Tax&Legal Highlights

Poland

Implementing the act on supporting new investments is gaining momentum. The Senate passed the new regulations without amendments.

On 16 May 2018, the Senate passed the act on supporting new investments- the last step of the legislative process is the president's signature.

What changes have been made in comparison to the governmental project?

The governmental project has been changed at the parliament stage in the following scope:

1. Settling state aid obtained on the basis of two or more decisions on support, permits or both.

3 new paragraphs have been added to article 13 of the act. Paragraph 6 and 7 implements the rule of chronological settling of state aid in the case of two or more decisions on support, or decisions on support and permits (in such a case, settling state aid occurs in accordance with the order of issue). An analogical rule will be implemented into article 12 of the Act on Special Economic Zones. What is important, at the same time the legislator has

decided not to change the provisions in the acts on income taxes in the scope mentioned above.

The role of the amendments is to sanction the existing practice of chronological settling of state aid resulting from more than one permit, which was a common practice executed through individual interpretations. It seems that the legislator has finally confirmed that companies in a given zone should calculate one result from exempt activities, regardless of the amount of permits it has.

The provisions will come into force at the moment the Act on supporting new investments comes into force, not from the new tax year: this additionally confirms the legislators' intent that the new regulations do not change the existing approach to calculating the tax result. Regardless of this, there are significant doubts if the individual tax interpretations will remain in force; in regards to income settled after the act comes into force (attaining new interpretations is worth considering).

There is also another question: if a business entity who in the second/next permit has other PKWiU codes (scope of the investment) than in the first/previous permit, shall he be entitled to state aid regarding second/next permit after using the state aid limit from the first/previous permit? Alternatively, will he be able to use the state aid limit from the first/previous permit despite the lack of PKWiU identity defined in the permit? Within this scope, it is worth looking at the common practices of tax authorities and courts.

Paragraph 8 was also added to article 13, stating that:

Settling state aid given to a business entity on a basis of a decision is only applicable to a decision on the basis of which the investment is fullfilled and business activity is conducted on its basis.

At first glance, it seems that introducing chronological settling of state aid, the legislator also introduces a project-based settling. From the legislator's rationality principle and the Ministry of Finance motives for amendment, it is possible to derive that it is applicable to a situation where the Company benefits from a permit/decision, while not realizing the investment that was the basis for its issue. It is important to state that the editing of the amendment allows for a broad scope of interpretation, which can lead to interpretational doubts in the future.

The regulation will also be added in almost identical wording to the article 12 of the act on special economic zones, and (what is alarming) will only apply to permits issued after the act on supporting new investments comes into force.

2. New rules on returning state aid in the case of revoking the permit/decision on support.

In regulations regarding accordingly PIT/CIT , new rules of returning due tax in the case of revoking the decision/permit on support, which will be enforceable form 1 January 2019. The amount of due tax will be calculated in two ways, dependent on the permits a business entity possesses:

- In the first case, when the business entity has only one permit/decision on support, the tax due shall amount to the amount of unpaid tax from the income incurred from business activity that is defined in the revoked permit or decision, along with interest- **in this case there are no changes;**

- In the second case, when the business entity has more than one permit/decision or jointly: a decision on support and a permit, the due tax shall be the amount of maximum state aid defined in the permit in the revoked decision- **here the change is significant.**

This does not implement the requirement to return the aid from all permits, only from the revoked permit. Determining the amount is a direct consequence of lack of a project approach while calculating the CIT exemption. Because we are discussing one tax result, revoking a given permit will be connected with the requirement to return a defined amount of the exemption limit (which means that we lose the limit amount we acquired in connection to a given permit, without the need to define from which part of the business the exempt income was generated).

However, regulating this issue in such a manner may cause a cauctionous approach from entrepreneurs and withholding the use of a new decision/permit, which is difficult in the case of a long period of upkeeping employment specified in the permit. Moreover, entrepreneurs that currently have a problem with realizing permits should consider suppressing them (which is possible until the Company does not start using state aid in connection with the permit's limit).

3. Realizing investments on lands where there are mineral deposits.

In article 3 of the act on supporting new investments the legislators have added the expression „ undeveloped":

Support cannot be granted in situations when the investment is located in areas where there are undeveloped mineral deposits, with the exception of investments including these deposits.

Wording the provision in this way is meant to erase any doubts about locating investments in post-mining territories, which was a significant issue in regards to investments located in Upper or Lower Silesia.

4. Additional tax avoidance clause

The legislator has not changed the drafted provisions concerning the loss of relief in a situation where the right to it is obtained by entering into an agreement or any other legal transaction or multiple, connected legal transactions, executed mainly for obtaining an exemption from income taxes.

This additional clause (in regards to the clause defined in the Tax Ordinance) stirs up many doubts if any action considered leading to tax evasion results in the loss of tax relief. An official interpretation of the indicated provisions will be crucial. Moreover, it seems that the wording of these provisions should be different; the legislator's intention was to cover activities that cause income that would have been taxed on a regular basis, is subject to a tax relief due to mock actions of the taxpayer. In an unfavorable interpretation,

it could be stated that even issuing an application for state aid could be considered an action to obtain a tax relief, therefore it is an action covered by the clause. However, this would lead to ludicrous conclusions, so this understanding of the clause is incorrect.

Executory provisions

The final wording of executory provisions is still unknown. They will regulate, i.a., issues regarding minimal expentiture on investments or maximum state aid in a given muncipality. Also, a decree regulating the procedure of issuing decisions on support has not been published yet. This means that there is no complete information yet.

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Will the individual interpretations issued thus far continue to protect?. Amendment of the Tax Ordinance

At the moment, legislative work on amending the Tax Ordinance is underway regarding the matter of interpreting tax law. The amendment is set to introduce individual interpretations regarding transactions and actions between related parties only within the scope of a new institution: based on a class proposal filed by all engaged entities. The planned amendment shall also relate to individual interpretations issued to date, regarding transactions with related parties, which (if not completed) shall expire by operation of law when the act comes into force.

Group interpretations

The proposed regulations introduce a mandatory requirement to enter a class proposal to issue an individual interpretation when the factual circumstances or a future event regarding it concerns a transaction or other action between related parties, or those that will become related parties.

Situations where the requests for an individual interpretation scope covers repeatable transactions or other actions with non-related parties- for which individual interpretations will be issued based on the exisitng rules, if the

terms of these transactions or other transactions between related parties are not different from terms for non-related parties.

In comparison to the previous request to issue an individual interpretation, a class proposal will require many detailed information on planned transactions or actions, including:

- Indicating acquired and planned advantages, including tax advantages resulting (directly and indirectly) from performed transactions or other actions;

- Indicating transactions and other actions done, in progress or planned on which achieving (both directly and indirectly) advantages mentioned above is based;

- Indicating the value of the company, its organized part or property right covered by the factual circumstances or a future event in the case where the market or nominal value on the date the class proposal was entered is jointly at least 10 000 PLN;

- In the latter, it will also be mandatory to indicate the value of the main advantages covered by the factual circumstances or future event.

Excluding protection i.a. in cases where:

- No expected or achieved advantages have been indicated in the proposal;

- No transactions or actions on which achieving advantages is dependent have been indicated in the proposal;

- Indication the value of the company, its part or the property right in the application differ from its real value by at least 25%.

In connection with the difficulties in defining the abovementioned elements and their values, the institution of updating the application in the indicated scope has also been introduced in the project- that is, indicating the correct values during the process of issuing an individual interpretation or after it has been issued.

Expiration of previous individual interpretations

It is still significantly relevant that the proposed regulations also influence individual interpretations already issued.

After the amendments come into force, the entities for which individual interpretations regarding the factual circumstances or a future event covering transactions or other actions with related parties were issued, should **within 6 months** from the date when the amendments come into force, supplement the application with the new elements specified above. If an applicant fails to do so, the interpretation will expire by operation of law when the amendments come into force. In this context, it raises the question of protection given by interpretations already issued and those that will be issued in the aforementioned 6-month period.

It is also necessary to consider that after supplementing the factual circumstances or a future event, the tax authority (in regards to the individual

interpretation) may change it or state that in a given situation the clause against tax evasion is applicable.

The draft of the law is currently in the stage of public consultation, and only a 14 day vacatio legis period is specified. The explanatory memorandum the need for a fast implementation of the amendments is visibly indicated. Considering the schedule of the lower chamber of the Polish Parliament (Sejm) it is possible that the regulations will come into force in August or September of this year. Therefore, it may be advised to review already issued individual interpretations. Moreover, it is important to note that the wording of the proposed amendments may still change.

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Surveillance of employees has been regulated. What methods of surveillance will be allowed and when?

On 10 May 2018, the lower chamber of the parliament (Sejm) passed a regulation on data protection, and on 16th May the Senate passed it without amendments. New regulations in the Labour Code are also included, introducing the institution of employee surveillance.

The provisions entered into force on the 25th of May 2018, which is related to the implementation of the EU Regulation 2016/679 of the European Parliament, and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in short referred to as GDPR.

The planned changes in the Labour Code introduce a regulation specifying the scope of data that companies can demand from candidates and employees, or regulations concerning the processing and protection of biometric data have not been the subject of the Sejm's proceedings yet. In addition, the provisions will include regulations giving employers the specific right to process personal data of candidates or employees, based on their consent (previously a doubtful issue).

What forms of surveillance will be allowed?

The provisions directly allow using **video surveillance** in a workplace (CCTV) and surveillance of electronic mail. Other forms of surveillance are also possible (but not directly named). This means especially employee Internet activity, and using GPS in company cars or reviewing text messages. It seems

that searching employees is also possible to prevent stealing employer's property.

This is a significant expansion of possible surveillance methods in comparison to those previously proposed by the government. Initially, the draft introducing the General Data Protection act proposed only video surveillance. However, after criticism, the government decided to introduce changes. This is a good step, because as of now there are other forms of surveillance, asides from video surveillance. It is necessary to remember that with new technology developments, many new methods will continue to arise.

When can surveillance be used?

Video surveillance will be possible when it is necessary for employee safety, property protection, production control or protecting trade secrets. On the other hand, monitoring e-mails (and other surveillance forms) can be used when it is necessary to ensure correct use of tools given to employees and monitoring workhours. The employer will decide if such surveillance is necessary.

However, the wording of the new regulations causes many doubts.

Protecting trade secrets as a reason for e-mail surveillance is not specified directly, which is confusing. Breaching trade secrets is most often discovered by checking employee e-mails. Usually, this way company secrets are leaked, and it is impossible to discover using video surveillance.

Allowing video surveillance for production control, at the same time stating that video surveillance cannot be used to control employee work is also doubtful. Up until now, based on general rules on protecting personal interests, it was stated that CCTV could not be used to control employee effectiveness. In a practical sense, this meant that CCTV had to cover a large area and couldn't be focused on individual workplaces. Again, reasons for such changes are not mentioned. However, it seems that the previous „guidelines" should remain in force.

It is also confusing that video surveillance cannot be used to verify employee workhours, as this is possible through monitoring of e-mails. It seems that video monitoring is more natural in this case,because it confirms that an employee is at his/her workplace during workhours. Again, no explanation from the legislator is provided.

Where can cameras be installed?

Cameras can be installed not only in the workplace, but also on the area surrounding it. Places exempt from surveillance are toilets, bathrooms, changing rooms, canteens, smoke rooms and rooms made available to work unions. There, it will be possible to install surveillance only in special circumstances, and if the cameras do not influence employee dignity and other personal interests, as well as the independence of work unions. This, in particular, will be executed by using techniques making it impossible to identify people using these rooms.

Up until now, it was common that cameras were not installed in toilets, bathrooms or changing rooms due to employee privacy. However, putting smoke rooms on the list is incomprehensible, unless the legislator considered the sensitive nature of information on addictions.

For how long will it be possible to store surveillance footage?

Surveillance footage can be stored for a maximum of **three months**. However, if they are considered proof in proceedings, the storage period will be lengthened until the final termination of proceedings. After this time, recordings containing personal data should be destroyed.

This is a significant change in comparison to the previous regulations, which stated that the recordings could be stored until the goal they were stored for is reached. Therefore, there are grounds to claim that recordings can be stored even for 10 years, which is the period of expiration for a stealth crime.

How can e-mails be monitored?

Monitoring e-mails, as well as other forms of monitoring must consider correspondence confidentiality and other personal rights. This means that surveillance will only be limited to business correspondence. The employer will not be able to read e-mails marked private. In addition, if during the verification of e-mails some e-mails turn out to be private and are not tagged as such, the employer must stop reading immediately. This rule will not change even if the workplace regulations strictly forbid using company property for private reasons..

Searching employees should be done in a manner that does not disturb their dignity. In particular, it should be done in a closed room, without other employees. A person of the same sex as the searched employee should conduct it.

How can surveillance be introduced?

The decision to introduce surveillance will be made by the employer. The rules of surveillance, however, should be specified in the workplace regulations, the collective labour agreement or notice (if a given company does not have a collective labour agreement and is not required to have workplace regulations). The employer should indicate the goals, scope and methods of surveillance.

The employees should also be informed of surveillance in a manner acceptable in the workplace, no later than two weeks before launching. Depending on the common practice, the information can be sent by e-mail, through intranet or on an information board. Newly hired employees should be given this information before being allowed to work.

Additionally, rooms and areas covered by cameras should be visibly marked before launching surveillance. The employer will also be obliged to provide information also to third parties entering the workplace.

What does this mean for employers?

Employers will be obliged to review their existing rules of surveillance and verify if they are in accordance with the new data protection regulations. This may mean the necessity to adapt technical parameters, as well as modifying the internal rules concerning surveillance.

The legislator did not provide a transition period to adapt to the new rules (no transition period regulations). This indicates that the changes should be done **immediately**.

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New Act on Money Laundering. Beneficial Owner Register.

Obliged entities (including most of the financial sector) do not have a lot of time to adapt to the requirements of the new act from 1 March 2018 on money laundering and terrorist financing, which implements the IV AML directive. The transition period ends at the end of May 2018.

Some provisions will enter into force later. This concerns creating a **central register of beneficial owners,** to which many commercial entities (such as general partnerships, limited partnerships, limited liability partnerships and joint-stock companies with the exception of public joint-stock companies) will have to report the names of persons controlling them. Regulations on the central register of beneficial owners will enter into force on **1 September 2019**.

The concept of creating a central register of beneficial owners is meant to be a universal and free tool enabling access to up-to-date information on beneficial owners. The accuracy of such data is particularly important because identifying a beneficial owner is one of the basic criteria in the AML process. For the first time, entrepreneurs will be obliged to actively provide information about persons that have a strong influence on the company.

The rule of full transparency and the right to privacy

A controversial issue is **the full transparency of the register**. This means that **everyone has access to the register of beneficial owners.** Some are of the opinion that this is excessive and may infringe the right to privacy of the persons that are in the register. The Polish act takes a step further in comparison to the IV AML directive, which states that access to the register is available to supervisory organs, obligated entities and entities that have a legal interest in the information. This solution has been adopted in many EU countries. However, the polish legislator has stated that creating a transparent register is justified by broader functions, such as providing a widely understood protection of market participants by enabling access to information about contractors. A solution that could contribute to protection of privacy is searching by inserting the name of a person instead of typing in the PESEL (Personal Identity Number) which enables access to information on all significant equity interests in different entities.

Updating information is the most important

It is worth noting that the EU legislator has defined general rules on how beneficial owner registers function, leaving matters such as technical issues, verification rules and data updating to member states. Ensuring accuracy of data in the register is a center issue influencing its usability. The Polish act makes it mandatory for obligated entities to update data. It is also worth

looking at solutions adopted by other countries, such as the possibility of notifying irregularities by users, which can contribute to preserving the best quality of information in the register.

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Act on transparency in public life. What does it regulate and why is it controversial?

The draft of the act on transparency in public life demands a new approach to corruption risk from the management board and supervisory board. It implements the necessity to undertake specific steps leading to preventing corrupt practices and encourages steps to evade penalties in cases where corruption has occurred.

The draft presented by the Minister- Coordinator of Special Services, has caused many controversies. Although the draft has not been submitted to the Sejm yet, it has sparked a debate between representatives of various industries.

It was the authors' goal to regulate different areas, i.a access to public information, financial statements for persons exercising public functions, limitations to commercial activity, lobbing and means to prevent corrupt practices. Although the name of the draft does not suggest it, the document will influence not only entities from the public sector, but also entities acting in the private sector. The draft makes it mandatory for entrepreneurs from "medium size enterprise" up to use internal anti-corruption procedures in cases when a person acts for (or on behalf) of an entrepreneur and commits a corruption crime specified in the draft. They are, for example, active bribing (in both the public and private sector), influence peddling, crimes with disrupting public tenders, bribery in trading refundable drugs.

According to the draft, using organizational, technical and staff measures are considered internal anti-corruption measures used to prevent creation of an environment to commit corruption crimes by persons acting for (or on behalf) of an entrepreneur. Some of the given examples are creating and implementing an anti-corruption code of the company, creating an internal procedure and guidelines on received gifts and other advantages, procedures on informing about corrupt propositions and procedures on informing about corrupt actions.

High penalties for lack of procedures

The draft introduces high fines for lack of internal anti-corruption procedures, or if the procedures are mock or ineffective, and the person acting for or on behalf of the entrepreneur has been charged with a crime specified in the draft. In such a case, the entrepreneur may be charged with a **pecuniary fine from 10 000 PLN up to 10 000 000 PLN**. A fined entrepreneur will **not be able to apply for a public contract for a period of 5 years.**

According to the draft, the procedure to fine the entrepreneur is launched when a person acting for or on behalf of the entrepreneur is charged with a corruption crime specified in the draft. In this case, the Chief of the Anti-Corruption Bureau initiates an investigation to determine if the entrepreneur uses internal anti-corruption procedures. If the investigation discovers that procedures are unused or do not exist, are mock or ineffective, the Chief of the Anti-Corruption Bureau submits an application to fine the entrepreneur.

If the entrepreneur does not pay the fine, the Chief of the Anti-Corruption Bureau submits an application to fine the entrepreneur to the Chief of the Office of Competition and Consumer Protection, who initiates proceedings. The result of the investigation by the Chief of the Anti-Corruption Bureau and the amount of the fine are binding for the Chief of the Office of Competition and Consumer Protection.

The penalty is imposed by a decision of the Chief of the Office of Competition and Consumer Protection and the entrepreneur may appeal it within one month to the District Court in Warsaw- court of competition and consumer protection. In some cases, the Chief of the Office of Competition and Consumer Protection may refrain from imposing a penalty (for example, if the infringement is slight).

What causes the most doubts?

Many controversies surround the fact that the draft does not specify how the effectiveness of internal anti-corruption procedures will be estimated. There is some concern over the fact that even the most advanced internal and expensive procedures may be deemed ineffective if even one corruption case occurs. The draft also states that when defining the amount of the pecuniary penalty, the impact of the infringement and mitigating circumstances will be taken into consideration. However, it does not directly specify if implementing anti-corruption procedures will be taken into account, although it may seem justified, as no system can fully protect against corruption. The practice of considering implemented anti-corruption procedures as a significant mitigating circumstance is present in the United States. The American anti-corruption act (US FCPA) mandates implementing procedures, but does not require them to be effective. Within this scope, the Polish draft seems much more restrictive.

Additionally, the new regulations implement not only the requirement to prevent corruption, but also an incentive to inform of such actions. An entrepreneur should notify the law enforcement authorities that he has reasonable grounds to believe that a crime has been committed.

Protecting whistleblowers

The draft also includes other regulations regarding corruption crimes, such as the institution of „whistleblower", meaning a person or entity employed by the entrepreneur (the draft does not limit this to employment contracts), who uncovers potential crimes to the law enforcement authorities. To encourage such actions, the draft provides legal protection of whistleblowers by forbidding termination of contract or aggravating conditions of employment without a consent from the prosecutor. At the same time, an entrepreneur violating these rules will be obliged to pay compensation amounting to twice the amount of the whistleblower's yearly remuneration.

Time is running out

It is worth noting that work on the draft of the act is still underway. It can be expected that before submitting it to the lower chamber of the Parliament (Sejm), as well as at the parliament stage, it may be subject to significant changes. The last accessible version from 8 January 2018 (on which this article is based) should not be treated as final, especially considering the fact that as of June 2918, the project has not yet been processed by the Parliament. Regardless of this, it is likely that within a short time companies and their supervisory boards will need to deal with the issue of handling corruption risk and ensuring the appropriate procedures are in place on time. Considering the complexity of the proposed changes and the amount of fines, this may be a time-consuming task.

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