# The Corporate Governance Review

Thirteenth Edition

**Editor**
Will Pearce

The Law Reviews

# THE CORPORATE GOVERNANCE REVIEW

THIRTEENTH EDITION

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# PREFACE

Over the past 40 years, corporate governance rules applicable to publicly traded companies have developed around the world, building on the basic corporate law framework governing the relationship between a company, its directors and its shareholders. These rules have taken a different form and legal status depending on the jurisdiction in question, usually ranging from mandatory compliance, or voluntary compliance with mandatory regular public disclosure of non-compliance, through to simple voluntary compliance with best practice or investor expectations.

In general terms, a common framework for corporate governance rules now seen across many jurisdictions comprises some combination of mandatory compliance with corporate law and stock exchange rules (the former focused on substance and the latter focused on disclosure) and voluntary compliance with guidance or best practice recommendations from national or supranational accounting or governance bodies or organisations representing investors.

Initially, corporate governance rules – led in large part by action taken by the Securities and Exchange Commission in the US, following the collapse of Penn Central in 1970 and other corporate scandals of the 1970s and 1980s, and by the publication of the UK's Corporate Governance Code by the Cadbury Committee in 1992 – focused on best practice recommendations for the composition of public company boards (including the important role of independent non-executive directors); the role, responsibilities and composition of board committees; and, in the UK, the separation of the roles of CEO and chair.

Driven by accounting scandals, audit failures and a perceived lack of checks and balances on the risk taken by public company boards, including the collapse of Enron, which declared bankruptcy in 2001, corporate governance rules sought to strengthen the powers and expectations of and oversight exercised by audit committees and the role of internal audit, notably through the adoption of Sarbanes-Oxley in the US in 2002.

Over the 15 years that followed, investor focus switched to the risks taken by and rewards offered to executive management, ultimately resulting in a number of jurisdictions adopting some form of 'say-on-pay' regime to help guard against outsized compensation packages driving excessive risk-taking. Investors also demanded greater gender diversity on public boards, with a consensus view emerging that a more balanced board would offer better decision-making and improved long-term stewardship of public companies for the benefit of all investors. Having made significant progress on gender diversity, a similar approach (with industry-set targets for representation and regular public disclosure of progress) has been adopted in a number of jurisdictions to help progress ethnic diversity.

Most recently, the 'g' of governance has been joined by the 'e' of environmental and the 's' of social, with traditional governance teams at investors now expecting public companies to take a more holistic ESG approach to business. This has driven a number of jurisdictions to require mandatory disclosure by public companies on environmental issues; the pay gap between executive management and the 'average' employee; and sustainability, supply chain and modern slavery issues.

To assist public companies, advisers and market participants alike, who are seeking to navigate this ever-evolving landscape, we are delighted to present the 13th edition of *The Corporate Governance Review*.

In this edition, we have included chapters covering 21 different jurisdictions. Each chapter provides an overview of the applicable corporate governance regime, roles and responsibilities of directors, details of required public disclosures of corporate governance-related matters, the rules of engagement with shareholders and the extent to which a public company can defend a takeover, together with an update of recent and forthcoming developments.

While every author has taken care to make this review comprehensive, up to date and accurate as at the publication date, please remember that each chapter provides only a summary and overview of a large body of law, regulation and market practice. If readers wish to explore specific issues that are of interest or pertinent to them, we suggest they seek detailed advice from suitably experienced counsel. Contact details for the authors are set out at the end of this review.

Finally, thanks to all of the authors, my colleague Sophie Vacikar Bessisso and Emily Wolfin at *The Law Reviews* for helping to pull together this edition.

**Will Pearce**
Davis Polk & Wardwell London LLP
London
April 2023

**Chapter 12**

# POLAND

*Andrzej Wierciński, Anna Wojciechowska and Anna Wyrzykowska*[1]

## I OVERVIEW OF GOVERNANCE REGIME

### i Legal framework: sources of law

General corporate governance rules applicable to companies in Poland, including listed companies, are laid down in the Commercial Companies Code of 2000 (CCC),[2] 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:

*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, in respect of 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 a special regime introduced by the Act on the Management of State Property, which entered into force on 1 January 2017.

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2 Unified text: *Journal of Laws* 2022, item 1467 as amended.

### 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 current Best Practice Code of WSE Listed Companies 2021 (the Best Practice Code) came into force on 1 July 2021. These rules apply on a voluntary basis (i.e., as soft law).

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 Corporate Governance Rules for Supervised Institutions issued by the Financial Supervision Authority, which have been in force since 2014.

## II CORPORATE LEADERSHIP

Only joint-stock companies can be listed (excluding simplified joint-stock companies). In joint-stock companies (excluding simplified joint-stock companies), 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.

### 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.

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 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.

It is possible to temporarily (for up to three months) appoint one member of the supervisory board to the management board as an exception to the general division of functions between company bodies.

The Best Practice Code provides that management board members should be of high quality and suitably experienced, and the overall composition of the board should ensure diversity as regards factors such as gender, age, education and professional background. In terms of gender diversity, the condition for ensuring diversity of the company's governing bodies (management board and supervisory board) is a minority of no less than 30 per cent in a given body.

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 on approval of the financial statements for the final full financial year of that term. It is important to correctly calculate the mandate of the management board members because miscalculation in this respect 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 is 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*).

The articles of association may provide for a joint term of office of the management board members. If that is the case, 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.

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, but there is no maximum unless otherwise specified in the articles of association.

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 (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.[3] 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 Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017 introduced further criteria for 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 (of which there must be at least three), being supervisory board members at the same time, as well as fulfilling the independence criteria, must have

3 2005/162/EC.

knowledge and skills in the scope of the industry in which the company is operating, and at least one of them must have knowledge and skills in the scope of accounting or examination of financial statements.[4]

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 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 be limited, to a certain extent. In particular, it may be subject to a list of reserved matters for which the consent is required of the supervisory board or the shareholders by way of resolution at a general meeting. In these situations, the supervisory board role is strengthened or the shareholders are more involved in the general meeting 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. The CCC incorporates the business judgement rule releasing the management board members from civil liability towards the company if they acted within the limits of reasonable economic risk, including on the basis of information, analysis and opinions allowing a careful assessment.

Furthermore, the management board members are bound to be loyal to the company and they cannot reveal confidential information about the company (even after the expiry of their mandates).

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.[5]

In this respect, in October 2022, the CCC was amended and now includes provisions regarding capital groups (in Germany, the law of corporate groups (i.e., *Konzernrecht*)). The Polish law of corporate groups is inspired partly by respective French regulations (in particular, the *Rozenblum* doctrine) and partly by the respective German regulations (in particular, regarding the issuance of binding instructions by the dominant company to the subsidiary).

4 ibid., Article 128, Section 1 and Article 129, Sections 1, 3 and 5.

5 Resolution of the Supreme Court – Civil Chamber, dated 22 October 2009, III CZP 63/09.

The purpose of the law of corporate groups is, on the one hand, to make it easier for the parent company to manage its Polish subsidiaries in pursuit of the interest of the capital group and, on the other hand, to provide adequate protection for the subsidiary and its minority shareholders and creditors. One of its main assumptions is that companies participating in a capital group are guided by the interest of the capital group, in addition to their own interest, provided that this does not infringe on the legitimate interest of creditors and minority shareholders of the subsidiary. The application of the group law within a certain capital group is not mandatory but depends on the decision of the respective companies included in the capital group. Furthermore, importantly, the law of corporate groups does not apply to public companies that are subsidiaries of a dominant company of a capital group.

The law of corporate groups mechanisms allowing the parent company to manage its Polish subsidiaries includes, inter alia, the issuance of binding instructions by the dominant company to the subsidiary, the right of the parent company to review books and documents of the subsidiary and to request information from a subsidiary, and the exercise of supervision by the supervisory board of the parent company over the implementation of the interest of the capital group by the subsidiary. Further, the Polish law of corporate groups determines specific regulations allowing the officers of the companies included in the capital group (e.g., the management board members and the supervisory board members) to invoke a specific interest of the capital group to exclude their civil liability towards the managed company for damages resulting from an act or omission undertaken in the specific interest of the capital group.

*Supervisory board*

A supervisory board exercises continuing 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 and losses. The supervisory board provides the shareholders with an annual written report on the results of the evaluation and with an annual report on the activities of the supervisory board in a given financial year. 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. Also, the obligations and competences of the supervisory boards were extended in October 2022 to include, inter alia, wider notification rights of supervisory boards and the right to appoint a consultant to examine a specific aspect of the company's activities.

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 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 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 or agreements with a supervisory board's consultant. Further, the consent of the supervisory board is needed in connection with the conclusion of certain agreements with affiliated companies.

***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).

*Roles of the chair*

It is permissible 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 chief executive officer or president of a US corporation.

In the case of a supervisory board, it is obligatory to appoint a chair who coordinates the functioning of the supervisory board.

## III CORPORATE DISCLOSURE

According to accounting rules, a listed company is obliged to include a separate statement on corporate governance in its annual management board report. This statement is subject to review by an external auditor. Each of the six chapters of the Best Practice Code (information policy and communication with investors, management board and supervisory board, internal systems and functions, general meeting and shareholders' relations, conflict of interest and transactions with affiliated entities, and remuneration) consists of general principles indicating the goals that the company should pursue in a given area, as well as specific principles subject to mandatory reporting. A listed company is obliged to report what principles it applies and what principles it does not apply. With regard to principles that are not applied by a given listed company, the information should additionally contain a detailed explanation of the circumstances and reasons for not applying the principle. In the event of a change in the status of the application of certain principles, the listed company shall promptly update the previous information. Further, in case of an incidental breach of a principle that was reported as an applied principle, the listed company shall promptly publish information about this fact, indicating, inter alia, the circumstances and reasons for the breach.

As emphasised by commentators,[6] 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),[7] which means that 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 this liability might apply.

## IV CORPORATE SOCIAL RESPONSIBILITY / ESG

### i Risk management and compliance

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.[8] Responsibility for the implementation and maintenance of the foregoing rests with the management board. The staff working in particular units responsible for risk management and compliance should report directly to the president or another member of the management board. 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, the financial reporting process and the effectiveness of internal control systems, internal audit systems and risk management.[9]

As regards whistle-blowing regulations, at present, almost every listed company has internal procedures in place for this purpose, or is in the process of adopting them. Also, the Polish legislator is working on a draft bill on the protection of whistle-blowers aimed at the implementation of Directive 2019/1937/EU;[10] protracted legislative work on the bill is still at the government stage.

The implementation of internal compliance and risk management regulations is common in the market because of laws that allow the imposition of very high penalties on corporations and their managers, while at the same time extending their corporate liability.

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 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 through a competitive selection process.

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

7 Regulation (EU) No. 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.

8 Chapter III of the Best Practice Code.

9 See Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017, Article 130, Section 1.

10 Directive 2019/1937/EU of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

### ii Corporate social responsibility

We observe a general tendency that more businesses and their top management have focused not only on gaining financial profit but also on supporting values and goals promoted and supported worldwide, such as goals described in the UN 2030 Agenda for Sustainable Development and the Paris Agreement on climate change adopted during the UN conference held in Paris in 2015.

The above international agreements became the cornerstone for adoption of other agreements setting standards of sustainable economy:

*a* the European Green Deal Investment Plan as an investment pillar of the European Green Deal; and

*b* the Collective Commitment to Climate Action signed by members of the UN in 2019.

Moreover, in 2018, the European Commission launched its initial Action Plan on Sustainable Finance and reviewed Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (NFRD) by adopting on 21 April 2021 the proposal for a Corporate Sustainability Reporting Directive (CSRD), amending the NFRD. The CSRD (Directive 2022/2464 of 14 December 2022 amending Regulation No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU on corporate sustainability reporting) entered into force on 5 January 2023.

In addition to the CSRD, the European Parliament and the Council adopted two regulations setting new reporting obligations and frames for sustainable investment, which are directly binding for entities operating in the EU (including Poland), namely:

*a* Regulation (EU) No. 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, which came into force on 29 December 2019 and has been applied since 10 March 2021; and

*b* Regulation (EU) No. 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, amending Regulation (EU) No. 2019/2088 (the Taxonomy Regulation), which entered into force on 12 July 2020 and introduced unified criteria for determining whether an economic activity is sustainable.

Other than the above-mentioned Regulations adopted at the EU level, no general corporate responsibility rules have yet been implemented in this respect in Polish law, especially in corporate law.

The Best Practice Code imposes an obligation on public companies to integrate environmental, social and governance (ESG) factors in their business strategy. The business strategy should include, in particular, environmental factors (including measures and risks relating to climate change and sustainable development) as well as social and employment factors, including, among others, actions taken and planned to ensure the equal treatment of women and men, respect for workers' rights and dialogue with local communities. Furthermore, in order to ensure appropriate communication with stakeholders, companies are required to publish information concerning their ESG strategy on their website, which should, among other things, explain how ESG factors are taken into account during the decision-making process and present the equal pay index for its employees (being the percentage difference between the average monthly pay of women and men in the previous year).[11]

## V ENGAGEMENT WITH SHAREHOLDERS

### i Shareholder rights and powers

***Equality of voting rights***

A company may issue either registered or bearer shares.[12] By definition, a listed company is a company in which at least one share is dematerialised.[13] In light of amendments to the CCC and the Act on Public Offering and Conditions for Introducing Financial Instruments to the Organised Trading System and Public Companies,[14] which entered into force on 1 March 2021, all issued shares, including shares in non-listed joint-stock companies and partnerships limited by shares, are subject to obligatory dematerialisation.

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 (excluding in listed companies), the right to dividends or the distribution of a company's assets in the event of its liquidation.

***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.[15] (This regulation is limited only to internal relations within the company because, 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 in respect of third parties.)[16]

The foregoing 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 relates to those who make decisions.[17] 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 these 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.[18] In practice, articles of association rarely make such a provision; therefore, board members must take into account that they can be

11 Principles No. 1.3 and 1.4.

12 Commercial Companies Code (CCC), Article 334, Section 1.

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

14 Act Amending the Act – Commercial Companies Code and other Acts of 30 August 2019 (*Official Journal* 2019, item 1798).

15 ibid., at Article 3751.

16 ibid., at Article 372, Section 2.

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

18 ibid.

dismissed in these circumstances. 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.[19] Thus, the general meeting may actually influence the management board if competence for this is included in the articles of association.

However, 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 (subject to Polish law of corporate groups, which specifies the authorisation of the dominant company to issue binding instructions to its subsidiaries).

***Decisions reserved to shareholders and subject to shareholder approval***

Pursuant to the CCC, the consent of shareholders is required, for example, for:

*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 on 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; and

*d* acquisition and disposal of real property, perpetual usufruct or an interest in real property, unless the articles of association provide otherwise.[20]

The absence of a shareholders' resolution, as required by the provisions of the CCC (which may be granted two months after the action at the latest), renders an action invalid.

The articles of association may specify other matters reserved to the competence of the shareholders' meeting. Although the absence of a shareholders' resolution required by the articles of association does not make a particular action invalid, nor does it preclude the liability of members of the management board towards the company for violation of the articles of association.

***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.

19 CCC, Article 375.

20 ibid., at Article 393, Section 1.

Furthermore, minority shareholders have the right to appoint members of the supervisory board by a vote in separate groups. 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 those for other shareholders.[21]

### ii Shareholder 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 shareholders may be obliged to purchase the shares of the minority shareholders under the buyout procedure.[22] The buyout procedure can be activated by a shareholder or shareholders representing not more than 5 per cent of the share capital.

#### *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 provides 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.

### iii Shareholder activism

#### *Say on pay*

Pursuant to the CCC, the authorisation of the general meeting in respect of the remuneration of the management board members includes the right to set the rules on which management board members are remunerated, particularly the permitted maximum amount of the remuneration, the possibility of granting additional benefits to the management board members or the permitted maximum value of those benefits.

Apart from as otherwise provided in the company's articles of association, according to the general rules provided in the CCC, the specific amount of remuneration for management

21 CCC, Article 353, Section 1-3.

22 ibid., at Article 418(1).

board members employed under employment contracts or other contracts is determined by the supervisory board. The general meeting may authorise the supervisory board to establish 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 between the shareholders.

***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*).[23]

Furthermore, any resolution of a general meeting that is in conflict with the provisions of the articles of association or good practice and detrimental to the company's interests or has the aim of harming a shareholder may be appealed 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 be commenced only within statutory periods and only by specific stakeholders.

***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.

***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[24] has not been fully transposed into Polish national legislation; 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).

23 ibid., at Article 486, Section 1.

24 2004/25/EC.

Members of the management board generally do not support takeovers, because 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 (and does not authorise, prohibit or require) 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 an entity that fails to make the announcement.[25]

***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 because, as 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 as a rule immediately following, or at least no later than 24 hours after, the occurrence of or on becoming aware of a reportable event (subject to other specific deadlines stipulated in the relevant provisions of law). 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 on the agenda. The management board may refuse to provide information if it could inflict damage on the company, an affiliate company

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

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 within no more than two weeks of a request being submitted 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.[26]

The Best Practice Code attaches great importance to proper contact with shareholders and investors. According to the Best Practice Code, companies should ensure adequate communications with investors and analysts by pursuing a transparent and effective disclosure policy. Companies should maintain efficient communication with capital market participants by providing reliable information on matters concerning the entities. For this purpose, companies ought to use various tools and forms of communication, including, in particular, a corporate website, where they publish all information relevant to investors. If an investor requests information about the company, the company must respond immediately, or no later than within 14 days.[27]

### *Selective meetings and communications*

*Circumstances in which meetings can take place with individual shareholders*

Listed companies (other than those being components of the WIG20, mWIG40 or sWIG80 indices) should hold, at least on an annual basis, meetings with investors at which the management board will present the financial results, situation and outlook, as well as publicly answer questions raised. Analysts, industry experts and the media should be invited to such meetings. Companies being components of the WIG20, mWIG40 or sWIG80 indices are required to hold such meetings for investors at least on a quarterly basis.[28]

It must be emphasised that the principle of equality of shareholders should be observed in respect of 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.

### *Issue of information to shareholders in advance of shareholders' meetings*

As regards communication with the shareholders of listed companies, the Best Practice Code includes certain rules regarding the provision of information to the shareholders, including justifications of the draft resolutions to be adopted at the general meeting and information on the candidates for the positions of members of the governing bodies.[29]

26 CCC, Articles 428 and 429.

27 Principle No. 1.7.

28 Principle No. 1.6.

29 Principle Nos. 4.6 and 4.9.

As a rule, a periodic report including information included in the announcement of the general meeting and content of draft resolutions and documents to be discussed at the general meeting should be published at least 26 days before the general meeting.[30]

## 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 initial public offerings. Apart from the turbulence caused by the covid-19 pandemic, the main barriers 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)).

As for the Polish law of corporate groups, for now, all indications are that it will not have much impact on the public market and listed companies. Due to its complex provisions and complicated nature, especially in respect of the relationship between the dominant entity and its subsidiaries, so far, the private sector has shown little interest in the implementation of the Polish law of corporate groups.

30 Section 78.5(1) 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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