



Tax&Legal Highlights

Poland

No Revolution in the Labour Law. PiS not to support the bills proposed by the Codification Committee

The spokesperson of the Law and Justice (PiS), Beata Mazurek, said today that PiS will not support the new labour law bills proposed by the Codification Committee. This basically means that there will be no revolution in the labour law.

However, it still remains to be seen whether some of the proposed solutions will be gradually introduced to the current regulations, which — doubtlessly — despite numerous amendments are obsolete in the light of the new economic reality and require further changes.

It should be recalled that in mid March, after 18 months, the Labour Law Codification Committee finished work on new individual and collective labour law bills. Among the proposed solutions were:

1. deemed employment status in relationships with natural persons, restrictions on civil-law contracts concluded by business entities, self-employment limitations;
2. limitations regarding fixed-term employment contracts and introduction of new types of contracts such as casual or seasonal employment contracts;

3. introduction of the obligation to give reasons for the termination of every type of employment contract, with the possibility of exemption for small businesses provided that they offer additional monetary benefit;
4. changed notice periods;
5. possibility of a partial waiver of salary by an employee;
6. introduction of salary accounts, possibility of adapting the working hours of the company in the collective labour agreement, high adoption of the opt-out clauses with regard to overtime; and
7. exclusion of employers hiring up to 20 employees from the provisions concerning protection against dismissal set out in the group dismissal act.

As far as the existing legislation and the rulings of the Supreme Court are concerned, the proposed solutions were often revolutionary. It is also a well-known fact they were not satisfactory to the trade unions and employers' organisations, despite the fact that their representatives participated in the works of the Codification Committee. Even certain members of the Committee voted against the bills, which also received unfavourable public perception.

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Solutions and Systems to Monitor Abusive Practices. How can the entities operating in the financial market avoid heavy fines?

Financial market participants are obliged to comply with the Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse ("MAR"). The objective of the regulation is to prevent market abuse in the form of market manipulation and determine measures to prevent manipulative strategies. MAR is followed up by Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse ("MAD").

Both legal acts provide for heavy fines for entities which fail to comply with the regulations. The fines, however, may be avoided, if certain regularities within an entity have been successfully detected.

The goal of MAR is to guarantee market transparency, protection of the financial market integrity and building of trust in the market. Article 2 of MAR describes the general scope of the Regulation identifying financial instruments admitted to trading on a regulated market, MTF, OFT etc. The provisions dealing with market manipulation (Articles 12 and 15 of MAR)

apply also to benchmarks and may be used with reference to interbank transactions.

MAR and MAD, and as a result the Act on trading in financial instruments, which has been amended as appropriate, provide for heavy sanctions for failure to comply with MAR regulations and requirements by entities operating in the financial market. Article 183 of the Act states that the person engaging in financial market manipulation faces a fine of up to PLN 5 000 000 or imprisonment from 3 months to 5 years or both these sanctions. The persons liaising with them face a fine of PLN 2 000 000.

Under Article 173.4 of the Act, the Polish Financial Supervision Authority may impose an additional fine of up to PLN 10 364 000 or to an equivalent of 2% of the total annual income disclosed in the last audited financial statements for a financial year, if it is more than PLN 10 364 000, on a legal person which fails to comply with the obligation to maintain systems and procedures in order to prevent and detect insider trading and market manipulation practices and attempted insider trading and market manipulation practices. As shown above the fines are substantial. It is the obligation of every entity subject to MAR to take all possible measures to mitigate the risk of such fines.

It should be emphasised that MAR defines "market manipulation" very broadly. Under MAR, manipulation in a financial market is every unlawful act carried out both by an entity operating in the market dedicated to the trading in financial instruments and by its employees or managers, provided that it has been determined that the goal of such acts was to impact the instruments themselves or the ratios underlying the pricing of the instruments (e.g. benchmarks).

Article 15 of MAR directly prohibits engagement in or attempted engagement in market manipulation by any person. This is an unconditional prohibition applicable to all market participants trading in financial instruments.

No entity may ever be certain that one or more of persons within their employment does not commit some form of abuse. If such event takes place, the persons will be punished, however, a question arises whether the system used to the monitoring of such behaviour in a given institution does not have gaps that make the abuse possible.

Pursuant to Article 16 of MAR market operators, investment companies operating a trading venue and anyone professionally arranging transactions are obliged to put in place and maintain effective solutions, systems and procedures to prevent and detect insider trading, market manipulation and attempted insider trading and market manipulation. Failure to put in place solutions and systems to prevent such abusive practices results in heavy fines imposed on a market participant trading in financial instruments.

The fines may be prevented by ensuring high quality of the systems used to monitor transactions and behaviour related to and affecting the traded instruments. Under recital 30 of MAR "Where legal persons have taken all reasonable measures to prevent market abuse from occurring but nevertheless natural persons within their employment commit market abuse on behalf of the legal person, this should not be deemed to constitute market abuse by the legal person".

In examining whether measures are “reasonable” one should in the first place consider the status and size of the market participant as in practice the requirements imposed on banks, which are institutions of public trust, are higher than those imposed on investment companies. This does not mean that the latter may attach less weight to preventing abusive practices.

Every market participant trading in financial instruments is obliged to ensure effective detection of abusive practices. To achieve that appropriate systems of monitoring orders and transactions must be put in place. Not only must such systems be established inside an entity, but they also must be regularly reviewed by external advisors, who — provided they specialise in forensic auditing and use appropriate technological solutions — can detect any gaps in the system which may have left serious abuse undetected. Verification may take the form of an analysis of sample documentation or internal communication of a given entity.

Article 176f of the Act states that while imposing a fine the Polish Financial Supervision Authority takes into account the circumstances referred to in Article 31.1 of MAR. These are: (i) the gravity and duration of the infringement; (ii) the level of cooperation of the person responsible for the infringement with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person, (iii) previous infringements by the person responsible for the infringement; or even (iv) measures taken by the person responsible for the infringement to prevent its repetition. Therefore all preventive measures taken by a given entity, which show that the highest professional standards are maintained, are taken into account.

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How to get ready for FATCA and CRS reporting for 2017

No later than on 2 July 2018 reporting financial institutions should send to the Head of the National Revenue Administration information about reportable accounts for 2017.

The information should be submitted in line with clearly defined procedures — XML Schema (i.e. files with rules how the submitted data should be structured).

To report data for 2017 Polish financial institutions should use the CRS-1(1) form for CRS reporting and FAT-1(3) for FATCA reporting. Valid XML formats are published on the web page of the Central Repository of Electronic Document Models on the [ePUAP](#) platform.

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The CRS-1(1) has not changed since last year, but a new FAT-1 format has been published by the Ministry of Finance for 2017. For example, compared to FATCA reporting for 2016, this year FAT-1(3) requires that the type of the Polish financial institution be given ("FileCategory"). On the other hand, "Report for Non-Participating Institutions" has been removed.

As far as the second change is concerned, there were doubts over the method of completing FAT-1(3). Despite the fact that the part devoted to reporting payments to non-participating institutions has been removed (the requirement to report such payments was in force only with respect to 2015 and 2016), the XSD/XML formats still include the "FATCA103 Non-Participating FFI" category for the holder. Therefore it may be uncertain whether "FATCA103 Non-Participating FFI" should be abandoned altogether for the account holder type or whether financial institutions must keep reporting payments to non-participating FFI.

In order to help Polish entities comply with FATCA and CRS requirements, the Ministry has published additional explanations how to complete the elements of XML schema (for [FAT-1\(3\)](#) and for [CRS-1](#)).

For CRS reporting it should be checked which non-EU states have joined the automatic exchange of information (i.e. they have become the participating countries) and therefore their tax residents should be included in the reporting for 2017. The list of participating countries, also for the year 2017, has been published by the Minister of Development and Finance in [Monitor Polski](#).

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