

# Special rules of representation for limited liability companies

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## Introduction

As a rule, limited liability companies are represented by their management boards in accordance with the rules of representation provided for in their articles of association or – in the absence of contractual regulations – in accordance with the statutory rules (Article 205 of the Commercial Companies Code). However, the Commercial Companies Code provides for derogations from representation by management boards to protect company interests. One such exception is representation by a supervisory board or proxy appointed by a resolution of a shareholders' meeting in contracts or disputes between companies and members of their management boards (Article 210(1) of the Commercial Companies Code).

## Different interpretations

Among other things, divergences in the interpretation of Article 210(1) of the Commercial Companies Code have arisen in relation to the amendment of limited partnership company agreements in which the general partner is a limited liability company and the limited partner is a member of its management board.

Under Article 9 of the Commercial Companies Code, all partners in a partnership must provide their consent in order to amend a partnership agreement of a limited partnership company. Some courts have ruled that the amendment of a limited partnership company agreement and the consent of all partners in the above circumstances falls within the scope of Article 210(1) of the Commercial Companies Code. The rest have argued that neither such a resolution to amend a partnership agreement nor any other shareholder resolution constitutes an agreement and it is therefore impossible to deviate from the general principles of representation. According to this position, the consent of all partners to a partnership, as provided for in Article 9 of the Commercial Companies Code, expressed in the form of separate declarations of will of each of the partners does not constitute a contract either. As a result of this divergence of views, some courts have registered amendments to the limited partnership agreement in the register of entrepreneurs of the National Court Register,<sup>(1)</sup> where a limited liability company (as a general partner) was represented by a proxy appointed on the basis of Article 210(1) of the Commercial Companies Code, while other courts have refused to register such amendments due to a violation of the general principles of representation.

The Lodz District Court recently submitted a legal question on this issue to the Supreme Court. A resolution passed in this manner is binding only on the court hearing a given case, but in practice, resolutions shape the manner of adjudication in other similar cases. In the case in question, the general partner of the limited partnership was a limited liability company and the limited partner was a member of its management board. When adopting the resolution on the amendment of the limited partnership agreement, the limited liability company as a general partner was

represented by a proxy appointed pursuant to Article 210(1) of the Commercial Companies Code. The Lodz District Court asked whether such representation of the general partner when amending the limited partnership agreement is correct or whether the limited liability company should be represented by its management board in accordance with general principles, despite the fact that the limited partner is a member of the management board of the limited liability company.

## **Decision**

When answering the above question, the Supreme Court indicated **(2)** that if a member of the management board of a limited liability company is a partner in a limited partnership with the same company, Article 210(1) of the Commercial Companies Code applies to the consent of the limited liability company to amend the limited liability partnership agreement, as required under Article 9 of the Commercial Companies Code. The Supreme Court presented the following arguments in favour of such an interpretation.

First, the reasoning states that the membership relationship in a partnership company is, as well as an organisational relationship, a legal relationship between the partners acting as parties to the partnership company agreement, which continues after the partnership has been entered into the register of entrepreneurs. This confirms the lack of separation of the body in the form of a shareholders' meeting in a limited liability company. As a result, the Supreme Court indicated that shareholders' consent to amend articles of association constitutes one legal action. It thus determined that such a resolution is an agreement between shareholders.

The Supreme Court also had no doubt that Article 210(1) of the Commercial Companies Code applies to the conclusion of a limited partnership company agreement with the participation of a limited liability company and a member of its management board. The supervisory board or a proxy appointed by a resolution of the shareholders' meeting must be represented.

Further, the Supreme Court indicated that Article 210(1) aims to protect the interests of limited liability companies and their shareholders and creditors. It applies to all contracts between companies and members of management boards, whether or not they relate to their function on the board. The protection consists in eliminating the possibility of board members acting in double roles. For these reasons, the case under consideration required the application of Article 210(1).

In its decision, the Supreme Court made an important general remark on Article 210(1). According to the court, the phrase "in a contract between a company and a member of the management board" means all legal actions relating to such a contract as well as:

*all acts of knowledge materially related to such a contract, i.e. conclusion of the contract, its amendment, withdrawal from it by the company, termination by the company, member of the management board or another party, dissolution by mutual agreement of the parties, evasion of a declaration of will submitted under the influence of an error, notification of a defect, set-off, notification of an objection of statute of limitations, recognition of claims, conclusion of a settlement, etc.*

Such a broad spectrum of application of specific rules of representation must protect the interests of limited liability companies. There is a potential conflict of interest in each of these situations.

## **Comment**

The Supreme Court's decision will certainly have a positive impact on the practice of applying Article 210(1) of the Commercial Companies Code. Divergence of jurisprudence is always an undesirable phenomenon. This decision is also important because a legal act contrary to the specific rules of representation is invalid. **(3)**

In the context of the Supreme Court's decision, it is justified to apply a special representation in all situations where there is a potential conflict of interest between parties to a legal transaction (eg, a limited liability company and a member of its management board). Such a conflict of interest, even if only potential, also exists in the case of amendments to the articles of association of a partnership company, where the shareholders are both a limited liability company and a member of its management board.

The broad application of special representation to all legal acts and acts of knowledge relating to agreements and not only to their conclusion and amendments is a notable outcome of the Supreme Court's decision. This is important because such situations could give rise to opportunities for abuse and action by board members in their own interest contrary to the company's interests.

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## Endnotes

- (1) The type of public register kept by district courts and the Ministry of Justice, in which commercial law companies are registered.
- (2) Supreme Court resolution of 7 September 2018, file III CZP 42/18. The text of the resolution with justification in Polish is available [here](#).
- (3) A Kidyba, "Updated commentary to Article 1-300 of the Commercial Companies Code", LEX 2019, commentary on Article 210(3).

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