



Kancelaria APLAW Artur Piechocki
ul. Solec 22
00-410 Warszawa
Tel.: +48 606 294 306
E-mail: artur.piechocki@aplaw.pl
www.aplaw.pl

NEW TECHNOLOGIES AND INTERNET LAW

**This publication has been prepared for the Polish Investment and Trade Agency (PAIH)
by the lawyers of APLAW Artur Piechocki**

Authors:

Artur Piechocki, legal advisor (*radca prawny*)
artur.piechocki@aplaw.pl

Daniel Siciński, lawyer (*prawnik*)
daniel.sicinski@aplaw.pl

New technologies have become a key element of the Polish economy. Professionalism and competencies of the Polish lawyers have been appreciated by the global companies that set up their Shared Services Centers (SSC) in Poland. Low wages, compared to Western Europe or the United States, as well as better work quality and better knowledge of foreign languages comparing to Eastern Europe, make Poland an attractive country to invest in. On the other hand, Polish entrepreneurs more often decide to expand their companies abroad, particularly in the new technologies sector.

Polish legal regulations, as well as the new technologies sector, promote an investment-friendly environment. Predictability and standardization with the EU law help to plan long-term investments in Poland.

In this publication, we focus on certain selected areas related to new technologies, such as data center and hosting, e-commerce, online marketing and services, and fintech. The choice is intentional, as these areas develop rapidly and at the same time, they have been secured in a complex way by legal regulations, supported in practice by the Polish public administration and courts.



Kancelaria APLAW Artur Piechocki
ul. Solec 22
00-410 Warszawa
Tel.: +48 606 294 306
E-mail: artur.piechocki@aplaw.pl
www.aplaw.pl

1. Polish market of data center and hosting

Data centers are locations designated to store an IT infrastructure, combined with areas supporting the infrastructure and ensuring security and integrity of servers. Data centers offer two types of services. The first service is a collocation of servers, enabling clients to locate his equipment in the infrastructure of the data center. However, hosting is even a more popular service, offering a space on the servers, that can be used to store, for example, websites, portals or discussion groups (forums).

The Polish data center market is over 10 years old, however, it has recently entered a dynamic phase of development¹. Commercial space in data centers in Poland is increasing rapidly every year. As a result, the Polish collocation and hosting market is the largest in the Central and Eastern Europe, attracting a significant interest of investors and foreign clients. The key dynamics of the market development is connected with the growth of supply and demand for such services, the growing importance of cloud solutions, decrease in prices for infrastructure services, as well as necessity of ensuring the security of resources. The usage of such solutions in Poland now reaches 20-25%, while in Western European countries it's 80%. The disparity clearly indicates that there is still a significant potential for the IT outsourcing development on the Polish market.

The Polish data center market notes more dynamic growth than in Western European countries. In recent years this dynamic growth, in terms of collocation and hosting services, has equalled over a dozen percent per year. According to PMR report ('Data centers market in Poland 2016. Market analysis and development prospects for 2016-2021'), the value of the Polish data center market was estimated at PLN 1,2 billion in 2014, and in 2015 it grew to PLN 1,4 billion. It gives approx. 15% increase. Experts estimate that in the next few years the Polish data center sector will still note a double-digit growth.

Hosting services in Poland also place highly in the rankings of the European market. According to the ranking „Global Web Hosting Market Share 2017”² Poland is ranked on the 8th place in terms of the hosting market share in Europe, and on the 13th place globally. The Polish hosting services market is valued at over USD 400 million and it ranks before Australia, Brazil or India. This huge success is largely a result of competitive prices offered by the Polish suppliers, and innovative approach to services.

¹ The data analysis included in PMR report have been used 'Data centers market in Poland 2016. Market analysis and development prospects for 2016-2021').

² <https://hostadvice.com/marketshare> (access: March 25, 2017).



2. Hosting – legal aspects

An increasing market share of IT data centers translates into a growing popularity of outsourcing based on cloud solutions and hosting services. In order to ensure a compliance between a business activity and legal regulations, the suppliers of IT services should take into account certain legal regulations that have a direct impact on their services.

A. Liability of hosting service providers

The Act of 18 July 2002 on Providing Services by Electronic Means, deserves a special attention, particularly in terms of the liability of hosting service providers.

The Act allows the service provider to be exempt from liability, having fulfilled certain conditions, for the user-generated content, for example, comments placed on the website. The general rule places no obligation on the hosting service provider to monitor the transmitted, hosted or shared content, nor the obligation to search for illegal content. There is the 'notice and takedown' procedure instead, requiring to inform the service provider of a particular content located on his servers, that may be of an illegal nature. Such content may include a copyrighted material, published without a right holder's consent, as well as material infringing personal rights or meeting criteria of a crime, i.e. defamation. Hosting provider is not liable for such data, as long as he is unaware of it, and after receiving an official notice or a credible information about the nature of data, he will immediately block access to it. In such case, the provider is also excluded from liability for loss of the service user, resulting from blocking access to the content.

If a hosting provider has any influence over the user-generated content, i.e. in terms of moderating comments on a discussion forum, it is equivalent to him having knowledge about the illegal nature of the content. In such instance, the hosting service provider is obliged to remove the content or block access to it, even without a previous notice.

It is worth to remember that a hosting service provider is still liable for the content, even if he meets all the conditions mentioned above, if he takes a capital control over a user that produced the content.

B. Data processing and data protection

If hosting service user stores personal data on the servers of an IT infrastructure owner (provider of the service), it is necessary to consider legal framework included in The Personal Data Protection Act of 29 August 1997, as well as in The Regulation of 29 April 2004 by the Minister of Internal Affairs and Administration as regards personal data processing documentation and technical and organisational conditions which should be fulfilled by devices and computer systems used for the personal data processing. In light of the Act, the hosting service user is a personal data controller, while a hosting



Kancelaria APLAW Artur Piechocki
ul. Solec 22
00-410 Warszawa
Tel.: +48 606 294 306
E-mail: artur.piechocki@aplaw.pl
www.aplaw.pl

service provider acts as a personal data processor, since any operation on personal data is considered data processing, including collecting, recording, storing and sharing, particularly when done on IT systems.

In case of making personal data available to the hosting provider, with the aim of processing on behalf of the controller, it is necessary to enter into a personal data processing outsourcing agreement. If this obligation is not met, the controller infringes the regulations and runs a risk of sanctions in case of inspection run by the Inspector General for Personal Data Protection (GIODO). Without concluding such agreement, the entrustment of personal data processing to a hosting service provider is regarded as sharing personal data with an unauthorised entity and constitutes a transgression, punishable by a fine, restriction of liberty or imprisonment for up to two years. The provider is free from such liability, unless he also makes the data available to other entities, however entering into data processing outsourcing contract is in provider's best interest. By offering such contracts, the provider becomes more competitive and in case of GIODO's inspection, he is able to demonstrate compliance with regulations and processing data on legitimate grounds. Additionally, data processing agreement allows parties set out their rights and obligations, especially important in case of data incidents.

The data processing agreement should be concluded in writing, and it can be included in a hosting service agreement or may be signed in a separate document. The contract should define at least the purpose and the scope of processing. In practice, the agreement also sets out the rights and the duties of the parties, the standards of data security and the control procedure run by the data controller, right to subprocess the data, as well as rules regarding the return of data.

The service provider, entrusted with data processing, needs to provide adequate technical and organizational means, necessary for securing the data from unauthorized access, alteration, loss, or destruction. This includes adoption of the relevant procedures and documentation, in particular, a data security policy, an IT system management guide, as well as a register of employees authorized to process the data. These obligations may be fulfilled by an information security manager appointed by the data processor. The requirements should be met and relevant measures implemented before the commencement of data processing, and its standard should reflect at least the one implemented by the controller.

Lack of compliance with the legal obligations concerning data processing and data protection results in controller's liability, however, this does not always exclude the data processor. If he fails to meet obligations arising out of the contract, the processor will be subject to contractual liability. On the other hand, failure to comply with statutory obligations, regarding data processing and data protection, puts the processor at risk of administrative liability.



Kancelaria APLAW Artur Piechocki
ul. Solec 22
00-410 Warszawa
Tel.: +48 606 294 306
E-mail: artur.piechocki@aplaw.pl
www.aplaw.pl

3. Polish e-commerce and internet advertising market

The Polish e-commerce sector develops very rapidly. As a result of a recent dynamic technological development, over 76% of Polish people use the internet, and half of them buy products and services online. According to Gemius report³ an estimated value of the Polish e-commerce market in 2015 equalled PLN 30-33 billion, noting a 20% increase to a previous year. Experts estimate that the value of this market will double in the next 4-5 years, and it shall equal approximately PLN 63 billion by 2020. The share of the Polish e-commerce market in total trading operations is growing steadily, now being at 2,5-4%, and it shall increase in the next two years up to 9%.

Together with a growth of the Polish e-commerce market, the share of internet advertisement expenses grows too. In 2015 it was valued at PLN 3,17 billion, and it was a 20% increase to a previous year.⁴ Further development of the internet marketing is expected, particularly the growth of expenses in advertising campaigns based on content and context marketing. Online advertising, therefore, is becoming increasingly important, as evidenced by a growing share of marketing budgets for internet campaigns in the Polish companies.

The above statistics and forecasts indicate a huge potential for further development of e-commerce and e-marketing sectors in Poland, thereby creating excellent perspectives for companies and investors operating in these areas.

4. E-services delivery

The key act regulating e-commerce and e-marketing in Poland is the Act of 18 July 2002 on Providing Services by Electronic Means. Apart from regulating the liability of a hosting service provider, the Act applies to all kinds of e-services. These services involve sending and receiving data by telecommunication systems on client's demand, without simultaneous presence of the parties, while the data is transmitted through the public network. Some examples of such services include web-content search tools, e-mail service or providing mobile applications.

A. Duties of a service provider

The Act on Providing Services by Electronic Means establishes several obligations for e-services providers, such as disclosure of the identity of the provider to a client or information about particular risks associated with using e-services. When processing client's sensitive data, i.e. like in internet banking services, the service provider needs to protect the confidentiality and integrity of the data,

³<https://www.gemius.pl/files/reports/E-commerce-w-Polsce-2015.pdf> (access: March 25, 2017).

⁴<http://iab.org.pl/aktualnosci/iabpwc-adex-reklama-online-na-fali-wznoszacej/> (access: March 25, 2017).



Kancelaria APLAW Artur Piechocki
ul. Solec 22
00-410 Warszawa
Tel.: +48 606 294 306
E-mail: artur.piechocki@aplaw.pl
www.aplaw.pl

through various means, including cryptographic techniques or electronic signature. The security measures should be adequate to the type of service, data processed, and to the risk of disclosure.

One of the key obligations of the e-service provider is an implementation of the Terms of Service document, setting out i.e. the type and conditions of the service, regulation regarding conclusion and termination of an agreement, and complaint procedure. Terms of Service should be provided to a client, free of charge, before entering into an agreement, for example by posting the rules on a website, with a function of saving it on client's electronic device.

Service provider's website can use cookie files - small text files saved on clients' electronic equipment. Cookies may be necessary for the proper functioning of a service, but they also enable profiling client for marketing purposes. The Act on Providing Services by Electronic Means, as well as The Telecommunications Law Act of 16 July 2004, impose obligations on the websites' owners, including duty to inform users about the use of cookies, the way they operate and how to disable it; they must also obtain client's permission for the use of cookies.

B. Obligations relating to e-marketing

Companies conducting e-marketing activities, for example on websites or through e-mails, need to take into account legal demands associated with the commercial information. Such information is dedicated, directly or indirectly, to promote brands, products, services or image of the company. This kind of information needs to be clearly separated from other content, as well as marked as a marketing message. Moreover, the marketing message has to include the name of the company it promotes, together with the company's e-mail address, description of its promotional activity and the terms of participation.

It is especially important to note, that sending any marketing message through electronic means to a specified individual (i.e. by e-mail or SMS) or through terminal device to any entity (i.e. by telephone or fax), requires prior consent for this type of communication. The consent can be expressed in any form, however, the person must be informed about its results, as well as the right to withdraw consent at any time. The consent cannot be implied, by including it in the accepted Terms of Service, but it can be expressed by marking proper checkboxes.

Not complying with requirements relating to online marketing, especially using intrusive advertising or infringing the information obligations, can lead to a violation of several regulations. Such practices may be qualified as an abuse of communication through technical means and constitute an act of unfair competition. Moreover, it can be classified as misleading or aggressive commercial practices, and also as practices infringing collective consumer interests. As a result of such practices, The Polish Office of Competition and Consumer Protection (UOKIK) can bring an action against the companies which



Kancelaria APLAW Artur Piechocki
ul. Solec 22
00-410 Warszawa
Tel.: +48 606 294 306
E-mail: artur.piechocki@aplaw.pl
www.aplaw.pl

employ such practices. The proceedings may lead to the imposition of fines amounting to 10% of total turnover in the year preceding the year of imposition.

Considering that the internet marketing is often connected with personal data processing, it is also necessary to take into account legal demands of the Act on Personal Data Protection. The service provider can process the entrusted data without client's consent in order to promote his products or services, however, the client may always object against such use of his data. On the other hand, sharing client's data with other companies for marketing purposes or providing marketing of such companies always requires client's clear consent. Such consent has to be separated and independent from other consents mentioned above (related to electronic communication). Gathering personal data for marketing purposes entails a range of different obligations set out in the Act, including registration of dataset to GIODO, as well as the implementation of technical and organizational tools necessary for providing security, confidentiality, and integrity of the processed data.

5. Polish fintech market

The scope of modern technology solutions used in the financial sector that enable to increase the effectiveness and accessibility of the provided services, is defined as fintech. This term is also being used to characterize an industry sector in which the financial institutions offer services and business models based on technology and innovation.

According to Deloitte's „CEE FinTech Report”⁵ the value of the global fintech market is estimated at over USD 19 billion, and the growth rate of the investments in this area will be valued at 55% per year by 2020. New technologies market that supports financial services in Central and Eastern Europe is valued at EUR 2,2 billion, of which EUR 860 million is concentrated in Poland.

The Polish fintech sector stands out mostly for its competitiveness and innovation, positive relations between banks and start-ups, highly qualified human resources, low costs, big size of the market, access to foreign markets, high interest of the foreign investors, and the support of Special Economic Zones⁶. Additionally, Poland is known for its openness to technological innovation as well as increasingly popular mobile payment systems, including contactless payments.

The dynamic growth of local start-ups, providing innovative financial services, also demonstrates a significant potential of the Polish fintech market. Over 100 of such companies operate on this market, and most of them offer e-payments or financial platforms. Other services include on-line fast loans, money exchange, virtual currency or investments.

⁵<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/central-europe/ce-fintech-in-cee-region-2016.pdf> (access: March 25, 2017).

⁶http://fintechpoland.com/wp-content/uploads/2016/12/FinTech_w_Polsce_bariery_i_szanse_rozwoju.pdf (access: March 25, 2017).



6. The Second Payment Services Directive (PSD2)

The Directive of the European Parliament and of the Council of 25 November 2015 (also known as PSD2) deserves special attention in respect of the fintech market. The Directive will have a significant impact on the shape of the European financial sector, at the same time providing new opportunities for the innovative business models such as fintech. The Directive has replaced previous Directive 2007/64/WE of 13 November 2007 (also called PSD1), extending the legal framework for modern payment solutions, as well as supplementing existing regulations. The provisions of the Directive need to be implemented by member states by adopting adequate local regulations. The PSD2 is to be implemented by 13 January 2018. The changes will have a significant impact on modern payment services market, including financial institutions, banks, independent ATM operators, as well as other providers offering mobile payment solutions.

The new Directive will have a broader scope of application than the PSD1. The new regulations will apply to every transaction, regardless of the currency of the transaction, if at least one of the payment service provider to a transaction, has a registered office in the European Economic Area (EEA).

Most importantly, the PSD2 extends a catalogue of the payment services providers to the entities providing the payment initiation services, as well as account information services. The former gives provider an access to the payer's bank account, allowing for the initiation of the payment. The latter will provide the payer with the information about his bank accounts. Providing such services will not entail any transfer of payer's means between accounts, therefore at no point will the service providers come into a possession of the money. Despite this, the payment initiation service provider will have to ensure the data confidentiality and verify the payer's identity, without storing the data, or modifying elements of the transaction. Providing such services will require an approval of a relevant authority, whereas account information service will only require the registration.

Among other changes, the new rules of responsibility for unauthorised transaction incidents are especially important. The Directive introduces new requirements regarding strong user authentication, setting up a higher standard for verification of payer's identity for particular account operations, for example initiating e-transactions or accessing an online account. In case of an incident, without such strong authentication being implemented by a payment services provider, he will be liable for any loss resulted. The payer will have a right to recover any damages directly from the bank account provider, who then will be able to claim reimbursement from the external provider responsible for an unauthorised transaction.

The logo for APLAW, consisting of the word "APLAW" in a white, sans-serif font centered within a dark gray square.

www.aplaw.pl

APLaw is a Polish boutique law firm providing services particularly in IP and TMT areas.

APLaw was founded by Artur Piechocki in 2010, a legal advisor with a wide experience who worked for many years as a legal counsel at the Research and Academic Computer Network (NASK), representing the PL Register in Poland and international organizations.

Artur Piechocki is a co-founder and a member of the Council of the Domain Names Arbitration Court at the Polish Chamber of New Technology and Telecommunications (PIIT) PIIT, and a co-founder of domain case law at the Arbitration Court at the Polish Chamber of Commerce (KIG). Moreover, he is an expert at the European Network and Information Security Agency (ENISA) in regulatory, privacy and data protection. He cooperates with the Internet Corporation for Assigned Names and Numbers (ICANN) and the World Intellectual Property Organization (WIPO) and in the past has cooperated with the Council of European National Top Level Domain Registries (CENTR). He is an active participant in International Telecommunication Union (ITU) meetings and a counsel to the Cybersecurity Foundation.

The scope of APLaw's services include:

- Information and communication technologies law (ICT)
- Privacy and data protection
- Intellectual property law
- Industrial property law
- Consumer protection and competition law
- Legal services for foreigners

The information included in this publication is not a legal advice and it is true and actual in the moment of publication. APLaw is not responsible for the consequences of use of the above information without previous analysis of the matter status. In case you need a legal advice you are kindly asked to contact the authors of this publication.

APLAW 2017 ©