

# Newsletter

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# Beneficial owner – draft clarifications from Ministry of Finance

**Successive amendments to income tax legislation have placed increasing emphasis on the need to verify that the counterparty is the ultimate beneficial owner. However, the legal complexities make complying with this obligation extremely difficult for many businesses. The amendments include a number of key indicators to determine whether an entity is acting as an intermediary.**

For example, entities acting as an intermediary are often characterised as receiving a small margin on the payments transferred, have significant balance sheet items related to foreign partners or receive receivable payments at regular intervals..

The Ministry of Finance also draws attention to situations in which the right to dispose of income may be limited by obligations to transfer payments to other entities, both on a factual and legal level.

## The Beneficial Owner: Criteria and Challenges

In response to doubts that have arisen about who is a beneficial owner, the Ministry of Finance has published draft clarifications that were the subject of a recent public consultation. The final content of these clarifications will soon be available, and the hope is that this will finally dispel doubts regarding the interpretation of these provisions.

Under the proposed amendments, a beneficial owner is an entity that meets the following criteria:

- it receives the amount due for its own benefit, can freely decide what to do with it and bears the economic risk associated with any loss of the amount due or part thereof;
- it is not an intermediary, representative, trustee or other entity obliged to transfer the amount due, or any part thereof, to another entity; and
- it conducts genuine economic activity in the country of its registered office; if the payments are received with reference to this economic activity, in assessing whether the entity conducts a genuine economic activity, the nature and scale of the entity's activities with respect to the payment received should be taken into account.

The ministry has recently issued extensive announcements that are relevant to all businesses.

Firstly, the ministry clarified that entities that receive receivables for their own benefit and are not required to transfer these funds to other entities are considered the beneficial owners. This is an important clarification, as it determines who actually controls the funds received.

Furthermore, the ministry stressed that entities acting purely as an income administrator with respect to the payments received cannot be considered as beneficial owners. This means that these entities do not independently decide on the destination of the received funds, which is a key difference in terms of being considered owners.

It is worth noting that these two premises – receiving payments for their own benefit and not being required to transfer them to other entities – should be considered together. This is a key aspect to consider when analysing your company's situation in the context of this guidance from the Ministry of Finance.

## The Role of the Revenue Administrator: Key Indicators

The text from the ministry highlights key indicators in identifying those acting as intermediaries in the transfer of payments. This information is crucial for business, and understanding it can have a significant impact on decision-making. Businesses should pay attention to the following key aspects:

**Low Margin Payments:** Low-margin entities are suspect because they often receive payments only to pass them on without generating a profit from the transaction.

**Lack of Actual Taxation:** If an intermediary entity does not tax the payments it receives, this may be a signal that it is acting as an intermediary and not as the owner.

**Cyclical and Regular Remittance of Payments:** Transferring payments at short intervals, on a cyclical and regular basis, may indicate the role of an intermediary.

**Lack of Reinvestment of Funds Received:** If an entity does not reinvest the funds received, it may suggest that it is not the beneficial owner.

**Predominant Cross-border Payments:** If the majority of income comes from cross-border payments, this may indicate an intermediary role in international transactions.

**Complicated Ownership Structure:** When the shareholder structure is complicated, with the involvement of further intermediary companies, this may suggest the concealment of the true owner.

**Lack of Preferential Taxation for the Ultimate Recipient:** When payments are made to an entity that does not benefit from preferential taxation under other tax laws, this may be a signal of acting as an intermediary.

**Temporal Link and Change in Tax Provisions:** The existence of a temporal link between the creation of an entity and a change in tax rules may suggest an attempt to avoid taxes.

**Tax Jurisdiction:** Choosing a jurisdiction with an extensive network of double tax treaties or preferential taxation rules for passive income can signal that the entity is acting as an intermediary to minimise taxation.

**Low Withholding Tax for Non-Residents:** The absence or low level of withholding tax in an entity's jurisdiction may indicate an intermediary role in international transactions.

Understanding these indicators is crucial for businesses to identify potential risks associated with business partners. Avoiding entities with an intermediary role can help minimise potential tax and legal issues, which is important for the stability and success of business operations.



 *Your contact:*

*Agata Wlekińska*  
*tax adviser*  
[agata.wleklinska@ecovis.pl](mailto:agata.wleklinska@ecovis.pl)

## WHISTLEBLOWERS IN AN ORGANISATION – difficulties employers will have to face

**Although we still do not have a full final version of the Polish Whistleblower Protection Act, we can already anticipate some of the difficulties employers might face in meeting the requirements imposed by the new legislation.**

To date, one of the most serious challenges has been a short time window allowed for large companies (with more than 250 employees) to comply with the new rules.

Although the transition period of the law has been extended, it is already worth preparing for the upcoming changes. The multitude of new obligations can pose a significant challenge for companies, especially given the other anticipated legal changes, whether tax, consumer or employment law, that our organisations are likely to face in the near future.

The topic of whistleblowers has become the subject of lively discussions, raising fundamental questions about how to introduce internal procedures.

**Does it require complex preparation, documentation and arrangements? What is worth paying special attention to?**

The answers to these questions on the whistleblower procedure depend to some extent on the specific employer. Nevertheless, there are a few common points that can be mentioned that play a key role:

- Ensuring the proper functioning of the employer (compliance).
- Effectively preventing the negative consequences of legal violations within the employer's structure.
- Creating a safe working environment, including whistleblower protection and the prevention of possible violations.

All of these aspects have a direct impact on the development of an employer's business, while also shaping its reputation and relationships with employees and the business community. By following these principles, employers can effectively manage risks while protecting their organisation from potential threats.

With these considerations in mind, a properly designed and implemented internal whistleblower procedure should support an employer in developing its business, rather than hinder it achieving its objectives.

Given the legal requirements to consult with employee representatives or trade unions when creating an internal procedure, it is crucial that these procedures are designed so that employees and others who may be whistleblowers (such as contractors or service providers) have easy access to information and reporting channels. Ease of use and the availability of information are key to ensuring that everyone can use these procedures appropriately.

In terms of the practical aspects of implementing a whistleblower procedure, one of the key issues is the organisation of the reporting system (reporting channels).

For the employer, it is important to properly plan the structure of whistleblower reporting channels in such a way that the confidentiality of reports is guaranteed. Access to this information should be limited only to objective individuals who have been authorised in writing by the employer. Reporting channels should be intuitive to use and provide a secure environment so that a potential whistleblower can use them safely, feeling trusted and protected.

The European Union Directive and the draft Polish law stipulate that whistleblowers must have access to special reporting channels, allowing them to report both orally and in writing. Oral reporting will be possible by telephone or through call recording systems (for example, on electronic platforms dedicated to reporting). Written reports can be submitted both in writing and electronically. It is important to establish the practicalities of the process.

Poland is required to implement whistleblower protection legislation for private entities, such as limited liability companies, with at least 50 employees, by 31 December 2023. In view of the upcoming deadline, it is advisable to conduct a detailed internal analysis within the organisation and to start preparing for the implementation of an internal whistleblower procedure.

It should be emphasised that the current version of the bill provides for a very short period in which to start implementing the procedure, amounting to only 14 days from the date of the act in its final form entering into force. Therefore, it is advisable to start proactively now in order to comply with these requirements within the set deadline.



 Your contact:

*Agnieszka Słowikowska*  
attorney at law  
[agnieszka.slowikowska@ecovis.pl](mailto:agnieszka.slowikowska@ecovis.pl)

## Responsibilities of a registered proxy

**According to the Polish Civil Code and the Commercial Companies Code, a registered proxy (prokurent) is a person who has been given the authority to perform legal acts in the name of and on behalf of another entity, such as a business entity or company, in the conduct of business. The function of a registered proxy is to represent the company and undertake various legal actions, such as signing contracts, making declarations of intent or performing other actions, as long as they are related to the day-to-day business.**

It should be emphasised that a registered proxy has the right to represent the company in relations with third parties, but does not have the right or the duty to manage the company's business. Their activities are limited to those related to the day-to-day operation of the company and do not include managing its internal affairs or making strategic decisions. This power can be an important part of a company's organisation, enabling the efficient representation of the company in its liaising with business partners, customers and public institutions, without the involvement of all the shareholders or management board members.

This means that the registered proxy acts on behalf of the business entity, representing it in legal actions, and the proxy's actions are entirely related to the interests of the company. In doing so, the proxy is not free to make decisions on their own account – they must comply with the applicable laws and act in accordance with the rules set out in the company's articles of association and the decisions of the management board.

It is worth mentioning here that a registered proxy may exercise its powers alone, together with another registered proxy or in cooperation with another member of the management board, depending on the content of the articles of association and the management board's decision in this regard.

It follows from the above that the registered proxy has a very broad range of powers in relation to the exercise of their function. This is crucial, given that the scope of the proxy may not be limited towards third parties, unless otherwise provided for by special provisions. An example of such a limitation is the need to have a power of attorney to carry out certain actions, such as the sale of an enterprise or real estate, which is regulated by law.

It should be emphasised that a registered proxy is not subject to the same liability as a member of the management board, a member of the supervisory board, a member of the audit committee or a liquidator in the context of damage caused by an act or omission contrary to the law or the provisions of the articles of association, in accordance with the provisions of the Commercial Companies Code. In the case of a registered proxy, liability for such acts or omissions is governed solely by the general tort provisions of the Civil Code.

It is worth noting an important difference between a registered proxy and other corporate bodies. The registered proxy, although having broad representational powers, does not have the same legal liability for their actions as other people exercising managerial or supervisory functions in the company. This specific feature is an important element of the organisational structure of companies, reflecting the differences in responsibilities between the various company bodies.

Although it is not possible to limit the proxy's actions towards third parties, the company can be protected against undesirable actions of a registered proxy by placing additional contractual liability on them. This can be done through the bylaws or rules on performing the position of proxy. In these documents, the company can precisely set out situations in which the registered proxy is required to obtain a resolution or a declaration from the management board.

The company may also regulate issues such as entering into transactions exceeding a certain value, excluding the possibility to sign loan agreements, prohibiting the signing of work regulations or deciding on remuneration. A breach of any of these provisions will render the registered proxy liable to the company.

Given the extensive powers of a registered proxy and the lack of precise rules governing its liability, it is crucial to properly regulate the details of their activities. This provides the company with protection against possible misunderstandings or actions not in line with expectations, while protecting the company's interests against unwanted actions or the possible incompetence of a registered proxy.



 Your contact:

*Michał Sobolewski*  
attorney at law  
[michal.sobolewski@ecovis.pl](mailto:michal.sobolewski@ecovis.pl)

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## How do we implement KSeF? Pagero's view

**Implementing mandatory e-invoicing in the National System of e-Invoices (KSeF), which will be required for every entrepreneur running a business in Poland from 1 July 2024, is a complex, multi-faceted project affecting how the entire organisation operates. Some say it will lead to a revolution in how businesses operate, and we tend to agree. The implementation of such a complex project is divided into several stages.**

### Full analysis

The first stage of the project to implement the KSeF involves a business and tax analysis. It is important for both parties (the tool provider and the client) to jointly define how KSeF will affect the customer's business and how its existing business operations and IT systems can be modified most efficiently way. This is also the proper time to decide whether it is worth including more than just invoices in the scope of the automation being introduced. We write more about this in [our guide: "5 things you will lose by implementing only KSeF"](#) – we encourage you to read it).

All the challenges related to KSeF are also discussed, such as the distribution of e-invoices to contractors and handling attachments or invoices from foreign suppliers. Tax consultations (for example, on the organisation's readiness to implement structured invoices) and KSeF-related substantive workshops are also carried out at this stage. The next stage is a technical analysis. In this, we look at the capabilities of the client's current systems and outline the requirements for implementation.

### Configuration and training

The jointly developed project is the cornerstone of a configuration in line with business requirements and the CTC model. The implementation of the solution follows, including testing of the tool, user training, provision of user instructions and UAT testing. Full support is provided to users throughout the entire process.

### Implementing changes

We believe that the final stage of implementation most exemplifies how many levels and roles in the organisation will be affected by KSeF. Existing documentation, internal processes, procedures and regulations are all updated, along with customer contracts. Implementing KSeF means changes in the way invoices are delivered to clients, changes to the way documents are archived, and changes to the information required by clients on invoices (which is not necessarily always consistent with the expectations of the Ministry of Finance), as well as providing system authorisations for dispatch and much more. Once all this is worked out, e-invoicing at KSeF can officially begin.

Plenty of existing processes will have to undergo a revolutionary transformation. However, this will translate into a number of benefits and take the organisation to a higher level of digitalisation and automation.

### About Pagero

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All this through a single connection. One connection – global reach.



 Your contact:

Andrzej Pijanowski  
Country manager  
[andrzej.pijanowski@pagero.com](mailto:andrzej.pijanowski@pagero.com)

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# DO YOU HAVE ANY QUESTIONS?

WE LOOK FORWARD TO RECEIVING A CALL  
OR A MESSAGE FROM YOU

## **ECOVIS LEGAL POLAND** **MULTAN, PRUŚ AND PARTNERS LAW & TAX FIRM**

9A/5 BELWEDERSKA STREET  
00-761 WARSAW  
+ 48 22 400 45 85

email: [warsaw-law@ecovis.pl](mailto:warsaw-law@ecovis.pl)



[www.ecovislegal.pl](http://www.ecovislegal.pl)  
[www.ecovis.com](http://www.ecovis.com)