Tax&Legal Highlights

Poland

Legal and water evaluation - a new instrument under the Act: Water Law

The amending Act to the Water Law, which was passed in the summer, is to take effect beginning from 01 January 2018. The new legislation incorporates many changes to the Water Act and introduces some new instruments that will affect water management in Poland. Among them, there is legal and water evaluation which - we believe - should be analysed in a greater detail, considering its impact on the investment process and, in certain cases, the need to obtain it.

Legal and water evaluation is a new type of decision under the Water Law Act. It is required in the case of investment projects or activities that may affect the accomplishment of environmental goals, especially in the scope of water protection efforts and improvement of its chemical composition. A list of specific types of projects and activities regarding which investors will need to obtain a legal and water evaluation is to be announced in the form of a regulation. The evaluating decision will be issued at the request of the investor planning to carry out a project that may affect the attainment of environmental goals, and where a specific undertaking may affect the

environment to a considerable degree, the investor will be obliged to apply for a decision on environmental conditions instead.

Legal and water evaluations are to be issued by the competent unit within the National Water Management Authority [Państwowe Gospodarstwo Wodne Wody Polskie], which is a new institution introduced into the Polish legal system by the new Water Law Act. The said unit will issue a legal and water evaluating decision if it determines that the undertaking is bound to exert favourable influence on the accomplishment of environmental goals or alternatively if it concludes that it is not going to influence it in any way. If the influence is assessed as unfavourable, the evaluating decision will be issued only where the investor proves that it has undertaken all efforts to mitigate the adverse impact on waters and that there is an overriding public interest and benefits to be derived from the investment which otherwise cannot be obtained from other activities. If it is not the case, the unit will issue a decision refusing to issue a legal and water evaluating decision.
The legal and water evaluating decision expires at the effective date of the regulation adopted by the minister competent for the matters of economy, updating the river basin management plan.

It is yet uncertain in what way the new legal and water evaluation requirements will affect the investment process. When the relevant regulation defining the catalogue of projects and activities that require legal and water evaluations is announced, the situation will become clearer. Nonetheless, entrepreneurs should be aware of this new institution and keep tabs on the situation. In particular, companies are advised to closely examine the secondary legislation as soon as it is promulgated to verify its

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Green light for cross-border transformation of Polish companies

On 25 October 2017 the EU Court of Justice issued a decision that would be consequential for Polish enterprises. The CJ's judgement regarding case: C-106/16 concerns non-compliance of the provisions of the Code of Commercial Companies and Partnerships (CCCP) with the EU freedom of establishment rule insofar as the CCCP requires the winding-up of the company in the case of taking the decision to transfer the registered office to a Member State other than the Republic of Poland.

The mechanisms of cross-border transformations of companies that lead to transfer of the company's registered office to another state have been in place in many EU member states for years now (such as the cross-border

transformation of a joint-stock company incorporated under the French law into a joint-stock company of the Belgian law).

Doubts as to the compatibility of the provisions of the Code of Commercial Companies and Partnerships (CCCP) with the EU law have been raised before, especially since the enactment of the amended international private law.

Polish enterprises that - relying on the freedom of establishment rule under Articles 49 and 54 of the Treaty on the Functioning of the European Union - want to follow the example of their foreign counterparts and contemplate the possibility of transferring their registered office to a different EU member state, come up against contradicting domestic regulations.
On the one hand, Article 19.1 of the International Private Law stipulates that upon the transfer of a registered office to another state, a legal person shall fall under the law of such other state. The legal personality acquired in the state of the hitherto existing seat shall be maintained, if the law of each of the interested states provides so. The transfer of the registered office within the European Economic Area shall not result in the loss of legal personality.

On the other hand however, as per Article 270 of the Code of Commercial Companies and Partnerships, a resolution of the shareholders on the transfer of the registered office abroad entails the winding-up of the company. Pursuant to Article 274 of the CCCP, liquidation is opened on the date of incidence of any reason for liquidation, and upon the completion of the liquidation the said company is deprived of its legal personality. What is more, in line with the regulations that govern the liquidation proceedings, generally the liquidation requires that the business activity be gradually phased out and the company's accounting records and documents be archived (Articles 282-288 of CCCP).

On the basis of the registration-related case which led to the judgement issued by the EU Court of Justice on 25 October 2017, the District and Regional Courts rejected the line of reasoning of the Polish company which had applied for removal of the Polish company from the register of companies on the argument of the transfer of its registered office to Luxembourg and not on the argument of its winding-up and liquidation. The Supreme Court, when analysing the last-resort appeal concerning the case, questioned whether the procedural requirements of the CCCP are proportionate and necessary to protect the values guarded by the national laws relating to liquidation of corporate entities.

The most important conclusions arising form the judgement passed by the Court of Justice:

- The freedom of establishment confers on a company incorporated under Polish law, the right to convert itself into a company incorporated under the law of a different member state, provided that the conditions laid down by the legislation of that other member state are satisfied and, in particular, that the test adopted by that member state to determine the connection of a company or firm to its national legal order is satisfied.
- The provisions of the Treaty concerning the freedom of establishment must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other

Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company.

- The Polish legislation at issue, by requiring the liquidation of the company, is liable to impede, if not prevent, the cross-border conversion of a company. It therefore constitutes a restriction on freedom of establishment.
- The mandatory liquidation required by the national legislation goes beyond what is necessary to achieve the objective of protecting the interests of the creditors, minority shareholders and employees.
- The fact that either the registered office or real head office of a company was established in accordance with the legislation of a different Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse and it cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty.
- A general obligation to implement a liquidation procedure amounts to establishing a general presumption of the existence of abuse, and the legislation that imposes such an obligation is disproportionate.

Among the key issues that arise in the wake of the foregoing judgement is the question whether, until the implementation of what seems to be a necessary amendment of the CCCP provisions, the Polish courts, in recognition of the principle of primacy of EU law over national laws, would adjudicate against the CCCP.

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Implementation of amended provisions of the Act on disclosure of information and exchange of economic data. Changes in the operation of the Economic Information Bureau.

The amended provisions of the Act on disclosure of information and exchange of economic data came into force on 13 November 2017. They will affect some of the procedures linked with registering contractors with Economic Information Bureaus ("EIB"). In addition, the range of the "services" offered to potential creditors by Economic Information Bureaus has been extended.

Below please find the most important amendments to the Act which should be generally regarded as favourable for entrepreneurs dealing with unreliable contractors.

1. Electronic payment notice

Based on the amendments, a company that is in default with any payments may be sent a payment notice by e-mail and not necessarily by registered letter. However, in order to be able to exercise this option, the contract concluded with the entity in question needs to include a provision to that effect.

2. Period of storing negative input at EIB
Under the hitherto binding law EIB was not allowed to store information about indebtedness for a period longer than 10 years from the date of its entry. After 13 November 2017, EIBs will not be able to store such information for longer than 10 years counting from the maturity date of the liability or its recognition (e.g. by the court). Hence, if payment notices sent by your company contain information about the period of storing data in EIB, such information needs to be brought up to date.

3. Faster transfer of negative input to EIB
According to the new regulations, the period upon the lapse of which the creditor can transfer negative input concerning overdue liability is shorter by half. Under the new law, such information can be included in the EIB's database even after 30 days from the due date, as opposed to the current legal status based on which the creditor needs to wait 60 days before they can exercise their right in this respect. One should keep in mind though that at least a month must pass since the moment of sending the contractor the payment notice, because only after one month the creditor may add negative input to the database.

4. Making transfers of periodical information easier
Until now, provision of sequential payment notices relating to unpaid liabilities under contracts for periodical supplies was troublesome - many creditors had to bear additional costs associated with sending payment notices by registered letter in order to be able to add their debtors to the EIB database. The amendments simplify this procedure. As regards liabilities occurring periodically under the same contract, the economic information may be updated based on the first payment notice, provided the first payment notice complies with the statutory requirements and warns the debtor about this option. Hence, companies need to remember to include a notification to that effect in the first payment notice.

5. Debtor's option to raise an objection directly to the creditor
In line with the hitherto binding regulations, the creditor was obliged to forward the information about the debtor's questioning of the entire liability or its part. According to the new regulations, the debtor also has the right to file a direct objection with the creditor concerning the creditor's intention to provide negative input to EIB. This does not entail lack of the option to make the information public. If the objection is not accepted, as before, the creditor is allowed to transfer to EIB the relevant business information along with the note about the debtor's objection to the liability. The Act allows the debtor to recognize the liability as prescribed (in full or in part, and generally regardless of the legal or actual background situation). If it is the case, the relevant note should also be included in the input transferred to EIB.

Hence, under the new regulations, the debtor has the right to raise objections concerning the transfer of negative input, both to the creditor (before or after the EIB entry), and directly to EIB (after the entry).
The debtor needs to be notified about the option to raise objections in the payment notice, which means that the relevant notification should become part of the standard documentation.

6. Extended cooperation among EIB databases
The amended Act introduces a statutory duty for EIBs to exchange information about entrepreneurs. Thus, in order to have an overview of the

status of a specific entity, the company will not need to conclude separate contracts with many EIBs - it will be sufficient to cooperate with just one. Furthermore, within the nearest future, the Economic Information Bureau plans to extend the Report of the Bureau to include all new public data bases, taking into account their availability, i.e.:
a) National Official Register of National Economy Subjects (REGON);
b) Central Register and Information on Economic Activity (CEiDG);
c) National Court Register;
d) Register of Public and Legal Dues;
e) Central Records of Restructuring and Bankruptcy, which will be operational as of 01 February 2018.

To recap the above, the companies cooperating with EIB in the scope of their debt collection need to modify their document templates to align them with the new wording of the Act.

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Draft Act on transparency in public life

On 25 October 2017, the draft Act on transparency in public life was tabled for interministerial discussions and submitted for public stakeholder consultations. The first draft shows the direction that the planned changes are bound to take. Considering their complexity and potential implications, it is worthwhile to get prepared for the new laws in advance.

It should be pointed out that the draft Act does not exclusively focus on declarations of financial interests. It also expands on the concept of 'internal anti-fraud procedures', which is currently rather unclear. Please note that lack of such procedures may result in sanctions, i.e. fines or temporary bans on competing for the award of public contracts.

Entities covered by the new Act

In line with the wording of the draft Act, its provisions affect the operations of enterprises, public finance entities and individuals who are in charge of public finance entities.

Why should public finance sector entities and enterprises learn more about the new laws?

The draft Act introduces severe penalties to be imposed on the aforementioned types of entities in case they do not follow anti-fraud procedures. At the same time, the criteria upon the fulfilment of which such penalties can be inflicted are rather unspecific. As per the draft, the

application of internal anti-corruption procedures is understood as: "taking organizational, technical and personnel-related measures aimed to counteract creating an environment conducive to the commission of offences". Further, the Act only provides examples of what such "measures" could be like, leaving open the catalogue of potential courses of action.
Anti-corruption procedures are primarily aimed to prevent corruption, paid extortion and bribery in managerial positions. At the same time, the achievement of that objective is ensured through introduction of legal regulations entitling authorities to impose penalties if an entity does not take any actions in that respect or if the entities' actions are deemed insufficient or unsatisfactory.

Hence, the draft act seems to leave the administrative authorities a lot of room for interpretation as regards the activities to be taken by entrepreneurs and public finance units to ensure that their anti-corruption procedures are considered sufficient or satisfactory.

Severe penalties
The draft provides a wide spectrum of penalties to be imposed on breaching entities or individuals. A case in point is the situation when an enterprise does not introduce internal anti-corruption procedures or the procedures applied are seen as simulated or ineffective. In such a situation, when the latter of the cumulative premises is fulfilled, i.e. the individual acting for or on behalf of an enterprise is charged (as indicated above, e.g. with bribery or paid protection), such an individual will be liable to a pecuniary penalty ranging from PLN 10 000 to 10 000 000.

Furthermore, the draft Act extends the competencies of the head of the Central Anti-Corruption Bureau. Namely, upon initiation of inspection, the Head of the Central Anti-Corruption Bureau will be able to motion for punishment of the entrepreneur if they consider the anti-corruption procedures in place to be simulated or ineffective. Should the entrepreneur fail to pay the fine in the amount motioned for, the case will be transferred to the Office of Competition and Consumer Protection that can impose penalties in the form of administrative decisions. If the Office of Competition and Consumer Protection imposes a penalty on the enterprise, the enterprise will be additionally punished with a ban on competing for the award of public contracts, binding for a period of 5 years from the date of the decision to impose the penalty becoming final.

How to protect yourself?
Entrepreneurs and public finance sector entities should evidence that they exercise due care in implementation of their anti-corruption procedures. Therefore, analysis of the currently used procedures and their effectiveness will be necessary. If no such procedures are in place or if they are incomplete, the entity should consider preparing a comprehensive set of procedures based on the experience gathered so far and the industry specifics - especially when the enterprise participates in public procurement procedures.

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Amendments to the Act on the social insurance system

The Council of Ministers approved draft amendments to the Act on the social insurance system

The Council of Ministers has approved the draft act amending the Act on the social insurance system. The new law does away with the annual limit of the retirement benefit and pension contributions' assessment basis. In 2017 the amount over which we do not pay retirement benefit and pension contributions equalled PLN 127,890. According to the draft Act (provided it is passed it its current wording), the amendments in this respect will take effect as from 01 January 2018. The draft Act was tabled for the Sejm discussions on 31 October (No. 1974) and on 03 November it was transferred for committee readings (to the Social Policy and Family Committee).

As per the currently binding provisions of the Act on the social insurance system, the annual assessment basis for retirement benefit and pension contributions in a calendar year cannot be higher than thirty times the predicted average remuneration in the national economy concerning that calendar year. If the modification suggested by the government is approved, the retirement benefit and pension contributions, both in the part financed by the employee and in the part financed by the employer, will be due on the entire remuneration of the employee, i.e. also on the revenue in excess of the current assessment basis limit (i.e. PLN 127,890). By implication, if the amendments take effect, then as of 01 January 2018 the rules of calculating retirement benefit and pension contributions will be analogous to the rules in respect of sickness and casualty insurance the assessment basis of which is not subject to any restrictions.

The introduction of the amended legislation will result in decreasing the net remuneration of almost 350 thousand employees whose remuneration exceeds the amount of the said annual limit and increasing the effective rate of public and legal dues (applicable to the income in excess of the limit) from 34.89% to 42.40%.

From the perspective of the employer, the change entails considerably higher general payroll expenses. This is so because the contributions paid by the employer on the remunerations in excess of PLN 127,890 PLN will go up more than five times, from 3.75% (assuming that the casualty consideration is 1.2%) to the level of 20.01%. For the employer this translates into more than 13% increase of the payroll costs as regards remunerations exceeding the amount of the current annual assessment basis for the retirement benefit and pension contributions.

Further steps

The changes, if they are not modified or repealed in the course of further legislative work, will be significant for the entities whose employees receive monthly salaries of more than PLN 10,600 gross. The payroll costs associated with the employment of such individuals will be significantly higher. These

entities should revise their payroll structures and wage grids to evaluate the impact of the amendments on their costs.

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Act on transparency in public life may complicate the lives of employers

The Government Legislative Centre has published a modified draft Act on transparency in public life which, in a sense, constitutes a response to the fast-track public stakeholders consultations. Even though the title given to the Act does not suggest it, the Act will considerably affect the businesses of employers, also those operating in the private sector.

The draft Act on transparency in public life (hereinafter referred to as: "the Act") will primarily regulate the issues of access to information on public matters, lobbying, limits on carrying on business activity and filling certain positions by officeholders, and the officeholders' duty to submit declarations of financial interests. At the same time however, the Act also focuses on counteracting corruptive practices, and these regulations will considerably affect employers, also those operating in the private sector.
When analysing the provisions that are especially significant from the viewpoint of employers, one needs to give special attention to the whistleblowing regulations and the obligation to apply internal anti-corruption procedures. The latter is discussed in our alert entitled: "Draft Act on transparency in public life", so now we would like to focus on the matter of protection of whistle-blowers.

Whistleblowing in Polish

The draft Act introduces the concept a whistle-blower to the Polish legal regime, as modelled on the solution already functioning in many countries (inter alia the UK, Israel, or Canada). The essence of the institution is to provide special legal protection to the individuals who cooperate with the judiciary by reporting inside information about the potential criminal offence committed by an entity with whom the whistle-blower has an employment contract or a different contractual relation.

In accordance with the draft act, the public prosecutor will be able to award the whistle-blower status to an individual who provides a credible report as to a suspected criminal offence, where the said criminal offence is included

in the list given in the Act. This applies both to corruption-related offences, such as active and passive bribery or paid protection, and to other economic offences, such as fraud, acting to the detriment of an entity, money laundering, disposing of property in the face of threat of enforcement.

Importantly, not only an individual who is formally employed by the offending entity but also a person engaged on a basis other than an employment contract will be eligible to receive the whistle-blower status. In addition, the following individuals can become whistle-blowers as well: (I) a natural person performing their profession as an independent trader or on their own behalf, or running business as part of performance of such profession, bound by a contractual relationship with the allegedly offending entity, and (II) an entrepreneur bound by a contractual relationship with the allegedly offending entity.

Considering that the list of individuals that may enjoy the status of a whistle-blower seems rather broad, the application of the concept, especially concerning entrepreneurs who are contractors of the allegedly offending entity, may raise certain questions.

Can't be dismissed without the public prosecutor's consent
The whistle-blower status is associated with serious restrictions in the scope of termination or change of the contractual relationship between the whistle-blower and the alleged offender.

From the employers' perspective, the inability to terminate the employment contract with the whistle-blower or to change the terms of the employment contract to less advantageous ones, in particular changing the location, hours of work or the financial conditions, are of key importance. The restrictions above will be lifted if the public prosecutor who has awarded the whistle-blower status agrees to the employer taking such measures. To obtain the public prosecutor's consent, the employer will need to submit the relevant application and justify it accordingly.

Whistle-blower protection may span years
In line with the Act, a whistle-blower is protected not only during the period of enjoying the whistle-blower status (generally, during the criminal proceedings), but also for a year as of the date of discontinuation of the proceedings or completion of the proceedings and the final and binding decision in respect of the perpetrator of the offence. Taking account of the fact that economic and corruption-related proceedings are often complex and tend to take years, the period of protection may also prove to be fairly long.

Serious consequences of breaching whistle-blower protection
The Draft Act provides that a whistle-blower whose employment contract is terminated without the consent of the public prosecutor on account of their reporting of the employer's offence (as listed above), is entitled to receive compensation equal to twice the amount of their annual remuneration paid in respect for the last occupied position. The whistle-blower whose terms of employment are unfavourably changed without the consent of the public prosecutor may expect a similar compensation too.

Certain doubts may arise as to the understanding of the concept of terminating the employment contract with the whistle-blower on account of their reporting of commission of an offence listed in the Act, in view of the regulations applied to compensation payments. In view of the laws above, it

seems that the right to compensation should be restricted to the situations when the actual reason for terminating the contract was the fact of the whistle-blower reporting irregularities at the employer. By implication, the whistle-blower is not entitled to compensation when the actual reason for contract termination without the consent of the public prosecutor is related to other circumstances, e.g. gross infringement of the employee's duties.
As a side note, one needs to point out that the relation between the claim for compensation provided for in the Act and the employee's claim on account of termination of the employment contract which can be made under the Labour Code is rather unclear. To be more specific, it is not certain whether the compensation provided for in the Act is an independent and additional claim that the employee is entitled to apart from the compensation prescribed by the Labour Code, or alternatively, whether the compensation under the Act excludes employee's claims based on the Labour Code (e.g., reinstating claims, compensation on account of employment contract termination).

Complications for the employer
Even though the introduction of the concept of a whistle-blower into the Polish legal regime seems fair and understandable, if the Act enters into force in its current form, undoubtedly it may make the lives of employers difficult. There are several reasons for that:

The Act introduces a new, so far unknown category of protected employees into the Polish labour law system. The scope of that protection is exceptionally broad, because the consent of the public prosecutor is required not only to terminate the employment contract with such an employee (including unfavourable termination of the terms of work and payment), but also to dismiss the protected employee without notice (e.g. in the case of gross breach of the basic employee's duties). At the same time, the implications of breaching the protective umbrella may be grave for the employer, considering the high compensation provided for in the Act.

The draft Act does not exclude the possibility of terminating the employment contract with the whistle-blower but in fact, the practical cooperation between employers and law enforcement authorities will be crucial. This is so because one cannot exclude the possibility that an employee who has obtained the whistle-blower status, feeling confident and smug about their wide-ranging protection, will commit acts that are the basis for terminating the employment contract for just cause. Since terminating the employment contract for just cause is not possible upon a lapse of a month of the employer becoming aware of the circumstances justifying contract termination, and simultaneously, the public prosecutor has 30 days to give consent to terminate the contract with the whistle-blower (as provided in the draft Act), in practice, terminating the whistle-blower’s employment contract for just cause may prove difficult or virtually impossible.
On the other hand, considering how lengthy criminal proceedings tend to be, whistle-blowers will likely enjoy their protection for years, which may make their dismissal difficult even in situations when such dismissals are objectively justified (e.g. when the employee does not fulfil their duties properly, in the case of reorganizations, etc.).

The final version of the Act has not been approved yet. Let us hope that the law enforcement authorities will show good judgement and use their new competencies taking into account the specifics of company operations.

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