Tax&Legal Highlights

Poland

Tightening excise regulations. Certain regulations come into effect

On 19 September 2018 certain regulations included in the Act of 20 July 2018 amending the Excise Act and the Customs Duty Act (the "Amendment") came into effect. The other regulations included in the Amendment shall become effective as of 1 January 2019.

What is this all about?

Early in August, the President signed the amendment to the Excise Duty Act. This has been the most comprehensive amendment thereto since 2016. The key changes that will affect entities trading in excise products include:

Electronic monitoring of exempted products and harmonized products with the zero excise rate

The overall purpose of the Amendment is to improve the control of tax authorities over excise products (i) exempted from the excise duty due to their intended use and (ii) harmonized excise products subject to the zero excise rate. The electronic monitoring of these products is the most radical of the introduced changes. Effective 1 January 2019, the printed delivery

document shall be replaced by e-DD, generated in EMCS PL2 system. Deliveries of products that at present must be accompanied by printed delivery documents shall be registered in EMCS PL2, which shall be adjusted for monitoring purposes. Coal is the only exemption, as effective 1 January it shall be included in the statement of purpose system instead.

Business users

Further, the Amendment introduces a new Business User concept, dedicated to entities that use the excise products subject to the zero rate in the course of their business operations. After 1 January 2019, only entities granted the Business User status will be able to purchase these products in packs larger than 5 litres or 5 kilograms without paying the excise duty at the rate of PLN 1,882/1,000 litres (PLN 14.72/GJ for gaseous products) indicated by the lawmakers as appropriate in such cases. In order to obtain the Business User status, an entity must submit an excise registration form, indicating among others addresses of its business locations and determining the type and the projected monthly average use of a given excise product.

Excise duty on losses and on excessive use

Under the Amendment, losses incurred during production of beer, wine, fermented beverages and intermediate products are excluded from the definition of losses. The changes are intended to satisfy the taxpayers manufacturing this sort of products, who indicated that reconciliation of such losses was time-consuming and required hiring additional staff, depending on the production scale, thus increasing the operating expenses. Further, in order to adjust Polish regulations to the EU law, the excise duty exemption regarding losses includes amounts in excess of allowed standard loss levels up to the actual loss amount if their natural occurrence related to product characteristics can be proven. These amendments are effective as of today. Further, as in the case of exceeding the allowed use standards for energy products subject to the zero excise rate, if an entity can prove that the use has been compliant with the intended purpose, which allows the application of a preferred rate, it will be able to apply the rate to products used once the standard use level has been exceeded. This amendment, though, shall come into effect on 1 January 2019.

The Amendment includes a series of other changes, effective as of today. They include (i) clarifying competencies of bodies deciding on excise refund with regard to intra-Community Delivery of Goods or to export of products the excise on which has been already paid; (ii) disallowing releases of harmonized products with the zero excise rate from depots upon a release permit; (iii) limiting the excise band exemptions in duty free areas or in customs depots to those finally sold to travellers going abroad and (iv) allowing electronic submission of requests for excise bands or legal marking.

Further, the lawmakers introduced a PLN 0 excise rate for natural gas bearing code CN 2711 11 00 and 2711 21 00 intended for engines, provided a positive decision of the European Commission regarding the compliance of the public aid with the common market is obtained.

What does this mean?

The lawmakers introduced the changes to simplify procedures faced by business entities trading in excise products through reducing administrative burden, costs and time spent to fulfill obligations arising from excise regulations. The electronic monitoring, though, seems to be aimed at improved control of transactions subject to exemption or to the zero rate. Exempted shipments are allowed only for entities indicated in the System as ones entitled to receive specified products exempted or subject to zero rate in a given location. Consequently, entities using harmonized excise products under the zero rate, such as organic solvents or antiknock agents shall be obliged to register for excise-related purposes if they have failed to do so by now. Pursuant to the new regulations, they have thirty days of the Amendment's effective date to get registered (i.e. by 20 October). Entities that registered for excise-related purposes prior to the Amendment's effective date shall be obliged to file an update form to include the extended scope of information to be delivered upon registration after 19 September.

Follow-up

Businesses should certainly analyze the effects of the Amendment on their existing excise-related obligations. Those who have not used EMCS yet need to develop appropriate procedures, train employees and fulfill the related registration obligations. Considering the adjustment of the existing ERP systems to allow full electronic communication with EMCS and automated generation of e-DD forms may pay off as well.

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Act on Collective Persons' Liability: amendments included in the newest draft of 5 September 2018

On 5 September 2016 the Ministry of Justice published another draft of the Act on Collective Persons' Liability. The former one had been released for consultation in May 2018. The introduced changes include both procedures and guidelines regarding collective person's liability. Further, collective persons are offered possibilities to be released from the liability.

Key assumptions underlying the new draft:

1. Key liability principles remain unchanged: the act shall apply to all legal persons, commercial companies co-owned by State Treasury and Polish branches of foreign companies.
2. The fact of committing an offence (without the need to identify the offender) shall be sufficient to hold a company liable. Legal proceedings against such an entity can be instituted if there is a reasonable suspicion of committing an offence and if justified by social interests.
3. Entities that committed an offence as a result of purposeful act or omission, or of failure to take care required under given circumstances despite the offender expecting or being able to expect the possibility of the offence, shall be held liable.
4. A collective person shall not be held liable if, at least once every two years, it undergoes a verification by an audit firm in terms of implementing internal procedures that ensure its compliance with the law and of assessing the risk of committing an offence related to its business operations (audit of compliance and risk), and if a body has been assigned in its organizational structure to supervise the compliance with principles and provisions that regulate its business operations, unless such verification or operation of the assigned body is unreliable or carried out by individuals lacking necessary qualifications, or is feigned.
5. Under a new solution, no proceedings are instituted, or, if instituted, they are cancelled, if a collective person's registered office is located abroad and no proceedings can be effectively instituted against it, no penalty or other measures can be imposed.
6. A whistleblower is not granted the right to restore employment or to claim damages if he/she has perpetrated an offence related to business operations of a collective person, unless such an individual has disclosed all material circumstances of the offence to the collective person and to prosecuting bodies.
7. The related penalties have not been changed and range from PLN 30,000.00 to PLN 30,000,000.00.
8. If an ownership title to an enterprise of a collective person or to most of its assets is transferred free of charge or for a price materially different from the market value of the enterprise or its assets, the acquirer of the enterprise or of most of its assets and the collective person shall be jointly and severally obliged to pay a fine or compensatory damages for the offence committed prior to the ownership transfer date.
9. Additionally, the Amendment provides comprehensive regulation with regard to proceedings instituted against a collective person in order to avoid further amendments to other acts (the Act on Collective Persons' Liability shall include comprehensive regulations regarding such proceedings).

Protection

Liability of a collective person depends to a large extent on maintaining due care. Lack of due care can be classified as regarding selection or organization. Implementing an effective compliance program aimed at ensuring compliance of entity's organization with the law shall be the best method to prevent liability.

Effective fraud prevention and detection that would allow collective persons to avoid liability is possible only in the form of implementing appropriate procedures and monitoring systems. Therefore, collective persons that prepare for the effective date of the amended act, should:

1. develop appropriate internal rules, guidelines and procedures to prevent fraud and to help their employees to adopt correct attitudes (including whistleblowing) if a fraud occurs;
2. introduce appropriate changes to operating systems used to allow monitoring of operations performed both by the entity and by individuals in charge of each process;
3. introduce obligatory regular training for employees and counterparties in order to build an appropriate model of conduct, thus improving legal and actual security of each collective person.

As already mentioned, the new draft act introduces an additional condition that allows avoiding liability for an offence committed due to irregularities in an entity's organization. The draft clearly indicates that an **entity which at least once every two years undergoes verification of internal procedures that ensures its compliance with the law and assessment of the risk of offence related to its business operations, performed by a firm specialized in compliance and risk audits**, shall not be held liable. **Thus, as of the act's effective date, audit of communications, documentation and internal processes aimed at fraud detection shall become of key importance for all** internal fraud prevention and moreover, shall release an entity from liability under the act, if an offence is committed as a result of irregularities in its business operations.

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Enhanced oversight of non-public securities trading

The Council of Ministers completed the work on a draft act amending certain acts in relation to enhanced oversight and investment protection on the financial market.[1] The draft introducing organizational changes in the Polish Financial Supervision Authority, establishing the Fund for Financial Education and implementing changes to trading in bonds of security, certificates issued by closed-end investment funds and corporate bonds, was accepted on 4 September 2018[2] and submitted to the Parliament.

Pursuant to the draft, the above debt securities, regardless whether traded on the public market or in non-public trading systems, cannot be issued in

the printed form. All corporate bonds, bonds of security and closed-end investment fund certificates shall undergo **registration in the deposit of securities** and regulations regarding dematerialized securities shall apply to them.[3] The lawmakers believe that the solution will improve transparency of debt securities issued and security of investments.

The above changes are intended to come **into effect on 1 January 2019**; assuming efficient proceeding through the Parliament, the deadline seems viable. Transitional provisions shall be of special importance for market participants, to include **mortgage banks and closed-end investment funds**. Instruments issued in a printed form prior to 1 January 2019 and not cancelled by that date, as well as those not having a printed form, but registered on prior terms, shall remain valid and governed by the current regulations.

However, if these instruments are not **redeemed until 31 December 2019**, their issuers shall be **obliged to provide additional information**.[6] Effective from 2020, at the end of each half of a given calendar year, issuers shall be obliged to present the National Deposit of Securities (KDPW) with detailed information on issued non-dematerialized bonds, bonds of security and investment certificates as at the last day of the six-month period the information pertains to. The first report should be provided to KDPW **on 31 March 2020 at the latest** and be updated at later dates.

National Deposit of Securities will be obliged **to collect and publish** information regarding non-redeemed bonds, bonds of security and certificates, amounts of liabilities arising from these securities and data that allow determining the scope and timeliness of their performance, provided by issuers with registered offices in Poland.[5] The solution is to improve the security of investment and market transparency, to include more effective operation of the Polish Financial Supervision Authority.

Please note that failure to provide the required information or to duly perform the information obligations shall be punishable by a **fine of up to PLN 2 million**, with **authorized representatives of an issuer** being held liable. The same penalty shall apply to individuals providing fake data or concealing actual information.

Issuers, though, will be able to **get released** from these information obligations (and to avoid the above sanctions) if the debt instruments in question are registered at the National Deposit of Securities. The scope of the release shall depend on the range of instruments registered.

Importantly, the planned changes regarding dematerialization of non-public debt securities reflect the consistent approach adopted by the Polish lawmakers. The Council of Ministers is preparing amendments to the **Code of Commercial Companies**, which include obligatory **dematerialization of shares (stock certificates, founders' certificates, subscription warrants and other income or asset sharing titles) in all joint stock companies.**[6] Shares in non-public companies are to be registered in the new register of shareholders, maintained by an entity authorized to maintain security accounts. At present, the draft is being analysed by the Council of Ministers. The projected effective date is **1 January 2020.**

Endnotes:

[1] The draft act and description of the legislation process available at: http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=2812

[2] Communication of the Government's Information Centre available at: https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/projekt-ustawy-o-zmianie-niektorych-ustaw-w-zwiazku-ze-wzmocnieniem-nadzoru.html

[3] Article 5, 6.3) and Article 13.3) of the draft act amending certain acts in relation to enhanced oversight and investment protection on the financial market.

[4] Articles 38 and 39 of the draft act amending certain acts in relation to enhanced oversight and investment protection on the financial market.

[5] Article 9.4 of the draft act amending certain acts in relation to enhanced oversight and investment protection on the financial market.

[6] The work on the draft act amending the Commercial Code an certain other acts can be monitored at: http://legislacja.rcl.gov.pl/projekt/12294656/katalog/12410412#12410412.

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Employee Equity Schemes approved by Government

The Standing Committee of the Council of Ministers approved the draft Act on Employee Equity Schemes (EES), the version of 4 July 2018, without any additional amendments. Now, the draft shall be transferred to the Parliament. Its effective date falls on 1 January 2019.

Employees of largest corporations (with the headcount of **at least 250 people** as at 31 December 2018, including contractors and supervisory board members) shall be automatically included in the system after three months, beginning from **1 July 2019**, unless they provide their employees with written resignation. EES shall apply not only to employees, as the current Employee Pension Schemes (EPS) do, but also to individuals working on contract of mandate and to supervisory board members. Employers shall be obliged to conclude EES management contracts with financial institutions prior to that date.

The draft assumes that should employees initially resign from participation in EES, they shall be **automatically reassigned** to it after four years only. If they decide to join it earlier, though, they may apply for reassignment at any moment.

EES shall be **funded partly by employers, and partly by employees**, their participants. The basic contribution shall amount to 3.5 percent of the pay

underlying the calculation of old age and disability pension. Out of the amount, 2 percent shall be contributed by participants and 1.5 percent by employers. The contribution covered by employers shall not be included in the pay underlying the calculation of statutory old age and disability pension premium. It will be treated as an additional benefit and taxed accordingly. The basic contribution shall be calculated on the participant's pay (underlying the calculation of the old age and disability pension premium) and deducted from payroll after tax. The current version of the draft provides for a lower contribution for those with the lowest income.

The collected funds shall be **paid to participants once they turn 60**: 25 percent as a one-off benefit, and the remaining 75 percent in at least 120 installments.

Companies that **register EPS by 1 July 2019 will not be obliged to establish EES**, if the former provides for a contribution of at least 3.5 percent of the pay and the number of participants reaches at least 25 percent of the total headcount.

Little time is left to decide which scheme to choose. Since they differ in terms of costs, administrative duties and participation principles, both pros and cons of each should be analysed in details to allow for the most beneficial choice and appropriate planning of its implementation.

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Definite-term employment contracts to become indefinite soon

The period of 33 months of the effective date of regulations amending the principles of concluding definite-term employment contracts shall end on 22 November. As of that date, all valid definite-term employment contracts concluded prior to 22 February 2016 shall be automatically transformed into indefinite-term ones.

Thus, employers should take time to analyze the existing contracts and decide upon their future. **September is the last month when such contracts can be terminated** prior to their transformation, i.e. upon **one-month notice**. Pursuant to definite-term contract termination rules amended in 2016, the notice period depends on years in service, the same as previously provided for indefinite-term contracts. For the purpose of calculating years in service with the current employer in relation to such contracts, employment prior to 22 February 2016 is not included (as determined in transitional provisions). Therefore, notices handed in September shall come into effect at the end of October.

Different treatment is applied to **contracts concluded after 22 February 2016**. For such contracts, **all years in service are included**, also those before 22 February 2016. Therefore, such contracts might have already passed the 33-month definite-term employment period and they might have been already transformed into indefinite-term ones.

Termination of indefinite-term employment contracts requires **indicating reasons** that justify the lay-off. Further, the plans to terminate such contracts **may necessitate consulting** with labour unions. Failure to do so constitutes a formal breach which, should an employee institute proceedings at the labour court, may result even with a sentence restoring their employment.

Additionally, if the total period spent with the current employer exceeds 36 months, an employee is entitled to a **three-month notice period**. Even if an employer indicates a shorter notice period, such contracts shall be actually terminated after the statutory one, and employees shall be entitled to remuneration for the "lost" notice period.

Therefore, it would be advisable to identify such cases beforehand to avoid future termination mistakes.

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