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Newsletter

NO 2/ 2023

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Tax

CRIMINAL, FISCAL-CRIMINAL AND TAX LIABILITY IN CONNECTION WITH TRANSFER PRICING DOCUMENTATION

Since 1 January 2022, new deadlines have apply in connection with with transfer pricing obligations for 2022, meaning that related parties are required to:

1.prepare local transfer pricing documentation by the end of the tenth month after the close of the tax year;

2.submit transfer pricing reports (TPR) to the tax office by the end of the eleventh month after the close of the tax year; and

3.have group documentation by the end of the twelfth month after the close of the tax year.

Consequently, an entity for which the financial year coincides with the calendar year should meet the above obligations by
(point 1) 31 October,
(point 2) 30 November and
(point 3) 31 December 2023, respectively.

Liability for a failure to comply with transfer pricing documentation obligations arises at two levels, both for the company and for the individuals authorised to represent and manage the company's business, who are most often members of the management board.

In practice, all of the members of the taxpayer's management board are responsible for the timely submission and the content of transfer pricing reports, and they all face the risk of liability under the applicable criminal, criminal fiscal and tax laws. What will the liability likely be?

Criminal and fiscal liability in transfer pricing

Sanctions for not having transfer pricing documentation under the Polish Criminal Code may be imposed:

For perjury in documents submitted by members of the taxpayer's management board. In this case the sanction can be much more severe if perjury was committed with the intent of achieving a pecuniary or personal benefit. The sanction increases from six months to eight years' imprisonment.

In connection with white-collar crimes. Any person required to manage the property or business of a given entity who, by abusing the powers conferred upon them, or by failing to fulfil their duty, causes substantial material damage to the company, will be subject to imprisonment for one to ten years.

Additional penalties are provided for in the Fiscal Criminal Code, where it is stipulated that anyone who, contrary to their duty, fails to prepare local transfer pricing documentation or fails to attach group transfer pricing documentation to local transfer pricing documentation, is subject to a fine of up to 720 daily rates. The same penalty is imposed on anyone who prepares false or incorrect documentation.

On the other hand, anyone who, contrary to the obligation, prepares the documentation after the obligatory deadline is subject to a fine of up to 240 daily rates.

In addition, anyone who, contrary to the obligation, does not file transfer pricing information with the relevant tax authority or, when filing this information, provides data inconsistent with the local transfer pricing documentation or with the actual state, is liable to a fine of up to 720 daily rates, and anyone who, contrary to the obligation, files the information after the deadline is liable to a fine of up to 240 daily rates.

This means that failing to have transfer pricing documentation, or preparing it late or with incorrect information, will lead to a fine, as will failing to submit a correct TPR or submitting it late.
A failure to comply with the transfer pricing documentation obligation may also expose the taxpayer to having to pay an additional tax liability.

The basic amount of this surcharge is 10% on the reported or overstated loss as a result of incorrect transfer pricing.
In the event that the basis of the additional tax liability exceeds the amount of PLN 15 million, the rate may be increased to 20%. This sanction is applied if the taxpayer fails to submit or submits incomplete transfer pricing documentation. They are then given an additional 14 days to complete the documents. If they do so, the higher sanction rate for non-submission of documentation will not be applied.

The sanction may increase up to 30% when the tax documentation is not submitted and the value of the basis for determining the additional tax liability exceeds PLN 15 million.
The additional tax liability may not be imposed on an individual who is liable for a criminal or criminal-fiscal offence.

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NEW VERSION OF THE BILL INTRODUCING THE OBLIGATORY **NATIONAL E-INVOICING SYSTEM**

A new version of the draft act amending the Act on Goods and Services Tax and Certain Other Acts, i.e. the regulations introducing the obligatory National e-Invoice System ("KSeF"), has been published on the website of the Government Legislation Centre (Rządowe Centrum Legislacji).

The entry into force of the mandatory regulations has been postponed by six months, i.e. until 1 July 2024.
Small entrepreneurs benefitting from tax exemptions, or who only perform activities that are exempt from tax under Article 43(1) of the VAT Act or its implementing regulations, will be required to use KSeF from 1 January 2025.

The new rules will also apply to taxpayers that do not have a registered office or permanent establishment in Poland, or which have a permanent establishment that is not involved in the transaction.

The new rules will also apply to taxpayers that do not have a registered office or permanent establishment in Poland, or which have a permanent establishment that is not involved in the transaction.
The amended bill introduces exemptions from the mandatory KSeF. It also removed mandatory e-invoicing in B2C, which was present in previous drafts. Invoices cannot be issued in KSeF on an optional basis.

KSeF will therefore remain optional for those taxable entities who do not have a place of business or permanent establishment in Poland, or who only have a permanent establishment that is not involved in the transaction.

The obligation to issue 'structured invoices' ("e-invoices") will apply between businesses (B2B) and to public authorities (B2G), as well as to taxable entities:

- who carry out activities covered by the invoicing requirement under Polish VAT regulations,
- who have their registered office or permanent establishment in Poland (where this permanent establishment is involved in the supply of goods or services).

Invoices issued to individuals not engaged in business activity (B2C) are excluded from e-invoicing.

These invoices will not be able to be issued in KSeF on an optional basis – a change from the assumptions of the previous version of the bill.

The e-invoicing obligation will not apply to taxpayers using the three special schemes , and will not be extended to taxpayers using the EU special schemes.

Other key changes compared to the original version include the following:

- After the public consultations, the Ministry of Finance decided to withdraw from the correction invoice proposal and the abolition of correction notes, or the introduction of a "correction invoice proposal', which was to be issued by the purchaser via KSeF;
- This means the final abandonment of the "correction invoice proposal" and the proposed abolition of correction notes;
- Changes have been made to the regulations concerning the application of exchange rates;
- A procedure has been introduced in the event of a failure on the part of the taxpayer, i.e. the "offline mode";
- The rules on correcting output/input tax on correction invoices issued offline (due to the failure / unavailability of the KSeF, or a failure on the part of the taxpayer) have also been clarified;
- A rule has been introduced whereby, in such cases, the supplier will reduce the taxable base and output tax in the accounting period in which it received confirmation that the purchaser received the correction invoice;
- The rules governing the time limit for issuing invoices before the supply of goods / services is made were changed;
- The new provisions also include the implementation of a package of regulations related to the concept of introducing exclusively electronic handling of binding tariff information (BTI), binding origin information (WIP), binding excise information (WIA) and binding rate information (WIS) through the expansion of the EBTI-PL2 system and connecting it to the e-Tax Office system as regards WIS, and to the PUESC system as regards BTI, WIP and WIA (the "e-WIS" project);
- The purchaser, in turn, is required to reduce the amount of input tax in the settlement for the period in which they received the offline correction invoice, where if the purchaser receives the corrective invoice later than the date of assigning the number identifying this invoice in the National e-Invoice System, the date of receiving this invoice will be the date of assigning this number;
- The obligation to provide the KSeF ID (or collective identifier) in bank transfer orders for an invoice issued in KSeF has been maintained.

In addition, for a taxpayer who:

- has failed to issue a required invoice using the National e-Invoice System
- o has issued an invoice that does not comply with the provided template
- o failed to send an invoice to the National System of e-Invoices within the deadline,

will face a fine from the head of the tax office of up to 100% of the amount of the tax shown on an invoice issued outside the National e-Invoice System, and if no tax is shown on the invoice, a fine of up to 18.7% of the total amount due under that invoice issued outside the National e-Invoice System.

Summarising the above, we must emphasise that the mandatory implementation of KSeF is also an additional tool in the hands of the tax authorities, enabling them to see the data at the moment of issuing the invoice.

Consequently, a reliable application of 'due diligence' rules will be key to eliminating tax risks.

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In the next edition of the Newsletter:

How to choose a KSeF integration tool and solution, which will ensure tax compliance and business process efficiency?

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Law

SUMMARY DISMISSAL

If an employee has committed an act of serious misconduct, the employer is often faced with the dilemma of an appropriate response. There are essentially four available courses of action: disciplinary interviews, a disciplinary penalty, termination of the employment contract or summary dismissal.

A moment should be devoted to summary dismissal, which is the most far-reaching measure, resulting in the immediate termination of the employment contract (without notice) and has very significant consequences for the employee.

First of all, it should be pointed out that the basis for summary dismissal is a serious breach of the employee's basic duties (serious misconduct). The most important element is the question of the severity of misconduct, as only qualified serious misconduct justifies parting with the employee under the summary procedure.

However, when assessing the employee's behaviour, two levels must be taken into account: the type of professional duty breached and the degree of culpability of the employee. With that said, the subjective element – fault – is crucial.

Case law is extremely strict in assessing the degree of fault of an employee as grounds for summary dismissal. The employer should therefore consider whether it is in its interest to take the questionable decision to terminate an employment contract without notice, which involves the risk of reinstatement with back pay, or compensation ordered by the court.

It is impossible to create a complete catalogue of circumstances that justify summary dismissal. However, as an example, it is possible to point out cases that have been recognised as serious misconduct:

- misappropriation of the employer's property (theft)
- refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment
- attending work in a state of intoxication, whether illicit drugs and/or alcohol
- insulting superiors, subordinates and other colleagues (e.g. offensive gestures)
- use of psychological violence (e.g. swearing, insults, threats), physical violence (e.g. hitting, kicking or punching) and cyberbullying to harass or insult (e.g. sending abusive emails, text messages or MMSs)
- bullying or harassment
- an unexcused absence from work (even a one-off)
- unauthorised use of time off work (annual leave or job search days)
- posting on internet forums or social networks to damage the reputation of the company or of colleagues
- engaging in competitive activity without the employer's consent
- an employee knowingly arranging the simultaneous transfer of several employees to an employer engaged in competitive activity
- use of a company phone to participate in social or gambling games
- sending files containing the employer's customer databases to a private email
- copying confidential data from a company computer, thereby posing a threat to the employer's property and non-property interests.

However, as indicated earlier, the grounds for summary dismissal are interpreted strictly, so employers should carefully consider whether to opt for a summary dismissal or to terminate the contract normally.

If the employer decides to dismiss an employee on summary grounds, it should not delay – the declaration will only be effective within one month from the event causing dismissal.

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IMPLEMENTATION OF THE WORK-LIFE BALANCE DIRECTIVE – CHANGES TO EMPLOYMENT CONTRACTS

The implementation of the Work-Life Balance Directive entails a number of changes to employees' rights. The new provisions will have the greatest practical importance on employmentcontracts.

MANDATORY JUSTIFICATION FOR THE TERMINATION OF FIXED-TERM CONTRACTS

Under the amended provisions, the employer's will have to give reasons for terminating all employment contracts – including those concluded for a fixed term.
The change means that the termination notice given by the employer will have to state the reason for the termination or it will be defective and the employee will be able to effectively appeal to the labour court.

In addition, the reason for termination, i.e. the justification for the dismissal, will be subject to examination in the same way as for indefinite contracts, meaning that the employer will only be able to dismiss a fixed-term employee if there are specific and genuine reasons.

The legitimacy of the termination, on the other hand, will be verifiable by the labour court, which will either award compensation to the employee or reinstatement (which will be rather rare) if it finds that the termination was unjustified.

Before a fixed-term contract can be terminated, any trade unions operating at the employer will need to be formally consulted about the intention to dismiss the employee.

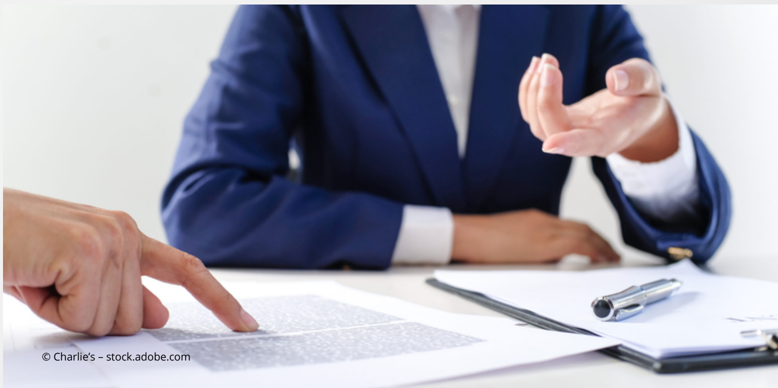
CONTRACTS FOR A PROBATIONARY PERIOD

The maximum trial period will not change – it will remain three months. However, the duration of a specific probationary employment contract will change depending on the intended period of employment at the end of the probationary period. If the employer intends to employ the employee for less than six months after the probationary period, the probationary contract may not last longer than one month; if the period of employment is to be six to 12 months, the probationary period may be two months.

The probationary period can be extended by up to one month by agreement of the parties. In addition, the parties can agree to extend a contract for a probationary period by the duration of any holiday or other excused absence.

INFORMATION ON THE TERMS AND CONDITIONS OF EMPLOYMENT

The scope of information to be provided by the employer to the employee in connection with the conclusion of the employment contract – including in relation to an employee posted to work in the EU or a third country – has been significantly expanded. It now includes information on the right to training and the length of paid leave. HR departments should familiarise themselves in detail with the new wording of Articles 29 and 291 of the Labour Code, which set out the scope of the information obligation.



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SEVERAL EMPLOYMENT RELATIONSHIPS

An employer will not be able to prohibit an employee from being in an employment relationship based on an employment contract or civil law contract and providing work for other entities, unless the parties enter into a non-competition agreement. Dismissal of an employee purely for this reason will render the termination of the employment contract ineffective.

REQUEST FOR A CHANGE IN TERMS AND CONDITIONS OF EMPLOYMENT

An employee who has been employed for a fixed term of more than six months will be able to apply to the employer for an indefinite contract, or for a change in the terms and conditions of employment, e.g. to full-time employment or a change in the type of work performed.
Such a request can be made once a year and the employer will be required to justify the reason for refusing the request. There will be no negative consequences for the employee making a request. In particular, the employer cannot terminate the employment contract for this reason.

The provisions amending the Labour Code came into force on 26 April 2023.

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Law and taxes in Poland

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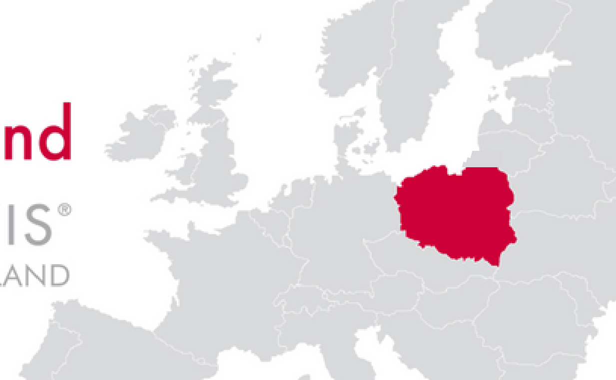

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