

Providing a headquarters for business to a company from the same capital group and the status of an obligated institution

Providing a
headquarters
for business

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Abstract

Purpose – By implementing Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015, the Polish legislator decided to pass the Act of 1 March 2018 on counteracting money laundering and financing of terrorism (AML). In connection with it, many interpretative doubts have arisen. The purpose of this paper is to explain one of them, namely, to indicate whether the provision by a company of a registered office for economic activity to another company from the same capital group means that the company granting its headquarters has achieved the status of an obligated institution pursuant to Article 2 section 1 point 16 letter c) of AML.

Design/methodology/approach – This study is based on a grammatical, systemic and functional interpretation. It is enriched with national and supranational regulations, doctrinal considerations and current jurisprudence.

Findings – On the basis of the conducted analysis, the author concludes that providing a headquarters to another company from the same capital group may mean meeting the conditions of an obligated institution within the meaning of Article 2 section 1 point 16 letter c) of AML and obtaining by the company providing the registered office the status of an obliged entity.

Originality/value – This paper contributes to the clarification of the AML interpretation problem. Adopting a similar approach when analysing other obligated institutions may positively influence the consolidation of the correct interpretation path of AML regulations.

Keywords Business, Headquarters, Act on Counteracting Money Laundering and Financing of Terrorism, Capital group, Joint-stock company, Obligated institution

Paper type Research paper

1. Introduction

In connection with implementation the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (further as: “the Directive”) into the Polish law by establishing the Anti-Money Laundering and Terrorism Financing Act of 1 March 2018 (further as: “AML”) many doubts have arisen



about the entity having the status of an obligated institution. One of them is the question whether the provision by the company of a registered office for business activity to another company from the same capital group means that the company granting the headquarters has achieved the status of an obligated institution pursuant to article 2 section 1 point 16 letter c) of AML. Provision of the headquarters may consist, for example, in the lease of premises for the headquarters.

The analysis of the above-mentioned problem must be based on a grammatical, systemic and functional interpretation. The purpose of this article is to demonstrate that such activity of a company towards another company from the same capital group meets the conditions of having the status of an obligated institution, and therefore imposes on the company providing its headquarters the obligations typical of an obligated institution under the AML.

2. The obligated institution

In the first instance the concept of an obligated institution requires interpretation. According to Article 2 section 1 point 16 letter c) of AML the obligated institution is the entrepreneur within the meaning of the Act of 6 March 2018 Entrepreneurs' law (further as: "Entrepreneurs' law") not being other obliged institution, providing services consisting in providing a registered office, an address of the place of business or a correspondence address and other related services to a legal person or an organisational unit without legal personality.

The above-mentioned definition refers to the concept of an entrepreneur described in Entrepreneurs' law as follows: "An entrepreneur shall be a natural person, a legal person or an organisational unit not being a legal person that is granted legal capacity by a separate act of law, conducting business" [1]. There is no doubt that a joint-stock company has legal personality [2], therefore it can undoubtedly be an entrepreneur in the above sense. Also "business" has its legal definition: "Business shall be organised gainful activity, conducted in one's own name and on a continuous basis" [3]. However, it is full of soft concepts that need to be interpreted. All the premises of business [4], that is:

- gainful activity;
- organized character;
- conducted on a continuous basis; and
- conducted in one's own name.

they must be met cumulatively (Komierzyńska-Orlińska, 2019, argument 8) [5] as there is no business if any of the above-mentioned factors does not apply to the assessed activity. This makes it necessary to interpret each of the premises separately.

A gainful activity is therefore an activity that is undertaken to achieve some kind of financial gain (profit). Therefore, neither charitable activity nor courtesy assistance may be qualified as gainful activity, because the purpose of their undertaking is not limited to the will to obtain benefit [6]. It does not matter if the purpose of the activity has been achieved [7]. The activity is gainful if it was undertaken for profit. The effect in the form of a financial gain is outside the scope of the condition for assigning an activity to a profit-making nature [8]. This does not mean that if profit is only a secondary purpose of an activity or its purpose is completely different, then it is not an business. The mere minority of the goal does not exclude its existence, and moreover, the definition of business contained in the discussed article is not an exclusive definition in the Polish legal system and even without having the feature of earning money, the activity may be considered an business on the basis of legal

norms other than those resulting from Article 3 Entrepreneurs' law. Quoting Voivodship Administrative Court in Gliwice: "[...] the lack of profit-oriented activity does not prejudice the economic nature of the activity at all. Whether entities conducting business assume profit, i.e. a surplus of revenues over expenses, or only covering the costs of their activity with their own income (as in the case of a housing cooperative), is related to the type of statutory tasks performed by them and the objectives of their activity" [9].

Moreover, recognizing that such an activity is an business, requires organized character. This premise includes both formal and legal organization, i.e. registration of a company in the register of entrepreneurs, tax and statistical notification, setting up an appropriate bank account or obtaining a license, as well as obtaining funds for financing business, purchasing or renting a suitable premises, employing workers [10]. Of course, this is not a closed catalogue, especially since none of the above examples is a *sine qua non* for understanding organization. Organization is ultimately based on the disclosure that the activity is not undertaken *ad hoc*, but that it has been prepared for and that its execution is in some way structured and therefore planned.

Another premise is the continuous nature of the activity, which means that it is not incidental, accidental, one-off, not focused on repetition or cyclical, and the interpretation of a specific case depends on the context. Seasonality or suspension of operations does not negate its continuous nature (Kruszewski, 2019, argument 2.4.) [11]. As pointed out by the Supreme Court "continuous in business has two aspects. The first is the repetition of activities, so as to distinguish the business carried out from a single contract for specific work or orders or service contracts, which do not in themselves constitute or do not yet constitute an business. The second aspect, resulting from the first, is the intention to run an business for a long time. Both aspects depend on the behavior of the economic operator[12].

Finally, activities to be defined as economic must be performed in their own name, which means at their own risk, independently, with the disclosure of the entrepreneur as a party to the relationship between him and another entity. It was argued in the doctrine that business activities are not activities taken under the employment relationship in accordance with the Labor Code[13], power of attorney or lease of the enterprise (Komierzyńska-Orlińska, 2019, argument 12).

It has already been indicated above that the discussed definition is not exclusive in the Polish legal system. However, it is a universal definition, which means that it always applies if the regulations do not refer to a different definition of business (Komierzyńska-Orlińska, 2019, argument 7). Since it is within the scope of the Entrepreneurs' law, just like the definition of the entrepreneur, it is undoubtedly the concept of business indicated in the definition of an entrepreneur that refers to it. In view of the above, it should be pointed out that a joint stock company may be an entrepreneur within the meaning of the Entrepreneurs' law. However, this is not tantamount to having the status of an obligated institution.

The legislator does not indicate whether the provision of the registered office address referred to in the discussed AML regulation is to be part of the entrepreneur's business, or whether it can be a separate activity, even not of an economic nature. From the literal wording of Article 2 section 1 point 16 letter c) of AML, it can be concluded that the status of entrepreneur may be held by a given entity for any reason, while providing a registered office address may (but does not have to) be a separate activity of the entity. This argumentation is reinforced by the regulation of Article 2 section 1 point 12 of the AML, which lists the types of activities undertaken as part of the business covered by this standard. Therefore, since the legislator did not specify in Article 2 section 1 point 16 letter c) of AML directly that the business of the entity is to provide the headquarters to another

entity, this means that it may be, but does not have to be, an activity within the business of the providing entity. This is important as it leads to the conclusion that determining the lease of premises to another company as an business is irrelevant to the possibility of meeting the AML conditions.

It should be emphasized that in the discussed example the company does not meet any other definition of an obligated institution under Article 2 section 1 of AML. Otherwise, the presented analysis would have a completely different context. Moreover, it should be noted that the legislator does not exclude the application of the discussed norm to capital groups, and it is correct to say that within the paradigm of the rational legislator, if the legislator wanted to make such an exclusion, it would be established. This paradigm also supports the position according to which the provision of a headquarters by an entity to another entity does not have to be included in the scope of its business, because if the legislator wanted these activities to be combined, he would construct a provision in such a way that the resulting norm would not leave any doubts in this matter.

3. Object of activity

It is also necessary to determine what type of activity is within the scope of the application of the standard resulting from Article 2 section 1 point 16 letter c) of AML. If it applies only to activities of a main nature, even ancillary activity consisting in providing a headquarters for business to a company from the same capital group does not make the entity granting the headquarters the obligated institution.

However, it cannot be read directly from the norm resulting from the cited provision. Therefore, it should be recognized that the provision of a headquarters may be both the main and an ancillary activity, which is sufficient for the purposes of qualifying an entity as an obligated institution. It should be inferred that if the legislator wanted to limit the activity only to the main or ancillary activity, it would have done so directly, as it did in Article 2 section 1 point 15a of AML, where it was explicitly stated that the obligated institution is an entrepreneur within the meaning of Entrepreneurs' law, whose *basic* business is the provision of services consisting in the preparation of declarations, keeping tax books, providing advice, opinions or explanations in the field of tax or customs law, which are not other obligated institutions [14].

Also at this point, the aforementioned rational legislator paradigm should be recalled, supporting the arguments concerning the distinction between a main and ancillary business. If the legislator intended to limit the norm from Article 2 section 1 point 16 letter c) of AML to the main activity of the entity, this provision would be structured in such a way that the scope of application of the norm resulting from it would cover only basic business, as the legislator did in Article 2 section 1 point 15a of AML.

4. Purpose of introducing the norm

As indicated above, the AML was established in the implementation of the Directive. In terms of the subject of these considerations, it does not introduce any significant changes. For comparison, the provisions in question are presented in the table below (Table 1) [15][16].

As can be seen from the presented list, the Polish act does not change much in relation to the Directive. The implementation, at least to the extent interesting for the subject of this article, actually consisted in almost literal transplantation of the provisions of the Directive to the AML.

In order to understand the context of establishing the discussed standard, one should explore its context. The Directive is part of a broader anti-money laundering and anti-terrorist financing strategy. This strategy also includes the work of the Expert group on

Table 1.
Comparison of the
relevant provisions
of the directive and
AML

The directive	AML
<p>Article 2 section 1 This Directive shall apply to the following obliged entities: [...] 3) the following natural or legal persons acting in the exercise of their professional activities: [...] c) trust or company service providers not already covered under point (a) [15] or (b) [16]; [...]</p> <p>Article 3 For the purposes of this Directive, the following definitions apply: [...] 7) ‘trust or company service provider’ means any person that, by way of its business, provides any of the following services to third parties: [...] c) providing a registered office, business address, correspondence or administrative address and other related services for a company, a partnership or any other legal person or arrangement; [...]</p>	<p>Article 2 section 1 The following shall be obliged institutions: [...] 16) within the meaning of the Act of 6 March 2018 Entrepreneur law, not being other obliged institutions, providing services consisting in: [...] c) providing a registered office, an address of the place of business or a correspondence address and other related services to a legal person or an organisational unit without legal personality, [...] Article 2 section 1 point 16 letter c) [...] c) providing a registered office, an address of the place of business or a correspondence address and other related services to a legal person or an organisational unit without legal personality, [...]</p>

Money Laundering and Terrorist Financing and Joint Committee. The European Commission and the European Council are actively involved in combating money laundering and terrorist financing. Not only does the European Union implement standards on counteracting money laundering and terrorist financing within its borders, but it is also the responsibility of the European Commission to keep a list of non-EU countries whose systems are insufficient to combat these social phenomena.

The Directive implemented the recommendations of The Financial Action Task Force (FATF) of 2012, which indicated a number of comments as to what solutions should be implemented by the Member States in their legal systems. The first step should be to identify, assess and understand the risks of money laundering and terrorist financing, and then take steps, including establishing a competent authority or a dedicated mechanism to coordinate actions in risk assessment and use available resources to reduce these risks[17]. As early as 2012, the aim of these recommendations was to draw Member States’ attention to the problem of money laundering and terrorist financing, as well as the risks arising from them. Currently, the implementation of these recommendations from soft law has become generally applicable and binding law throughout the European Union, which should be implemented in accordance with the legal order in connection with the principle of European Union solidarity.

The objectives and the reasons of European Union for tackling the practice of money laundering and terrorist financing influenced the form of the preamble to the Directive. According to the dictionary definition, the concept of money laundering means “introducing into the legal circulation of money from illegal sources, e.g. trafficking in arms, drugs, in order to legalize them”[18]. The Directive also understands them in this way. As it states in

the preamble: “The flow of illicit money can damage the integrity, stability and reputation of the financial sector, and threaten the internal market of the Union as well as international development. Money laundering, terrorism financing and organised crime remain significant problems which should be addressed at Union level. In addition to further developing the criminal law approach at Union level, targeted and proportionate prevention of the use of the financial system for the purposes of money laundering and terrorist financing is indispensable and can produce complementary results”[19]. This shows that the European Union recognizes the problem of introducing funds from illegal sources into circulation and its importance for the safety and fairness of trading. Moreover, it clearly emphasizes that only top-down mechanisms at the EU level are not sufficient to counteract this practice, because the necessary systems for combating money laundering and terrorist financing at national levels should also be introduced.

The need for cooperation is highlighted in the Report from the Commission to the European Parliament and the Council on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities of 26 July 2017 (further as: “the Report”). The report noted that “a common technique for criminals is to create shell companies, trusts or complicated corporate structures to hide their identities. In such cases, while the funds involved may be clearly identified, the beneficial owner remains unknown. According to law enforcement authorities’ information, in major ML/TF cases opaque structures have been recurrently used to hide the beneficial owners. This widespread issue is not limited to certain jurisdictions or certain types of legal entities or legal arrangements. Perpetrators use the most convenient, easiest and securest vehicle depending on their expertise, location, and the market practices in their jurisdiction”[20]. In view of this content of the report, it is impossible not to notice that the Directive also aims to verify the flow of funds between companies, but it does not exclude the possibility of money laundering within one capital group, which makes it reasonable that its scope also covers companies from one capital group.

Considering the above, it seems correct that the standards resulting only from the recommendations of relevant bodies and institutions turned out to be insufficient, so the European Union decided to implement these standards in a generally applicable act. The European Union does not rule out the application of regulations on an obligated institution to entities from one capital group, while the content of the preamble and the Reports indicate that the standards concerning an obligated institution should also apply to a company from one group, as it is in line with the objective of transparency of funds, flowing between companies. To verify only the capital group externally in relations with third parties, and at the same time agree to the procedure with which the Directive is to fight within the same group is very difficult to imagine.

5. Summary

Taking into account all the above-mentioned arguments in terms of grammatical, systemic and functional interpretation, it should be concluded that providing premises to another company from the same capital group means that the company providing the premises obtains the status of an obligated institution. The provision of a headquarters by, for example, rental of premises may or may not be within the bounds of the business activities of the company providing the registered headquarters. It is irrelevant for the fulfilment of the conditions of Article 2 section 1 point 16 letter c) of AML. AML also does not limit the provision of the headquarters to the main activity, which in turn means that also secondary, incidental activities consisting in providing another entity with a headquarters may mean fulfilling the conditions for obtaining the status of an obligated institution. This argument is

strengthened by directly established by the legislature in Article 2 section 1 point 15a of AML limitation to the activities performed by the entity as the main activity. The rational legislator's paradigm leads to the conclusion that if the legislator wanted to narrow down the activities referred to in Article 2 section 1 point 16 lit. c) of AML, it would do so directly in line with Article 2 section 1 point 15a of AML.

The Directive, established as part of a broader program of counteracting money laundering and terrorist financing, is an act of binding law, introducing into the common law the existing soft law recommendations in the field of combating this practice. Simultaneously, in the Polish system, the implementation was done almost directly (at least in the scope covered by this article), as the provisions of the Directive and the AML look almost identical. However, this does not change the fact that both these acts are based on the same idea expressed in the preamble to the Directive. The purpose of the introduced standards is to make cash flows between entities transparent and there is no exemption for capital groups anywhere. Anyway, it would be irrational to counteract money laundering and terrorist financing outside the group, while in the middle of the group turn a blind eye to potential violations.

Therefore, a firm answer should be given that providing a headquarters to another company from the same capital group may mean meeting the requirements of an obligated institution within the meaning of Article 2 section 1 point 16 letter c) of AML and obtaining by the company providing the registered office the status of an obliged institution. Provision of the headquarters may consist also in the lease of premises for the headquarters.

Notes

1. article 4 section 1 of Entrepreneurs' law.
2. article 12 of the Act of 15 September 2000 Code of Commercial Companies.
3. article 3 of Entrepreneurs' law.
4. The judgment of the Supreme Court of October 30, 2018, I UK 277/17, LEX no. 2570510.
5. Look at: [Kruszewski, 2019](#), argument 2.5.
6. Look at: *ibidem*, argument 13 letter b and the judgment of the Supreme Court of September 23, 2020, II UK 353/18, LEX no. 3106218.
7. Look at: The judgment of the Supreme Court of April 6, 2017, II UK 98/16, LEX no. 2307127: "The condition of the profit-making nature of the activity will of course be met when its conduct brings real profit, but it is also necessary to recognize the situation where, despite the failure to achieve it, the entrepreneur was focused on earning income. In this respect, the goal set by the entrepreneur is important, which in each case, through the implementation of the intended undertakings, must assume a financial result.
8. Look at: *ibidem*, argument 13, letter a,c.
9. The judgment of the Voivodship Administrative Court in Gliwice of April 7, 2008, IV SA/GI 1157/07, LEX no. 519071.
10. Look at: The judgment of the Supreme Court of April 6, 2017, II UK 98/16, LEX no. 2307127.
11. Look at: [Komierzyńska-Orlińska, 2019](#), argument 15.
12. Look at: The judgment of the Supreme Court of September 21, 2017, I UK 366/16, OSNP 2018, no. 7, item 98; The judgment of the Supreme Court of April 11, 2019, I UK 33/18, LEX no. 2645121; The judgment of the Supreme Court of July 2, 2019, I UK 100/18, OSNP 2020, no. 8, item 81; The judgment of the Supreme Court of September 23, 2020, II UK 353/18, LEX no. 3106218.

13. The Act of 26 June 1974, Labor Code.
14. article 2 section 1 point 15a of AML.
15. It applies to auditors, external accountants and tax advisors acting in the exercise of their professional activities.
16. It applies to notaries and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the buying and selling of real property or business entities, managing of client money, securities or other assets, opening or management of bank, savings or securities accounts, organisation of contributions necessary for the creation, operation or management of companies and creation, operation or management of trusts, companies, foundations, or similar structures.
17. Look at: "International standards on combating money laundering and the financing of terrorism & proliferation. The FATF Recommendations", 2012 (updated 2021), available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>, accessed 17 August 2021, p. 10: "Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively".
18. "Money laundering", available at: <https://encyklopedia.pwn.pl/haslo/pranie-brudnych-pieniedzy;3961715.html> accessed 18 August 2021.
19. the Directive, point 1.
20. the Report, point 2.2.2.

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- Kruszewski, A.K. (2019), "Commentary on article 3", in Pietrzak, A. (Ed.), *Entrepreneurs' Law. Commentary*, Wolters Kluwer, Warsaw, LEX.

Further reading

- "Anti-Money laundering and terrorism financing act of 1 march 2018".
- "Directive (EU) 2015/849 of the European parliament and of the council of 20 may 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending regulation (EU) no 648/2012 of the European parliament and of the council, and repealing directive 2005/60/EC of the European parliament and of the council and commission directive 2006/70/EC".
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