

Warsaw, 27 September 2017

Mr Armen Artwich

Director

Department of Business Regulations
Improvement

Position of the Association of Business Service Leaders (ABS L) on the bill of the act setting down the rules for screening applicants for employment at financial sector entities for criminal records ("the Bill")

Dear Mr Artwich,

The Association of Business Service Leaders (ABS L), representing more than 200 undertakings from the modern business services sector which employ more than 150 thousand people in Poland, approves of the Bill and its explanatory memorandum ("the Explanatory Memorandum") and the regulatory impact assessment ("the RIA"), and sees the Bill as a step in the right direction. This position paper points out the elements of the Bill which require to be worded more precisely or elaborated for the proposed act to satisfy the reasonable expectations of the undertakings.

The solutions proposed in the Bill are an effort to satisfy the long-voiced demands of businesses and undertakings to give them the right to obtain information whether their job applicants and employees have any criminal past. The today's legal regulations relating to background checking of job applicants fail to keep up to date with the reality of the modern economy, and in particular of the modern labour market. The rights of employers are limited to the minimum; thus, employers are unable to verify the credibility of job applicants and their predispositions for the job they apply for. An extended check of applicants is particularly needed in the case of employers who entrust to their employees assets and financial information of their own and of their business partners. That is why the present situation runs against the interests of both employees, employers and other market players and participants. In our opinion, the proposed amendment is likely to contribute significantly to creating highly professional jobs also in Poland and to make the Polish labour market more competitiveness.

Hence, while we generally approve of the proposed wording of the Bill, we would like to highlight the following aspects and areas which need to be modified.

I. Article 2 section 3 point 11(a)

According to the provisions of Article 2 section 3 point 11 of the Bill, the rights conferred upon financial sector entities by the Bill would be available to entities which provide services to the entities referred to in section 1, provided such services are directly connected with the core business activities of such entities.

In the above context, it should be observed that this provision does not address situations when services are provided to the entities listed in Article 2 section 2 and section 3 points 1-10 of the Bill. As a result, the entities listed in section 2 and section 3 points 1-10 of the Bill are worse placed than the entities listed in section 1.

This is because these first-named entities (including the National Bank of Poland and the Financial Supervision Authority) are unable to satisfy themselves that the persons employed by the entities which provide services to them have not been convicted of the offences listed in the Bill. We do not find any reason to justify such different treatment of the market players.

And while we are not aware whether such entities use or intend to use service providers in their core business activities (for example in connection with IT services or data security), it seems justified to give them the same rights as to the entities listed in section 1.

Therefore, we propose amending Article 2 section 3 point 11(a) of the Bill to read as follows:

"the entities referred to in sections 1, 2 and 3 points 1-12".

This will make it possible to screen for criminal records the employees of the entities which provide services to them. And this in turn will enable them to require their service providers to background check their employees.

II. Article 2 section 3 point 11

As regards the provisions of Article section 3 point 11 of the Bill, we would also like to suggest a modification of its wording to make it read as follows:

"the provider of services whose final recipient is: (...)".

We understand that this provision, in its current wording, has in essence this meaning, and as such is consistent with the terminology relating to an economic recipient of work (compare Article 8 section 2a of the Social Insurance System Act of 13 October 1998 (Official Journal of Laws of Poland of 2016 item 963).

Nonetheless, we suggest the above modification to avoid doubts with respect to the use of subcontractors and to provide for the ability to screen subcontractors' employees for criminal records. It is not uncommon when a contract for particular

services is concluded on the groups of companies' level. By way of an example, a contract with a financial sector entity is signed by its parent company which has specialist (or local) daughter companies through which it provides the contracted services. In such situations, such parent company should be able to verify the employees who are to provide the contracted services.

That is why we suggest rewording the above provision to ensure it clearly addresses situations when subcontractors are used (as the current wording may create some doubts as to its interpretation).

III. Article 3 section 1

We also suggest amending Article 3 section 1 of the Bill so that the right provided by this article applies clearly also to internal recruitment processes. While the functional interpretation would have one apply the same rules to all job applicants in a given recruitment process, regardless of whether they are employed by a given employer or are "external" applicants, yet the actual wording of this provision leads to serious doubts as to its interpretation. In consequence, it may lead to lack of certainty about the availability of the right worded in such a way.

Employees who enter the process to recruit for another position at their employer's do not, in the strict sense, apply for "employment"; they apply for a change of their position. The different treatment of "external" and "internal" applicants participating in the same recruitment process seems to serve no purpose.

Accordingly, we propose amending the wording of Article 3 section 1 of the Bill so that it reads as follows:

"The employer being a financial sector entity has the right to request an applicant for employment or its employee applying for a change of their position within the territory of the Republic of Poland to provide information whether they have been convicted by a final judgement for the intentional offence (...)"

This provision in the above wording would apply to those employees who would apply for a change of their position (for example by entering a given recruitment process). This would require active involvement on the part of the employee concerned – hence there would be no room, for example, for abuses on the part of the employers asking for clean criminal record certificates (for example when the employer unilaterally nominates the employee for promotion or terminates the employee employment contract by changing their position).

Failure to provide a clean criminal record certificate (or providing a certificate stating that the employee has prior convictions) would affect the recruitment process, yet it would not be the reason to terminate the then-in-force employment contract (as per Article 5 of the Bill).

In addition, we suggest that the right to background check for criminal convictions applies not only to the persons who apply for employment, but also to those already employed.

To minimise the risks faced by financial sector entities and to protect market players and participants, it is expedient to confer on these entities the right to background check for prior convictions also the already employed persons (the employees or cooperating persons), for example by requiring the persons employed to provide, from time to time, a certificate of clean criminal record.

Should the Bill drafters conclude that the above-proposed modification is too far reaching, we ask that you please consider limiting its applicability only to the entities listed in Article 2 section 3 point 11 of the Bill. In such case, Article 3 section 1 of the Bill could read as follows:

"The employer being a financial sector entity has the right to request an applicant for employment within the territory of the Republic of Poland, and the employer referred to in Article 2 section 3 point 11 also from the employee applying for a change of their position, to provide information whether they have been convicted by a final judgement for the intentional offence (...)".

IV. Article 3 section 1

We suggest expanding the catalogue of the offences listed in this Article by including the offences referred to in the following acts of law:

- a) the Fiscal Offences Code Act of 10 September 1999 (consolidated text in Official Journal of Laws of Poland of 2007, number 111, item 765, as amended);
- b) the Commercial Companies Code Act of 15 September 2000 (Official Journal of Laws of Poland of 2001, number 102 item 1117, as amended);
- c) the Accounting Act of 29 September 1994 (Official Journal of Laws of Poland of 2002, number 76 item 694, as amended);
- d) the Personal Data Protection Act of 29 August 1997 (Official Journal of Laws of Poland of 2002, number 01 item 926, as amended),

and adding Chapter XXIX of the Criminal Code to the catalogue of the offences.

The offences referred to above fall into a widely understood class of business frauds, and therefore they should be included in the catalogue of the offences listed in Article 3 of the Bill.

In addition, we ask to delete the word "*intentional*" from section 1 of Article 3, to make the Bill applicable also to unintentional offences listed in the catalogue given in the Bill, for example certain serious torts such as the one defined in Article 265 § 3 of the Criminal Code (state secret).

V. Article 3 section 1, Article 4, Article 6

We suggest to stop using the term "*employer*" in the Bill, because the proposed Bill is to apply not only to employees but also to persons who perform work based on civil-law contracts (see Article 1 section 2 of the Bill). Hence, we believe the Bill should apply to "*financial sector entities*".

VI. Article 3 and Article 4

We propose to provide additionally for the option to require job applicants to provide, in addition to a certificate from the National Criminal Records Bureau, also certificates or statements from other registers (which are equivalents of Poland's National Criminal Records Bureau), for example from the country of origin of such persons and from the country (countries) where they have resided or worked.

This requirement is warranted by the fact that the modern services sector employs many foreigners whose criminal past (if any) is not recorded in the records of Poland's National Criminal Records Bureau.

VII. Article 3 section 2

Article 3 section 2 of the Bill introduces the requirement to ask job applicants for a written permit to process data about their criminal records (if any). This requirement (and the resulting need to archive hard copies of permits to demonstrate the employer complies with the personal data protection regulations) will constitute for financial sector entities significant hindering of their activity, particularly in the case of recruitment processes conducted by means of modern data communication systems.

Also, one cannot find any justification for the requirement to obtain a written permit in the personal data protection regulations which are scheduled to enter into force in 2018. First, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR), repeals the current requirement to obtain a written permit to process the so-called sensitive personal data (including data about any criminal convictions). However, in case the Bill is enacted prior to the incorporation of the GDPR regulations into the Polish legal system, we propose incorporating the requirement to obtain a written permit in the transitional regulations which will remain in force until the entry into force of the Polish legal regulations transposing the GDPR regulations.

Also, the proposed amendments of the Labour Code (Article 5 of the Bill implementing the Personal Data Protection Act) will not require obtaining a written

permit from employees to process their personal data (this will extend to all classes of personal data, including sensitive data).

With that being said, we believe the Bill should not require financial sector entities to obtain a permit from job applicants to process their personal data for the purposes of performing the provisions of the Bill. On the contrary, the Bill should stipulate that it constitutes a statutory legal ground to process personal data. Hence, in our opinion, Article 3 section 2 of the Bill should be worded as follows:

"The employer referred to in section 1 of this Article has the right to process personal data within the scope referred to in section 1 of this Article, for the purposes of performing the provisions of this Act".

Another solution could be to abolish the requirement for a written form of the permit (not specifying the form in which a permit for processing personal data is to be given will trigger the applicability of the GDPR regulations) or to stipulate that such permit may be given also in the form of a document (for example, a job applicant could email a scan of a signed statement or give a consent using an electronic form).

VIII. Article 4 section 2

The provision of Article 4 section 2 of the Bill is in line with our suggestions. Nonetheless, we would like to underline that the current wording of the Bill confers on financial sector entities less rights than on the entities which provide services to them.

We understand that this provision was included in the Bill in response to certain requests and suggestions from service providers. However, in our opinion, the rights of service providers are, in a way, "derived" from the rights conferred upon financial sector entities. It would therefore seem reasonable to confer the right to demand the representation referred to in this provision also upon financial sector entities.

Otherwise, we will face the situation when financial sector entities will not be entitled to demand such representations "directly", however they will be able to do so through the service provider.

That is why we propose the following wording:

"The employer which is a financial sector entity has the right to request that the representation contain also information whether an applicant for employment or the person employed (...)"

IX. Article 5

We propose redrafting this article to add a reference about the ability to provide a photocopy of the information issued by the National Criminal Records Bureau, as referred to in Article 4 section 4 of the Bill.

We therefore suggest adding the following wording:

"Failure by an applicant for employment to provide the information referred to in Article 3 or Article 4.2 or failure to provide documentary evidence of the information referred to in Article 3, in accordance with the procedure envisaged by Article 4.3 or Article 4.3 (...)".

X. Periodic screening of employees for criminal records

We would also like to point out that the Bill does not provide for the right to demand certificates from employees. This means that it is not possible to verify whether the certificates provided by job applicants remain up-to-date.

In our opinion, it would therefore be advisable to provide for the ability to update such information. Such updating could be limited – both in terms of frequency (for example not more frequently than once a ...) and in terms of its applicability (it would extend only to the employees who were required to provide the certificate as part of their recruitment process). The updating requirement would therefore not apply to the persons who are currently employed or who were employed following the recruitment processes completed prior to the entry into force of the Bill.

In recent years, Poland has become one of the main locations for centres provide professional services to international clients. The employees of such centres should have access to IT-system-stored information about the assets of service recipients, to be able to carry out operations and transactions involving such assets (make cash transfers, move items of current assets, carry out banking transactions or transactions involving intellectual property rights or other assets of service recipients etc.).

There are also more and more shared services centres which provide services to groups of companies which include banks, investment companies or insurance companies. In such cases, the employees of shared services centres should be able to carry out operations involving assets of such entities. This means that shared services centres should exercise extreme caution when recruiting their employees to minimise the risk of hiring persons who might want to use such access for their own, unfair purposes.

The today's legal regulations in general do not permit employers to require job applicants to provide information about their criminal records. Lack of the ability to obtain such information from a potential employee significantly increases the risk of employing a person who will want to use their professional position for wrongful purposes, causing damage to the assets and the reputation of the employer or the recipient of their services.

Poland's situation is an exception to the legal solutions in force in other European countries where screening of job applicants for criminal records is permitted (these countries include for example: Great Britain, Ireland, France and Italy).



The proposed legislative amendment will help increase Poland's investment attractiveness, which will contribute to the creation of new jobs.

Respectfully yours,

A blue ink signature of Jacek Levernes, consisting of several overlapping loops and a long horizontal stroke.

Jacek Levernes
President of the Management Board

A blue ink signature of Jolanta Jaworska, written in a cursive style with a prominent 'J' and 'A'.

Jolanta Jaworska
Vice-President of the Management Board