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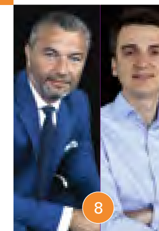

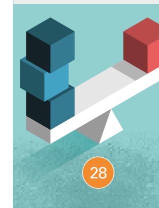

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He has been involved in tax consultancy for over 20 years. A tax advisor and a member of the International Fiscal Association (IFA). Obtained an economics degree at the Warsaw School of Economics, where he also completed doctoral studies at the Collegium of Management and Finance. The author of numerous publications in the field of taxation law, including the first comprehensive paper devoted to insufficient capitalization and the co-author of the report on cross-border corporate restructuring, published in "Cahiers de droit fiscal international" 2011. Takes an active part in the legislative process, he participated in the proceedings of a number of parliamentary commissions and task groups. In 2013, 2014 and 2015, he was voted the best Polish expert in the area of corporate income tax in the Companies and Tax Advisors Ranking of the 'Rzeczpospolita' daily.

TAX COSTS REDUCTION – DIFFICULTIES OF INTERPRETATION

We talk to Rafał Ciołek and Przemysław Szywacz about the reduction of tax costs, current exemptions and interpretation difficulties related to this matter.

Turning Point TP >: On January 1, 2018, the amendment to the Corporate Income Tax Act (hereinafter: "CITA") came into force. Its Art. 15e limits the list of allowed deductible expenses, excluding purchases of certain categories of services and intangible assets and rights acquired from related entities or entities located in tax havens. What was its purpose?

RAFAŁ CIOŁEK (RC):
According to the explanatory memorandum, the amendment aimed at counteracting aggressive tax optimisation, in the form of overestimating the costs of revenue regarding the purchase of services, values or rights, the market value of which is difficult to assess objectively. Practical problems with applying new regulations resulted in numerous taxpayers applying for individual tax interpretations, and led to the official explanation regarding the interpretation of Art. 15e., published by the Ministry of Finance (hereinafter "MF") on 23rd April 2018.

TP › **What is the scope of the introduced limit?**

PRZEMYSŁAW SZYWACZ (PS): The legislator created a catalogue of intangible assets and services, as well as rights, which, in the legislator's opinion, are the most subject to manipulation in determining the purchasing value, the fact which is often used in aggressive tax optimisation mechanisms based on artificial creation of tax deductible costs. CITA Art. 15e in its final version puts the limitation on consulting, market research, advertising, management and control services, data processing, insurance, and guarantees. It should be noted that the catalogue of services is not close-ended, as the legislator has stated that "benefits of a similar nature" to the services explicitly listed in the article are also subject to the restrictions.

TP › **How then should the new regulations be interpreted?**

RC › The catalogues of services within the scope of both Art. 15e and Art. 21 of CITA overlap to a large extent, so in theory for the purpose of interpreting Art. 15e, one could use the already published individual interpretations of tax law and case law regarding the latter provision. Nevertheless, it does not guarantee unambiguous conclusions, as evidenced by some of the individual interpretations issued recently. For example, tax authorities presented the view on the basis of CITA Art. 21 that "benefits of a similar nature" do not include commercial agency, but they do include audit and marketing services. In turn in the light of the currently developing line of interpretation regarding Art. 15e, tax authorities argue that commercial brokerage and support are included in those benefits. Another practical concern is about the impact of the new regulations on the amount of depreciation charges. This is due to the fact that the fees and charges for the use of intangible assets subject to depreciation, i.e. copyrights or related property rights, licenses, industrial property rights, as well as know-how, were also subjected to the limitation. In this case, however, the construction of the provision, as it refers to Art. 16b (1) (4-7) raises interpretive doubts related to the possibility of applying a reduction of depreciation charges to the initial value of above-mentioned intangible assets and rights. Nevertheless, in the light of the interpretation practice that is developing currently, depreciation deductions on the values and rights indicated in Art. 15e are, in the opinion of tax authorities, also subject to the aforementioned limitations.

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Specializes in tax advisory, mainly in the area of corporate income tax, in the tax-related aspects of reorganisation and transformation of companies. He also advises his clients regarding ongoing tax issues related to business operation. His experience includes participation in projects in the fields of international tax law and transaction advisory, where he managed the work of numerous groups. He advises both Polish and foreign entities - in particular regarding daily tax consultancy for companies in the energy, telecommunications and consumer goods distribution sectors. Author of numerous tax publications and a speaker during trainings and conferences. A certified tax advisor.

The regulation under scrutiny, despite the official explanations of the Ministry of Finance, still raises many doubts that will be the subject of the developing prevailing line of interpretations and rulings, in particular before the deadline for tax settlement for the first year of new regulations passes.

TP › **What exemptions are provided in the new regulations?**

PS › The legislator has provided a number of exceptions, in which the restrictions will not be applied. It happens, among others in transactions between related entities belonging to one tax capital group or in case of service costs, in relation to which taxpayers made the so-called advance pricing agreement (APA), i.e. a decision to recognise that using the transaction price is correct.

RC › Practical concerns are raised by further exemptions, which have a much wider application in the economy. The legislator excluded from the catalogue the costs of obtaining revenues directly related to the creation or acquisition of goods or services by the taxpayer. The wording of this exemption may give rise to interpretation doubts due to the use of a term that is linguistically similar to the concept of "costs of obtaining revenues directly related to revenues", however, the above concepts have a different scope of meaning, as confirmed by the explanations of the Ministry of Finance. As a result, the costs directly related to creation or acquisition should be understood as the costs determining the price of a product or a service sold by the taxpayer. Demonstrating the price-creating nature of a cost is a different issue altogether, in particular the question whether this nature should be evident from the taxpayer's accounting records (i.e. to be part of the cost of production for accounting purposes). The analysis of the Ministry of Finance regulations and explanations does not give us a straightforward answer.

PS › Both the lack of direct reference to accounting regulations and the autonomy of tax law support the assumption that such a requirement does not exist, and that the accounting records may constitute an auxiliary (but not decisive) argument for applying the exemption. The adoption of this assumption would allow a wider application of this exemption, in particular if an individual interpretation confirmed that it is indeed the case.

TP › **What are the other problematic sections, in terms of interpretation?**

RC › Another exemption which raises interpretation problems, concerns re-invoiced services costs. It is necessary to settle the following uncertainty: whether it is about re-invoicing on the active part (when the taxpayer re-invoices costs), or on the passive part, i.e. the final consumer of the service. The content of the provisions cited above suggests that the exemption for re-invoices will apply to the situation where a taxpayer incurs costs of certain intangible services on behalf of another taxpayer and then charges the latter with the expenses. At the same time, one could try to argue that the above exemption will also apply to costs re-invoiced to the final beneficiary. Nevertheless, the explanations of the Ministry of Finance and the positions taken by the tax authorities support the recognition that the exemption should apply only "active" re-invoicing, i.e. the taxpayer who purchases services and then re-invoices them further.

TP › **What are the perspectives in the current situation?**

PS › The regulation under scrutiny, despite the official explanations of the Ministry of Finance, still raises many doubts that will be the subject of the developing prevailing line of interpretations and rulings, in particular before the deadline for tax settlement for the first year of new regulations passes.

The tax authorities should analyse the nature of services, intangible assets and rights that may be subject to limitation in order to ensure the safety of tax settlements. What's more, an amendment of art 15e is currently planned, however, these changes do not resolve interpretation problems mentioned above.

RC › In particular, when a taxpayer acquires services for which doubts about their status regarding limitation exists, or in case of doubts as to the applicability of the exemptions listed above, one should consider safeguarding the taxpayer's situation by obtaining an individual tax law interpretation.

PZ › **Thank you for your time.** ■

CUSTOMER EXPERIENCE IN THE GDPR ERA

How do regulatory changes regarding protection of personal data influence the capability of actively building positive customer experiences? What should one know about Customer Experience management in the GDPR context?

Companies that consciously shape Customer Experience (CX) at various points of contact of a customer with a company are thus brands that are able to thoroughly understand consumer needs, preferences and behaviours – and manage them effectively. Nowadays, information and data that allow a company to get to know their customer and the network of his decision making criteria are a lot more complex than traditional research methods which try to map customer behaviour using market analyses, demographic data or clients' behaviour in the past. Companies that actively manage customer experiences use an entire ecosystem of quantitative data to learn more about the clients, often combining such analyses with advanced qualitative research methods, such as cognitive or ethnographic studies. All that is crucial for organizations to define and differentiate customer segments and then to adapt not only the products or services, but also the communication and the approach to customer service to best fit their preferences.

GDPR introduces changes

On May 25, 2018, the EU General Data Protection Regulation entered into force. From then on, the GDPR regulate the way in which companies collect, store, share and use personal data. New provisions introduced, are, among others, the right of citizens to request erasure of their personal data processed by a given company or the imposition on enterprises of the obligation to inform about user profiling (using data about online activity, location, online shopping, etc.). Although the new regulation is an opportunity for companies to build an image of a transparent and trustworthy brand, it does mean that the companies must now face a double challenge: introducing organizational and technical changes in response to new regulations while maintaining an extensive range of information about their client as a fundamental element of active management of Customer Experience.

Although the new regulation is an opportunity for companies to build an image of a transparent and trustworthy brand, it does mean that the companies must now face a double challenge: introducing organizational and technical changes in response to new regulations while maintaining an extensive range of information about their client as a fundamental element of active management of Customer Experience.

Changes in the eyes of Polish respondents

According to the KPMG survey carried out in February 2018 , Poles thought of several changes introduced by the GDPR as very important. As such were considered the right to request erasure of personal data from a specific company, oppose profiling or request a company to provide information about the purpose of data processing or cease data processing altogether. From the perspective of Customer Experience management in an organization, the possibility of clients requesting the removal of personal data from a given company seems to be one of the most important changes introduced by the new provisions. Even before GDPR was implemented, the majority of respondents declared that they were withdrawing or planning to withdraw the consents granted for the processing of personal data, and the higher the education of Polish respondents, the more often marketing consent is withdrawn. We can somehow predict that the new regulations and the resulting increasing awareness of the need to protect data will push a much larger group of customers to demand the discontinuation of information processing.

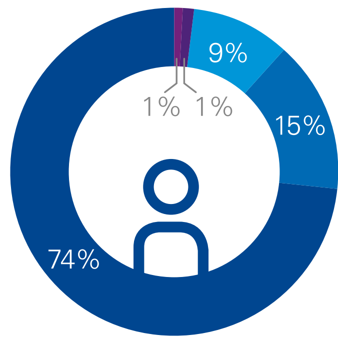
Another important aspect for Customer Experience resulting from the new regulations is the obligation for companies to inform about profiling activities. KPMG's research has shown that as many as 60% of Poles treat this information as profitable for service providers. Just like with other privacy issues, the awareness of the commercial usage of online activities data will only grow, not only due to the stir caused by the GDPR, but also because of recent reports in the media about how personal data is processed by the largest providers of digital content.

Faced with the growing awareness of our societies, the regulatory changes, but also customers' fears of data leaks and personal data abuse and their aversion of aggressive marketing contacts or profiling, companies have to become trusted partners for consumers, offering on the one hand safety, contact and transparency, and on the other – clearly defined benefits for the customer that will decide to trust an organization with their data. Organizations will now have to answer the question as to which data do they really need at every stage of the customer's journey – and what they can offer in return. »

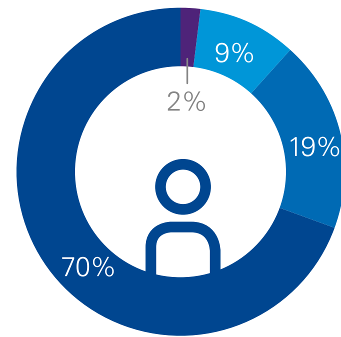
1 KPMG in Poland report, "Customer Experience management in the GDPR era. How much do Poles care about the protection of their personal information".

CHART 1

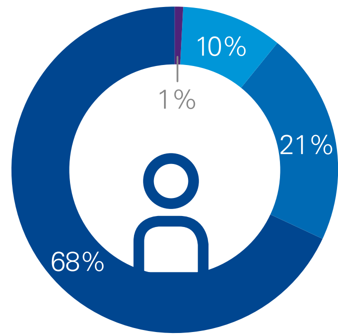
Which of the following GDPR requirements seem particularly important?



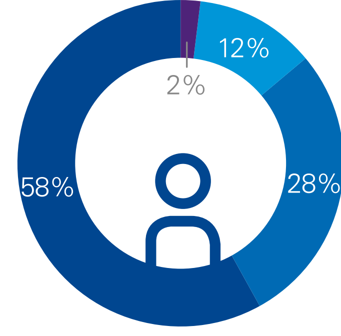
I will be able to request the deletion of personal data by a given company / institution



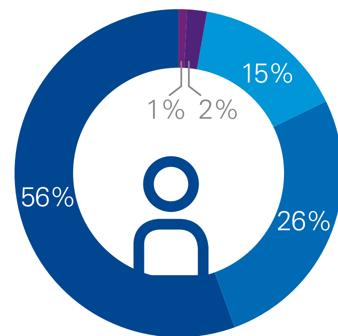
I will be able to request that the company / institution stops processing my personal data



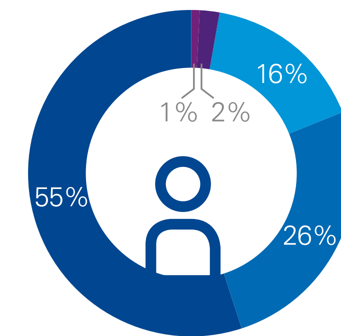
Companies will have to provide transparent information about the purpose for which my personal data will be processed



I will have the right to object to profiling



Companies will have to release information about profiling



I will be able to request access to my personal data, which are processed by the company / institution

5 very important → 4 → 3 → 2 → 1 not important at all

Source: KPMG report in Poland entitled, "Managing Customer Experience (CX) in the GDPR era. How much do Poles care about the protection of their personal information"

GDPR vs. CX – how to encourage sharing data?

Companies can take a number of incentives to proactively manage the risk of customers restricting access to their data due to the growing trend of personal data protection. Firstly, companies should proactively inform consumers about the changes introduced by GDPR and ensure that they comply with the new regulations. Some brands have used this as an opportunity to create engaging infographics, videos or short presentations educating customers about the right to privacy and building the image of a transparent organization. However, it has been a common practice to send formal e-mails, which could only be treated by customers as fulfilling the information obligation (and did not involve them in interaction with the brand). Another action that companies can take is to adapt the processes of handling inquiries and withdrawals of consents by clients, so as to take into account educational elements in such process, in particular emphasizing the benefits for consumers which result from the possibility of data processing by the organization for marketing purposes. According to the latest KPMG report, the benefits a brand receives through its access to customer data and the adjustment of marketing content to the needs of its recipients can be crucial in the new legislative reality. The KPMG study showed that although the main reason Polish consumers give for providing marketing consent are, first of all, financial benefits (such as discounts, special offers or loyalty programs), the second most popular motivating factor for not withdrawing one's data includes CX-related aspects – such as greater convenience in using of a product or a service (for instance, simplified payment or signing in process) and more accurate personalisation of offers or recommendations. Such benefits should be communicated to the customer in a transparent manner and be the foundation of the offer by the brand that wants to process personal information. Companies highly rated by respondents in the global Customer Experience ranking understand those principles perfectly: an American brand from the financial industry is providing an advanced application that not

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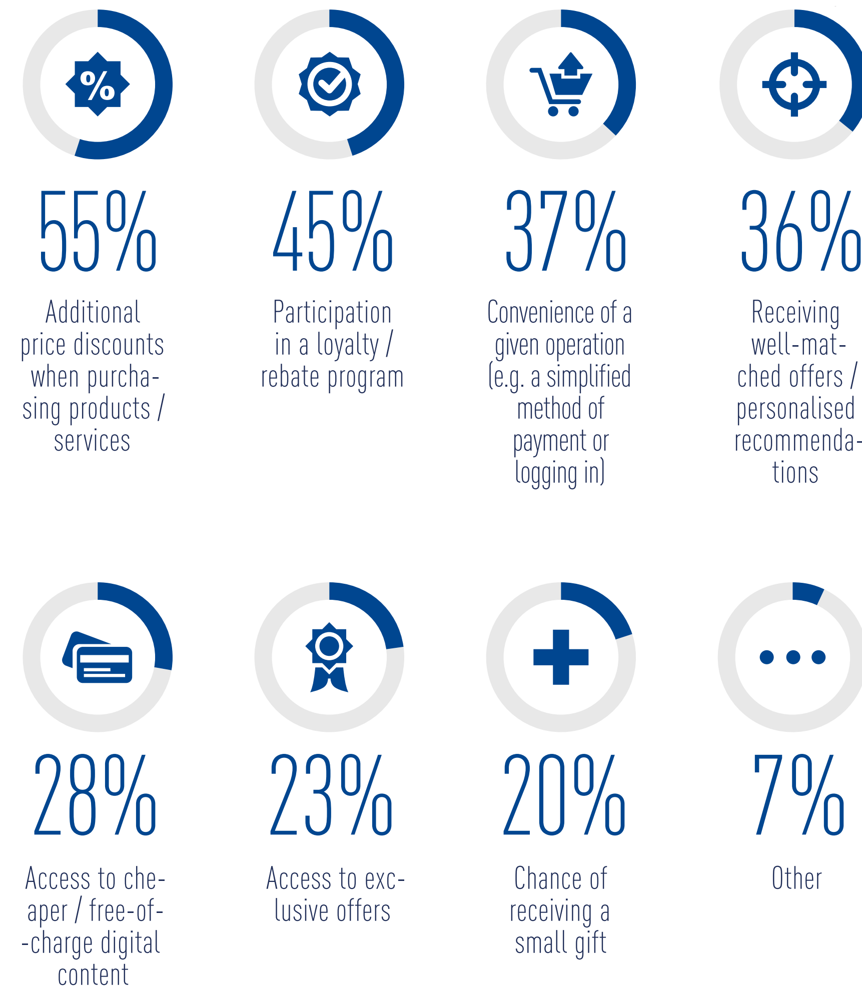
According to the latest KPMG report, the benefits a brand receives through its access to customer data and the adjustment of marketing content to the needs of its recipients can be crucial in the new legislative reality.

CHART 2

What makes Poles share their personal data with companies and institutions?



Source: KPMG International report: "Tomorrow's experience, today. Harnessing a customer first approach in a changing world"

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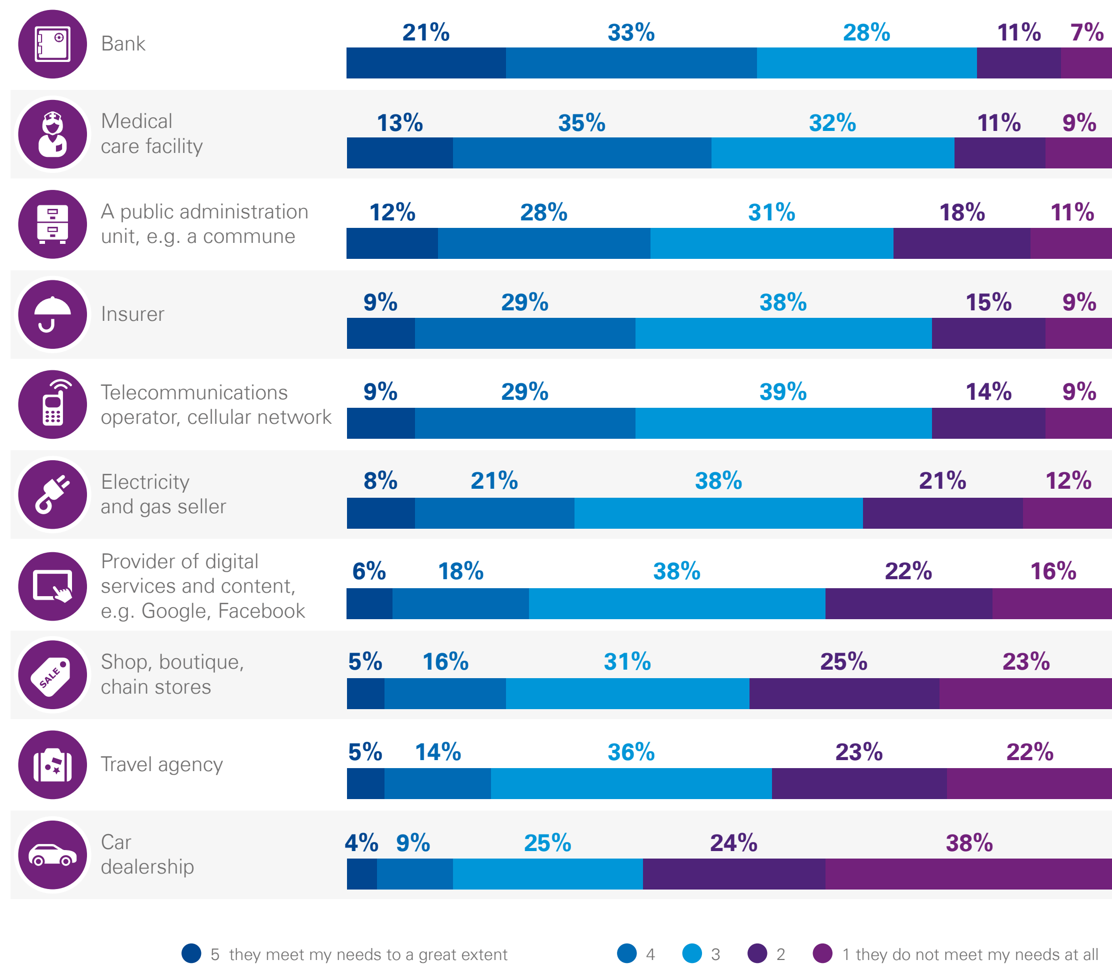
only helps clients solve their problems, but also provides personalized communication; Netflix and Amazon based their whole business model on the personalised offers and recommendations; or even entities not directly associated with digitisation, such as luxury fashion houses, now use customer data to deliver personalized and individualized experiences not only in store, but also to the online consumers. It is important to remember that obtaining or maintaining consent is an important step, but it is equally important to ensure that customers abide with this decision, in particular by providing them with tailored information and benefits. This condition, in the light of the results of the survey, is not always met by enterprises operating on the Polish market as respondents claim that information received from companies does not always meet their needs. Banks were best rated in this respect, which may result from the specifics of the offer of banking products, which customers use relatively often and look for solutions tailored to their actual financial needs. On the other hand, banks have a fairly wide range of information about the activities of their clients, thanks to which they can actively shape customer communication and interaction. Medical facilities have also been highly rated, and as their operations deal with sensitive health data, their character itself determines a high level of personalization and adjustment to the current needs of patients. Travel agencies and car dealers have b een rated low when it comes to meeting customer's needs. The reasons may be found in the shopping cycle of such products (usually once or twice a year in the case of tourist trips, every few years in the case of cars), which results in that customers may be sensitive to too frequent communication or a mismatched moment in the cycle (for example, a too early offer to buy a new car or a holiday trip). Shops, boutiques and chain stores are also poorly ranked in answering the needs of Polish clients, possibly because of too frequent communication (in particular in the e-commerce world) aimed at finalizing a transaction.

CHART 3

To what extent do the offers and commercial and marketing information provided by individual companies meet the needs of Polish customers?



2 Raport KPMG International „Tomorrow's experience, today. Harnessing a customer first approach in a changing world".

Therefore, problems in this sphere may directly result in an increase in withdrawing consent to data processing. We are now dealing with a phenomenon in which only the companies trusted by their clients will have wider access to customer data and will be able to use personalization in building a competitive advantage based on positive Customer Experience.

Fair play culture

There is another, perhaps the most important element of the puzzle – trust, which is a fundamental pillar of building the positive experiences of customers all over the world, Poland included. In the digital evolution era, trust takes on a broader meaning and concerns not only trust given to brands, their products and services or even trust based on clients' identification with the values offered by a company. It is crucial to understand that trust now also concerns the way companies process and analyse customer data. Data security is now inseparable from the level of trust that companies can count on.

Therefore, problems in this sphere may directly result in an increase in withdrawing consent to data processing. We are now dealing with a phenomenon in which only the companies trusted by their clients will have a wider access to customer data and will be able to use personalization in building a competitive advantage based on positive Customer Experience.

GDPR is not only a regulatory change and an imposed obligation for businesses – it may become a step towards a culture of transparency, trust and protection of privacy for both brands and consumers. Companies should not treat GDPR only as an element of compliance management, but also as an opportunity to strengthen a customer-centric culture in a world where they have a significantly greater impact on how the information about themselves are processed and whether they derive sufficient benefits from consents for data processing. ■

3 KPMG in Poland report, "Creating positive Customer Experience. Analysis of leading Customer Experience management practices in Poland".

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INSTITUTIONS OBLIGATED TO PROVIDE **INFORMATION TO GIFI**

On 13th July 2018, the Act of 1st March 2018 on Counteracting Money Laundering and Terrorism Financing ("New AML Act") came into force. It rescinds existing provisions of the Act of 16th November 2000 on Counteracting Money Laundering and Terrorism Financing (the "Act of 2000") and implements the provisions of the 4th AML Directive into Polish law.

From the perspective of everyday operations of obliged institutions, significant changes in the new AML Act include provisions of Chapter 7. They define the scope and principles of gathering information by the GIFI (General Inspector of Financial Information) and the corresponding information duties of obligated institutions. In the Act of 2000, these issues primarily involved the registration of each completed transaction for a total sum exceeding EUR 15,000. ("above-threshold transactions") and transactions made in circumstances which suggested that they could be connected with money laundering or financing terrorism ("suspicious transactions"), as well as reporting "registered transactions" to the GIFI.

In the new regulations, the legislator withdrew from the formal obligation on institutions to register "above-threshold" and "suspicious" transactions (see, however, further comments in this text). Instead of submitting information on "registered transactions" to GIFI, the new AML Act introduces compulsory reporting on "above-threshold transactions" (Article 72) and on "suspicious circumstances" within the meaning provided in Art. 74. It also gives GIFI the right to request information from obligated institutions, pursuant to Art. 76.

The reporting obligation therefore applies to each obligated institution that accepts a payment or withdraws cash in the amount exceeding the equivalent of EUR 15,000. For non-cash transactions, the obligation to report "above-threshold transactions" will only apply to fund transfers which will allow to identify flow of assets within the financial system (exceeding the equivalent of EUR 15,000). As indicated in the explanatory memorandum to the draft of the new AML Act, the limitation of the number of "above-threshold transactions" subject to reporting will help reduce the information obligations of those obliged institutions that do not directly carry out the "above-threshold transactions" as defined in the regulations.

The obligation to provide GIFI with information about "suspicious circumstances"

Chapter 7 of the new AML Act also formulates the duty of the obligated institution to provide GIFI with information "on circumstances that may indicate suspected money laundering or terrorism financing" (Article 74, paragraph 1). It replaces the current obligation to report "suspicious transactions".
In comparison with the existing regulations, there is a significantly larger emphasis on reporting, as from 13th

PROVIDING GIFI WITH INFORMATION N ABOVE-THRESHOLD TRANSACTIONS

The new AML Act modifies the scope of reporting to GIFI about the so-called above-threshold transactions. From 13th July 2018 on, obligated institutions are required to submit to GIFI, within 7 days from the day of completing the following operations, information about:

- **accepted payment and cash withdrawal, the value of each exceeding EUR 15,000. (Article 72, paragraph 1, item 1),**
- **a completed money transfer as defined by the Regulation (EU) 2015/847, the value of which exceeds EUR 15,000 (Article 72 paragraph 1, item 2, with the exceptions indicated in this provision).**

According to Art. 3 item 9 of the Regulation (EU) 2015/847: "'transfer of funds' means any transaction at least partially carried out by electronic means on behalf of a payer through a payment service provider, with a view to making funds available to a payee through a payment service provider, irrespective of whether the payer and the payee are the same person and irrespective of whether the payment service provider of this payer and that of the payee are one and the same, including: a) a credit transfer (...); b) a direct debit (...); c) a money remittance, whether national or cross border (...); d) a transfer carried out using a payment card, an electronic money instrument, or a mobile phone, or any other digital or IT prepaid or postpaid device with similar characteristics".

The new AML Act introduces compulsory reporting on "above-threshold transactions" (Article 72) and on "suspicious circumstances" within the meaning provided in Art. 74.

July 2018 it is mandatory to provide information on "suspicious circumstances" that are not necessarily related to a specific transaction. Therefore, it will not be necessary for the so-called suspicious transaction to occur. However, if "suspicious circumstances" involve a specific transaction, then the obligation to provide information pursuant to Art. 74 arises regardless of whether it is a transaction involving money or other assets. The scope of information that should be included in a report to GIFI is specified in Art. 74 par. 3, and includes:

(1) identification data of the client of the obligated institution which provides the notification and of entities that are not its clients (as referred to in Article 36, paragraph 1 of the Act),
(2) type and size of material assets and location of their storage,
(3) client's account number,
(4) stored information, as referred to in Art. 72 par. 6, regarding completed transactions or attempts to complete them,
(5) an indication which EEA state is the transaction linked with (in case of cross border transactions),
(6) information about the identified risk of money laundering or terrorism financing and about criminal activity through which property may have been obtained,
(7) justification of the notification.

The deadline for reporting to the GIFI about "suspicious circumstances" was significantly shortened. The new AML Act grants 2 business days from the date on which an obligated institution confirmed suspected act of money laundering or terrorism financing (Article 74, paragraph 2).

Information provided at the GIFI request

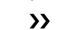
In addition to the abovementioned disclosure obligations, which are require by law from obligated institutions, Chapter 7 of the new AML Act also grants GIFI the right to demand "immediate transfer or sharing of information or documents held necessary to perform the GIFI's tasks specified in the Act" (Art. 76) from the obliged institution.
Statutory tasks of GIFI include counteracting money laundering and financing of terrorism (Article 12, paragraph 1). GIFI may therefore request a transfer of both transaction data that the obligated institution should have reported as "above-threshold transactions", or because "suspicious circumstances" and other issues occurred, if such transfer is necessary to counteract money laundering and financing of terrorist activity. Types of such data is enumerated in Art. 76 par. 1, indicating that they may concern:

- clients,
- completed transactions, within the scope of data specified in Art. 72 par. 6,
- type and size of assets and storage locations,
- application of the financial security measure referred to in Art. 34 par. 1, item 4,
- IP addresses which connected to the IT system of the obligated institution, as well as duration of such connections,

The scope of data resulting from art. 72 par. 6 (which is also required as part of information about "suspicious circumstances") includes:

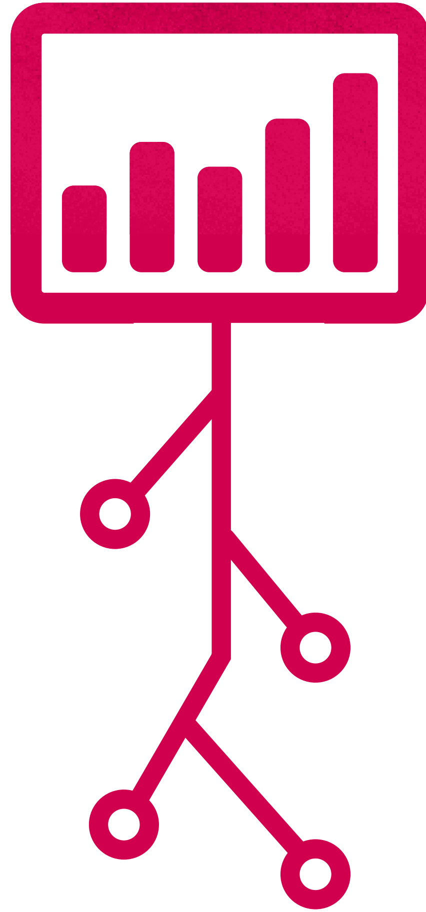
- unique transaction identifier kept in the records of the obligated institution,
- date or time and date of the transaction,
- identification data, referred to in Art. 36 par. 1, of the client who issued the instruction or order to carry the transaction out; possibly identification data of other parties of the transaction,
- the amount and currency of the transaction, or the weight and the sample of foreign exchange gold or foreign exchange platinum that were the subject of the transaction,
- the method of issuing an instruction or order to conduct a transaction,
- IBAN number.

In this context, it should also be noted that the abovementioned financial security measures under Art. 34 par. 1, item 4 include:
(1) analyzing transactions conducted as part of business relationships, in order to ensure that these transactions are compliant with the knowledge of the obligated institution about the client, the type and scope of client's business operations and take into account the risk of money laundering and terrorism financing related to that client,
(2) examining the source of assets at the client's disposal – in justified cases,
(3) ensuring that existing documents, data or information on business relationships are updated on an ongoing basis.



As indicated in the explanatory memorandum to the draft of the new AML Act, the limitation of the number of "above-threshold transactions" subject to reporting will help reduce the information obligations of those obliged institutions that do not directly carry out the "above-threshold transactions" as defined in the regulations.

The analysis of the scope of information required if obligations mentioned in the provisions of Chapter 7 indicates that the fulfilling these obligations in accordance with the requirements of the new AML Act will only be possible with proper gathering of information and taking security measures, in particular with regard to ongoing monitoring of client's business relationships pursuant to Art. 34 par. 1, item 4.



Summary
The analysis of the scope of information required if obligations mentioned in the provisions of Chapter 7 indicates that the fulfilling these obligations in accordance with the requirements of the new AML Act will only be possible with proper gathering of information and taking security measures, in particular with regard to ongoing monitoring of client's business relationships pursuant to Art. 34 par. 1, item 4.
With that in mind, looking again at the abovementioned lack of formal obligation in the new regulations to register transactions, it should be noted that fulfilling reporting obligations referred to in Chapter 7 (as well as other provisions of the new AML Act, which are not the subject of this article), will entail, however, the necessity for the obligated institution to properly register transactions, keep properly systematized data about clients and introducing appropriate procedures for collecting the necessary information and documents. ■

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THE IMMINENT OBLIGATORY DEMATERIALISATION OF ALL SHARES

Works on the amendment to the Commercial Companies Code, which introduces the obligation to dematerialize all shares in joint-stock companies and limited joint-stock partnerships, are in progress. The project also provides for new obligations for companies and board members.

The Ministry of Justice has published a draft amendment to the Commercial Companies Code, which provides for the total dematerialisation of shares of commercial law companies (joint stock companies and limited joint-stock partnerships). We should emphasize that in the current legislation, dematerialisation of shares refers only to public companies. Moreover, even in public companies this requirement does not apply to all issued shares. The only shares that require dematerialisation are those which are to be subject of a public offering, to be admitted to trading on a regulated market or admitted to an alternative trading system.

WHAT IS DEMATERIALISATION OF SHARES?

Dematerialisation is a process through which a physical share certificate is converted to an electronic record, which is maintained on a corresponding account kept by an authorized entity, e.g. a brokerage house. Most importantly, after dematerialisation, the physical share certificate loses its validity.

The authors of the project motivate the need to introduce changes by the current structure of bearer shares, which results in actual inability to identify the holder of this type of shares. The inability to identify the holder of bearer shares may potentially make it easier for a shares owner to take illegal advantage of the regulations, for example through money laundering.

The status of amendment

Works on the project and submitted opinions indicate that the current legal status will change significantly. The authors of the project motivate the need to introduce changes by the current structure of bearer shares, which results in actual inability to identify the holder of this type of shares. The inability to identify the holder of bearer shares may potentially make it easier for a shares owner to take illegal advantage of the regulations, for example through money laundering. The authors of the project point out that an additional benefit of the amendment is increasing the safety and efficiency of trading by limiting the risk of losing shares. When the project comes into force bearer shares which are very popular in joint-stock companies may still be issued, but due to the planned changes they will lose their core value, i.e. anonymity. Considering the above, as a consequence of the planned amendment bearer shares will lose their importance on the market.

New regulations

The above general assumption of the project is reflected in a number of new regulations that will have to be met by companies, and in practice their by their management. First of all, the proposed amendment assumes that from the moment of its introduction, shares will no longer take the form of a physical document. The validity of physical shares will expire. Each joint-stock company and limited joint-stock partnership will be required to fulfill corporate obligations in order to create a digital register of all its shareholders. Additionally, companies will have to call their shareholders to submit share documents in a manner specified in the project.

Another issue will be the selection of the entity to be entrusted with keeping the register and concluding the contract for keeping the shareholders register. The register may be maintained by entities that previously kept securities accounts in dematerialised form. As a rule, such entities shall include brokerage houses and banks that provide brokerage services. An alternative to shareholders registers is dematerialisation of shares in non-public companies by registering those shares in the National Depository of Securities SA. Up to this point this option was available only for public companies. In order to choose the best entity entrusted with maintaining a register each specific case requires a separate analysis.

In principle, the register will be open for the company and shareholders. The change of an entry in the register will take place based on documents that substantiate the entry at the request of the company itself or the person concerned by the content of the entry (for instance a buyer or seller of shares). The entity maintaining the register will not be entitled to carry out substantive audit of documents, as well as to test their authenticity. The function of this entity will therefore be restricted to registration and technical operations. Importantly, the project does not foresee any procedure for entering content into a registry or for resolving possible discrepancies between the positions of an applicant and the registry's operator. In our opinion if the project is not amended and supplemented regarding this matter, any "appeal" of the entity's decision will be possible only in court.

Another important innovation is the fact that the transfer of dematerialised shares or the establishment of a limited property right will depend on making an entry in the shareholders register. An entry will include information about a particular buyer, pledgee or user, along with the list of transferred or encumbered shares.

At the request of a shareholder, pledgee or user, the entity maintaining the register will issue personal registry certificates. This document will confirm the entitlement to a dematerialised security in the shareholders' register. The issuance of a registry certificate will result in suspending the control over these shares for the period of validity of the certificate. The operation will be carried out by the entity maintaining the shareholder register. The amendment also introduces changes to holding general shareholders' meetings by making the shareholder's right to participate dependent on whether the shareholder was registered at least one week prior to the general meeting. Analysis of new regulations indicates that most joint-stock companies should adapt their statutes to the new legislation in order to ensure proper organisational and corporate functioning.

Time for change

According to the project assumptions, a major part of the amendment is expected to enter into force on 1st January 2020, although some of the provisions that prepare companies for the amendment and impose new duties on board members will be implemented earlier, starting on 1st January 2019. Obviously, detailed project provisions may still change. The date specified in the project suggests that companies will not have much time to prepare for the planned changes. This is important especially from the point of view of the management boards of companies, because the project also provides additional provisions on the liability of management board members. In particular, not meeting the obligation to keep a register of shareholders in electronic form may result in imposing a fine of up to PLN 20,000 on a management board member. ■

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1 The 27.01.2017 draft of the Act amending the Commercial Companies Code and the Act on the European Economic Interest Grouping and the European Company, along with an explanatory statement.

SOLIDARITY TAX – WHAT DO YOU NEED TO KNOW

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The draft of the act introducing the so-called "solidarity contribution" was announced in July this year. Its goal is to redistribute part of the income of the highest earners (over PLN 1 million per year) to persons with disabilities. As for its structure, the contribution was introduced as a new part of personal income tax.

Characteristics of the solidarity contribution

The uniqueness of this contribution lies in the fact that it is imposed on a taxpayer if the total annual income in various sources exceeds PLN 1 million. Consequently, in order to determine whether this contribution is due, taxpayers will be required to aggregate their income taxed according to a progressive tax scale (eg. employment, management contracts, freelance and specific work contract, or individual enterprise/ sole proprietorship taxed according to the progressive tax scale), income taxed with flat tax (individual enterprise/ sole proprietorship, if it is subject to the flat tax) and capital income (also subject to the 19% PIT). The new tax, however, will not affect the interest, capital and dividend gains when the tax is remitted by the payer of income.

The former solution raises an obvious question about the goal the authors had in mind when they excluded this type of income from taxation with a solidarity tax. The resulting taxation asymmetry can in fact lead to some effects unexpected both for the legislator and taxpayers.

Buy-back transactions

The first issue worth looking into is the taxation of dividend-type income. The regulations in this area have evolved over the past few years, so currently, for example, certain forms of redemption of shares are taxed using the same terms as dividend. Thus, the obvious question is whether any unexpected paradoxes involving stock market buy-back transactions will occur, where, depending on the form of share redemption, we will face taxation following rules less favorable for the taxpayers (either just the 19% PIT, or the 19% PIT tax and an additional 4% solidarity tax on income exceeding PLN 1 million).

Polish residents vs non-residents

An issue separate from the scope of income subject to the solidarity contribution, is whether the contribution affects only Polish tax residents or also non-residents who obtain income in Poland. There is no doubt that taxation of the latter is subject to restrictions resulting from existing double tax treaties. Let's consider a following example – there are two people, A and B. The person A is a Polish tax resident, B is not. Additionally, we assume that a treaty on the avoidance of double taxation between Poland and the country of residence of person B has been concluded. In our example, both people obtain exactly the same income in Poland, for work performed in this country, PLN 600,000. They also both have an additional income due to shares and securities trade, amounting to PLN 600,000 PLN each. In both cases, their total income earned in Poland is PLN 1.2 million. The structure of the solidarity tax for the Polish resident means that person A will have to bear an additional 4% tax on the amount that exceeds 1 million. The income of Person B (non-resident) should not be subject to this tax, as only income from work performed in Poland is taxed in Poland. Trading in securities by non-residents, on the other hand, should not be taxed in Poland.

Solidarity tax and flat tax

The subject of the solidarity contribution will also undoubtedly focus attention of individual entrepreneurs who are used to taxing their income with a flat tax. In their case, only revenues up to PLN 1 million will be subject to the flat tax rate. The issue is not as abstract as it seems at first glance. The flat income tax applies not only to sole proprietorships, but also to partnerships (for instance public or limited partnerships), which often take form of large, sometimes very large, high income enterprises.

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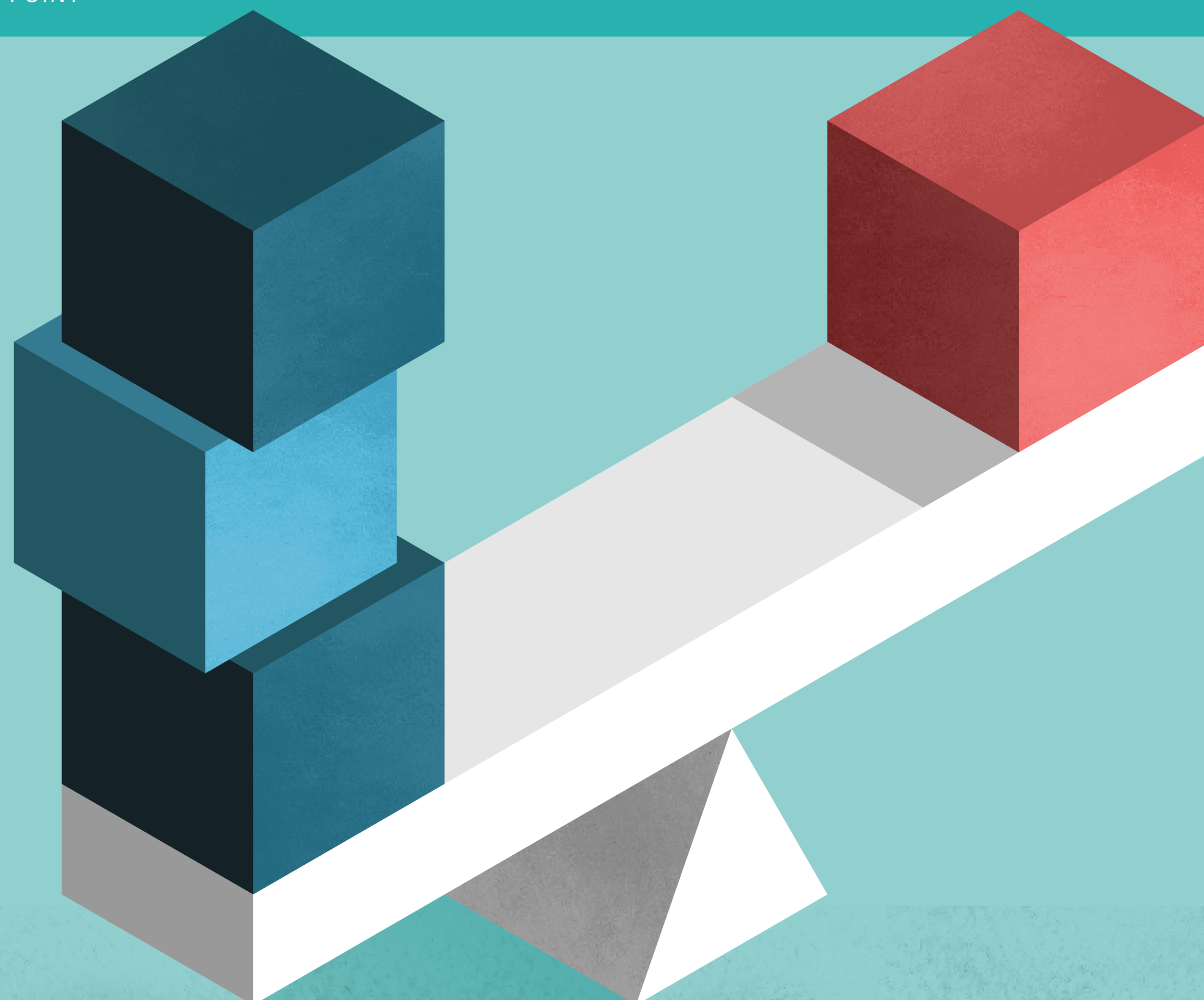
The question is whether this situation shall result in some instability, stemming from the fact that companies will pay only 19% CIT rate, and not 19% PIT plus the additional 4% for income exceeding PLN 1 million.
It is difficult to decide whether this was indeed the legislator's intention. That said, we shall wait for the next drafts of the bill, because one should take into account that its content should evolve in the course of parliamentary proceedings. ■



COMPROMISE RESOLUTION OF TAX DISPUTES IN THE PROJECT OF A NEW TAX ORDINATION

After several years of work, commissioned by the Minister of Finance of the General Tax Code Codification Commission, a draft of the new Tax Ordinance was published. In accordance with the declared goals, it is to guarantee the appropriate rights of taxpayers and increase their sense of security. At the same time, however, it is also to contribute to increasing the efficiency of tax collection.

Work on the creation of a new tax ordinance was initiated in 2014 by the setting up of an expert codification committee, before which the ambitious task of elaborating a completely new legal act replacing the rules of the hitherto binding law that laid the foundation for the application of specific tax law regulations was set. In its assumptions, the New Tax Ordinance was not only to contain a catalogue of general principles of tax law and to regulate the manner of tax authorities' proceedings, but first and foremost to organize provisions, introduce institutions necessary for the protection of the taxpayer's rights in its reforms with the authorities and properly balance the interests of the tax authorities and taxpayers.

The published bill attempts to implement these demands, introducing a number of new institutions and solutions to the tax procedure, of which at least a few merit the special attention of taxpayers. Mention should be made, in particular, of the regulations concerning tax agreements, mediations, cooperation agreements and tax consultations, as outlined in the draft. They may, assuming that the project proposals will not be significantly changed during further legislative work, actually mark a new quality in the area of the functioning of Polish tax administration regarding the resolution of tax disputes.

Tax agreements

The draft of the new Ordinance introduces a completely new institution in tax procedure in the form of a tax agreement. These contracts do not replace the decisions issued so far determining the amount of tax liabilities and they will not be able to rely directly on the amount of tax, but they will be able to deal with, among others, doubts as to the actual state of affairs regarding the nature or value of transactions, activities or events covered by taxation.

The result is that the tax agreement can become an extremely valuable instrument, which so far was lacking in relations between taxpayers and tax authorities – in particular in the case of high-value tax disputes, often involving complex situations or transactions and economic events of ambiguous results. At present, even in the case of the conviction that the right of tax consequences of a given activity may lie partly on both sides of the dispute, the tax authorities do not have a formal procedure for ending proceedings by partial concession as to the core of the case, which makes it extremely difficult to work out and legitimize any compromise resolution within the formal framework.

Including in the Tax Ordinance, as provided for in the draft, that the lawful tax agreement may entail reciprocal concessions of both the authority and the party, will allow for the use of the negotiation space available in many matters for the purpose of amicable settlement of disputes and the provision of the appropriate legal instruments. It should also change the whole model of tax proceedings, which are often carried out by the tax authorities from the initial stage, with a view to the final resolution of any disputable issues by the administrative courts..

Mediation

Another new procedure designed to compromise the settlement of tax disputes is mediation, which can be carried out in some cases in which it will be possible to conclude a tax agreement.

The aim of the mediation procedure is to facilitate communication between taxpayers and tax authorities and overcome communication difficulties, which often arise in the conditions of the natural conflict between these entities. In this way, mediation will be a form of "assisted negotiations"

In its assumptions, the New Tax Ordinance was not only to contain a catalogue of general principles of tax law and to regulate the manner of tax authorities' proceedings, but first and foremost to organize provisions, introduce institutions necessary for the protection of the taxpayer's rights in its reforms with the authorities and properly balance the interests of the tax authorities and taxpayers

between the authority and the taxpayer. According to the draft of the new tax code, the tax authority will be able, upon the request or only with the consent of the party, to refer the matter to mediation before setting up an impartial and neutral mediator who will conduct a mediation meeting with the tax authority and the party, then to submit the mediation positions of the parties and proposals for a compromise solution of the conflict, and, as a result, termination of the proceedings through the conclusion of a tax agreement.

Cooperation agreements

For taxpayers having "significant economic importance", the new Ordinance introduces the possibility of concluding a cooperation agreement

with the Head of the National Tax Administration (KAS). This contract will aim at ensuring compliance with tax law in the conditions of mutual trust between the tax authority and the taxpayer, and transparency and understanding by the tax authority of the nature of the activity carried out by the taxpayer.

This instrument is intended to cover the largest business entities whose list will be prepared by the Minister of Finance. The cooperation agreement will depend, among other factors, on the compliance with the procedures agreed with the Head of the KAS regarding the internal control of the correctness of the tax settlement and the reporting to the Head of KAS without delay any information relevant to taxation of their activities. In the contract, the tax administration will undertake to adjust the form and frequency of actions verifying the correctness of the taxpayer settlements to the effectiveness of internal taxpayer's control and to provide without delay consultations and express opinions on the relevant tax issues indicated by the taxpayer. With a taxpayer who has entered into a cooperation agreement, the competent tax authority shall be the Head of KAS.

Tax consultations

For each taxpayer concerned, a tax consulting procedure will be available. Within this framework, the applicant and the tax authority will be able, at the request of the taxpayer, in consultation mode, to make arrangements regarding the tax consequences of the applicant's actions. This solution has been envisaged, in particular, for taxpayers who have made complicated economic operations (e.g. transformations) and are not sure whether they have made mistakes causing negative tax consequences. Thus, this procedure will be a form of "on-demand demand", initiated at the taxpayer's request in order to verify the correctness of the settlement of the transaction made by her/him.

The main difference between tax consultations and the current option of requesting individual tax interpretation is that during the consultation procedure the authority will not limit itself only to the legal analysis of the facts presented by the taxpayer (as in the case of interpretation), but will examine the whole documentation in order to verify the correctness of settlements. The procedure will end with the issuing of a decision determining the amount of tax.

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Summary

Time will tell whether the procedures for compromising the settlement of potential tax disputes will eventually be implemented in the new form in the draft, whether the provisions of the Act will be far-reaching in the legislative process that may distort the sense of the proposed institutions, and what will the functioning of these regulations look like in practice.
One can, however, hope that the institutions provided for in the project will be introduced into the legal order, thus contributing to increasing the certainty of the application of the tax law and the implementation of one of the main objectives set out in the new tax ordinance, which according to its assumptions is to increase the taxpayers' sense of security. ■

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NEW INVESTMENTS SUPPORT AMENDED REGULATIONS

On 30th June most of the provisions of the Act of May 10, 2018 on new investments support entered into force (Journal of Laws of 2018, item 1162, hereinafter: "Act"). It grants entrepreneurs implementing new investments the exemption from income tax (PIT or CIT, respectively). Whether a company is eligible for the exemption from tax will depend on entirely different factors than these provided for in the Act of October 20, 1994 on Special Economic Zones (Journal of Laws of 2017, item 1010; hereinafter: "The SEZ Act"). By the end of 2026, the two abovementioned supporting systems will be simultaneously in place.

AS INDICATED IN THE EXPLANATORY TO THE ACT, ITS PURPOSE IS TO STIMULATE THE GROWTH OF PRIVATE INVESTMENTS, WHICH IN TURN SHOULD RESULT IN:

1~ **development of innovative areas** of economic activity,

2~ **creating new, stable jobs** for highly qualified employees,

3~ **development of new technical and technological solutions** and their implementation in the national economy,

4~ **increasing the competitiveness of manufactured products and services**,

5~ **further development of export**,

6~ **halting the growth of regional**.

No territorial restrictions

One of the main assumptions of the Act is the exemption of income tax on investments regardless of their location, which means that it will no longer apply only in the SEZs, as it is the case under the provisions of the SEZ Act. The exemption from income tax, as a rule, will be available throughout Poland. As a result, both territorial restrictions as well as a complicated and time-consuming (in some cases lasting over 20 months) procedure of applying for the extension of the SEZ borders will be abolished.

The income tax exemption period

Support in the form of exemption from income tax is granted through a decision issued for an entrepreneur who implements a new investment. The decision to support the investment with the tax exemption will be issued for a period from 10 to 15 years, depending on the amount of public aid in a given area. If investments are located in the existing SEZ, the period of using the exemption will be 15 years. If the entrepreneur has at least two positive decisions regarding aid, the public aid will be paid in accordance with the order in which the decisions were issued. According to the provisions, the new procedure for issuing decisions regarding aid should last about a month.

Criteria of granting the income tax exemption

Obtaining an income tax exemption will be possible after meeting the quantitative and qualitative criteria, detailed in the draft implementing executive regulation to the Act, which defines:

1. QUANTITATIVE CRITERIA
as minimum investment costs in a poviat with a certain unemployment rate (the higher the unemployment rate, the lower the investment amount required). In addition, if the investment applies to the field of modern business services and the research and development (R & D) area, the eligible costs of the new investment will be subject to a significant reduction. Also micro-, small and medium-sized enterprises (MSME) are eligible for reductions in the obligatory costs of new investments.

As one of the countermeasures against tax avoidance or evasion, the legislator excluded the entities forming tax capital groups from the list of companies eligible for the exemption from income tax.

2. QUALITY CRITERIA
which in principle include:

- **structural development:**
  - creating high-paid and specialised jobs offering stable employment,
  - ensuring a certain level of export sales,
  - investing in projects supporting industries in line with the current development policy of the country; sectors where Poland can gain a competitive advantage,
- **scientific development:**
  - creating a modern business services center, its range extending beyond Poland,
  - conducting R&D,
  - clusters development,
- **sustainable development:**
  - locating investments in areas with high unemployment rate,
  - locating investments in medium-sized cities that are losing their socio-economic functions or municipalities bordering such cities,
  - qualifying the entrepreneur to the MSME category,
  - low environmental impact, the use of environmental technologies that reduce the negative impact of business activity on the natural environment,
- **human resources development:**
  - supporting employees in getting education and professional qualifications as well as cooperation with trade schools,
  - undertaking actions in the field of employee care.

It should be noted that the set of qualitative criteria for projects implementing new investments in the services sector partly differs from the set of criteria for the industrial processing sector.
If the quality criteria are met, points (maximum 10) are awarded. Depending on the region, a different number of points to secure an income tax exemption will be sufficient.

Restrictions in granting the exemptions

As one of the countermeasures against tax avoidance or evasion, the legislator excluded the entities forming tax capital groups from the list of companies eligible for the exemption from income tax.
In addition, the Act introduces the so-called "small anti-optimising clause" to the PIT and CIT Acts. It applies to the decision on support as well as to the entrepreneurs that use the tax exemption under the SEZ Act. The introduced clause states that if

Support in the form of exemption from income tax is granted through a decision issued for an entrepreneur who implements a new investment. The decision to support the investment with the tax exemption will be issued for a period from 10 to 15 years, depending on the amount of public aid in a given area. If investments are located in the existing SEZ, the period of using the exemption will be 15 years.

The chance of using exemption from income tax on investments, regardless of the place they are implemented, may significantly contribute to the growth of new investments, primarily in the field of modern business services, R&D and investments by the MSME sector.

an entity obtains income from activity undertaken first and foremost in order to obtain an income tax exemption and the activity does not have actual purpose, or if a taxpayer using tax relief undertakes activities with the main goal, or one of the main goals, of avoiding or evading taxation, then the income tax exemption does not apply. The explanatory to the Act indicates that the clause is intended to eliminate fictitious arrangements that do not reflect economic nature and are made only to obtain tax benefits. On the other hand, according to the explanatory notes to the Act, actions aimed at tax avoidance or evasion should also include activities that aim at shaping taxed income in such way that could directly result in the increase of the public aid limit, for instance by way setting eligible costs at a level that differs greatly from their market value.

Summary

The chance of using exemption from income tax on investments, regardless of the place they are implemented, may significantly contribute to the growth of new investments, primarily in the field of modern business services, R&D and investments by the MSME sector. It results from much lower quantitative criteria for entrepreneurs who carry out investments in the abovementioned categories and for entrepreneurs from the MSME sector. Another factor that may influence growth of new innovative investments is the possibility of concurrent settlement of both the R&D tax relief regarding taxed activity and the income tax exemption regarding investments based on decisions on support (the draft of the executive regulation to the Act, in its present form does not feature an exclusion in such cases).

At the same time, it should be pointed out that some provisions of the Act may raise significant doubts regarding interpretation, especially when it comes to the introduction of an additional clause on tax avoidance in the PIT and CIT Acts. Therefore, all actions related to planning new investments based on decisions on support should be undertaken with great caution.

Due to the fact that, as of the date of writing this article, works on the implementing executive regulation to the Act were still in progress, the final version of the executive regulation will need to be analysed in order to verify any further changes. ■

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