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## **SUPERVISORY BOARD AND AUDIT COMMITTEE IN A LISTED COMPANY**

### **1. Introduction**

Polish law regulates two types of companies: private limited liability companies and joint-stock companies. Joint-stock companies are divided into two types, depending on the way of trading shares. If the shares are admitted to trading on a regulated market, the company is then called a public company, or a listed company in the reading of art. 1 of Directive 2007/36/EU of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (O.J.EU.L.2007.184.11). This article uses the term “listed company” to denote a company in which, under Polish law, there is at least one dematerialized share.

The Commercial Companies Code (the Official Journal of Laws of the Republic of Poland, 2017.1577, as amended, hereinafter abbreviated as CCC) and other acts impose additional requirements on listed companies. The Code itself contains specific provisions concerning the exercise of shareholder rights connected with the general meeting, which is the implementation of Directive 2007/36/EU. As regards the other acts, they are mostly concerned with trading of shares on a regulated market, the most important of which is the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies (the Act of 29 of July 2005, the Official Journal of Laws of the Republic of Poland 2016.1639).

Moreover, listed companies are also treated as public-interest entities, in the meaning of Directive 2006/43/EU of the European Parliament and of the Council of 16 May 2006 on statutory audits of annual accounts and consolidated accounts (O.J.U.E.L.2006.157.87), which introduces the obligation for public-interest entities, including listed companies, to appoint the audit committee. This directive was amended by Directive 2014/56/EU of 16 April 2014 (O.J.EU. L.2014.158.196) and the audit committee is now regulated by Article

39 of Directive 2006/43/EU which was implemented into Polish law in the Act on Statutory Auditors, Audit Firms and Public Oversight of 11 May 2017 (the Official Journal of Laws of the Republic of Poland, 2017.1089). In general, the audit committee is treated in the Polish literature on the subject as a special commission within the supervisory board of a listed company, appointed by way of a resolution of the supervisory board for the performance of duties prescribed by law [1, p. 275; 3, p. 481; 6, p. 475].

The aim of this paper is to present the regulations of the supervisory board considering the requirement for the audit committee in the light of the new act.

## **2. Composition of the Supervisory Board**

The supervisory board is a mandatory organ in the structure of Polish joint-stock companies. The supervisory board shall be composed of at least three members, and at least five members in listed companies, appointed and removed by the general meeting (art. 385 § 1 CCC). The statutes may provide for a different manner of electing and removing members of the supervisory board, however, for obvious reasons, the management board may not have any influence on the appointment and removal of supervisory board members [1, p. 212; 2, 951; 4, p. 750].

In the Polish Act, there is a special minority right concerning the appointment of members of the supervisory board (art. 385 § 3 – 9 CCC) called “group elections”. Upon request of shareholders representing at least one-fifth of the share capital, members of the supervisory board shall be elected at the next general meeting by a vote in separate groups. Shareholders representing at the general meeting the portion of shares which is the aggregate number of the represented shares divided by the number of members of the supervisory board may form a separate group in order to appoint one member of the supervisory board. Upon election of at least one member of the supervisory board, the mandates of all existing members of the supervisory board shall expire before the end of their term of office.

As regards the requirements set for the members of the supervisory board, in general, it must be a natural person having full legal capacity, not convicted for offences defined in art. 18 CCC. Moreover, the statutes of the company may provide for additional requirements for members of the supervisory board. The most important feature of the dualistic system, in which two separate organs for management and supervision exist, is the prohibition to combine functions regulated by the provision of art. 387 CCC. A member of the management board, holder of a commercial power of attorney, liquidator, head of branch or plant, as well as chief accountant, attorney-at-law or advocate employed at the company shall not simultaneously be a member of the supervisory board. This

restriction shall also apply to members of the management board or liquidators of a dependent company and to any other person reporting directly to a member of the management board or liquidator.

Given the obligation that in listed companies members of the audit committee must comply with additional conditions, further requirements are imposed on members of the supervisory board. In listed companies, the audit committee is appointed by the supervisory board from among its members and it shall consist of at least three members, including the chairman (art. 128 of the Act of 2017). A relevant resolution of the supervisory board shall contain the names of the members of the audit committee, the person of the chairman and entrusting the performance of the duties to the audit committee [1, p. 276; 2, p. 962; 3, p. 481].

At least one member of the audit committee shall have competence in accounting and/or auditing. The new requirement for the members of the audit committee is that the committee members as a whole shall have competence relevant to the sector in which the company is operating. This requirement is fulfilled if one of the members has such competence or individual members have partial competences in that sector. Furthermore, the majority of the members of the audit committee, including its chairman, must meet the criteria of independence laid down in art. 129 (3) of the Act of 2017. As the members of the audit committee shall be appointed by means of a resolution of the supervisory board from among its members, the general meeting shall be obliged to appoint to the supervisory board candidates who meet the criteria for appointment to the audit committee. Therefore, it is recommended that these requirements be directly regulated in the statutes of the company.

The term of office of a member of the supervisory board shall be no longer than five years and it shall be defined in the statutes of the company. As regards the audit committee, there are no rules governing the term of office of its members, so the resolution may appoint the members for the entire term of office of the supervisory board members, or it may appoint members of the audit committee for a determined period of time, shorter than the term of office of the supervisory board.

Member States may decide that the functions assigned to the audit committee may be performed by the supervisory body as a whole. According to the Polish Act, it is admissible only in smaller companies in which at the end of the financial year and in the previous financial year two of the following three measures are not reached: 17 000 000 PLN of the sum of the assets in the balance sheet; 34 000 000 PLN of the net income of sales of goods and services; 50 per-sons in yearly employment in full-time equivalents. In the

case where the supervisory board performs the duties of the audit committee as a whole, the criteria for the audit committee members must be met by the members of the supervisory board.

A member of the supervisory board may be removed at any time by the general meeting before the end of his term of office. As regards members of the audit committee, there are no additional rules but it should be assumed that they may be removed either by a resolution of the general meeting, given the fact that they are simultaneously members of the supervisory board, or by a resolution of the supervisory board. In the latter case, it should be assumed that if the supervisory board is empowered to appoint members of the audit committee, so the supervisory board shall also be authorized to remove a member of the audit committee from office. This means that the composition of the audit committee may be changed during the term of office of the supervisory board. Moreover, removal of a member of the supervisory board who is simultaneously a member of the audit committee requires a supplementation of the composition of the audit committee.

A special relationship between a company and members of its supervisory board develops following their appointments. It is in fact a contractual and organizational legal relationship between a member of the board and the company [6, p. 559]. In general, no additional contract is concluded in connection with the membership in the board (in contrast to the members of the management board), and the remuneration of the members of the supervisory board results directly from their membership in the board. A special additional contract with members of the supervisory board is potentially possible as a contract for providing supervisory services, but the contents of the contract should be determined by way of a resolution of the general meeting, independently from the members of the management board, and should not include the possibility of termination of the contract by means of a decision of the management board for other reasons than removal from office. As stated in a judgment of the Supreme Court of 3 November 2009 (II CSK 181/09, Lex nr 560018), a contract in which the management board has the power to terminate the contract is invalid as being contrary to the essence of the obligation (art. 3531 of the Civil Code).

The remuneration of supervisory board members results from the membership in the board which is counted from the moment of their appointment to the supervisory board by the empowered authority (judgment of the Supreme Court of 30 January 2014 III CZP 104/13, OSNC 2014/11/110). The remuneration shall be set forth in the statutes or a resolution of the general meeting. Members

of the supervisory board shall in any case be entitled to reimbursement of costs incurred in connection with concluding the supervisory board activities.

Neither the Commercial Companies Code nor the provisions of the Act on Statutory Auditors, Audit Firms and Public Oversight of 2017 contain any regulation regarding the remuneration of members of the audit committee, so they shall obtain remuneration on the same grounds as the other members of the supervisory board granted by way of a resolution of the general meeting or by the statutes. However, their remuneration may differ given the fact that they fulfill additional duties stipulated in the Act on Statutory Auditors, Audit Firms and Public Oversight and they assume more responsibility for being simultaneously members of the audit committee.

## **2. Competences of the Supervisory Board**

The rights and duties of members of the supervisory board are laid down in the Commercial Companies Code. There are three different types of competences which may be divided into supervisory competences, personal competences towards the management board, and competences connected with the general meeting. Additional competences stipulated solely for the members of the audit committee are regulated in the Act on Statutory Auditors, Audit Firms and Public Oversight of 2017, which may be set out as preparatory, supervisory and informatory competences. This section of the article further presents the competences of the supervisory board and the audit committee.

The first category of supervisory board competences concerns permanent supervision over the company. The supervisory board shall exercise permanent supervision over the company's activities in all aspects of its business (art. 382 § 1 CCC). In order to perform their duties, the supervisory board may inspect all documents of the company, request reports and explanations from the management board and employees, and review the assets and liabilities of the company. However, unless the statutes provide otherwise, the supervision is carried out by the board as a whole and specific individual activities of a member of the supervisory board require a delegation in the form of a resolution of the supervisory board (art. 390 § 1 CCC).

Special duties of the supervisory board relate to the closure of the financial year and shall include evaluation of the reports on the company's operations and financial statements in respect of their compliance with the books, documents and the facts, and evaluation of the proposal of the management board concerning distribution of profits or coverage of losses. The supervisory board shall submit annual reports in writing presenting the outcome of the above evaluation to the general meeting.

The second category of competences refers to the management board. The supervisory board has the power to appoint and remove members of the management board. The power of the supervisory board shall also include the right to suspend all or individual members of the management board for important reasons. The supervisory board shall set the remuneration of the members of the management board employed on the basis of employment contracts or civil contracts, unless the statutes provide otherwise. In contracts between the company and a member of the management board, as well as in disputes with a member of the management board, the company shall be represented by the supervisory board.

By the power vested in the supervisory board, it may delegate its members to perform duties assigned to management board members (art. 383 § 1 CCC). The supervisory board may also delegate its members for a period of no longer than three months to temporarily perform the duties of members of the management board who have been removed, resigned, or who for any other reason are incapable of performing them. In such a case, their membership in the supervisory board is suspended for that period and the delegated person shall be treated as a member of the management board (judgment of the Supreme Administrative Court of 12 April 2013, I GSK 1263/11, Lex nr 1336162). However, this does not mean that the supervisory board is incomplete and cannot execute its functions effectively. In fact, only the suspended member of the supervisory board must refrain from any activities of the supervisory board [2, p. 948; 6, p. 483].

The statutes may provide for a broader scope of powers of the supervisory board, in particular, by providing that the management board must obtain consent of the supervisory board prior to undertaking actions set forth in the statutes (art. 384 CCC). However, the supervisory board may not give binding instructions to the management board concerning the management of the company's affairs (art. 3751 CCC). This means that in the situations set forth in the statutes, the management board is obliged to obtain consent of the supervisory board, but on the other hand, the supervisory board may not oblige the management board to undertake some actions. Nevertheless, a legal act performed without the consent of the supervisory board required by the statutes shall be valid, which may render members of the management board liable to the company for a violation of the statutes (art. 17 § 3 CCC).

As regards the third category of competences which are connected with the general meeting, the supervisory board may convene a general meeting and it is empowered to file a statement of claim for repealing a resolution or

for declaring a resolution invalid. Members of the supervisory board are also entitled to participate in the general meeting.

The competences of the audit committee are regulated by art. 130 of the Act on Statutory Auditors, Audit Firms and Public Oversight. The most significant are the competences associated with the supervision in respect of financial control and external audit. The audit committee is obliged to monitor the financial reporting process and to monitor the statutory audit of the annual and consolidated financial statements, in particular, its performance, taking into account any findings and conclusions by the competent authority. The audit committee shall also monitor 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. The task of reviewing and monitoring the independence of the statutory auditors or the audit firms, and in particular, the appropriateness of the provision of non-audit services to the audited entity also falls under this category of competences.

As regards the preparatory competences, they relate to submitting recommendations or proposals to ensure the integrity of the financial reporting process, as well as preparing the procedures for the selection of statutory auditors or audit firms and recommendations for the statutory auditors or the audit firms to be appointed.

The informatory competence consists in informing the administrative or supervisory body of the audited entity of the outcome of the statutory audit and explaining how the statutory audit contributed to the integrity of financial reporting and what the role of the audit committee in that process was.

It should also be noted that the audit committee shall be entitled to request reports and explanations from members of the management board and other persons without any additional delegation from the supervisory board and have access to all the documents necessary to fulfill its duties.

### **3. Liability of the members of the supervisory board**

The regulation concerning the liability of supervisory board members is provided for in art. 483 CCC. A member of the supervisory board shall be liable towards the company for any damage inflicted through an action or omission contrary to the law or the provisions of the articles of association or statutes of the company, unless no fault is attributable to such a person. This provision may apply to the liability of all members of the supervisory board, including members of the audit committee, if through action or omission contrary to the provisions of the Commercial Companies Code or to the provisions of the Act

on Statutory Auditors, Audit Firms and Public Oversight or any other act, they inflict damage on the company.

It should also be noted that a member of the supervisory board while performing his or her duties shall act with due care resulting from professional integrity, thus more stringent requirements concerning knowledge or experience are imposed on members of the supervisory board. These more stringent requirements shall be crucially important in respect of the audit committee as its members must meet additional criteria.

Apart from the above regulation, additional provisions are contained in the Act on the Statutory Auditors, Audit Firms and Public Oversight. Pursuant to art. 192 of the Act, all members of the audit committee shall be responsible for any violation of the provisions of that Act, in particular, for the lack of procedures for the selection of statutory auditors or audit firms, and recommendations for the statutory auditors or the audit firms to be appointed, omission of informatory tasks and a violation of the provisions concerning appointment of statutory auditors or audit firms, terms of contracts and rotation systems. Furthermore, the company itself or members of its supervisory board shall be responsible for the appointment and composition of the audit committee, as well as ensuring that its members meet the required qualifications.

There are two kinds of administrative penalties which may be imposed by the Polish Financial Supervision Authority (KNF). The first one is a fine, which may not exceed 250 000 PLN for one person. The second one is a ban on sitting on the management board or supervisory board for three years.

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#### **Pinior P. Supervisory Board and Audit Committee in a listed company**

Listed companies as public-interest entities are under a duty to appoint the audit committee within the supervisory board. This duty affects the composition of the supervisory board, as the members of the audit committee must meet additional criteria stipulated in the Act on Statutory Auditors, Audit Firms and Public Oversight.



Moreover, the rights and duties of the supervisory board are changed due to the regulation of specific duties set out for the members of the audit committee. Finally, the new Act also stipulates additional grounds for the responsibility of the members of the audit committee, supervisory board and the company. All these aspects show that the position of the supervisory board in a listed company is much more significant than in other types of companies.

**Keywords:** listed company, supervisory board, audit committee.