

International **Comparative** Legal Guides



Corporate Governance **2020**

A practical cross-border insight into corporate governance law

13th Edition

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1 Setting the Scene – Sources and Overview

1.1 What are the main corporate entities to be discussed?

Below we set forth the corporate governance rules for two distinct types of Polish law commercial companies, which are the most common corporate forms in Poland: (a) joint-stock companies (*spółka akcyjna*); and (b) limited liability companies (*spółka z ograniczoną odpowiedzialnością*).

1.2 What are the main legislative, regulatory and other sources regulating corporate governance practices?

The primary source of corporate governance rules for Polish companies is the Commercial Companies Code dated 15 September 2000.

Governance of listed companies is further regulated by the Market Abuse Regulation (EU) No 596/2014, the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies dated 29 July 2005 and the Act on Trading in Financial Instruments dated 29 July 2005.

In addition, the Warsaw Stock Exchange publishes a Code of Best Practices for Warsaw Stock Exchange Listed Companies, which should be applied by all listed companies on a “comply or explain” basis.

1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

Bans of public gatherings, travel restrictions and switching to remote working due to the COVID-19 pandemic in 2020 has brought unprecedented change to the usual operation of the governing bodies of companies in Poland and across the world.

The emergency COVID-19 legislation introduced on 1 April 2020 allows all Polish companies to hold virtual or hybrid meetings of their Management and Supervisory Boards and facilitates the adoption of circular resolutions by these bodies. In addition, all shareholders of Polish companies are now allowed to participate electronically in Shareholders’ Meetings.

The digitalisation of corporate governance brings much needed flexibility to the rules on corporate administration, of which companies can take advantage. However, it also brings new legal and operational challenges, such as ensuring confidentiality of discussions and of decisions taken during a virtual

board or Shareholders’ Meeting, as well as implementing proper identification of shareholders and their entitlement to vote.

1.4 What are the current perspectives in this jurisdiction regarding the risks of short-termism and the importance of promoting sustainable value creation over the long-term?

Polish law does not directly address the issue of short-termism. However, as a basic rule, members of the Management and Supervisory Boards must act in the best interest of the company, which is not equivalent to the mere best interest of the company’s individual shareholders. Therefore, members of the Management and Supervisory Boards should promote the company’s sustainable long-term growth, rather than simply maximising shareholders’ profits in the short term.

The risks of short-termism are also indirectly addressed by the requirements for management remuneration and the “say on pay” rule which were introduced to Polish law to implement the revised EU Shareholders’ Rights Directive (Directive (EU) 2017/828).

2 Shareholders

2.1 What rights and powers do shareholders have in the strategic direction, operation or management of the corporate entity/entities in which they are invested?

Shareholders may influence the company’s business operations through their participation and voting at the Shareholders’ Meeting. Shareholders’ Meetings are exclusively entitled to amend the company’s Articles of Association, including the principal scope of the company’s activities and to approve major structural decisions such as mergers, disposal of major assets and/or opening the procedure for the company’s liquidation.

Moreover, depending on the provisions of the Articles of Association, shareholder approval may be required for the company to enter into certain contracts or transactions involving the company’s shares.

2.2 What responsibilities, if any, do shareholders have with regard to the corporate governance of the corporate entity/entities in which they are invested?

In principle, shareholders in Polish companies do not have any responsibilities other than covering their shares with cash or in-kind contributions.

Shareholders of limited liability companies may also be required to make so-called “additional payments” (*dopłaty*) to the company. These are a quasi-debt instrument used to finance the company’s operations. The requirement to make additional payments may be adopted by the Shareholders’ Meeting by a majority of votes but only if this is permitted by the company’s Articles of Association.

Imposing any other responsibilities upon the shareholders would need to be explicitly agreed by the shareholders.

2.3 What kinds of shareholder meetings are commonly held and what rights do shareholders have with regard to such meetings?

The Shareholders’ Meeting may be convened as an ordinary meeting or an extraordinary meeting.

An ordinary meeting takes place once a year, in order to approve annual financial statements, management activity reports and to grant a vote of acceptance for Management Board members for their terms of office.

An extraordinary meeting can be convened at any time, in order to debate any matter other than those matters explicitly reserved for an ordinary meeting.

2.4 Do shareholders owe any duties to the corporate entity/entities or to other shareholders in the corporate entity/entities and can shareholders be liable for acts or omissions of the corporate entity/entities? Are there any stewardship principles or laws regulating the conduct of shareholders with respect to the corporate entities in which they are invested?

Shareholders in Polish companies are not liable towards third-party creditors for the company’s debts. Under certain circumstances, shareholders can be held liable towards the company, for instance, if they fail to make contributions for their shares, or if their in-kind contributions were defective or overvalued.

There are also certain specific disclosure obligations for shareholders of listed companies (see also question 2.6 below).

2.5 Can shareholders seek enforcement action against the corporate entity/entities and/or members of the management body?

Generally, shareholders cannot initiate legal action directly against members of the Management Board or the Supervisory Board. Any potential claims against members of these management bodies must be initiated by the company.

However, if the company fails to bring legal action against a member of the Management or Supervisory Board within one year from becoming aware of circumstances giving rise to a potential damage claim against such member, any shareholder may file an action for such damage claim on behalf of the company.

2.6 Are there any limitations on, or disclosures required, in relation to the interests in securities held by shareholders in the corporate entity/entities?

Shareholders in public joint-stock companies are subject to mandatory disclosures regarding large stake acquisitions. Reaching, exceeding or falling below a threshold of 5%, 10%, 15%, 20%, 25%, 33%, 33⅓%, 50%, 75% or 90% of total voting rights must be notified to the Polish Financial Supervision

Authority and the company. There are also further notification requirements for shareholders holding at least 10% and 33% of voting rights.

Any shareholder in a limited liability company who holds in excess of 10% of the total number of issued shares in such limited liability company must be disclosed in the publicly available National Court Register (*Krajowy Rejestr Sądowy*).

Private joint-stock companies are under an obligation to only disclose their sole shareholders in the National Court Register. Until 31 December 2020, the shareholder registers of private joint-stock companies are kept by these companies and are not publicly available. However, starting from 1 January 2021, shareholders in Polish joint-stock companies must be registered in an electronic shareholders’ register (*rejestr akcjonariuszy*) which, in case of private companies, will be available to access at all times for the company and all of its shareholders.

All private companies must also disclose their beneficial owner, i.e. a natural person (or persons) who is entitled to exercise, directly or indirectly, more than 25% of total number of votes at the company’s Shareholders’ Meeting, or otherwise controls the company. The beneficial owners are disclosed in the publicly available Polish Ultimate Beneficial Owners Registry (*Centralny Rejestr Beneficjentów Rzeczywistych*).

2.7 Are there any disclosures required with respect to the intentions, plans or proposals of shareholders with respect to the corporate entity/entities in which they are invested?

Such requirements exist only with respect to certain regulated entities, e.g. banks and insurance companies.

2.8 What is the role of shareholder activism in this jurisdiction and is shareholder activism regulated?

Polish law does not regulate shareholder activism as such, but it does give minority shareholders certain possibilities to influence and verify the company’s operations. These minority rights include: (a) the right to request the convening of a Shareholders’ Meeting; (b) the right to submit new items for the agenda and drafts of resolutions; and (c) (for limited liability companies only) the right to view the company’s books and documents (right of individual control).

3 Management Body and Management

3.1 Who manages the corporate entity/entities and how?

Polish joint-stock companies have a two-tier board structure, comprised of the Management Board and the Supervisory Board.

The Management Board deals with the day-to-day management of the company and has signing authority. Only natural persons can be appointed to the Management Board. The number of Management Board members is determined by the company’s Articles of Association. Each member of the Management Board has the right and duty to conduct the company’s daily affairs. Any matters exceeding the scope of the ordinary course of business must be approved by Management Board resolution. Typically, resolutions of the Management Board are adopted by a simple majority of votes, but companies can establish different voting requirements and thresholds.

The Supervisory Board monitors the Management Board and approves certain contracting and strategic planning decisions as reserved by law or as specifically set forth in the company’s

Articles of Association. The Supervisory Board is comprised of at least three natural persons (or at least five in public companies and banks), unless the company's Articles of Association provide for a higher number. Companies are free to determine the quorum and voting requirements in their Articles of Association.

Polish limited liability companies may choose to have a two-tier board structure, like that of joint-stock companies, or to have only a Management Board. In the latter case, the supervisory functions are vested directly with the company's shareholders.

3.2 How are members of the management body appointed and removed?

Members of the Management Board of Polish joint-stock companies are appointed and removed by the Supervisory Board, while members of the Supervisory Board are appointed and removed by the Shareholders' Meeting. The Articles of Association can stipulate a different manner for appointing and removing board members, for instance, vest the right to appoint members of the Management Board with the Shareholders' Meeting.

Members of the Management Board of Polish limited liability companies are appointed and removed by the Shareholders' Meeting unless there is a Supervisory Board, in which case these matters are specifically reserved for its decision under the Articles of Association. The Articles of Association can also vest the power to appoint and remove board members with the individual shareholders or other stakeholders.

3.3 What are the main legislative, regulatory and other sources impacting on compensation and remuneration of members of the management body?

The main source is the Polish Commercial Companies Code which, since 2019, includes provisions implementing the EU Shareholders' Rights Directive by introducing stricter "say on pay" rules to Polish company law.

Pursuant to these rules, the shareholders of both joint-stock and limited liability companies may determine the maximum remuneration of members of the Management Board and their rights to any additional benefits. The remuneration of members of the Supervisory Board is always determined by the Shareholders' Meeting.

Listed companies must, in addition, adhere to the Code of Best Practice for Warsaw Stock Exchange Listed Companies, pursuant to which they should implement a detailed remuneration policy for board members.

3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

There are no limitations on holdings by members of the Supervisory Board of interests or securities in companies or other corporate entities.

Members of the Management Board are free to hold interests or securities in the company which they manage. However, they are not allowed to hold shares in any companies engaging in competitive activities to the company, if such holding constitutes more than 10% of the total share capital of such competing company or if their holding gives them the right to appoint at least one board member in such competing company.

Members of the Management and Supervisory Boards of listed joint-stock companies are subject to the general restrictions on insider trading and disclosure obligations on the acquisition of significant shares (see also question 2.6 above).

3.5 What is the process for meetings of members of the management body?

Until recently, the basic rule was that both Management and Supervisory Boards had to operate in physical meetings, with some exceptions for adopting circular resolutions in writing or through means of electronic communication.

As part of the measures bringing more flexibility to company operations in the context of the COVID-19 pandemic, Poland has introduced provisions to the Commercial Companies Code which now allow all members of the Management and Supervisory Boards to participate in board meetings through video or teleconference.

The details of the internal organisation and operation of the Management and Supervisory Boards are usually set out in the company's Articles of Association and/or the by-laws of such respective governing body.

3.6 What are the principal general legal duties and liabilities of members of the management body?

The principal legal duty of members of the Management Board is to conduct the company's affairs in accordance with the law and the company's Articles of Association. The duties of the Supervisory Board members encompass comprehensive supervision of the company's operations and management of the company, including inspecting its accounts and supervising the performance of the Management Board members.

In fulfilling their duties, the members of the Management Board and Supervisory Board must always act in the best interests of the company and treat all shareholders equally. The company's interests are not defined in Polish law, but it is widely accepted that they are not equal solely to the interests of the shareholders but should also include the interests of other stakeholders such as the company's employees.

Any breach of duties by a Management Board or Supervisory Board member may result in both civil and criminal liability. The members of the governing bodies are responsible for all damages incurred by the company as a result of their mismanagement. It is also a criminal offence in Poland to act to the detriment of the company and is punishable with a fine and a maximum prison sentence of five years.

3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

Under the Code of Best Practice for the Warsaw Stock Exchange, the Management Board is responsible for the implementation and maintenance of efficient internal controls, risk management and compliance systems and internal audit functions that are suitable for the size and type of the company's activity. The Supervisory Board is responsible for monitoring the efficiency of these systems and functions.

The rising complexity of law and business compliance obligations, especially in the field of data maintenance and cybersecurity, translates into more resources being devoted to non-revenue-generating activities. Creating a suitably lean management

structure, which at the same time is capable of dealing with increased compliance requirements, therefore remains one of the key challenges that Management and Supervisory Board members are currently facing in Poland.

3.8 Are indemnities, or insurance, permitted in relation to members of the management body and others?

Directors and officers (D&O) liability insurance is permitted and customary for Management and Supervisory Board members. In principle, companies are also allowed to pay the entire premium amount for these D&O policies.

Indemnities by the company or shareholders are less common but not directly prohibited. Nonetheless, the admissibility of an indemnification by the company should be analysed on a case-by-case basis.

3.9 What is the role of the management body with respect to setting and changing the strategy of the corporate entity/entities?

The Management Board is responsible for setting and changing the company's overall strategy. A change in strategy will usually require approval of the Supervisory Board unless the Articles of Association provide otherwise.

Any change in strategy that requires the company to go beyond its scope of business as provided for in the Articles of Association will also require shareholders' approval and an amendment to the respective provisions of the Articles of Association.

4 Other Stakeholders

4.1 May the board/management body consider the interests of stakeholders other than shareholders in making decisions? Are there any mandated disclosures or required actions in this regard?

In principle, the Management Board and the Supervisory Board when making their decisions must consider the best interests of the company.

The company interest is not defined by Polish law, but it is widely accepted that it should encompass not only the interests of the individual shareholders, but also other stakeholders such as the company's employees or its creditors (see also question 4.3 below).

4.2 What, if any, is the role of employees in corporate governance?

The role of employees in corporate governance is regulated by the following Acts: (i) Act on Commercialization and Certain Rights of Employees dated 30 August 1996; (ii) Act on Informing and Consulting Employees dated 7 April 2006; and (iii) Act on Trade Unions dated 23 May 1991.

The first of these Acts applies only to companies created as a result of transformation of former state-owned enterprises and its role is currently quite limited. The employees of such companies benefit from the right to appoint: (i) up to 40% of the total number of Supervisory Board members; and (ii) one member of the Management Board in companies employing over 500 employees on average annually.

Pursuant to the Act on Informing and Consulting Employees, all companies employing at least 50 employees may form a work council. If the employees of such companies decide to form a work council, then the Management Board must inform such work council of, and consult with them regarding, certain vital matters of the company, for instance any reorganisation or structural changes. Consultations with the work council are, however, not binding for the Management Board.

Finally, if trade unions are present in the company, the Management Board must inform them of, and consult with them regarding, any issues related to working conditions and wages as well as certain reorganisation matters which may lead to transfer of undertaking or collective redundancies.

4.3 What, if any, is the role of other stakeholders in corporate governance?

Other stakeholders must be taken into consideration in the decision process when Acts explicitly impact their rights, for example, labour law for employees (see also question 4.2 above) and bankruptcy and reorganisation law for creditors.

Among these stakeholders, after the employees, creditors have the most significant and regulated position in the company. Statutory legal measures for protection of creditors may be divided into three groups of legal regulations regarding:

- (a) access to information about the company (for example, public availability of corporate data and financial statements in the National Court Register, broad reporting obligations of the listed companies);
- (b) guarantee of sufficient capital to cover debts towards the creditors (for example, limitation of payments from the company's assets for the benefit of shareholders, if such payments are required for the full coverage of the company's share capital, prohibition of acquiring own shares and financing the purchase of own shares); and
- (c) creating an additional source of satisfaction of creditor's claims (for example, liability of Management Board members for not reporting bankruptcy on time).

In this sense, the interest of creditors must certainly be considered and has a direct influence on the company's corporate governance.

4.4 What, if any, is the law, regulation and practice concerning corporate social responsibility?

Poland has implemented EU Directive 2014/95/EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups.

As a result, additional reporting obligations were imposed on the largest companies, in the form of an obligation to submit an additional statement on environmental, social and employee-related matters, respect for human rights and anti-corruption and bribery issues (the so-called "non-financial" information). The non-financial information may be reported as part of the company's activity report, or as a separate report. This obligation applies only to the largest business entities, specifically banks, insurance companies and joint-stock companies employing more than 500 people and having total assets of the balance sheet exceeding PLN 85 million (approx. EUR 19 million), or net revenue from sales exceeding PLN 170 million (approx. EUR 37.5 million). The law lacks guidelines specifying the principles for preparing reports on non-financial information, leaving companies with considerable leeway in this respect. However, if the obliged company does not pursue a policy in any

of the areas specified in the Act, it is required to disclose and explain its reasons for this (the so-called “comply or explain” principle).

5 Transparency and Reporting

5.1 Who is responsible for disclosure and transparency?

The Management Board is ultimately responsible for ensuring compliance with disclosure and transparency requirements.

5.2 What corporate governance-related disclosures are required and are there some disclosures that should be published on websites?

All listed joint-stock companies must publish their annual reports and information on their compliance (or non-compliance) in accordance with the corporate governance rules set out in the Code of *Best Practice* for *Warsaw Stock Exchange* Listed Companies.

In addition, in accordance with the Code of Best Practice for *Warsaw Stock Exchange* Listed Companies, listed companies should also disclose basic corporate documents on their websites, including their Articles of Association and other documents setting out the corporate governance rules such as the by-laws of the Management Board, the Supervisory Board and the Shareholders' Meeting.

There are no mandatory corporate governance-related disclosures for private companies, including all limited liability companies.

5.3 What is the role of audits and auditors in such disclosures?

The annual financial statements of all joint-stock companies, irrespective of whether they are listed or private, must be audited by an independent auditor.

The annual financial statements of limited liability companies need only be audited by an independent auditor if at least two of the following three conditions have been cumulatively met:

- (a) average annual employment in such company is at least 50 full-time employees;
- (b) the sum of the balance sheet assets at the end of the financial year is the Polish currency equivalent of at least EUR 2.5 million; and/or
- (c) the net revenue from sales of goods and products as well as financial operations for the financial year are the Polish currency equivalent of at least EUR 5 million.



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