New rules regarding the liability of representatives and shareholders for public obligations of legal entities

New regulations regarding the liability of third parties (shareholders, managing directors, members of governing bodies, procurators, commercial representatives, commercial agents) for tax and social security obligations of legal entities provided for in Article 19 of the Tax and Social Security Procedure Code (TSSPC) were introduced with an Act to Amend and Supplement the TSIPC, promulgated in the State Gazette on 4 August 2017.

Amendments were also adopted with regard to:

- the exchange and disclosure of tax and social-insurance information, financial information and information about existence or absence of public obligations
- confidentiality of information and personal data protection
- non-performance of obligations to submit reports between states
- new rules regarding collection of public receivables and international cooperation.
Below you will find an analysis of the new provisions regarding the liability of third parties for tax and social security obligations which entered into force on 4 August 2017.

The new provisions contain ambiguities which raise a number of questions that have yet to be resolved by court and administrative practice.

**Liability for actions of representatives of legal entities**

Before the adoption of the new amendments, the law provided for liability only for management bodies and authorized representatives of companies (procurators, commercial representatives, commercial agents). The newly adopted amendments provide that liability for public obligations will also be incurred by shareholders.

The representatives of legal entities remain liable in cases when such individuals conceal any facts and circumstances from the revenue authorities, provided that the representatives have been obligated to disclose such facts and circumstances. These representatives shall also be liable if they have maliciously performed actions resulting in a decrease of the property of the legal entity, respectively non-payment of taxes or compulsory social-insurance obligations.

The new regulations broaden the group of liable persons. It is provided that any person who is authorized to perform actions within the competence of a managing director shall be considered a procurator. A business agent shall be considered any person who falls within the definition of a business agent pursuant to the Commercial Act even if such a person is not entitled to a remuneration. Business agents shall also be considered the persons who act on behalf of a company without proper authorization, provided that the company has not objected to the performed actions.

The group of actions resulting in liability for representatives of companies has also been extended. In addition to previously provided cases, liability now shall also arise from actions related to expropriation of the enterprise of the legal entity and actions related to encumbering of assets owned by the legal entity with the purpose to guarantee payment of a debt owed by another entity or individual, provided that the assets in question have been cashed in favor of the beneficiary.

Liability for adverse actions shall arise for major shareholders, provided that the adverse actions have been undertaken as to enforce a formal decision of the shareholders. Liability shall not arise for those shareholders who did not vote and for those who voted against the decision in question. The provision does not make it clear and a dispute may arise whether the management
bodies/authorized persons may be held liable if they have undertaken any adverse actions based on a formal decision taken by major shareholders.

The liability of representatives and major shareholders shall be limited to the amount of the payments made, respectively to the amount by which the assets of the legal entity have been decreased.

**Liability of shareholders and concealed partners**

In addition to the cases of adverse actions performed on the grounds of a formal decision adopted by major shareholders, as described above, the newly adopted TSSPC provisions also define other circumstances under which shareholders shall be held liable for public obligations of legal entities.

It is provided that a liability for unsettled tax and social security obligations shall arise for major shareholders who maliciously transfer the ownership of their shares as to cease being major shareholders.

An additional condition required is that the persons in question possess the capacity of shareholders as at the day the public obligations arise. The transfer of shares is considered malicious when the shareholder was aware at the time that the company was insolvent or over-indebted and the transfer of shares occurred prior to the declaration of bankruptcy or the rejection of the request to declare the debtor bankrupt. The transfer of shares is also considered malicious when it occurs after a procedure for tax and social-security control has been initiated pursuant to the TSSPC provisions.

Furthermore, it is set out that a liability shall arise for minor shareholders if the latter simultaneously or successively in a period no longer than three months maliciously transfer their shares whose total price constitutes a major share of the capital. It is explicitly laid down that the above regulation shall not apply to minor shareholders in joint-stock companies which offer shares publicly.

The liability of shareholders shall be proportional to the transferred shares.

The new regulations do not provide for any difference between shareholders - individuals or legal entities. It means that legal entities which own shares in another legal entity may be held liable for unsettled public obligations of the legal entities they participate in. This raises the question whether the representatives of the liable shareholders – legal entities may be held liable themselves or the liability shall only arise for the liable legal entity.
Shareholders who have benefited from a concealed profit or dividend distribution shall be held liable for unsettled obligations for taxes and social security contributions of the legal entity, provided that the obligations have arisen in a time when the liable individuals had the capacity as shareholders. The liability shall be limited to the amount of the received sums unless the concealed distribution of profit has been disclosed to the authorities.

It is also provided that a liability shall arise in cases of the so called 'concealed partnership' – persons who participate in a concealed partnership shall incur joint liability along with the insolvent legal entity for the unsettled payments of taxes and social security contributions.