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DOING BUSINESS IN POLAND

Introduction for foreign entrepreneurs

by

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and

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BUDZOWSKA FIUTOWSKI & PARTNERS

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- Copyright and intellectual ownership.

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PART I

I. HISTORY

Since 1989 Poland has been replacing a social economy model with a market economy. In this year Poland seized the opportunity and implemented a package of successful economic reforms, which laid the foundations for the present economy. Since 1990 the political system in Poland has witnessed a fundamental change leading to a radical change in the economy. The country moved from a centrally planned economy and managed through top to down directives to a system based on market rules. The goal of these transformations was to build a socio – economic system similar to the ones existing in countries with modern market economies.

This system is based on the following basic features: parliamentary democracy, oligopoly, market structure and globalization of the economic processes. Poland has achieved strong and solid progress with structural and institutional reforms. Up until now, Poland has managed to achieve and maintain a very high economic growth rate and curb inflation. Since 1990, Poland has been continuously building a market economy capable of remaining flexible. Poland's accession to the structures of the European Union has given credence to its strong economy, which is capable of withstanding external competition. Such a strong economy is attracting many foreign investors, to whom Poland fosters advantages in doing business here.

What are the competitive advantages of Poland for foreign investors?

- The biggest market size in the Central Europe – with the population of app. 39 million people;
- One of the lowest labour costs in the new EU, and for any investor costs are a crucial factor when deciding upon starting a business in a foreign country;
- Well - educated workforce;
- The high inflow of foreign capital – this adds to the country's credibility for foreign investors;
- Growing integration with the world economy and with investors – friendly business environment – Poland remains an equal partner in the world economy. Poland is a member of the EU, WTO and OECD. In the run – up to membership of the EU,

which finally took place on 1 May 2004, Poland harmonized most of the national legislation with *acquis communautaire*.

- Location. From the point of view of entrepreneurs planning to access the markets of Ukraine, Belarus or Russia – Poland has become an ideal place, from which it is convenient to start business operations;
- Another course of action aimed at ensuring that foreign investors attain proper service and assistance from the government and the creation of a government agency, the Polish Information and Foreign Investment Agency (PAIiZ), www.paiz.gov.pl/index/, which handles the promotion of foreign investments and exports. It functions with a wide scope of activities, involving:
 - 1/ co-ordination of the investment process, by fostering co-operation among the government, local governments, and the private sector;
 - 2/ acting as the investor's sole partner during the investment process; the role of the agency should not be just fundamentally consultative, it should also encompass negotiating – on behalf of the investor – the terms of the investment with central and local authorities, and with the authorities of special economic zones;
 - 3/ running own foreign offices and regional branches, to work in close co-operation with local and regional governments. PAIiZ creates an effective use of the Economic and Commercial Departments at Polish embassies in the investment process and establishes close ties between them and the agency. This enables investors to be identified at an earlier stage;
 - 4/ maintaining a database of available locations, business partners, and suppliers, which is particularly important for medium-sized and smaller investors;
 - 5/ arrangement of funding from public sources.

All these factors create a very favorable image of the Polish economy and advantageous circumstances for foreign investors to do business in Poland.

II. GENERAL RULES GOVERNING DOING BUSINESS IN POLAND

Basic rules of taking up and doing business in Poland by foreigners are described in details in the fundamental Polish act in this field, the Act on the Freedom of Business Activity of 2 July 2004 (a unified text, Journal of Law 2007, no. 155, item 1095), hereinafter referred to as “The Business Freedom Act”.

The main purpose of the above mentioned Act is strictly and firmly directed to make the Polish market more accessible for foreign business. It also simplifies business life of foreign investors on the following levels: while starting a business (less bureaucracy), carrying it on and broadening the scale of the business already run. Such regulations have been required by the fundamental rule that governs in the EU, the rule that has been clearly expressed in the Article 43 of the Treaty establishing the European Community: the rule of freedom for taking up and carrying on business activity on its own account by citizens of the European Union in every Member State of the EU. To realize this, Poland as a new member of the European Union since 1 May 2004, has introduced legislation that is fully in harmony with the EU law.

III. FORMS OF BUSINESS ACTIVITY RUN BY FOREIGN INVESTORS IN POLAND

According to the general rule expressed in Art. 13 of the Act on Freedom of Business Activity, all foreign entities may take up and manage business activity in Poland.

A foreigner (definition) is described as:

- individuals, whose place of living is situated abroad, and who does not possess Polish citizenship,
- legal entity, whose registered seat is located abroad;
- foreign organized unit (which is not a legal entity), but which possesses legal capacity.

Referring to the country, where foreign entities originate, the Business Freedom Act indicates various legal opportunities of running business activity by these persons. In relation to the mentioned above:

- Foreign persons from Member States of the European Union, countries of the European Economic Area not belonging to the European Union and countries not being parties of a treaty about the European Economic Area which may enjoy the freedom of entrepreneurship on basis of treaties concluded with the European Community and its Member States, may undertake and perform business activity on basis of the same rules as Polish citizens. There are no restrictions for foreigners other than those imposed on national entrepreneurs. Foreigners are required to follow the same procedures, incur the same costs without any discrimination.

There is also a special group of foreigners – individual persons, being citizens from other countries than mentioned above who may undertake and perform business activity just like Polish citizens (according to Art. 13 section 2 of the Business Freedom Act). Within these group there are among others foreigners who:

- 1) do have in the Republic of Poland:
 - a) a permit to settle,
 - b) a permit for stay of a long-term resident of the European Communities,
 - c) a permit for a tolerated stay,
 - d) a status of a refugee,
 - 2) enjoy in the Republic of Poland a temporary security.
- Other foreign persons, who do not meet the criteria mentioned above, have the right to commence and carry on business activities in Poland exclusively in the form of: limited partnership company, limited joint stock partnership company, limited liability company or joint stock company or to accede to such companies or to subscribe for the shares, unless the international treaty says otherwise.

PART II

DOING BUSINESS BY FOREIGNERS (INDIVIDUAL PERSONS) IN POLAND IN THE FORM OF INDIVIDUAL BUSINESS ACTIVITY

A foreigner from the EU who wants to start a business in Poland as an individual conducting business activity on its own account shall submit an application form to the Municipal Council where such a business activity is to be carried out in order to be entered into a special register kept there. In order to manage a commercial activity in Poland in the form of one – man business at own risk and on ones own account, it is required to apply for a REGON number (for statistical purposes) and for a NIP number (for tax purposes). Additionally, it is necessary to be registered and to register employees in the Institution of Social Insurance (“ZUS”) (for social security purposes). In order to simplify the procedure, all the application forms mentioned above may be filed to Municipal Council. Finally, a private person who does business in Poland is obliged to have its own seal. The registration proceedings have been simplified, and no extra actions are demanded. The whole procedure takes about 2 – 3 days, however, it must be counted that NIP no. will be received within a period of 7 – 10 days since filing a motion for its issuing. A future entrepreneur must bear costs only for the entry into the register of business activity and they amount to about 200 zloties (about 50 EUR) – a stamp duty. While filing for a NIP no. it is necessary to present a number of a bank account* and a lease agreement of property where an entrepreneur has its seat or other document confirming the right to property.

*Making or receiving payments connected with business activity (of each entrepreneur, i.e. being not only an individual) shall be made each time through the bank account of an entrepreneur when:

- 1) a party of a transaction from which payment arises is other entrepreneur and
- 2) a single value of a transaction, irrespective of the amount of payments arising from that, exceeds an equivalent of 15.000 Euro converted into zloties according to an average exchange rate of foreign currencies published by the National Polish Bank on the last day of a month preceding a month in which a transaction has been made.

PART III

ESTABLISHING BRANCHES AND AGENCIES

All foreign companies may establish its own branches and/or agencies in the territory of Poland.

1. BRANCH

A Polish branch may be founded to conduct business activity in Poland exclusively in the scope of the type of activities carried out by the main foreign company. A Polish branch business name is to be the name of the foreign company plus addition “branch in Poland”. What is crucial, is to appoint a person authorized to represent Polish branch.

To set up a branch in Poland, it is required to file an application form to the National Court Register (with the articles and relevant documents). Foreign companies are not restricted to the establishment of only one branch in Poland. If there is to be more than one branch established, all the documents may be submitted into the files of a single branch, and while forming another branch, it is sufficient to make relevant references where the documents are filed.

Foreign companies, which have their own branches in Poland shall have a separate accounting for the branch, kept in Polish language.

2. AGENCY

A Polish agency of a foreign entrepreneur may be established exclusively in order to perform business activities in the scope of advertising and promotion of a foreign company.

In order to found an agency in Poland, it is required to submit an entry form to the register kept by the Polish Minister of Economy. The application form shall be made in Polish language.

An agency’s business name is created by the name of the foreign company with an addition: “Agency in Poland”. A Polish agency shall have its own bookkeeping, separate from the bookkeeping of the foreign company.

PART IV

DOING BUSINESS IN THE FORM OF ESTABLISHING A COMMERCIAL COMPANY

1. LEGAL REGULATION

The Polish Commercial Companies Code (Journal of Law 2001, no. 102, item 1117 with further changes), hereinafter: “the Code”, came into force in 2001 and replaced the Commercial Code of 1934. One of the guidelines for the new Code was that it should be harmonized with the European Law. The drafters of the Code have also drawn from the comparative study of company law regulations of other countries. Thus, the Polish Commercial Companies Code has incorporated the EU law into the Polish legal system. It benefits from the experience of economically advanced countries, in particular Germany. Inspiration derived from German law is of particular importance to Polish law, since there exist many similarities between the two systems of law.

2. COMMERCIAL COMPANY

The term “commercial company” covers six types of companies regulated in the Code. These include:

1. a registered partnership (*spółka jawna*);
2. a professional partnership (*spółka partnerska*);
3. a limited partnership (*spółka komandytowa*);
4. a limited joint stock partnership (*spółka komandytowo-akcyjna*)

classified as **partnerships (*spółki osobowe*)**, as well as:

5. a limited liability company (*spółka z ograniczoną odpowiedzialnością*), and
 6. a joint – stock company (*spółka akcyjna*) *amistal*
- classified as **capital companies (*spółki kapitałowe*)**.

Merely foreign persons from Member States of the European Union, countries of the European Economic Area not belonging to the European Union and countries not being parties of a treaty about the European Economic Area which may enjoy the freedom of entrepreneurship on basis of treaties concluded with the European Community and its

Member States and citizens of other countries than mentioned above, specified in Art. 13 section 2 of the Business Freedom Act (see: above Part I point III., page 8) may do business in all legal forms mentioned above with no exceptions. Other foreign persons may establish and conduct business companies exclusively in a form of a limited partnership, a limited joint stock partnership, a limited liability company and a joint stock company.

Partners (in partnerships) or shareholders (in capital companies) undertake to pursue a common goal by making contributions to the company and, if so provided in the articles of association or the statutes, by other joint action.

The registration proceedings of a company in the National Court Register that is proper with regard to the seat of the company last approximately 1 month. Costs of registration are as follows: 750 zloties (about 200 Euro) in case of registration of a partnership and 1.000 zloties (about 260 Euro) for the entry into the register of a capital company, and 500 zloties (about 130 Euro) for publication of information about the registration in the Courts and Commercial Gazette. It is also necessary for a company to have a REGON number, a NIP number, an own seal, and a bank account.

3. PARTNERSHIPS

As a rule, partners are free to determine their contributions (their type and amount) to the partnership, and it is only in a case of a limited joint stock partnership that the Code requires the share capital of at least 50.000 zloties (about 13.000 EUR)

Procedures for organizing a partnership include the conclusion of the articles and filing the motion for registration of a partnership in the National Court Register. A moment of such registration determines creation of professional, limited and limited joint stock partnerships.

It is the only case when articles of a registered partnership may be concluded in a simple written form; in case of other partnerships, articles must be made in form of a notarial deed. Generally, the articles define the business name of a partnership (such a name is to be composed of names of partners with the indication of the type of the partnership they form), its seat, the contributions offered by the partners, the object of the partnership, and its duration.

A partner in a registered partnership is liable for the obligations of the partnership with all of his assets, without limitation, jointly and severally with other partners and with the partnership, subject to the rule of subsidiary liability.

Partners in a professional partnership, a mechanism for pursuing certain professions (e.g. lawyers, architects, building engineers, insurance brokers, tax advisers, nurses, doctors), as a rule are not liable for debts of the partnership incurred in connection with the exercise of the profession by other partners.

The nature of the partners' liability for the debts of the partnership serves as distinguishing characteristics of a limited partnership: some partners are liable without limitation (general partners), while the liability of other partners is limited to a certain amount specified in the articles.

The partners in a limited joint stock company are also grouped into those who bear unlimited liability and those who hold shares and are not liable for obligations of the partnership.

Each partner in a registered partnership and a professional partnership may represent the partnership, while in a limited and a limited joint stock partnerships, the right of the representation is vested in the general partners.

4. CAPITAL COMPANIES

A limited liability company (LTD company) and a joint stock company are called in the Code "capital companies". These two forms are the most popular forms of doing business in Poland by foreigners.

Both types of companies have a status of legal entity and governing bodies with clearly defined powers. An LTD company and a joint stock company may be formed for any legally permitted purpose. It is allowed that they have only one promoter, including a single-shareholder company, provided that the promoter is not a single-shareholder limited liability company.

Shareholders of capital companies are liable only to provide performance of the duties stipulated in the articles of the association or the statutes, and are not liable for the obligations

of the company. The basic duty of the shareholders is to make contributions to the company's share capital.

An LTD company may have the lowest share capital of 50.000 zloties, while that of a joint stock company must be at least 500.000 zloties (about 130.000 EUR). The shareholders should make full contributions towards the share capital of a LTD company prior to its filing for entry into the court register. In case of a joint stock company the shares subscribed for in-kind contributions should be paid in full not later than before the end of one year of registration of the company, while the shares subscribed for cash shall be paid prior to registration of the company to the extent of at least one fourth of their nominal value. No share documents are issued by a LTD company, shareholders are registered in the book of shares kept by the management board of a company, such a book is to be filed in the court register and updated following each share transfer. The joint stock company issues share certificates which description is stipulated in the Code.

Alongside the rule that shares in a LTD company and in a joint-stock company are transferable, the Code allows the articles of association or the statutes to stipulate that the consent of the company is necessary for transfer of shares. If such a requirement is provided, the consent shall be given by the management board, or else such consent shall be invalid, unless the statutes provide otherwise.

The shareholders in a joint-stock company may enter into an agreement limiting their right to transfer shares, however for not more than five years. Similarly, agreements creating a pre-emption right are allowed – for maximum ten years.

PART V

I. ACQUISITION OF A COMPANY

Takeover of an existing company may be done in two ways:

- by the purchase of company's property on basis of Art. 55² of the Polish Civil Code (Journal of Law 1964, no. 16, item 93 with further changes);
- by the purchase of shares in an existing company.

1. ACQUISITION OF PROPERTY

A purchaser becomes an owner of property, which had belonged to the existing company, and which had served to conduct business by the company. It concerns in particular: business name, ownership rights of real estate and movables, including equipment, materials, products, rights arising from lease and tenancy contracts, liabilities possessed by the existing company, pecuniary means, concessions, licenses, permissions, patents, property copyrights, business secrets, accounting books and other documents related to commercial activity.

2. ACQUISITION OF SHARES

Foreign private persons as well as foreign companies may buy shares in existing companies, whose seat is located on the territory of Poland, and to gain profit in the form of the dividend in proportion of the amount of shares possessed. Generally, each share gives its owners the right to one vote on the General Meeting of the company, which means that in case of possessing a considerable amount of shares, its owner may have the majority of votes, and consequently – may respectably influence business undertakings of the company.

II. MERGERS

The Polish Commercial Companies Code provides following methods of mergers of companies:

- 1) a transfer of all the assets of a company (the company being acquired) to another company (the acquiring company) for shares which the acquiring company issues to the shareholders of the company being acquired (merger by acquisition),

- 2) formation of a capital company to which the assets of all the merging companies are transferred, which is followed by issuing shares of the new company (merger by formation of a new company).

An acquiring company or a newly formed company shall enter, as of the merger date, into all rights and obligations of a company being acquired or companies merging by the formation of a new company. In particular, permits, concessions and relief granted to a company being acquired or to any of the companies merging by the formation of a new company, shall be transferred as of merger date to the acquiring company or the newly formed company, unless provisions of law or the decision granting a permit, a concession or a relief provides otherwise. However, the rule expressed in the previous sentence shall not be applied to permits and concessions granted to a company which is a financial institution if the agency which granted the permit or the concession lodges an objection within one month since the draft terms of merger were announced.

PART VI

ACQUISITION OF REAL ESTATES IN POLAND BY FOREIGNERS

The acquisition of real estates in Poland by a foreigner is subjected to the regulation of the Polish Act of 24 March 1920 on purchase of immobilities by foreigners. The Act is fully harmonized with the EU law in this matter. One of the latest amendments was introduced on 1 May 2004, and was created to make acquirement of real estates in Poland more accessible to foreigners from the EU countries.

The Act applies to the acquirement of the ownership of real estate or to the purchase of the perpetual usufruct right. Such a purchase requires a permit. The Act gives an objective, stable and clear criteria for obtaining a permit. A permit is issued as an administrative decision by a Minister competent in internal affairs, along with the consent of the Minister of National Defence, and in the case of agricultural real estate, also with the consent of a minister competent in the country development.

Along with the date of Poland's entering the European Union – since 1 May 2004, a permit is not required for foreigners who are the citizens or entrepreneurs of Member States of the European Economic Area, except for the acquisition of :

- an agricultural and forestry real estate within the period of 12 years since Accession of the Republic of Poland to the European Union;
- the second house, within the period of 5 years since Accession of the Republic of Poland to the European Union (this limitation refers to individuals only).

Provisions of law specify some exceptions from the above mentioned requirement for obtaining a permit in case of purchase of agricultural real estate in certain parts of the country or in case of purchase of the second house in connection with a certain period of residence in Poland or for purpose of performance of tourist service.

PART VII

TAX ISSUES

To eliminate double taxation of profits gained by foreigners in Poland, contracts against double taxation have been concluded between most of countries and Poland. A Polish rate of income tax for legal entities (CIT) amounts to **19%**. This makes it very advantageous to invest in Polish companies. At present, many foreign companies have chosen doing business in Poland, because of introduction of many tax relieves.

PART VIII

DISTRIBUTION / AGENT / FRANCHISEE CONTRACTS

Foreign companies may also find it convenient to conclude a distribution or agency contract with one of the Polish companies. These contracts usually stipulate that the goods, originating from foreign companies will be sold exclusively by the Polish company (exclusive distribution contracts). These contract are mainly concluded by companies specializing in selling goods or services, and such goods/services are famous because of their recognizable

brand. It is advisable to examine the credibility of a Polish partner before starting cooperation, as the confidence placed in the Polish company in such circumstances is particularly important. According to the general rule governing in Poland – the rule of freedom of contract – parties may settle their relation in a way convenient for both of them. Most of the contracts include clauses, which have been negotiated by the parties. Therefore parties may try to introduce into the contract clauses that are beneficial for them. As far as a franchisee contract is concerned, this type of contract is not governed by the Polish Civil Code. That is why, parties who want to conclude a franchisee agreement may form their relations on their own on basis of freedom of contract. Foreign investors are advised to choose Polish Law and Polish courts to settle any potential disputes arising between the parties of the contract. Polish courts are relatively cheap and proceedings are moderately short, in particular when it comes to vindication proceedings.

PART IX

CONCLUSIONS

There are many ways to invest on the Polish market. Foreign investors may select the most suitable way for them to do business in Poland either by establishing their own company in Poland or – without creating any structure in Poland – by concluding a distribution contract or by purchasing shares in already existing Polish companies. To be sure, that the investment will yield sufficient profits, foreign investors are highly advised to make a reconnaissance of the Polish market to exclude any potential threats. Nowadays, many foreign investors before starting business with Polish companies apply for a report and due diligence of the financial and economic condition of Polish company. Such a report allows them to eliminate, or considerably reduce the risk of doing business in Poland.