

NATIONAL-LEVEL CORPORATE ANTI-ABUSE MEASURES RELEVANT TO THE EU COMPANY LAW PACKAGE

Expert Questionnaire

Poland

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1) Anti-abuse mechanisms - do any of the following mechanisms exist in this country? If so, how do they work?

a. Disqualified Directors

i. Is there an official definition of “disqualified director”? If so, what are the grounds for disqualification? In which law can this be found? (link to legal text(s))

No, there is no such definition. This issue is indirectly regulated by Art. 18 of the Act of 15 September 2000: Code of Commercial Companies (hereinafter the Polish acronym will be used - KSH).

Pursuant to Art. 18 of the KSH:

A person who has been convicted by a final judgment for crimes may not be a member of the management board, supervisory board, audit committee, liquidator or commercial proxy. for offenses specified in the provisions of chapters XXXIII-XXXVII of the Penal Code and in art. 585, art. 587, art. 590 and art. 591 of the Act.

The prohibition ceases on the fifth year from the date of the conviction becoming final, unless the conviction has been expunged earlier.

Within three months from the date of the judgment becoming final, the convicted person may submit an application to the court which issued the judgment to be released from the ban on holding a position in a commercial company or to shorten the duration of the ban. This does not apply to offenses committed intentionally. The court decides on the request by issuing a decision.

The above-mentioned provisions also apply to a member of the management board of a partnership company and a member of the supervisory board of a limited joint-stock partnership.

Crimes

The ban on holding office applies to persons convicted by a final judgment and refers to the following group of crimes specified in the Penal Code: against the protection of information (Articles 265-269b of the Penal Code), against the credibility of documents (Articles 270-277 of the Penal Code), against property (Article 278 -295 of the Penal Code), against business transactions (Articles 296-309 of the Penal Code), against money and securities trading (Articles 310-316 of the Penal Code), as well as crimes

specified in the KSH: made by publishing untrue data or presenting such data to company bodies, state authorities or auditors (art.587), facilitated an illegal vote (art.590) or illegally voted (art.591) at a general meeting or exercise of minority rights.

Such bans may also result from other special provisions, which are most often aimed at restricting positions in company bodies by employees of state offices and persons holding managerial positions in state and local government bodies. These include, for example, the Act of 21 August 1997 on the restriction of economic activity by persons performing public functions or Art. 14 of the Act of 3 March 2000 on the remuneration of persons managing certain legal entities.

It should also be pointed out to Art. 39 of the Penal Code, which among penal measures specifies a ban on holding a specific position, performing a specific profession or conducting a specific business activity.

Pursuant to Art. 41 §1 of the Penal Code, the court may order a ban on holding a specific position or practicing a specific profession, if the perpetrator has abused the position or profession while committing the offense, or has proved that the continued holding of the position or profession poses a threat to important rights protected by law. And according to Art. 41 §2 of the Penal Code, the court may prohibit the conduct of a specific economic activity in the event of a conviction for an offense committed in connection with the conduct of such activity, if its further conduct threatens important values protected by law.

In the event of a ban on holding a specific position or practicing a specific profession, the court is required to send a copy of the judgment to the competent government administration or local government authority and the employer or institution in which the convicted person holds the prohibited position or performs the prohibited profession.

ii. Is there an official list of (current) disqualified directors? If so, where can this be found? (name of organization maintaining it and link)

No, there is no such list. But the problems that in practice were related to non-disclosure by persons appointed to the bodies of capital companies of information about their conviction by a final judgment for crimes specified in Art. 18 of the KSH, prompted the legislator to amend the Act on the National Court Register (KRS). Pursuant to Art. 21a point 1 of the Act on the National Court Register, added by the Act of 7 December 2012 amending the Act on the National Criminal Register and certain other acts, the registration court receives from the Information Office of the National Criminal Register, via the ICT system, in relation to persons to whom Art. 18 § 2 of the KSH, information on convictions for offenses specified therein.

iii. If there is an official list, who has access to this list (general public or restricted)?

There is no such list.

b. Beneficial Owners

i. Where is the database of beneficial owners and which organisation maintains it (link)

The database operates at the address: -

<https://crbr.podatki.gov.pl/adcrbr/#/wyszukaj>

Central Register of Real Beneficiaries (CRBR) - is a public register kept by the Minister of Finance. The register collects and processes information on real beneficiaries, i.e. on natural persons who exercise direct control over commercial law companies. The register is public, it has an electronic form, and all information contained therein is made available free of charge. CRBR was established to counteract money laundering and terrorist financing - the register is to facilitate the identification of natural persons who decide on the activities of companies.

The obligation to submit information to the CRBR does not apply to foreign companies that are registered in the National Court Register and operate in Poland in the form of a branch. A company put into liquidation or bankruptcy is not exempted from the obligation to report information and update the notification in the CRBR.

ii. Are there any checks on the authenticity of beneficial owners, or does the organisation depend on a “statutory declaration” or “affidavit” from the company directors?

Entries to the Register are made only by a person authorized to represent, in accordance with the rules of representation applicable in the company. In practice, in a partnership, the right to report will most often be a partner, and in a company, the management board.

The persons who submit the notification are responsible for the correct indication of the data contained in the notification to the Register, under pain of criminal liability for submitting a false statement. But no further checks are made, e.g. requiring notarized copies of passports of beneficial owners.

Data cannot be reported to CRBR through an attorney-in-fact (i.e. a person authorized to do business on behalf of another person).

iii. How quickly must the company give notice when ownership has changed (updating of lists/databases)?

Entries to the Register should be made within:

- 7 business days from the day the company is entered into the National Court Register - for new companies;
- until 13 July 2020 - for companies existing before 13 October 2019.

In the event of a change in the information provided in the application to the Register, it must be reported within 7 days from the date of the change.

As the period of full operation of the Registry has been short (from 13 July 2020), it is still difficult to assess its practical application.

iv. Who has access to the beneficial ownership database? Does the general public have unrestricted access, restricted access or no access?

Access is open and free.

Legal basis: Art. 55-71, art. 153, art. 195 of the Act of 1 March 2018 on counteracting money laundering and financing of terrorism;

Ordinance of the Minister of Finance of 16 May 2019 on reporting information on beneficial owners.

c. Electronic identity (eID) scheme – is there a scheme registered with the European Commission, and if so, what eIDAS level of assurance does it have?

Applications for e-identity can be submitted from 4 March 2019. All identities issued on the basis of applications submitted after this date have an electronic chip. The process of exchanging the identity documents is spread over 10 years and will last until 2029. Replacing the existing ID card with an e-ID is free of charge.

The eID must be collected in person - high security level. However, this eID system is not yet an eIDAS system notified with the European Union.

If you are unable to collect your ID card in person due to illness, disability or other important reason that arose after submitting the application, you must contact the office that accepted the application. The clerk is obliged to visit you where you are staying and arrange for the collection of your ID card.

2) Company registry – transparency, access, cost

a. Which organization maintains the company registry? (name and link)

The National Court Register (KRS) has been operating since 1 January 2001 on the basis of the Act of 20 August 1997 on the National Court Register. It replaced the previous ones: the commercial register, the register of foundations, the register of associations and the register of state-owned enterprises.

Unlike the previous commercial register, whose level of accessibility was limited for technical reasons, the National Court Register makes it possible to obtain information on any entity subject to the obligation to be entered in this register. The information may take the form of a copy, an extract or an appropriate certificate. The information can be obtained in several dozen branches of the Central Information Office of the National Court Register throughout the country. Since June 2012, electronic current copies of the KRS can be downloaded free of charge on the Internet.

The National Court Register is kept in the IT system by 27 economic divisions of the National Court Register, which are located in 21 district courts.

The KRS search engine can be found at this link:

<https://ems.ms.gov.pl/krs/wyszukiwaniepodmiotu?t:lb=t>

b. To what extent is the registry digitalized? Can company foundations/registrations and reporting be carried out fully online/digitally?

The register is available online. To obtain basic information (which is free of charge), the person concerned must know one of the following:

- -NIP (tax identification number),
- -REGON (registration number),
- -name.

The National Court Register stores various types of information, including mainly those relating to the legal status of registered entities, their financial situation and the method of representation adopted by them. Thanks to this, the National Court Register fulfills its role as a creature ensuring security of trading.

In addition to the basic information that the National Court Register stores to ensure the safety of trading, it also contains other data about entrepreneurs, including:

- information on tax and customs arrears,
- arrears with the Social Insurance Institution,
- creditors and amounts of outstanding debts.

Moreover, the part of the National Court Register concerning insolvent debtors is an additional source of economic information. It contains data on indebted individuals with whom conducting business interests can be very risky.

Access to the above data is free of charge.

The catalogue of documents that anyone interested has the right to browse includes the following items:

- founding acts, in particular contracts and statutes, and resolutions amending them;
- uniform texts of founding acts, contracts and statutes,
- resolutions on changing the amount of the share capital, if they do not require a simultaneous amendment to the contract or the statute;
- resolutions on the appointment and dismissal of members of corporate bodies;
- annual financial statements and annual consolidated financial statements of capital groups, copies of resolutions on approval of annual financial statements and distribution of profit or loss coverage, as well as opinions of statutory auditors and reports on the activities of units, if the obligation to prepare them results from specific regulations.

You must pay a fee of PLN 50 for a copy of a document from the electronic register. After the payment is made, a copy of the documents from the catalog is received in the form in which they were submitted and signed by an authorized court employee who sent the document to the catalog. The received copies are certified for compliance with the documents in the registry files of the inspected entity.

Since 2018, one can submit financial reports online. Here is the link:
<https://ekrs.ms.gov.pl/rdf/rd/>

c. Are bulk downloads of the entire list of registered companies possible?

No, there is no such possibility.

d. Does the registry have search features beyond the name of the company or person (e.g. by sector or employee size)

No, it is not possible to search by sector or number of employees.

What is more, it should be emphasized that you cannot search using the name and surname of persons who are owners of shares or persons sitting on the company's bodies. You need to know NIP, REGON or the name of the company.

If we only know the first and last name, an ordinary internet search engine can help us in many cases (realistically speaking). Of course, there are also paid commercial websites that deal with "combining" information about a person and in which companies he has shares or sits on bodies.

e. What is the typical cost of downloading a document from the registry?

A lot of information can be get for free, and documents (such as annual reports) PLN 50 apiece.

f. Is there information on employment levels beyond what is contained in annual accounts?

No.

g. Information on European company forms and EU reorganizations (CBM) - is a search possible for companies with the SE legal form or companies reorganized through a CBM?

No.

3) Firm foundations

a. What authority or organization is responsible for registering new companies (with link)?

The Commercial Court is responsible for registration, which is made by entering into the National Court Register (KRS) administered by the Ministry of Justice.

At this link, you can find a territorially competent branch

<https://www.gov.pl/web/sprawiedliwosc/siedziby-i-obszary-wlasciwosci-wydzialow-gospodarczych-krs>

b. What are the steps needed to found and register a new company? To what extent can these happen digitally?

There are 2 alternative ways.

Traditional way

The first step is to conclude a company agreement with a notary. The next step is to obtain an entry in the National Court Register. For this purpose, an application for

company registration must be filed and paid at the competent commercial court. At the same time, thanks to the one-stop-shop principle, the Commercial Court also submits applications for reporting a company to the Tax Office in order to obtain a NIP number, the Statistical Office to obtain a REGON number and to the Social Insurance Institution. You must physically show up with the documents in court
You must physically show up with the documents in court.

Online way

The company can be registered fully online in the so-called S24 system.

The eKRS system of the National Court Register is available to both Polish citizens and foreigners. However, in order to use it, you must register on the portal. At the stage of setting up an account, you must authorize by means of a signature with a qualified signature (electronic signature) or with a signature using the ePUAP profile.

The model articles of association available on S24 contain, in principle, only provisions that must be included in the contract in the light of applicable regulations. For some provisions, the applicant has a choice between legal alternatives, but cannot add his own provisions or interfere with those contained in the template.

The share capital can only be covered in cash. If it is real estate or other in-kind contribution, the company must be registered with a notary.

Link: <https://www.biznes.gov.pl/pl/firma/zakladanie-firmy/chce-zalozyc-spolke-kapitalowa/rejestracja-spolki-z-o-o-przez-internet>

The process of registering a company on the S24 platform takes about 45 minutes. An entity may appear in the National Court Register even after 24 hours (companies are registered during the working hours of the courts). In practice, for companies registered online, it usually takes 2 - 7 days to register. This process is significantly extended if it is necessary to attach missing documents or correct incorrectly completed forms.

In both cases, you have to pay for submitting the application to the National Court Register. However, when registering on-line, the fee is PLN 250, and for the traditional road, PLN 500.

There is also a "third way" to register a new company - partly online. It is an electronic access to registry courts. It is not a very well-known procedure. It involves concluding the company agreement at a notary and then submitting the documents to the registry court on-line. The link is - pdi.ms.gov.pl

However, this portal does not function very well. The complete digitization of the KRS was supposed to end in 2017, then in March 2020, and continues indefinitely until today.

c. What checks (if any) are done on the authenticity of documents, identity of founders, record of founders (e.g. disqualification as directors) and beneficial owners

i. By registration authority

Disqualification as director will be automatically checked if disqualification is based on Art. 18 of Code of Commercial Companies (KSH).

The other items are not checked.

ii. By notaries

Legal position of a notary public in the Polish legal system

Within the scope of statutory powers, a notary acts as a person of public trust, enjoying the protection enjoyed by public officials. His/her status in the legal system, including his/her duties, as well as the grounds and scope of responsibility, are determined by the Law on Notaries. The duties entrusted to a notary public are to be performed in accordance with the law and conscience, to keep professional secrecy, to follow the principles of dignity, honor and honesty in his/her proceedings, and to maintain a high degree of diligence. A notary is obliged to ensure that the rights and legitimate interests of the parties and other persons for whom this activity may have legal effects are properly secured. He/she is also to be loyal to the State.

In accordance with the Anti-Money Laundering and Terrorism Financing Act of 2018, certain obligations have been imposed on notaries:

1. obligations related to the collection of specific information
2. applying financial security measures to clients, on the basis of a risk assessment (Article 8 b), which is carried out as a result of the analyses carried out, taking into account in particular the type of client, business relationships, products or transaction objectives (Article 10a);
3. keeping the register and ongoing analysis of the transactions carried out, as well as documenting and appropriately securing and storing the results of the analyzes, the register of transactions together with the related documents (Article 8a, Article 8 (4) of the Act);
4. providing the General Inspector of Financial Information with data on registered transactions, while not disclosing this circumstance to unauthorized persons, including parties to the transaction or account holders (Article 11);
5. immediate disclosure of information on transactions covered by the provisions of the Act at the written request of the Inspector General;
6. suspension of transactions (Article 16);
7. introducing an internal procedure in a written form, which will take into account the specific nature of the obligated institution and the areas of undertaken activities (Article 10a);
8. the obligation to provide employees with training in the identification of activities that may be related to money laundering and terrorist financing offenses;
9. submission to the inspection of the application of the provisions of the Act, carried out by authorized entities, including the provision of premises and submission of documents and materials necessary for the inspection (Articles 21-27).

Polish literature indicates that the act imposes obligations on notaries that are actually unenforceable and yet sanctioned with severe administrative and criminal liability, moreover, it "forces them" to breach professional secrecy. For example, J. Holocher, *Bezpieczeństwo obrotu prawnofinansowego. Obowiązki notariusza w świetle ustawy o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu* [Safety of legal and

financial transactions writes critically about solutions obliging notaries to participate in counteracting money laundering. Duties of a notary public in the light of the Act on counteracting money laundering and financing of terrorism], *Kwartalnik Prawa Publicznego*, 2/2015 (<https://czasopisma.uksw.edu.pl/index.php/kpp/article/view/115/116>). As the law imposed similar obligations on lawyers, the entire process of its introduction was presented (by some lawyers) as an example of a fight the party currently ruling in PL (Law and Justice) against the entire legal community. One can read about it, for example, in the article: T. Pietryga, *Wojna PO i PiS o sądy. Konstytucja nie jest już nietykalna* [War of the PO and PiS for courts. The constitution is no longer inviolable], *Rzeczpospolita*, 2021 (<https://www.rp.pl/Plus-Minus/308319923-Wojna-PiS-i-PO-o-sady-Konstytucja-nie-jest-juz-nietykalna.html>).

iii. **By “facilitator” companies (foundation agents)**

There is no such possibility

4) Cross-border Mergers (CBMs)

a) Which authority is responsible for the pre-merger certificate (outbound CBMs), which authority is responsible for approving the merger (inbound CBMs)? (name and link)

Registry court

The procedure is as follows:

1. Preparation of the plan (art. 516(3) of the KSH)
2. Announcement of the plan (Art. 516(4) of the KSH). The company should announce the cross-border merger plan no later than one month before the date of the shareholders' meeting or the general meeting of the company at which the resolution on the merger is to be adopted.
3. Preparation of the company's management board report (art. 516 (5) of the KSH). The company's management board prepares a written report justifying the merger.
4. Appointing an expert (Art. 516(6) of the KSH).

The registry court competent for the seat of the company appoints, upon its request, an expert to examine the merger plan.

5. Document review period (Art. 516(7) of the KSH). Shareholders of the merging companies and representatives of employees, and in the absence of such representatives - employees, have the right to view the following documents:

- merger plan;
- financial statements and management board reports on the operations of the merging companies for the last three financial years, together with the audit report, if the audit report was prepared;
- report justifying the merger;
- expert opinion on the examination of the merger plan.

6. Certificate of merger (Art. 516(12) of the KSH). The management board of the company submits an application to the registry court for a certificate of compliance with Polish law of a cross-border merger in the scope of the procedure governed by that law.

b. What personnel capacity/qualifications does the authority/ies listed above (organization(s) granting the pre-merger certificate + approving merger) have?

There are no requirements for the personnel capacity or qualifications of the responsible authority. The court relies solely on expert assessment.

Regarding the expert, two points should be emphasized. First, it is possible not to designate him/her. The option to withdraw from the examination of the merger plan by an expert occurs in the case of a cross-border merger of companies according to the rules specified in the merger of domestic companies. Withdrawal from the audit of the merger plan by an expert will be allowed if all partners of each of the merging companies have agreed to it. Secondly, regarding the qualification of an expert. The legislator does not indicate that the expert be a person entered on the list of court auditors or that it is a statutory auditor (statutory auditor, i.e. a person subject to the Act of 11 May 2017 on statutory auditors, audit firms and public oversight).

The expert may be a researcher specializing in a given field, a practitioner who has already made many merges, etc. The court itself decides about the need to appoint a larger number of experts and is not bound by the application in this respect. The companies do not have the right to appeal against the court's decision. The assessment of a specific factual situation will be decisive.

a. What (if any) anti-abuse checks are made?

i. Purpose of reorganization

No checks

ii. Background check on directors

No checks

iii. Identity of beneficial owners

No checks

iv. Worker I/C/P arrangements

In order to enter a newly established company into the register, an application must be made to the registration court. The notification must be accompanied by:

- 1) certificates issued by the authorities competent for the merging companies on the compliance of the cross-border merger with the law applicable to each of the merging companies with regard to the procedure governed by that law, issued not earlier than within six months from the date of notification;
- 2) merger plan;
- 3) copies of the merger resolutions;
- 4) an agreement specifying the conditions for employee participation, if required.

The registry court examines whether the merging companies approved the merger plan on the same terms and, if required by separate regulations, whether the terms of employee participation have been defined.

As can be seen from the above, only formal premises are examined de facto.