FINANCIAL ALERT

No. 2/2021

Regulations on trading in financial instruments are changing

Amendments to the Act on trading in financial statements have been published in the Journal of Laws. They call for changes to oversight of providers of financial data processing services, insurance and reinsurance, as well as strengthen legal protection of consumers and minority shareholders.

The Act amending the Act on trading in financial instruments and certain other acts, passed on 21 January 2021, has been published in item 355 of the 2021 Journal of Laws.

Among others, the act implements Directive (2019/2177) on changes in the operation of European Supervisory Authorities and supplements Directive (2015/2366) on payment services.

Among others, the amendments change the regulations on the operations of suppliers of information reporting services who provide services as an approved publication entity, approved reporting mechanism or supplier of consolidated information.

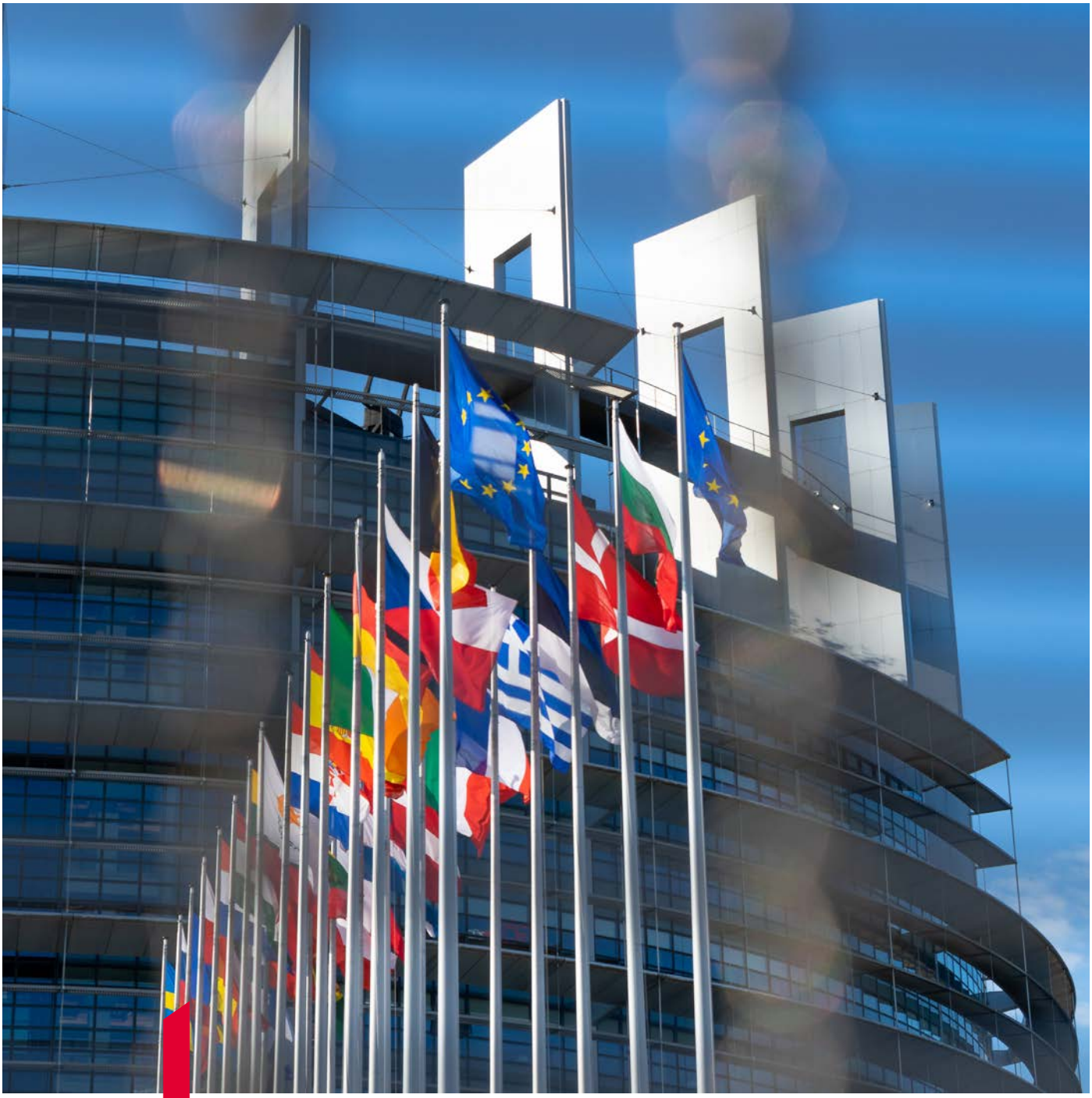
Until now such entities obtained permits and were supervised by national supervisory authorities. After the changes it will be ESMA (European Securities and Markets Authority) that will perform these tasks.

The amendments also require the supervisory authority, i.e. the Polish Financial Supervision Authority (KNF), to immediately provide the relevant supervisory authorities from other EU member states and EIOPA (European Insurance and Occupational Pensions Authority) with information on domestic insurance or reinsurance companies that perform or intend to perform significant cross-border activities in the territory of those states, and on the risks associated with such activities. The new regulations also make it possible for the KNF to submit requests to the relevant supervisory authorities from other EU member states and EIOPA to establish and coordinate collaboration platforms and to participate in such platforms.

DR ANDRÉ HELIN,
BDO Managing Partner

The amendments also require suppliers of payment services to provide consumers with free information pamphlets on consumer rights attached to making payments in Europe.
Regulations are also being introduced on the performance of insurance, reinsurance and retrocession contracts concluded up until 31 December 2020 by insurance and reinsurance companies with registered seats in the United Kingdom of Great Britain and Northern Ireland, as well as in Gibraltar, which under a single license conducted operations in the territory of Poland, until the expiration of the claims arising out of such contracts.

The new regulations are generally scheduled to become effective as of 1 January 2022, with the exception of certain provisions relating to, among others, Brexit, which went into effect 14 days after publication. Whereas the changes relating to insurance and reinsurance activities are going to become effective on 30 June 2021.



Old rules will only apply to insurance contracts concluded prior to 1 January 2021

Brexit will not be an obstacle to the payment of damage compensation and clients can expect that insurers will meet their insurance contract obligations — as long as they were concluded prior to 1 January 2021 — the UKNF explained in a special announcement.

The Office of the Polish Financial Supervision Authority (UKNF) has issued a reminder that following Great Britain's departure from the European Union (Brexit) and the end of the transition period, suppliers of financial services from Great Britain and its dependent territories (including Gibraltar) have as of 1 January 2021 lost the ability to perform operations based on a single European passport.

With regard to entities from the insurance market, there are two rules that condition the ongoing operation of insurance companies from Great Britain and Gibraltar in the territory of the Republic of Poland. Firstly, British and Gibraltarian insurance companies may only undertake and perform activities in the form of a main branch, after obtaining a permit from the KNF for the performance of activities by the main branch. Secondly, based on the special provisions that went into force on 27 February 2021 with effect as of 1 January 2021, insurance companies from Great Britain and Gibraltar can — as an exception to the above rule — perform contracts concluded prior to 1 January 2021 without the need to obtain a permit. The regulation only covers insurance, reinsurance and recession contracts concluded in the territory of the Republic of Poland prior to 1 January 2021 by insurance and reinsurance companies with their registered seats in the territory of the United Kingdom of Great Britain and Northern Ireland or Gibraltar, and in the case of contracts from section II, also those that point to the Republic of Poland as the state where the risk is situated. Such contracts may be performed by British and Gibraltarian companies until the expiration of the claims arising out of the contracts. At the same time, the entities covered by this provision are subject to the same restrictions when conducting operations involving domestic insurance companies whose license for the performance of insurance activities has been rescinded (Article 173 par. 1 and 2 of the Insurance and Reinsurance Activity Act), including among others, a ban on the conclusion of new and renewal of insurance contracts concluded prior to 1 January 2021.

For the clients of British and Gibraltarian insurers this means that Brexit will not become an obstacle in the payment of damage compensation and that the clients may expect that their insurers will perform the obligations arising out of the insurance contracts — as long as they were concluded prior to 1 January 2021.

The UKNF also recommends that all doubts relating to existing insurance contracts be communicated to the insurance company (or agent) that sold the given product to ensure that it will work in the current circumstances.

Brokerage houses may conclude agreements with clients electronically

An agreement for the provision of investment services and ancillary services, where one of the parties is a retail or professional client, must be concluded in writing. An agreement concluded in electronic form, bearing a qualified electronic signature, is equivalent to the written form, as long as it has been recorded on a durable medium.

The KNF has issued an announcement that explains the rules on the form of agreements for the provision of brokerage services. It stressed that in accordance with Article 58 of Regulation 2017/565, an agreement for the provision of investment services and ancillary services, where one of the parties is a retail or professional client, must be concluded in writing. The agreement should be recorded on paper or another durable medium. Because the provision does not specify additional requirements for the written form, then domestic regulations should be applied in this regard. If they call for another form of agreement conclusion, the effects of which are equivalent to that of the written form, then that form will meet the requirements of Regulation 2017/565. An additional condition is the need to record the declaration of intent on paper or another durable medium. The requirement to record the declaration of intent on a durable medium is also specified in Polish regulations.

In accordance with Article 781 § 1 of the Civil Code, an agreement concluded in electronic form, bearing a qualified electronic signature, is equivalent to the written form and thus meets the requirements of Regulation 2017/565, as long as it has been recorded on a durable medium. The written form requirement is also met when the agreement is concluded using a trusted profile with a trusted signature, if it is recorded on a durable medium. Declaration of intent submitted in electronic form may be equivalent to the written form, as long as the parties had previously stipulated for this form of act in law. This option applies to agreements concluded with both retail and professional clients. The regulations do not require that it be concluded in any special form. It may, therefore, be concluded in any form, and based on it, declarations of intent submitted in the agreed form, such as electronic form, for trading in financial instruments, will be equivalent to the declarations submitted in written form, even when the written form has been stipulated under the penalty of invalidity. An agreement that provides for the submission of declarations of intent in electronic form should be concluded before the conclusion of an agreement for the provision of brokerage services. The conclusion of such an agreement between an investment company and its client authorizes the investment company to in contact with the client use electronic forms of communication that enable the transfer of declarations in electronic form. The choice of electronic forms of communication is not unlimited, as it must allow the ability to positively identify the person submitting the given declaration.

The Sejm has passed important changes in banking law

Under the amended banking law, the KNF will be able to recall a member of the supervisory or management board of a bank, financial holding and brokerage house when the person fails to meet the requirements to hold the position.

Amendments to banking law are the result of the need to adapt Polish regulations to the EU's CRD V/CRR II package (Directive CRD V and Regulation CRR II), on capital requirements for financial institutions.

After the changes, banking law will cover financial holding companies and mixed financial holding companies that can be parent companies of banking groups, but are not currently subject to financial supervision. It will specify the rules for their organization, operation and supervision. Furthermore, an entity applying for a permit to establish a bank will, in addition to the currently required documents, be required to provide information on the entities that belong to the same group about the relationships within the group.

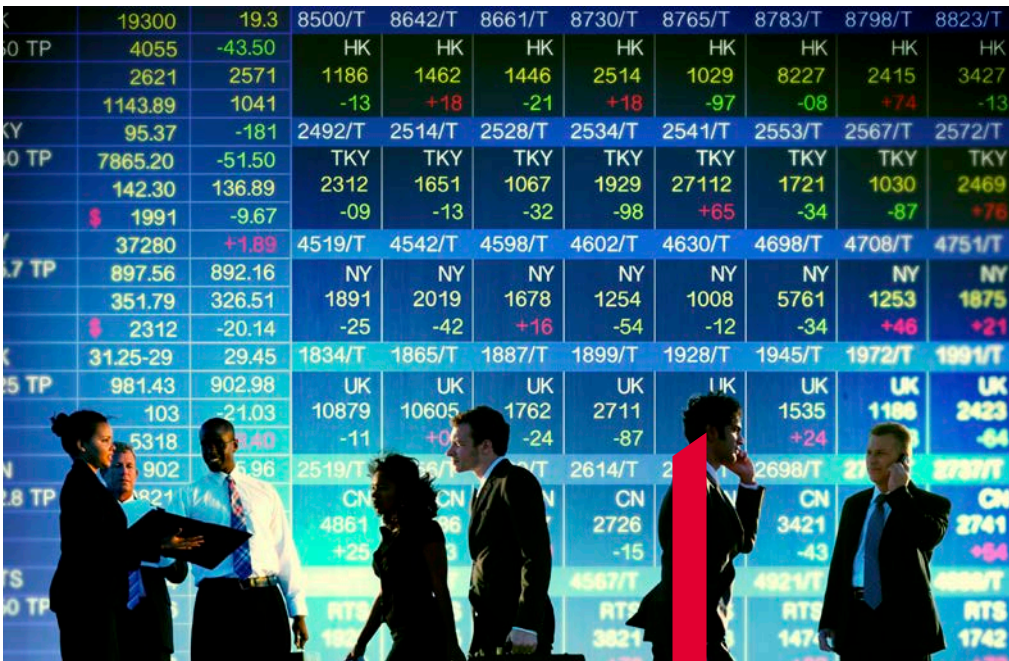
Under the new regulations, banks will be subject to new regulative standards that are to help increase their resilience to financial crises. The KNF will be able to impose additional reporting requirements onto a supervised entity (bank), or increase their frequency. Smaller banks with a less complex business model will have fewer reporting and disclosure requirements than the larger ones, which will reduce their operating costs.

What is more, under the new regulations the KNF will be able to recall a member of the supervisory or management board of a bank, financial holding company or brokerage house when the given person fails to meet the requirements to hold the given position.

In addition, the new regulations provide that members of the management and supervisory boards of banks, financial holding companies and mixed financial holding companies should have the knowledge, skills and experience appropriate for the positions they hold and the duties they perform, and should guarantee the proper performance of those duties. The guarantee applies in particular to the reputation, integrity and credibility of the person and his/her ability to manage the affairs of the bank, financial holding company and mixed financial holding company in a prudent and stable manner.

The new regulations will also limit the number of management or supervisory board positions a single person can hold at the same time. One position of management board member and two positions of supervisory board member, or four positions of supervisory board member will be allowed to be held at the same time.

At the time of preparation of the alert, the act was being reviewed by the Senate.



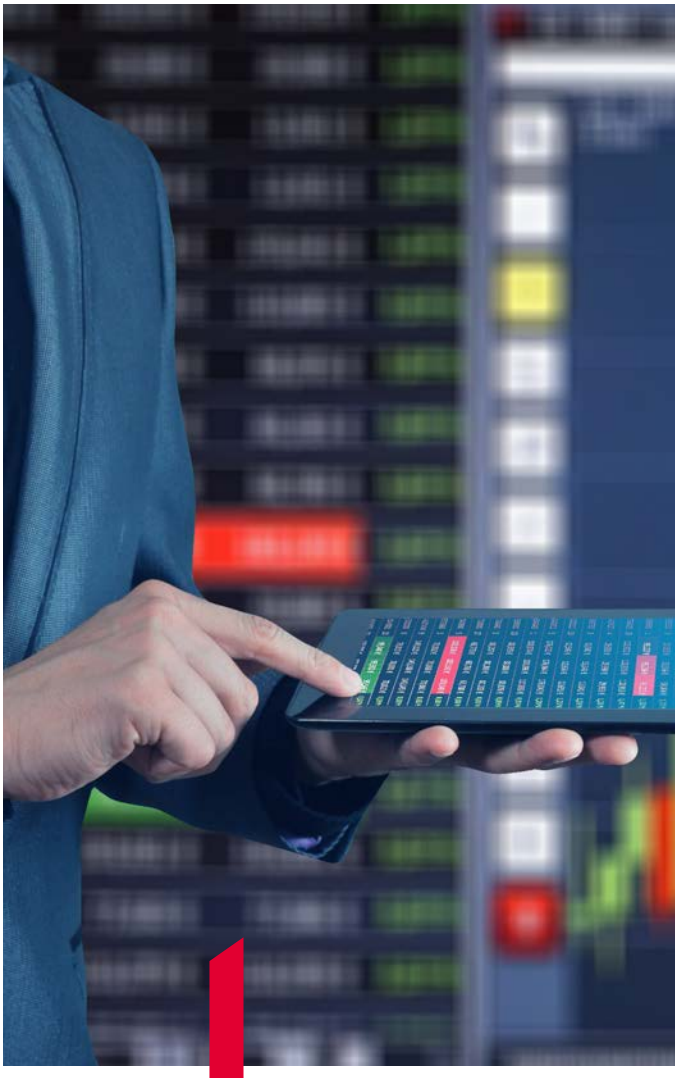
In short

Consolidated text of regulation on acquisition of company shares has been published

The minister's of finance, funds and regional policy's decree of 11 February 2021 on the acquisition of public company shares in a compulsory buyout has been published in the 2021 Journal of Laws (item 294). The decree specifies how to publish information on an intended acquisition of public company shares in a compulsory buyout, as well as sets out the conditions for the acquisition of shares covered by a compulsory buyout. The decree became effective as of 1 March 2021.

Most LIBOR rates cannot be used as of 2022

On 5 March 2021 the British Financial Conduct Authority (FCA) announced that it will completely cease to provide the following reference rates: LIBOR CHF (all settings) – as of the end of 2021; LIBOR EUR (all settings) – as of the end of 2021; LIBOR GBP, LIBOR JPY (selected settings) – as of the end of 2021; LIBOR USD (selected settings) – as of 30 June 2023. The FCA's announcement is the basis for the KNF-supervised entities that apply LIBOR-based reference rates to undertake actions set out in their emergency plans. The KNF also expects the entities that apply LIBOR-based rates to immediately take action to inform their clients who hold contracts, financial instruments and investment fund units where such rates are used, of the planned end of the calculation of these rates and the resulting consequences.



The Polish Financial Supervision Authority has provided electronic intermediary registers

The UKNF has made its registers available in a new formula. Among others, the changes are meant to increase security and functionality of the tool, as well as provide a more user-friendly access to the registers. In particular, a change has been made to the presentation of public data that are now available in the form of special search engines that make it possible to view detailed information. The following registers have been made available in this manner: the register of mortgage intermediaries; register of mortgage intermediary agents; register of consumer credit intermediaries and the register of credit institutions.

Requirement to use ESEF in financial statements has been deferred

Amendment number 12, adding a new Article 23a, was submitted to the draft bill amending the Banking Law Act and certain other acts (Sejm paper number 859) at its 1st reading by the Public Finance Committee of the Polish Parliament. The amendment was adopted by the Public Finance Committee. Under the proposed Article 23a, an issuer whose securities have been admitted to trading on a regulated market can choose not to use ESEF in their annual and consolidated annual reports, containing the financial or consolidated financial statements for a financial year beginning in the period from 1 January to 31 December 2020, and prepare the reports in accordance with currently applicable regulations.

Insured company turnover has grown to PLN 575 billion in 2020

The Polish Chamber of Insurance has informed that in 2020 the total of insured company turnover once again exceeded PLN 500 billion (reaching PLN 575 billion) and was by more than PLN 40 billion higher than the year before. Despite the pandemic and the resulting restrictions, insurance companies have not reduced

their support of businesses. Although the financial markets experienced a breakdown in March 2020, insurance companies slightly raised the credit limits granted to insured businesses. The value of insured turnover has also grown by 8 percent.

Three more punished for promoting pyramid schemes

The President of the Office of Competition and Consumer Protection (UOKiK) has filed charges against three traders who on the Internet and during various events encouraged others to invest in FutureNet, FutureAdPro, or to join the NetLeaders network. These are pyramid schemes and their formation, running and advertising is prohibited and considered an unfair market practice. The traders are facing financial fines. In addition, the President of the UOKiK has notified enforcement organs of 16 investment projects, such as cryptocurrency portfolios, investment bills or an offer of profits from legalizing marihuana, which raise suspicions of criminal activity. Some of these are being investigated by the UOKiK within its scope of authority.

Consultations on the concept of investment fund management have ended

19 March 2021 was the end date of the Ministry's of Finance consultations on the application of a VAT exemption on investment fund management services. To properly apply the exemption it is necessary to have a proper understanding of the concept of "managing" such funds. However, neither the Value Added Tax Act nor the VAT Directive contain a legal definition of the term. The Ministry of Finance wanted to know the opinions on the identification and characteristics of the elements that make up the provision of such services, the broader context of their provision and the broader context of the activities performed by entities involved in investment fund management.

Loans to companies in connection with COVID-19

This is the first time that the European General Court (EGC) has examined the compatibility with EU law of state aid granted as a result of economic disturbances caused by the COVID-19 pandemic. The judgment of the Court, in which this type of aid was assessed as compatible with the internal market, reflects the adoption of a purposive interpretation aimed at providing Member States with a safe area in terms of aid schemes established by them to address the economic consequences of the pandemic and should mark the beginning of a line of case law favourable to Member States.

Facts

On 3 April 2020 Sweden notified to the European Commission an aid measure in the form of a loan guarantee scheme for certain airlines ('the aid scheme at issue') pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The objective of the scheme was to ensure that airlines licensed in the Kingdom of Sweden (the 'Swedish license'), which play an important role in the country's transport system (with the exception of those airlines whose principal business is to provide non-scheduled passengers air services), have sufficient liquidity to avoid disruption due to the COVID-19 pandemic affecting their economic viability and to ensure business continuity throughout the current crisis and beyond.

The maximum amount of guaranteed loans under the scheme was to be SEK 5 billion, and the guarantee was to be for investment funds and working capital and was to be granted by 31 December 2020 at the latest and remain in force for a maximum of six years.

The notification was accepted, with the European Commission indicating that although the measure proposed by the Member State constitutes unlawful State aid within the meaning of Article 107(1) TFEU, it is nevertheless **compatible with the internal market** in the light of the Communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ. 2020, C 91 I, p. 1, as amended on 3 April 2020 (OJ 2020, C 112 I, p. 1) ('the Temporary Framework') and is

DOROTA SZLACHETKO-REITER,
Managing Partner, Attorney-at-law
BDO Legal Łatała i Wspólnicy Sp.k.
(limited partnership)

therefore covered by the exception in Article 107(3)(b) TFEU, which declares aid aimed to remedy damage caused by natural disasters or other exceptional occurrences compatible with the internal market.

Contesting the Commission's decision and presented pleas

Ryanair DAC, whose registered office is in Swords (Ireland), challenged that decision of the Commission seeking its invalidation on the grounds, inter alia, of the discriminatory nature of the aid scheme at issue and a failure to demonstrate in the decision that the grant of the aid was subject to an operating licence issued by the Swedish authorities.

EGC position

The EGC did not share Ryanair's pleas and therefore dismissed the action in its entirety.

As regards Ryanair's alleged discrimination through the different treatment of airlines with their principal place of business outside

Sweden, reference to Article 18(1) TFEU was made, which states that 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'. However, given that the Commission has demonstrated in the contested decision that there was both a serious disturbance in the Swedish economy due to the COVID-19 pandemic and serious negative effects of that pandemic on the aviation sector in Sweden and hence on the operation of air services in that Member State, **the objective of the aid scheme at issue meets the conditions laid down in Article 107(3)(b) TFEU since, according to that provision, the aid from the Kingdom of Sweden was intended to remedy a serious disturbance in its economy.**

The EGC did not endorse the plea considering the receipt of aid being linked to the possession of a Swedish concession.

The EGC considered that, in view of the nature of the aid scheme at issue, which takes the form of a state guarantee allowing banking institutions to grant loans for a period of up to six years, **it is normal for the Member State concerned to seek to ensure that airlines eligible for the guarantee have a lasting presence** in Sweden in order to repay the loans granted, so that the number of situations in which the state guarantee would be called upon is kept to a minimum.

In addition, it was stated that the Kingdom of Sweden wished to ensure that there was a lasting relationship between that State and the airlines benefiting from the guarantee, **since companies established outside of Sweden are not subject to supervision by the Swedish authorities in respect of financial matters and good repute within** the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) and **their situation is not characterised** by that **stable and special relationship** between that State and companies licensed by it.

The Court has also regarded the examined aid as a proportionate solution because, it states that, from the point of view of ensuring the functioning of the communications system in Sweden, the double requirement of a Swedish licence and air services in Swedish territory through regular flights **is the most appropriate for guaranteeing that the presence of an airline on that territory is permanent, by ensuring that, as a result of that licence, the principal place of business of that airline will be in that territory and that it will intend to stay there, bearing in mind the regular air routes mentioned above.**

Evaluation of the ruling

The inclusion of the aid granted by the Kingdom of Sweden in the exception provided for in Article 107(3)(b) TFEU (aid aimed to remedy damage caused by natural disasters or other exceptional occurrences) should be assessed as an important direction for potential future proceedings concerning the examination of the compatibility of aid granted by Member States with EU law. Counteracting the serious economic damage caused by the COVID-19 pandemic was, in the EGC's view, granted the status of a condition sanctioning state aid, in principle inadmissible under normal circumstances. The fact that the EGC so highly valued the need to support the national economy, even if in a purely abstract sense it violates EU competition rule, should be assessed positively, and we should expect future rulings along the same lines.

Judgment of the General Court of 17 February 2021, Ryanair v Commission, T-238/20

Amendment to the Act on Financial Instruments Trading

The Act Amending the Act on Financial Instruments Trading and Certain Other Acts was signed by the President on 24 February 2021 and will, in principle, enter into force on 1 January 2022, with the exception of certain provisions concerning, among other things, the performance of insurance contracts concluded in connection with the protection of consumers from the effects of Brexit.

WIESŁAW ŁATAŁA,
Managing Partner, Attorney-at-law
BDO Legal Łatała i Wspólnicy Sp.k.
(limited partnership)

The amendment implements, among other things, the Directive (2019/2177) concerning amendments to the functioning of the European Supervisory Authorities and supplements the Directive (2015/2366) concerning payment services. This means that the amendment implements EU rules on preventing the use of the financial system for money laundering and supporting terrorism, following the entry into force of the EU regulations on the European Supervisory Authorities (ESAs). These include the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA). The activities of these offices focus on improving the stability and transparency of the financial system in the Member States and seeking to improve investor and consumer protection.

The purpose of the amendment is to align domestic regulations with EU legislation. Supervision over insurance and reinsurance companies which conduct or plan to conduct cross-border operations has been strengthened and proper tools have been introduced to improve control over such entities. This is supposed to result in increased protection of clients of such entities and investors.

Supervision by the European Securities and Markets Authority

The amendment transfers some of the powers of national authorities to the European Securities and Markets Authority. Changes have been made to the activities of entities that provide services of publishing and reporting data on transactions in financial instruments (i.e. providers that provide services as an approved publishing entity, approved reporting mechanism or consolidated information provider).
Prior to the amendments, providers were licensed and supervised by the Polish Financial Supervisory Commission (KNF). As of 1 January 2022, the amendment transfers these powers from the Commission to the European Securities and Markets Authority (ESMA). Thus, as of that date, data reporting services providers will be supervised by ESMA. The exceptions are approved publishing entities and approved reporting mechanisms, which are less relevant for the internal market. They will not be required to obtain authorisation from ESMA.

Information exchange

The EU regulations are also designed to ensure an effective exchange of information between the supervisory authorities of the European Union Member States and the European Insurance and Occupational Pensions Authority (EIOPA). In order to achieve these objectives, the amendment obliges the Polish Financial Supervision Authority (KNF) to immediately provide supervisory authorities of other Member States and EIOPA

with information on domestic insurance and reinsurance companies that conduct or intend to conduct significant cross-border operations in the territory of these Member States, as well as on the risks associated with such operations. This amendment is intended to enable Member States to take effective preventive action and intervene in this regard.
In addition, the amendment provides for the creation of so-called cooperation platforms. They are intended to be a tool to strengthen the cooperation of authorities and consumer protection in the European Union through effective supervision over cross-border operations of insurance market entities. As of 1 March 2021 the Polish Financial Supervision Authority (KNF) has gained the power to apply to competent supervisory authorities of other EU Member States and EIOPA to establish and coordinate cooperation platforms, as well as to participate in such platforms.

Contracts with UK insurance companies

The purpose of the amendment is also to ensure continuity of performance of insurance contracts executed by insurance companies in Great Britain, Northern Ireland and Gibraltar in the period from 1 January 2021 until the date of expiry of claims under such contracts. This provision is intended to protect consumers from possible negative effects of Brexit in this respect.
In addition, the new legislation also obliges payment service providers to make available to the consumer a free information booklet drawn up by the European Commission on consumer rights when making payments in the European Union.

Reporting violations

The amendment also implements Directive 2014/65/EU3, which aims to ensure that any authorized person has an obligation to promptly report to the competent authorities facts or decisions concerning a business that may cause adverse effects. The regulations introduce protection for whistleblowers in that pointing out and reporting violations or potential violations does not constitute a breach of professional secrecy or the obligation to keep information confidential. The fact of reporting to the Polish Financial Supervision Authority (KNF) cannot constitute grounds for terminating an employment contract, contract of mandate or any other contract of similar nature. This solution is designed to guarantee obtaining information from entities that provide services of publishing and reporting data on financial instruments transactions, but are not subject to ESMA supervision.

Summary

It is argued that the growing share of cross-border insurance and reinsurance operations in the market as well as cases of insolvency and bankruptcy of entities providing those services make it necessary to strengthen the supervision of their operations. The new solutions are intended to provide the authorities of Member States with effective tools to improve cooperation and control over entities conducting insurance and reinsurance operations, which will result in increased consumer protection. The introduced changes should be assessed positively.

BDO spółka z ograniczoną odpowiedzialnością sp.k., ul. Postępu 12, 02-676 Warszawa;
tel.: +48 22 543 16 00, fax: +48 22 543 16 01, e-mail: office@bdo.pl
BDO Legal Łatała i Wspólnicy sp.k. Kraków, ul. Morawskiego 5, 30-102 Kraków,
tel.: +48 12 423 23 23, fax: +48 12 429 41 17, e-mail: office@bdolegal.pl