

Amendment to the Commercial Companies Code

On October 13, 2022, the Act of February 9, 2022 amending the Act - Commercial Companies Code and certain other acts¹ (hereinafter: the "**Act**" or the "**Amendment**") will come into force. The Act will introduce numerous changes to the Commercial Companies Code (hereinafter: the "**CCC**")²; however, below we describe only those that we believe are the most important from our clients' perspective.

¹ *Journal of Laws of 2022, position 807.*

² *Act of September 15, 2000 – Commercial Companies Code (consolidated text Journal of laws of Republic of Poland of 2022, position 1467 with further amendments).*

Introduction of the regulation of group of companies law (the holding law) to the CCC

► Group of companies

A group of companies involves limited liability companies, simple joint-stock companies and joint-stock companies. It consists of a controlling company and at least one subsidiary, which jointly follow one strategy to pursue a common interest (interest of the group of companies).

A common strategy justifies the exercise of unified management over the subsidiary by the controlling company. A controlling company and a subsidiary that participate in a group of companies are obliged to follow not only their own interest, but also the interest of the group of companies (provided that it is not to the detriment of the creditors or minority shareholders of the subsidiary).

► Participation in a group of companies

In order to join a group of companies, the shareholders' meeting of the subsidiary adopts, by a majority of $\frac{3}{4}$ of votes, a resolution on participation in the group of companies, with indication of the controlling company. Subsequently, the company's participation in the group should be disclosed in the Register of Entrepreneurs of the National Court Register (Polish: *Rejestr Przedsiębiorców Krajowego Rejestru Sądowego*; hereinafter: „KRS”). In the event that the controlling company has its registered office abroad, participation in the group of companies needs to be disclosed only in the subsidiary's KRS.

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► **Binding instructions**

Participation in the group of companies means that the controlling company may issue binding instructions to the subsidiary if this is justified by the interests of the group of companies and specific provisions do not provide otherwise. Each binding instruction should be made in written or electronic form under the pain of nullity and include the following elements:

- the subsidiary's behaviour expected by the controlling company in connection with the implementation of the binding instruction;
- the interest of the group of companies which justifies the implementation of the binding instruction by the subsidiary;
- the anticipated benefits or damages of the subsidiary company which will be the consequence of implementation of the binding instruction, if any;
- the anticipated method and time of redressing the damage suffered by the subsidiary as a result of implementation of the binding instruction.

The implementation of a binding instruction by the subsidiary participating in a group of companies requires a prior resolution of the subsidiary's management board.

► **Liability for damage incurred in connection with implementation of a binding instruction**

The Polish lawmakers explicitly exclude the liability of the members of the subsidiary's management board for damage caused by the execution of a binding instruction.

The controlling company is liable for damage caused to the subsidiary caused through the implementation of a binding instruction (unless it is not at fault):

- in case of a sole-shareholder subsidiary – only if the implementation of a binding instruction led to its insolvency;
- in other cases – if the damage was caused by the implementation of a binding order and has not been remedied within the time limit indicated in the binding instruction.

The liability of the controlling company is ascertained with regard to the duty to remain loyal to the subsidiary company in the moment of issuance and implementation of a binding instruction.

A subsidiary participating in a group of companies is obliged to adopt a resolution on refusal to implement a binding instruction, if its implementation would lead the subsidiary to insolvency or a threat of insolvency.

A subsidiary participating in a group of companies which is not a sole-shareholder company is also obliged to adopt a resolution on the refusal to implement a binding instruction, if there is justified concern that such instruction is in conflict with that the company's interest and will cause damage that will not be redressed by the controlling company or another subsidiary participating in a group of companies within the time limit set in the CCC or the Articles of Association.

Moreover, the subsidiary's Articles of Association may provide for additional premises for a refusal to act in compliance with a binding instruction.



► **The report on the contractual links of the subsidiary participating in a group of companies**

The management board of the subsidiary participating in the group of companies is obliged to prepare a report on that subsidiary's contractual links with the controlling company for the last financial year and present it to the shareholders' meeting. Such report may constitute a part of the annual management board's report.

► **Termination of the participation in a group of companies**

Participation in a group of companies may be terminated by means of:

- a resolution passed at the shareholders' meeting by a majority of $\frac{3}{4}$ of the shareholders or
- a statement on termination of such participation made by the controlling company to the subsidiary participating in a group of companies.

Business judgement rule

The Act explicitly implements the well-known business judgement rule, according to which a member of the management board is not held liable for a damage inflicted to a company, if, while remaining loyal to the company, he/she acts within a justified economic risk, including on a basis of the information, analyses, and opinions which should be taken into account in given circumstances while making a careful judgment.



Responsibilities of the members of the management board

Although it has already been a common practice, the Amendment explicitly introduces an obligation to keep minutes of the resolutions of the management board. Such minutes should include the agenda, names and surnames of the members of the management board in attendance, number of votes taken on a particular resolution and – possibly – a contrary opinion of one of the members of management board. The minutes should be signed by at least one member of the management board, unless the company's Articles of Association state otherwise.

Additionally, a former member of the management board may (and should) report on the company's activities in the course of preparation of report of management board and financial statement covering the which he/she performed the function of management board member and participate in the ordinary shareholders' meeting which approves such report and statements, unless the shareholders' resolution states otherwise.

Such a solution allows the current members of the management board to obtain additional knowledge on the situation of the company. However, the Act does not provide any means to execute such obligation. Therefore, its performance will depend on the will of the former members of the management board.

Moreover, the Act directly prohibits the former members of the management board to disclose company's secrets upon the expiry of their term of office.

Term of office of the members of the management board

The Act confirms the jurisprudential approach according to which the term of office of a member of the management board is counted in full financial years, unless the company's Articles of Association state otherwise.





Extension of the catalogue of offences

The Amendment extends the catalogue of offences which make it impossible for persons convicted by a final judgment to hold the function of e.g. member of the management board or commercial proxy.

This prohibition also applies to persons holding the function before the Act comes into force.

Once the Act enters into force, the aforementioned catalogue will be supplemented by the following offences: passive bribery, active bribery, influence peddling, abuse of power, failure to provide information, documents, reports or explanations to the supervisory board or obstruction of the supervisory board's access to them.

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