

ALBANIA  
BOSNIA-HERZEGOVINA  
CZECH REPUBLIC  
CROATIA  
BULGARIA  
HUNGARY  
CENTRALEUROPE  
LITHUANIA  
SLOVENIA  
POLAND  
SLOVAKIA  
ROMANIA  
KOSOVO  
SERBIA  
LATVIA  
ESTONIA

# Tax&Legal Highlights

**March 2019**

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## Albania

### Instruction “On value added tax”

In the Official Gazette no. 23 is published the Instruction of the Minister of Finance and Economy no. 5, dated 22.02.2019 ‘On some additions and amendments to the instruction no. 6, dated 30.01.2015 “On value added tax in the Republic of Albania”, as amended’ through which are reflected the amendments of the reduced rate of value added tax for certain supplies of goods and services as follows:

#### Supply of advertising services

It is reflected the change regarding the reduced rate for advertising supplies from audiovisual media:

- The supply of advertising services from audiovisual media is taxable at a reduced rate of VAT of 6%;
- Any other commercial activity performed by audiovisual media, with the exception of advertising is a taxable supply at the standard rate of VAT of 20%;
- The supply of advertising services by other taxable persons other than audiovisual media is taxable with the standard VAT rate of 20% (with the exception of advertising services by written media which is a supply exempt from VAT).

#### Exemption of newspaper, magazines and advertising from written media

The following are no longer VAT exempted supplies:

- Supply of books provided in the traditional way (from 1 January 2019 is subject of the reduced VAT rate of 6%). If the materials are not offered in the traditional way of a book, the standard VAT rate of 20% will be applicable.
- Supply of advertising services from electronic media (from 1 January 2019 is a taxable supply subject of the standard VAT rate of 20%).

#### Supply of processing of goods under active processing regime

It is reflected in the instruction the treatment as export at 0% VAT, the supply of services for processing of goods by subcontractors for economic operators that operate in the active processing sector.

The supply of services for processing goods from subcontractors equipped with the respective authorizations from the customs authority, on behalf of the companies of active processing will be considered as a supply of service taxable with a VAT rate of 0%.

To implement such treatment, each taxable person subcontractor, upon receipt of the authorization by the customs authority, has to submit a copy of the authorization, along with a copy of the contract between the parties to the Regional Tax Directorate, which then issues the “For inclusion in active processing operations” authorization within 30 days from the date of issuance of the authorization by the customs authority. Service supplies

within the active processing regime can not be carried out by unauthorized subcontractors from the relevant customs and tax authorities.

### **Determination of network electricity losses during the distribution process**

In the case of electricity supply, "loss of electricity distribution" shall not be considered the percentage of electricity losses distributed by the Energy Regulatory Entity (ERE), but the percentage of losses as defined in the DCM no. 434, dated 20.05.2015 "On determining normatives for losses, damage and scratch during production, storage, transportation, etc., recognized for fiscal purposes".

### **Instruction "On income tax"**

**In the Official Gazette no. 23, dated 26.02.2019 is published the Instruction no. 4, dated 21.02.2019 "On some additions and amendments to the Instruction no. 5, dated 30.01.2006 "On income tax", as amended. This instruction has reflected and expanded the amendments introduced by the Fiscal Package 2019 and has also brought some additional treatments.**

### **Income of non-residents for services sourced in Albania**

Income from services performed by non-resident persons for resident persons shall be considered as sourced in Albania and taxable in Albania, unless exempt from taxation in Albania under the provisions of a double tax treaty.

### **Income from immovable property, minerals, hydrocarbons etc. sourced in Albania**

Expansion of the income tax basis sourced in the Republic of Albania has been reflected, following the amendments to the article 4 of the law, considering as income sourced in Albania also income from:

- a. rights for exploitation of mineral resources, rights for exploitation of hydrocarbon resources,
- b. gains from the sale of shares (or similar interests) deriving their value in more than 50% from the property, rights or information related to them in the Republic of Albania,
- c. other rights for exploitation of natural onshore and offshore resources, including seas in the Republic of Albania, as well as
- d. information that pertains to these rights.

The instruction further clarifies the concept of the rights for exploitation of mineral and hydrocarbon resources, as well as the concept of the information related to such rights.

### **Tax on dividends and profit share**

The reduced tax rate on dividends and profits distributed to shareholders from 15% to 8% is reflected.

### **Transfer of ownership rights on immovable properties**

The instruction expands the concept of the transfer of ownership rights on immovable properties (building, land, and agricultural land) by including also the waiver of ownership rights on immovable properties besides sales and donations.

In the list of income exempt from personal income tax, the instruction reflects also for the cases of transfer of the ownership rights of ownership within the family between men, women, children, through donation and/or ownership waiver, when the property derives from compulsory joint ownership acquired under Law 7501, dated 19.07.1991 "On land", as amended.

### **Non-resident persons subject to corporate income tax**

Non-resident persons that are not subject to income tax from the rights over the immovable properties, the rights over the immovable property or their alienation, shall be subject to corporate income tax. These non-resident persons are subject to the income tax resulting from the sale of shares if, at any time during the 365 days period before the alienation, more than 50% of the value of these shares derives directly or indirectly from the immovable property located in Albania, or from the rights or information related to such immovable property.

### **Non-deductible expenses**

Are included in the list of non-deductible expenses:

- Expenses for per diems that exceed 50% of the annual gross salary fund;
- The surplus of the net interest expense that exceeds 30% of the EBITDA of the borrowing company in cases of loans, borrowings or financing from related parties.

### **Depreciation expenses**

The calculation of depreciation shall be terminated for all long term assets that do not contribute in the economic activity of the taxpayer.

### **Bad debt write-off for banks**

The instruction now reflects a provision regarding the treatment of bad debt expenses in the cases where the collateral is executed before the end of the 365 days deadline set by the law in cases of loans secured with movable or immovable properties. According to the amending instruction, if the movable or immovable property that secures the loan is executed before the 365 days deadline set in letter i) of the law, the previous bank provisions considered as deductible expenses shall continue to be considered as such.

### **Change of ownership and penalties for failure to notify**

A special paragraph is added in the instruction on income tax regarding the change of ownership thereby clarifying the purpose of such provision, modalities of application through some examples and notification requirements. The purpose of this paragraph is to enable taxation in Albania of gains from the indirect sale/transfer of valuable assets in Albania.

It is important to emphasize that the instruction clarifies that the notification requirement is not applicable in the cases where the sale of shares results in a change of less than 10% in the ownership of the Albanian companies because at such level, the Albanian company may not be aware of the sale transaction. However, even though there is no obligation for notification, the sale of shares is still taxable in Albania under the condition that more than 50% of the value of the shares derives from the immovable property in Albania.

### **Declaration and payment of corporate income tax from non-resident persons**

The amending instruction reconfirms the obligation for non-resident persons earning an income sourced in Albania that are subject of corporate income tax in Albania to submit a special form: "Form of Declaration and Payment by non-resident persons", the form of which is enclosed to this instruction.

### **Instruction "On national taxes"**

**In the Official Gazette no. 22 is published the Instruction of the Minister of Economy and Finance no. 9, dated 20.02.2019 'On some additions and amendments to the instruction no. 26, dated 04.9.2008, "On national taxes", as amended' through which are reflected the following amendments:**

#### **Royalty tax**

The instruction reflects the amendments of the law regarding the royalty tax rates for 'chromium mineral for export' and the percentage of the royalty tax for the content of the metal ore in the mining byproduct.

#### **Exemptions from carbon tax**

It is reflected in the instruction the exemption from carbon tax for quantities of gasoline and gasoil produced domestically, but exported outside the territory of the Republic of Albania. This way, the production entities are obliged to send information to the GTD by the 15<sup>th</sup> of the following month on which the tax payment is made, regarding: the quantities of gasoline and gasoil produced, the quantities exported, and the quantities on which taxes are paid.

#### **Plastic/glass items and packages**

The amendments brought to the law as part of the Fiscal Package 2019 regarding the tax on plastic materials/items, imported raw materials for their production and of glass/plastic packaging are reflected.

For plastic items and imported plastic packaging, a tax rate of 35 leke/kg applies, with the exception of raw materials in primary forms (chapters 3901 to 3914 of the NKM) for which a tax rate of 25 leke/kg applies in case they are imported by domestic producers or domestic importers of plastic products. In case the imported raw materials in primary forms are not used for the production of plastic products in the country, but for other technological processes or for the production of other materials not categorized as plastic products, then the tax of 25 leke/kg is not paid. In order to obtain exemption from this tax, the importer must apply the procedure and submit the documentation specified in the instruction.

The tax on plastic packaging applies even when the plastic material occupies, at least, 51% of the total packing size that packs other imported products. In cases where in the materials/items imported under Chapter 39 of the NKM, the non-plastic part occupies more than 51%, the tax applies only to the part of the plastic mass.

For domestically produced and for imported glass packaging, a 5 leke/kg tax will apply. This tax applies to all glassware, in cases where the packaging is imported separately and in cases where the glass material occupies at least 80% of the total packing size that packs other products.

For the purpose of applying the tax on imported plastic/glass packaging, the importing entity shall divide the type of packaging of the imported products. For glass packaging produced domestically, the tax is included in the taxable value of the invoice.

The Customs Administration reimburses the tax on plastic/glass packaging, which is exported and for which the tax has been paid at the time of import or production. Reimbursement of tax can be made against the completion of an application and procedure that will have to be followed with the Customs Administration.

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## Czech Republic

### New R&D tax relief rules apply

**On Tuesday, 12 March, the Chamber of Deputies approved an amendment to the Income Taxes Act, which also amends rules for applying R&D tax relief. Amendments proposed by the Senate of the Czech Republic were not accepted. Currently, the amendment still awaits the President's signature, but we expect the new rules to be effective from 1 April 2019.**

A draft of revised provisions was created in response to the recommendations of a working group set up under the leadership of the Research, Development and Innovation Council. The aim of the amendment is to eliminate uncertainties for taxpayers applying R&D tax relief (hereinafter "R&D") on the one hand, while avoiding the misuse of this instrument on the other hand. Since the introduction of the possibility to apply R&D tax relief to the Income Taxes Act in 2005, these are historically the first conceptual adjustments of the whole system.

#### **What does the R&D amendment bring specifically?**

First of all, it is the introduction of the "Notification of the intention to deduct R&D tax relief from the tax base" (hereinafter the "Notification"). In connection with it, the entire process of deduction changes as well. On the date when the R&D Project has to be approved under the current rules, under the revised amendment it will be necessary to notify the intention to apply deduction to the relevant tax authority. This notification obligation does not have a specific procedural arrangement; therefore, most taxpayers will probably deal with it by sending a standardised text notification through a taxpayer's data box. The content of the notification will be the name of the R&D project, describing its general focus, and basic identification data of the taxpayer.

It is important to point out that the introduction of the Notification does not invalidate the obligation to process the R&D Project. According to the amendment, it must be prepared and approved no later than the deadline for submitting a proper tax return, even if the deduction were not applied for the given period due to a low tax base or a tax loss. Procedural and content changes will apply to the R&D Project, too. In addition to the change of deadline for its approval, it will be newly terminologically referred to as the "Project Documentation" and the obligation to indicate the place of approval and the restriction that the approval can only be made by a taxpayer's statutory representative will disappear. On the contrary, it will be necessary to observe the compliance of the same project name in the Notification and the corresponding project name in the Project Documentation.

Since the new Project Documentation will usually be processed several months after the end of the taxation period, it can be expected that the tax authority will put greater emphasis on the content and sufficient concreteness of the document. In addition, according to the amendment, the taxpayer will be obliged to record changes made to the Project Documentation after its approval.

#### **Deloitte recommendations:**

- Take into account that the Name and Objectives listed in the Project Documentation cannot be changed during the project.



- Think through the name of the R&D Project mentioned in the Notification thoroughly and keep in mind that it has to be maintained also in the Project Documentation.
- Do not underestimate the start of the R&D Project. If you do not submit a Notification about a specific R&D Project to the relevant tax authority in due time, any expenses incurred after that date will not be eligible for deduction in tax returns.
- As the amendment becomes effective during the calendar year, it is necessary to pay increased attention to transitional provisions and to correctly determine whether the situation in your company is subject to the “old” conditions, the revised provisions, or you can choose between the two regimes yourself with respect to the possibility and also, if need be, the advantage in each specific situation (project).

We seek to respond to changes in legislative requirements, inter alia, through the implementation of appropriate technological solutions to ensure that we do not miss any formal or material requirement that is crucial to successful deduction.

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## Can holiday compensation be used as part of the R&D deduction claim?

**Holiday compensation and its utilisation as a research and development (“R&D”) deduction has been a widely debated issue in recent years. The General Financial Directorate refused for such compensation to be utilised as part of the R&D deduction; on the other hand, a strong opinion of legal experts existed upholding the legitimacy of the deduction. Therefore, it was evident that the matter had to be decided in court.**

This week, the Regional Court in Hradec Králové has published a decision in favour of the plaintiff (ZVU Engineering a.s.) against an additional corporate income tax assessment for the 2011, 2012 and 2013 taxation periods. The tax was additionally assessed based on the non-recognition of the legitimacy of personnel expenses relating to employees’ holiday compensation as part of the R&D deduction.

The plaintiff argued that compensation for the holiday entitlement used is, pursuant to the Labour Code, an integral and obligatory part of personnel expenses, which is why it may be considered as equal to a wage for performed work, which is generally accepted.

The tax administrator opined that a deductible item may only include expenses that have been incurred in direct relation to implementing an R&D project. This condition is not met in the event of holiday compensation and relating social security and health insurance contributions as employees are not involved in implementing R&D projects during holidays. Simultaneously, the tax authorities consider it possible, pursuant to Decree D-288, to include only employees' wages in personnel expenses.

However, the Regional Court did not agree with this argumentation, confirming that not only the costs of wages or salaries need to be incurred in respect of development employees but also other relating expenses, which also cover holiday compensation. The Court opined that the time spent by employees on holiday is necessary for employees to implement R&D projects. The costs of holiday compensation are thus considered as "costs incurred in direct relation to implementing an R&D project". What is more, the existing legal regulation of utilising R&D deduction is also rather unclear in that holiday compensation is not to be included in the deduction. For the sake of completeness, attention was also given to the fact that Decree D-288 cannot restrict taxable entities' rights beyond statutory limitations.

The authors of this article would like to note that owing to the financial implications of the respective decision, a cassation complaint is expected to be filed. Consequently, it looks likely that the question as to whether it is legitimate to utilise holiday compensation as part of the R&D deduction will only be decided by the Supreme Administrative Court.

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## Lex Brexit – current status

**An approved law regulating various areas of so-called hard Brexit passed the legislative process. Following the development of the situation, it will be promulgated in the Collection of Laws unless a UK-EU agreement is agreed or Brexit is postponed.**

Below we summarise the current situation as regards so-called Lex Brexit – act on the adjustment of certain relationships concerning the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union.

- On 29 March 2019, it will be two years since the United Kingdom of Great Britain and Northern Ireland announced its intention to withdraw from the European Union following the outcome of a referendum. On the basis of a unilateral decision of the British nation to leave the EU, Article 50 of the Treaty on European Union was triggered in March 2017 and the Union is thus facing, for the

first time, a situation in which the relationship with a hitherto significant member state is being abolished.

- Part of the proposed UK withdrawal agreement is to negotiate the so-called transition period (from 30 March 2019 to 31 December 2020), during which the United Kingdom should be guaranteed a so-called third country status while simultaneously maintaining the status of a single market member.
- With regard to the existing development and UK's possible withdrawal without a proper agreement (so-called uncontrolled or hard Brexit), the government Committee for the European Union charged the Ministry of the Interior to prepare what is referred to as Lex Brexit. The government draft was approved by both chambers of the Parliament of the Czech Republic and signed on 7 March 2019 by President Miloš Zeman.
- The main objective of this temporary legislation is to adopt measures through which the Czech Republic minimises at least some of the imminent negative impacts that will occur in case of a missing agreement (i.e. hard Brexit).
- The recommendation issued by the Ministry of the Interior of the Czech Republic before the adoption of "Lex Brexit" is still in force and stipulates that a UK citizen who wishes to reside in the Czech Republic during the transition period should apply to the Ministry of the Interior of the Czech Republic (Department for Asylum and Migration Policy) for a certificate of temporary residence in the Czech Republic by no later than 29 March 2019.
- In order to ensure legal certainty, Lex Brexit allows UK citizens and their family members to carry out their work under the employment contract concluded before the entry into force of the transitional legislation without a work permit, employee card or blue card, legally until the end of 2020. During the transition period, these citizens will have sufficient time to settle the necessary work permits in the Czech Republic, which are usually required from so-called third country nationals.
- In terms of income tax, the taxpayer's situation needs to be assessed – in the case of Czech tax residents, Lex Brexit considers for some time the United Kingdom as an EU member state. However, it does not apply entirely to the situation of UK residents (particularly the withholding tax and tax securement, which will be applied in case of hard Brexit from 30 March 2019).
- Nevertheless, the measures cannot be applied in the case of taxes harmonised within the EU (VAT, excise tax) and customs duties where the rules as for third countries will apply (import-export) in the case of hard Brexit.

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## The Final Version of the Tax Package has Been Approved

**In general, the changes introduced by the tax package are expected to come into force on 1 April 2019; however, in certain situations, it is necessary to verify whether special effectiveness rules or transitional provisions apply or not.**

On 12 March 2019, the Chamber of Deputies voted on the tax package, which had been returned to it by the Senate with a proposed amendment in January. The deputies voted down the Senate's proposal, thereby approving the tax package in the originally approved wording.

The approved amendment to tax legislation (income taxes, VAT, Tax Code, excise taxes and others) now has to be signed by the President, and it subsequently will be promulgated in the Collection of Laws.

## What principal amendments the tax package includes?

### Income Tax:

- Implementation of principles arising from the ATAD – new principles seeking to limit cross-border tax optimisation schemes. It is a new concept for calculating non-tax deductible excessive financial expenses, introducing exit tax and rules for the taxation of controlled cross-border entities and limiting the use of cross-border hybrid schemes. The Tax Code will also specifically introduce the institutes of the anti abuse rule. For details about the implementation of the ATAD;
- Change in the upper limit of income of CZK 2 million to limit expense flat charge-off rates for the self-employed;
- Introduction of a new obligation to report payments in excess of CZK 100,000 not subject to withholding tax in the Czech Republic to the tax administrator on a monthly basis (payments that are exempt or not subject to taxation in the Czech Republic based on the applicable double taxation treaty provisions);
- Change in the rules for preparing research and development projects;
- Possibility of reflecting the impact of IFRS as early as for the 2019 taxation period (financial institutions); and
- Change in the withholding tax limit to the amount decisive in paying sickness insurance.

**VAT:**

- New guidance on taxing vouchers (single-purpose and multi-purpose vouchers)
- New provisions on the date of taxable supply (ancillary supplies to leases, long-term supplies)
- New rules for delivering tax documents
- Finance lease definition (effective from 2020)
- Lease of real estate and taxation option restriction (effective from 2021)
- VAT deduction adjustment in respect of real estate repairs
- VAT deduction claim upon registration
- Determination of the place of supply on electronically-provided services

The amendment is expected to become generally effective on 1 April 2019; however, the effective date is different for some of the provisions – therefore, we recommend carefully verifying the effectiveness of amendments, if relevant.

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## Hungary

### Regulations on making and managing security camera recordings are changing in favour of data controllers

**Rules governing the use of close-circuit television cameras (CCTV), better known as security cameras, i.e. privacy issues related to the image and voice footage recorded by the cameras are governed by the act on the security of persons and property.**

Few are aware of the fact that the operation of security cameras involves management of personal data, therefore such activities may be conducted in accordance with the prevailing data protection regulations and even fewer know that pursuant to the effective regulation, consent is needed for data handling, i.e. to record our image by camera. This consent is given by entering the area protected by camera surveillance despite the displayed information.

With the General Data Protection Regulation of the European Union (GDPR) entering into force on 25 May 2018, there came a significant change in terms of legal grounds. Pursuant to the GDPR, consent may be revoked at any time, in which case the personal data (in the present case, video or audio footage) must be deleted. As this cannot be implemented in practice, deregulation of the property security act with regard to legal grounds is necessary.

The law harmonising the GDPR currently at Parliament will settle this issue and after the adoption of the amendment, the legal ground for observation by camera surveillance as data handling activity will be the legitimate interest of the data controller. It is important to note that the application of these legal grounds generates administrative obligation for the data controller, as in order to comply with the legal regulations, he must perform a so-called balance of interests test, and inform those affected or the NAIH about its result if requested.

Further important news are expected regarding the retention time of the recordings. Currently, the property security act prescribes strict deadlines for the retention of video and audio footage, which, in accordance with the NAIH's practice, must be also applied by data controllers not affected by the scope of the security act. Pursuant to this act, as a general rule, video and audio footage may be retained for 3 working days, and in special cases for 30 or 60 days. Experience shows that the 3-day retention time often does not comply with the interests of data controllers. The omnibus act is expected to be repeal the current regulations and in the future, the retention time of the recordings will be defined by the data controller; however, it should be noted that the retention period must be reasoned in each case.

Although the deregulatory changes of the property security act are expected to lighten the obligations, data controllers will still have to surround themselves with appropriate documentation, so that camera surveillance, especially the legitimacy of the retention time of recordings will be appropriately verifiable. A tool for this is the balance of interests test, but it is also recommended to perform a detailed analysis to support the retention deadlines.

### Beneficial changes regarding the EKD grant

The amendment of the government decree on grants based on an individual government decision (EKD grants) entered into force on 6 March 2019. It positively affects non-refundable EKD grants for job creating investments, non-job creating (technology-intensive) investments, as well as R&D projects.

Main points of the amendment:

- In the case of **technology-intensive** investments, there is a possibility to realise a **joint project between two associated parties**, and the minimum eligibility headcount has **decreased** from 250 to **100 people**.
- In the case of **research and development projects**, the scope of eligible costs **has been extended with the contracted research costs**, up to 25 percent of the full eligible costs of the project.
- Besides Békés, Nógrád and Szabolcs-Szatmár-Bereg counties, the EKD grants have become available in **Borsod-Abaúj-Zemplén county** as well, in the case of investments exceeding 5 million euros and **50 newly created jobs**.
- In the case of projects regarding **rented or leased property**, if the lease/rental contract expires before the end of the compulsory operational period, in the future, it will be sufficient to undertake to prove the availability of a different venue in the same planning-statistical region as the original investment venue, which complies with the above criteria.
- The scope of eligible costs of **non-current asset-based investments** has been modified:
  - Costs of **tools related to renewable energy generation** qualify as eligible costs under certain conditions (energy production is not the primary goal of the investment, the generated energy must serve the operation of the investment, maximum 20% of the produced energy may be sold), up to 25% of the total eligible costs of the project.
  - The minimum cost of eligible tools has increased to HUF 200 thousand.

**For more information concerning EKD grant or other state grants please turn to our expert at the following contact details.**

### Wave of inspections at employers – Is your company affected?

Considering the increasing employment difficulties and the significant tax impact, reviews of engagement contracts and services agreements by the tax authority are on the increase. The existing legal practice entails that the tax authority can introduce sophisticated criteria to assess the contractual background and actual circumstances of outsourced work processes.

Experience shows that the tax authority increasingly looks for activities suggesting concealed employment performed seemingly under a mandate agreement or a services agreement. In the course of such inspections, employers **are in a significantly harder position** this year than before: for a year, in accordance with the legal amendment effective since the

beginning of the year, it cannot be reasoned anymore that both parties preferred a mandate agreement or services agreement instead of an employment contract; in addition, the employer **is obligated to prove** that the legal relationship in question is subject to the Civil Code and not the Labour Code.

It is an important and often forgotten fact that it is not only **services agreements** and **mandate agreements** that may pose reclassification risks: contracts for the transfer of the employee's workforce may also be reclassified. For example, an imprecisely worded services agreement, where services include the employers of the service provider working for the recipient of the service may be interpreted as a concealed temporary labour contract. **Control risk** is heightened in the case of such contracts by both the fact that temporary labour requires a permit, and the fact that based on inspection trend forecast by the NAV, this year the inspection of the temporary labour sector will have special emphasis.

It can be concluded that in the case of every entity which receives the services of third parties for activities that can also be performed in an employment relationship for a longer or indefinite period under a mandate agreement or a similar agreement, **a heightened risk of inspection should be expected**. Furthermore, the risk of an unfavourable tax authority finding is increased by factors such as the following:

- **KATA taxpayers** provide services to the company, especially of the service provider used to be an employee;
- A task that can be performed individually is carried out by a third party **who used to be an employee** or an activity that used to be performed internally is outsourced;
- Previous employees are further employed via **temporary employment**;
- The job includes **activities** that can be performed individually **that could be outsourced** and could be performed under an employment relationship (e.g. IT, logistics, security services, property management e.g. cleaning, certain production or research sub processes).

If **concealed employment can be concluded** and the tax authority reclassifies the contract, the employer incurs PIT and social security contribution liability retrospectively, and VAT on the service received may not be deducted due to fictitious contract. Furthermore, the service **cannot be recognised** as subcontractor's performance **in terms of local business tax** and the actual employer must bear the sanctions after the total findings (tax penalty, late charges), and the managing director will bear criminal liability.

In addition, a reclassification may involve **further labour law impacts**, such as termination of the contract by the principal may be qualified as the unilateral (and unlawful) termination of the employment relationship, considering which the adverse party is eligible to demand severance payment and damages. This **poses a high-level risk** even if the employment was not even inspected by the tax authority, as a claim by one or several contractors / entrepreneurs might direct the NAV's attention to the applied structures. Of course, in the case of reclassification of a services agreement (as a temporary employment agreement) the risk is already increased in the case of all employees affected.

Other rulings pertaining to tax implications fully utilize and adopt the system of criteria developed for the clarification of legal relationships



especially in civil law cases. It is also obvious that the authorities have established responses for typical arguments used in the reasoning of mandate agreements or contractual relationships, i.e. for example **a reasoning explaining the contractual freedom of the parties is not suitable** for the defence of such structures and for the avoidance of negative legal ramifications, especially since the aforementioned legal amendment.

Our team specialised in legal disputes with the tax authority therefore suggests a detailed review to assess the rate of the risk of a reclassification by the tax authority with regard to all outsourced work processes. After reviewing the contracts and the actual working circumstances, **our experts recommend the course of action** – whether regarding the actual circumstances or the contractual background – **which can help mitigate the risk.**

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## Kosovo

**Resolution No.06-R-016 on the suspension of gambling activities has been published on the official website of the Parliament of the Republic of Kosovo.**

**This Resolution is a response of the Parliament to the increasing illegal activities that occur on gambling grounds.**

This resolution, while relatively short has a wide-ranging impact on Kosova. With two goals set in the Resolution, the Parliament has obliged the government to:

1. Start the legal proceedings for the suspension of all types of gambling activities pending the amendment/supplementation of the appropriate law;  
and
2. Within 30 (thirty) days the Government shall put forth the Draft Law which prohibits all gambling activities for a 10 (ten) year period;

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## Poland

### **Withholding taxation (WHT) in view of the new beneficial owner definition. Actual economic activity requirement. The possible restriction of withholding tax (WHT) relief**

**One of the most widely discussed issues among the amended provisions concerning withholding tax (WHT) is the new definition of a beneficial owner. As a result of introducing new conditions, this definition has been significantly restricted. Moreover, according to the statement of the Ministry of Finance, the criteria from the new definition can be applied even where applicable provisions do not include a beneficial owner clause. This can result in restricting the scope of exemption from withholding tax and questioning the right to apply double tax treaties in many typical examples of payments within capital groups.**

#### **Beneficial owner and withholding tax (WHT)**

The concept of a beneficial owner has been developed on the basis of double tax treaties to restrict the right to enjoy the benefits granted by such treaties in situations when the payment recipient (a resident of the country being a party to the treaty) is only the formal disposer of the payment. When such recipient does not meet the criteria of a beneficial owner, certain benefits under the applicable treaty (exclusive taxation in the country of residence, reduced tax rate) are not awarded. Most commonly, such situation regards the taxation of interest and royalties – however, to apply this regulation, as a rule, it is necessary for a double tax treaty to refer directly to them.

#### **New definition in Polish tax law**

Since January 1, 2019 the definition of a beneficial owner in the CIT Act and the PIT Act has been significantly changed. According to the new definition, a beneficial owner is an entity that jointly meets the following criteria:

- it obtains an amount due for its own benefit, including that it can decide on its own on use thereof, and bears an economic risk related to loss of this amount due or its part;
- it is neither an intermediary, nor a representative, trustee, nor another subject obliged to transfer the given amount due to another subject in whole or in part;
- it carries out actual economic activity in the state of its place of residence – in the case of the amounts due gained in connection with the economic activity carried out.

The most significant change in comparison with the previous definition is introducing the requirement of carrying out actual economic activity. What is more, according to the Ministry of Finance's statement, this requirement refers also to holding companies receiving dividends (which, as a rule, are not connected with economic activity carried out).

#### **Actual economic activity and withholding tax (WHT)**

While assessing the actual economic activity one needs to apply regulations concerning Controlled Foreign Companies (CFC). In this respect, in particular the following conditions must be taken into account:

- existence of an enterprise, within the framework of which the entity actually carries out operations, including in particular possession of premises, qualified personnel and necessary equipment;
- proportionality between the scope of activity carried out by an entity and the premises, personnel or equipment actually owned by it;
- independent performance of the enterprise's basic economic functions using its own resources, including the executives present on site;
- the economic justification of the ownership structure and concluded arrangements.

#### **When the status of a beneficial owner matters**

The new definition applies directly while considering withholding tax exemption for interest and royalties paid between certain related entities (there are, however, doubts as to whether this is in accordance with the Interest-Royalty Directive – the legal act being implemented to the Polish legal system by the analyzed provisions).

However, it seems that tax authorities may also want to apply it in other circumstances – when the provisions of a double tax treaty include a beneficial owner clause or even to all payments in the scope of taxation of withholding tax under domestic law.

During the last consultations, the Ministry of Finance stated that even though the new regulations do not include a beneficial owner clause in circumstances where it had not previously appeared, in practice, meeting the beneficial owner criteria might be demanded every time when applying double tax treaties (and exemptions resulting from Polish tax law).

One might expect that tax authorities will demand, in case of each such payment, verification whether:

- taxpayer receives the payment for its own benefit (including whether the benefit is permanent or the payment is passed through);
- taxpayer carries out actual economic activity.

In case of lack of one of the above-mentioned requirements, applying tax exemption or reduced tax rate from a double tax treaty may be questioned.

#### **What to pay attention to**

Bearing that in mind, analyzing payments to non-residents from the perspective of the two above-indicated requirements is vital. Attention should be paid, in particular, to:

- **dividend payments**, especially when functions and assets of the receiving holding company are significantly limited;
- **interest payments** to inter-company financing entities or entities which use external financing on their own;
- **royalty payment**, especially in case of sub-license agreements (for instance royalty paid to a related entity that bought the license from an external supplier);

- **payments of remuneration for inter-company intangible services**, especially in situations when such payments are made to the invoicing entity which does not provide all of services on its own.

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### Changes planned in respect of trading in heating oils. New obligations linked with the preferential excise duty rate on heating oils.

The Government Legislation Centre has published a modified draft of the Act amending the Act on the system of monitoring road and rail transport of goods and some other acts (hereinafter referred to as: "the draft Act"), prepared on the basis of discussions, public consultations and opinions. The explanations accompanying it suggest that the rationale underlying the new legislation is to maintain the upward trend in the budgetary receipts from taxes by reducing the shadow economy associated with heating fuels.

#### **New obligations imposed on entities trading in heating oils**

According to the explanatory statement published together with the bill, the new Act will introduce a comprehensive regime aiming to seal the tax system applicable to trading in heating oils. In addition, the new regulations are also expected to reduce the administrative burden on entrepreneurs trading in heating oils.

The draft Act provides certain criteria that must be fulfilled in order to apply the reduced excise duty to heating oils used for heating purposes, namely:

- proper monitoring of the transport as well as the sales and purchase transactions not associated with movement of oils through the SENT system (transportation package) (in addition, this obligation will need to be met regardless of the purpose of the goods and regardless of whether the preferential excise duty treatment is applied or not),
- following a specific transaction pattern for these products,
- separate excise duty registration for transactions involving heating oils (the so-called simplified registration).

It needs to be emphasized that the scope of the planned changes is fairly extensive, e.g. they might also concern natural persons not conducting business operations. According to the draft Act, such natural persons will be required to make a simplified registration for excise purposes and fulfil certain obligations in the scope of SENT through the PUESC platform, e.g. concerning registration with an appropriate IT system.

Furthermore, the draft Act introduces two new institutions for excise purposes: (i) an intermediary oil entity and (ii) an oil consuming entity. As a result, in order to benefit from the preferential excise duty rate for heating oils, entities that so far had little to do with excise duty would have to learn to operate in a new reality.

#### **When will the new regulations take effect?**

The new legal regime will be introduced in stages. As regards the amendments concerning the excise duty, the simplified registration requirement comes into force as from **01 June 2019** and the registration will need to be made before the first operation involving non-exempt heating oils. The remaining provisions of the draft Act enter into force as of 01 September 2019, but the legislator has provided for a transitional period **until the end of 2019** during which it is possible to follow the current rules of applying reduced excise duty rates to heating oils.

### **Implications of non-compliance**

Considering the current wording of the regulations contained in the draft Act, the use of the SENT monitoring system seems to be among the most burdensome obligations requiring the involvement of entities purchasing heating oils (also natural persons that do not conduct business activity). The transportation package regulations provide for the possibility to impose severe fines for non-compliance.

Notwithstanding the above, non-compliance with the requirements provided for in the Excise Duty Act will primarily result in the necessity to tax the heating oil with a higher excise duty rate, which may translate into higher prices of the oil.

### **What next?**

The amendments to the binding regulations discussed above constitute yet another step towards increasing the technology-based state supervision over trading in sensitive products. First, the monitoring of the transport of sensitive goods by means of SENT was introduced, then the authorities started supervising trading in certain categories of excise goods through electronic delivery documents (eDDD), and now such control is to be extended to heating oils. All the associated obligations are carried out electronically and involve the PUESC platform. Considering this common feature of all newly introduced control systems, all the entities concerned should contemplate the possibility of making the relevant registration in advance, taking into account all the potential obligations that may need to be fulfilled in the near future.

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### **New VAT rate matrix - outcome of stakeholder consultations. Partial concessions on the side of the Ministry of Finance.**

**On 15 February 2019 the Government Legislation Centre published the results of the public stakeholder consultations concerning planned changes in VAT rates.**

For several months now the Ministry of Finance has been working on extensive amendments to the VAT Act, namely a system of reduced VAT rates (we discussed this matter in our [alert of 13 November 2018](#)).

Although the main objective of introducing the changes is to simplify the system based on the principle of levelling down the rates, the draft Act has been very controversial from the very outset, especially among the representatives of the food industry who are displeased at the fact that it

simultaneously prescribes an increase (sometimes a significant one) of VAT rates on many products.

On 15 February 2019 the Government Legislation Centre published on its website a several dozen page-long document summarizing all observations made during the public consultation process.<sup>[1]</sup> In a sense, the document heralds the changes that are to be included in the next version of the draft.

Below please find a brief synopsis of the document.

### **Juices and nectars - more beverages covered by the 5% VAT rate**

Currently, fruit and vegetable beverages are subject to a preferential rate of 5% VAT, if they contain at least 20% of juice (if the juice content is lower, the rate is 23%). In the original version of the draft act the reduced rate applied only to beverages with 100% juice content.

However, in response to the protests of the representatives of the fruit and vegetable industry, the ministry has decided on a compromise. According to the new version of the draft, the 5% rate is to be applied to:

- 100% juices;
- fruit nectars and vegetable drinks where the weight proportion of vegetable juice is at least 50% of all ingredients;
- beverages created as a result of mixing the above products.

Fruit nectars are to be defined in line with the implementing regulation issued on the basis of Article 15.2 of the Act of 21 December 2000 on the commercial quality of agri-food products (which specifies, among other things, the minimum proportion of fruit juice from individual fruits in the ingredients of such a beverage).

At the same time, the demand to maintain the 5% rate for vegetable beverages (made from oats, buckwheat, spelt, rice, soya, etc.) has been rejected. Currently, they benefit from a preferential rate, because generally, they are considered beverages with juice content exceeding 20% of ingredients. The Ministry does not want to regulate this product category separately – in effect, they can enjoy preferential tax treatment only if the new criteria are met.

### **The VAT rates on regional and local newspapers and audiobooks**

The so-called specialist magazines within the meaning of Article 2.27f of the VAT Act (i.e. magazines with relatively low circulation concerning e.g. cultural, popular science, social, regional or local issues) constitute another area where higher VAT rates can be expected.

In acknowledgement of the opinions expressed by the representatives of the industry concerning the negative implications of raising the rates on local and regional newspapers, the new version of the draft preserves the reduced rate of 5% on regional and local magazines (to be defined in detail in item 27g which is to be added to Article 2 of the VAT Act).

The wording of the provisions contained in the new Act will also be clarified so as to cover audiobooks recorded on physical carriers with the preferential 5% rate, and the so-called yearbooks - with 8% rate applicable to the press. Conversely, the Ministry is unwilling to support the demand to



maintain the ISBN and ISSN symbols as a precondition to be met by publishing houses if reduced rates are to be used.

### **New effective date**

Until now it was assumed that the new regulations, especially the new laws concerning:

- **the binding rate information (WIS)** - a formal protection measure for taxpayers in terms of the applied rates,
- some aspects of the new VAT rate matrix concerning books, journals, e-books, etc.,

would take effect as early as on 1 April 2019. Now however, the Ministry wants to postpone the effective date until **01 June 2019**.

At the same time, the effective date of the new VAT rates matrix (**01 January 2020**) has not changed, which means that businesses will have less time to prepare for these extensive changes.

### **Binding rate information (Wiążąca Informacja Stawkowa, WIS) and other issues**

As expected, it has been formally confirmed that veterinary medicinal products will be subject to 8% VAT rate.

The procedure of issuing **the binding rate information (WIS)** will also be modified. Contrary to previous assumptions, not the directors of the tax administration chambers appointed by the Minister, but rather one national authority, i.e. the Director of the National Fiscal Information (who is already responsible for issuing individual tax rulings), will have the competence in this scope. Hopefully, this change will improve the consistency of the standpoints expressed in tax matters by the taxman. Moreover, it is planned that the WIS will refer not only to one product or one service, but also to comprehensive services (e.g. sets consisting of several products).

Endnotes:

<sup>[1]</sup> <https://legislacja.rcl.gov.pl/projekt/12317902>

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## Industrial Property Law -amendments in the scope of trademarks

**On 20 February 2019 the Sejm adopted the Act amending the Act: Industrial Property Law. The amendments implement into the Polish law the provisions of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks. The new legal regime will come into force on the day following the date of announcing the Amending Act.**

### **New definition of a trademark**

The most talked-about modification is the introduction of a new definition of the trademark which provides that the trademark **no longer needs to contain a graphical representation**. With this amendment the definition of a national trademark is equated with the definition of a European Union trademark provided in Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

Until now, under the Polish law, a trademark was a sign that could be represented graphically, provided that such a sign was capable of distinguishing the goods or services of one undertaking from those of other undertakings. In line with the new wording of Article 120(1) of the Industrial Property Law ("IPL"), a trademark may be any sign which makes it possible to distinguish the goods of one enterprise from the goods of another enterprise and may be presented in the trademark register in a manner that makes it possible to determine an unambiguous and precise subject-matter of the protection granted.

The basic idea underlying the change of the definition is to make it easier to register "non-traditional" trademarks, such as sound, colour, hologram, and in theory also smell or taste. Until now, due to the obligation to present the trademark graphically, it was extremely difficult to register unconventional trademarks under the national procedure. The Patent Office of the Republic of Poland has granted patent protection to, e.g. the bugle call of St. Mary's Church in Cracow (R-238511), the petrol station look (R-151457) and the orange colour (R-376006), but the above examples are exceptions.

However, while the requirement of graphical representation of a trademark, i.e. the visual perception criterion, has been formally removed based on the amended provisions, the burden has shifted to the necessity of presenting such a trademark in the register in a manner that will allow for the determination of an unambiguous and precise subject matter of protection. That requirement cannot be examined in isolation from paragraph 13 of Directive 2015/2436 according to which a trade mark must be capable of being represented in a manner which is clear, precise, self-contained, easily accessible, intelligible, durable and objective. It should be pointed out that those conditions are derived directly from the judgement of the Court of Justice of the European Union on Case C-273/00 (*Sieckmann vs. Deutsches Patent und Markenamt*).

Hence, even though the formal obstacle of the graphical representation criterion has been removed from IPL, the requirement to present the sign in the register in a manner that will allow for the determination of an

unambiguous and precise subject matter of protection may still pose problems when registering unconventional trademarks.

### **Amendments concerning the list of signs for which no protection is granted**

To date, spatial signs showing only the shape of the goods (conditioned solely by their nature, necessary to obtain a technical effect or significantly increasing the value of the goods) were not subject to registration. The wording that defined this exclusion has also been changed. According to the new legal regime, signs consisting exclusively of shapes or other characteristics of the goods resulting from the nature of the goods themselves, necessary to obtain a technical effect or significantly increasing the value of the goods, will not be subject to registration. Therefore, registration of a spatial sign will still not be completely excluded, however not only the shape of the sign itself, but also its other properties and the extent to which they result from the nature of the goods as such will be examined.

### **Easier extension of the trademark rights**

Under the new wording of Article 153.3-6 the trademark rights shall be extended for further ten years, providing the fee for the extended period of protection is paid. This means that in order to **renew the right of protection, it is sufficient to pay the relevant fee.** By implication, it is not required - as under the previously binding version of the Act - to engage each time in the formal procedure of submitting an application for extension of the right of protection to the Patent Office, where the Office had to issue a formal decision approving the application (which approval generally depended only on the payment of the fee for extension of the period of protection).

**In this connection the amendments reduce the redundant formalities and streamline the procedure of renewing trademark rights, which is definitely an improvement.** Nonetheless, as opposed to the previous status, the new law does not provide for an additional period allowing the stragglers to retain their protection rights, if their application for renewal and payment of the relevant fee is made within 6 months after the expiry of the period for which the trade mark protection right was granted. By contrast, this change should be assessed negatively. Possibly, that is the reason why the legislator has introduced a provision according to which the Patent Office reminds the holder of the trademark right about the approaching date to pay the fee for the further period of trademark protection (Article 224.21 of the IPL).

Regardless of the above, the holders of trademark rights should continue to monitor the expiry dates of their trademark rights themselves, because under Article 224.23 of the IPL, if the right holder does not receive a notification from the Office about the approaching fee payment date, it does not in any way affect the expiry date of the protection rights. In other words, if a right holder fails to pay the fee for the subsequent period of protection within the time limit allowed, they cannot invoke the fact of not receiving a reminder from the authorities.

It should also be noted that the amended provisions of the IPL do not prescribe that the fee for further trademark protection must be paid by the right holder. Under the previously binding legislation a request for extension of the protection rights could only be submitted by the right holder, which

was clearly stipulated in Article 153.3 of the IPL. Does it imply that in the current legal status anyone can pay the fee for extending the protection rights with effect for the right holder? Not necessarily, because according to the new wording of Article 153.4 of the IPL, the Patent Office may ask the payer to provide explanations, inter alia, as to the grounds for paying the fee.

At the same time however, the legal regulations do not specify who - apart from the owner of the trademark - is considered the right holder. One may wonder whether the fact that the regulations governing the extension of trademark protection rights do not include a requirement for the right holder to personally pay the fee may open a possibility for licensees or pledgees to make such payments, considering that they have a material factual interest in it, and the legal grounds for such payments are provided by the relevant provisions of their licence or pledge agreements.

### **More rights granted to licensees in respect of protection of infringed trademark rights**

Under the previous version of the Act only the exclusive licensee (apart from the right holder) could assert claims on account of infringement of trademark protection rights, and that option was available only if the exclusive licensee was entered in the trademark register. Neither non-exclusive licensees nor exclusive licensees who were not disclosed in the trademark register could raise claims against the infringer; their only resource was to try to force the licensor (if the licensor was the right holder) to take the relevant steps against the infringer. The only steps that the licensee could take was to ask the licensor to provide them with the power of attorney *ad litem*. Even so, if the licensee was taking steps under POA, they were acting on behalf of the licensor and any compensation amounts or refunds of unjustified benefits were potentially awarded to the licensor.

Under the new wording of Article 163.11, unless the licence agreement provides otherwise, the licensee may bring an action for infringement of the trademark protection right only with the consent of the right holder. Hence, while the consent of the trademark right holder is still required for the non-exclusive licensee to file an action against a trademark infringer, it seems that **if such consent is obtained, the non-exclusive licensee may file claims on his/her own behalf.**

The amendments also affect the rights of exclusive licensees that - in accordance with Article 163.11 of the IPL - may bring an action against a trademark protection rights infringer, if the right holder (licensor), despite being requested to do so, fails to bring an infringement action within a reasonable period of time.

As indicated above, the changes in the exclusive licensee's rights are important. First of all, **the requirement to disclose the exclusive licensee in the trademark register as a prerequisite for his/her right of action when pursuing claims for infringement of trademark protection rights no longer applies.** It is not entirely clear whether the said right of the exclusive licensee may be excluded under the licence agreement - the wording of Article 163.1<sup>1</sup> of the IPL seems ambiguous in this respect.

As per the previously binding legislation, the exclusive licensee disclosed in the trademark register - unless the licence agreement provided otherwise -

did not have to take into account the steps taken by the licensor against the infringer when deciding to file a claim for infringement of the trademark protection right. The amended Article 163 of the IPL gives the right holder (licensor) priority in asserting claims due to infringement of the right of protection. Namely, **the exclusive licensee is entitled to bring an action against the infringer only after a relevant time limit set by the exclusive licensee for the right holder** (licensor) to bring an action against the infringer **has expired ineffectively**.

Additional claims of the right holder under the trademark protection right in the event of infringement of rights

The amended provisions of the Industrial Property Law ensure increased protection of the right holders whose trademark protection rights have been infringed.

The new regulations directly address the issue of counterfeiting goods and additional claims protecting the right holder against infringement of their rights. The amendments specifically regulate the issue of packaging, labels, tags, the elements of a product, its protection or authenticity verification, if the trademark is placed on them and where they could be used in relation to goods in a manner that violates the trademark protection rights. Thus, if there is a risk of using such packaging, labels, tags, product elements or security features in a way that results in trademark right infringement, the right holder will be able to prohibit the affixing of a sign identical or similar to the protected trademark on them. In addition, the right holder will also be able to prohibit the offering, placing on the market, import, export or storage of such items. Irrespective of the new rights, it will also be possible to use the legal remedies available so far in case the trademark has already been infringed, i.e. to demand that the infringement be ceased, that the unlawfully obtained profits be surrendered, and - in the case of intentional infringements - to demand compensation.

An additional weapon in the fight against trading in counterfeit products is the possibility to prohibit third parties from marketing goods (as part of their business activities in Poland) that originate from third countries and that, without the right holder's consent, bear a trademark that is identical or that cannot be distinguished in terms of its essential features from the trademark used.

More entities will be accountable for infringement of trademark rights

Under the previous legal regime any person whose trademark protection right was infringed could enforce a claim against two entities:

- 1) the direct infringer; and
- 2) a person who only put on the market the goods already bearing that trademark, provided that the goods did not originate from the right holder or from a party authorised by him to use the trademark.

In line with the amendments, **a third entity, i.e. a person whose services are used to infringe the trademark rights, can also be held accountable**.

According to the explanatory statement accompanying the bill amending the Industrial Property Law, Article 296.3 has been amended to align the Polish law with the guidelines of the judgement passed by the CJEU on 7 July 2016, case C-494/15. In this judgement, the CJEU stated that the third sentence of Article 11 of Directive 2004/48/EC on the enforcement of intellectual property rights must be interpreted as meaning that the tenant of market halls who sublets the various sales points situated in those halls to market-traders, some of whom use their pitches in order to sell counterfeit branded products, falls within the concept of 'an intermediary whose services are being used by a third party to infringe an intellectual property right' within the meaning of that provision. In addition, CJEU also prescribed that the third sentence of Directive 2004/48 must be interpreted as meaning that the conditions for an injunction within the meaning of that provision against an intermediary who provides a service relating to the letting of sales points in market halls are identical to those for injunctions which may be addressed to intermediaries in an online marketplace, set out by the Court in the judgement of 12 July 2011 (C 324/09). This means that the injunctions must be effective, proportionate and dissuasive and should be applied in such a manner as to avoid the creation of barriers to legitimate trade.

As per the last sentence of the amended Article 296.3 of IPL "*the provision shall be applied without prejudice to Articles 12-15 of the Act of 18 July 2002 on provision of services by electronic means*". In practical terms, this means that, in principle, extending the list of entities that are held accountable for infringing the trademark protection rights does not affect the liability of online intermediaries whose platforms are often used to infringe intellectual property rights, including the trademark protection right (e.g. by selling counterfeits). As before, it will be possible to hold such intermediaries accountable for infringement of trademark protection rights after the so-called "notice and take down" procedure has been unsuccessfully followed, i.e. only if they do not prevent access to the data stored by them, despite having obtained reliable information about the unlawful nature of the data stored.

However, the extended list of entities held accountable for infringement of trademark rights covers all entities other than online intermediaries, whose services are used to infringe the right of protection.

Under the new regulations the concept has a broad character and in theory, may also include e.g. a courier or the Polish Postal Services delivering parcels with counterfeit goods. The case-law will show where the limits of intermediaries' liability for infringement of trademark protection law are. Nevertheless, this far-reaching legal uncertainty should be definitely assessed as something negative.

Furthermore, apart from using a very imprecise concept of "an entity whose services were used to infringe the protection right", it can also be argued that the amendments do not properly incorporate the guidelines of the CJEU arising from the aforementioned judgement (C-494/15). Both Article 11 of Directive 2004/48/EC, as well as Article 8(3) of Directive 2001/29/on the harmonisation of certain aspects of copyright and related rights in the information society refer to an "injunction" imposed by a court on an intermediary which should be understood as an obligation put on the intermediary to cease the infringements of intellectual property rights by the users of its platform, as well as to prevent new infringements of this kind (as indicated by the CJEU in its judgement C-494/15). It was not the

intention of the EU legislator or the CJEU to equip the right holder against the intermediary by giving him a wide range of claims that he is entitled to against the direct infringer. However, the new wording of Article 296.3 of IPL allows the right holder to raise all claims described in Article 296.1, including compensation claims, against the intermediary. While such a solution is certainly beneficial for the right holder whose rights are infringed, the proportionality of these measures and their interference with the rights and freedoms of intermediaries may give rise to constitutional questions.

<sup>1</sup> According to this provision, "(...) Member States shall also ensure that owners may apply for a prohibition against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC".

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## Significant changes concerning the issue of municipal bonds binding as from 01 July 2019

01 July 2019 marks the beginning of a new chapter in the history of financing of, among others, local government units and municipal companies, but there is little talk about the upcoming changes and what the financing market will look like after that date. The far-reaching changes stem from the fact that most of the provisions of the Act of 09 November 2018 amending certain acts in connection with strengthening the supervision over the financial market and protection of investors in this market (Journal of Laws of 2018, item 2243) come into force in the second half of the year.

**The amendments will trigger significant changes in the structure of bond issues, which will be subject to severe sanctions, and impose disclosure obligations on the issuers who have issued debt in recent years.** This is particularly important for local governments that have been keen to use this method of financing indebtedness and investment projects in recent years.

The most important changes taking effect as from 01 July 2019 are the following: **it will no longer be possible to issue bonds in the form of documents and all issued bonds will need to be registered** in the depository for securities (maintained by the National Depository for Securities, "NDS" or a company to which the performance of such activities has been delegated). Until now the registration duty applied only to the bonds issued by way of a public offering, whereas the records of the so-called private placements (the form usually used in the case of municipal bond issues) were kept by the bank acting as the bondholder.

The above change will increase the costs of issues, because the registration will require payment of a fee for each series of issued securities. What is more, a sudden increase in the number of entities obliged to register the issued bonds may also result in extending the period needed to process the applications.

The registration data thus collected will enable NDS to make important information publicly available, i.e. the information on outstanding bonds issued by individual entities, on the amount of their liabilities arising from these securities, as well as the information allowing to determine the scope and timeliness of performance of the obligations. To ensure greater security of bond issuing and to streamline the process of bond registration with NDS or with a different authorised entity, the amendment puts the issuer under an obligation to enter into an agreement with the issue agent before conducting a private offering. **The issue agent will be obliged, among other things, to verify the legal requirements of the bond issue and to offer them, as well as to support the issuer in the process of registering securities in the depository.** Only investment firms authorised to maintain securities accounts (e.g. brokerage houses) or custodian banks will be allowed to perform that function. This is important inasmuch as not all banks that are now active in the local government funding market possess the status of custodian banks. In addition, the involvement of another entity in the issue process will increase the costs further. The regulations provide for **a fine of up to PLN 2,000,000 for failure to perform or inadequate performance of the obligation to**



**provide information concerning the bonds or the issuer in the securities' registration procedure where such data are important for the assessment of the admissibility of the registration.** Furthermore, the sanction may be imposed on both the management board members and the attorneys acting on behalf of the issuer or the issue agent.

The rules above will apply to bond issues to be executed after 01 July 2019. **As regards earlier issues of securities not redeemed by that date, the existing provisions apply, with a proviso that the Act imposes an additional disclosure obligation on issuers.** Namely, by 31 March 2020, issuers will be obliged to provide NDS with information on the bond issues conducted so far, in particular the number of securities, their interest rates and the dates of providing benefits from them, as at 31 December 2019. A failure to disclose such information will also be subject to a sanction of up to PLN 2,000,000.

**The bond issuers that - on the basis of the relevant contracts - are permitted to issue bonds both before 01 July and after that date will face certain difficulties. The emergent dualism will necessitate adapting the issue documentation so as to enable continuation of bond issuing after 01 July 2019 without the risk of sanctions.**

The amendments discussed here follow the MiFID II<sup>1</sup>/MiFIR<sup>2</sup> package which has been in force for more than a year and introduced significant changes in the bond issue market. The underlying objective of the legislator is to increase the transparency of the issue process and improve its security through the involvement of an additional specialised entity.

Nevertheless, it is hard to overlook that the changes above might discourage potential issuers because of the increased costs and stringent penalties for any breach of the regulations. Please be aware that many local governments, in view of their past experience with bond issuing, have already decided to run competitions to select issue agents on their own. However, considering the changes coming into force on 01 July 2019, it could be advisable to employ an entity providing professional advice to issuers so as to mitigate the risk of errors that may occur in connection with the introduction of new regulations, and thus avoid potential sanctions.

We expect that after a period of transition, the advantages of bonds, i.e. their flexibility and lack of the obligation to apply the public procurement law to the issues launched by local governments, will outweigh the risks and trouble associated with the new duties, and local governments will use this convenient way of obtaining financing as often as they do today.

<sup>1</sup>Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (EU Journal L 173/349) implemented into Polish legislation by the Act of 1 March 2018 amending the Act on trading in financial instruments and certain other acts (Journal of Laws of 2018, item 685).

<sup>2</sup>Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012 (EU Journal L 173/84).

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## Romania

### **New interpretation on the provisions of Directive 2011/83/EU requiring traders to inform the consumers with respect to the communications means**

A new, more flexible and result oriented interpretation of the provisions of Directive 2011/83/EU on consumer rights requiring traders to provide consumers information regarding the means through which they may contact the former, is offered by the Advocate General through the opinion issued in case C-649/17.

In the opinion, it is mentioned that the traders have the obligation to enable efficient communication means and to clearly inform the consumers regarding the way in which those means can be used. Yet, this obligation cannot be interpreted as imposing on the traders, in their relation with the consumers, the implementation of certain communication means specified by the Directive 2011/83/EU (e.g. the mobile phone).

Thus, the opinion underlines that consumer protection is done not by imposing certain methods of communication, but by ensuring that the consumers are able to use the most efficient means of communication for the environment in which they operate transactions.

The full text of the alert above can be found [at this link](#).

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**Significant amendments to Government Emergency Ordinance (GEO) 114 regarding the bank assets tax, as well as regulations pertaining to crediting activities and the energy sector**

A Draft Ordinance amending the provisions of GEO 114/2018 was issued yesterday. Most likely, the draft shall be adopted during the Government's session on 28 March 2019.

The most important amendment concerns the bank assets tax; the other amendments refer to the deadline for topping up the minimum share capital for private pension fund managers, as well as regulations in the field of energy. At the same time, the draft Ordinance also provides for new rules for the determination of variable interest rates on credit agreements concluded with consumers.

Below we summarized the main proposed amendments.

The full text of the alert above can be found [at this link](#).

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## Slovakia

### **EU proposes a regulation on emergency social security measures in the event of Hard Brexit**

#### **Proposal for a Regulation of the European Parliament and the Council on establishing contingency measures in the field the coordination of social security systems following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union without a Withdrawal Agreement**

In the absence of a withdrawal agreement or of an extension of the two-year period after the United Kingdom's notification of its intention to withdraw from the Union on 30 March 2019, the Union rules on social security coordination provided in Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 will also cease to apply to and in the United Kingdom.

To achieve the aim of safeguarding social security entitlements for the persons concerned, Member States should continue applying the Union's principles of equality of treatment, of assimilation and of aggregation laid down by Regulations (EC) No 883/2004 and 987/2009 as well as the rules of these Regulations necessary to give effect to the said principles, as regards persons covered, facts or events that occurred and periods completed prior to the withdrawal of the United Kingdom from the Union. To achieve a uniform unilateral application of the social security principles of equality of treatment, of assimilation and of aggregation, this contingency Regulation has been proposed.

This Regulation shall apply to all branches of social security provided for in Article 3 of Regulation (EC) No 883/2004 and it should apply as from the day following that on which the Treaties cease to apply to and in the United Kingdom unless a withdrawal agreement concluded with the United Kingdom has entered into force by that date.

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