

# New provisions on supervisory board under Polish Commercial Companies Code

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## **New provisions on supervisory board under Polish Commercial Companies Code.**

The mandatory supervisory board is obliged to supervise the joint-stock company under Polish law. Supervision over the company's activities in all aspects of its business is one of the most crucial elements in the corporate structure. This paper presents the new supervisory instruments in joint-stock companies and their assessment. The latest amendment to the Commercial Companies Code allows, among others, for the nomination of a supervisory board advisor, broader access to information, the appointment of committees, and the approval of transactions with related entities. Additionally, it aims to describe the impact of new provisions on the liability of the supervisory board members.

**Keywords:** supervisory board, advisor, committee, liability

## **Introduction**

With the amendment to the Polish Commercial Companies Code<sup>1</sup> adopted by the Act of 9 February 2022<sup>2</sup>, the legislature introduced new supervisory instruments in the private limited company, the simple joint-stock company, and the joint-stock company. Moreover, the duties of loyalty and due care, and the business judgment rule were introduced in both types of companies.

This paper aims to present the new provisions on the joint-stock company as these involve a complete regulation in this respect. Essentially, the supervisory body is not mandatory in all private limited companies<sup>3</sup>, and there is a choice between a monistic and dualistic system in simple joint-stock companies<sup>4</sup>. Additionally, some of the new

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<sup>1</sup> Act of 15 September 2000 Commercial Companies Code, Journal of Laws of the Republic of Poland, 2022, item 1467, hereinafter abbreviated as CCC.

<sup>2</sup> Act of 9 February 2022 on the Amendment to the Commercial Companies Code, Journal of Laws of the Republic of Poland, 2022, item 807. The amendment to the Code entered into force on 13 October 2022.

<sup>3</sup> The supervisory board or internal audit committee must be established only if the law or the articles of association so provide. Pursuant to the provisions of the Commercial Companies Code, in companies whose share capital exceeds PLN 500,000 and where there are more than twenty-five shareholders, the supervisory board or the internal audit committee must be established. The necessity to appoint the supervisory board is also indicated in particular provisions, for example in companies with the participation of the local government entities.

<sup>4</sup> With the amendment to the Polish Commercial Companies Code introduced by the Act of 19 July 2019, a new type of company was introduced into the Polish legal system, the simple joint-stock company, with effect from 1 July 2021 (initially, the simple joint-stock company was intended to take effect from 1 March 2020, but was postponed to 1 March 2021). The simple joint-stock company offers the choice between a monistic and dualistic management system, as it must comprise a general meeting of shareholders and – depending on the

instruments, for example, the provisions on supervisory board advisor in a private limited company, must be applied exclusively if the articles of association so provide (the opt-in system); some issues have been regulated only in joint-stock companies (e. g. the obligation of the management board to furnish the supervisory board with information).

Firstly, this paper presents the new supervisory instruments along with their assessment, and secondly, the impact of those provisions on the liability of the board members concerning the duty of loyalty and due care, and the business judgment rule.

## **1. Company supervision**

### ***1.1 Overall powers of the supervisory board***

The supervisory board of a joint-stock company plays a pivotal role in the corporate supervisory system. Under the provision of Art. 382 § 1 CCC, the supervisory board exercises permanent supervision over the company's activities in all aspects of its business. The competence allows for the influence of the supervisory board in joint-stock companies over the management board (appointment, removal, suspension of the management board, the power of representation in contracts and disputes with the management board, settling the remuneration of the management board members, giving consent for company operations where the law or the company's by-laws so provide). The powers of the supervisory board also include reviewing the financial statements and the report of the management board in terms of their compliance with the books, documents, and facts, reviewing the proposals of the management board concerning the distribution of profits or coverage of losses and drawing up and submitting to the general meeting an annual written report for the previous financial year (report of the supervisory board).

Additional powers may result from other provisions, in particular from the Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Listed Companies<sup>5</sup>. In listed companies, pursuant to Art. 90g sec. 1 POA, the supervisory board of a company draws up an annual remuneration report presenting a comprehensive review of remuneration, including all benefits, regardless of their form, received by individual members of the management board and supervisory board in the last financial year. Moreover, under Art. 90i sec. 3 POA, the conclusion of a significant transaction requires the consent of the company's supervisory board (related-party transactions).

The new provisions introduced the possibility to nominate a supervisory board advisor, linked with the right to represent the company in a contract with the advisor,

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form adopted in the articles of association – either board of directors or a management board and supervisory board. However, the supervisory board is not mandatory as the shareholders have an individual right of control, similarly to private limited company.

<sup>5</sup> Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Listed Companies. The Official Journal of Laws of the Republic of Poland 2021.1983, hereinafter abbreviated as POA.

along with the right to determine the remuneration for the advisory activity. Further, the approval of transactions with a dominant company, a dependent company, or an associated company is now introduced. Apart from the said powers, the manner of exercising supervision was changed, including the right to information, document inspection, and supervision by nominated supervisory committees. Finally, regardless of the amendment to the supervisory system, the duty of loyalty and due care of the board members, the duty of confidentiality, together with the business judgment rule, were incorporated.

### ***1.2 Nominating a supervisory board advisor***

Pursuant to Art. 382<sup>1</sup> CCC, the supervisory board may adopt a resolution on examining a specific case concerning the company's activities or assets by a selected advisor (supervisory board advisor) at the company's expense. The advisor to the supervisory board may also be appointed to prepare specific analyses and opinions. The advisor may be a natural or a legal person, but the law does not provide for any other requirements, such as the experience or knowledge of the advisor. Nonetheless, the advisor must possess the knowledge and experience necessary to examine the activity or to prepare the analysis devoted to him by the supervisory board, as the nomination of unqualified persons may lead to the liability of the supervisory board for being negligent in the selection of candidates and, in particular, due to the unjustified expenses incurred by the company.

It must be underlined that nomination of advisors has already existed in the companies' practice. However, the supervisory board has become independent in this respect because the supervisory board will represent the company in the contract between the company and the advisor of the supervisory board<sup>6</sup>. The right to nominate the advisor constitutes a vital competence that may strengthen the supervisory board to exercise independent judgments. The appointment of the advisor may also influence the presumptive liability constituting a premise of the business judgment rule (see below p. III.2.). The advisor may provide for an external audit *ad hoc* and prepare opinions and analyses necessary to adopt an independent and substantive resolution in the company's best interest.

The choice of the form of contract with the advisor rests in the competence of the supervisory board, unless the company's by-laws provide otherwise. In the said types of services, covering the preparation of analyses, opinions, or the examination of the selected issues, a contract for performance a specified work<sup>7</sup> shall usually proceed (art. 627 CC<sup>8</sup>) or an innominate contract for services to which the provision of the mandate

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<sup>6</sup> OSTROWSKI, F., SZYMAŃSKI, K. In SZUMAŃSKI, A., KWAŚNICKI R.L. OSTROWSKI, F., (eds), Kodeks spółek handlowych. Komentarz do zmian (tzw. Prawo holdingowe). Warszawa: C.H. Beck 2022, p. 497.

<sup>7</sup> By a contract for performance a specified work, the party accepting the order undertakes to complete a specified work and the ordering party undertakes to pay the contractor remuneration.

<sup>8</sup> Civil Code of 23 April 1964, Journal of Laws of the Republic of Poland 2022, item 1360, hereinafter abbreviated as CC.

contract applies accordingly<sup>9</sup>. Additionally, the supervisory board is responsible for determining the advisor's remuneration.

Nonetheless, the company's by-laws may exclude or restrict the right of the supervisory board to conclude agreements with the supervisory board advisor, in particular by empowering the general meeting to determine the maximum total cost of remuneration of all advisors of the supervisory board that the company may incur during the financial year. This restriction is mentioned only as an example. The company's by-laws may impose further restrictions, in particular, a limit of contracts concluded yearly or a limit of resolutions nominating advisors, as well as the scope of the advisor's examination. Moreover, the company's by-laws may entirely exclude the right to nominate advisors.

The manner of representation by the supervisory board has not been statutorily detailed. Hence it must be treated equally to the manner of representation of the company by the supervisory board in contracts and disputes with the management board members. Owing to the doctrinal and judicature views, the representation power addresses the body in its entirety, meaning that the resolution of the supervisory board on concluding the contract is required, which empowers the board chairman (or any other of its members) to sign the contract or eventually the contract needs to be signed by all the members of the supervisory board<sup>10</sup>. In practice, the empowerment of the chairman appears consistently.

The management board must provide the supervisory board's advisor with access to documents and provide the information requested. Thus, the advisor to the supervisory board and the natural person performing activities in his name or on his behalf is bound to maintain confidential all not publicly revealed information and documents received from the company. The obligation of secrecy is not limited in time. Breaching the confidentiality duty may result in the liability of the advisor or any natural person under the provisions of the Civil Code. In the case of the advisor, this must be a contractual obligation under the contract concluded with the advisor. Additionally, it may result in criminal liability indicated in the Penal Code<sup>11</sup>. Under Art. 266 PC, whoever –against the statutory provisions or an accepted obligation– discloses or makes use of information they have learned in connection with an office held or work they have performed or public, social, business, or scientific activity they have conducted, is liable to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years<sup>12</sup>.

<sup>9</sup> Pursuant to Art. 750 CC, the provisions on mandate apply accordingly to contracts for services that are not governed by other provisions.

<sup>10</sup> The decision of the Supreme Court of 17 March 2021, II PSK 47/21, Lex No 3148109; POPIOŁEK, W. In STRZĘPKA, J.A. (ed.), *Kodeks spółek handlowych. Komentarz*. Warszawa: C.H. Beck, 2015, p. 939; OPALSKI, A. In OPALSKI, A. (ed.), *Kodeks spółek handlowych. Komentarz*. Vol. III A. Warszawa: C.H. Beck, 2016, p. 1412; OSTROWSKI, F., SZYMAŃSKI, K. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), *Kodeks spółek*, p. 501.

<sup>11</sup> Act of 6 June 1997, the Penal Code, *Journal of Laws of the Republic of Poland*, 2022, item 1138, hereinafter abbreviated as PC.

<sup>12</sup> The Polish Penal Code imposes four different penalties: fine, limitation of liberty, deprivation of liberty (imprisonment), and deprivation of liberty for life (life sentence). Under Art. 34 of the Penal Code, the limitation of liberty may cover an obligation to perform unremunerated, supervised work for community

On the other hand, under Art. 587 (2) CCC, whoever –acting contrary to the obligations resulting from Art. 382<sup>1</sup> § 3 CCC– fails to furnish the information, documents, reports, statements, or explanations in due time or submits the same that are inconsistent with the facts or conceals data significantly affecting the content of such information or document is liable to a fine no lower than PLN 20,000 and no higher than PLN 50,000 or a penalty of limitation of liberty. Where the perpetrator acts unintentionally, he or she shall be liable to a fine no lower than PLN 6,000 and no higher than PLN 20,000. The introduction of penal provisions for submitting inconsistent information and documents or concealing the data might be justified. In contrast, the penalty of limitation of liberty for failing to furnish the information in due time seems too stringent. Nonetheless, using the term “significantly affect” may raise disputes about the discretionary form of this provision.

The supervisory board may make the advisor’s work results available to shareholders unless this could harm the company, an associated company, dependent company, or a cooperative, particularly by disclosing the company’s technical, commercial, or organizational secrets<sup>13</sup>. Even though not indicated in this provision, it requires a resolution of the supervisory board. Where the supervisory board decides to make the results of the supervisory board advisor’s work available to the shareholders, the management board shall furnish them in the manner specified for notices of convening the general meeting within two weeks from the adoption of the resolution by the supervisory board.

### ***1.3 Access to documents and information***

Pursuant to Art. 382 § 4 CCC, in order to perform their duties, the supervisory board may inspect all company’s documents, review the company’s assets, and request from the management board, proxies, and persons employed in the company, to draw up or provide any information, documents, reports, or explanations concerning the company, in particular its activities or assets. An employed person under Art. 382 § 4 CCC means a person employed based on an employment contract or performing specific activities for the company regularly based on a contract for specific work, a mandate contract, or another contract of a similar nature. The subject of the request may also be information, reports, or explanations regarding dependent companies and associated companies held by the authority or the obliged person. The new wording of this provision makes it clear to demand from all the employees, independently of the type of contract concluded with the company, to provide information, explanations, and documents. Even though the interpretation of the previous wording used to be also broad<sup>14</sup>, the doubts still referred to

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purposes or a deduction from 10% to 25% of the monthly remuneration for work for a court-designated community purpose. The sentenced, while serving a sentence of limitation of liberty, may not change the place of permanent residence without the court’s consent and must provide explanations regarding the course of serving a penalty.

<sup>13</sup> In the private limited company and the simple joint-stock company, the advisor’s work is available to each shareholder on his demand by exercising the individual right of control.

<sup>14</sup> POPIOLEK, W. In STRZĘPKA, J.A. (ed.), Kodeks spółek, p. 946; PINIOR, P. Nadzór wspólników, p. 429.

outsourcing services and the admissibility to demand explanations and documents from persons providing such services. Now the new provisions directly allow to address the demand not only to the employees but also to other persons on condition that they provide the services regularly. However, such accurate wording seems unnecessary and may raise questions about the meaning of performing activities “regularly”.

The competence to inspect all company documents, review the company’s assets, and request to receive any information or explanations concerning the company refers to the supervisory board *in corpore*. It requires the adoption of the resolution of the supervisory board to demand the information and documents mentioned above. The supervisory board may also appoint a committee to undertake supervisory activities (see II.4. below) or may delegate its member to undertake supervisory activity individually (Art. 390<sup>1</sup> § 1 p. 1 CCC).

The information, documents, reports, or explanations must be provided to the supervisory board without delay and, at the latest, within two weeks from the date of the request to the obliged person unless the request specifies a longer period. Moreover, the management board may not restrict the access of the supervisory board members to information, documents, reports, or explanations (Art. 382 § 6 CCC). It must be noted that in the literature, the obligation not to restrict access to information and documents was adopted to be binding before the amendment<sup>15</sup>. Thus, this provision may seem to be a statutory *superfluum*, taking into account the penal liability as provided in Art. 587<sup>1</sup> CCC.

According to Art. 587<sup>1</sup> CCC, whoever –acting contrary to the said duties– fails to furnish the information, documents, reports, statements, or explanations in due time or submits the same that are inconsistent with the facts, or conceals data significantly affecting the content of such information or document will be liable to a fine no lower than PLN 20,000 and no higher than PLN 50,000 or a limitation of liberty order. Where the perpetrator acts unintentionally, the perpetrator shall be liable to a fine no lower than PLN 6,000 and no higher than PLN 20,000.

The amendment to the provisions of the Commercial Companies Code also imposes the obligation to guarantee the participation of the key statutory auditor in the meeting of the supervisory board adopting resolutions to review and approve the financial statements and the report of the management board on the company’s operations for the previous financial year, as regards their compliance with the books, documents, and facts, as well as adopting a resolution to review the proposal of the management board on the distribution of profits or coverage of losses. Namely, the supervisory board has the duty to notify the statutory auditor who audited the company’s financial statements of the date of such meeting with a week’s notice.

The company ensures the participation of the key statutory auditor or another representative of the audit firm in the meeting, where they are to provide the supervisory board with an audit report, including an assessment of the grounds for the adopted opinion relating to the company’s ability to continue as a going concern, and answer questions of

<sup>15</sup> POPIOLEK, W. In STRZĘPKA, J.A. (ed.), Kodeks spółek, p. 946.

the members of the supervisory board. The said obligation aims to allow the board members to familiarize themselves thoroughly with the audit results and the possibility to ask questions on an ongoing basis to clarify issues that may raise the board's doubts or justify the opinion adopted by the auditor. Hence, the participation of the statutory auditor in the supervisory meeting should guarantee the transparency of audit activity and its results. The statutory auditor or another representative of the audit firm may participate in the meeting in person or by utilizing electronic communication means.

### ***1.4 Appointment of the committees***

The provisions of the Commercial Companies Code did not provide for any obligation to establish the committees or even did not indicate the possibility of forming them. Instead, the admissibility of their establishment met common acceptance in the doctrine<sup>16</sup>.

In practice, the committees used to be appointed in larger companies where, as a rule, the number of members of the supervisory board in the complex structure of a company's business is higher. Irrespective, the obligation to create a committee has been put on companies by provisions of the Act on Statutory Auditors, Audit Firms, and Public Oversight<sup>17</sup> which requires the appointment of an audit committee in listed companies<sup>18</sup>. Due to the said obligation, the proposals for amendments to the Code have been formulated in the literature to introduce provisions explicitly enabling the supervisory board to establish the committees from among its members and to determine the scope of competence of such committees<sup>19</sup>. The nomination and/or remuneration committee is another example of a committee operating in companies' practice. This committee often exists within the supervisory board in listed companies and, among other powers, prepares the draft of the remuneration report presented later by the supervisory board at the following general meeting<sup>20</sup>.

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<sup>16</sup> SOŁTYSIŃSKI, S. In SOŁTYSIŃSKI, S. (ed.) System Prawa prywatnego. Prawo spółek kapitałowych. Vol. 17 B. Warszawa: C.H. Beck, 2010, p. 517; OPALSKI, A. Rada nadzorcza w spółce akcyjnej. Warszawa: C.H. Beck, 2006, p. 380; POPIOLEK, W. In STRZĘPKA, J.A. (ed.), Kodeks spółek, p. 962; SPYRA, M. In WŁODYKA, S. (ed.) System Prawa Handlowego. T. 2B, Prawo spółek handlowych. Warszawa: C.H. Beck, 2007, p. 381; OPLUSTIL, K. Instrumenty nadzoru korporacyjnego (*corporate governance*) w spółce akcyjnej. Warszawa: C. H. Beck, 2010 r. p. 481; NOWACKI, A. Komitet audytu. In *Przegląd Prawa Handlowego*, 2011, No 3, p. 42; PINIOR P. Komitet audytu w radach nadzorczych polskich spółek. In KRUCZALAK-JANKOWSKA, J., (ed), Wpływ europeizacji prawa na instytucje prawa handlowego., Warszawa: LexisNexis, 2013, p. 202.

<sup>17</sup> Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017, the Official Journal of Laws of the Republic of Poland, 2022.1302.

<sup>18</sup> Under Art. 130 of the Act on Statutory Auditors, Audit Firms, and Public Oversight, the audit committee is obliged to monitor the financial reporting process and the statutory audit of the annual and consolidated financial statements, in particular, its conduct, taking into account any findings and conclusions by the competent authority. The audit committee also monitors the effectiveness of the undertaking's internal quality control and risk management systems and, where applicable, its internal audit, regarding the financial reporting of the audited entity, without breaching its independence.

<sup>19</sup> OPALSKI, A. In OPALSKI, A. (ed.) Kodeks spółek, p. 1602; PINIOR, P. Nomination and remuneration committee In SUCHOŻA, J., HUSÁR, J., HUCKOVÁ, R., (eds.), Právo, obchod, ekonomika, X. Košice: Univerzita P.J. Šafárika v Košiciach, 2021, p. 158.

<sup>20</sup> PINIOR, P. Remuneration policy and remuneration report in listed companies. In *Przegląd Ustawodawstwa Gospodarczego (Business Law Journal)*, 2021, No. 7, p. 6.

A committee within the supervisory board is obviously not a separate body, but constitutes a body being part of the board formed to implement the tasks assigned to it. The establishment of the committees aims to intensify the effectiveness, independence, and professionalism of the supervisory board<sup>21</sup>.

Pursuant to Art. 390<sup>1</sup> § 1 p. 2 CCC, the supervisory board may establish an *ad hoc* or a permanent committee of the supervisory board, consisting of members of the supervisory board, to perform specific supervisory activities (supervisory board committee). The committee's establishment shall not relieve the members of the supervisory board of their responsibility for supervising the company. For example, even though, in practice, the remuneration committee prepares the draft of the remuneration report in listed companies, the final report requires adoption by the supervisory board as a resolution<sup>22</sup>, and the supervisory board shall bear the liability for a reliable preparation of the report as such.

The primary purpose of the committees should be to increase the efficiency of the supervisory board by ensuring that the decisions are based on due consideration and to help organize its work<sup>23</sup>. To exercise efficient supervision, the supervisory board committee must have the right to undertake the supervisory activities referred to in Art. 382 § 4 CCC (including access to information and documents), unless the supervisory board decides otherwise.

If the committee is appointed as an *ad hoc* committee, it is usually devoted to a particular task concerning supervisory activity, or it operates as an advisory and opinion-forming body<sup>24</sup>. The results of the *ad hoc* committee's activity must be presented at the next supervisory meeting. However, nominating the committee as a permanent one requires that the supervisory board is provided with information on the results of the committee's activity periodically. Thus, the provision of Art. 390<sup>1</sup> § 4 CCC imposes the obligation that the supervisory board committee provides the supervisory board, at least once every quarter of a financial year, with information on the supervisory activities undertaken and their outcomes.

The provisions do not dictate any details of the manner of appointing the committees, but such detailed regulation may be provided in the company's by-laws or the supervisory board's rules of procedure. The number of committee members, the scope of the committee's tasks, and the term for which they are established (permanent, interim, or *ad hoc*) must be set forth in the supervisory board's resolution. A chairperson may also be appointed within a committee to coordinate the tasks and convoke committee meetings when necessary. The supervisory board's resolution may change the scope of the committee's activity at any time and remove or replace its members.

<sup>21</sup> OPALSKI, A. In OPALSKI, A. (ed.) Kodeks spółek, p. 1597; PINIOR, P. Nomination and remuneration, p. 153.

<sup>22</sup> PINIOR, P. Remuneration policy, p. 6.

<sup>23</sup> PINIOR, P. Nomination and remuneration, p. 155.

<sup>24</sup> SOLTYSIŃSKI, S. In SOLTYSIŃSKI, S. (ed.) System Prawa, p. 519; OPALSKI, A. In OPALSKI, A. (ed.) Kodeks spółek, p. 1597; OPLUSTIL, K. Instrumenty nadzoru, p. 490; PINIOR, P. Nomination and remuneration, p. 154.



In the case of a permanent committee, the supervisory board may also adopt the committee's by-laws or authorize the committee to adopt its rules of procedure<sup>25</sup>. In general, the committee's by-laws indicate the committee's composition and manner of operation, particularly the issues of the adoption of resolutions by the committee and the forms of holding committee meetings. The by-laws may describe the manner of organizing the meetings with a physical presence of its members, meetings using direct communication facilities, or hybrid meetings. Apart from the meetings, the manner of adopting resolutions without holding a meeting, such as a written poll or electronic voting, may be allowed. The by-laws should also indicate the majority required for a resolution to be adopted by the committee<sup>26</sup>.

The remuneration of the supervisory board members must be set forth in the by-laws or by way of a resolution of the general meeting (Art. 392 CCC). However, additional remuneration may be granted due to participation in a committee. The additional remuneration must also be outlined in the by-laws or by way of a general meeting resolution; it may be even linked to performing additional tasks<sup>27</sup>. An additional remuneration was accepted in the judgment of the Court of Appeal of 14 February 2012<sup>28</sup> which stated that the general meeting might discretionarily set forth the remuneration of the members of the supervisory board, including the variable components of the remuneration granted for additional duties commissioned to such a member or members. Thus, members of both *ad hoc* and permanent committees may obtain additional remuneration for exercising tasks devoted to them by the supervisory board. Nevertheless, the amount paid additionally may be restricted in the company's by-laws to avoid situations where the appointment of committees, particularly *ad hoc* committees, results in unjustified expenses.

Most importantly, the introduction of provisions enabling the appointment of committees within the supervisory board should be positively evaluated because it meets the expectations of the doctrine and trade practice.

### ***1.5 Consent to related-party transactions***

Under Art. 384<sup>1</sup> § 1 CCC, the conclusion of a transaction exceeding 10% of the company's total assets between a company and a dominant company, dependent company, or an associated company requires the approval by the supervisory board unless the company's by-laws provide otherwise. The company's by-laws may delegate this competence to the general meeting or exclude the necessity to obtain consent.

When determining the transaction value, all transactions concluded with the same company during the financial year are accrued. The total value of assets must be

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<sup>25</sup> PINIOR, P. Nomination and remuneration, p. 157.

<sup>26</sup> PINIOR, P. Nomination and remuneration, p. 158.

<sup>27</sup> SOŁTYSIŃSKI, S. In SOŁTYSIŃSKI, S. (ed.) System Prawa, p. 536; OPLUSTIL, K. Komitet audytu w radzie nadzorczej spółki akcyjnej w świetle nowych regulacji. In MODRZEJEWSKA, M. (ed.), Prawo handlowe XXI wieku. Czas stabilizacji, ewolucji czy rewolucji. Księga jubileuszowa Profesora J. Okolskiego. Warszawa: Wolters Kluwer, 2010, p. 728; PINIOR P. Komitet audytu, p. 204.

<sup>28</sup> The judgment of the Court of Appeal in Wrocław of 14 February 2012, I ACa 1391/11.

determined based on the company's last approved financial statements. In the case of transactions involving recurring benefits which are fulfilled based on an agreement concluded for an indefinite period, the value of the transaction is the sum of the benefits provided for in the agreement in the first three years of its duration.

The consent of the supervisory board requires the form of a resolution adopted by the absolute majority of votes. Concluding the transaction in the absence of a consent by the supervisory board is null and void (Art. 17 § 1 CCC). However, the transaction may receive approval within two months from conclusion (Art. 17 § 2 CCC). A confirmation expressed subsequent to the submission of the statements has a retroactive effect as of the date of performance of the legal act.

Before deciding whether to consent to a transaction, the management board shall provide the supervisory board with information on links between the company and the other transaction parties, the object and value of the transaction, and the circumstances necessary to assess whether the interest of the company justifies the transaction.

The consent of the supervisory board to transactions prescribed in Art. 384<sup>1</sup> § 1 CCC is similar to the provisions of the Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading and Listed Companies<sup>29</sup>. Under Art. 90h – 90l POA, a company whose shares are admitted to trading on the regulated market is obliged to reveal on its webpage the significant transaction concluded with a related entity if the transaction value exceeds 5% of the company's total assets. Such a transaction requires the consent of the supervisory board of a listed company<sup>30</sup>.

Both regulations aim to limit unrestricted transactions with related entities that may create a risk of abuse because the beneficiaries of such transactions are usually the company's officers or a dominant shareholder (corporate controllers)<sup>31</sup>. Amidst the special provisions of the Act of 29 July 2005, provisions on related-party transactions of the Commercial Companies Code are not applicable to listed companies. According to Art. 384<sup>1</sup> § 4 CCC, these provisions do not apply to companies at least one share of which is admitted to trading on the regulated market and companies belonging to groups of companies<sup>32</sup>. The second exclusion refers to the so-called "qualified group of

<sup>29</sup> The Official Journal of Laws of the Republic of Poland 2021.1983, hereinafter abbreviated as POA.

<sup>30</sup> Pursuant to Art. 90i sec. 3 POA, when making a decision on granting a consent to the conclusion of a significant transaction, the supervisory board of the company takes into account whether it is possible to prevent the affiliated entity from taking advantage of its position and ensuring appropriate protection of the interests of the company and the shareholders who are not affiliated entities, including minority shareholders. If a significant transaction concerns the interests of a member of the supervisory board, said member does not take part in the decision-making process concerning the consent to the conclusion of this transaction.

<sup>31</sup> SZYMAŃSKI, K. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), Kodeks spółek, p. 509.

<sup>32</sup> The group of companies is defined as the dominant company and one or more subsidiary companies, which due to the resolution on participation in a group of companies, are guided by a common strategy to achieve a common interest (interest of a group of companies) justifying the consistent management of the dominant companies over its subsidiaries (Art. 4 § 1 p. 5<sup>1</sup> CCC). The premises for the establishment of a group of companies are the resolution of the shareholders' meeting adopted with the qualified majority of three-quarters of votes for the participation in the group with the indication of the dominant company and

companies” or “registered group of companies” created under the new provision of Art. 21<sup>1</sup> CCC<sup>33</sup>. The provisions of the Commercial Companies Code apply to private joint-stock companies (non-listed) and joint-stock companies whose shares are admitted to the alternative trade system (e. g. NewConnect).

### ***1.6 Obligations of the management board***

The new provisions also impose additional duties on the management board. The management board is obliged, without additional notice, to provide the supervisory board with information on 1) resolutions of the management board and their subject-matter; 2) the situation of the company, including its assets, as well as significant circumstances related to the conduct of the company’s affairs, in particular in the operational, investment, and personnel areas; 3) progress in the implementation of the designated directions of development of the company’s activities, whereas it should indicate deviations from the previously designated directions, along with the statement of reasons for deviations; 4) transactions and other events or circumstances which significantly affect or may affect the company’s financial situation, including its profitability or liquidity; 5) changes to information previously provided to the supervisory board, if such changes materially affect or may affect the situation of the company. The duty of information also includes information held by the management board concerning dependent and associated companies.

The information about the company’s situation (Art. 380<sup>1</sup> § 1 p. 2 CCC) is quite broad. The operational area refers to all current business activity as regards the production of goods, provision of services or conduct of trade, while the investment area refers to the acquisition or disposal of assets (including intangible ones) and current financial assets<sup>34</sup>. The personal area refers to the count and structure of employees, the amount of remuneration paid, including average remuneration, and any foreseeable changes in this field.

The introduction of the obligation to systematically provide information by the management board to the supervisory board aims at activating supervisory board members to perform supervisory activities on an ongoing basis. The passive attitude of the supervisory board members, linked with the lack of sufficient information from the company, meant that the exercise of supervision in the company often proved to be ineffective<sup>35</sup>.

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disclosure of the participation in the group in the National Court Register by filing a relevant annotation in the register. The formation of the group allows to use the provisions of Art. 21<sup>1</sup> – Art. 21<sup>16</sup> CCC, on groups of companies.

<sup>33</sup> PINIOR, P. New provisions on groups of companies under Polish law – selected issues. In *Zásahy verejnej moci do podnikania a obchodovania*. Pocta Profesorovi Jánovi Husárovi. Košice: Univerzita P.J. Šafarika v Košiciach, 2022, p. 134.

<sup>34</sup> OSTROWSKI, F., SZYMAŃSKI, K. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), *Kodeks spółek*, p. 458.

<sup>35</sup> OPALSKI, A. In OPALSKI, A. (ed.) *Kodeks spółek*, p. (art. 382); OSTROWSKI, F., SZYMAŃSKI, K. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), *Kodeks spółek*, p. 452.

The significant transactions and changes to prior information must be provided immediately after specific events or circumstances, while other information is to be provided at each supervisory board meeting unless the supervisory board decides otherwise. The information must be provided in writing, except where it is impossible to preserve that form because of the need to communicate it immediately to the supervisory board. The supervisory board may decide to admit the transmission of the information also in another form.

The assessment of how the management board complies with the information obligation is an obligatory element of the report of the supervisory board, which is submitted to the general meeting. A breach of the disclosure obligations may constitute the basis for liability of the management board members for damage inflicted to the company, as well as a justified basis for removing a management board member.

The company's by-laws may exclude or restrict the information duty of the management board. Hence the scope of information to be provided is quite broad, and the tendency to restrict that duty is to observe in companies' practice. The companies may also consider –with a view of the potential liability of the management board members– define this obligation more precisely or differently, as it consists of lots of uncertain terms such as “significant circumstances,” “other events or circumstances which significantly affect or may affect the financial situation” or changes which “materially affect or may affect the situation of the company.”

## **2. Duty of loyalty and due care of the supervisory board's members**

### ***2.1 Duty of loyalty and due care***

Pursuant to Art. 387<sup>1</sup> § 1 CCC, a member of the supervisory board or a board member, while performing their duties, must act with due care resulting from professional integrity and honor the duty of loyalty to the company. The Polish doctrine formulated the following elements of the loyalty duty: the primacy of the company's interest, the ban on abuse of competence, the obligation to refrain in the case of conflict of interests, the prohibition of competition, the obligation to use corporate opportunities, availability to the company, and the duty of confidentiality<sup>36</sup>. Except for the ban on competition, all the said elements refer to supervisory board members.

As stated above, the comprehensive access to information and documents by the supervisory board members justifies, in particular, the confidentiality duty. Moreover, the duty not to disclose the company's secrets also extends after the expiration of the terms of office (Art. 387<sup>1</sup> § 2 CCC). This amendment should also be positively evaluated due to a large amount of important information on the company while holding the office. The duty not to disclose company secrets after the expiration of the mandate requires a statutory basis in the Code.

<sup>36</sup> PINIOR, P. Nadzór wspólników w spółce z ograniczoną odpowiedzialnością. Warszawa: C.H. Beck, 2013, p. 90; OPALSKA, D. Obowiązek lojalności w spółkach kapitałowych. Warszawa: C.H. Beck, 2010, p. 144 onwards; OPALSKI, A. In OPALSKI, A. (ed.) Kodeks spółek, p. 1165; OPLUSTIL, K. Instrumenty nadzoru, p. 501.

When adopting a resolution, supervisory board members have a duty to refrain from a conflict of interests, as the provision of Art. 377 CCC applies accordingly what was indicated by the amendment to the Code in Art. 388 § 5 CCC. Thus, in the event of a conflict of interest between the company and the interest of a board member, his or her spouse, blood relatives or second-degree affinity, and persons with whom the board member has a personal relationship, such board member is obliged to reveal the conflict of interest. Primarily, the board member must refrain from participating in the handling of such issues, and the member may request that this fact be recorded in the minutes.

It is worth mentioning that the doctrine representatives had claimed, even before the amendment, the obligation to refrain from the conflict of interests had been binding on the supervisory board members. The doctrine indicated the use of the duty under Art. 377 CCC *per analogiam*<sup>37</sup>. The existence of the obligation to refrain from a conflict of interest was a consequence<sup>37</sup> of the duty of loyalty of the supervisory board members. After the amendment, without a doubt, the obligation to reveal the conflict of interest and to refrain from participating in the adoption of resolutions in the event of a conflict of interest is binding on the supervisory board members. In particular, a conflict of interest may occur in a situation where the consent of the supervisory board is required for legal action to be undertaken by the management board. The consent of the supervisory board is necessary in related-party transactions (transactions with dominant, dependent, or related entities, see. II.5. above) as well as in the case where the consent of the supervisory board is binding due to the delegation of additional competence to the supervisory board in company's by-laws (art. 384 § 1 CCC). In the literature, the supremacy of the company's interest denotes not only refraining from voting on the board resolution but also any other action which might be undertaken to settle the particular issue<sup>38</sup>. The obligation to refrain from the conflict of interest also refers to other resolutions of the supervisory board, such as the appointment of the members of the management board and granting them remuneration, the representation in contracts and disputes with the management board members, or giving consent to a member of the management board to undertake a competitive activity. Acting contrary to the said obligation may result in the liability of the supervisory board member for damage inflicted on the company due to the omission to refrain from the conflict of interests.

Similarly, it is binding when filing a statement of claim against the shareholders' resolutions<sup>39</sup>. In the Judgment of the Supreme Court of 22 October 2009, the Supreme Court underlined that the need to ensure proper protection of the company's interest is valid in every situation because the potential danger of a conflict of individual interests with the company's interest exists both in the event of a challenge to a resolution of the shareholders' meeting by the board operating *in corpore*, and when individual members of this body challenge the resolution. Thus, the competence of the board to represent the

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<sup>37</sup> OPALSKI, A. Rada nadzorcza, p. 176; OPALSKA, D. Obowiązek lojalności, p. 155.

<sup>38</sup> OSTROWSKI, F., SZYMAŃSKI, K. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), Kodeks spółek, p. 531.

<sup>39</sup> Judgment of the Supreme Court of 22 October 2009, III CZP 63/09, OSNC 2010, No 4, item 137.

company is excluded both in the event of a resolution being appealed against by the board acting *in corpore* and by its individual members, even when other members of the board – in accordance with the rules applicable in the company – may represent it.

In the case of the supervisory board, the duty of loyalty has a slightly different dimension than the duty of loyalty of the management board, as the supervisory board is not directly involved in managing affairs (apart from the situation where the law or the company's by-laws provide for the obtaining of a supervisory board's consents for a particular transaction). Therefore, the primacy of the company's interest and its protection shall be understood as the proper exercise of supervision over its assets. In this context, the active exercise of supervisory activities, including the demand to provide information, explanations, and documents, is of great importance. In this respect, an omission by members of the supervisory body constitutes a breach of their duty of loyalty. In particular, a member of the supervisory board should not treat the mandate in the supervisory body as representing the interests of a shareholder or shareholders. On the contrary, the mandate should be associated with the criterion of independence of a supervisory board member<sup>40</sup>.

Members of the supervisory board should act with due care when reviewing financial statements and reports on the company's operations and analyzing reports prepared by independent auditors and the supervisory board's advisors. In particular, they should thoroughly analyze the current financial and market situation to assess the profitability of individual investments, the potential risk associated with investments and assess the company's activities in terms of acting within the limits of justified economic risk<sup>41</sup>.

## ***2.2 Liability of the board members – business judgment rule***

The supervisory board members shall be liable to the company for any damage inflicted through an action or omission contrary to the law or the provisions of the company's by-laws unless no fault is attributable to such a person (Art. 483 § 1 CCC). The amendment to the Commercial Companies Code has significantly influenced the provisions on board members' liability. Firstly, by regulating the comprehensive access to information, documentation, and explanations, the admissibility to appoint advisors, or the necessity of the participation of the key statutory advisor, the supervisory board has been furnished with effective instruments to be used in the permanent supervision. Thus, the omission of duties constitutes a premise to the supervisory board's liability. Secondly, the breach of the duty of loyalty and due care constitutes a premise enabling to file a statement of claim against the supervisory board members in the case of any negligence in the supervising activity. After the amendment, the duty of due care will not be solely an element to be taken into account when assessing the degree of fault of a board member, but it will constitute a premise for a board member's liability. Hence, the former Supreme Court judgments, in

<sup>40</sup> PINIOR, P. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), Kodeks spółek, p. 525.

<sup>41</sup> PINIOR, P. In SZUMAŃSKI, A., KWAŚNICKI R.L., OSTROWSKI, F., (eds), Kodeks spółek, p. 525.

particular the judgment of 9 February 2006,<sup>42</sup> stating that acting solely without the due care resulting from professional integrity is not an action contrary to the law, are not valid. However, in later judgments of the Supreme Court, one can find rulings in which the Court established that negligent conduct of a member of the board, exceeding the limits of business risk, which causes damage to the company, may be assessed in individual cases as contrary to law and therefore may give rise to liability of the board member (Judgment of the Supreme Court of 9 February 2018<sup>43</sup>).

On the other hand, introducing the business judgment rule may moderate the potential liability of the supervisory board members. Under Art. 483 § 3 CCC, board members shall not abuse due care if, being loyal to the company, they act in the frame of justified economic risk based on the information, analyses, and opinions to be considered when applying due care. The essence of that principle is to release the board members from liability for the damage incurred by the company resulting from wrongful decisions if the decision was reached in a manner the board members reasonably believed to be in the best interests of the company, justified by the circumstances of a specific case and based on the information necessary for the decision to be adopted<sup>44</sup>. The rule constitutes a rebuttable presumption of exercising rights and duties by the company's officers properly, in the company's best interest<sup>45</sup>.

Thus, referring to company supervision, the proper use of the supervisory instruments, such as the nomination of the supervisory board advisor, careful examination of the statements and reports, and active cooperation with the management board by demanding information or with the key statutory auditor may allow the supervisory board members to prove their loyalty to the company and due care. The burden of proof in this regard rests with the board member, who may release himself from the said liability by proving that while performing their duties, they exercised the required diligence resulting from the professional nature of the activity. Consequently, the board member should prove the suitable exercise of the supervisory instruments and prove to avail independent opinions of external experts where necessary.

## Summary

The assumption of legislature, when introducing the amendment to the Commercial Companies Code, was to furnish supervisory boards with legal instruments enabling more effective conduct of corporate supervision, to eliminate doubts raised by entrepreneurs and representatives of the doctrine, and to modernize and Europeanize company law. It should be underlined that such legal instruments as the supervisory board advisor or the participation of the key statutory auditor in the supervisory board meeting, the requirement of furnishing the supervisory board with information by the management board, existed in practice. However, after the Code amendment, these

<sup>42</sup> Judgment of the Supreme Court of 9 February 2006, Ref. No. V CSK 128/05, Legalis,

<sup>43</sup> Judgment of the Supreme Court of 9 February 2018, Ref. No. I CSK 246/17, LEX No 2483686

<sup>44</sup> OPLUSTIL, K. Instrumenty nadzoru, p. 220; BLASZCZYK, P., Koncepcja „biznesowej oceny sytuacji” na tle prawa polskiego (uwagi de lege lata i de lege ferenda). In *Państwo i Prawo* 2012, No. 3, p. 76.

<sup>45</sup> OPLUSTIL, K. Instrumenty nadzoru, p. 220.

powers will be available or, in some cases, mandatory in all joint-stock companies, which will make corporate supervision more effective. Together with the duty of loyalty and due care, the obligations of the supervisory board members will be linked to comprehensive measures to exercise permanent supervision.

On the other hand, the provisions may seem to be too detailed or extensive. In particular, the duty to furnish the supervisory board with the information by the management board might require – if interpreted strictly – much devotion of time, or vice versa, become a simple matter of routine. Furthermore, the penalty of limitation of liberty for failing to furnish the information in due time seems too stringent. The same applies to furnishing the information to the supervisory board advisor.

As far as the board member's liability is concerned, imposing the duty of loyalty and due care as a premise to pursue claims for damage inflicted to the company linked with the business judgment rule may positively impact the board operation. It should be positively evaluated by the companies, having a more prominent ability to be compensated for wrongful management and supervision, and simultaneously positively evaluated by the board members due to the introduction of the business judgment rule.

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