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Poland: New Rules Aim To Protect SMEs From Late Payments From Larger Companies

In this Client Alert, we continue our discussion of the changes in the law which will come into effect on 1 January 2020 in Poland to limit the payment backlogs of companies. We previously discussed how missing a payment due date will become more expensive. In this Alert, we examine how the new rules are aimed at specifically protecting SMEs from late payments from large companies, and what occurs when there is an "excessive delay in payment"

SHORTER PAYMENT DEADLINES – LARGER COMPANIES AFFECTED

The changes will include amendments to the rules on payment terms in commercial transactions. One of the key changes is a shortening of the permitted payment times in asymmetric commercial transactions, i.e. between larger companies and small and medium enterprises ("SMEs").

A payment term in a transaction in which a debtor is a public entity - except for a public health care entity – cannot exceed 30 days from the invoice issuance date. When a debtor is a large company and a creditor is an SME, the deadline for payment cannot exceed 60 days from the day of the delivery of the invoice or receipt confirming the delivery of goods or performance of services. Any provisions of a contract specifying longer payment periods will be invalid.

Moreover, companies which are not SMEs will be obliged to inform their counterparties at the moment of conclusion of a contract, at the latest, that they maintain a large company status.

"EXCESSIVE DELAY IN PAYMENT" TARGETED BY NEW RULES

An excessive delay in payment occurs when a total sum of unpaid debt or debt paid with delays within three consecutive months exceeds the threshold applicable in 2020 and 2021 of PLN 5 million (approximately EUR 1,2 million) or PLN 2 million (approx. EUR 470,000) from 2022 onwards. An excessive delay in payment will be recognized as an act of unfair competition. As a result, any person (in particular, the affected debtor) will be entitled to notify the President of Competition and Consumer Protection Office (the "President of the Office"), if he or she suspects that there is an excessive delay in payment.

The identity of the notifying person may not be disclosed by the President of the Office. The new rules concerning excessive delay in payments apply equally to larger companies and SMEs.

POWERS OF INVESTIGATION OUTLINED

If there is high probability that the company excessively delays payments, the President of the Office will commence an investigation. When carrying out the inspection, the President of the Office will check payments over the previous two years. The President of the Office may request any information and documents necessary to carry out the investigation. In addition, the President may delegate an employee of the Office to conduct the inspection at the premises of the company in question.

The new rules also provide for the close cooperation and exchange of information between the President of the Office and the National Tax Administration.

FINANCIAL PENALTIES FOR NON-COMPLIANCE CREATED

If the President of the Office concludes that there was an excessive delay in payment, he/she may impose a financial penalty on the company. The penalty will be calculated according to a formula, based on the value of delayed payments and the days of the delay, using the statutory interest rate for delay in commercial transactions. In certain limited cases, the President of the Office may refrain from imposing a penalty.

NEW RULES MAY BE EFFECTIVE, BUT ALSO POTENTIALLY ABUSED

The new rules seek to encourage large companies, which until recently often used their strong market position to shift the financial burden onto SMEs, to make payments at more regular intervals. It also gives SMEs a new tool to indirectly force large companies to respect payment deadlines, which, in practice, may end up being abused. Even if the excessive delay in payment is not the fault of the company in question and the President of the Office refrains from imposing a penalty, merely being the subject of an investigation may be burdensome.

In addition, the Statute does not specify how disputed invoices will be treated by the President of the Office. The President of the Office does not have the competence of a civil court and it is hard to imagine that he will decide which party is at fault in disputes.

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