

Legal Alert

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The NSA allows the sale of alcohol over the Internet

The Supreme Administrative Court (NSA), in a judgment dated 8 September 2022 (case ref. II GSK 2034/18), dismissed the cassation appeal of the SKO (Local Government Appeal Board) in Krakow and upheld the judgment of the Regional Administrative Court (WSA) in Krakow overruling the SKO's ruling on withdrawing the permit for the sale of alcoholic beverages due to their sale on the Internet. The judgment is final.

Thus, the NSA allowed the sale of alcohol via the Internet if the seller has the appropriate permit for the sale of alcoholic beverages at a certain place of sale.

The existing line of jurisprudence

To date, the administrative courts have assumed that the sale of alcoholic beverages over the Internet is not possible. On one hand, they have argued that the legislator did not explicitly provide for, in the provisions of the Act on Upbringing in Sobriety and Counteracting Alcoholism ("Act"), the possibility of selling alcohol over the Internet; therefore, limiting the scope of permission to sell alcohol to a specific point of sale. Thus, a broad interpretation would be inconsistent with the purpose of the Act which is to limit the availability of alcohol (the NSA judgment of 14 April 2011, case ref. II GSK 431/10).

It was also argued that alcoholic beverages are considered to be things specified as to their kind (rzeczy oznaczone co do gatunku) and therefore, the execution of the concluded contract of sale takes place at the place where the delivery of these things takes place - the moment of the delivery of the purchased goods to the purchaser determines at what place the contract resulting in the transfer of the ownership of the thing is executed. In cases where the delivery of the items occurred, for example, in the consumer's apartment, the courts considered that the sale took place outside a store with a sales permit. Meanwhile, the performance of business activities within the scope of the permit may take

place only at the place specified in the permit (the NSA judgment of 21 April 2016, case ref. II GSK 2566/14).

Place of conclusion of the contract of the thing specified as to its kind

The NSA upheld the verdict of the Regional Administrative Court in Krakow which confirmed that alcoholic beverages are things specified as to their kind but the sale of which cannot be considered to always take place at the place where the things are delivered. As a general rule, the sale of things specified as to their kind takes place when the thing is delivered to the buyer at the place designated in the contract. This means that, in the terms and conditions of an online store, which is a model contract, it is possible to stipulate that the place of the performance of the services is a stationary store with the appropriate permit for the sale of alcohol. **The NSA also held that the Internet is not another, additional place of sale but only one form of sale involving the placing of an order over the Internet.**

Online alcohol sales ban vs. business freedom

The NSA accepted that the principle of freedom of business activity provided for in Article 22 of the Constitution of the Republic of Poland cannot be restricted by a provision that is not clear and unambiguous. The issue of the permissibility of contracts for the sale of alcoholic beverages via the Internet, i.e. by means of electronic communication, is not regulated by the provisions of the Act. Thus, it is neither explicitly permitted nor prohibited. Article 96 of the Act which, according to the authorities, would prohibit the sale of alcohol online, only regulates the requirements for points of sale. However, these provisions do not formulate the requirements for the form of the conclusion of a sales contract. According to the NSA, it is not possible to derive the validity of the prohibition of the remote sale of alcoholic beverages by means of electronic communication from the current legal regulation; thus, such form of the sale of alcoholic beverages should be considered permissible.

Despite the fact that the NSA judgment is a favourable change for entrepreneurs in the approach of administrative courts to the sale of alcohol over the Internet, it should be borne in mind that the judgment was issued on the grounds of a specific factual situation and does not prejudice the possibility of administrative courts or authorities taking a different stance in other cases (court judgments are not generally binding in Poland). Conducting the sale of alcoholic beverages via the Internet is still subject to the risk that such practice will be challenged by a certain authority and that a permit for the sale of alcoholic beverages will be withdrawn. Therefore, it is advisable to amend the law to unambiguously determine the permissibility of selling alcoholic beverages over the Internet.

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