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THE RIGHT FOCUS

MARCH 2023

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RESPONSIBILITIES AND MANNER OF DESCRIBING 'CROSSED-OUT' PRICES IN LIGHT OF THE OMNIBUS DIRECTIVE

KRZYSZTOF ZIĘBA

In a communication published in January 2023, the President of the Office of Competition and Consumer Protection (UOKiK) made a number of remarks as to the implementation of the obligation under the Omnibus Directive to indicate, in price reduction announcements, the lowest price of a good in 30 days prior to the price reduction

Several of the cases analysed, about which the UOKiK President had reservations, concern situations where, in addition to the prior price required to be indicated by the Omnibus Directive (i.e. the lowest price from 30 days before the reduction), traders also indicated another previously applied reference price. The communication from the UOKiK President implies a restrictive approach regarding the need to describe 'crossed-out' prices in promotion announcements.

According to the legislation, what are the requirements for describing prior prices? And does the Omnibus Directive really imply an obligation to describe 'crossed-out' price in every case?

What are the obligations concerning price reduction announcements under the Omnibus Directive

In any price reduction announcement, the Omnibus Directive requires traders to indicate the prior price of the good applied for a certain period of time.
As defined in the Omnibus Directive, the prior price is the price applied by a trader for at least 30 days prior to the application of the price reduction.
In order to properly comply with this obligation, it is important that the prior price is appropriately displayed.

Having analysed the Omnibus Directive, the act implementing it in Poland and the European Commission's Guidance[i], it is clear that the requirements for the presentation and description of prior prices in an announcement depend to a large extent on whether the trader presents a single prior price or (usually for marketing reasons) chooses to present several different prior prices applied for a given good.

Indication of several different prior prices

Both the Directive and the act implementing it in Poland, introduce the requirement to indicate, in a price reduction announcement, the prior lowest price of the good applicable in the period of 30 days before the price reduction.

However, the legislation does not prevent other reference prior prices from also being communicated. These could be, for example, the regular price of the good differing from the lowest price during the 30 days prior to the price reduction. Market practice shows that traders often also refer to prior prices applicable immediately before the price reduction.

When referring to several different prior prices in a price reduction announcement, a few rules in particular should be borne in mind:

- The price reduction announcement should always refer to the lowest price from 30 days before the announcement. Other reference prices (e.g. regular prices, prices immediately before the reduction) may be used in addition to, but not instead of, the lowest price of the 30-day period before the price reduction

- If traders wish to display two reference prior prices, both should be properly described so that customers understand what they refer to. Both the prior price required by the Omnibus Directive and the second prior price should be provided with appropriate explanations
- The lowest price in the 30-day period before a discount is offered, as required by the Directive, must be properly displayed and other prior prices should not distract the consumer's attention from the price required by the Omnibus Directive. The UOKiK President paid particular attention to the display of the lowest price in a font that was too small or not sufficiently distinguishable from the background. Information on the lowest price in the 30-day period should be displayed in the announcement more prominently than, or at least as prominently as, other prior prices (e.g. the regular price), if any
- If the announcement indicates a discount in percentage or amount (e.g. "-50%", "-PLN 50"), it should include information on the level of the discount in relation to the price required by the Omnibus Directive.

A crossed-out price next to the current price in the announcement

There is some controversy about the concerns expressed by the UOKiK President, indicating a requirement to describe crossed-out prices in a situation where traders provide only a prior price (as a crossed-out price) next to the current price.

According to the communication of the UOKiK President, it is not permissible to indicate the current sale price and the crossed-out price without also indicating what the "crossed-out" price relates to, or to describe such a price otherwise than as "the lowest price of the good in the 30-day period before the discount". The communication further indicates that terms such as, for example, "reference price" are not sufficient to describe this price.

The expectations of the UOKiK President in this respect can be considered too broad. The Omnibus Directive provides that discount information must include the prior price that applied for a certain period of time before a discount was offered, and specifies that this prior price means the lowest price over a period of no less than 30 days prior to the application of the discount.

It is therefore important that the prior price (e.g. displayed in a crossed-out form) is in fact the lowest price in the 30-day period before a discount. If, on the other hand, traders present only one prior price (the lowest price in the 30-day period before a discount) as the crossed-out price, it does not seem necessary to always provide this crossed-out price with a specific description.

The Omnibus Directive and its implementing act do not contain an explicit requirement to describe the prior price. Nor does the European Commission Guidance contain such an obligation, only referring to the need to accurately describe and explain the prior prices when traders refer to several of them in a single announcement.

However, there is no such requirement in the European Commission Guidance where a single crossed-out price is displayed. In this case, the default assumption is that this is the lowest price over a period of at least 30 days prior to the announcement of the discount.

The aim of the Omnibus Directive is to combat the display of false discounts, which may consist in temporary, artificial price increases being followed by a discount or a significant discount. The objective of the Directive is achieved if the displayed crossed-out prices are in fact the lowest prices in the 30-day period, even if they are not additionally described with the specific phrase.

As long as the obligation to determine the crossed-out price taking into account the 30-day period preceding the price reduction is fulfilled and only one crossed-out price is indicated in the announcement next to the current price, the absence of a specific description of the crossed-out price will not mislead consumers. The mere absence of a specific description next to the 'crossed-out' price will not, in such a case, distort consumers' beliefs in a way that is likely to influence their purchasing decisions.

Summary and recommendations

The above arguments show that, in contrast to the situation where several prior prices are displayed, traders are not obliged to describe the price in detail when only one crossed-out price is displayed. What is important, however, is that such a crossed-out price is in fact the lowest price in the 30-day period before a price reduction.

Notwithstanding the above assessment of the position of the UOKiK President, which we believe is too restrictive, the safest solution to avoid intervention by the authorities would be to display the crossed-out price, while describing it as "the lowest price in the 30-day period before the discount", at least until doubts are clarified in case law.

[i] ConsumerRights2023 – UOKiK President says "call" (in Polish: #PrawaKonsumenta2023 – Prezes UOKiK mówi „sprawdzam")
[i][i] Commission Notice – Guidance on the interpretation and application of Article 6a of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers

THE SELLER'S R&WS IN MERGES & ACQUISITIONS

HOW TO AVOID BUYING "A PIG IN A POKE"

PAWEŁ MARDAS

The seller's representations and warranties (R&Ws) are one of the key elements of any M&A transaction

In addition to the provisions of an SPA that relate to the effective transfer of shares or other subject matter of a transaction, and the provisions that determine the financial terms of a transaction (relating to the price for the shares, the way this is calculated and any post-closing adjustments), the seller's R&Ws constitute one of the most important sections of an SPA in an M&A transaction.

The seller's R&Ws – what is their purpose

The seller's R&Ws serve to appropriately allocate risk between parties to a transaction. The seller warrants to the buyer that the shares subject to a transaction are free from defects and, in particular, that they are not encumbered by any third-party rights.

The seller warrants that the company to be sold is in good standing and that there are no grounds for declaring it bankrupt, and represents that the company holds valid and undisputed title to its material assets based on which it operates.
The seller also makes a number of other similar warranties to assure the buyer is acquiring a stake in a sound company, enabling the buyer to achieve its planned return on investment or to further develop its existing business.

Contractual provisions defining the seller's liability for the warranties it provides are another important aspect of risk allocation. It is common practice to limit this liability both in terms of duration and financial amount.

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R&Ws and disclosure letters

The seller's R&Ws also involve other issues, such as the buyer's ability to rescind an SPA if, between the signing of the agreement and the closing of the transaction, the seller's R&Ws are found to be false or otherwise inaccurate. However, such a provision must be included in the agreement.

Another solution closely related to R&Ws and applied in transactional practice is the seller's use of a disclosure letter.

A disclosure letter is a document (usually attached to an SPA) in which the seller discloses certain information to the buyer in derogation of the seller's R&Ws.

For instance, disclosure letters may state that one of the properties of a target company is mortgaged. Such information modifies the seller's general warranty that no material asset of the target company is encumbered by any third-party rights.

Unfortunately, the devil is in the detail, and it is the detail that is easiest to "water down" when negotiating R&Ws.

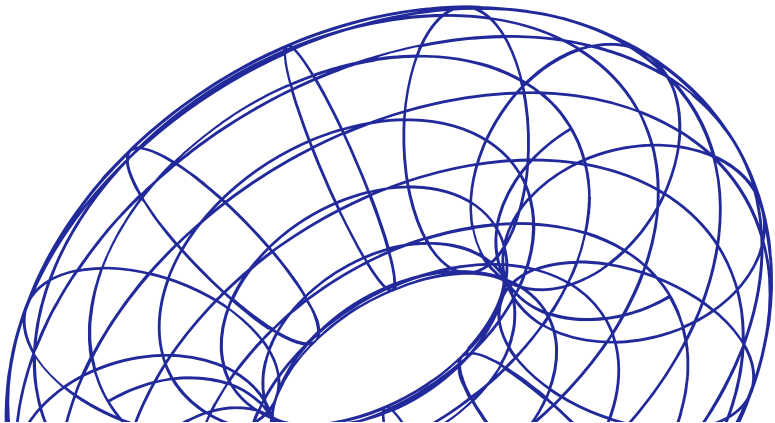
Continuing with the above example, if the seller has disclosed that one of the properties is mortgaged, but has not at the same time indicated the source of the mortgage (e.g. a loan agreement entered into by the target company as the borrower incurring the debt secured by the mortgage), then the seller's reliance on the fact that it has disclosed information about the existing debt of the target company will be quite problematic, unless the seller has included information on the loan either in a disclosure letter or directly in R&Ws.

Costly post-M&A disputes

Unfortunately, disputes that arise after a transaction has been completed can be costly, e.g. where there has been a failure in the conduct of the process.

The preparation of a transaction is fully as important as, if not more important than, the closing. This should include the involvement of a team of professional advisers who, via their access to the necessary information, are able to safeguard the interests of the parties by defining the content of R&Ws and the principles of the seller's liability for its R&Ws.

M&A transactions are like life. Since the seller has made certain R&Ws and assumed liability for their correctness and completeness, the word is out... Agreements must be honoured, even if this means paying for a lack of diligence and foresight in the preparation phase.



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THE TERM OF OFFICE AND THE MOMENT OF EXPIRY OF THE MANDATE OF AN LCC MANAGEMENT BOARD MEMBER

DOMINIK KARKOSZKA

On 13 October 2022, an amendment to the Commercial Companies Code came into force to regulate the method of calculating the term of office and the moment of expiry of the mandate of a limited liability company management board member appointed for a term of office exceeding one year.

Until then, this issue had given rise to considerable doubt, both in theory and in practice. The changes are crucial, since the correct determination of the term of the mandate has a significant impact on the validity of the actions taken by management board members on behalf of a company. If the term is calculated incorrectly, it may turn out that the member in question did not have a valid mandate and was therefore not entitled to represent the company.

Term of office vs. mandate

The terms "mandate" and "term of office" themselves are often confused.

The former is the authority to exercise the functions of a management board member, while the latter determines the validity of the mandate and, according to the amendment, is calculated in full financial years, unless the articles of association provide otherwise. In most cases, therefore, the term of office and the mandate do not overlap completely.

The key point is that a person can serve as a management board member as long as his or her mandate remains valid.

Method of calculating the mandate if the term of office exceeds 1 year

In practice, three concepts have emerged for determining when a management board member's mandate expires.

Let's illustrate this with a concrete example: a management board member appointed on 1 August 2021 for a two-year term of office:

- Prolongation concept – the last full financial year of the board member's service is the year in which the term of office itself ends. In this case, this will be 2023, so the mandate of the board member so appointed will expire on the date of the general meeting that approves the financial statements for 2023, i.e. generally by 30 June 2024. The mandate of the member will therefore be longer than the term of office.

- Reduction concept – the last full financial year is 2022. The board member's mandate will therefore expire on the date of the general meeting that approves the financial statements for 2022, i.e. generally by 30 June 2023. In this case, there will be a shortening of the mandate relative to the term of office.

- Third concept – the board member's mandate will expire exactly two years after his or her appointment, i.e. in this case on 1 August 2023. This was the least preferred concept.

Supreme Court rules in favour of the prolongation concept

Even prior to the entry into force of the amendment to the Commercial Companies Code, the Supreme Court, in its resolution of 24 November 2016, ref. III CZP 72/16, ruled in favour of the prolongation concept, finding that:

"The last full financial year within the meaning of Article 369 § 4 read together with Article 386 § 2 of the CCC is the last financial year that began during the term of office of a joint-stock company supervisory board member".

Although the resolution concerns the term of office of a joint-stock company supervisory board member, it could be applied per analogiam to the term of office of members of other company bodies.

The Commercial Companies Code after the amendment

At present, Article 202 § 2 of the Commercial Companies Code, which defines when the mandate expires and how the term of office is calculated, provides that:

"If a management board member is appointed for a period longer than one year, the mandate of that member shall expire on the date of the general meeting that approves the financial statements for the last full financial year of the member's service as a management board member, unless the articles of association provide otherwise. The term of office shall be calculated in full financial years, unless the articles of association provide otherwise".

In this way, the lawmakers have finally determined that it is the prolongation concept that should be considered valid. Thus, the last full financial year is the last (financial) year that falls entirely within the term of office for which a limited liability company management board member has been appointed. Conversely, it cannot be a financial year that began but did not end during the term of office.

Assessment of the amendment

Although we have waited a long time for the lawmakers to take such a step, the amendment should be viewed positively. After all, it has finally clarified how the term of office is calculated, and how the moment of expiry of the mandate is determined. The latter is crucial from the perspective of a company and the validity of decisions taken by management board members on its behalf. If such decisions could be called into question, the security of transactions would be jeopardised.

08.

HERMÈS WINS CASE OVER 'METABIRKIN' NFTS

SETTING PRECEDENT FOR NFTS IN THE FASHION INDUSTRY

TOMASZ SZAMBELAN

The legal battle between Hermès brand owner and artist Mason Rothschild, the creator of 'MetaBirkin' NFTs, has lasted more than a year. On 8 February, the Court ruled that the NFT version of the famous Birkin handbags infringed the rights of the Hermès fashion house

NFTs infringe 'Birkin' trademark rights

Before discussing the verdict, it is worth recalling a series of earlier articles describing the dispute initiated by Hermès (read here).

In its verdict of 8 February, a nine-member jury of the U.S. District Court for the Southern District of New York found that Mason Rothschild had infringed the rights of the luxury brand Hermès in the 'Birkin' trademark.

The Court found in favour of Hermès and ordered Rothschild to pay damages totaling USD 133,000, including USD 110,000 in estimated profits from the sale of NFTs and USD 23,000 for cybersquatting on MetaBirkins.com.

The limits of creativity with NFTs

The Court did not share the artist's arguments that 'MetaBirkin' was nothing more than an art form and a 'commentary' on the real Birkin bags. According to Rothschild, this kind of creativity should fall under the First Amendment to the U.S. Constitution (freedom of speech).

However, the jury found that a similar concept to Andy Warhol's use of a Campbell's soup can could not be applied to this case. As a result, the Court considered 'MetaBirkin' to be a consumer product that infringed Hermès' trademarks rather than a work of art.

Landmark verdicts in NFT cases

The Hermès verdict is the first settlement of an NFT case in the U.S.
There will certainly be more litigation of this kind in the future, and not only in the U.S. but also in Europe.

This is confirmed by the recent verdict of the Court of Rome in a case between Juventus F.C., the legendary football club, and the Blockeras platform which offered for sale NFTs and other digital content related to the Italian club's trademarks. We also covered this dispute in detail (read here).

Given the number of filings with the EUIPO specifically related to NFTs, we have to assume that similar cases will soon become quite common.

Let's remember that in 2022 alone, a total of 1,867 applications for NFT-related trademark protection were filed with the EUIPO, as we wrote about quite recently (read here). This just goes to show that it's a good idea to start thinking now about how to protect your business against infringements involving NFTs.

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WITHHOLDING TAX AND DOUBLE TAXATION AVOIDANCE RULES

SŁAWOMIR WNUCZEK

JAKUB DITTMER

Are you operating in Poland and buying services from foreign companies?
Have you transferred your business from Ukraine to Poland, but continue to use Ukrainian contractors?
Have you received an interest-bearing loan from a foreign entity or are you paying dividends to a foreign shareholder?

If so, you may be required to deduct withholding tax.

What is WHT?

Withholding tax ("WHT") is applicable to taxable persons paying both PIT and CIT, and applies to monies paid to foreign entities.
The responsibility for the settlement of this tax lies with the entity paying the remuneration (as the remitter) and not with the receiver of the remuneration. As a result, the tax is withheld in the source country, i.e. that from where the payment is made, and not in the country of the payee.
However, not every payment to a foreign counterparty will give rise to an obligation to remit WHT.

Types of payment subject to WHT

The PIT and CIT Acts contain a list of payments that are subject to WHT. These include payments in respect of:

- Interest
- Royalties
- Dividends
- So-called intangible services

While the identification of interest or dividend payments made to foreign entities is usually relatively straightforward, situations involving royalty payments or intangible services are in practice much less obvious.

The list of intangible services subject to WHT includes consultancy, accounting, legal, advertising, management and auditing, data processing, HR and other similar services. It is precisely such a vague reference to 'similar services that makes it difficult to precisely determine whether we have a WHT obligation in a particular case.

The same is true in relation to royalties, which include payments for:

- Copyright or related rights
- Rights to inventive designs
- Trademarks
- Know-how

The above list is illustrative, so it is up to the purchaser (remitter), potentially obliged to withhold tax, to determine what the payment they are making relates to, within the meaning of the tax legislation.

Withholding tax - determining the rate

If it is determined that a particular payment is subject to WHT, this means that the entity making the payment (the remitter) must determine the appropriate tax rate at which it will deduct WHT.
Under Polish tax legislation, intangible services, interest and royalties are taxed at a rate of 20%, while dividends are taxed at a rate of 19%.

Double Taxation Treaties

Importantly, Polish regulations requiring CIT and PIT taxable persons to settle WHT should be applied taking into account any changes arising from double taxation treaties ("DTT").

These are agreements concluded between individual states to eliminate double taxation of the same income. Notably, DTT provisions have priority in a situation of contradiction with Polish regulations, owing to the status of DTTs as ratified international agreements.

Thus, if the recipient of a payment has its registered office or place of residence in a state with which Poland has concluded a DTT, the provisions of the applicable DTT may modify the types of payments subject to WHT, enable the application of a reduced tax rate or allow the tax not to be withheld at all.

Application of DTT is not sufficient by itself

Individual DTTs do not provide for any additional conditions to be met in order to benefit from the preferential treatment provided for therein. evertheless, in such cases the established practice of the Polish tax authorities is to also apply the requirements stemming from Polish regulations.

Consequently, to use the opportunities provided for in the DTT (such as the application of a reduced WHT rate) in such a way as to satisfy the requirements of the Polish tax authorities, the entity making the payment (remitter) is required to:

- Obtain a tax residency certificate from the counterparty (recipient of the payment)
- Exercise due diligence in verifying the conditions for the application of the reduced WHT rate (or tax exemption, or the non-withholding of tax)

A residency certificate is a document showing the taxable person's residence (for legal entities) or domicile (for individuals) and stating in which state the taxable person will pay tax.

By having the counterparty's tax residency certificate, the remitter may be exempt from the obligation to withhold tax wherever the relevant DTT provides for such a possibility.

And when assessing the exercise of due diligence, the remitter should, in accordance with Polish law, take into account the nature and scale of its business and the personal or corporate relationship between the remitter and the recipient of the payment.

What is not subject to WHT

As a general rule, in accordance with DTTs, the types of income that are not subject to WHT include in particular business profits, i.e. income generated in the course of business activities which does not fall within other categories of services/provisions covered by the relevant DTT (e.g. they do not constitute remuneration for a licence).

This means that, when paying remuneration from a B2B contract, to a counterparty who is a trader, obtaining its

tax residency certificate may bypass the requirement for WHT to be deducted altogether in certain situations.

Interpretative doubt

What, on the surface, could be regarded as corporate profits, is not always so, as shown by the numerous and often contradictory views of tax authorities and administrative courts. Certainly, we will not be dealing with business profits where the payment falls into other categories of income, for which the DTT provides for different taxation rules.

Consequently, the remitter should each time analyse the nature of a specific type of performance, and not only on the basis of Polish law and DTT, but also taking into account the most up-to-date practice of tax authorities and case law.

Examples of the application of DTT and withholding tax provisions

Remuneration paid to a counterparty for its software development services is normally treated by the Polish tax authorities as payments outside the scope of WHT or business profits under the respective DTT. However, the situation becomes significantly complicated if the agreement between the parties includes a transfer or granting of the right to use the author's economic rights to the software. In that case, there is a risk of the payment being qualified as royalties, which would change its tax treatment.

The situation is similar for computer software licences, which are generally subject to WHT as royalties. An exception to this, however, are licences granted to the end user, which are not treated as royalties.

Tax withholding is not all: IFT-1/IFT-1R

WHT remitters are not only obliged to deduct the tax, but they also have notification obligations. Regardless of whether you withhold WHT or have exercised the option to not withhold it, you are still obliged, as a remitter, to prepare a IFT-1/IFT-1R notification (these are two separate notifications, on one form).

The IFT-1R notification is submitted by the end of February of the year following the tax year, to the head of the tax office competent for taxation of foreign persons, while the IFT-1 is prepared at the request of the counterparty and sent within 14 days to both the counterparty and the head of the tax office.

Depending on whether the tax withheld was PIT or CIT (according to the counterparty's status), a PIT-8AR or CIT-10Z return, as the case may be, is required to be filed by the end of January of the year following the year in which the tax was withheld. The PIT-8AR return is filed with the Tax Office competent for the remitter, while the CIT-10Z is filed with the Tax Office competent for taxation of foreign persons.

Summary

Ambiguous tax regulations combined with the frequently contradictory and changing positions of tax authorities, make the correct determination of WHT-related obligations often a real challenge for Polish businesses.

Therefore, the verification of these obligations should always be preceded by a detailed review of the provisions of the particular commercial contract and an examination of its subject matter. It is also worth ensuring that appropriate WHT clauses are included in contracts, which will warn the counterparties of Polish companies that WHT may be deducted and that their remuneration will be paid after such deduction. This will certainly avoid misunderstandings when dealing with business partners in the event of a tax settlement in Poland.

From the WHT perspective, it is also important to determine the tax residency of the counterparty and obtain a residency certificate from the counterparty.

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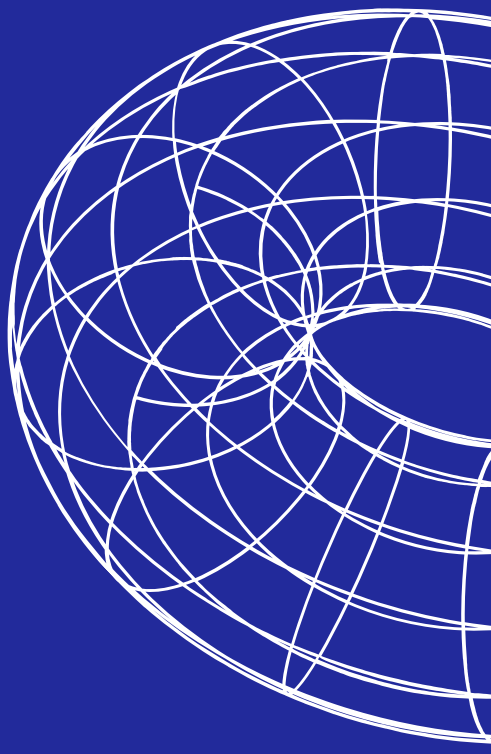

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