



LEWIATAN

Warsaw, 11 February 2020

KL/53/27/DG/2020

Lower Silesia Governor

Supervision and Audit Department

Lower Silesia Governor Office

in Wrocław

pl. Powstanców Warszawy 1

50-153 Wrocław

Petitioner:

Lewiatan Confederation

ul. Zbyszka Cybulskiego 3

00-727 Warsaw

represented by:

Mr Maciej Witucki, President of the Lewiatan Confederation; and

Mr Grzegorz Baczewski, General Director of the Lewiatan Confederation

Petition

for declaring Resolution XX/197/20 of the City Council of Walbrzych of 30 January 2020 invalid

On behalf of the Lewiatan Confederation, pursuant to Article 16(2) of the Employer Association Act (Dz. U. [Journal of Laws] of 2019, item 1809) and Article 227 of the Code of Civil Procedure ("CCP") in conjunction with Article 229(1) CCP, I hereby report a violation of law by *the City Council of Walbrzych by issuing Resolution XX/197/20 of 30 January 2020 on imposing a limitation on the use of and on the elimination of certain single-use plastic products ("Resolution")*, i.e. a violation of Article 40(1) and Article 40(3) of the Municipal Self-government Act ("MSG"), Article 3(2)(5) of the Municipal Cleanliness and Order Act, Articles 40a et seq. of the Packaging and Packed Waste Management Act, Articles 25(6f) et seq. of the Waste Act, Articles 170(1) and 171 of the Environment Protection Law and Article 94 of the Constitution in conjunction with Articles 3 and 32(1) of the Constitution, Articles 4(1) and 4(2) of the Treaty on European Union and Article 288 of the Treaty on the Functioning of the European Union.

Taking the above into consideration, I move that:

1. supervisory proceedings be commenced *ex officio* with respect to the above Resolution (Article

Lewiatan Confederation
ul. Zbyszka Cybulskiego 3
00-727 Warsaw

tel. (+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

Member of BUSINESSEUROPE
NIP (tax ID) 5262353400
KRS (court register) 0000053779
District Court for the Capital City of
Warsaw, XIII Commercial Division of
the National Court Register



LEWIATAN

- 61(1) CCP in conjunction with Article 91(1) MSGA);
2. a decision be issued to stop the implementation of the above Resolution for the time of the proceedings (Article 90(2) MSGA);
 3. the Resolution be declared invalid in its entirety (Article 90(1) MSGA);
 4. the Petitioner be notified of the result of the procedure to examine this complaint (Article 238(1) CCP).

Statement of reasons

A. Facts

On 30 January 2020 the City Council of Walbrzych (“City Council”) passed Resolution XX/197/20 on imposing a limitation on the use of and on the elimination of certain single-use plastic products, which is an act of local law.

The City Council, with reference to, *inter alia*, Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (“SUP Directive”), considered that it had a right, under Article 40(3) MSGA, to pass law-and-order regulations applicable to the use of plastic products. The Resolution sets out that special zones will be established in public objects in Walbrzych, owned by the City, where possessing, using, offering and selling multiple categories of products, made from plastic and oxo-degradable plastic, is prohibited, as it is forbidden to possess, offer and sell beverages, to provide consumers with foods and beverages or to pack products if they are contained in such plastics. Simultaneously, the Resolution excludes from the above bans, among other things, plastics acquired before the effective date of the Resolution and business activity. In addition, the Resolution has introduced a ban on selling and making available to customers single-use shopping bags made from plastic. Failure to comply with those regulations is subject to a fine in accordance with the rules set out by the petty offence law, however the Resolution does not include any penalty rates.

B. The Resolution is inadmissible in the light of Article 40(3) MSGA and other Acts

In the Lewiatan Confederation’s view, the Resolution should be assessed from the perspective of proper application of Article 40(3) MSGA in connection with a fundamental principle of freedom to conduct a business, implemented by Article 2 of the Enterprise Law (Dz. U. [Journal of Laws] of 2019, item 1292). The vague scope of possible application of the Resolution, as discussed below, undermines the principles of trust, proportionality, impartiality and equal treatment of entrepreneurs. It should be emphasised that such vague regulations will affect not only the citizens of the City, but also entrepreneurs, who have been deprived of protection as regards the safety of legal transactions (legal certainty). It should also be stressed that the Resolution took entrepreneurs by surprise, as it was not properly consulted with them. Entrepreneurs who operate in Poland must not be surprised by regulations that shape the law in a manner that departs from the intention of the Legislator reflected in relevant provisions that apply throughout the country. The Resolution introduces a legal system that is different from the one arising from the statutory and secondary regulations,

Member of BUSINESSEUROPE

Lewiatan Confederation
ul. Zbyszka Cybulskiego 3
00-727 Warsaw

tel. (+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP (tax ID) 5262353400
KRS (court register) 0000053779
District Court for the Capital City of
Warsaw, XIII Commercial Division of
the National Court Register



LEWIATAN

which is inadmissible and undermines both legal and business certainty.

The City Council passed the Resolution by referring to the authorisation to create law-and-order regulations that is laid down in Article 40(3) MSGA. However, because of its general nature, that authorisation needs to be used with due caution and only if all the conditions of its applications are met. Those conditions include: a condition relating to legal status, named the objective condition, a condition relating to actual status, named the subjective condition, and a condition relating to the area of occurrence of a threat, named the territorial condition (P. Chmielnicki, *Ustawa o samorządzie gminnym. Komentarz [Municipal Self-government Act. Commentary]*, LexisNexis2013, commentary on Article 40 MSGA, thesis 25, quotation from Lex). The doctrine happens to indicate also a separate condition of necessity to issue law-and-order regulations to protect goods or values listed in Article 40(2) MSGA (M. Sthal, Gloss to the judgment of the Supreme Administrative Court of 3 December 2004, case GSK 1132/04, OSP 2005, No. 9, p. 482; also the judgment of the Supreme Administrative Court of 13 February 2013, II OSK 994/16), which other authors classify as part of the subjective condition (P. Chmielnicki, *ibidem*, commentary on Article 40 MSGA, thesis 27, quotation from Lex).

In the case of the Resolution, not even one of the above conditions was met, despite the requirement that all of them should be met jointly.

The condition relating to legal status (objective condition) is the existence of a certain area that is not regulated by generally applicable separate Acts of Parliament or other regulations, which means that existing legal status needs to be examined and such examination should lead to the conclusion that the subject-matter of an intended regulation has not been regulated yet by generally applicable Acts of Parliament or other regulations (P. Chmielnicki, *ibidem*, commentary on Article 40 MSGA, thesis 26, quotation from Lex). In this case, there are statutory provisions in force that regulate the issue of placing on the market and handling the products covered by the Resolution. In this case, there is no "area that is not regulated by generally applicable separate Acts of Parliament or other regulations". Therefore, it should be assumed that the City Council exceeded its powers and entered an area already regulated by Polish law – in Acts of Parliament.

The Resolution infringes, for example, Article 3(2)(5) of the Municipal Cleanliness and Order Act, Articles 40a et seq. of the Packaging and Packed Waste Management Act and Article 25(6f) and other Articles of the Waste Act or Article 170(1) of the Environment Protection Law. All the above regulations are connected with the subject-matter of the Resolution and the fact of their existence in the current wording excludes the right of local governments to introduce any different regulations in that scope. An "area that is not regulated" would only occur under Article 40(3) MSGA if the system of generally applicable laws included no other regulations allowing the elimination of phenomena discerned by a municipality that are undesirable in the light of that provision (judgement of the Supreme Administrative Court of 11 July 2006, case II GSK 68/06).

Irrespective of the above, it should be noted that the right of a municipality to impose a ban on sale of any specific product cannot be inferred from the general authorisation to pass law-and-order regulations, which is granted by Article 40(3) MSGA. This is because municipal regulations must not thwart statutory rights to initiate and conduct a business in accordance with conditions set out by separate regulations (judgement of the Supreme Administrative Court of 6 March 1992, case SA/Po

Member of BUSINESSEUROPE

Lewiatan Confederation
ul. Zbyszka Cybulskiego 3
00-727 Warsaw

tel. (+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP (tax ID) 5262353400
KRS (court register) 0000053779
District Court for the Capital City of
Warsaw, XIII Commercial Division of
the National Court Register



LEWIATAN

147/91; Monitor Prawniczy of 1993, No. 3, item 90).

The condition relating to actual status (subjective condition) is a result of assessment conducted by an authority that intends to introduce a law-and-order regulation with the conclusion that any of the goods enumerated in an Act of Parliament have been or may be violated and need protection (P. Chmielnicki, *ibidem*, commentary on Article 40 MSGA, thesis 27, quotation from Lex).

In this case, the territorial condition, i.e. that the area where the subject threat occurs must cover a municipality or its part, was not met either. In the event of a bigger threat, intervention should be taken by either a county authority or a field authority that is part of the national government administration (P. Chmielnicki, *ibidem*, commentary on Article 40 MSGA, thesis 28, quotation from Lex). The issue of excessive amounts of uncontrolled plastic waste is not a problem of the City of Walbrzych, but of the whole country, resolved by Acts of Parliament. Those solutions may be deemed flawed (they will certainly be strengthened after the SUP Directive becomes effective), but the fact that that issue is not a regional problem makes Article 40(3) inapplicable.

In this context, it should be noted that Article 40(3) MSGA and the authorisation it confers on municipality councils, i.e. to issue law-and-order regulations, may not be construed extensively. This is because law-and-order regulations may only be issued in exceptional cases, which are precisely specified by the examined provision of law. This means that, under such provision, it is allowed to introduce prohibitions and orders that are directly aimed at meeting the conditions indicated by the legislator (judgement of the Supreme Administrative Court of 11 July 2006, case II GSK 68/06).

C. The Resolution is inadmissible in the light of the Constitution

As laid down in Article 94 of the Constitution, local government authorities pass acts of local law that are effective in the territory over which such authorities have jurisdiction on the basis and within the limits of statutory authorisation. Local governments simply may not introduce any rules that should be implemented in the entire country, for example the implementation of new categories of substances the possession or use of which is prohibited by law, as such rules must be uniform for all residents in the country. This results, indirectly, from Article 3 of the Constitution, which sets out that the Republic of Poland is a unitary state, and Article 32(1) of the Constitution, which lays down that all people are equal and have a right to be treated equally by public authorities. In the light of the above mentioned provisions of the Constitution, it may not be assumed that a substance is not allowed in the jurisdiction of a local government, and, what's more, under penalty, while such prohibition does not apply in the rest of the country.

This means that the City Council was not authorised to issue an act of local law under which the possession of a substance is prohibited if such substance is allowed for trade and use by an Act of Parliament.

D. The Resolution is inadmissible in the light of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)

The City Council refers to European law both in the legal basis and the statement of reasons of the Resolution, and in particular the SUP Directive, as the basis of issuance of the Resolution. And the City Council discerns that the provisions of the SUP Directive should be implemented by 3 July 2021,

Member of BUSINESSEUROPE

Lewiatan Confederation
ul. Zbyszka Cybulskiego 3
00-727 Warsaw

tel. (+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP (tax ID) 5262353400
KRS (court register) 0000053779
District Court for the Capital City of
Warsaw, XIII Commercial Division of
the National Court Register



LEWIATAN

however, as they have not been implemented yet, the City Council feels authorised to take actions to accomplish objectives that are similar to those declared by the SUP Directive.

The legal basis of the Resolution as declared by the City Council, and which invokes the provisions of Article 4(1) and Article 5 of the SUP Directive, shows that the City Council violated Articles 4(1) and 4(2) TEU and Article 288 paragraph 3 TFEU, and the provisions of the SUP Directive, referred to by the City Council. As laid down in Article 4(1) TEU, all competences not conferred upon the Union remain with the Member States, and, in accordance with Article 4(2) TEU, the Union respects their essential state functions, including, in particular, the functions that are to ensure the territorial integrity of the state and maintenance of law and order. Pursuant to Article 288 TFEU, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but it leaves to the national authorities the choice of form and methods. The above provisions of the TEU and the TFEU clearly show that directives are addressed to Member States, understood as international law subjects, and not to individual local governments in Member States. Moreover, Articles 4 and 5 of the SUP Directive clearly indicate that the standards implemented by the SUP Directive are addressed to Member States, and not to any other subjects, which are not Member States.

Besides, it should be noted that relevant public administration authorities are working on the regulations that will implement the SUP Directive and it is very likely that the implementation process will have been completed by the due date provided by the EU law. It should also be emphasised that the intention of the City Council was in conflict with the SUP Directive – a legal act whose implementation was preceded by extensive public consultations and detailed analyses. The essence of the SUP Directive is an objective to gradually withdraw certain single-use products, also by imposing a ban on placing them on the market rather than, for example, by punishing for the possession of specified products.

E. Formal defects of the Resolution

Despite the assumption that the Resolution will create liability punishable under the rules applicable to petty offences, it does not include any specific penalties. A municipality council that wants to introduce a fine for violation of law-and-order regulations under Article 40(4) MSGA must always determine in detail the rates of such penalty within the limits provided for in Article 24 of the Petty Offences Code. (B. Dolnicki, *Ustawa o samorządzie gminnym. Komentarz [Municipal Self-government Act. Commentary]*, WKP 2018, commentary on Articles 40 and 41, thesis III, quotation from Lex), otherwise the entire act is affected by an irreparable defect (vide: the supervisory verdict of the Silesia Governor of 27 December 2007, NP.-N-0911/637/07).

F. The Resolution is self-contradictory and inapplicable in practice

It should not be ignored that the Resolution is self-contradictory and impossible to apply in practice.

For example, the Resolution includes a ban on sale of prohibited products or offering plastic bags to customers and, at the same time, it exempts businesses from the scope of its application, which creates an internal conflict.

The Resolution assumes that the bans will not cover the products acquired before its effective date, which is impossible to verify in practice, especially at the level of a single municipality, so the

Member of BUSINESSEUROPE

Lewiatan Confederation
ul. Zbyszka Cybulskiego 3
00-727 Warsaw

tel. (+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP (tax ID) 5262353400
KRS (court register) 0000053779
District Court for the Capital City of
Warsaw, XIII Commercial Division of
the National Court Register



LEWIATAN

Resolution will be practically impossible to implement.

G. Similar cases in the past

It should be mentioned that there were some attempts in the past to implement regulations similar to the Resolution, for example Resolution No. XX/398/07 of the City Council of Lodz of 25 October 2007 on the implementation in the City of Lodz of a ban on use of single-use and free plastic bags in retail trade and services activities or Resolution No. XVI/214/07 of the City Council of Zabrze of 19 November 2007 on the implementation in the City of Zabrze of a ban on use of single-use and free plastic bag in retail trade and services activities. In both cases, the respective supervisory authorities (regional governors) declared those resolutions invalid (see the supervisory verdict of the Silesia Governor of 27 December 2007, NP.-N-0911/637/07).

The above issue was also examined by the doctrine, which unanimously decided that the verdicts of the supervisory authorities were correct, i.e. any similar resolutions of municipal authorities should be declared invalid (I. Andruszkiewicz, *Używania toreb foliowych może zabronić tylko ustawodawca [Only the Legislator may impose a ban on plastic bags]*, *Gazeta Samorządu i Administracji* 2007/25, p. 18 et seq.; B. Dolnicki, *Ustawa o samorządzie gminnym. Komentarz [Municipal Self-government Act. Commentary]*, WKP 2018, commentary o Articles 40 and 41, thesis III, quotation from Lex).

H. Conclusions

It should be emphasised that the challenged Resolution may not remain part of the legal system as it interferes in an area that is reserved for and already regulated by the Legislator. The objective and subjective scope of the Resolution is difficult to assess because of its inaccuracy.

However, there is no doubt that it will affect not only citizens, but also entrepreneurs who run various businesses. Each of the arguments presented above is sufficient to declare the Resolution unlawful and, thus, invalid. And the number of those arguments and their significance show that this act of law should be immediately removed from the legal system, by issuing not only a relevant supervisory act, but also a prior decision to stop the implementation of the Resolution.

[handwritten signature]

Maciej Witucki

President of the Lewiatan Confederation

[handwritten signature]

Grzegorz Baczewski

General Director of the Lewiatan
Confederation

Member of BUSINESSEUROPE

Lewiatan Confederation
ul. Zbyszka Cybulskiego 3
00-727 Warsaw

tel. (+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP (tax ID) 5262353400
KRS (court register) 0000053779
District Court for the Capital City of
Warsaw, XIII Commercial Division of
the National Court Register