CCC Amending Act of 2022 – the highlights #1

LEGAL ALERT 3/2022

The CCC Amending Act[1] will come into force on 13 October 2022 and will introduce a number of significant changes in the operation of groups of companies and in the rules of the management and supervision of commercial companies.

The changes cover the following areas:

1. the law on groups of companies;
2. amendments to the provisions on supervisory boards of capital companies (*spółki kapitałowe*);
3. the introduction of provisions regarding the governing bodies of limited liability and joint stock companies that are similar to the provisions on the governing bodies of a simple joint stock company;
4. amendments to the provisions on the management boards of capital companies; and
5. the extension of the list of criminal offences which, if confirmed as having been committed by a final and binding convicting judgment, prevent the perpetrator from performing functions in capital companies.

1. Act of 9 February 2022 Amending the Act – Code of Commercial Companies and Certain Other Acts (the "**Act**" or "**CCC Amending Act**").

1. CCC Amending Act – the law on groups of companies

The major highlight of the CCC Amending Act is the introduction of the law on groups of companies into the Polish legal system[1]. The regulations regarding groups of companies will apply only to parent companies and subsidiaries that adopted resolutions regarding their participation in a group of companies, and, accordingly, to affiliates of such parent companies if the articles of association or statutes of such affiliates so provide. The main objective of the law on groups of companies is to statutorily regulate the relations between entities owned by holding companies.

The law on groups of companies introduces the following:

- the concept of "*the interest of a group of companies*";
- the possibility for a parent company to issue a binding instruction to a subsidiary regarding the conduct of its affairs; additionally, the law on groups of companies regulates the manner of execution of such instruction and the circumstances under which a subsidiary may refuse to carry out the instruction;
- the exemption of members of the management board, the supervisory board, and the audit committee as well as the liquidators of a subsidiary and of a parent company from liability for damage caused by the execution of a binding instruction, if, however, they acted in the interest of the group of companies;
- the parent company's right to view the books and documents of a subsidiary at any time and to request information from the subsidiary;
- a new obligation for the supervisory board of a parent company, namely the obligation to supervise the implementation of the interests of the group of companies by a subsidiary; however, this obligation may be contractually or statutorily excluded;
- the obligation of the management board of a subsidiary to prepare an annual report on the contractual relations with the parent company and on binding instructions issued by the parent company;
- the right of shareholders or minority stockholders representing at least 10% of the share capital to request a special audit to examine the books of accounts and the activities of the group of companies;
- the right of shareholders or minority stockholders representing less than 10% of the share capital to demand a squeeze-out of their shares by the parent company that directly or indirectly represents at least 90% of the share capital of a subsidiary;
- the right of a parent company representing at least 90% of the share capital of a subsidiary to adopt a resolution regarding a squeeze-out of shareholders or minority stockholders, and
- the possibility of holding the parent company liable for damages (in certain cases) towards a subsidiary, the shareholders or minority stockholders of a subsidiary, or the creditors of the subsidiary for damage caused by the implementation of a binding instruction.

Participation in a group of companies is disclosed in the National Court Register, and the application of the law on groups of companies is possible only after such disclosure has been made.

The provisions of the law on groups of companies involving subsidiaries do not apply to public companies, companies under liquidation or companies being subject to financial market supervision. The provisions of law relating to parent companies do not apply to the State Treasury (albeit they apply to State enterprises that are State legal persons).

At the same time, once a company adopts a resolution regarding the participation in a group of companies, the Act grants its shareholders or stockholders the right to demand that the parent company buys out the shares or stocks that they are eligible to as at the date of the Act's entry into force (i.e. 13 October 2022), provided that they voted against the resolution and requested that their objection be recorded in the minutes, or they were groundlessly refused to participate in or were absent at the meeting that had been defectively convened, or the resolution regarding the participation in a group of companies had not been included in the agenda.

2. CCC Amending Act – changes to the regulations regarding supervisory boards of capital companies

Another very important improvement introduced by the CCC Amending Act, in addition to the law on groups of companies, is the reform of corporate governance, which entails the introduction of new duties and powers of the supervisory board (and the non-executive directors in the case of a simple joint stock company). These changes apply to any type of a capital company. The most important ones include:

1. Cf: Article 4 § 1(4)(f), Article 4 § 1(5[1]) and Article 21[1] to Article 21[16] of the Code of Commercial Companies.

- the introduction of the obligation to prepare and submit an annual report on the activities of the supervisory board to the meeting of the shareholders or the general meeting (at present only regulations regarding joint stock companies specify what should be included in such a report);
- the introduction of the right to demand that the management board, registered proxies and employees of a company prepare or provide any requested information, documents, reports or explanations regarding the company, its subsidiaries and affiliates;
- the introduction of the requirement that the key statutory auditor of any company whose financial statements are subject to statutory audit must participate in supervisory board meetings convened to assess the company's financial statements and the activities of the management board, motions regarding the distribution of profit, and reports on the results of these assessments;
- explicit regulation of the possibility for the supervisory board to resolve to establish ad hoc or permanent committees within the supervisory board (in the case of a simple joint stock company, such a possibility already exists under current regulations, but such committees are established on the basis of the regulations of the governing body or its articles of association);
- the introduction of the possibility for the supervisory board to resolve that the supervisory board's advisor investigate a specific matter concerning the company's operations or assets;
- unification of the statutory standards for adopting supervisory board resolutions, i.e. in open voting and by an absolute majority of votes (the CCC Amending Act, however, does not require that supervisory board resolutions in a simple joint stock company be adopted by open voting);
- the introduction of the requirement for limited liability companies that resolutions of their supervisory boards be recorded in the minutes of the meeting of the supervisory board (under current regulations, the supervisory board of a joint stock company or a simple joint stock company is required to record its resolutions but the CCC Amending Act introduces new formal requirements in this respect);
- the introduction of the statutory requirement for joint stock companies that the supervisory board express its consent to the conclusion of a transaction by the company with a parent company, subsidiary or affiliate if its value, when combined with the value of all transactions concluded with the same entity in a given financial year, exceeds 10% of the company's total assets based on the financial statements of the company for the preceding financial year, and
- detailed regulation of the manner of operation of supervisory boards of limited liability companies and joint stock companies, including, inter alia, the role of the chairman of the supervisory board and the rules of convening and holding supervisory board meetings in such companies.

The above-mentioned new control powers of the supervisory board are backed up by corresponding new penal provisions whereby failure by a member of the management board or an employee of a company to provide the supervisory board or its advisor with the information, documents, reports or explanations requested by them, as well as concealment or falsification thereof, constitute an offense subject to a fine of PLN 20,000.00 to PLN 50,000.00 or the restriction of liberty. Moreover, such an offence, if confirmed as having been committed by a final and binding convicting judgment, prevent the perpetrator from serving as a member of the management board, supervisory board, audit committee, liquidator or registered proxy in capital companies.

3. Introduction of provisions regarding the governing bodies of limited liability companies and joint stock companies that mirror those appliable to governing bodies of simple joint stock companies

The CCC Amending Act introduced provisions regarding management boards and supervisory boards in limited liability companies and joint stock companies that mirror those already applicable to simple joint stock companies. In this respect, the CCC Amending Act introduces explicit regulations for limited liability companies and joint stock companies regarding the following:

- the obligation of members of management boards and supervisory boards to exercise due diligence resulting from the professional nature of their activity and the obligation of loyalty to the company when performing their duties, as well as the related prohibition on disclosing company secrets following the expiry of their mandates;
- the rules for calculating the term of office in full financial years (unless the articles of association or the statute provide otherwise), and
- the business judgment rule, which excludes civil liability of members of the management board and the supervisory board (and liquidators) for damage caused to the company if they acted loyally to the company and within the limits of justified economic risk, including on the basis of information, analyses and opinions that should

be taken into account when making a diligent assessment of the circumstances.

4. Changes in regulations regarding management boards of capital companies

Furthermore, the CCC Amending Act introduces new obligations for management boards of capital companies:

- in relation to limited liability companies: the obligation to record the resolutions of management boards of limited liability companies similar to that currently applicable to management boards of joint stock companies and simple joint stock companies (the reform of the Code of Commercial Companies has additionally unified the formal requirements to be met by the minutes of resolutions of the management board of all types of capital companies);
- in relation to joint stock companies: the obligation to immediately provide the supervisory board with information about, among other things, the adopted resolutions, the company's situation, progress in the achievement of designated development milestones, as well as transactions and other events actually or potentially affecting the company's financial situation, and
- in relation to all capital companies: the obligation to prepare or provide the supervisory board or its advisor upon their respective requests with all information, documents, reports and explanations concerning the company.

5. Extension of the catalogue of offences which, if confirmed as having been committed by a final and binding convicting judgment, prevent the perpetrator from performing functions in capital companies

The CCC Amending Act expands the catalogue of offences which, if confirmed as having been committed by a final and binding convicting judgment, prevent the perpetrator from serving as a member of the management board, the supervisory board, the audit committee, or as a liquidator or a registered proxy, in capital companies. This also applies to persons who started performing the above functions before the entry into force of the Act.

The existing catalogue will now additionally include the following offences (except for those listed in point 2):

- the acceptance of financial or personal benefits or promises of such benefits in connection with the performance of a public function;
- the granting of or promising to grant financial or personal benefits to a person having a public function in connection with the performance of such function;
- the intermediation in settling a matter in exchange for a financial or personal benefit or a promise of such benefit, while claiming to have influence on a state or local government institution, an international or national organisation, or a foreign organizational unit having public funds at its disposal;
- the granting of or promising to grant financial or personal benefits in exchange for intermediation in settling a matter in a state or local government institution, in an international or national organization, or in a foreign organizational unit having public funds at its disposal; such intermediation consisting in unlawfully exerting influence on a decision, action or omission of a person having a public function in connection with the performance of such function;
- the exceeding of powers or failure to fulfil obligations by a public official that may result in damage to public or private interests.

The Act imposes on the Information Office of the National Criminal Register the obligation to notify registry courts ex officio about persons who, from the date of entry into force of the CCC Amending Act, will not be able to perform functions in capital companies.

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