Changes in the civil procedure (part 1) — are specialized courts going to review intellectual property cases?

On the 30th of October 2019 the Polish government brought to the Parliament a proposal of an act amending the Code of the Civil Procedure (CCP) and several other acts. The government bill, drafted by a panel of experts that had been appointed in 2017 by the Minister of Justice and assigned with a task of developing a plan for establishment of special intellectual property courts, was initially expected to enter into force as soon as on January 1, 2020. However, due to the principle of legislative discontinuity, the draft had to be withdrawn from the parliamentary path and had to be once again submitted to a formal adoption by the government, which took place on December 3. The first reading at the plenary sitting of the 9th term Sejm took place on December 20, while the second and the third — on January 10; afterwards it was placed for consideration before the Senate that adopted several amendments on February 6. The project at this moment is expected to enter into force on July 1, however since it proposes a number of significant changes, it commands close attention even at the current stage of the legislative process.

We have prepared for you a detailed analysis of the key solutions proposed by the amendment — today we encourage you to read its first part, wherein we dissect the matters of defining intellectual property cases and designating the special courts that are supposed to review them.

Definition of an intellectual property case

The government bill expands a catalogue of separate proceedings by adding a new division IVg that introduces a set of distinct provisions regarding the proceedings in intellectual property cases. The scope of application of new regulations is determined through a reference to a newly adopted statutory definition of an intellectual property case, according to which it is a case that concerns protection of copyright and related rights, as well as inventions, utility models, industrial designs, trademarks, geographical indications, mask works, and protection of other intangible property rights (Article 479^{89} § 1 of the CCP). It is worth to remark that this provision mirrors without even the slightest departure

the regulation that used to belong to the general part of the CCP, i.e. Article 17 point 2 defining the jurisdiction ratione materiae of regional courts.

Furthermore, it is prescribed that within the meaning of this division a term „intellectual property case" shall also denote cases that concern preventing and combatting unfair competition; cases concerning protection of personal interests in so far as a given personal interest is used for the purposes of individualization, advertising or publicity of an entrepreneur, goods or services; as well as concerning protection of personal interests in connection with scientific or inventive activity (Art. 479^{89} § 2). In order to place the first group of these cases (preventing and combatting unfair competition) under the statutory definition, it was necessary to eliminate point 4^3 from the current wording of Article 17 and to plant it in the special part of the CCP without altering it at all. Finally, the scope of the intellectual property courts' cognizance is complemented by the cases related to protection of personal interests — however only as long as they pertain to the sphere of intellectual property. Whether a claimant demands protection of exclusively proprietary rights, or exclusively non-proprietary rights, or puts forward claims of mixed types, is irrelevant. This distinction used to be significant in the light of Article 17 in its current wording: point 1 referred to regional courts „cases concerning non-proprietary rights and proprietary claims pursued in conjunction with the former" (with some exceptions). The nature of claims that were raised in response to an infringement of personal interests determined whether a case was adjudicated by a district or regional court. Such infringements that occur in the field of scientific or commercial activity shall be from now on investigated solely in the separate type of proceedings reserved for intellectual property rights.

In the explanatory statement to a draft project, its authors invoke the body of rulings regarding Article 17 point 2 of the CCP, underlining that in construing the definition of an intellectual property case, the courts' well-established guidelines should still be taken into account. In this context they cite an order of February 26, 2015 made by the Civil Chamber of the Supreme Court in a case no. III CZ 6/15, wherein the Supreme Court advocated the broad interpretation of a term "case concerning protection of copyright". According to the Supreme Court, a notion of such a case should be approached in a functional manner, without limiting its scope exclusively to protection of moral rights and copyright as defined in the Law of Copyright and Related Laws of February 4, 1994. The Court noticed that, "the purpose of referring such cases to the jurisdiction of regional courts (…) justifies including in the scope of this term all cases involving claims raised on the ground of copyright provisions". To substantiate the choice of such an interpretation, the Supreme Court demonstrated that "such a transfer of competence in cases concerning copyright and related rights, as well as in other cases listed in that rule, is motivated by an assumption that those cases are characterized by a particular degree of legal complexity (…) Therefore, to deal with

them, more experience is needed, as well as a denser framework of fewer competent courts".

It is necessary to point out that the position of the definition of intellectual property cases changed twice in the course of legislative works. In the version of the act that was adopted by the Sejm on January 9, the definition was added to Article 1 of the CCP in the immediate vicinity of the definition of civil cases. The Senate put forward amendments that place it back in the new division IVg and restore it to its previous form. The editorial revisions introduced previously by the Sejm have now been abandoned — therefore three specific types of cases (cases that concern preventing and combatting unfair competition; cases concerning protection of personal interests in so far as a given personal interest is used for the purposes of individualization, advertising or publicity of an entrepreneur, goods or services; as well as concerning protection of personal interests in connection with scientific or inventive activity) are once again listed in a manner that distinguishes them from the other intellectual property cases. In the version of the act that the Sejm had adopted on January 10 the definition of intellectual property cases had a simplified construction: the general term had encompassed all the aforementioned kinds of cases without dividing them into any categories.

Intellectual property courts

When analyzing the provisions of the division IVg, one has to point out that just after establishing the statutory definition of an intellectual property case, the authors of the draft indicate the proper courts that are going to conduct those cases once the law becomes effective. At the same time we are approaching here a dimension of the amendment that requires the most detailed scrutiny due to its potential of deeply reshaping the existing procedures and provoking the most far-reaching effects.

To juxtapose the proposed changes with the current legal situation, it is necessary to briefly mention that right now, on the ground of aforementioned Article 17 of the CCP, cases concerning intellectual property rights fall under the jurisdiction ratione materiae of regional courts, with the Regional Court in Warsaw being exclusively designated to adjudicate cases regarding the European Union trade marks and Community designs.

The wording of the newly introduced provision on the jurisdiction ratione materiae in intellectual property cases, if taken at face value, does not seem to reveal any groundbre-

aking developments. According to Article 479^{90} § 1, intellectual property cases shall fall under the jurisdiction of regional courts. Therefore the presumption which has already been widely recognized — and has been reinforced by the Supreme Court's position in the case no. III CZ 6/15 — that regional courts are better suited to conduct such cases, remains still valid. Since reviewing intellectual property cases requires specific competence and experience, as well as a higher level of concentration and uniformity of judicial rulings, it is reasonable to exclude them from the cognizance of district courts and to hand them over to regional courts in first instance. The authors of the draft do not however stop there; they are proposing a specialization that goes a step further.

In the explanatory statement they disclose a plan to limit the jurisdiction in intellectual property cases to just a few divisions of the regional courts appointed by the means of a regulation implementing the amendment to the CCP. Tentatively, four divisions are expected to be established countrywide: in Gdansk, Poznan, Lublin and in Warsaw. The regulation would also provide basis for establishment of two specialized divisions in the appellate courts — in Poznan, as well as in Warsaw.

At the same time the Court of European Union Trade marks and Community Designs (XXII Division of the Regional Court in Warsaw) shall cease to exist. The authors of the draft argue that its autonomy in this field is going to lose its raison d'être once the new regulation becomes effective; the respective divisions of regional courts (as well as the division of the Appellate Court in Poznan) shall also be competent to make judicial decisions in the field of EU trade marks and Community designs. The project promoters are clearly aware that adopting such a regulation triggers a duty to issue a proper notification to the European Commission: on the ground of Article 80 of the Council Regulation (EC) no 6/2002 of 12 December 2001 on Community designs, The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance which shall perform the functions assigned to them by the Regulation (i.e. adjudicating the cases concerning Community designs).

It is crucial to highlight that the Regional Court in Warsaw shall keep its special position in the new structure. According to Article 479^{90} § 2, under its exclusive jurisdiction shall fall intellectual property cases regarding computer programs, inventions, utility models, mask works, plant varieties, as well as trade secrets of a technical nature. Therefore it would be put in a role of a — using an expression borrowed from the explanatory statement to the project — "technical" intellectual property court whose cognizance shall encompass cases that are particularly complex and require a higher level of professional knowledge. This expected cumulation of responsibility that awaits the Regional Court in Warsaw shall be compensated to a certain extent by redistributing tasks in the area of re-

viewing cases concerning EU trade marks and Community designs among the body of newly established intellectual property courts.

Setting the limits of the jurisdiction ratione materiae

With regards to the jurisdiction ratione temporae of intellectual property courts, another pressing issue that has to be resolved rather sooner than later involves determining the precise frontiers of the scope of their competence. Let us consider what are the specific solutions that the project promoters are putting forward in that matter. Anticipating objections of potential critics of the reforms, they do acknowledge that the serious difficulties in this field are expected to be encountered especially in atypical cases and cases involving commercialization of certain personal interests.

The provision of Article 479^{92} of the CCP is supposed to equip intellectual property courts with a distinct prerogative. They would not be bound by another court's decision to refer a case made under Article 200 § 2 (the amendments of the Senate revoke the caveat that such a decision shall be made solely on the grounds of Article 200 § 2); while "another court" for the purpose of the amended rules shall signify any court that is conducting proceedings that are different from the kind regulated in the CCP division dedicated to intellectual property cases. Every intellectual property court shall be free to determine, considering circumstances of a given case, whether it is actually the best suited to conduct it. In the event of concluding that a case falls outside the limits of its jurisdiction, it would be allowed to transfer it back — even to the court that previously declared itself improper to review it. The decision made by the intellectual property court would be binding for a court that a case is eventually handed over to (Article 479^{92} § 3). To use more colloquial term, the authors of the project assume that intellectual property courts would "know better" if nature of a given case actually matches their competence. Importantly, they set there a temporal limit: an intellectual property court would not be able to make a decision to refer a case to another court after two weeks have passed since the date that case was submitted to it. Such a regulation is evidently motivated by an aim of avoiding lengthiness of proceedings.

While examining the mechanism established in Article 479^{92}, it is crucial to remark that a question of demarcating jurisdictions has not been regulated in new provisions in an exhaustive, thorough manner. By according precedence to intellectual property courts in terms of determining the scope of their cognizance, the authors of the draft do not provide them with any authoritative guidelines as to how they should approach decision on referral

of a case. In the explanatory statement they admit that the proposed provisions leave a significant space for courts to develop their own case law.

Regarding the question of "borderline" legal problems, a point has to be made that Article 479^{91} permits to apply provisions of other separate proceedings in cases conducted under the procedure instituted in the division IVg (intellectual property cases) only in so far as they are consistent with the rules of the latter. It shall be understood that in certain conditions a final shape of the procedure shall be dependent on a combination of solutions derived from different separate proceedings: the authors of the draft do not rule out a possibility that some institutions that are typical for, e.g., proceedings by writ of payment, payment-order proceedings or proceedings in the field of labor law, would be applicable in intellectual property cases. Nonetheless, should any conflict between those provisions occur, the regulation of proceedings in intellectual property cases must prevail.

Summary

As was indicated in the introduction to this report, this was just the first part of the analysis we have prepared for you, and there are numerous other aspects of the amendment that require further consideration. In our next publication you will find our coverage of other newly proposed measures, such as obligatory professional representation in proceedings, new regulations in the area of securing, disclosing and releasing evidence, and ordering to reveal information, as well as two kinds of special actions. Although it seems reasonable to present our evaluation of the awaited changes only after the exhaustive review of all the most important solutions included in the project, at this point it is necessary to signal that the general directions of the reforms seem utterly rational. It would be difficult to disagree with the underlying thesis that the nature of proceedings in intellectual property cases requires specific expertise. Distinguishing the specialized divisions within the existing judicial structure should indeed contribute to significant improvements in that field — however a question rises whether to a sufficient extent; in the second part we would also like to share with you our predictions in that area.

