





## e-Commerce 2011

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# Poland

## Robert Malecki

Karniol Malecki i Wspólnicy Sp. k

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### General

- 1 How can the government's attitude and approach to internet issues best be described?

The Polish legislator appreciates the importance of e-commerce issues and we are seeing the development and implementation of many acts related to e-commerce.

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### Legislation

- 2 What legislation governs business on the internet?

The following acts regulate business on the internet: the Civil and Criminal Codes; the Provision of E-Services Act of 18 July 2002 (APES); the E-Signatures Act of 18 September 2001 (AES); the Personal Data Protection Act of 29 August 1997 (APDP); the Copyright and Neighbouring Rights Act of 4 February 1994 (the Copyright Act); the Telecommunications Law Act of 16 July 2004 (TLA); and the Protection of Particular Consumers' Rights and the Liability for the Damage caused by a Hazardous Product Act of 2 March 2000 (APPCR).

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### Regulatory bodies

- 3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

These are matters for the Ministry of Infrastructure, which may instruct the president of the Electronic Telecommunications Office (ETO) to prepare draft acts in this area. The ETO supervises the telecommunications market. It also imposes financial penalties for breaches of the TLA and failure to observe decisions of the president of ETO. The Polish Chamber of Information Technology and Telecommunications, created in 1993 – by which the Arbitration Court for internet domains operates – gives opinions on existing and proposed legal provisions in these areas.

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### Jurisdiction

- 4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

The general principles referring to civil proceedings apply in such a case. In particular, the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 and Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are of paramount importance.

If at least one of the parties is resident in an EU member state, or in a country that is a party to the Convention, the parties may agree

that a court in a particular member state shall have jurisdiction. Otherwise, persons resident in an EU member state should be sued before the courts of that member state, irrespective of their citizenship. In the case of a legal person, under the above regulation the location of its registered office will determine the appropriate court, or alternatively the place of its main governing body or business activity. The claim may also be brought before a court where the obligation was performed or was to be performed.

Under agreements with consumers, the consumer may initiate proceedings against a legal person or an individual conducting business activity before the court having jurisdiction over its registered office or the place of the consumer's residence. Actions against a consumer may be taken by legal persons or individuals conducting business activity only in courts of the country where the consumer is resident.

If none of the aforementioned acts apply and there are no applicable bilateral agreements, the parties may submit specific cases to the Polish courts or the Arbitration Court. In any case, Polish courts have jurisdiction if the agreement was signed or performed in Poland, the defendant is resident or has its registered office in Poland or the tort or breach was committed in Poland.

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### Contracting on the internet

- 5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Yes, it is possible. In case of contracts formed electronically offline (e-mail), an offer made electronically shall be deemed to have been made to the other person at the moment of its introduction to a means of electronic communication in a way that enabled that person to learn of its content.

In the case of a contract formed electronically online, an offer made electronically is binding for the maker of the offer if the other party confirms its receipt without delay. This rule shall not be applied to contracts concluded by e-mail and other means of individual long-distance communication. In business-to-business relationships the parties may agree on the exclusion of this rule as well. A party entering into a 'click wrap' contract should be provided with the terms and conditions of the vendor's contract. Moreover, the party that is a business entity should provide the other contracting party, inter alia, with information about technical acts covered by the execution of the agreement, the legal effects of confirmation of the receipt of an offer and the languages in which the agreement may be concluded. If the contract is formed by e-mail or another form of individual electronic long distance communication, the general provisions of the Civil Code shall apply. In business-to-consumer (B2C) contracts, the business entity should also meet the additional conditions stipulated by APPCR.

- 6** Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

The general provisions of the Civil Code, AES and APES also apply to internet contracts. B2C contracts are subject to the provisions of the Civil Code and APPCR.

- 7** How does the law recognise or define digital or e-signatures?

Under AES, an e-signature is data in an electronic format which, together with other data to which it has been attached or to which it is logically related, identifies the signatory. The Act further defines an advanced e-signature as being an e-signature ascribed solely to the person appending the signature, who controls the data exclusively using safe equipment.

- 8** Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

The Civil Code makes no such provision, but retention of such data is always in the interest of the contracting party in order to produce evidence in any subsequent proceedings.

Article 180(a) of TLA requires public telecommunications operators or providers of publicly accessible telecommunications services to retain the transmission and localisation data generated or processed by those entities within the territory of Poland for 24 months and to make such data accessible to the competent authorities, including courts and prosecutors, on the basis regulated in the special acts. However, this data does not relate to the content of contracts; it just confirms internet activity (time of log-in, IP number and so on).

AES regulations concerning software create requirements for the formation of electronic contracts. These refer to software meeting specified standards for the proper verification of signature authenticity. APES requires that the service provider ensures the security of the service performed and, in particular, renders it impossible for a third party to access the content of the transmission.

### Security

- 9** What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

Under APDP and APES, the data controller – being the data processor, including the service provider rendering electronic services – must take measures to ensure the protection of personal data that is subject to processing.

- 10** As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

Under AES, a business entity as defined in the Act on the Freedom in Conducting Business Activities of 2 July 2004 (AFCBA) may provide certification services. No permit or licence is necessary, but only an entity entered into the register maintained by the minister of the economy may issue a qualified certificate. Such services may also be provided by the National Bank of Poland and public authority bodies, but only for their own use or in favour of other public authority bodies.

Pursuant to article 11(3) of AES, no liability is incurred for any damage resulting from false data entered in the certificate at the request of the person appending the e-signature.

Providers are liable to recipients for the non-performance or improper performance of their obligations unless the resulting damage was caused by circumstances for which they are not liable and which could not have been prevented by exercising due care.

Qualified certification providers are subject to compulsory liability insurance.

Data for appending the e-signature (a private key) is only available to the person appending the signature, and this person is under no duty to disclose it. Additionally, other information related to the provision of certification services, including data used for verification of the authenticity of the signature and of the person (a public key) is secret. It may be required only by a court or a prosecutor if such information is connected with the pending proceedings, by state authorities when supervising the entities providing certification services, and by other authorities empowered by separate Acts.

### Domain names

- 11** What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

Poland has no special regulations relating to internet domains in the country. Depending on the particular matter, provisions concerning trademark protection, the Combating of Unfair Competition Act of 16 April 1993 (ACUC), copyright law and provisions of the Civil Code will apply. Issues related to registration of specific domains are determined by the regulations of the registration authority. The right to the 'pl.' domain is not reserved for businesses with registered offices in Poland or persons resident in Poland.

- 12** Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

Generally domain names confer no additional rights, as registration of a domain means only that others may not hold this domain as their own. The 'first come, first served' principle applies in domain registration. For example, the NASK, which registers 'pl.' domains, states that it does not check whether the name of the given domain infringes the rights of third parties, and a party which wants to register a domain name should make such declarations before the start of the registration procedure. Industrial property law permits the registration of a domain as a trademark after the completion of specific formalities. However, use of a similar domain may constitute an act of unfair competition, especially where there is a risk that clients will be misled as to the identity of the business holding the given domain.

- 13** Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Trademark holders may sue a third party that is infringing their rights by using the domain name. Holders may demand that such use is stopped, as well as the reimbursement of profits gained by its use or the award of damages, and the court may order the defendant to pay a sum of money for a charitable purpose. These claims can also be made against a person using a registered trademark as an internet domain.

### Advertising

- 14** What rules govern advertising on the internet?

The applicable provisions are ACUC, APES and regulations for the protection of incorporeal interests in industrial or intellectual property. In specific situations, the Press Law of 1984 and the Radio and Television Law of 1992 apply.

- 15** Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

Banned advertising includes: advertising contrary to the law, misleading advertisements, unjust comparative advertising, hidden advertising, advertising that invades privacy, spam and advertising of tobacco, alcohol (beer – on certain conditions), games of chance and medicinal products that do not meet specific requirements.

Certain limitations apply to the advertising of medical services, services rendered by attorneys-at-law, notaries, and legal and tax advisers.

Total bans apply to contents of a criminal nature, including child pornography, pornography with animals or those provoking crime or racial or ethnic hatred.

### Financial services

- 16** Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

The sale of financial services products is subject to APES, article 21 of the AFCBA and article 66(1) of the Civil Code. Service providers must provide the service recipient with information concerning themselves and the contractual procedure.

Chapter 2(a) of APPCR applies to consumers, who must be informed by the service provider about, inter alia, the identity of the service provider, the subject matter and conditions of the transaction, and the right and method by which to withdraw from the agreement. However, this right to withdraw from the agreement does not apply to financial services whose price depends only on fluctuations of the market which are beyond the control of the service provider.

Advertising of financial services products is not subject to specific statutory control but is subject to the requirements of fair advertising arising under ACUC.

### Defamation

- 17** Are ISPs liable for content displayed on their sites?

A website's creator, rather than the ISP, is generally liable for content displayed on the site. However, an ISP may be liable under civil law for any unlawful act as an accomplice of the tortfeasor.

ISPs that are natural persons may incur criminal liability as an accomplice if the content displayed on the website includes prohibited material (eg, defamatory or pornographic content). According to article 12 of APES, an ISP is not liable for the content displayed on the site if it is not an initiator of data transmission, does not choose the recipient of such transmission and does not choose or modify information contained in such transmission.

- 18** Can an ISP shut down a web page containing defamatory material without court authorisation?

If the web page clearly contains defamatory or criminal material, then the ISP may shut it down even without a court order without incurring liability for damages.

### Intellectual property

- 19** Can a website owner link to third-party websites without permission?

Basically, yes. However, Polish law contains no express regulation concerning this issue and each case of linking should be considered individually, particularly with respect to the regulations of the Copyright Act and the Act on Industrial Property of 30 June 2000.

- 20** Can a website owner use third-party content on its website without permission from the third-party content provider?

Under article 50(3) of the Copyright Act, making a work available to the public when and where the public chooses is one example of the fields of exploitation of the work, and this extends to the internet. The owner of the rights to work may use and dispose of such work in all fields of exploitation.

The website owner may not display a third party's content that constitutes a work within the meaning of the Copyright Act without the express consent of the owner of the rights to that work.

However, the principles of permitted public use regulated by the provisions of the Copyright Act apply. In specific cases, a work can be used without the express consent of the copyright owner; however, this is without prejudice to his or her right to remuneration, if applicable.

- 21** Can a website owner exploit the software used for a website by licensing the software to third parties?

Yes, if the website owner has copyright or licence rights to the software in the relevant exploitation fields. If not, the copyright owner's consent is required.

- 22** Are any liabilities incurred by links to third-party websites?

Displaying a link to any unlawful content may result in joint liability in law if there was knowledge of the nature of the content. The entity displaying a link may also be liable if the link is classified as unlawful advertising or when the content or form of the link itself is contrary to law. Moreover, if the placing of a link is contrary to specific provisions of law, it may result in a liability specified by those provisions.

### Data protection and privacy

- 23** How does the law in your jurisdiction define 'personal data'?

Under article 6 of APDP, personal data is any information concerning an identified or identifiable natural person. An identifiable natural person is a person who can be identified directly or indirectly, in particular by identity number or by one or more specific factors determining his or her physical, physiological, intellectual, economic, social or cultural features.

- 24** Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

Pursuant to article 40 of the APDP, the data controller is obliged to notify a data filing system for registration to the Inspector General of Personal Data Protection. The data controller is the person who has real control over the processed data, and is not always the website owner.

The prior and explicit consent of the data subject is required for any sale of the data.

- 25** If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction?

Article 19(4) of APES limits the website owner to profiling its customer base only for advertising, market studies or analyses of service recipients' preferences, and only for the purpose of improving these services' quality. Only the exploitation data and data not necessary to provide the electronic services may be processed when profiling such a base. Exploitation data is data that determines the service recipient's manner of using the electronic service (profile, identification of the telecommunication network or information technology

system, information about the beginning and end of use of the electronic service).

However, processing the above-mentioned data, which identifies the service recipient and his or her telecommunication network or information technology system, requires the prior express consent of the service recipient (the data subject). If consent is not given, the service provider is obliged to make such data anonymous and use only data that does not identify the service recipient.

**26** If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

The transfer of personal data to a third country may take place only if the country of destination ensures at least the same level of personal data protection in its territory as that which is in force in the territory of the Republic of Poland. This rule should not be applied to the transfer of personal data required by legal provisions or by provisions of any ratified international agreement.

The data controller may transfer the personal data to the third country provided that:

- the data subject has given his or her written consent;
- the transfer is necessary for the performance of a contract between the data subject and the data controller, or takes place in response to a request from the data subject;
- the transfer is necessary for the performance of a contract concluded in the interest of the data subject between the data controller and another subject;
- the transfer is necessary or required by reasons of public interest or for the establishment of a legal claim;
- the transfer is necessary in order to protect vital interests of the data subject;
- the transfer relates to data which is publicly available.

In other cases, the transfer of personal data to a third country requires the consent of the Inspector General of Personal Data Protection, provided that the data controller ensures adequate protection with respect to privacy protection and the rights and freedoms of the person whom the data concerns.

### Taxation

**27** Is the sale of online products subject to taxation?

Yes, but the sale of online products is not subject to separate tax provisions and online sales are subject to taxation just like ordinary sales. The issue is regulated by the Income Tax Acts, the Act on VAT and the Act on Civil Law Transactions.

**28** What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Regarding income tax, in certain circumstances this may result in the taxpayer having a permanent establishment in the given country and may result in liability for payment of income tax in that country on income generated in connection with the existence of such permanent establishment.

Placing a server in the Republic of Poland does not influence VAT taxation on sales transactions. The nature of the transaction and the VAT taxation status of the purchaser are crucial to determine VAT liability.

### Update and trends

The Council of Ministers has adopted a draft amendment of the Act on Gambling which permits mutual internet betting. Nevertheless, internet mutual betting will be allowed only after obtaining a permit. On 20 May 2010, the president of Poland signed the Act on the support of development of services and broadband networks in telecommunication, which, inter alia, aims to increase access to the internet and empower local authorities to conduct certain telecommunication activities.

**29** When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

The place of registration should be the tax office competent for the company's registered office or principal place of business. Registration should be effected upon the commencement of business activities.

Internet sales are subject to general VAT rates applicable in Poland: the principal rate is 22 per cent and the reduced rate for some goods and services is 7 per cent. Certain goods and services are not eligible for VAT.

**30** If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Taxation issues for transfer-pricing provisions are not specifically regulated because of their internet relationships. Thus, there will be no difference in tax liability in the case of returns between a Polish parent company and a foreign associated company, as the internet's status as a channel of communication is irrelevant here.

### Gambling

**31** Is it permissible to operate an online betting or gaming business from the jurisdiction?

This issue is regulated by the Gambling Act of 19 November 2009 (AG).

Operating online betting or gaming is not expressly regulated by the AG. However, due to its provisions, cylindrical games, card games, games of dice, games on gaming machines and mutual betting may only be provided in real, non-internet casinos, in bingo rooms and at mutual betting points. Therefore, the operation of such an online business is prohibited.

**32** Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

Online casinos and betting websites offering mutual bets are prohibited in Poland. Under article 107 section 2 of the Tax Criminal Code, it is also prohibited to participate in a foreign game of chance or a foreign mutual bet within Poland. Anyone using such a service within Poland commits a tax offence subject to a fine or imprisonment of up to three years.

### Outsourcing

**33** What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Outsourcing is classified and defined in the Council of Ministers' Regulation of 24 December 2007 on Polish Classification of Business Activity and in the Council of Ministers' Regulation of 29 October 2008 on Polish Classification of Goods and Services.

There is no general regulation concerning the provision of services on an outsourced basis.

Special provisions for the banking sector are provided by the Act on Banking Law of 29 August 1997, which determines the conditions and principles which must be met in order to provide services on an outsourced basis.

Tax law does not provide any special regulations on outsourcing. Therefore, the general provisions of Polish tax law are applicable.

- 34** What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

If outsourcing leads to the termination of employment contracts when the employer hires more than 20 people and a specific group of employees is made redundant, then under the Act on Special Principles of Terminating Employment with Employees for Reasons Not Related to the Employees, if a trade union operates at the employing establishment, the employer must consult with the trade union about such dismissals and is liable to make severance payments.

If the employer hires at least 50 people, it must inform and consult with the employees' council on issues related to changes in the structure and operation of the business before using an outsourced company.

#### Online publishing

- 35** When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

There is no requirement to monitor information displayed on websites through an intermediary and there is no liability if such information infringes third-party rights, provided that the website provider is not aware of the illegal nature of such information. If the provider receives official notice about the unlawful nature of the information, it is not liable to a third party if it prevents access to that information without delay. If a website provider is simultaneously a content provider, it is liable for the information displayed online under the general principles of the Civil Code or for infringement of other rights (eg, intellectual or industrial property rights). See question 12.

- 36** If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

The Databases Protection Act (DPA) applies. A website provider who has a right to a data filing system may prohibit unauthorised third parties from the total or partial use of such a data filing system.

However, it is allowed to use part of a data filing system made available on a website, which is not essential as to the quality and quantity. Moreover, such use should not infringe the normal use of the data filing system or harm the interests of its owner.

In any event, use of the database is permitted if the third party uses it for didactic or research purposes and identifies the source, or if such use is justified for a non-commercial goal, or for internal security and court or administrative proceedings. Despite this, recurring and systematic downloading or secondary use of the database is not permitted if this is contrary to normal use and results in unjustified violation of the owner's interests.

If the data filing system can be regarded as a work according to the provisions of copyright law, this will apply instead of the DPA's provisions.

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