

## AMENDMENTS TO THE COMMERCIAL COMPANIES CODE CONCERNING DOMESTIC AND CROSS-BORDER REORGANISATION PROCESSES

On 15 September 2023, significant changes came into force relating to the process of carrying out domestic and cross-border corporate reorganisations. These apply to Polish companies and limited joint-stock partnerships. In order to implement certain European directives,<sup>1</sup> an amendment to the Commercial Companies Code introduces rules governing cross-border conversions and cross-border demergers of companies. Furthermore, they introduce new solutions to domestic reorganisations such as demerger by separation and a new simplified merger procedure. This may, in practice, streamline corporate reorganisations - both domestic and cross-border.

### New regulations on domestic mergers and demergers of companies

#### Demerger by separation

The amendment to the Commercial Companies Code introduces a new type of corporate demerger - demerger by separation.

So far, the carve-out of part of the assets of a company through its demerger was only possible by transferring them to a "sister company," i.e. a company in which shares are taken up by the shareholders of the company being demerged (demerger by spin-off). By contrast, a demerger by separation will consist in the transfer of part of the assets of the company being demerged to a company the shares of which are taken up by the company being demerged itself ("daughter company").

The difference is, therefore, that the shares in the acquiring or newly established company(ies) will be acquired in the case of *demerger by separation* by the company being demerged, and in the case of a *demerger by spin-off* by the shareholders of the company being demerged.

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<sup>1</sup> Directive 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive 2017/1132 as regards the use of digital tools and processes in company law (Official Journal of the EU L 186/80 of 11.07.2019, pages 80–104); 2) and Directive 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 demergers (Official Journal of the EU L 321 of 12.12.2019, pages 1–44).

In addition, a number of simplifications will apply to a demerger by separation, in particular there is no need for the demerger plan to be examined by an expert and for the management board to draw up a special report for the purposes of the demerger.

#### **New simplified merger procedure**

The amendment also introduces a new simplified merger procedure, whereby a merger may be carried out without the allotment of new shares in the acquiring company. This will result in savings of both time and costs when one shareholder directly or indirectly holds all of the shares in the merging companies or the shareholders of the merging companies hold shares in the same proportion in all of the merging companies ("sister companies"). In addition, a number of other simplifications will apply to such a merger. In particular there is no need for the merger plan to be examined by an expert and for the management board to draw up a special report for the purposes of the merger.

The existing provisions of the Commercial Companies Code already provided for a number of simplifications in cases where the acquiring company was the sole shareholder or a shareholder holding at least 90 per cent of the shares in the target company. However, as a result of an error on the part of the legislator when introducing some previous amendments, it was not completely clear whether a share capital increase was necessary in such a situation. Moreover, the new provisions significantly expand the scope of simplification by providing that also indirect ownership of all the shares and merger to a "sister company" allows for the simplified procedure to be applied.

#### **A limited joint-stock partnership as an acquiring company or company being demerged**

As a result of the amendment, not only a company, but also a limited joint-stock partnership may be the surviving entity after the merger. Before that only a company could be such an entity. Additionally, in addition to companies a limited joint-stock partnership may also be subject to demerger.

#### **Shortened waiting period in the demerger procedure**

The shareholders of companies involved in the demerger should still be notified twice about the intended demerger. However, it has now been made clear that the shareholders' meeting of the relevant company should be held 6 weeks after the first notice, not the second notice. This should slightly shorten the entire process.

### **New regulations regarding cross-border reorganisations**

#### **Cross-border mergers of limited liability companies and limited joint-stock partnerships**

Unlike cross-border demergers and cross-border conversions, a cross-border merger was already regulated by the Commercial Companies Code. However, the amendment introduces certain modifications in this respect. The most notable of them are listed below.

There is a new requirement to obtain the opinion of the relevant Polish tax authority on the cross-border merger. Moreover, the registry court has now explicit right to examine whether the cross-border would not result with abuse of law.

Also, the list of documents required to be attached to the application to issue compliance certificate has been extended by e.g. statement of the management board on the purpose of the merger, and no arrears certificate issued by social securities authority (ZUS).

The new law makes it clear that until the date of receipt of a certificate of compliance of the cross-border merger with national law, for each of the merging companies the cross-border merger will be subject to the law of the country of its registered office, and after that date it will be subject to the law of the country of the registered office of the surviving company.

Furthermore, the merging company will have to file a merger plan for a cross-border merger with its registration court or announce it at least five weeks before the date of the shareholders' meeting to approve the merger. Until now, this deadline was one month and there was no option to file with the registration court.

A new solution regarding the report of the company's management board justifying the merger is the introduction of separate sections in the report for the company's shareholders and employees, whereby the company may choose to prepare two separate reports in this respect, the former to be released just to shareholders and the latter just to employees.

The changes introduced also include the obligation to notify the company's shareholders twice of the intention to merge: the first notification must be made no later than six weeks before the date of the shareholders' meeting approving the merger and the second not less than two weeks after the date of the first notification.

It is also worth mentioning that in case of buy-out of shareholder objecting to the cross-border merger the buy-out price will be fair value determined by an expert.

### **Cross-border demerger**

A new institution provided for in the amended Commercial Companies Code is the cross-border demerger of companies and limited joint-stock partnerships within the European Union.

As in the case of a cross-border merger, the process includes the following steps in chronological order (subject to certain exemptions):

- preparing and signing the demerger plan, and the management boards' reports for shareholders and employees;
- announcing the demerger plan and/or filing it with the registry court;
- notifying shareholders about the demerger;
- issue of an expert's opinion;
- adopting shareholders' resolutions on the demerger;
- obtaining a certificate from the registry court that the demerger complies with Polish law (preceded by an opinion of the relevant Polish tax authority); and
- registration of the demerger.

The provisions also include measures to protect creditors' rights, and rules of the buy-out of shareholders voting against the demerger.

### **Cross-border conversion**

A new institution provided for in the amended Commercial Companies Code is also the cross-border conversion of companies and limited joint-stock partnerships within the European Union into another type of company (as per the list attached to the relevant directive).

The process includes the following steps in chronological order (subject to certain exemptions):

- preparing and signing the conversion plan, and the management boards' reports for shareholders and employees;
- announcing the conversion plan and/or filing it with the registry court;
- notifying shareholders about the conversion;
- issue of an expert's opinion;
- adopting shareholders' resolutions on the conversion;
- obtaining a certificate from the registry court that the conversion complies with Polish law (preceded by an opinion of the relevant Polish tax authority); and
- registration of the conversion.

The provisions also include measures to protect creditors' rights, and rules for the buy-out of shareholders voting against the conversion.

### **Conclusion**

The changes should be assessed positively. To comply with EU law, the possibility of cross-border demerger and cross-border conversion within the European Union has been introduced. This increases the flexibility for carrying out corporate reorganisations involving Polish corporate entities. The option of demerger by way of the separation of assets to a daughter company may be particularly useful and the inability to carry this out under Polish law had long been criticised. A number of simplifications have also been expanded, in particular additional simplified merger procedure for "sister companies", i.e. where the economic ownership by shareholders of these companies is the same.

However, changes to the cross-border merger procedure make it rather more burdensome. In particular, the requirement to obtain the opinion of the relevant Polish tax authority on each cross-border merger (as well as cross-border demergers and cross-border conversions) may seriously extend these processes and discourage entrepreneurs from proceeding with such reorganisations.

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