

# NEW LANDSCAPE FOR TRANSFORMATIONS



**KAROLINA ŁASOWSKA, ATTORNEY AT LAW, CORPORATE AND M&A COMMERCIAL LAWYER AT VISTRA POLAND, EXAMS THE IMPACT OF NEW REGULATIONS IN COMMERCIAL LAW ON COMPANIES WHICH PLAN TO REORGANIZE THEIR STRUCTURES.**

Polish companies which consider reorganization process regarding international markets shall pay special attention to the upcoming changes in commercial law. The Government Legislation Centre has published a draft amendment to the Commercial Companies Code, which amounts to a real revolution in reorganization processes, both domestic and cross-border. The draft constitutes the implementation of the 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. It also refers to the judgment of the Court of Justice of the European Union dated 25 October 2017 in the *Polbud – Wykonawstwo sp. z o.o.* liquidation (Case C-106/16) and regards the protection of freedom of establishment.

## NEW MECHANISMS

Nowadays, the Polish Commercial Companies Code allows only for cross-border mergers of corporation and limited joint-stock partnerships (with some limitations). The draft, however, introduces two new mechanisms of cross-border reorganizations, namely cross-border division of companies and cross-border transformation. The new regulations allow for cross-border division of corporation or limited joint stock partnerships, which was previously omitted by Polish regulations. In principle, new regulations will adequately reflect the provisions which currently apply to domestic companies' divisions. The draft distinguishes three types of the cross-border division: a division by incorporation of new entity, a division by acquisition and subsequent incorporation of the new entity, and a division by separation. Each of them requires transfer of assets and liabilities of the divided company to newly in-

corporated companies. In other words, that excludes the possibility to transfer assets to the existing company.

Moreover, pursuant to the draft, the corporation or limited joint-stock partnership may be transformed into a foreign company indicated in the attachment to the Directive (EU) 2017/1132 dated June 14, 2017, governed by the laws of an EU member state or the European Economic Area (EEA), and, consequently, may move its registered office there. It means that the new regulations allow to relocate the company's registered office outside of Poland within EU or the EEA territory without an obligation to liquidate the entity.

The new regulations, as expressed in the draft, also provide some simplifications in cross-border mergers. One of them includes no need to determine share exchange ratio and examine a merger plan by the auditor. Such merger may be carried out without an issuance and granting shares of the acquiring company if the sole shareholder holds all shares of the merging company directly or indirectly.

## WIDER PROTECTION

The new provisions in the draft provide a legal mechanism to strength the protection of employees, shareholders and creditors of companies involved in the cross-border reorganization process. In light of the new regulations, creditors of a company involved in a reorganization process may demand security for their claims, which have not become due, within one month from the date the plan was disclosed or made available. In that case, creditors are obliged to prove that the cross-border transaction has negative impact on satisfaction of their claims and the provided collaterals are not sufficient. Moreover, with regard to the cross-border division, the creditors will be able to

seek satisfaction of their claims from the companies involved in the division process. These companies will be jointly and severally liable.

The planned changes also protect those shareholders who are against the cross-border reorganization process. In the case the shareholders vote against the resolution on acceptance of cross-border process or are not allowed to vote, they may request buyback of their shares. In that case the purchase price needs to correspond to the fair value of the shares. Apart from that, shareholders without right to buyback, who are not satisfied with share exchange ratio indicated in the plan, will be entitled to file lawsuit for additional payments in cash. In addition, creditors, shareholders and employees will be entitled to submit comments on the reorganization plan in at least five workdays before the date of the shareholders' meeting convened to adopt resolution on reorganization. Apart from that, the management board of the company involved in the reorganization process will be obliged to prepare a report for shareholders and employees indicating, among others, the impacts and effects of the reorganization and the conditions of employment.

## DOMESTIC REORGANIZATIONS

The planned regulations broaden the circle of entities allowed to participate in domestic reorganizations. The new regulations state that the limited joint stock partnership, apart from transformation, is entitled to act as a merging entity or newly incorporated entity in merger process and as a divided entity in division process. The same rules apply to cross-border reorganizations. The

planned changes may cause that the reorganization involving a limited joint stock partnership will be more considerable. The draft also broadens the scope of companies' reorganizations. One of the significant changes refers to the introduction of a new type of domestic companies' division — the division by isolation (*podział przez wyodrębnienie*). Such division will involve the transfer of a part of the assets of the divided company to an existing or newly incorporated company or companies of the acquiring or newly incorporated company/companies to be taken up by the divided company (unlike shareholders in division by separation), for shares. This new type of division may be interesting alternative to the sale of enterprise. Additionally, a new type of simplified merger, apart from cross-border processes, will also be introduced into domestic transactions. The simplification of procedure assumes that a merger may be carried out without allocating shares of the acquiring company only if one shareholder directly or indirectly holds all shares of the merging companies, or the shareholders of the merging companies hold shares in the same proportion in all the merging companies. The planned changes will significantly change the whole reorganization process not only in Poland but also with regard to cross-border transactions. The proposed procedural simplifications and the wider scope of protection of entities introduced in the draft, may lead to more considerable reorganizations and making Polish companies more active in foreign markets.