

EDITORIAL

Dear Readers,

The date when Poland was to overcome the final barrier to its full membership in the European Union had been awaited with considerable impatience: on May 1st, 2011, 7 years after Poland's accession to the EU, all Polish citizens, as well as the citizens of the other seven Central & Eastern European Member States, have become entitled to undertake work across the European Union, including Germany and Austria, without having to apply for a work permit.

What is going to happen?

There are mixed opinions. Yet, the general consensus is that on May 1st, 2011 and in subsequent weeks nothing spectacular will happen. The question of mid- and long-term consequences remains: also here, a straightforward answer is not as important as the change of perspective, which has taken place. Almost no representative of an interest group perceives the issue from the national point of view, there can be rather heard general considerations from various vantage points regarding the advantages and disadvantages of doing away with restrictions for workers, which makes EU unification an anxiety-free issue. Despite fears among German business representatives of wage dumping on the part of Polish workers, it is generally assumed, that due to the ageing of the German society and demographic changes, the influx of a large labour pool will be favourable to the economy.

There was agitation in response to the statement issued on January 17th, 2011 in Frankfurt/Oder, wherein also DGB (Confederation of German Trade Unions) supported the establishment of a completely free flow of labour and expressed interest in actively contributing to the cooperation between Polish and German workers.

Strangely, it is Polish statistics that anticipate the highest numbers of workers moving to Germany, supposedly running into hundreds of thousands of people over the next few years, with fears that workers leaving Poland will primarily rank among the most highly qualified. On the up side, Polish workers will be able to earn more.

It is also a general consensus that statistics are not based on reliable surveys for this issue. Moreover, no one maintains, that citizens of any Central and Eastern European state would move just out of willingness to leave their country. Rather, workers are more likely to move to another Member State, if the potential employer's state offers them much better work conditions.

To end these considerations, it seems highly likely that the goal of EU will be achieved, whereby, after political barriers have been removed, employers and employees should enter into contracts based on economic criteria, which, from the business point of view, should be optimal for most. Thus, the EU system stands to prevail yet again, contrary to all the naysayers.

Wishing you a pleasant reading of our Iu\$letter.

With kind regards,

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The law firm

The consulting firm „von Zanthier & Schulz“ and „von Zanthier Kancelaria prawnicza“ provide services within the area of legal advice and tax consultancy as well as audit. Our purpose is to extensively attend to clients judicial and fiscal with their investment plans and exercise of economic activities in Germany and Poland.

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INCREASED RENT FOR PERPETUAL USUFRUCT – WHETHER AND HOW TO FIGHT IT?

1. Introduction

In Poland, the perpetual usufruct law (Art. 232 and subsequent articles of the Civil Code), like the German “Erbbaurecht”, allows its holder – usually over a period of 99 years and in return for an annual fee – to use land, erect buildings thereupon and potentially, encumber the right of perpetual usufruct. The land held under perpetual usufruct may be owned by the State Treasury or local government.

More and more companies in Poland (including Poznań, too) are forced to face a considerable and often quite unexpected, increase of fees for perpetual usufruct. It is anticipated that in 2011 only in Poznań increased perpetual usufruct fees may affect approx. 2000 perpetual usufruct holders, including many businesses. The increase will amount to approx. 200–400%, and in some cases as much as 1000%, therefore being an enormous additional burden on the land holders. Such action on the part of Poznań's officials is often hard to understand.

2. The principles for increasing payments for perpetual usufruct

Perpetual usufruct holders are obliged to make annual payments for perpetual usufruct to the State Treasury or the applicable local government bodies (including also applicable municipalities). In the case of enterprises, the amount of the above fee depends on a series of factors, including:

- the present value of land lot (or a part thereof) used by the enterprise, and
- a basic percentage rate to calculate the amount (amounting to 3% for most businesses).

According to the provisions of the Real Estate Management Act of 21.08.1997 (Journal of Laws of 2004, no 261, item 2603 as amended), which applies to the issue under consideration, the amount of rent to be paid for perpetual usufruct may be updated on an annual basis based on an opinion of a property valuer (who draws up the so-called “operat szacunkowy” – appraisal study). If the valuer recognises, that the value of the land has increased (compared to the years before), it may in principle lead to a recalculation and therefore increase of the perpetual usufruct fee.

3. Legal remedies against increased payments for perpetual usufruct

Both the Real Estate Management Act and the ordinances adopted on its basis, provide for rigorous premises which should be met to warrant an increase of the perpetual usufruct fee.

The extensive scope of necessary actions related to increasing the perpetual usufruct fee, coupled with the haste of officials (who often act to increase the fees as fast as possible to increase the income from that source) may result in: 1) failing to meet the premises justifying the increase (fewer cases), or 2) undue overestimation of the updated amount (more cases).

Moreover, please note that the fee under consideration is updated on the basis of a study drawn up by property valuers who are usually chosen through public procurement. The basic selection criterion is usually the lowest price. As a result, in practice it often

happens that under the pressure of time the valuers fail to take into account all the circumstances of a given case, fail to meet a series of strict statutory requirements, which leads to overestimating the value of the land, and consequently – an unwarranted or partly unwarranted increase of the perpetual usufruct fee.

If it is determined that the fee increase is partly or fully unwarranted, then the perpetual usufruct holder can resort to the following remedies:

- apply to an appeals body (the local government appeals court of proper jurisdiction) to determine whether update of perpetual usufruct fee was unwarranted or warranted in a different amount,
- if the above appeals body rules against the perpetual usufruct holder, the latter is entitled to file an objection, leading to court proceedings (at a common court of proper jurisdiction).

The pleas most frequently raised by perpetual usufruct holders in the course of the appeals procedure, or at court, include but are not limited to:

3.1. Formal aspects of terminability of the previous amounts of perpetual usufruct fee

The authority wishing to terminate a valid fee for perpetual usufruct and introduce a new (higher) amount, should meet stringent conditions, as follows:

aa. the notice of update of perpetual usufruct fee (termination of the previous payment and proposal of a new amount) must be made in writing;

bb. the above-mentioned written notice must include the following elements:

- valid land registry data of the real estate,
- proposal of the new amount of annual rent,
- presentation of the calculation method of the new amount of annual rent,
- advise to the usufruct holder about their right to appeal the increase of the payment in question,
- information on the new land evaluation and the place where the perpetual usufruct holder may access the applicable appraisal study;

cc. the letter in question must be delivered to the perpetual usufruct holder by December 31st, of the year preceding the fee update at the latest, if the new fee is to apply as of January 1st, of the following year.

Failing to meet the above premises in full or in part may render the increase of the annual fee for perpetual usufruct null and void in full or in part as of the beginning of the following year.

3.2. Objections against the property valuer's appraisal study

Depending on circumstances, firstly it may be claimed, that the appraisal study on the basis of which the annual fee for perpetual usufruct has been updated, is defective, e. g. due to overpricing of a given real estate, which may result in a partially unwarranted increase of the fee above.

The property valuer's opinion should satisfy all the premises stipulated in the Real Estate Management Act and ordinances adopted thereunder (of particular import in this case is the ordinance of the Council of Ministers of 21.09.2004 on the valuation of real estate and drawing up appraisal studies; Journal of Laws of 2004 no 207, item 2109 as amended).

For instance, the following errors in property valuers' appraisal studies can be identified, which may underlie an effective appeal against fee increase:

aa. averaged prices of real estate sale transactions

Property valuers put a price on real properties on the basis of a comparison of average transaction prices in the sales of similar real estates. In this way, the so-called "representative sample" is identified on the basis of which the property valuer determines and estimates a probable price in a potential sales transaction of the given land property.

One of the most frequent errors is that valuers build a sample which is not representative in nature. In other words, property valuers compare transaction prices of sold land properties which are grossly dissimilar, and therefore not comparable, which may in consequence lead to overpricing a given property.

According to judicial practice (cf. e. g. the decision of the Regional Administrative Court in Poznań of 23.10.2007, file ref. II SA 351/07), the similarity of real estates in light of the provisions of the appraisal study must be beyond any doubt.

bb. temporary drop in value of a given land property

A temporary loss in value of a land real estate may e. g. result from the fact, that applicable authorities disallow or significantly obstruct a particular development of the given real estate and consequently the development of the real estate according to the conditions of the zoning plan, or pursuant to the planning permission, is not possible.

Obtaining a building permit frequently entails procedural problems which extend the wait for the permit by several months or even years, which may have an obvious adverse impact on the value of the land at the time.

cc. economic crisis/decline of demand

When valuating a real estate, the property valuer should take into account the current business relations in the real estate market (sales), yet it is not always the case. An economic crisis or diminished demand for a particular type of real estate (e. g. large properties) may directly affect the current value of a given real estate. The property valuer is obliged to submit appropriate documents which will make it possible to determine whether the given appraisal study sufficiently provides for all the external circumstances (i. e. business relations) with potential impact on the value of the given real estate.

According to judicial practice (cf. the decision of the Regional Administrative Court in Łódź of 12.02.2008, file ref. II SA/Łd 770/07), the market of large-area land properties is investment-oriented in nature, requires large capital and therefore relatively few buyers are involved in it. Meagre demand, in turn, translates directly into the price of such land properties.

4. Conclusions

- Errors in practice on the part of authorities responsible for updating the annual fees for perpetual usufruct are relatively frequent, which may account for grounds for appealing against the increase of the payment in question. In this regard, it is necessary to investigate in detail whether in the given case all the statutory premises for increase the above-mentioned payment have been satisfied. Such analysis may also be performed while the appeal or court proceedings are in progress;
- initiation of the appeals procedure is free of charge;
- pursuant to previous Supreme Court decisions (cf. the decision of 23.06.2005 file ref. III CZP 37/05; decision of 26.10.2005,

file ref. V CK 276/05) the annual rent for perpetual usufruct determined at court becomes due and payable, in the part exceeding the previous amount, after the court decision comes into force. In light of the above, in principle, a perpetual usufruct holder in such a situation is not obliged to pay interest for defaulting in payment of the above perpetual usufruct fee.

Łukasz Dachowski, LL.M.
legal counsel / tax adviser

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LIBERALISATION OF E-INVOICE REGULATIONS

On 01.01.2011, the ordinance of the Finance Minister of 17.12.2010 on sending invoices in electronic form, principles for storing them and methods of presentation to tax or fiscal authorities (Journal of Laws of 2010, no 249, item 1661) came into effect. The ordinance in question puts Polish regulations in line with the requirements of the Council Directive 2010/45/EU of 13.07.2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing.

The ordinance of 17.12.2010 overruled the previously applicable ordinance of the Finance Minister of 14.07.2005 on issuing and sending invoices in electronic form, as well as storing them and presentation to tax or fiscal authorities.

Pursuant to § 4 of the new ordinance, invoices may be sent in electronic form provided that the authenticity of their origin and integrity of content is guaranteed.

Authenticity of origin and integrity of content of an invoice are ensured using measures including but not limited to:

- secure digital signature, verifiable via a valid qualified certificate,
- electronic data interchange (EDI).

It should be emphasized that under the legal regime applicable prior to 01.01.2011, sending invoices in electronic form was possible only using a secure digital signature, verifiable via a valid qualified certificate, or through electronic data interchange (EDI). Under the current legal regime, it is also possible to send invoices in other electronic formats, provided that the authenticity of origin and integrity of content of the invoice are ensured.

According to the information on the homepage of the Ministry of Finance, the aim of the newly introduced changes was to make it possible to send e-invoices via e-mail or making e-invoices available directly on the server. Considering that an e-invoice must comply with requirements as to authenticity and integrity, it is advisable that it should be issued in a non-editable format, e. g. as a PDF file.

Another necessary precondition for sending and providing access to electronic invoices is the invoice recipient's prior approval of this method for sending invoices. The consent may be given in written or electronic form. Please note, that the invoice issuer must receive the recipient's approval prior to sending the first invoice in electronic form.

The invoice recipient may withdraw his consent for receiving invoices in electronic form. The invoice issuer loses the right to send invoices in electronic form to the recipient as of the day following the day of receiving notice from the recipient on withdrawing consent, unless both parties agree with another date for the issuer to lose the right to send invoices in electronic form, not later however than within 30 days.

Pursuant to § 7 of the new ordinance, invoices sent in electronic form may be stored in electronic form outside the territory of the country, provided that tax or fiscal inspection authorities are provided on-line access, using electronic means, to those invoices. Moreover, pursuant to § 8 of the ordinance, invoices sent and stored in electronic form shall be made available to tax and fiscal inspection authorities in a way which makes it possible for them to immediately download and process the data included therein.

What is more, please note, that electronic invoices must have all the features required of invoices in paper form, with one exception: unlike invoices in paper form, e-invoices do not have to be issued in two copies (i. e. one copy marked as the "original" for the recipient and the other marked as "copy" for the issuer). An invoice in electronic form is issued in one copy which is then sent to the recipient and stored by the issuer.

Łukasz Dachowski, legal counsel/ tax adviser
Sabina Guzenda, trainee legal counsel

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POLISH COURT DECISIONS

1. The Supreme Court in the resolution adopted by 7 judges on 15.02.2011, file ref.: III CZP 90/10, took the position that the principle of public credibility of land and mortgage registers protects the buyer of perpetual usufruct also in the case of defective entry in the land and mortgage register of the State Treasury or local government body as the owner of the real estate.

2. In the resolution of 09.02.2011, file ref. III CZP 130/10, the Supreme Court ruled that a partner in a civil partnership is not entitled to pursue a debt comprising the joint estate of the partnership members.

3. Under the resolution of the Supreme Court of 24.02.2011, file ref. III CZP 132/10, on rendering ineffective a debtor's legal action to the detriment of the creditor, the third party who, as a result of this action, derived material profit, shall retain their passive mandate also in the case when – prior to receiving summons – they have disposed of the obtained material profit to the benefit of another person.

4. According to the resolution of the Supreme Court of 21.01.2011, file ref. III CZP 124/10, the application of a property owner to establish a transmission line easement for due remuneration (Art. 3052 § 2 of the Civil Code) interrupts the course of the period of usucaption of said easement.

5. In the resolution of 09.12.2010, file ref. III CZP 104/10, the Supreme Court ruled that failing to perform or an improper performance of a written development agreement gives the contracting party the right to pursue damages from the developer under Art. 471 of the Civil Code.

Sabina Guzenda, trainee legal counsel

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News from our Office

1. The Berlin-Brandenburg Tax Advisers' Association is holding a seminar on September 6th, 2011 on: "The structure and division of the double taxation agreement". The lecture will be held by Dipl.-Kfm. Rüdiger Schulz. The lecture will cover such issues as the meaning and purpose of the double taxation agreement, types of income, as well as the methods for avoiding double taxation. For more information, please go to: www.steuerberaterverband-berlin-brandenburg.de.

2. On October 9th, 2011, Dipl.-Kfm. Rüdiger Schulz will conduct a seminar at the Tax Academy of the Tax Advisers' Association in Hessen on: "Everything about limited tax liability", covering such issues as the differences between unlimited and limited tax liability.

For more information, please go to: www.stbverband-hessen.de.

3. Rechtsanwalt/legal counsel Henning von Zanthier, LL.M. and legal counsel/tax adviser Lukasz Dachowski attended a conference on April 13th - 14th, 2011 organised by the Polish Wind Energy Society (PSEW) in Warsaw.

4. Our Office in cooperation with the World Trade Center (WTC) Poznań organised a seminar on April 7th, 2011 on: "Investment in Germany - opening of the labour market", which included lectures on e. g. the legal framework of investments in Germany, free flow of Polish labour after 30.04.2011, taxation and accounting in Germany for Polish investors. We wish to thank WTC Poznań for the successful cooperation.

5. Rechtsanwalt/legal counsel Henning von Zanthier, LL.M. and attorney Magdalena Stawska-Höbel were interviewed by Tagesspiegel (a Berlin-based daily) for a documentary series "125 years of Kurfürstendamm" (a Berlin boulevard). The series presents interviews with owners/tenants of buildings of particular beauty situated at Kurfürstendamm.

The series will be available online at:

<http://www.tagesspiegel.de/mediacenter/fotostrecken/berlin/125-jahre-kudamm/4073540.html?p4073540=15#image>

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