

October 2021

Amendments to provisions on payment delays in commercial transactions applicable as of 2022

The transition period during which increased thresholds for payment arrears in commercial transactions under the Act of 8 March 2013 on counteracting excessive delays in commercial transactions (Journal of Laws of 2021, item 424, hereinafter: “the Act”) can be applied ends with 1 January 2022. Lowering the threshold from PLN 5 million to PLN 2 million is likely to translate into growing number of initiated proceedings and increased penalties.

Administrative penalties for exceeding payment deadlines are imposed by the President of the Polish Office of Competition and Consumer Protection (UOKiK) who also identifies the entities in arrears, inter alia, based on the annual reports on the payment dates in commercial transactions carried out. Importantly, under the amended provisions, the list of entities required to submit such reports got extended with real estate companies.

Prohibition on excessive delays

On 1 January 2020, Article 13b of the Act, prohibiting excessive delays in cash payments made by non-public entities, came into force. Pursuant to the Act, an “excessive delay” means a situation where in the period of three subsequent months the total value of cash payments not made or made after the set deadline by an entity amounts to at least PLN 2 million. Importantly, under the interim provisions, the value threshold was increased to PLN 5 million for the two first

years of the Act’s operation (i.e. 2020-2021).

The interpretation practice pursued by UOKiK so far is to the disadvantage of taxpayers, as it consists in adding up the total amounts of delayed payments over the period of 3 consecutive months, regardless of the duration of the delay. Consequently, as of 1 January 2020, if the entity is in arrears with payments in each subsequent month of a three-month period in the amount of approx. PLN 667,000 (or more) for at least one day, the limit of PLN 2 million for 3 months ($3 * 667,000 = \text{PLN } 2,001,000$) will be exceeded.

Substantive amendments to the definition of “excessive delay” in making cash payments bring far-reaching consequences. This is because the President of UOKiK may launch administrative proceedings against delaying entities, culminating in imposing administrative fines by way of decision which, in practice, may also bring even more severe consequences.

Penalties for delays

The amount of the fine is set based on a number of detailed indicators, including the number of days of delay, the amount due and the amount of interest for delay in commercial transactions accrued until the date of the decision.

The Act provides for three possibilities of avoiding sanctions. This means that the administrative fine will not be imposed if:

- the value of cash payments not made or made after the set deadline by the party to the proceedings is equal to or lower than the value of cash payments not received or received by this party after the set deadline within the period covered by the proceedings;
- if the excessive delay in making cash payments was caused by force majeure;
- in other justified cases (an option conveyed by the wording of the provision, i.e.: “The President of the Office may withdraw from...”).

The experience so far shows that the authorities carry out a detailed scrutiny of the above-defined circumstances and admit only precisely correlated data, clearly supporting the relationship between the cause of the delay and the delay itself.

In certain other cases, the legislator provided for the possibility of diminishing the fine by 20 percent and 10 percent respectively, provided that the entity met a set of strict conditions before or just after the proceedings were launched by the President of UOKiK. Meeting these conditions does not mean, however, that the proceedings will not be launched.

Proceedings and current practice

According to the information provided by UOKiK, around hundred individual proceedings are currently being conducted, some of which have been already lasting for more than a year. This may be due to the fact that during the proceedings, the

Office requires the party not only to provide explanations but also detailed information on the entire period under scrutiny, according to the individually pre-set format and classification. Regardless of the penalty imposed, the procedure itself may require significant personnel involvement in the preparation of appropriate data and the fulfilment of the imposed obligations, especially in situations where the data is kept in a different format than the one required by the UOKiK.

It should be noted that in the majority of cases the penalty for failure to provide correct information in the course of the proceedings may be much more severe than the actual fine for excessive delay, as it may amount to 5 percent of the entity's revenue earned in the previous year, up to EUR 50 million (approx. PLN 230 million).

Importantly, the very fact of launching the proceedings can lead to imposition of further sanctions, i.e. for the failure to apply the appropriate clause on the status of a large entrepreneur held by the entity under the commercial agreements investigated in the proceedings, each instance of which being subject to a fine of PLN 5,000.

Consequently, from the business perspective, the core administrative fine may be less severe than the consequences brought by participation in the proceedings and supplementary fines imposed in the course thereof.

Extending the list of eligible entities

A new tool granted to the President of UOKiK for the purpose of efficient screening for entities involved with delays in payments are the reports on the payment dates in commercial transactions carried out, applicable starting from 2020. Now, the group of entities obliged to submit such reports is to cover not only tax capital groups and taxpayers with revenues exceeding the amount

of EUR 50 million in the previous tax year, but also real estate companies.

Real estate company means an entity other than a natural person, obliged to prepare a balance sheet on the basis of accounting provisions, in which:

- for entities commencing their business activity:
 - a) being CIT payers (jointly):
 - i. as at the first day of the tax year, at least 50 percent of the market value of assets (directly or indirectly) consisted of real estate located in Poland or rights thereto;
 - ii. the value of such assets exceeded PLN 10 million.
 - b) not being CIT payers (jointly):
 - i. as at the first day of the financial year, at least 50 percent of the market value of assets (directly or indirectly) consisted of real estate located in Poland or rights thereto;
 - ii. the value of such assets exceeded PLN 10 million.
- for entities commencing their business activity:
 - a) being CIT payers (jointly):
 - i. as at the last day of the year preceding the tax year, the book value of assets consisted in at least 50 percent of real estate;
 - ii. the value of such assets exceeded PLN 10 million;
 - iii. in the year preceding the tax year, at least 60 percent of revenues came from letting, subletting, lease, sublease, and other similar contracts, and/or from the transfer of ownership to real estate or rights thereto, specified by Article 3(3)(4) of the CIT Act, and from shares in other real estate companies.

b) not being CIT payers (jointly):

- i. as at the last day of the year preceding the financial year, the book value of assets consisted in at least 50 percent of real estate;
- ii. the value of such assets exceeded PLN 10 million;
- iii. in the year preceding the financial year, at least 60 percent of revenues came from letting, subletting, lease, sublease, and other similar contracts, and/or from the transfer of ownership to real estate or rights thereto, specified by Article 3(3)(4) of the CIT Act, and from shares in other real estate companies.

In practice, this means that the requirement to submit the report and publicly disclose the pursued payment practices may be extended to smaller entities.

Moreover, it may happen that in the course of an audit the authorities look into the practices pursued by the audited entity's counterparties and require them to provide further clarification. This means that the liability for the breach may be extended to other entities, normally not covered by the reporting obligation.

The report must be submitted annually, by 31 January of each calendar year. Due to:

- lowering the delayed payment threshold from PLN 5 million to PLN 2 million in the period of 3 months;
- unfavourable practices of UOKiK with regard to adding up all delayed payments in the analysed period, regardless of the delay duration;
- increasing the number and importance of delayed payment proceedings;

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

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- extending the list of entities required to submit reports on the payment dates in commercial transactions carried out;
 - we assume that further engagement of UOKiK, associated with launching time-consuming proceedings and imposing administrative fines, should be expected in the near future.
- How can we assist you?**
- In connection with the above, KPMG offers comprehensive support in the area of payment backlogs, helping to reduce the risk of initiating proceedings and securing the entity's interests, consisting in:
- assessing whether a given entity is under the obligation to submit a report on payment dates in commercial transactions carried out and providing support in the preparation of appropriate data for reporting;
 - analysing commercial contracts entered into by the entity against the existing liabilities and payment dates, along with establishing enforceability methodology;
 - introducing instruments providing for the extension of payment deadlines within the maximum statutory framework, taking into account the specific nature of the given business;
 - establishing or amending commercial contracts to align them with the regulations in force;
 - implementing payment procedures providing for making payments within the statutory deadlines;
 - preparing legal opinions on the solutions employed by the entity;
 - rendering other related services, tailored to the entity's needs and nature of its business.
- Please contact us to receive more information on counteracting excessive delays in commercial transactions and the support we may provide you in this regard.

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