

CORPO REVIEW #2

REORGANISATIONS

Cross-border and domestic – what to note

Cross-border and domestic reorganisations

- what to note

The next amendment to the Commercial Companies Code (hereinafter: CCC) enters into force on 15 September 2023 as a result of the (delayed - planned to take place by 31 January 2023) implementation into the Polish legal order 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 transformation, merger and division of companies.

The legislation introduces a number of regulations of procedural nature, the application of which will determine the timing and documentation of a given process. Therefore, a detailed analysis of the legislation is justified not purely theoretically, but under the conditions of a specific restructuring (e.g. for the purpose of assessing the possibility of waiving preparation of a management report for shareholders and employees or waiving requirement for an expert to examine the reorganisation plan and prepare an opinion, etc.).

On the other hand, important novelties and changes of a directional nature that may be taken into consideration in business decisions in organisations and transactional strategies are worth noting.

New type of domestic demerger - demerger by separation

A **demerger by separation** (as opposed to a demerger by spin-off) will involve the transfer of part of the assets of the demerged company to an existing or newly incorporated company or companies in exchange for shares in the acquiring or newly incorporated company or companies, which are taken up by the demerged company. As a result, a subsidiary company (daughter company) will be created and its shares or stocks will be taken up by **the company being divided** and not by its shareholders, as in the case of a division by spin-off.

A demerger by separation accompanied by universal succession rule will provide an alternative to an in-kind contribution of assets (enterprise/organised part of enterprise) that is a transfer by singular succession.



New simplified type of domestic and cross-border merger (merger by acquisition)

If one shareholder holds, directly or indirectly, 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, the merger will be able to be carried out without granting shares in the acquiring company (no share capital increase in the acquiring company). The new regulation will allow mergers of companies in a number of configurations (e.g. merger of 'sister' companies). Additionally, the simplified procedure allows for waiving a number of formal and legal requirements (e.g. a simplified merger plan, no auditor's opinion, no management report and no merger resolution in the company being acquired).

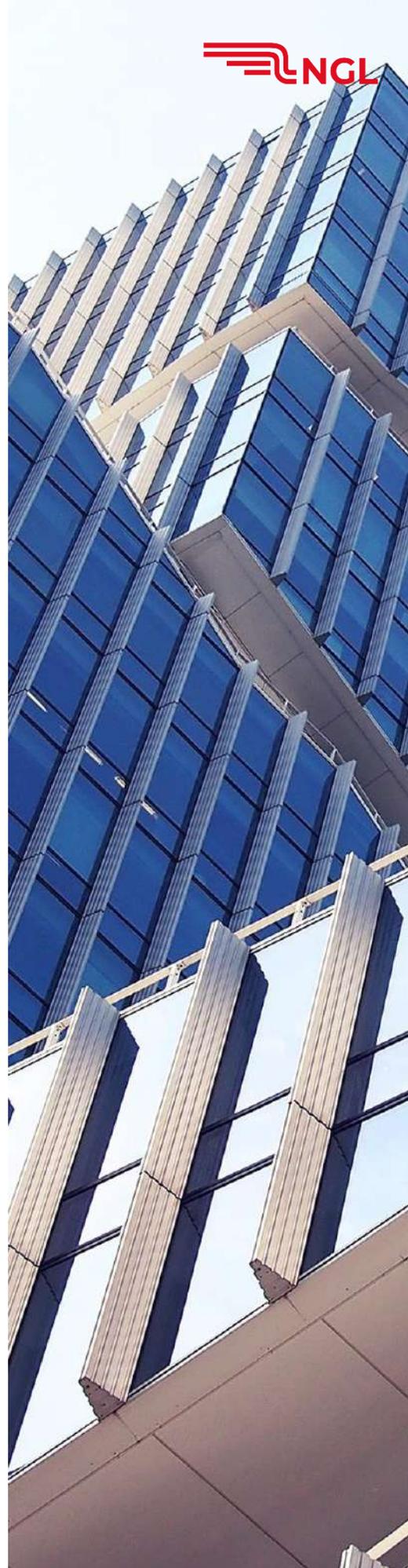
New reorganisation processes with a foreign element: cross-border demerger and cross-border conversion

Until now, the existing provisions of the CCC only allowed for a cross-border merger.

In the case of a demerger, the following will be allowed:

- division by incorporation of new companies (transferring all the assets of the divided company to the newly formed company in exchange for the shares of the new company, which are taken up by the shareholders of the divided company),
- division by spin-off (division by transferring a part of the assets of the company being divided to a newly established company (or companies) for the shares of the company or companies newly established, which are taken up by the shareholders of the company being divided; and
- division by separation (division by transferring a part of the assets of the company being divided to a newly incorporated company (or companies) for the shares or stocks in the newly incorporated company or companies, which are taken up by the divided company).

It will not be possible to make a cross-border division by transferring the assets of the company being divided to the company or companies already in operation.



The cross-border conversion may relate to a limited liability company and a limited joint-stock partnership, which will be able to be converted into a foreign company with a form listed in Annex II to Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law, governed by the law of a Member State of the European Union or of a State party to the Agreement on the European Economic Area and having its registered office, central administration or principal place of business within the European Union or a State party to the Agreement on the European Economic Area, while transferring at least its registered office to that country. As a result of the conversion, the company will transfer its registered office to another country and at the same time its legal personality will be preserved.

Participation of the limited joint-stock partnership in reorganisation processes

The amended act also extended the possibility for limited joint-stock partnerships to participate in reorganisation processes, both domestic and cross-border.

National control of the legality of a cross-border operation

Among the novelties is the obligation to **issue a certificate** on the legality of a cross-border division, merger or transformation under Polish law. The application for the certificate will be submitted by the company's management board to the registry court. Together with the application for the certificate to the registry court, an application will also be submitted to the competent tax authority for an opinion. The inspection will therefore be of an interdisciplinary nature, covering, in addition to procedural issues, tax and employee issues (including the payment of social security contributions).

The registry court is obliged to determine whether the reorganisation serves to commit an abuse, breach or circumvention of the law. If it finds a serious doubt, it may request an opinion from the competent authorities to examine a certain scope of the company's activities or consult an expert.

The registry court will, within three months from the date of receipt of the application (the deadline may be extended by a further three months if the issuance of the certificate requires additional information to be taken into account or additional explanatory activities to be carried out), issue a certificate of compliance with Polish law, unless it finds that the restructuring meets the prerequisites of abuse, infringement or circumvention of the law.

Failure to obtain the certificate is to render the reorganisation impossible.

Opinion of the Head of the National Tax Administration (hereinafter: 'Head of NTA') on the opinion on any planned cross-border reorganization

The second significant novelty from the perspective of controlling the legality of restructuring is introduction of provisions aimed at determining the scope and nature of the participation of the Head of NTA in issuing an opinion on the legality of cross-border reorganisation. The opinion will be obligatory.

The object of the opinion is:

1. assessing whether there is a reasonable presumption that the cross-border reorganisation may:
 - be aimed at tax avoidance (within the meaning of the Tax Ordinance),
 - be the subject of a decision issued with the application of measures restricting contractual benefits or
 - constitute an abuse of rights in the meaning of the VAT legislation, and
2. confirmation that the company's monetary liabilities to tax authorities or non-tax budgetary receivables of a public law nature, for the assessment or collection of which the NTA authorities are competent, are satisfied or secured.

An application for the opinion (submitted to the registry court, which forwards it to the tax authority) should contain data relevant to determining the tax consequences of the cross-border transformation, merger or division of the company, including the tax benefits resulting from the restructuring, the tax scheme number or an explanation as to why the settlement was not subject to notification, and indicate, inter alia, the objectives which the reorganisation is intended to achieve, as well as economic or business justification for the acts.

The application must be accompanied, inter alia, by a declaration of the members of the company's management board as to the location of the real estate owned by the company in the territory of the Republic of Poland. The declaration is made under pain of criminal liability for making a false declaration.

The Head of NTA shall issue the opinion without undue delay, not later than within one month from the date of receipt of the application. In cases justified by the complexity of the case, requiring additional information to be taken into account or additional explanatory activities to be carried out, the deadline may be extended, but not more than by 3 months.

Questions?

Feel free to contact us!



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If it is found that the implementation of a cross-border reorganisation may have the purpose of violating the conditions indicated above, the tax authority shall refuse to issue the opinion, which may result in the refusal of the registry court to issue a certificate of compliance of the cross-border reorganisation with Polish law.

Protection and involvement of employees, creditors, shareholders of cross-border reorganisations

The amendments aim to increase the protection and involvement of shareholders (minority / opposing shareholders), creditors and employees of companies involved in cross-border reorganisations. This will undoubtedly be an element that, in addition to the procedure before the registry court and the Head of NTA, can significantly affect the planning of the timetable and the success of the restructuring.

Shareholders are provided with access to information and documents and the opportunity to submit comments on the plan. In addition, shareholders voting against the reorganisation resolution have been granted the right to exit the company and receive consideration for their shares at fair value, as defined in the plan respectively. A shareholder will also be able to claim additional remuneration in court if he/she does not agree with the purchase price. Importantly, bringing an action will not stop the purchase or the registration of the reorganisation.

Creditors who make it probable that the satisfaction of their claims is jeopardised by the reorganisation and that they have not obtained adequate security from the company may claim security for their claims that have not become due at the time the plan is disclosed or made available. Fulfilment of the security, will depend on the effectiveness of the reorganisation.

Employees will also be provided with access to information about the reorganisation in the form of a report on its legal impact on employees and will be able to submit comments on the plan.

In addition, on 15 September 2023 enter parallel into force new rules on employee participation in a company resulting from a cross-border reorganisation, i.e. the Act of 26 May 2023 on employee participation in a company resulting from a cross-border transformation, merger or division of companies (Journal of Laws 2023, item 1784), which replaces the Act of 25 April 2008 on employee participation in a company resulting from a cross-border merger.