



JDP NEWSLETTER – CHANGES IN OPERATION OF COMMERCIAL COMPANIES

As of 1 March 2019 numerous amendments to the Code of Commercial Companies will come into force under the act of 9 November 2018 to amend certain acts in order to introduce simplifications for enterprises with respect to tax and commercial law.

Said act introduces nearly 50 simplifications for enterprises with respect to tax and commercial law (so called SME Package). Following the package of 100 changes for companies and the Constitution for Business these are further regulations aimed at simplifying everyday activities of Polish enterprises. The package is directed primarily to the sector of small and medium-sized enterprises.

This newsletter highlights crucial issues and consequences for companies and other business entities operating in Poland following the planned amendments to the Polish Code of Commercial Companies. The amendments refer primarily to capital companies, in particular limited liability companies (*spółka z ograniczoną odpowiedzialnością*).

TABLE OF CONTENTS

MEMBERS OF THE MANAGEMENT BOARD OF A PROFESSIONAL PARTNERSHIP	2
DIVIDEND RECORD DATE AND DIVIDEND PAYMENT DATE IN A LIMITED LIABILITY COMPANY	2
RETURN OF INTERIM DIVIDENDS	2
RESIGNATION OF A SOLE MANAGEMENT BOARD MEMBER OF A CAPITAL COMPANY	3
EXTENSION OF THE SCOPE OF SHAREHOLDERS' RIGHT TO ADOPT RESOLUTIONS BY CIRCULATION	4
CANCELLING A SHAREHOLDERS' MEETING BY THE CONVENING PERSON IN A LIMITED LIABILITY COMPANY ..	4
PROXIES FOR SHAREHOLDERS' MEETINGS	5



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MEMBERS OF THE MANAGEMENT BOARD OF A PROFESSIONAL PARTNERSHIP

Under the current legal regulations, controversies have arisen whether apart from partners also third persons may be members of the management board of a professional partnership. Therefore, the legislator has clearly specified that **also a third person may be a member of the management board as long as at least one partner of the professional partnership is also a management board member.** The aim of this solution is to enable a professional partnership to organise its operations effectively and to be represented to third parties by professional managers without the necessity to constantly engage partners in partnership's affairs who deal mostly with professional operations.

DIVIDEND RECORD DATE AND DIVIDEND PAYMENT DATE IN A LIMITED LIABILITY COMPANY

The current regulations do not govern the situation when shareholders do not take a decision on the dividend record date. Moreover, the current regulations allow the management board to determine the dividend payment date without any time limits, in the event the shareholders have not adopted a relevant resolution.

Under the new regulations governing limited liability companies, if a shareholders' meeting's resolution does not specify the dividend record date, **the date of adoption of a resolution on profit distribution will be the dividend record date.**

However, if the shareholders' meeting does not determine the dividend payment date, the **dividend will be paid immediately after the dividend record date.** Determination of the dividend payment date, if such date has not been determined in a shareholders' resolution, will prevent the payment to be postponed for too long. The dividend payment date will no longer be determined by the management board of the company, which will make it impossible to prevent asserting claims for payment of dividends (for instance by not adopting a resolution to determine the dividend payment date).

RETURN OF INTERIM DIVIDENDS

With respect to a limited liability company the legislator has provided a regulation which allows the company to demand the interim dividends paid to the shareholders to be returned. Such right arises if in a given financial year the interim dividends have been paid to the shareholders but the company **has recorded loss or gained profit lower than the interim dividends paid.** In such situation shareholders must return the interim dividend as follows:

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- (a) in full – if the company recorded loss, or
- (b) in the part equal to the amount exceeding the income falling for a shareholder for a given financial year – in case the generated profit is lower than the interim dividends paid.

So far there has not been any explicit legal basis for a company to demand return of the interim dividends paid, if the dividends have not been approved. Article 198 of the Code of Commercial Companies, which provides for return of payments made in violation of law provisions or company's articles of association, did not constitute such basis, as long as the interim dividend was paid in accordance with company's articles of association and the Code of Commercial Companies.

RESIGNATION OF A SOLE MANAGEMENT BOARD MEMBER OF A CAPITAL COMPANY

Under the current legal regulations there is a lot of controversy regarding the recipient of the statement of resignation of a management board member in a capital company in the event of resignation by a member of a one-person management board or the last member of a several-member management board or all members of a several-member management board at the same time.

Limited liability company (*spółka z o.o.*)

As of 1 March 2019, if as a result of resignation by a member of the management of a limited liability company all mandates become vacant, **when submitting its resignation to the shareholders the management board member is at the same time obliged to convene an extraordinary shareholders' meeting**, unless the shareholders stipulated otherwise in articles of association. The invitation to the shareholders' meeting should include such statement of resignation which will become effective as of the day following the day for which the extraordinary shareholders' meeting has been convened.

Such mechanism will enable the shareholders, notified of the shareholders' meeting date, to make necessary preparations, including to propose potential candidates for the new management board member (or members). Therefore, such solution secures company's interests and guaranties its business continuity and at the same time does not unduly limit management board member's right to resign from their function.

Joint-stock company (*spółka akcyjna*)

The amendments provide for slightly different rules of resignation of a member/members of a joint-stock company. If as a result of a resignation of a management board member in a joint-stock company all management board mandates become vacant, **the management board member submits his statement**

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of resignation to the supervisory board. In order for the statement to be submitted effectively, at least one member of the supervisory board must review it.

A special regulation has been provided for the event when the supervisory board has not been appointed in the company. If there is no supervisory board member in the company, the **management board member along with the submission of a statement of resignation to the shareholders must convene an extraordinary shareholders' meeting.** The statement of resignation will become effective as of the day following the day for which the extraordinary shareholders' meeting has been convened.

EXTENSION OF THE SCOPE OF SHAREHOLDERS' RIGHT TO ADOPT RESOLUTIONS BY CIRCULATION

Generally, the shareholders' resolutions are adopted at a shareholders' meeting (Article 227 § 1 of the Code of Commercial Companies). Certain resolutions may be adopted outside a shareholders' meeting as long as all shareholders give their written consent to the provision to be adopted or to a voting in writing (so called "**adoption by circulation**"). However, said procedure did not cover resolutions to be adopted at an annual shareholders' meeting (Article 231 § 4 of the Code of Commercial Companies).

This restriction has obstructed operation of limited liability companies in business transactions. As a response to this situation, as of 1 March 2019 the legislator lifts the aforementioned restriction and hence **enables the shareholders to adopt by circulation resolutions reserved to an annual shareholders' meeting.**

CANCELLING A SHAREHOLDERS' MEETING BY THE CONVENING PERSON IN A LIMITED LIABILITY COMPANY

Absence of a provision clearly providing for who may cancel a convened shareholders' meeting has provoked corporate disputes in this respect. To resolve this issue, the legislator has provided a regulation stipulating that **the person convening the meeting will have the right to cancel it.**

It is particularly important if an extraordinary shareholders' meeting has been convened at request of a shareholder or shareholders (Article 236 of the Code of Commercial Companies). In such situation the **exclusive right to cancel the meeting will be vested in the shareholders convening the given meeting.** Such mechanism seeks to prevent the management board from cancelling meetings convened at request of minority shareholders.

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PROXIES FOR SHAREHOLDERS' MEETINGS

Under the current provisions of the Code of Commercial Companies a proxy of a shareholder of a limited liability company or a joint-stock company has to attach the original of its power of attorney document to the minutes book. In practice, such power of attorney documents are usually issued only in one copy whereas the proxy needs it more than once. Since said provisions of the Code of Commercial Companies were dead letter and proxies were submitting at best copies of their power of attorney documents to the minutes book, the legislator **has lifted the obligation to attach the original of the proxy document to the minutes book**. As of 1 March 2019 it will be possible to attach a copy of a power of attorney document to a minutes book.

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