risk group also appear to be a severe illness. The list of such conditions is incomplete, for the virus has only appeared relatively recently and is still being studied. One could invoke the view presented by the World Health Organization that the elderly (above 65 years of age) and, 'persons with pre-existing medical conditions (such as high blood pressure, heart disease, lung disease, cancer or diabetes),' present a high-risk group.¹⁴⁴ The Ministry of Health also puts persons with asthma on this list.¹⁴⁵

Hence, considering the realistic risk of becoming infected with the coronavirus while incarcerated and the resulting risk to life and health, one can draw only one conclusion —convicts receiving treatment for the aforementioned diseases should be regarded as persons with severe illnesses within the meaning of Article 150(2) CCE.

It appears that under the current wording of the provisions regulating deferment those convicts whose health condition so warrants are likely to have a favourable decision issued on a mandatory basis. However, out of procedural prudence, it would be expedient also to move for an optional interruption on the grounds of 'too severe consequences' the immediate enforcement of the sentence would have for the convict and the convict's family.

An optional deferment of the enforcement of the sentence will be appropriate in all those cases where there is no severe illness but there are other circumstances prompting the choice of such a solution. Motions for optional deferment could with all certainty be filed by inmates older than 65, who, because of their age, belong to a high-risk group irrespective of their health condition. It would hardly

¹⁴⁴ <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>;

¹⁴⁵ <https://www.gov.pl/web/koronawirus/porady>;

be possible, however, to give a list of all factual situations capable of satisfying the requirement of, ‘too severe consequences for the convict and the convict’s family.’ Any such motion must be heard by the corrections court.

Inmates who are already serving their terms, on the other hand, could move for an interruption (Article 153(1-2a) CCE). A motion for interruption filed by a chronically ill inmate will be subject to the same evaluation criteria as a motion for mandatory deferment — health reasons in the context of the ‘severe illness’ under Article 150(2) CCE will be decisive. The remaining cases will be decided favourably if supported by, ‘important family and personal reasons.’ The director of the corrections facility may also apply for an interruption. The epidemiological threat also provides a certain kind of ‘loophole’ for inmates granted an interruption within the year preceding the epidemic outbreak. In accordance with the general rule set out in Article 153(3) CCE, a convict must not be granted another interruption within one year of the end of the previous interruption, unless supported by health reasons (mental illness or some other severe illness the convict may suffer from) or ‘some other fortuitous event’. It is an established view in court decisions that a fortuitous event should be construed to mean a sudden extraordinary event affecting the convict or the convict’s close ones, viz. death, fire or some other natural disaster.¹⁴⁶

The COVID-19 special legislation has also introduced the institution of an interruption granted strictly in view of the existing coronavirus threat (Article 14c of COVID-19 Act). An interruption in such circumstances would be granted by the corrections court upon motion from the director of the corrections of facility following approval by the Director General of the Corrections Service and having taken account of the opinion on the convict. Such an interruption will not be available to those sentenced to more than 3 years’ imprisonment for an intentional offence or to repeat offenders within the meaning of Article 64(1 and 2) or professional, organized or terrorist offenders within the meaning of Article 65(1).

146 Court of Appeals in Lublin, order of 12 December 2007, II AKzw 963/07, access: lex.pl. Court of Appeals in Cracow, order of 9 December 2005, II AKzw 785/05).

The interruption would be granted for a specific period of time, with extensions possible until such time as the coronavirus state of epidemiological threat or state of epidemic ceases. The latter will bring an automatic end to the interruption, with the convict having 3 days to report back to the facility. This instrument also presupposes the active participation of the public prosecutor in the proceedings, with the option to oppose the interruption, requiring the court to discontinue the interruption proceedings. Given this assumption, the question arises who actually decides whether to grant the interruption — the public prosecutor or the court.

The Act has also introduced an alternative for all those inmates who have not been granted an interruption but who still pose a threat to other inmates — transfer to a medical facility until such time as the COVID-19 state of epidemiological threat or state of epidemic ceases (Article 14d of the Act). Due to the fact that a whole dedicated system of voivodeship (provincial) hospitals for coronavirus patients has been created to fight the epidemic, it is worth considering to what extent this change is reasonable and viable.

As regards procedural matters, the Act has also introduced the possibility of holding hearings before the corrections court with the use of audio-video devices with the inmate's participation (Article 14f). This change should be viewed as a positive development, for it accommodates the inmates, removes the need for a prison convoy and makes it possible to proceed in compliance with safety standards.

1.7. Serving the term in the electronic monitoring system

The epidemiological threat may provide a window of opportunity for those inmates who are eligible to apply for their penalty to be served in the electronic monitoring system. So far only those sentenced to no more than one year's imprisonment had been eligible for electronic monitoring. The idea of extending its application also to those sentenced to one year and 6 months' imprisonment had been proposed in an amendment to the Code of Criminal Enforcement previously, but in June 2019 that amendment was referred to the Constitutional Tribunal, as a result of which the provision has not ultimately been amended yet.

The legislature has now revisited the idea, introducing the amendment with the COVID-19 Act (Article 15). This provision creates new opportunities for those who remain at liberty and for inmates in the process of serving a sentence of up to one year and 6 months' imprisonment (according to the Ministry, this makes 3,340 convicts).

The explanatory memorandum to the Act clarifies that 16,601 convicts having been sentenced to up to one year and 6 months' imprisonment and not yet having begun to serve their terms will be eligible to apply for monitoring. The Ministry has rightly noted that the incarceration of such a number of people would involve a high risk of mass-scale SARS-CoV-2 infection in closed facilities, potentially threatening the functioning of the entire corrections system.

CORONAVIRUS AND THE LAW IN POLAND

PRODUCTION



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18 Manufacturing industry in the face of the epidemic

As the COVID-19 outbreak evolves globally and nationally, societies and businesses are facing new challenges due to the urgency and unpredictability of the changes. Businesses face the growing challenge of the number and scale of new occurrences and uncertainties of the developing situation. Despite numerous analyses, it is difficult, at present, to answer the essential questions which would allow appropriate planning and the assessment of the risk for businesses. The manufacturing industry is undoubtedly in a unique situation, on the one hand dependent on the supply chain, with high employee numbers, and on the other it functions in a way which prevents it from using remote working, also commonly referred to as a home office model, on a wider scale.

Key areas in manufacturing companies in connection with the epidemic

Due to the nature of the threats and very stringent health and safety regulations combined with the nature of the work, most manufacturing companies have Business Continuity Management teams and procedures in place. Such teams work towards developing procedures and tools for rapid response to various emergency situations, such as a cyberattack or an epidemic, and the threats and consequences they entail. Provided such procedures and mechanisms have been developed and tested, then in the current situation, crisis response structures

can immediately analyse and access risk to rapidly agree a strategy for action. From this perspective, the strategic crisis management with the appointment and smooth functioning of a crisis team planning for scenarios (including the worst case scenario) are of key importance.

Production companies have their particular characteristics due to the sector they operate in, but the main challenges for manufacturing industry caused by the COVID-19 outbreak undoubtedly lie in the following areas:

- » Human resources and employer-employee relations, including appropriate communication,
- » Protection – not only in relation to the health and safety but also economic and mental welfare,
- » The supply chain,
- » Costs and maintaining liquidity,
- » Maintaining the company's market position (and its revenue),
- » Law and compliance systems.

Law and compliance

It should be noted at the outset, that the legal issues addressed in this chapter are only examples of areas impacted by the current epidemic.

In light of the present challenges, it seems justified to state that traditional features of compliance systems must be supplemented with new areas and tasks, where applicable, and simplified and digitalised (unless these changes have been already introduced). It is essential to respond rapidly and efficiently to emerging legislative changes. Currently, one of the most important tasks of compliance systems is evaluating the response, whether the systems monitor the information relating to the proposed and implemented legal changes on an ongoing basis, delivering it in a timely manner, and whether the information about the legal changes and their potential implications reaches all stakeholders.

The impact of the legal changes on organisations must be assessed on many levels, looking firstly at the main consequences on the emerging rights and obligations of the entrepreneur then by assessing the impact on the business environment and employees, as well as evaluating the risk and selecting the best option.

We are clearly operating in the VUCA mode, with an increased flow of information, or even information overload, so compliance plays an even greater role in the area of communication. It is worth engaging legal staff or compliance officers in the work of the communications department to support it in the creation of messages to employees to ensure, on the one hand, the best and fastest information flow, and on the other, the compliance with corporate governance requirements.

Undoubtedly, the COVID-19 epidemic is also a performance check for legal and compliance departments, especially in companies with a large number of employees. The work of legal departments has to be further intensified, and information on legal changes should be analysed, not only in terms of short-term effects, but more importantly long-term consequences – how legal changes will impact the company's business environment in the long term. The analysis of the scenarios resulting from the support packages / special legal acts is among the crucial issues here – the specification of procedures for implementing support packages and the analysis of tax implications, within the scope of state / government aid, employment guarantees and other significant issues to be taken into consideration while performing the regulatory risk assessment.

The organisation of place and time of work

The labour market has been significantly impacted by the growing disorganisation of social life resulting from the further spread of the virus. These are undoubtedly challenging times for the manufacturing industry whose employees are predominantly unable to work remotely (using the home office model). Obviously, the above does not relate to the teleworking regulated by the Labour

Code, but to all forms of non-teleworking remote work regulated by company's internal regulations.

At the production facilities, basically only employees from the so-called business support areas, such as HR, finance, marketing or project teams, can take advantage of the remote work solution. Within the scope of the remote working itself, with the high number of employees working from home, the challenge, as usual, is obviously compliance with occupational health and safety regulations, supervision of employees, appropriate incentive measures and performance assessment. One of the solutions that can be implemented at the production facilities, if we are looking to improve employee safety and ensure that "social distancing" is observed, is a decrease in the number of meetings and taking measures to reduce the number of people working in an open space at the same time (eg. Introducing the so-called flexible working hours, shortening the working day and introducing shift work). As far as shift work is concerned, the so-called "split shift working" arrangements could be adopted. For example, introducing 30-minute breaks between shift changes allows workers to avoid physical contact and significantly improves infection prevention.

The rapid processing of changes in the documents that constitute internal labour law rules, such as regulations and instructions, poses a significant challenge. The current situation demonstrates that the legal regulations in the field of labour law are very inflexible.

Whilst awaiting the introduction of a packet of anti-crisis legislation, it is worth mentioning right now that when the state of epidemic emergency was declared in Poland, the following already existing legal solutions could be implemented to optimise the labour costs:

Introducing changes to working time:

- » Flexible working time (Article 140¹ of the Labour Code),
- » Extension of the remuneration period,
- » Equivalent working time (Article 135 of the Labour Code),

- » Shortening of the working day,
- » Shift work.

The above should be supplemented with:

- » An arrangement with employees suspending the application of internal labour law provisions (Article 91 of the Labour Code) or using less favourable employment conditions than those resulting from employment contracts (Article 23^{1a} of the Labour Code).
- » Instructing an employee to work remotely,
- » Assigning alternative work duties to an employee (Article 42(4) of the Labour Code),
- » Granting an employee leave (overdue, planned) or agreeing with an employee on current annual leave / unpaid leave,
- » Taking time off by an employee in return for work done overtime.

An important question for entrepreneurs who will not be able to take advantage of the legal solutions included in the anti-crisis package and a stoppage of activity contained therein is whether the stoppage within the meaning of Article 81 of the Labour Code can be currently applied. According to the explanations of the National Labour Inspectorate of 12 March 2020: "The necessity to close down a place of employment in order to counteract the spread of COVID-19 will constitute a reason relating to the employer, despite the fact that it will be a reason that cannot be attributed to the employer (similar to a power cut in the city, including in the place of employment, which makes it impossible to perform work; a flood that flooded the place of employment etc.)"¹⁴⁷ and will entail an obligation to pay an employee a remuneration for the period of inactivity.

Occupational Health and Safety in the new reality

One of the dilemmas that entrepreneurs are faced with is what personal protective equipment (PPE) the employer should provide in the manufacturing company.

¹⁴⁷ <https://www.pip.gov.pl/pl/wiadomosci/108610,praca-zdalna-przeciwdzialanie-covid-19.html>

Firstly, the employer must organise suitable occupational health and safety training on counteracting infections. Secondly, the kind of personal protective equipment will depend on the nature of work and working methods as well as obligations under Regulations. Personal protective equipment will certainly have to be enhanced, i.e. equipping washing facilities with gel and liquid sanitizers, providing employees with disposable gloves, goggles or face shield visors. Suitable preparation of the workplaces may be important – frequent airing, maintaining appropriate temperature, and decontamination (disinfection) of the busiest places on site, door handles, handgrips.

The Regulation adopted on 31 March 2020¹⁴⁸ introduces new restrictions and obligations for businesses. Pursuant to Paragraph 9(7)(3) of the Regulation, one of the restrictions requires the employer to provide between 2 and 11 April 2020 the following:

- a) disposable gloves or hand sanitizers to workers, regardless of their employment status,
- b) a minimum distance of 1.5 m between workstations.

Enterprises are facing an immense challenge relating to preventive medical screening (initial, periodic and return-to-work health checks) and specific additional examinations required, for example, with regards to licensed production, where the expiry of such examinations results in an obligation to withdraw an employee from the production classified as licensed. With overwhelmed health services, there is a dilemma concerning ongoing preventive examinations, where health-care institutions are unable to perform them. The Special Anti-Crisis Act of 31 March 2020¹⁴⁹ states in Article 12a that periodic health examinations are to be postponed for the duration of the epidemic. In practical terms this means that the employer is required to refer

148 Regulation of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and bans in relation to the state of the epidemic (hereinafter referred to as the Regulation of 31 March 2020)

149 Act of 31.03.2020, Dz. U., item 568, on the amendment of the act on special arrangements associated with preventing, counteracting and combating COVID-19, other contagious diseases and the crisis situations they cause, as well as some other acts; (hereinafter referred to as the Anti-Crisis Special Act).

an employee for medical check-ups, but such obligation is suspended as a result of the epidemic. When the epidemic ends, the check-ups must be performed and completed within 60 days. Initial and return-to-work examinations should be performed by an authorised physician but, if no such physician is available, any physician can perform these tests. A certificate issued by such a physician remains valid for 30 days from the day the end of the epidemic has been declared. Medical reports issued within the initial, periodic and return-to-work health examinations which expired after 7 March 2020 remain valid for no longer than 60 days from the day the state of epidemic emergency or the epidemic ended.

Another question that arises as to the health preventive measures and the improvement of health and safety is whether the employer may refer an employee for coronavirus testing. It is emphasised that, in general, the employer is not entitled to verify the health of their employees, except for preventive screening resulting from the provisions of Article 229 of the Labour Code. The legal framework does not provide for referring an employee for any health examinations in connection with the increased risk of contracting viral diseases without their consent (if this does not coincide with the deadline for a further periodic check-up). The above position was also confirmed by the National Labour Inspectorate in the explanatory note dated 26 February 2020¹⁵⁰ regarding employers' rights with respect to the risk of employees contracting the coronavirus. The occurrence of a new event potentially indicating a change in the employee's health, despite a valid medical certificate, constitutes an exception here. For example, on return from a business trip an employee is showing evident symptoms which can be observed (such as, for example, a cough or fever). In such circumstances, the medical certificate is no longer valid and the employer must refer the employee for a medical check prior to the employee returning to work.

Privacy during the epidemic

When it comes to privacy, COVID-19 has brought many challenges. More and more employers face the dilemma whether, and if so, how to prevent infections

¹⁵⁰ <https://www.pip.gov.pl/pl/wiadomosci/108072,wyjasnienia-pip-w-zwiazku-z-koronawirusem.html>

in their workplaces without breaking the law, including the GDPR. As one of the most common symptoms of the disease caused by the virus is an elevated body temperature, one of the solutions relating to the prevention of the spread of the virus is a preventive temperature check of employees and other persons entering the site. However, it raises an important concern about data protection law. Undoubtedly, the information that a certain person has an elevated body temperature is personal data concerning their health. It should then be decided whether the employer has a legal basis to gather and process such data. In light of uncertainties regarding the interpretation of the GDPR and the Labour Code in this context, the solution of anonymous body temperature measurement of all persons entering the site, without the verification of their identity, should be considered. Therefore, every person entering the site would have their temperature measured. If the temperature were to be elevated, such person would not be allowed to gain access, without any collection of personal data. Therefore, no personal data would be gathered.

Many companies use self-assessment forms; the question arises whether their use is justified for safety reasons and prevention. The overriding opinion is that asking employees, guests, clients etc. whether they have returned from places/regions particularly affected by the coronavirus, and thereby processing such data may be classed as a legitimate interest based on Article 6(1)(f) of the GDPR. However, there are many more substantial issues and concerns, the above two problems being only examples of commonly discussed issues.

Broken supply chain and contractual obligations

Irrespective of the type of industry, businesses are beginning to experience problems relating to supplies and performance of contractual obligations. Globally linked supply chains increasingly more acutely suffer from restrictions in mobility and the consequences of introducing remedial measures. Questions regarding the performance of contracts during the epidemic are asked more frequently. How can we currently classify the situation we are facing? – Are there grounds to recognise it as force majeure? Can we invoke the *rebus sic stantibus*

clause –the concept of a fundamental change of circumstances? In practice, every situation must be analysed separately. If the contract included a force majeure clause, and an epidemic was listed therein as an example of a sudden, unforeseeable event, then, unless the contract stipulated otherwise, the event may exclude the debtor's responsibility for non-performance or improper performance of the contract, e.g. whereby the debtor has no access to the goods ordered. Where the epidemic is not listed in the contract clause as an example of a force majeure event, the assessment of the legal nature of the coronavirus pandemic will require detailed analysis of the provisions of a force majeure clause and the legal framework of the contract. In general, the lack of the force majeure clause means that general principles of liability relating to performance of obligations apply.

Key selected issues in the context of the labour law

Work stoppage

Employers who will introduce the work stoppage measure will be able to lower employees' remuneration by a maximum of 50% and receive state funding of PLN 1,300 gross per employee.

Limitation of working hours

Employers may reduce working hours by 20%, but no more than 50%, and receive funding of half of an employee's remuneration, capped at PLN 2,080 (no more than 40% of average monthly remuneration) based on the previous applicable quarter on the day the application is filed.

Flexible working hours

In a crisis situation, employers may reduce the rest period to 8 hours a day and 32 hours a week, and introduce equivalent working time more easily.

Later introduction of Employee Capital Plans (PPK)

New deadlines for the second group of entrepreneurs: an agreement on operating PPK should be concluded by 10 November 2020, and an agreement on the management of PPK by 27 October 2020.

Suspension of preventive health examinations

Periodic check-ups will be suspended. Initial and return-to-work examinations are still required, but the number of physicians authorised to perform such check-ups has been increased.

Additional rights for critical companies

Enterprises from essential economic sectors will be able to change the system or schedule of their employees' working hours in a manner necessary to ensure business continuity.

Changes within the scope of the residence and work of foreign nationals

The period of validity of the following has been extended: a national visa (type 'D'), the right of foreign nationals to remain within the territory of the Republic of Poland and documents legalising work in the Republic of Poland.

Sectoral support programmes

Due to numerous restrictions and potential limitations¹⁵¹ included in the Anti-Crisis Special Act, it is worth examining the support available within the framework of EU projects, as long as the European Commission, in the notification procedure, finds a given support measure compatible with the internal market.

At present, the European Commission points to three types of such support.

- 1. Pursuant to Article 107(2)(b) of the TFEU, any aid granted by Member States aims at compensating for direct losses incurred as a result of the COVID-19 epidemic.**

The aid does not aim to maintain or restore profitability or solvency of a given entity, but only cover losses directly connected with the COVID-19 epidemic and restrictions introduced in relation to this.

151 Everything indicates that the instruments of job protection within the Shield may be limited under existing wording of the Temporary guidelines of the EC – where the current limit is EUR 800,000, unless the Government successfully notifies the European Commission of the Anti-Crisis Shield.

Under Article 107(2)(b) of the TFEU, Member States may pay compensation to enterprises (in particular in those sectors exceptionally affected by the epidemic, such as transport, tourism, culture, hospitality and retail) or to organisers of cancelled events for damage suffered directly due to the epidemic.

2. As part of the aid under Article 107(3)(b) of the TFEU, support will also be granted to enterprises finding themselves in a situation of a sudden shortage of funds.

In the Communication from the Commission – Temporary Framework of state aid to support an economy in the context of the COVID-19 outbreak, the Commission declared that under a fast-track procedure it would find an aid up to EUR 800,000 per enterprise as compatible with the internal market. However, this does not exclude the setting up of support schemes providing for higher support amounts.

3. As part of the aid under Article 107(3)(c) of the TFEU, Member States may grant aid to companies to address their urgent liquidity needs and support companies experiencing financial difficulties.

Generally, when it comes to support schemes under Article 107(3)(c) of the TFEU, it is possible to grant aid to companies in a difficult situation and in relation to their restructuring. However, it is allowed, by way of an exception, to grant the so-called rescue aid to companies which are not in difficulty (within the meaning of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty), but which have urgent liquidity needs due to exceptional and unforeseeable circumstances.

* * *

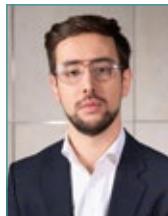
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CORONAVIRUS AND THE LAW IN POLAND

LITIGATION



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19 Litigation and arbitration during the COVID-19 epidemic

The COVID-19 epidemic precipitated unexpected and dramatic changes in many areas of public and private life. The broadly understood administration of justice and the functioning of courts and arbitration bodies, the parties to proceedings pending before them and their attorneys were also affected by these changes, which led to restricting and reorganizing the activities of the judiciary. In this chapter, we analyse these changes and explain their practical consequences for everyday disputes between entrepreneurs.

The analysis consists of four sections. The first deals with the functioning of the administration of justice from proclaiming the state of epidemic threat until the entry into force of the act amending the Act on special solutions preventing, counteracting and combatting COVID-19, other infectious diseases and the ensuing crisis situations, and certain other acts (Journal of Laws 2020, item 568) (hereinafter the “Anti-Crisis Shield”). The second describes the changes introduced by the Anti-Crisis Shield. The third discusses methods of pursuing litigation which in our opinion are the most effective and accessible for the time being. The fourth predicts how the administration of justice will function when the epidemic passes.

Considering the rapidly changing actual and legal situation, we note that the contents of this study is current as of 1 April 2020.

1. SUMMARY

- 2.1 The functioning of courts has been restricted. Most trials, including in business cases, have been cancelled, inevitably leading to a huge congestion of pending cases, including business ones, in the future. To clear this bottleneck, drastic reforms of the administration of justice will be necessary. In this context, moving towards electronic courts appears obvious.
- 2.2 Proclaiming the state of epidemic threat and the state of epidemic did not lead to suspension of civil proceedings in any court by operation of law under Article 173 of the Code of Civil Procedure. However, difficulties in undertaking procedural steps by reason of the pandemic will in certain cases justify the submission of a motion to reinstate the time limit to perform an action, including to lodge appeal measures. The scope of Polish Post operations has been restricted.
- 2.3 The legislative changes found in the Anti-Crisis Shield provide for the following:
 - 2.3.1 adjourning trials and open hearings in the majority of cases (except urgent ones) until the epidemic passes;
 - 2.3.2 suspending the course of procedural time limits until the epidemic passes.
- 2.4 It appears that many disputes occasioned by the epidemic will be resolved amicably or through mediation. In turn, one of the alternatives to proceedings before common courts might be arbitration which can be conducted electronically to a wider extent than litigation.
- 2.5 For the purposes of future disputes, it is already necessary to gather evidence supporting the impact of epidemic-related circumstances on the performance of agreements.
- 2.6 One method worth considering in business disputes before common courts is filing a motion to secure a claim, for example a claim for payment. It appears that such motions could be examined by courts at short notice even given the current difficulties in court functioning.

2. FUNCTIONING OF COURTS IN THE PERIOD FROM INTRODUCING THE STATE OF EPIDEMIC THREAT UNTIL PASSING THE ANTI-CRISIS SHIELD.

2.1 The functioning of courts has been restricted.

The impromptu manner of introducing changes in the functioning of courts

The regulation of the Minister of Health of 13 March 2020 proclaiming the state of epidemic threat and the regulation of the Minister of Health of 20 March 2020 proclaiming the state of epidemic did not contain separate provisions concerning the manner in which courts are to function during these states. Nor are any exact regulations in this respect found in the provisions of generally applicable law. In light of state activities related to the epidemic, on 12 March 2020 the Ministry of Justice published two statements containing recommendations on how courts should function in the period between 13 March 2020 and 31 March 2020.

The Ministry's recommendations did not cover all practical aspects of court functioning and were not binding, leaving the specifics to be regulated by orders issued by court presidents. Below we will discuss these recommendations and the manner in which they were implemented in courts, the Regional Court in Warsaw, primarily Poland's largest court, while mentioning steps taken in other courts in a cursory manner, to outline existing discrepancies.

Court presidents, exercising their prerogatives granted by the Common Courts System Act, issued orders on the functioning of the courts subordinated to them. Because the arrangements adopted by courts were not uniform, the sole credible source of information on what rules are in effect at each court is analysing the order of its president, verifying the notices posted at the court's website, or perhaps calling the court's information office. The relevant information usually appears in a visible location at court websites, most often as *pop-up* windows once a website is accessed.

Cancelling trials and open hearings and the list of urgent cases

The Ministry of Justice recommendations propose, among others, to postpone all trials and public hearings, and contain a list of urgent cases which are to be conducted in accordance with former rules.

The courts did implement the principle of cancelling trials and open hearings – the vast majority of courts cancelled them until the end of April 2020.

Individual courts differed in their lists of urgent cases to be conducted as before. Some of them arranged their lists by direct reference to the Ministry of Justice list. Others referred to the definition of an urgent case found in the Regulations on the functioning of common courts of 18 June 2019. Yet another group, including the Regional Court in Warsaw, compiled their own lists. The list does not include business cases or other proceedings in which the parties are entrepreneurs disputing in connection with the economic activities they conduct.

Actual administrative and ruling activities of the courts

Closed hearings, as a rule, were not cancelled, at least according to information which can be gathered from websites, and should theoretically proceed according to schedule. So far, there has been nothing to suggest that courts do not engage in ruling and administrative activities in the meaning of active work on pending proceedings. Unofficial information suggests that some courts introduced working shifts to prevent larger gatherings on court premises.

Filing pleadings with registry offices

Since 16 March 2020, the registry office of the Regional Court in Warsaw has been operating as a single counter in the building at Aleja Solidarności 127 in Warsaw. Anyone entering the building to contact the registry office must undergo a temperature check and is admitted only if the result is below 37.5 degrees Celsius. It is recommended to dispatch writs to the court via Polish Post.

Analysing the orders adopted by other courts shows that some registry offices have been completely shut down, preventing interested parties from filing their

pleadings directly at the court building. Some courts, in turn, decided on intermediate arrangements, for example the Regional Court in Łódź set up boxes in which pleading can be deposited. In these cases, courts claim that the boxes are emptied at least once per day and confirmations of receiving the pleading are dispatched by court clerks.

Contacting court information offices

The court information office at the Regional Court in Warsaw operates remotely, answering queries by e-mail or phone. Similar working arrangements have been pursued by a decisive majority of information offices in Polish courts. Personal contact is possible in exceptional cases.

File reading rooms

Browsing files at the Regional Court in Warsaw is possible only in particularly justified cases. Some of the exceptions include instances in which a trial or an open hearing has been scheduled during the epidemic period or the time limit for lodging an appeal measure or rectifying formal defects of a pleading is running. Most Polish courts theoretically allow the possibility to browse files in justified cases. Unofficial reports suggest, however, that they often refuse to do so.

Time limits and dispatching court correspondence

The recommendations of the Ministry of Justice prescribe that courts should stop dispatching any court letters for which a procedural time limit exists, except for letters in urgent cases.

The Regional Court in Warsaw ceased to send letters which if received caused a time limit to run, with the exception of some kinds of cases such as enforcement, land and mortgage register, and enforcement warrant proceedings. A similar strategy has been adopted by a large majority of courts. Unofficial intelligence suggests however that many attorneys have recently received a considerable number of mailings or notices of mailings from courts, which allows to conclude that some departments “sped up” their efforts in light of the expected restriction of court activities for a longer term.

Functioning of the Supreme Court

The Supreme Court cancelled all trials and open hearings, except for hearings in matters which need to be examined urgently, as defined by the president heading the particular Supreme Court chamber. The court information office operates only remotely. Browsing files is possible only in case of justified necessity.

Business cases

The list of urgent cases offered by the Ministry of Justice excluded business cases or other proceedings in which the parties are entrepreneurs disputing in connection with their economic activities. Nor did the courts define such cases as urgent in their orders. Hearing a person to secure evidence and staging closed hearings may be considered as exceptions; these opportunities may be of some, although usually not major, importance in certain business proceedings.

2.2 Since the introduction of the Anti-Crisis Shield, the course of procedural time limits did not cease to run by operation of law.

The time limits were not suspended under Article 173 of the Code of Civil Procedure.

When the state of epidemic threat was proclaimed, there were views that civil, including business, proceedings had been suspended by operation of law under Article 173 of the Code of Civil Procedure due to courts ceasing their operations as a result of force majeure, i.e. the state of epidemic threat, and then the state of epidemic. Suspending proceedings by operation of law would mean, among others, suspending the course of all procedural time limits. Such an arrangement would be all the more attractive because the parties and their attorneys affected by objective difficulties in drafting and dispatching pleadings could rely on the suspension of procedural time limits.

However, no grounds exist to apply that provision. The erroneous opinion is based on the wrong assumption that courts stopped their activities. However, statements made by courts do not suggest that any of them ceased to operate

- their work was merely scaled down (as described in detail above). It is still possible to effect a number of procedural steps, including filing a pleading with a court. As such, it is a mistake to assume that the proceedings are suspended by operation of law under Article 173 of the Code of Civil Procedure.

Motions to reinstate time limits may succeed.

An alternative for those who, due to the epidemic, could not or cannot observe procedural time limits might be using the possibility to reinstate the time limit to perform a step due to circumstances for which they are not liable. Such circumstances may include an epidemic. However, merely invoking the conditions related to the epidemic in a general way, without referring specifically to particular circumstances and demonstrating how they resulted in the impossibility to observe the time limit (for example when an employee knowledgeable about the case was formally quarantined), would be risky. When filing a motion to reinstate a time limit, one should also remember to comply with all formal requirements, i.e. to file the motion together with the very pleading (appeal measure) whose time limit is to be reinstated, within 7 days from the date on which the impediment ceased (in the above example, this may be 7 days from the date on which the key employee's formal quarantine had ended).

Dispatching pleadings at a post office whose opening hours have been shortened.

In the context of the above discussion, the issue of dispatching mail to courts using the designated operator (Polish Post) should be noted. Since 16 March 2020, the Polish Post has been operating under special conditions. The opening hours and method of accepting mail for delivery have been changed. At present, the majority of post offices is opened only six hours per day and customers are admitted on the premises one at a time. Although such circumstances hinder the use of the services of the designated operator and, as such, the timely filing of a pleading (to observe which it is sufficient to deposit the mail with the designated operator), it does not appear that these circumstances alone could suffice as a ground for reinstating the time limit for filing a pleading. Even though in some instances people had "doors slammed in their faces" and therefore were

unable to dispatch mail on the date on which the time limit elapsed, it is clear that the present situation obliges parties and their attorneys to take particular, extraordinary care to observe the time limits.

2.3 Accelerated and forced shift to electronic court proceedings.

As noted above, even though the epidemic resulted in restricting court activities, it did not cause the suspension of procedural time limits under Article 173 of the Code of Civil Procedure. Until the Anti-Crisis Shield was introduced, the circumstances largely hindered these limits from being observed. The Polish civil procedure allows pleadings to be filed electronically – an alternative to the traditional paper-based method – as a rule only in electronic writ of payment proceedings (the so-called e-court). Given these circumstances, the only methods guaranteeing that the time limit would be observed were filing the pleading with a registry office (if open) or dispatching it via Polish Post. Both these methods required an individual to leave their home, an activity prohibited for those formally quarantined and dangerous for those belonging to a special risk group.

A number of Polish courts, for example the Appeals Court in Warsaw, the Regional Court in Warsaw and the Regional Court in Łódź, devised arrangements attempting to address this issue, allowing certain pleadings to be filed via electronic mail messages. The possibility of using this method does not result directly from legal provisions, but was approved in respect of appeal measures, subject to certain formalities, by the Supreme Court in a resolution of 23 May 2012, file ref. no. III CZP 9/12.

The procedure published by the Regional Court in Warsaw, taking into account the formal requirements described in the Supreme Court resolution cited above, provides that appeal measures and motions to give reasons for rulings in the PDF format may be sent to a special mailbox address. If the e-mail message is delivered before 2 p.m., the appeal measure will be printed out on the same day and the court will mail back the scanned first page of the measure together

with a confirmation stamp showing the date on which the appeal measure was received by the court. Appeal measures will then be considered filed on the date on which the measure was printed out. As foreseen by the Supreme Court in its resolution, such appeal measures can have their defects rectified at a later date by affixing a signature and sending attachments. Similar arrangements were also adopted by other courts, such as the Appeals Court in Warsaw or the Regional Court in Łódź.

2.4 Restricted out-of-office activities in enforcement proceedings.

In order to prevent the spread of epidemic, out-of-office activities, attachments and auctions were restricted. Other enforcement activities which can be performed in-office (for example garnishments from bank accounts) will continue. The speed and effectiveness of activities is of course affected by the ability of the large majority of judicial enforcement offices to work remotely.

3. SPECIAL ARRANGEMENTS INTRODUCED BY THE LEGISLATOR IN THE ANTI-CRISIS SHIELD.

The Anti-Crisis Shield introduced systemic changes in the functioning of the administration of justice, among others by suspending the course of procedural time limits and cancelling trials and open hearings in all cases except urgent ones for the duration of the epidemic.

3.1 The Anti-Crisis Shield introduces a statutory list of urgent cases.

The Anti-Crisis Shield contains a list of urgent cases (Article 14a(4) and 14a(5) of the Act) which are to be examined by another court of the same level should the original court cease to function entirely. Business disputed have not been classified as urgent cases, which are the only cases in which trials and open hearings are possible. This does not mean, however, that urgent matters will be

the only ones examined. Courts are able to perform certain actions, such as holding closed hearings, also in cases not identified as urgent.

3.2 The majority of procedural and substantive law time limits are suspended.

During the state of epidemic threat and state of epidemic, the Anti-Crisis Shield suspends the course of procedural and court time limits in court proceedings, including administrative and court proceedings, enforcement proceedings, penal proceedings, penal and fiscal proceedings, and administrative enforcement proceedings, in the majority of cases. These time limits continue to run, however, in cases defined as urgent. It appears that the aforesaid suspension of procedural time limits should be counted from the date on which the act entered into force.

Suspending civil law time limits was another idea that surfaced while drafting on the Anti-Crisis Shield. Ultimately, however, it was struck out of the act. Traces of it were preserved in a wording of one of the provisions that stipulates suspending the course of administrative law time limits. Striking out the words "civil law" from the original bill while retaining the words "administrative law" resulted in the provision stipulating the suspension of administrative law time limits "which if not observed cause the expiry or alteration of property rights, claims and liabilities." Even though this provision of the Anti-Crisis Shield contains language strictly related to civil law, there are no grounds for maintaining that civil law time limits have been suspended.

4. POSSIBILITIES OF CONDUCTING DISPUTES DURING THE EPIDEMIC.

4.1 Proceedings to secure claims as a potential opportunity to overcome court functioning restrictions.

The Anti-Crisis Shield regulations do not prevent securing one's claim against a business partner in business cases before a common court, subject to

the expected slowdown of court processing. Being able to enforce this security in practice will pave the way to effective enforcement of the subsequent judgment. This will deprive the other party of the motivation to stall the litigation. Obtaining a security injunction may also give an advantage in settlement negotiations.

4.2 Gathering evidence for the purpose of future disputes is already necessary.

In business cases that are under way during the epidemic, reference to the state of epidemic as a circumstance affecting the performance of agreements will not be a sufficient argument for either party. Of key importance will be producing evidence (preferably in the form of documents) to reliably record these circumstances, such as quarantined employees, lack of components or materials necessary to assemble the final product, government acts preventing the performance of a consideration, etc. Such evidence needs to be gathered even now.

4.3 Alternatives to courts, or opportunities for mediation and arbitration.

Restricting the activities of courts has not caused disputes between entrepreneurs to disappear. In the present circumstances, alternative methods to resolve them need to be looked for.

Settlements and mediations may help to address numerous cases.

It appears that a considerable majority of potential disputes that may arise due to the state of epidemic will be settled through out of court mediation, especially in the near future. Business partners are aware of the circumstances and instead of going to court and risking long-term proceedings will prefer to achieve their economic objectives and enter into a compromise, for example by waiving part of their fees or extending the deadline to perform the consideration.

Modern character of arbitration.

In economic relations, arbitration courts present an alternative to common courts. It is true that arbitration proceedings were affected by the epidemic, with many scheduled trials cancelled, though to a lesser degree than court proceedings. Polish arbitration institutions (primarily the Arbitration Court at the Polish Chamber of Commerce in Warsaw or the Arbitration Court at the Polish Confederation Lewiatan), in keeping with the spirit of the times, introduced multiple arrangements to streamline the proceedings. An advantage of arbitration proceedings is that a major part of them can take place through electronic means of communication – for example pleadings can be exchanged by e-mail. Once entered in a Polish common court, an arbitral award is enforceable on par with a judgment of the former. Of course the issue of staging arbitration trials, which formerly have usually taken place directly in court buildings, remains problematic in epidemic conditions. There are, however, no formal obstacles to staging them by means of videoconferencing.

Arbitration is possible only in case of disputes resulting from agreements containing an arbitration clause. In light of the potential extreme congestion of cases in common courts, it appears reasonable to consider introducing an arbitration clause in any agreement entered into at present.

5. FUNCTIONING OF COURTS ONCE THE EPIDEMIC PASSES

5.1 Restricting court activities will compound issues with lengthy proceedings.

One of the troubles affecting the administration of justice, of particular importance for entrepreneurs, is the excessive length of court proceedings. The longer the state of epidemic lasts, the later will courts resume normal work. It is already evident that the epidemic will cause a considerable delay in case processing. Even more, the attending economic slowdown will generate new disputes, if not right away, then surely over the coming months. New kinds of cases may arise related

to performance of agreements during the epidemic and delayed payments. The smooth processing of court cases will not be helped by the appreciating Swiss franc exchange rate and the resulting rising tide of mortgage loan disputes.

5.2 The need to reform the system.

A deep-reaching reform of the judiciary should be the subject of serious discussions. Even though it is clear that while the epidemic is on the rise, health matters should be given priority, ignoring the situation of the judiciary is not a good idea. The efficient functioning of courts is especially important when it comes to mitigating payment delays which will be an important factor affecting the business during the expected economic slowdown.

A discussion on changes in conducting business disputes should be initiated. Digitizing the judiciary, in particular court files, and enabling the court, parties and attorneys to exchange correspondence electronically, appears a reasonable course. Introducing the possibility of electronic exchange of pleadings was indeed considered while drafting the Anti-Crisis Shield. Ultimately, however, this solution was not approved.

One should also consider the possibility of examining certain categories of cases solely electronically in all instances of proceedings. Similarly, investments in IT infrastructure are necessary to support and assist the effectiveness of court staff. Finally, and most importantly, it is people who need to be recognized – the not so recent protests of judiciary workers have visibly demonstrated the problems faced by this inadequately remunerated professional group.

CORONAVIRUS AND THE LAW IN POLAND

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20 Telecommunication and the introduction of the state of COVID-19 epidemic

Similar to other industries, telecommunications undertakings also need to adapt their operations to the new situation.

What is important, apart from the obligations and restrictions affecting all enterprises, telecommunication undertakings operate under special legal regulations, which impose additional limitations or requirements. In the following paragraphs we will be looking at various legal requirements regarding distance contracts for the provision of telecommunications services, obligations of telecommunications undertakings under states of emergency related to epidemics, as well as the necessary reporting obligations to be performed in March this year and the consequences of failing to discharge these.

Distance contracting in the context of the obligation to verify the subscriber's identity

One of the main impacts of the measures taken in connection with the epidemic is limiting the operation of sales and service points. The Regulation on the introduction of a state of epidemic dated 20 March 2020 prohibited the functioning of service points in shopping centers (commercial objects with a surface of at least 2,000 m²). Therefore telecommunications undertakings lost the possibility to operate their stores at such venues. As at the date of

drafting this text, the government had announced a complete lockdown of service points. Therefore, the key question becomes one regarding conditions that must be met in order to conclude a distance contract involving no personal contact.

Recent amendments to the Telecommunications Law Act were in line with the paperless dealings policy and enabled the conclusion of contracts in documentary form, that is electronically, without the need to use a certified electronic signature (e.g. by placing orders through subscriber service portals or by e-mail). It should however be borne in mind that before commencing service provision the telecommunications undertaking must meet additional legal requirements regarding subscriber's identity verification. These requirements may actually limit certain providers' distance contracting capability.

Pursuant to the Telecommunications Law Act, verification includes, but is not limited to the following elements:

- 1) in the case of natural persons:
 - a) name and surname;
 - b) personal identification number (PESEL), if available, or name, series and number of the identity document, and in the case of foreigners who are not residents of a Member State or the Swiss Confederation – passport or residence card number;
- 2) in the case of a subscriber who is not a natural person:
 - a) name;
 - b) National Official Business Register Number (REGON), Tax Identification Number (NIP) and/or National Court Register (KRS) number or Central Registration and Information on Business (CEIDG) number.

The subscriber's identity may be confirmed in one of the following manners:

- a) using authentication systems provided by banks;
- b) using an electronic signature qualified certificate;

- c) by means of the telecommunications undertaking's electronic system, if the subscriber's data recorded therein have already been verified for another contract (e.g. if the subscriber is already bound by a written contract);
- d) through means of electronic identification used for authentication in a ICT system that meets all the requirements set forth in the executive provisions issued under the Polish Act on informatization of operations of entities performing public tasks.

As results from the above, telecommunications undertakings may conclude contracts with their current subscribers without any specific restrictions (e.g. by selling additional or more expensive services or concluding fix-term contracts). In this case verification should not be regarded as a problem, as the subscriber's data was previously verified. However, when wishing to attract a new subscriber, the service provider has to use one of the tools mentioned in the previous paragraph i.e. either require the subscriber to provide an electronic signature or use online banking functions. At present, the means of electronic identification described in the Act on informatization of operations of entities performing public tasks are not used for identifying subscribers.

It should be borne in mind that distance contracting entails a number of obligations resulting from the Consumer Rights Act.

Regulatory reporting obligations

Telecommunications undertakings also have numerous regulatory reporting obligations. The statutory deadline for compliance with some of those obligations is 31 March of every calendar year. It should be stressed that the present situation related to the COVID-19 epidemic did not change those deadlines in any way. Since these are statutory deadlines, the President of the Office of Electronic Communications cannot grant any exemptions. As at the date of drafting this article, no statutory solutions were introduced in this respect.

As a clarification to the above, the following should be submitted to the President of the Office of Electronic Communications by 31 March of the present year:

- 1) data on the type and scope of telecommunications operations performed and the telecommunications services sales figures (Article 7 of the Telecommunications Law Act);
- 2) report to the Information System for Broadband Infrastructure (System Informacyjny o Infrastrukturze Szerokopasmowej, SIIS) on broadband infrastructure held (Article 29 of the Act on supporting the development of telecommunications networks and services).

A fine of up to 3% of the revenues from the year preceding imposition of the fine may be imposed by the regulator for failure to comply with the above-mentioned obligations. This however does not mean that fines will surely be imposed under the current circumstances. Pursuant to the relevant provisions of the Telecommunications Law Act, the President of the Office of Electronic Communications may (but does not have to) impose a fine for failing to perform regulatory obligations. Each situation should be considered individually and the decision on imposing a fine should be based on such criteria as "nature and scope of infringement".

The COVID-19 epidemic may certainly be considered an exceptional situation. It should however be noted that the epidemic itself does not automatically prevent the regulator from imposing fines. Therefore, it is recommended to document the reasons for not complying with the obligation to the best possible extent for any possible administrative proceedings concerning the imposition of a fine. Such reasons may include e.g. absences of employees, need to perform other public security obligations, more frequent failures related to network congestion etc.

Obligations related to situations of particular danger and states of emergency

Telecommunications undertakings have a number of obligations related to counteracting the effects of special situations posing a risk to public security, such as states of emergency ("public welfare emergency", "martial law" and "natural

disaster emergency”, as set forth in the Polish Constitution) or crisis situations (within the meaning of the Crisis Management Act). Below is a description of the main obligations.

What must be stressed first is that as at the date of drafting this article, the applicable Regulation on the introduction of a state of epidemic did not impose any special obligations on telecommunications undertakings (excluding the obligations applicable to all entrepreneurs). Neither has the President of the Office of Electronic Communications issued a decision imposing any such special obligations. However, such obligations may be imposed as the situation evolves and therefore it should be taken into account when planning operations during the epidemic.

The obligations mentioned below are applicable in “situations of particular danger” within the meaning of Article 176a paragraph 1 of the Telecommunications Law Act, that is in the event of introduction of one of the states of emergency or in a crisis situation within the meaning specified in the Crisis Management Act. It should be noted that the present state of epidemic in Poland may be considered a crisis situation and lead to the declaration of a public welfare emergency or natural disaster emergency. In such an event, the main obligations of the telecommunications undertaking include:

- 1) provision of facilities (to another telecommunications undertaking or the emergency services) free of charge for the purpose of rescue operations (Article 177 paragraph 3 of the Telecommunications Law Act);
- 2) enforcement of the decision of the President of the Office of Electronic Communications determining the activities of the telecommunications undertaking in a situation of particular danger (Article 178 paragraph 1 of the Telecommunications Law Act).

In respect of the second obligation it should be clarified that the President of the Office of Electronic Communications may require the telecommunications undertaking, among others, to:

- 1) provide telecommunication services with priority for the relevant entities and emergency services;
- 2) limit the provision of certain telecommunication services (e.g. in order to increase the possibility of provision of other services);
- 3) provide services from public telephones free of charge (it seems that this provision no longer applies).

Additional obligations may result from the declaration of a public welfare emergency. In such a case, additional obligations will be imposed on telecommunications undertakings to cooperate with state authorities to enforce preventive censorship, in accordance with the provisions of the Public Welfare Emergency Act.

One should also not forget about the obligation of the telecommunications undertaking to draft an action plan for situations of particular danger and to implement such a plan if the said situation occurs (Article 176a paragraph 2 and 4 of the Telecommunications Law Act). A review of the plans and the related implementation capability should be considered to be the recommended course of action. Infringement of the obligation to have a plan in place may expose the undertaking to a severe fine imposed by the President of the Office of Electronic Communications (the fine may amount to up to 3% of the revenues from the calendar year preceding its imposition).

TELECOMMUNICATIONS



CORONAVIRUS AND THE LAW IN POLAND

TSL

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21 LEGAL ISSUES FOR TSL COMPANIES

Introduction

The coronavirus epidemic and the resulting social and economic implications exert significant impact on companies within the TSL sector. This study aims at presenting basic legal issues that may be applicable in the current situation.

1. Carrier's liability for damage to consignment and delay

1.1 Basic rules of liability

The situation resulting from the coronavirus epidemic may have significant impact on the carriers' ability to fulfil their obligations under the contracts of carriage. The basic principles of carrier's liability related to goods accepted for carriage are common for the national transport, pursuant to the Transport Law, as well as for the international transport, pursuant to the Convention on the Contract of International Carriage of Goods by Road. The carrier shall be liable for the total or partial loss of the consignment or for the damage thereto occurring between the acceptance of consignment for transport until its delivery and for the delay in delivery regardless of the related circumstances. However, the carrier may rely on circumstances excluding their liability.

1.2 International transport

Pursuant to Article 17 (2) of the Convention on the Contract of International Carriage of Goods by Road, the carrier shall be relieved of the aforementioned liability, if the loss, damage or delay was caused by the wrongful act of the claimant, by the instructions of the claimant given otherwise than as the result of the carrier's fault, by inherent vice of the goods or through circumstances which the carrier

could not avoid and the consequences the carrier was unable to prevent. The carrier may be relieved of liability based on the latter premise, if it is proven that the event causing the damage was at the same time impossible to avoid and exceeded the carrier's ability to counteract these circumstances.

Such circumstances shall include e.g. a sudden closure of roads or border crossings, as well as the extended time for crossing the borders due to actions counteracting the epidemic. Essentially, under the provisions of the Convention on the Contract of International Carriage of Goods by Road, the burden of proof that the loss, damage or delay resulted from the aforementioned circumstances shall rest with the carrier. Therefore, the carrier shall prove that they could not avoid the delay caused by the closure of roads or border crossings, e.g. by choosing a different route.

Thus, it should be noted that the carrier may rely on the circumstances excluding their liability only in a situation when the circumstances preventing the carriage could not really be avoided. It means that these days, upon concluding the contract of carriage, the carrier shall analyse in detail, whether, at a particular moment, the performance of contract is feasible. Only the circumstances which changed after concluding the contract may constitute grounds for the exemption from liability.

It should be noted that regardless of the circumstances exempting the carrier from liability, pursuant to Article 30 (3) of the Convention on the Contract of International Carriage of Goods by Road, the delay in delivery may constitute grounds for compensation, only if the reservations in writing were sent to the carrier within 21 days from the date when the goods were placed at the disposal of the consignee.

1.3 National transport

Pursuant to Article 65 (2) of the Transport Law, the carrier is relieved of liability, if the total or partial loss or damage or delay in the delivery of consignment resulted from causes attributable to the consignor or the consignee, failed to

result from the fault of carrier, the characteristics of goods or due to the event of force majeure.

In the Polish civil law there is no definition of the concept of force majeure. However, the courts rather uniformly assume that this is an external and rapid phenomenon that can be neither predicted nor prevented. Based on these criteria, the epidemic of the scope comparable to the current coronavirus epidemic with its implications in the form of numerous restrictions falls within the category of force majeure.

However, it should be noted that in line with the rule specified in the Convention on the Contract of International Carriage of Goods by Road, the burden of proof that the damage or delay in the delivery of consignment occurred as a result of the a/m circumstances, shall rest with the carrier.

1.4 Carrier's liability under special act

Regardless of the premises indicated in the Transport Law, pursuant to Article 14 (1) of the Act of 2 March 2020 on Special Solutions Preventing, Counteracting and Combatting COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations (special act), the air, rail or road carriers shall be relieved of liability for damage caused as a result of reasonable actions taken by the public authorities, aiming at counteracting COVID-19, in particular for the inability to transport goods.

It appears questionable how much impact the rule specified in the special act may exert directly on the carrier's liability resulting from international conventions regarding particular transport sectors, such as the Convention on International Carriage by Rail, the Convention on the Contract of International Carriage of Goods by Road or the Aviation Warsaw and Montreal Conventions. In the light of constitutional hierarchy of legal acts these international agreements shall take precedence over the national laws; therefore, the national act should not amend their provisions. Fortunately, in any of these legal acts we can find independent grounds for the exemption of carrier's liability, provided that public authorities take actions preventing the transport of goods.

2. Disturbances in the course of transport operations

The unexpected new laws, as well as the rapidly changing epidemiological situation may result in disturbances in the course of transport operations, preventing the transport of goods.

2.1 International transport

Pursuant to Article 14 of the Convention on the Contract of International Carriage of Goods by Road, if it is impossible to carry out the contract of carriage in accordance with the terms laid down in the consignment note, the carrier shall immediately ask for instructions from the person entitled to dispose of the consignment. The Convention fails to provide for the possibility to offer such instructions by the entitled person in advance; therefore, the carrier shall notify in any case, of the impossibility to transport goods and request instructions when the circumstances preventing the transport of goods arise.

Consequently, if the carrier is unable to transport goods, and the goods are already in the carrier's possession, the carrier shall immediately ask the consignor for instructions. If the instructions are provided verbally, the carrier shall write a memo confirming the receipt thereof. The instructions shall satisfy the conditions laid down in Article 12 (5) b) of the Convention; i.e. carrying out the instructions should be possible when the instructions reach the addressee and should not interfere with the carrier's standard operations or be detrimental to consignors or consignees of other consignments.

In case it is impossible to request the instructions, or despite doing so, the instructions are not delivered to the carrier, the carrier should take measures perceived by the carrier as the most appropriate for the person entitled to dispose of the goods (e.g. transhipment).

Pursuant to Article 16 (1) of the Convention on the Contract of International Carriage of Goods by Road, the carrier shall have the right to recover the expenses of the carrier's request for instructions or carrying out the instructions, unless such expenses resulted from the carrier's fault.

2.2 National transport

In national transport, a disturbance in transport includes any event which prevents the performance of the contract of carriage under its primary conditions, including the delivery of consignment to the consignee at the place designated for delivery. As per the reference literature, it also refers to situations when it is impossible to meet the deadline of delivery, follow the delivery route or reach the designated place of delivery. Such circumstances may occur e.g. in connection with actions taken by the state authorities, preventing the spread of COVID-19.

The Polish Transport Law in Article 55(1) provides that the consignor may specify in the consignment note the guidelines on the handling of delivery in case of any disturbances in transport causing inability to perform the contract of carriage under the conditions laid down in the consignment note or disturbances in the delivery, resulting in the inability to deliver the goods at the place designated for delivery to the consignee indicated in the consignment note. It is important that, to be effective, the instructions should be included in the text of consignment note – it is insufficient to include the instructions e.g. in the transport order.

In the absence of relevant instructions in the CMR note, the carrier shall immediately ask the consignor for instructions – namely the entity who ordered the transport, and not necessarily the entity who loaded the goods. If the disturbances are not caused by the carrier, the carrier is entitled to the reimbursement of expenses incurred while following the consignor's instructions, in particular to increase the carrier's charges, if the transport route is extended. Moreover, the time of delivery of goods is prolonged, as a result of the extended transport route.

However, if the instructions cannot be obtained, the carrier shall liquidate the consignment.

2.3 Refusal to accept the consignment

The refusal to accept the consignment by the consignee for fear of contaminated consignment is a specific and more frequently observed disturbance in international transport.

The activities that can be undertaken in such situation under the Transport Law are defined above, since under the Polish law, such refusal to accept the consignment constitutes transport disturbances.

Unlike the Polish Transport Law, the Convention on the Contract of International Carriage of Goods by Road defines separately the impossibility to transport goods and the inability to deliver the goods to the consignee indicated in the consignment note. The latter case is defined separately in Article 15 of the Convention.

Pursuant to this provision, if circumstances preventing the delivery of goods occur after their arrival to the place designated for delivery, the carrier shall ask the consignor for instructions. Moreover, the provision specifies that if the consignee refuses to accept the goods, the consignor shall have the right to dispose of them with no obligation to produce the first copy of the consignment note.

Under art. 15(2) of the Convention, the consignee shall have the right to change their position on the acceptance of goods – as long as the carrier has not received instructions to the contrary from the consignor, the consignee may require the delivery of goods, even if the consignee has earlier refused to accept the goods.

3. Handling of consignment in case of transport disturbances

3.1 International carriage

Pursuant to art. 16 (2) of the Convention, should it become impossible to perform the contract of carriage under the original conditions or there are circumstances preventing the delivery of the goods after their arrival to the place designated for delivery, the carrier may immediately unload the goods at the expense of the person entitled to dispose of the goods. In such case, the carriage shall be deemed finalized. It is rather generally recognized that in principle, if unusual circumstances fail to support a different procedure, the unloading of goods may

occur only in the absence of instructions from the authorized person and impossibility to provide any alternative transport procedure.

After the unloading, the carrier shall supervise the goods on behalf of the person entitled to dispose of the goods; however, the carrier may entrust the goods to a third party and in that case the carrier shall be liable for reasonable care in the choice of such third party. The storage expenses shall be incurred by the person entitled to dispose of the goods and added to the expenses chargeable against the consignment.

Pursuant to Article 16(3) of the Convention, the carrier shall have the right to sell the goods. It should also be noted, as before, that, in principle, such option may be considered only when the carrier is unable to provide any alternative method for the delivery of goods. The sale shall be determined by the law or custom of the place where the goods are located.

3.2 National transport

If the carrier fails to receive instructions from the person entitled to issue the instructions as for the conduct with the consignment in case of any transport disturbances or inability to deliver the goods, the carrier shall have the right to liquidate the consignment. Pursuant to Article 58(2) of the Transport Law, the consignment is liquidated through sale, free transfer to the relevant organization unit or destruction. In principle, the liquidation may occur 30 days after the scheduled time for accepting the consignment, however, not earlier than 10 days after the notification of the authorized person on the intention to liquidate the consignment.

4. Carrier's liability for failure to perform the contract of carriage

The coronavirus epidemic may affect the inability to perform not only the contracts of carriage where the transport of goods have already begun, but also where the loading of goods has not yet begun. It refers, in particular, to general

contracts with the specific volume of transport operations specified for the carriers. Because of the epidemiological situation, the carriers may become unable to fulfil their contractual obligations, due to the actions of public authorities or due to the lack of employees or subcontractors ready to take particular tasks.

4.1 General rules of liability

The main principle is to fulfil the contractual obligations. However, when the non-performance of contract or any breach of the contractual obligations, namely e.g. failure to meet the contractual time-limits, result from the epidemic, in most of the standard cases, the party in breach of such obligations may not be held liable. The principle of fault is the main rule of liability; and the carrier shall not be liable for failure to perform the contract of carriage, if due diligence is undertaken.

It means that in most cases the effective charging of contractual penalties or demanding compensation might not be possible.

The above mentioned principles shall refer, first of all, to contracts concluded before the epidemic in Poland (or – to contracts which involve transporting the goods from other countries – in other regions). In such cases, the contractual party may argue that even with due diligence, the party could not predict or prevent the epidemic.

The legal situation is somewhat different for contracts concluded already during the epidemic. Since in this case, upon signing the contracts, the parties should predict that meeting the contractual obligations might be hindered due to the development of epidemic.

4.2 Epidemic as force majeure

Some contracts concluded with carriers extend the scope of carrier's liability and the carrier shall be liable not only when a particular event results from the fault of the carrier. Sometimes the liability may be excluded only due to the event of force majeure.

In the Polish civil law there is no definition of the concept of force majeure. However, the courts rather uniformly assume that this is an external and rapid phenomenon that can be neither predicted nor prevented.

Based on these criteria, the epidemic of the scope comparable to the current coronavirus epidemic with its implications in the form of numerous restrictions falls within the category of force majeure.

However, it should be noted that in B2B transactions, the parties have the right to define force majeure in the concluded contract, as they see fit – therefore, it is worth verifying whether the contract provides for any limitations in this respect.

Moreover, the laws allow even such contractual obligations defined in a B2B contract, where the party shall be liable for the proper performance of contract even in the event of force majeure.

4.3 Contractual clauses related to epidemic

In general, relying on the absence of fault or on force majeure is possible when contracts have been concluded before the effects of coronavirus epidemic. The TSL sector is still operational but in a different reality, and the contracts of carriage, including the framework agreements are concluded on an ongoing basis. This raises the question whether the carriers can become relieved of liability, if they are unable to perform the contract of carriage they signed, due to the deteriorated epidemiological situation.

In such cases it will be much more difficult to argue convincingly that the carrier could not predict that the contractual obligations may prove impossible to fulfil or that the costs of contract may significantly increase. Therefore, it is not in the carriers' interest to take on obligations that might already be impossible to fulfil.

In such situation it is indispensable to provide the contracts with clauses specifying that in particular situations e.g. employees' refusal to perform work due to the risk of infection, the carrier shall be relieved of the obligation to perform the contract of carriage or the carrier's remuneration shall be increased.

5. Possibility to refuse to perform work by drivers

At present, drivers in the international transport perform transport operations to or via countries where there is a significant risk of coronavirus infection. Therefore, there are frequent instances when drivers refuse to perform work relying on the said risk.

The Labour Code in Article 210 provides for the right to refrain from the performance of work on the part of employees. However, to do so, some conditions must be met and some circumstances must arise, i.e.:

- 1) the conditions of work do not correspond to the provisions on health and safety at work and pose a direct danger to the health or life of an employee or if the work performed by the employee presents a threat of such danger to other people,
- 2) the employee shall immediately notify the superior of exercising their right to refrain from the performance of work.

And according to the Supreme Court, an employee may refrain from the performance of work only when the circumstances specified in Article 210 § 1 of the Labour Code occur jointly (the conditions of work do not correspond to the provisions on health and safety at work and pose a direct danger to the health or life of an employee).

In such circumstances, an employee may not suffer any negative consequences resulting from the refraining from work or moving away from the place of danger, and what's more – an employee retains their right to remuneration. The amount of remuneration for the time when employees refrain from work shall be calculated in accordance with the principles applicable to calculating the remuneration for the period of holidays.

The aforementioned danger to the health and life must be a real and objectively verifiable danger, not just some potential danger based on fear or mass panic, or only indirect danger. Unfortunately, at present it is difficult to provide a clear

division of circumstances when the employee's fear of potential infection with SARS-CoV-2 is justifiable and when it is simply a subjective feeling. Each case would have to be analysed individually and assessed whether there are objective premises of danger to the health and life of an employee in particular circumstances or at least – "reasonably justified assumption of an employee", since such justified premise is recognized by law.

Moreover, at the same time, the working conditions would have to fail to correspond to the provisions on health and safety at work.

In accordance with the Labour Code, the employer shall:

- 1) react to the needs in relation to ensuring health and safety at work, as well as adopt measures to improve the existing level of protection of health and life of employees, given the changing conditions of work;
- 2) inform employees about any danger to health and life at work, on respective job positions and at the works performed, including information on the rules of conduct in the event of breakdown and other situations endangering the health and life of employees,
- 3) if an employee is working under conditions of exposure to harmful biological factors, the employer must apply all necessary measures eliminating the exposure, and if this is not possible – apply measures limiting the degree of such exposure, by the appropriate use of scientific and technological achievements.

Therefore, the wider the scope of measures improving the safety of drivers, applied by the employer, the lower the possibility of employees to resort to Article 210 of the Labour Code. Therefore, the employer's correct response to the epidemiological threat may, to some extent, limit the likelihood that the employees will rely on the working conditions which fail to correspond to the provisions on health and safety at work and pose a direct danger to the health or life of an employee.

6. Drivers' working time

In the national and international transport, the restrictions related to following the rules on professional drivers' working hours are of key importance for the safety of transport and the health and safety of all road users.

During the pandemic, the working time of drivers in national transport has not been changed.

Under the information presented on 18 March 2020 by the Ministry of Infrastructure, Poland pursuant to Article 14(2) of the Regulation (EC) No 561/2006 on the harmonisation of certain social legislation relating to road transport has granted temporary exceptions from the application of Articles 6-7 of the a/m regulation to drivers engaged in international carriage by road of goods and passengers. These exceptional measures are justified by the coronavirus SARS-CoV-2 (COVID-19) pandemic.

Below there is a list of provisions binding to date and the provisions changed during the pandemic:

	TO DATE:	DURING THE PANDEMIC 18.03.2020 – 16.04.2020
Drivers' working time:		
Daily	Daily driving time shall not exceed 9 hours.	Daily driving time shall not exceed 11 hours.
Weekly	Weekly driving time shall not exceed 56 hours.	Weekly driving time shall not exceed 60 hours.
Total	The total driving time within two consecutive weeks shall not exceed 90 hours.	The total driving time within two consecutive weeks shall not exceed 96 hours.
Break	After a driving time of four and a half hours the driver is entitled to have an uninterrupted break of at least forty five minutes.	After a driving time of five and a half hours the driver is entitled to have an uninterrupted break of at least forty five minutes.
Rest periods	Daily and weekly rest periods shall remain unchanged. Due to the extended driving time from 9 to 11 hours the exceptions relating to the daily and weekly rest periods shall not apply.	

The exceptions shall apply temporarily – from 18 March 2020 to 16 April 2020.

It is important that drivers who wish to benefit from the extended working hours, during the a/m period, indicate it accordingly – under Article 12 of Regulation (EC) No 561/2006, the driver shall indicate the reason for the departure from standard working hours manually on the record sheet of the recording equipment or on a printout from the recording equipment or in the duty roster, at the latest on arrival at the suitable stopping place. For safety reasons and for subsequent documentation the drivers shall be instructed to fill in the necessary information.

The exceptions from standard provisions on the drivers' working times have been granted during the pandemic not only in Poland but also in other countries. The list of such exceptions is published on the European Union websites: <https://ec.europa.eu/transport/sites/transport/files/temporary-relaxation-drivers-covid.pdf>

7. Lack of obligatory quarantine for drivers in international transport operations

Under the Regulation of the Minister of Health of 20 March 2020, effective from 20 March 2020, on declaring the state of epidemic in the Republic of Poland, upon crossing the border of the Republic of Poland it is necessary to: fill in a special Location Card and undergo a 14-day quarantine. However, pursuant to § 2 (6) 3) and 4) of the said regulation, the aforementioned obligation shall not apply to: drivers engaged in road transport within the international road transport or international combined transport within the meaning of road transport provisions, also in a situation when they return from abroad using other means of transport than the vehicle used to perform transport operations: a) in order to take a rest specified in the Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006, on the harmonisation of certain social legislation relating to road transport (...), in the Republic of Poland, b) after taking a rest specified in the regulation defined in p. a, and after a break in performing work

in the circumstances specified in Article 31(1) of the Act of 16 April 2004 on working time of drivers (Journal of Laws [Dz. U.] of 2019, item 1412).

Thereby, the regulation on the state of epidemic has repealed another restriction in the international transport, relieving of the information obligations and of the compulsory quarantine also the drivers who take a rest.

The exemption from the aforementioned obligations (filling in the Location Card and undergoing a quarantine) applies also to drivers performing road transport operations with vehicles or combinations of vehicles with a maximum permissible mass not exceeding 3.5 tonnes used in the road carriage of goods and non-commercial carriage of goods, when crossing the border of the Republic of Poland while performing their professional operations.

Pursuant to the instructions of the Minister of Infrastructure and information provided by ITD (General Inspectorate of Road Transport) and border guard, the exemption applies also to drivers who are non-EU nationals, provided that such drivers are employed by employers established in the Republic of Poland and hold a valid driver attestation.

Moreover, it should be noted that other countries may introduce different regulations regarding quarantine, which means that drivers who perform international transport operations may be subject to a compulsory quarantine in another country. Therefore, it is necessary to specify, every time, the rules applicable in countries where particular transport operations are going to be performed.

8. Problematic double manning rule

Pursuant to § 9 (7) p. 3 lit. (b) of the Regulation of the Council of Ministers of 31 March 2020, on the establishment of certain restrictions, orders and bans in relation to the state of epidemic, from 2 April 2020 to 11 April 2020, businesses shall ensure the distance between the workstations of at least 1.5 meter. This obligation shall not be subject to any exceptions. This raises the justifiable question

whether during the specified period it is permissible to organize road transport operations performed under the double manning rule, since such system of work allows the presence of two persons in the cabin where the distance between them is smaller than 1.5 meter. In such case, the passenger seat is still treated as a work place – the additional driver does not drive the vehicle at that time but remains inside the vehicle for the purpose of fulfilling the employee's duties.

We cannot rule out that the enforcement authorities will treat these orders liberally with regard to drivers, but until the official statement in this respect is announced, we should consider the risk that double manning may result in penalties for the transport company.

10. Suspended mandatory drivers' medical check-ups

Pursuant to Article 12a of the amended act of 2 March 2020 on special solutions related to preventing, counteracting and fighting COVID-19, other infectious diseases and crisis situations caused by them, during the threat of epidemic outbreak or the state of epidemic, the following obligations related to the drivers' regular medical check-up are suspended:

- » obligatory regular check-ups
- » obligatory medical check-ups confirming the absence of contraindications to perform the work of a driver
- » obligatory psychological examination.

When the aforementioned state has ceased to exist, the employer shall immediately fulfil the obligation of performing regular check-ups, but not later than within 60 days from the date when the a/m state ceased to exist.

11. Extended deadlines for vehicle registration

Pursuant to Article 31i of the amended special act, the deadlines for vehicle registration in Poland after importing the vehicle, as well as after purchasing the vehicle

in Poland were extended from 30 to 180 days. However, this regulation shall not apply to vehicles imported or purchased not later than 30 days after the special act has become effective. This exception fails to refer to the new imported vehicles – they have an extended deadline for registration regardless of their purchase date.

12. Refusal to pay remuneration due to undelivered original copies of transport documents

The spread of SARS-CoV-2 virus affects all stages of performing the contract of carriage. The restrictions introduced in various countries and the suspended acceptance of postal mail to other countries may render quick delivery of original transport documentation to the Contracting Party impossible.

At the same time, the contracts of domestic and international transport generally include the provisions making the payment of remuneration conditional upon the delivery of a VAT invoice to the Contracting Party, together with the original consignment note and e.g. goods dispatch notes or pallet receipts.

Is it possible, in exceptional circumstances when the delivery of documents is impossible, to demand payment of remuneration for the performed transport operations under the delivered scans or pictures of transport documents?

Upon concluding new contracts it is necessary, first of all, to analyse the provisions defining the remuneration payment rules. The Contractor should include in the content of contract the provision on possibility to confirm the performance of transport operations with the copies of transport documents and the right to deliver the original documents at a later date. At the same time, the Contractor should ensure that the remuneration payment deadline is conditional upon the time of transport operations, namely the delivery of goods or the time of delivery of the copies of transport documents, e.g. in electronic form.

The change of standard contract terms is often impossible, due to various reasons, or the contract is concluded under direct arrangements with the Contracting

Party, e.g. via email or conversation at the freight exchange communicator. In such situation, the carrier should receive from the Contracting Party a clear consent to a later deadline for the delivery of original documents and the confirmation of the payment of remuneration under the delivered copies of documents.

However, if the contract was concluded earlier or the Contracting Party is not willing to pay based on the copies of documents, and the actual situation prevents the delivery of original documents to the Contracting Party in a short time, there are grounds to argue that the Contracting Party should not refuse to pay anyway.

Both the academic studies and court rulings indicate that the essence of the contract of carriage is simply the carriage of goods against remuneration, and not the delivery of transport documents. This standpoint was presented e.g. by the Court of Appeal in Gdańsk by judgment of 14 July 2016 in case under reference number I ACa 1106/15, stating that the refusal to pay the remuneration shall not take place only because the carrier failed to deliver the original goods dispatch notes or the consignment notes.

Although the Polish law provides for the principle of the freedom of contract defined in Article 353¹ of the Civil Code, the principle is limited, if the content of contract is contrary to the nature of legal relationship. Therefore, if the most important aspect of the carriage itself is to deliver the goods to the consignee, against remuneration, the provisions refusing payment despite the correct delivery of goods shall be deemed contrary to the essence of the contract of carriage, and consequently null and void.

This report reflects the legal situation as of 1 April 2020.

CORONAVIRUS AND THE LAW IN POLAND

RESTRUCTURING AND INSOLVENCY



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22 The impact of the coronavirus pandemic on restructuring and insolvency

The purpose of this work is to call the attention of entrepreneurs to obligations entailed by the loss of liquidity in consequence of the coronavirus epidemic. Since failure to respond appropriately to problems relating to solvency will pose a special risk for members of corporate management boards, the text highlights key activities relating to evasion of liability for the company's obligations. It also discusses solutions available to protect the business from insolvency through court-ordered restructuring, as well as several practical remarks on restructuring itself.

The Restructuring Law Act and the Insolvency Law Act are two pieces of legislation which entrepreneurs become acutely aware of in the hour of crisis. Better late than never. For, on the one hand, the solutions adopted in these two acts impose on entrepreneurs certain specific obligations in default of which severe consequences are looming. On the other hand, though, swift and skilled use of the tools provided by them can save the entrepreneur from the worst-case scenario.

The crisis triggered by the coronavirus pandemic has two characteristics making it more difficult to assess its consequences from the viewpoint of restructuring and insolvency law. Firstly, one can hardly predict how long the epidemic is going to last, and therefore when the economy is going to regain its lost momentum. Secondly, the crisis has global reach and affects practically each and every

industry that exists. This, in turn, leads to a significantly higher risk of so-called 'insolvency chains' (domino effect), whereby one entity that enters insolvency pulls other, collaborating entities with it. Even where the coronavirus poses no obstacle to a company's continuity of business (for example because the company provides services remotely), there is still the probability of such an obstacle arising for its trading partners, who will not be able to make their payments. Insolvency is contagious.

Not everyone will end up in insolvency, however — some will survive the crisis in reliance on their own resources, and some will look to court-ordered restructuring. We should expect interest in restructuring proceedings to become far greater than it used to be, due to the crisis. This work aims to familiarize entrepreneurs with several key aspects of insolvency and restructuring that may be escaping their attention now in the turmoil caused by the fight for survival across the markets.

These include:

- » ongoing analysis of the company's liquidity to monitor it for facts triggering the obligation to file for insolvency;
- » the fact that the obligation to file for insolvency is not waived by the consequences of the present coronavirus epidemic;
- » the circle of entities required to file an insolvency application on time and the consequences of non-compliance;
- » the opportunity to protect the company from insolvency with court-ordered restructuring;
- » the advantages of restructuring proceedings to an entrepreneur in crisis;
- » practical remarks concerning debts owed to banks, lessors, landlords, employees and public-law creditors along with the impact of such liabilities on restructuring proceedings;
- » the role of the restructuring advisor in the proper conduct of a restructuring.

How to diagnose insolvency?

The phenomenon of insolvency is the axis around which restructuring and insolvency revolve (with both of these disciplines even usually being grouped under the umbrella of ‘insolvency law’). Restructuring law rewards prudent and vigilant entrepreneurs, as it allows restructuring proceedings to be held even for an entity still facing only a threat of insolvency. Practice shows that restructuring opened in advance of insolvency has the best prognosis. The longer the indebted company stalls, the less confidence it can inspire in its creditors and the court, which is necessary for any composition to be made and implemented. However, the Act also permits restructuring to be opened for an already insolvent debtor. Here, it must be remembered that an insolvent debtor falls within the ambit of insolvency law. Insolvency law, in turn, requires such a debtor to file for insolvency. Hence, an entrepreneur threatened with insolvency may stop at filing for restructuring, while an already insolvent one should consider filing a parallel application for insolvency. For failure to file for insolvency on time may give rise to far-reaching civil and even criminal liability.

Polish restructuring and insolvency law employs two insolvency tests. They are each independent of the other, which means that any one of them enables the conclusion that the debtor is insolvent.

These are:

- » the cash-flow test, under which the debtor is insolvent if no longer capable of performing its financial obligations as they fall due;
- » the balance-sheet test (or indebtedness test or asset test), under which a debtor having legal personality (e.g. a limited-liability company — *spółka z ograniczoną odpowiedzialnością*) or being an organizational unit without legal personality vested with legal capacity by statute (e.g. a limited partnership — *spółka komandytowa*) is also insolvent when its total financial liabilities exceed the value of property owned and this condition persists for more than 24 months.

Before offering any broader explanation of these two insolvency tests, it will be necessary to highlight one more condition for declaring insolvency. As the proceedings we are discussing here are designed as a path of collective recovery of claims by all of a debtor's creditors, they are not available when the debtor has only a single creditor. The rights of a single creditor will find effective protection in the ordinary enforcement procedure. Hence, any insolvency application filed by an insolvent debtor having just one creditor will be dismissed by the court. With a restructuring application this matter is less clear-cut, though due to the very nature of things such cases will be extremely rare. Furthermore, with a single creditor the debtor can always enter into a settlement, in lieu of a composition taking place in a restructuring. Such a settlement will certainly be faster and cheaper to achieve, which is of paramount importance when facing liquidity problems.

The cash-flow test

The consequences of the coronavirus situation will be the most readily visible through the lens of the cash-flow test. Depending on the size of the entrepreneur's cash reserves, i.e. safety cushion, sooner or later the lack of current revenue generation will result in payment backlogs. The type of the overdue debt has no relevance here. It can be trade or financial liabilities (including loans), public levies, social-insurance premiums, and so on.

To determine the exact point at which the debtor becomes insolvent is a difficult task requiring expert knowledge. Hence, in court disputes this fact is established on the basis of an expert opinion admitted into evidence. To simplify things, the Act establishes the presumption that the debtor has lost the ability to pay cash debts as they fall due when the payment backlog exceeds 3 months. If, therefore, the entrepreneur has liabilities more than 3 months overdue, insolvency should be presumed. This is a rebuttable presumption, which means there is no bar to proving that the entity became insolvent at an earlier or later date. Still, any entrepreneur who has been late with the payment of an uncontested debt for more than 3 months should be aware of being perceived by the Act as insolvent by default.

In respect of the cash-flow test the Act specifies that the loss of payment capability refers to obligations that are firstly pecuniary and secondly mature. If my obligation to a trading partner is to deliver a supply of goods or hand over a building under a construction contract, those are not pecuniary obligations, and they will be disregarded in the insolvency test. If, however, as a result of my delay the trading partner demands a contractual penalty or liquidated damages for inadequate performance, then that will indisputably be a pecuniary obligation.

The debt also has to be already due — if I am disputing the obligation (provided that the dispute is not a mere pretext or simulation), or the debt is not yet due, or there is no fixed due date and I have not been called upon to pay yet, then there is no mature debt to speak of.

The loss of liquidity has to be permanent, or at least long-term. Temporary problems that will soon be resolved are not signs of insolvency. However, it is often hard to decide unequivocally whether the problems are about to cease any time soon. If so, it is worth assuming that at least a threat of insolvency exists and, consequently, filing for restructuring.

The dynamically developing epidemic situation makes it impossible to predict with any credibility when the economy is to regain its lost momentum. This, in turn, translates into added difficulty in determining whether the entrepreneur's loss of liquidity is a long-term condition. Moreover, the state is currently implementing various types of actions to assist entrepreneurs in coping with the consequences of the crisis. It cannot be excluded, therefore, that the situation of certain entrepreneurs will soon improve. For example it could not be long before a cinema proprietor runs out of cash for current liabilities. If, however, several weeks from now cinemas are open once again and an entertainment-thirsty audience comes flocking in, the owner will pay back the debts and avert the insolvency risk. All the more so if at least health-insurance premiums are reduced as a form of relief or loan payments are deferred. But if state aid is not forthcoming, is too late or too little, then the forecast is that in several months insolvency courts will be buried in insolvency applications citing the consequences of the current COVID-19 pandemic as the main reason.

At the end of each day it is worth asking oneself honestly — is my company capable of paying all debts as they fall due? If the answer is negative, then we are probably dealing with insolvency. With an affirmative answer, we will still need to ask ourselves how long the company will remain capable of paying its liabilities given its current revenue levels. If the company remains liquid only thanks to a cash cushion, that can be a sign that insolvency is looming and a restructuring application would be in order.

The indebtedness test

And what of the indebtedness test? It is too early now for the indebtedness ground to materialize as a consequence of the pandemic. Since 2016 liabilities exceeding assets no longer suffice for the indebtedness test. Such a state of things has to continue without interruption for more than 24 months. Hence, even if the present crisis makes an entrepreneur's liabilities exceed the assets, insolvency under the indebtedness test will only be possible in two years from now. For this reason the indebtedness test is generally perceived as not carrying much practical value, especially as it does not apply to sole traders (those entrepreneurs who are individuals), as opposed to the cash-flow test, which is applicable to all entrepreneurs. Sometimes, it can be the proverbial nail in the coffin when appearing beside the cash-flow test. In such a case it prompts the conclusion that the debtor's financial predicament is not the result of a momentary turbulence but has a longer pedigree.

The analysis of a company from the perspective of the indebtedness test should begin with the balance sheet. Emphatically, though, while it begins there, it should not stop there. The indebtedness test is often referred to as the balance-sheet test. This term, however, can be misleading. For it is not true that a debtor whose liabilities exceed the assets in the balance sheet is insolvent. The Act speaks of monetary liabilities and property owned. This means actual property, not assets in the balance sheet.

Still, the legislature decided that the balance sheet should provide the basis for the presumption that the debtor is insolvent. The debtor is presumed insolvent

under the indebtedness test if, according to the balance sheet, its liabilities — excluding provisions for liabilities and liabilities owed to affiliates — exceed the value of the debtor's assets and this state of affairs persists for a time longer than twenty-four months. Similarly to the one in the cash-flow test, this presumption also is rebuttable. Hence, it is possible to prove that, despite the balance-sheet excess of liabilities over assets, the actual value of property owned by the debtor exceeds the liabilities. Or the opposite case could be true — that in spite of the surplus of balance-sheet assets over liabilities, the debtor's actual property is not sufficient to cover all monetary debts.

Understandably, the presumption of the existence of the indebtedness ground for insolvency was designed primarily to assist a creditor seeking to have its debtor declared insolvent. Due to lack of access to financial data, the creditor could attempt to establish the debtor's insolvency on the basis of publicly available reports filed by the debtor with the companies register — the National Court Register (KRS).

The threat of insolvency

Definitions relating to liquidity loss also reference the concept of a threat of insolvency. The latter is regulated in the Restructuring Law Act and opens before the debtor the path to court-ordered restructuring (discussed below). As can easily be surmised, a threat of insolvency occurs when the debtor is still able to pay its monetary obligations (cash debts) as they fall due but its economic situation shows that this ability can soon be lost.

A threat of insolvency, therefore, precedes the company's ultimate liquidity breakdown by a sizeable margin. The entrepreneur's appropriate response during this time significantly improves the company's chance of survival, if the decision is made to pursue restructuring proceedings. Restructuring proceedings may also be opened for an already insolvent company, though sometimes the timing can be too late for a successful rescue.

In summary — insolvency ('bankruptcy') is declared for an insolvent company, while restructuring proceedings can be opened either for an already insolvent company or one still only threatened with insolvency.

Who should file a restructuring or insolvency application and when?

Let us begin with explaining that to file for restructuring is always only a right. Filing for insolvency, on the other hand, is mandatory for the debtor, while only a right for the creditors.

In the case of entrepreneurs who are individuals (sole traders) the obligation to file for insolvency is incumbent upon themselves. If the debtor is a legal person or some other organizational unit without legal personality vested with legal capacity by a separate statute, then the obligation to file for insolvency is incumbent on anyone who, on the basis of statute or the company's articles or other formation instrument, has the authority to conduct the debtor's affairs and represent the debtor, either alone or jointly with others. This includes, therefore, members of the management board, liquidators, and, in partnerships, partners authorized to conduct the partnership's affairs and represent the partnership (e.g. general partners in a limited partnership, unless stripped of their representation authority). Holders of a general commercial power of attorney (*prokurenci* — 'procurists', sometimes translated as 'commercial proxies'), on the other hand, have no such obligation. This is because they are only authorized to conduct the company's affairs, while the Act imposes the obligation to file for insolvency on those who are both authorized to conduct the debtor's affairs and equipped with the authority to represent the debtor.

Sometimes it happens that the individual members of the management board take a different view of the company's health and solvency. One member can insist on filing, while another is opposed. In such cases we need to remember that the filing of an insolvency application does not require compliance with the representation rules established in the company's formation instrument. Suffice that only

one member of the board signs the application (even though the company's representation rules may require two members to act jointly), and it will take effect.

The application must be filed within 30 days of the date when the grounds for declaring insolvency were met, i.e. of the day the company's insolvency arose. As recently as several years ago this time-limit was much shorter, only being 14 days. Considering that to prepare such an application requires the co-operation of the management board, accountants and lawyers and, furthermore, that not all of the data needed for the application can be extracted in a simple way from accounting software, the 14-day time-limit clearly was excessively rigorous.

A restructuring application, on the other hand, may already be filed when insolvency is still only a threat. The uncertainty associated with the coronavirus puts many entrepreneurs precisely in a situation of threatened insolvency. So should they apply to be included in one of the restructuring frameworks available? It depends. If the company has only a few creditors and a good relationship with all of them to boot, then in the first place it is worth trying to enter into agreements modifying the debts so that the company could pay them despite being in a temporary crisis (extend the deadlines, break the debt into instalments). Therefore, out-of-court restructuring should take priority, though it must be conducted with quite some skill. If there are many creditors, on the other hand, and not all of them are inclined to negotiate an amicable settlement, then restructuring proceedings will be of assistance in the situation. This is because not all creditors must agree to a voluntary arrangement. It is sufficient if the move is supported by creditors jointly having at least of the sum total of liabilities owed to all creditors voting, if they also constitute a majority of voting creditors (50% + 1). These are the so-called capital majority and personal majority.

Can a company having self-diagnosed its own insolvency still try to have restructuring proceedings opened for it? Yes. It must, however, realize that having filed for restructuring does not alone waive the obligation to file for insolvency. Only the opening of restructuring proceedings has such an effect. Let us take a look at the time-limits.

Suppose the company realized it was insolvent on the day the insolvency arose. Hence, a 30-day time-limit to file for insolvency began. But within one week the company prepared an application to open accelerated arrangement proceedings (one of the four restructuring proceedings available, significantly less formalized and very much streamlined in comparison to composition or 'sanation' proceedings). The Act gives the court one week to rule on such an application. Hence, if the court manages to comply with this non-binding, instructional time-limit, restructuring proceedings will be opened even before the time-limit to file for insolvency expires. However, it is truly rare for courts to meet instructional time-limits. This is even less likely to happen in the face of the state of epidemic, with the courts operating in a special mode with significantly reduced staffing. Hence, once insolvency arises, companies should have both applications at the ready, simultaneously, so as to be also able to file the insolvency application on the last day of the 30-day time-limit. The court will, in principle, consider the restructuring application first anyway. Still, the fact of having filed an insolvency application takes the steam out of any enthusiastic plans laid out in the restructuring application. Hence, it is best to file the restructuring application before insolvency kicks in and not when the company has already become insolvent. In this way the chance of seeing the application disposed of before the end of the time-limit for the insolvency application increases significantly. Obviously, this course of action also has the effect of increasing the chance of success of the restructuring proceedings themselves, for practice shows clearly that the sooner the restructuring application reaches the judge's desk, the better the chance for a positive outcome in the whole procedure.

May a creditor demand insolvency or restructuring?

An application for insolvency may be filed by any of the debtor's personal creditors. Can that be a creditor who is owed PLN 10? Yes. However, this is a rather hypothetical situation, since the costs of preparing an insolvency application for which the filing fee is PLN 1000 along with more than PLN 5000 as an advance payment toward the cost of the proceedings would make this manner of pursuing a PLN 10 claim altogether unprofitable.

It is also worth pointing out that the Act introduces certain facilitations to accommodate a creditor seeking to have the debtor declared insolvent. In addition to the aforementioned possibility of relying on a presumption of insolvency, the creditor's application need not contain too much detailed information about the debtor's assets, liabilities, litigation and foreclosures, and need only establish the debt as probable rather than having to prove it. The debtor can defend itself against the creditor's application by demonstrating that it has no mature debts owed to any other creditor or that while it does have such debts, it has not lost the ability to pay them, nor does it have debts more than 3 months overdue owed to two different creditors yet. The debtor can also dispute the debt identified in the creditor's application and attempt to demonstrate that it is contentious. If so, for the proceedings to go on it will no longer be sufficient to establish the existence of the debt as probable; now the creditor will have to prove it. If, however, the dispute arose between the parties before the creditor filed the application and the debtor demonstrates that the whole debt is contentious, then the court will have to dismiss the application.

As regards the restructuring application, the debtor alone has the standing (*locus standi*) to file. The sole exception is here are sanation proceedings, which the debtor's personal creditor may also file to open, but only when the debtor is a legal person. The creditor, however, may only file this application against an insolvent debtor. Hence, the threat alone of insolvency will not suffice in this case. For this reason, the creditor of a company threatened with insolvency due to the pandemic would not be successful in filing for insolvency or for the opening of sanation proceedings. Nonetheless, the boundary between the threat of insolvency and actual insolvency is often difficult to grasp. Furthermore, in the case of either insolvency or restructuring, the material date for the assessment of the debtor's situation will be the date of ruling on the application, and so it could happen that at the time of filing the debtor is only threatened with insolvency, while at the date of ruling we will be dealing with actual insolvency.

Is an entrepreneur's obligation to file for insolvency waived if the insolvency is the consequence of the state of epidemic?

The cause of the loss of ability to pay monetary debts as they fall due has no relevance in determining whether the entrepreneur should file for insolvency. It does not matter whether the business plan failed, an uninsured warehouse full of finished products has gone ablaze or the coronavirus has made continued business impossible. If the consequence of such circumstances is the loss of ability to pay debts, the entrepreneur is required to file for insolvency.

Even should the sole member of the management board of an insolvent company be hospitalized with COVID-19, that would still not waive the obligation to file for insolvency. It would, however, enable that board member to avoid liability for failure to file on time. For this, however, the following conditions would have to be satisfied: Firstly, the objective inability to file the application, caused by the illness, arose before the end of the time-limit for filing. Secondly, once the obstacle ceased (i.e. after recovery) the board member filed for insolvency without delay.

It is questionable whether quarantine due to the suspicion of coronavirus infection should be regarded as an exculpatory circumstance for a board member failing to file on time. For such a board member can still remotely supervise and manage the work on an insolvency application. However, someone with authority to represent the company would still have to sign the application along with the statement of accuracy of the data contained in it. Even if the ready application were then to be submitted to the quarantined board member for signature without direct contact, the document itself can become a medium for the virus to spread, endangering the person passing it on and the employees of the receiving court. Hence, quarantine should be regarded as an objective obstacle to timely filing, resulting in exculpation.

Inculpability in not filing on time could also be considered in a situation of the entire company being quarantined with objectively no way of accessing the data concerning the enterprise. After all, filing for insolvency requires detailed information

to be provided about the state of the debtor's liabilities, receivables, assets, collaterals, and any court proceedings or foreclosures or other debt-enforcement proceedings. It would be difficult to analyse liquidity without access to such data.

Whether the consequences of not filing the insolvency application on time can be avoided will depend on the circumstances of the individual case. Here, it must be remembered that exculpations are considered for each and every obligated party individually. Hence, if the company has three management board members out of whom two are being hospitalized, this fact has no bearing on the third member's liability. It is worth adding that an application filed by one member is effective with regard to the others, provided that the application is correct, i.e. has not been dismissed ('returned', literally speaking) due to formal or fiscal deficiencies (e.g. unpaid or not fully paid fees).

Does the lack of funds to cover the costs of the insolvency proceedings waive the obligation to file for insolvency?

In the circumstances of the epidemic outbreak, many entrepreneurs have to pay fixed costs of operation despite a drastic loss of revenue (to almost zero in certain industries). The imbalance in this regard contributes to a very fast drain on financial reserves, and at the time the decision is being made to file for insolvency it can already turn out that the value of the enterprise is much lower now and that no high-liquidity assets are left. Insolvency proceedings, on the other hand, always generate costs (e.g. the administrator's fees, costs of estimating and securing the assets, taxes, warehouse rental, etc.), the amount of which depends on the size of the enterprise being wound up. A practical estimate would be at least several dozen thousand PLN. In the light of this, does the fact that the debtor does not have sufficient assets to cover the costs of the insolvency proceedings waive the obligation to file for insolvency?

No, it does not — the application still has to be filed. This is because the obligation consists in filing, not in obtaining a favourable ruling in the form of an order

declaring the debtor insolvent. If the insolvent debtor's assets are not sufficient to cover the costs of the insolvency proceedings or are only sufficient to pay such costs, then the court will dismiss the application for insolvency. Nonetheless, despite the dismissal it could still turn out that the debtor had filed on time, which would then suffice to protect the debtor from liability for failure to comply with this obligation.

Can problems with debt recovery trigger the obligation to file for insolvency?

Let us emphasize this once again — the cause of the loss of ability to pay monetary debts as they fall due is of no relevance to the formation of the obligation to file for insolvency. If the state of epidemic has not interrupted the entrepreneur's continuity of business and the entrepreneur still provides services or sells goods but the recipients cannot pay for them, this can lead to a domino effect. Inability to recover debts or predict when such recovery will be possible can be the cause of insolvency under the cash-flow test. Such cases appear to be the ideal setting for restructuring proceedings. For if the debtor's enterprise functions properly, there is demand for the services provided or goods supplied and it is only the poor financial condition of its existing customers that has thrown the enterprise off balance, then the solutions offered by restructuring law will secure the time and funds necessary to regain that balance. In such a case filing for insolvency could be premature, resulting in the liquidation of the assets and of the enterprise itself while there is still a chance for rescue.

Consequences of failure to file for insolvency within the time-limit

If an entrepreneur fails to file for insolvency on time, this may have severe consequences for the individuals responsible, whether they are individuals engaging in business as sole traders or members of corporate management boards.

It is evident that an individual engaging in business activity as a sole trader is personally liable for obligations incurred as part of that business. In other words,

being struck from the CEIDG register (*Centralna Ewidencja i Informacja o Działalności Gospodarczej* — Central Registration and Information on Business) will not prevent trade partners from being able to claim against the debtor and seeking satisfaction from assets not used in the conduct of business (e.g. a private apartment or car). Hence, it appears that failure to file for insolvency on time has little bearing on such an entrepreneur's scope of liability. Previously, i.e. before the amendment of the provisions on consumer insolvency, the sole negative consequence of failure to file for insolvency on time was for the unavailability of debt relief under consumer-insolvency provisions. Currently, that provision has been abrogated. A harsh consequence for a sole trader failing to file for insolvency on time will be the possibility of a court-imposed disqualification from conducting business as a sole trader or partner in a civil-law general partnership (*spółka cywilna*), serving on corporate bodies or as a representative or attorney-in-fact for a sole trader, partnership, corporation, state-owned enterprise, co-operative, foundation or association.

Sanctions for not filing for insolvency on time entail very serious consequences for members of corporate management boards, who, after all, are in principle not personally liable for the company's debts. In addition to the possibility of the aforementioned disqualification, they will also be liable in damages to the company's creditors. The basis for this will be Article 299 of the Code of Commercial Companies and Article 21(3) of Insolvency Law. Managers also incur tax liability under Article 116 of the Tax Code and criminal liability under Article 586 of the Code of Commercial Companies.

Court-ordered and out-of-court restructuring

The processes leading to the restructuring of an enterprise can be accomplished either internally or with the use of the specialized tools provided by restructuring law (so-called court-ordered restructuring).

Internally conducted restructuring should begin with a verification of contracts, costs of operation, revenue forecasts, employment roll, liabilities, receivables and

an inventory of property owned. Such an analysis will make it possible to attempt a spin-off of unprofitable businesses, renegotiation of contracts with trade partners, reduction in workforce, or talks with financial institutions.

Much is being said nowadays of how the state of epidemic constitutes a so-called force-majeure event, that is an unforeseeable external event of which the consequences cannot be avoided. Certainly, many entrepreneurs will be able to defend themselves against their trade partners' claims with the argument that the non-performance was caused by force majeure, i.e. by circumstances for which they are not responsible. In reliance on the *clausula rebus sic stantibus* enshrined in the provisions of civil law (extraordinary change of circumstances), entrepreneurs will also have an opportunity to request court-ordered modifications and even dissolutions of their contracts. One ought to remember, however, that those activities are intended for coping with the consequences of non-performance of obligations in the circumstances of the epidemic outbreak rather than permitting withdrawal from contracts without any consequences. Furthermore, they are individual in scope — one trade partner, one litigation. Complex action with regard to a whole bundle of unprofitable contracts binding an entrepreneur in crisis is not possible with these instruments.

Where remedial actions fail or where it makes no sense to implement them because it is known in advance that any such attempt will be futile without externally provided support and protection, it could turn out that the company is permanently insolvent and it is necessary to open restructuring proceedings. In such a case court-ordered restructuring is on the table, with the goal of avoiding the declaration of insolvency by enabling the debtor to restructure through an arrangement made with the creditors.

What type of restructuring procedure to choose?

Restructuring law defines four types of restructuring proceedings:

- » proceedings to approve an arrangement (pre-pack)

- » accelerated arrangement proceedings
- » arrangement proceedings
- » 'sanation' proceedings

Proceedings to approve an arrangement are the least invasive to the structure of the enterprise and take place substantially out of court. The debtor enters with a restructuring advisor into a contract for the supervision of the proceedings, collects the votes from the creditors on the arrangement and subsequently files an application in court to approve the arrangement. The advantages of this procedure are the usually short duration of the whole process and its independence from the court, whose intervention is limited to issuing the order approving the arrangement. The disadvantage is the lack of protection against the enforcement of debts.

Accelerated arrangement proceedings are one of the most frequent types of restructuring proceedings in practice. In principle, they should take no longer than several months. In this procedure a supervisor is appointed by the court to approve the debtor's transactions exceeding the scope of ordinary management. This type of proceedings leaves the debtor with substantial relative freedom in its functioning throughout the restructuring, provides limited protection against enforcement and takes a load off the whole procedure by preventing the creditors from disputing the value of the claims included on the list of debts. In practice, unfortunately, such proceedings usually take longer than the expected 2–3 months.

Arrangement proceedings do not enjoy much popularity among entrepreneurs. They usually take longer than accelerated arrangement proceedings and may be conducted only when specific requirements are met in respect of the sum total of contentious debts. There will also be a court-appointed supervisor in this procedure. It provides limited protection from enforcement but due to the requirement of a specific volume of contentious debts (more than 15% of the sum total of all debts) it allows debts included on the list to be disputed, making the procedure longer and more complicated.

According to the statistics of restructuring proceedings, sanation is one of the most frequently used types. It involves a deep reorganization of the enterprise and usually takes at least 12 months. In sanation proceedings an administrator is appointed and the debtor may be stripped of the right to manage the enterprise (in practice the debtor is usually allowed to continue to exercise ordinary management).

The choice of one of these types depends on the debtor's individual needs and the volume of contentious debts (i.e. debts disputed by the debtor, for example in court litigation). Hence, it would be impossible to offer a one-size-fits-all recommendation working out well for each and every company suffering from the consequences of the pandemic. With a large dose of caution one could recommend considering sanation proceedings. These proceedings equip the entrepreneur with the full scope of tools provided by the Restructuring Law Act. In comparison to the other types of restructuring proceedings, one could call sanation the 'all-inclusive' option. This is the procedure in which the legislature allows the fullest protection against enforcement, the possibility of withdrawing from disadvantageous contracts, simplified procedure for employment cuts and a special procedure for the liquidation (sale) of individual assets (similar to that used in insolvency proceedings or debt enforcement). Under this form of restructuring one can undo the consequences of the debtor's disadvantageous disposals made in the latest period. On the other hand, these are relatively protracted proceedings (approximately 12 months in a by-the-book scenario) and thus expensive for the debtor. Moreover, unlike in all other types of restructuring, the debtor will in principle be deprived of own administration of the assets in favour of a court-appointed administrator.

The court may dismiss the application for the debtor-selected type of restructuring proceedings if it decides the wrong type was chosen. Hence, when making the choice it is worth consulting a restructuring advisor.

Benefits of restructuring

The main benefit of restructuring is, of course, avoiding the declaration of insolvency, so the business is allowed to go on. The opening of restructuring proceedings

(accelerated arrangement, arrangement or sanation proceedings) or approval of an composition arrangement in arrangement-approval proceedings offers protection against all of the negative consequences of failing to file for insolvency on time.

Opening the restructuring proceedings leads to a 'freezing' of liabilities arising before the day the restructuring proceedings were opened along with interest accrued to that date and interest accruing in the course of the proceedings. This means the debtor does not have to, and, due to the statutory prohibition, actually cannot, pay these liabilities in any way other than performance of the arrangement. Only when the arrangement is adopted and approved in a legally binding way may the debtor begin to make the payments in accordance with the terms of the arrangement. Thanks to this the debtor can defer the payment (e.g. three months of the date of legally binding approval of the arrangement), break it into instalments or even have part of the obligation forgiven (e.g. interest and 30% of the principal), or avoid committing funds and suggest that creditors be satisfied by conversion of the debt into equity shares.

Depending on the choice of the restructuring procedure the debtor receives protection against enforcement and a guarantee that contracts of key importance to the operations of the enterprise will not be terminated. The strongest protection against enforcement is available in proceedings. During sanation proceedings not only debts included in the arrangement cannot be enforced but neither can the current debts arising in the course of the proceedings. However, if the debtor fails to pay off current liabilities, the sanation remedial proceedings can be discontinued by the court. Arrangement proceedings or accelerated arrangement proceedings generally preclude the enforcement of debts covered by the arrangement.. If, however, such a debt is secured against the debtor's assets with a mortgage or pledge or lien, then the creditor can enforce against such an asset in the course of the proceedings. If the asset is indispensable to the operation of the enterprise, then such enforcement may be suspended for no longer than three months.

Throughout the proceedings counterparties are also not allowed to terminate such contracts with the debtor as tenancy or lease of premises or of a property

in which the debtor's business is run, loans, leasing contracts, non-life insurance, bank-account contracts, sureties, licences granted to the debtor or guarantees and letters of credit issued before the day the restructuring proceedings are opened. Termination is still permissible, however, under certain conditions, with the approval of the competent procedural authority and even without such approval when the debtor is not performing, after the day the proceedings are opened, the obligations arising from such contracts (e.g. is not paying rent for the time after the proceedings are opened).

In sanation proceedings there is also the possibility of employment cuts on the same terms as available to the administrator in insolvency proceedings (shortened notice periods, terminations during the protected period). Under these proceedings it is also possible to withdraw from unprofitable contracts in these proceedings. The application for withdrawal is filed by the administrator appointed in the proceedings, and the approval is given by order of the judge-commissioner. Importantly, withdrawal in such conditions will not involve imposing a contractual penalty on the debtor. As opposed to the aforementioned possibility of pursuing court-ordered modification or termination of a contract due to an extraordinary change in the circumstances, a complex withdrawal from unprofitable contracts can be accomplished in a single procedure. Moreover, withdrawal from such a contract does not require any demonstration of extraordinary circumstances, as the option to withdraw from unprofitable contracts in sanation proceedings is available in normal market circumstances. Taking advantage of this possibility in connection with the corona crisis appears to be all the more justified.

Practical remarks — including banks in the arrangement

Debts arising before the day the restructuring proceedings are opened will be 'frozen' for the duration of the proceedings and, as so-called 'debts included in the arrangement', will not be able to be satisfied during the course of the proceedings. This is a statutory prohibition — debts included in the arrangement

may be satisfied only on the basis and on the terms of the arrangement adopted. Any paying off of debts outside the arrangement would constitute discrimination favouring certain creditors.

In restructuring proceedings enforcement of debts included in the arrangement is generally prohibited. If the entrepreneur has taken a loan from the bank, the entire outstanding balance constitutes a debt included in the arrangement, and the bank will have to wait patiently for repayment according to the terms of the arrangement. The situation of a working-capital facility differs somewhat — in such a case the debt included in the arrangement will be the limit used up until the day the restructuring proceedings are opened. The debtor, in turn, will have the option to use the unused limit on the existing terms, and the bank will not be able to withhold the financing or terminate such a contract.

It is worth noting that banks not infrequently make up a key group of creditors in restructuring proceedings. Due to the usually large amount of debts owed to them they have the decisive vote when voting on the arrangement. Also, the financing provided by banks is usually secured against the debtor's assets with a mortgage, pledge, collateral transfer of ownership or assignment as a collateral, etc., which gives them a privileged position in the proceedings. In the part the secured debt is covered by the value of the collateral, the bank is excluded from the arrangement by operation of the law, though it may consent to be included. This means that, for example, if the bank is owed 100, secured with a mortgage on the debtor's real property worth 60, then only 40 will be included in the arrangement. Only this part can be subjected to a reduction under the arrangement or have its instalments deferred, etc. As regards the remaining 60 the bank will be able to claim that amount in full, and after the end of the proceedings it can even enforce the mortgage against the real property. If, however, the bank agrees to include the debt in the arrangement, the entire sum of 100 will be subjected to the restructuring. Hence, maintaining good relations and transparent communication with the banks is of extraordinary importance to a successful restructuring.

Practical remarks — leasing and rent debts

Debts under leasing contracts and rent (as well as other debts for a settlement period) are subject to a special regime for the duration of their inclusion in the arrangement. Thus, if the proceedings are opened during such a settlement period, then the debt for that period will be prorated according to the number of days into parts arising before and after the day the proceedings are opened. For example, if rent is 100 per month and the proceedings are opened on the 13th day of the month, rent for that month will be prorated as follows: $12/30 \times 100 = 40$ (12 days of the month before the opening of the proceedings) will be included in the composition, while $18/30 \times 100 = 60$ will be a so-called current liability, which needs to be paid in the course of the proceedings. Also subsequent instalments for periods falling after the opening of the proceedings will constitute a debt that should be paid by the debtor on a current basis. Failure to pay such debts may lead to the termination of the contract by the creditor and even to the discontinuation of the restructuring proceedings. Debts arising from operating leases (as defined in tax law, i.e. if the depreciation is recognized by the lessor) will display similar behaviour to rent.

The situation will be different with finance leases (as defined in tax law, i.e. if the depreciation is recognized by the lessee). In such a case the entire debt arising from such a contract will be included in the arrangement, even instalments falling after the opening of the proceedings, hence they will not need to be paid on a current basis.

It is important, therefore, for an entrepreneur looking at court-ordered restructuring to consider the need for guaranteed funds to pay current debts from operating leases, rent under lease or tenancy, or even taxes or social-insurance contributions.

Practical remarks — public-law debts

The freezing of debts arising before the day the restructuring proceedings are opened applies equally to public-law liabilities. As they are usually owed for

a certain settlement period, they will be included in the composition on similar terms as debts arising from operating lease or rent (*pro rata* for the period before the day the proceedings are opened). Public-law obligations arising during the course of the proceedings, on the other hand, will have to be paid on a current basis.

Contributions paid to the Social Insurance Institution (ZUS) are regulated differently to some extent. For in this case the social-insurance contributions in the part financed by those insured, for which the debtor is the withholding agent, are not included in the composition at all, even though they might apply to the period before the day the restructuring is opened. This means the debtor should continue to pay such contributions. For this reason the amount of indebtedness covered by the arrangement is best agreed directly with the ZUS. This is because a one-off payment made by the debtor will be settled and booked by the ZUS toward social-insurance, health-insurance, Employment Fund (FP) and Guaranteed Employee Benefits Fund (FGŚP), which may lead to certain complications, especially if the ZUS fails to register the information that restructuring proceedings are pending with regard to the debtor.

The method of restructuring of public-law obligations is, in principle, the same as with all other debts. In principle, partial forgiveness of the debt under VAT, income tax, property tax or contributions into the State Fund for the Rehabilitation of the Disabled (PFRON) is achievable. Apart from several other exceptions, the focus of attention should once again be on ZUS contributions. Such debts may be restructured only by breaking them into instalments or deferring the payment deadline (contributions will therefore have to be paid in 100% plus interest). In arrangement proposals occurring in practice a separate group of creditors is often created for ZUS alone (arrangement proposals may provide for the separation of creditors into groups). This allows such debts to be satisfied in 100% while moving the debts owed to trade partners and other creditors to different categories, where partial forgiveness of the debt may be proposed.

Practical remarks — debts owed to employees and payments from the FGŚP

Debts owed under an employment contract are excluded from the arrangement by operation of the law but may become included with the employee's consent (if so, they will be satisfied on terms agreed in the arrangement).

The Act on the Protection of Employee Claims in the Event of Employer Insolvency allows payments to be made to employees from the Guaranteed Employee Benefits Fund (FGŚP). In accordance with this act an insolvent employer is deemed to be, among others, one for whom arrangement proceedings, accelerated arrangement proceedings or proceedings have been opened. Benefits paid by the FGŚP include, for example, the salary or wage, compensation for a shortened notice period, or severance packages required under the provisions of the Act on the Detailed Rules for the Termination of Employment for Reasons not Concerning the Employees. Such debts are, however, paid up to the limits specified in this Act.

Payment by the FGŚP makes the Fund now the debtor's creditor in respect of that payment. Detailed provisions, however, make it possible to enter into an agreement with the FGŚP as to the payment of such a debt, which may include breaking it into instalments or extending the deadline, although the requirements for concluding such an arrangement are quite strict.

Completion versus discontinuation of the proceedings

Restructuring proceedings are completed with the day the order approving the arrangement or withholding approval becomes final and unappealable. The model is as follows: the creditors vote on the arrangement, the arrangement is adopted, the judge-commissioner confirms the arrangement has been made, and the open hearing takes place in which the restructuring court rules upon the approval. If the court approves the arrangement and no creditor files a complaint, the proceedings have been completed successfully. Withholding the approval, on the other hand, will mean the proceedings have been futile. In either case, however, the proceedings will end.

Discontinuation of the proceedings consists, in a way, in interrupting its course. The whole procedure is not completed, unlike in the example given above. Discontinuation usually results from failure in the proceedings and may happen, for example, when the creditors do not support the arrangement, the proceedings are detrimental to the creditors or the debtor fails to pay the costs of the restructuring proceedings and current debts arising after the opening of the proceedings. Discontinuation of the proceedings allows the creditors to file simplified applications for the debtor's insolvency.

Co-operation with the restructuring advisor

Court-ordered restructuring involves the participation of a licensed restructuring advisor, who takes on different roles in the proceedings. Firstly, the advisor may act as the debtor's attorney in the proceedings to open the restructuring, prepare the restructuring application along with a preliminary restructuring plan and assist the debtor throughout the restructuring proceedings. The advisor may also act as the supervisor of the arrangements in proceedings to approve the arrangement, as the court-appointed supervisor in arrangement proceedings or accelerated arrangement proceedings, or administrator in sanation proceedings.

Outside of the case of proceedings to approve an arrangement, in which the debtor enters with the advisor into a contract for the supervision of the proceedings, the supervisor or administrator will be court-appointed. For larger entrepreneurs employing the requisite number of employees and generating the requisite revenue, only a qualified restructuring advisor can serve as the supervisor or administrator. At present, barely more than 20 restructuring advisors hold such a licence in the entire country.

The success of the restructuring proceedings depends on many factors, but doubtless one of those is good collaboration between the debtor and the appointed supervisor or administrator. The efficient conduct of restructuring proceedings requires not only a heightened effort from the management board and the employees but also the experience of an advisor capable of developing

together with the debtor a restructuring plan allowing the entrepreneur's competitive position in the market to be rebuilt.

Hence, it is recommended to work with an advisor the entrepreneur feels fully confident about. Restructuring law notices this need and permits the debtor to request the appointment of a named advisor in the proceedings. This request will be binding on the court if the written consent of a creditor or creditors jointly having more than 30% of the sum total of all debts is attached. Unfortunately, for a variety of reasons this quota may be difficult to accomplish, hence some restructuring courts follow the commendable practice of appointing the advisor named by the debtor even if the debtor does not enjoy the creditors' support on this matter.

Will the consequences of the pandemic affect already pending insolvency and restructuring proceedings?

The pandemic-induced paralysis of the state has sparked interest in legal institutions making reference to force majeure. The provisions of civil procedure impose a suspension of the proceedings by operation of the law if the court ceases to operate in consequence of force majeure. Will insolvency and restructuring proceedings also be suspended?

Both the Insolvency Law Act and Restructuring Law Act expressly exclude the application of the provisions of the Code of Civil Procedure on suspension. And while there is no doubt with regard to the other grounds that they are not applicable to insolvency and restructuring proceedings, cessation of operations by the court as a result of force majeure is not as easy to determine. After all, deciding that despite the force majeure (e.g. court lockdown for the duration of the epidemic) the proceedings are not suspended would be contrary to the facts. Firstly, the court would *de facto* show no activity. Secondly, no activities could be undertaken by the participants (due to the filing office having been shut down they would be unable to file any pleadings, motions or appeals). Maintaining that the proceedings are still in progress in such a case would be a fiction serving no purpose. Hence, the correct position appears to be that if the court stops its

operations, then insolvency and restructuring proceedings are suspended by operation of the law. This opinion has previously been advanced by some insolvency scholars such as Professor Feliks Zedler. It must be stressed, however, that as long as only hearings are cancelled but the courts, in principle, perform all of their other activities and the filing offices are still open (at least in part), this requirement will not be satisfied.

The economic crisis caused by the pandemic also marks a threat to the conduct of restructuring proceedings already pending. If the court decides that the current economic situation shows that the arrangement will not be performed, it may discontinue the restructuring proceedings. Particular problems could be encountered by debtors involved in arrangement proceedings or proceedings. For those proceedings must be discontinued if the debtor has lost the ability to pay on a current basis the costs of the proceedings, debts arising after the opening of the proceedings, and debts that cannot be included in an arrangement. Additionally, the debtor is presumed to have lost the ability to satisfy debts if the delay in performance exceeds 30 days. In the realities of the current crisis it is not difficult to find payment backlogs exceeding 30 days. The court-appointed supervisor or administrator is to report to the court also on whether the debtor is performing obligations on time. If the court becomes aware of a payment backlog, it will be required to discontinue the proceedings unless it is demonstrated that the backlog does not mean the loss of ability to perform obligations but is only temporary. Hence, it is important for the debtor to provide the court-appointed supervisor or administrator and the court itself with exhaustive information establishing the transient nature of payment difficulties. The debtor's activity is crucial in this regard. Courts, on the other hand, should be moderate in their application of the presumption of loss of ability to perform obligations and should be open to explanations given by entrepreneurs.

Final notes

It is obvious that no entrepreneur is pleased to be in restructuring. The implementation of a restructuring procedure is always the result of some sort of crisis

in the company, and it requires a significant concentration of staff and funds on this procedure instead of operational activities, which should still be pursued despite the liquidity problems or even all the more so because of them. Debtors are afraid of stigmatization by other market players, if only due to operating with the label 'in restructuring', which can inspire a certain lack of confidence in customers and business partners.

Still, it must be noted that, after four years of the Restructuring Law Act in force, the market has already become convinced of the merit of the Act's solutions for dealing with a crisis situation in the company. Even well-known brands go into restructuring, and many of the proceedings are successful. Market players begin to see the difference that restructuring does not mean insolvency, and many have found out that repayment of debts under an arrangement leads to being paid in a larger proportion than through insolvency and in any case faster by several years. Restructuring, therefore, should not be feared, as it is an effective and rational tool for overcoming a crisis situation and in the corona crisis it will certainly provide a cure for many businesses infected with insolvency.

RESTRUCTURING AND INSOLVENCY



CORONAVIRUS AND THE LAW IN POLAND

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23 Protection of intellectual property amid the coronavirus epidemic

Compulsory licences during the COVID-19 pandemic

The ongoing pandemic has prompted numerous media reports on the shortages of essential products, such as medicines, personal protective equipment and medical device parts. In Italy, where the situation is currently very serious, the manufacturer of respirator parts has not been able to produce enough of them to meet the current extremely high demand. However, two volunteers, Cristian Fracassi and Alessandro Romaioli, offered to make the missing parts for a fraction of the commercial price by printing them on a 3D printer. However, the initiative was supposedly precluded by a patent belonging to the parts' manufacturer. This is just one of the stories of recent days. The US company Labrador Diagnostics holds a patent that potentially covers coronavirus testing, including the SARS-CoV-2 virus which causes COVID-19 and hence is responsible for the current pandemic. The patent holder brought an action before the Federal Court against companies Biofire Diagnostics LLC and BioMerieux i.e. the companies which had introduced rapid tests for this virus, and even requested infringing tests to be withdrawn from the market. What makes the situation even more alarming is that the patent holder himself does not produce any tests, but merely holds a patent, and apparently intends to profit from that exclusive right.

Such stories tend to undermine people's confidence in the patent system, especially now when we are all faced with a dramatic and unprecedented situation. So far, however, it would appear that decency has the upper hand. In the case of

the aforementioned respirator parts, the patent holder has decided not to hinder those who offered to help with the production of the parts (however, the patent holder supposedly refused to provide them with the schematics, so they had to develop them themselves using reverse engineering). In turn, Labrador Diagnostics' actions caused such a huge wave of criticism in the US that the company withdrew the lawsuit and committed to grant a free license.

However, what would happen if the patent holders had actually sought to pursue their rights aggressively in any of the above-mentioned situations? Is someone, who does not manufacture a patented solution and only seeks to benefit from his exclusive right, entitled to do so without any limitations (apart from concerns over the public opinion)? And what if the patent holder actually manufactures and sells the product, including the one that addresses an important need, but fails to meet the existing demand while another company has the ability to manufacture such a product, but the patent holder refuses to grant the license? Does the fact that the whole world is facing a crisis have an additional weight here?

Patent provides its holder with the exclusive right to use a specific technical solution (within a specific territory and for a limited period of time), whether for profit or professionally. Nevertheless, it would not be true to say that the patent holder may always fully exercise his exclusive right in any situation. Most jurisdictions, provide some limitations to said exclusive rights in order to, among other things, prevent situations where one might abuse its rights to the detriment of society.

The first provisions establishing protection against patent abuse appeared already in the Paris Convention signed on March 20, 1883 (Poland has been a signatory since 1919). At present, the relevant regulations are harmonised to a certain extent in most countries around the world, basing on international treaties, including in particular the TRIPS agreement devised by the World Trade Organisation (Multilateral International Agreement on Trade-Related Aspects of Intellectual Property dated 15th April, 1994). This agreement established certain minimum standards for the protection of intellectual property in WTO member states

(164 countries in total, including the US and all EU countries, including Poland). It is article 31st of the TRIPS agreement that concerns the use of the patented solution without the consent of the patent holder, maintaining, at the same time, the protection of his rights to a certain extent.

In Poland, relevant provisions were introduced in the Industrial Property Law dated 30th June 2000 (Journal of Laws 2020, item 286, as amended) (hereinafter referred to as the IPL). The state authorities have special powers under the Act. Where it has been found indispensable to counteract or remove a state of threat to the state's vital interests, in particular in respect of security and public order, exploitation of an invention for national purposes,to a necessary extent, without exclusive rights thereto , does not constitute a patent infringement (Article 69section 2 of the IPL). For the purposes of such use of the invention by the State, an administrative decision of the competent minister or Voivode determining the scope and duration of exploitation of the invention is necessary. This does not mean, however, that the patent holder is not entitled to any remuneration. He should receive an appropriate compensation from the budget funds at an amount that corresponds to the market value of the license. In addition, the aforesaid administrative decision is challengeable before an administrative court. Such and similar solutions were adopted in many countries, with the international TRIPS agreement being complemented in 2001 by the Doha declaration, setting forth that each Member State may determine on its own what constitutes a state of threat and such a state may include crisis situations regarding public health, including an epidemic.It is therefore undeniable that the current coronavirus pandemic may be classified as such an emergency.

However, it should be noted that in reality, the state apparatus usually does not have the capacity to use a patented solution (e.g. drug production) on its own. It is therefore more often the case that the state, when in a state of threat, provides third parties with the capacity to realise the proprietary invention, using so-called compulsory licences. This is also allowed under the TRIPS agreement, and is intended to prevent anti-competitive practices and abuse of patent rights, as well as to respond to extraordinary circumstances.

One of the most recent examples from around the world is the decision of the Israeli authorities to allow the import of replacements of the Kaletra drug, used to combat HIV infections. This drug is covered by the patent (or, to be precise, what is patented is its beneficial form of administration). The patent remains in force in Israel, but has expired or never existed in certain other countries, such as India. Generic products have therefore already been marketed there. Since this drug has the potential to be used to treat the coronavirus and the patent holder in Israel was not able to provide it in sufficient quantities, the authorities decided to authorise the import of substitute drugs. Perhaps partly due to this decision but also due to public pressure, AbbVie, the holder of the majority of the exclusive rights to this form of the drug in the world, was the first drug manufacturer in the current pandemic to announce that it would not bring any claims against those using the patented solution to treat the coronavirus.

A compulsory licence is therefore a solution that may allow third parties to use a patented solution despite the lack of consent, or even despite the objection of the patent holder. Usually, however, the licensee must pay a license fee to the patent holder. The fee should correspond to the market value of the licence. The TRIPS Agreement also imposed various restrictions on the Member States, according to which the scope and duration of the compulsory licence must be limited and adequate to its purpose. In the example described above, the Israeli Ministry of Health declared that the Kaletra substitutes imported into Israel would not be administered to HIV patients, but only used to treat coronavirus infections, thus limiting the scope of use of patented third party products. Furthermore, according to the TRIPS Agreement, any use of a compulsory licence should aim primarily at satisfying the needs of the domestic market. It is therefore intended to be an emergency solution that allows public needs to be met. Before the occurrence of this year's pandemic, the use of compulsory licences in order to allow the import of drugs or their ingredients by third parties was most often applied by developing countries (e.g. Malaysia, Thailand).

In Poland, compulsory licence under the IPL has not been used so far (however, there were cases of compulsory licences for fire extinguishing equipment in

mines, based on previous regulations). Naturally, this may change in the present circumstances. Therefore, it is all the more important to be aware of how this matter has been regulated in Polish law.

In Polish law, the mechanism in question is regulated in Articles 82-88 of the IPL. Patent Office may grant permission to third parties (including state bodies) to use a patented invention in three cases provided in the Act..

Firstly, compulsory license may be granted when it is necessary to prevent or remove the national security emergency , in particular in the field of defence, public order, protection of human life and health and protection of the natural environment. Such a scenario will therefore certainly occur when the patent holder is unable to produce sufficient quantities of the drug or parts for medical devices in case of an epidemic occurrence.

The second scenario is broadly defined as one in which the patent is found to be abused. The Patent Office may then decide compulsory license may be applied for and announces it in "Wiadomości Urzędu Patentowego" (Official Patent Gazette).

What can be construed as patent abuse? Pursuant to Article 68, not only the holder of a patent, but also the licensee should not abuse their rights which, pursuant to said regulation, may indeed occur, in particular when the invention would be prevented from being exploited by a third party, if such exploitation is necessary for the purpose of meeting home market demands and is particularly dictated by public interest considerations, and consumers are supplied with the product in insufficient quantity or of inadequate quality, or at excessively high prices.. In practice, such abuse may occur, for example, if the patent is not being used, i.e. when, for instance, the patent concerns a product (such as a drug) which is neither manufactured by patent holder nor licensed to anyone. Yet this only would not necessarily have negative consequences for the patent holder, since Polish law does not provide for an obligation to use a patent (as is the case with trademarks). Yet, if the patent holder fails to market the proprietary solution himself and at the same time prevents third parties from doing so, in a situation

where market demand or public interest requires the solution to be used, such actions will constitute an abuse of the patent holder's right. It is worth noting that the actions of the patent holder do not necessarily have to fall within the scope of behaviour of the so-called patent troll, when the patent holder does not use the solution in his own business and tries to benefit from third parties which potentially may infringing his patent... It is enough if the patent holder refuses to grant a license to others while not responding to a public need. Abuse may happen also in the case when even though patent holder uses the solution, he is not able to meet the demand and despite that, he prevents third parties from using the solution. This could be the case in the above-mentioned situation regarding the manufacturer of respirator parts, had he actually refused to allow the necessary parts to be manufactured.

However, regardless of the patent holder's actions, pursuant to the IPL, the patent holder cannot be considered to abuse his right if three years have not yet passed since the right was granted. As such, the legislator gives some time to market the new solution and launch the production.

It deserves to be mentioned here that the provisions of Article 68 of the IPL concerning the abuse of the patent holder's right are obviously not everything that should be taken into account. In Poland, as in many other European countries, there are additional anti-monopoly laws in place, included in competition and consumer protection regulations. The non-use of a patent can be considered an anti-competitive practice in some situations. An example for this is when a manufacturer of car spare parts arbitrarily refuses to supply them to independent workshops or charges unfairly high prices, even though the relevant car models are still on the market. Such actions may be considered an abuse of a dominant position (see judgment of the European Court of Justice C-53/87).

The consequence of an abuse of an exclusive right may be precisely the use of a compulsory licence. One should bear in mind that compulsory licence may be used not only in a state of exception, such as the present one, but also in response to the actions of the patent holder, if they, in addition to excessively restricting

competition, are detrimental to the public good or the fulfilment of the demand on the national market.

The third scenario in which the Patent Office may decide to apply a compulsory licence is when the needs of a national market cannot be met because the patent holder is obstructed by another, earlier patent which covers his solution. If the holder of that earlier patent refuses to grant a licence to the holder of a dependent patent, the Patent Office may also resolve this situation by means of a compulsory licence. However, there is an additional condition - if the dependent patent concerns the same subject matter as the earlier patent, the new solution must introduce significant technical progress in order for a compulsory licence to be granted. It is also worth mentioning that the holder of an earlier patent may, however, request permission to use the invention that is the subject of the dependent patent, i.e. may request a so-called mutual licence.

There is one more condition upon which a compulsory licence may be granted. If the possibility of applying for a compulsory licence has not been announced publicly in the Official Patent Gazette or more than a year has passed since such an announcement, the person applying for such a licence must prove that it had previously tried to obtain the consent of the patent holder by acting in good faith. Therefore, such a person should prove that it really wants to enter into an agreement with the patent holder and that had tried to negotiate. The burden of proof lies with the person applying for the licence, who also must prove that it had acted in good faith (therefore, it cannot, for example, offer absurdly unfavourable licence conditions in negotiations with the patent holder and claim afterwards that it is entitled to a compulsory licence on account of the patent holder's refusal). However, what is very important at this point in time is that this condition of prior attempts at obtaining consent does not apply where a compulsory licence is intended to prevent or remove national security emergency..

The Patent Office is to decide on the granting of a compulsory licence by means of adversarial proceedings, which may be quite time-consuming. In emergency situations (i.e., those related to national security e.g.), it may be permissible to

issue such a decision in a closed session, although it is difficult to imagine that the Office would not allow the patent holder to present arguments for its defence before issuing the decision. The patent holder may appeal against the decision to the Voivodship Administrative Court in Warsaw.

As mentioned above, persons granted a compulsory licence may use the invention without the consent of the patent holder, but are required to pay a licence fee. The value of this fee, the terms and conditions for its payment, as well as the duration and scope of the license are determined by the Patent Office. As a rule, a compulsory licence is non-exclusive (meaning it can be granted to more than one person). It may be entered in the patent register (only at the request of an interested party), although there is no such obligation. Moreover, the licence is not easily transferred to another person, as it is only possible when done together with the whole enterprise or a part thereof in which the licence is exercised. Once granted, the licence may, when justified, be modified at the request of an interested party (i.e. the licence holder or the patent holder) in terms of the duration, scope and fee amount, but only after two years have passed since it was granted. Importantly, compulsory licence may concern not only patents, but also rights for utility models, industrial designs or rights under registration of topography of integrated circuits..

Therefore, state administration has the powers to limit the monopolistic practices of owners of exclusive rights, especially if they are detrimental to the social interest, as well as, in a way, to enforce a more widespread use of protected solutions in cases where they are necessary to overcome a crisis or a state of threat to public safety. This does not change the fact that the patent holder does not lose his right and may still exercise it (i.e. manufacture the patented product e.g.), as well as retains the right to remuneration in the form of a licence fee. Nevertheless, the best scenario would arguably be if there still was no need to use tools such as the compulsory licence in our country. So far, in all the cases described above where an abuse of exclusive rights may have taken place, the patent holders did however, sooner or later, take the exceptional circumstances into account. In a difficult situation such as the present one, it is worth keeping in mind that one may

and should exercise his own exclusive rights, as is the case with any other owned property, wisely and with attention to others.

Trademarks and industrial designs during the COVID-19 pandemic

The coronavirus pandemic affects not only our health, but also the way we function in every sphere of our lives. Our social relationships, hobbies and business activities are being restricted. Nowadays, everyone has to get used to remote working or at least to maintain social relationships at a distance.

Entrepreneurs have already been adversely affected by the coronavirus, and one must bear in mind that this is just the beginning of the pandemic.

As the special anti-crisis act comes into force, some enterprises go bankrupt, while others change their product range and diversify their operations. During this time, the ones who make a profit are mainly producers of antibacterial gels, soap and toilet paper, but not exclusively, as the market is quick to respond to new needs.

Now, we have decided to approach the coronavirus issue from another angle and analyse just how entrepreneurs react to the current situation by submitting new trademarks or industrial designs for registration.

Trademark applications

From the beginning of 2020, the following trademarks have been applied for in regard to medical and hygienic preparations:

- 1) **CORONEX** - EU trademark application No. 018192950, for pharmaceutical preparations, dated 7 February 2020, on behalf of Excivion Ltd based in Great Britain.



- 2) EU trademark application No. 018209699, for a number of goods, i.e. antibacterial gels, masks, toiletries, disinfectants, air purification preparations and hygiene articles, dated 11th March 2020, on behalf of a Bulgarian individual.
- 3) Polish trademark application No Z.509660, for laundry preparations, dated 31 January 2020, on behalf of Zakłady Wytwórcze AGRO-CHEMAT based in Wiązowna.



- 4) **CORONNOFF** - EU trademark application No. 018212449, for designation of disinfectants, dated 18 March 2020, on behalf of the Norwegian company Corticalis AS.

The information that alcohol supposedly aids in the fight against the coronavirus has also led to the appearance of applications for trademarks for beer and alcoholic products. The following were particularly interesting for us:

- 5) **CORONAVIRUS** - EU trademark application No. 018209884, dated 12 March 2020, on behalf of Alejandro De la Hoz de Miguel from Spain.
- 6) **ANTYWIRUSÓWKA** - EU trademark application No. 018202543, dated 27 February 2020, on behalf of the Polish company BEAUTY BRANDS CONCEPT based in Lesznowola.



- 7) **Antivirus** - Polish trademark application No Z.510890, dated 2 March 2020, also filed on behalf of the Polish company BEAUTY BRANDS CONCEPT.
- 8) Polish trademark application No. Z.511122, dated 6 March 2020, on behalf of an individual from Grzegorzewice, Poland.

Apart from that, we can also find applications for other goods and services, such as:

- 9) **Byebyecorona** - EU trademark application No. 018212707 for an internet platform, dated 18 March 2020. The applicant's data have not yet been disclosed.
- 10) **Corona KID** - EU trademark application No. 018211918 for clothing and textiles, filed on 17 March 2020. The applicant's data have been disclosed.
- 11) **Coronabot** - EU trademark application No. 018211463 covering, among others, electrical appliances, medical equipment, as well as educational, scientific and beauty care services. The application was filed on 17 March 2020; the applicant's data have not been made available.
- 12) **Coronaguide** - EU trademark application No. 018211444 for a number of goods and services, including multimedia devices, medical equipment, as well as educational, entertainment and healthcare services, dated 17 March 2020; the applicant's data have not yet been disclosed.

Of those trademarks, only ANTYWIRUSÓWKA, CORONEX and PASTA CORONA have so far passed the examination by the European Union Intellectual Property Office (EUIPO), but before they are registered, they are subject to third-party observations and oppositions.

The other trademarks still have 'under examination' status. Will they meet the formal requirements to be registered and protected by an exclusive right? In our view, due to the recently tightened policy of examining the absolute requirements, EUIPO may raise doubts as to whether certain trademarks are descriptive for the goods and services they designate. For example, is Coronaguide distinctive enough for educational services? It seems to us that the opinions on this matter can be quite divergent.

An application for pasta , filed by the Italian company PASTA CORONA S.R.L. UNI-PERSONALE, has also appeared in the EUIPO's database. The application has met the requirements of the EUIPO and is currently in the opposition period. We are very curious to see whether PASTA CORONA pasta will be available in stores and just how successful it will be. Given the dramatic situation in Italy, it may seem inappropriate, to say the least, to market such a product.

Meanwhile, we hope that soon we will all be able to say "bye bye corona" and not violate anyone's trademark rights thereby!



Innovations during the pandemic - industrial design applications

The analysis of industrial design applications always prompts reflections on current market trends; it provides information on products which may appear on the market next. A similar situation is encountered in case of industrial design applications filed during the COVID-19 pandemic.

Indeed, recently more applications for masks, inhalers, nebulisers, room disinfectants and other innovative solutions that may aid in fighting the coronavirus have been occurred.



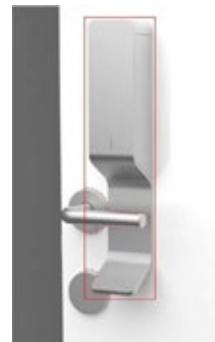
In particular, our attention has been drawn to the application for a door handle sanitizer. In the current situation, it is worthwhile for such a device to be installed in all civic buildings.

The representations of Community Designs No. 007339189-0001 and 007339189-0002 illustrate main characteristics of the device. The door handle sanitizer was submitted for registration by the Swedish company Clean Handle AB even prior to the epidemic outbreak in Europe, i.e. on 4 December 2019. Clean

Picture 1 - ZWW
nr 007339189-0001

Handle AB managed to perfectly take advantage of the situation around the globe and developed an effective solution to the problem of germ transmission in an ingenious way.

The manufacturer's website reads "*Clean Handle is a fully automatic door handle sanitizer designed to minimise the spread of harmful bacteria in everyday environments. A vibration sensor activates the device 10 seconds after opening or closing of the door. Clean Handle antibacterial aerosol evaporates quickly and leaves a door handle that is dry and sanitized.*"¹⁵².



Picture 2 - ZWW
nr 007339189-0002

The cost of ordering one piece is approximately 900 PLN. On the other hand, the cost of registration of both designs (including a 5-year period of protection at the EU level) was EUR 525 (approx. PLN 2400).

It is worth noting that the above-mentioned device was first the subject of an application with the Swedish Patent Office, which granted a patent for the invention after more than two years. The solution is also the subject of an international PCT application; therefore, the Applicant may also seek protection in other countries. There is one important point that needs to be clarified here. In order to obtain protection for an industrial design, the appearance of the product defined in it must be new, i.e. there is no identical design that has been previously made available to the public. A prior patent application does not necessarily preclude obtaining industrial design protection as the content of such an application is not available to third persons at its early stage. There is, therefore, no public disclosure until the patent application is published, which only takes place 18 months after the priority date. Furthermore, there is an exception regarding the novelty of an industrial design. If an earlier disclosure is made by the designer or upon his consent, the industrial design application may be filed up to 12 months after such an event. In the case described above, Clean Handle AB had filed the patent

¹⁵² <https://cleanhandle.se/> accessed on 24 March 2020

application much earlier and the application was published in May 2019. There was, therefore, no hindrance to an industrial design application that was filed a few months later. It is worth to remember the above as patents and industrial designs provide different protection opportunities, and it happens often that the technical part of the solution may be achieved earlier than the occurrence of the final appearance of the product.

Patent protection grants the owner the widest available exclusive right, considering that such right covers the solution of the technical problem, regardless of the final product appearance. In comparison, the right stemming from the registration of an industrial design protects only the illustrated appearance of a product, while its modifications are not guaranteed to be protected. By obtaining patent protection, the patent holder has a monopoly on the use of a given technical solution.

As a result, if door handle sanitizers in the shape of a sphere were to appear on the market, Clean Handle AB would find it difficult to prove that its right, stemming from the registration of its Community designs, has been infringed. However, by invoking its right under the patent, it could effectively seek compensation for the infringement of its rights by invoking the patent claims. The latter indicate that what is covered by the patent is an apparatus for cleaning handles configured to be attached to a door, comprising a holder that receives a container of liquid or gaseous germicide. They read as follows: "*said apparatus further comprises at least one sensor for detecting whether a handle is in use and; at least two nozzles, each positioned on an angled surface and fluidly connected to the container to convey the germicide from the container onto the handle; and a control circuit configured to control the apparatus to automatically spray the germicide on the handle via the at least two nozzles upon receiving signals from at least one sensor.*"¹⁵³. Therefore, any device constructed in the same way will potentially constitute a patent infringement (assuming that the patent is granted).

¹⁵³ Abstract of Application No. WO2019081006A1 APPARATUS FOR HANDLE DISINFECTION

In turn, Clean Handle AB filed an industrial design application, in order to protect a particular appearance of their product, at a later stage, probably only after the design of their finished product had been developed. By taking advantage of this form of protection, the patent holder will in turn be able to protect himself, for example, from the marketing by third parties of devices which do not perform the same technical function but look confusingly similar.

Another important point worth noting is the procedural differences between these two forms of protection. It takes an average of 3 to 6 years for a patent for an invention to be granted, depending on the body examining the application, and in the case of more complex solutions, it lasts even much longer. Patent application is a time-consuming and expensive procedure. Filing EU design application is much simpler and cheaper and the requested right can be obtained in as little as 3 working days. It is the great advantage of this procedure, especially if the entrepreneur has developed a given solution in response to emerging market trends. Nevertheless, it should be remembered that industrial design protection applies to the illustrated product appearance only; it does not apply to either the technical functions or the essence of the solution. In addition, publication of the industrial design or marketing the product can make it impossible to obtain patent protection for the technical essence of such a product at a later stage. Consequently, if the new idea concerns both product appearance and product-related technical issues, it is recommended to think about the patent application beforehand and on the next stage – to apply for protection of the external form of the product through an industrial design.

Once an industrial design is registered, the product can be quickly marketed and made use of. This way of commercialisation allows for a rapid increase in profits. Let's assume that the entrepreneur decides not to maintain the design protection for 10 years, as the market will become saturated after only three years. During that time, however, the company will be able to make a profit off the product, despite the fact that the protection resulting from it did not enjoy a broad market monopoly.

It is not infrequent that entrepreneurs have to choose whether to wait longer for a broad protection (patent for invention) or to receive a weaker protection faster

(industrial design registration). In times when market conditions change rapidly, it is the registration of an industrial design that proves to be more profitable in general.

As demonstrated by the example of Clean Handle (the name has also been registered as a trademark), you can efficiently use the full array of available legal procedures in order to protect your ideas and build your brand.

The above considerations could be summarised in the following statement - knowledge of the procedures and schemes that govern the world of intellectual property allows entrepreneurs to maximise their gains.

Coronavirus and “free” licences

In the era of the global epidemic of SARS-CoV-2 coronavirus which causes the disease known as COVID-19, we can observe a plethora of ways in which businesses deal with the challenges that epidemic causes to the global economy. Enterprises based on retail or direct services, with the exception of basic supply and food stores and drugstores, are currently going through a rough time. However, all sectors where remote working is possible, generally via the Internet, have more or less switched to this type of working. This has also resulted in a massive increase in the demand for various types of software facilitating the performance of tasks via the Internet.

On the other hand, there is an increased demand for services provided to consumers online - these include not only remote services such as language teaching, but also virtual goods such as movies (with Netflix-like platforms at the forefront), as well as music, books or radio dramas.

Intertwined with all these services are intellectual property right issues that determine to what extent and in what way we seize the opportunities offered by the Internet during the pandemic. It is worth looking at changes introduced by some entrepreneurs in this respect and learn how they may impact their future market situation.

Remote working with the use of a free license

Even before the mass switch to remote work, many businesses which were often scattered across many countries, or even continents used tools facilitating teamwork on daily basis.. The role of such tools varies depending on the specific programme - from extensive communication capabilities provision to facilitation of the assignment of tasks, tracking time limits, and circulation of information between team members in this respect.

The most popular tools in this category are Microsoft Teams and Slack, followed by Zoom, Asana and Google Hangouts. Generally, all of them have observed a significant increase in the number of new users since the pandemic outbreak.

The programme that stands out in particular in this comparison is the Microsoft product; as of 19 March 2020, it has achieved 44 million active users daily - an increase of 12 million users in just one week¹⁵⁴. At the same time, this massive spike in popularity has caused a significant service performance slowdown and, in some cases, even a complete service breakdown. However, these issues persisted for a relatively short period of time, after which the system was quickly restored by significant increase of the capacity of Microsoft servers¹⁵⁵.

A significant increase in user activity, however not that much spectacular, was also noted by MS Teams' main competitor, Slack. This application, which enables online communication and organization of work, had about 12 million active users daily in October 2019, and, according to the president of the company providing the tool, while in the second half of 2019 there had been 5,000 new paid subscriptions per quarter, in the short period from January till 25 March 2020 as many as 9,000 new paid customers have already joined Slack¹⁵⁶.

¹⁵⁴ <https://www.businessinsider.com/microsoft-teams-coronavirus-daily-active-users-2020-3?IR=T>

¹⁵⁵ <https://docs.microsoft.com/en-us/microsoftteams/faq-support-remote-workforce>

¹⁵⁶ <https://twitter.com/stewart/status/1243001400696557568>

What is somewhat unique against this background is the sudden increase in the number of Zoom application users. The video communicator, so far used mainly for business calls, has suddenly become very popular also for everyday socialising - which in the current circumstances is taking place online more and more often; Zoom has gained as many as 20 million users in just one week of March and now it is the second most frequently installed mobile app in the world. One of the features that determined this success is the capacity to transmit a higher quality signal than is offered by the competition¹⁵⁷.

It is worth pointing out that mass quarantine leads to a general increase in demand for data transfer over the Internet, which requires actions not only from individual program providers, but also from Internet providers and mobile operators. On the other hand, sometimes controversial steps are also taken to reduce the network load, such as the recent decision of Netflix and other video streaming providers to cut the highest streaming quality, which was taken in response to appeals from the European Commission and European telecoms operators¹⁵⁸.

However, this most impressive increase in the number of users and demand for communication and services devoted to remote work does not solely result from the pandemic-induced demand for homeworking facilitation tools. Indeed, many providers of these services have decided to extend the possibility of using them free of charge, in particular by providing previously paid, more advanced software versions for free.

Various types of facilitation measures range from removal of the time limit for calls in the free version of Zoom in selected countries, including China and Italy, to removal of the limit for a maximum number of simultaneous users in the free

¹⁵⁷ <https://www.businessinsider.com/zoom-video-everywhere-google-hangouts-skype-2020-3?IR=T#-clear-evidence-of-zooms-rise-the-zoom-app-is-dominating-the-charts-for-both-iphone-and-android-users-2>

¹⁵⁸ <https://www.ft.com/content/70333747-f180-4887-8a26-27ab6b230299>

version of Microsoft Teams¹⁵⁹. In turn, the provider of Slack allows scientific and research institutions involved in coronavirus research, as well as media publishing on the subject, to use the application for free¹⁶⁰.

It seems that Microsoft Teams is the programme that has been made available free of charge to the largest extent. Not only has the premium version been made available to all educational institutions for free, but also a freemium version has also been offered (i.e. a premium version with restrictions, e.g. in regard to access to cloud storage space) to all users for six months¹⁶¹. This version is distributed as a trial version - together with the full MS Office 365 package¹⁶². Furthermore, Microsoft has made its product available to selected public institutions outside the education system, e.g. the UK health service, in order to support it during the difficult times when the number of coronavirus cases is on the rise.¹⁶³.

The above steps take various legal forms, but it would appear that the most common one is to offer special licenses that are limited to the time of the intensive fight against the pandemic. It should be mentioned that the most serious players in the market providing remote work facilitating tools, such as Microsoft and Slack, strive to offer temporary, free access to tools that used to be available against payment in ordinary circumstances. The contractual mechanism applied in such cases basically comes down to an extended 'trial period' of the licence, which will be followed by offer to extend it for a fee or to cancel the service. Consequently, what we are witnessing is not a completely free distribution of full software versions, but rather a wider distribution of premium versions for a limited period of time, after which each new user will be faced with the decision whether to opt out of

159 <https://www.vox.com/recode/2020/3/11/21173449/microsoft-google-zoom-slack-increased-demand-free-work-from-home-software>

160 <https://www.businessinsider.com/slack-ceo-coronavirus-covid19-impacted-company-earnings-twitter-stewart-butterfield-2020-3?IR=T>

161 <https://www.microsoft.com/en-us/microsoft-365/blog/2020/03/05/our-commitment-to-customers-during-covid-19/>

162 <https://docs.microsoft.com/en-us/microsoftteams/e1-trial-license>

163 <https://www.maddyness.com/uk/2020/03/21/nhs-staff-to-use-microsoft-teams-for-free-amid-coronavirus-outbreak/>

the temporary benefits and switch to a more “primitive” version of the product, or to become a paid user. Of course, this does not apply to educational licenses, which were widely distributed even prior to the pandemic. However, they should be used for strictly defined purposes, not related to business or gainful employment.

The decision to offer a potentially huge number of new users a software version that is basically fully functional, and not just free and truncated, is most likely not an altruistic move aimed at making people’s lives all around the globe as normal as possible during the sometimes lengthy quarantine periods; this decision is backed by financial calculations. Even before the pandemic outbreak, remote working was a fast-growing trend¹⁶⁴, influenced, among other things, by technological development and continuously widening access to high-speed Internet. In fact, remote working is expected to become even more popular once the pandemic ends. In this context, enabling millions of people to test software that allows for the most efficient team management, without the need for the employees to be physically present in one location, is a step towards gaining the greatest possible share of this highly prospective market. According to some evaluations, even one in three employees will no longer return to his or her office, remaining permanently in remote work mode¹⁶⁵; hence, the business gains for companies specialising in providing the solutions in question are undoubtedly worth some sacrifices in the form of free licences and trial versions, which in addition improve the company’s image by tagging them with the “socially responsible” label during an epidemic, and this is a powerful image tool.

It seems, therefore, that on the one hand, the above-described efforts of companies which provide communication and work organisation tools via the Internet will arguably facilitate the daily work of many people forced to work remotely, while on the other, they are also a well thought-out marketing strategy that software providers can only profit from.

164 <https://www.vox.com/recode/2019/10/9/20885699/remote-work-from-anywhere-change-coworking-office-real-estate>

165 <https://www.rp.pl/Praca/200329622-Co-trzeci-zdalny-pracownik-nie-wroci-juz-do-biura.html>

Free works

In this respect, we should point out an interesting consumer-oriented solution, enabling to share works without the need of signing a contract - the "Creative Commons" licenses. They are model license agreements developed by an American non-profit organisation bearing the same name. On their basis, copyright work owners make the works available under the terms and conditions of a given licence. Therefore, Creative Commons licenses are said to work on the "*certain rights reserved*" principle, as opposed to the usual "*all rights reserved*" principle. The use of the said licenses is possible because the proprietary copyright work owners may freely dispose of these rights. On the other hand, thanks to Creative Commons, the consumers gain the certainty that their specific actions (falling under the terms and conditions of a given license) will not be recognised as illegal.

How to become familiar with the terms and conditions of a license? It is sufficient to check the designations of the works made available under these licenses. At present, there are six Creative Commons licenses:

- 1) Attribution (CC BY)
- 2) Attribution-NonCommercial (CC BY-NC)
- 3) Attribution-NonCommercial-ShareAlike (CC BY-NC-SA)
- 4) Attribution-NonCommercial-NoDerivatives (CC BY-NC-ND)
- 5) Attribution-ShareAlike (CC BY-SA)
- 6) Attribution-NoDerivs (CC BY-ND)

The detailed scope of these licenses can be found on the official Polish website of Creative Commons Polska: <https://creativecommons.pl/>.

Interestingly enough, Creative Commons licenses are also used by official government websites for their content. For example, on the official coronavirus information page (available here: <https://www.gov.pl/web/koronawirus>), the website's content is provided under a CC BY license – Attribution.

However, Creative Commons licenses are a tool that may deprive the original right-holders of control over the use of the work in different ways, depending on the license used; consequently, they are rarely used by enterprises that distribute literary, musical or cinematographic works on a mass scale.

Nevertheless, we can observe that during the pandemic, they also have opened up their resources by becoming free to use online - however, in view of the current situation, it seems that only the biggest market players can afford to do so. Moreover, in all of the above-described business steps aimed at making certain resources available under free licences (even temporarily), one can clearly see the underlying image-related goals.

For example, bookshop chain Empik offered the Empik Premium service in connection with the popular #zostańwdomu action (the Polish equivalent of #stayathome). For two months, Empik will be making the resources that are part of this service available to everyone for free, namely over eleven thousand audiobooks and e-books, as well as radio dramas and podcasts.

This is an interesting initiative which, apart from obviously contributing to an increase in the number of active readers in Poland, will surely also make users feel more attached to the brand and warm up the brand identity. Therefore, despite the fact that this strategic seems to be fundamentally different in nature from the activities of businesses providing facilitation tools for remote work described in the first part of this study, similar motivations and strategies can be observed in business operations during the global coronavirus epidemic.

Intellectual property protection authorities and courts functioning during the COVID-19 pandemic

Due to the coronavirus pandemic, the global situation in the first quarter of 2020 is arguably unprecedented. It would be difficult to name an epidemic in the last few decades that has had such a significant impact on the functioning of states in virtually every aspect, from restrictions imposed on citizens and business

constraints to the functioning of administrative and judicial bodies. This article aims to present how Polish and foreign intellectual property protection bodies function amid the COVID-19 pandemic.

The functioning of the industrial property protection system in Poland will be greatly facilitated by the provisions of the Act of 31 March 2020 amending the Act on Special Solutions Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Ensuing Crisis Situations dated and certain other acts (Journal of Laws of 31 March, item 568, hereinafter referred to as the "**Special Anti-Crisis Act**"), which has been adopted by the Parliament at an express pace and has already entered into force on the day of its adoption after being signed by the President and published in the Polish Journal of Laws. Some of the provisions are effective from dates prior to the date of entry into force of the Act.

Even before the adoption of the Special Anti-Crisis Act, in order to ensure general safety and limit the transmission of Covid-19, public authorities and courts had decided, among other things, to cancel the pending hearings.

The institutions strive to work normally by enabling their employees remote working. The more technologically advanced the body, the fewer problems the applicants and parties to the proceedings will have with its functioning during the epidemic. In addition, the European institutions, i.e. the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO), have decided to offer the entities before them a helping hand by extending the official time limits.

Extensions of time limits before the European Union Intellectual Property Office (EUIPO)

On 16 March 2020, EUIPO decided to extend all time limits expiring between 9 March 2020 and 30 April 2020, inclusive, until 1 May (in practice, until 4 May, given that 1 May is a public holiday). All time limits that concern the parties to proceedings before the Office are covered by the extension, i.e. the following:

- » deadlines for payment of the Application Fee,
- » deadlines regarding Right of Priority,
- » Opposition Period,
- » deadlines for payment of the Opposition Fee,
- » deadlines for Request for Renewal,
- » deadlines for diling of an Appeal and of the Statement of Grounds and for payment of the Appeal Fee,
- » deadlines for Conversion,
- » deadlines for deferment of publication of design.

Note: the extension applies to time limits for proceedings before the EUIPO only; consequently, it does not apply for example to time limits for proceedings before other authorities.. This is in particular the case with regard to the time limit for bringing an action before the General Court against decisions of the Boards of Appeal (Article 72(5) of Regulation (EC) No 207/2009 of 26th February 2009 on the Community trademark and Article 61 of the Regulation (EC) No 207/2009 of 26th February 2009 on the Community trademark).

Moreover, parties to the proceedings will not be informed automatically on the extension of time limits.

Time limits before the European Patent Office (EPO)

All time limits which expired on or after 15 March 2020 are extended until 17 April 2020.

As regards time limits expiring before 15 March 2020, the EPO has facilitated the use of legal remedies for users located in areas directly affected by disruptions due to the COVID-19 outbreak. The extensions and remedies apply to parties and representatives in proceedings under the EPC and the PCT. The EPO does not rule out the introduction of further extensions and remedies in the event the pandemic continues.

The EPO has decided to postpone all oral proceedings scheduled until 17 April 2020, unless they have already been confirmed to take place by means of videoconference. However, oral proceedings will not be held in the premises of the Boards of Appeal until 30 April 2020.

Actions of the Patent Office of the Republic of Poland (UPRP)

For the time being, the UPRP has only postponed all hearings until 31 March 2020 and has recommended that correspondence should be sent in electronic form.

In response to the request of the Polish Chamber of Patent Attorneys for possible time limit extensions and the appeal for setting longer time limits ex officio (under the Industrial Property Law, the Polish Patent Office may set 3-month, not just 1- and 2-month time limits), the President of the UPRP assured that she had issued appropriate recommendations to the respective Experts on setting longer time limits in application proceedings and maintaining the protection of industrial property right objects.

Significant changes in the scope of proceedings pending before the UPRP are introduced by the Special Anti-Crisis Act, the regulations of which touch upon, among others, the running of time limits under administrative law. According to this Act, during the state of an epidemic threat or the state of an epidemic, announced on account of COVID-19, some of the time limits laid down in administrative law do not begin to run, while those that have begun to run are suspended for as long as that state persists.

Abovementioned time limits include, among others,, time limits determining whether legal protection is to be granted before a court or authority; time limits for a party to perform actions shaping its rights and obligations; limitation periods; time limits, the failure of which results in the expiry or modification of rights in rem as well as claims and receivables; final dates, the failure to observe which has, by statute, negative consequences for the party.

When analysing these provisions, one comes to the conclusion that they will concern a number of actions that need to be performed in the course of proceedings pending before the UPRP, such as the time limits for responding to letters from the UPRP in the application proceedings, the time limits for making payments for the protection of industrial property rights, the time limits for submitting applications for re-examination of the case by the PPO or, finally, the time limits set for the parties in the course of contentious proceedings pending before the UPRP.

The above-mentioned regulations apply to all administrative proceedings. In addition, the Special Anti-Crisis Act introduces an interesting solution concerning particular proceedings related to industrial property rights. The legislator has extended the time limits for filing oppositions to trademark applications and for submitting a translation of a European patent (including the time limit for submitting a translation of a limited or modified European patent). This provision applies to time limits expiring between 8 March 2020 and 30 June 2020; they are interrupted and will begin to run anew from 1 July 2020. What is particularly important is the extension of the second of these time limits, which, under the current provisions of the Act on Filing European Patent Applications and the Effects of the European Patent in the Republic of Poland, may not be reinstated, while suspending it under the general provisions has so far been impossible in practice.

Assurances of the World Intellectual Property Organisation (WIPO)

The World Intellectual Property Organisation (WIPO) continues to function under the Patent Cooperation Treaty (PCT), the Madrid System for the International Registration of Marks, the Hague System for the International Registration of Industrial Designs, the Lisbon System for the International Registration of Geographical Indications and related systems.

In a similar manner, the WIPO Arbitration and Mediation Centre (AMC) continues its work with regard to the resolution of domain name disputes in accordance

with the Uniform Domain Name Dispute Resolution Policy (UDRP) and other alternative dispute resolution methods.

A speech by the President of WIPO has been announced to occur on 7 April 2020, intended to address the Organisation's services during the coronavirus pandemic¹⁶⁶.

The functioning of Polish and foreign courts

The current situation in the Polish judiciary, similarly to the situation in the bodies described above, is subject to dynamic changes. Almost every day further measures are implemented in order to protect customers and court employees. The courts adapt the way they function to the existing epidemiological circumstances in a broad sense, as well as to the subsequent actions of the authorities.

Interestingly, even before the Special Anti-Crisis Act was passed, the courts themselves, in an attempt to deal with the situation, had imposed and continue to impose further restrictions on the service of customers, along with new procedures for handling urgent cases.

In the initial period of the pandemic's development in Poland, the situation in courts was quite diverse. Initially, some judges decided not to cancel scheduled hearings. However, as the number of infections began to rise, more and more hearings were cancelled. Between 13 March 2020 and 25 March 2020, an additional series of restrictions have been introduced which, one after the other, limited the possibility of contacting the courts in order to ensure safety of the parties to the proceedings and the court employees.

From the perspective of intellectual property proceedings, the actions of District Courts (including the District Court in Warsaw, where the European Trade Mark and Design Court operates) are very important. Within just a few days after

¹⁶⁶ https://www.wipo.int/export/sites/www/about-wipo/en/dgo/pdf/circular_2020_dg_briefing.pdf

the first coronavirus infections were reported in Poland, the District Court in Warsaw took steps that, first and foremost, aimed at reducing physical contact with the people, so that the virus transmission could be reduced as much as possible. Our practice shows that as early as around 12 March 2020, all hearings in the said Court were cancelled until the end of the month. In order to meet the expectations and needs of the parties to the proceedings and their legal representatives, in accordance with the Order of the President and Director of the District Court in Warsaw of 19 March 2020, the Court suspended the sending of pleadings that were related to the running of time limits for submitting means of challenge, or other procedural or court time limits, until further notice.¹⁶⁷ While it does make some exceptions, the Order should be considered as one that is reasonable and takes into account to a large extent the practice of conducting court proceedings and the obligation to communicate with the court in writing. Moreover, the Court has made it possible to send pleadings that constitute means of challenge to an e-mail address specifically designed for that purpose.¹⁶⁸ The respective Order also specifies, among other things, when a given pleading is printed by the employees of the Court's registry office and how to correctly determine the date of its receipt by the Court. This Order will certainly contribute to the means of challenge being processed faster and facilitate the work of the Court employees. Unfortunately, such a solution will not improve the way in which the parties to the proceedings and their legal representatives submit these means of challenge. This is due to the regulations in force in both civil and criminal proceedings, under which in order for a pleading to be regarded as submitted on a particular day, it must be mailed at the post office on the very same day.

There can be no doubt, however, that the restriction in sending pleadings to the Court, as a result of the above-mentioned order to not send any pleadings to the parties to the proceedings which may trigger the necessity to submit a means of challenge, as well as the suspension of procedural and court time limits introduced by the Special Anti-Crisis Law, will be of significant importance for

¹⁶⁷ file:///C:/Users/dof/Downloads/93.2020%20(1).pdf

¹⁶⁸ file:///C:/Users/dof/Downloads/zarz%C4%85dzenie%2094.2020%20pra%20(1).pdf

the practice of conducting proceedings ever after the epidemic ends – the pleadings will be then sent in huge numbers and the Court will be hard-pressed to process them all.

When analysing the current situation, we cannot help but notice that communication with the courts would be greatly improved by the full digitalisation of courts, permitting submission of pleadings via e-mail. Taking into account the already existing regulations concerning ePUAP, i.e. Electronic Platform of Public Administration Services, such a solution is possible and should be applied as a special measure due to the extreme situation that we are currently finding ourselves in.

The way the courts function during the epidemic is regulated by the above-mentioned Special Anti-Crisis Act. According to this Act, during the state of an epidemic threat or the state of an epidemic, announced on account of COVID-19, as a rule, no hearings or open meetings are held, except in urgent cases indicated in the Act. It follows that the hearings originally scheduled for March, which were subsequently postponed to the beginning of April, will be cancelled. In the current situation, it is difficult to say how the courts should deal with the matter of hearings cancelled following the entry into force of the Special Anti-Crisis Act. The solution is either to move the hearings to June or July, in the hope that by that time the state of epidemic will have been lifted, or to cancel the hearings already scheduled and set the new ones only after the end of the epidemic. It seems that for the sake of speed and efficiency of pending proceedings it would be best to apply the former solution, and even to keep changing the already set hearing dates several times rather than set all the dates anew when the epidemic ends. After all, it should be kept in mind that notices of hearing dates must be sent to the parties within such a period of time as to enable them to receive the notice and appear at the hearing.

What is also important is that, as in the regulations on time limits under the administrative law described above, the Act states that during the state of an epidemic threat or the state of an epidemic, announced on account of COVID-19, procedural and court time limits (including those in court and administrative court

proceedings) do not begin to run, while those that have begun to run are suspended.

This solution, as well as the above-mentioned order of the President of the District Court in Warsaw of 19 March 2020, will contribute to ensuring that the parties to the proceedings are safe in performing their procedural duties and in safeguarding their rights. As a result of this solution, once the epidemic is over, a party to the proceedings which submits a means of challenge or responds to a court summons which might result, for example, in the rejection of a statement of claim or an appeal, will do so within the time limit. However, if a party performs a procedural act despite the suspension of the respective time limit, such act will be effective by statute. It should be borne in mind that the Act introduces the suspension of time limits.

After an analysis of the situation in western countries, such as Germany and Spain, which are affected by the coronavirus epidemic to a much greater extent than Poland, we would like to highlight the following facts. In Germany, delays in the circulation of pleadings are also anticipated; moreover, hearings have been suspended and postponed. However, the majority of pleadings are submitted with the use of an online system that has been put into operation last year. In Spain, on the other hand, all courts are closed until further notice and are not processing any cases. The protection of citizens' rights in a minimal scope, i.e. in regard to violence and fundamental rights, is ensured by access to the "LexNet" online system.

INTELLECTUAL PROPERTY



CORONAVIRUS AND THE LAW IN POLAND

PUBLIC PROCUREMENT



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24 COVID-19 and public procurement

The impact of COVID-19 on the conduct and implementation of public procurement proceedings taking into account the Anti-Crisis Shield, i.e. the provisions of the Act amending the Act on special measures for preventing, counteracting and combating COVID-19, other contagious diseases and the crisis situations they cause, and certain other acts (hereinafter: Amended COVID-19 Act).

1. COVID-19 and exclusion of Public Procurement Law (PPL) application

On the 31 March 2020 the Act (hereinafter: 'the Anti-Crisis Shield') amending the Act on special measures for preventing, counteracting and combating COVID-19, other contagious diseases and the crisis situations they cause, and certain other acts, entered into force. The amended Act hereinafter is referred to as 'the Special Act'.

In accordance with the above Act, the provisions of the PPL shall not apply to:

- a) Contracts for services or supplies necessary to combat COVID-19 where there is a high probability of rapid and uncontrolled spread of the disease or where the protection of public health so requires.
- b) contracts awarded by Bank Gospodarstwa Krajowego, Polski Fundusz Rozwoju Spółka Akcyjna [*Polish Development Fund Public Limited Liability Company*] or regional development funds referred to in Article 13(1a) of the Act of 5 June 1998 on the Self-Government of the Voivodeship (*Journal of Laws [Dziennik Ustaw]* 2019, Items 512, 1571 and 1951) related to the implementation of

tasks concerning the servicing of funds created, entrusted or transferred on the basis of separate regulations and related to the implementation of government programs or other programs financed from public funds, or tasks related to the use of means from such funds concerning support instruments necessary to counteract the negative economic effects of COVID-19.

Amended wording of Article 6 of the Special Act refers to services and supplies in the meaning provided for in the PPL that allows for consistent interpretation of statutory terms directly defined in the PPL.

The Special Act therefore excludes the application of the PPL in cases where it is necessary to counteract COVID-19 in relation to it:

- 1) contracts for services,
- 2) contracts for supplies,
 - » if there is a high probability of rapid and uncontrolled spread of the disease;
or
 - » if the protection of public health so requires.

Therefore, the exclusion shall apply to all supply or service contracts that are necessary to counteract COVID-19, i.e. to all activities related to:

- » fighting the infection,
- » preventing the spread,
- » prophylaxis,
- » combating the consequences, including socio-economic consequences, of an infectious disease caused by SARS-CoV-2, hereinafter referred to as 'COVID-19'.

Polish legislator finally resigned from making the award of contracts excluded from the obligatory application of the PPL conditional upon complying with the principles of ensuring the transparency of the procedure and equal treatment

of entities interested in the performance of the contract. Such a requirement appeared in the draft bill presented to the Senate. Taking into consideration the purpose of the Act, it can be concluded that in such an emergency situation, it is not appropriate to introduce additional rules as to the cases excluded from the PPL regime – what matters is the effective award of the contract. Time plays an undisputed and fundamental role in the execution of the contracts in question, therefore – from the current perspective – the final version of the Special Act should be assessed positively.

Wording of Article 6(2) introduced by the Anti-Crisis Shield, also should be taken into account. It reads as follows:

"To contracts awarded by Bank Gospodarstwa Krajowego, Polski Fundusz Rozwoju Spółka Akcyjna [*Polish Development Fund Public Limited Liability Company*] or regional development funds referred to in Article 13(1a) of the Act of 5 June 1998 on the Self-Government of the Voivodeship (*Journal of Laws [Dziennik Ustaw]* 2019, Items 512, 1571 and 1951) related to the implementation of tasks concerning the servicing of funds created, entrusted or transferred on the basis of separate regulations and related to the implementation of government programs or other programs financed from public funds, or tasks related to the use of means from such funds concerning support instruments necessary to counteract the negative economic effects of COVID-19."

Polish legislator has applied a subjective exemption for Bank Gospodarstwa Krajowego (BGK), which is a state bank, referred to in the Act on Banking Law of 29 August 1997 (*Journal of Laws [Dziennik Ustaw]* of 2019, item 2357, consolidated text), wholly owned by the State Treasury.

This exemption applies only to tasks necessary to counteract the negative economic impact of COVID-19. Pursuant to Article 4 of the Act of 14 March 2003 on Bank Gospodarstwa Krajowego (*Journal of Laws [Dziennik Ustaw]* of 2019, item 2144, consolidated text), within the scope specified by the Act and by separate provisions of law, primary objectives of the BGK comprise supporting economic

policy of the Council of Ministers, supporting government socioeconomic programmes, local government programs and regional development programmes, covering in particular projects:

- 1) implemented with the use of funds from the European Union and international financial institutions within the meaning of Article 4(1)(3) of the Banking Law.
- 2) infrastructural,
- 3) related to the development of the small and medium-sized enterprise sector,
 - » including those implemented using public funds.

In addition, regional development funds are exempted from the obligation to apply the Act. In a view to implement tasks in the field of voivodeship development policy, pursuant to the Article 13(1a) of the Act of 5 June 1998 on Self-Government of the Voivodeship, in the area of public utility, a voivodeship may establish a regional development fund in the form of a private limited liability company or a public limited company.

It is important to note that the exemption from the application of the PPL shall expire 180 days after the date of entry into force of the Special Act (Article 6 read in conjunction with Article 36(1) of the Special Act).

It is also worth take into consideration the Article 1(2) of the Special Act providing that provisions of the Act of 5 December 2008 on the Prevention and Combat of Human Infections and Diseases (Journal of Laws [*Dziennik Ustaw*] of 2019 items 1239 and 1495, and of 2020 items 284 and 322 – hereinafter referred to as the “Infectious Diseases Act”) apply to the matters not regulated by the Special Act.

Concurrently, the Polish legislator (under Chapter 3 on changes in other certain laws – Article 25(4) of the Special Act) introduced Article 46c into the Infectious Diseases Act concerning the exclusion of application of the provisions on public procurement. Pursuant to the wording of the said Article:

"Public procurement law shall not apply to service, supply or construction works contracts to be awarded in connection with the prevention or combating of an epidemic in an area where a state of epidemic threat or state of epidemic has been declared."

The use of the above mentioned exemption by the contracting authorities is not limited in time and is possible in case of any epidemic other than COVID-19 or state of epidemic threat.

2. Coronavirus and current public procurement procedures

Due to the ongoing threat and possibility of COVID-19 infection, many activities and liberties have been limited. First of all, in accordance with the Regulation of the Minister of Health of 13 March 2020, a state of epidemic threat was declared on the territory of the Republic of Poland (Journal of Laws [*Dziennik Ustaw*], item 433). In the next step, on 20 March 2020 the state of epidemic threat was revoked and the state of the epidemic was introduced until further notice by virtue of the Regulation of the Minister of Health of 20 March 2020.

There is no doubt that this situation causes a number of technical problems for entities which spend public funds on the basis of the provisions of the Public Procurement Law (hereinafter „PPL”). Many questions arise, such as whether to initiate a procurement procedure, whether it is necessary to extend the deadlines for the submission of tenders until the state of emergency or epidemic ceases, how to conduct the opening session properly when people are not allowed to gather, and how to send a tender in electronic form correctly and effectively if the contracting authority does not have a procurement platform. In the present moment, life seems to be writing a rather unusual scenario to which each participant will have to adapt to and choose the most effective way of acting for themselves, often facing hard questions and problems.

In this study, we will give guidance on what communication between the contracting authority and the economic operator should look like in the context of

the submission of tenders/requests to participate in public tender proceedings falling below EU thresholds.

2.1. Use of electronic means of communication in national procedures

The largest technical problem is reported by the contracting authorities conducting so-called sub-threshold proceedings. In these procedures, as a general rule, the traditional form of submission of tenders or requests to participate, i.e. a written version understood as a paper version to be delivered to the contracting authority in person or by post/ courier service, is used. With regard to the above issue, in order to properly assign the rights and obligations of the parties to the proceedings, it is necessary to refer to the statutory regulations.

Thus, Article 18a of the Act of 22 June 2016 amending the Act – Public Procurement Law and certain other acts (Journal of Laws [*Dziennik Ustaw*], item 1020, as amended) provides that in national procedures whose value is lower than the amounts specified in the regulations introduced pursuant to Article 11(8) of the PPL Act, a contracting authority has a right to make a choice as to in what manner communication between the parties to the proceedings (contracting authority and economic operators) will be conducted.

Therefore, contracting authorities may choose and indicate in the tender documentation (contract notice) how tenders or requests to participate are to be submitted. In Article 18a(1)(4) of the PPL Act it has been specified that communication in the tender proceedings takes place **according to the contracting authority's choice:**

1. through a postal operator within the meaning of the Act of 23 November 2012. - Postal law, in person, through a messenger, facsimile transmission, or
2. using means of electronic communication within the meaning of the Act of 18 July 2002 on the provision of services by electronic means.

Tenders, requests to participate and the declaration referred to in Article 25a **shall be submitted** in one of the following forms (otherwise being null and void):

1. in writing, bearing a handwritten signature, or
2. subject to the consent of the contracting authority – in electronic form, bearing a qualified electronic signature.

Therefore, when conducting the procedure, the contracting authority must indicate in what form (otherwise being null and void) it allows tenders/requests/declarations to be submitted. The Public Procurement Office's statement of 20 March 2020 confirmed the possibility to communicate in national proceedings using electronic means of communication. The Office recommended "that electronic communication should cover all correspondence in the proceedings, **including the submission of tenders, requests to participate in the proceedings, declarations and documents**. (...) tenders, requests to participate and the declaration referred to in Article 25a submitted electronically shall bear a qualified electronic signature".

Many contracting authorities have followed this information by allowing or planning to allow the submission of an offer via e-mail, indicating that, in accordance with Article 2(17) of the PPL Act, electronic mail has been allowed as one of the means of communication on the basis of the Act of 18 July 2002 on the provision of services by electronic means (Journal of Laws [*Dziennik Ustaw*] of 2019, Items 123 and 730).

Therefore, the question arises whether the possibility of submitting a tender via email is actually admissible under the provisions of the PPL and, if it is, then in what formula?

It should be noted that the PPL merely indicated the possibility of submitting a tender, requests to participate in the procedure, declarations, as well as documents by means of electronic communication. However, this does not explicitly mean that this communication allows for a tender to be submitted via email without any additional requirements.

By way of illustration, the contracting authority allows for tenders to be submitted by electronic means of communication – electronic mail. The

economic operator sends the tender together with the required declarations to the specified address. The tender file and all attachments will be readable as soon as the tender is received in the contracting authority's email box. Will such an approach be considered as correct?

This approach seems to be unacceptable for two reasons. Firstly, the contracting authority violates Article 86(1) of the PPL Act, under which the contracting authority may not examine the contents of the requests to participate in the procedure and tenders prior to the expiry of the deadline for their submission or opening, respectively (unless no tender/request is submitted in the procedure). Undoubtedly, submission of a tender via email (unencrypted) will not guarantee protection of its content against access by third parties, i.e. any person having access to the Internet box will hypothetically be able to view its content. Secondly, the provisions implementing the PPL Act are also relevant in this respect. In the light of the wording of §7(2a) of the Regulation of the Prime Minister of 27 June 2017 *on the use of electronic communication means in the public procurement procedure and on making available and storing electronic documents*, in the event that the contracting authority consents to electronic communication with respect to submission of tenders, requests to participate in the procedure, declarations and documents, **the provisions of this Regulation shall apply**. This means that if such consent is given, the contracting authority is bound by the same restrictions as in below EU threshold procedure. Thus, §3 of the Regulation indicates that transmission of tenders or requests to participate in the procedure, declarations and documents is made using electronic means of communication that comply with the requirements provided for an ICT system within the meaning of the Act of 18 July 2002 on the provision of services by electronic means. Importantly, the means of communication which the contracting authority intends to use to transmit tenders or requests to participate in the procedure must ensure:

1. identification of the transmitting entities, the precise time and date of transmission of those documents, and accountability for other actions taken by the transmitting entities;

2. protection against access to the contents of these documents before the expiry of the prescribed opening deadlines;
3. only authorised persons may set and change the deadlines for submitting and opening these documents;
4. during the various stages of the procurement or competition procedure, the possibility of making all or part of the data contained in these documents available only to authorised persons;
5. the possibility of ensuring in practice that any breach or attempted breach of the requirements referred to in sections 2 to 4 is clearly identifiable;
6. the possibility of removing a tender or a request to participate in the procedure in such a way as to make it impossible for users to recover and read its content, where the tender or the request to participate in the procedure is returned by the contracting authority or withdrawn.

Thus, allowing for the possibility of submitting a tender or requests via email (without adequately securing the tender against third party access) may lead to a violation of the provisions of the PPL Act. Of course, this does not mean that contracting authorities are completely deprived of this possibility. The least technical problems will undoubtedly be experienced by those who have purchasing platforms. Pursuant to the above-mentioned regulations, the contracting authority may enable economic operators to submit a tender both traditionally and through the platform or using the Miniportal. For those contracting authorities who are not able to allow economic operators to submit tenders/requests using the tools indicated above, only the traditional form or electronic mail remains, subject to compliance with the guidelines referred to below.

How to properly submit a tender via email?

In order to meet the needs of the parties to the procedure, consideration should be given to whether and how electronic mail could constitute a medium for the transmission of data in accordance with the provisions of the Regulation. Major concerns in this respect are raised by the compliance with the contracting authority's obligation to protect tenders/requests before accessing their contents

prior to the expiry of the deadline for their opening. It seems that solutions successfully applied in 2018 may be helpful in this respect. In the light of the provisions of the Act of 22 June 2016 amending the Act – Public Procurement Law and certain other acts (Journal of Laws [Dziennik Ustaw] of 2016, item 1020), in procedure initiated as of 18 April 2018 economic operators were required to submit the European Single Procurement Document (ESPD) in an electronic form bearing a qualified electronic signature. Importantly, in the study entitled "Manual for submission of the European Single Procurement Document by electronic means of communication", the Public Procurement Office noted that "bearing in mind the need to ensure the integrity of information contained in the ESPD and **the obligation not to disclose the data contained in the ESPD, the electronic ESPD created or generated by the economic operator should be encrypted (with an access password)**". For this purpose, the economic operator may use the tools offered by the software in which it prepares ESPD (e.g. Adobe Acrobat), or use commercially available open-source tools (such as AES Crypt, 7-Zip and Smart Sign). Exercising the right specified in § 2 of the Regulation of 27 June 2017 on the use of electronic communication means, the contracting authority may specify the encryption tools recommended in the course of the procedure, which may be used by the economic operator, bearing in mind the obligation to observe the principles referred to in Article 7 subparagraph 1 of the PPL Act."

As such, based on past experience, it will be acceptable to allow economic operators to submit a tender or a request via email, while requiring that the tender/request be encrypted (with an access password). The password and all necessary information relevant for proper access to the tender or request (including information on the encryption programme or document decryption procedure used) must be communicated to the contracting authority by electronic means or fax, as appropriate:

1. during the tender opening session within the deadline set by the contracting authority so as to enable the contracting authority to carry out the tender opening procedure without interruption (e.g. within 10 minutes from the expiry of the tender opening deadline); or

2. promptly within the deadline set by the contracting authority after the expiry of the deadline for submission of requests to participate in the procedure.

Examples of Tender Specification provisions:

A tender shall be invalid unless submitted **in writing or in electronic form**, at the economic operator's option.

Examples of further Tender Specification provisions in the event of allowing for a tender to be submitted by electronic means of communication – for communication by electronic mail.

1. The economic operator may submit a tender / request to participate in the procedure in electronic form via **electronic means of communication** such as electronic mail.
2. A tender / request to participate may be sent to the email address:
.....
3. In particular, the contracting authority accepts the following format for the data to be transmitted: .rtf, .pdf, .xps, .odt, .doc, .docx.
4. Submission of a tender in an electronic form requires a **qualified electronic signature** issued by a qualified trust service provider that is an entity providing certification services – the electronic signature that meets the security requirements specified in the Act of 5 September 2016 on *trust services and electronic identification*. The content of the message sent should specify the designation and name of the procedure, the name of the economic operator or any designation allowing for the economic operator to be identified.
5. The tender / request to participate in the procedure should be encrypted, i.e. bear an access password. For this purpose, the economic operator may use the tools offered by the software in which it prepares the declaration document (e.g. Adobe Acrobat), or use available open-source tools (such as AES Crypt, 7-Zip and Smart Sign) or commercial tools.
6. The economic operator shall provide

- (1) password for access to the request / tender to the email address respectively following the expiry of the deadline for submitting requests / following the expiry of the deadline for opening tenders, but not later than time and
- (2) all information necessary to decrypt the tender / request, including data on the encryption programme or procedure used to decrypt the data. The content of the message sent should specify the designation and name of the procedure, the name of the economic operator or any designation allowing for the economic operator to be identified.
7. When sending a tender / request to participate in the procedure, the economic operator shall request confirmation of the delivery of a message containing the tender / request. The date of sending the tender / request will be the confirmation of the delivery of the message containing the tender / request from the contacting authority's mail server.
8. The obligation to submit documents in electronic form bearing a qualified electronic signature in the manner specified above applies to:
- the declarations and documents submitted on request pursuant to Article 26(2) of the PPL Act,
 - the declarations, documents and powers of attorney submitted on request pursuant to Article 26(3) and Article 26(3a) of the PPL Act.

In such case, the contracting authority does not require these documents to be encrypted.

9. If the original document or declaration referred to in Article 25(1) of the PPL Act, or other documents or declarations submitted in the contract award procedure have not been drawn up in the form of an electronic document, the economic operator may draw up and submit an electronic copy of the document or declaration in its possession.
10. If the economic operator provides an electronic copy of a document or declaration, the fact of affixing the same with a qualified electronic signature by the economic operator or, as appropriate, by an entity on whose capacity or situation the economic operator relies on the terms set out in Article 22a of

the Act, or by a subcontractor, is tantamount to certifying that the electronic copy of the document or declaration is true to the original.

11. Where an economic operator transmits an electronic document in a compressed format, the fact of affixing the same with a qualified electronic signature in a compressed data file is tantamount to certification by the economic operator as a true copy of all the electronic copies of the documents contained in that file, with the exception of the copies certified, where appropriate, by another economic operator that is applying jointly with it for the award of the contract, by the entity on whose capacity or situation the economic operator relies, or by a subcontractor.
12. The documents or declarations referred to in the Regulation of the Minister of Development of 26 July 2016 *on the types of documents which the contracting authority may require from the economic operator in the contract award procedure* are submitted in accordance with §14 of the Regulation of the Minister of Entrepreneurship and Technology of 16 October 2018 *amending the regulation on the types of documents which the contracting authority may require from the economic operator in the contract award procedure*.

2.2. Tender submission deadline

The setting of minimum tender submission deadlines during the epidemic may lead either to no tenders being submitted or to tenders submitted in a form less favourable to the contracting authority. Economic operators may take into account in the tender price the risks associated with the development of the epidemic and the current situation. Therefore, it seems reasonable for contracting authorities to extend the tender submission deadline on its own or at the request of economic operators, or to set deadlines in new procedures in such a way as to enable proper preparation of a tender and its possible submission after the end of the epidemic.

2.3. Opening tenders

During the epidemic doubts arise as to how to conduct the tender opening session. Naturally, in addition to the traditional formula, on-line transmission of the opening of tenders should also be allowed. This view was also presented in

the opinion of the PPO. According to it, on-line transmission of the opening of tenders in a situation of epidemic threat (and a fortiori in a state of epidemic) sufficiently fulfils the principle referred to in Article 86(2) of the PPL. This provision stipulates that the opening of tenders is public and takes place immediately after the expiry of the tender submission deadline, with the date on which the tender submission deadline expires to be the tender opening date. As such, the lack of possibility of the physical presence of interested persons at the opening of tenders with simultaneous provision of on-line transmission and prior information about the transmission will not constitute a violation under the PPL Act.

2.4. Conclusion of the contract by electronic means

In addition to the traditional formula of concluding a contract by its physical simultaneous signing by the parties during the epidemic period, the formula provided for in Article 78(1) of the Civil Code, consisting in the exchange of counterparts of the contract, each of which is signed by one of the parties (e.g. via mail), may become relevant. However, it should be noted that it is possible to conclude a contract by electronic means using a qualified electronic signature. Although in accordance with Article 139(2) of the PPL, the contract must be made in writing otherwise being invalid; nevertheless, in accordance with Article 78¹(2) of the Civil Code, a declaration of intent made in electronic form is tantamount to a declaration of will made in writing.

3. Impact of COVID-19 on the National Chamber of Appeals and Regional Courts

3.1. Impact of COVID-19 on the operation of the National Chamber of Appeals.

On 13 March 2020, on the website of the National Chamber of Appeals there was published a notice regarding the suspension of the organisation and handling of cases before the National Chamber of Appeals in the period between 16 March 2020 and 27 March 2020. The notice of the National Chamber of Appeals was subsequently updated on 30 March 2020 to the effect that it was reported that during the period of the epidemic declared due to COVID-19 the National Chamber

of Appeals would not hold hearings involving the parties to and participants of the appeal proceedings, and that in all other aspects it undertakes all actions with respect to appeal cases and examination of objections to the results of the audit of the President of the PPO.

This means far-reaching consequences for public contract award procedures that are currently under way as well as for those to be initiated in the near future.

In particular, attention should be drawn to the prohibition under Article 183(1) of the PPL Act, according to which in the event of an appeal, the contracting authority cannot conclude a contract until such time as the Chamber has issued a judgment or order terminating the appeal proceedings.

Due to the fact that appeals can still be lodged (including electronically), while the National Chamber of Appeals has suspended the handling of cases involving the parties to and participants of the proceedings, the lodging of an appeal may practically "freeze" the proceedings and make it impossible for the contracting authority to finalise the same by concluding a valid contract until such time as the National Chamber of Appeals resumes its normal operation. As a rule, the Chamber examines the appeal in public in attendance of the parties to and participants of the appeal proceedings.

Naturally, there is the possibility of lifting the prohibition to conclude a contract since, pursuant to Article 183(2) of the PPL Act, the Chamber may, at the request of the contracting authority, lift the prohibition to conclude a contract if failure to conclude the contract could have negative consequences for the public interest, in particular in the areas of defence and security, exceeding the benefits associated with the need to protect all interests that are likely to be prejudiced as a result of actions taken by the contracting authority in the contract award procedure. Since they are issued in private, such decisions are not excluded. The request must in each case demonstrate the existence of the grounds set out in the provision justifying the lifting of the prohibition to conclude a contract, which can be extremely difficult in the case of current contracts that are not of

particular importance for the public interest. The mere fact of introducing a state of epidemic is not in and of itself a ground for lifting the prohibition to conclude a contract in the aforesaid manner.

From the point of view of the functioning of the National Board of Appeals, the provisions of Article 15zzs(3) and (6) introduced to the Special Act by the Anti-Crisis Shield should be regarded as particularly important. Pursuant to the above-cited regulations:

- » the halting and suspension of procedural and court time limits during the period of an epidemic threat or a state of epidemic declared due to COVID-19 **does not apply to appeal proceedings before the National Chamber of Appeals**;
- » the President of the National Chamber of Appeals, in consultation with the President of the Public Procurement Office, may set out, by way of a regulation, detailed conditions for the organisation of the work of the National Chamber of Appeals related to ensuring the proper conduct of its operation and the security measures to be applied, subject to the need to take measures aimed at preventing, counteracting and combating COVID-19;
- » no trials or public hearings are held during the state of epidemic threat or state of epidemic declared due to COVID - 19.

The foregoing is therefore in line with the notice of the National Chamber of Appeals referred to in the introduction. During the state of epidemic threat or the state of epidemic the National Board of Appeals will not fix the dates of trials or public hearings. In certain situations, however, it is possible for the Chamber to proceed in private without the participation of the parties to and participants of the proceedings. Pursuant to the provisions of Article 186(2) and (3) of the PPL Act, in a situation where an appeal lodged with the National Chamber of Appeals is fully accepted by the contracting authority and is not objected to by a participant of the proceedings joining the proceedings alongside the contracting authority, or where no economic operator joins the proceedings alongside the contracting authority in due course, then the National Chamber of Appeals - in the former

case - shall discontinue, and in the latter case - may discontinue the proceedings in private without the presence of the parties to and participants of the appeal proceedings. On the other hand, the contracting authority performs, repeats or cancels actions in the contract award procedure as per the request included in the appeal, whereupon it may conclude a valid public contract, as a decision to discontinue the procedure issued in the aforesaid manner is a decision terminating the appeal proceedings within the meaning of Article 183(1) of the PPL. The above comments apply accordingly if the contracting authority accepts the arguments for appeal in part and the appellant withdraws the remaining arguments (Article 186(3a) of the PPL Act).

It is also worth noting the disposition resulting from the provision of Article 182(6) of the PPL Act. If an appeal is lodged after the expiry of the tender submission deadline, the tender validity deadline shall be suspended pending the decision of the Chamber. In the existing circumstances, due to the suspension of the operation of the National Chamber of Appeals and the impossibility of deciding appeal proceedings within a more precise time frame, economic operators will remain bound by tenders which, once the procedures are resumed, may prove to be completely inadequate to the prevailing market conditions.

3.2. Impact of Covid-19 on the operation of the Regional Courts.

In connection with the SARS-CoV-2 pandemic, which carries a risk to human health and life in the form of COVID-19 disease, Regional Courts across the country have introduced significant restrictions on their current work, such as in particular:

1. cancellation (up to 30 April 2020) of all trials and hearings and other actions involving the parties, both in and out of the court premises (with the exception of hearings in urgent cases where the failure to hold a hearing would have irreversible procedural consequences, in particular those relating to the application of pretrial detention and urgent guardianship matters);
2. since cases initiated by complaints against the decisions of the National Chamber of Appeals **do not qualify as urgent cases**, they will not, as a rule, be examined by the Regional Courts until at least 30 April 2020.

However, the above restrictions on the examination of complaints against the decisions of the National Chamber of Appeals will apply to those cases where complaints have already been lodged. No new complaints against the judgments of the National Chamber of Appeals should be expected as these will not be issued during the epidemic. Potential complaints may only relate to decisions issued in private, such as decisions dismissing the appeal for formal reasons.

4. COVID-19 vs liquidated damages

4.1. No automatic exclusion of liquidated damages

At the outset, it should be made clear that the mere fact that a coronavirus epidemic has occurred does not automatically authorise the contracting authority to charge liquidated damages stipulated in the event of non-performance or improper performance of the contract.

Pursuant to Article 484(1) of the Civil Code, in the event of non-performance or improper performance of an obligation, liquidated damages are payable to the creditor in the amount stipulated to that effect, regardless of the amount of damage suffered. Unless the parties agree otherwise, no claim for compensation exceeding the amount of the stipulated liquidated damages is admissible.

Naturally, in line with the overriding principle stemming from Article 471 of the Civil Code the economic operator will not be obliged to pay liquidated damages if the non-performance or improper performance is caused by the circumstances for which the debtor is not liable. Similarly, there will be no culpable delay on the part of the economic operator if the delay in the performance of the contractual obligation is caused by the circumstances for which the debtor is not liable (Article 476 of the Civil Code).

The occurrence of COVID-19 epidemic, which must certainly be considered a force majeure event, is undoubtedly a circumstance for which the economic operator performing contracts within the framework stemming from the provisions of the PPL is not liable. Nevertheless, in order to be released from liability for

non-performance or improper performance, economic operators are obliged to demonstrate a causation between the occurrence of force majeure and the impossibility or limited possibility of performing the contract.

Furthermore, it is not uncommon that the performance of the contract may be prevented altogether (e.g. contracts regarding the organisation of trips abroad, conferences). The provisions concerning the subsequent impossibility of performance will then come into play (Article 475 of the Civil Code). In such situation, the contract will expire without the contracting authority being entitled to charge liquidated damages.

It is therefore apparent that, even without the solutions provided for in the Anti-Crisis Shield, the economic operator was in a position to release itself from this liability.

Nevertheless, economic operators should gather evidence on an ongoing basis in order to demonstrate the impact of the epidemic on the impossibility or limited possibility of performing the contract. The above also entails information obligations towards the contracting authority.

4.2. Information obligations

The Anti-Crisis Shield provides (its Article 15r introduced in the Special Act) that the parties to a public contract must promptly inform each other of the impact of the circumstances surrounding the occurrence of COVID-19 on the proper performance of the contract concerned, if such impact has occurred or is likely to occur. It is important that such information be accompanied by declarations or documents confirming the impact of the circumstances surrounding the occurrence of COVID-19 on the proper performance of the contract concerned. This information may concern, e.g.

- » the absence of employees or persons providing work for remuneration otherwise than under an employment relationship who are or could be involved in the performance of the contract;

- » decisions issued by the Chief Sanitary Inspector or a provincial state sanitary inspector acting under his authority, in relation to counteracting COVID-19, requiring the economic operator to take certain preventive or control measures;
- » orders issued by provincial governors or decisions issued by the Prime Minister in relation to counteracting COVID-19;
- » suspension of supply of products, product components or materials, difficulties in accessing equipment, or difficulties in providing transport services;
- » the circumstances referred to in sections 1 to 4, in so far as they concern a subcontractor or a further subcontractor.

If the contract contains provisions regarding liquidated damages, the contractual party must, in its submission, describe the impact of the circumstances surrounding the occurrence of COVID-19 on proper performance of the contract and the impact of the circumstances surrounding the occurrence of COVID-19 on the appropriateness of determining and recovering these liquidated or other damages or on their amount.

Both the contracting authority and the economic operator may request additional declarations or documents confirming the impact of the circumstances surrounding the occurrence of COVID-19 on the proper performance of the contract concerned. For natural reasons, for the most part this request may be made by contracting authorities, as it is them who will ultimately decide whether or not to accept the economic operator's information to the effect that the latter is not liable for non-performance or improper performance of the contract.

It is important that the circumstances referred to in sections 1 to 4 above may also apply to a subcontractor or further subcontractor.

The list of circumstances presented above is not exhaustive. It is arguable whether this is also a non-exhaustive list for subcontractors and further subcontractors. This is so as the reference to subcontractors (further subcontractors) is included in section 5 of the list (Article 15r(1) introduced to the Special Act under

the Anti-Crisis Shield) which, assuming that the legislator is reasonable, should mean that in relation to subcontractors and further subcontractors, only the circumstances included in the above-mentioned sections 1 to 4 can be considered (sadly, this issue is not clarified in the explanatory memorandum to the amending bill). However, it should be concluded that the list of these circumstances is also non-exhaustive in relation to subcontractors.

It has been assumed in the Anti-Crisis Shield that if the information is provided by the economic operator, the contracting authority shall, within 14 days after its receipt, present its reasoned position as regards the impact of the circumstances referred to in paragraph 1 on its proper performance. At the same time, no sanctions were introduced for failure to comply with this obligation. **As such, the contracting authority's passive approach cannot be considered as acceptance of the economic operator's request.** It is all the more possible if the contracting authority indicates within 14 days that the circumstances presented are insufficient and requests further information and evidence. At the same time, even if the contracting authority demonstrates a passive approach, it may at a later time consider the presented circumstances as not attributable to the economic operator.

4.3. No breach of public finance discipline

The Anti-Crisis Shield assumes that the failure to determine or to recover from the contractual party, inter alia, liquidated damages for non-performance or improper performance of a public contract due to the circumstances related to the occurrence of COVID-19 does not constitute a breach of public finance discipline. Although at first glance beneficial for economic operators, the above solution does not differ in any way from the applicable regulations. Even without this provision, it would be difficult to attach to the contracting authority liability for the breach of public finance discipline if it did not claim liquidated damages from the economic operator when, due to force majeure, the latter was prevented from performing the contract or from timely performing the contract.

5. Amending PPL contracts Force majeure

As regards the performance of contracts concluded under the Public Procurement Law act, the consequences of the COVID-19 pandemic may be particularly severe due to statutory limitations on the possibility of amending such contracts. For purposes of clarity, it should be stated that the PPL, as a rule, follows the principle that contracts entered into under the Act cannot be amended. By way of exception, Article 144 of the PPL provides for certain instances (grounds) in which such a contract may be amended. Considering these possibilities from the viewpoint of COVID-19 impact, two of them, namely Article 144(1)(1) of the PPL and Article 144(1)(3) of the PPL, should be singled out.

5.1. Amending a contract based on contractual clauses

The first of the above grounds refers to the contract binding the parties and its clauses that permit it to be amended. It should be noted that even if the contracting authority foresaw such provisions in contracts (for example to allow for the possibility to amend the procurement performance deadline should an epidemic occur on the territory in which the procurement will be carried out), the contract would be amendable on such grounds only if it is considered that a particular contractual legal basis to amend the contract has been foreseen in an effective manner. In this context, one should refer to the opinion of the Public Procurement Office President¹⁶⁹ who explains how to word contractual provisions based on Article 144(1)(1) of the PPL. Only such correctly worded contractual provisions can serve as a basis for amending the contract. Accordingly, if the nature, scope and circumstances of contract amendment is set out in terms that are too general, they will not entitle the parties to amend the contract on such grounds. Consequently, amending the contract based on an incorrectly worded legal basis (contractual provision) will lead to the contract being amended in violation of the PPL. In case of procurements financed from external funds (such as the EU budget), such a violation will result in decreasing the granted co-financing. Therefore, in all those cases in which contracts contain provisions allowing the contract to be amended in conditions "matching" those related to the COVID-19 pandemic,

¹⁶⁹ <https://www.uzp.gov.pl/baza-wiedzy/interpretacja-przepisow>

the parties to the contracts (and especially the contracting authority) should prior to amendment assess whether the legal basis which they intent to rely on has been correctly worded.

In the context of contractual provisions, one should also note the institution of "force majeure." This term is not legally defined in civil law. Legal doctrine reached a definition according to which force majeure should be understood as "*an external event whose consequences cannot be foreseen or prevented, assuming that all those attributes appear jointly. This is in keeping with the objective theory of force majeure, since the distinguishing feature is the classification of the event itself, and not the degree of human diligence.*"¹⁷⁰ The COVID-19 pandemic can undoubtedly be classified as an instance of force majeure. The basic consequence of the impact that force majeure has on the proper performance of procurements is the exclusion of the economic operator's liability for improper performance, for example releasing them from compensatory liability for failure to observe supply deadlines. From the viewpoint of amending the contract (based on a contractual provision), the most important point is to examine whether a contract provides for its amendment in case of force majeure. Contracts that include such regulations will probably regulate the institution of force majeure in another manner. This is because there are almost no statutory guidelines in this respect. Some contracts only contain a contractual definition of force majeure, releasing the economic operator from liability for proper performance of the public contract should such an event manifest. Others, in turn, provide for more complex regulations in these circumstances, for example the possibility of postponing the contract performance deadline or changing the economic operator's remuneration. The final form of the relevant clauses will depend solely on the imagination of the contract's designers. It should be stressed that even those contracts that provide directly for their amendment due to manifestation of force majeure can only be amended when such contractual provisions meet the wording requirements referred to in Article 144(1)(1) of the PPL. Adopting a different position, according

¹⁷⁰ Thus W. Dubis (in:) Kodeks cywilny. Komentarz pod red. E. Gniewek, P. Machnikowski, 9th edition, 2019, Legalis, Article 435 of the CC.

to which these wording restrictions would not apply to these provisions, would lead to violating the aforesaid PPL principle prohibiting the amendment of contracts.

To summarize this section, it should be noted that parties of those contracts that may be amended due to circumstances that manifested as a result of the COVID-19 pandemic should check whether such legal grounds are effectively provided for before they proceed with the amendment. Only contractual provisions that meet the requirements of the PPL can serve as grounds for amending the contract. Situations in which amending the contract on an ineffective legal basis could lead for example to decreasing the granted co-financing for the performance of the public contract would be highly undesirable.

5.2. Amending a contract based on PPL provisions

Speaking about statutory grounds, namely Article 144(1)(3), it should be noted that contract amendments are permitted if two conditions are jointly met. Firstly, the need to amend the contract is caused by circumstances which could not have been foreseen by the contracting authority acting with due diligence; secondly, the amendment value does not exceed 50% of the original public contract value stated in the contract. The latter condition is clear and does not need to be explained further. More controversial, however, is the possibility of classifying the impact of COVID-19 from the viewpoint of the former condition. In this context, we can depend on Article 15r(4) introduced into the Special Act by the Anti-Crisis Shield. According to that article, the contracting authority, having ascertained that circumstances related to the occurrence of COVID-19 (...) may or do affect the proper performance of the contract referred to in section 1, may amend the contract referred to in Article 144(1)(3) of the PPL in agreement with the economic operator, in particular by:

- 1) amending the deadline for performing the contract or a part thereof or temporarily suspending the performance of the contract or a part thereof,
- 2) amending the manner of performing supplies, services or construction works,

- 3) amending the scope of the economic operator's consideration and the corresponding remuneration
 - provided that the increase of remuneration caused by each subsequent amendment does not exceed 50% of the original value of the contract.

The cited regulation directly confirms that Article 144(1)(3) of the PPL can be used to amend contracts if the occurrence of COVID-19 impacts the possibility of properly performing the contract. In such cases, the contract would be amended pursuant to Article 144(1)(3) of the PPL in connection with Article 15r introduced into the Special Act. Before the contract is amended, however, it is recommended that the parties fulfil additional notice conditions provided for in the regulation and discussed above.

In Article 15r(5) of the Special Act, the legislator also explained that to amend the contract due to the occurrence of COVID-19 the parties may take advantage of contractual grounds regardless of any statutory grounds. Relying on contractual grounds to amend the contract is recommended in all cases in which the economic operator would obtain a position more favourable than resulting from an amendment based on statutory grounds.

As regards the permitted scope of amendment, it should be noted that Article 15r(4) introduced into the Special Act contains an open list of sample scopes which can be affected by the amendment. These include the possibility to amend the public contract performance deadline, to suspend the contract performance, to change the manner of performing supplies, services or construction works, as well as to change the scope of the economic operator's remuneration. It is important, however, that the contract can also be amended in any other respect (not enumerated by the legislator, for example as regards the manner of settlements between the parties), but only when amending the contract allows continued performance of the contract (a conclusion derived from the justification to the amendment act bill).

Relationships between the economic operator and its subcontractors were regulated slightly differently. It was assumed that the economic operator and

a subcontractor, having ascertained that circumstances related to the occurrence of COVID-19 may or do affect the proper performance of a contract between them related to performance of a public contract or a part thereof, **agree to amend such contract accordingly**, in particular by amending the deadline to perform the contract or a part thereof, temporarily suspending the contract or a part thereof, changing the manner of performing the contract, or modifying the scope of mutual considerations. By using the words "agree to amend," the legislator intended to mean that such amendment of the contract is obligatory.

Another important issue is the impact of amendment of the master contract on subcontracting and sub-subcontracting contracts entered into by the economic operator. If the master contract is amended due to the occurrence of COVID-19, a subcontracting contract would also have to be modified if the amendment of the master contract affects the part of the contract entrusted to the economic operator. As a result of amendments of both contracts, the terms and conditions on which a subcontractor performs the contract cannot be less advantageous than the terms and conditions applied to the economic operator following the amendment of the master contract (a similar obligation obtains in relations between a subcontractor and sub-subcontractor).

At the same time, the statutory amendments provide that the economic operator may amend the subcontracting contract accordingly without waiting for the master agreement to be amended if such amendment is recommended due to the impact of COVID-19 on the ability to properly perform the public contract (and likewise in case of sub-subcontracting contracts). These amendments are therefore meant to secure also the interests of other entities involved in performing the public contract.

To summarize this section, it should be noted that the entry into force of Article 15r of the Special Act should allow for easier amendment of contracts pursuant to the currently effective Article 144(1)(3) of the PPL.

5.3. Alteration of contracts yet to be entered into

It should be added that the above discussions will apply primarily to public contracts that are currently being carried out. In case of public contracts still to be awarded, it would be advisable to verify the draft contracts with a view to inserting contractual clauses allowing to amend the contract due to the impact of COVID-19 on its proper performance. Drafts lacking such clauses (or with clauses that are badly worded) should be amended if the stage of the procurement proceedings so allows. In case of such (not yet awarded) public contracts, the ability to rely on statutory grounds will be limited. The economic operator will have to demonstrate that it was unable to foresee specific circumstances related to the COVID-19 pandemic despite being a professional acting with due diligence when submitting the tender. Such diligence and unforeseeable nature will have to be assessed from the viewpoint of the entity that incurs an obligation in pandemic conditions. To protect their interests, economic operators should therefore factor the risk related to the pandemic into the price of (currently submitted) tenders.

The previously discussed possibilities to amend a contract apply to amendments that occur with the joint will of the parties. In other words, amendments of the contract will be possible only when the contracting authority and the economic operator reach an agreement on the details of contract amendments to be implemented.

5.4. Alteration of a contract when the parties refuse to act jointly

In all cases in which a contract cannot be amended on conditions acceptable to both parties, one might consider amending the contract based on Article 357¹ of the Civil Code. In such case, the contract will be amended by a court decision that follows court proceedings in the relevant scope. Whether a case can be justifiably resolved in this manner will naturally depend on actual circumstances applicable to a particular public contract. A condition necessary to amend a contract on that basis is the court's recognition that an extraordinary change of relations had occurred that affects the originally agreed manner of carrying out the public contract. According to current judicial decisions of the Supreme Court, "An

extraordinary change of relations is understood as an event that is rare, unusual, exceptional, not normally occurring. The reasons why such an event obtains may involve commonly occurring natural (crop failures) or social (epidemics, natural disasters, economic disturbances) causes. Such situations include also surprising changes in tax or customs rates or rapid fluctuations of prices on the market. An unforeseeable situation is a future situation which the parties had no reason to expect.¹⁷¹ Considering the above, it appears that the COVID-19 pandemic may, as a rule, constitute an extraordinary change of relations referred to in Article 357¹ of the Civil Code.

To summarize, it should be stated that each public contract whose performance is disrupted due to the impact of COVID-19 must be individually assessed to ascertain whether the contract binding the parties can be amended. Public procurement law is unusually restrictive in this regard. Therefore, before any amendment is made, the circumstances attending each particular case need to be thoroughly analysed, since it is these very circumstances that decide whether a contract can be amended, and if so, on what grounds and in what respect.

6. The possibility of withdrawing from a contract under Article 145(1) of the PPL

If further performance of a contract is no longer justified from the point of view of the contracting authority due to COVID-19, one should consider the special legal basis for withdrawing from a contract, which is provided for in the PPL. First, however, it is worth mentioning that this is not the only legal basis that can be used to nullify the existence of a public contract, because thanks to the wording of Article 139(1) of the PPL the contract may also be subject to relevant provisions of the Civil Code¹⁷² (hereinafter also CC), that is for example Articles 491(1), 635, 636(1), 640 and 395 of the CC. In addition, the legal relationship resulting from public contracts may also be terminated for causes specified in detail in a contract.

¹⁷¹ Judgement of the Supreme Court of 8 March 2018 (ref. no. II CSK 303/17)

¹⁷² Judgement of the National Chamber of Appeals of 22 January 2014, ref. no. KIO 24/14;

The wording of Article 145(1) of the PPL states that in the event of a material change of circumstances as a result of which the performance of the contract is no longer in the public interest, and which could not have been foreseen at the time of entering into the contract, or where further performance of the contract can pose a threat to a material security interest of the state or public security, the contracting authority may withdraw from the contract within a period of 30 days from the date on which it became aware of these circumstances. Pursuant to Article 145(2) of the PPL, if the contract is withdrawn from on the above legal basis, the economic operator may demand solely the remuneration due for the performed part of the contract. Section 1, therefore, sets out the prerequisites that allow the contracting authority to make a unilateral statement of will to withdraw from the contract, while section 2 defines the rights of the economic operator as to what portion of remuneration that can be demanded as a result of withdrawal from the contract and what consequences follow from withdrawal on that legal basis. Since, therefore, this provision is of a generally applicable nature, it should be noted that it applies to all contracts entered into under the PPL. The risk of potential withdrawal from the contract using that basis should always be factored in by the economic operator when entering into such contract.¹⁷³

A contracting authority that wishes to invoke this right submits to the other party of the legal relationship a notice which takes effect when it reaches the other party in a manner allowing its contents to be perused. Withdrawal based on this provision may apply to the entire obligation or a part thereof.¹⁷⁴ In accordance with Article 77(2) of the CC, withdrawing from a contract under Article 145(1) of the PPL must be made in the form of a document. Once made, the statement causes legal effects regardless of the consent of the economic operator. Withdrawal from a contract causes effects retroactively, reverting affairs to such a state as if the contract had never been entered into. However, withdrawing from a contract on this basis does not retroactively nullify the resulting obligations, but

¹⁷³ Judgement of the National Chamber of Appeals of 16 June 2010, KIO/UZP 1041/10;

¹⁷⁴ A. Gawrońska-Baran, Ochrona interesu publicznego na tle art. 145 ustawy – Prawo zamówień publicznych, PZP 2010, no. 3, p. 32

only transforms them into an obligation to return any considerations already provided and make subsequent settlements between the parties.¹⁷⁵

For obvious reasons, the contracting authority may exercise this right only after entering into a contract, because until the proceedings are completed, it can invoke the rights provided for in Article 93(1)(6) of the PPL to void them.

The contracting authority is therefore entitled to withdraw from a contract if the following prerequisites specified in the cited provision are jointly met:¹⁷⁶

- 1) a material change of circumstances occurred;
- 2) due to a material change of circumstances, the performance of the contract is no longer in the public interest, which could not have been foreseen at the time of entering into the contract, or
- 3) further performance of the contract can pose a threat to a material security interest of the state or public security.

Accordingly, withdrawal from a contract pursuant to Article 145(1) of the PPL can occur in two situations. The first is where a material change of circumstances occurs, as a result of which the performance of the contract is no longer in the public interest, which could not have been foreseen at the time of entering into the contract.

The material change of circumstances must actually take place as a situation which can be determined using objective measures. Judicial decisions and legal doctrine note that a material change of circumstances may follow from the occurrence of both legal and actual events which are not included in regular contractual risk. Such events happen very rarely and are of an extraordinary nature. The COVID-19 pandemic can certainly be counted among them.

175 A. Ciecielski, A. Szeliga, Przesłanki odstąpienia od umowy oraz jej unieważnienia. Zamówienia Publiczne Doradca, 2019, no. 7. pp. 64-72, judgement of the Supreme Court of 25 February 2015, ref. no. IV CSK 395/14;

176 M. Jaworska, Prawo zamówień publicznych. Komentarz. 10th edition, 2020, and judgement of the National Chamber of Appeals of 22 January 2014, ref. no. KIO 24/14;

The contracting authority may withdraw from the contract on that legal basis within a period of 30 days from the date on which it became aware of circumstances justifying the withdrawal. The withdrawal deadline is a final deadline, which means that, once it expires, the contracting authority's right to withdraw from the contract expires. The contracting authority may withdraw from a contract pursuant to Article 145(1) of the PPL at any stage of performance. The cut-off dates for exercising of this right are the date of entering into the contract and the date of its complete performance. As a result of declaring the state of epidemic threat on 13 March 2020 and the state of epidemic on 20 March 2020, the 30 days' period to make a statement on withdrawing from a contract should be counted from these dates.

There can be no doubt that when public contracts were being entered into before the pandemic manifested, it was impossible to foresee the spread of SARS-CoV-2 at so large a scale and the activities undertaken by state authorities that severely hinder the conduct of economic activities in the usual course of business. Hence, the prerequisite of a material change of circumstances which could not have been foreseen when the contract was entered into is now met.

As to lack of public interest in performing a public contract, it should be noted that this issue is highly individual and must be assessed taking into account the specific nature of each public contract and the prevailing actual circumstances of the case. Should a contracting authority wish to withdraw from a contract already entered into pursuant to Article 145(1) of the PPL, then considering the current situation it should document in detail what was the impact of COVID-19 spread on performance of the public contract, and in particular demonstrate that further performance of the public contract is no longer in the public interest.

Taking the potential decision to withdraw from a contract pursuant to Article 145(1) of the PPL, the contracting authority should examine all possible scenarios related to further performance of the public contract and the impact of withdrawal on its subsequent carrying out of public tasks. On many occasions the potential withdrawal from contracts already entered into but not currently

performed due to lack of demand will force the withdrawing contracting authority to announce further public contract award proceedings so as to ensure that their benefits continue once the state of epidemic is lifted. A possible consequence for the economic operators is the risk that the public contract will be performed on conditions less advantageous than offered in the current contract. To avoid this, the contracting authority should analyse each category of public contracts to ascertain how withdrawing from a contract may affect the subsequent operations of its institution. To this end, the contracting authority should also consider the future situation of its unit and examine what terms can be proposed by other economic operators once new proceedings are announced when it turns out that resuming the provision of certain services or supplies of goods necessary for the operation of the unit is necessary. Withdrawing from a contract in such a situation may potentially paralyse the activities of a unit since there will be no contract to carry out a procurement necessary to resume the pre-epidemic operations of the unit once the epidemic ceases.

It may turn out that even if prerequisites for withdrawing from the contract exist, it will be more advantageous for the contracting authorities to keep on carrying out existing contracts by amending them pursuant to, among others, Article 15r(4) of the Act on special measures for preventing, counteracting and combatting COVID-19, other contagious diseases and the crisis situations they cause of 2 March 2020 in connection with Article 144(1)(3) of the PPL, taking into account the guidelines detailed in the text of the Anti-Crisis Shield, or based on provisions found in the contract as suggested by Article 144(1)(1) of the PPL. However, it needs to be stressed that this cannot be the general rule, because withdrawing from a contract instead of amending it may prove more advantageous in specific actual circumstances considering the currently prevailing public interest.

To summarize, it should be noted that the possibility to withdraw from a contract pursuant to Article 145(1) of the PPL is an extraordinary mechanism that needs to be used with extreme caution because the article contains general clauses that set the conditions for taking advantage of the right of withdrawal. It is necessary to emphasize that the obligation to demonstrate the existence of prerequisites

set by that article in order to potentially demonstrate that the withdrawal was used correctly is imposed on the contracting authority. In general terms, carrying out a contract is no longer in the public interest if its performance becomes devoid of purpose considering the needs of the public. This means that withdrawal from a contract based on Article 145(1) of the PPL is possible when there is no need to provide specific services to a particular community. The material change of circumstances must be ascertained using objective measures that allow to determine whether we are facing an exceptional, extraordinary situation which could not have been foreseen as part of regular contractual risk. Withdrawing from the contract pursuant to Article 145(1) of the PPL means that the contracting authority is obliged to pay remuneration solely for the realized part of the public contract. Because public interest existed, the economic operator is barred from seeking damages. Finally, it needs to be emphasized that the possibility to withdraw from a contract pursuant to the aforesaid provision of the PPL depends on actual and legal circumstances surrounding a particular situation. Taking a decision to withdraw from the contract, the contracting authority should be convinced that its position is justified by documenting circumstances which demonstrate the validity of such an approach. Otherwise, should it turn out that the withdrawal occurred in breach of law, the economic operator will become entitled to seek damages for, among others, improper performance of an obligation.

