



**POLAND**

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Poland is one of the preferred investment locations for foreign entrepreneurs in Europe. The entry of Poland into the European Union led to a considerable improvement of the administrative and legal conditions and provided an opportunity to quickly register a commercial activity, to efficiently conduct the activity and to organise the activity according to the requirements and development possibilities of the company.

Due to the present economic situation, Poland is seen as a “green island” in the storm of the global crisis as it has maintained its financial credibility and at the same time has been able to fight the recession. The Polish economy is currently developing faster than the western European economy. The economic growth is mainly driven by private foreign investors. The key factors as to why Poland is assessed to be an economic partner with a large potential for investment in Europe include its economic stability, the intensive development of its infrastructure and a level of debt which is acceptable.

The economic success and attractiveness of Poland has contributed towards many foreign companies opting to engage in economic activity in Poland. The largest share of new investments in Poland is connected with companies funded by German capital. If German investors can benefit from Polish profitability this is especially due to the fact that the legal conditions are similar to those found in Germany and that the collection of receivables and the enforcement of court rulings is made possible on a cross-border level through EU directives. Furthermore, in relation to Germany there are no foreign exchange restrictions or customs barriers.

The general principles for a commercial activity carried out by natural persons or legal entities from the EU/EFTA region are subject to the same conditions and rules which are valid for Polish persons and are free of restrictions. Due to the particularities of the Polish legal and tax system foreign entrepreneurs wishing to expand their investment in Poland, however, have to be aware of how to use and exploit the legal and tax opportunities in due time and also how to recognise and limit potential risks – especially when preventive measures are necessary. The foreign entrepreneur can freely choose the legal form with which he wishes to carry out his activity. Concerning trading companies, the Polish civil code foresees six forms of commercial activity:

- › general partnership;
- › partner company;
- › limited partnership;
- › limited partnership with shares;
- › company with limited liability;
- › joint stock company.

The most popular form of the legal forms for the execution of commercial activity in Poland by foreigners is primarily the joint stock company with limited liability. The concept of founding a Polish GmbH was inspired by German law and therefore the legal rules on how to manage the company should be absolutely transparent for German investors. The most important advantages of a GmbH include the relatively low amount of required share capital of the company (5,000 PLN), the possibility of commencing the commercial activity immediately after the coming into effect of the articles of association (i.e. before registration in the commercial register) and the fact that the shareholders of a Polish GmbH are not personally liable for the debts of the company. A Polish GmbH may not be set up just by a domestic or foreign one-person company. Apart from that, the articles of association have to be certified by a notary.

The Polish civil code defines the minimum content of the articles of association for trading companies. However, depending on the requirements of the investor we recommend the inclusion of many additional and flexible regulations. The management of the company is granted to the personally liable company management which may also include foreign citizens. For contacts between the company and the company management – including employment contracts or management contracts – and in the case of disputes with the management the company is in principle represented by an authorised representative who is appointed by a shareholders' resolution. There are, however, possible cases where a managing director can, according to the so-called organ theory, sign a contract in the name of both parties. Such a case exists when a managing director carries out duties in two separate companies and concludes the contract in the name of these companies.

However, if the entrepreneur decides for a partnership, the limited partnership is the recommendable option. The most important legal aspects of a limited partnership are that at least one shareholder (general partner) is liable without limitation to creditors for the liabilities of the company and at least one shareholder (limited partner) is liable only for an amount which is regulated in the articles of association. The articles of association of a Polish KG require notarial certification but they are only effective after registration in the national court register. Foreign entrepreneurs usually opt for a mixed arrangement of a limited partnership whose general partner is a company with limited liability. This serves to limit liability and to fine-tune the tax costs of the commercial activity.

Furthermore, foreign investors can found branch offices in Poland. From a legal point of view the branch offices do not have their own legal personality and their activity is limited to the commercial activity of the foreign company.

Poland offers foreign entrepreneurs excellent access to a well educated population with competitive labour costs. In comparison to Germany, however, the rights of Polish workers are

particularly protected and are restrictively interpreted by the Polish courts. This role is fulfilled by the Polish labour code which represents the most important source of the rights of the Polish employee. Each employment contract has to comply with the conditions of the labour law. If a condition is agreed in the employment contract which is less favourable than the regulations of Polish labour law, this condition is automatically replaced by the corresponding conditions of the labour law. However, if the entrepreneur concludes an employment contract with employment conditions which are more favourable than the conditions of Polish law, then these conditions are binding. Such a situation especially occurs with the definition of the holiday entitlement of an employee which in Poland is lower than in Germany. Furthermore, the content of the employment contract must at least correspond to the prevailing conditions of the labour code.

Foreign investors may be confronted by special barriers with the acquisition of land and forestry real estate. In respect of this, until May 1, 2016 German entrepreneurs have to obtain a special authorisation from the Polish ministry of the interior. The authorisation is issued by the minister for internal affairs through an administrative decision provided the defence minister and the minister for land development have no objection. Besides this, it should be emphasised that a German entrepreneur is defined as a company funded by German capital, whereby this also includes a company not directly controlled by a foreign person (i.e. also a company where a German citizen can influence the selection of company management). Furthermore, the acquisition of agricultural real estate with an area of more than five hectares is in principle restricted by the right of first refusal for contracts of sale and the right to purchase in favour of the agency for agricultural real estate in the case of other types of contract. The realisation of these rights is such that in certain legal situations and with the occurrence of certain conditions contained in the contract the agency is authorised to take over the position of the purchaser. The right of first refusal of the agency is excluded when the sale is made to near relatives or due to expansion of agriculture. If the agency is unable to exercise its rights, it is nevertheless possible that a possible tenant of the agricultural property has right of first refusal.

German investors can benefit from different various grants provided they register a commercial activity in Poland. In order to develop the business activity, investors have access to a substantial amount of EU funds. This support is particularly high in the area of agriculture. However, the process to obtain agricultural subsidies is extremely formalised. The subsidies are granted after an application has been made by the farmer and after many conditions have been fulfilled – including the land area as defined by law for the agricultural property. Such an application must include information about the agricultural conditions of the grounds and drawings of the agricultural land or breeding farms must be included. The principles for the granting of funds are primarily regulated in EU directives.

The Polish special economic zones represent an effective incentive for foreign entrepreneurs. Special economic zones are designated areas in Poland where investors can engage in commercial activity at more favourable conditions. At the current time there are 14 special economic zones in Poland. The preferential conditions enable the possibility of obtaining regional aid and exemption from corporation tax. In order to take advantage of these benefits, the investment must satisfy certain conditions, whereby in particular the value of the investment must be at least 100,000 euros and it must always be for a duration of five years. The commercial activity in the area of a special economic zone requires authorisation.

Rödl & Partner has been represented in Poland since 1992. As we have now been providing consulting services to companies for more than 20 years we are familiar with the special requirements and opportunities of the local market. In this time period our lawyers, auditors and tax consultants have amassed extensive experience and built up a reputation as a leading consulting firm for foreign investments.

# Practical examples

## Taxes

### Background facts:

In Poland the German company Oderwart acquired agricultural products from 2007 to 2010 from Polish flat-rate farmers. After acquisition the goods were resold to Germany and transported. In addition, in 2007 the company sold goods to a Polish company. The company was not registered in Poland from 2007 to 2011 as being subject to sales tax.

The company applied for the repayment of the sales tax according to the process valid for foreigners. However, the applications were rejected for the reason that in this matter the invoices were proof of expenses of the applicant and at the same time represent sales tax flat rate invoices (VAT RR invoices). These represent a special form of sales documentation and can be issued by persons who acquire agricultural products or services from flat-rate farmers. Here it should be observed that only active sales tax registered companies which deduct sales tax are entitled to issue such invoices and the applicant must not be an active sales tax registered company in the Republic of Poland.

### What can be done now?

Rödl & Partner was commissioned to effect the retroactive registration of the company as a sales tax registered company. A sales tax register was generated for the years 2007 to 2011. Corrections were made to the invoices which were previously incorrectly issued because the invoice must include certain VAT RR flat-rate elements. Contact was taken up with the Polish

flat-rate farmers because the corrections of the invoices had to be signed by the flat-rate farmers.

As in the case in question the amount of sales tax to be repaid amounted to a figure in the millions, the execution of a company tax audit by the Polish tax office was unavoidable. Rödl & Partner represented the company in the course of the company audit.

In the end, the sales tax which had been applied for was transferred in its entirety to the bank account of the company.

### What should one have done differently from the beginning?

A consultation with a local tax consultant right at the start would have avoided a large part of the consulting costs which were incurred later and would have considerably shortened the time required for the repayment of the sales tax. The company could have received this sales tax already in the years of 2007, 2008, 2010 and 2011– and not as late as 2012.

However, the company was lucky as it contacted and commissioned Rödl & Partner at the right moment. If Rödl & Partner had been commissioned at a later date, the right to repayment of the sales tax may have become time-barred.

## Law

### Background facts:

The Polish company (company with limited liability) whose company management consists of three managing directors with German and one managing director with Polish citizenship included the following general rule of representation in the articles of association: "Authorised to submit a declaration of intent in the name of the company is the chairman on his own account, the ordinary managing director – together with the chairman or a different managing director and in the case of issuing power of attorney – together with the person holding power of attorney".

There are many situations where the Polish ordinary managing director of the above-named company have to make decisions very quickly and must also conclude many contracts because the activity of the company requires this (e.g. conclusion of delivery contracts which are necessary for the on-going business activities of the company).

In these situations obtaining the signature of the second managing director from Germany was not possible and the Polish managing director signed for contracts by himself. This situation came to light when Rödl & Partner in 2013 carried out a due diligence covering the years from 2010 to 2013.

### What can be done now?

Due to the fact that contracts only signed by the ordinary managing director are void, Rödl & Partner was commissioned to find a solution. Firstly, the company was informed that the change of the general rule of representation through a change to the articles of association is possible and recommendable if the representative rule of the company has not worked up to now. In addition, the company was informed that due to the judgement of the supreme court of August 23, 2006 (ref.: III CZP 68/06, OSNC 2007) there is no doubt that a managing director of a company with limited liability who is only able to act together with a second managing director can be given power of attorney by the other managing director for individual activities. Regarding the contracts which contrary to the general representative rule were only signed by a single managing director making them therefore void, the company was informed that the company management and shareholders' meeting can approve all acts of a managing director which are contrary to the general presentation rule and confirm the effectiveness of these activities. Rödl & Partner prepared the corresponding resolutions which should correct the situation.

## What should one have done differently from the beginning?

If the company had asked Rödl & Partner earlier about whether a managing director on his own can sign the contracts in the name of the company – i.e. contrary to the general representation rule included in the articles of association – the problem of the invalidity of the contracts could have been avoided.

## Law

### Background facts:

The German company Montage GmbH, which would like to perform installation services in Poland, takes on Polish employees for this purpose. These employees are Polish citizens who live in Poland and have never worked in Germany. For this purpose the Montage GmbH company concludes a standard employment contract with the employees in the German language which regularly finds application for German employees without enlistment of a Polish legal advisor. This employment contract includes provisions concerning contractual penalties and supplements for night work and overtime for the amount which is usual in Germany. The contracts do not include a choice of law clause or a jurisdiction clause.

Despite all this the payroll accounting is left in the hands of a local Polish tax consultant. After six months the company decides to transfer the payroll accounting to Rödl & Partner. When the payroll accounting documents are transferred the employment contracts are passed on to the legal department for an inspection.

### What can be done now?

Rödl & Partner is commissioned to examine the employment contracts. When the facts become known it is clear that the absence of a choice of law clause means that the facts of the case will be subject to Polish law and therefore Polish labour law. Therefore the employment contracts should have been written in Polish. The breach of this requirement represents a criminal offence. The Polish labour code regulates the minimum requirements of the employment contract. Deviations to these requirements are only binding if they are more favourable for the employee than the prevailing conditions of the labour code. Therefore conditions regarding the contractual penalties and the amount of the overtime supplements are void and have to be replaced by a statutory provision. On the other hand the condition regarding the supplement for night work is more favourable.

Therefore the applicable employment contract was dissolved by mutual agreement and new contracts were concluded according to Polish labour law. In this process, however, the more favourable conditions were retained. Nevertheless the situation may still lead to a penalty due to an offence or a labour law infringement.

### What should one have done differently from the beginning?

If Rödl & Partner had managed the contract management, the parties would have concluded the contracts in the Polish language and a choice of law clause would have been agreed. Labour law also requires that the cross-border contract must have a choice of law and jurisdiction clause to enable the parties to regulate their labour law rights and obligations correctly right from the start. This serves to avoid the criminal liability of non-use of the Polish language and the responsibility for labour law infringements.

## Law

### Background facts:

The Polish company Poland sp. z o.o. (GmbH), a subsidiary of a German company group, needed a new machine to go with its production line which was to be installed in Poland. The parent company was to choose this machine for the Poland sp. z o.o. and if necessary submit an offer. The parent company did this. The Poland sp. z o.o. received the offer from the Deutsch GmbH company addressed to the parent company for the assembly of a machine with certain characteristics. But the Poland sp. z o.o. reacted to this offer from the Deutsch GmbH company and ordered the machine according to the offer. The Deutsch GmbH company delivered the machine to Poland according to the offer and issued the invoice to the Poland sp. z o.o..

The parties have not concluded a purchase contract which is signed by both sides. The conclusion of the contract was made through submission of the offer and its acceptance. Some months after the assembly and commissioning of the machine the Poland sp. z o.o. company established that the machine does not have the assured characteristics and therefore is not compatible to the production line. Complaints concerning defects were made. The Deutsch GmbH did not acknowledge the notice of defects but attempted without success to correct the defects. However, the Deutsch GmbH was not prepared to enter into negotiations to arrive at an out of court settlement. After more than a year Poland sp. z o.o. opted to take legal action against the Deutsch GmbH.

## What can be done now?

Rödl & Partner was commissioned to render an expert opinion of the claims of Poland sp. z o.o.. An investigation of the facts clearly showed that first of all the time of the conclusion of the contract, the applicable law and the court of jurisdiction would have to be established. In their expert opinion Rödl & Partner determined that the purchase contract was subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG) as the parties had not expressly excluded these regulations. Alternatively, German substantive law might apply (period of limitation of claims). But in that case legal proceedings could be taken out before a Polish court. It was also clear that due to the course of time the Poland sp. z o.o. was not in a position to raise all the claims according to CISG purchase rights and legal proceedings had to be urgently started in order to prevent the possible time-barring of the claims.

Due to time and cost reasons a decision was taken to bring legal action before a Polish court. In the statement of the claim, Rödl & Partner presented the legal position in detail. After the service of the action was received the Deutsch GmbH company declared itself willing to enter into negotiations to realise an out of court settlement. Rödl & Partner managed the negotiations and the result was that the Deutsch GmbH company finally paid the complete claim lodged including legal costs and in return the Poland sp. z o.o. waived its claims and rights to compensation for damage.

## What should one have done differently from the beginning?

Until legal action was taken both contract parties were convinced that the purchase contract was exclusively subject to their respective domestic legal regulations and had not considered the application of CISG law. Contract management support here provided by Rödl & Partner could have enabled the parties to negotiate and sign a written contract which would have included a choice of law clause and as a result the parties would have assessed their contractual rights and obligations correctly right from the start thereby saving high costs for legal advice and legal proceedings.

## Taxes

### Background facts:

A German company with limited liability took organisational measures in Poland designed to open a new branch office there. These measures mainly included actions for the organisation of facilities in which the company could carry out sales activities.

Therefore the company incurred expenses for adjustment and renting of retail space in shopping centres located in Poland. At a later date these premises were to be used by the branch office of the German GmbH in Poland for its commercial activity.

The expenses incurred by the company were supported by invoices including Polish sales tax. As the GmbH at the time the expenses were incurred was not registered as being subject to sales tax in Poland (the company was, however, subject to sales tax in Germany), the company applied for the repayment of the sales tax paid in Poland according to the procedure for foreign companies. After mediation of the German financial authorities, the company submitted a corresponding application to the Polish tax office. In the meantime the GmbH had registered its branch office in Poland and therefore became subject to sales tax.

The Polish tax office had doubts about the merits of the submitted application for the repayment of the sales tax. Therefore it made an investigation. The doubts of the tax authorities concerned a part of the invoices issued to the Deutsch GmbH company in the time period when the company registered its branch office in Poland. As a result the Polish tax authorities partly rejected the application for repayment.

### What can be done now?

As the tax authorities had opened an investigation to check the merits of the tax repayment to GmbH, Rödl & Partner acted as an authorised representative of the German company with limited liability. This considerably simplified and accelerated the proceedings because the tax authorities required that the correspondence should take place exclusively in the Polish language.

The employees of Rödl & Partner gave extensive explanations to the tax office regarding the application made by the German company with limited liability. In particular, they explained that at the time the application was made the GmbH was registered as being subject to sales tax in Germany and eligible for a tax refund. Furthermore, it was explained that the registration of the branch office of the Deutsch GmbH company for sales tax in Poland was only

undertaken after the Deutsch GmbH company had made the application for the repayment of the tax. In the time period referred to in the application the Deutsch GmbH company had not delivered goods in Poland subject to payment, had not supplied services subject to payment, had not exported goods and had not supplied goods to the European community from Poland. Therefore the authorised representatives provided arguments which confirmed the right of the Deutsch GmbH company to repayment of the paid tax.

The matter was made additionally more complicated by the fact that in Poland the tax regulations changed in the time period for which the repayment should be made. Nevertheless the proceedings ended with a positive result and the German company with limited liability received repayment of the sales tax according to its application.