

CIVIL-LAW PARTNERSHIP IN THE SYSTEM OF COUNTERACTING MONEY LAUNDERING AND TERRORISM FINANCING (AML/CFT) / Kamil Majewski

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Abstract: *This article addresses the problems of legal status of the so-called civil-law partnership, as specified in Art. 860 § 1 of the Polish Civil Code, from the point of view of performing the obligations in the area of counteracting money laundering and terrorism financing. First, the author provides a detailed characterization of this civil law institution and resolves that the civil-law partnership does not have legal subjectivity separate from its partners, and then points to the consequences of the above facts in the area of counteracting money laundering and terrorism financing. In conclusion, the author formulates a general conclusion that the obligations in respect of counteracting money laundering and terrorism financing, including financial safeguards, should be applied to the civil-law partnership partners, as customers in the understanding of Art. 2(2) item 10 of the Polish AML Act.*

Key words: *civil-law partnership, AML, CFT, Fourth AML Directive, legal persons, natural person, financial safeguards, obliged institutions, system of counteracting money laundering and terrorism financing, Polish law, EU law*

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1. INTRODUCTION

In the Polish legal order, there is a system of counteracting money laundering and terrorism financing. The adopted solutions, in model terms, are consistent with European legislation.¹ Such situation is a consequence of the fact that both Poland and other Member States of the European Union (EU) have been obligated to implement 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

¹ In support of the conclusion that practice deviates from model assumptions, see work of Majewski (2020, pp. 92–103) and regarding the fact that not all solutions work out in practice, see work of Majewski (2017, pp. 165–182).

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.² In the light of open borders, common markets and other circumstances facilitating widely understood business contacts within the EU, it is fully justified to address such problems on the level of European legislation. Also, the legislative method applied (Directive of the European Parliament and of the Council) is adequate. Adoption of an act requiring implementation in national legal orders implies allowing for a number of crucial discrepancies between individual legislations, which are dictated by social, legal and economic circumstances, including local market specificity (Majewski, 2018, pp. 67–77, cf. 2019, pp. 187–193),³ including in the banking market.

The Fourth AML Directive was implemented in the Polish legal system by the Act of 1 March 2018 on counteracting money laundering and terrorism financing,⁴ which, in principle, entered into force on 13 July 2018. Despite its application for over one year, in the second half of 2019, the Polish legislator, inspired by the position of European institutions, reached the conclusion that it was necessary to introduce amendments to certain solutions adopted in 2018. Those amendments were finally introduced in the act of 16 October 2019 amending the Act on counteracting money laundering and terrorism financing.⁵ From the point of view of banks, the introduced modifications were not revolutionary (cf. Majewski, 2020, pp. 92–103).⁶ One of them extended the liability to senior management staff responsible for the execution of obligations prescribed in the AML Act. The amendments passed on 16 October 2019 have no significance from the point of view of the subject matter discussed in this article.

The solutions adopted both in 2018 and at a later time do not eliminate all practical problems. The reasons of efficiency of the anti-money laundering and terrorist financing counteraction system, in light of the diversity of economic operators on the market and diversity (or often dissimilarity) of their activities, make it necessary to introduce solutions covering the widest possible scope, both in subjective and objective terms. The universalism of the legislative regime becomes problematic from the practical point of view. This phenomenon is even more significant on the European (directive) level, where solutions had to be developed to take into account the diversity on the interstate (EU), rather than national, level. In the Fourth AML Directive and, consequently, also in the AML Act itself, solutions were included to mitigate the risks relating to that phenomenon and other risks observable in the context of AML. One of them was the introduction of the obligation to formulate a National Money Laundering and Terrorist Financing Risk Assessment and to verify its up-to-datedness at least every two years. Those obligations were addressed in the Polish legal system in Art. 25 of the AML Act.

In the Polish legal system, civil-law partnership is a specific type of legal construction. The most important aspect is that the partnership is not an entity separate from the parties establishing (partners) such vehicle and, consequently, it raises a

² OJ L 141, 5.6.2015, p. 73–117; hereinafter referred to as the “Fourth AML Directive.”

³ Adequacy does not refer only to the market but also to specific actors on that market, or even to specific areas of market activities.

⁴ Dz.U. 2019, item 1115; hereinafter referred to as the “AML Act.”

⁵ Dz.U. 2019 r. poz. 2088.

⁶ For a detailed discussion of the introduced amendments.

number of doubts and practical problems in the context of specific statutory regimes, including the AML Act. This article is an attempt to formulate an answer to questions raised by both legal theorists and practitioners. In the first place, the purpose of this analysis is to answer the following questions:

- 1) who should be considered a bank's customer in case of a so called "civil-law partnership,"
- 2) who should be considered a customer, in the understanding of the AML Act, in case of a civil-law partnership,

Then, opinions will be presented on civil-law partnerships from the perspective of other categories of the system of counteracting money laundering and terrorism financing. Specific aspects will be discussed taking into consideration the activities of banks as obliged institutions in the understanding of Art. 2(1) item 1 of the AML Act, that is institutions obligated, in the first place, to apply the financial safeguards laid down in that Act to such specific legal vehicles (Art. 33(1) in conjunction with Art. 34(1) of the AML Act). Some of the conclusions to be made, as relating to the provisions of the AML Act common to all obliged institutions, may be directly referred or applied also to their activities.

The last element subject to analysis will be the contents of the National Money Laundering and Terrorist Financing Risk Assessment⁷ published in 2019 by the General Inspector of Financial Information (GIFI) in the context of the discussed subject of civil-law partnerships.

2. THE LEGAL STATUS OF CIVIL-LAW PARTNERSHIPS

The so-called civil-law partnership⁸ was introduced in Art. 860 § 1 of the Act of 23 April 1964 – Civil Code.⁹ Under that provision, by a contract of partnership, partners commit to strive to achieve a common economic purpose by acting in a specified way, especially by making contributions. In literature, the following are listed as *essentialia negotii* of the partnership contract:

- 1) commitment of partners to achieve a common economic purpose,
- 2) commitment of partners to act in a specified way with a view to achieving that purpose (specification of the mode of action for each partner) (Bagińska et al., 2018, p. 1150) (cf. Aślanowicz et al., 2016, p. 712).¹⁰

The above list does not include contributions, as mentioned in Art. 860 § 1 CC. Such an approach to the problem should be considered legitimate. The fact that the legislator used the term "especially" leads to the conclusion that contributions are an element (the only one, for the time being) of an exemplary list of actions which amount to acting in a specified way (cf. Sójka, 2019). However, if in a specific case, such element appears in the partnership contract, partners should additionally define the object of contribution and its value.¹¹

⁷ Hereinafter also "National Assessment".

⁸ The Code Civil uses the expression "company." The designation "civil-law" follows from its nature.

⁹ I.e.: Dz.U. 2019, item 1145; hereinafter referred to as "CC".

¹⁰ C.f. Poland, Court of Appeal in Lublin, I ACa 373/13 (26 September 2013). Doctrinal authors emphasize also the contractual (voluntary) basis of establishment.

¹¹ C.f. Poland, Court of Appeal in Lublin, I ACa 373/13 (26 September 2013).

At this stage of deliberations, it is essential to determine the legal status of the construction of so-called civil-law partnership, as specified in Art. 860 CC, including in particular the existence or absence of its legal personality and legal capacity, which qualities are necessary for any separate legal subjectivity of such partnership in relation to its partners (whether or not it is a separate entity). It follows from the literal reading of Art. 860 § 1 CC that so-called “civil-law partnership” is actually a mere relationship established under a contract of specific content concluded between two or more legal subjects.¹² In general, the Civil Code governs civil law relationships between natural persons and legal persons (Art. 1 CC), that is relationships which are subject to civil law norms.¹³ In the light of the above, bearing in mind art. 1 CC, only two types of subjects may appear in civil law relationships. Additionally, in the provision of Art. 33(1) CC, there is yet another category – so called imperfect legal persons, that is organizational units with no legal personality but which are granted legal capacity (capacity to be a subject of rights and obligations) under the provisions of law, to which, according to Art. 33(1) § 1 CC, the provisions on legal persons apply as appropriate. Organizational units of such type are also separate entities. In effect, despite the three categories of subjects, with few exceptions, in fact we have to accept only two legal regimes – relating respectively to natural persons and legal persons.

Every human being is a natural person (Art. 8 § 1 CC). At the time of birth, every human being acquires legal capacity and, upon reaching the age of maturity (as far as they have not been incapacitated) – the capacity to perform legal acts (Art. 11 in conjunction with Art. 8 CC). In the context of nature of such persons, as presented above, they will be automatically excluded from further considerations.

Under Art. 33 CC, legal persons are the State Treasury and organizational units which are accorded legal personality by specific regulations. As a rule, an organizational unit acquires legal personality upon its entry in a relevant register (Art. 37 § 1 CC). In the absence of any legal provision granting legal personality to the partnership referred to in Art. 860 CC (civil-law partnership), it must be concluded that civil-law partnerships have no such personality¹⁴ and, in consequence of the above, they are not legal persons in the understanding of Art. 33 CC.¹⁵ Analogical conclusions should be formulated with regard to legal capacity. The absence of any legal provision granting legal capacity to civil-law partnerships leads to the conclusion that they are not imperfect legal persons in the understanding of Art. 33¹ CC. In consequence of the above, it is undoubted that the so-called civil-law partnership, governed by the provisions of Art. 860 and following of the Civil Code, is not a separate subject of civil law – it does not enjoy legal subjectivity separate from its partners (cf. Jezioro, 2019; Nowacki, 2017; Uliasz, 2019), partly otherwise (cf. Sójka, 2019) (cf. Pietrzykowski, 2018).¹⁶ In the light of such legal situation,

¹² At least two. As regards the consequences of a civil-law partnership having only one partner, c.f. Poland, Supreme Administrative Court, I SA/Gd 367/98 (14 July 2000).

¹³ Cf. Poland, Supreme Court, I CZ 108/80 (10 September 1980).

¹⁴ Cf. Poland, Voivodeship Administrative Court in Kraków, I SA/Kr 1601/08 (3 March 2009).

¹⁵ Cf. Poland, Court of Appeal in Białystok, I ACa 484/12 (26 October 2012).

¹⁶ This is the opinion of a vast majority of doctrinal authors in civil law and case-law. Also a comparison of opinions in the discussed matter see in Pietrzykowski (2018). Regarding opinion of the judiciary, cf. Poland, Supreme Court, IV CZ 18/18 (18 April 2018); Poland, Supreme Administrative Court, II FSK 1533/12 (4 June

it must be indicated that the partnership specified in Art. 860 CC is a relation between partners, who are civil law subjects (ibid Uliasz, 2019), and legal subjectivity is a quality of such partners.¹⁷ In the same way, any legal acts, as a rule, should not be performed by the partnership or with the partnership but by its partners or with its partners.¹⁸ On the other hand, there is nothing to prevent a further specification that those persons act within a civil-law partnership (to make identification easier).

The last question that must be discussed and, at the same time, is closely related to the one above is the status of an entrepreneur. Under Art. 43(1) CC, an entrepreneur is a natural person, a legal person or an organizational unit referred to in article 331 § 1 conducting business or professional activity on its own behalf. The definition in that provision requires the existence of the following two elements if a given person is to be recognized as an entrepreneur:

- 1) the subjective element, namely being a civil law subject – natural person, legal person or imperfect legal person,
- 2) the functional element, namely conducting business or professional activity on one's own behalf that is understood as a sequence of specific repetitive activities.¹⁹

Under Art. 43(2) § 1 CC, an entrepreneur operates under a business name. Further provisions of the CC set out that the business name of a natural person is their given name and surname, which does not preclude inclusion in the business name of a pseudonym or designations pointing to the object of the entrepreneur's activities, the place of conducting business or other freely chosen designations, and the business name of a legal person is its name. To resolve the above question, it is enough to consider the subjective scope of the definition under Art. 43(1) CC. If entrepreneurs may only be the subjects listed in that provision (natural and legal persons, imperfect legal persons) and civil-law partnerships – as stated above – are neither one of the former, they may not be considered entrepreneurs in the understanding of Art. 43(1) CC. In such situation, it is needless to examine the remaining circumstances. In consequence of all the facts mentioned above, a civil-law partnership has no business name. On the other hand, partners who have concluded a partnership contract may act under a business name, as long as they meet the requirements laid down in Art. 43(1)CC.²⁰

2013); Poland, Voivodeship Administrative Court in Wrocław, I SA/Wr 844/16 (10 January 2017); Poland, Voivodeship Administrative Court in Kielce, I SA/Ke 213/13 (27 June 2013); Poland, Voivodeship Administrative Court in Warszawa, VIII SA/Wa 36/11 (5 May 2011).

¹⁷ Cf. Poland, Voivodeship Administrative Court in Warszawa, VI SA/Wa 827/12 (4 July 2012).

¹⁸ So also the Supreme Administrative Court against the background of the provisions of the Act of 29 August 1997 – Banking Law (Dz.U. 2019, item 2357), cf. Poland, Supreme Administrative Court, II FSK 1533/12 (4 June 2013). Regarding other legal branches, cf. Poland, Voivodeship Administrative Court in Gliwice, I SA/Gl 1066/18 (6 February 2019) and Poland, National Appeal Chamber, KIO 1965/14 (9 October 2014).

¹⁹ Cf. Poland, Court of Appeal in Szczecin, I ACz 441/06 (7 August 2006).

²⁰ Cf. Poland, Supreme Court, IV CZ 18/18 (18 April 2018).

3. CIVIL-LAW PARTNERSHIP AND COUNTERACTING OF MONEY LAUNDERING AND TERRORISM FINANCING

The AML Act imposes a series of obligations on obliged institutions. Among these, special significance may attach to the following requirements:²¹

- 1) development and implementation (adoption and application) of an internal procedure of counteracting money laundering and terrorism financing (Art. 50(1) of the AML Act), and in case of obliged institutions within a group – also implementation of a group procedure in this regard (Art. 51(1) of the AML Act),
- 2) detection, assessment and documentation of the risk of money laundering or terrorism financing both at the level of customer (Art. 33(2) of the AML Act) and the obliged institution – with regard to their activities (Art. 27(1) of the AML Act),
- 3) application of financial safeguards (Art. 33(1) in conjunction with Art. 34 and following of the AML Act).

Under Art. 33(1) of the AML Act, financial safeguards are applied by obliged institutions to their customers. The catalogue of such measures, as adopted in Art. 34 of that Act, also directly refers to customers, by setting out that the application of financial safeguards covers, among others, customer identification and verification of customer identity (Art. 34(1) item 1 of the AML Act). In effect, it is crucial, from the point of view of due performance of that obligation, to properly specify the customer, and especially the customer's legal form.

Since, under the provisions on counteracting money laundering and terrorism financing, there is no special regime concerning civil-law partnerships, it must be concluded that it is a form in the understanding of the provisions of the Civil Code (operating on that basis),²² which should be classified in the context of the AML Act.

The AML Act contains a number of definitions, including also the definition of customer of an obliged institution. Under Art. 2(2) item 10 of the AML Act, for the purposes of the regime of counteracting money laundering and terrorism financing, a customer is a natural person, legal person or organizational unit without legal personality to whom the obliged institution provides services or to whom the obliged institution renders activities within the scope of its professional objects, including a person with whom the obliged institution establishes a business relationship or upon whose instruction the obliged institution executes an incidental transaction; in case of an insurance contract, the person that is considered a customer of an obliged institution is the policyholder. The first two listed categories raise no doubts. However, such doubts may arise with regard to the third category. In relation to organizational units, the cited definition, as opposed to the provisions of the Civil Code, does not provide for the requirement of legal capacity being granted. Nevertheless, it refers to an entity in the form of an organizational unit. Since the civil-law partnership, as specified in Art. 860 CC, does not have legal subjectivity separate from its partners, it must be concluded that it may not count as an organizational unit as well without legal personality. As a consequence, the customer, in the understanding of Art. 2(2) item 10 of the AML Act will be the partners

²¹ The presented list is not an exhaustive catalogue. The AML Act imposes many other requirements on obliged institutions.

²² Similarly, the SAC against the background of tax law provisions, cf. Poland, Supreme Administrative Court, I GSK 1448/14 (18 February 2016).

of a civil-law partnership and, consequently, financial safeguards should be applied to such partners. This conclusion also follows from the expression used in the definition of a customer "including a person with whom the obliged institution establishes a business relationship."

4. THE NATIONAL MONEY LAUNDERING AND TERRORIST FINANCING RISK ASSESSMENT

Under Art. 25(1) of the AML Act, GIFI is responsible for the preparation of the National Money Laundering and Terrorist Financing Risk Assessment in cooperation with the Financial Security Committee,²³ the cooperating entities and obliged institutions. The Polish legislator indicates that, in the preparation of the National Risk Assessment, GIFI takes into account the report by the European Commission mentioned in Art. 6(1-3) of the Fourth AML Directive²⁴ (Art. 25(2) of the AML Act). Another statutory obligation imposed on GIFI – this time addressed in Art. 25(3) of the AML Act – is the verification of up-to-datedness of the National Risk Assessment and its update, when necessary but at least every two years.

The National Money Laundering and Terrorist Financing Risk Assessment was published on the website of the Ministry of Finance on 17 July 2019.²⁵ Five annexes were attached to the National Risk Assessment, covering respectively:

- 1) Methodology of preparation of the first National Assessment (Annex 1),
- 2) Money laundering risk scenarios (Annex 2),
- 3) Terrorist Financing risk scenarios (Annex 3),
- 4) Analysis of the statistical information obtained from supervised entities by the Polish Financial Supervision Authority for the purposes of the National Assessment (Annex 4),
- 5) Description of activities of the selected bodies and public authorities involved in the operation of the national anti-money laundering and terrorist financing counteraction system (Annex 5).

The National Assessment was divided into several parts. In the first place, financial and non-financial markets in Poland were discussed. Then the phenomena of money laundering and terrorist financing were described, as well as anti-money laundering and counteracting of terrorist financing. The following parts relate to: threats relating to money laundering and terrorist financing. The last part summarizes the National Assessment and presents its conclusions.

²³ The Financial Security Committee is attached to GIFI and has an opinion-giving and advisory function in the area of anti-money laundering and counteracting of terrorist financing (Art. 19(1) of the AML Act). The Committee's tasks were defined in an open catalogue of Art. 19(2) of the AML Act.

²⁴ Art. 6(1-3) of the Fourth AML Directive mentions the Commission's responsibility to carry out risk assessment in relation to money laundering and terrorist financing, which risk has a bearing on the internal market and relates to cross-border activities, and to prepare a report establishing, analysing and assessing the risk at the EU level. As in the case of the National Risk Assessment, the report is updated every two years or, if necessary, more often (need for updating).

²⁵ Information available at the address: <https://www.gov.pl/web/finanse/krajowa-ocena-ryzyka-prania-pieniedzy-oraz-finansowania-terroryzmu>.

The National Assessment refers to civil-law partnerships at several points. First, the civil-law partnership appears in connection with the pursuit of the profession of legal advisers – it is indicated as an admissible form of practicing that profession. At a further part of the document, the civil-law partnership appears in connection with the definition of an entrepreneur. At this point, however, the reference is limited to mere indication that, under the Polish law, partners of a civil-law partnership are considered entrepreneurs in respect of their business activities. The Civil-law partnership is also mentioned in the context of the form the business activities are conducted, however, the authors of the National Assessment limited themselves to indicating that Polish law offers the possibility to conduct business activities, among others, in the form of civil-law partnership. For the last time, the civil-law partnership was mentioned in the catalogue of areas covered by the obligation to provide criminal information.

The issue of civil-law partnerships was not addressed in the money laundering risk scenarios presented in Annex 2 to the National Assessment. That document concentrates on products, services and forms of operation (bank accounts, credits and loans, prepaid cards, money transfers, payment services, investment fund units, charity, etc.). Although the scope of Annex 3 is slightly different, analogical conclusions should be formulated in respect of its terrorist financing risk scenarios.

It follows from the above that the National Assessment does not remove doubts relating to the status of the Polish civil-law partnership within the anti-money laundering and terrorist financing counteraction system. Answers to the questions posed in this article are nowhere to be found in the National Assessment. The document only allows to draw indirect conclusions (in the light of inclusion of partners of such vehicle rather than the partnership itself). However, the document remains practically useful, especially the risk scenarios under Annexes 2 and 3.

5. SUMMARY

A civil-law partnership, as referred to in Art. 860 § CC, established by conclusion between two civil law subjects of a partnership contract, through which the partners commit to achieve a common economic purpose by acting in a specified way, does not have legal subjectivity separate from its partners. This is the case because it cannot qualify either as a legal person in the understanding of Art. 33 CC or imperfect legal person in the understanding of Art. 33(1) § 1 CC, that is an organizational unit without legal personality but with legal capacity granted under the provisions of law. In the light of the above, the parties to legal transactions are its partners. The absence of legal subjectivity, in turn, leads to a situation in which the civil-law partnership may not be considered a customer in the understanding of Art. 2(2) item 10 of the AML Act. This does not mean, however, that in the discussed case the obligations under the AML Act are not to be followed and that no financial safeguards are applied. Customers, for the purposes of the AML Act are the partners, and the financial safeguards specified in that Act should apply to such partners.

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