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The International Comparative Legal Guide to:

Corporate Governance 2013

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A practical cross-border insight into corporate governance

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The International Comparative Legal Guide to: Corporate Governance 2013

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1 Setting the Scene - Sources and Overview

1.1 What are the main corporate entities to be discussed?

This chapter focuses exclusively on a limited liability company ("**LLC**") which is the most common type of company operating under the Polish law. In order to provide the most detailed coverage of the subject we have decided not to discuss other corporate entities here (only some minor aspects relating to joint-stock companies are raised below).

There are many reasons for the popularity of the LLC. First of all, it is deemed a flexible form of conducting business activity (though it may be established for any purpose allowed by law – also for non-profit purposes). Secondly, it provides protection for the personal assets of shareholders against the company's creditors (and there is only a small possibility of lifting that corporate veil). In addition, since 1 January 2012 it is possible to establish the LLC over the Internet. The so-called e-registration procedure is simpler, faster and cheaper than the traditional one – thus it is becoming more and more popular.

1.2 What are the main legislative, regulatory and other corporate governance sources?

The law is stated as of 30 April 2013.

The provisions concerning corporate governance of LLCs are included mainly in the following statutes:

- **the Commercial Partnerships and Companies Code ("CPCC")** dated 15 September 2000 – the main legislative corporate governance source that regulates the incorporation, organisation, functioning, dissolution, merger, division and transformation of commercial partnerships and companies (including LLCs);
- **the National Court Register Act** dated 20 August 1997 which provides for certain disclosure and transparency requirements relating to commercial partnerships and companies, as well as some other entities. Kept by district courts, the National Court Register ("**NCR**") is a public register where all the mentioned entities are entered into (an entry into the NCR is even necessary to complete the LLC's formation process) and obliged to disclose their data specified in the respective provisions of the law; and
- **the Accountancy Act** dated 29 September 1994 – setting out the principles of accountancy and audit that apply to commercial partnerships and companies (and some other entities), and imposing some further disclosure and transparency duties on the mentioned entities.

The statutory provisions on corporate governance are supplemented by the articles of association of the LLC ("**articles**"), as well as the regulations adopted by the corporate bodies of the LLC i.e. resolutions of the general meeting of shareholders ("**GM**") and regulations of the management board ("**MB**") or supervisory board ("**SB**").

It is also worth mentioning that for companies listed on the WSE (Warsaw Stock Exchange) Main Market (regulated market) and NewConnect (alternative trading system) – which are in fact joint-stock companies only – there are two specific non-statutory corporate governance sources:

- **"The Code of Best Practice for WSE Listed Companies"**; and
- "**Good Practice of NewConnect Listed Companies"**.

Each of the mentioned acts constitutes a set of corporate governance rules and standards, adopted by the WSE, which govern relations between listed companies and their market environment. Although application of those rules is voluntary, it is subject to the "comply or explain" principle (if the listed company decides not to comply with any of the mentioned rules, it is required to provide the market with direct information about that, as well as the reasons for such a decision).

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

There have been no significant amendments to the statutory provisions relating to corporate governance of LLCs within the past three years. Likewise, no corporate governance related bills are being broadly discussed these days.

Nonetheless, there have been some (either introduced or intended) amendments regarding the LLCs *per se* which are worth mentioning here.

Firstly, as stated in question 1.1, under the Act of 1 April 2011 on Amendment of CPCC (in force since 1 January 2012) it is now possible to establish a LLC via the Internet. The so-called **e-LLCs** have become very popular as their creation (as opposed to the traditional procedure) does not require any presence of a notary public (with all the associated costs), submitting dozens of papers to the registry court and waiting weeks for registration of the company in the NCR.

Secondly, this year the Parliament voted on the proposal to reduce the minimum initial capital of LLCs from PLN 5,000 to PLN 1. Although the proposal has been rejected during the so-called first reading of the act, some enthusiasts still believe that it is only a matter of time until such an amendment is introduced to the CPCC

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(as similar amendments have been adopted in many European countries).

One of the main challenges for the Polish legislator in the area of corporate law still remains the matter of holdings (groups of partnerships and/or companies). In spite of many public discussions and foreign legislation-inspired acts, no comprehensive law has been passed so far. Consequently, there are only a few provisions of different statutes that govern the complex area now and many matters in such respect appear to be unregulated.

2 Shareholders

2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

According to the CPCC, shareholders participate in the operation and management of LLCs by adopting resolutions in the most important company matters (listed in the CPCC or in the articles).

Pursuant to the CPCC, such a resolution is required particularly in the following matters:

- consideration and approval of the MB report on the operations of the company and the annual financial report;
- approval of the performance of duties by members of the company's governing bodies;
- disposal of, or tenancy of, the enterprise or its organised part and the creation of a limited right *in rem* over them;
- acquisition and disposal of real estate, the right of perpetual usufruct, or a share in real estate (unless the articles provide otherwise);
- conclusion of a credit agreement, a loan agreement, a surety agreement or other similar agreement with a member of the MB, SB, audit committee ("**AC**", a commercial proxy or a liquidator (or for the benefit of any such person)) - unless the law provides otherwise;
- amendments to the articles;
- merger, division or transformation of the company; and
- dissolution of the company.

Resolutions are binding only internally (i.e. they apply to the LLC's bodies, the shareholders and the company itself). However, legal acts executed without a resolution of shareholders that is required by the statute are invalid (those executed without the resolution required by the articles are valid, but may result in the liability of members of the MB for a breach of the articles).

Unless the articles provide otherwise, shareholders have the right to appoint and remove members of the SB, the AC and the MB. The power to remove those members can be limited but not excluded in the articles.

Shareholders of LLCs are also granted the right to control their company (it may, however, be excluded or limited by the articles in case of appointing the SB or the AC). As a result, each of them is entitled e.g. to inspect the books and documents of the company or even request certain explanations from the MB.

2.2 What responsibilities, if any, do shareholders have as regards the corporate governance of their corporate entity/entities?

There are no specific statutory provisions imposing on shareholders of the LLCs any responsibilities as regards the corporate governance of their company. There is, however, an unwritten rule that all corporate rights (described briefly in question 2.1) are associated with the correlative duties. For instance, the right to vote on GMs is associated with the respective duty to exercise it at least in those cases when a resolution of shareholders is statutory required and necessary (so that the MB could manage the LLC effectively). The same refers to the annual evaluation of the performance of duties by members of the company's governing bodies.

It should be noted that failure to perform (or improper performance) of main corporate duties is considered as a "significant reason" which may justify the expulsion of the shareholder from the company (see question 2.5).

Naturally, the shareholders who are the members of MB, SB or AC have additional corporate governance related responsibilities which result from their membership in the governing bodies of the LLC.

2.3 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

GMs may be convened as ordinary or extraordinary meetings.

According to the general principle, the ordinary GM is required to be held within six months of the end of each financial year. The agenda of such meeting includes at least:

- consideration and approval of the MB report and the financial statement for the previous financial year;
- adoption of a resolution on division of profits or financing of losses (if such matters have not been excluded from the competence of the GM by the articles); and
- approval of the performance of duties by members of the company's governing bodies.

On the other hand, the extraordinary GM can be convened to adopt any other resolutions – if required by the statute or the articles. It may also be held *ad hoc*, when governing bodies or persons authorised to convene GMs consider it desirable.

It should be noted that a shareholder or shareholders representing at least one tenth of the share capital may request that the extraordinary GM be convened, and that certain matters be placed on the agenda of the next GM (the articles may grant the mentioned rights to shareholders representing even less than one tenth of the share capital). If the extraordinary GM is not convened within two weeks of the submission of the request to the MB, the registry court may authorise the shareholders to convene the extraordinary GM.

However, in some situations, resolutions may be adopted despite the general meeting not having been formally convened.

Apart from the powers mentioned above, shareholders have the following rights as regards GMs:

- the crucial one is the right to participate in the GM and vote on it (also by proxy);
- the right to request a secret vote; and
- the right to bring an action for annulment of a resolution or declaration of its invalidity.

Most important of all, resolutions may be adopted without holding a GM – when all shareholders consent in writing to the decision to be taken or to a written vote.

2.4 Can shareholders be liable for acts or omissions of the corporate entity/entities?

According to the general principle, shareholders are not liable for obligations of the LLC. However, this rule is not without exceptions.

Firstly, a shareholder is jointly and severally liable with the

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company and persons who acted in the name of the LLC after signing the articles but before its registration in the NCR ("**LLC in organisation**") for the obligations of that LLC in organisation (up to the value of the unpaid contribution to finance the subscribed shares).

Secondly, shareholders may be liable (with all their assets) for tax arrears and social security contributions of the LLC in organisation if the execution against the mentioned company proves to be fully or partially ineffective and it has no MB or even the attorney acting on its behalf.

For liability of a shareholder who is also a member of the MB, see question 3.6.

2.5 Can shareholders be disenfranchised?

The essential right of each shareholder of the LLC is the right to vote. According to CPCC there are, however, situations where this right cannot be exercised. For instance, a shareholder may not (personally/by proxy/as a proxy of another person) vote on resolutions on his liability to the company.

Moreover, a shareholder may be deprived of his corporate rights by redemption of shares (since it is allowed by the articles). That may be executed with the consent of a shareholder (voluntary redemption) or without such consent (forced redemption). Redemption of all shares of the shareholder leads to his exclusion from the LLC.

Additionally, a shareholder may on some conditions be expelled from the LLC by court (for significant reasons and upon the request of the prescribed number of the remaining shareholders, as long as they represent more than half of the share capital of the company).

2.6 Can shareholders seek enforcement action against members of the management body?

There are two ways for shareholders to seek enforcement actions against members of the MB (the LLC's management body).

First, as the member of the MB, under the CPCC, is liable to the LLC for damage caused by acts or omissions in breach of the law or the provisions of the articles (unless he or she is not at fault) each of the shareholders may bring against him – on behalf of the company – an action for redress of damage. The condition is that the LLC has not brought such an action itself within one year of the date on which the act causing the damage was discovered.

Second, shareholders are entitled to seek redress of damage on their own behalf according to the general principles of liability for damages included in the Civil Code (if they suffer damage due to acts or omissions of the member of the MB).

2.7 Are there any limitations on, and disclosures required, in relation to interests in securities held by shareholders in the corporate entity/entities?

The MB is obliged to keep a share register where the following information is required to be entered into: the name, seat and address of each of the shareholders; the nominal value of one's shares; the creation of a pledge or usufruct and the exercise of the right to vote by the pledgee or the holder of the right of usufruct; and all changes of the shareholders and their respective shares. Each time following registration of the change, the MB is obliged to file a new list of shareholders with the registry court.

Moreover, each of the shareholders holding shares that represent at least 10 per cent of the share capital of the LLC has to be entered into the NCR that is kept for the company.

There are also some disclosure requirements connected with a relation of dominance and dependence between companies. For example, both a shareholder and a member of the MB/SB of a company ("**X**") may demand that a company/partnership being a shareholder in X provides information as to whether it remains in a position of dominance/dependence with respect to a particular company/partnership being a shareholder in X too. The entitled person may also demand disclosure of the number of shares or votes that the requested company holds in X.

It is also worth noting that the LLC cannot be formed solely by another single-shareholder LLC.

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

The right to manage the affairs and to represent the LLC is vested in the MB. Pursuant to the CPCC, the MB can consist of one or more members (individuals only; shareholders; and/or non-shareholders).

If the MB comprises more than one member, the way of executing both of the mentioned powers can be (discretionally) determined by the articles. Unless the articles provide otherwise, representations in the name of the LLC may be made by two members of the MB acting jointly or by one member acting together with a commercial proxy. On the other hand, unless the articles include any different rules, each member of the MB may manage the ordinary affairs of the LLC on his or her own. If at least one of the remaining members objects to the conclusion of the matter, or if the matter falls outside the ordinary affairs of the LLC (no statutory definition or examples of such matters), a prior resolution of the MB is required. Unless the articles provide otherwise, the resolution shall be adopted by an absolute majority of votes. Moreover, as stated in question 2.1, some matters require a resolution of shareholders. Most important of all, the statute provides that the SB (if created) does not have the right to give the MB any binding instructions with respect to the management of the affairs of the LLC.

It is worth noting that none of the members of the MB can be deprived of, or even limited in, their right to represent the LLC with regards to third parties. It is, however, admissible to restrict the member's right to manage the affairs and to represent the LLC internally.

3.2 How are members of the management body appointed and removed?

According to the CPCC, members of the MB are appointed and removed by a resolution of shareholders. However, the articles may provide otherwise e.g. grant the right to appoint and/or dismiss the members to the SB (if one is appointed), one or some of the shareholders or even to third parties. It is also admissible to stipulate in the articles that some of the members are appointed and/or removed by shareholders whereas others are appointed and/or removed by any other person or body of the LLC.

Notwithstanding the above, the CPCC provides that a member of the MB may be removed at any time by a resolution of the shareholders. Although the respective right of shareholders cannot be excluded in the articles, the articles may e.g. limit it to situations where there are significant reasons for the dismissal.

The mandate of a member of the MB also expires upon death, resignation or (in most cases) as a result of the end of tenure.

It is worth mentioning that the CPCC does not determine the tenure

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of a member of the MB. Consequently, depending on the relevant provisions of the articles, the member may be appointed for a definite or an indefinite period of time.

3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

Contracts of members of the MB are subject to statutes (e.g. the CPCC, the Civil Code, the Labour Code), the articles and (unless the articles provide otherwise) the resolutions of the shareholders. The law does not determine any limits regarding the remuneration of members of the MB.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

A member of the MB may not, without the consent of the LLC, engage in a competitive business or participate in a competitive company (as a member of its governing body), partnership or civil law partnership (as a partner), or any other competitive legal person (as a member of its governing body). The same prohibition refers to participation in a competitive company where the member of the MB holds at least 10 per cent of shares or has the right to appoint at least one member of the MB. Unless the articles provide otherwise, the consent should be given by the governing body which is entitled to appoint the MB.

3.5 What is the process for meetings of members of the management body?

The CPCC does not include any detailed provisions governing the process for meetings of members of the MB. It only states that – unless the articles provide otherwise – all members shall be properly notified of the meeting. This means that the members are required to be informed in advance at least of the date, time and place of the meeting.

The articles may introduce further requirements, as well as regulate the process in detail. They may e.g. stipulate that if the number of votes is equal, the president of the MB has the casting vote and they may grant him or her certain powers in managing the operations of the MB.

Moreover, the GM is entitled to adopt the regulations of the MB, supplementing both statutory provisions and provisions included in the articles.

3.6 What are the principal general legal duties and liabilities of members of the management body?

As stated above, the main duty of members of the MB is to manage the affairs and represent the LLC. However, in case of a conflict between the interests of the LLC and the interests of a member of the MB, his or her spouse, relatives and in-laws up to the second degree or persons with whom he or she has personal relations, the member is obliged to withhold from deciding on the matters.

Pursuant to the CPCC, when performing their duties, members of the MB are required to 'exercise diligence characteristic of the professional nature of their activity'. If they fail to meet that requirement, they may find themselves liable for obligations of the company.

For instance, members of the MB who have provided false data in representations on contributions towards the share capital (required for 'paper' registration of the LLC or registration of the increase of the share capital of the LLC) are jointly and severally liable with the LLC to its creditors – for three years from the date of the mentioned registration.

Moreover, members of the MB can be jointly and severally liable for obligations of the LLC if the enforcement against the LLC proves to be ineffective. In certain situations the member may however be released from such liability e.g. if he demonstrates that in appropriate time a petition for bankruptcy of the LLC was filed. Liability for tax arrears and social security contributions is regulated independently, but the terms are very similar.

Finally, it is worth noting that not only the LLC as an organisation but also the persons who acted in the name of such a company (e.g. as the MB) are liable for its obligations.

For liability for damage caused to the company – see question 2.4.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body?

There are no further specific statutory corporate governance responsibilities/functions of members of the MB of the LLC other than those mentioned above. As stated in question 1.2, only for companies listed on the WSE Main Market or on NewConnect (those however operate in a form of joint-stock company and not an LLC) there are additional corporate governance related rules prescribed.

3.8 What public disclosures concerning management body practices are required?

See section 4 on Transparency and Reporting.

3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Liability insurance for members of the MB and other corporate bodies of LLCs (D&O insurance) is permitted under the Polish law. D&O insurance is usually purchased by the LLC itself, even if it is for the sole benefit of the mentioned persons (its purpose is to ensure that some strategic decisions of the executives of a company can be made without fear of personal financial loss).

4 Transparency and Reporting

4.1 Who is responsible for disclosure and transparency?

Responsibility for disclosure and transparency in the LLC rests with the MB.

For disclosure requirements, see question 4.2.

4.2 What corporate governance related disclosures are required?

There is a general rule that both data and corporate documents of LLCs should be reported to the registry court so that they can be registered in the register of entrepreneurs of the NCR or at least disclosed in the registration files kept for the company.

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The mentioned requirement refers, in particular, to any amendments to the articles, the appointment and dismissal of members of the MB and SB, the appointment and dismissal of commercial proxies, the approval of the annual financial statement and many other events concerning the activity and legal status of the LLC.

The register of entrepreneurs of the NCR is public – anyone may request written excerpts from it, inspect the company's registration file, or even access all registration details (of all entities) which are currently disclosed in the register by visiting the following website: https://ems.ms.gov.pl. Nonetheless, almost all entries into the NCR must, in addition, be published in the Official Court and Business Gazette (*Monitor Sądowy i Gospodarczy*).

4.3 What is the role of audit and auditors in such disclosures?

The Accountancy Act requires some LLCs to subject their annual financial reports to audit. Those are the LLCs that met at least two of the conditions listed below in the preceding financial year for which the financial statement was prepared:

- average annual employment calculated as full time jobs amounted to no less than 50 people;
- total balance sheet assets at the end of the financial year amounted to no less than the PLN equivalent of EUR 2,500,000; and/or
- net proceeds from sales of products and goods and from financial operations for the financial year amounted to no less than the PLN equivalent of EUR 5,000,000.

During an audit, an auditor issues a written opinion on whether a given financial statement is prepared in compliance with the accepted accounting principles and whether it gives a true and fair view of the property, financial standing and the financial results of the audited LLC. Its role is therefore to ensure reliability of the disclosures.

4.4 What corporate governance information should be published on websites?

As opposed to public companies, LLCs are not obliged to publish any corporate governance information on their websites. They are not even required to have a website at all. However, once the LLC decides to have one, the information published there should include at least: the business name of the LLC, its seat and address and the name of the registry court where the documents of the LLC are filed; the number under which the LLC is entered into the NCR; the tax identification number (NIP); the amount of the share capital; and information that contributions to cover the share capital of the e-LLC have not been made yet (to be deleted when the share capital of such a company is fully paid-up).

5 Corporate Social Responsibility

5.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

There are no statutory provisions concerning corporate social responsibility in Polish law. However, companies are becoming more aware of the underlying ideas and more often take them into consideration when determining the policies and business strategy.

5.2 What, if any, is the role of employees in corporate governance?

The general rule is that employees of the LLC have no powers in corporate governance (unless they are shareholders or members of the corporate bodies at the same time). Nevertheless, under the Act of 7 April 2006 on Informing and Consulting Employees, they are entitled to be informed of some of the aspects of the LLC's activity (e.g. economic situation, current and future undertakings), as well as to be consulted with regard to those matters.

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