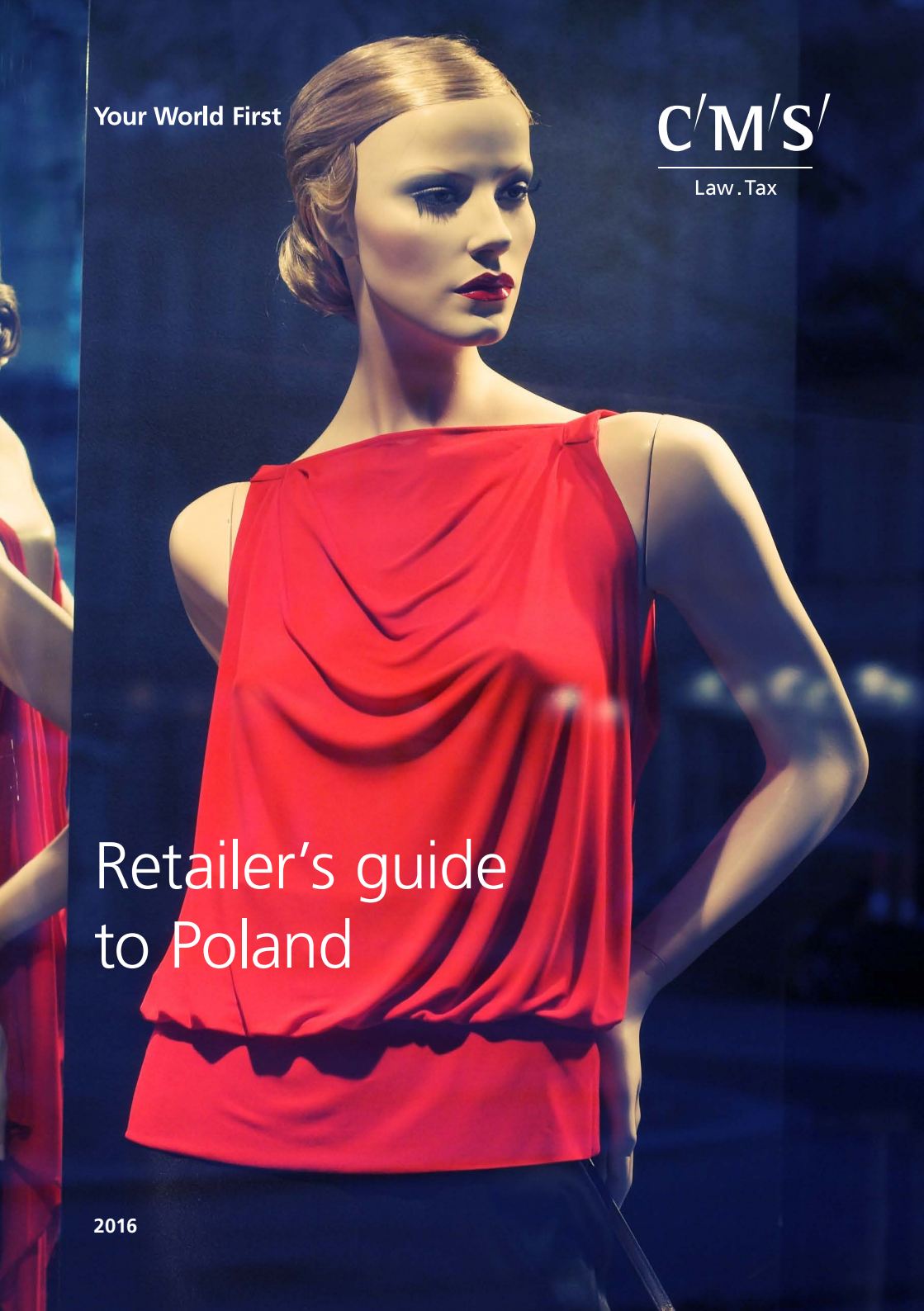
Your World First
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Retailer's guide to Poland
2016

Contents

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The information is current as of 1 January 2016.

1. Establishing a business

1. Establishing a business

1.1 Subsidiary or branch office?

Entities from the European Economic Area ('EEA') and some other countries may undertake commercial activity on the same conditions as Polish citizens and companies. The freedom to establish and conduct business granted to entities registered outside of the EEA is slightly different, but there are no significant barriers to successfully running a business in Poland.

Businesses registered within the EEA may conduct retail activities through a branch office or a subsidiary. Those from outside the EEA may operate through branches only if the legislation of the country in which they are registered allows Polish investors to establish branch offices there (reciprocity).

Apart from establishing a branch office or a subsidiary, retailers may sell their goods through franchisees or other distributors.

1.1.1 Most common forms of business entity

Retailers usually operate through a limited liability company (spółka z ograniczoną odpowiedzialnością, abbreviated to sp. z o.o.) or, far less frequently, through a joint stock company (spółka akcyjna, abbreviated to S.A.). The Sp. z o.o. is the Polish equivalent of an English private limited liability company, a French société à responsabilité limitée (SARL), or a German Gesellschaft mit beschränkter Haftung (GmbH). The S.A. is the equivalent of an English public limited company (plc), a French société anonyme (SA), or a German Aktiengesellschaft (AG).

Both types of companies are separate legal entities that come into full existence upon registration, but may start trading beforehand (see below about companies in organisation) and are operated by their governing bodies. The shareholders are not responsible for company debts.

Only one founder is needed to establish either an Sp. z o.o. or an S.A. However, a single shareholder limited liability company (whether Polish or foreign) cannot incorporate a single shareholder Sp. z o.o. or S.A. in Poland. This restriction does not apply to a single shareholder joint stock company, which may incorporate a single shareholder Sp. z o.o. or S.A. Following formation, it is nevertheless possible to complete a share transfer that results in all the shares in a company being held by a single shareholder limited liability company.

The corporate governance system follows the German model (2-tier board structure), whereby the business of the company is run by its management board, which is generally supervised by a supervisory board (in most cases the Supervisory Board is not obligatory in an Sp. z o.o.) or the shareholders. A management board may consist of one or more members, and a supervisory board is composed of at least three members (five in a listed S.A.). The members of the corporate bodies are subject to annual approval by a general meeting of shareholders (AGM).

The Sp. z o.o. is a very flexible vehicle – it is subject to a minimum capital requirement twenty times smaller than the S.A. (PLN 5,000 (the equivalent of approx. EUR 1,250) for an Sp. z o.o. as opposed to PLN 100,000 (the equivalent of approx. EUR 25,000) in an S.A.) and requires fewer formalities in its formation and subsequent operations. An Sp. z o.o., however, cannot issue share certificates in the form of a document and it cannot be listed on a stock exchange.

The Sp. z o.o. offers its shareholders more insight into its operations than the S.A. Shareholders of an Sp. z o.o. may demand that the company be put into liquidation, they can attempt to exclude other shareholders from the company (subject to certain restrictions), and there are more limitations on the transfer of shares. Also, as opposed to the S.A., in-kind contributions to the share capital of an Sp. z o.o. do not have to be audited. Moreover, the annual financial statements, below a certain level of net income, employment and balance sheet sum, do not have to be audited.

The S.A. is intended for investments of a larger scope and degree of sophistication. In principle, shareholders in an S.A. do not have the right to personally inspect the activities of the company, limitations on the transfer of shares are restricted to a certain extent, and the S.A.'s financial statements and in-kind contributions to its share capital must be audited. An S.A. can be admitted to trading on a stock exchange. The S.A. is also open to more sophisticated forms of equity financing.

1.1.2 Tax transparent entities

Partnerships (i.e. entities with no separate legal personality) are transparent, which means that the income tax is levied at the level of the partners. However, a partnership of foreign partners in Poland will usually constitute a permanent establishment of the partners, thus the income of the partnership will be taxable in Poland.

Partnerships are based on a co-operation agreement between two or more individuals or companies. It is not possible to have a partnership with a single partner. The most important types of commercial partnerships are: a registered partnership (subject to certain exceptions, not available to entities from outside the EEA) and a limited partnership. It is compulsory to register a partnership before starting to trade.

Partnerships are separate entities from their partners, but are not legal entities, as compared to the Sp. z o.o. and S.A. Every partner, except for a limited partner in a limited partnership, is liable for the partnership's obligations, without limit and with all personal property, jointly and severally with the remaining partners and with the partnership. However, a partner's liability is subsidiary, which means that a creditor of the partnership may carry out an execution from a partner's assets only if execution from the partnership's assets proves ineffective.

1.1.3 Branch office

Retailers wishing to invest in Poland without incorporating a partnership or a company may do so through a branch office. A branch does not have legal personality separate from its parent company, therefore all of its activity is performed on behalf and on account of the parent company. The branch can start conducting business activity once it is registered in Poland. When establishing a branch, the foreign company is obliged to indicate a person who will be entitled to represent the branch office in Poland. This person may be a Polish citizen or a foreigner, but must reside in Poland.

The income of a foreign company acting in Poland through a branch will usually be subject to tax in Poland. This is because the branch will usually constitute a permanent establishment of the foreign company.

1.1.4 What to choose?

The decision whether to operate via an Sp. z o.o. or a branch office, which are the most flexible forms of running a business in Poland, depends on various factors. The most important are tax benefits and the level of control that the parent wishes to exercise over the business in Poland. As an Sp. z o.o. is a separate legal entity, the financial exposure of the parent company is capped up to the amounts invested in the Sp. z o.o. In the case of a branch office, the financial exposure is not limited, as the branch office is in fact a part of the parent company – the local director of the branch contracts on behalf of the parent.

1.2 Time factor and formalities

1.2.1 Time

A retailer who wants to enter the Polish market may either purchase a 'shelf' company from a firm that provides such services, or establish a new company or a branch. Establishing an Sp. z o.o., a partnership or a branch takes approximately three weeks, whereas establishing an S.A. may take longer, depending on the procedure chosen by its founders. A limited liability company, a registered partnership and a limited partnership may also be incorporated online (e-company). Establishment is complete when the new entity or branch is registered with the National Court Register. Only an Sp. z o.o. and an S.A. may start to conduct business activity before registration. If a company is not registered within six months of signing the company's deed, it must be wound up.

1.2.2 Formalities

Establishing a company or a branch office involves compiling the necessary documents, executing the company's deed before a notary public (save for a registered partnership or a branch office) and filing an application to register the entity in the National Court Register. Moreover, the entity has to be registered with the statistical office and the tax office. The relevant applications may be filed together with an application to the National Court Register. Law firms in Poland usually handle the establishment of a subsidiary or a branch, and there is even no need to travel to Poland, though certain documents will have to be executed abroad and sent to Poland.

1.2.3 The National Court Register (Krajowy Rejestr Sądowy)

The National Court Register (the 'Register') is an electronic database for the entire territory of Poland, maintained by 21 district courts in Poland. The Register provides easy access to reliable information on the legal status of a business partner or his main details. Official information for foreign investors relating to the registration of an entity may be found at www.ms.gov.pl/en/.

1.2.4 Companies in organisation

An Sp. z o.o. after the company's deed has been signed, and an S.A., in which all shares have been subscribed for, are considered companies 'in organisation' and may start trading before the share capital has been paid

and registration completed. An application to register a company in organisation must be filed with the Register within six months, or the Company must be liquidated.

Persons acting on behalf of a company in organisation are personally liable for its obligations, together with the company. Shareholders of a company in organisation are liable jointly and severally with the company, but only up to the amount of their contribution to the share capital, which has not yet been paid. Once the company is registered with the National Court Register, it assumes all the rights and obligations of a company in organisation, and the liability of the above persons towards the company ends.

1.3 Funding the business

There are many ways of financing commercial activity. The most common forms are contributions to the share capital, shareholders' loans and 'additional payments'. Both an Sp. z o.o. and an S.A. may allot shares at a premium to nominal value. The basic rate of stamp duty on share capital contributions is 0.5% on the nominal value of the shares issued. Applicable regulations exempt shareholders' loans from stamp duty.

A loan made by a shareholder to an Sp. z o.o. or an S.A. is treated as share capital if the company is declared bankrupt within two years of the date of concluding a loan agreement. This means that the shareholder who granted the loan will not be reimbursed during the bankruptcy proceedings as other creditors of the company, but will, in fact, finance the reimbursement of these creditors.

An Sp. z o.o. may raise additional funds from shareholders in the form of additional payments (dopłaty). As a rule, additional payments can be repaid to shareholders if the company makes a profit, but not earlier than one month following a public announcement about repayment. Additional payments, unlike shareholders' loans, are subject to 0.5% stamp duty.

The financing of a branch is even easier. The transfer of money between the foreign company and its branch should not be accounted as income and cost elements, but rather as internal flows.

1.4 Pulling profits

1.4.1 Dividends

This is the traditional way of repatriating money, depending however on the subsidiary having made a profit during the last financial year. Dividends paid by a Polish company to a Polish or foreign parent company are subject to 19% withholding tax in Poland. However, a Polish/EU-based/EEA-based parent company is exempt from this withholding tax if it has held (on the basis of an ownership title) at least 10% of the share capital of the Polish subsidiary for more than two years, and if it provides the Polish company with a tax residency certificate and a written statement that the recipient of a dividend does not benefit from tax exemption in relation to its worldwide income. The minimum holding period does not have to be fulfilled upfront on dividend payment dates. Also, certain bilateral tax treaties may provide a different withholding tax rate.

Based on the anti-abuse rule, the withholding tax exemption on dividends will not apply if dividends are connected with an agreement, a transaction or a legal action or many linked actions, for which the main or one of the main purposes was benefiting from this exemption (not solely to eliminate double taxation) and which do not reflect economic reality.

1.4.2 Interests, royalties, know-how and management fees, etc.

Interest on loans and royalties that Polish companies pay to foreign entities are subject to 20% withholding tax in Poland unless a relevant tax treaty provides otherwise and an appropriate tax residence certificate is provided. Interest and royalty payments that a Polish entity pays to an EU-based/EEA-based parent company are exempt from withholding tax if the EU-based/EEA-based parent company has held (on the basis of an ownership title) at least 25% of the share capital of the Polish subsidiary for more than two years and provides the Polish company with both its tax residency certificate and a written statement that the recipient of the payment does not benefit from tax exemption in relation to its worldwide income. This condition is also met if the payer has directly held at least 25% of the share capital of the recipient of the payments or the same entity has directly held at least 25% of both the share capital of the payer and of the share capital of the recipient of the payments and such entity is subject to income tax in and EU/EEA member state on its entire income, regardless of its source.

The exemption on interest and royalties also applies to payments made by a foreign permanent establishment located in Poland and of EU-based companies which are subject to income tax on their total income in an EU member state, regardless of the source of the income, provided that such payments qualify as tax-deductible expenses when computing the income subject to tax in Poland.

1.4.3 Transfer pricing

Polish transfer pricing rules are, in principle, based on OECD standards. Transactions between related parties or with residents of 'tax havens' must be made on market terms and properly documented. Otherwise the tax authorities may challenge the deductibility of certain expenses. Tax regulations provide general guidelines for the calculation of acceptable market prices.

1.5 Foreign exchange status

Polish foreign exchange regulations make a distinction between 'residents' and 'non-residents'. The term 'resident' includes branches and subsidiaries of 'non-residents', i.e. individuals or entities with their seat abroad. Therefore, regardless of the form of the entity conducting business activity in Poland (subsidiary or branch office), it will always be considered a 'resident' in terms of foreign exchange regulation. Its legal status will, therefore, be equal to that of Polish companies.

1.6 Taxation, accounting and reporting

1.6.1 VAT

In general, the Polish Act on VAT is in line with the provisions of EU directive 2006/112/EC. The basic rate is 23%; however there are also 8%, 5% and 0% rates.

In order to deduct input VAT from output VAT, the output VAT must constitute the result of a VATable sale of the given company, with certain exceptions. As regards VAT refunds, in principle, the tax office should make them within 60 days.

If an EU-based trader is obliged to be registered for VAT purposes in Poland, it has to register itself directly. There is no need to appoint a tax representative. If a trader from outside the EU is obliged to be registered for VAT purposes in Poland, in principle, it has to appoint a tax representative and then register itself. A tax representative is obliged to fulfil the obligations of the represented entity regarding the calculation and payment of the VAT, appropriate evidence and documentation and other activities. A tax representative is liable jointly and severally with the foreign entity.

1.6.2 Corporate income tax

The basic corporate income tax (CIT) rate is 19%. A company that has its seat or management board in the territory of Poland is subject to the CIT on its entire income. With regard to a foreign company, it is subject only to its income earned in the territory of Poland. Polish limited joint-stock partnerships are treated as corporate income taxpayers.

Tax losses may be carried forward over the next five years; however, only up to 50% of the loss may be deducted during any given year. Losses may not be carried back.

1.6.3 Stamp duty

A large number of agreements are subject to stamp duty, if not subject to VAT. These include sale agreements, loan agreements, assignment of rights, etc.

Depending on the type of agreement, the stamp duty rate varies in most cases between 0.5% – 2%.

1.6.4 Accounting and reporting

Polish accounting regulations are in line with International Accounting Standards. Consequently, the Polish accounting system is very similar to the systems applicable in other EU Member States.

2. Leasing premises

2. Leasing premises

2.1 Standard leases and local practice

Very few mandatory rules apply to commercial leases in Poland. This allows for a relatively broad scope of contractual regulation. However, there have not been many court cases concerning the issue of whether certain provisions of lease contracts are too far reaching. As a rule, it is safer to subject disputes to resolution by arbitration courts, which should be more commercial in their outlook than state courts.

Under current Polish regulations there is no common model of a standard commercial lease. However, the core provisions of standard retail leases seem to be generally accepted. As a rule each shopping centre has its own standards, and even though certain terms and conditions are negotiable, the lease structure itself is not. Needless to say, the final outcome of negotiations depends on the market position of a given development and the attractiveness of the potential tenant.

2.2 Leasing agents

It is quite common for retail developers and managers to use leasing agents, although some of them have their own in-house leasing teams. In some cases, it is also advisable for tenants (especially new entrants) to use agents. Many of the big international property consultants currently active in Poland have been present on the Polish market since the mid-90s.

2.3 Lease term and extension options

There are two types of commercial lease under Polish law: a lease (najem) and a tenancy (dzierżawa). Either agreement may be concluded between business entities for an unspecified period of time or for a maximum fixed period of 30 years. Without getting into too much detail, it is fair to say that a 30-year tenancy may be signed with respect to farmland, operating businesses and rights, while a lease is available to all types of movable and immovable assets leased for any business activity including commercial premises.

If a lease is concluded between business entities for longer than 30 years, after the lapse of that 30-year period, the lease is considered to have been concluded for an unspecified period of time (and thus may be freely terminated with notice).

In practice, the average term of a shopping centre lease is five years, as in most cases this is the minimum required by the banks financing the development. It is very rare to sign a lease for less than three years, though seven and ten year leases (especially for anchor tenants) are also quite common.

Unlike in other jurisdictions, a tenant does not have a statutory priority (or extension) right to conclude a new lease in the same premises. This matter is purely contractual.

2.4 Rent and service charges

Euro denominated and HICP-indexed rent have become the rule in Poland. Depending on the lease terms, payments under commercial leases may be made in PLN or in EUR if expressly agreed by the parties. Certain retailers (basically super – and hypermarkets) are strong enough to negotiate a PLN denominated rent, so that they do not incur any currency risk in Poland.

Apart from a monthly base rent, optional turnover rents are common. This involves the tenant having a relatively high degree of financial transparency towards the landlord, and involves not only the submission of official financial statements (monthly, quarterly or yearly), but in many cases the retailer's tills are connected to the landlord's computer system as well.

Base rent is usually payable monthly, whereas turnover rent is payable for various periods agreed in the contract. Two months' delay in rent payments authorises the landlord to terminate the lease if this default has not been cured within an additional grace period of one month.

Leases need to make a very clear distinction between the rent and the service charge (commonly payable in PLN). Landlords tend to include as many items as possible in the service charge, but each individual case will depend on the negotiating power of the landlord and the tenant. However, it is now more frequent for landlords to make a concession on the rent, rather than on the service charge. Usually, the service charge includes repair, maintenance and upkeep costs of the common areas, management costs, insurance, security, and consumption of media in the common areas as well as land tax. It often includes marketing costs. In cases where the shopping centre is developed on land held in perpetual usufruct – it usually also includes the yearly perpetual usufruct fee. Shopping centre owners may also create sinking funds in order to finance future major repairs.

The service charge is usually paid in advance in 12 monthly instalments (advances) calculated on the basis of a budget prepared by the manager. The actual amount of such monthly advances may vary during the year, due to changes in the level of common costs month by month. Each tenant's participation in the service charge budget usually depends on the surface area of its premises. However, weighting rates are applied to the areas occupied by bigger tenants. It also happens that

certain tenants have caps on their service charge contributions, and others do not participate in certain categories of costs (e.g. marketing costs).

Older leases (e.g. from the mid-90s) often provided for a service charge contribution of a fixed amount, but they have been gradually replaced with triple net leases where the tenants agree to pay the entire actual cost of taxes, insurance, and maintenance relating to the leased property.

VAT at the rate of 23% applies to both the rent and the service charge advances. Common costs should be re-invoiced at their face net value with only landlord's VAT added (unless the landlord is expressly authorised to margins on such costs). The tenant should request to carry out service charge audits.

There are three basic types of security for rent and service charge payments. The most widely used and preferred by landlords with respect to smaller and medium-sized tenants is a cash deposit (usually 3 months' rent plus VAT and 3 months' service charge plus VAT). Larger tenants deliver bank guarantees in the same amount. Landlords usually request that the bank guarantee is irrevocable, unconditional, paid on first request and freely transferable. Only anchor tenants may sometimes give a parent company's guarantee.

2.5 Fit-out

Tenants are granted fit-out periods during which they have to prepare their premises for operation. Such periods are usually excluded from the lease period, at least for the purposes of rent and service charge payments. Any permits required for fit-out works are the responsibility of the tenant, but the landlord has a co-operation obligation in this respect. Designs and time schedules for works should be approved in advance by the landlord, so it may be advisable to attach them to the lease. Works are supervised by the landlord's site manager (or the manager of the shopping centre) and the tenant has to take out an insurance policy covering construction risks.

As the market is becoming more and more tenant-driven, fitting out premises is often a part of the tenant's incentive package.

2.6 Upkeep, renovations and repair

Upkeep, renovations and repair of common parts is usually the obligation of the landlord. This also concerns essential parts of the premises, like structural elements

and common infrastructure. 'Fully repairing' leases have now become a standard, which means that the relevant costs are included in the service charge. Sinking funds are also created in order to finance capital repairs.

Any renovation in a shopping centre that impacts the amenity of the tenant (e.g. access to the premises, visibility, etc.) should be subject to consent. Many leases contain an upfront tenant's consent for such works, but they are only valid if they are specific enough (e.g. they define what kind of impact is allowed).

Upkeep and renovation of the premises are the obligation of the tenant.

2.7 Insurance

The rule is that the landlord insures the common areas and the tenant insures its premises. The premium paid by the landlord is usually recovered in the service charge. It is important to structure the inter-relation between various policies such that the scopes of insurance do not overlap. Otherwise there may be problems with the payment of an indemnity, as there may be a dispute between the insurers as to which of them is actually bound to do it, and in what proportion.

Tenants are also required to insure their civil liability for any possible damage to individuals or assets they (their employees, agents, etc.) may cause in their operations. Sometimes, they also take out 'business interruption' insurance or 'lost rent' insurance.

Landlords' policies are often assigned (at least conditionally) to the banks that financed the development. Tenants' policies may sometimes be assigned to the landlord and then further to the banks.

2.8 Early termination and indemnities

Fixed-term leases may only be terminated in cases specified by law and by the contract itself.

The law authorises the tenant to terminate a fixed-term lease if the premises have defects (whether existing on signing or identified during the term of the lease) making them unfit for the purpose of the lease. The tenant must, however, grant a grace period to the landlord to cure such defects and will not have the right to terminate if it knew about defects when signing the lease. The tenant may also terminate the lease if the state of the premises (as delivered by the landlord) is

dangerous to the health of its occupiers, even if it knew about this state while signing the lease.

The landlord is authorised by law to terminate a fixed-term lease in four cases. Firstly, if the tenant breaches the provisions of lease concerning the use of the premises and fails to cure this default despite being granted a grace period; secondly, if the use of the premises by the tenant may result in their destruction; thirdly, if the activities of the tenant disturb neighbours (other tenants) or make the use of other premises difficult or if the tenant continually breaches internal regulations; and finally, if the tenant is in delay with rent or service charge payments for at least two settlement periods, and does not pay the arrears despite being granted an additional one month's grace period.

Lease contracts often provide for many more reasons for the landlord to terminate the lease and usually make it difficult for the tenant to do so (save for his statutory termination rights described above). In order for those contractual termination provisions to be effective, they should be quite specific. It is not enough to say that the landlord will have the right to terminate the lease if the tenant is in breach of its provisions.

The most typical contractual termination clauses include the following breaches by the tenant: changing the scope of activities in the premises, changing the brand (graphic signs etc.), breach of opening hours provisions, stocking hazardous materials, not disclosing financial information (in the case of turnover rent), breaking competition clauses, execution of unauthorised works, unauthorised subletting, etc.

Lease contracts usually provide for contractual penalties to be paid by the tenant if the lease is terminated due to the tenant's breach. Polish courts have the right to lower the amount of such 'liquidated' damages if they consider them excessive. Moreover, as a contractual penalty may not be stipulated for a breach of pecuniary obligations, it may not work if the lease is terminated due to the lack of payment (which is, by far, the most common reason for terminating by the landlord).

2.9 Enforcement by landlord

Each tenant should be aware of the landlord's rights against it under the lease. Apart from regular enforcement proceedings, those include a statutory pledge on the tenant's assets, fast-track enforcement and disconnecting the media.

The landlord has a statutory pledge on all the tenant's assets (goods, equipment, other moveable property) within the premises. If the tenant is late with a payment, the landlord may seize the assets and foreclose on them. The pledge does not release the landlord from foreclosure proceedings, which may be simplified if the tenant voluntarily submitted to foreclosure – see below. The pledge may only concern the assets owned by the tenant and secure debts due for less than 12 months. When things go really bad, it is often the case that the tenant takes the goods out of the premises, as the pledge expires when the asset leave the premises.

The tenant's voluntary submission to enforcement is a pretty standard requirement of every landlord. It enables the latter to leapfrog judicial proceedings and start enforcement much faster than usual. Submission to enforcement is executed by the tenant before a notary, and the entry into force of the lease is sometimes made dependent on the delivery of this notarial deed to the landlord. Submission to enforcement concerns two things: payments and the vacation of premises.

One of the common ways to 'discipline' a tenant in delay with payments is disconnecting the media. This is possible only if the lease authorises the landlord to do it on 'reasonable' terms (e.g. a delay in payment justifying early termination, prior notices, etc.). Otherwise, the landlord would be liable for all damage incurred by the tenant due to the media being disconnected.

2.10 Change of ownership, enforcement by the landlord's creditors and bankruptcy

In certain cases, external circumstances may have an impact on the lease. Those include, in particular, a change of ownership of the shopping centre, enforcement by the landlord's creditors and bankruptcy of either party.

If the shopping centre (the asset, not the company) is sold to a third party, the new owner may terminate each lease with statutory notice periods, unless three conditions are met cumulatively: (i) the lease has a fixed term, (ii) the premises have already been handed over to the tenant and (iii) the lease has a certain date. The 'certain date' requirement is met if the counterpart of the lease agreement is presented to a notary who will write a date on the counterpart (being the date on which he has seen the counterpart). It is recommended to obtain a 'certain date' as soon as the lease agreement is executed. The requirement of the certain date is also met if the lease agreement has been executed as a notarial deed, or with signatures notarised, or if a public authority or a local government authority

(e.g. a mayor) made a dated mention on the copy. If a public document (e.g. a notarial deed containing the tenant's submission to enforcement) refers to the signed lease, it has the same effect. If the lease is signed with signatures confirmed by a notary, it is also possible to register the rights resulting from the lease in the land and mortgage registry kept for the real property. In such case, provided that the subject of the lease has been handed over to the tenant, the new owner is not entitled to terminate the lease.

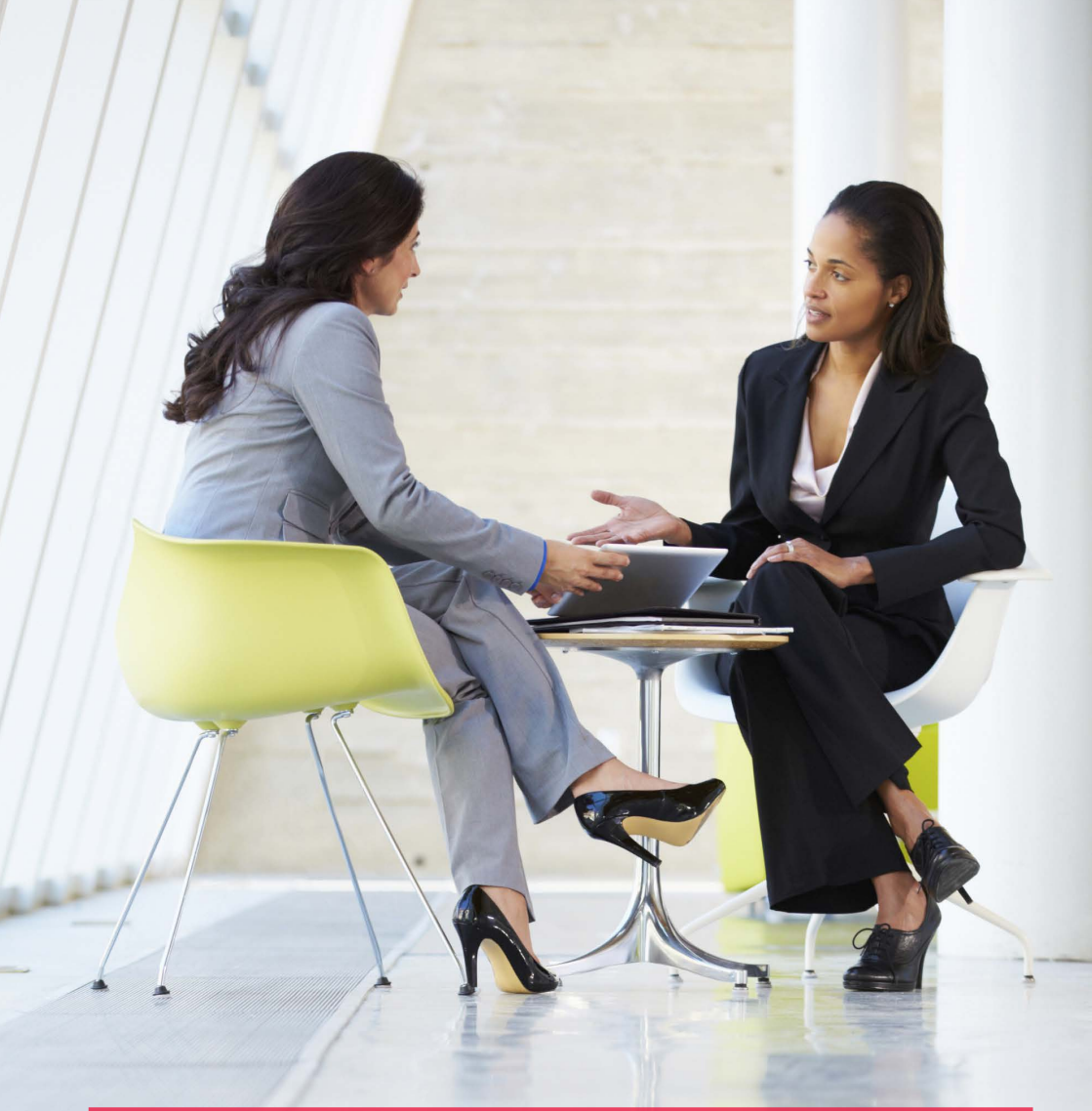
If the landlord's creditor forecloses on the shopping centre and it is sold by the bailiff in execution or bankruptcy proceedings to a third party, then the lease agreements (whose term is longer than two years) are terminable by such buyer. The buyer is entitled to exercise the termination right within one month of the resolution on granting ownership to the shopping centre becoming final. The termination period is one year unless the lease agreement provides for a shorter notice term. The tenant has no protection against such termination because the standard civil code protection rule (based on a 'certain date' and the subject of tenancy being handed over as mentioned above) does not apply in sales in execution and bankruptcy proceedings. The lease must not be modified or terminated, either by the parties, or automatically, in the case of the bankruptcy of any of them, otherwise than in compliance with the rules of the Bankruptcy law, which are briefly described below.

If the landlord goes bankrupt, the receiver may terminate the lease with 3 months' notice on the basis of a court decision. This may happen only if keeping the lease would make the sale of the asset (e.g. shopping centre) difficult, or if the rent is not at market rates. Terminating the lease by the receiver would, therefore, be a rare case. In such a case the tenant is entitled to submit to the bankruptcy estate a claim for damages suffered due to the early termination. However, if the tenant has paid the rent in advance for more than three months, he will have to pay again the amount due for the period above three months – this time to the bankruptcy estate.

If the tenant goes bankrupt but the premises have not been handed over to the tenant (e.g. they are still under construction) then both the tenant and landlord may withdraw from the lease within 2 months of the date on which the bankruptcy was declared. Such withdrawal does not trigger a compensation claim.

If the tenant goes bankrupt and the premises have been handed over to the tenant, then the receiver may terminate the lease with three months' notice or with a contractual notice, if shorter.

If any of the parties is insolvent or threatened with insolvency, it is possible to conduct reorganisation proceedings. There are four reorganisation proceedings: proceedings aiming at approval of settlement, accelerated settlement proceedings, settlement proceedings and restructuring proceedings. During accelerated settlement proceedings the landlord must not terminate the lease without the creditor's consent. Settlement is also possible during bankruptcy proceedings. The settlement may even prohibit the landlord from terminating the lease until the full execution of the settlement (which may take several years). The settlement may reduce the rent and arrange instalments for paying rent and service charge arrears as of the date of the court's decision, but not for future ones (if the lease is to be continued).



3. Hiring staff

3. Hiring staff

3.1 General information

Polish labour law is statutory law, the core act of which is the Polish Labour Code. There is, however, a variety of additional legislation including provisions on labour unions, collective disputes, group redundancies, safety and hygiene, etc.

As a general rule, the terms and conditions on which a given employee is employed cannot be less favourable than the minimum requirements set out in statutory law.

3.2 Directors

Company directors may be employed on the basis of an employment contract or other agreement (management contract). They may also act solely as office holders without any underlying contract, with remuneration paid on the basis of a resolution on the appointment (which may be a resolution of the shareholders or the supervisory board, depending on the circumstances). The latter solution may be financially attractive, as remuneration paid on this basis is not subject to social insurance contributions.

There is no special type of employment contract for company directors. If a company director has a contract of employment with the company, being both an office holder and employee (which is common practice), he/she benefits from all of the employment rights of a regular employee, excluding entitlement to compensation for overtime. For example, termination of his/her employment contract may require separate (additional) reasons to a mere dismissal from a position on the company's management board.

3.3 Work permits

As a rule, employers can only employ foreigners if they have valid work and residence authorisation in Poland. Generally, a work permit is also required for a member of a legal entity's management board, if the member is present in Poland for more than 6 months in total during any consecutive 12 months.

Permits are granted for a fixed period of up to three years, with the possibility to extend. If management board members are obliged to have a work permit, the permit may be granted for a period of up to five years, provided that the company employs more than 25 employees. The work permit procedure, the list of supporting documents that should be delivered and formalities that must be observed depend on the grounds for hiring the foreigner, i.e. whether the foreigner is to be directly employed in Poland or assigned to Poland as an intra-company secondee. This may

also impact who – the company or the foreigner – should file the application for the work permit. As a rule, the employing entity (regardless of whether located in Poland or abroad, as in the case of a secondee) files the application.

Each work permit is granted to a particular foreigner and specifies his/her position and the period of the permit's validity.

The aforementioned requirements do not apply to citizens of EU member states, Iceland, Norway, Lichtenstein and Switzerland. They can enter Poland and start working from the first day of their stay in Poland. Additionally, certain categories of non-EU foreigners are exempt from the obligation to obtain a work permit (e.g. individuals married to Polish citizens, individuals with the status of refugees in Poland, or individuals who have permanent residency cards).

In addition foreigners who are not exempt from the visa obligation, upon receiving a work permit, must individually apply for a work visa prior to their entry to Poland. Upon the expiry of a visa, the foreigner may either apply for a new one or for a temporary Polish residence permit (depending on whether he/she is currently in Poland or not).

3.4 Employment contracts

Employment contracts provide that a given employee will perform certain work for and under the supervision of his/her employer, in a place and at a time specified by the employer, in return for remuneration.

Such contracts may generally be concluded for a definite or indefinite period, or for a trial period.

Employers are obliged to comply with certain requirements, including arranging for the employee to have a preliminary medical examination, registering the new employee with the Social Insurance Agency (ZUS), and organising health and safety training.

In 2016, the monthly national minimum remuneration for work is PLN 1,850 gross (the equivalent of approx. EUR 440) per month for a full-time employee, which is approx. 47% of the average salary in the private sector.

An employment contract may be terminated subject to certain conditions by mutual consent of the parties, by a written notice served to the other party, or without notice. The latter method can be lawfully exercised only in specific circumstances, e.g. by the employer if the employee seriously violates his/her basic employee duties.

3.5 Other agreements relating to the performance of work

Individuals can also work on the basis of agreements other than employment contracts, for example freelance agreements and agreements to perform a specific task. It is often beneficial for both companies and individuals to conclude such agreements, as they are generally more flexible and are not subject to the mandatory rules imposed by the Polish Labour Code.

However, any agreement that fulfils all of the criteria that characterise an employment contract will be considered such a contract, regardless of its name or the intention of the parties. Furthermore, forcing an individual to enter into a freelance agreement instead of an employment contract is deemed a labour-related offence, subject to a fine of up to PLN 30,000 (the equivalent of approx. EUR 7,150).

3.6 Tax and social security charges, Labour Fund and Employee Benefits Guarantee Fund

Since 2009, annual personal income tax (PIT) rates have been 18% and 32%, depending on the level of annual income.

Employers are obliged to withhold the following from employees' salaries: PIT advance payments and social insurance contributions, i.e. the parts of the contributions to pension and disability insurance that are covered by employees, as well as full health insurance contributions. In addition, employers cover from their own resources: parts of the pension and disability insurance contributions, full accident insurance contributions as well as contributions to the Labour Fund and Employee Benefits Guarantee Fund; these contributions are paid on top of employees' gross salaries.

The total social security contributions from employees' monthly salaries amount to 13.71% of their total salary. In addition, employers cover from 19.48 to 22.67% of a given employee's monthly salary, on top of gross earnings, depending on the degree of occupational risk attributed to a specific post (the applicable rate for accident insurance may vary, standard rate is 1.93%).

Social security contributions are deducted from remuneration on a monthly basis. In 2015, contributions to pension and disability insurance are deducted only until a given individual's total annual remuneration reaches PLN 118,770 (currently approx. EUR 28,300) in a given calendar year.

Management contracts and freelance agreements are generally subject to similar social insurance contributions (with some exceptions) as those due in the case of employment contracts and monthly advance income tax payments.

3.7 Trade unions

Employees are free to organise and join trade unions, which can be established by at least ten individuals. Typically, trade unions operate at a company level, and their members are employed in the same company (a company trade union organisation). There is no statutory limit to the number of trade unions that may operate within one company. However trade union members do not have to be employed in one company. It is possible for employees of two or more companies (especially belonging to the same capital group) to establish an intra-company trade union organisation. Further, they have the right to merge with other trade union organisations (both company and intra-company level) into a so-called federation (association) of trade unions to increase their membership and influence.

The trade unions may also operate as nationwide organisations comprising employees of the same industry. Some nationwide organisations, such as the Independent Self-governing Trade Union 'Solidarity' (NSZZ Solidarność), represent employees of a range of different occupations and industries in the public and private sectors.

In principle, all trade unions in a company (regardless of their legal structure) must be recognised if the company has been notified of the existence of the particular trade union by the trade union officers (members of the board of this trade union). From the date of such notification the company is obliged to respect a trade union's rights and privileges prescribed by the Trade Unions Act.

Trade unions have to be informed in advance and consulted on various matters such as: transfer of business, collective redundancies and other restructuring matters or varying compensation schemes and social benefit plans in force in the company. The information and consultation duty may delay the proposed restructuring or other changes in the company; however in principle trade unions cannot block such changes. After the required consultation period the company is able to enforce the change despite the resistance of the trade unions.

Members of a trade union's management board and other persons designated by the trade union cannot be dismissed or made redundant, nor can their employment conditions be diminished, without the consent of the union operating in the workplace. Company directors and officers may be penalised for actions preventing or otherwise hindering the creation of trade unions or participation in trade unions.

3.8 European works councils

Undertakings and groups of undertakings that perform their activity in more than one EU member state and employ at least 1000 employees, including at least 150 employees in each of at least two member states, are obliged to create a European works council. Such councils should consist of representatives of employees, and are entitled to acquire information regarding the undertaking or group of undertakings in question. They must be consulted no less frequently than once a year in matters relating to workplaces in more than one EU member state.

Company directors and officers may be penalised for actions preventing or otherwise hindering the creation of European works councils.

3.9 National works council

National works councils must be distinguished from European Works Councils.

A national works council is a permanent consultative body made up of representatives of employees, and is created as a result of the obligation of employers based in Poland to inform and consult their workforce about economic and employment-related matters of the company.

National works councils are formed in companies with 50 or more employees. A works council may be established upon the request of at least 10% of the workforce. The employer is not obliged to create a works council until such request has been made. However, the employer is obliged to inform the staff of their right to create a works council once the average headcount in the company for the last 6 months reaches 50.

Works councils, if elected, must be informed of the company's business and financial standing and any planned decisions in this respect. In addition, they must be consulted on important facts and decisions that may affect the company's employment structure and staffing levels (e.g. changes in business activities or business transfers resulting in a reduction of the company's workforce) and any other anticipated decisions that might lead to material changes in work organisation or pay conditions. A works council cannot block any company decisions; however it can postpone them by initiating a consultation process.

Works councils are not notified or consulted about individual terms of employment, including individual dismissals of employees.

Company directors and officers may be penalised for actions preventing or otherwise hindering the creation of national works councils

3.10 Sick leave, maternity leave and annual holiday

Generally, employees are entitled to 33 days of paid sick leave per year, during which they should be paid 80% of their salary by their employer (employees who are 50 years of age are entitled to only 14 days of paid sick leave per year). Beginning from the 34th day (or in the case of employees who have reached their 50's, beginning with the 15th day) of the leave, the sick pay is covered by the Social Security Agency (ZUS).

Employees that give birth to a child are entitled to maternity leave for a period from 20 to 37 weeks (the length of this period depends on the total number of children during one birth) during which they are paid maternity aid by the Social Security Agency (ZUS). At least two weeks of maternity leave may be granted to a female employee before the expected date of childbirth.

Part of the aforementioned leave can be transferred to the father of the child, provided that the female employee used at least 14 weeks of her maternity leave after the childbirth.

Apart from maternity leave, employees are also entitled to parental leave for a period of 32 to 34 weeks (depending on the number of children born during one birth). For the time of parental leave employees are entitled to 60% of their salary (100% during maternity leave).

Additionally, fathers can request up to two weeks' paternity leave until the child is 24 months old.

Employees are entitled to annual holiday leave lasting 20 or 26 working days per year, depending on their total employment history and level of education.

Polish labour law also provides for a number of situations in which employees are entitled to paid or unpaid leave.

Generally, employees on sick leave, maternity/paternity leave and during holiday enjoy special protection against termination of their employment contracts.

3.11 Non-competition clauses

A non-competition clause may be included in a separate contract between employer and employee, and may relate to the duration of the employment relationship or extend to a period following termination of this relationship. The former is allowed without any constraints, and its application does not entail the need to provide compensation to the employee. The latter may only be concluded with employees that have access to important information, the disclosure of which could cause a loss to the employer. A non-competition clause extending beyond the period of employment should indicate the period of its effectiveness and compensation for the employee in exchange for observing the ban. This compensation must be no less than 25% of the remuneration actually received by the employee during the period preceding the termination of the employment contract equal to the period of the ban.

3.12 Overtime work

Generally, standard working hours may not exceed eight hours a day and an average forty hours in an average five day working week in an adopted settlement period, unless specific work conditions (e.g. arising from activity conducted by the employer) justify alternative solutions.

If working overtime, employees are entitled to additional remuneration in the amount of 50% (for overtime work on normal workdays) or 100% (for overtime work at night, on Sundays and public holidays) of their hourly remuneration. Alternatively, employees may be compensated for overtime with time off in the appropriate amount. Company directors (if employed under an employment contract) as well as high-level managers of companies are usually not entitled to additional remuneration for overtime work.

3.13 Redundancies

3.13.1 Group redundancies

Any redundancy brought about by an employer that employs at least 20 persons for reasons not related to employees, and which results in the termination of employment contracts of:

(i) 10 employees, if an employer employs less than 100 employees,

(ii) 10% of employees if an employer employs at least 100 employees, but less than 300, or

(iii) 30 employees if an employer employs at least 300 employees, during a period of 30 days, constitutes a group redundancy.

Group redundancies are subject to certain conditions, including the employer's obligation to consult the employee representatives in advance, and should (wherever possible) be done on the terms of an agreement concluded with them. The procedure also entails notification of the competent Labour Offices.

Employees who are made redundant are entitled to statutory redundancy pay in an amount that is the equivalent of between one and three times their monthly salary, depending on the length of service with a given employer. In 2016, the amount of statutory redundancy pay is capped at PLN 27,750 (approx. EUR 6,600).

3.13.2 Individual redundancies

Individual redundancies take place if reasons for terminations by an employer employing at least 20 employees relate only to the employer. Employees who are made redundant in individual redundancy are also entitled to statutory redundancy pay as stated above.

3.14 Health & Safety Rules

Generally, employers are responsible for health and safety conditions in the workplace.

In addition, they must inform the relevant labour inspection and hygiene inspection authorities, on the location, kind, and scope of activities that they intend to perform within 30 days of commencement of commercial activity.

Depending on the kind of work and possible dangers to employees, employers are obliged, in particular, to provide their employees with proper work clothes and shoes, or adequate food and beverages, or to apply special measures in order to prevent professional illnesses.

Employers are obliged to appoint a competent person, either an employee or not, to perform H&S duties in the workplace, and – as a rule – are obliged to establish a H&S Service if the number of their employees exceeds 100.

If the manager suspects that an employee has shown up to work intoxicated or that he/she has consumed alcohol at work, the manager can ask a public body established to maintain public order (the police or municipal police) to conduct a sobriety test. The employer may also remove an employee from work if a justified suspicion of insobriety occurred. For such time off the employee is not entitled to remuneration.

4. Trading

4. Trading

4.1 Opening hours

Shop opening hours are not regulated under Polish law. However, municipalities of particular regions are empowered to issue laws specifying the days and times at which shops can be open. Such provisions of law are binding within a particular region.

As a general rule, shops that employ individuals under employment contracts cannot trade on public holidays unless they are operated by non-employees on such days. This prohibition is also in force whenever a public holiday occurs on a Sunday. On a normal Sunday shops employing employees may trade if their activities are necessary from the social point of view and/or are aimed at fulfilling everyday needs of citizens.

4.2 Packaging, WEEE and batteries

Polish law sets out a number of requirements to be met in relation to packaging, which are aimed at ensuring environmental protection.

As a general rule, manufacturers, importers and entities undertaking intra-community acquisition as well as intra-community delivery of packaging should limit the amount of substances used for the production of packaging, and their adverse effects on the environment, and the quantity of packaging waste generated. Packaging should be designed and manufactured so that:

— the volume and mass of the packaging is limited to the minimum required for the packaging to fulfil its function,

— the packaging is designed and made in a way that facilitates its multiple use and subsequent recycling,

— the packaging contains as little of any hazardous substance as possible.

Packaging manufacturers, importers and entities undertaking intra-community acquisition of packaging as well as entities introducing to trade packaged products may label packaging. If they do so, labelling should specify the type of materials used for its production, the possibilities of re-using it and its ability to be recycled. The packaging label designs are specified in the relevant regulation. Business entities that introduce to trade packaged products, as defined in the said regulations, are obliged to ensure recovery, including recycling, of packaging waste of the same type as the packaging in which the entity introduced its products to trade. The mount of recovered and recycled waste should meet the target levels of recovery specified for particular types of packaging. Business entities that introduce packaged products to

trade should also conduct public educational campaigns contributing to ecological awareness. Obligations related to packaging can be assigned to a professional subcontractor – recovery organisation.

Packaging manufacturers, importers, exporters and entities undertaking intra-community acquisition or delivery of packaging as well as entities introducing to trade packaged products, are obliged to provide the relevant authority with annual reports on the quantity of packaging that is manufactured, brought from abroad or delivered abroad by them, broken down to reflect the types of materials from which this packaging is made and including information on achieved target levels of recovery.

Sellers of packaged products are obliged to provide the users with information on the packaging itself and its waste, as well as information relating to systems for returning, collecting or recovering this packaging, including recycling, the appropriate waste-handling methods and the meaning of the information placed on the labelling. Retail outlets with a sales area exceeding 2,000 m2 are obliged to carry out selective collection of waste packaging of the products they sell at their own expense.

Business entities introducing to trade oils and tyres, electrical or electronic equipment or batteries are obliged to fulfil a number of statutory obligations, in particular, to reach certain target levels of the collection or recovery, and specifically the recycling, of post-use waste, waste from electrical and electronic equipment ('WEEE') or batteries. These obligations may be performed by the company on its own, or by a subcontractor (a recovery organisation). Entities not complying with these obligations must pay a product fee, calculated for a failure to achieve the required levels of recovery, recycling or collection. Also, as a rule, non-compliance with obligations regarding the aforementioned products is subject to fines, where the most significant one is the fine between PLN 5,000 and PLN 2,000,000 (the equivalent of approx. EUR 1,250 and EUR 500,000).

Post-use waste includes oils and tyres. WEEE includes in particular waste from electric or electronic house appliances, telecommunication equipment, audio-video equipment, lighting, tools, toys, and some other specialised equipment.

In general, entities that carry out activities that cause generation of waste must plan, design and conduct such activities in a manner that:

— prevents generation of waste, limits the amount of waste generated, or limits its adverse impact on the environment both during the manufacturing process and during and after the application of this process,

— ensures recovery processes which are consistent with environmental protection principles, where the generation of waste could not be prevented,

— ensures the disposal of waste which could not be avoided or recovered.

4.3 Labelling

4.3.1 Information

All products, or product packaging, offered on the market in Poland must clearly specify the name of the product and the name and place of business of the manufacturer, his country of residence (if outside EEA) and information necessary to identify the product (unless the intended use is apparent). In addition, it may also be necessary to mark a given product with a mark identifying the product or production lot.

Products must not be labelled in a way that can mislead consumers about the product's origin, quality, quantity, components, production method, uses or conservation, or that can be misleading about any other material features. Nor can product labelling aim to conceal or minimise any inherent risk that results from using a product in a certain way. Similarly, products must also be labelled in such a way that no relevant information is omitted.

Certain types of product, e.g. foodstuffs, toys, cosmetics and textile products, are also covered by additional regulations relating to labelling where there may be more detailed product labelling requirements to adhere to.

4.3.2 Prices

Products for retail sale must be marked with the sale price and unit price, which can be displayed in the form of a price label (e.g. a price tag, a price ticket, table), price list, catalogue, dust cover, print or inscription on the product or its packaging. This information should be presented on the product, directly next to the product or in the vicinity of the product, so it is impossible to confuse the price of a particular product with other prices. The information on the price labels should be clear and legible and must leave the consumer in no doubt as to the price due. The prices of products that are not accessible or visible to consumers should be specified in price lists. Prices must be up-to-date and must include VAT and excise tax.

In cases of price divergence or doubts as to the price of a good or service, a consumer has the right to demand the sale at the price most advantageous for the consumer.

4.3.3 CE marking

The CE marking (commonly known as the 'CE mark') is not a quality mark, but rather a European Safety Mark, which denotes the first letters of the phrase 'Conformite Europeene' ('European Conformity'). Labelling with the CE marking is mandatory with respect to many products placed on the internal market in the European Union and EEA.

By affixing the CE marking, the manufacturer or person placing the product on the market or putting it into service confirms that the item meets all the essential requirements of the relevant directive or directives (of which there are approx. 25 in total). Thus, products that are not encompassed by one of the relevant Directives should not be marked with the CE marking. Products that require CE marking include e.g. toys, explosives, medical devices, electrical goods, machinery and yachts. Relevant products need to display only one CE mark, even if they are covered by more than one directive.

The CE marking must be visible, legible and indelible, placed either on the product itself, or on the packaging of the product and on any accompanying documentation, as appropriate. If legislation stipulates that a certified body must assess the conformity of products, then the identification number of this certified body should follow the CE marking.

4.4 E-commerce

4.4.1 Services by electronic means

The Polish electronic commerce market has grown significantly over the past several years.

One of the regulations applicable to e-commerce is the Law on Provision of Services by Electronics Means. It provides the legal framework for the provision of electronic services and specifies the duties of service providers, the limitations to their liability, and protects the personal data of service receivers.

Services provided by electronic means are services which are provided through public telecoms networks, solely by electronic means and at a distance (i.e. without the simultaneous presence of both parties), and which are provided upon the request of service receivers. The definition of electronic services embraces generally all services provided in the Internet (e.g. internet forums, newsletters, hosting services, subscription to on-line newspapers).

Service providers are obliged to fulfil a number of obligations, in particular to provide service receivers with certain information e.g. their full name, surname, company name and registered seat, as well as with contact details (e.g. electronic addresses). Service receivers must be warned about the risks related to the use of electronic services provided by electronic means (e.g. computer viruses) and informed about security measures implemented by the service provider (e.g. SSL encryption protocol). Service providers must also issue terms of providing electronic services containing information required under the Law.

In addition, the Law defines the liability of the service provider as well as exemptions from this liability.

4.4.2 Spam

Polish law forbids sending unsolicited commercial information (spam) by electronic means (e.g. by e-mail, SMS). Information is perceived as solicited whenever the recipient has agreed to receive it, especially if the recipient made his electronic address available for this purpose. Consent to receive commercial information may be provided in any form. It should constitute a separate declaration of will and may not be implied or presumed from a declaration of will of a different content (e.g. consent to a website's Terms of Use). Additionally, spam may be regarded as an act of unfair competition (See section 5).

4.5 Cross-border trade

4.5.1 Customs duty

Since 1 May 2004, customs issues in Poland have been governed by the Community Customs Code, established by Council Regulation No. 2913/92 and complemented by the Polish Act on Customs Law.

In general, all the provisions regarding customs regulations in Poland are in line with EU Law.

4.5.2 VAT

(a) Intra-Community supply of goods from Poland. In general, the Polish Act on VAT is in line with the provisions of EU law.

The structure of the Polish intra-Community VAT number is consistent with EU standards: PLxxxxxxxxxx – where 'x' is a digit.

Pursuant to Polish VAT regulations, an intra-Community supply of goods from Poland to another EU member state may be subject to a zero percent VAT rate if the following conditions are met:

(i) the buyer is registered for VAT purposes in another Member State and has a valid VAT number issued for intra-Community transactions,

(ii) the goods are dispatched or transported to another EU Member State,

(iii) the supplier has documents confirming that the goods actually left Poland and that the goods were delivered to a buyer from another Member State, and

(iv) the supplier must be registered as a EU VAT taxpayer not later than on the day of submitting the tax return in which the taxpayer shows the intra-Community supply of goods.

(b) VAT refunds

Foreign taxable persons who are not established in Poland and who incur Polish VAT on business expenditures in Poland may under certain conditions claim VAT refunds. They are eligible to do so if the following conditions are met:

(i) they are registered for VAT purposes or a similar tax in their home country,

(ii) they do not conduct taxable activities in Poland, with certain exceptions, and

(iii) their home country regulations allow Polish businesses to claim VAT refunds (reciprocity). This condition applies to foreign taxable persons established outside the European Union.

Claims must be submitted by 30 September of the year following the year in which the VAT that is the subject of the claim was charged to the relevant tax office. The completed claim forms should contain the following attachments:

(i) the original invoices,

(ii) a certificate of the taxpayer's registration as a taxpayer of VAT or a tax of a similar nature in the country of its seat. This condition applies to foreign taxable persons established outside the European Union.

A decision regarding a VAT refund is issued within four months from the date of filing an application. However, the Tax Authorities may extend this time limit in order to verify the claim. The whole procedure cannot take longer than eight months from the date on which the application is filed.

4.5.3 Excise duty

Excise duty regulations are consistent with the appropriate EU Directives. Polish legal regulations implement the majority of EU legislation regarding excise duty concerning free zones, tax warehouses, suspension arrangements, registered and non-registered traders, etc.

4.5.4 Foreign exchange regulations

Generally, Polish foreign exchange regulations have introduced the principle of free movement of capital. Entities registered in the EU, OECD and EEA are treated with priority, and currency transactions in their case are subject to more lenient provisions. Foreign exchange restrictions are not very significant, especially with respect to EU residents.

Trans-border money transfers of convertible currencies from one bank account to another do not require any permits. There are no restrictions with respect to the transfer amount. The only requirement is that with respect to remittances exceeding the amount of EUR 15,000 residents are obliged to perform such transfers to non-residents (for example EU residents) through a bank authorised to engage in foreign exchange transactions; most banks have such an authorisation. Polish law does not prohibit remittance through a legal parallel market, including convertible negotiable instruments (such as granting euro-denominated Polish bonds instead of making an immediate payment in EUR).

There have never been any serious difficulties or delays in transferring investment returns such as dividends, royalties, return of capital, lease payments, or management fees. Capital invested in Poland was always freely withdrawn in cases of liquidation or decreases in share capital. No permit is required for the full repatriation of profits and dividend payments.

5. Competition issues

5. Competition issues

5.1 Distribution

5.1.1 General remarks

Distribution agreements may potentially infringe competition law if they contain certain restrictive clauses, such as resale price maintenance, various non-compete obligations, absolute territorial protection, export bans, etc. Certain restrictions, such as resale price maintenance, are prohibited regardless of the market share. Some other restrictive clauses are permissible provided that each of the supplier's and the purchaser's market shares do not exceed 30% of the relevant market for contractual goods and services (and some other conditions are met).

The most common distribution arrangements and their restrictive effects on the competition are described below.

5.1.2 Agency agreements

Under an agency agreement, the agent is granted authority to negotiate and/or conclude contracts for the purchase or sale of goods or services on behalf of the principal, either in the agent's own name, or in the name of the principal.

If there is a 'true agency' situation, then commercial agents are generally considered to fall outside the competition legislation, since they are usually treated as a single economic unit with the principal. As long as the agent does not bear any risk, or bears only insignificant risks in relation to the contract he concludes for his principal, competition law will not apply to the agreement.

However, if the agent is not fully integrated into the principal's distribution system, but operates independently, accepts financial risks on his own account (such as e.g. taking title in the goods bought or sold), or undertakes personal liability to perform contracts, then the agency agreement may fall within the scope of competition law, unless covered by the various exemptions available. Exemptions apply to agency agreements up to the 30% market share threshold, and cover e.g. exclusivity provisions if applicable conditions are met.

5.1.3 Exclusive distribution/supply agreements

Many of the common provisions contained in such agreements, such as requirements to purchase minimum quantities, long-term purchase obligations, tying provisions and non-compete obligations, are permissible, provided that the

market shares of each of the supplier and the purchaser do not exceed 30% and the agreement does not include so called hard-core restrictions. Also, non-compete obligations may not be entered into for a period longer than five years, or for an indefinite period or be automatically renewed.

If any party's market share exceeds 30%, the exemption does not apply and the position of the parties on the relevant market may affect the relevant authority's thinking on the permitted length of the contract and any non-compete provisions, as well as the minimum volumes of goods to be supplied. In general, the higher the market share, the less burdensome limits may be agreed by the parties. Entities with significant market power must also take care to ensure that any such provisions are not viewed as an abuse of dominance.

The exemption covers the most extreme forms of limited distribution: exclusive distribution and exclusive supply, whereby an agreement specifies that there is only one buyer inside the country to which the supplier may sell a particular good or service.

5.1.4 Selective distribution

A selective distribution system is a distribution system where the supplier undertakes to sell certain goods or services only to distributors selected on the basis of specified criteria. Both distributors and retailers can be appointed within the same system.

Under general principles, certain selective distribution systems do not infringe competition law at all. There are three conditions for determining whether a selective distribution system is purely qualitative and escapes the competition law prohibition:

— selective distribution must be an appropriate system for the product in question (generally this concerns sophisticated products such as, e.g., luxury goods, Hi-Fi sets),

— retailers must be chosen on the basis of objective, relevant and technical criteria that are applied uniformly to all potential retailers, and

— the criteria must not go beyond a necessary minimum.

Selective distribution systems satisfying these conditions do not raise competition law concerns.

It is only the more onerous systems, involving, for example, minimum purchase obligations or where the selection of outlets is made on a quantitative basis, which might be caught by the competition law prohibition. These will be assessed in the light of the 30% market share exemption. The more general market structure may also be relevant for the assessment of anti-competitive effects of a selective distribution system.

There are some provisions that are prohibited, irrespective of the market share of the supplier. These are:

— the distributor cannot be restricted from supplying other distributors within the same selective distribution system (so, appointed wholesalers cannot be restricted from supplying other appointed wholesalers, or from supplying appointed retailers),

— retailers within a selective distribution system cannot be restricted in selling to customers or generally be prohibited from advertising or selling via the Internet (unless there is an exceptional objective justification, for instance, on the grounds of product quality or safety),

— distributors or retailers within a selective distribution system cannot be restricted in selling the brands of specified competing suppliers – an obligation requiring distributors not to resell competing brands in general will be permitted, however focusing the non-compete obligation on certain competitors will be prohibited.

Restrictions on the retailer's ability to decide on the location of its business premises are, however, permitted.

Distributors can be differentiated on the basis of a combination of quantitative (i.e. the number of outlets) and qualitative (i.e. the standard of the outlet and related services) criteria, however only up to the 30% market share threshold of each the supplier and the purchaser.

If the nature of the product does not justify its sale through a selective distribution system, the exemption may be withdrawn, even in cases where the 30% market share threshold is not exceeded.

5.1.5 Franchising agreements

Franchising agreements are where one company, the franchiser, grants another company, the franchisee, a package of intellectual property rights

relating to trademarks, signs and know-how for the sale and distribution of goods or services, usually in return for a fee or royalty.

Generally speaking, franchising agreements contain a range of vertical restraints, such as selective distribution, and/or non-compete, and/or exclusive distribution, applying to both the franchisee and the franchiser. Competition law's guidelines on other types of commercial agreements are therefore relevant also for franchising agreements.

The 30% market share exemption also covers appropriate intellectual property provisions, such as trade-mark licences, contained in the franchising agreements, provided that such provisions do not constitute the primary object of the agreement, but are directly related to the use, sale or resale of the relevant goods or services, and that certain other conditions are met.

5.1.6 Single-branding and tying arrangements

The potential anti-competitive effects of any obligation placed upon a purchaser to focus its purchases on one supplier should also be assessed. Such an obligation may relate to one type of product and is often described as 'single-branding' or 'quantity-forcing'. Similarly as a non-compete obligation, such restriction is exempted, subject both to the 30% market share and to the five-year cap on duration of the exclusivity obligation. The obligation may relate to more than one product. The purchase of one product may be conditional on the purchase of another, which is usually called a 'tie', or the obligation may be combined even with a purchase of a whole range of products, called 'full line forcing'. Tying arrangements are exempted up to the market share threshold.

Agreements where the market share of any of the parties exceeds 30% threshold are not automatically prohibited, but an individual assessment must be made. For both types of restrictions (which are analogous to exclusive purchasing), the analysis should cover not only the parties' market power, but also e.g. the market power of their competitors, the potential for new competitors to enter the market, the countervailing buyer power and the cumulative effect of similar single-branding or tying arrangements over the whole market.

5.2 Pricing

5.2.1 Price-fixing between competitors

Price-fixing between competitors is strictly forbidden in any form or under any circumstances, regardless of the market share or the nature of the price-fixing agreement. Any attempt, in a formal agreement or otherwise, by competitors to fix the price at which their products or services are sold is prohibited. Examples of price-fixing agreements include:

— a straightforward agreement between suppliers to set their prices,

— agreements on particular elements of a pricing strategy, e.g. offering rebates, discounts, margins,

— the acceptance of prices set by members of a trade association.

5.2.2 Resale price maintenance

Resale price maintenance, i.e. establishing by the supplier of a fixed or minimum resale price which must be observed by the distributor is a hard-core infringement of competition law which is not subject to any exemptions.

Other examples of resale price maintenance may include:

— setting a recommended price which in fact is a fixed price,

— fixing distribution margins or the maximum level of discount the distributor can grant from a prescribed price level,

— making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level,

— linking the prescribed resale price to the resale prices of competitors,

— putting pressure on, giving warnings, penalising, delaying or suspending deliveries or terminating contracts in relation to observance of a given price level.

Maximum prices can in general be agreed upon with distributors, as long as each of the supplier's and the purchaser's market share does not exceed 30% level. However, if a supplier or purchaser holds a higher market share than this level, maximum prices are allowed only in exceptional cases

provided an individual assessment is made in order to check if competition is restricted as a result of their application and if yes whether it may be outweighed by any efficiencies, i.e. positive effects for competition.

Recommended resale prices are allowed provided that they are not combined with other factors which could directly or indirectly establish a fixed or minimum resale price.

5.2.3 Dominant companies and pricing

Whilst there is nothing wrong with having a dominant position on the market (in Polish competition law there is a presumption of dominance if a company holds a market share exceeding 40%), and many companies strive to increase their market share as much as possible, dominance entails certain special responsibilities and the actions of dominant companies are therefore likely to be more heavily scrutinised for anti-competitive practices, including pricing abuses.

In order to avoid any accusations of abusive conduct, dominant companies should observe the following overriding principles in framing and implementing their pricing policies:

— any price structure should be applied uniformly to all customers,

— discounts, rebates and reductions should be applied consistently and on an objective, economically grounded basis,

— any differentiation in treatment should also be based on objective criteria,

— prices should not be excessive or predatory,

— prices should be fair, uniform, and non-exclusionary.

5.2.4 Price differentiation

Whilst charging clients with different prices for the same products is an example of pricing abuse, there may also be legitimate reasons for differential pricing structures. These may include differentiation for objective reasons, such as reduced prices for bulk buying, or prices varying in line with transport costs, also products of different quality are likely to command different prices.

However, discriminatory prices, including any differential element in price-related terms, are likely to be seen as an abuse of a dominant position and will be regarded as anticompetitive. Competition authorities also look at excessive price differentiation or exclusionary behaviour when assessing if there is a likelihood of abusive discrimination. In order to avoid accusations of pricing abuses, a supplier should treat its customers on equal terms, where such customers are in an equal position.

5.2.5 Excessive prices

An excessive price is defined as bearing no reasonable relation to the economic value of the products supplied or the services provided. Often excessive prices can only be charged by dominant companies who are less bound by competitive market forces. One of the indicators of excessive prices would be economic harm suffered by a buyer.

In practice, it is, however, difficult to specify a product's economic value. This can be usually done through a cost/price analysis, with some element of comparison to competitors' products and prices. There is no numerical formula that can be used to state when a price becomes excessive.

5.2.6 Lowering prices (predatory prices)

In the same way that manufacturers may wish to set higher prices than competitors, there are also legitimate commercial strategies that call for lowering prices. However, strategies aimed at reducing prices as a way of eliminating competition from the market are regarded as an abuse of a dominant position. 'Predatory' prices are assumed to be when a price is below average avoidable costs (which are most often equal to the average variable costs) and is so low that a dominant undertaking can make no profit. At this pricing level an equally efficient competitor cannot serve the targeted customers without incurring a loss and therefore would be likely to be foreclosed from the market. Also, applying a price below long-run average incremental costs (the average of all – variable and fixed – costs that a company incurs to produce a particular product) can be treated as predatory pricing. Failure to cover long-run average incremental costs may indicate that a dominant company is not recovering all the fixed costs of producing the goods or services and that an equally efficient competitor could be foreclosed from the market.

5.2.7 Discounts

The basic competition principles concerning discounts are relatively simple. A discount scheme should result in a fair price, which does not exclude competitors or make it difficult for customers to access the products of other suppliers. In practice, there are fundamentally three types of discount: discounts based on volume, discounts based on achieved targets, and loyalty (fidelity) discounts.

Of these three, volume discounts, i.e. discounts based on quantity, are the least likely to infringe the prohibition on anticompetitive abuse. Provided that a discount is given to a buyer because of an objectively justifiable (i.e. quantifiable) amount the buyer buys from a particular supplier, it is unlikely to have an exclusionary effect and is unlikely to be prohibited. At the other extreme, a loyalty discount is a reward for exclusivity, and will often encourage or oblige a buyer to take all or most of its purchases from one source. The commercial justification for the customer doing so is unlikely to be objective and cost-based, and therefore may be viewed as an abuse. It is also irrelevant that the loyalty obligation is willingly accepted or even that it represents a response to the request of customers.

Discounts given to buyers as a reward for reaching defined targets may also be viewed as an abuse. Companies with large market shares should ask themselves how such discounts are calculated, what the reference period is, how transparent the criteria are and to whom they apply.

In the context of discounts, a company should not make a low price conditional upon a customer taking more than one product, or a full range of products if any of its products has a high market share. In other words, product ties or full-line forcing can be seen as an anticompetitive abuse.

5.3 Market sharing

Polish competition law prohibits agreements that allocate business amongst competitors on either a geographical or consumer basis, through distribution, licensing or other arrangements. A market can be divided, inter alia, by:

— geographical region,

— class of consumers,

— class of products.

5.3.1 Geographical region

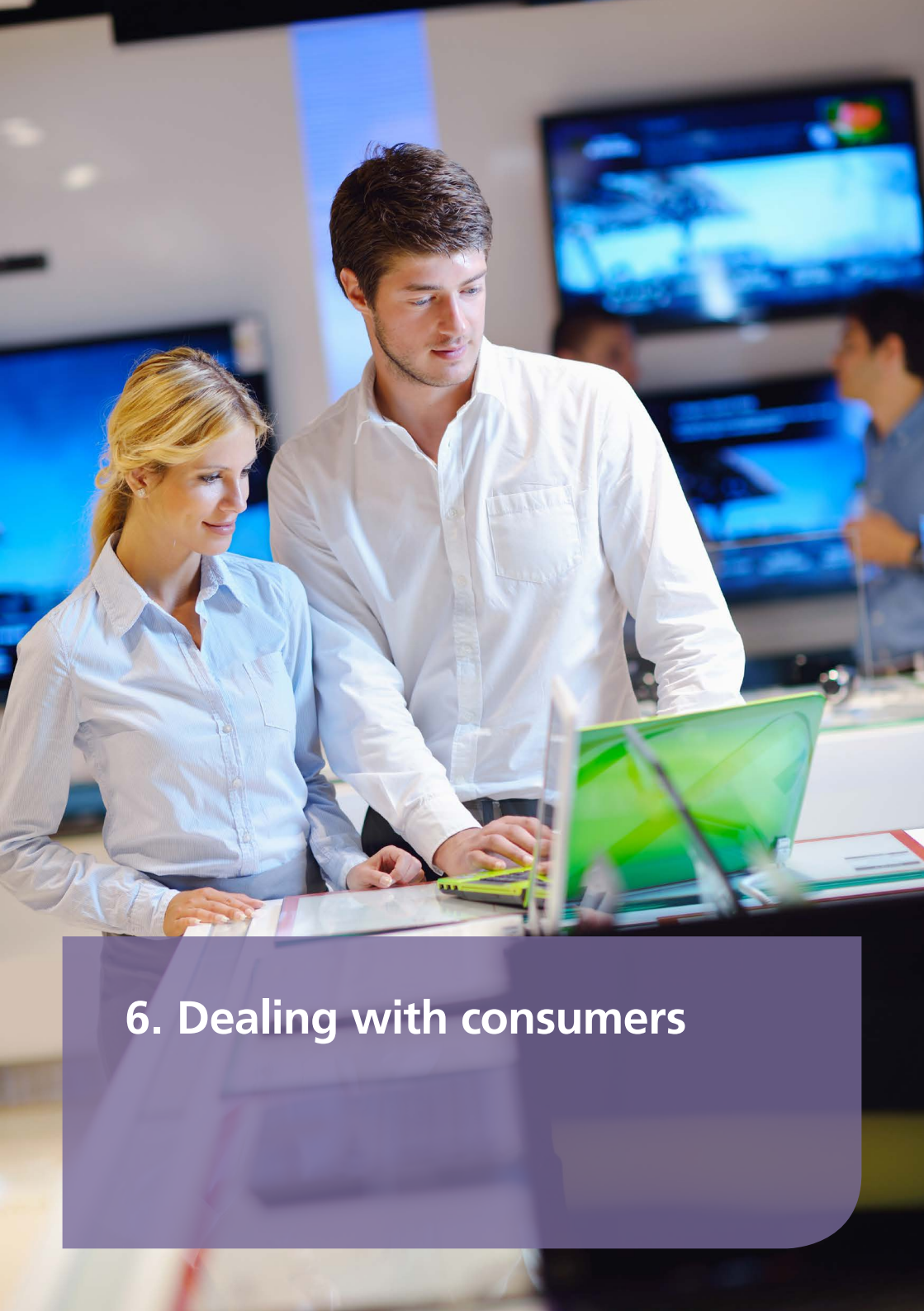
When two or more producers who sell the same or similar products agree to a territorial division of markets, this constitutes a hard-core competition law infringement. This can result, in particular, from an agreement to keep out of each other's territories or from establishment of quotas. An example of this is an agreement that restricts competition by providing for different prices in particular regions without economic justification (such as labour or transport costs).

5.3.2 Class of consumers

Competition law infringement takes place also when market is divided by classes of consumers. Such agreements provide that undertakings will not compete for particular groups of consumers. They may be formulated in a positive manner (i.e. provide with whom a certain undertaking may deal) as well as in negative form (i.e. provide with whom such undertaking may not deal). The division can be made, e.g. according to sectors, professions or gender of consumers.

5.3.3 Class of products

A division of the market can also take the form of product-related market sharing agreements. Such agreements are concluded between real or potential competitors. As a result of an agreement between real competitors, e.g. a manufacturer may agree not to sell particular products in exchange for its competitor doing the same in different areas. Agreements between potential competitors may be aimed at restricting an entry onto the market. Usually, such agreements give the potential competitors other advantages.



6. Dealing with consumers

6. Dealing with consumers

6.1 Consumer definition

Consumers are individuals who, acting outside the scope of their professional or commercial activity, purchase goods or services from business entities. This definition of a consumer was implemented into Polish law in accordance with several EU regulations, and does not cover legal entities. Individuals performing commercial activity will be treated as consumers if the scope of the relevant contract is not directly related to their business.

The scope of the aforementioned definition is important because of the strict protection of consumers that is guaranteed by various regulations; namely, consumers are protected against so-called 'prohibited (abusive) contract clauses' and given additional protection under product liability regulations. There are also special provisions regulating consumer sales and consumer lending.

6.2 Prohibited contract clauses

Certain disadvantageous contractual clauses are not binding upon consumers. The Civil Code includes a non-exhaustive catalogue of such clauses, which may refer to entering into a contract, to any changes or termination of a contract and the scope of liability of the parties. Such clauses are not allowed unless they are individually agreed with a consumer, and include clauses that:

— make performance by the seller dependant on the seller's will (e.g. 'we will deliver goods if they are available'),

— exclude or significantly limit the seller's liability towards the consumer,

— grant the seller the right to unilaterally change the contract,

— grant the seller the exclusive right to withdraw from the contract,

— grant the seller the right to keep amounts prepaid by the consumer, if the latter withdraws from the contract,

— make entering into a contract dependent on entering into further contracts of the same kind.

Until 16 April 2016, all contractual clauses fall under the control of the Consumer and Competition Protection Court which may declare them abusive. A clause declared by the Court to be forbidden is registered in a special register of prohibited contract clauses, maintained by the President of the Competition Authority (available at this website: www.uokik.gov.pl). Such clauses or any other clauses that

have an identical meaning may no longer be used in relations with consumers and if used in a contract would be declared void.

However, from 17 April 2016, control over contractual clauses will be executed by the President of the Competition Authority. The President of the Competition Authority will have the right to declare a clause as abusive and forbid the use of such a clause. Furthermore, the President of the Competition Authority will have the power to impose on a business entity a fine of up to 10% of its turnover in the preceding financial year. The decision issued by the President of the Competition Authority will be applicable to contracts with all customers of the business entity concerned.

6.3 Unfair market practices

Pursuant to the Law on Unfair Commercial Practices, businesses must not perform any acts or omissions towards consumers that are contrary to good practice and that could materially distort the market behaviour of the average consumer before, during or after agreeing to buy a product (these are so-called unfair market practices). The burden of proof is on the business entity, not the consumer, to show that the commercial practice is not unfair.

Prohibited unfair practices include:

— misleading acts or omissions spreading untrue information;

— misleading acts or omissions connected with entering the market with a new product, including prohibited comparative advertising;

— using codes of practices containing illegal provisions.

The Law contains specific, more rigorous provisions relating to aggressive practices and running 'Ponzi schemes'. Namely, in such cases not only civil, but also criminal sanctions (fine or imprisonment) may be imposed.

Aggressive practices include activities such as convincing customers that they cannot leave the business's premises without entering into an agreement, visiting customers at their home residence against their will, using pressure tactics by contacting customers against their will, or running adverts which appeal directly to children to buy an advertised product. These can result in the business entity being fined up to PLN 5,000 (the equivalent of approx. EUR 1,250).

Another form of an aggressive practice is the operation of a 'Ponzi scheme', where money is collected from groups of customers and used to finance product purchases. Business operators found guilty of applying the consortium system can face imprisonment of even up to eight years.

Consumers can demand that a business entity cease an unfair practice, remedy any adverse consequences they have suffered or make a single or multiple statements. A consumer may also demand that a binding contract is cancelled and the parties return to each other the benefits they received under the contract, and that the business entity pays compensation to the customer. If an unfair practice constitutes a tort, the consumer will be able to claim damages under general rules of tort law.

6.4 Collective consumer interests

The Law on Competition and Consumer Protection provides that businesses must not violate the collective interests of consumers. An example of such a violation is the infringement of the duty to provide consumers with reliable, true and full information. Acts of unfair competition and unfair commercial practices are also prohibited.

The infringement of collective consumer interests by a business entity may result in a fine of up to 10% of this business entity's turnover for the preceding financial year.

6.5 Sale of consumer goods

Polish law provides for special conditions for consumer goods sales contracts. This is connected with the implementation of European regulations.

Under these regulations, sellers must:

— provide information on:
  - the main characteristics of the goods or services,
  - the identity of the seller,
  - the total price of the goods or services, or the method of its calculation, as well as additional costs,
  - the time and manner in which the seller will fulfil his obligations, and the seller's complaint handling policy,
  - the seller's liability for the quality of his performance,

- the conditions of after-sales services and guarantee,
- the duration of the contract and the conditions for terminating the contract,
- the functionality of digital content and the technical means of its protection,
- any relevant interoperability of digital content with hardware and software.

— inform consumers on how to use the product in question in a clear and understandable way, including information on the type of a good, indication of a manufacturer or an importer, safety mark and conformity mark, marketing authorisation, energy consumption and other information required by specific laws,

— explain the meaning of the contractual provisions on consumer's demand,

— ensure conditions enabling the consumer to choose and check the quality, completeness and functioning of the main mechanisms and components of the product,

— hand over all components of the equipment (if applicable) and the instruction manual.

Some pre-contractual information (e.g. identity of the seller) may be omitted with respect to contracts related to small day-to-day affairs.

All of the information provided by the seller must be in Polish.

The business entity must acquire clear approval from the consumer for any additional payment which is not within the scope of the main obligations of the business entity, before the conclusion of a contract. Furthermore, if the business entity indicates a contact telephone number, the cost of making a call for a consumer may not be higher than the cost of a regular telephone call. These rules also apply to contracts concluded outside the business entity's place of business or through distance selling.

The statutory rights of consumers with respect to sales of goods may not be contractually excluded or amended.

6.6 Conclusion of contracts outside the business entity's place of business and distance selling

Consumer's right to withdraw from the contract

Contracts with consumers may also be concluded without the presence of one of the parties but by means which enable distance communication (e.g. telephone or email) or in a place other than the place in which a business entity conducts its

economic activity. In such cases consumers are entitled to withdraw from the contract within fourteen days of the date of its conclusion, without giving any reasons. Business entities must inform consumers of their right to do this e.g. by providing them with the appropriate form of such statement. If the business entity does not inform the consumer about the right, the consumer may withdraw from the contract within 12 months of the date of delivery of the product.

If the consumer decides to withdraw from the contract, he is entitled to the reimbursement of the delivery cost but not exceeding the least expensive type of standard delivery offered by the seller.

The right to withdraw from the contract is not applicable, inter alia, to:

— sale of goods made to the consumer's specifications or clearly personalised;

— sale of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;

— sale of goods which are liable to deteriorate or expire rapidly.

Communication related to distance selling

The application of devices that enable distance communication (e.g. telephone) in order to present an offer is allowed only if a consumer has consented to this, prior to the business entity making distance contact.

If the representative of the business entity makes a telephone call to the consumer, at the beginning of the conversation the representative must disclose his identity, the identity of the person on whose behalf he makes the call and the commercial purpose of the call. If the business entity offers a consumer to conclude a contract by telephone, it must confirm the offer in paper form or on other durable medium. The consumer is bound by the contract only once he has sent his consent in paper form or on other durable medium.

Provision of pre-contractual information

With respect to the conclusion of contracts outside the business entity's place of business and through distance selling, the seller is obliged to provide consumers with a considerable amount of pre-contractual information specified in the Act on Consumer Protection (e.g. business entity's contact details, properties of the product, its price, delivery of the product, consumer's rights) in plain and clear language. In the case of contracts concluded outside the business entity's place of business, the information must be provided on paper or, if the consumer agrees, on another durable medium. As regards distance selling, the information must be provided in a way that is appropriate to the means of distance communication.

If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the seller may provide a limited scope of pre-contractual information to the consumer. However, this must include at least information on the main characteristics of the goods or services, the identity of the seller, the total price, the right of withdrawal, the duration of the contract and, if the contract is for an indefinite period, the conditions for terminating the contract as well as a minimum term for the consumer's obligation. Additional information must be aligned to the means of communication used.

E-commerce websites must indicate clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply and which means of payment are accepted.

The seller must ensure that the consumer, when placing his order through distance selling, explicitly acknowledges that the order implies an obligation to pay (e.g. in the form of a button labelled with the words 'order with obligation to pay').

Conclusion of the contract

The consumer must be provided with a copy of the signed contract or confirmation of the contract on paper or, if the consumer agrees, on another durable medium.

After the conclusion of the distance contract but at the latest at the time of the delivery of the goods or before the beginning of the performance of the service, the business entity must provide confirmation of the conclusion of the contract. The confirmation must include inter alia all of the required precontractual information unless the business entity provided this information to the consumer on a durable medium before the conclusion of the contract.

All these provisions are not applicable when concluding some types of contracts, e.g. through auctions, vending machines or contracts in which the consumer is obliged to pay less than PLN 50 (approx. EUR 12).

Specific rules may apply to certain types of contracts, e.g. sale of digital content.

The statutory rights of consumers with respect to the conclusion of contracts outside the business entity's place of business or through distance selling may not be contractually excluded or amended.

6.7 Warranties and guarantees

Special regulations on warranties and guarantees, which modify the general Civil Code regulations, apply with regard to consumer sales. Under these regulations, 'warranty' means the statutory regulation of the seller's responsibility for physical and legal defects and 'guarantee' means the manufacturer's (or the seller's) liability in respect of the buyer. The terms of these two mechanisms are usually defined in a document delivered together with the product.

The statutory rights of consumers with respect to warranty and guarantee, as described below, may not be contractually excluded or amended.

6.7.1 Warranty

According to the regulations in question, sellers are liable for defects in goods, i.e. goods that do not comply with a contract. Products are deemed to not comply with a contract if:

— they do not have properties corresponding to the assurance issued by the seller, producer and his agent, the entity who introduces the goods onto the market or puts his name, trademark or any distinguishing mark on them; the statement may be presented in the form of a sample or model given by the seller; however, the seller is not bound by these assurances if he proves that he did not know and could not have known of them, or that they did not affect the buyer's decision or that the seller's assurance has been corrected before concluding the contract,

— they are not appropriate for the use intended by the consumer and communicated to the seller at the time of entering into the contract without the seller's objection,

— they do not have properties typical of goods of its particular kind with regard to the purpose included in the contract or resulting from the circumstances or designation of the good,

— they have been handed over to the buyer in an incomplete condition,

— they have been improperly installed and launched, if these actions were conducted by the seller or third party, for which the seller is liable, or by the buyer who was acting in line with instructions provided by the seller.

The seller is not liable if the buyer knew about the defect in the goods when concluding the contract.

If the bought goods are defective, buyer may demand reduction of the price or (if the defect is not minor) withdraw from the contract, unless these goods are either immediately and without unnecessary inconvenience repaired or exchanged by the seller. If the seller chooses to repair or exchange the goods, the consumer may modify this choice respectively (i.e. replace repair with exchange or replace exchange with repair), unless the repair or delivery of new goods is impossible, or cannot be done without bearing excessive costs. The buyer may also demand a reduction of the price or withdraw from the contract from the beginning if the product has already been repaired or exchanged (or the seller has already not fulfilled his duty to repair or replace the defective goods).

If the consumer demands repair or exchange of the goods or a specified reduction of the price, and the seller does not reply to such demand within 14 days, it is presumed that the seller is liable.

Sellers can be held liable only for defects that have been discovered within two years from the time when the goods were handed over to the buyer. Generally, the limitation period for the seller's liability is one year from discovering the defect, but not less than two years from the time when the goods were handed over to the buyer. Moreover, before the lapse of one year from the moment the goods were handed over to the consumer, there is a presumption that the goods were defective. However, if the buyer fails to carry out this obligation, he forfeits his rights under the warranty.

The consumer's right to withdraw from the contract may be limited only to defective goods if certain conditions are met. The law also provides specific rules inter alia with respect to additional damages, reinstallation of the goods or legal defects.

The seller is entitled to a recourse claim against a prior seller in the supply chain, if the defect was the consequence of the prior seller's actions or failures to act. The seller's claim covers incurred expenses and lost profits. The seller can only raise a claim within a period of six months from the day of incurring expenses or the day on which the seller should have fulfilled his obligations under the warranty.

6.7.2 Guarantee

In a guarantee, the guarantor warrants certain properties of the product. A statement of guarantee is free of charge and can be given by a producer,

seller or importer, in the form of a document or otherwise (e.g. in an advertisement).

Manufacturers (or sellers) are not obliged to grant a guarantee, but if they do so, then the buyer is entitled to be provided with the guarantee document.

A guarantee document must detail the information necessary to exercise the buyer's rights (repair periods, complaint procedure, etc.), the name and address of the guarantor or his agent in Poland, the time for which a guarantee lasts. It must also state that the guarantee does not exclude, limit or suspend buyer's rights arousing from warranty.

Buyers are free to select which of their rights they will exercise under a warranty or under a guarantee. In other words, the seller may not send a customer to the manufacturer to repair a product if the customer decides to raise his warranty (and not guarantee) claims.

6.8 Product liability

The producer and every other person taking part in the process of production or delivery of products are obliged to trade in safe products only. They are obliged to inform consumers about any potential danger that the product poses, to test the product and – in extreme cases – to recall the product from the market, if required.

The fulfilment of these obligations falls under the administrative control of the President of the Polish Competition Authority who is authorised to:

— demand information about any potential danger that the product may pose,

— order that the product is tested,

— order that the public receives information about any potential dangers connected with a particular product,

— demand that the product is recalled from the market,

— demand that the product is destroyed,

— order that the product is entered into the register of dangerous products.

In addition, placing a product that is entered in the register of dangerous products on the market or acting against the orders of the President of the Polish Competition Authority may result in a fine of up to PLN 100,000 (the equivalent of approx. EUR 25,000).

Pursuant to the Polish Civil Code, anybody who is or claims to be the producer (or importer) of a dangerous product may be held liable for damage caused by that product. If none of these persons can be identified, the seller can be held liable unless he/she indicates the producer or importer within one month.

Every individual that suffers damage can raise a claim against a product that caused this damage. In order for this to be successful, the individual in question must prove that the product is dangerous, i.e. does not ensure the safety one could expect through typical use.

Generally, liability can be avoided if:

— the damage was caused by a product which has not been placed on the market,

— putting the product on the market was not related to the business activity of the manufacturer,

— the dangerous qualities of the product came to light after the product was placed on the market, unless the cause was present in the product before,

— one could not foresee the dangerous qualities of the product,

— the producer proves that the product was produced in compliance with regulations, and that this production process in fact made it dangerous.

The strict liability (regardless of the existence of fault) under these regulations is limited to damage to property. It does not include damage to the product and damage that does not exceed EUR 500. In the case of death or injury, liability depends on proving the fault of the person liable.

Consumers can only raise a claim within a period of three years from the time when they have learned or could have reasonably learned of the damage and the entity obliged to compensate such damage; however, no later than within ten years from the moment the product was put on the market.

Insurance can be taken out against product liability. It may be purchased as a separate insurance product or as an extension of general business liability insurance. Product liability insurance covers losses suffered by third parties as a result of using goods specified in the insurance contract, where such goods cause death or injury and damage to property. Generally, by way of example, such insurance does not cover losses which the producer is obliged to cover in the product warranty or guarantee, losses caused as a consequence of recalling the product from the market, or losses resulting from an act of war or use of nuclear power. However, insurance companies usually offer separate insurance that covers losses caused as a consequence of recalling the product from the market.

6.9 Promotions and lotteries

6.9.1 Promotional sales

Pursuant to Polish law, sales of products and services to consumers may not be promoted by offering different, free-of-charge products as an incentive to purchase. There are, however, certain exceptions to this general prohibition.

If the additional product is not seen as 'different', then the promotional sale is likely to be allowed. Examples of this on the Polish market have included a free mug with a jar of coffee or free batteries with small electrical goods. Nonetheless, promotional offers should be carefully considered on a case-by-case basis.

Promotional sales may also be permitted if the value of the promotional gift is held to be low. With no legislative guidelines, the value is classified as 'low' on the basis of a comparison to the main product being sold, or through independent and objective assessment. Examples of this may be seen in breakfast cereals offering low value collectables.

In addition, the prohibition of promotional gift offers does not extend to awards in promotional lotteries organised in accordance with regulations on games of chance, or in competitions where the result does not depend on chance. However, such lotteries and competitions are strictly regulated in other legislation.

6.9.2 Promotional lotteries

Promotional lotteries are considered to be games of chance under Polish gambling law. Restrictions on organising such lotteries include the need to obtain a permit from the Customs Office and to ensure a bank guarantee up to the value of prizes foreseen by the rules of the lottery. Such rules for a given game must be issued in advance in writing. The rules and offers of promotional lotteries must not imply to the consumer that there is a certainty of winning, irrespective of the result, if the consumer places an order for certain products or services or pays a certain amount of money in advance. Entities organising lotteries without the required permit or in breach of other provisions of the gambling law may face severe fiscal sanctions.

These regulations and restrictions only apply to games of chance. If a game is organised as a competition where the result is determined solely by the participant's knowledge, skill factor or some other factor other than chance, then less restrictive rules apply.

6.10 Consumer lending

Most retailers in Poland, especially those providing expensive products such as electronic domestic appliances, offer a hire purchase option to their customers. This requires full compliance with consumer credit regulations. However, it is usually not the retailer itself who provides the customers with such credit. In most cases, retailers conclude standard agreements with banks for the provision of such services. As a result, it is the bank that enters into a consumer loan contract with a customer, with the retailer acting only as an intermediary.

There are two basic kinds of products offered by banks. In most common situations, the bank provides the retailer's clients with a simple loan for the purchase of a given product. Sometimes also the bank undertakes to issue unique credit cards, which constitute a valid means of payment only at certain retailers. In these cases, the burden of full compliance with the strict statutory regulation concerning consumer lending is borne by the bank. However, there are also restrictions and requirements imposed on a retailer in connection with such consumer contracts. For example, the retailer is obliged, under the sanction of a fine, to indicate in all advertisements the actual annual interest rate and the total amount payable, as well as to use the representative examples when advertising products.

In the second, less likely scenario, loans may be offered directly to customers. In this case, a loan of PLN 255,550 (the equivalent of approx. EUR 64,000) or less will fall within the scope of the strict Consumer Credit Act regulations, which implements the European directive on consumer lending into Polish law. This Act imposes certain obligations on lenders connected with the conclusion of a contract, and lists minimum particulars that must be included. The legislation increases the scope of information obligations (especially cost-related) towards consumers, requires a visible description of all additional fees and charges, and provides an obligation to verify the creditability of a consumer. The lender must inform the customer about his right of prepayment, and the right to withdraw from the contract within 14 days of its conclusion. The Act introduces a standardised manner of calculating the actual annual interest rate, pursuant to a specific formula. Moreover, from 11 March 2016 the maximum non-interest cost of a loan will also be calculated on the basis of a specific formula set out in the Act. Finally, the regulation provides for a standard credit information form which specifies the scope of information to be presented to the customer prior to entering into the credit agreement.

If the agreement does not comply with certain requirements of the Act, it may be automatically modified by law. Namely, the lender is no longer able to claim the payment of interest or any other sums due from the borrower, who is only obliged

to return the drawn down loan on the date stipulated in the agreement. The statutory rights of consumers with respect to consumer lending may not be contractually excluded or amended.

6.11 Consumer litigation

In general, disputes between consumers and retailers are decided by the civil divisions of the common courts. The statement of claim should be filed with the court competent for the seat or place of residence of the defendant, and in the case of claims related to contracts, also with the court competent for the place of performing the contract.

The Civil Procedure Code contains provisions aiming at disciplining parties to court proceedings. Apart from a statement of claim, a reply to a statement of claim and motion for evidence filing, any other pleadings during court proceedings are allowed only upon the court's discretion. Furthermore, the court should disregard all delayed evidence and statements unless a party to the dispute proves that the delay in raising them was not its fault or that the admission of delayed statements and evidence will not delay the proceedings or that there are special circumstances.

If the value of a contractual claim is not higher than PLN 10,000 (the equivalent of approx. EUR 2,500) and, in the case of the warranty and guarantee claims, if the value of the contract is not higher than PLN 10,000 a simplified, fast track procedure will apply. The statement of claim and some other submissions should be filed on an official form. The parties have the right to appeal against the court's decision within two weeks of receipt of the decision along with its justification. The parties may waive their right to receive a written justification of the court's decision, as well as their right to appeal against this decision.

There are also special 'Perpetual Consumer Arbitration Courts' which hear disputes arising from sales or service agreements concluded between professionals and consumers. Such Courts are established next to the Regional Trade Inspections. An important drawback for the consumer is that such proceedings may be initiated only if both parties decide to undergo arbitration proceedings. The decision of such court may be – as a rule – challenged only within 2 months of the delivery of the court's ruling by submitting to the common court a complaint for setting aside the judgement of the arbitration court. The challenge of the judgement of the arbitration court may be based on very limited grounds.

6.12 Personal data protection

It is quite common in the retail sector for the personal data of consumers and potential customers, suppliers and other business partners to be processed (e.g. stored). While doing this, retailers become data controllers, and therefore have to comply with certain rules, as outlined below.

Personal data is any information relating to an individual that allows this individual to be identified, and may include the name, surname, official identification number, and any other specific facts relating specifically to the individual in question. Processing personal data is any operation relating to personal data, including, for example, gathering, storing, compiling, changing, providing access to and deleting such data.

The obligations arising from the Personal Data Protection Act are imposed on entities which process personal data in connection with their commercial, professional or statutory purposes, and have their seat in Poland or in a state beyond the EEA, provided that they process personal data using technical means located in Poland ('data controllers'). The obligations do not apply to entities that have their seat outside Poland, whose activity in Poland is limited to transmitting data to other countries, as well as to individuals who process data only for personal purposes.

Processing personal data is permitted only on a legal basis, as provided in the Personal Data Protection Act. Generally, data controllers may process an individual's data while performing a contract concluded with such individual or after obtaining his/her consent. They are obliged to ensure sufficient protection of the processed data by providing appropriate technical means to prevent the data from being accessed by unauthorised persons, changed, damaged or lost.

Personal data are processed in databases. Data controllers are generally obliged to register databases with the General Inspector for Personal Data Protection (Generalny Inspektor Ochrony Danych Osobowych), and may begin to process data only after filing an appropriate application, or – in the case of sensitive data – after the registration of the database in question. This obligation does not include employers' databases, databases used exclusively for the purposes of issuing invoices, and databases containing information that is publicly available. What is more, under the Personal Data Protection Act amended in January 2015, the data controller is exempt from the obligation to notify and register databases if he appoints a Data Privacy Officer. Also, the obligation to register a database does not apply when such data are processed exclusively in the paper version of the data files.

Data controllers may subcontract the processing of data to another entity by entering into a written agreement on the entrustment of processing of personal data with such entity. The data controller remains liable if the subcontractor breaches the law on personal data protection. The subcontractor is liable for the implementation of relevant technical and organisational measures protecting the processed personal data.

Data controllers are obliged to provide the individuals whose data they obtain with certain information on the data in their possession, on the address of the seat and full name of the data controller, the aim of collecting the data, recipients or categories of recipients of their data, the individual's rights to access and modify his/her personal data, and whether the provisions of personal data is voluntary or obligatory and, if obligatory, about its legal basis. Notification is not necessary if the individual concerned already knows this information.

The infringement of data protection law might result in penal, administrative or civil sanctions. In the case of infringement, the General Inspector for Personal Data Protection may issue a decision ordering the data controller to undertake certain actions restoring the lawful status (e.g. application of additional measures protecting the processing of data). If the data controller does not follow such a decision, the Inspector may impose a fine (administrative sanction) on the data controller of up to PLN 200,000 (the equivalent of approx. EUR 50,000). Notwithstanding the above, the infringement of data processing rules may also lead to the criminal liability of the responsible individuals (up to three years of imprisonment) or the civil liability of the data controller.

7. Branding products and advertising

7.0 Branding products and advertising

7.1 Trademark protection and licences

Trademarks in Poland enjoy a wide scope of protection based on international standards. Depending on requirements as to the breadth of the territorial range of protection, trademarks can be registered:

— only in Poland under Polish legislation (Industrial Property Law),

— on an international scale, in relation to the Polish territory, under international legislation (the Madrid Treaty and Protocol),

— in the European Union (under Regulation No. 207/2009 on the Community Trademark).

Trademarks are protected territorially, i.e. within the territory of selected countries. Therefore, trademarks – even if registered in other countries – are not protected in Poland unless also registered in Poland or with respect to Poland (under the Madrid system); an exception to this rule is the Community trade mark, which is protected in all EU member states without the necessity of seeking separate registration or protection in a given country. If, however, one wishes to register a mark at a national level in Poland, it is necessary to file the appropriate application with the Polish Patent Office.

There is an open catalogue of marks that can be registered as trademarks. The forms that a trade mark can take include words, logos (graphic representations), compositions of colours, shapes, and sounds. Also, some slogans can become trademarks.

It is advisable for companies entering the Polish market to check whether brands that they intend to use are already protected as trademarks. This can be done via a review of the register of trade marks maintained by the Polish Patent Office or publicly available databases. It is also advisable for companies to register marks that are relevant to their business activity when entering the Polish market, as there is always a risk that a third party may also wish to use this mark. If such infringement were to take place with respect to a registered mark, then the proprietor of this mark can apply a number of protective legal measures foreseen under Polish law. Protection is also available for unregistered marks, if the marks can be deemed commonly known on the basis of Polish regulations relating to trade-marks or if the infringement in question can be deemed an act of unfair competition in view of relevant legislation.

If a relevant trademark has already been registered by a third party, it is possible either to acquire (purchase) this mark or to obtain a licence for its use from the right holder. Under Polish trademark law, licence agreements must be concluded in writing. The parties can define: remuneration, the extent of authorised use of the mark, term of the licence, its territorial range, the possibility of granting a sub-licence, as well as other terms and conditions of the licence. Licence agreements may be entered into the trademarks register. An exclusive licence holder who registered the licence agreement in the trademarks register of the Polish Patent Office can raise the same claims against infringing persons as the proprietor of the trademark.

If rights arising from a registered trademark are infringed, the right holder can demand the cessation of the further use of the trademark, reimbursement of profits achieved through the infringement, or compensation in the form of damages (either on the basis of general principles of compensation under Polish law, or in an amount that the infringing party would have had to pay for a licence for the use of the trademark). In addition, the court ruling on a trademark infringement can ensure that the ruling is made public in an appropriate publication. In cases of unintentional infringement, if ordering cessation of the violation would be disproportionately harmful for the infringing party, the court can instead order that party to pay a certain amount of money to the proprietor of the trade mark.

The proprietor of the trademark also has the right to demand the provision of information by the infringing party or even by third parties involved in infringing actions. Such information is especially significant when estimating the level of compensation due to the proprietor of the trademark.

Notwithstanding the above, an infringement of trademark rights may also in some cases give rise to criminal proceedings.

7.2 Advertising

In today's business world, advertising is used as a major business tool aimed primarily at attracting and maintaining clientele and market share, and as such is not always used in an entirely transparent and ethical manner; thus, there is often a danger that advertising will mislead consumers and/or significantly impact the choices that they make on a daily basis. As a result, legislation relating to unfair advertising is becoming ever more important in protecting consumers. In Poland, the relevant general legislation comes in the form of the Law on Combating Unfair Competition, the Law on Counteracting Unfair Commercial Practices and the Law

on Competition and Consumer Protection, along with certain non-binding regulations such as the Code of Ethics in Advertising and other codes of ethics relevant to the sector. As advertising can take many forms and relate to a number of products, more specific provisions of law relating to advertising are often contained in separate, specialised legal acts.

Unfair advertising can take many forms, among them advertising which violates the law, good customs or human dignity, or which misleads consumers over a decision to buy goods or services. Advertising which plays on emotions to cause fear, or sells products and services through using superstitions or children's credulity is prohibited.

7.2.1 Misleading advertising

Advertising can be considered misleading if it creates a false impression of the goods and services that are their subject, and is therefore likely to affect consumers' decisions as to purchasing these items. It is not necessary for a consumer to actually buy the product or service in question, but merely for an advertisement to have the potential to influence his/her decision in this respect.

In order to determine whether advertising is misleading, various factors are taken into account, in particular the origin, quantity, quality, and uses of the advertised goods, as well as consumer behaviour.

7.2.2 Comparative advertising

Comparative advertising (i.e. advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor) is permitted insofar as it is not misleading and objectively compares one or more material, relevant, verifiable and representative feature of goods or services that meet the same needs or that are intended for the same purpose (these features may include price). Comparative advertising will be stopped if it creates confusion in the market between the advertiser and a competitor, or if it is seen to be negative about the trademarks, trade names or other distinguishing signs of a competitor, or takes unfair advantage of such trademarks or signs; the latter case encompasses presentation of goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name. In addition, products with a designation of origin can only be compared to relevant products with the same designation.

7.2.3 Sanctions

Claims against an advertisement and the manufacturer of the product that is the subject of this advertisement can be brought before a court by a competitor or a consumer who feels that his interest has been threatened or infringed, as well as a national or regional organisation for the protection of business or consumer interests.

In such cases, an entity whose interests have been infringed can demand the cessation of unfair acts, elimination of the effects of unfair activity, publication of one or more public statements with the content determined by the claimant, redress of damage and payment of a certain amount of money for a specific public purpose connected with supporting Polish culture or protection of Polish national heritage and, in the case of an action initiated by the consumer, consumer protection. In the case of an action initiated by a competitor, he may also claim reimbursement of unjust benefits resulting from unfair activity.

Moreover, in cases when the advertising infringes collective consumer interests, the President of the Polish Competition Authority can initiate proceedings against the entity responsible for the advertisement. The Authority may initiate proceedings at its own initiative, even without a consumer complaint.

The Authority can order the cessation of the advertising and the elimination of all of its effects, which may include the order for making a public statement. The Authority may also impose a fine up to 10% of the turnover of the entity responsible for the advertisement in the financial year preceding the year in which the fine was imposed.

7.2.4 Specific provisions

There are also specific rules that apply to advertising, depending on the type of medium that is used for a given advertisement. In particular, there is a ban on television or radio advertisements that:

— directly persuade minors to buy goods or services,

— encourage minors to exercise pressure on their parents or other persons in order to buy the goods or services advertised,

— abuse the trust of minors in parents, teachers and other persons,

— present minors in dangerous situations in an unjustified manner,

— affect the subconscious in a covert way.

In addition, television or radio advertisements must not violate human dignity, be discriminatory in any way, including on the grounds of race, sex, sexuality, nationality, ethnic origin, faith, world view, disability, age, sexual orientation and must not infringe religious or political beliefs, threaten the physical, psychological and moral development of minors, or favour behaviour which threatens health, safety or the protection of the environment. Programmes directed to children should not be accompanied by commercial content related to unhealthy food and drink. There are detailed rules on sponsoring programmes and product placement.

7.2.5 Sensitive goods

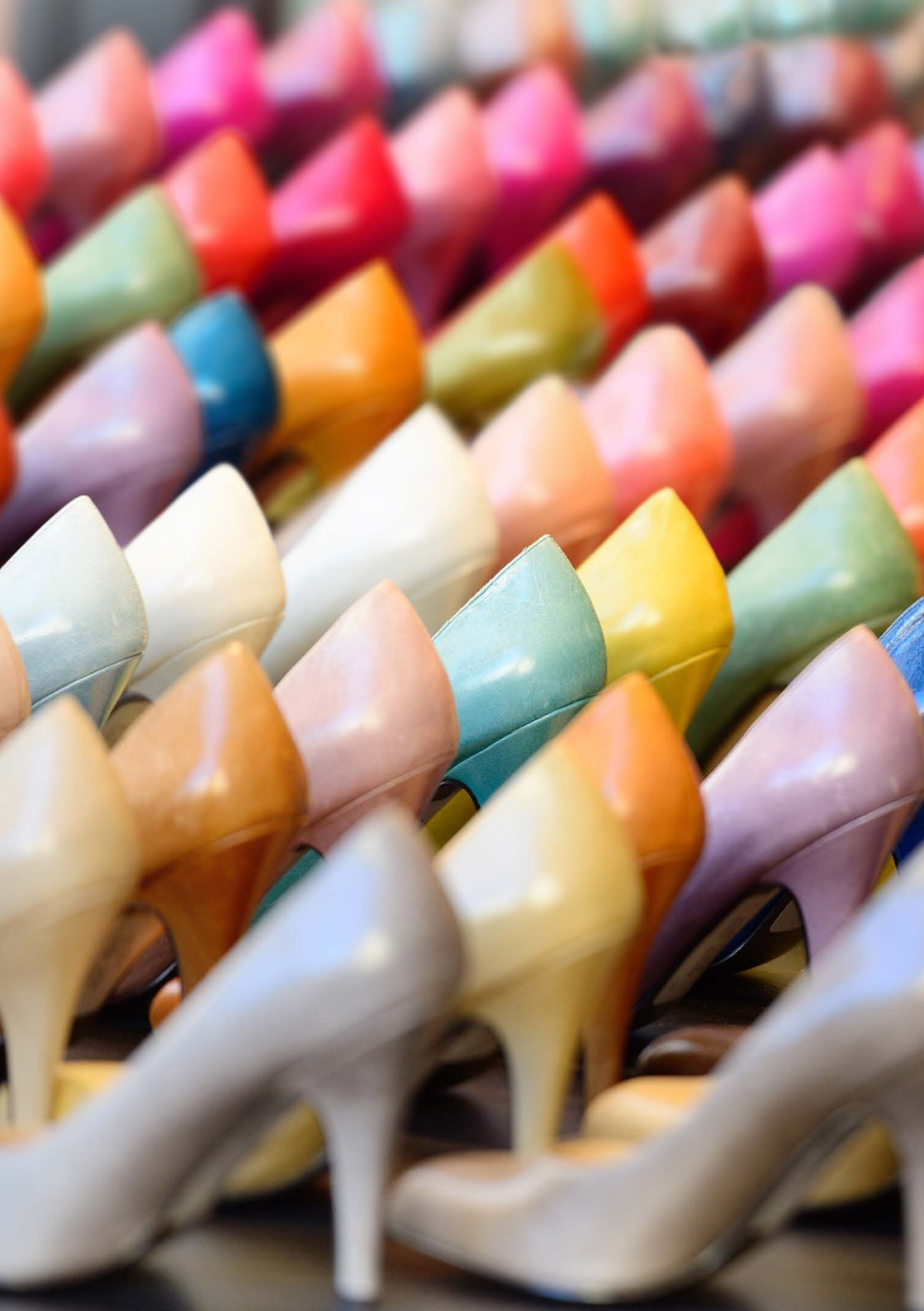
Special rules apply to advertising sensitive goods such as pharmaceuticals, alcohol and tobacco.

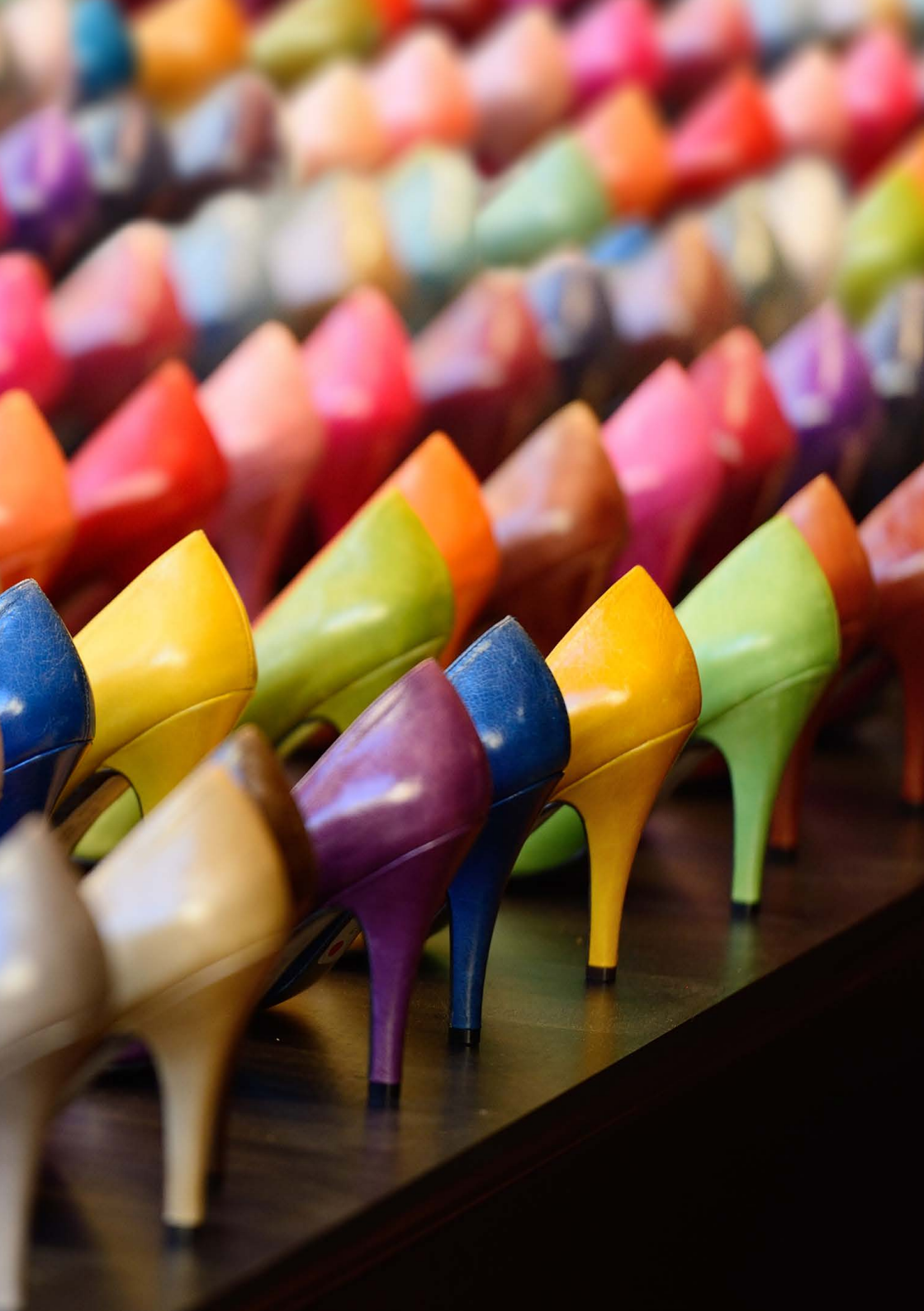
Prescription medicines, drugs and psychotropic substances as well as medicines subject to reimbursement cannot be advertised unless specifically targeted at doctors and entities that trade in medicinal products (e.g. pharmacists). Other pharmaceuticals can be advertised provided that such advertisement are not addressed to children and objectively present the pharmaceutical and give information on its rational usage. There are also restrictions on advertising pharmaceuticals by means of marketing visits by representatives of pharmaceutical companies to individuals authorised to issue prescriptions. Moreover, if addressed to the public, advertising cannot refer to recommendations from scientists (in particular doctors) and persons known to the general public (e.g. sportspeople or actors). In general, these comments do not apply to medicinal devices. Advertisements concerning dietary supplements are regulated by specialised food legislation, which also contains additional rules on food advertising. Notwithstanding all the above, it should be noted that pharmacies are not allowed to advertise their business in any way.

Alcohol must not be advertised in public. However, this restriction does not apply to alcohol advertising in wholesaling premises, points of sale exclusively engaging in the sale of alcoholic beverages, and restaurants, pubs or bars, where alcoholic beverages are served. Less restrictive rules apply to the advertisement of beer.

There is a ban on advertising tobacco products, tobacco accessories or products imitating tobacco products. In particular, this prohibition applies to advertising on television, radio, or in cinemas, sport and recreational

facilities, medical clinics, schools, and in other public places, as well as in newspapers, posters and billboards and Internet or e-mail advertising. In addition, tobacco companies are prohibited from sponsoring sporting, cultural, educational, health-related or socio-political activities and to exhibit products imitating packets of tobacco products in retailer outlets. The only allowed form of tobacco advertising is product information displayed in points of sale, which may only contain information regarding the tobacco brand and the amount of harmful ingredients in the product. It should also include a warning about harmful effects of tobacco use and cannot contain any form of encouragement to use it.





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