

The 2022 amendments to the Commercial Companies Code – changes to the principles of corporate oversight #2

LEGAL ALERT

On 13 October 2022 an amendment to the Commercial Companies Code (the “**CCC Amendment**”)¹ will enter into force which significantly strengthens the position of supervisory boards in joint stock and limited liability companies. The new powers vested in supervisory boards of such companies (and by non-executive directors in a simple joint stock company) are correlated with the new duties of supervisory boards and management boards. The new powers and duties relating to corporate governance in companies are further strengthened by the introduction of criminal sanctions into the CCC for the failure to provide information, documents, reports or explanations to the supervisory board or its advisor. The CCC Amendment also provides for the professionalisation of supervisory board members in companies.

The following are the most important rules related to corporate governance of companies after the entry into force of the CCC Amendment.

1. The requirement to draw up a report on the activities of the supervisory board.

A new specific duty of supervisory boards, introduced by the CCC Amendment, is the preparation of a report on their activities for the previous financial year. This report is to be submitted by the supervisory board to the shareholders’ meeting (in a limited liability company) or the general meeting (in a joint stock company). A corresponding obligation has been introduced for non-executive directors in a simple joint stock company, who submit their report to the general meeting.

In the case of a joint stock company, the lawmakers have specified in detail the obligatory components of the supervisory board’s report. No such regulation has been introduced in the case of limited liability companies or simple joint stock companies. Accordingly, supervisory boards of these companies may themselves decide what information to include in their reports. Information included in the reports of supervisory boards of limited liability companies and simple joint stock companies should be appropriate to the type and scope of the company’s business activity and the expectations of its shareholders.

¹The Act of 9 February 2022 on amending the Commercial Companies Code and certain other acts.

The report of the supervisory board of a joint stock company should include, *inter alia*:

- > an assessment of the company's situation, taking into account the adequacy and effectiveness of its internal control and risk management systems, and the obligation to ensure compliance with the relevant standards and/or applicable practices, as well as of its internal audit function;
- > an assessment of the fulfilment by the management board of its reporting obligations towards the supervisory board;
- > an assessment of the manner in which the management board prepares and/or submits the requested information, documents, reports or explanations to the supervisory board; and
- > information about the total remuneration due from the company to the advisors to the supervisory board for all of the reviews and other services commissioned by the supervisory board during the financial year.

2. Participation of the key auditor in the supervisory board's meeting.

Another novelty introduced by the CCC Amendment is an obligation for the key statutory auditor or another representative of the audit firm to participate in the supervisory board's meeting dealing with the assessment of the company's financial statements, the management report and the proposals concerning the distribution of profits or the coverage of losses, as well as the preparation of the supervisory board's report.

This obligation applies only to those companies whose financial statements are required by law to be audited by a statutory auditor. In such case, the supervisory board will give at least one week's notice of the date of the supervisory board's meeting to the key statutory auditor who conducted the audit.

The role of the key statutory auditor or another representative of the audit firm at the meeting of the supervisory board is to present the report on the audit of the company's financial statements to the supervisory board. In particular, the auditor will assess the declaration on the company's ability to continue as a going concern and answer any questions raised by the members of the supervisory board.

A corresponding arrangement has been made for simple joint stock companies, with the notice of the meeting being given to the key auditor by the board of directors or its committee. Accordingly, the auditor participates in the meeting of the board of directors or its committee and answers questions from the directors of the simple joint stock company.

3. Right to request information.

The CCC Amendment defines precisely: the scope of information and documents that the supervisory board may request to be disclosed, the group of entities required to disclose such, the deadline to comply with the request, and the sanction for declining to comply with the supervisory board's request.

With a view to performing its duties, the supervisory board may not only examine all documents of the company, but it may also require certain information or explanations to be provided, or a report to be drawn up. The supervisory board is also entitled to inspect the condition of the company's assets. The supervisory board may demand documents, information, explanations or reports concerning not only the company itself but also its subsidiaries and affiliated companies.

The CCC Amendment has significantly broadened the circle of entities required to provide information to the supervisory board. These include: (i) the management board; (ii) commercial proxies; (iii) persons employed by the company under an employment contract; and (iv) persons performing certain activities for the company on a regular basis under a contract for specific work, a contract of mandate or another contract of a similar nature. Thus, the CCC Amendment gives the supervisory board the right to demand specific information not only from persons employed within the internal structures of the company, but also from third parties. Importantly, the supervisory board's power is an independent power that can be exercised without the involvement of the company's management board.

Information, documents, reports or explanations will need to be provided to the supervisory board promptly, and in any event within two weeks of a request being made to the relevant person or body. However, the supervisory board may also specify a longer deadline in its request.

An analogous power has been granted to non-executive directors in a simple joint stock company.

It should be noted that the above regulations are of a mandatory nature. This means that limiting the aforementioned powers of the supervisory board (of non-executive directors) in the company's articles of association is not possible.

Failure to fulfil the above obligations within the specified time limit, or the submission of information, documents, reports or explanations that do not truly and fairly reflect the actual state of affairs, or the concealment of data that has a material impact on the content of such information, documents, reports or explanations, is subject to a fine or the limitation of liberty.

4. New disclosure obligations of the management board towards the supervisory board in a joint stock company.

In a joint stock company, in addition to the supervisory board's power to request information and documents, an obligation was introduced for the management board to inform the supervisory board, without being prompted, about certain matters concerning the company, its subsidiaries and affiliated companies.

The management board is required to provide the supervisory board with information on:

- > resolutions of the management board and their subject matter;
- > the situation of the company (and also of its subsidiaries and affiliated companies), including with regard to its assets, as well as any significant circumstances relating to the conduct of the company's affairs, in particular in the area of operating activity, investments, and staffing;
- > progress in the pursuit of the adopted lines of development of the company's operations (and the operations of its subsidiaries and affiliated companies); as well as identify any departures from the previously adopted lines of development and specify the reasons for such departures;
- > transactions and other events or circumstances that materially affect or may affect the company's asset situation (and that of its subsidiaries and affiliated companies), including its profitability or liquidity; and
- > changes to information previously provided to the supervisory board, if such changes materially affect or may affect the situation of the company (as well as that of its subsidiaries and affiliated companies).

The management board provides information on its resolutions, the situation of the company and progress in the development of the company's business at each meeting of the supervisory board, unless the supervisory board decides otherwise.

The management board provides the supervisory board with information on transactions and/or events affecting the company's financial position, as well as on any changes to previously provided information that are of material importance to the company's position, as soon as such events or circumstances occur.

5. Supervisory board committees.

The CCC Amendment specifically provides that ad hoc or standing committees of the supervisory board may be established under a supervisory board's resolution in joint stock companies and limited liability companies. For joint stock companies, this possibility was already regulated under the current legislation, but the committee was established under the by-laws of the governing body or under the articles of association.

A committee of the supervisory board may undertake supervisory activities, unless the supervisory board excludes such possibility in a resolution.

6. Advisor to the supervisory board.

The CCC Amendment introduces into Polish law the power of the supervisory board to appoint its own advisor. Importantly, the supervisory board is entitled to conclude a contract with such advisor. Therefore, the supervisory board's action to appoint an advisor does not require cooperation with the management board (which, as a rule, is the body that represents the company).

The articles of association of a joint stock company or a simple joint stock company may exclude or limit the supervisory board's right to conclude a contract with an advisor, in particular by authorising the general meeting to determine the maximum total cost of remuneration of all of the advisors to the supervisory board that the company may incur during the financial year. In the case of a limited liability company, the power to appoint an advisor to the supervisory board is granted only if the articles of association so provide.

The CCC Amendment further strengthens the supervisory board's position by introducing criminal penalties for a situation where the management board fails to provide the supervisory board's advisor with access to documents or requested information, provides information that is untrue or inaccurate, or withholds data that materially affects the content of such information or documents.

7. The rules of convening, holding and taking minutes of supervisory board's meetings.

The CCC Amendment regulates in detail the functioning of the supervisory board in a limited liability company and a joint stock company, including, inter alia, the role of the chairman of the supervisory board and the rules for convening and holding meetings of the supervisory board.

The CCC Amendment significantly strengthens and emphasises the constitutional position of the chairman of the supervisory board. The chairman directs the work of the supervisory board and is responsible for organising its activities and convening its meetings. The articles of association may additionally confer certain powers to other members of the supervisory board relating to the organisation of the supervisory board and the performance of its duties but may not limit such powers.

The CCC Amendment also introduces provisions on the convocation of supervisory board's meetings in limited liability companies and introduces additional regulations in this regard in joint stock companies. Supervisory board's meetings are to be convened by invitations indicating the date, time and place of the meeting and the proposed agenda, as well as the means of direct remote communication to be used during the meeting.

In the case of limited liability companies and joint stock companies, the CCC Amendment provides that, unless the articles of association of the company provide otherwise, the supervisory board may also adopt resolutions on matters not included in the proposed agenda, if none of the supervisory board members participating in the meeting object to this. Until now it has generally been considered possible to expand the agenda during a supervisory board meeting (unless the internal regulations of a given company contain some provisions in this respect). It should be noted that the supervisory board may also hold meetings without being formally convened, if all members agree to do so and do not object to specific items being put on the agenda.

The CCC Amendment also introduces the obligation to take minutes of supervisory board's resolutions in limited liability companies.

The lawmakers have also determined that votes of the supervisory board (in a limited liability company and in a joint stock company) are open to the public.

The articles of association or by-laws of the supervisory board may, however, regulate these matters differently.

8. Transactions with related parties.

For joint stock companies, the CCC Amendment introduces a statutory requirement that the supervisory board must grant its consent to the company to execute a transaction with its parent company, a subsidiary or an affiliated company if the aggregate value of all transactions executed with the same company in a given financial year exceeds 10% of the company's total assets based on the company's financial statements for the previous financial year. The company's articles of association may, however, quash this requirement. A provision excluding the application of the aforementioned legal norm needs to be explicitly set out in the articles of association in order to be effective.

Before deciding to grant consent to the execution of a specified transaction, the management board is required to provide the supervisory board with information on, *inter alia*:

- > the nature of the relationships between the company and the other parties to the transaction;
- > the subject of the transaction;
- > the value of the transaction; and
- > the circumstances necessary to assess whether the transaction is justified in terms of the company's best interests.

In the case of transactions involving recurring performances under an agreement concluded for an unspecified term, the transaction value will be deemed to be the sum of the performances set out in the agreement in the first three years of its term.

These provisions do not apply to public companies (in which transactions with related parties are regulated separately), and companies belonging to groups of companies.

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