

Tax Alert

KPMG in Poland

February 2020

The Act amending certain regulations in order to limit payment backlogs entered into force on 1 January 2020

We would like to remind you that 1 January 2020 marked the entry into force of the material provisions of the Act of amending certain regulations in order to limit payment backlogs (Polish Journal of Laws of 2019, item 1649, hereinafter: "the Act").

According to the explanatory memorandum to the Act, the main goal of the introduced amendments is to improve the legal environment in which parties to commercial transactions operate in order to limit payment backlogs.

The Act brings amendments to a number of legal acts, including:

- the Act of 26 July 1991 on Personal Income Tax (consolidated text; Polish Journal of Laws of 2019, item 1387, hereinafter: "the PIT Act").

Changes in commercial transactions

The provisions of the Act presume, in particular, improved payment discipline and increased legal protection for micro small and medium-sized enterprises (SMEs). Thus, key amendments relate to the provisions of the Act on counteracting excessive payment delays in commercial transactions.

The Act upholds the regulations permitting to set payment deadlines longer than 60 days for symmetrical relations (i.e. transactions between large entrepreneurs or between SME entities) **provided that the arrangement is not grossly unfair to the creditor.** The burden of proof of whether the deadline extension was justified lies with the **debtor.** In turn, **the deadline for payment in asymmetrical transactions with a large enterprise as a debtor and a micro, small or medium-sized enterprise as a creditor may not exceed 60 days as of the date of the delivery of invoice or bill to the debtor (any contractual provision extending the deadline shall remain null and void).** Moreover, under the regulation, the creditor has a right to terminate or dissolve the agreement if the payment term set therein **unreasonably exceeds 120 days.**

The new definitions given to **micro, small, medium and large enterprises** shall be interpreted in line with Annex I to the Commission Regulation (EU) No 651/2014 of 17 June 2014, declaring certain categories of aid compatible with the internal market (hereinafter: "the EU Regulation").

Article 2 of Annex I to the EU Regulation provides the following definitions:

- **a medium-sized enterprise** employs fewer than 250 persons and has an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million;
- **a small enterprise** is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million;
- **a micro-enterprise** is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

A large enterprise means an undertaking not fulfilling the criteria laid down for micro, small and medium-sized enterprises.

Moreover, provisions of Annex I introduce **an additional distinction to the definition of an enterprise.**

Pursuant to Article 3 of Annex I, there exist three types of enterprises:



- autonomous enterprises;
- partner enterprises;
- linked enterprises.

Importantly, while assessing the type of an enterprise, indicators related to staff numbers, turnover and balance sheet total are aggregated with the data on other qualified entities (partner and linked enterprises).

A large entrepreneur involved in commercial relations is now obliged to submit a declaration of its status to the contractor.

Moreover, the amendments **introduce an increase in the rate of statutory interests for delay in commercial transactions**, generally by 2 percentage points (the National Bank of Poland's reference rate + 10 percent, i.e. **11.5 percent at present**).

Regardless of the statutory interests imposed for delays in commercial transactions, the Act provides creditors with a possibility to **charge extension interest** in the amount of the National Bank of Poland's reference rate + 3.5 percent (i.e. **5 percent at present**). Extension interest are charged starting from the 31st day from the date of performance and delivery of the invoice to the day of payment, but not longer than until the due date.

One should keep in mind the existing prohibition of the parties setting a deadline for the delivery of an invoice or bill as part of a transaction. Additionally, the Act regulates such matters as examination of goods or services and its impact on the establishment of payment deadline.

The amendments also pertain to the **regulations on the compensation for the lump-sum recovery costs** which up to now was fixed at EUR 40. Currently it may amount to EUR 40, 70 or 100, depending on the amount claimed. Moreover, the Act abolishes the transferability of these claims.

A cautious approach allows as to assume that the discussed regulations are deemed to be applicable also to contracts under foreign law and with foreign entities (from the EU, EEA and the Swiss Confederation), provided that there are somehow linked with Poland, e.g. one of the parties is a Polish entrepreneur.

The Act is applicable to commercial transactions (i.e. contracts related to goods or service provision) concluded from 1 January 2020.

Changes in the regulations on combating unfair competition

The amendments introduced to the Act on combating unfair competition **a new typified unfair competition act, i.e. unjustified extension of the term of payment for goods or services provided, constituting, among others, a violation of the provisions of the Act on counteracting excessive payment delays in commercial transactions**.

Should an act of unfair competition take place, the entrepreneur whose interests were put at risk or violated may call for, among others, abandonment of unauthorized activities, removal of the effects of unauthorized activities, submission of a statement of relevant content, remedying damage caused in line with general principles or handing over unjustly obtained benefits, in line with general principles.

New reporting obligations

The new provisions impose on tax capital groups and CIT taxpayers who exceeded the equivalent EUR 50 million in revenues in the previous financial year, the requirement to submit **reports on the payment dates applied in a given year** to the Minister of Economy. The reports shall be submitted electronically by 31 January of each following year. The report shall cover data on the value

of payments received and made in the previous year within a period: not exceeding 30 days, from 31 to 60 days, from 61 to 120 days, exceeding 120 days, including the value of payments not made and not received in the previous calendar year. **The first reports shall be submitted by the entities' management until 31 January 2021 and shall cover the payment practices carried out in 2020.**

Moreover, a situation where in the period of three subsequent months the total value of cash payments received and made by a given entity after the set deadline **amounts to at least PLN 2 million (and in the years 2020-2021: PLN 5 million) will be perceived as an excessive delay in making payments and as such will be subject to a penalty.**

The President of the Office of Competition and Consumer Protection (UOKiK) may impose a fine on an entity delaying payments. The amount of the fine is calculated as the sum of singular fines for each payment that was delayed or not made in the controlled period, according to the appropriate formula.

Changes in CIT and PIT

The amendments introduce to the income tax acts regulations concerning the so-called "bad debts".

Amendments to the CIT and PIT Acts introduce the **possibility for the creditor to reduce the tax base** by the value of claims included in receivables for payment of a cash benefit **which have not been settled or disposed of**. The reduction should be made in the tax return submitted for the tax year in which **90 days have elapsed from the date of expiry of the payment deadline** specified in the contract or the invoice (bill).

The right to reduce the tax base or increase the loss may be enforced if the debt has not been settled or disposed of by the date of submitting the tax return.

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At the same time, the Act imposes on the debtor the obligation to **increase the tax base by the value of an unpaid cash liability** included in tax deductible costs.

Also in this case, the increase is made in the tax return for the tax year in which 90 days have elapsed since the date of payment.

The tax base must be increased, or the loss reduced if the liability has not been settled by the date of submitting the tax return. However, if the liability is settled, the debtor has the right to make a return adjustment in the settlement for the period in which the liability will be settled.

The Act introduces additional conditions entitling to make the adjustment of the tax base or the value of the loss, i.e.:

- no restructuring, insolvency or liquidation proceedings against the debtor on the last day of the month preceding the day of submitting the tax return;
- a specified period from the invoice issue or the conclusion of the contract documenting the claim (generally 2 years from the end of the calendar year until the date of adjustment); and
- conducting a commercial transaction as part of the creditor's and the debtor's operations, the income from which is subject to income tax on the territory of the Republic of Poland.

The discussed provisions will not apply to transactions between related parties within the meaning of tax regulations.

A more extensive presentation of the amendments with focus on tax issues can be found in KPMG's Tax Alert of 27 August 2019.

Entry into force

Most of the provisions relevant from a practical point of view entered into force on 1 January 2020.

If you are interested in discussing the impact of the above regulations on your company's situation, please contact us.

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