

## **Incorporation of a Polish limited liability company**

Foreign investors willing to establish their presence in Poland typically ask such questions as:

- What kind of company can we incorporate in Poland?
- Are there any restrictions regarding the foreign capital?
- What about the requirements regarding the number of shareholders or members of the governing bodies?

In this paper we focus on the requirements relevant for the incorporation of the most popular corporate entity: the limited liability company (Sp. z o.o.).

### **1. General overview**

The limited liability company (hereinafter: "**Company**") is the most common form of an investment vehicle in Poland. The limited liability company may be formed by one or more shareholders, however it cannot be incorporated by another sole-shareholder company. The shareholders are not liable in respect of the Company's obligations; however they should contribute to the Company's share capital a minimum amount of PLN 5,000 (as at 24 August 2011 equal to c.a. € 1,200). The Company is liable for its obligations with its assets. It is also a corporate tax payer.

To set up a limited liability company the following is required:

- execution of the Company's Articles of Association in the form of a notarial deed,
- contribution of the entire share capital before registration,
- appointment of the company bodies,
- registration in the commercial register.

Once the limited liability company is registered in the commercial register it becomes a legal entity, having a full legal personality. On the other hand, even before filing for registration the Company may operate for up to six months as a so-called "company in organization", with the capacity to make valid contracts, though in practice its activity can be impeded.

## **2. Incorporation**

- (a) The first step to incorporating a limited liability company is the execution of the Articles of Association in the form of a notarial deed (before a notary in Poland), as well as a declaration on subscription of the shares. The Articles and the declaration may be signed directly by the shareholders or by their attorney – in that case a power of attorney in the form of a notarial deed would be required.

The Company's Articles of Association must provide for the following:

- the business name and registered office of the Company;
- the object of the Company's activity, as specified in the Polish Classification of Activities (*PKD*), substantially similar to the NACE classification;
- the duration of the Company, whenever established for a definite period of time (indefinite period is a rule);
- the amount of the share capital;
- a provision as to whether a shareholder may hold more than one share;
- the number and nominal value of shares subscribed for by each shareholder.

It is practical that the deed also contain, apart from the Articles of Association, a resolution on appointment of the first Board of Directors.

The deed is made in Polish and therefore if the persons signing the deed do not speak the Polish language, the notary public will require the presence of a sworn translator, in order to make sure that the parties fully understand the contents of the documents they sign (a sworn translator is a person having a special certificate indicating that he/she is entered in the list of approved translators, kept by the Ministry of Justice). Also, if one of the shareholders is a corporate entity, an extract from the relevant corporate register is required showing the power of the person signing the deed to represent the shareholder.

We normally recommend that the newly appointed Directors, at the occasion of the visit at the notary's, make specimens of their signatures to

be certified by the notary – such specimens are later required for the Company's registration process.

- (b) The next step is to make contributions to the Company's share capital, following which all members of the Board of Directors should release a written statement that the Company's share capital has been fully paid up.
- (c) The final step is to prepare an application to register the Company by the registry court in the so-called business register of the National Court Register. The application is prepared on special forms for which additional attachments are required, including:
  - two copies of the Articles of Association;
  - statement signed by all members of the Board certifying that the Company's entire share capital has been paid up;
  - the list of shareholders signed by all members of the Board of Directors;
  - specimens of signatures of the members of the Board of Directors made before a notary public;
  - names, surnames and addresses of the members of the Board of Directors,
  - a document confirming the Company's rights to the premises or real estate, where the Company has its registered office.
- (d) Together with the application to register the Company in the business register of the National Court Register, it is necessary to submit the following documents: (i) motion for the REGON statistical number issued by the Central Statistics Office; (ii) application for the registration of the Company as payer with the Social Insurance Institution; and (iii) application for the NIP tax identification number with information indicating the relevant tax authorities. The registry court shall deliver the motion and application respectively to the relevant statistics office and tax authorities. After the Company's NIP tax identification number is obtained, the court shall send the payer's application to the Social Insurance Institution.

### **3. Articles of Association**

The Articles of Association may be limited to just a few clauses regarding issues indicated under item 2 (a) of this paper, however, they may also provide for many

other issues. We recommend that the rules of management of the Company be provided for in detail, including the precise division of powers between the Board of Directors, the Shareholders' Meeting and the Supervisory Board (if established). Typically, for certain decisions of the Board authorization of the Shareholders' Meeting is sought. The scope of decisions for which such authorization of the Shareholders' Meeting is required should be set out in the Articles of Association. Additionally, we recommend to incorporate in the Articles certain solutions which may facilitate the functioning of the Company, as well as reduce the costs.

(a) The Company's name, registered place of business and scope of activity

The Articles need to define the name, registered place of business and the scope of activity. Please note that the object of the activity shall be defined according to the Polish Classification of Activities, substantially similar to the NACE Classification.

The shareholders are free to choose any name for the Company as long as it is sufficiently distinct from the names of other enterprises operating in the same market as the Company. The company name must include the wording "Spółka z ograniczoną odpowiedzialnością", which stands for limited liability company, abbreviated as "Sp. z o.o.".

(b) Share capital, share value

The minimum share capital is PLN 5,000 (as at 24 August 2011 equal to c.a. € 1,200). It may be covered with monetary or in-kind contributions.

The minimum value of one share is PLN 50. The share capital is divided into shares which may have equal or unequal value. The Company's Articles of Association should state whether the shareholders may have one or more shares. In case the shareholders may have more than one share, the shares should be equal and indivisible.

(c) Increase of the share capital

The Articles may contain a provision that an increase of the share capital performed within a specified time and not exceeding a specified amount would not require a resolution of the Shareholders' Meeting. Such solution would allow to increase the company share capital without the need of holding a Shareholders' Meeting and amending the Articles, which means the notarial costs in that respect could be avoided.

(d) Additional contributions

Additionally, the Articles may provide for a possibility of obliging the shareholders – through a resolution of the Shareholders' Meeting - to bring in so-called additional contributions, up to an amount defined by the Articles. Such additional contributions do not become part of the share capital and can be returned to the shareholders upon a relevant decision of the Shareholders' Meeting, provided that certain requirements regarding the Company's financial situation are fulfilled.

(e) Dividend

Dividend may normally be paid out to the shareholders once a year, following the approval of the yearly financial statements. However, the Articles may provide for the possibility to pay out an advance dividend upon fulfillment of certain requirements imposed by the law. Such distribution of an advance dividend, if authorized by the Articles, may be decided by the Board of Directors.

(f) Board of Directors

It may consist of one or more members, who may be appointed for one or more years, or for an indefinite period of time. There are different ways of representation that may be authorized by the Articles. For example, it may be provided that in the case of a multi-person Board the Company is represented:

- by one member of the Board;
- by the President of the Board ('ordinary' members of the Board being authorized to represent the Company only when they act jointly);
- by two (or more) members of the Board acting jointly;
- by one member of the Board acting jointly with another member of the Board or with a proxy.

The Articles may also provide for formalized rules of convening the Board of Directors or adopting resolutions.

(g) Proxy

The Board of Directors may appoint a so-called proxy (*prokurent*) who can represent the Company on his/her own except for the sale or encumbrance of property, as well as the sale or grant for use of the Company's enterprise. The proxy should be entered in the company register.

(h) Supervisory Board

The limited liability company may have a Supervisory Board (or a so-called auditing committee) which may be granted by the Articles certain controlling powers. The Supervisory Board may also be useful in the case of certain contracts concluded between the members of the Board of Directors and the Company: in such situations, when there is no Supervisory Board, the Company may be represented only by an attorney appointed by the Shareholders' Meeting. In companies where the share capital exceeds PLN 500,000 and which have more than 25 shareholders, the Supervisory Board (or the auditing committee) is compulsory.

(i) Shareholders' Meeting

In accordance with the Commercial Companies' Code, the following issues, among other things, require resolutions of the Shareholders' Meeting:

- (1) examination and approval of the report of the Board of Directors on the Company's operations, the financial statements for the previous financial year and granting a vote of confidence to the members of the Board of Directors (and Supervisory Board – if established) for the performance of their duties;
- (2) distribution of profit or coverage of losses;
- (3) decisions concerning claims for redress of damage caused at the incorporation of the Company or in the course of exercise of management or supervision duties;
- (4) sale or lease of the enterprise (going concern) or an organized part thereof, as well as the establishment of a limited property right;
- (5) return of additional payments (when such payments have been authorized by the Articles);

- (6) conclusion by the Company of a credit, loan or surety agreement, or another similar agreement, with or in favor of the members of the Board of Directors, holders of proxy or liquidators;
- (7) acquisition and sale of real estate, perpetual usufruct or a share in real estate – however the Articles may provide that this question does not require the consent of the Shareholders' Meeting;
- (8) conclusion by the Company of an agreement for the acquisition of real estate or a share in real estate or fixed assets for a price in excess of ¼ of the Company's share capital, however not less than PLN 50,000.00, before two years have elapsed from the incorporation date of the Company – unless such agreement has been foreseen in the Articles;
- (9) other issues which have been reserved by the Articles of Association for the competence of the Shareholders' Meeting.

Except for matters in which the consent of the Shareholders' Meeting is required by the Articles and not by the law, a contract made without the required consent of the Shareholders' Meeting would be null and void.

On the other hand the Commercial Companies' Code provides for the requirement for the Board of Directors to seek the consent of the Shareholders' Meeting for the execution of every contract the value of which exceeds twice the amount of the Company's share capital. However, in this case a contract executed without a prior consent of the Shareholders' Meeting would be valid, with members of the Board being liable towards the Company in respect of any damage caused. It is worth mentioning that the Articles of Association may exclude this particular restriction to obtain the consent of the Shareholders' Meeting.

Under the Commercial Companies' Code the invitations to the Shareholders' Meeting should be dispatched at least 2 weeks before the Meeting, by courier, registered letter or – if authorized in advance by a particular shareholder – by e-mail.

In accordance with the Commercial Companies' Code, the Shareholders' Meetings can be held at the Company's registered place of business; other places (within the territory of Poland) should be authorized by the Articles or by the Shareholders' Meeting (of course, Meetings may always be held with the participation of the shareholders' representatives acting on the basis of the proper Power of Attorney).

(j) Sale of shares, increase of share capital, pre-emption right

In accordance with the Commercial Companies' Code, in the event of increase of the share capital, the shareholders have a priority right, however this right may be excluded in the Articles of Association or by the Shareholders' resolution. On the other hand, in the event of sale of shares, a pre-emption right may be established by the Articles of Association.

(k) other issues

The Articles of Association may provide for other issues relevant for the shareholders, e.g.:

- rules of redemption of shares;
- non-competition rules between the shareholders;
- dispute resolution, including arbitration clauses;
- rules of distribution of assets upon liquidation of the company;
- privileges in the area of dividend, number of votes attached to one share or distribution of assets upon liquidation;
- rules governing inheritance of shares.

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If you intend to establish a limited liability company in Poland or seek advice regarding any corporate matters, you are welcome to contact the **authors of this paper:**

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