Mergers and acquisitions in Polish law

Mergers and acquisitions are transactions used by enterprises whose aim and effect is the unification of two business entities in one organisation (merger) or the acquisition of such number of shares or stocks of one enterprise by the other, which gives such latter entity the control over the entity being taken over (acquisition). Such transactions, to a lesser extent, are made by way of a direct acquisition of an enterprise or its organised part.

The most complex legal regulation concerns mergers and is codified in the Act dated 15 September 2000 - the Code of Commercial Partnerships and Companies, in Art. 491 and successive ones. Their current wording is a result of the implementation of the 3rd Directive (Directive 2011/35/EU) in conjunction with the provisions taken from the Act preceding the Code of Commercial Partnership and Companies – i.e. the Commercial Code. The 3rd Directive regulated the merger plans and the examination of such plans by experts, as well as the manner of their appointment. The provisions of Art. 516^1 - 516^{19} – are, in turn, the result of the implementation of the provisions of the so-called 10th Directive on cross-border mergers (Directive 2005/56/EC). They facilitate the merger of the companies whose registered offices are located within the territory of one of the EU Member States, or a country – a party to the Agreement on the European Economic Area.

The acquisition of the stacks of shares or stocks is partially regulated in the Code of Commercial Partnership and Companies as regards the legal form of the activity, while as regards the sale agreement - such a transaction is regulated in the Civil Code. The main regulation of the acquisition of the enterprise and its effects can also be found in the Civil Code.

1. The acquisition by way of the so-called "share deal"

The acquisition of a transaction, as a result of which the acquiring entity obtains control over the business activity of the target entity (i.e. the entity being acquired). The consequence of the acquisition is not – like in the case of a merger - the loss of the legal existence of the target company, because it continues to exist; it is the ownership structure that changes. The acquisition of the enterprise may occur, for example, as a result of the acquisition of the shares, or stocks, of the target company. A characteristic feature of the acquisition is that together with the takeover of the stocks, or shares, an indirect takeover of the enterprise takes place. Polish law does not contain any

regulations as regards this particular effect, which puts considerable risk on the acquiring party. The application of warranty provisions in the sale agreement is only limited to the legal defects of the object of the agreement – i.e. the shares, or stocks. That is why the transactions to acquire stacks of shares, or stocks are, as a rule, preceded by detailed legal, tax, financial, environmental or product-related audits and due diligence analyses, whose aim is to identify the risks for the acquiring party and the construction of relevant clauses protecting the interests of such party. Normally, the agreements constituting the basis for the transfer of ownership to the shares, or stocks, contain the description of the company in the form of representations and warranties of the seller as well as indemnification clauses of the seller, which can assume a number of forms constructed depending on the assumed methods of valuation and identified risks. Quite frequently, additional security instruments are used, such as sureties, guarantees, or depositing part of the price on an escrow account.

1.1 Legal forms of the sale of shares and stocks

1.1.1. Sale of stocks in a limited liability company

The sale of stocks in a limited liability company is regulated by the provisions of the Code of Commercial Partnerships and Companies, supplemented by relevant regulations on the sale agreement from the Civil Code. The sale of a stock, its part or fraction, requires a written form with the signatures of the parties confirmed by a notary. Articles of association can provide limitations as regards the disposal of the shares and make such sale conditional upon obtaining a consent from the company. It should be remembered that a relevant amendment in the stock register, maintained by the company Management Board, must be made.

1.1.2 Forms of the sale of shares in a joint-stock company

The form of sale of shares in a joint-stock company depends on the type of shares in question. As in the case of stocks in a limited liability company, the provisions of the Code of Commercial Partnership and Companies and the relevant provisions on sale from the Civil Code will apply.

- **Sale of registered shares**

The disposal of a registered share requires a written statement on the share document itself, or on a separate document, and also a transfer of its possession. It does not need to be just the actual release of the share documents. The transfer of the possession is also possible where a given share is in the so-called dependent possession, e.g. if it is deposited in a bank or a brokerage house. In such a case the transfer of the autonomous possession can be done by way of an agreement between the parties and the notification of the dependent possessor. The acquiring party needs to make sure that the management board of the company makes the relevant entry in the share register; this is rather important because only a person entered in the share register can be regarded as the company's shareholder.

- **Sale of bearer shares**

Trading in bearer shares is simpler. Pursuant to the relevant regulation in the Civil Code, the transfer of a bearer share (document) is effectuated by way of the actual release of such document. As in the case of the registered shares, in order to dispose of it, it is necessary to release it to another person.

2. Limitations in the disposal of shares and stocks

The disposition of shares and stocks can be limited. The limitations can be divided into three types:

- The first ones are those arising from the statute, or the articles of association, of a company. A company can in such a way make the sale of a share or stock dependent on the granting of consent by the company. Such limitation cannot be applied, however, to bearer shares. It is also possible to reserve the right of first refusal or other priority, or pre-emption rights.
- Another type of limitations in the disposal of shares or stocks is constituted by contractual limitations. They occur as a result of conclusion of an agreement between a shareholder and a third party, and the object of such agreement is the establishment of a limited rights *in rem* on shares or stocks. It can also be an agreement establishing, for example, the right of pre-emption to the shares in accordance with the specific regulations.

- The last type of limitations comprises those which arise from the provisions of the Act. The statutory limitations comprise, for example, the invalidity of the disposal of a share, or stock, made before entering a share-holding company in a relevant register, or made before registering the share capital, arising from Art. 16 of the Code of Commercial Partnership and Companies We can distinguish, in this group, the limitations arising from:
  - the Act dated 24 March 1920 on the acquisition of real property by foreigners;
  - the Act dated 11 April 2003 on the agricultural system;
  - the Act dated 16 February 2007 on the protection of competition and consumers and the Regulation of the Council (EC) no. 139/2004 dated 20 January 2004 on the on the control of concentrations between undertakings;
  - the act dated 2 July 2004 on the freedom of economic activity.

2.1 Limitations affecting the foreigners

The Act dated 24 March 1920 on the acquisition of real property by foreigners imposes considerable limitations to the acquisition of shares or stocks, which provides that the acquisition or the takeover of shares or stocks by a foreigner is a commercial law company with its registered office on the territory of Poland, as well as any other act in law concerning shares or stocks requires a consent of a Minister competent for internal matters if, as a result of such acquisition, the company being an owner or a perpetual usufructuary of a real property on the territory of Poland becomes a controlled company. The same consent is required for the acquisition or takeover, by a foreigner, of shares or stocks in a commercial law company with the registered office in Poland, being an owner or a perpetual usufructuary of a real property in Poland, if such company is a controlled company, and the shares or stocks are acquired by a foreigner who is not a shareholder of such company.

In the meaning of the aforementioned Act, a foreigner is:

1) a natural person who does not hold Polish citizenship;

2) a legal person with its registered office abroad;

3) an association of the persons listed under sec. 1 or 2, without legal personality, with its registered office abroad, established in accordance with the law of foreign countries;

4) a legal person and a commercial law company without legal personality with its registered office in Poland, and controlled - directly or indirectly – by the persons or companies listed in sec. 1, 2 and 3. A commercial law company is regarded as a controlled company if a foreigner, or foreigners, hold - directly or indirectly - more than 50% of shares at a meeting of shareholders, also as a pledgee or beneficial holder, or on the basis of the understandings with other persons, or towards which a foreigner has a dominant position, in the meaning of the provisions of the Code of Commercial Partnership and Companies.

The acquisition of the shares or stocks without a required authorisation is invalid.

Exceptions

The above limitations do not concerns the cases where the shares of the company are admitted to trading in a regulated market, or the company is an owner or perpetual usufructuary of the real properties specified in the Act (independent residential premises, independent commercial premises used as a garage, undeveloped real properties whose total area in the whole country does not exceed 0.4 hectare within town/city areas), unless such real property is located in the frontier zone, or is agricultural property with the area exceeding 1 hectare.

Foreigners who are citizens or entrepreneurs of the countries from the European Economic Zone or Switzerland are excluded from the obligation to obtain such consent.

2.2 Limitations concerning agricultural land

On 30 April 2016 certain provisions of the Act on the agricultural system were changed, which resulted in the limitations of the acquisition of shares or stocks in the companies which own agricultural real properties.

According to the Act in question, agricultural real properties are those which are or can be used in connection with conducting production activity in agriculture, be it plant or animal production, without excluding garden, fruit plant and fish production, with the exclusion of the real properties located within the areas designated, in zoning plans, for non-agricultural purposes.

According to the new regulations, the Agricultural Property Agency - operating on behalf of the State Treasury – has the pre-emptive right to shares and stocks in commercial law companies which own agricultural real properties.

The acquisition of shares and stocks in commercial law companies holding agricultural real properties made without observing the aforementioned regulations is invalid.

Exceptions

The provisions of the Act do not apply to the agricultural real properties with the area up to 0.3 hectare.

The pre-emptive right shall not apply in the case of the disposal of:

- the shares admitted to public trading on the stock exchange market in the meaning of the provisions of the Act dated 29 Julyo2005 on trading in financial instruments
- shares and stocks to a relative.

2.3 Limitations arising from the competition law

Mergers and acquisitions can sometimes lead to a situation where a given entity obtains a dominating position and can consequently largely limit the competition on a given market. In order to protect the competition by way of counteracting anti-competitive concentrations of undertakings, the competition law has introduced an obligation to obtain a consent from relevant authorities before effectuating concentration. In Poland, the authority entitled to control any concentration plans is the President of the Office of Competition and Consumer Protection (President of the UOKiK). At the EU level, sometimes a consent from the European Commission is required.

2.3.1 Concentration at the national level

According to the Act dated 16 February 2007 on the protection of competition and consumers, any concentration plan need to be reported to the President of the UOKiK if:

- the overall global turnover of the entrepreneurs participating in the concentration in the financial year preceding the notification year exceeds EUR 1,000,000,000;

or

- the overall turnover on the territory of Poland of the entrepreneurs participating in the concentration in the financial year preceding the notification year exceeds the equivalent of EUR 50,000,000,

The above obligations applies to the intention of:

- a merger of two or more independent entrepreneurs,
- a takeover- by way of the acquisition or taking up shares, other securities, stocks, or in any other way - of a direct or indirect control over one or more entrepreneurs by one or more entrepreneurs;
- establishing a joint undertaking by several entrepreneurs,
- the acquisition by an entrepreneur of a part of assets of another entrepreneur (the whole o part of the enterprise), if the turnover generated by such assets in any of two financial years exceeding the notification exceeded, on the territory of Poland, the equivalent of EUR 10,000,000.

The President of the UOKiK can impose a monetary penalty on an enterprise, whose amount, however, cannot be higher than 10% of the turnover generated in the financial year preceding the year during which the penalty was imposed, if such entrepreneur, even unintentionally, effectuated a concentration without obtaining a relevant consent, and in the case where the concentration resulted in considerable limitation of competition on a given market, the President can order, for example, the division of the concentrated entrepreneur, disposal of the whole or part of its assets, disposal or shares or stocks ensuring the control over the entrepreneur, or entrepreneurs, or the dissolution of the company, jointly controlled by entrepreneurs.

If the intention to concentrate is not reported, the President of the UOKiK can impose a penalty equal up to fifty times the average remuneration on a person holding managerial functions, or being part of the body managing a given entrepreneur.

Exceptions:

The Act on the competition and consumer protection provided for several exemptions from the above obligation. The following intentions to concentrate do no need to be notified :

- if the turnover of the entrepreneur whose control is to be taken over, or the turnover of any of the entrepreneurs to be merged did not exceed, on the territory of Poland, the equivalent of EUR 10,000,000 in any of the two financial years preceding the notification to concentrate;
- where the takeover of the control over the entrepreneur, or entrepreneurs belonging to one capital group and a simultaneous acquisition of part of the assets of the entrepreneur, or entrepreneurs belonging to such capital group – if the turnover of the entrepreneur, or entrepreneurs, over which the control is to be taken over, and the turnover generated by the acquired parts of the assets has not exceeded, on the territory of Poland, the equivalent of EUR 10,000,000 in any of the two financial years preceding the year of making the notification;
- if a financial institution has acquired or taken up, for a limited time, any shares or stocks with the intention to resell them, and the object of business activity of such institution is investing, on its own or for third parties, in the shares or stocks of other entities, provided such resale is effectuated before the lapse of a year from the date of acquisition or takeover, and that such institution does not exercise any rights attached to such shares or stocks, with the exception of the right to dividend, or it exercised those rights only in order to prepare the resale of the whole, or part, of the enterprise, its assets or those shares or stocks;
- where the concentration consists in temporary acquisition or takeover, by an entrepreneur, of shares or stocks with the intention to secure receivables, provided such entrepreneur does not exercise the rights arising from such shares or stocks, with the exclusion of the right to sell them;
- where the concentration occurs in the course of bankruptcy proceedings, with the exclusion of the cases where the party intending to take over control, or the party acquiring part of the assets is a competitor, or belongs to the capital group to which the competitors of the entrepreneur being taken over belong, or whose assets are being taken over.
- where the concentrating entrepreneurs belong to the same capital group.

2.3.2 Concentration at the EU level

Certain concentrations require a consent granted by the European Commission. According to the Regulation of the Council (EC) No. 139/2004 dated 20 January 2004 on the control of concentrations between undertakings, such consent is required in the case of transactions concluded by entrepreneurs, whose overall global turnover exceeds EUR 5 billion, and the aggregate turnover in the Community, each of at least two interested undertaking, amounts to at least EUR 260 million, unless each interested undertaking generates more than two thirds of its overall turnover attributable to the Community in one and the same Member State.

2.4 The limitations arising from the Act dated 2 July 2004 on the freedom of economic activity

The provisions of this Act introduce certain limitations to foreign persons from outside the EU Member States or from outside the European Economic Area. Such limitations concern the selection of organisational and legal forms of conducting business activity in Poland. Undertaking and conducting business activity on the territory of Poland by such persons can only be carried out in the form of a limited partnership, joint-stock limited partnership, limited liability company and joint stock company, and also by way of acceding such companies and taking up or acquiring shares or stocks in them, unless international treaties provide otherwise. Therefore, in such international treaty is in force, undertaking and conducting business activity by such foreigners can only be carried out on the terms and conditions specified in such treaty, which can introduce, for example, the reciprocity rule, according to which a given country, while granting specific rights to entities from another country, does so on condition that that such other country will do the same.

3. The acquisition of enterprise by way of the so-called "asset deal"Acquisition can also be effectuated by way of a direct takeover of an enterprise or its organised part. According to the provisions of the Civil Code, enterprise is an organised group of tangible and intangible elements used for conducting business activity. It comprises, in particular:

- the determination specifying the enterprise or its separated parts (name of the enterprise),

- the ownership of the real property or movable property, including the equipment, materials, goods and products, as well as other rights *in rem* to the real property, or movable property,
- the rights arising from lease or tenancy agreements relating to the real property, or movable property, as well as the rights to use the real property, or movable property arising from other legal relationships,
- receivables and rights from securities, as well as cash,
- concessions, licenses and authorisations,
- patents and other industrial property rights;
- copyrights and similar rights,
- enterprise secrets,
- records and documents connected with conducting business activity.

The enterprise comprises only assets, while liabilities do not form part of the enterprise. That means that the acquisition of the enterprise comprises the transfer of assets only to the acquiring party, whereas the liabilities remain with the seller of the enterprise. The obligations connected with running an enterprise cannot be transferred to the acquiring party without the consent of the creditor.

However, the provisions of the Civil Code provide that the acquirer of an enterprise is liable jointly and severally with the transferor for the obligations of the latter connected with the running of the enterprise except for the case where, at the time of the acquisition, the acquirer did not know about those obligations in spite of observing due diligence. The liability of the acquirer is limited to the value of the acquired enterprise reflecting its condition at the time of the acquisition, and according to the prices at the time of satisfying the creditor. Such liability cannot be precluded or limited without the consent of the creditor.

According to tax regulations, the acquirer of the enterprise, or its organised part, is also liable with all its assets jointly and severally with the transferor for any tax arrears which occurred until the date of acquisition, connected with the conducted business activity, provided it was impossible for such acquirer, despite observing due diligence, to become aware about the existence of such arrears. The acquirer's liability is also limited to the value of the acquired enterprise or its organised part.

According to the provisions of labour law, if part of employment establishment is transferred to the acquirer, both the existing and the new employer will be liable for the obligations which had arisen before such transfer, whereas if the entire enterprise is transferred, only the acquirer will be liable for any obligations arising from employment relationships. However, the liability of the acquirer towards the employees for the obligations arising from employment relationship is unlimited in nature and irrespective of the knowledge about the transferor's obligations, that is why it is extremely important to perform a detailed legal due diligence examination of the enterprise to be acquired.

The act in law (such as a sale), whose object is an enterprise, will cover all that, which belongs to the enterprise unless something else follows from the content of that act in law or from separate provisions. Therefore, non-excluded elements of the enterprise are transferred even without their distinct specification. The parties of the transaction can, however, exclude, from the acquisition in question, certain selected elements of the enterprise. It should be remembered, however, that in order to be able to speak about the acquisition of an enterprise, it is necessary to maintain a certain minimum of the elements comprising this notion. For the avoidance of doubt, we recommend drafting an inventory specifying in detail what elements of the enterprise are to be disposed of.

In the case of the acquisition of an enterprise, there may occur certain limitations arising from detailed provisions concerning foreigners, the acquisition of agricultural properties, concentration of undertakings, referred to in sec. 2.1, 2.2, 2.3 above.

4. Merger of companies

4.1 General remarks

According to the biding provisions of law, share-holding companies and partnerships can merge, with the reservation that the newly created company, or the acquiring company will be a share-holding company, which is either a joint-stock company or a limited liability company. Moreover, companies in liquidation, those which initiated the distribution of the assets or bankrupt companies are not allowed to merge. The provisions on mergers take into account the provisions of the EU directive aimed, among other things, at the protection of shareholders of the merging companies. This is mainly assured by information-related obligations and the participation of a chartered auditor in the

transaction, whose task is to examine the merger plan as regards its correctness and reliability. Despite those statutory mechanisms to protect the interest of the transaction parties, the merge can also be preceded by audits, as in the case of acquisitions, and secure the interests of the parties by way of introduction of additional indemnification clauses in the agreements supporting the merger.

4.2. Types of mergers

A merger, i.e. a joining of two companies, can be done in two ways:

- The first one is the merger by way of a takeover. It consists of the transfer of the whole of the assets and liabilities of the target company to the bidding (acquiring) company in exchange for the shares which the acquiring company issues to the shareholders of the target company. A consequence of such merger is a loss of the legal existence by the target company.
- The second method is a merger by way of establishing a new company. The result of such merger is the establishment of a new share-holding company to which the assets and liabilities of the merging companies will be transferred. Such type of merger results in the discontinuation of the legal existence of all the companies participating in such merger.

4.3 Effects of a merger

As a result of the merger, the acquiring company or the newly established company takes over all the rights and obligations of the target company or the companies merging on the day of merger, i.e. on the date of making an entry on the merger by the registry court, territorially competent as regards the registered office of the acquiring company, or the newly established company. The shareholders of the target company or the merging companies become shareholders of the acquiring company or the newly established company, and the target company or the merging companies become dissolved without conducting liquidation proceedings.

As a result of the merger, the newly established company or the acquiring company, takes over, as of the merger date, all the rights and obligations of the target company (universal succession), including, among other things: permits, concessions and allowances/reliefs granted to the merging companies or the target company, unless the Act or decision on their separation provides otherwise.

In the case of financial institutions, an additional limitation can be an objection of the authority which had granted a concession (permit), raised within one month from the date of announcement of the merger plan. for the occurrence of the effects in the form of succession, no additional actions are required beside those necessary to be effectuated in the process of merger of companies.

In the case of the merger of companies, both by way of a takeover and by way of the establishment of a new company, we also have a case of the creation of a new employer. According to the regulations of the labour law, if the employment establishment, or its part, is transferred to another employer, such new employer becomes a party to all the existing employment relationships by the operation of law. By the same token, as a result of the merger of companies there is a change of the employer in employment contracts, because in such a situation the acquiring company becomes the employer –f the employees employed in the target company, whereas in respect of the employees of both merging companies, the newly established company becomes the employer. The above effect, i.e. the change of the employer, occurs automatically, by mere operation of law, at the moment where the employment establishment is taken over. The new employer is bound by all existing terms and conditions of employment contract, in force at the moment of transferring the employment establishment to the new employer. The acquiring company or the newly established company, is responsible for all the obligations arising from employment relationships existing before the merger.

4.4. Procedure of merging Polish share-holding companies

The first thing to do in the procedure of merging share-holding companies is the agreement of the merger plan by the merging companies.

The merger plan should contain at least the following elements:

- the type, name and registered office of each of the merging companies, the manner of merger, and in the case of establishing a new company – also the type, name and registered office of such new company;
- proportion of exchange, of shares or stocks of the target company or the companies merging by way of establishing a new company, into the shares or stick of the acquiring company or the newly established company and the amount of additional contributions, if any;

- the principles governing the granting of the shares or stocks to the acquiring company, or in the newly established company;
- the day on which the shares or stocks granted to the acquiring company start to entitle the holders to participate in the profit of the acquiring company or the newly established company;
- the rights granted by the acquiring company, or the newly established company, to the shareholders and persons with special entitlements in the target company, or in the companies merging through the establishment of a new company;
- special benefits for the members of the governing bodies of the merging companies, as well as other persons participating in the merger, if ever granted.

Moreover, the merger plan should also be companied by:

- draft resolutions on the merger of the companies,
- a draft of the amendments to the articles of association or the stature of the acquiring company, or a draft articles of association, or the stature, of the newly established company;
- the determination of the value of the assets and liabilities of the target company, or of the companies merging by way of the establishment of a new company, as at a specific day in a month preceding the filing of the application on the notification of the merger plan,
- a statement containing the information on the accounting situation of the company made for the purposes of the merger as at the date referred to above, using the same methods and with the same arrangement as the last annual balance sheet.

Moreover, the management board of each of the merging companies prepares a written report justifying the merger, its legal bases and economic justification, and, in particular, the exchange ratio of shares or stocks.

The merger plan should be submitted to the registry court of the merging companies with the application for appointing an expert for examining the merger plan as regards its correctness and reliability.

It is also necessary to file an application for the announcement of the merger plan in Monitor Sądowy i Gospodarczy [Official Gazette]. The announcement of the plan should occur no later than one

month before the date of the meeting of shareholders at which the resolution on the merger is to be passed. The obligation to announce the merger plan in Monitor Sądowy i Gospodarczy does not apply to the company which, no later than one month before the day of commencement of the meeting of shareholders at which the relevant resolution on the merger is to be adopted, will make such merger plan available, uninterruptedly until the end of such meeting, at its website.

Another obligation is the duty to inform about the merger intention, on two separate occasions, by the management board of the merging companies, in the manner provided for the convening the meetings of shareholders. The first notification should be made no later than one month before the planned day of passing a resolution on the merger, whereas the second no earlier than two weeks after the first notification.

The merger of the companies requires a resolution of the meeting of shareholders of each of the merging companies, passed with the majority of three quarters of the votes cast, representing at least half of the share capital, unless the articles of association or the statute of the company provide for a stricter majority. In the case of a public company, the majority of two thirds of the votes cast, unless the statute of the company provides otherwise. The resolution should contain a consent to the merger plan as well as to the proposed amendments to the articles of association or the stature of the acquiring company, or to the content of the articles of association or the stature of the new company, and should be attached to the minutes of the meeting made by a notary.

The last stage of the merger is the notification, by the management board, of each of the merging companies, of the resolutions on the merger of companies for making an entry in the register about such resolution, with the specification whether the company is the acquiring company or the target company.

The merger occurs on the date of entering the merger in a relevant register, competent for the registered office of the acquiring company or the newly established company. Such an entry results in the striking off the target company, or the companies merging by way of establishing a new company, from the register.

4.5. Procedure of cross-border merger of companies

The procedure of cross-border merger of companies is similar to the merger of Polish companies. As in the case of merging Polish share-holding companies, in order to effectuate a cross-border merger, it is necessary :

- to prepare a merger plan and then notify it and obtaining an opinion about the plan from an expert;
- for the management board to prepare a report justifying the merger,
- to adopt resolutions on the merger of companies,
- to report the merger to the registry court.

The provisions introduce, however, certain differences concerning, among other things, the obligatory elements of the merger plan, the obligation to file, by the management board, of the motion to the registry court for the issuance of a certificate of compliance with Polish law of a cross-border merger as regards the procedures being subject to this law.

4.6 Limitations

In the case of the mergers, we can also face certain limitations to those transactions arising from the provisions of specific regulations applicable to foreigners, the acquisition of agricultural properties, concentrations of entrepreneurs referred to in sec. 2.1, 2.2, 2.3 above.