



Q&A Summary (12^h March 2025 in Warsaw)

Negative equity in Polish LLC



How many months/weeks/days does “undue delay” mean?

It cannot be explicitly determined. In practice, convening the Shareholders’ Meeting without “undue delay” means that the Management Board should undertake activities to convene such Shareholders’ Meeting as quickly as it is possible in a given situation, usually immediately after the Management Board obtained financial information which justifies such action in light of the Article 233 of the CCC. Thus, each case must be analysed separately to determine whether the Shareholders’ Meeting has been convened without “undue delay”.

Could you tell us a most likely situation where management of LLC will be required to pay for damages as civil liability.

If the Management Board Members did not file for LLC's bankruptcy, although the statutory prerequisites have been met, the creditors of the LLC may demand payment directly from Management Board Members if enforcement against the LLC is ineffective, i. e. if the LLC does not have enough assets to pay its debts. Such liability results from Article 299 of the CCC.

In practice, the creditors should primarily sue the LLC and, after the damage compensation is ordered by the court, they should try to satisfy their claims from LLC's property. If satisfaction of claims from LLC's property is ineffective, the creditors can file another lawsuit, this time against the Management Board Member(s). If the creditors again succeed and the court in its final and non-appealable verdict orders against Management Board Members, they may be effectively held liable from their own personal assets, without any limitation (full liability).

The liability of Management Board Members is joint, meaning that the creditors may choose from which Management Board Member and to what extent they demand payment. They may for example demand 60% of the debt from one Management Board Member and 40% from the other.

The Management Board Members may be obliged to pay for example for rent of office which the LLC uses or for goods/ services provided by LLC's contractor, as well as any other commercial contract of LLC (in case the LLC did not pay for such goods/ services).

Management Board Members may exclude their liability only by demonstrating that not filing for bankruptcy took place without their fault.

Furthermore, the Management Board Members are liable to the LLC for damages resulting from their violations of statutory regulations or provisions of articles of association. Such liability results from Article 293 of the CCC. Management Board Members may exclude their liability if they demonstrate that the damage was caused without their fault. Additionally, the so-called "Business Judgement Rule" applies. This means that the liability for damages will be excluded if a Management Board Member acted in a manner loyal to the LLC within the limits of justified economic risk.

Are there any commercial insurance to cover board members' liability like those, i.e. civil, administrative monetary liability and penalty, in the market?

Yes. The so-called D&O (Directors and Officers) insurance is offered by numerous insurance companies operating on the Polish market. Such insurance mostly often covers civil liability of management board members. The scope of insurance may also include reimbursement of administrative and criminal penalties paid by the Management Board Members.

On No.1, how can we allocate the increased value of capital into sources of equity, i.e. share capital, reserve capital, supplementary capital, other source?

In case of share capital, it shall be stressed that it is always covered by contributions of shareholders made in exchange of shares (in the course of establishing the LLC or share capital increase) in the amount equal to nominal value of shares. This is a mandatory requirement. The share capital is the most fundamental source of equity, especially in early stages of LLC's activity. Compared with reserve and supplementary capitals, strict statutory rules apply. Shareholders may not receive any payments from LLC's equity needed to fully cover the share capital. As to the rule, it is prohibited to return to shareholders the contributions made in exchange of shares. Additionally, the formalized procedure applies to increase or decrease of share capital.

In case of supplementary capital, it is most crucial to take into account the price which shareholders issue for obtaining shares (in the course of establishing the LLC or share capital increase). Such price may never be lower than the nominal value of shares. However, it is common market practice that shares in the increased share capital are obtained for a price exceeding their nominal value. If so, the surplus over the nominal value (the “agio”) is allocated into the supplementary capital. This is a mandatory requirement (the agio cannot be allocated to the share capital or reserve capital). This mechanism provides that parallel to creation of new shares, the LLC is further recapitalized. The transfer of the agio to supplementary capital is mandatory regardless of the type of contribution (monetary or non-monetary) made by the shareholders. As to the rule, the amount of the agio may substantially exceed the total nominal value of all new shares in the increased share capital. There are no strict limits in that regard, so the ratio between nominal value and agio may be even 0,1 % to 99,9 %. Apart from the agio, the source of the supplementary capital may be LLC’s profits transferred to that capital based on resolution of shareholders.

In case of the reserve capital, its main source may be additional payments and profits transferred based on resolution of shareholders. The shareholders may contribute additional payments only if the articles of association provide for such possibility. It shall be stressed that making additional payments does not constitute the share capital increase or amendment to articles of association. It does not require participation of notary public or notifying the registry court.

The articles of association shall determine the maximum amount of additional payments relative to value of shares. In practice, the maximum value is often specified as multiplication of shares' nominal value (e.g. to 100 times nominal value of shares). Including further regulations (e.g. on procedure) is also admissible. The resolution of shareholders determining the amount and the date of making payments is subsequently required to legally oblige the shareholders to make the payments (such resolution is a sufficient legal basis to contribute the payments). The additional payments may be returned in case they are not required to cover the loss presented in LLC's financial statement. The return shall be made proportionally with reference to each shareholder. It is admissible that the shareholder deducts his claim towards the LLC (e.g. resulting from a loan contract) with LLC's claim towards the shareholder to contribute the additional payments.

Could you make comments on overview of tax consequences on those measures one by one?

- Increase of share capital
 - Charter capital increase: 0,5% PCC is imposed against the increased amount registered as share capital.
 - Agio which goes to supplementary capital; 0,5% rate is not imposed against the amount of agio which goes to supplementary capital.
- Additional payment: Additional payment (in Polish “dopłaty”), which is also called surcharge is considered as amendments to articles of association for PCC taxation purposes. In this case, the tax is collected on the entire amount of the additional payments.



Thank you



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Document Classification: KPMG Public