

Forming a Polish LLC by foreign entities.

Introduction

The aim of this article is to explain, the procedures for setting up a Polish Limited Liability Company, which is one of the most commonly chosen business structures, by foreign entities. The reason for this is primarily its form, which as the name suggest, limits the members liability for the company's obligations, to the amount of non contributed capital. This secures the members personal assets, in the event of the company's insolvency. Other characteristics, that founders may find encouraging, are the minimum share capital (which is only 5000PLN) and the possibility to choose any possible business area for the business activity of the company. But before you will be able to start your activity in a LLC, as with any other type of company, you will have to complete certain formalities. In this article I will try to explain the procedures for establishing a LLC with particular regard to foreigners

1. FOREIGN ENTITIES AND THE POLISH LAW

1.1 Depending on the country of Origin

The act which regulates the conditions for establishing a business activity in Poland is "*ustawa o swobodzie działalności gospodarczej*" (eng: The Freedom of Economic Activity Act) . Under this law, setting up and running a business activity is free to everyone on equal terms, ***unless an exception is provided by law***. The first question that comes to mind is: Are foreigners free to set up a LLC in Poland ? According to the aforementioned act, Limited Liability Companies, are one of these type of companies (next to: Limited Partnership Companies, Limited Joint-Stock Companies and Joint Stock Companies), for which the Polish law does not place any restrictions on the fact, that the parties willing to form the company are foreign entities.

However the above mentioned statement is not absolute, and the regulations are unfortunately, a little more complex than it might seem. The above provision refers only to situations in which the establishers of the LLC are foreign entities from an EU country, or a country that is part of EFTA (European Free Trade Association), and member of EEA (European Economic Area) like Norway, Lichtenstein and Iceland. Entities from these countries, may enjoy the right to set up and run a Limited Liability Company, on par with Polish Citizens. For foreign entities from countries that are outside of the above mentioned area, the Polish law introduces additional requirements, that together form the procedure for obtaining a *temporary residence permit for the purpose of economic activity* (if you are a citizen of an EU, EFTA/EEA member state, then you can go to chapter 2.0).

1.2 Requirements for foreigners (individuals)

According to the Polish *Act of Foreigners* („*ustawa o cudzoziemcach*”) individuals, including those who are members of the board and at the same time foreigners from a country that is not member of EU Or EFTA/EOG, are granted temporary residence permit for the purpose of economic activity, for a period that is not exceeding three years, if the following conditions are met. The foreigner must have:

- 1) a valid health insurance Or confirmation that the insurer will cover the costs of medical treatment on the territory of Poland,
- 2) a stable and regular source of income, sufficient to cover the foreigners costs of living – The income meets these requirements if it exceeds the amount entitling to cash benefits from the social assistance,
- 3) a consent from a competent authority if it's a requirement of the law, for occupying a specific position Or performing a particular profession,
- 4) a place of living on the territory of the Republic of Poland – This can be proved with any legal entitlement to a dwelling, like a tenancy agreement or a statement of the owner that he will provide the foreigner with a place to live.

A foreign entity applying for a *temporary residence permit for the purpose of business activity* for the first time must also prove that he has sufficient funds allowing him to, in the future, meet additional requirements which are required by the Polish Act of Foreigners, that is:

- 1) Reaching a revenue for a period of one year which is equal 12-times the average monthly salary which is announced by the president of the statistical office for the third quarter of the previous year in the region in which the business is conducted, Or
- 2) Employing at least 2 persons for an indefinite period. These employees should be either Polish citizens or foreigners referred to in the “*Act of Employment promotions and labor market institutions*”¹ in Art. 87 par.1 pt 1-9, which:

- 1) have a refugee status granted in the Republic of Poland;
- 2) were granted subsidiary protection in the Republic of Poland;
- 3) have a permanent residence permit in the Republic of Poland;
- 4) have a EU long-term resident status in the Republic of Poland;
- 4a) has permission to stay on humanitarian grounds;
- 5) have permission for a „tolerated stay” in the Republic of Poland;
- 6) have temporary protection in the Republic of Poland;
- 7) are citizens of an EU member country;
- 8) are citizens of a country that is member of the EEA (European Economic Area);
- 9) are citizen of a country that is not member of EEA, but may benefit from the freedom of movement of persons, on a basis of an agreement concluded by their country of origin and the European Union and its member states.

The above mentioned requirement of having sufficient funds, may be exchanged with a reasoned statement indicating the implementation of actions aimed to fulfill those requirements. Such activities may in particular be those that contribute to the growth of investment, technology transfer, innovations or creation of new jobs, which reinforce the belief that the company will reach the sufficient income or employ an adequate number of employees in the future.

1.3 Application to the Office of the Provincial

The application for a “*temporary residence permit for the purpose of business activity*” must be submitted to the Provincial Office (Department of Civil Affairs and Foreigners) on an official form, with the following attachments:

- 1) 4x color photographs depicting the image of the face of the foreigner,
- 2) a photocopy of a valid travel document (original for inspection),
- 3) proof that the stamp duty have been paid (340PLN for the authorization and 50PLN for a residence card)
- 4) proof of health insurance or confirmation that the insurer will cover the costs of medical treatment on the territory of Poland (eg. a relevant certificate from the Social Security or an insurance policy)
- 5) a document guaranteeing that the foreigner has a place of living in Poland – for example a tenancy agreement or a statement made by the owner of the dwelling.
- 6) a contract of employment with a tax declarations showing the foreigners income for the last fiscal year, or other documents to certify a stable and regular source of income sufficient to cover the foreigners and his family members cost of living (The minimum is – 542PLN per month for the foreigner, and 456PLN per each of his family member)
- 7) A consent to occupy a certain position or pursue a profession, given by a competent authority (if required by separate regulations).²

¹ Ustawa z dnia 14 marca 2014 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy oraz niektórych innych ustaw (Dz.U. 2014 poz. 598).

²Source:http://www.malopolska.uw.gov.pl/default.aspx?page=wydawanie_zezwoleń_na_pobyt_czasowy_na_prowadzenie_dg_na_terenie_RP.

The provincial governor gives the permit for a limited period of not more than 3 year, and therefore further business activities after this period will require the submission of a new application. The second application must be submitted before the expiry of the first, and should contain additional documentation to prove that the requirements set by law have been met.

The second application should therefore include:

1. documents proving the company's financial results from the last fiscal year. This is to prove that the company has reached the requirements set by the Polish law (the earlier mentioned income equal the average salary in the area in which the company operates) – for example a CIT-8 form (“testimony of income”) or a testimonial from the tax office Or
2. evidence of employment of at least 2 employees for an indefinite term and full-time basis for a period of at least 1 year prior to the application – This can be Contracts of employment with Social Insurance testimonials(in polish: “deklaracje ZUS”)
3. a testimonial of not having any tax arrears,
4. a testimonial that the company does not have any tax arrears,
5. company's balance sheet, together with the current profit and loss account;
6. the Company's act of association.

1.4 Requirements for Legal Persons from countries outside UE, EFTA/EOG

The *permissions* that were described above, are not needed or relevant if the founder of the company is a foreign company that has its own legal personality. Such entities does not need any permission to set up a company in Poland. This is due to the fact that the “*Foreigners Act*”(ustawa o cudzoziemcach) is addressed to individuals and so are its regulations about the conditions for granting temporary residence permission.

The provisions of the foreigners Act, including art. 142, does however regulate situations where the share buyers or establishers of the company are foreign individuals. From this point of view, the permit will also be required if the shareholder or member of the board that are planned to be established in the company, would be a person from a non European Union or EFTA / EEA country. In such a situation, these persons will have to obtain the “temporary residence permit”. The type of permit depends on the specific situation and whether the individual is a shareholder or not. A shareholder running the company, for example as a member of the board will be treated as a person operating a business within the meaning of Art. 142 and will therefore also need a “*temporary residence permit for the purpose of business activity*”. On the other hand, a person from outside of the company, will be treated as a ordinary employee (In this case, the Polish law sets different requirements).

If the only shareholders in the established company will be foreign companies and the members of the board will be citizens of the European Union or from a country that is a member of the EFTA / EEA, then the obligation to obtain a permit completely collapses, due to the lack of regulation in this area. It's easy to notice that the Polish law combines the “permission for running a business” with a “temporary residence permit”. The reason for this is probably the will to secure the Polish market, however these regulations significantly impede the establishment of a new LLC by foreigners. If an entrepreneur covered by this stricter legal regime would like to establish a company in Poland, and not necessarily move to this country, then it may be a solution, to give someone a power of attorney, however the above mentioned formalities will still be needed at the beginning.

1.5 Real Estates in the Company

Another important limitation imposed by the Polish legislator is the obligation to obtain a permit to acquire real estates by foreign entities. Acquiring real estate without a proper permit will cause invalidity of the acquisition, and the foreigner will be refused to make any changes in the **real estate register** (Polish: “Księga Wieczysta”). The obligation to get the permit does not only apply to direct purchases but also indirect acquisition (eg. when a foreign entity take control over a Polish company, whose assets include real estate, or when a Polish company controlled by foreign entity, want to purchase a real estate). Such an obligation is based on the “*Act on the*

acquisition of real estate by foreigners".³ This law precisely defines its understanding of who a foreigner is. The foreigner within the meaning of the Act is a:

- 1) Natural person without Polish citizenship;
- 2) Legal Person based abroad;
- 3) non-corporate company of persons referred to in point 1 or 2, based abroad, established in compliance with the legislation of foreign states,
- 4) Legal person and non-corporate commercial company based in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies referred to in points 1, 2 and 3. The usual situation in which the company is controlled is when the foreigner or foreigners directly or indirectly possess more than 50% of Votes at the meeting of shareholders or at the general meeting, but may also have place in event of obtaining the rights on the basis of agreements, or as a lienholder, or when the company have a dominant within the meaning of the Polish "*Code of Commercial Companies*".

The permit is issued by way of an administrative decision by the minister of interior, if the Minister of National Defense does not raise any objection, and in case of agricultural real estate, if the minister of rural development does not raise any objection.⁴ In the application, the foreigner should prove that there are circumstances confirming its bonds with the Republic of Poland. As examples of such circumstances the act mentions in particular:

- 1) pursuing business or agricultural activity on the territory of the Republic of Poland in compliance with the provisions of Polish law
- 2) being married to a citizen of the Republic of Poland,
- 3) membership in the governing body of a Polish business operators, controlled by foreign entities
- 4) Polish nationality or Polish origin,
- 5) having a temporary residence permit (including *temporary residence permit for the purpose of business activity*).

The application should indicate:

- 1) applicant (buyer) and its legal status,
- 2) subject of acquisition,
- 3) transferor (seller),
- 4) legal form of acquisition
- 5) information about the purpose and possibility of acquiring the property

The following attachments should be added to the application:

- 1) Documents confirming the circumstances mentioned in the application. especially proving the bonds with the Republic of Poland,
- 2) Proof that the Stamp duty have been paid:
 - a) *Permit for acquiring shares/ real estate by foreigners*– 1.570 PLN
 - b) *promissory note* – 98 PLN
 - c) *Other decisions to which provisions of the „code of administrative proceedings”⁵ should be used* ,– 10 PLN
 - d) *Power of Attorney* – 17 PLN
 - e) *issuance of a certificate* – 17 PLN

Detailed requirements for the documents required in the application are described in the ordinance, issued by the minister of interior on *the detailed information and types of documents to be submitted by a foreigner applying for issuing a permit for the acquisition of real estate*.⁶

³ Ustawa z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców (Dz.U. 1920 nr 31 poz. 178). Translated text: <https://msw.gov.pl/en/document/acquisition-of-real-es/60.Acquisition-of-real-estate.html>

⁴ add. An objection could be based on the risk to the defensiveness, national security or public order and contradiction with the social policy and public health considerations.

⁵ Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dz.U. 1960 nr 30 poz. 168).

Foreign entities interested in acquiring a property and establishing a limited liability company, should consider the purpose of buying the property. This is not without meaning when it comes to establishing a new company, especially if the members want to use the estate as the company's head office. In such a case it would determine the sequence of actions that would have to be taken for setting up the company.

It should be mentioned that the Act contains a number of derogations, describing a number of circumstances in which the obligation of obtaining a permit is abolished. To name a few examples, the foreigner is free from any permits in case of:

1. purchasing a flat,
2. acquiring a undeveloped property with an area not exceeding 0,4 Hectare across the whole country, by a Polish company controlled by foreign entities, unless the purpose of the acquisition is consistent with the statutory objectives of the company.

2. MAKING THE DECISIONS

Business decisions are an internal part of establishing a business, and though it's not a requirement of the law to plan everything from the beginning, it does determine the way we draw up the company's contract. That's why I've decided to write a few words about how you should prepare for establishing a Limited Liability Company. At this step, the founders should agree about the fundamental principles of the company's operation. The way the parties want to form their rights and responsibilities will be core for the Company Establishment Contract. The parties should therefore make a preliminary agreement about the mandatory provisions of the contract, and perhaps also the less important ones which also should be considered drawn into the contract. In particular, the shareholders should agree the following :

- Who is going to be a member
- The roles of the members; their rights and responsibilities in the company and towards it.
- The value of the shares (min. 50zł per share), amount and type (e.g. preferred shares)
- The amount of shares that one shareholder/member may have
- Company name and location of its office
- The Share Capital
- The principles on how the division of the LLC's profits between its members should be made
- Contributions to the company
- Are the members going to contribute non-monetary contributions?
- Does the shareholders want to protect their Brand, Logo ?
- Is the Company being established for a fixed or open term ?
- Does the shareholders want to restrict the sale of shares ?

These elements are merely exemplary. The main aim of this step is to determine the principles of the company activities, while aiming for a common agreement, in order to facilitate further establishment of the company. It is clear that these assumptions will not be fully reflected in the situation when the establisher is a single legal entity, but also in this situation, it is recommended that the sole shareholder plan everything carefully in advance.

3. CONCLUDING THE COMPANY'S ESTABLISHMENT CONTRACT - - THE ARTICLE OF ASSOCIATIONS

The essential act for setting up a company is the contract establishing it (the article of association). In case the company is going to be a solely owned company, a founding act will be the equivalent of the above mentioned contract. Both the contract and the founding act should be concluded at the notary public, in the form

⁶ rozporządzenie Ministra Spraw Wewnętrznych z dnia 20 czerwca 2012 r. w sprawie szczegółowych informacji oraz rodzajów dokumentów, jakie jest obowiązany przedstawić cudzoziemiec ubiegający się o wydanie zezwolenia na nabycie nieruchomości (Dz. U. z 2012 r., poz. 729).

of a notarial deed. The fee for preparing the deed depends on the share capital of the company and is 100PLN + 3% of the excess over 3000PLN. You must also know that the notary public is going to charge you with a civil law activity tax in the amount of 0.5% of the company's share capital. The presence of a notary certified translator, while concluding the notarial deed, is also necessary. His role is to ensure, that the parties, understand each statement of the deed they are going to sign. While present at the notary public office, you are going to need an ID issued by the country of your origin. It's very important that it is an official document issued by the authorities in your country (e.g. passport). The Notary will draw up a deed in accordance with the law and the will of the parties, that later will be read and finally signed by the parties. If the establisher of a LLC in Poland, is a foreign company, it's very important that the person representing that entity has a power of attorney. (this power of attorney must be prepared in the form of a notarial deed and provided with an apostille.⁷

According to the Polish "Code of Commercial Partnerships and Companies", the establishment contract (article of association) of the LLC should contain the following mandatory elements:

- a. **Company name and head office** - The name may be freely chosen, and must contain an additional designation: „*spółka z ograniczoną odpowiedzialnością*” (*sp. z o.o.*) which is the same as “Limited Liability Company”. The address of the head office will determine where the company will be based.
- b. **Areas of business activity** – These categories of business activity should be defined on the basis of „*Polska klasyfikacja działalności gospodarczej*”- “Polish Classification of Economic Activities.” It is possible to define many areas of the business activity
- c. **The share capital** – The minimal share capital for LLC companies in Poland is 5000PLN. It will have to be contributed by the shareholders before registering the LLC. That money does not have to be frozen on a bank account. The company may use its share capital for further investments.
- d. *Important note ! It's important to know that exceeding 500 000 PLN of share capital, while having a large number of members in the company (over 25), will cause that, establishment of a Supervisory Board or Audit Commission will be mandatory*
- e. **How many shares a shareholder may have** – The Polish regulations provide an ability to determine whether the shareholders interests in the company's share capital are equal or unequal. If a shareholder may have more than one share, then the shares should be equal and indivisible. If the establishers of the company decide that the shares are unequal, then the shareholders may only have one share each, which has a value corresponding to a fraction of the company's share capital. The decision about, the solution that should be applied is in the hands of the establishers.

Important note ! The minimum nominal value of one share may not be less than 50PLN.
- f. **The number and nominal value of the shares acquired by the shareholders** – The number and value of the shares should correspond do the share capital of the company (the sum of the shares should be equal to the share capital of the company).

⁷ *Apostille - Is a form of authenticating a document. This is done with a clause, drawn up on the on the basis of a model annexed to the Hauge Convention. Documents that are authenticated this way does not require further authentication in the countries covered by the Convention.*

Here you will find the list of countries covered by the convention and their empowered authorities :
<http://www.apostilleinfo.com/norway.htm>

- g. **The duration of the company if it's a fixed time company** – The parties may decide whether the company is concluded for a fixed or open period. If the parties will not specify the time for which the contract is concluded, it is assumed that the intention of the parties is an indefinite period.
- h. **The non-cash contributions.** Contributions to the company does not necessarily have to be money. The establishers may decide that the contributions will have the form of movable and unmovable property, and also transferable property rights. It is important that the above mentioned "*in kind*" contributions, have their value that can be defined by a sum of money. In event of a capital contribution in kind (f.eks. a car or real estate), the shareholders (establishers) must make a note in the company's "*article of association*", describing the contributed goods, the shareholder making the contribution in kind, and the number and value of shares acquired in exchange.

If any of the above mentioned elements will be missing, the court will refuse to register the company. A notarial deed is a mandatory form for the *article of association*. Normal written form of that contract will cause its invalidity, and registration will be refused. The contract may also contain other, less important elements such as: specific rules of representation, establishment of the directors board, privileged shares, shareholders with privileged rights (e.g. in terms of voting rights or profits per share.), additional obligations imposed on the shareholders.

4. ESTABLISHING THE BOARD OF DIRECTORS

If the article of association, did not establish the board members, it is now the right time to do so. In a limited liability company, it's the board of directors that is responsible for representing and running the company. Establishing the board of directors is also necessary, for the next steps of setting up the company where a representative will be needed.

To appoint the board, the shareholders should either

- 1) convene a general meeting to pass a resolution establishing the directors, or
- 2) sign an adequate paper

After any of the above mentioned activities the Company will have an authority, authorized to represent it. It's worth a mention that the company may have any number of directors (also one), and the decision in this field have been left to the shareholders.

5. CONTRIBUTING THE CAPITAL

Before the company can be registered, the share capital which the parties agreed about in the *article of association* should be fully covered by the shareholders. The value of contributions must be at least equal to the value of the company's share capital. Contributing the capital is nothing else than its transfer to the company. In case of money contributions, this can be done in two ways:

- payment in cash to the company
- bank transfer

Due to the fact that "*limited liability companies in organization*" are entities, which may acquire rights and incur obligations, it is possible to open a bank account for the company, to which the shareholders can pay the required capitals. Establishing a bank account is in the competence of the board. Keep in mind that cash contributions in foreign currencies shall be converted to PLN in order to determine the correct amount of contributions in relation to the share capital of the company. In the case of in-kind contributions like: movable

property, unmovable property and other rights, their contribution to the company will rely on the proper transfer of the ownership or an assignment, respectively. When the shares have been paid, the board of directors must declare (on paper) that all financial contributions have been fully paid.

6. REGISTERING THE COMPANY:

The last step in creating a LLC is to register the company in „*rejestr przedsiębiorców*’ which is an open company register, ran by commercial courts of competent jurisdiction. The application to the register should be signed by all the directors and submitted during 6 months from concluding the act of association (either by the directors or an authorized person.

The application should include:

- | | |
|--------------------------------------------------------------------------|----------------|
| 1) Company Name, headquarter (city) and address | (form: KRS W3) |
| 2) Areas of business activity, | (form: KRS WM) |
| 3) Share Capital, | (form: KRS W3) |
| 4) Number of shares per shareholder, | (form: KRS W3) |
| 5) Names, addresses of the board members and the rules of representation | (form: KRS WK) |
| 6) Names of the Supervisory Board or Audit Committee members (if any) | (form: KRS ZK) |
| 7) Description of In kind contributions (if any) | (form: KRS W3) |
| 8) Duration of the Company (if fixed) | (form: KRS W3) |
| 9) Indication of letters intended for company announcements (if any) | (form: KRS W3) |

In case of a sole founder, the application should include detail about that entity (name, address), and a mention that he is the only member.

Attachments to the application should include:

1. *the article of association*
2. A declaration that the share capital have been contributed.
3. An evidence that the authorities of the company are established. This document should include the names of the board directors (and also: supervisory board or audit committee if any of these were established)
4. A list of shareholders, containing the number and nominal value of their shares. The list should be signed by each board director. (form: KRS WE)

On the basis of a complete and properly filed application, the court shall register the LLC in the Company Register. The company is now a fully-fledged LLC.

Important note: *Foreign company's should also attach :*

- *a document from an appropriate register in the company's country of origin, specifying each of the member.*
- *Translated, certified copy of the company's register records with an apostille.*

7. COMPANY REGISTERED. WHAT'S LEFT ?

At December 2014 there was a major change in the procedures for obtaining Tax Identification numbers (NIP) and National Economy Numbers by companies (REGON) in Poland. The procedures have become a lot simpler, faster and most of the formalities are happening automatically, due to the new system that has been implemented. After the court have registered the company in KRS (company register) the basic information about the company is now automatically being sent to a register called "CRP KEP". This register is used as a shared base for other registers like REGON and ZUS (*Social Insurance Agency*). The tax identification number is granted, automatically, after the court has sent the information about the company to CRP KEP. The numbers will appear in the company register (*KRS*) as soon as they are created. The company's representatives will receive a confirmation from the court, as soon as the the *KRS* have been updated with those numbers (NIP,REGON).

Besides the basic information that the court send to the CRP KEP register, there are also additional information that should be provided to CRP KEP, REGON and ZUS. This is also the only concern of the company's representatives. Their duty is to provide the tax authorities, with additional information. This should be done at the tax office on a form called NIP-8. The entrepreneur have 21 days, from the day that the *KRS* – company register was updated with the above numbers, to provide the tax authorities with these additional information. In case the company has employees, the above term limit is only 7 days since the company employed the first employee.