

PUBLICATION OF DRAFT AMENDMENTS TO THE COMMERCIAL COMPANIES CODE

On 5 August 2020, the Government Legislation Centre published the long awaited draft bill amending the Commercial Companies Code (the “CCC”) and certain other acts.

The primary purpose of the proposed amendments is to introduce certain regulations from holdings law (the law on corporate groups) into the Polish law system, which will regulate relationships between parent companies and their subsidiaries such that the interests of all parties concerned are taken into account.

Furthermore, the draft bill, as published, provides for a number of amendments strengthening supervisory boards by giving them tools allowing them to exercise more effective corporate supervision. The bill also sanctions a duty of loyalty of members of a company’s governing bodies.

Regulations of holding law

Corporate groups

- > Introducing a definition of corporate groups, which comprises a parent company and its subsidiary or subsidiaries, pursuing – in accordance with the articles of association or statute of each subsidiary – a common business strategy (corporate group interests), allowing the parent company to manage its subsidiaries in a uniform manner.
- > The definition above introduces the concept of a *de facto* holding company, based on the dominant and subsidiary relationship of companies within the group, to the Polish legal system.
- > The bill repeals Article 7 CCC, which regulated management agreements in respect of subsidiaries – a contractual holding. Consequently, once the amendments are implemented, holding law will be based entirely on the *de facto* holding company structure.
- > Both subsidiaries and parent companies will be under a duty to disclose their participation in corporate groups in the National Court Register.
- > The letters and online information of a company being part of a corporate group will have to identify their corporate group.
- > The bill foresees the possibility of corporate groups where the parent company is an entity other than a commercial company or partnership, as the provisions on corporate groups will apply, as appropriate, to cooperatives, foundations or associations undertaking business activities, investment funds and entrepreneurs being natural persons, required to register with the register of entrepreneurs or the Central Registration and Information on Business.

Corporate group interests

- > Both the parent company and its subsidiaries being members of the corporate group will be required to pursue the corporate group’s interests in addition to their own.
- > However, when pursuing the corporate group’s interests, they cannot act in a manner violating the interests of a subsidiary’s creditors, partners or shareholders.

Implementing a corporate group’s joint strategy

- > The parent company will be allowed to issue binding instructions (in written, documentary, or electronic form) to its subsidiaries being members of the corporate group in respect of the management of the company’s affairs, if justified by a specific corporate group interest.

- > The body managing the company's affairs must adopt the appropriate resolution prior to performing a parent company's instructions. Such resolutions may be passed if the performance of the parent company's instructions does not violate the subsidiary's interests, or if it could be reasonably assumed that any damage suffered by the subsidiary as a result of its performance of the parent company's instructions will be remedied by the parent company, or another company within the corporate group, in due time (however, no more than 2 years after the damage occurs).
- > Wholly-owned subsidiaries being members of corporate groups will not be able to refuse to perform their parent company's instructions.
- > Subsidiaries, being members of corporate groups, in which the parent company holds, directly or indirectly, at least 75% of the share capital will be able to refuse to perform instructions only when their performance would result in it becoming insolvent, or being subject to a threat of insolvency.
- > The draft bill provides for a protection mechanism for the parent company, allowing it to effectively manage the corporate group by undertaking a compulsory buy-out of the shares (stock) held in its subsidiaries by their minority partners or shareholders (a, so-called, squeeze-out), which will be the first time in Polish legal history that this institution is applied to the law on limited liability companies.
- > Parent companies will be entitled to review the books and documents of their subsidiaries at any time and request information from a subsidiary being a member of the corporate group.
- > A parent company's supervisory board (or, in its absence, the body managing its affairs) will, as a rule, exercise ongoing supervision over the pursuit of the corporate group's interests by the subsidiaries, being members of the corporate group.

Liability of members of group companies' governing bodies

- > Members of the governing body of a subsidiary being a member of a corporate group may rely on the fact that their actions or omissions were undertaken with regard to a specific corporate group interest, provided that the company has disclosed its membership in the group in the National Court register.
- > As a rule, members of a subsidiary's governing bodies will not be held liable under civil or criminal law for the performance of a parent company's instructions.

Parent company liability for instructions given

- > A parent company will be liable for the consequences of binding instructions given to its subsidiaries, when performed by subsidiaries being members of the corporate group. They will be liable for compensatory damages on the basis of fault.
- > A parent company's liability will depend on the nature of its dominant relationship towards the relevant subsidiary: (i) in wholly-owned subsidiaries, or subsidiaries in which the parent company holds at least 75% of the share capital, the parent company's liability arises if the instruction's performance led to the subsidiary's insolvency; (ii) in all remaining subsidiaries, the parent company will be liable if the instruction's performance by a given subsidiary violated the corporate group's interests.
- > The draft bill also introduces the, so-called, Business Judgment Rule (i.e. acting within the limits of reasonable business risks), whereby a parent company will not be liable for a subsidiary's performance of its instructions if it/ acted within the limits of reasonable business risks, including on the basis of information, analyses and opinions.

- > Parent companies will also be held liable towards their subsidiaries' creditors and minority partners or shareholders for the consequences of their subsidiaries' performance of their instructions, to a certain degree.

Protection of the minority partners (shareholders) of subsidiaries in corporate groups

- > Subsidiaries will be required to make annual reports on their ties to their parent companies for the previous financial year, with said reports specifying the binding instructions received from the parent company.
- > The draft bill would allow a subsidiary's minority partners or shareholders to demand the compulsory purchase of the shares or stock they hold, also referred to as a '*sell-out*' right.

Strengthening supervisory boards

Supervisory boards granted additional competences

- > In order to perform their duties, supervisory boards will be entitled to demand any and all information, documents, statements and/or explanations they need in order to supervise the company, in particular those pertaining to the company's activities or assets, from its management board, commercial proxies, and all persons employed by the company (including persons employed under civil law agreements), also with respect to subsidiaries.
- > Supervisory boards will be authorized to adopt resolutions requiring that specific issues concerning the company's activities or assets be audited (at the company's expense) by an advisor of their choice, provided that the chosen advisor possesses the necessary professional expertise and qualifications to assess a given matter.
- > A duty to obtain the consent of a joint-stock company's supervisory board will be introduced in respect of transactions concluded by such companies with a parent company, subsidiary, or related entity, if the transaction's value exceeds 10% of the company's total assets, calculated on the basis of the company's most recent approved financial statements.
- > Supervisory boards will now be able to establish *ad hoc* or permanent committees to perform certain supervisory functions (supervisory board committees).

Additional duties of management boards

- > Management boards will be required to provide supervisory boards with additional information on a range of matters listed in the draft bill, including, for example, material transactions, resolutions adopted by the management board, or changes in the company's situation, without being called to do so.
- > The draft bill provides for the imposition of criminal penalties, in the form of fines, on members of the management board personally if they fail to provide the required documents or information to the supervisory board, while also expanding the catalogue of persons prohibited from acting as a member of a company's management board to include persons convicted of the above offence.

Supervisory board report

- > As before the duties of supervisory boards will include the preparation and submission of an annual written report on their activities over the previous financial year (the supervisory board's report) to the partner's (or shareholders') meeting or general meeting.
- > In addition to an assessment of the company's situation, the supervisory board's report shall also include an evaluation of the company's control and risk management

procedures and an evaluation of the management board's communication of documents and information to the supervisory board.

Other changes

- > The terms of office for members of companies' governing bodies will be based on full financial years (unless the company's articles of association or statute provide otherwise), which will resolve the current practical doubts concerning the period of time for which persons act as members of governing bodies raised by the use of the terms "term of office" and "mandate".
- > Sanctioning a duty of loyalty of members of companies' governing bodies, whereby their performance of their duties will be assessed on the criteria of diligence – they will, therefore, need to maintain the level of due diligence expected on account of the professional nature of their position on a governing body.
- > The duty to keep the company's business secrets confidential will continue beyond the end of a member's mandate on a company's governing body.
- > Engaging the services of a professional advisor while conducting qualification proceedings in respect of members of a company's management board will now be permitted.
- > The Business Judgment Rule is intended to be determinative as to whether members of a company's governing bodies are liable for damage caused to the company, which will allow for the definitive exclusion of liability for damage caused to the company on account of its governing bodies' faulty decisions, provided that such decisions were made within the limits of reasonable business risks and were based on adequate information under the circumstances.
- > The draft bill imposes a duty upon the members of companies' governing bodies, as well as its liquidators and commercial proxies, to submit declarations certifying that they fulfil the conditions set out in the Commercial Companies Code for their respective functions.

Planned commencement

- > The draft bill is currently the subject of consultations which will last until 19 September 2020.
- > The draft bill provides for a 3-month *vacatio legis*, as it is necessary for companies to amend their articles of association (statutes).

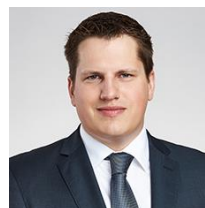
If you have any questions relating to any of the above topics, please contact our lawyers from the corporate law and corporate governance team:



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