(10) Poland

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1. General background

Are joint ventures popular as a form of foreign investment into your jurisdiction?

Joint ventures continue to be a popular way for foreign entities to invest. Agreements on co-operation between partners are becoming more and more complex. Very often a joint venture is chosen by foreign investors as the first step in the Polish market. After a successful start-up (which may last several years), the foreign investor frequently chooses to take over the whole undertaking, if given the opportunity.

There are no specific legal provisions governing joint ventures in Poland. The joint venture will be regulated by the provisions applicable to the "vehicle" chosen by the parties (e.g. contract, partnership, company).

Are there restrictions on foreign participation?

Most of the restrictions on foreign participation in joint ventures have been lifted. The restrictions which are still applicable concern particular sectors and relate to investors which have their registered seats outside the EU or the European Economic Area.

What (if any) are the major legal problems which a foreign investor in a joint venture faces in your jurisdiction?

There are no major legal problems that would differ Poland from most other European countries. Some procedural requirements (see e.g. s.12 below regarding legal formalities) can, though, be cumbersome and take time to complete.

2. Governmental/regulatory approvals

What principal governmental or regulatory approvals are required (excluding competition law) for establishing a joint venture?

If a foreigner which has its registered seat outside the EEA intends to take up more than 50 per cent of shares in a company owning real estate, a permit from the Minister of Internal Affairs and Administration will be required. No other government or regulatory approvals are required for a joint venture to be set up with foreign participation.

Are there local anti-trust laws which might apply to the formation of the joint venture?

Under the Law on the Protection of Competition and Consumers, the President of the Office for Competition and Consumer Protection must be notified of any intention to carry out a transaction resulting in a "concentration" if either (i) the aggregate world turnover of entrepreneurs participating in the concentration in the year preceding in which the notification is made exceeds €1 billion or (ii) the aggregate turnover in Poland of entrepreneurs participating in the concentration in the year preceding in which the notification is made exceeds €50 million.

This obligation should be met by a notification being filed within seven days of an agreement being executed or any other action by which a concentration is to be effected.

The Law requires the following events to be reported to the President of the Office: (i) merger of two or more independent entrepreneurs; (ii) take-over in any manner of direct or indirect control over another entrepreneur; (iii) establishment of a common entrepreneur by several entrepreneurs; (iv) acquisition of part of a business, if the turnover of the acquired part of the business exceeded €10 million in either of the two years preceding the take-over. The Law provides for a number of exceptions to these requirements, the most important being that no filing is required if the annual turnover of the target did not exceed €10 million in either of the two years preceding the take-over. A brief summary of merger law is given below:

Filing requirement/ trigger	**Timetable for clearance**	**Test for clearance**	**Mandatory/voluntary penalties**
Applies to both co-operative and concentrative JVs.	Two months from filing. A transaction cannot be completed until a clearance decision has been received or the waiting period has expired.	Whether the JV would significantly impede the effective competition in the market, in particular as a result of the creation or strengthening of a dominant market position. There is a presumption of dominance when the market share is greater than 40 per cent.	Filing is mandatory. Failure to fine/failure to suspend implementation: fines of up to 10 per cent of the turnover achieved by the undertakings in the last financial year. A separate fine may be imposed on a person acting on behalf of the undertaking of up to 50 times the average remuneration in Poland (approx. €35,000). Implementing of a prohibited transaction or not fulfilling commitments: daily penalty up to €10,000 and a revocation of the clearance in the case of commitments.

3. Types of joint venture vehicle

What are the principal types of joint venture vehicle commonly used with foreign investors?

The most popular vehicles for equity joint ventures are a *limited liability company* (similar to the German *GmbH*) and a *joint stock company* (similar to the German *Aktiengesellschaft*). A limited liability company is more frequently used since there are fewer formal requirements for its management. Investors rarely decide to use partnerships. Sometimes the parties decide to establish a partnership.

The parties sometimes decide to conduct certain activities jointly without incorporating a separate entity. In such cases, the parties execute agreements which may differ significantly from each other depend on the wishes of the persons involved—called joint venture agreements (although this name has recently become less popular), co-operation agreements, consortium agreements, agreements on a common undertaking, etc.

If a partnership structure is chosen, does this lead to (a) joint and several liability to third parties and/or (b) duties of good faith as between partners?

If the investors decide to structure their joint venture in the form of a partnership, they will be jointly and severally liable to third parties. However, in limited liability partnership or joint stock limited liability partnership the liability of certain types of partners may be limited.

The law provides that the partners in a partnership must co-operate to achieve a common goal.

4. Capital structure and funding

Is it common to have different "classes" of shares (e.g. A and B shares) to reflect different initial contributions or financial interests of the parties?

The articles of association or the statutes may grant preferences to certain shares. The most common type of share preference concerns the number of votes at the shareholders' meeting, dividends or post-liquidation assets. The Code of Commercial Companies provides that not more than three votes can be attached to a share in the case of a limited liability company and not more than two votes in the case of a joint-stock company. The Code also sets limits for preferential dividend rights in both types of company, e.g. the maximum preference cannot be more than 50 per cent of the dividend due to shareholders who do not hold preference shares. There are no limitations on preferences concerning post-liquidation assets.

Is it common to have "preference" shares which give a party a priority on payment of dividends or on a return of capital? Are "redeemable" shares permitted?

The provisions of the Code of Commercial Companies allow a shareholder to be given priority in respect of payment of dividends or a return of capital in both a limited liability company and a joint-stock company with one condition: this right must be set out in the company's articles of association or statute.

The shares in both a limited liability company and a joint-stock company may be redeemed if the articles of association or the statutes so provide. A share may be redeemed with or without the shareholder's consent. The conditions for redeeming shares and the procedure should be set out in the articles of association or the statutes. Redeeming shares usually requires a shareholders' resolution. However, if an event provided for in the articles of association or the statutes takes place, the management board may be entitled to redeem the shares.

Are "non-voting" shares permitted?

Non-voting shares are only permitted in a joint-stock company. The Code of Commercial Companies provides that shares with dividend preferences may be deprived of voting rights (similar to German *Vorzugsaktien*). Holders of non-voting shares may be granted the following additional rights (which are not available to holders of other shares): (i) priority of satisfaction over other shares; (ii) lack of limitation on maximum level of dividend preference; and (iii) right to compensation paid out of profit in subsequent years if the holder does not receive the full dividend due to it in a given financial year.

Is there any capital or similar tax payable in respect of issued share capital?

Issued share capital is subject to 0.5 per cent civil transactions tax, which is payable within 14 days of the date on which the shareholders' meeting is held. However, if the minutes of the meeting are taken by a notary, the notary is obliged to collect the tax on the day the meeting is held.

Civil transactions tax (of 0.5 per cent) is also levied on additional payments and loans granted to a company by its shareholders.

Is a separate "contribution agreement" or other formal document (other than formal property transfer agreements) required or usual under the local law to document the contribution of assets to the joint venture?

The law does not require a separate contribution agreement to be executed between the company and the investor, although, if the assets are to be contributed at a later stage, then an agreement documenting the transfer would be needed.

Are there any local laws which require an independent valuation of any non-cash assets to be contributed to the joint venture?

The Code of Commercial Companies provides that, if the share capital of the joint stock company is to be covered by in-kind contributions, the management board should draw up a report specifying in particular the nature of the in-kind contributions as well as the number and classes of shares allotted in exchange. The report must be audited by a certified auditor appointed by the company's local registry court.

The above requirement does not apply to limited liability companies and partnerships.

Are there exchange control regulations which materially affect the establishment of the joint venture-or the subsequent repatriation of profits or dividends from the joint venture to a foreign party?

There are no such exchange control restrictions.

5. Tax

Are there any particular tax laws or incentives which significantly affect the establishment of joint ventures in this jurisdiction by a foreign investor?

There are no tax laws which apply specifically to joint ventures, irrespective of whether they are "equity" or "non-equity".

Will withholding taxes apply to dividends paid by a joint venture company?

The payment of dividends and other revenues from sharing in profits is currently subject to 19 per cent tax withheld by the payer. The payee is not liable to any further taxes on the dividend received. Dividends paid abroad are also subject to 19 per cent withholding tax unless a relevant tax treaty provides otherwise. A reduced rate provided in a double tax treaty may be applied only if the recipient (foreign entity) supplies the required certificate issued by its domestic tax authority showing that it is tax resident or has its registered office abroad.

The EU Parent/Subsidiary Directive has been implemented into Polish tax law. Payments of dividends and other revenues from sharing in profits of Polish entities are exempt from taxation in Poland if the following conditions are jointly met: (i) dividends are paid to a non-resident company; (ii) the beneficiary is subject to income tax on its worldwide income in an EU Member State; and (iii) the beneficiary has directly held at least 25 per cent of the shares in the Polish company for an uninterrupted period of not less than two years.

The amount of tax withheld by the Polish dividend payer may be credited against the payee's tax liabilities (other than those resulting from sharing in corporate entities' profits) and carried forward without limitation.

6. Board and management

Are there local law rules which affect the board or management structure of the joint venture?

The same rules for management boards apply to joint ventures as to other limited liability or joint-stock companies. The management board may be composed of one or more members. In a limited liability company the members are appointed by the shareholders' meeting and in a joint-stock company by the supervisory board, unless the articles of association or the statutes provide otherwise.

Permanent supervision of the company's activities in all aspects of its business is exercised by the supervisory board with the reservation that the supervisory board is not allowed to issue binding instructions to the management board in respect of managing the company's affairs. The Code of Commercial Companies provides that a supervisory board must be appointed: (i) in all joint-stock companies; and (ii) in limited liability companies if (a) the share capital exceeds PLN 500,000 and there are more than 25 shareholders or (b) the articles of association so provide.

The supervisory board must comprise at least three persons. A supervisory board member may not be a member of the management board at the same time.

Companies whose shares are traded on the stock exchange may decide (at their sole discretion) to apply corporate governance rules which inter alia regulate the composition of the management board and their relations with the other authorities of the company.

It is also possible to incorporate a European Company in Poland (also for joint venture purposes) and to appoint a one-tier board.

Are there local law constraints on persons who can be directors or managers of the joint venture (e.g. only local residents or nationals)?

There are no requirements for Polish nationals to be directors or managers of joint ventures. Nationals of certain countries require a work permit if certain conditions are not met (this does not apply to most EU countries).

Does a shareholder in a joint venture company owe a duty of good faith (or similar duty) to other shareholders in the way it behaves in relation to the joint venture?

Unless required under a contract, shareholders do not owe a duty of good faith to each other. However, each shareholder has the right to appeal against a shareholders' resolution which is contrary to the articles of association or good practice and which at the same time is detrimental to the company's interests or aimed at harming a shareholder.

7. Transfer of shares

In the case of a joint venture company, can a permanent restriction on transfer of shares be imposed under the local law (e.g. no transfer without the consent of the other shareholder)?

The articles of association or the statutes may make the disposal or pledge of a share contingent upon the consent of the management board, the shareholders' meeting, the supervisory board or the other shareholders. The law does not contain any time limitations on this restriction.

Shareholders may also execute agreements under which they restrict the transferability of shares. In the case of a joint-stock company the restriction cannot apply for more than five years. Law provisions do not contain any time limit for the validity of such restrictions in limited liability companies, but the general civil law rule will apply under which the transferability of a right cannot be excluded for an indefinite period.

8. Protection for minority shareholders

Are there any statutory rules or remedies which help significantly to protect a minority shareholder in a joint venture company?

The general rule in the Code of Commercial Companies is that a company's shareholders must be treated equally in the same circumstances.

Irrespective of this general rule, minority shareholders holding at least 10 per cent of the shares have certain rights, such as (i) the right to request that a shareholders' meeting be convened or that certain matters be put on the agenda, and (ii) the right to request that the registry court appoint an auditor to audit the company's accounts. Furthermore, each shareholder may appeal against a shareholders' resolution which he feels is contrary to the articles of association or good practice and is detrimental to the company's interests or aimed at harming a shareholder.

Does the law require any major business decisions to be approved by a special resolution or super-majority (whether at board or shareholder level) or must a minority party protect itself by contract?

The Code of Commercial Companies requires that the consent of the shareholders' meeting is necessary for (i) any disposal of the lease of the enterprise or an organised part thereof, or establishment of a property right thereon, (ii) any acquisition and disposal of real property or interest therein, unless the articles of association or the statutes provide otherwise, (iii) any contract under which the company acquires real property or fixed assets at a price exceeding a quarter of the company's share capital, executed within two years of the company being registered and (iv) any issue of convertible bonds or bonds with priority of conversion into share capital (only in a joint-stock company). If any of the above actions are taken by the company without consent being given by way of a shareholders' resolution, these actions will be invalid.

Unless the articles of association or the statutes provide otherwise, resolutions are adopted by the shareholders' meeting by an absolute majority of votes. Exceptions apply to e.g. resolutions amending the articles of association or the statutes, disposing of the enterprise, winding up or redeeming share capital, which require a majority of two-thirds in a limited liability company and three-quarters in a joint-stock company.

A resolution amending the articles of association or the statutes by imposing a broader scope of shareholder duties or restricting the personal rights conferred upon individual shareholders requires the consent of all the shareholders affected.

9. Employment laws

Are there local law obligations requiring a "local" party to consult with, or obtain the approval of, employees or employee representatives on a contribution of its business to the joint venture?

There is no obligation to obtain the approval of any employee representatives when contributing a business to a joint venture with one exception: the director of a state-owned enterprise must obtain the approval of the board of employees before making the contribution. In view of the fact that there are few state-owned enterprises left (most have been transformed into limited liability or joint-stock companies, with the state being the sole or majority shareholder), the effect of this restriction has decreased significantly.

Are there any material employment laws (compared with the UK) which are likely to affect the ongoing operations of the joint venture?

Polish labour laws are rather complex, as are those of most other European countries.

This means that, on the one hand, most labour law directives have already been implemented or will be implemented in the near future and, on the other, the rights of employees and trade unions are similar to those guaranteed in other European countries.

10. Accounts

Is there a requirement on the joint venture company to file accounts with any authority where they are publicly available?

Financial statements must be filed with the company's local registry court and tax office.

All entities which by law have to be audited must also publish elements of their financial statement in a special economic bulletin. Listed companies are obliged to file their financial statements with the Securities and Exchange Commission.

11. Dispute resolution

Is there any standard local practice as to form of dispute resolution in relation to joint ventures with foreign investors? Is arbitration in a venue outside that jurisdiction acceptable?

There are no particular rules on dispute resolution in relation to joint ventures with foreign investors. Arbitration is very often an alternative. The parties may choose between a permanent arbitration court or arbitration ad hoc, either in Poland or abroad.

Is the local jurisdiction a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes. Poland has been a signatory to this Convention from the very beginning.

12. Legal documents and formalities

Is there any special form of legal documentation required under local law for establishment of a joint venture company? What are the usual principal documents?

To establish a limited liability company the shareholders must: (i) draw up articles of association and execute them before a notary, (ii) appoint members of the company's authorities and (iii) pay up the entire amount of share capital. Appointments can be made in the articles of association or by way of a shareholders' resolution or in any other way stipulated in the articles of association (e.g. nomination by a certain shareholder).

Together with the application (in the form set by the law) to the registry court, management board members have to file a set of documents which must be signed by them—in particular, specimen signatures made before a notary, a statement that contributions to share capital have been paid up, list of shareholders, etc.

The same procedure generally applies to the incorporation of a joint-stock company.

However, if any in-kind contributions are made, the management board must in addition apply to the registry court with a request to appoint an independent auditor to confirm that the in-kind contribution was valued properly.

Does the joint venture documentation need to be in the local language and/or governed by the local law?

Formal corporate joint venture documentation must be drawn up in Polish. However, this does not apply to agreements such as shareholders' agreements, joint venture agreements or commercial agreements.

Are there any commonly-accepted "standard forms" for joint ventures with foreign investors in your jurisdiction?

There are no standard forms for joint venture agreements, though shareholders' agreements are sometimes similar.

Are agreements between shareholders (e.g. as to appointment of directors, conduct of the business of the company or voting majorities required) enforceable under local law? Is specific performance or a similar remedy available—or only damages?

The enforceability of shareholders' agreements depends on the nature of the obligations provided therein. As there are no specific legal provisions which regulate these matters, there is a great deal of controversy about this issue in legal literature. However, in enforcing obligations relating to e.g. appointing directors, running the company's business or voting majorities required for certain decisions, specific performance is not available and the investor may only seek damages. Of course, other contract instruments may be used to secure and enforce these obligations (e.g. powers of attorney to vote which can only be used in certain circumstances, etc).

Are restrictions relating to (a) transfers of shares and/or (b) minority "veto rights" commonly included in the articles of association or by-laws of the company—or included in a separate shareholders' agreement?

Restrictions on transferring shares are usually set out in the articles of association and the statutes. This is due to the fact that transferring shares without the consent required under the articles of association or the statutes is ineffective with respect to the company. On the other hand, if the transfer is performed in breach of the shareholders' agreement, the investor may only claim damages from the party in breach for liquidated damages, if such damages were stipulated in the agreement.

Issues concerning minority "veto rights" have recently been widely discussed in Polish legal literature and there are different opinions in this respect. It can generally be stated that it would be against the rule for shareholders to be treated equally in similar circumstances for one shareholder to be given the right to veto shareholders' resolutions. On the other hand, the interests of a minority shareholder may be secured in the articles of association or the statutes by requiring a higher majority for the adoption of resolutions.

Are there any formalities (e.g. notarisation or registration) which are material and which may affect the timing involved in forming the joint venture?

The articles of association (and the statutes), all resolutions passed by the shareholders' meeting of joint-stock companies and limited liability companies amending the articles of association must be executed in the form of a notarial deed. This requirement is not time consuming but it does involve additional costs.

Furthermore, amendments to the articles of association (statutes) and changes in the company's authorities and other changes must be registered with the registry court. Although the procedure is usually quick, it can sometimes take several weeks.