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COMPLYING WITH POLAND'S NEW LAW ON PAYMENT DELAYS

HOW TO DETERMINE WHETHER YOU ARE A SME OR A NON-SME

On 1 January 2020, important legal provisions aimed¹ at reducing payment delays came into force (the "**Act**"). We have commented on the key changes in our previous newsletter [here](#). Provisions of the Act include measures to strengthen the legal protection of **micro, small and medium-sized enterprises** (SMEs). It is therefore critical for businesses to first determine whether they are a SME or non-SME enterprise, and we would like to look at this topic in more detail below.

Under the new rules, in so-called "**asymmetrical transactions**", in which the creditor is a SME, and the debtor is a non-SME (i.e., a large enterprise), the payment term cannot exceed 60 days. Any contractual provision specifying a longer period is invalid. The non-SME enterprise may not simply rely on the creditor's statement of its non-SME status if it turns out such creditor is a SME, unless, despite exercising due diligence, it could not have known its actual status. It seems that in the case of payment periods longer than **60 days**, the creditor's non-SME status will have to be confirmed by the non-SME debtor on the basis of publicly available or provided financial data of the creditor.

The establishment of payment periods longer than 60 days in symmetrical relations (i.e., between non-SMEs or between SMEs) is still possible, however, only if the longer period may not be deemed as grossly unfair to the creditor. Importantly, the burden of proof for justifying a period longer than 60 days lies with the debtor.

Furthermore, the non-SME debtor is **obliged to inform the creditor**, not later than at the conclusion of the transaction, that it is classified as a non-SME enterprise. It seems that in the case of long-term business relationships, especially where the parties do not conclude an underlying agreement but simply issue the invoices, a one-off statement is sufficient. Nevertheless, should there be any changes to the entrepreneur's status, it must notify the creditor.

¹ Journal of Laws of 2019, item 1649.

6 STEPS TO DETERMINE YOUR BUSINESS CLASSIFICATION – SME OR NON-SME

The new definitions for micro, small, medium and large enterprises should be interpreted in accordance with Annex 1 to Commission Regulation (EU) No 651/2014² ("**EU Regulation**"). Definitions of SME and non-SME entities under the EU Regulation are different to the analogous definitions under the Act of 6 March 2018 on entrepreneurs (Entrepreneurs Act) and should not be confused with the purpose of the Act.

STEP 1 - THRESHOLDS

According to the EU Regulation, SMEs **(i)** employ fewer than 250 persons, **(ii)** have an annual turnover not exceeding EUR 50 million, and/or **(iii)** an annual balance sheet total not exceeding EUR 43 million (the enterprise may choose between annual turnover or annual balance sheet total). For more information about our services, please contact:

An enterprise which remains above these thresholds is a non-SME entity.

STEP 2 - BASE FOR CALCULATIONS

The thresholds above apply to the figures for individual enterprises only. An enterprise that is a part of a larger group needs to include staff headcount/turnover/balance sheet data from that group too.

In order to determine the data that must be assessed, an enterprise must first establish whether it is an **autonomous enterprise** or has a "**partner**" or "**linked**" relationship. Any relationship an enterprise has with other enterprises (direct or indirect) must be considered. Depending on these connections, an enterprise may have to consider (i) only its own data, (ii) a proportion of the data in case of a partner enterprise, or (iii) all the data of any enterprise considered linked to it. The calculations should be based on a closed accounting period, and not necessarily on the approved one, for example by the shareholders' meeting.

STEP 3 – IDENTIFICATION OF BUSINESS RELATIONSHIPS (AUTONOMOUS, PARTNER OR LINKED)

The distinction of **business relationships (autonomous, partner or linked)** that enterprises can have with each other is aimed at establishing a clear picture of an enterprise's economic situation and to exclude those that are not genuine SMEs.

An enterprise may only be considered **autonomous** if it is totally independent, meaning it has no, or less than 25% of the capital or voting rights in other enterprises and no other enterprise has a participation of more than 25% of the capital or voting rights in it. If the enterprise is autonomous, for the calculations of thresholds it uses only the number of employees and the financial data contained in its annual accounts.

² Annex 1 to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain types of aid compatible with the internal market.

If the enterprise has direct or indirect control of the majority of voting rights in another entity, or the ability to exercise a dominant influence over the entity, it is considered **linked**. The typical signs of two linked enterprises are, among others, majority of the voting rights (more than 50%), appointing a majority of administrative, management or supervisory board, a contract or provision in the articles of association or statute enabling to exercise a dominant influence, for example, a veto right on strategic decisions.

Lastly, when determining the linked enterprise, account should also be taken of relations between enterprises which pass through natural persons. Family links have been considered enough to conclude that **natural persons** act jointly. If the enterprises are linked through natural person(s), they are considered to be linked, if they and operate in the same relevant market or in adjacent markets.

Partner enterprises are neither autonomous, nor linked, meaning that there is no direct or indirect control between them. If partner enterprises are identified, the enterprise in question must add a proportion of its partner's staff headcount and financial data (reflecting the percentage of shares or voting rights — whichever is higher) to its own.

STEP 4 – CONSOLIDATION OF ACCOUNTS

To establish the relationships between the enterprises, **analysis of consolidation** must be performed. Enterprises that are included in the consolidated accounts of another enterprise by way of full consolidation, are usually treated as linked enterprises. Furthermore, if the enterprise which consolidates an enterprise is included in the consolidated accounts of another enterprise (multi-level consolidation), in order to define the status of the enterprise, data of all consolidated entities must be included in the overall calculation.

STEP 5 – STAFF HEADCOUNT

Staff headcount is a compulsory criterion for determining whether an enterprise should be considered a SME or a non-SME. It includes employees, persons working for the enterprise being subordinated to it and those considered employees under national law (persons employed under civil law contracts), owner-managers and partners who are engaged in a regular activity in the enterprise and benefit from financial advantages from the enterprise.

STEP 6 – NEW REPORTING OBLIGATION

After determining the status of the enterprise as a SME or a non-SME, it should also be considered whether the enterprise is obliged to **publicly report** on its payment practices. According to the Act, all Polish entities being corporate income taxpayers that (i) are in tax capital groups, and/or exceeded EUR 50 million in revenues in the previous year, must annually report on their payment practices to the Minister of Economy. Reports should be submitted by January 31 each year by electronic means, however, the electronic motion (for the submissions with data from 2020, due on 31 January 2021), has not yet been prepared.

UNFAIR COMPETITION ACT, AND CONSEQUENCES OF NON-COMPLIANCE

The **Office of Competition and Consumer Protection ("UOKIK")** has been appointed under the Act as the new payment supervisory authority, authorized to intervene in cases when delays in payment are excessive. Both an enterprise which was impacted by a payment backlog and a person suspecting that an entity does not pay its contractors may notify UOKIK that payments are not made on time. **A fine will be calculated** using the formula based on the value of late payments, the length of delay and the statutory interest rate for delay in commercial transactions. Information on the commencement of proceedings and imposed fines will be publicly accessible on the official website of UOKIK.

EXTERNAL LEGAL EXPERTISE IS OFTEN NECESSARY TO EFFECTIVELY COMPLETE THIS PROCESS

Establishing a clear picture of an enterprise's status as a SME or non-SME requires the assessment of many factors. This process should be conducted on a case-by-case basis. If you are interested in discussing the status of your enterprise as a SME or a non-SME, please contact us at Wolf Theiss for assistance.

About WOLF THEISS

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