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REAL ESTATE

Further facilitation of access to the Land and Mortgage Registers

As of December 1, 2013 the latest amendment to the Land and Mortgage Register Act comes into force. It appears to be a significant step forward towards complete computerization of data stored in the Land and Mortgage Registers.

Newly amended provisions allow everyone to file motions for excerpts and copies from specific land and mortgage register via internet. Such documents, unlike under the currently binding provisions will have the validity of court documents. Furthermore, the amendment in question enables - among others - courts, law enforcement agencies, court enforcement officers and public notaries to browse Land and Mortgage Registers using various criteria such as, for example, name of the owner of a real estate. As a consequence, the above listed entities will be given tools to increase their performance. The best example is that this amendment will facilitate enforcement over the real estate. At the same time, giving better access to information will prevent debtors from concealing information regarding ownership of real properties from disclosure.

These newly introduced solutions seem to respond to a decreasing number of effective enforcement proceedings. As it is provided in a survey prepared by the Ministry of Justice covering the activity of the Polish administration of justice, this number has fallen down from 36,6% in 2007 to 17,69% in the first half of 2012.

CORPORATE LAW

Share capital and means of protecting creditors in limited liability companies in proposed amendments to the Code of Commercial Companies

On July 17, 2013 draft amendments to the Code of Commercial Companies (the "Draft") has been delivered for social and inter-ministerial review. It is assumed that the proposed amendments, also in part discussed in this alert, shall come into force at the beginning of 2015.

Under the currently binding law, the nominal value of one share in a limited liability company (the “LLC”) cannot be lower than 50 PLN and the value of share capital cannot be lower than 50,000PLN.

According to the Draft, the above-mentioned rules are to be fundamentally revised. First of all, shareholders in LLC will be allowed to assume possession of shares of no nominal value. Such shares shall not be associated with the share capital and any amounts paid in their coverage shall be transferred into newly created capital separate from the share capital. Depending on the shareholders’ decision, this new capital could be established instead of the share capital or the new capital and the share capital could exist simultaneously. At the same time, as the Draft provides, share capital itself and its minimum value shall no longer be mandatory, as currently binding provisions setting minimum amount of the share capital are deemed to be arbitrary and not corresponding to the needs of the market.

The Draft introduces also new solutions to protect creditors from insolvency of any LLC. First, it introduces a solvency test. Pursuant to its purpose, before any payment to a shareholder deriving from its shareholding, the Management Board will be obliged to represent that such payment shall not lead within one year to the insolvency of the LLC in the ordinary course of business. The Management Board would be in such case responsible to the LLC for exercising due care in making the above-mentioned declaration. Second, each LLC will be obliged to establish in its Articles of Association or Shareholders’ Resolution mandatory supplementary capital to cover any future losses. Its minimum amount would be calculated as 5% of the aggregated sum of obligations borne by the LLC, but no less than 50,000 PLN. Finally, the Management Board will be obliged to call the Shareholders Meeting whenever periodic assessment reveals that the LLC approaches its insolvency.

The Draft is to transfer into the Polish law solutions tested and approved in corporate laws of other countries of the EU. As such, it seems to respond to the growing needs of protecting the creditors in the middle of the financial crisis and upgrading the outdated model of the Polish LLC.

LABOR LAW

Amendments of rules on child care leave

On October 1, 2013 the amendments of the child care leave entered into force. The said amendments are the consequence of the implementation of the EU directive 2010/18/UE dated March 8, 2010.

As a consequence of the new provisions entering into force, parents, having a minimum seniority of employment of 6 months, will be entitled to maximum 36 months of child care leave, which they could divide into maximum 5 parts, and use it until the child is 5 years old.

Additionally, each parent, within the limits of leave (36 months), is exclusively entitled to 1 month of child care leave, which cannot be transferred to the other parent. Moreover, parents may benefit simultaneously from the child care leave for maximum 4 months.

Parents on the child care leave at the date of the new rules entering into force are entitled to benefit from the above changes, that is, they may simultaneously benefit from the child care leave in the enlarged limit of 4 months and may divide it into maximum 5 parts (also the 36 months).

The child care leave is granted at the request of the employee. According to the proposed amendment of the regulation on granting the child care leave by the Minister of Administration and Digitization, the request could be sent electronically (via email). This solution is currently only a proposal.

The changes of the child care leave affect also the holiday leave entitlement. According to the new provisions, the holiday leave is not reduced if the employee goes and returns from the child care leave in the same calendar year.

TAX LAW

Polish tax authorities gather information on foreign investors

Recently, numerous foreign investors, that acquired shares in Polish companies, have received summons to register for tax purposes in Poland. Although the legal provisions in this respect have not changed, the approach of the authorities has diverted to the disadvantage of foreign investors.

Until very recently, it was sufficient that the foreign investor filed the appropriate declaration and paid the transfer tax resulting from the acquisition of shares. Nowadays, however, the Polish authorities request that such firms file for tax registration. This obviously triggers increased costs (e.g. translations, proxies, etc.).

It is difficult to think of benefits (other than gathering information on foreign investors, which may be further used to investigate their relationships with Polish taxpayers) resulting from the recent change of the approach. Potentially, the authorities may attempt to initiate penal fiscal proceedings in cases where companies fail to register.

PUBLIC PROCUREMENT

Obligatory exclusion of a contractor on the basis of art. 24 par. 1 subpar. 1 and 1a of the Public Procurement Law – a provision that stirs up controversy

Provisions of art. 24 par. 1 and 1a of the PPL (the “PPL”) have proved to be very controversial. National Chamber of Appeal had doubts whether art. 24 par. 1 and 1a of the PPL complies with directive 2004/18/EC (the “Directive”) and, therefore, for the first time, it has submitted a prejudicial question to the Court of Justice of the European Union. As a result, on 13 December

2012, the Court issued a judgment (C-465/11) in which it has set forth the principles of interpretation of art. 24 par. 1 and 1a of the PPL in connection with the wording of art. 45 of the Directive. In accordance with the judgment, the current situation, where the exclusion of the contractor is obligatory, is not in line with the Directive.

Moreover it is also the position of the European Commission that said provision is inconsistent with European legislation. The Commission explained that it is not possible for the Member States to specify the cases for the exclusion of the contractor other than the ones specified in the Directive and that making the provisions stricter or extending the circumstances justifying the exclusion of the contractor, infringes the European legislation.

As a consequence, a group of parliamentarians submitted a motion to the Constitutional Tribunal to examine whether art. 24 par. 1 and 1a of the PPL infringes the Polish Constitution. Also an initiative to amend the PPL has been launched. It is proposed, among others, the change of the causes for the exclusion from the public procurement due to the damage done and the change of the criteria for the basis of exclusion due to the termination of, rescission of or withdrawal from the agreement. The change of art. 24 par. 1 and 1a of the PPL should consist in the provision that the damage, if rectified, should not constitute the basis for the exclusion. At the same time, it has been proposed that the provision concerning the contractual penalty as a reason for the exclusion should be deleted. The amendment of subpar. 1 a of said provision is designed to limit the possibility to terminate or renounce the agreement only in cases of intentional guilt or gross negligence.

MERGERS AND ACQUISITIONS. ANTITRUST LAW

New amendment to Polish antitrust law

On 30 August 2013, Polish parliament received a draft of the amendment to Polish Act on the Protection of Competition and Consumers prepared by the government.

Among the main proposed amendments there is a proposition to introduce a two-stages proceeding related to the concentration of entrepreneurs instead of the current one-stage proceeding. Generally, the first stage is set to be concluded within one month as opposed to the current two-month deadline for the one-stage proceeding. According to the draft, this time limit applies only to cases which do not raise significant concerns. However, provided that the case stands out with particular complexity or there are concerns that the outcome of a contemplated transaction may substantially diminish the competition or the proceedings require carrying out a market survey, the amendment envisages a second stage of the proceeding lasting up to four months. According to the government officials, currently binding deadline is unsuitable to both complex and relatively plain cases, thus, the twofold proceeding is supposed to guarantee an increased and fastened performance of the Office of Competition and Consumer Protection.

Among further amendments, there is the one which aims to discharge from obligation to notify those mergers whose participants do not represent at least EUR 10.000.000 turnover in Poland each. Currently, every case of merger of independent entrepreneurs whose joint turnover in Poland exceeds EUR 50.000.000 triggers the obligation to notify the intent of concentration.

The same draft introduces also a new institution of settlements to Polish antitrust law which allows a voluntary subjection to a fine penalty in exchange of its 10% reduction.

Although mostly appreciated, several provisions do not meet with at least a part of the entrepreneurs' approval. The Polish Confederation of Private Employees Lewiatan raised its objection in an open letter to the Head of the Chancellery of the Prime Minister pointing out the excessive amounts of already existing fines (up to EUR 50.000.000) which can be imposed on an entrepreneur violating even unintentionally the obligation to submit required information. Moreover, after the amendments come into force, imposing a fine (up to PLN 2.000.000) will be also possible in case of individuals holding key positions in business entities responsible for restraining the competition.

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