Law & Business 2017
Key changes
Trends and challenges
A few words of introduction

In this brochure, we provide an overview of changes in the Polish law we believe will have a major impact on business in Poland in 2017.

We focus on obligations connected with new regulations which in many instances will affect all businesses. We also discuss new market trends and issues vital for selected industry sectors. We analyse issues that may be much debated or pose particular challenges.

The brochure was written by a team of experts across numerous fields of law and reflects our subjective choices. The articles also reflect the sorts of matters that we as a law firm handle on a day-to-day basis.

If you have any additional questions, we invite you to contact the lawyers presented at the end of the brochure.

The Wierzbowski Eversheds Sutherland Team
### The topics at hand

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Big Data + IoT + AI = Industry 4.0</td>
<td>3</td>
</tr>
<tr>
<td>Software as a Service</td>
<td>4</td>
</tr>
<tr>
<td>Blockchain</td>
<td>5</td>
</tr>
<tr>
<td>e-Privacy</td>
<td>6</td>
</tr>
<tr>
<td>Online platforms</td>
<td>7</td>
</tr>
<tr>
<td>Liability of internet intermediaries</td>
<td>8</td>
</tr>
<tr>
<td>Competition law</td>
<td>9</td>
</tr>
<tr>
<td>Planned initiatives of UOKiK</td>
<td>10</td>
</tr>
<tr>
<td>Consumer law</td>
<td>11</td>
</tr>
<tr>
<td>Tougher controls of product safety</td>
<td>12</td>
</tr>
<tr>
<td>Public procurement</td>
<td>13</td>
</tr>
<tr>
<td>Real estate</td>
<td>14</td>
</tr>
<tr>
<td>Taxes</td>
<td>15</td>
</tr>
<tr>
<td>Litigation and ADR</td>
<td>16</td>
</tr>
<tr>
<td>Labour law and social insurance</td>
<td>17</td>
</tr>
<tr>
<td>Banking and finance</td>
<td>18</td>
</tr>
<tr>
<td>Rollout of MiFID II and MiFIR in financial institutions</td>
<td>19</td>
</tr>
<tr>
<td>AML/CTF</td>
<td>20</td>
</tr>
<tr>
<td>Regulatory risk and compliance in banks</td>
<td>21</td>
</tr>
<tr>
<td>Payment services</td>
<td>22</td>
</tr>
<tr>
<td>Energy</td>
<td>23</td>
</tr>
<tr>
<td>Pharmacies and digitization of the health service</td>
<td>24</td>
</tr>
<tr>
<td>A third type of company</td>
<td>25</td>
</tr>
<tr>
<td>Contact</td>
<td>26</td>
</tr>
</tbody>
</table>
Big Data + IoT + AI = Industry 4.0

What legal changes lie ahead?
The 4th industrial revolution (or Industry 4.0 for short) is the concept of a synthesis in applying the new technologies that have been launched in recent years. The original industrial revolution was tied to invention of the steam engine, and the 2nd with introduction of assembly-line production. The 3rd industrial revolution is spread out in time and continues to the present day. It involves the growth of high tech and implementation of information technologies. But now rapid acceleration can be observed in IT development and a change in how IT is used, and this is the basis for heralding of the 4th industrial revolution.

Industry 4.0 means all technologies combining physical systems with the internet of things (IoT) and cloud computing, as well as elements of analysis of Big Data, and in the future artificial intelligence (AI). These technologies have been used for a long time but only recently have become mature enough for huge implementations and a real transformation of operations across entire sectors.

What will be the most pressing issues in the immediate future?
Implementation of new technological solutions always requires a legal analysis of the solutions. Projects launched in Industry 4.0 will be innovative, making it necessary first and foremost to understand how they function, in order to identify the regulations that may be applicable. This will seriously test lawyers, their tech knowledge, and their skill at translating their knowledge into practical application of the law for proper assessment of legal risks.

Particularly vital issues include:

> **Data protection** – Cloud processing of data is becoming the rule, requiring an evaluation of new solutions in terms of compliance with data protection regulations, particularly as the EU's General Data Protection Regulation enters into force in May 2018, introducing administrative fines as high as EUR 20 million or 4% of an undertaking’s total worldwide turnover in the prior year.

> **Software as a Service** – Despite the growing popularity of the cloud-based model for using software, it is still treated as an extension of the traditional licensing model. But this model carries entirely new risks for the parties, requiring the proper approach and contractual treatment.

> **New IT launches** – New projects will requirement investment in information technologies, including creation of programming, which for now will most often combine elements of traditional computer programs with programs available on the cloud. And some software, including open source, will be standardized. Such projects will require careful analysis in terms of business and legal risks connected with the selected model of software use.

> **Blockchain and smart contracts** – The blockchain technology enables creation of solutions providing complete control over production and supply chain for all participants, along with complete automation. This will make it easier to conclude and perform contracts with customers, partners and suppliers. This might also reduce risks associated with manufacturing and logistics. Such projects will primarily require a clear understanding of how the mechanisms work and how they translate into the existing legal framework.

> **Internet of things** – In manufacturing, IoT will shift industrial automation to the cloud, so processes can be administered in new ways. But this also raises many new issues, for example involving protection of confidentiality and knowhow. Equipping devices with the ability to gather data about their own use will also open up exposure to risks associated with processing and further exploitation of data, including personal data.
Software as a Service

What legal changes lie ahead?
In 2017/2018 cloud computing—delivering programming and IT infrastructure electronically, in the form of a service—will become a firmly established element of business reality. While just recently only a few enterprises used cloud solutions, in practice there will soon be no turning back from solutions based on cloud computing, and this will apply in particular to software.

Many producers still offer software installed on the client’s infrastructure, alongside the option of using the same programming under the Software as a Service (SaaS) model. But more and more often, new software products are offered only in a cloud-based model. There are many factors behind this. Cloud services are easier to implement and more scalable, and their cost is spread out over time. Thanks to increasingly refined cybersecurity technologies, concern about loss of data or threats of hacker attacks are waning. Software producers encourage this trend as they can achieve a steady stream of revenue from subscription fees in place of what were often one-off licence fees.

What will be the most pressing issues in the immediate future?
Despite the growing knowledge of the pros and cons of cloud-based software solutions, agreements for use of such software are still often constructed similarly to software licensing agreements, ignoring the fundamental differences between these models. In the case of cloud services, there is typically no need to grant a copyright licence (unless there is an installation on the client’s servers), but it is necessary to address issues that either did not arise in a licence model or did not have to be addressed so precisely. These issues include in particular the processing of personal data. This is because the supplier of SaaS will always be an entity processing data for the user (the data controller), whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data. The upcoming changes in regulations governing personal data protection, specifically entry into force of the EU’s General Data Protection Regulation, will raise the bar in this area, whereas under the licence model the software producer typically did not interact in any way with the licensee’s data.

Another issue that is often treated superficially but is key for the service recipient is ensuring the ability to export data in a manner that ensures that it is easily transferrable to another system. It must be borne in mind that in exchange for the advantages of the cloud model, we lose the ability to continue using the software if we fail to pay subscription fees. Under the traditional model, the licensee could usually decline upgrades or servicing options and retain the legacy version of the software without paying additional fees, and continue to use the data collected in the old software. Under the SaaS model, the customer must always be prepared to download its data and transfer them to another system, which is why it is vital to address this issue clearly in the contract.

What else should you know?
Despite the spread of software supplied in a cloud-based model, many producers—particularly those whose business model has been based on the sale of software licences—will attempt to continue applying their existing models of software sales. These typically consist of distribution of cloud services via commercial partners, similar to the software distribution model. In this approach, the contract is concluded with the partner through whom the invoicing is conducted, and who usually provides additional consulting related to use of the service, while the actual contract for supply of cloud services is concluded in the form of a standard service contract, based on general terms and conditions that are non-negotiable. Unfortunately, this means that if issues vital to the service recipient are not properly addressed in the general terms and conditions—usually covered either too generally or passed over in silence—the customer has no opportunity to obtain a satisfactory solution through negotiations with the actual service provider. For this reason as well, users of software provided in the SaaS model should always try to enter into contracts directly with the service provider, as the direct model appears to offer the optimal approach for concluding agreements of this type.

Contact author: Tomasz Zalewski | LinkedIn | Twitter
Blockchain

What legal changes lie ahead?

A lot is being said and written about blockchain, particularly in the context of virtual currencies like Bitcoin (based on the blockchain technology), as well as the possibilities offered by this technology for changing the face of the financial and insurance sector. But blockchain applications do not end with the finance industry. It is a technology with potential for radical redesign of many spheres of life, first and foremost those whose effective functioning requires the trust that was traditionally provided by third parties like banks, insurers, public registers or platforms. Blockchain enables secure execution of transactions or conclusion of contracts between various people without the need for creation of any additional protections.

While blockchain-based projects realized to date have largely been experimental, in the next few years the first production launches should be expected, which will no doubt make this technology a real game-changer across many sectors.

Assessing the prospects associated with blockchain, including prospects within a given sector or segment of the market, first requires an understanding of the fundamental principles under which this technology functions. On the technological side, blockchain is a decentralized database, or ledger, that exists in numerous identical copies held by specific users, a special feature of which is that each copy contains a complete set of data in the form of interlinking blocks (hence the term “blockchain”). Each person authorized to use the ledger (the group may be restricted or it may be public) has access to the entire ledger and the history of all changes, and may thus verify all entries independently. Meanwhile, changes in the data in the ledger cannot be reversed, because they are inextricably linked with one another; every change links to the previous one, forming a chain of all historical changes in the ledger. If we add to this the peer-to-peer architecture of such a ledger, consisting of communication of changes in the ledger directly between all copies of the ledger, without the involvement of any central module, as well as the possibility of programming the manner in which changes are made in the ledger (occurring automatically and registered in all copies of the ledger), we obtain the basic picture of the elements making up the blockchain technology. This technology can be used first and foremost for recording any types of transactions between users. Each user can also choose whether to remain anonymous or to disclose their identity to other users, as the transactions are conducted between alphanumerical addresses of the users of the ledger.

What will be the most pressing issues in the immediate future?

The appearance of new technological solutions exerting a major impact on the economic system usually carries with it great legal uncertainty. Suffice it to mention the concerns that arose with the spread of the internet, and doubts concerning for example the validity of contracts concluded online, or the tax treatment of online activity. Solutions based on blockchain present comparable issues. This applies firstly to solutions affecting areas regulated in detail by the law, such as payment services, electronic money, and trading in financial instruments. Here the potential of the new solutions is especially vast, but conversely the risk of potential legal violations is great, particularly given the existence of institutions that can to a certain degree authoritatively interpret the existing law. Uncertainty may also arise with respect to taxation of transactions conducted in a blockchain ledger.

This doesn’t mean that implementation of this technology requires the enactment of new legal regulations. Such regulations may be necessary in certain instances, but most often it will be possible to base the new solutions on existing regulations, particularly when the solutions are implemented outside the financial sector, e.g. in logistics or energy.

Proper legal assessment of projects connected with blockchain require first and foremost an understanding of how the technology functions, so it can then be accurately determined which regulations may be applicable. Development of this technology therefore presents great challenges for lawyers, their knowledge of IT, and their skill at translating this knowledge into application of the law in practice, so that legal risks can be properly evaluated.
What legal changes lie ahead?

2017 and 2018 promise to be particularly intriguing from the perspective of several tightly interwoven fields with a huge impact on all entities and all regions. The legal changes will affect not only individual consumers but also legal persons—new regulations on electronic marketing, electronic services, and data protection.

Adoption of the EU’s General Data Protection Regulation (2016/679) will revolutionize this area. It enters into force in 2018, but now is the time to start preparing for implementation of the regulation. A further step toward consistent and tight regulation of privacy, data protection and electronic services will be adoption and entry into force of the EU’s proposed e-Privacy Regulation.

What makes this change revolutionary is primarily that the e-Privacy Directive (2002/58/EC) will be replaced by a regulation. This is an instrument of EU law that applies directly in the same form in every member state. It does not require implementation into the national legal system, although on certain issues even an EU regulation allows the member states a small degree of legislative discretion. Then the member states can clarify certain issues under national law, but typically only to heighten its protections, not relax them.

What will be the most pressing issues in the immediate future?

It should be stressed that the e-Privacy Regulation which has been published on the European Commission website is not a final document yet. It will no doubt undergo changes during the legislative process. Nonetheless, the proposal gives a good picture of how EU lawmakers intend to regulate the issue of privacy on the internet and more broadly in the virtual world.

The issues to be governed by the e-Privacy Regulation which will generally be essential for every business include the conduct of electronic marketing, collection of user data, and first and foremost the legal basis for such activities, such as consent, the conditions for obtaining it, the ability to withdraw it, and so on.

What else should you know?

First, art. 8 and 16 of the draft regulation should be examined. Under art. 8, as a rule, it will be prohibited to collect information about an end user of terminal equipment, such as a computer or mobile phone, unless one of the enumerated exceptions applies. One such exception is the user’s prior concept. But consent must be “informed” and given for specific and transparently defined purposes. Nonetheless, the preamble to the proposal expressly recognizes that consent may be given via internet browser settings. The drafters thus seek to make the manner in which the required information is presented to users and their consent is obtained as user-friendly as possible.

Further consideration should be given to art. 16 of the proposed regulation, addressing “unsolicited communications”—electronic marketing contacts. A condition for delivering such marketing materials is to obtain the end user’s prior consent. But an interesting possibility is also provided for: if the sender already has the electronic contact details for the end user because the end user is already a customer, it may use these contact details for direct marketing of its own similar products or services, but only if customers are clearly and distinctly given the opportunity to object to such use (free of charge and in an easy manner). The right to object would have to given at the time of collection of the contact details and each time a message is sent using the contact details.

Significantly, the draft of the e-Privacy Regulation provides for fines for violations of the regulation of up to EUR 20 million, or in the case of an enterprise, up to 4% of its global turnover in the preceding financial year—whichever is higher.

Watch Dr Arwid Mednis’s presentation on how to prepare for the General Data Protection Regulation (in Polish).
Online platforms

What will be the most pressing issues in the immediate future?

The role of online platforms is growing and will continue to grow, changing the face of many sectors of the global economy. They have thrown down the gauntlet to traditional business models in retail, transport, tourism, financial services, advertising, the music and film industries, and many other sectors.

Online platforms take various forms: internet search engines, purchasing platforms, platforms for cooperation or sharing of certain goods, as well as social media sites. Thus they resist easy distinctions and classifications. The best-known include such names as eBay, Amazon, Zalando, Google, Facebook, YouTube, Play and the App Store, and various tools for comparing prices of goods and services. Sharing economy platforms, the most prominent of which include Uber, BlaBlaCar and Airbnb, continue to gain popularity.

Despite the diversity of business models, online platforms share certain common characteristics. They typically operate on international markets, bringing together professional users and consumers (B2B, B2C, C2C). They exploit “network effects,” i.e. the value of their services increases as the number of users increases, and ultimately their operations rely on collecting and processing large quantities of data. By gathering unique data sets, it is easier for them to identify strategic links and undertake new business ventures.

Online platforms currently represent one of the biggest regulatory challenges for the EU’s digital single market. They are not yet subject to any comprehensive, uniform legal regulation, but fall under existing EU regulations governing such fields as consumer protection, competition, data protection, and e-commerce.

Giving their growing role, the question arises whether current legal mechanisms can keep up with the rapid development of the digital economy, and in particular whether they are suited to the sharing economy or existing online intermediaries. The answer to this question is important for platforms and their growth, but also for other enterprises, which are often dependent on platforms—or conversely regard the growth of online platforms as a threat to their business.

In May 2016 the European Commission issued a communication entitled “Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe” (COM(2016) 288 final), addressing issues of innovation and growth as well as regulatory problems. At the current stage the Commission assumes that future regulatory measures proposed at the EU level should address only clearly defined issues connected with specific types of online platforms or types of activity they conduct.

For example, traditional regulations governing bilateral contractual relations are ill-suited to sharing platforms or even purchasing platforms, where the relations are typically trilateral: platform operator/seller/consumer. The issues arising here mainly apply to the role of the operator of the platform (whether a contract party or an intermediary), and consequently the operator's duties, including responsibility for performance of the contract by the seller, as well as informational obligations. Concentration at the EU level is also focused around various unscrupulous business practices on the part of online platforms, such as imposing unfair terms for access to their databases, unfair promotion by platforms of their own services at the cost of offers by other suppliers, and a lack of transparency in the use of data and search results.

We recommend closely following the work of the Commission, as the results of these studies may have a real and fundamental impact on the functioning of the entire digital economy.
Liability of internet intermediaries

What legal changes lie ahead?

2017–2018 will be a decisive period for the liability of intermediaries in the digital environment. Online intermediaries are all entities that enable the exchange of information between internet users. They include both telecommunications operations and social media sites. The notion of the liability of such entities refers to the question of whether and under what rules they will be held responsible for violations of law by users of their services.

At the European level, according to the plans of the European Commission, the current regulations, functioning in unchanged form since the beginning of the 21st century, will be modified. Among other aspects, these changes will head in the direction of creating a special liability regime for copyright infringement. According to the proposal for a Directive on copyright in the Digital Single Market (COM(2016) 593 final) published in September 2016, intermediaries who enable access to a large number of works or other protected subject matter uploaded by their users will be required to cooperate with rightholders to ensure protection of their rights. The protective means referred to in the proposed directive is the use of effective content-recognition technologies.

From the Polish perspective, these initiatives will not be the only ones. It is probable that the parliament will adopt a law aimed at blocking content by service providers. For now the debate is focused only on the issue of pornography, but it is easy to imagine adoption of a law with broader application. We also expect to see an increase in the number of rulings issued by courts concerning internet intermediaries.

What will be the most pressing issues in the immediate future?

In the near future we will witness growing pressure on internet service providers to limit their users’ access to sites infringing the law. Specifically, this will take the form of attempts to require intermediaries to block specific pages, in the aftermath of the judgment by the Court of Justice in UPC Telekabel (C-314/12).

It should be borne in mind, however, that application of this judgment in the Polish legal system is more difficult. This is because Poland did not implement art. 8(3) of the Copyright Directive (2001/29/EC) or the third sentence of art. 11 of the IPR Enforcement Directive (2004/48/EC), which obligate the member states to ensure that rightholders can seek injunctions against intermediaries, and it was these provisions that were at issue in UPC Telekabel. The debate over whether the ability to seek such injunctions can be derived from current Polish law will pick up steam in the upcoming years.

If an injunction is granted, yet another issue requires clarification - who will bear the costs of enforcing it. This will be hotly debated between the parties.

In 2017 the Kraków Court of Appeal will issue a judgment in which it will probably rule on whether an intermediary (a provider of hosting services) can rely on the exclusion of liability in the Electronic Services Act if it charges fees for access to infringing content. The answer could have a huge impact on the whole sector.
Competition law

What legal changes lie ahead?

In the first quarter of 2017 we may expect passage of the Act on Claims for Redress of Injury Caused by Violation of Competition Law. This will serve as implementation of the Antitrust Damages Directive (2014/104/EU), which is designed to create a harmonized system for pursuing damages for infringement of competition law throughout the European Union. This system will supplement the public model of competition law enforcement and make it easier for parties injured by violations (consumers and businesses) to pursue claims for damages.

Among the proposed solutions, some of the key provisions include introduction of a presumption of fault on the part of the perpetrator of a violation, as well as a presumption of injury caused by the violation; confirmation that the courts are bound by a legally final decision of the president of the Office of Competition and Consumer Protection (UOKiK) finding a violation; easier access by injured parties to evidence in the possession of the defendant, the competition authority, or a third party; introduction of joint and several liability for entities jointly committing a violation; and extension from 3 to 5 years of the limitations period for pursuing claims for antitrust damages. The overall set of solutions is designed to facilitate the pursuit of damages against participants in prohibited agreements and entities abusing a dominant position.

What will be the most pressing issues in the immediate future?

Under the current wording of the bill, the act would apply only to violations of competition law which were ongoing at the time the act entered into force. In practice this means that the first claims pursued under the act may begin to be filed in late 2017.

Over the longer term, adoption of the act should lead to a greater number of cases seeking damages, which so far have not been common in Poland. This will result not only from an increased awareness among entities injured by violations of competition law concerning the possibility of seeking damages, but primarily from affording them more effective mechanisms for enforcing their claims. Moreover, creation of a consistent system for pursuing antitrust damages throughout the EU may reinforce the phenomenon of forum shopping, i.e. suing businesses in the courts of member states where it is most advantageous to pursue antitrust damages claims, such as the Netherlands or Germany, where further-reaching measures are introduced than those planned in Poland. The grounds for commencing proceedings outside Poland could be, for example, the occurrence of loss resulting from a violation of competition law in another member state, or participation in a prohibited agreement among undertakings in different countries. Finally, introduction of some solutions, such as easier access to evidence, may create room for abuses. The consequences might include filing claims only as a fishing expedition, to obtain information and documents to be used for other purposes, e.g. to pursue business aims.

Further along, changes are also planned in the Class Actions Act of 17 December 2009, with the aim of bringing the act into line with the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. Adoption of solutions streamlining the functioning of class action mechanisms, such as easier consolidation of claims, limitations on the possibility of demanding guarantee deposit for trial costs, improving the system of notification of class actions, and permitting the court to estimate the losses suffered by members of the class, may be another factor facilitating pursuit of damages for violation of competition law.

Class actions may be used more and more often—by both consumers and businesses—to pursue claims arising out of infringements of competition law, becoming an important weapon in the hands of injured parties.

Also check out initiatives planned by UOKIK.

Contact authors: Piotr Skurzyński, Dr Maciej Gac
Planned initiatives of UOKiK

Contrary to expectations, 2016 did not bring a step-up in enforcement of competition law by the Polish Competition Authority, the president of the Office of Competition and Consumer Protection (UOKiK). Statutory amendments introduced in 2015, aimed at increasing detection of violations of Polish competition law, did not generate the expected results. In the past year, as in prior years, UOKiK’s activity concentrated primarily on consumer issues, particularly in the broader financial sector.

But the current president of UOKiK has announced major policy changes. This should be evident particularly in imposition of harsher penalties, more often approaching the ceiling of 10% of revenue. Moreover, UOKiK no longer intends to make extensive use of soft measures, where it notifies an undertaking of its reservations and calls for voluntary changes in the questionable behaviours prior to formal commencement of antitrust proceedings. The current staff take that view that such measures were not effective enough. For this reason as well, in the near future the fundamental instrument for “amicable” resolution of antitrust cases is to be injunctive decisions, which instead of finding a violation and imposing a fine on the undertaking will impose an obligation to take certain measures to eliminate the consequences of substantiated violations.

In merger review cases changes should be anticipated in UOKiK’s approach to decisions granting conditional approval to concentrations—as signalled already by decisions issued in December 2016. In recent years UOKiK has generally imposed only a condition involving exclusion of specific assets from the transaction (a carve-out). In the near future, expect to see a return to the use of structural conditions requiring problematic assets to be sold off within a certain time after the transaction closes.

For a long time the main problem for UOKiK has been the falling number of antitrust proceedings being commenced, among other reasons because of the failure of the leniency system as applied in Poland. UOKiK’s proposal to change this state of affairs is to introduce an institution based on whistleblowers—encouraging individuals (e.g. employees) to notify the regulator of infringements of competition law, in return for some form of financial incentive, such as a bounty equal to a certain percentage of the fine imposed by UOKiK. For now this is just a preliminary concept, but the president of UOKiK has announced plans to pursue further work in this direction, patterned on solutions adopted in other countries, such as Hungary.

Entry into force in the middle of 2017 of the Act on Combating Unfair Exploitation of Contractual Advantage in Trade in Agricultural and Food Products will represent a major change in law. Under this act, the president of UOKiK will gain new authority to uncover instances of abuse of a contractual advantage (i.e. actions contrary to fair dealing) by businesses functioning in the chain of production, distribution and sale of foods and agricultural products. In proceedings conducted under that act, the president of UOKiK will be empowered among other things to carry out unannounced inspections of undertakings and impose fines of up to 3% of their turnover.
Consumer law

What legal changes lie ahead?

In 2017 we will feel the effects of the “consumer” amendment of the Act on Competition and Consumer Protection which entered into force on 17 April 2016, introducing among other things a new model for review of abusive clauses in form contracts and a revised definition of practices infringing the collective interests of consumers.

Pursuant to the amendment, the ban on use by undertakings of prohibited clauses in contracts with consumers has been separated out, while the consequence of a proceeding seeking to find form contract provisions to be unfair is issuance of an administrative decision by the president of the Office of Competition and Consumer Protection (UOKiK). Thus the model for oversight has changed from judicial (by the Court of Competition and Consumer Protection) to administrative. Decisions by the president of UOKiK are published on the UOKiK website in its decision database. The existing register of unfair clauses will continue in force until 2026, and orders issued under proceedings pending under the old regulations will be entered in the existing register. The amendment empowered the president of UOKiK to impose fines for use of abusive form contracts of up to 10% of the turnover generated by the undertaking in the preceding year.

The Act on Out-of-Court Resolution of Consumer Disputes entered into force on 10 January 2017. The act imposes a number of informational obligations on businesses deciding to participate in the ADR system for consumer disputes. These obligations apply to online as well as regular shops.

What will be the most pressing issues in the immediate future?

Strategic changes in consumer law have been proposed at the EU level and primarily concern the digital single market. The main goal is to eliminate further barriers to the growth of cross-border e-commerce, and consequently provide consumers and businesses better access to goods and services on the internet throughout the European Union. Differences in contract law between member states continue to be perceived as a barrier to cross-border e-commerce. Thus the latest initiatives call for harmonization of contract regulations concerning delivery of digital content and sale of goods via internet. Work is underway on an e-commerce package including a Directive on certain aspects concerning contracts for the supply of digital content and a Directive on certain aspects concerning contracts for the online and other distance sales of goods.

Work is also underway on combating geographical blocking, aimed at passage of an EU Regulation on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market. Changes are also proposed to establish more effective mechanisms of cooperation between national authorities responsible for enforcement of consumer law.

Internet platforms

One of the more interesting trends in the consumer area is the future regulation of internet platforms at the EU level. They are not currently governed by any uniform, comprehensive set of legal regulations. Internet platforms take various forms, such as purchasing platforms and sharing platforms, pursuing various business models. The platforms typically feature a trilateral contractual setup of platform operator/supplier/customer. The issues primarily involve the role of the platform operator—whether the operator is a contract party or an intermediary—and consequently the operator’s duties, including liability for performance of the contract, as well as informational obligations.

More>
Tougher controls of product safety

Product safety and market supervision
The mandate of the Office of Competition and Consumer Protection (UOKiK) includes not only combating infringements of the collective interests of consumers and overseeing proper competition on the market. As the watchdog for compliance with consumers’ rights, the office also monitors products offered to consumers in terms of compliance with basic requirements and exercises oversight of the national product safety system. UOKiK, with the help of the Trade Inspectorate, monitors the market for non-food products and agri-food items in terms of commercial quality and eliminates threats they may pose to human life and health. The monitoring system includes not only processing complaints from consumers and notifications of threats posed by products filed by manufacturers and distributors, but conduct of inspections of products and the activity of undertakings by the Trade Inspectorate. We can expect stepped-up initiatives by UOKiK and other authorities in this area in 2017.

Activity of authorities in the area of product safety
The inspection numbers show the seriousness of the broad topic of product safety. In 2015, at the request of UOKiK, province trade inspectors conducted 15,825 inspections of such products as knitwear, toys, beds, garden furniture, and children’s eating utensils. Apart from the Trade Inspectorate, businesses can be subject to inspections by other oversight authorities as part of the product safety system, verifying products’ compliance with basic requirements set forth in regulations implementing the relevant EU directives in Polish law. In total, 6,012 inspections were conducted in 2015 in the area covered by this system, in which 16,538 different products were inspected. Depending on the product category, these inspections were conducted by such units as the State Labour Inspectorate (e.g. involving machinery and individual protective devices), the Office of Electronic Communications (e.g. electromagnetic compatibility of radio and telecommunications devices and energy-efficiency labelling of electrical devices). In 2016 the Sanitary Inspectorate conducted numerous inspections of labelling and safety of foods, particularly dietary supplements and foods for special nutritional needs.

Defective products, dangerous products
A fundamental question facing businesses from various sectors, such as FMCG, including cosmetics and foods (also dietary supplements), children’s’ items (such as toys), clothing, electrical devices and electronics, is how to respond if a defective product is found, in dealings with consumers and other customers, suppliers and manufacturers, as well as regulators in their inspection activities or administrative proceedings concerning defective products. One reason this is so important is that all manufacturers and distributors are required to be involved in monitoring the safety of the goods they offer. When a product is found to be defective, it exerts consequences in various areas of responsibility, under the warranty against defects or for injury caused by a dangerous product, and administrative law issues of product safety requirements. Fundamental issues concern when a product can be said to be “defective,” ensuring compliance with regulatory requirements for products, holding safety certifications, how consumer claims are framed, and how to handle a defective product in dealings with counterparties in the event of recourse claims within the supply chain.
Public procurement

What legal changes lie ahead?
The biggest overhaul in the history of Poland’s Public Procurement Law entered into force on 28 July 2016. Despite the passage of time, major issues connected with the practical application of the new regulations continue to arise. It can be expected that more issues will come up in 2017 to be resolved in procedures for award of public contracts in the case law from the National Appeal Chamber.

Apart from the ongoing process of implementing the new regulations on the ground, it will also be necessary to prepare for full electronisation of the public procurement regime. In the case of procedures conducted by central contracting authorities, the shift to full electronic communications should occur from 18 April 2017, and in the case of other contracting authorities 18 October 2018. In practice, electronic communications means conducting procedures via a dedicated purchasing platform through which all communications will be conducted between the contracting authority and contractors, including filing of offers. Only appeal procedures will be conducted under same rules as before.

Work is also underway on a totally new Public Procurement Law. For now the work has advanced only to the conceptual stage, so the new law certainly will not be ready until 2018 at the earliest.

What will be the most pressing issues in the immediate future?
The recent amendment showed that uncertainty in the law has a great deleterious impact on the economy. Because of Poland’s delay in implementing the EU’s new procurement directives, and resulting doubts as to the correctness of tenders financed out of EU funds between 18 March 2016 (the implementation deadline) and 28 July 2016 (the actual implementation), many contracting authorities halted procedures, translating into problems for many industries relying on public contracts. Moreover, it turned out that even after entry into force of the amendment, the number of procedures continued to fall below that of previous years as numerous doubts surrounding the amendment prolonged preparations for new tenders.

The Polish public procurement market will soon experience a slowdown due to the completion of EU programs that were largely the source of financing for the country’s biggest projects. From 2020, EU funds available to Polish contracting authorities will begin to drop. But interest will grow in approaches for implementing projects enabling the use of private capital, public-private partnerships and concessions, as well as deployment of the EU funds that are still available. This will require solutions such as international procurements and innovation procurements—currently not very popular.

What else should you know?
Contracting authorities are slowly becoming aware that public contracts can stimulate economic growth and development of solutions desirable to specific contracting authorities. The use of social clauses encourages changes for example in forms of employment and standards of environmental protection, and consequently some of them are now mandatory. Contracting authorities may now use new procedures facilitating procurement of innovative solutions, even solutions that don’t yet exist in implementable form. In particular, the innovation partnership procedure, introduced by the 2016 amendment of the Public Procurement Law, makes it possible to procure solutions that have not yet been offered on the Polish market or still require expenditures on development or production of prototypes. This is a great option for contracting authorities wishing to purchase state-of-the-art solutions, but also an opportunity for contractors to carry out projects requiring investments in R&D. We predict that popularization of this procurement approach will depend primarily on efforts by contractors to persuade contracting authorities to consider it.

Check out our procurement blog EuroZamówienia, where we provide ongoing commentary on issues vital for all participants in the public procurement market.

Contact authors: Tomasz Zalewski, Dr Aleksandra Kunkiel-Kryńska
Real estate

What legal changes lie ahead?

Participants in the real estate market are still waiting for adoption of the Urban Planning and Construction Code. The idea of the code is to streamline the construction process and improve the execution of land development policy. The code would repeal the existing Building Law Act and amend dozens of other acts. Enactment of the code would impact numerous aspects of the development process. Among other things, it would introduce a condition that location of specific types of developments would be permissible only on the basis of a local zoning plan. New institutions, such as "development approval", would also be introduced. As we go to press the draft of the Urban Planning and Construction Code is still in the negotiation phase, and given the number of criticisms already raised further work should be expected.

In 2017, changes may also be expected in the regulation on the technical conditions for buildings and their location. They should include such items as introduction of a minimum area for residential units (25 m²), easier construction of infill, and the possibility of departure from heat insulation requirements in the case of reconstruction or expansion of buildings listed in the register of historic monuments.

As we write, consultations are also underway on a proposed REIT Act. Entry into force of the act was planned for 1 January 2017, but work on the final wording is still ongoing. There are doubts for example concerning the scope of permissible investments by REITs. Regardless of how the negotiations go on the specific rules for operation of REITs, REITs have a chance of attracting retail investors and encouraging widespread investment in real estate companies. The fundamental advantage of REITs over other investments is the investment profile established upfront which is based on receipt by the REIT of a steady stream of rental income.

Further work should also be expected in 2017 on conversion of the right of perpetual usufruct into the right of ownership. Currently there is a draft of the relevant bill, but for now it is limited to plots developed for residential purposes.

What will be the most pressing issues in the immediate future?

Investors on the real estate market continue to seek out new areas for investment. According to forecasts for 2017, alongside traditional commercial properties there will be a great deal of interest in private dormitories, rental residential properties, and retirement homes.

Real estate crowdfunding should also find itself in the centre of interest in the next few years. Online platforms are already operating in the United States and Western Europe bringing investors together to pool their funds for investment in specific projects. There is no one legal formula for the operation of such platforms. Such ventures are slowly beginning to appear also in Poland, but so far only on a limited scale. Like REITs, such platforms could also prove attractive for smaller investors on the real estate market.

Depending on how the PLN/CHF exchange rate shapes up, the issue of homeowner loans denominated in Swiss francs may return, and a statutory solution may be adopted to resolve this issue.
Taxes

What legal changes lie ahead?

From 1 January 2017 a number of further changes in tax regulations entered into force, including new income tax rules. Unfortunately, most of the changes in income tax are disadvantageous to businesses.

The unfavourable changes include rules governing the tax consequences of in-kind contributions to companies. Now the revenue of a taxpayer making an in-kind contribution to a company (other than in the form of an enterprise or organized part of an enterprise) is the value of the contribution as specified in the company’s articles of association or statute or other document, and not, as was previously the case, the par value of the shares issued in exchange for the in-kind contribution. The tax neutrality of an exchange of shares is now also dependent on the existence of justified economic grounds. A presumption has been introduced that if a merger, division or share exchange is not conducted for justified economic grounds, it will be deemed that the main goal, or one of the main goals, of the operation is tax avoidance. Meanwhile, no definition is provided for “justified economic grounds.”

There are other changes also aimed at increasing the tax burdens on businesses. A definition of “beneficial owner” has been introduced under which, ultimately, a foreign company receiving licence fees or interest must be the beneficial owner in order for the exemption from taxation at the source on interest and licence fees paid by Polish entities to be applicable. Moreover, the catalogue of types of income that will be deemed to be obtained by non-residents in Poland, and consequently taxable in Poland, has been clarified. The rules for claiming tax-deductible revenue-earning costs have also been tightened. The limit for cash transactions has been lowered from EUR 15,000 to PLN 15,000, and exceeding the new limit prevents the taxpayer from deducting the cash expenditures as revenue-earning costs. The scope of taxpayers’ duties with respect to transfer pricing has also been expanded. An obligation has been introduced to prepare group documentation for entities operating within a capital group. The scope of the tax exemption for investment funds has been narrowed. These changes are primarily intended to tax the income of closed-end investment funds (FIZ) obtained through structures exploiting certain types of partnerships, such as a Luxembourg special limited partnership (SCSp) or a Polish limited partnership (sp. k.). In practice, from a tax optimisation perspective, structures based on FIZ will no longer be as attractive as they previously were.

From 2017 some companies will be entitled to pay a reduced corporate income tax of 15%. This favourable regulation applies to “small” taxpayers, as well as other taxpayers for the tax year when they begin operations. But there are a number of restrictions where the main CIT rate of 19% will be retained.

What will be the most pressing issues in the immediate future?

The recent changes in income taxes, along with other amendments introduced in recent years—particularly the general anti-avoidance rule (GAAR) introduced in 2016 and the rules governing controlled foreign corporations (CFC) from 2015—fall within a series of measures seeking to tighten the tax system. These changes may result in increased tax revenues for the state. But for businesses they primarily mean further complication of the tax system. It appears that businesses will have to devote more and more effort to managing tax risks and avoiding violations of tax regulations within the firm.

Contact authors: Karolina Stawowska, Małgorzata Sajkiewicz
Litigation and ADR

What legal changes lie ahead?

The Ministry of Justice has announced plans for a sweeping reform of civil procedure. A draft of the proposal will be issued in February 2017 at the earliest and circulated for consultation. The changes are to focus primarily on two goals: increasing the number of cases resolved by settlement, and limiting the possibility for parties to exploit procedures to delay litigation.

Under the proposed changes in civil procedure, the rule would be that the judge would schedule a preliminary session where he would share with the parties “indications as to the likely result in the case in light of the allegations and evidence presented.” According to the proponents of the reform, such a session could avoid the need for the principal hearing in some cases.

This change would be supplemented by authorizing the judge to express an opinion on the result of the proceeding before the close of the hearing. Under current practice, while the judge has a preliminary overview of the case and reviews the parties' pleadings, he must keep his opinion to himself to avoid accusations of a lack of impartiality, resulting in recusal from the case. The proponents of this change argue that the judge's expression of a preliminary opinion does not conflict with the requirement to maintain impartiality, and may encourage the parties to attempt an amicable settlement of the case. Opponents point out that if the judge sides with one or other of the parties before issuing a judgment, it may discourage the "winning" side from making any concessions or even entering into negotiations for a settlement.

The restriction on the parties’ abuse of their rights to slow down the proceedings would be achieved by introducing a clause in the Civil Procedure Code on abuse of procedural entitlements. The form such a clause might take is not yet known, so the possible effectiveness of such a solution cannot be evaluated yet.

What will be the most pressing issues in the immediate future?

The proposed changes, if adopted in their current form, will apply to disputes between businesses and between individuals, as well as consumer disputes. The guidelines presented betray a clear attempt to increase the number of cases resolved by settlement and cut the duration of trials, and consequently to unburden the courts. But it may be wondered whether expediting proceedings before the courts of first instance using the measures presented by the proponents of the reform will lead to a greater burdening of the appellate courts. Another major risk could be the haste at which major changes in law are introduced, when they should be preceded by intense consultations and a thorough legislative process.

Out-of-court resolution of disputes between businesses and consumers


The purpose of the new rules is to unify within the EU the system for resolving disputes businesses and consumers arising under contracts for sale of goods or services by providing consumers access to inexpensive but effective methods for resolution of disputes by independent and impartial decision-makers. This solution is also intended to be advantageous for businesses as it should allow them to avoid lengthy and costly judicial proceedings in disputes with consumers.

The new act carries with it new informational obligations for businesses, as they will have to inform consumers in an understandable and accessible way about the ADR entity which would be competent to resolve a dispute arising out of the transaction. If a complaint filed by the consumer is not upheld by the seller, the consumer would have to unambiguously consent to resolution of the dispute by the given ADR entity. Unless otherwise provided in specific regulations, businesses will have 30 days to respond to a consumer complaint.
Labour law and social insurance

What legal changes lie ahead?

From 1 January 2017, individuals performing work personally under a contract of mandate (umowa zlecenia) or service contract will have a guaranteed minimum hourly rate, which in 2017 is PLN 13. The minimum hourly rate will be adjusted each year, and is tied to the minimum wage for work established for the given year.

Employers must remember the necessity to specify in contracts of mandate and service contracts the manner for confirming the number of hours spent in performing the task or services. They should also note that in the case of contracts concluded for a period of longer than one month, payment of the fee based on the minimum hourly rate must be made at least once per month.

From 2017 the rule is no longer in force which permitted employees to be paid only 80% of the minimum wage during their first year of employment. Now all employees—regardless of seniority—have a guaranteed minimum wage for work, which in 2017 is PLN 2,000 per month.

From 1 January 2017, appealing termination of the employment relationship, or refusing to admit an employee to work, was unified and extended to 21 days.

From January 2017 the obligation to introduce work and remuneration regulations applies to employers employing at least 50 people, and not 20 as before. Employers with at least 20 employees but fewer than 50 may introduce such regulations, but will be required to do so only if requested to do so by a workplace trade union organization. A comparable rule will apply to the obligation to establish social benefit fund for employers with the equivalent of at least 50 full-time employees.

Changes advantageous to employers concerning work by pregnant women at monitor screens are planned for 2017. Currently the special list in force, identifying work which pregnant women are prohibited from performing, prohibits pregnant women from working at monitor screens longer than 4 hours per day. Work is now underway on a new list of work deemed to be burdensome, hazardous or harmful for the health of women who are pregnant or breastfeeding, scheduled to enter into force on 1 May 2017. According to the draft proposal, pregnant women would be allowed to work at monitor screens up to 8 hours per day, but no more than 45 minutes per hour of work. Introduction of the new list will require employers’ work rules to be updated accordingly, as a mandatory element of the work rules is a list of duties which women are prohibited from performing.

What will be the most pressing issues in the immediate future?

The approaching months may bring further changes in the rights of individuals performing work personally on the basis of contracts other than an employment contract.

Work is underway on amendment of the Trade Unions Act which would enable such non-employees to establish and join trade unions under certain conditions.

The lower retirement age will be reinstated on 1 October 2017, at 60 for women and 65 for men. The regulations governing the four-year pre-retirement period when employees are protected from termination of employment are vital from the employers’ perspective. The interim provisions of the amending act are intended to ensure that all employees enjoy the full period of protection. The solutions adopted in this respect mean that in the next few years, some employees will enjoy protection after they reach retirement age. Thus when hiring a person who is entitled to draw a pension, it is important to determine whether the person is protected against termination of his or her employment contract.

A Labour Law Codification Committee was appointed in September 2016 to draft proposals for two codes, covering individual labour law and collective labour law. The proposals are to be presented in 2018.

See our Legal Alert on changes to the Labour Code that went into force on 1 January 2017.
Banking and finance

What legal changes lie ahead?
A draft of the Mortgage Credit Act, currently being prepared by the Council of Ministers, has been filed with the Sejm. The act will implement the Mortgage Credit Directive (2014/17/EU) into the Polish legal system. Major new challenges and changes introduced as a result of implementation of the Mortgage Credit Directive will involve:

- Introduction of an obligation by lenders to examine consumers’ credit capacity
- Establishment of conditions for early repayment of credit
- Restrictions on issuing credit in foreign currency
- Limitations on “tied sales”
- Establishment of rules for valuation of real estate
- Passorting (within the EU) of credit intermediaries who meet the requirements for conducting such business in their home member state
- Rules for debt restructuring
- Rules for advertising of residential loans (in particular the scope of information presented to customers in ads).

The Mortgage Credit Act will govern residential loans in a manner similar to the Consumer Credit Act of 12 May 2011 now in force. For example, the lender will be required to present the total cost of the credit. The proposal also includes a controversial provision prohibiting lenders from paying a fee to credit intermediaries.

Adoption of the Consumer Credit Act will make it necessary for banks to adjust their product documentation to the new regulations. The ban on payment of fees to mortgage brokers by lenders will require brokers to change their business model. Until now, mortgage brokers have been compensated almost entirely by lenders. This change will have a major impact on the entire credit intermediary sector.

What will be the most pressing issues in the immediate future?
We can expect to see a continuation of trends that are already evident today:

- Financial markets will undergo deeper and deeper regulation.
- The FinTech sector will develop rapidly.
- The process of consolidation on the banking services market will continue.
- Bank customers will increasingly band together to dispute provisions in the product documentation used by banks, e.g. through class actions. This phenomenon will gather force particularly in the event of major changes in forex exchange rates or benchmarks used to set interest rates.

Financial difficulties of major banking groups are a significant issue that may face financial market participants and regulators, bringing with it the need to implement appropriate measures for restructuring of banks.

 Polish credit agreement standard based on LMA forms

Near the end of 2016, a working group of the Polish Bank Association (ZBP) completed its work on a Polish standard credit agreement based on the form originally promulgated by the London-based Loan Market Association. For years the LMA standard had been used in lending transactions by Polish banks, customers and advisers, but certain issues requiring adaptation to Polish law and contractual practice were not uniformly resolved. Law firms preparing documentation based on the LMA standard for banks and their customers used their own versions of the LMA forms. Although the LMA standard had been applied in Poland for well over a decade, the banking community still needed to unify certain solutions. The LMA-based contract form developed by ZBP meets these needs and will soon be available at the website of the Polish Bank Association.

Contact author: Michał Markowski
Rollout of MiFID II and MiFIR in financial institutions

What legal changes lie ahead?

Implementation into the Polish legal system of the recast Markets in Financial Instruments Directive (2014/65/EU, known as MiFID II) is quickly approaching, along with entry into force of the EU’s Markets in Financial Instruments Regulation (600/2014, known as MiFIR).

MiFID II and MiFIR replace the original MiFID (2004/39/EC), which is the basis for current regulations for provision of investment services and the functioning of financial markets in EU member states. The current deadline for implementation of MiFID II and the date for entry into force of MiFIR is 3 January 2018.

In connection with entry into force of MiFID II and MiFIR, certain elements of existing business models, sales strategies for financial products, and rules for doing business on financial markets will change. The implementation process will be particularly demanding, as it will require application of thousands of pages of executive regulations, technical standards (RTS and ITS), and implementation guidelines.

New obligations

New obligations will be imposed on financial institutions, involving such areas as:

> Protection of investors, e.g. new requirements for preparing and offering financial products, new restrictions on accepting benefits from third parties (such as investment funds), extension of MiFID II rules to structured products, new requirements for communications with customers, and increased informational obligations of investment firms
> Market transparency, e.g. increased publication of information about transactions
> Corporate governance
> Adoption of appropriate control systems and tools, e.g. IT systems, when algorithmic trading techniques are used.

Regulations governing market infrastructure will also change, e.g. introduction of new trading systems and platforms, and regulators will be vested with a range of new powers, including authority to limit trading in a given financial instrument. Another major change will be introduction of a new model for providing investment advice: the notion of “independent advice,” not previously existing in Poland. Providing investment advice under this model will require introduction of additional safeguards by investment firms, e.g. for preventing conflicts of interest and concerning the manner in which products are recommended to clients.

All investment firms covered by the requirements will have to implement measures to comply with MiFID II and MiFIR. The adaptation process in investment firms will be complicated, time-consuming and costly. Implementation of MiFID II at financial institutions will thus require particular effort in planning implementation work and deploying the available resources.
AML/CTF

What legal changes lie ahead?

2017 will feature new regulations for anti-money laundering (AML) and counter-terrorist financing (CTF). The amended Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (2015/849, known at the 4th AMLD) should be implemented by 26 June 2017.

The key changes introduced by the 4th AMLD include:

> A new risk-based approach (RBA)
> Rules for determining beneficial owners
> Expanded catalogue of politically exposed persons (PEPs)
> Central register of information about beneficial owners.

What will be the most pressing issues in the immediate future?

The scope of obligated institutions will be expanded to include providers of gambling services. It may also cover providers of virtual currency services (e.g. Bitcoin). Under proposed amendments to the 4th AMLD, the scope of the directive would extend to operators of currency exchange platforms and providers of virtual wallet services, which would be required to apply financial security measures, particularly involving identification and verification of customers’ identity.

These measures fit within a general change in the client assessment model adopted under the 4th AMLD, with its client risk-based approach. In practice this obligation will make it necessary to create complex risk matrices enabling accurate identification of risks associated with a specific client and the client’s transactions.

In certain instances it will be necessary to identify the beneficial owner by determining indirect ownership or control. This applies to legal entities that own or control other legal entities. When it is not possible to determine the individual who is the beneficial owner, the risk-based approach will assume great importance. The requirement to apply this model for assessment of risk should exclude the nearly automatic acceptance of certain assumptions, for example that the beneficial owners of legal persons or other organisations are their officers and directors.

The definition of politically exposed persons will be expanded to cover not only foreign PEPs but also domestic PEPs. Additionally, decisions to enter into business dealings with PEPs will not always have to be taken at the management board level.

Creation of a central register of information about beneficial owners will require introduction of new regulatory obligations. The function of this register is to be performed by the proposed Central Account Base (CBR). Obligated institutions will forward information to CBR about accounts they maintain and their nominal owners and beneficial owners. Significantly, the obligation to provide data to CBR will also apply to entities offering products and services involving storage of authentication data necessary to obtain access to virtual currencies (known as a “hot storage wallets”).

Given the great regulatory risk and the high sanctions obligated institutions are exposed to for failure to comply with the 4th AMLD, implementation projects deserve top priority.

The new regulations will increase the powers of the General Inspector of Financial Information (GIIF) and significantly expand the scope and levels of sanctions that may be imposed on obligated institutions. Maximum fines will rise from PLN 750,000 to EUR 5 million. Information about improper compliance by obligated institutions will be made public.
Regulatory risk and compliance in banks

What legal changes lie ahead?

A number of fundamental changes in the functioning of compliance units at banks will occur in 2017. First, the regulation on risk management systems, internal control systems, compensation policy and the detailed method for estimating internal capital is expected to enter into force in the near future. A draft of the regulation has been published on the website of the Government Legislation Centre. Second, a major update of Recommendation H from the Polish Financial Supervision Authority (KNF), concerning internal control systems at banks, will enter into force in 2017. The regulation on the criteria and method for conducting the supervisory review and evaluation process (SREP), entering into force this year, should also be mentioned.

What will be the most pressing issues in the immediate future?

The regulation on risk management systems and internal control systems confirms the reliance of internal control system on three lines of defence. The first level is management of risk in the bank’s operating activity. The second is management of risk by staff through a unit or position established for this purpose (compliance unit), which should be exercised independently of operational risk management. The third level is the activity of the internal audit unit.

A certain new regulatory feature is the bank’s remuneration policy, defined in the regulation, designed to foster proper and effective risk management. The remuneration policy should not encourage assumption of excessive risk at the bank and should enable realization of the strategy for managing the bank as well as the risk management strategy, and should limit conflicts of interest. The compensation policy should undergo an independent internal review at least once a year. The regulation also introduces a procedure for staff to make anonymous reports of violations of law or the bank’s own procedures and ethical standards. While the regulations require a designated member of the management board to be responsible for this process, nonetheless in practice anonymous reports will be investigated by the compliance unit. This regulation also lays out the control mechanisms that can be applied by the compliance unit, and the basic duties of the unit. The regulation does not exclude the obligation to follow the compliance requirements imposed on banks conducting brokerage activities or custody banks. Significantly, the regulation does not cite in this respect the provisions governing banks’ performance of functions as a depository for investment funds, including alternative investment funds.

The amended Recommendation H calls for use of horizontal and vertical monitoring tools by compliance units to verify the bank’s activity on an ongoing basis, as well as testing of areas of the bank’s operations. It is not clear, however, how horizontal testing within the 2nd line of defence should be understood, as it is problematic to determine the entity responsible for this task. Additionally horizontal testing will be conducted on the basis of the criterion of compliance with the law, the bank’s internal regulations, and its adopted standards. This understanding means that compliance units may be saddled with a very broad scope of responsibility for the bank’s activity across numerous areas of law not previously monitored by them, such as taxes. On the other hand, Recommendation H lays down the minimum scope of authority and duties of the compliance unit, formalizes its status in the structure of the bank, and ensures its independence (including with respect to Remuneration) and appropriate empowerment.

Finally, it should be noted that the rules for conducting SREP at banks will change. In the SREP area, KNF will be backed by guidelines from the European Banking Authority. Given the wide administrative discretion vested in KNF, in the SREP process it will be essential to prepare scrupulously for the new rules for conducting reviews and to ensure that the process is conducted in compliance with the new regulatory requirements.
Payment services

What legal changes lie ahead?
Most of the new regulations amending the Payment Services Act enter into force at the beginning of February 2017. The amendment signed on 9 December 2016 by the President of Poland is primarily intended to implement the Payment Accounts Directive (2014/92/EU) and to adjust local regulations to the EU’s Interchange Fee Regulation (2015/751) with respect to card-based payment transactions.

Thus, in 2017 banks will be required to offer “basic” payment accounts. They may have limited functionalities but must allow the customer to make at least five payment transactions per month free of charge. Additionally, the new regulations guarantee the possibility of switching accounts between banks and introduce rules for comparison of fees charged for payment accounts offered by different institutions.

The second set of changes are introduced by the Interchange Fee Regulation (IFR). National limits on interchange fees will be eliminated (to be replaced by limits applying directly under IFR). A number of rules will appear for functioning of entities operating payment schemes, including a requirement of approval from the president of the National Bank of Poland for operating a payment scheme (except for trilateral or international schemes when their rules of operation are subject to regulatory oversight in another member state), reporting obligations for these entities, and sanctions for violation of IFR. Operators of payment schemes will be required to apply for approval within 6 months after entry into force of the amended act. These entities will also be required to submit information to NBP by 8 April 2017 confirming that the rules for functioning of the payment card system established by the entity comply with the requirements set forth in IFR.

A facelift to art. 113 of the Payment Services Act included in the amendment, governing rules for charging of fees by the Polish Financial Supervision Authority (KNF) for oversight of domestic payment institutions, should also be mentioned. This provision enters into force at the beginning of 2018 and may significantly impact the functioning of providers holding a Polish licence.

It should also be borne in mind that the entire sector awaits adoption of the new Anti-Money Laundering Act, which is being drafted by the Ministry of Finance.

What will be the most pressing issues in the immediate future?
The trends for the upcoming years will primarily be further restrictions on the role of banks in payment services, in favour of non-bank providers, particular FinTech providers, consolidation among holders of domestic licences, and a deepening regulatory role in light of the international situation, particularly in the AML/CTF area. The importance of virtual currencies will continue to grow, and along with that the interest of regulators.

Work on RTS
In early 2017 the European Banking Authority should complete its work on the Regulatory Technical Standards (RTS) and guidelines connected with the 2nd Payment Services Directive (PSD2). Together with adoption of PSD2, EBA should be delegated the work of developing technical standards for implementing the new directive. The documents prepared by EBA will be forwarded to the European Commission for approval and publication.

Regulatory sandbox initiative
In late 2016 the Ministry of Development hosted a meeting (together with the Ministry of Finance, the FinTech Poland Foundation, and the Centre of New Technologies at the University of Warsaw) to discuss the possibility of creating a “regulatory sandbox” in Poland. The idea of the regulatory sandbox involves separating out a legal environment where businesses can experiment with new technologies without negative consequences and without obtaining licences—a space where they can create and test new financial services within a restricted group of clients with minimal regulatory requirements. It’s certainly a noteworthy initiative.

Contact author: Magdalena Chrzan
Energy

What legal changes lie ahead?

It appears that 2017 will be a groundbreaking year for the Polish energy sector. With entry into force on 16 December 2016 of the regulation establishing the detailed list of liquid fuels whose production, storage, handling, shipment, distribution or trading, including trading abroad, requires a concession and whose importation requires entry in the register of importers, fuel enterprises were required to apply by 16 January 2017 for amendment of their existing concessions to conform to the new liquid fuels nomenclature. By the same date, enterprises importing liquid fuels indicated in the regulation were also required to obtain the relevant entry in the register of importers.

Changes affecting the natural gas market also entered into force on 1 January 2017. The amendment to the Energy Law published on 8 December 2016 provides among other things for elimination of tariffing of activity involving sale at natural gas at a virtual location, as well as CNG, LNG or gas sold via tenders, auctions or public procurement procedures. Then, from 1 October 2017, the obligation of approval of tariffs for all other natural gas customers will be eliminated, except for households, for which this obligation is scheduled to be eliminated at the end of 2023.

Changes in the renewables sector should also be noted. According to plans announced by the Ministry of Energy, a comprehensive regulation governing energy clusters and cooperatives should be created in 2017. There is a glimmer of hope that the definition of a “prosumer” will be extended to cover enterprises generating electricity for their own business operations. The new year also means changes in regulations connected with import of solid fuels to Poland, which according to ministry plans will be regulated by an amendment to the Act on the System of Monitoring and Inspection of Fuel Quality and the relevant executive regulations.

The Capacity Market Act should enter into force in 2017. It should also be mentioned that in 2017 the president of the Energy Regulatory Office should complete all proceedings concerning excessive power consumption which occurred in August 2015. The fines meted out by the regulator may lead to numerous appeals by businesses to the Court of Competition and Consumer Protection.

What will be the most pressing issues in the immediate future?

It appears that the most immediate issues will be the regulations on electromobility and offshore wind farms, and new rules for support for cogeneration. With respect to electric automobiles, a draft of the Act on Electromobility and Alternative Fuels appeared in the list of the Council of Ministers’ legislative work on 13 December 2016, and should be adopted by the Council of Ministers in the first quarter of 2017. This means that in the near future we may witness the development of electromobility in Poland. Another important issue requiring regulation is the support system for cogeneration. The current system of support for cogeneration systems will remain in force only until 2018. And given the growth of interest in offshore wind farm projects, detailed regulations on this issue may also appear within the next few years.

What else should you know?

As the elimination of tariffs in natural gas trading comes to pass, trading enterprises are required to adjust their sale contracts with customers and complex contracts to reflect the new circumstances. Under the amendment, if a contract for sale of gaseous fuels or complex contract does not specify the price of gaseous fuels or the manner in which the price is determined after the tariff obligation ends, the trading enterprise will be required to send the customer a draft amendment to the contract with respect to the proposed prices of fuels or the manner for determining them. The draft contractual amendments should be forwarded by trading enterprises no later than 2 months before the date when the prices will be freed, that is by 1 August 2017 for industrial customers and by 1 November 2023 for household customers. Together with the draft contract amendment, the trading enterprise must provide the customer written notice of the right to terminate the contract. In that situation, the customer has a right to terminate the contract without additional costs. To terminate the contract, the customer must submit a written termination notice. This will result in dissolution of the contract as of the last day of the month following the month in which the trading enterprise received the notice of termination, but the customer can also indicate a later date when dissolution of the contract will be effective.
Pharmacies and digitisation of the health service

What legal changes lie ahead?

In the near future the Ministry of Health plans big changes in the Pharmaceutical Law. Currently work is underway at the ministry which should lead to submission to the Council of Ministers of a proposal on restriction of sales of medicinal products and the range of other products sold in pharmacies. According to recent reports, medicinal products could be sold exclusively at pharmacies and pharmaceutical locations. Thus OTC drugs currently sold outside pharmacies would disappear from the shelves of grocery stores and petrol stations. In turn, it would be prohibited for pharmacies to sell such products as cosmetics and dietary supplements. To compensate for narrowing the scope of permissible products in pharmacies, a dispensing fee would be introduced, i.e. a fixed fee paid by the patient for dispensing a package of medicinal products.

The rules for operating pharmacies could also change. A proposal to amend the Pharmaceutical Law was introduced in the Sejm that would limit the ability to operate a pharmacy exclusively to professional pharmacists and registered partnerships or professional partnerships whose sole business is operation of a pharmacy and whose partners would have to be professional pharmacists. Converting an entity operating a pharmacy into a different form of company or partnership would result in termination of the permit to operate the pharmacy.

Both chains considering opening more locations, and individual pharmacists, need to brace themselves for the possible introduction of such regulations.

What will be the most pressing issues in the immediate future?

The upcoming years promise major changes in the digitization of the health service, launched by work on the P1 healthcare platform. An obligation for all entities conducting medical treatment to maintain medical documentation in electronic form is scheduled to enter into force in 2018. This is a huge challenge for both purchasers and suppliers of hospital information systems. It will have to be determined in practice whether the regulations in this area—concerning both the manner in which medical documentation is maintained and ensuring the security of patients’ personal data—are sufficient for the safe and proper circulation of such specific documents in electronic form. The measures undertaken will be vital for proper and efficient introduction and growth of telemedicine in Poland. The market for such services is growing in value every year worldwide.

In Poland it will probably be possible in the near future to apply for establishment and operation of public medical registers. Work is currently underway on an amendment to the Healthcare Information Act enabling private entities to apply to the Minister of Health with initiatives to create such registers and be entrusted to operate them. If this amendment is adopted, a new possibility will open up for entities from the private sector to participate in the healthcare system in Poland by administering the huge quantity of medical data concerning illnesses and treatment methods.
A third type of company

What legal changes lie ahead?

Because of the great need to introduce a new type of company specifically intended for conducting innovative activity, including startups, combining features of the two existing types of companies in Poland (the limited-liability company (sp. z o.o.) and the joint-stock company (SA)), the Ministry of Development has begun work on introduction of a third type of company into the Commercial Companies Code: the simple stock company (prosta spółka akcyjna—PSA).

As of now, the main assumptions for the PSA concept include:

> Easy registration—apart from the traditional method, a PSA could be registered electronically (in 24 hours)
> Minimal capital requirements for the founders and flexible structuring of the company’s assets, including:
  > Reduction of the minimum share capital to PLN 1
  > In addition to share capital, a separate capital could be established that would be much more liquid than share capital, and among other things shares in such capital could be taken up in exchange for an in-kind contribution or labour (sweat equity)
  > Possibilities for easy and varied forms of investment in the company, e.g. crowdfunding
  > The ability to contribute knowhow or labour to the company without complicated and costly valuations at the stage of launching activity
  > The ability to dematerialize the shares, as in public companies, but without the need to perform the additional obligations of a public company (but PSA shares could not be traded on the stock exchange)
  > Possible provision in the statute for various types of privileged shares or shares with limited transferability, offered in packages
  > Introduction of model (optional) contractual clauses between shareholders (e.g. tag-along, drag-along, shootout, liquidation preference, and vesting clauses)
  > A selection of structures for the PSA’s authorities:
    > Management board (and optionally also a supervisory board), or
    > Board of directors—the body administering the company, where the members would include executive directors (managers) as well as independent, non-executive directors, also performing supervisory functions
  > Minutes of the general meeting would not have to be recorded in the form of a notarial deed
  > Possible quick and uncomplicated liquidation of a PSA.

In June 2016 the Ministry of Development circulated for pre-consultation a document entitled “Outline concept for a simple stock company (PSA),” and in September 2016 a closed group of experts took up further work on development of the form of the PSA. There are many indications that the simple stock company could be introduced into the Polish legal system before the end of 2017.

Contact author: Ewa Szlachetka
# Contact

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>E-Mail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Krzysztof Wierzbowski</td>
<td>Managing Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Łukasz Jankowski</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Gerard Karp</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Paweł Lipski</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Ewa Łachowska-Brol</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Dr Arwid Mednis</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Henryk Romańczuk</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Karolina Stawowska</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Ewa Szlachetka</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Tomasz Zalewski</td>
<td>Partner</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Patryk Galicki</td>
<td>Of Counsel</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Paweł Kuskowski</td>
<td>Of Counsel</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Piotr Skurzyński</td>
<td>Of Counsel</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Marta Gadomska-Gołąb</td>
<td>Senior Associate</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Dr Aleksandra Kunkiel-Kryńska</td>
<td>Senior Associate</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Maciej Jóźwiak</td>
<td>Senior Associate</td>
<td>Send e-mail</td>
</tr>
<tr>
<td>Małgorzata Sajkiewicz</td>
<td>Senior Associate</td>
<td>Send e-mail</td>
</tr>
</tbody>
</table>

Contact Marketing & PR team: Aleksandra Makulińska, Renata Misiewicz

Meet our whole team >
Stay in touch

› **Read our Legal Alerts**
  We write about matters affecting many industry sectors

› **Follow our blogs**
  Kodeks w pracy (labour law)
  EuroZamówienia (public procurement)
  Smart strategy (ADR)

› **Subscribe to our newsletter**
  Receive periodic notices about important changes in law, and training events and conferences organized by our firm

› **Follow us on social media**
  LinkedIn
  Twitter
  Facebook
Join our workshops

We invite you to visit eversheds-sutherland.pl where we provide a list of seminars and workshops we organise ourselves or external events where our lawyers appear as speakers.

We hold events addressed to a broad spectrum of legal issues important for business.

In 2016 we hosted nearly 500 participants.

See the upcoming event on cybersecurity >
A few words in closing

- **Eversheds Sutherland was globally launched on 1 February 2017**

  Eversheds Sutherland, created by the combination of leading law firms, Eversheds, headquartered in the U.K., and Sutherland Asbill & Brennan LLP, based in the U.S., was launched globally under the name Eversheds Sutherland.

  With more than 2,300 lawyers in 61 offices across 29 countries, Eversheds Sutherland ranks in the top 10 in UK listings and top 40 in U.S. global listings.

- **We have changed our name and visual identity**

  As a result of the combination, our law firm has changed its name to Wierzbowski Eversheds Sutherland Sp. k.

  Combining the strengths of Eversheds and Sutherland is a huge step in the process of building a firm with global reach, and another milestone in the development of our Polish office.

  From now on we will be able to better respond to the needs of our existing US clients and clients who intend to enter the US market, plan to conduct transactions there, or are engaged in disputes with companies in the US.

  Read more at [eversheds-sutherland.pl](http://eversheds-sutherland.pl)