



IT WILL BE EASIER TO REORGANISE POLISH COMPANIES, INCLUDING THE RELOCATION OF THEIR REGISTERED OFFICE ABROAD

**CROSS-BORDER TRANSFORMATIONS AND
DIVISIONS OF COMPANIES IN THE EU**

LEGAL ALERT

September 2023

On 16 August 2008, the Polish Parliament adopted an Act amending the Commercial Companies Code. The amendment provides, inter alia, for the introduction into Polish law of provisions on cross-border transformations and cross-border divisions of companies within the Member States of the European Union. The provisions amending the Commercial Companies Code will enter into force on 15 September 2023.

The amendment implements the provisions of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border transformations, mergers and divisions of companies (the "Directive").

LEGAL POSITION PRIOR TO THE AMENDMENT

As it stands, the Polish Commercial Companies Code contains provisions on cross-border mergers but lacks a comprehensive regime for cross-border reorganisations involving transformations or divisions.

Furthermore, according to the judgment of the Court of Justice of the European Union of 25 October 2017 in the case of the Polish company Polbud-Wykonawstwo sp. z o.o. on liquidation (C-106/16), the current provisions of the Commercial Companies Code constitute a restriction on the freedom of establishment which has been established by the Treaty on the Functioning of the European Union in so far as they make the transfer of the registered office of a Polish company to another Member State conditional on the company in question being wound up.

NEW RULES FOR CROSS-BORDER MERGERS AND DIVISIONS

The amendment to the Commercial Companies Code **will introduce two new types of cross-border operations into the Polish law: cross-border transformation and cross-border division of companies** in accordance with the Directive.

According to the enacted legislation, a cross-border transformation is the transformation of a Polish limited liability company, joint-stock company, or limited joint-stock partnership into a foreign company governed by the laws of an EU member state. This transformation takes place with the simultaneous transfer of its registered office to that member state, while retaining its legal personality.

The permissible foreign legal forms into which a Polish company may convert are listed in Annex 2 to the Directive. Using Germany as an example, a Polish limited liability company, joint-stock company, or limited partnership, may convert into a German GmbH, AG or KGaA, to the exclusion of the other types of companies as defined by German law.

The effect of a cross-border conversion is to transfer the registered office of a Polish company to another Member State and change its legal form to a foreign one while maintaining its legal personality (on the basis of its continued operation).

On the other hand, the cross-border division will consist in the division of a Polish limited liability company, joint-stock company, or limited joint-stock partnership into two or more companies governed by the laws of an EU member state, provided that at least two of the companies involved in the division are governed by the laws of different member states.

The new rules on cross-border divisions - following the proposed model in the Directive - cover only cases of cross-border divisions by transferring all or part of the assets of a Polish company being divided to a company or companies newly established in another Member State. On the other hand, they do not provide for cross-border divisions involving the transfer of all or part of the assets of a Polish company being divided and distributed to a company or companies already established in another Member State.

The permitted foreign legal forms of companies created as a result of a cross-border division are listed in Annex 2 to the Directive. Using Germany as an example, a Polish limited liability company, joint stock company or limited partnership could transfer its assets in a cross-border division to a newly formed German GmbH, AG or KGaA, to the exclusion of the other types of company defined by German law.

A cross-border division results in the transfer of all the assets of the divided company to a newly established foreign company (or the acquiring companies) based on universal succession, with the loss of the legal existence of the divided company (in the case of a complete division). On the other hand, a partial demerger results in the transfer of a part of the assets of the demerged company to a newly established foreign company (or the acquiring companies) based on a partial universal succession, while the Polish demerged company retains its legal existence.

Unfortunately, the juxtaposition of the proposed Polish regulations and provisions of the Directive raises doubts as to whether a simple Polish joint-stock company may be subject to a cross-border conversion or division.

A key moment in any cross-border conversion and division will be the issuing of a certificate of admissibility of the conversion or division by the court of the country of the converted or divided company. Until the certificate is issued, the procedure and formalities relating to the transformation or division are governed by the law of the country in which the transformed or divided company is based in at the moment. On the other hand, once the certificate has been obtained, further requirements and formalities will be governed by the law of the country in which the transformed or acquiring company is based in.

Furthermore, in line with the provisions of the Directive, the proposed Polish legislation provides for a prohibition on the invalidation of cross-border transformations and divisions. After the date of the conversion or the date of the demerger, it will not be possible to revoke or declare invalid the resolution on the cross-border conversion or the resolution on the cross-border demerger, nor will it be possible to dissolve the Company in accordance with Section 21 of the Companies Act.

OTHER AMENDMENTS

This amendment to the Commercial Companies Code also provides for changes to the current rules on cross-border mergers and the rules on domestic mergers, demergers, and transformations.

Of particular interest in this respect is the planned addition of a new type of division, namely **division by demerger**, which consists of the transfer of part of the assets of the company being divided to one or more existing or newly established companies in exchange for shares in the company or companies **being acquired by the company being divided**. This is an unknown solution in Polish law, which corresponds to the German division by demerger ("Ausgliederung") provided for in Article 123(3) of the Transformation Act (Umwandlungsgesetz).

PLEASE DO NOT HESITATE TO CONTACT US

If you have any questions, the members of the WKB German Desk who specialise in corporate law, in particular, corporate reorganisations are available to assist:



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