

# STRENGTHENING THE EFFECTIVENESS OF THE CORPORATE COMPLIANCE SYSTEM IN A GROUP OF COMPANIES – AFTER THE AMENDMENT OF THE CODE OF COMMERCIAL COMPANIES IN 2022

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**Abstract.** The aim of the article is to discuss the changes adopted in the Code of Commercial Companies in 2022, which are the most significant since its adoption, i.e., since 2000. The changes not only regulated the functioning of the group of companies, but also made it possible to establish a corporate compliance system in the group of companies, aimed at strengthening the effectiveness of counteracting many negative phenomena, including corruption. The publication is another part of the Authors' research in the area of compliance and corporate governance, the results of which were partially used in the work of the Corporate Governance Reform Committee introducing the abovementioned changes to the Code of Commercial Companies.<sup>1</sup> Finally, the publication also presents the theoretical and practical aspects of establishing a corporate compliance system in a group of companies.

**Keywords:** compliance; corporate governance; corporate law; capital group; supervisory board

## INTRODUCTION

In Poland, there are no solutions based on generally applicable provisions of law obliging to establish a corporate compliance system in a capital company or group of companies.<sup>2</sup> According to the authors, the latter legal form

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<sup>1</sup> PhD Robert Lizak was a member of the expert Team for Increasing the Efficiency of Supervisory Boards operating under the Corporate Supervision Reform Committee established in 2020 to amend the Commercial Companies Code.

<sup>2</sup> There are regulations that may indirectly indicate the need for a legal entity to establish

in particular deserves attention. According to a statutory definition, a group of companies is a parent company and a company or subsidiaries, which are capital companies, following the resolution on participation in a group of companies by a common strategy in order to implement a common interest (interest of the group of companies), justifying the parent company exercising uniform management over a subsidiary or subsidiaries. The definition referred to above appeared in 2022, following the amendment to the Act of September 15, 2000, Code of Commercial Companies,<sup>3</sup> which followed the adoption of the Act of February 9, 2022 amending the Act – Code of Commercial Companies and some other acts.<sup>4</sup> The new regulations will apply from October 13, 2022. Until the abovementioned regulations came into force, the establishment of a corporate compliance system in the group of companies was significantly difficult, as the provisions of the Commercial Companies Code did not in practice regulate the functioning of groups of companies. The Act on Amending the Commercial Companies Act regulated not only the functioning of the group of companies, but also made it possible to establish a corporate compliance system in the group of companies aimed at strengthening the effectiveness of counteracting many negative phenomena, including corruption, to which the Authors devoted special attention in this publication.

Pursuant to Article 1(3a) of the Act of June 9, 2006 on the Central Anticorruption Bureau, corruption is an act involving: a person, in return for an act or failure to act in the performance of his or her functions, benefits, in return for an action or failure to act in the performance of its function, 3) committed in the course of economic activity, including the performance of obligations towards the public authority (institution), consisting in promising, proposing or handing directly or indirectly to the person managing a non-credited entity to the financial sector in public or working in any capacity for such an entity, any undue benefits, for itself or for the benefit of any other person, in return for an act or omission of an act that violates its obligations and constitutes a socially harmful reciprocity, 4) committed in the course of business involving the performance of obligations towards the public authority (institution), consisting in requesting or accepting, directly

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such a system. See Article 38 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2022, item 1360 as amended [hereinafter: CC], pursuant to which a legal person acts through its organs in the manner provided for in the Act and in the statute based on it, or Article 9c(1)(4) in relation with section 2 of the Act of 29 August 1997, the Banking Act, Journal of Laws of 2021, item 2439 as amended.

<sup>3</sup> See Article 4(1)(5<sup>1</sup>) of the Act of 15 September 2000, the Code of Commercial Companies, Journal of Laws of 2022, item 1467 as amended [hereinafter: CCC].

<sup>4</sup> See Act of 9 February 2022, amending the Act – Code of Commercial Companies and some other acts, Journal of Laws of 2022, item 807 as amended [hereinafter: Act on amending the Act on Commercial Companies Code].

or indirectly, by a person managing an entity not included in the public finance sector or working in any capacity for such an entity, any undue benefits or accepting a proposal or promise such benefits for himself or for any other person, in return for an act or omission that violates his or her duties and constitutes a socially harmful reciprocity.<sup>5</sup>

Counteracting the phenomenon of corruption is not limited only to preventing the occurrence of a criminal act consisting in giving and accepting benefits. Corruption should also be understood as unfair behaviour towards the need to behave in accordance with the ethical and legal norm, which in fact is the essence of compliance. According to the authors, in the era of an increasing corruption risk, especially resulting from the growth of international business ties and political instability, the market position and a competitive advantage of companies and groups of companies may depend on the effectiveness of the compliance systems.

As a result of the above, there were three reasons for which the authors took up the subject defined in the title of this article. Firstly, there has been a significant change in the provisions of the Commercial Companies Code, including those that are directly related to counteracting corruption in commercial companies. Secondly, the publication is another portion of the Authors' research conducted in the area of compliance and corporate governance, the results of which were partially used as part of the work of the Corporate Governance Reform Committee introducing the aforementioned changes to the Commercial Companies Code [Lizak and Skuza 2017a, 195-208; Lizak and Skuza 2017b, 549-65; Lizak and Skuza 2018, 51-63; Lizak 2019, 29-31; Lizak and Skuza 2021, 355-68]. Thirdly, the aim of the publication is to present the possibility of creating a structure in groups of companies that will allow for solving compliance problems, including counteracting corruption.

#### 1. THE BASIS FOR ESTABLISHING AN ANTI-CORRUPTION COMPLIANCE SYSTEM IN A GROUP OF COMPANIES, TAKING INTO ACCOUNT ITS INTERESTS

The capital group is a common form of business in the conditions of a market economy, in particular among entities with a large scale of business [Gajewski 2005; Kołodkiewicz, 2013; Postuła 2013]. The key factor determining the creation of a capital group is at desire to increase the effectiveness of the business, which makes it easier to achieve the assumed goal. It is not important whether this goal is a profit maximization or securing the

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<sup>5</sup> See Act of 9 June 2006, the Act on the Central Anti-Corruption Bureau, Journal of Laws of 2021, item 1671 as amended.

public interest in the case of entities oriented at the implementation of the public mission.<sup>6</sup> Regardless of the ownership structure, as well as the basic purpose of the operation of individual entities, the capital group can contribute to the improvement of operations in almost all areas, in particular management, organizational, operational, financial and legal.

The act amending the Commercial Companies Code covers private and legal relations between the parent company and its subsidiaries.<sup>7</sup> The explanatory memorandum to this act indicates that a group of companies is a “qualified” relationship of dominance and dependence between certain companies that make up the group of companies, as these companies are guided by a common economic strategy that allows the parent company to exercise uniform management over the company or subsidiaries.<sup>8</sup> The rules governing the group of companies can be divided into two categories. The first category is to facilitate the efficient “management” of a group of companies by the parent company in connection with the implementation of the group’s common economic strategy.<sup>9</sup> The second category of regulations is to ensure the protection of specific interest groups occurring in the case of a group of companies, primarily a subsidiary belonging to at group of companies, the parent company, and indirectly the entire group of companies.<sup>10</sup> The second category of regulations is to ensure the protection of specific interest groups occurring in the case of a group of companies, primarily a subsidiary belonging to at group of companies, the parent company, and indirectly the entire group of companies.<sup>11</sup>

The review of the applicable provisions of the Commercial Companies Code, as well as those introduced by the Act on the amendment of the Commercial Companies Code, does not directly indicate that the bodies of a capital company are legally obliged to establish a corporate compliance system, so the question arises in the company and the group of companies whether, despite the lack of a statutory basis, the company’s authorities subsidiary and parent should establish a corporate compliance system in the company and group of companies? The answer to this question justifies paying attention to several important aspects.

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<sup>6</sup> See Article 1(8) of the Act of 16 December 2016, the Act on the Principles of Managing State Property, Journal of Laws of 2021, item 1933 as amended.

<sup>7</sup> See justification for the act amending the Act on CCC.

<sup>8</sup> Ibid.

<sup>9</sup> See Article 1 the act amending the Act on CCC.

<sup>10</sup> Ibid.

<sup>11</sup> According to Article 21<sup>2</sup>(1) CCC, the parent company may issue a binding instruction to a subsidiary participating in a group of companies (binding instruction), if it is justified by the interests of the group of companies and special provisions do not stipulate otherwise.

The role of the management board of a joint-stock company comes down to managing the company's affairs, i.e. making economic decisions in any of its areas.<sup>12</sup> In the judgment of July 24, 2014, the Supreme Court adopted that running the company's affairs consists in managing its assets, managing its current affairs and representing it, and that when making decisions regarding the conduct of the company's affairs, a management board member should be guided solely by its interests.<sup>13</sup> In the judgment of July 24, 2014, the Supreme Court adopted that running the company's affairs consists in managing its assets, managing its current affairs and representing it, and that when making decisions regarding the conduct of the company's affairs, a management board member should be guided solely by its interests.<sup>14</sup> Related to the management board's duty to act in the interests of a joint-stock company is linked to another obligation, namely the duty to protect its assets. The literature indicates that while the obligation to act in the interest of the company is positive, as it refers to ensuring its profitability and competitiveness, the obligation to protect the company's assets is its negative reflection, i.e., preventing the depletion of its assets, preventing the company from suffering damage [Płonka 1994, 225]. The above leads to the conclusion that acting in the interests of the company is nothing more than making decisions in such a way as to increase the company's value and generate profits, on one hand, and on the other hand, to prevent and facilitate the avoidance of losses, i.e. to protect the company's assets or its good name.

Hence, in accordance with the general clause in Article 483 of the Commercial Companies Code, a member of the management board of a joint-stock company is liable to the company for the damage caused by an act or omission contrary to the law or the provisions of the company's articles of association, unless they are not at fault. Moreover, they are obliged to exercise due diligence resulting from the professional nature of the administrator's activity. This means that the management board of a joint-stock company is burdened with additional restrictions on account of performing the function, because the legislator has specified in the generally applicable provisions of law that the measure of diligence in relation to a person conducting business activity is higher than in comparison to ordinary activity, because due diligence of a person conducting business activity is defined as taking into account its professional nature [Kwaśnicki 2005, 287].<sup>15</sup> The term "due diligence resulting from the professional nature of the activity" is un-

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<sup>12</sup> According to Article 368(1) CCC, the management board manages the affairs of the company and represents the company.

<sup>13</sup> Judgment of the Supreme Court of 24 July 2014, ref. no. II CSK 627/13, Lex no. 1545031.

<sup>14</sup> Judgment of the Supreme Court of 5 November 2010, ref. no. I CSK 158/09, OSNC 2010, No. 4, item 63.

<sup>15</sup> Judgment of Appeal Court in Łódź of 16 April 2014, ref. no. ACa 1157/13, Lex no. 1500811.

derstood as standards of conduct in trade, adequate to the scale and nature of the business activity [Opalski and Oplustil 2013, 21].

*Prima facie* it seems that the concept of diligence included in Article 483(2) of the Commercial Companies Code is a criterion of guilt and its fulfilment does not release from the obligation to separately establish the unlawfulness of the actions of a management board member.<sup>16</sup> Illegality should be demonstrated by indicating a specific legal provision or provisions of the company's articles of association or its articles of association. *A contrario*, in the doctrine one can meet with the position that the negligent conduct of the company's affairs or careless supervision contrary to the wording of Article 483(2) of the Commercial Companies Code, constitutes an unlawful act, and as a consequence, it is not necessary to additionally prove that a management board member has violated separate provisions of law [Opalski and Oplustil 2013, 11-23].

Thus, answering the question whether the establishment of a corporate compliance system falls within the ordinary management of a joint-stock company should depend on the risk assessment, including corruption, adequate to the scale and nature of the business conducted by the company or group of companies. Hypothetically, assuming that in the case of a joint-stock company operating in the territory of another country, where the corruption risk is extremely high, and the lack of an assessment of corruption risk and failure to establish a corporate compliance system would be the main reason for the company's bankruptcy, it justifies the belief that due diligence was not respected, and what for hence, it may constitute grounds for bringing to justice the members of the management board of a joint-stock company.

The role of the supervisory board is to exercise permanent supervision over the company's operations in all areas of its operations, which in practice means making factual findings and seeking to obtain information about the actual condition of the company, and ultimately presenting this information to the owner. Exercising continuous supervision should include designing, implementing and maintaining an adequate and effective system of three lines of defence, monitoring its effectiveness, as well as periodically evaluating it and adjusting it to current needs. *Summa summarum*, the essence of the functioning of the supervisory board of each company is to strive for establishing the material truth in the shortest possible time. Hence, the following are an essential support in exercising constant supervision by the supervisory board: audit, compliance and internal control, which are

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<sup>16</sup> According to Article 483(2) CCC, a member of the management board, supervisory board and liquidator should, in the performance of his duties, exercise due diligence resulting from the professional nature of his activity.

elements of the three lines of defence model [Lizak and Skuza 2018, 54-55]. The supervisory board in the company acts as a kind of superior compliance unit. In view of the above, a special role is played by the chairman of the supervisory board of the subsidiary and, respectively, the parent company in a group of companies. Moreover, the above actually results from the provision of Article 217(1) of the Commercial Companies Code, according to which the supervisory board of the parent company exercises permanent supervision over the implementation of the interests of the group of companies by the subsidiary participating in the group of companies, unless the agreement or the Articles of association of the parent company or subsidiary provide otherwise.

## 2. EXTENDING THE BAN ON HOLDING POSITIONS IN COMPANY GOVERNING BODIES FOLLOWING A CONVICTION FOR CORRUPTION OFFENSES IN THE PUBLIC SECTOR

In order to introduce the provision of Article 18 of the Commercial Companies Code, the possibility of performing the function of a member of the management board, supervisory board, audit committee, liquidator or proxy is limited in the event of a total of three conditions: 1) being a natural person, 2) having full legal capacity, 3) no conviction for the offenses specified in the provisions of chapters XXXIII-XXXVII of the Penal Code and in Article 587, Article 590 and Article 591 of the Commercial Companies Code. For the purposes of this publication, attention has been focused on the third of the abovementioned premises. For its occurrence, it is necessary to issue a final conviction for at least one of the abovementioned offenses, without the need to separate a ruling on the prohibition of performing a function, because this type of prohibition occurs by operation of law upon the validation of the conviction.<sup>17</sup> Importantly, conviction for offenses other than those mentioned in Article 18(2) of the Commercial Companies Code, does not exclude the possibility of holding a function in the company, unless separate regulations provide otherwise.

The ban on performing functions in the bodies of commercial companies was introduced in order to protect the proper functioning of economic transactions. This protection consists in preventing the performance of a specific function by persons who do not guarantee reliability and honesty, and thus the proper performance of their duties. In the opinion of the drafters of the act amending the Commercial Companies Code, it was justified to extend the catalogue specified in Article 18(2) of the Commercial

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<sup>17</sup> Judgment of the Court of Appeal in Warsaw of 22 February 2019, ref. no. VII AGa 1850/18, Lex no. 2668814.

Companies Code, for offenses stipulated in Article 228-231 of the Act of June 6, 1997 Criminal Code.<sup>18</sup>

The essence of the crimes specified in Article 228-231 of the Penal Code comes down to the protection of the proper functioning of state institutions and local government, as well as public institutions in other countries and international organizations. The protection of proper functioning should be understood, on the one hand, to maintain the loyalty of persons performing public functions towards the abovementioned institutions and the state, and on the other hand, their disinterestedness towards clients. Unfortunately, there are cases of accepting personal and property benefits by persons performing public functions. A property benefit is a gain in material goods. A benefit has a material character when it has an economic value, that is, the value of which can be expressed in money, and also when a given good can satisfy a specific material need. It can be expressed as an increase in assets, i.e. an increase in property or a decrease in property liabilities, meaning a reduction in burdens or the avoidance of losses. On the other hand, a personal benefit is a benefit which is not of a material nature, i.e. it cannot be counted into money. In many cases, it is not easy to distinguish between material and personal benefits. Some benefits meet both tangible and intangible needs (e.g. taking a position on the company's management board or supervisory board).<sup>19</sup> In view of the above, the legislator sanctioned the acceptance of personal or property benefits by persons performing public functions (Article 228 of the Penal Code), as well as giving them the abovementioned benefits by anyone (Article 229 of the Penal Code). Criminal sanctions also apply to persons accepting benefits and claiming influence, even if they do not actually exist (Article 230 of the Penal Code), granting benefits to persons claiming influence (Article 230a of the Penal Code), and finally persons who are public officials who exceed their powers or failing to fulfil obligations act to the detriment of public or private interests (Article 231 of the Penal Code). Thus, there are a number of criminal law norms which, on the one hand, protect the proper functioning of economic transactions and, on the other hand, the proper functioning of state institutions and local government. So, the question is how to extend the catalogue of crimes stipulated in Article 18(2) of the Commercial Companies Code, for offenses specified in Article 228-231 of the Penal Code, which in fact are to protect the proper functioning of state institutions and local government, is to contribute to strengthening the proper functioning of commercial companies and economic transactions?

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<sup>18</sup> Act of 6 June 1997, the Criminal Code, Journal of Laws of 2022, item 1138 as amended.

<sup>19</sup> Anti-corruption guidelines for officials, Central Anti-Corruption Bureau, Warsaw 2014, p. 10.



In the Authors' opinion, the right example justifying the extension of the catalogue of crimes specified in Article 18(2) of the Commercial Companies Code is to prevent a situation in which a person holding a public function accepts an advantage in connection with performing this function from a representative of a specific commercial company, where the benefit is to appoint that company to the supervisory board in the future, in exchange for dealing with a specific case for the benefit of this company. It is not difficult to cite examples of this type of case, e.g., issuing a concession, license, consent, awarding a public contract, or enabling the entry into force of a legal act or a specific legal provision. It seems that establishing and recalling statistical data how many people convicted of crimes under Article 228-231 of the Penal Code, were appointed to the bodies of commercial companies in connection with the commission of these crimes, it would only be of an illustrative nature and would not reflect the essence of the problem, as it is highly risky for business transactions to bring about an immediate risk of causing damage. Moreover, it is reasonable to say that in the case of the crimes specified in Article 228-231 of the Penal Code, the number of cases is less important, and the scope of potential damage is greater, for example, the area of critical infrastructure of the state, constituting real and cybernetic systems (facilities, devices or installations) necessary for the minimum functioning of the economy and the state. The Supreme Court aptly put it in its decision of October 25, 2007, I KZP 33/07, which ruled that the inadmissibility – by operation of law – of performing functions in the bodies of commercial companies is a solution characteristic of the Commercial Companies Code, and no criminal record as a condition for performing the function is a kind of statutory qualification criterion to be active in a specific area and constitutes a restriction of subjective rights due to important public interest.<sup>20</sup>

Another argument in favour of extending the prohibition contained in Article 18(2) of the Commercial Companies Code is more prosaic, namely it prevents the performance of managerial functions that have a real impact on shaping the company and economic turnover by people who do not guarantee honesty and integrity, regardless of whether they operate in the public, private or public-private sector. According to P. Ochman, the provision of Article 18(2) of the Code of Commercial Companies and Partnerships is primarily aimed at preventing the committing of subsequent crimes of a specific type while using the performed function or simply preventing the perpetrator of a specific type of crime from performing a function (particularly from the point of view of the functioning of commercial companies) in connection with a final conviction for a crime [Ochman 2012, 69-96].

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<sup>20</sup> Judgment of the Supreme Court of 25 October 2007, ref. no. I KZP 33/07, Lex no. 310369.

Finally, extending the directory with Article 18(2) of the Commercial Companies Code is important in that it prevents any participant in any possible configuration of the corruption mechanism, including a person holding a public function receiving the benefit and the person granting it, the person receiving the benefit, from performing the function of a member of the management board, supervisory board, audit committee, liquidator or proxy and claiming influence and the person granting its benefit, and finally a public official accepting the benefit and acting to the detriment of public or private interests. In the justification of the judgment of 17 February 2016, III CSK 107/15, the Supreme Court indicated that the purpose of the prohibition in question is to exclude from participation in trade persons whose conduct justifies concerns about the reliability of economic tasks and may harm other participants trading.<sup>21</sup>

Following the entry into force of the extended catalogue of offenses specified in Article 18(2) of the Commercial Companies Code for offenses under Article 228-231 of the Penal Code, for persons convicted of these crimes, their mandate in the company's governing body shall expire definitively. The prohibition ceases to exist in the fifth year after the conviction becomes final, unless the conviction has been expunged earlier. After the statutory deadline or earlier expungement of the conviction, the rights of a natural person to perform a function in a given body of a capital company are not reactivated, only the possibility of reappointment of a given natural person to the company's bodies appears. In addition, from October 13, 2022, in relation to candidates for company governing bodies, for which information about the conviction under Article 228-231 of the Penal Code and there are no grounds for lifting the prohibition (e.g., five years after the conviction becomes final), registry courts should dismiss an application for entry in the National Court Register of a convicted person as a candidate for one of the functions listed in Article 18(2) of the Commercial Companies Code [Wajda 2018, 22-27].

### 3. CHAIRMAN OF THE SUPERVISORY BOARD OF A PARENT COMPANY IN A GROUP OF COMPANIES AS CHAIRMAN OF THE BOARD OF JOINT CHAIRMEN OF SUPERVISORY BOARDS OF SUBSIDIARIES

In the justification to the act amending the Commercial Companies Code, point 5.9., *Emphasizing the importance of the function of the chairman of the supervisory board and the duty of activity of the supervisors of*

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<sup>21</sup> Judgment of the Supreme Court of 17 February 2016, ref. no. III CSK 107/15, Lex no. 2048971.

*this body*, which indicated that the practice of trading, and in particular the commonly known cases of improper shaping of internal corporate governance, indicate the need to regulate the role of the chairman of the supervisory board as a person responsible for proper organization of work at the statutory level. This authority. Often, the effectiveness of internal supervision in a capital company depends on the activity and diligence in exercising the powers by the chairman of the supervisory board. The justification also clarified that the indicated person should set the schedule and the scope of the work of the body, and not be a passive executor of the management board's requests for issuing the expected decisions by the supervisory board or strive to implement the minimum activities of the supervisory board imposed by law, disregarding the actual internal needs of the company.<sup>22</sup>

In the authors' opinion, the chairman of the supervisory board of a parent company in a group of companies is the most important link in the corporate governance chain responsible for the parent company and the entire group of companies remaining in compliance with the mission, vision, values, strategy, business challenges, risk management and the supervisory and internal control system.

The existing provisions regulating the essence of duties and activities of the chairman of the supervisory board of a parent company were not too extensive and basically did not distinguish between the chairman of a parent company in a group of companies and the chairman of a subsidiary. The Code of Commercial Companies only stipulates that the chairman of the supervisory board, regardless of the company's status, convenes the meeting, decides in the event of an equal number of votes and opens the general meeting. The lack of differences between the chairmen of parent companies and subsidiaries resulted from the lack of regulations regulating the functioning of groups of companies, which results from the fact that each of the companies in the group of companies was, in fact, a separate legal entity. After the review of the new regulations in the Commercial Companies Code, adopted in 2022, the situation looks different.

Firstly, the supervisory board of a parent company in a group of companies is obliged to learn to understand and be guided, in addition to the company's interests, to the interests of the group of companies, as well as to exercise permanent supervision over the implementation of the interests of the group of companies by a subsidiary participating in the group of companies.

Secondly, the scope of supervision of the supervisory board of a parent company in a group of companies includes the issuing of binding orders by the parent company to the subsidiary regarding the management of the

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<sup>22</sup> See justification for the act amending the Act on CCC.

company's affairs, if it is justified by the interests of the group of companies and special provisions do not provide otherwise.

Third, the supervisory board of a parent company may require the management board of a subsidiary participating in a group of companies to provide its books and documents and to provide information.

Fourth, the supervisory board may establish an ad hoc or permanent supervisory board committee consisting of supervisory board members to perform specific supervisory activities (supervisory board committee). An *ad hoc* or standing committee of the supervisory board may be established by the supervisory board of the parent company in the group of companies.

Fifth, if the articles of association so provide, the supervisory board of the parent company may adopt a resolution to examine, at the company's expense, a specific matter relating to the company's operations or its assets by an selected adviser (adviser to the supervisory board). As before, the adviser may be appointed by the supervisory board of the parent company.

From the above, it can be concluded that the scope of new rights and obligations of the supervisory board of the parent company in the group of companies whose work is managed by the chairman has significantly expanded, which means that he has become not only the chairman of the board of joint chairmen of supervisory boards of subsidiaries, but also a full he is the role of a kind of superior compliance officer in a group of companies. This may also be determined by the fact that the management board of a parent company operating in the banking sector should ensure that its operations comply with corporate law, generally applicable national and international law, and the law of other countries (e.g., FCPA, Bribery Act, FATCA). In addition, a company of this type should operate in accordance with the guidelines of at least 18 market regulators in Poland and abroad, for example the Polish Financial Supervision Authority, ESMA, FCA, SEC. The role of the supervisory board of the parent company is to assess the interests of the group of companies in all areas of its activity, and the example cited above actually refers to only one of them - the legal one.

Despite the separation of the management and supervisory functions in capital companies, the activities of the management board and the supervisory board remain closely related, and harmonious cooperation determines the good condition of the company, hence it is so important to maintain the state of partnership and cooperation. There is no doubt that the chairman of the parent company's supervisory board will now largely be formally responsible for this harmonious cooperation of management boards with supervisory boards in the group of companies.

Finally, the authors wish to renew the *de lege ferenda* postulate of introducing full-time remuneration for chairmen of supervisory boards of parent

companies, first of all in large and complex groups of companies. The authors fully agree with the results of research by T. McNulty, A. Pettigrew, G. Jobome, and C. Morris, which indicate that factors such as time commitment, greater experience and knowledge about the company and group of companies [McNulty, Pettigrew, Jobome, and Morris 2011, 93]. On the other hand, the research using the questionnaire of the questionnaire conducted by the authors among the chairmen of supervisory boards of parent companies shows that it is legitimate to discuss the introduction of full-time remuneration for the chairman of the supervisory board of the parent company, and the amount of remuneration could depend on the size of the group of companies measured by turnover, employment or market share or a combination of these factors: 1) the remuneration of the chairman of the supervisory board of the parent company could fluctuate between 50-75% of the remuneration of members of the parent company's management board, 2) the remuneration could be in line with the regulation contained in the Act of 9 June 2016 on remuneration of persons managing certain companies, 3) remuneration should be determined by the general meeting, and its amount should oscillate around 10% of the remuneration of a management board member [Lizak and Skuza 2021, 363].

#### 4. ANTICORRUPTION COMPLIANCE SYSTEM IN A GROUP OF COMPANIES IN THE BUSINESS INTELLIGENCE FORMULA

The anti-corruption compliance system in the group of companies is multidimensional, as it covers many issues, such as, for example, values, rules and procedures; training and communication; management of third parties, protection of whistle-blowers, register of benefits, etc. In each of the abovementioned areas, huge amounts of data and information are generated. So, the question is how to effectively, efficiently and holistically manage these areas? Using the example of third party management, let us pay attention to the data and information needed to collect, for example, the legal basis for their collection and the tool for processing the data and information in question.

The anti-corruption compliance system should take into account the risk of relations with third parties, especially in terms of the profile and area of activity, as well as the nature of relations of third parties, including their representatives, consultants, intermediaries, advisers and distributors. A third party, or contractor, may be a natural or legal person or an organizational unit without legal personality that is a party to the contract or the entity providing the service.

Before establishing business relations with contractors and signing the contract giving rise to the obligation, it is reasonable to verify the credibility

of contractors in order to minimize or eliminate the risk of establishing cooperation with contractors operating in violation of the law, good manners and commercial practices, in particular those involved in corruption. In commercial transactions, the process of verifying the credibility of the contractor is referred to in the English-language due diligence return, which is a limitation to the “bona fide” principle. According to the caveat emptor principle, the party establishing the relationship should verify everything possible to determine the risks on their own, and the other party cannot consciously and deliberately hide these risks. In Polish law, the definition of “due diligence” can be distinguished from the wording of Article 355 of the CC, according to which due diligence is the diligence required in a given type of relationship. This means nothing more than adopting a pattern of behaviour consisting in maintaining the appropriate level of accuracy, caution and caution appropriate to specific cases and situations.<sup>23</sup>

In the era of globalization of economic processes, the assessment of external partners before concluding transactions in international trade is actually a *sine qua non* condition. The entity should make sure that the third party actually exists, the terms of the contract with the third party detail the services to be performed, the third party actually provides such services, and the value of the contract subject is commensurate with the work performed in this industry and geographic region.

While determining whether a third party has established an anti-corruption compliance system and, consequently, whether it is able to detect certain types of undesirable patterns of behaviour that are characteristic of a profile and area of activity, should be taken for granted, a range of internal third party business processes. The process of security verification and ensuring security only then, when it covers such as:

- business interests (assessment of business conditions as well as business perspective and risk, including, for example, in the field of registration data, capital and personal ties),
- financial (assessment of securing an account, including, for example, Swiss fund, money, money and medicine financing),
- law (assessment of the legal status and remedial security for breaches of obligations, in connection with the obligation to undertake criminal and civil legal proceedings),
- tax (assessment of the correctness of the settlement of public-law burdens, including, for example, operating in the shadow economy or participating in tax avoidance or evasion),

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<sup>23</sup> Judgement of the Supreme Court of 21 September 2007, ref. no. V CSK 178/07, Lex no. 485896.

- technical (assessment of the condition of assets and products),
- environmental (natural resource impact assessment),
- corporate social responsibility (assessment of interests and environmental protection, as well as business relations),
- security (evaluation of the anti-corruption compliance system, including the so-called red flags, an example of the second solution of the warning system).

The due diligence process is carried out on the basis of information provided by a third party, remaining in the resources of the organization undertaking the cooperation, obtained from external entities and from open sources. Access to relevant information, its collection and analysis should be preceded by the consent of a third party.

Due diligence analysis is a process usually related to the commencement of new projects, such as the formation of a consortium, signing a contract or making a decision on a merger or acquisition, but it should be mentioned the need for ongoing monitoring of business processes by organizational units responsible for the anti-corruption compliance system and entities directly involved in the core business, especially with high-risk business partners or public authorities. Examples of areas that should be monitored include wholesale and retail purchase and sale of goods and services, sponsorship, leasing, franchising, donations, leases and rentals, as well as HR and payroll areas, conflict of interest management, information and data security, and finally relationships investor.

One of the important tools for counteracting corruption are electronic registers of contracts concluded with third parties, employment contracts and civil law contracts. The scope of registration should include at least such data as: contract identification number, type, date of conclusion, data identifying the parties to the contract, value and its subject, validity and payment period. Importantly, this data can be used not only to counteract corruption, but also to assess the quality and timeliness of contract performance on an ongoing basis, create algorithms for how to proceed in the event of defects being found, exceed deadlines, claim payment of contractual penalties, create a specific type of reliability rating of third parties, especially those involved in purchasing and sales procedures, and finally support in the management of supply chains.

Finally, it is worth mentioning the verification of information in the area of HR and public affairs in the field of representing the organization outside and risk management in relation to persons holding positions with an increased risk of corruption, especially in order to counteract competitive activity or a conflict of interest. Positions with an increased risk of corruption include at least persons: authorized to incur liabilities, authorized to

perform legal actions, participating in purchasing and sales procedures, public procurement and tenders, participating in administrative decisions, and finally authorized to represent the organization outside, especially for contacts with contractors and public authorities.

As can be seen, the amount of data needed to collect is not insignificant at all, but is their scope an obstacle to constant supervision over the company's activities in all areas of its activity? First, the amended provisions of the Commercial Companies Code provide a legal basis for the supervisory board of the parent company to exercise permanent supervision over the implementation of the interests of the group of companies by a subsidiary participating in the group of companies. Secondly, the supervisory board of the parent company may require the management board of a subsidiary participating in a group of companies to provide its books and documents as well as information for the purpose of supervision. Third, it is crucial to establish a system of coordination and exchange of data and information from subsidiaries for the supervisory board of the parent company. In the Authors' opinion, when creating this type of system, it is reasonable to take into account a number of important factors [Lizak and Skuza 2017, 205-206].

Counteracting the pathology of social life, which is corruption, is based on four functions, i.e., identification, detection, evidence and prevention [Sławik 2003, 21-26]. For each of them, information and its analysis play a fundamental role, which together are to provide the knowledge that is the basis for taking specific actions.

Technological progress and the process of globalization, on the one hand, have complicated the method of collecting and analysing data and information, and, on the other hand, have provided tools for more and more efficient acquisition of knowledge [Konieczny 2012, 3-16]. In order to effectively and efficiently use the collected data and information, the group of companies has developed a wide category of applications and technologies for acquiring, collecting, analysing and delivering data, which is referred to as Business Intelligence (BI).

The basic goal of Business Intelligence is to enable quick access to knowledge by building a centralized data warehouse collecting data from various and dispersed resources, and then using DSS (Decision Support Systems) decision support systems, Q&R (Query and Reporting) systems based on this warehouse, Online Analytical Processing (OLAP) systems, static analysis systems, forecasting and data mining (Data Mining) [Liautaud and Hammond 2003, 28]. Despite the fact that the evaluation of BI solutions shows many advantages (for example, the reduction of analysis and decision-making time) and disadvantages (for example, the disadvantages of BI include the high cost of user training), it is a review of the literature that allows for



a conclusion that such an analysis can significantly improve and make counteracting corruption more effective.<sup>24</sup> BI enables conducting various analyses and forecasts, data mining, including servicing many users in the company and outside it, handling distributed data, as well as providing the desired knowledge to potential users using data visualization techniques [Thierauf 2001, 3-4].

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<sup>24</sup> OECD, Advanced Analytics for Better Tax Administration. Putting Data to Work, 2016. <https://doi.org/10.1787/9789264256453-en> [accessed: 01.08.2022]; Canada Revenue Agency. October 1, 2014 to March 31, 2017. *A strategy for data-centric innovation. Business Intelligence Strategy*, <https://www.irs.gov/pub/irs-soi/statscanadapresentation.pdf> [accessed: 01.08.2022].

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