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Poland

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Introduction

In recent years, corporate governance in Poland has been receiving greater prominence, with significantly increased legislation, regulation, and regulatory mechanisms, while best practices in corporate governance continue to evolve. Increasing public scrutiny and higher expectations of public accountability have motivated organizations to improve corporate leadership and transparency in their decision-making and financial reporting processes. These high stakeholder expectations, which are both complex and challenging, apply to corporate directors, officers, supervisors, and to their advisors, subordinates, and associates.

Poland has a robust framework for corporate governance and has developed special codes of good corporate government practices. There are several laws that set forth directors' duties and penalize related offenses. A comprehensive discussion of all the complex issues related to corporate directors' liability is beyond the scope of this chapter, which instead focuses on the essential issues.

Dualistic (Two-Tier) Board System

Under Polish law, a company is organized in accordance with a dualistic system of management and supervision. Management and supervision activities are performed by two separate bodies: a management board and a supervisory board. The management board is a managing and executive body authorized to represent the company *vis-à-vis* third parties, while the supervisory board exercises supervision and internal control over the company's activities.

The limited liability company (*spółka z ograniczoną odpowiedzialnością*, Sp.z o.o.) essentially conducts its business activities on a smaller scale. An Sp.z o.o. cannot be quoted on the regulated market and the appointment of the supervisory board is facultative, subject to some exceptions. By contrast, in the joint stock company (*spółka akcyjna,* S.A.), appointment of a supervisory board is compulsory.

Only natural persons can become members of the management board and the supervisory board. For the purposes of this chapter, the members of both these boards are called directors of the company while members of the management board are called the 'inside directors' and members of the supervisory board are called the 'outside directors'.

Management Board

Authority

The management board has a strong and independent position in relation to the other bodies in the company. It manages the company's affairs and represents it before third parties. In a joint stock company, the shareholders' meeting and the supervisory board may not give any binding instructions to the management board in relation to the management of the company's affairs,[1] nor is the supervisory board in a limited liability company empowered to instruct the management board.[2]

Pursuant to the presumption of the inside directors' powers, the management board is authorized to act in all matters that the provisions of the law or the articles do not assign to the competence of other corporate bodies.

The powers of an inside director to manage the affairs of the company and to represent it encompass all court proceedings and out-of-court dealings of the company and may not be restricted with legal effect toward third parties.[3] If the management board is composed of several inside directors, the manner of representation will be determined by the articles of association. If the articles of association do not include any provisions in this respect, the representations on behalf of the company may be made by two inside directors acting jointly or by one inside director acting together with the holder of the commercial power of attorney.[4]

Election of Inside Directors

The management board may be composed of one or more inside directors.[5] The articles of association may (but do not have to) specify the number of the inside directors, as well as their position, such as president, vice-president, or secretary.

In a joint stock company, the inside directors are appointed by the supervisory board[6] and, in a limited liability company, they are appointed by resolutions at shareholders' meetings.[7] The articles of association may specify other rules for the appointment of inside directors.

An inside director in a joint stock company cannot hold this office for more than five years,[8] while in a limited liability company the term may be specified in the articles of association. If the articles of association do not regulate this matter, the mandate of the inside director must terminate on the date of the shareholders'

1 Commercial Companies Code, art 375(1).
2 Commercial Companies Code, art 219(2).
3 Commercial Companies Code, arts 204 and 372.
4 Commercial Companies Code, arts 205 and 373.
5 Commercial Companies Code, arts 201(2) and 368(2).
6 Commercial Companies Code, art 368(4).
7 Commercial Companies Code, art 201(4).
8 Commercial Companies Code, art 369(1).

meeting which approves the financial statement for the first full financial year of his service as an inside director.[9]

Board Operations and Meetings

The company's articles of association or internal regulations may include the rules of the management board's operations, such as the frequency of board meetings. Moreover, the articles of association may govern the relations among the inside directors; if the articles do not regulate it, the Commercial Companies Code provides some general rules in this respect. In accordance with these rules, all inside directors of a joint stock company will jointly manage the company's business.

Resolutions of the management board must be adopted by an absolute majority of inside directors' votes at a board meeting about which they have been duly notified.[10] Each inside director in the limited liability company will manage its day-to-day business without a prior resolution by the management board. However, if at least one of the other inside directors objects to any matter related to the company's day-to-day business, a prior resolution by the management board is required.[11]

Contracts Concluded by and between Company and Inside Directors

In General

In contracts between the company and its inside directors, the company must be represented by the supervisory board or an attorney-in-fact appointed under a resolution of the shareholders' meeting.

If the sole inside director is at the same time a sole shareholder, this rule of the company's representation does not apply. Any legal actions, including but not limited to contracts between such inside director and the company, may only be concluded in the notarial form.[12]

Inside Directors' Compensation

The supervisory board in a joint stock company will determine the compensation of the inside directors employed under an employment contract or other contract, unless the articles of association state otherwise.

The shareholders' meeting may authorize the supervisory board to decide that this compensation will include the inside directors' rights to a specified share in the annual profits of the company.[13] The compensation of the inside directors of

9 Commercial Companies Code, art 202.
10 Commercial Companies Code, art 371.
11 Commercial Companies Code, art 208(4).
12 Commercial Companies Code, arts 210(2) and 379(2).
13 Commercial Companies Code, art 378(2).

a limited liability company is determined in the contracts between the director and the company[14] and/or by the shareholders' resolution.

Employment Contract and Management Contract

Inside directors are employed by the company under an employment contract or other service contract, also known as a management contract. The management contract may be concluded directly with the inside director or with a business entity conducting management activities and indicating a natural person (or persons) to be appointed as the company's inside director (or directors).

The employment contract is a common form of employment for inside directors, although it may seem inadequate in relation to their position in the company. In fact, under an employment contract, the employee will be subordinated to the employer and his liability will be limited. Inside directors, however, have an independent position, as no corporate body or person may give them any binding instructions as to the management of the company's business, and their liability to the company is unlimited.

Therefore, a management contract is the most appropriate form of employment for inside directors. Employment and management contracts, irrespective of their form, provide various clauses, depending on the specific company's requirements. Clauses that may be useful are:

- A non-competition clause that applies during the term of office and the term of the contract and also after termination;
- Security on property or other security against any compensation claims by the company;
- Limitation or extension of the inside director's liability, depending on the specific company's requirements;
- Performance criteria;
- Criteria for awarding variable components of remuneration;
- Terms and conditions of payment or return of variable components of remuneration, pursuant to the recommendations of the European Commission;[15]
- Terms and conditions of termination payments; and
- Terms and conditions of share-based remuneration.

Conflict of Interest

An inside director of the company may not simultaneously be the outside director of that company or its dependent company or cooperative.[16] In the event

14 Discussed in 'General Rules', above, and further discussed in the following subsection.

15 Recommendations of the European Commission Number 2004/913/EC and Number 2009/385/EC.

16 Commercial Companies Code, arts 214 and 387.

of a conflict of interest between the company and the inside director, his spouse, relatives or those related up to the second degree, and persons with whom he has personal relations, the inside director must abstain from making any decisions and may request the recording of this fact in the minutes.[17]

Companies which are listed on the stock exchange or alternative markets (alternative trading system) apply good practices of corporate governance on a 'comply-or-explain' basis. Pursuant to these rules, an inside director must notify the management board of any conflict of interest, or the possibility of its occurrence, and must refrain from taking part in discussions and voting on a resolution on an issue related to this conflict of interest.

Access to Corporate Information

Inside directors have an unlimited access to corporate information. They are insiders of the first degree, to whom the strict security rules of inside information on a capital market apply.

Supervisory Board

Authority

The fundamental power of the supervisory board consists in the permanent supervision over all areas of the company's activities.[18] Furthermore, the tasks of the supervisory board (and the outside directors) include, but are not limited to:

- Representation of the company in contracts concluded by and between the company and its inside directors;
- Representation of the company in disputes between the company and its inside directors;
- Granting consent to inside directors to deal with competing interests, if the supervisory board appoints and dismisses the inside directors or if the articles of association grant this authority to the supervisory board;
- Convening the ordinary shareholders' meeting if the management board has not convened it within the term provided by law;
- Applying for convening of the extraordinary shareholders' meeting by the management board, and convening the meeting if the management board fails to do so despite the relevant application;
- Bringing an action for repeal of a resolution of the shareholders' meeting; and
- Bringing an action for declaration of the invalidity of a resolution of the shareholders' meeting.

17 Commercial Companies Code, arts 209 and 377.

18 Commercial Companies Code, arts 219(1) and 382(1). The issues related to the supervision of the company's business and its books (and documents) are discussed in 'Internal Control by the Supervisory Body', below.

Election of Outside Directors

The supervisory board must be composed of at least three outside directors and at least five outside directors in case of public companies.[19] Outside directors are appointed by the shareholders' meeting.

The resolutions of a limited liability company also may be adopted by the shareholders in writing or by correspondence outside of the shareholders' meeting. The articles of association may provide for a different procedure of appointing outside directors.

In joint stock companies, upon an application of the shareholders representing at least one-fifth of the share capital, the election of outside directors is conducted by way of voting held in separate groups, even if the articles of association provide for a different procedure to appoint the supervisory board.[20]

An outside director in a joint stock company cannot hold this office for more than five years. Outside directors in a limited liability company must be appointed for one year, unless the articles of association provide otherwise.

Pursuant to the rules of good corporate governance, at least two outside directors should meet the criteria of independence from the company and connected entities.[21] Moreover, specific committees, such as an audit committee and a remuneration committee, should operate within the supervisory board.[22]

Board Operations and Meetings

The supervisory board in the joint stock company must exercise its duties collectively. It may, however, assign an outside director to individually perform certain supervisory activities (for instance, within the audit or remuneration committees).[23]

Each outside director in a limited liability company may exercise the right of supervision independently, unless the articles of association state otherwise.[24] The meetings of the supervisory board in a joint stock company must be convened as the need arises, but not less frequently than three times in the financial year. The chairman of the supervisory board must convene the meeting at the request of the management board or an outside director, within two weeks from receipt of the request.[25]

19 Commercial Companies Code, arts 215(1) and 385(1).
20 Commercial Companies Code, art 385(3).
21 Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC), Attachment II.
22 Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/EC), Attachment I.
23 Commercial Companies Code, art 390(1).
24 Commercial Companies Code, art 219(5).
25 Commercial Companies Code, art 389.

Resolutions will be adopted if all the outside directors have been invited and at least half of them attend the meeting. The articles of association may stipulate stricter rules concerning the quorum. The resolutions must be adopted by an absolute majority of votes, unless the articles of association state otherwise. The articles of association may provide, among other rules, that, in case of an equal number of votes, the chairman will have the casting vote, that outside directors can vote in writing through another outside director, and that adoption of the resolutions in writing or by means of direct remote communication is authorized.

Adoption of the resolutions other than by way of a meeting of the supervisory board is not allowed for the election or dismissal of the supervisory board's chairman and deputy chairman, for the appointment or dismissal of an inside director, and for the suspension of an inside director. Pursuant to good corporate governance practices, an outside director should not resign from his position if his resignation could have a negative impact on the supervisory board's activities.

Outside Directors' Compensation

The articles of association or the resolution of the shareholders' meeting may determine the outside directors' compensation. Remuneration in the form of the right to participate in the profits of the company may be granted solely by the shareholders' meeting. Outside directors will be entitled to reimbursement of costs related to their participation in the work of the board.[26]

Outside directors in a joint stock company delegated to permanently and individually perform acts of supervision will receive separate remuneration, as determined by the shareholders' meeting. The shareholders' meeting may entrust this power to the supervisory board.[27]

Conflict of Interest

Certain persons may not hold the position of an outside director.[28] Persons prohibited from being outside directors are:

- An inside director;
- The holder of a commercial power of attorney;
- A liquidator;
- A manager of a branch or a factory;
- A chief accountant, a legal advisor, or an advocate employed in the company;
- Other persons directly reporting to an inside director or to the liquidator; and
- Inside directors or liquidators of a dependent company or cooperative.

26 Commercial Companies Code, art 392.
27 Commercial Companies Code, art 390(3).
28 Commercial Companies Code, arts 214 and 387.

Pursuant to good corporate governance practices, an outside director should notify the supervisory board about any other kind of conflict of interests and abstain from making decisions in matters related to such conflicts of interest.

Access to Corporate Information

Outside directors have unlimited access to corporate information. They are insiders of the first degree, who must respect the strict security rules of inside information in a capital market.

Agreements with Directors

The conclusion by the company of a loan agreement, a credit agreement, a surety agreement, or other similar agreement with the director, or for the director's benefit, requires the consent of the shareholders' meeting.[29]

The conclusion of any of these agreements between the director of the dominant company and a dependent company requires the consent of the shareholders' meeting of the dominant company.[30] The consent may be granted before or after the conclusion of the contract, but not later than within two months of the date on which the company makes the relevant declaration.[31]

Ban on Competition

An inside director or an outside director in a joint stock company who is delegated to the sole performance of supervision may not engage in any competing activity without the company's consent. Accordingly, he may not involve himself in a competing business, and/or participate in a competing partnership, whether as a partner in a civil law partnership and/or in a partnership.

A director also may not hold the position of a company director or director in another competing legal entity, nor may he hold 10 per cent or more of the shares of a competitor's company and/or hold the right to appoint at least one inside director in a competitor company.[32]

The consent for a director's performance of the competing activity may be given by the corporate body authorized to appoint a director, unless the articles of association state otherwise. The ban on competition may be appropriately detailed or extended in the contract concluded by and between the company and the director.[33]

29 Commercial Companies Code, art 15(1).
30 Commercial Companies Code, art 15(2).
31 Commercial Companies Code, art 17(2).
32 Commercial Companies Code, arts 211 and 380.
33 Discussed in 'Employment Contract and Management Contract', above.

Monitoring

External Audit/Notification Obligations of the Company

Statutory Auditor

In general, the external audit of the company is conducted by a statutory auditor who is an independent expert acting within the Act on Statutory Auditors and their Autonomy.[34] The statutory auditor will be appointed by a resolution of the shareholders' meeting, unless the articles of association state that the supervisory board will appoint the statutory auditor.[35] The statutory auditor examines and expresses the opinion on, among other matters:

- The veracity, reliability, and clarity of the company's annual financial statement;
- Financial statements of a listed company published in periodic reports;
- The veracity and reliability of the statement of the joint stock company's founders;
- Whether the value of in-kind contributions to the joint stock company's capital correspond at least to the nominal value of the shares subscribed for such contribution;[36] and
- The planned merger, division, or transformation of the company.[37]

Disclosure of Financial Documents

The management board should submit the company's financial statement, statutory auditor's opinion, management board's report on the company's activity, resolution of the shareholders' meeting approving the annual financial statement, and resolution on profit distribution or loss to the registration court within 15 days from the date of approval of these documents by the shareholders' meeting.

The company's documents that are filed with the registration court are available to the public.

Transparency Obligation of Listed Companies

Listed companies must meet specific transparency requirements.[38] They must simultaneously provide all inside (non-public) information and ongoing and

34 Act on Statutory Auditors and their Autonomy, Entities Authorized to Examine the Financial Statements, and on Public Audit of 7 May 2009 (Dz.U. Nr 77, poz. 649).

35 Accounting Act (Dz.U. Nr 121, poz. 591), art 66(4).

36 Commercial Companies Code, art 312.

37 Commercial Companies Code, arts 503, 538, and 559.

38 Directive 2004/109/EC of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (the Transparency Directive); Act of Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies of 29 July 2005 (Dz.U. Nr 184, poz. 1539), referred to as the Act on Public Offering.

periodic information (in the form of reports) to the Polish Supervision Authority, the company operating the regulated market, and to the public.[39]

This information must be disclosed through the Electronic System for Information Transmission (ESIT) and the Internet. Furthermore, listed companies must publish financial statements, ongoing and periodic reports, and all disclosed information on their websites. Semi-annual and annual reports[40] include specific statements by inside directors.

In the semi-annual and annual reports, inside directors should state that, to the best of their knowledge, the annual financial statement or the semi-annual shortened consolidated financial statement and comparative data have been executed in accordance with accounting rules in force and that they truly, reliably, and clearly reflect the property and financial situation of the issuer and its financial result. They also must state that the issuer's activity report shows the true picture of its development, achievements, and situation, including, but not limited to, basic dangers and risks.

In addition, inside directors should state that the entity authorized to examine the financial statements and examining the annual (or the semi-annual shortened consolidated) financial statement has been appointed in accordance with the provisions of law in force, and that this entity and statutory auditors examining this statement are in a position to give their impartial and independent opinion on the examined financial statement, pursuant to the provisions of law in force and professional standards.

These statements confirm the inside directors' liability for reliability and exhaustiveness of the information included in the financial statement and reports, as well as the legality of the appointment of statutory auditors and their qualifications to provide an impartial and independent opinion on the financial statement.

The annual report includes the company's statement on its application of the rules on good corporate governance practices.

Internal Control by the Supervisory Board

The supervisory board exercises constant supervision in every area of the company's activity. Its duties include, but are not limited to:

- Assessment of the annual financial statements and the management board's reports on the company's activity as to its compliance with the books and documents, as well as with the actual state of affairs;
- Assessment of the management board's application for profit division or loss covering;

39 Act on Public Offering, art 56(1).

40 Regulation of 29 February 2009 on Information (Dz.U. Nr 33, poz. 259), paragraphs 89–91.

- Execution of the annual written report, including the results of these assessments, which will be submitted to the shareholders' meeting;
- Suspending, for significant reasons, individual or all inside directors from their duties (this power is relevant to the joint stock company); and
- Delegating outside directors, for a period not exceeding three months, to temporarily perform the duties of those inside directors who have been dismissed, who resigned, or who are incapable of performing their duties for other reasons (this power is relevant to the joint stock company).

The supervisory board may examine all company documents, demand reports and explanations from the management board and the employees, and review the state of the company's assets.[41] The articles of association may extend the powers of the supervisory board.

Shareholders' Supervisory Rights

The principal supervisory rights of the shareholders include consideration and approval of the annual financial statements and the management board's reports of the company's activity. Investors in securities of public companies have wide access to the information published in ongoing, quarterly, semi-annual, and annual reports and to information which has been made available to the public.

Furthermore, shareholders have the right to bring an action in order to redress damage incurred by the company, if the company fails to do so within one year from the date on which the act causing the damage is discovered (*actio pro socio*).

A shareholder or shareholders of a listed company holding at least five per cent of the total number of votes (qualified shareholders) have a right to file an application for adoption of a resolution concerning auditing (at the company's expense) of a specific matter related to the company's incorporation or the management of its affairs by the statutory auditor (special-purpose auditor). If the shareholders' meeting fails to adopt the resolution in accordance with the qualified shareholder's proposal, the court register will appoint the special-purpose auditor at the shareholder's request.[42]

In a limited-liability company, appointment of the supervisory board is not obligatory, with some exceptions. Each shareholder has the right to control the company. The shareholder may, at any time, inspect the books and documents of the company, draw up the balance sheet for his use, or request explanations from the management board. The management board may refuse to provide the requested explanation to the shareholder or may refuse to provide the books and documents for inspection if there is a justified concern that the shareholder may use this information for purposes contrary to the interests of the company and which may cause substantial damage to the company. Disputes between the

41 Commercial Companies Code, art 382(3) and (4) and art 219(3) and (4).
42 Act on Public Offering, arts 84 and 85.

management board and the shareholder in this respect may be settled through a court action.[43]

Upon a request by the shareholder or shareholders of a limited liability company representing at least one-tenth of the share capital, the court may appoint a statutory auditor for the purpose of examining the accounts and operations of the company.[44]

This shareholders' right to control may not be excluded or limited, even if the supervisory board is appointed; however, this right may be excluded or limited by the articles of association if a supervisory board or an audit committee is established.

Good Practice Rules

In general, listed companies apply good practices of corporate governance pursuant to the 'comply-or-explain' rule. Good practices of companies listed on the Warsaw Stock Exchange (WSE), known as the Code of Best Practice for WSE Listed Companies (the Best Practices Code), provide that the company shall establish its remuneration policy at least for directors and key managers.[45]

The remuneration policy should in particular regulate the form, structure and method of establishment of directors' and key managers' remuneration. According to the Code of Best Practice, the remuneration level for inside directors, outside directors, and key managers should be sufficient to recruit, maintain, and motivate people competent for due management of the company and its supervision.

The motivation programs shall, among others, make the inside directors' and key managers' remuneration level conditional upon the real, long – term financial situation of the company, long – term value increase for the shareholders and the stability of the enterprise's functioning. Contrary to that, the outside directors' remuneration shall not be dependent on any variable components, nor on the company's financial outcome.

In the report on the company's activity, the remuneration policy's report should be presented which should include at least:

- The general information on the company's remuneration system,
- Information on every inside director's remuneration conditions and amount, divided into constant and variable remuneration components including determination of the key parameters to establish the variable remuneration components and rules of compensation payments or other payments related to the termination of an employment, service or any similar agreement – separately for the company and for every entity belonging to the capital group,

43 Commercial Companies Code, art 212.
44 Commercial Companies Code, art 223.
45 Code of Best Practice for Companies Listed on the WSE 2016.

- Information on every inside director's or a key manager's non-financial remuneration components,
- Determination of important changes in remuneration policy that occurred in the past financial year or information on the lack of such changes,
- The evaluation of the remuneration policy's functioning under accomplishment of its purposes, in principle long-term value increase for the shareholders and the stability of the enterprise's functioning.

Whistleblowing

Polish law does not regulate issues related to whistleblowing schemes — that is, employees voluntarily informing the company about irregularities perpetrated by, among others, the directors. Implementation of this program in Polish companies requires strict adherence to the provisions of Polish and European law on privacy and personal data protection.

In practice, whistleblowing programs are implemented in Polish subsidiaries of United States listed companies that must meet the requirements specified in the Sarbanes-Oxley Act (SOX). This program concerns the heaviest irregularities, including torts and even offenses or crimes related to accounting, internal accounting controls, auditing matters, bribery, and banking and financial crimes. Moreover, the whistleblowing program in Polish subsidiaries should comply with the requirements of Article 29 of the Data Protection Working Party Opinion Number 1/2006.

Organizational Liability of Directors

In General

Directors may bear organizational liability if they do not perform their duties in a proper manner. The sanctions are dismissal or suspension of the directors from their duties under the general rules. Directors may be dismissed at any time, unless the articles of association provide otherwise.

Dismissal of Directors

Dismissal of Inside Directors

An inside director in a joint stock company may be dismissed by the supervisory board, unless the articles of association provide otherwise. He also may be dismissed or suspended from his duties by the shareholders' resolution.

An inside director in a limited liability company may be dismissed by the shareholders' meeting, unless the articles of association provide otherwise. Although an inside director may be dismissed at any time, this does not affect his rights under the employment relationship or another legal relationship applicable to his service as an inside director. The articles of association may include other provisions, particularly those concerning limitation of the right to dismiss an inside director in situations where significant reasons exist.

Dismissal of Outside Directors

An outside director may be dismissed by the shareholders' meeting, unless the articles of association provide otherwise.

Suspension of Inside Directors

The supervisory board in a joint stock company may suspend individual or all inside directors for significant and justifiable reasons. Furthermore, an inside director may be suspended by the shareholders' meeting. The articles of association of a limited liability company may provide for the supervisory board's power to suspend inside directors.

Directors' Civil Liability

Directors' Liability to Third Parties

Liability for Providing False Data

This liability relates to providing false data when the company is incorporated and when its share capital is increased. If inside directors have provided false data in their representations related to the cash and/or in-kind contributions of the shareholders to the share capital (false representation), they will be liable to the creditors of the company, jointly and severally with the company, for three years from the date of the company registration or from the date of increase of the share capital.[46]

Inside directors' liability for false representation must be based on fault: wrongful intention or negligence. In order to register the company or its increased share capital, all inside directors must make the declaration that the contributions to the share capital have been made by all shareholders in full (in case of a limited liability company), or in compliance with the articles of association and applicable law (in case of a joint stock company).

Inside directors will be liable to any of the company's creditors for any of the company's obligations for three years from the date of its registration or registration of the increase in share capital, irrespective of any causal link between their false representation and damage incurred by creditors. This is a liability of repressive character, to ensure compliance.

Liability for Dissemination of False or Incomplete Information

In General. Corporate directors may be held liable for disseminating false or incomplete information when issuing financial instruments.

False Information Related to Securities of Unlisted Companies. Dissemination of false information or illegal concealment of information on the company's assets

46 Commercial Companies Code, arts 291 and 479.

in relation to the securities issued by an unlisted company constitutes a tort.[47] A person who has collaborated in the issuing of such securities by the company, directly or through third parties, will be liable for this tort. Thus, directors may bear this liability.

On the other hand, any person who incurred damage may raise a claim based on this tort against the wrongdoer. The claimant has to assert an adequate causal link between the damage incurred and the concealment of the relevant information or dissemination of the false information, as well as the fault of the wrongdoer.

Damages will cover the actual loss suffered by the claimant (*damnum emergens*) and the benefits which the injured party could have obtained had it not suffered the damage (*lucrum cessans*).

A claim for redress for damage is barred by limitation after three years from the date on which the injured person learned of the damage and of the identity of the person liable to redress it. However, this period cannot exceed ten years from the date of the event which caused the damage. Dissemination of false information concerning the company is a criminal offense.[48]

Defects in the Prospectus. Liability will attach to a person or persons responsible for making public information that is unreliable, untrue, or incomplete or omitting to include information in the prospectus, the information memorandum, or other documents made available with respect to public offering of securities or financial instruments for admission to trading on the regulated market, or seeking such admission (prospectus information).[49]

Any person responsible for incorrect or false information in the prospectus, including the company's directors ('responsible persons'), will be liable to compensate any person who suffers harm as a result of this act.

The injured person may be, *inter alia*, the person who purchased or sold the relevant securities or a person who decided not to conclude a contract on purchase or sale of the securities in the capital market on the basis of the false or incomplete information.

This regulation provides for a presumption of fault of the wrongdoers and their subordinates, associates, and service providers. Wrongdoers may be exculpated by proving that they are not at fault; moreover, they have to prove that their subordinates, associates, and services providers, if applicable, also are not at fault.[50]

Liability extends to intent to harm or negligence. Negligence, in this specific context, means the responsible person's failure to exercise due care considering

47 Commercial Companies Code, art 484.

48 Commercial Companies Code, art 587. The liability for disseminating false information about the company is discussed in 'Selected Issues of Directors' Criminal Liability', below.

49 Act on Public Offering, art 98(1).

50 Act on Public Offering, art 98(1).

the professional nature of his action.[51] In the event that several wrongdoers have committed the act (tort), they will be jointly and severally liable for it, and their liability may not be excluded or limited. Liability for this tort occurs if there is an adequate causal link between disclosure of the unreliable, untrue, or incomplete information and the damage incurred.

A claim for redress for damage is barred by limitation after three years from the date on which the injured person learned of the damage and the identity of the person liable. However, this period cannot exceed 10 years from the date of the event which caused the damage. This act also constitutes a criminal offense.[52]

Disclosure of Untrue Information or Omission of Information. The issuer or the entity that prepared or participated in the preparation of the ongoing and periodical inside information[53] must redress the damage caused by disclosure of untrue information or the omission to disclose true information, unless this entity and its subordinates, associates, and services providers are not at fault.[54]

Directors also may be liable for omissions or misleading or untrue disclosure. The rules of responsibility discussed previously[55] apply to this tort. This act also constitutes a criminal offense.[56]

Use of Defective Information in the Prospectus. Reliance on untrue (or omitted) information in the prospectus in the trading of financial instruments also creates liability. Any persons (including directors) who participate in disseminating defective information in a prospectus will be liable for any resultant damage to an injured person who relies on such information when trading in financial instruments, unless the person or persons responsible were not and could not have been aware of the untruthfulness or omission of such information.[57]

Inside Directors' Liability for Limited-Liability Company's Obligations

Inside directors in a limited-liability company are jointly and severally liable for the company's obligations to its creditors, if enforcement of these obligations against the company proves to be ineffective.[58]

An inside director may release himself from that liability if he proves that a petition for bankruptcy was filed at the appropriate time or at the same time the

51 Act on Public Offering, art 98(9).
52 Act on Public Offering, art 100. Criminal liability is discussed in 'Selected Issues of Directors' Criminal Liability', below.
53 Act on Public Offering, art 56(1).
54 Act on Public Offering, art 98(7).
55 In 'Defects in the Prospectus', above.
56 Act on Public Offering, art 100. Criminal offenses are discussed in 'Selected Issues of Directors' Criminal Liability', below.
57 The liability rules discussed in 'Defects in the Prospectus' also apply in this case.
58 Commercial Companies Code, art 299.

court issued a decision on the opening of the restructuring proceedings; or on the approval of the agreement in the agreement approval proceedings or if he proves that it is not his fault that the petition for bankruptcy, was not filed; or if he proves that the creditor did not incur any damage even though the petition for bankruptcy was not filed or that the decision on the opening of the restructuring proceedings was not issued or that the agreement in the agreement approval proceedings has not been approved.

An inside director is therefore liable when he is at fault in not filing the petition for bankruptcy or not initiating the restructuring proceedings, which resulted in the ineffective enforcement against the company. There should be a causal relation (*sine qua non*) between the inside director's omissions and the ineffectiveness of enforcement against the company.

The burden of proof related to the causal link and/or the insider director's fault is reversed, that is, it lies on the director. The creditor only has to prove that the enforcement against the company has been ineffective, in order to pursue its claims against the inside director. The liability is of a repressive character, to ensure compliance. This kind of liability does not concern the inside directors in joint stock companies, including public companies, nor does it concern outside directors.

Liability for Non-Performance of Duties Specified in Bankruptcy Law

Under the Bankruptcy Law, inside directors are liable to third parties, including the company's creditors, for failing to file for the company's bankruptcy within 30 days from the date on which it has been considered insolvent.[59] The company is considered insolvent when it has lost its ability to settle its due and payable liabilities or when, even if it settles its payable liabilities, the company's liabilities exceed the value of its assets and such a condition persists for a period of time exceeding 24 months.[60] It is presumed that the company has lost its ability to settle its due and payable liabilities if the delay to settle its payment liabilities exceeds three months.[61]

Damages exclusively cover the loss caused by the failure to file for bankruptcy within the appropriate time. The burden of proof of an adequate causal link between the damage and the failure to file for bankruptcy within the appropriate time lies on the creditor, who also has to prove the inside director's fault. This liability concerns inside directors of all kinds of companies, but does not concern outside directors. Failure to file for bankruptcy within the appropriate time also constitutes a criminal offense.[62]

59 Bankruptcy Law, art 21.
60 Bankruptcy Law, arts 10 and 11.
61 Bankruptcy Law, art. 11 (1a).
62 Commercial Companies Code, art 586. Criminal liability is discussed in 'Selected Issues of Directors' Criminal Liability', below.

Directors' Civil Liability to Company and Shareholders

General Principles of Liability

Presumption of Fault. The liability of the company's directors is based on the presumption of their fault. The burden of proof is reversed, which means that the wrongdoer has to prove that he is not at fault in order to release himself from liability.

Liability for damages occurs if there is an adequate causal link between an illegal act or omission and the damage caused. Damages will cover both the losses suffered by the company (*damnum emergens*) and benefits which the injured party could have obtained had it not suffered the damage (*lucrum cessans*). Directors are liable jointly and severally if they have jointly caused the damage.

Duty to Exercise Care and Reliance on Advice of Others. Directors must exercise due care in accordance with the professional nature of their activities.[63] Thus, they should be conscientious, qualified, professionally experienced, and effective.

Pursuant to the jurisprudence of the Supreme Court, the standard of due care required by the professional nature of directors' activities includes, but is not limited to, the knowledge of the law in force and resulting consequences on the business activity. This is the increased diligence required from professionals.[64]

The directors may not release themselves from liability by claiming lack of the required knowledge or qualifications. Moreover, they cannot fully rely on professionals' advice, as they are obligated to supervise the quality of professional services. Deliberate risk-taking within the limits of rational economic decisions does not violate the due diligence rule.

Prescription. A claim for redress of damage will be time-barred after three years from the date on which the company learnt of damage and the identity of the person liable. In any case, a claim will be barred by limitation after 10 years (in the case of a limited liability company) or after five years (in the case of a joint stock company) from the date of the event which caused the damage.[65]

Joint and Several Liability. If the damage has been caused by several persons (directors) jointly, they will be jointly and severally liable for this damage.

Liability Related to Improper Exercise of Directors' Duties

The directors are liable for damage caused to the company if they are at fault for acts or omissions that violate the law or provisions of the articles of association

63 Commercial Companies Code, arts 293(2) and 483(2).
64 Supreme Court judgment, III CRN 77/93 (OSNC 1994, no. 3, item 69).
65 Commercial Companies Code, arts 297 and 488.

and cause damage to the company's assets, and there is an adequate causal link between the damage and the acts or omissions.[66]

In particular, directors are liable for breach of their obligation to efficiently manage the company's affairs.[67] The obligation to comply with the law and the provisions of the articles of association is absolute. The director cannot release himself from liability by relying on the fact that he has merely executed resolutions of the shareholders' meeting or of the supervisory board if such resolutions were in breach of the law or provisions of the articles of association. Directors are authorized to bring an action for annulment of a shareholder's resolution or for the declaration of its invalidity. The general principles of liability also apply to this liability.

Liability to Shareholders

Directors' liability to shareholders is related to the merger or division of companies.[68] The directors of the merging companies are jointly and severally liable to the shareholders if they are at fault for acts or omissions in breach of the law and the provisions of the respective articles of association in relation to the companies' merger, acquisition, or division, if this causes damage to the shareholder's assets, and when there is an adequate causal link between the damage and the acts or omissions.

The provisions discussed in 'Presumption of Fault' and 'Duty to Exercise Care' apply to this liability. Claims for redress of damage will be barred by limitation after three years from the date of the announcement of the merger or division.

Liability Related to Company's Incorporation

This liability is for damage caused in relation to the company's incorporation.[69] The inside directors of the first management board of the incorporated company and any other persons participating in the company's incorporation will be liable for damage to the company if they are at fault for an act in breach of the law at the time of the company's incorporation which has caused damage to the company's assets, when there is an adequate causal link between the damage and the act or omission.

In a joint stock company, acts in breach of the law may consist of inclusion or collaboration in the inclusion of false information in the articles of association, reports, opinions, announcements, and records of false data or dissemination of this false information in another way; omission of information that is significant in the company's incorporation in the articles of association, reports, opinions,

66 Commercial Companies Code, arts 293 and 483.

67 Commercial Companies Code, arts 201(1) and 368(1).

68 Commercial Companies Code, arts 512 and 548; Third Council Directive 78/855/EEC concerning mergers of public limited liability companies; Sixth Council Directive 82/891/EEC concerning the division of public limited liability companies.

69 Commercial Companies Code, arts 292 and 480.

announcements, and records, in particular information related to in-kind contribution, acquisition of property, and granting of remuneration or other special benefits to the shareholders or other persons; and collaboration in activities intended to register the company on the basis of a document containing the false data. The burden of proof of the wrongdoer's fault lies with the company.

The claim for redress of damage will be time-barred after three years as of the date on which the company learnt of damage and the identity of the person liable. In any case, the claim will be barred by limitation after 10 years (in the case of a limited liability company) or after five years (in the case of a joint stock company) from the date of the event which caused the damage.

Liability for Excessive Benefits

This liability arises for loss to the company resulting from excessive payments made[70] in connection with the incorporation or increase in share capital of a joint stock company. Any person, including a director, will be liable to the company if he secures, through his fault, for himself or a third party, a payment excessively higher than the sale value of in-kind contributions or acquired property, or a remuneration or special benefits disproportionate to the services provided, with resultant damage to the company's assets, when there is an adequate causal link between the damage and the wrongdoer's act of securing the excessively high payment or benefits.

The burden of proof lies with the company. The claim for redress of damage will be time-barred after three years from the date on which the company learnt of the damage and the identity of the person liable. In any case, the claim will be barred by limitation after five years from the date of the event which caused the damage.

Action of Shareholder in Company's Interest

Certain liabilities of directors that cause damage to the company may give rise to an action by shareholders for the investigation of claims based on these liabilities.

Any shareholder (in case of a joint stock company, also any person who holds another title to participate in profits or division of assets) may bring an action for redressal of damage caused to the company, if the company does not bring this action within one year from the date on which the act causing the damage is discovered (*actio pro socio*).[71]

At the defendant's request, the court may order a deposit to be paid to secure the damage which may be sustained by the defendant. If the action proves to be unfounded and the plaintiff acted in bad faith or with flagrant negligence when bringing the action, the plaintiff must redress the damage caused to the defendant.

70 Commercial Companies Code, art 481.
71 Commercial Companies Code, arts 295, 296, 486, and 487.

When an action is brought by the shareholder in the interest of the company or in the event of the company's bankruptcy, the persons liable to redress the damage may not invoke a resolution of the shareholders' meeting on approval of the performance of their duties or a waiver by the company of claims for damages.

Liability for Questionable Payments

The directors of a company are liable for any questionable payments approved by them.[72] The directors will be liable to the company if they are at fault for payments or performance in favor of a shareholder in breach of the law or the provisions of the articles of association.

Claims related to such illegal actions will be time-barred after three years from the date of the payment, except for claims against a recipient who was aware of the illegality of the performance. Claims against the recipient will be time-barred after 10 years. The illegal action also may constitute a basis for directors' liability for damages.[73]

Liability for Overvaluation of In-Kind Contributions

Directors may be liable for the overvaluation of in-kind contributions.[74] In a limited liability company, the inside directors and the shareholder who made the overvalued in-kind contribution will be jointly and severally liable to make good the outstanding balance to the company, if the value of in-kind contributions has been considerably inflated in relation to their sale value as of the date of conclusion of the articles of association, and the inside director was aware of this, and filed such information at the time of registration.

An inside director has the right of recourse against the shareholder who has held shares in exchange for the overvalued in-kind contribution. The inside directors will be joint and several debtors, which means that the inside director who made good (settled) the outstanding balance to the company is entitled to initiate a claim for recourse against the other liable inside directors.

The relevant shareholder and the inside directors may not be relieved of this obligation. The company's claims will be time-barred after 10 years from the date of making the in-kind contribution to the company. Liability for inflation of the value of in-kind contributions also may give rise to the inside directors' liability for damages.[75]

Directors' Release from Liability to Company

The relationship between the director and the company is in the nature of an obligation. Pursuant to the general rule of the freedom of contract, the parties

72 Commercial Companies Code, arts 198(1) and 350(1).
73 Discussed in 'Liability Related to Improper Exercise of Directors' Duties', above.
74 Commercial Companies Code, art 175.
75 Discussed in 'Liability Related to Improper Exercise of Directors' Duties', above.

may arrange their legal relationship as they deem proper, provided that the wording and the purpose of the contract comply with the nature of the relationship, as well as with the law and the principles of community life.[76]

Therefore, the directors' liability may be contractually excluded or limited, if this is not contrary to mandatory provisions of law or the nature of the legal relationship (release from liability *pro futuro*). Accordingly, a director may not be released from liability in matters such as liability for making questionable payments,[77] failing in the obligation to manage the company's affairs efficiently,[78] or liability for damage which he intentionally caused the company.

The company also may waive (*ex post*) its claims against directors. The shareholders' meeting may adopt a resolution related to the company's claim for redressal of damage that occurred during the formation of the company or in the course of its management or supervision.[79]

Despite the waiver by the company of its claims for damages against directors, a shareholder may bring an action against the directors in the interest of the company (*actio pro socio*) and effectively claim for redressal of damage caused to the company.[80]

Directors will be released from liability to the company if they have been granted approval for the action as part of the performance of their duties, provided that the shareholders have been duly informed about the action at the time of granting their approval.

Directors and Officers Insurance

Directors and officers (D&O) insurance is the insurance against directors' civil liability. In practice, premiums for this insurance are paid by the company. However, the tax authorities consider that these premiums are not the company's deductible costs and qualify D&O insurance premiums as the directors' income.

Not all companies in Poland insure their directors against civil liability. However, approximately 90 per cent of listed companies insure their directors. Standard premiums amount from several thousands to tens of thousands of zlotys, with some companies paying premiums exceeding PLN 1,000,000.

In practice, actions against directors are very rare. Furthermore, the Code of Best Practice for Listed Companies does not provide any recommendation for companies to insure their directors, nor does it mention disclosure of D&O insurance policies and premiums.

76 Civil Code, art 353^1.
77 Commercial Companies Code, arts 198(3) and 350.
78 Commercial Companies Code, arts 201 and 368.
79 Commercial Companies Code, arts 228(2) and 393(2).
80 Discussed in 'Action of Shareholder in the Company's Interest', above.

Inside Directors' Liability for Company's Tax Obligations

Inside directors will be jointly and severally liable for the company's tax arrears if execution against the company's assets has proved ineffective in whole or in part.[81]

An inside director may release himself from this liability if he demonstrates that he filed for bankruptcy within the appropriate time or restructuring proceedings have been opened or the agreement has been approved in the agreement approval proceedings, or if he proves that the failure to file for bankruptcy was not due to his fault. Furthermore, an inside director may release himself from this liability if he discloses assets of the company that will enable satisfaction of a significant part of the company's tax arrears.

Inside Information

Combating Insider Trading

In General

Polish law contains legislation on inside information.[82] Directors belong to the group of primary insiders, as they have unlimited access to company information, including inside information.

Inside information is defined as any information of a precise nature relating, whether directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments, or acquisition or disposal of such instruments, which has not been made public, and which, if made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments.[83]

Use of inside information in this context will be presumed when the financial instruments are:

- Admitted to trading on a regulated market in the territory of the Republic of Poland or another Member State, or sought to be admitted to trading on such markets irrespective of whether the transaction in such an instrument is executed in this alternative trading system;
- Not admitted to trading on a regulated market in the territory of the Republic of Poland or another Member State, but their price or value depends, whether directly or indirectly, on the price of a financial instrument admitted or sought to be admitted to trading;

81 Tax Ordinance (Dz.U.2005.8.60), art 116.

82 Act on Trading in Financial Instruments, arts 154–161; Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), known as the Market Abuse Directive.

83 Act on Trading in Financial Instruments, art 154.

- Introduced via an alternative trading system in the territory of the Republic of Poland, or sought to be introduced to such system, irrespective of whether the transaction in such instrument is executed in this alternative trading system; or
- Not introduced to an alternative trading system in the territory of the Republic of Poland, but their price or value depends, whether directly or indirectly, on the price of a financial instrument introduced or sought to be introduced via an alternative trading system.[84]

Insider trading is prohibited, which means that insiders may not use inside information, disclose inside information, or recommend or induce another person, on the basis of inside information, to acquire or dispose of financial instruments to which such information relates.

Prohibition on Use of Inside Information

The use of inside information is prohibited by law.[85] This prohibition includes acquisition or disposal of financial instruments and any other legal transaction which leads or might lead to disposal of these financial instruments on the basis of the inside information held by an insider. The insider may not execute such transactions for his own account or for the account of a third party.

The Polish Act on Trading in Financial Instruments and the Market Abuse Directive specify actions which are not deemed to be the prohibited use of inside information.[86] These include, but are not limited to, transactions carried out in performance of responsibilities concerning the policies of a State, stabilization of prices, repurchase of shares, and similar transactions.

Takeovers and Mergers

The Act on Trading in Financial Instruments does not exclude the prohibition on use of inside information in the context of mergers and acquisitions. It refers, among others matters, to the information collected within the due diligence exercise used to acquire the financial instruments to take over a company. The provisions of the Market Abuse Directive should apply directly, particularly Recital 29 of the Preamble, which states:

> 'Having access to information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider trading.'

Consequently, it should be admitted that the collection and use of inside information within the due diligence exercise in relation to mergers and acquisitions will be authorized.

84 Act on Trading in Financial Instruments, art 156(4); Market Abuse Directive, arts 9 and 10.
85 Act on Trading in Financial Instruments, art 156(1); Market Abuse Directive, art 2.
86 Act on Trading in Financial Instruments, art 156(7).

Acquisition and Disposal of Financial Instruments

It is prohibited to recommend to a person or to induce a person to acquire or dispose of financial instruments on the basis of inside information. In general, a recommendation may be defined as guidance for specific investment activities on specific financial instruments.

The Regulation of the Minister of Finance (the Regulation)[87] specifies numerous detailed technical requirements for a recommendation and, in particular, that it should include the facts on the basis of which it was established, sources of information, and conclusions as to the price movements in the market.

However, it is prohibited to make the recommendation on the basis of inside information, regardless of whether it complies with the requirements of the Regulation. An inducement may be defined as persuading another person to acquire or dispose of the financial instruments on the basis of inside information. The Act on Trading in Financial Instruments lists the activities that are not deemed to be the use of inside information.[88]

Prohibition on Disclosure of Inside Information

Disclosure of inside information by an insider is prohibited. Disclosure of inside information consists of communicating it to an unauthorized person, or enabling or facilitating an unauthorized person to gain inside information concerning one or more issuers of financial instruments, one or more financial instruments, and the acquisition or disposal of financial instruments.[89]

The insider also may commit this prohibited act by omission, by failing to comply with the obligation to protect inside information. The Act on Trading in Financial Instruments lists the exclusions from the prohibition on disclosure of inside information. Among other exclusions, an insider may disclose the inside information if it is related to his employment, professional practice, or the performance of his duties, provided that he has taken relevant measures to ensure that the inside information will be kept confidential by the persons to whom it has been disclosed.[90]

Prohibition on Trading during Restricted Period

During a restricted period, a director may not acquire or dispose of, for his own account or for the account of a third party, any of the issuer's (company's) financial instruments, including shares, nor may he undertake, for his own

87 Regulation of the Minister of Finance of 19 October 2005 on information constituting recommendations relating to financial instruments and its issuer (Dz.U. 2005 nr 206, poz. 1715), implementing Commission Directive 2003/125/EC of 22 December 2003 as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.

88 Act on Trading in Financial Instruments, art 156(7).

89 Act on Trading in Financial Instruments, art 156(5); Market Abuse Directive, art 3.

90 Act on Trading in Financial Instruments, art 156(6); Market Abuse Directive, art 3.

account or for the account of a third party, any other legal transactions which lead or might lead to the disposal of such financial instruments.

Under the Act on Trading in Financial Instruments,[91] 'restricted period' means the period between the time when the insider gains the inside information and the time when such information is made public.

For the purpose of the annual report, the restricted period is a period of two months preceding the publication of the report or, if shorter, the period between the end of a given financial year and the publication of the annual report.

For the purpose of the semi-annual report, the restricted period is a period of one month preceding the publication of the report or, if shorter, the period between the end of a given half-year and the publication of the semi-annual report.

For the purpose of the quarterly report, the restricted period is a period of two weeks preceding the publication of the report or, if shorter, the period between the end of a given quarter and the publication of the quarterly report. The Act on Trading in Financial Instruments[92] specifies the list of acts excluded from the prohibition on trading in financial instruments during a restricted period.

These acts include, but are not limited to, trading in capital market instruments by a broker to whom the insider had entrusted management of a portfolio of financial instruments in a manner which excludes the insider's influence on the investment decisions made for his account; trading in capital market instruments in relation to exercising the sale or purchase of shares within a binding agreement, executed in writing with a certified date from before the commencement of a restricted period; and trading in capital market instruments in relation to an offer addressed to employees or directors of an issuer, provided that the information in the offer has been publicly available before the commencement of a relevant restricted period.

Notification Obligations

In General

Notification obligations are mandated by law.[93] They include notification of transactions by directors, lists of insiders maintained by an issuer, and suspicious transactions.

91 Act on Trading in Financial Instruments, art 159(2).

92 Act on Trading in Financial Instruments, art 159(1b).

93 Act on Trading in Financial Instruments, arts 158, 160, and 161; Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions, and the notification of suspicious transactions.

Transactions by Directors

Directors must notify the Polish Financial Supervision Authority and the company (the issuer) about any transaction executed by them or by persons related to them, by which they acquire or dispose of any issuer's financial instruments, including shares.[94]

Any information that is disclosed to the issuer regarding transactions by directors (and persons related to the directors) must be simultaneously disclosed to the company operating the regulated market and to the public.[95]

List of Insiders

The issuer must prepare and maintain separate lists of natural persons who have access to inside information and who are employed or mandated by the issuer (including the issuer's directors) or other entity acting in its name and/or on its behalf.[96]

At the demand of the Polish Financial Supervision Authority, the issuer must promptly submit the lists of insiders and inform the Authority about any changes in these lists, including new entries.[97]

Suspicious Transactions

Market brokers must notify the Polish Financial Supervision Authority of any reasonable suspicion of illegal disclosure or use of inside information. Market brokers include, but are not limited to, brokerage houses, banks conducting brokerage activities, and agents of investment companies.[98]

Sanctions

Administrative Sanctions

Trading during Restricted Period. A director (among others) who acquired or disposed of financial instruments during a restricted period is subject to a pecuniary penalty of up to PLN 200,000.

When the pecuniary penalty is imposed on the insider, the Polish Financial Supervision Authority will publish the information (as a decision of the Authority) in the *Official Journal* or order its publication in two daily newspapers with national circulation at the guilty party's cost, unless such publication could cause disproportionate damage to trade participants or pose a serious threat to financial markets.[99]

94 Act on Trading in Financial Instruments, art 160(1).
95 Act on Trading in Financial Instruments, art 160(4).
96 Act on Trading in Financial Instruments, art 158(1).
97 Act on Trading in Financial Instruments, art 158(3).
98 Act on Trading in Financial Instruments, art 161.
99 Act on Trading in Financial Instruments, art 174.

A director (among others) is not exposed to the pecuniary penalty if he commissioned an authorized entity conducting brokerage activities to manage his securities portfolio in a manner which excludes the director's influence on the decisions made for his account.

Failure to Notify. A director (among others) who fails to perform or unduly performs his obligation to notify the Polish Financial Supervision Authority and the company (the issuer) of any transaction executed by him or by persons related to him, whereby he acquires or disposes of the issuer's financial instruments, is subject to a pecuniary penalty of up to PLN 100,000.

A director (among others) is not exposed to the pecuniary penalty if he has commissioned an authorized entity conducting brokerage activities to manage his securities portfolio, as a result of which he has no knowledge of the transactions executed by the portfolio manager, or if he did not or could not have known, despite exercising due care, about the execution of the transaction.[100]

Non-Performance or Improper Performance of Issuer's Obligations. The issuer is obligated to simultaneously notify both the company operating the regulated market and the public about directors' transactions related to the issuer's financial instruments. The issuer also is obligated to prepare and maintain a list of insiders and submit it to the Polish Supervision Authority when so requested.

An issuer who fails to perform or improperly performs these obligations is subject to administrative sanctions in the form of exclusion of the relevant securities from trading on the regulated market; a pecuniary penalty of up to PLN 1,000,000; or exclusion, for a definite or an indefinite period, of the securities from trading on the regulated market and a pecuniary penalty of PLN 1,000,000.[101]

Criminal Sanctions

Use of Inside information. A director (among others) who violates the prohibition on the use of inside information is subject to a fine of up to PLN 5,000,000 or imprisonment for a period ranging from six months to eight years, or to both these penalties jointly.[102]

Recommendations and Inducement. A director (among others) who violates the prohibition on recommendations and inducements to acquire or dispose of financial instruments on the basis of inside information is subject to a fine of up to PLN 2,000,000 or imprisonment for a period of up to three years, or to both these penalties jointly.[103]

100 Act on Trading in Financial Instruments, art 175.
101 Act on Trading in Financial Instruments, art 176.
102 Act on Trading in Financial Instruments, art 181(2).
103 Act on Trading in Financial Instruments, art 182.

Disclosure of Inside Information. A director (among others) who violates the prohibition on disclosure of inside information is subject to a fine of up to PLN 2,000,000 or imprisonment for a period of up to three years, or to both these penalties jointly.[104]

Selected Issues of Directors' Criminal Liability

Abuse of Confidence

Abuse of confidence may constitute one of the criminal offenses defined in the Penal Code. It also relates to corporate directors. Directors who have caused the direct threat of the significant detriment to the company's assets by abuse of their powers or failure in their duties shall be subject to a penalty of imprisonment of up to three years. The criminal action related to this offence may be initiated on a private charge by the aggrieved party but brought to the court by public prosecutor. Furthermore, the court may order a ban on the holding of a specific position or practice of a specific profession by a director who committed this criminal offense.[105] Directors who have caused significant detriment to the company's assets by abuse of their powers or failure in the performance of their duties bear criminal liability.[106] Significant detriment to the company's assets means a loss in an amount exceeding PLN 200,000. The offender is subject to a penalty of imprisonment for a period of three months to five years. Furthermore, the court may impose a fine and order a ban on the offender holding a specific position or practicing a specific profession.[107]

An offender who has committed this offense for personal financial gain is subject to imprisonment for a period of six months to eight years. Moreover, if the offender has caused great harm to the company (currently defined as damage amounting to more than PLN 1,000,000), he is subject to imprisonment for a period of one year to 10 years. A person who has been sentenced under a final and non-appealable judgment for any offenses related to abuse of confidence may not serve as a corporate director.[108]

Fraudulent Transactions

A director will bear criminal liability if he demands or accepts financial or personal gains (or the promise of such gains) as consideration for abuse of his powers or failure to perform his duties, when these actions may have a detrimental effect on the company's assets or if these actions constitute an act of unfair competition or an unacceptable preferential act for the benefit of the purchaser or recipient of goods or services.[109]

104 Act on Trading in Financial Instruments, art 180.
105 Criminal Code, art 41.
106 Criminal Code, art 296(1).
107 Criminal Code, art 41.
108 Commercial Companies Code, art 18(2).
109 Criminal Code, art 296a(1).

The offender is subject to imprisonment for a period of three months to five years. Moreover, the court may impose a fine and order a ban on the offender holding a specific position or practicing a specific profession. If the offender causes significant harm to the company's assets (amounting to more than PLN 200,000), he is subject to imprisonment for a period of six months to eight years.[110]

A person who has been sentenced under a final and non-appealable judgment for these criminal offenses may not serve as a corporate director, among other corporate positions.[111]

Actions to the Creditors' Detriment

The Commercial Companies Code and the Criminal Code sanction those actions of a director that are to the creditors' detriment, including those in relation to the company's bankruptcy.

An inside director who fails to file for bankruptcy of the company is subject to a fine, a penalty of restriction of liberty, or imprisonment for a period of up to one year.[112] Furthermore, the bankruptcy court may rule on the deprivation, for a period of three to 10 years, of the right to conduct a business activity on the offender's own account and to hold a position as a corporate director (among other corporate positions).[113]

The Criminal Code sanctions several kinds of directors' actions to the detriment of the company's creditors. These actions include, but are not limited to, reckless conduct contributing to the company's bankruptcy or insolvency,[114] fraudulent transfer of assets to a newly established company,[115] privileged treatment of some creditors to the detriment of others,[116] and an insolvent debtor (such as the company) preventing or reducing the satisfaction of its creditors by, among other means, removal or concealment of and charges on the debtor's assets.[117]

These criminal offenses are penalized by a fine or imprisonment. Furthermore, a person who has been sentenced under a final and non-appealable judgment for any of these offenses may not serve as a corporate director (among other corporate positions), within a period of five years from the date on which the sentence becomes final.

110 Criminal Code, art 296a(4).
111 Commercial Companies Code, art 18(2).
112 Commercial Companies Code, art 586.
113 Bankruptcy Law, art 373.
114 Criminal Code, art 301(3).
115 Criminal Code, art 303(1).
116 Criminal Code, art 302(1).
117 Criminal Code, art 300(1).

False Data and Deficient Corporate Reports

In General

The Commercial Companies Code, the Criminal Code, the Act on Accounting,[118] and legal provisions related to the capital market[119] sanction actions committed by the directors that consist of making false or incomplete data available to the public and/or disseminating such data concerning the company, documenting information in an unreliable manner or concealing information, as well as failure to maintain the company's records as required by law.

Regulation of Commercial Companies Code

Corporate directors who make false information available to the public or submit it to the company's governing bodies, government agencies, or to an auditor, are subject to a fine, a penalty of restriction of liberty, or a penalty of imprisonment for a period of up to two years.[120]

Regulation of the Criminal Code

The Criminal Code sanctions the acts of, among others, inside directors related to failure to maintain the required documentation or documenting unreliable or false information that has had a detrimental effect on the company's assets[121] and the dissemination of false information when trading in securities of private (unlisted) companies.[122]

These offenses are penalized with a fine and imprisonment. Furthermore, a person who has been sentenced under a final and non-appealable judgment for any of these offenses may not serve as a corporate director for a period of five years from the date on which the sentence becomes final.

Regulation of the Act on Accounting

Pursuant to the Act on Accounting,[123] acts that constitute an offense include failure to maintain or improper maintenance of accounting books, infringing the provisions of this Act, including false data in the accounting books, and failure to draw up or improper drawing up of the financial statements and/or report on the company's activity. The offender may be penalized with a fine or imprisonment for a period of up to two years, or to both these penalties jointly.

118 Dz.U. Nr 121, poz. 591
119 Act on Public Offering; Act on Trading in Financial Instruments.
120 Commercial Companies Code, art 587.
121 Criminal Code, art 303.
122 Criminal Code, art 311.
123 Act on Accounting, art 77.

Misinformation in Public Offering

Under the Act on Public Offering, infringement of notification obligations relating to the public offering of securities is a wrongful act, which may constitute a criminal offense committed by, among others, corporate directors. This offense consists of making false data available to the public or conniving in the falsification of data which may essentially affect the information included in an issue prospectus or other information documents connected with a public offering or admission or seeking admission of securities or other financial instruments to trading on a regulated market, as well as inside information made available to the public that is included in current and periodic reports.[124]

The offender is subject to a fine of up to PLN 5,000,000 or imprisonment for a period of six months to five years, or to both these penalties jointly. The Act on Public Offering also specifies other kinds of infringement of notification obligations that constitute offenses that may give rise to corporate directors' liability.

Offenses Related to Violation of Capital Market Regulation

Market Manipulation

Market manipulation is prohibited by the Act on Trading in Financial Instruments and the provisions of the Market Abuse Directive.[125] Violation of this prohibition results in administrative and/or criminal liability. Under the Act on Trading in Financial Instruments,[126] acts of manipulation which constitute criminal offenses are:

- Placing orders or executing transactions which are or may be misleading as to the actual supply of, demand for, or price of a financial instrument (with exclusions described in the Act);
- Placing orders or executing transactions which result in the price of one or more financial instruments moving to an abnormal or artificial level (with exclusions described in the Act);
- Placing orders or executing transactions with the intention to produce legal effects other than those which should actually result from a given legal transaction;
- Placing orders or executing transactions while simultaneously misleading market participants, or using the fact that the market participants are being misled about the price of a financial instrument;
- Securing control over demand for or supply of a financial instrument in breach of the principles of fair trading or in a manner resulting in a direct or indirect fixing of the purchase or selling prices of financial instruments; and

124 Act on Public Offering, art 100.
125 Act on Trading in Financial Instruments, art 183; Market Abuse Directive.
126 Act on Trading in Financial Instruments, art 183.

- Acquisition or disposal of financial instruments at the close of trading with the effect of misleading investors acting on the basis of closing prices.

The offender is subject to a fine of up to PLN 5,000,000 or to imprisonment for a period of three months to five years, or to both these penalties jointly. Furthermore, any person who acts jointly and in concert with other persons for the purpose of market manipulation will be subject to a fine of up to PLN 2,000,000.

Unlawful Offering of Securities

The unlawful offering of securities is governed by Directive 2003/71/EC.[127] Under the Act on Public Offering,[128] public offering of securities without the statutorily required approval of the issue prospectus or the information memorandum, or making these unapproved documents available to the public or to interested investors, constitutes an offense.

Furthermore, the public offering of securities before the deadline for objection by the Polish Financial Supervision Authority as to the notification of the offer documents, including the information memorandum, or despite an objection by the Authority, constitutes an offense.[129] Any person, including corporate directors, may be liable for this offense and will be subject to a fine of up to PLN 10,000,000 or imprisonment for a period of up to two years, or to both these penalties jointly. In the case of a less serious offense, the offender will be subject to a fine of up to PLN 2,500,000.

Conclusion

Corporate directors bear a far-reaching civil liability to the company. Furthermore, they bear, in some situations, civil or tax liability for the company's obligations to third parties.[130] Corporate directors also are subject to criminal liability for acting to the detriment of the company and in violation of certain rules.

Directors of public companies bear particular liability, as they are subjected to strict rules of the capital market, where violations may result in serious criminal and administrative sanctions. In practice, however, civil actions against directors in the courts are brought relatively rarely, and criminal proceedings against them that result in their indictment or conviction are even rarer.

127 Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

128 Act on Public Offering, art 99.

129 According to Directive 2003/71/EC.

130 Discussed in 'Directors' Civil Liability' and 'Inside Directors' Liability for the Company's Tax Obligations', respectively.