The Corporate Governance Review

Ninth Edition

Editor
Willem J L Calkoen

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THE CORPORATE GOVERNANCE REVIEW

Ninth Edition

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this ninth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society, and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management, and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust.

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What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well. Recently, we see that governments want to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in R&D. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management with new risks entering such as a digitalised world and cybercrime is an essential part of directors' responsibilities, as is the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders, regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. Understanding differences leads to harmony. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2019

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Chapter 20

POLAND

Andrzej Wierciński, Anna Wojciechowska and Anna Wyrzykowska[1]

I OVERVIEW OF GOVERNANCE REGIME

i Legal framework: sources of law

In Poland, general corporate governance rules applicable to companies, including listed companies, are laid down in the Commercial Companies Code of 2000 (CCC), which replaced the former Commercial Code of 1934. The CCC sets out the general duties and powers of the various corporate bodies, as well as rules on representation, conflicts of interest and the liability of management board members.

As regards listed companies, further rules are contained in the following acts:

a the Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies, which includes rules regarding takeover offers and general duties of listed companies;

b the Act on Trading in Financial Instruments, which contains provisions on disclosure of non-public information that could affect the market in respect of a listed company's shares and a prohibition on insider trading;

c the Accounting Act, which contains rules regarding financial reporting and disclosure; and

d the National Court Register Act, which contains rules on filings with the public register of companies.

Compliance with the above rules can, if necessary, be enforced through the courts and, with respect to the capital market regulations, by the Financial Supervision Authority. The significant role of registry courts in respect of the National Court Register goes far beyond the mere authority to maintain the public registers. Under certain circumstances, the registry courts may decide to dissolve a company (although this is very rare in practice). Companies with state participation fall additionally under special regime introduced by the Act on the Management of State Property, which entered into force on 1 January 2017.

ii Legal framework: best practice relating to the governance of listed companies

Alongside the above statutory rules, companies listed on the Warsaw Stock Exchange (WSE) are also expected to follow corporate governance rules adopted by the WSE. The first formal document containing these rules was adopted by the WSE in early 2000 and entered into force in 2002. Since then, it has been revised regularly and adapted to the needs of the

1 Andrzej Wierciński is a senior partner and Anna Wojciechowska and Anna Wyrzykowska are partners at WKB Wierciński, Kwieciński, Baehr.

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growing Polish capital market. The most recently adopted Best Practice of WSE Listed Companies 2016 (Best Practice Code) came into force on 1 January 2016. These rules apply on a voluntary basis (i.e., as soft law).

In contrast to the version that was in force in from 2008 to 2015, the latest Best Practice Code uses a legislative approach adopted in the UK Corporate Governance Code (formerly the Combined Code) and repeated in the EU model of corporate governance rules, consisting of general principles followed by detailed guidelines. The absence of such general principles in the earlier Best Practice Code was heavily criticised. In particular, it was emphasised that without general principles, the Best Practice Code was essentially just a manual providing a set of technical rules. Apart from seeking to protect shareholders' interests, the current version permits the rules to be better understood and properly applied, which serves the interests of all members of a company's governing bodies.[2]

Compliance with the Best Practice Code is monitored by the WSE, and listed companies have certain disclosure obligations in this regard based on the comply or explain model.

There are separate best practice rules that apply to companies listed on New Connect, a stock exchange for smaller companies that is generally subject to less stringent rules and oversight.

Financial institutions are also obliged to implement the current Corporate Governance Rules for Supervised Institutions issued by the Financial Supervision Authority, which have been in force since 2014.

II CORPORATE LEADERSHIP

In Poland, only joint-stock companies can be listed. The relevant regulations of the CCC provide for a mandatory two-tier board structure for joint-stock companies that consists of a management board and a supervisory board.

i Board structure and practices

Composition, appointment and dismissal

Management board

The management board of a company must have at least one member (with no applicable maximum number of members unless otherwise specified in the articles of association). Only individuals can be members. In particular, another company may not be appointed to the management board.

If a fixed or a minimum number of management board members is provided in the articles of association and that number of members is not appointed, even temporarily, then the ability of the management board to validly represent the company may be compromised. To avoid any such issues, most companies have articles of association specifying that the management board consists of one or more members.

The competence to appoint, remove or suspend a management board member is vested in the supervisory board, unless the articles of association of the relevant company provide otherwise (e.g., by stipulating that the management board members are appointed

2 A Opalski in A Opalski, ed., *Kodeks spółek handlowych: Tom IIIA: Spółka akcyjna* (2016), pp. 81–82.

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by way of a shareholders' resolution or by conferring rights on a certain shareholder to make nominations). Management board members may always be removed or suspended by the shareholders at a general meeting.

Following the amendment of the CCC, which entered into force on 1 January 2017, the articles of association or a resolution of a general meeting may stipulate certain criteria that should be met by a management board candidate, or may provide a detailed qualification procedure.

There is the possibility to temporarily appoint one member of the supervisory board to the management board. Such an appointment (which is an exception to the general division of functions between company bodies and the non-compatibility rule described below) is only allowed for up to three months and is only used in exceptional circumstances (e.g., after the resignation of a management board member and before the appointment of a new candidate).

The Best Practice Code provides that management board members should be of high quality and experienced, and the overall composition of the board should ensure diversity as regards matters such as gender, age, education and professional background.

Generally, no minimum term applies to the appointment of management board members, although a single term of office cannot exceed five years. Reappointment for a subsequent term cannot be made earlier than one year before the end of the current term of office. If the articles of association do not provide any specific term of office, the mandate of a management board member automatically expires, at the latest, on the date of the general meeting approving the financial statements for the final full financial year of service of the relevant management board member. Similarly, if a term of office is specified in the articles of association, the mandate of a management board member expires upon approval of the financial statements for the final full financial year of that term. In 2016, the Supreme Court ruled that, for these purposes, the final full financial year is the final financial year that commenced during the term of office.[3] The ruling brought an end to debate in the legal doctrine with regard to that aspect of the interpretation of the regulation. This is an important development, because miscalculation of the expiry of mandates of management board members could have significant consequences. In particular, a management board member without a valid mandate cannot validly represent the company, and as such, the effectiveness of any acts undertaken by a management board member after the expiry of the mandate could potentially be brought into question, sometimes years later. Following the amendment of the Civil Code adopted in 2018, from 1 March 2019 onwards it will be possible for a company to confirm legal acts undertaken by the member or members of its management board without a valid mandate (similar to acts of a *falsus procurator*). This brings an end to a discussion regarding the controversies regarding whether such a possibility exists with respect to acts undertaken by a company's organs.

The articles of association may provide for a joint term of office of the management board members. In such cases, the mandates of all members generally expire at the same time, even if a particular management board member was appointed during the term of office.

3 Resolution of the Supreme Court dated 24 November 2016, III CZP 72/16; although it concerns members of the supervisory board, the ruling is also relevant to management board members because of the similar statutory regulations in respect of the terms of office.

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A management board member may generally be removed without reason at the discretion of the general meeting or other nominating body. However, the articles of association may limit this right to circumstances in which there are valid reasons for removal.

Supervisory board

The supervisory board of a listed company must consist of at least five members, and there is no maximum unless otherwise specified in the articles of association. Because of the division of functions between the management board and the supervisory board, it is not possible for a management board member to be a supervisory board member at the same time. The same restrictions apply to a commercial proxy, a liquidator, a manager of a branch office of the company and certain other persons employed by the company.

Members of the supervisory board are generally appointed and dismissed by way of resolutions at a general meeting. Irrespective of the appointment rules specified in the articles of association, the regulations of the CCC provide a special appointment procedure designed to protect the interests of minority shareholders. Shareholders representing at least one-fifth of the share capital may request that the election of the supervisory board at a general meeting take place by voting in separate groups. Shareholders may create groups by division of the total number of shares represented at the general meeting by the number of supervisory board members to be appointed. Each group may then elect one supervisory board member.

The recommendations of the Best Practice Code regarding the composition of the management board and diversity are equally applicable to the supervisory board. Additionally, at least two members have to fulfil the independence criteria described in the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.[4] Neither an employee of the company, a subsidiary or an affiliated company, nor a person holding at least 5 per cent of the shares in the company, can be regarded as independent for these purposes. The new Act on auditors and auditors' firms that entered into force 2017[5] introduced further criteria for part of the supervisory board members in listed companies. Under this Act, an audit committee appointed by the supervisory board from its own members is obligatory in such companies. The audit committee members (there must be at least three of them), being supervisory board members at the same time, apart from fulfilment of the independence criteria must have knowledge and skills in the scope of the industry in which the company is operating, whereby at least one of them must have knowledge and skills in the scope of accounting or examination of financial statements.[6]

The rules regarding the term of office and expiry of the mandate of a supervisory board member are the same as for the management board members as described above.

Legal responsibilities and representation

Management board

The competence to represent a company in relation to third parties generally lies with the company's management board. Specifically, management board members are entitled to

4 2005/162/EC.

5 Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017.

6 Articles 128 Section 1 and 129 Sections 1,3 and 5 of the Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017.

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represent the company in relation to third parties in all judicial and extrajudicial matters. The representation rules specified in the articles of association may provide for either joint or individual representation. The rules on joint representation may provide that the company can be represented by a management board member acting jointly with a commercial proxy. The notion of commercial proxy in Poland is similar to that of *Prokura* in Germany.

As a general rule, each management board member is responsible for the day-to day management of the company.

The competence of the management board to manage the company's business may, to a certain extent, be limited. In particular, it may be subject to a list of reserved matters for which the consent of the supervisory board or the shareholders by way of resolution at a general meeting is required. In such situations, the supervisory board role is strengthened or the shareholders in general meeting are more involved in crucial decisions concerning the management of the company. However, exceptionally detailed or exhaustive catalogues of reserved matters for the supervisory board may not be permissible because, in practice, the need for the approval of the supervisory board may be tantamount to it giving binding instructions to the management board, which is prohibited.

In the course of performing their duties, the management board members are obliged to act with due care necessitated by the professional nature of their activity. In 2012, the Court of Appeal in Poznan emphasised[7] that a management board decision can be made based on analyses prepared by the company's employees or opinions of external persons who have the required special knowledge. However, simply entrusting other persons with an issue is not on its own sufficient to fulfil the obligations of due care of a management board member. In particular, the responsibility for decision-making cannot be shifted to a subordinate.

The management board members have fiduciary duties towards the company and are obliged to act in the interests of the company. Following a resolution of the Supreme Court in 2009, it is clear that the interests of the company are not independent and abstract from the interests of the shareholders, but the interests of the shareholders should be taken as a whole.[8]

Supervisory board

The supervisory board exercises ongoing supervision of all the company's activities. For that purpose, the supervisory board members may inspect all the company's documentation and request information from the management board and the company's employees.

The specific responsibilities of the supervisory board include, in particular, evaluating annual financial statements, annual management board reports and motions from management concerning decisions on the company's profits or losses. The supervisory board provides the shareholders with an annual written report on the results of the evaluation. The basic scope of supervisory board responsibilities may be extended and include, among other things, reserved matters for which management is obliged to get supervisory board approval.

The powers of the supervisory board also include suspending (but only for significant reasons) an individual or all management board members from their duties and temporarily appointing supervisory board members to the management board (for a period no longer than three months) to perform the duties of management board members who were dismissed, who resigned or who are incapable of performing their duties for other reasons. The supervisory

7 Judgment of the Court of Appeal in Poznan – I Civil Division dated 11 October 2012, I ACa 336/12.
8 Resolution of the Supreme Court – Civil Chamber dated 22 October 2009, III CZP 63/09.

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board is not entitled to issue binding instructions to a management board member and the supervisory board members cannot represent the company in relation to third parties, except in relation to agreements or disputes with the management board members.

Supervisory board and management board

Delegation of board responsibilities

The supervisory board members generally act jointly. Indeed, the regulations of the CCC explicitly apply a collectivity principle to the activities of the supervisory board. In accordance with this principle, a supervisory board member cannot act individually without the prior authorisation of the entire supervisory board. However, the supervisory board may delegate an individual supervisory board member to undertake certain specific supervision activities.

As a general rule, and unlike the supervisory board members, each management board member is responsible for the day-to-day management of the company. The management board is entitled to issue its own by-laws regulating its internal operation, unless the authority to issue the by-laws is granted under the articles of association to the supervisory board or to the shareholders in a general meeting.

The by-laws may provide for the delegation of certain areas of the company's operations to individual management board members. However, the delegation of functions within the management board does not relieve the other management board members of their responsibility for those functions. Management board members are obliged to control each other and prevent a negative outcome for the company (horizontal control). According to the Best Practice Code, such an internal division of responsibilities should be clear and unambiguous and published on companies' websites.

Roles of the chair

There is the possibility to appoint one of the management board members as the president of the management board. However, unless provided otherwise in any management board by-laws or the articles of association, no particular duties or powers apply to the president. As such, this function is not necessarily the same as or comparable to the position of a CEO or president of a US corporation.

In the case of a supervisory board, there is often a chair and a deputy chair. Unless explicitly granted additional powers (e.g., a decisive vote if there is no majority on a supervisory board decision), the main power of the chair is basically to open general meetings. Usually, the chair has administrative functions with respect to the supervisory board, such as preparing agendas for and chairing its meetings.

Remuneration

The shareholders should determine the general remuneration policy of the company including, among other things, caps and remuneration systems, as well as any rights of the management board members to participate in the company's profits. However, the specific remuneration of the management board members is usually determined by the supervisory board.

According to the Best Practice Code, the level of remuneration of management and supervisory board members and key managers of the company should be sufficient for the acquisition, retention and motivation of persons with the qualities and range of competences generally required by the company, as well as being adequate with regard to the specific tasks and any additional functions discharged by the relevant individual.

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III DISCLOSURE

According to accounting rules, a listed company is obliged to include a separate statement on corporate governance in its annual management board report. These statements are subject to review by an external auditor. Matters referred to in the Best Practice Code and marked with 'R' are recommendations for disclosure in these statements. Instances of non-compliance with matters marked with 'Z' fall under the comply or explain principle. Specifically, a listed company has to report cases of non-compliance with matters marked with 'Z', whether permanent or incidental, including information on the reasons for non-compliance and the steps to be undertaken to ensure future compliance. The report has to be published on the company's websites, as well as by the same method employed for ongoing reporting and disclosure. The report has to be published immediately after the non-compliance occurred. Similarly, a report has to be published immediately if the company decides not to apply a relevant recommendation. The Best Practice Code requires that a company explicitly explain the reasons for any non-compliance.

As emphasised by commentators,[9] it cannot be excluded that in certain cases a failure to report non-compliance with a particular recommendation of the Best Practice Code may infringe the obligation to disclose confidential information provided in Article 17 of the Market Abuse Regulation (MAR),[10] which means that such an infringement may potentially be subject to criminal, administrative and civil liability. A failure to report non-compliance with the recommendation to disclose transactions with a shareholder representing 5 per cent of the votes in the company or an affiliated company without supervisory board consent is an example of a situation in which such liability might apply.

IV CORPORATE RESPONSIBILITY

i Risk management and compliance

Polish listed companies are not obliged to adopt any risk management regulations, or to appoint a risk officer or establish a risk committee. Polish law is quite traditional in this respect, making management board members liable for their decisions that exceed the permitted risk doctrine. Responsibilities are usually divided among management board members. According to the Best Practice Code, which is not binding, the internal division of responsibilities for individual areas of a company's activity among management board members should be clear and transparent, and a chart describing that division should be available on the company's website.[11]

However, at the same time, according to the Best Practice Code, a company should maintain efficient internal control, risk management and compliance systems, and an efficient internal audit function adequate for the size of the company and the type and scale of its activity.[12] Responsibility for the implementation and maintenance of the above rests with the management board. The staff working in particular units responsible for risk management,

9 K Oplustil in Mirosław Stec, ed., *Law on Financial Instruments* 2016 (1st edn), pp. 932–933.

10 Regulation (EU) 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

11 Principle No. II.Z.1.

12 Ibidem, Part III.

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internal audit and compliance should report directly to the president or another member of the management board, and should be allowed to report directly to the supervisory board or the audit committee. A supervisory board, which is obligatory in joint-stock companies, is generally responsible for exercising supervision over a company's activity. However, listed companies are also required to appoint an audit committee. The audit committee should consist of at least three members appointed by the supervisory board to monitor, among other things:

a the financial reporting process;

b the effectiveness of internal control systems, internal audit systems and risk management;

c the performance of financial audits; and

d the independence of the auditor and the entity authorised to audit financial statements.[13]

Polish law does not provide for any specific whistle-blowing regulations for listed companies (although provisions regarding whistle-blowing procedures mitigating anti-bribery risks are currently subject to parliamentary works). Obviously, auditors responsible for examining a company's financial statements and books play an important gatekeeping role. Nonetheless, there is a general trend towards implementing internal whistle-blowing systems in line with the compliance regulations introduced by corporations internally. At present, almost every listed company has such internal procedures in place, or is in the process of adopting the same.

The implementation of internal compliance and risk management regulations is also becoming increasingly common in the market because of new laws that allow the imposition of very high penalties on corporations and their managers, while at the same time extending their corporate liability. For instance, EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data allows corporations to be penalised for infringements with administrative fines of up to €20 million, or, in the case of an undertaking, up to 4 per cent of the total worldwide annual turnover of the preceding financial year, whichever is higher;[14] and the MAR,[15] which, in certain circumstances described therein, allows the imposition on legal persons of a penalty of €15 million or 15 per cent of the total annual turnover of the legal person according to the most recent available accounts approved by the management body. In certain cases, EU regulations are transposed into Polish law, for example, in relation to liability in cases of unintentional infringement of competition and consumer protection law, which may be penalised with an administrative fine of up to 10 per cent of the turnover achieved in the financial year preceding the year in which the fine is imposed.[16]

The visible practice of the implementation of risk management and internal compliance regulations is a sign that the tone from the top (i.e., ethical business standards set by top

13 See Article 130 Section 7 of the Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017.

14 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

15 See footnote 8.

16 Protection of Competition and Consumers Act dated 16 February 2007.

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management) is slowly but steadily breaking through to Polish corporate society. However, as usual, reality is different from theory, since it is created by managers who are not always appointed as a result of a contest.

ii Corporate social responsibility

We observe a general tendency for higher expectations among corporations: increasingly, more businesses and their top management focus not only on gaining financial profit, but also on supporting values and goals promoted and supported worldwide. An example of these values and goals is described in the UN 2030 Agenda for Sustainable Development, raising such issues as affordable, decent work and economic growth, and partnerships between governments, the private sector and civil society. A more detailed example of cooperation between the private and public sectors and their joint cooperation is the Paris Agreement on climate change adopted during the UN conference held in 2015 in Paris.

These trends are also visible from the Polish perspective, and Polish corporations are expected to live up to a set of general social, economic and climate expectations. However, no general corporate responsibility rules are implemented in this respect, especially in corporate law. What is being introduced internally for all company's employees, managers and members of supervisory boards are certain ethical and business conduct standards.

V SHAREHOLDERS

i Shareholder rights and powers

Equality of voting rights

A company may issue either registered or bearer shares.[17] By definition, a listed company is a company in which at least one share is dematerialised.[18] Only bearer shares may be dematerialised. Except for silent shares (non-voting shares), only registered shares may be preference shares.

As a rule, the preference may concern in particular the voting right the right to dividends; or the distribution of a company's assets in the event of its liquidation.

A single share may carry no more than two votes. In the event that such a share is changed into a bearer share or disposed of in breach of certain reserved conditions, the privilege expires. While the voting preference does not apply to listed companies,[19] before the CCC was adopted listed companies were also allowed to issue preference shares, and therefore they may still exist in the Polish market.

The powers of shareholders to influence the board

The general meeting and the supervisory board may not give binding instructions to the management board concerning the running of the company's affairs.[20] (This regulation is

17 Article 334 Section 1 of the CCC.

18 Article 4(20) Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies.

19 Article 351 Section 2 of the CCC.

20 Article 3751 of the CCC.

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limited only to internal relations within the company since, from the point of view of outside relationships, the right of management board members to represent the company may not be restricted with a legal effect with respect to third parties.[21])

The above reflects the principles governing joint-stock companies, such as the principle of separation of capital from management and the principle of the presumption of competence of the management board. This also supports the principle that liability is related to those who make decisions.[22] The discussed regulation does not preclude the right of the general meeting or the supervisory board to give non-binding guidelines and advice (i.e., suggestions on taking a position or other recommendations). However, a board's failure to comply with such guidelines does not render board members liable for damages and should not constitute a valid reason to dismiss a board member if the articles of association limit the right of dismissal only to valid reasons.[23] In practice, articles of association rarely make such provision, and therefore board members must take into account that they can be dismissed in such cases. Furthermore, there is a general rule that, in relationships with the company, members of the management board shall be subject to restrictions set forth in the CCC, articles of association, management board by-laws, and resolutions of the supervisory board and the general meeting.[24] Thus, the general meeting may actually influence the management board if competence for this is included in the articles of association.

It is noted, however, that the above-mentioned right is reserved for the shareholders' meeting and not individual shareholders. The rights of individual shareholders are limited to the right to information, and not the right to influence the board.

Decisions reserved to shareholders and subject to shareholder approval

Pursuant to the CCC, the shareholders' consent is required for the following:

a examination and approval of a management board report on the company's operations, financial statements for the previous financial year, and granting a vote of approval to members of the company's bodies for the discharge of their duties;

b decisions concerning claims for redressing damage inflicted upon the formation of the company or exercising management or supervision;

c disposal or lease of the enterprise or an organised part thereof, and establishment of a limited right *in rem* thereon;

d acquisition and disposal of real property, perpetual usufruct or an interest in real property, unless the articles of association provide otherwise;

e issue of convertible bonds or senior bonds and issue of subscription warrants;

f acquisition of own shares and authorisation to acquire the same under the circumstances set forth in the CCC; and

g conclusion of a management contract between the company and its subsidiary.[25]

The following also require a resolution of the general meeting: contracts for the acquisition of any assets for the benefit of the company (including the acquisition of property from the

21 Article 372 Section 2 of the CCC.

22 S Sołtysiński, A Szajkowski, A Szumański, J Szwaja, *Kodeks spółek handlowych: Tom III: Spółka akcyjna: Komentarz do artykułów 301–490* (3rd edn, Warsaw, 2013).

23 Ibidem.

24 Article 375 of the CCC.

25 Article 393 Section 1 of the CCC.

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controlling company or from a subsidiary company or cooperative), for a price higher than one-tenth of the paid-up share capital, from the company's founder or shareholder, or for a subsidiary company or cooperative from the company's founder or shareholder, executed prior to the lapse of two years from the company registration.

The foregoing does not apply to the acquisition of assets on the basis of the provisions of law concerning public procurement, liquidation, bankruptcy and execution proceedings, and to the acquisition of securities and commodities on the regulated market.[26]

The articles of association may specify other matters reserved to the competence of the shareholders' meeting. While the absence of a shareholders' resolution required by the articles of association does not make a particular action invalid, neither does it preclude the liability of members of the management board towards the company for violation of the articles of association. Furthermore, the absence of a shareholders' resolution required by the provisions of the CCC (which may be granted two months after the action at the latest) does entail the invalidity of an action.

Rights of dissenting shareholders

The CCC and other regulations applicable to listed companies provide for the principle of majority rule. Nonetheless, minority shareholders are to some extent protected and are vested with rights aimed at guaranteeing them a certain influence in company matters.

For instance, at the request of a shareholder or shareholders in a public company holding at least 5 per cent of the total vote, the general meeting may resolve to mandate an expert to review, at the company's expense, a specific issue relating to the company's incorporation or the conduct of its business (a special-purpose auditor). To this end, the shareholders may request that an extraordinary general meeting be convened or that the adoption of such a resolution be placed on the agenda of the next general meeting. The management board and the supervisory board of the public company shall provide the special-purpose auditor with the documents specified in the resolution of the general meeting or in the court's decision to appoint the special-purpose auditor, and shall also provide all the explanations necessary for the performance of the review.[27]

Furthermore, minority shareholders have the right to appoint members of the supervisory board by a vote in separate groups, which may be executed at the request of shareholders representing at least one-fifth of the share capital, even if the company's articles of association provide for a different manner of appointing the supervisory board.[28] As a result of the aforementioned regulation, the minority shareholders representing at least 20 per cent of votes may have their representative appointed to the supervisory board.

Facilities for long-term shareholders

Polish law does not provide for any specific facilities (such as extra votes or extra dividends) for long-term shareholders, except for the option to obtain preference shares incorporating a right to a dividend on advantageous terms compared with other shareholders. For example, shares carrying special dividend rights may entitle the holder to a dividend that exceeds by

26 Article 394 Section 1, 2 and 4 of the CCC.

27 Articles 84–86 Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies.

28 Article 385 Section 3 and 9 of the CCC.

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no more than one-half the dividend to be distributed to holders of non-preference shares. Shares carrying special dividend rights do not enjoy priority of satisfaction over other shares and may be deprived of voting rights (non-voting shares).[29]

ii Shareholders' duties and responsibilities

Controlling shareholders' duties and liability

Polish law does not impose any special requirements on controlling shareholders apart from the obligation (which applies to all shareholders) to notify the Financial Supervision Authority and the company about reaching or exceeding a particular percentage of the total votes in a company or a change in the share of votes held in excess of 10 per cent of the total votes by at least:

a 2 per cent of the total votes in a public company, the shares of which have been admitted to trading on the official stock exchange listings; and

b 5 per cent of the total votes in a public company, the shares of which are admitted to trading on another regulated market, or a change in the share of votes held in excess of 33 per cent of the total votes by at least 1 per cent of the total votes.

Furthermore, the majority shareholder is obliged to purchase shares of the minority shareholders under the buyout procedure.[30] A shareholder or shareholders representing not more than 5 per cent of the share capital may demand that the agenda of the next general meeting include the issue of adoption of a resolution on the compulsory buyout of their shares by no more than five shareholders holding, in aggregate, no less than 95 per cent of the share capital, where each of them holds no less than 5 per cent of the share capital (majority shareholders).

Institutional investors' duties and best practice

Neither the CCC nor the Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies provide for any regulation specifically relating to institutional investors; nor is there any specific best practice code for such investors or other shareholders besides the Best Practice Code.

According to the Best Practice Code, the general meeting should deliberate with respect to the rights of shareholders and make sure that the resolutions do not infringe upon legitimate interests of various groups of shareholders. Moreover, the shareholders participating in the general meeting are obliged to exercise their powers in a manner not prejudicial to good practice.

iii Shareholder activism

Say on pay

There is no general rule that a company's shareholders have the right to vote on the remuneration of executives. Save as otherwise provided in the company's articles of association, according to the general rules provided in the CCC, the supervisory board sets the remuneration of management board members employed under employment contracts or other contracts, and the general meeting may authorise the supervisory board to establish

29 Article 353 Section 1-3 of the CCC.

30 Article 418(1) of the CCC.

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that the remuneration of members of the management board shall also include the right to participate, in a specified manner, in the company's annual profit allocated for distribution among the shareholders. Obviously, the company's articles of association may provide that the rules of the remuneration are determined by the shareholders.

The Best Practice Code specifies only that companies have a remuneration policy at least for management board members and key managers. The remuneration policy should specify, in particular, the form, structure and method of determining the remuneration of members of a company's bodies and its key managers.

Derivative actions

Under Polish law, if a company fails to file a statement of claim for redressing damage within one year of the disclosure of the act resulting in the damage caused to the company, each shareholder or person otherwise entitled to participate in profit or in distribution of assets may file a statement of claim for redressing the damage suffered by the company (*actio pro socio*).[31]

Furthermore, a shareholder has the right to file a statement of claim to repeal or declare a resolution of the general meeting invalid if:

a the shareholder voted against the resolution and, upon the adoption thereof, requested that his or her objection be recorded in the minutes. The voting requirement does not apply to shareholders holding a non-voting share;

b the shareholder was prevented from participating in the general meeting without a sound reason; and

c the shareholder was absent from the general meeting, only in the event of a defective convening of the general meeting or adoption of a resolution on a matter not included in the agenda.

Any resolution of the general meeting that is in conflict with the provisions of the articles of association or good practice and detrimental to the company's interest or aimed at harming a shareholder may be appealed against by filing a statement of claim against the company to repeal the resolution. A statement of claim against the company to declare a resolution of the general meeting invalid may be filed if the resolution was adopted in breach of the law. Both proceedings may only be commenced within statutory periods.

Proxy battles

Polish law does not set out any regulations that would prohibit shareholders from joining forces and gathering enough shareholder proxies to win a corporate vote. It is a strategy that often accompanies takeovers.

Formally, the right to appoint a proxy at the general meeting and the number of proxies cannot be limited. A proxy exercises all rights of the shareholder at the general meeting unless the power of attorney provides otherwise. A proxy may grant a further power of attorney if the power of attorney so provides. A proxy may represent more than one shareholder and vote differently under the shares held by each shareholder. A shareholder holding shares registered on a collective account may appoint separate proxies to exercise the rights attached

31 Article 486 Section 1 of the CCC.

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to the shares registered on this account. A shareholder holding shares registered on multiple securities accounts may appoint separate proxies to exercise the rights attached to the shares registered on each account.

The provisions on the exercise of a voting right by proxy apply to the exercise of a voting right through another representative.[32]

Shareholder campaigns

There are no regulations or established market practice regarding shareholder campaigns.

iv Takeover defences

Shareholder and voting rights plans, white-knight defences and other measures

The Takeover Directive[33] has not been fully transposed into Polish national legislation, and therefore there are no explicit provisions governing the admissibility of reactive defensive measures that could be undertaken by the management board. It is clear that the shareholders taking over a company are guided exclusively by their own interests rather than the interests of the company, which might be better judged by its management board, representing the next shareholders' interests, as well as the interests of other persons associated with it (i.e., company stakeholders such as banks, creditors, employees and the state).

Members of the management board generally do not support takeovers since they are likely to lose their positions in the aftermath of a takeover. Therefore, through the prism of their own interests, they opt for taking defensive measures *ad hoc*. Unfortunately, Polish law does not regulate (neither authorises, nor prohibits, nor requires) the admissibility of reactive defensive measures by the management without the authorisation of the general meeting. Consequently, in principle, and if they are not prohibited by law, defensive measures are allowed, and their exercise depends on the will of the management board members and the actual position of the management board in the company. From a broader perspective, however, it seems that the taking of defensive measures by the management board, and thus exerting influence on the shareholding structure, does not fall within the competence of the management board under the CCC at all.

The regulation aimed at protecting companies against takeovers stipulates an obligation to announce a takeover bid for the sale or exchange of shares. The purpose of the announcement is to allow other shareholders to exit the company or to reduce their involvement therein, and consequently to have one of the investors acquire a stake resulting in the acquisition (change) of control of the company. If the shareholder taking over the company fails to make the announcement and, at the same time, exceeds a certain threshold of the total votes in the company, that shareholder cannot exercise the voting rights attached to the shares. Furthermore, the Financial Supervision Authority may impose a penalty of up to 10 million zlotys on the entity that failed to make the announcement.[34]

32 Article 412 Section 1-7 of the CCC.

33 2004/25/EC.

34 Article 97 Section 1 Item (5) and (5a) of the Act on Public Offering and Conditions for Introducing Financial Instruments to Organised Trading, and Public Companies.

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Staggered boards

The rules for the appointment and dismissal of members of the company's bodies should be described in the articles of association subject to the provisions of the CCC. In the absence of any statutory provision, it would seem that the company's articles of association may provide for staggered boards. However, according to the statutory rule, members of a company's bodies may always be revoked by the general meeting. Therefore, staggered boards are not a sufficient solution for takeover defences under Polish law.

v Contact with shareholders

Mandatory and best practice reporting to all shareholders

The mandatory provisions applicable under Polish law focus on the shareholders' right to information. Compared with the right to information in limited liability companies, this right is limited in joint-stock companies since, together with the right of supervision, it is vested with the supervisory board, which should be appointed within the company.

The main source of information for shareholders is reports, which the company is obliged to publish immediately, or at least no later than 24 hours after the occurrence of or upon becoming aware of a reportable event. Furthermore, pursuant to the provisions of the CCC, in the course of the general meeting, the management board is obliged to provide a shareholder, at the latter's request, with information concerning the company, if this is justified for the purpose of evaluating an issue included in the agenda. The management board may refuse to provide information if it could inflict damage on the company, an affiliate company or a subsidiary company or cooperative, in particular through the disclosure of technical, commercial or organisational secrets of the business enterprise. A management board member may refuse to provide information if providing it could constitute grounds for criminal, civil or administrative liability of the member. A reply is deemed given if relevant information is available on the company's website in a place designated for replies to shareholders' questions.

For important reasons, the management board may provide information in writing outside a general meeting. The management board is obliged to provide information within no more than two weeks of a request being submitted during a general meeting. If a shareholder submits a request for information concerning the company outside a general meeting, the management board may provide the information to the shareholder in writing. In the documents submitted to the next general meeting, the management board is obliged to disclose in writing information provided to a shareholder outside a general meeting together with the date on which the information was provided and the person to whom it was provided. Information submitted to the next general meeting does not have to include information made public and provided during a general meeting.

A shareholder refused requested information in the course of a general meeting who has requested that his or her objection be recorded in the minutes may apply to the registration court requesting that the management board be obliged to provide the information.[35]

According to the Best Practice Code, companies should ensure adequate communications with investors and analysts by pursuing a transparent and effective disclosure policy. To this end, they should ensure easy and non-discriminatory access to disclosed information using diverse tools of communication. The Best Practice Code specifies all the information

35 Articles 428 and 429 of the CCC.

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that should be published on a company's website.[36] Furthermore, if a shareholder requests information concerning the company, the company's management is obliged to respond to the shareholder no later than within 30 days, or notify him or her of its refusal to provide the information, if the management board made this decision on the basis of Article 428 Section 2 and Section 3 of the CCC.[37] All responses should be published on the company's website.[38]

Selective meetings and communications: circumstances in which meetings can take place with individual shareholders

The Best Practice Code recommends that companies should allow investors and analysts to ask questions and receive explanations – subject to prohibitions defined in the applicable legislation – on topics of their interests. This recommendation may be implemented through open meetings with investors and analysts, or in any other format allowed by a company.[39]

It must be underlined that the principle of equality of shareholders should be observed with respect to meetings and the provision of information to shareholders. Issuers of securities admitted to trading on the regulated market are obliged to ensure equal treatment of the holders of securities of the same type in the same circumstances. The foregoing shall not prevent the issuer from redeeming debt securities earlier, pursuant to the legislation of the country where the issuer's registered office is established, in cases where derogation from the original conditions of issue is necessary in accordance with social priorities.[40]

Issue of information to shareholders in advance of shareholders' meetings

Companies should use best efforts, including taking all steps well in advance as necessary to prepare a periodic report, to allow investors to review their financial results as soon as possible after the end of a reporting period.[41]

Resolutions of the general meeting should allow for a sufficient period between decisions causing specific corporate events and the date of determination of the rights of shareholders pursuant to the corresponding events.[42]

As a rule, a periodic report should be published at least 26 days before the general meeting.[43]

VI OUTLOOK

With the Polish national economy constantly growing, it is clear that the public market will evolve. However, because of changes in the law, and particularly the adoption of the MAR, it is quite possible that we will see more delistings than IPOs. The main barriers

36 Principles Nos. I.Z.1.1–I.Z.1.21.
37 See the chapter on mandatory and best practice reporting to all shareholders.
38 Principle No. IV.Z.13.
39 Recommendation No. I.R.3.
40 Article 20 of the Act on Public Offering and Conditions for Introducing Financial Instruments to Organised Trading, and Public Companies.
41 Recommendation No. I.R.4.
42 Principle No. IV.Z.14.
43 Section 100.3 of the Ordinance of the Minister of Finance on current and periodic information provided by issuers of securities and conditions for recognising as equivalent information required under the law of a non-Member State.

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to the development of the Polish capital market are a limited inflow of capital, a lack of understanding of the market, risk aversion and the choosing of banks for savings. These are the reasons why stock market specialists and advisers underline how important it is to strive for the support and education of listed companies, and to tighten the requirements for small stock companies (i.e., New Connect, small companies stock; and Catalyst, bonds stock).

The corporate market and the listed companies market will also probably be influenced by a substantial change to Polish corporate law planned for a few years (i.e., the introduction of the Polish simplified joint-stock company, which is supposed to be similar to the French *société par actions simplifiée* or the Slovak *jednoduchá spoločnosť na akcie*). The initiative for this regulation came from the idea of creating a new simplified and inexpensive tool for start-up investments. However, even at this stage of work on the new regulation, it is emphasised that it must not be the only goal of the new company structure, which is also supposed to serve other, larger enterprises. The advantages offered by the simplified functioning of the simplified joint-stock company and its financing might attract more investors than the public stock market, where companies and their managers may be penalised with huge administrative fines, such as those provided for in the MAR.

Nonetheless, regardless of the above, we have recently seen a trend for an increasing number of IPOs.

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Appendix 1

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