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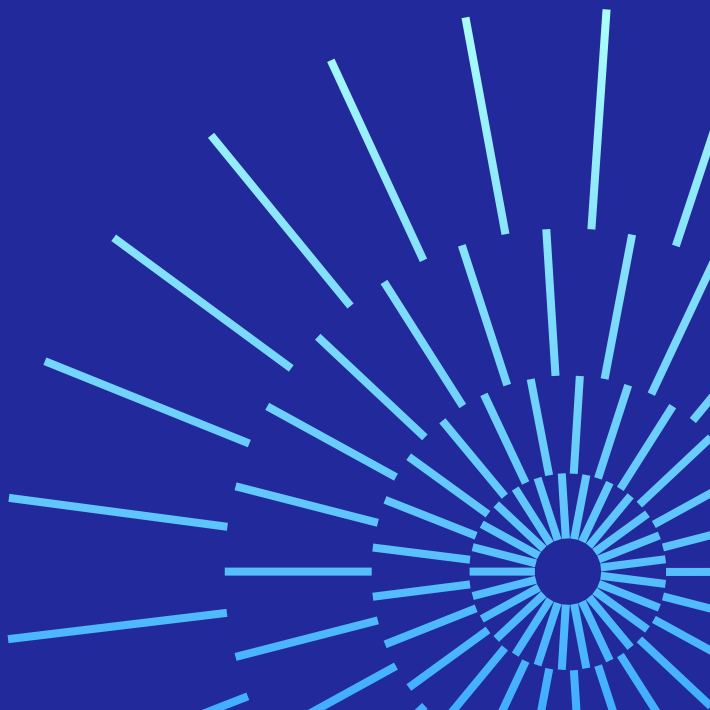
THE RIGHT FOCUS

JUNE 2024



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NEW DEFINITIONS FOR ‘STRUCTURE’ AND ‘BUILDING’ / WHAT CHANGES IS THE MINISTRY OF FINANCE ANNOUNCING?

JAKUB DITTMER

JAN JANUKOWICZ

Last year, we wrote about a landmark judgment in which the Constitutional Tribunal ruled that Article 1a(1)(2) of the Local Taxes and Fees Act, which sets out the definition of a structure (Polish: ‘budowla’), was unconstitutional (judgment of 4 July 2023, Case No. SK 14/21). >>

At the time, the Tribunal decided that the regulation would remain in force for a further 18 months. Almost a year on from the judgment, the Ministry of Finance has drafted a new proposed definition of a structure for property tax purposes. We consider whether the changes could create new interpretation pitfalls for businesses.

What is a structure as defined by the Ministry of Finance?

In the new bill, the Ministry has proposed a new definition of a structure, according to which structures are the construction works listed in Annex 4 to the Act.

Structures will include, without limitation:

- Outdoor sports and recreation facilities
- Sewage treatment plants
- Water treatment plants
- Storage facilities, including but not limited to:
  - Silos
  - Grain elevators
  - Storage facilities for fuels, gases and other chemical products
- Sheds and hangars
- Ports, harbours, docks, breakwaters, quays, piers, jetties, slipways
- Swimming pools, artificial islands,
- Flood control dikes
- Outdoor shooting ranges
- Power lines and traction
- Car parks which are buildings and are not part of buildings, parking areas, storage areas, garbage areas, driveways and canopies
- Industrial installations and technical equipment

Structures are also to include the following, if made using construction products:

- Construction parts of equipment which is not part of a structure
- Construction parts of wind power stations and nuclear power stations
- Foundations for technically separate machinery and equipment
- Connections to construction works

Advantages and disadvantages of the new definition of a structure

The new objects of taxation will be included in an annex to the Property Tax Act, which will contain an autonomous list of construction works considered to be structures. In this way, the definition of the term will no longer refer to provisions outside the tax system, which seems beneficial.

However, the proposed amendment also has its drawbacks.

The new provisions do not refer to construction law and are not linked to the Fixed Asset Classification, which makes it difficult to understand what the legislator had in mind when using certain terms, such as technical equipment, storage facilities or industrial installations, the definition of which may cause considerable problems for taxpayers.

What will a building be according to the Ministry of Finance?

The Ministry has also proposed a definition of a building, which is to be:

"a construction work, including installations that make it usable for its intended purpose, made using construction products, which is permanently connected to the ground, delineated from the surrounding area by building partitions and has foundations and a roof".

The difference between the current definition and the proposed one is that the condition for construction works to be considered a building will be that they are used for their intended purpose and are constructed using construction products, as in the definition of a structure.

In addition, and this raises considerable doubts, under the new bill, construction works that are part of a structure may also be a building.

Controversy over the new definitions

This is only a draft law, so we will have to wait for the final version. However, the proposed definition of a structure is already causing a lot of controversy.

In fact, in view of the current wording of the bill, taxpayers will now have to check whether facilities on which they have never paid property tax will become structures under the new rules.

The new definitions are expected to come into force on 1 January 2025. We will keep you informed of any developments.

Social Security Holiday

URSZULA WÓJCIK

On 7 June, the Amendment to the Social Security System Act was signed by the President. This means that a large number of businesses will soon benefit from favourable changes to the payment of social security contributions.

However, entrepreneurs have many questions, so we answer the most common ones.

What is the most significant change introduced by the Amendment?

Entrepreneurs engaged in non-agricultural business activities will be able to benefit from an exemption from paying contributions to their own compulsory old-age pension, invalidity pension and accident-at-work insurance, for one calendar month of their choice in each calendar year (so-called 'contribution holiday').

Who can benefit from a contribution holiday?

Only entrepreneurs engaged in non-agricultural business activity, as defined in Article 8(6)(1) of the Social Security System Act, can benefit from the contribution exemption.

In addition, the Amendment provides for some additional restrictions, related to the size of the business and the scale of its operations.

As a result, only those meeting all of the following conditions will be able to benefit from the new solutions:

Number of employees condition

In the calendar month preceding the month in which the application for a contribution holiday is made, the entrepreneur has not registered more than ten persons (including the entrepreneur) for old-age pension, invalidity pension and accident-at-work insurance or health insurance.

Revenue condition

In the last two calendar years preceding the year in which the application is made, the entrepreneur has not earned any revenue from non-agricultural economic activity or, in at least one of these last two years, their annual revenue from such activity did not exceed the equivalent of EUR 2 million (the amount of this revenue is not prorated on the basis of the number of days on which the non-agricultural economic activity was actually carried out).

Condition of not providing services to a former employer

As an insured person, in the preceding calendar year and in the period from the beginning of the year in which the application is submitted to the date of submission of the application, the entrepreneur has not carried out any non-agricultural economic activity for their former employer for whom, in the year in which they started the economic activity or in the previous year, they carried out the same activities falling within the scope of their economic activity, but in an employment relationship or a cooperative employment relationship.

Condition of insurance

In the calendar month preceding the month in which the application was submitted, the entrepreneur, as an insured person, was subject to old-age pension, invalidity pension and accident-at-work insurance on account of running a non-agricultural economic activity.

What does an entrepreneur need to do in order to benefit from a contribution holiday?

In order to benefit from a contribution holiday, an application must be submitted to ZUS. The entrepreneur must do this in the month preceding the month in which the exemption is to apply.

In accordance with the Amendment, applications will only be submitted electronically and no decision will be required to grant the application. The relevant information will be transmitted via the ZUS system.

The entrepreneur does not have to formally cease his or her business activities in order to take advantage of the tax holiday.

Moreover, he or she will remain a participant in the social security system during the period of the contribution holiday (unlike, for example, those who benefit from the so-called 'start-up relief').

This is fundamental in view of the potential consequences of non-participation, even temporary, in the social security system. For example, there is no risk of 'dropping out' of sickness insurance when taking a contribution holiday.

Are the changes positive or not?

In our view, the Amendment is a step in the right direction.

Indeed, the explanatory memorandum to the bill states that the increase in the amount of social security contributions paid by companies over the last ten years has been almost 109%, which is higher than the rate of inflation. This has had a negative impact on this group of market participants.

The proposed solution is an attempt to support businesses and at the same time, given the scale of the burden on the state budget, does not threaten the stability of the Polish social security system.

When will the changes take effect?

The Amendment will come into force on the first day of the month following the expiration of 4 months from the date of its announcement, with the exception of Article 8, which will come into force on the day following its announcement.

EURO 2024 / A CELEBRATION OF SPORT AND THE SAFEGUARDING OF UEFA IP RIGHTS

TOMASZ SZAMBELAN

The European Football Championship is an example not only of excellent organisation of a sporting event, but also of thoughtful and long-term protection of the organiser's intellectual property rights. On many levels.

Building an IP rights portfolio through UEFA EURO 2024

Anyone who thinks that Europe's biggest football event of the year is only about sport is sorely mistaken. With the announcement in September 2018 of Germany as host of the tournament, UEFA i.e. the main organiser, has been systematically securing its intellectual property rights by filing trademark and Community design applications with the European Union Intellectual Property Office (EUIPO).

The first of these was the word and figurative mark UEFA EURO 2024 GERMANY.

UEFA EURO2024 GERMANY

EUTM 018040798

In parallel with the organisational preparations for the tournament, UEFA has been expanding the portfolio of IP rights to be protected by reserving, for example, the distinctive layout elements of graphics currently used in the media coverage of the event, such as those of the host cities, or the graphic of the cup inscribed in a background of flags found on most products relating to the event.

EUTM 018571307

EUTM 018571312

EUTM 018571348

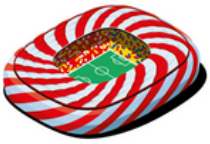
An indispensable element of any event of this stature is, of course, the mascot, which premiered a year before the planned event. In this case, too, an application for an EU trademark, which depicts the friendly Albärt bear, was immediately filed.

EUTM 018890511

RCD 015017107-0006

UEFA has also taken care to register a whole range of Community designs, which relate to the marks previously discussed.

RCD 008717169-0015



RCD 009025687-0005

These are just a small selection of UEFA's registered trademarks and Community designs. There is also the copyright to the songs played during the broadcast or the official song of the tournament: Meduza, OneRepublic, Leony - Fire (Official UEFA EURO 2024 Song).

The whole thing adds up to a deliberate strategy to fully protect and commercialise the rights.

UEFA EURO 2024 logo only with permission of UEFA

On the occasion of the tournament, UEFA published guidelines detailing all aspects of the use of its IP rights in the context of a sporting event. This is because it is UEFA that decides who can use the championship logo and other registered marks.

Please note that not every use of the EURO 2024 brand is prohibited. If someone uses the EURO 2024 logo in a purely personal, non-commercial way (e.g. at a private party in their home), then there is no obligation to obtain special permission from the owner.

Interestingly, UEFA itself indicates that any individual or company may use UEFA word marks in a commercial context, as long as they are presented purely descriptively and no official association with the organisation is implied. At the same time, it is made clear that the commercial use of official EURO 2024 graphics or emblems is prohibited, and the use of any EURO 2024 word marks must not be more prominent than the rest of the text.

UEFA is known for its attention to its IP rights and its enforcement of potential infringements. In such a case, UEFA may claim damages, the amount of which will depend on the damage suffered by the organisation.

Undoubtedly, the way in which Europe's biggest football event is prepared in terms of securing intellectual property rights can be an inspiration to others, also in the context of industries not directly related to sport.

The most important thing is to build the legal protection and management of the brand and IP rights portfolio thoughtfully and well in advance, long before the goods or services are officially launched on the market.

CONTRIBUTIONS IN LIMITED LIABILITY COMPANIES AND JOINT-STOCK COMPANIES AND THE CONSEQUENCES FOR SHAREHOLDERS AND MANAGEMENT BOARD MEMBERS

WERONIKA DUCHNOWSKA

When setting up a business, it is necessary to provide the company with certain resources, i.e., among other things, to contribute the appropriate capital required to fully pay for the shares issued.

The need to recapitalise the company may also arise later, and one of the forms available is an increase in share capital and the related contribution to cover it.

Such contributions may take the following forms:

- Cash contributions
- Non-monetary contributions (contributions in kind), i.e. things and rights that are capable of being contributed

Depending on the type of company, the rules on restrictions and obligations regarding contributions in kind may differ.

Contributions in kind – Contributability

Contributability is defined as the quality of things and rights that makes them capable of being contributed to a company as a contribution in kind.

At the same time, the Commercial Companies Code explicitly states that a non-transferable right or the provision of work or services cannot be contributed to a limited liability company or a joint stock company (Article 14(1) of the Commercial Companies Code).

The regulations also specify what cannot be a contribution in kind.

In practice, a contribution in kind should be:

- An existing asset
- Transferable
- Capable of being valued and being included as an asset in the company's balance sheet
- Capable of being the object of direct enforcement proceedings in order to satisfy creditors' claims

Contributions with defects

In accordance with the Commercial Companies Code, if a shareholder makes a defective contribution in kind, the shareholder is obliged to compensate the company for the difference between the value stated in the articles of association and the sale value of the contribution. The articles of association may provide for further rights of the company in such a situation.

For example, a physical product in an unfinished state may represent a physical defect of a contribution in kind. On the other hand, the fact that the object of the contribution in kind is an item that is owned (wholly or partly) by a third party, or a situation where the contribution in kind is a right that does not exist, may constitute a legal defect.

The liability to compensate for the difference arises upon the occurrence of the defect and the resulting difference between the value of the contribution in kind as stated in the articles of association and its sale value. This is irrespective of whether or not the company has suffered any loss as a result.

Valuation of contributions in kind

The Commercial Companies Code does not impose any obligation to value contributions in kind made to a limited liability company.

The statutory requirement to value contributions in kind applies only to joint stock companies.

If the value of a contribution made to a limited liability company is overstated, the contributing shareholder and those members of the Management Board who were aware of this and nevertheless applied for the registration of the company or notified an increase in its share capital to the National Court Register, will be jointly and severally liable to the company (Article 175 § 1 of the Commercial Companies Code).

It is also possible that the obligation to compensate the limited liability company for the value of the contribution arises both from a physical or legal defect in the object of the contribution in kind and from an overvaluation of the contribution.

As in the case of a shareholder's liability for defects in a contribution in kind made by them, liability for making an overvalued contribution in kind arises irrespective of whether the company has suffered any loss as a result. In such a case, the shareholder of the limited liability company and the Management Board members aware of this are jointly and severally liable to compensate the company for the difference.

This is why it is so important to carefully check the physical and legal condition of contributions in kind to capital companies before making such contributions, and to state their value as calculated on the basis of a current and correct valuation.

FLEXIBLE CONNECTIONS IN THE NEW ARCHITECTURE OF THE EU ELECTRICITY MARKET

WOJCIECH WROCHNA

ALEKSANDRA PINKAS

Accelerating RES installations and reducing barriers to the realisation of new capacity connections are key challenges in the energy transition process. The European Union has adopted a package amending[1] the system regulations for the internal electricity market, with the aim of increasing the flexibility of the energy system and adapt the grid infrastructure to the development of distributed RES. Flexible connection agreements are another alternative for projects that have been refused a connection and cannot obtain a commercial connection.

Why the electricity market needs an additional solution for RES connections

The EU energy system is to be made greener by RES and so-called decarbonised gases, and the economy is to be electrified.
Rapidly developing modern technologies and growing investor interest in renewable energy are colliding with outdated energy infrastructure[2] and refusals to connect[3], because operators' development plans do not anticipate the demand for such large volumes of renewable energy.

Connection refusals and the obligation for operators to cooperate with applicants willing to co-finance the connection in the so-called commercial regime do not solve the problem. There is no uniform practice for connecting commercial RES without the risk of discrimination against investors, and sometimes the need for cooperation between operators prolongs the procedure, creates uncertainty and makes the investment unprofitable.

Flexible connection agreements as a so-called third alternative for RES connection

EU Member States will be required to implement regulations aimed at increasing the flexibility of grid operation and generation sources. Solutions such as energy sharing or peak shaving will be introduced.

The electricity system is to become flexible, meaning that it will have the ability to adjust to the variability of generation and consumption patterns and grid availability, across relevant market timeframes[4].

Also key is the introduction of a peak hour, i.e. an hour where, on the basis of the forecasts of transmission system operators, the gross consumption of electricity generated from sources other than renewable sources or the day-ahead wholesale electricity price is expected to be the highest, taking cross-zonal exchanges into account.

Importantly, a flexible connection agreement will be introduced[5], which means a set of agreed conditions for connecting electrical capacity to the grid that includes conditions to limit and control the electricity injection to and withdrawal from the transmission network or distribution network. The agreement will be able to be introduced on the basis of guidelines adopted by the regulatory authority[6] in this regard.

In areas where network capacity for new connections is limited or unavailable, the transmission system operator (TSOe) and distribution system operator (DSOe) will be able to offer flexible connection agreements.

The areas with limited or no capacity will be identified by the TSOe, who will be obliged to publish detailed information in this respect with high spatial granularity, respecting public security and data confidentiality (with monthly updates)[7].

The TSOe shall also be obliged to inform applicants about the status and treatment of connection requests (including information on flexible connection agreements to be provided within three months of the submission of the request).
If a connection request is neither granted nor permanently rejected, the TSOe must update the information on the treatment of the request and on the possibilities for flexible connection at least on a quarterly basis.

This solution has the potential to ensure that investors whose connection requests are rejected in situations where the operator fails to negotiate a commercial connection can connect installations under a flexible connection agreement.

The conditions to be met by flexible connection agreements are:

- No delaying of network reinforcements in identified areas
- The possibility to convert from flexible to firm connection agreements if the network is developed on the basis of established criteria
- The application of flexible connection agreements as a permanent solution where the regulatory authority considers that network development in a given area is not the most efficient solution

Flexible connection agreements will have to specify, in particular:

- The maximum firm injection and withdrawal of electricity to and from the grid, and additional flexible injection and withdrawal capacity that can be connected and differentiated by time blocks throughout the year
- The network charges applicable to both the firm and flexible injection and withdrawal capacities
- The agreed duration of the flexible connection agreement and the expected date for granting connection to the entire requested firm capacity

System users connecting under a flexible connection agreement will be required to install a power control system certified by an authorised entity[8].

Entry into force of new regulations

The grid flexibility and flexible connection regulations set out in the package will partially enter into force 20 days after the publication of the Regulation in the Official Journal of the European Union. The remaining part of the rules, which are covered by the Directive, will be implemented within 6 months of the date of entry into force of the Directive (the same date as for the Regulation).

[1] Regulation of the European Parliament and of the Council amending Regulations (EU) 2019/942 and (EU) 2019/943 as regards improving the Union's electricity market design and Directive of the European Parliament and of the Council amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union's electricity market design (the package has been adopted by the EU Council and is awaiting the signature of the EU legislators).
[2] Supreme Audit Office, Information on the results of the audit. Development of the electricity distribution network, 2024 - the report shows, among other things, that in 2021, 46% of 110 kV (HV) power lines were over 40 years old, half of which were over 50 years old.
[3] Bulletin 01/2023 of the Energy Regulatory Office, pp. 72-73 - more than 7,000 negative decisions were issued in 2022 alone, an increase of approximately 88% compared to the previous year.
[4] Article 2(79) of Regulation 2019/943.
[5] Article 6a of Directive 2019/944.
[6] In Poland, the President of the Energy Regulatory Office.
[7] Article 50(4a) of Regulation 2019/943.
[8] The certification is likely to be made by Polskie Sieci Elektroenergetyczne.

REMOTE HEARINGS BEFORE THE NATIONAL APPEALS CHAMBER? AMENDMENTS TO THE PUBLIC PROCUREMENT LAW

JAKUB KRYSA

MICHAŁ WARAKSA

The Ministry of Economic Development and Technology has prepared a draft law proposing a number of changes to commercial and administrative law. One of the acts to be amended is the Public Procurement Law. We review the key points of the government's bill.

Current rules of procedure for appeals

There is no evidence preclusion in the current regulations. This means that each party to the appeal proceedings before the National Appeals Chamber may present evidence in support of its arguments or in rebuttal to the arguments of the opposing party until the hearing is closed. The appeal is heard in public, with the participation of the parties – at the seat of the National Appeals Chamber.

Legislator prioritises speeding up appeal proceedings

The amendment to the Public Procurement Law will change these rules.

Firstly, the parties will have to present all the evidence, otherwise they will lose the right to use it during the appeal proceedings. And this in the first pleading. The presentation of evidence at a later stage will only be possible in exceptional cases – e.g. if the need arises in the course of the appeal proceedings.

Secondly, the amendment will introduce the possibility of holding a remote hearing – provided that the nature of the activities to be carried out at the hearing allows for the hearing to be held at a distance and that this does not disrupt the proper course of the proceedings or infringe the procedural rights of the parties and participants in the proceedings.

The other proposed changes are:

- Reduction of the time limit for joining the appeal proceedings to two days from receipt of the notice of appeal
- The obligation for the contracting authority to file a response brief on pain of losing the right to use evidence (currently, the contracting authority has the right to file a response brief, but is not obliged to do so)
- The obligation to attach to pleadings submitted in the course of the proceedings proof of service of those pleadings on the other parties and participants in the proceedings

Our assessment of the changes

The impact of the proposed amendment, if it comes into force, remains to be seen. Certainly, some of the changes may simplify the appeals procedure (e.g. remote hearings), but some of them, such as evidence preclusion, raise some doubts.
Appeal proceedings are by definition to be conducted expeditiously (within 15 days of service of the appeal on the President of the Chamber), so additional restrictions on the presentation of evidence may deprive the parties of their right to defend their case.

PREVENTING DISINFORMATION OR SLAPP / OR WHAT ELECTION LAWSUITS LOOK LIKE IN PRACTICE

OLGA SENATOR

The parliamentary, local government and European Parliament elections are behind us. Each was preceded by an election campaign - a period when candidates present their manifestos and the public is more interested in them. This is a time when information about people seeking votes spreads extremely quickly, which can contribute to the dissemination of disinformation or untruths.

Spreading disinformation – what does the Election Code say?

Article 111 of the Election Code is intended to prevent the spread of false information during an election campaign.

It gives candidates or representatives of electoral committees the right to bring such cases to court.

In the petition (Polish: "wniosek w trybie wyborczym") they can, inter alia, ask the court to:

- Prohibit the dissemination of such information
- Order the rectification of such information
- Order the publication of a response to the disseminated information infringing personal rights
- Order the publication of an apology
- Order the contribution of up to PLN 100,000 to a public benefit organization

This wide range of claims can only be made by a candidate during the election campaign, i.e. from the day the election is announced until 24 hours before polling day.

The regulations provide that the petition is to be examined expeditiously, i.e. within 24 hours of its receipt by the court, which will immediately deliver a decision concluding the proceedings in the case together with a statement of reasons. The parties have a further 24 hours to file an appeal, which should also be heard within 24 hours of receipt by the appeal court.

Election lawsuits – what are the rights of the other party?

Petitions to bring an action under the Election Code are heard by the court in non-contentious proceedings. The candidate's opponent is not called a defendant, but a participant. However, this does not deprive them of the right to defend and present their position in the case.

Although Article 111 of the Election Code does not explicitly mention the participant's right to file a reply, in practice the courts oblige the participant to present their position in writing. However, this does not extend the time limit for hearing the case, which, as a reminder, is 24 hours.

Therefore, a participant against whom allegations of dissemination of false information are made may be given only a few hours by the court to read the petition, collect evidence and present it, together with relevant arguments, in a pleading.

Can the action relate to press articles

According to the literal wording of the regulation, an action brought under the Election Code may relate to campaign material and statements or other forms of campaigning containing false information.

In practice, such actions are often brought by politicians standing for election to counter information unfavourable to them in press material published in print or online. The question therefore arises as to whether press material can be considered campaign material or a form of campaigning.

During the European Parliament elections campaign, in a case brought by a well-known politician, the Regional Court in Krakow held that a press article was neither campaign material nor a form of campaigning and that the press were not obliged to refrain from publishing information about politicians during the campaign. The publication of materials on candidates during this period does not make the journalist or press publisher a campaigner, but rather constitutes the fulfilment of the function of the press, which, in a democratic state under the rule of law, is to fulfil the citizens' right to information about public life. The Regional Court therefore agreed with the argumentation of the law firm representing the publisher and dismissed the politician's claims in their entirety.

Is any election lawsuit a SLAPP?

Each case has its own peculiarities and it cannot be ruled out that a press publication in specific circumstances may constitute campaigning.

Irrespective of the outcome, however, taking legal action forces the press to devote time, personnel and financial resources to rapidly engage in the proceedings and present their position.

In this context, the instrumental use of the mechanism under Article 111 of the Election Code can be classified as SLAPPs >>, i.e. strategic lawsuits against public participation aimed at suppressing debate, which are increasingly criticised by freedom of speech and press freedom activists.

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