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LEGAL ALERT

An amendment to the Polish Code of Commercial Companies takes effect. New solutions for domestic and cross-border reorganizations of companies

31 January 2023 was set as a deadline for the transposition of the EU directive 2019/2021 on cross-border reorganizations. Poland transposed the directive into national law on 15 September. In addition to the implementation of EU regulations concerning cross-border conversions, divisions and mergers, the last amendment also offers new solutions for domestic reorganizations of companies.

Below the crucial changes introduced into the Polish law:

New solutions for domestic reorganizations

- **New division type – division by separation**

A new form of a partial division of companies was introduced to the Polish law - division by separation (podział przez wyodrębnienie). It consists of transferring a part of the assets and liabilities of the company being divided to an existing or a newly established company, in exchange for the issue of stocks or shares taken up directly by the company being divided. Differently from the division by spin-off (podział przez wydzielenie), it is the company being divided (not its shareholders) that receives shares in the recipient company in exchange for a part of its assets and liabilities.

This solution facilitates the separation of subsidiaries (daughter companies) and - owing to the universal succession principle – it may constitute an alternative in relation to transactions of non-cash contributions of an organized part of an enterprise, or asset deals.

- **New simplified form of a merger**

The amendment provides for a new possibility of a simplified merger in cases where one shareholder holds directly or indirectly all the shares in the merging companies. Such a merger does not require the acquiring company to increase its share capital or its shares to be allotted, or the draft terms of the merger to be examined by a certified auditor. This will enable a simplified concentration of the assets and liabilities of dispersed companies within a holding structure, as well as a merger of e.g. a granddaughter company with its grandmother company. A simplified merger is also available to companies in which several shareholders hold shares in the same proportion in each of the companies. This may enable simplified mergers e.g. within family company groups, where a number of family members hold shares in the same proportions in several companies.

- **New reorganization opportunities for limited joint-stock partnerships**

A limited joint-stock partnership acquires the right to participate in mergers with companies as an acquiring entity (in the case of a merger by acquisition) or as a newly established entity (in the case of a merger by establishing a new entity). This was not possible before.

In addition, a joint-stock partnership will be able to be divided, both at the domestic and the cross-border levels.



- **New possibility to merge partnerships**

Partnerships will be able to be merged with each other also by establishing, or by being acquired by, a joint-stock partnership. Previously, partnerships could merge with each other only by establishing a company.

New solutions for cross-border reorganizations

- **Cross-border conversion**

A key novelty is the opportunity to carry out a cross-border conversion of a company. Up till now regulations admitted only a cross-border merger of companies.

Based on the new regulations, Polish companies and joint-stock partnerships can be converted into foreign entities being subject to the law of an EU member state or of a state-party to the EEA agreement and having its statutory registered office, central administration or principal place of business in the EU or in a state-party to the EEA agreement. As a result of such a conversion, the Polish company's registered office may be transferred abroad where its business operations will be continued uninterruptedly, which previously required the company to be liquidated and a new company to be established abroad.

- **Cross-border division**

Another new feature is the opportunity of a cross-border division. Polish companies and joint-stock partnerships acquired the right to be divided into two or more foreign entities being subject to the law of an EU member state or of a state-party to the EEA agreement and having its statutory registered office, central administration or principal place of business in the EU or in a state-party to the EEA agreement.

The division may be carried out in any way applicable to domestic divisions, including a new form of division by separation. This tool may be a new opportunity for Polish companies to expand internationally. Thus, a Polish company may establish a foreign sister company or daughter company. The cross-border division may only cover a division of the assets and liabilities of the company being divided into a newly established company (companies). A cross-border division leading to a transfer of the assets and liabilities of the company being divided to an existing company (companies) will be impossible.

- **Unification of the principles of cross-border operations and of the protection of employees, creditors and minority shareholders**

The amendment unifies the principles of cross-border operations i.e. cross-border mergers, divisions and conversions. This refers first of all to the protection of employees, creditors and shareholders of companies participating in the given operation and consists in e.g.:

-the obligation to determine in the draft terms of the cross-border operation

safeguards proposed to creditors or conditions of exercising the rights of creditors, employees, and shareholders, as well as an address of the website on which information can be found about those conditions;



- the right of shareholders, creditors and employee representatives to submit comments to the company on the draft terms of the cross-border operation;
- the creditors' right to request safeguards for their claims if they substantiate the fact that the satisfaction of their claims is threatened by the operation;
- the shareholder's right to claim repurchasing his/her shares if the shareholder voted against a resolution on the cross-border operation and requested that his/her objection be included in the minutes, or if he/she was unreasonably prevented from the participation in the shareholders' meeting or general meeting at which the resolution on the cross-border operation was adopted; the repurchase price will correspond to the fair value of the shares and its due determination will be subject to the examination by a certified auditor;
- the management board's obligation to draw up reports for shareholders and employees, which will explain legal grounds for and will justify economic aspects of the cross-border operation, including an explanation of the operation consequences for the employees and for the future activities of the company.

- **New simplified form of a cross-border merger**

In addition to the unification to EU standards of the current regulations governing cross-border mergers, the amendment also introduces a new simplified method of a cross-border merger of companies by acquisition. Such a merger can be carried out without allotting any shares in the acquiring company, where one of the shareholders holds directly or indirectly all the shares in the merging companies. Thus, this solution will enable avoiding an increase in the acquiring company's share capital and will facilitate a simplified concentration of the assets and liabilities of dispersed companies within a cross-border holding structure.

- **Extended control of registration court over legality of cross-border operations**

Significant risks arising from the amendment may concern a considerable extension of the registration court's rights to control the legality of a cross-border operation from the perspective of abusive clauses. The registration court may refuse to issue a certificate of the compliance of a cross-border operation with Polish law, and consequently - prevent the operation, if it finds the operation is abusive or leads to the violation or circumvention of the law, e.g. it is carried out in order to evade the payment of taxes or Social Security Office (ZUS) contributions, or its purpose is to hinder creditors from claiming their receivables or to circumvent the rights of employees. To this effect, the registration court - in the case of its serious doubts - may request opinions of other applicable authorities (first of all - tax authorities) or experts in order to examine the specific scope of the company's activities and the legality of the cross-border operation.



In addition, a new stage of cross-border operations is a mandatory opinion being issued by the Head of the National Fiscal Administration (KAS) which is to prevent abuses within the operations. An application for this opinion should be submitted together with the motion to the registration court for a certificate of the compliance of the cross-border operation with Polish law. The application is forwarded by the registration court without delay to the appropriate tax authority. The subject of the opinion is, first and foremost, the ascertainment that there is no reasonable assumption that the cross-border operation constitutes a circumvention of tax law, and that the company's monetary liabilities towards tax authorities, including local government units, have been satisfied or secured.

Besides, a motion for the certificate must be accompanied by the Social Security Office's statement confirming no arrears in payments due to the Office.



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IF YOU HAVE ANY QUERIES CONCERNING SOLUTIONS AVAILABLE FOR DOMESTIC AND CROSS-BORDER REORGANIZATIONS, PLEASE DO NOT HESITATE TO CONTACT US.

