

## REPRESENTATION OF CAPITAL COMPANIES IN A TIME OF CRISIS

In the face of the epidemic hazard and restrictions of the movement of people, a practical question arises how to ensure proper representation of capital companies (limited liability companies and joint-stock companies; collectively: company).

Companies are represented by a management board. Usually, the rules of representation are set forth in company's articles of association; in practice companies choose joint representation which requires two board members to act together or one board member to act together with a commercial proxy.

**Do the two board members or the board member and the commercial proxy have to sign an agreement or its termination or withdrawal statement at the same time?**

- Joint representation **does not require that two representatives appear physically** at the same place. They may affix their signatures independently, it is important, however, that the documents signed by them have the same contents. For instance, an agreement may be signed by Mr Kowalski staying in Warsaw and Mr Schmidt staying in Berlin – both of them will sign “their own” copy of the agreement and thereby the representation requirements will be met.
- The management board may appoint a **commercial proxy** – authorised to act alone, who may represent the company within very broad limits, or authorised to act only together with a board member or another commercial proxy.
- Board members who are authorised to joint representation may grant a power of attorney to one another. In such situation **the board member acting as an attorney-in-fact** may represent the company alone within the limits of such power of attorney.
- Board members may also **empower** another person, associated or not directly associated with the company. The power of attorney should precisely stipulate the limits of the representation (limited or special power of attorney).
- In case of joint-stock companies it is possible to **delegate members of the supervisory board** for a period not longer than three months to temporarily fulfill the responsibilities of board members who have been dismissed, who resigned or for other reasons are unable to



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perform their function. In the latter case, such inability may result from a mandatory quarantine or isolation due to a disease.

- **Change of representation rules agreed in company's articles of association** requires a notarised amendment of the articles of association and registration of such change in the register of businesses. Such amendment may also be effected by an attorney-in-fact. That can take at least three weeks; nevertheless, in the current situation, since the applications must be sent by regular mail to the National Court Register, we can expect it will be longer. Additionally, the registration of an application lasts longer because the IT systems in courts are not adjusted to the possibility to work from home.
- A special situation arises when a created company has not been entered into the register yet. Then such company is represented by the management board (limited liability company in formation), all founders together (joint-stock company in formation) or an attorney-in-fact appointed by a unanimous resolution of the shareholders or the founders. In light of the epidemic hazard, it will be easier to adopt such resolution in a limited liability company than in a joint-stock company. If all shareholders agree, an attorney-in-fact of a limited liability company in formation may be appointed even by circulation, without holding a shareholders' meeting. It is also necessary to appoint an attorney-in-fact to represent the company in case of conclusion of an agreement or a dispute between a board member and the company. In such situation, however, unanimity is not required. Moreover, in such case also special representation of the company by the supervisory board is possible. However, since a supervisory board must take decisions collectively, its operation might be obstructed by the COVID-19 pandemic.
- A situation when the actual number of board members is lower than the minimum number stipulated in the articles of association should be assessed separately. Should it be the case, the members of the so called "non-quorum" management board may represent the company as long as they meet the requirements regarding representation set out in the articles of associations, however they may not adopt resolutions. That means that if in a three-member management board one position becomes vacant, the two other board members cannot take actions that fall beyond the ordinary course of business, because doing so requires a resolution of the entire management board. However, on principle they may effectively represent the company towards business partners because they meet the standard requirements of joint representation by two board members together.



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