



Issues Relating To Organizational Forms And Taxation

POLAND Wardynski & Partners

CONTACT INFORMATION

Michal Barlowski

Wardynski & Partners

Aleje Ujazdowskie 10

00-478 Warsaw

Poland

+48 22 437 82 00

michal.barlowski@wardynski.com.pl

www.wardynski.com.pl

- 1. Identify the forms of organization available in your jurisdiction and discuss the advantages and disadvantages of each (eg., corporation, limited liability company, partnership, limited partnership, co-operative, etc.), describing which type of legal entity is mostly used or is of special interest, namely by foreign investors.**

Various forms of organizations are available under the Polish law. In particular, these are: registered partnership, limited partnership, professional partnerships, joint-stock limited partnership, limited-liability company, joint-stock company. The form of a cooperative is also available, but it is not very common because it has to be established by a certain number of natural persons or legal persons.

Not all of these forms are available to every foreign investor: some of them (e.g. those who are not from EU or EEA member states) can do business only in the form of a limited partnership, joint-stock limited partnership, limited-liability company or joint-stock company.

Partnerships are associations of two or more persons operating a business under its own name – they are not considered separate legal entities but can acquire rights in its own name, incur obligations, sue and be sued. A limited partnership is a partnership in which at least one partner is liable to creditors for the obligations of the partnership without limitation (the general partner) and the liability of at least one partner (the limited partner) is limited to a fixed amount. A professional partnership is a partnership formed by natural persons practising a specific profession (e.g. lawyers, tax advisors). A limited joint-stock partnership combines elements of a partnership and a corporation: at least one partner is liable to

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creditors for the obligations of the partnership without limitation (the general partner) and at least one partner merely holds shares.

Companies are legal persons, and the shareholders are not liable for the companies' debts. However, in order to establish a company, the shareholders must contribute share capital to the company. In order to operate, companies need to have appointed members of their authorities (a management board, and in some cases a supervisory board and/or audit committee). Companies may be formed by a sole shareholder (however, with the exception that a limited-liability company cannot be formed solely by another single-shareholder limited-liability company).

Foreign investors may also choose to establish:

- a) a branch of a foreign business,
- b) a representative office.

A branch of a foreign business may be established on the basis of reciprocity. Such branches may conduct commercial activity only within the scope of that undertaken by the foreign business. The activity of a representative office is limited exclusively to advertising and promotion of the foreign business.

Currently the vehicle mostly used in business (by both Polish and foreign owners) is the limited-liability company, mostly because of the fact that it is a capital company with liability separate from its shareholders', but the regulations for this type of company are not as detailed as for a joint-stock company. Please note that for some types of business, e.g. banking and insurance, forming a joint-stock company is compulsory.

2. Are there attributes of the form that you consider unique to your jurisdiction?

We do not perceive the legal forms available in Poland to be particularly unique in comparison to other Continental jurisdictions. Similar to countries like Germany and France, Poland has a code-based legal system.

A legal institution that is commonly used in Polish business operation but is not well-known, for instance, in common-law jurisdictions, is the commercial proxy. The commercial proxy is a form of power of attorney which may be granted only by a business that is required to be entered in the commercial register. The commercial proxy is also disclosed in the commercial register. The authority of a commercial proxy extends to all acts, in court or out-of-court, connected with the operation of an enterprise, with the exception of transfer or usufruct of the enterprise and transfer or encumbrance of real estate, which require a separate power of attorney).

3. Describe the management and governance structure for each organizational form.

In the case of general partnerships, unless the parties decide otherwise, each partner has the right and obligation to manage the affairs of the partnership. He or she is also entitled to represent the partnership (this right cannot be limited with effect towards third parties). These rules may be altered in the case of other types of partnerships in favour of some particular partners (e.g. the general partner of a general partnership) or management board (in a professional partnership).

The authorities of companies consist of:

- a) management board: the body responsible for day-to-day operations and representing the company;
- b) supervisory board: the body exercising permanent supervision over all areas of the activities of the company (in a limited-liability company it is mandatory to have a supervisory board only in case of companies with higher share capital and a large number of shareholders);
- c) audit committee: a non-mandatory body of a limited-liability company whose duties include evaluating the financial reports;
- d) shareholders meeting (the highest decision-making body, which is convened in as an ordinary meeting (i.e. the annual meeting to approve the company's actions during the previous financial year) or as an extraordinary meeting (e.g. to enable the shareholders to decide on some specific actions of the company as needed).

The management board may consist of one person only, while the supervisory board and audit committee are always collective. There is also a rule of no overlapping functions: a member of the management board, a commercial proxy, a liquidator, the manager of a branch or establishment, and persons employed in the company as chief accountant, legal advisor or advocate may not serve at the same time as a member of the supervisory board or the audit committee.

4. Is there a residency requirement for management or owners? In particular, are there restrictions or prohibitions on foreign investors to perform, or have interests in, specific activities?

In general, no residency is required for management or owners. However some limitations exist with respect to particular industries. For example, a licence for television or radio broadcasting will not be issued to a company in which the participation of foreign persons exceeds 49% (this restriction does not apply to companies from the EEA or their subsidiaries).

Moreover, some actions by foreign businesses may be subject to governmental control, e.g. acquiring real estate.

5. Describe the extent to which management and owners are exposed to liability.

With respect to partnerships, the liability of the partners is subsidiary and unlimited. Partners are jointly and severally liable with all their assets for the partnership's debts if execution against the partnership's assets is ineffective.

This rule is modified in the case of a limited partnership, where the liability of the limited partner is limited to a fixed amount described in the partnership agreement and disclosed in the commercial register. The limited partner is free from liability for the partnership's debts in case that his paid-in share is equal to the amount specified in the partnership agreement. If his paid-in share is lower than the amount described in the partnership agreement, the limited partner is liable up to the difference. There is a similar rule in a joint-stock limited partnership; there, however, the shareholder's liability is excluded completely.

A partner in a registered or professional partnership and a general partner in a limited partnership or in a limited joint stock partnership is responsible with all his assets jointly and severally with the partnership or the other partners for tax arrears of the partnership.

In case of companies, the rule is that management board members may be responsible for the company's debts and tax arrears (if execution against the company's assets is ineffective), whereas the shareholders are not. Where members of the management board have intentionally or negligently given false information in a statement, they are jointly and severally liable to creditors of the company.

Management board members may be jointly and severally liable for a loss to the company through their action or omission contrary to the law or provisions of the articles of association, unless they are at no fault.

With respect to responsibility for books and accounts, not only the management board, but also the supervisory board members are jointly and severally liable for any loss to the company through their action or omission in performing duties of preparing the financial statements and business reports.

Whenever an infringement of tax law by a company is penalized, management board members and persons responsible for tax settlements of the company can be subject to individual penal fiscal liability, depending on their fault and level of participation in the fiscal offence.

With respect to a branch office or representative office, only the shareholder is always liable for any debts, since the branch or representative office has no legal personality.

Additional liability is provided under bankruptcy law. Each and every person authorised to represent the partnership or company (i.e. partner or management board member) is required to file for the bankruptcy of the entity within a specific time if the entity becomes insolvent. Otherwise, such persons are liable for a loss occurring failure to file for bankruptcy by the legal deadline.

6. Ownership interest: (i) how is it represented? (ii) is it transferable?; and (iii) is there a minimum number of owners?

Partnerships have to be formed by at least two partners. Companies may have only one shareholder; however, a limited-liability company cannot be formed solely by another single-shareholder limited-liability company.

In partnerships, partners have the right and obligation to manage the affairs of the partnership. However this duty may vary with respect to different types of partnerships (e.g. in a limited partnership the limited partner has no such right or obligation unless the partnership agreement provides otherwise) and is also subject to the partners' decision (e.g. the partnership agreement of a registered partnership may provide that management of the affairs of the partnership may be entrusted to one partner or several partners).

In companies, the owners' interest is represented by shares in the company's share capital. Usually, the number of shares provides the same number of votes for the shareholder at the

shareholders' meeting. However, a different approach may be provided for, e.g. in the articles of association. In joint-stock companies shares may be in the form of tangible documents.

The interest is transferable.

However, all rights and obligations of a partner in a partnership may be transferred to another person only where the partnership agreement so provides, and unless the partnership agreement provides otherwise, all rights and obligations may be transferred to another person only upon written consent of all the other partners. In the case of a transfer, the withdrawing partner and acceding partner are jointly and severally liable for the obligations of the withdrawing partner arising in connection with his membership of the partnership and for the obligations of the partnership.

In the case of companies, the transfer of shares is not subject to restrictions, but the articles of association may provide that transfer of shares is subject to consent of the company or otherwise restricted.

7. Is there a minimum capitalization?

There is a minimum capitalization level established only in the case of a joint-stock limited partnership (PLN 50,000), limited-liability company (PLN 5,000) and a joint-stock company (PLN 100,000).

8. Is there a security that can be issued to the public?

Public companies can issue shares (equity securities) that can be offered to the public. It is also possible for companies to issue debt securities, such as bonds and notes.

Securities can be issued to the regulated market (at the Warsaw Stock Exchange) and to the deregulated market (New Connect, which is organised by the Warsaw Stock Exchange). Debt securities can also be listed on the BondSpot.

Trade in securities (either equity or debt securities) can take two forms: primary and secondary public trading.

Primary public trading involves the issuer or underwriter proposing acquisition of securities that are newly issued, or acquisition thereof.

A public offering is effected by addressing the offer of securities to more than 100 persons or to unspecified addressees in a manner that allows them to decide to purchase the securities. A public offer or allowance of securities into trading on a regulated market requires:

- a) preparation of an issue prospectus (in accordance with EU Regulation 809/2004),
- b) approval of it by the Financial Supervision Authority and
- c) availability of it to the public.

Polish law can exempt the necessity for an issue prospectus; especially, when a public offering is addressed exclusively to qualified investors.

The single-passport rule in EU Directive 2003/71/EC of 4 November 2003 is a part of Polish law. It provides that when shares are to be admitted into trading on regulated markets in several Member States, the issue prospectus approved in a home member state (e.g., in Poland) is valid to admit the shares into trading in the other EU member states.

Secondary public trading involves an entity other than the issuer or underwriter proposing acquisition of securities.

The same rules apply in cases when bonds are issued; see the answer to point 9 dealing with debt securities.

9. Can the form incur debt, or grant security for debt?

Polish law allows companies, including partnerships, to incur debt; assets, specifically, can be security, e.g., immovable property, such as land and buildings, can be mortgaged; movable assets, inventory, products, as well as rights, including receivables, can be pledged.

Most popular is a registered pledge, whereby the asset remains with the debtor and can also cover a collection of assets (floating charge). It is created in writing and is registered in a special public court registry.

Other security rights can include:

- a) transfer of title for security,
- b) bills of exchange,
- c) bank guarantees (Banking Law Act),
- d) personal guarantees (guarantee issued by a natural person or an entity, Civil Code),
- e) insurance company guarantees (issued by an insurance company, Insurance Activity Act),
- f) transfer of rights under an insurance policy, issued under the Insurance Activity Act.

It is also possible for a shareholder to pledge the shares in a company.

Public companies, limited liability companies, and partnerships limited by shares can issue bonds. Bonds are debt securities and can be traded publicly and on the stock exchange. See answers to point 8 on public trading in bonds.

Polish legislation provides for other, more sophisticated legal structures for issuing securities; specifically, investment funds can issue publicly traded certificates, for securitisation of liabilities, so to gain sources to purchase the liabilities. Further, mortgage banks can issue letters of mortgage (a security that can be publicly traded), based on the mortgage the bank has.

10. What is the duration of the form? Can it be renewed?

Companies and partnerships may be established for a definite or indefinite period. In case of a definite period, it may be extended by amending the articles of association.

Apart from lapse of the time for which the company or partnership was established, the form may be dissolved for other reasons.

In general, the reasons for dissolution of partnerships include:

- a) reasons set forth in the partnership agreement;
- b) unanimous resolution of all partners;
- c) declaration of bankruptcy of the partnership;
- d) the death or bankruptcy of a partner;
- e) termination of the partnership agreement by a partner or a creditor of a partner;
- f) a final court judgment.

The reasons for dissolution of companies include:

- a) reasons set forth in the articles of association;
- b) a resolution of the shareholders on dissolution of the company or on transfer of the seat of the company abroad;
- c) declaration of the bankruptcy of the company.

11. Describe the process, customary time period and approximate cost of establishing the form.

Partnerships and companies are established upon registration by the court. This process requires:

- a) execution of the articles of association or partnership agreement;
- b) a declaration of the management board that the company's share capital was paid in (in case of companies; in a limited-liability company the entire share capital must be paid in prior to registration);
- c) appointment of the members of the company's governing bodies (in the case of companies);
- d) establishing a bank account and rights to the company's registered office (e.g. a lease).

In practice, once the relevant documentation is submitted to the registry court, it takes around 2-3 weeks to register the form in the National Court Register. Within 3 days of registration, the court is required to send registration applications to the statistical office (for issuance of a REGON statistical number) and the tax office.

As a whole, the registration of the form, including proceedings before the registry court, the tax office and the statistical office, usually take up to 6 weeks.

The management board of the company is obliged to file an application to enter the company in the National Court Register within six months after execution of the articles of association, otherwise the company is dissolved.

12. Are there requirements for the government (central or local) to be part of a project or investment vehicle or receive part of the profits arising therefrom (apart from taxes)?

The rules for concluding contracts between private entities and public finance sector entities or other entities financed from public sources are regulated by the Public Procurement Law dated 29 January 2004, which applies to supply and construction work as well as service contracts. Entities obligated to follow public procurement procedures are state and local authorities, bodies governed by public law, associations formed by one or more of such bodies or other public bodies, as well as companies operating in the water, energy, transport and postal services sectors.

This is also a public-private partnership (PPP) model, using a PPP contract or a concession agreement (regulated by the Public-Private Partnership Act dated 19 December 2008, and by the Construction Work and Service Concession Act dated 9 January 2009). The specific nature of this type of order lies in the way in which the contractor receives its fee, which is the right to operate the facility, with or without an additional monetary fee. Also important in this type of transaction is the fact that the payment made by the public party cannot result in the public party covering the full amount of expenses incurred by the contractor. In other words, the economic risk associated with performing the concession must be borne “to a decisive extent” by the contractor.

The basic principles of public procurement procedures are fair competition, equal treatment of contractors, impartiality and objectivity of persons involved in proceedings for awarding contracts, the public nature of procurement procedures, and the primacy of open and restricted procedures. The Polish market is fully open to foreign bidders. Any national or even European preference is forbidden. Openness of the procedure is also the rule, with an exception when bidders request that trade secrets not be disclosed.

Unless otherwise provided by law, proceedings are conducted in written form and in the Polish language. This means above all that the contracting authority will draw up necessary procurement documentation in Polish, such as the announcement of the proceedings, the terms of reference, and the minutes of the proceedings.

Commercial operators may compete for a contract jointly. In such case, they appoint an agent to represent them in the proceedings.

All documents must be submitted in the original or a certified copy. It should be stressed that documents in a foreign language must be submitted with a certified Polish translation. The contracting authority may waive the translation requirement, however.

13. For what taxes is the form liable?

a) Corporate Income Tax (CIT)

According to the Polish CIT Act, taxpayers having their seat or place of management in Poland (Polish tax residents) are subject to tax liability on their world-wide income, irrespective of the source of that income (unlimited tax liability rule).

Taxpayers who do not have their seat or place of management in Poland (non-Polish tax residents) are subject to taxation in Poland only on the income earned in Poland (limited tax liability rule).

Polish capital companies, other legal entities (including co-operatives) and organizational units without legal personality (except partnerships) are subject to CIT at the rate of 19%.

Generally, partnerships are transparent entities from the CIT perspective. There is, however, one exception that refers to partnerships between non-Polish tax residents if under the law of their country of origin they are considered to be legal entities and are taxed on their worldwide income regardless of its source.

Revenues generated and costs borne by partnerships are subject to CIT at the partner level in proportion to the partner's share of interest.

b) Value added tax (VAT) and excise tax

Generally, VAT payers are legal entities and organizational units without legal personality (including partnerships) that independently carry on a business activity, regardless of the purpose or the effect of such activity.

Additionally, an entity performing intra-community transactions is a VAT/EU payer.

Under Polish VAT law, the standard 22% VAT rate applies to all supplies of goods or services, unless a specific provision allows a reduced rate (7%, 3%, 0%) or total exemption. 0% supplies include exports of goods outside the European Union and intra-community supplies of goods.

Generally, legal entities and organizational units without legal personality (including partnerships) are excise tax payers if they carry on activities subject to excise tax.

c) Civil law activities tax (CLAT)

Both capital companies and partnerships are, generally, subject to CLAT levied on civil law transactions such as sale agreements, loan agreements, etc.

For example, capital companies are subject to 0.5% CLAT on the increase of the share capital and on additional contributions thereto. Loans received from shareholders in a capital company are exempt from CLAT but loans granted by a partner to the partnership are subject to 2% CLAT.

d) Other taxes

Legal entities (including capital companies) and organizational units without legal personality (including partnerships) may also be subject to real estate tax, agricultural tax, forest tax, vehicle tax, tonnage tax.

14. What is the tax treatment of payments to foreign owners?

a) Dividends

Dividends and other income from participation in the profits of legal entities paid by resident companies to non-resident companies are subject to withholding tax (WHT) at the rate of 19%. This tax is withheld and remitted by the company paying the dividend.

The WHT rate on dividends can be reduced under the applicable double taxation treaty (DTT).

Additionally, an exemption from WHT on dividends payable to companies residing in EU/EEA member states is available, based on the EU Parent Subsidiary Directive, which was implemented into the Polish CIT Act. To benefit from this exemption, all the following conditions need to be satisfied:

- The company paying the dividend must be an income tax payer that has a registered office or the management board in Poland;
- The receiving company is subject to corporate income tax on its world-wide income in an EU/EEA member state (or in Switzerland);
- The receiving company holds at least 10% (25% in case of Switzerland) of the shares of the Polish company which is paying the dividend for an uninterrupted period of at least two years. Polish CIT law currently provides that the WHT exemption also applies when the holding period is expected to expire after the distribution of dividends for which that benefit is claimed.

To be able to benefit from the reduced WHT rate or exemption, a certificate of residence of the recipient of the dividend is required.

b) Profits of the partnerships

Taking into account the transparency of the Polish partnerships, in case of the foreign partners, (although the Polish income tax provisions do not expressly address that issue), the partnership's income attributable to a Polish permanent establishment of each partner (the existence of which would be, generally, claimed as a result of being the partner in the Polish partnership) would be subject to tax in Poland. As a rule, both in the treaty and non-treaty situations, foreign partners' income from sharing the interest in profits of the partnership would be taxed on current basis accordingly to the business profits regime (pro rata to partner's share in the partnerships' profits, or in equal parts if not agreed otherwise).

c) Interest / Royalties

Generally, interest/royalties paid by a Polish company to a non-Polish resident company are subject to 20% WTH, unless the applicable DTT states otherwise. The tax is withheld and remitted by the Polish company paying the interest/royalties.

Based on the European Interest/Royalty Directive, which was implemented into the Polish CIT Act, WHT on interest/royalties is reduced up to 5% from 1 July 2009 until 30 June 2013 and from 1 July 2013 there will be full WHT exemption. Generally, to be able to benefit from that reduction (and later exemption) certain conditions need to be satisfied (specifically the 25% holding requirement).

In order to benefit from the reduced WHT rate or exemption, a certificate of residence will need to be presented.

15. Is there a tax treatment which would impact foreign owners differently than owners resident in the jurisdiction?

Domestic regulations

Sale of shares in a Polish company by a Polish-resident shareholder would be taxable in Poland.

In a situation where shares in a Polish company are sold by a foreign shareholder, the capital gains from such transaction, if any, should not be taxable in Poland.

However, this general rule, according to the standpoint of the Polish Minister of Finance, cannot be applied to sales of shares which result in a transfer of the rights to an immovable property located in Poland (i.e. when assets of the company whose shares are being sold consist mainly of real estate) and to sale of securities in a Polish joint stock company on the Polish stock exchange. Capital gains from such transactions generated by a foreign shareholder should be, as a rule, taxable in Poland (they constitute a separate source of income on the territory of Poland), taking into consideration applicable DTT.

DTT regulations

In most Polish DTTs, the right to levy tax on the sale of shares of a Polish company is given to the country where the shareholder is tax resident. If so, Polish tax rules would not apply. Certain Polish DTTs provide, however, that the sale of shares in a company whose main business involves real estate is to be considered to be subject to taxation in the country where the real estate is located.

Partnerships

Sale of interest in a Polish partnership by a Polish-resident partner would be taxable in Poland.

However, if the interest in a Polish partnership is sold by a foreign partner, tax treatment of such transaction will vary taking into consideration applicable DTT.