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2023 Revisions to the commercial companies code - new regulations for cross-border and domestic company reorganisations

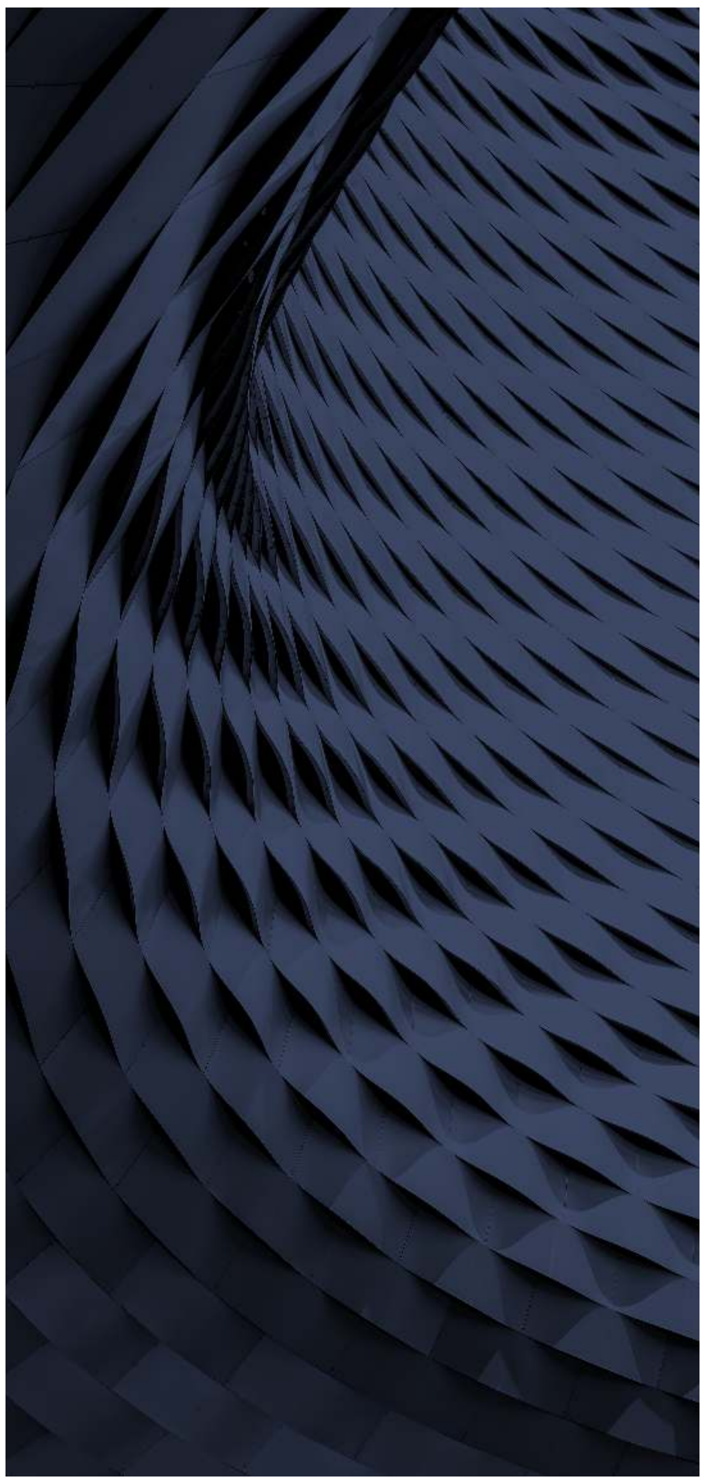
On 15 September 2023, an amendment to the Commercial Companies Code[1] (the "**Code**") (the "**Amendment**") entered into force which transposes into Polish law Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019, amending Directive (EU) 2017/1132), as regards cross-border conversions, mergers and divisions (the "**Directive**"). The Directive introduces, inter alia, the notion of cross-border divisions and conversions of companies and substantially modifies the existing regulations on cross-border mergers.

The new rules aim to enhance the integration of the single market in the EU, ensuring the freedom of establishment and preventing that freedom from being restricted by varying legal standards across the various Member States. They also aim to harmonise the rules on cross-border conversions and company reorganisations. The changes are comprehensive as they introduce changes in the area of both cross-border and domestic reorganisations.

The Amendment also aims to implement the judgment of the Court of Justice of the European Union (the "**CJEU**") of 26 October 2017 (C-106/16) in the case of Polbud-Wykonawstwo, in which the CJEU ruled that Community legislation precludes the making of the transfer of the registered office of a company to another Member State, with a view to its conversion into a company governed by foreign law, conditional on the liquidation of the company being converted in the country of departure.

Therefore, the new rules (Article 270(2) - in the case of a limited liability company, and Article 259(2) - in the case of a joint-stock company) no longer require liquidation proceedings to be carried out in connection with a company's cross-border conversion combined with the transfer of its registered office to another Member State or a state party to the European Economic Area (the "**EEA**") agreement.

The Amendment extends the capacity of a partnership limited by shares to be reorganised. As the only form of partnership, it will be able to participate in merger processes – both as a recipient and as a newly incorporated entity. Furthermore, it will be able to participate in division processes as the partnership/company being divided.



CHANGES TO CROSS-BORDER REORGANISATIONS

The Amendment introduces two new types of cross-border company reorganisations to the Code (in addition to the hitherto available cross-border merger): a cross-border division and a cross-border conversion. These solutions are available both for companies and partnerships limited by shares.

Cross-border divisions

A cross-border division involves the division of a domestic company or partnership limited by shares into two or more partnerships/companies governed by the laws of another EU Member State.

A cross-border division may be carried out in three different ways:

- **through the formation of a new company or companies**, when the newly-formed company or companies take over all the assets and liabilities of the company being divided and its existing shareholders receive the shares in such company or companies;
- **through separation**, where a part of the assets and liabilities of the company being divided is transferred to a newly formed company or companies and the existing shareholders receive shares in the newly formed companies; and
- **through spin-off**, where a part of the assets and liabilities of the company being divided is transferred to a newly formed company or companies in exchange for shares in such companies which are subscribed for by the company being divided.

As can be seen from the above, the Amendment allows a cross-border division through the transfer of all or part of the assets and liabilities of the Polish company being divided **only to a company or companies newly formed in another Member State**. This means that it is not possible to transfer all or part of the assets and liabilities of a Polish company being divided to a company or companies already existing in another Member State. The permitted foreign legal forms of the companies thus created are set out in Annex 2 to the Directive 2017/1132.

Cross-border conversion

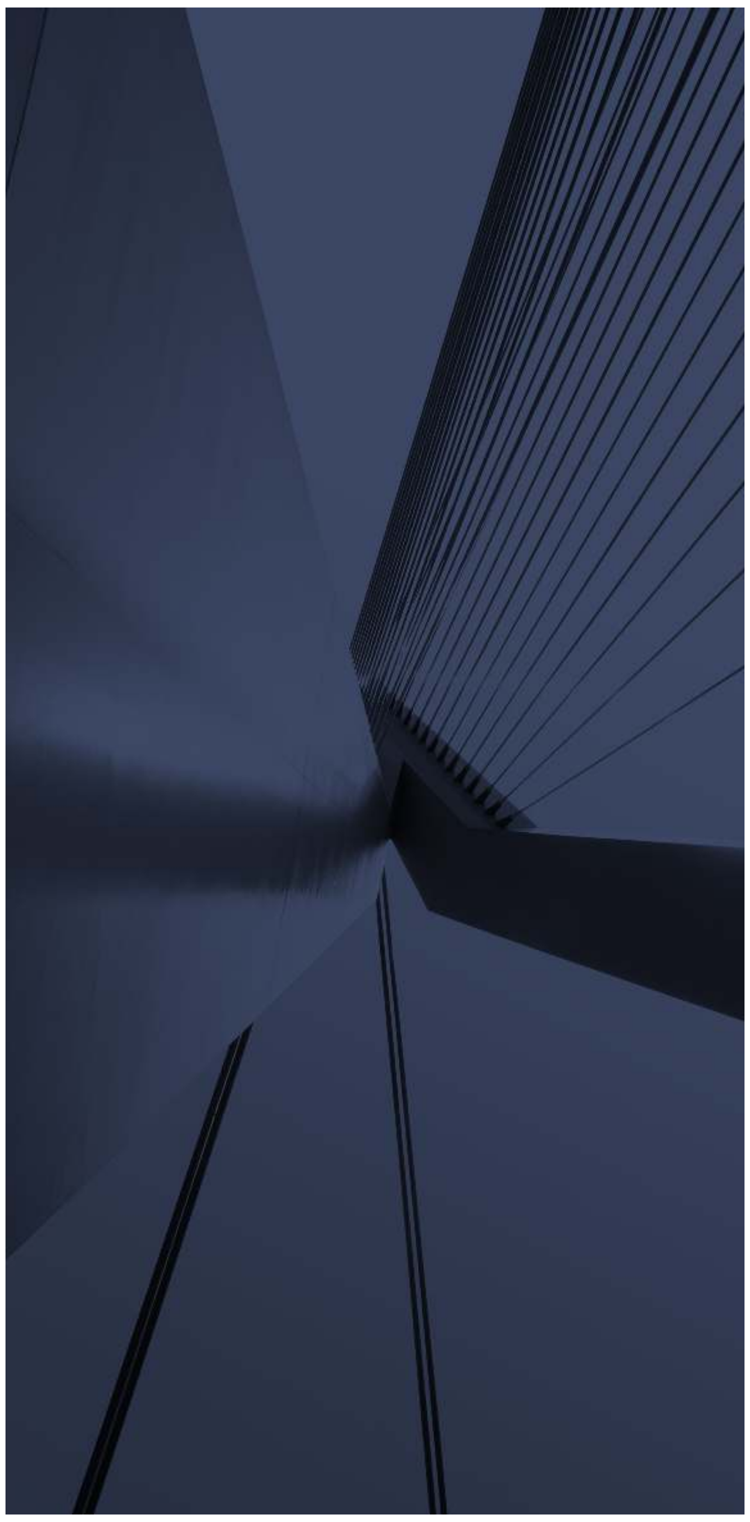
The second newly available solution is cross-border conversion. The Amendment enables a Polish company or a partnership limited by shares to be converted into a specific type of company (as listed in Annex 2 to Directive 2017/1132) governed by the law of an EU Member State or a state that is party to the EEA Agreement.

This means that it is possible to change the current legal form (e.g. a limited liability company) to another (e.g. the Spanish sociedad anónima or the German Aktiengesellschaft, i.e. the equivalent of a Polish joint-stock company), as well as to change the current legal form (e.g. a limited liability company) to its equivalent under foreign law (the Spanish sociedad de responsabilidad limitada or the German Gesellschaft mit beschränkter Haftung).

A cross-border conversion will involve the simultaneous transfer of at least the registered office to the chosen country and the maintenance of the legal personality of the company being converted. Thus, the transfer of a Polish company or a partnership limited by shares to another Member State will not involve carrying out liquidation in the country of departure.

New creditor, minority shareholder and employee protection rules, and broader reorganisation scrutiny

The amendment aims to increase the level of protection afforded to the interests of creditors, minority shareholders and employees of companies involved in cross-border reorganisations. The Amendment is a compromise between the need to facilitate cross-border operations and the imperative to protect the interests of the various stakeholders of a partnership/company that might potentially be adversely affected by such operations.



In the case of cross-border reorganisations, the main way to protect creditors of a domestic partnership/company is to give them the option, within one month of the date on which a cross-border reorganisation plan is made available, to demand that security be established for their claims that have not become due at the time the plan is made available. This would require creditors to make a prima facie case that the satisfaction of their claims is jeopardised by the reorganisation.

The interests of minority shareholders who oppose a cross-border reorganisation are safeguarded by their right to exit the company and receive compensation, which should be assessed by an independent expert. Minority shareholders are also entitled to submit comments on the reorganisation plan.

Employees, on the other hand, are given the opportunity to comment on the cross-border reorganisation plan, the right to examine the report on its effects and to submit their opinion on the content of such report. In addition, the report presenting the legal grounds and the economic rationale for the cross-border operation in question will have to include a section for employees. The participation of employees in the company formed as a result of the cross-border operation is regulated outside of the Code[2].

More extensive scrutiny of reorganisations

The Amendment strengthens domestic scrutiny of the lawfulness of cross-border reorganisations. The legislation introduces – mirroring the solutions previously adopted in the case of cross-border mergers – the requirement to obtain a **pre-division certificate or a pre-conversion certificate confirming that the given cross-border division or conversion complies with Polish law.**

Until the certificate is issued, the conversion or division will be governed by the law of the country in which the conversion or division of the company is taking place.

Once the certificate is obtained, further requirements and formalities will be determined by the law governing the converted company or the acquiring company.

In order for a cross-border reorganisation to take effect, it is necessary to obtain an opinion of the Head of the National Revenue Administration (Szef Krajowej Administracji Skarbowej) on the compliance of the cross-border operation in question with the provisions of tax law. For this reason, the management board of the company (the converting company or the company being divided) has the requirement to submit an additional application.

CHANGES TO DOMESTIC REORGANISATIONS

In addition to the changes to cross-border reorganisations, the Amendment also introduces significant changes to domestic company reorganisations. The most important of these are the introduction of a new type of division of a company (division by spin-off) and a new type of simplified merger.

Division by spin-off

A division by spin-off (similarly to a division by separation) involves the transfer of some of the property (assets and liabilities) of the partnership/company being divided to one or more acquiring companies. In a division by spin-off, it is **the partnership/company being divided** (and not its partner/shareholders) **that becomes a shareholder of the acquiring company**. This is similar to an in-kind contribution of an organised part of an enterprise, but with all the advantages of a division. Under the new institution, a transfer of rights and obligations will take place pursuant to the principles of universal succession. As of the spin-off date, the spun-off company assumes the rights and obligations of the company being divided as specified in the division plan. All permits, licences and exemptions/reliefs associated with the allocated (spun-off) assets/liabilities of the company being divided will also be transferred to it (unless a statute or an administrative decision provides otherwise).

It is therefore a convenient mechanism for creating holding structures or transferring assets to subsidiaries, which has the potential to replace many asset deal and non-cash contribution transactions.

A domestic division by spin-off makes it possible to transfer part of the assets/liabilities of a company being divided not only to a newly formed company or companies, but also to an existing company or companies (unlike in the case of a cross-border division).

The company being divided remains jointly and severally liable with the acquiring company towards any creditors of the company being divided the claims of which are allocated in the division plan to the acquiring company and which the company being divided has not satisfied. This liability is limited to the value of the net assets allocated to each company participating in the division.

New type of simplified merger

Where one shareholder directly or indirectly holds all of the shares in the merging companies or the shareholders of the merging companies hold shares in all of the merging companies in the same proportion, it is possible to carry out a merger without allotting shares in the share capital of the acquiring company. The obligations to determine the exchange ratio and the rules governing the allotment of shares, to have the merger plan audited by a statutory auditor, for the management board of the company being acquired to draw up a report providing a rationale for the merger and for the shareholders of the company being acquired to adopt a resolution on the merger will also not apply in such cases.

The new type of simplified merger can be employed, for example, to concentrate the assets and liabilities of companies dispersed within a holding structure.

[1] The Act of 16 August 2023 amending the Commercial Companies Code and Certain Other Acts (Journal of Laws of 2023, item 1705)

[2] The Act of 26 May 2023 on the participation of employees in a company created through a cross-border conversion, merger or division of companies (Journal of Laws 2023, item 1784), which also entered into force on 15 September 2023.

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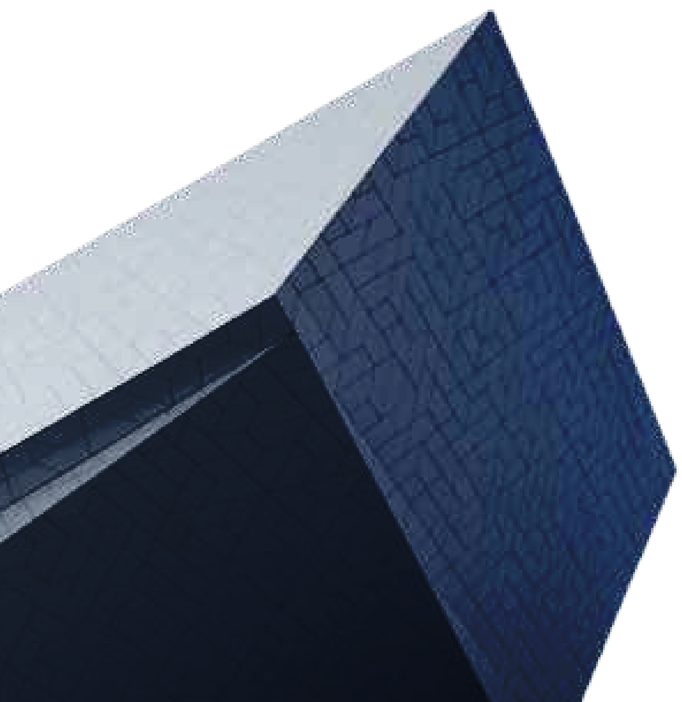

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