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The supervisory board as an instrument of internal corporate governance in a limited liability company

Summary: The supervisory board is a body of authority in the company treated as the basic internal mechanism of corporate governance. The aim of this article is to indicate the importance of the corporate supervision using the example of the supervisory board as a statutory body exercising permanent supervision over the activities of a limited liability company. The study attempts to determine what powers of the aforementioned body should be extended in the articles of association and, optionally, in other corporate documents. This article has been written from a perspective of a legal-dogmatic approach that forms the basis of the analysis of the presented problems, using applicable legal provisions and relevant literature. The conducted analysis shows that the power of the supervisory board cannot be increased in a way that infringes the functions of other company bodies. The supervisory board is expected to be involved in the day-to-day operations of the limited liability company and to make strategic decisions.

Keywords: supervisory board, corporate governance, limited liability company, company deed, rights, competence

Rada nadzorcza jako instrument wewnętrznego ładu korporacyjnego w spółce z ograniczoną odpowiedzialnością

Streszczenie: Rada nadzorcza to organ władzy w spółce traktowany jako podstawowy wewnętrzny mechanizm nadzoru korporacyjnego. Celem artykułu jest wskazanie istoty nadzoru korporacyjnego na przykładzie rady nadzorczej jako organu ustawowo sprawującego stały nadzór nad działalnością spółki z ograniczoną odpowiedzialnością. Przeprowadzone badania miały za zadanie ustalenie, jakie uprawnienia tego organu należy rozszerzyć w umowie spółki oraz fakultatywnie w innych dokumentach korporacyjnych. W niniejszym artykule wykorzystano metodę dogmatycznoprawną, która była podstawą do przeprowadzenia analizy przedstawionych problemów w oparciu o przepisy prawne oraz literaturę przedmiotu.

Z przeprowadzonej analizy wynika, że nie można zwiększyć uprawnień rady nadzorczej w sposób, który narusza funkcje innych organów spółki. Od rady nadzorczej oczekuje się zaangażowania w bieżącą działalność spółki z ograniczoną odpowiedzialnością oraz podejmowania strategicznych decyzji.

Słowa kluczowe: rada nadzorcza, nadzór korporacyjny, spółka z ograniczoną odpowiedzialnością, umowa spółki, uprawnienia, kompetencje

JEL: K22, L22, M14

The supervisory board has a very important role to play in any limited liability company. Its duties include e.g. providing the shareholders with comfort in terms of the quality of management of the company in which they invested their money.

In order to take a more in-depth approach to the issues of the binding formal and legal framework that regulates the way corporate governance operates, one should still refer to no clear definition of the concept of corporate governance. Due to numerous interpretations of representatives of science and practitioners in this field, the term (in Polish lg. /transl.note/) is used interchangeably with owner governance, corporate order or the English phrase corporate governance. The supervisory board as a separate authority figures in companies with a two-tier board organization model. The second component of this model is the Management Board (Kołodkiewicz, 2011, p. 111). The Polish corporate governance system is based to a significant extent on the dualistic (German) model (Żak, 2019, p. 22). The model was introduced by the Commercial Code, effective from July 1st, 1934, and involves the separation of supervisory functions – performed by the supervisory board, and management functions – performed by the management board. In 2001, there were changes in commercial law; the Commercial Code was repealed and replaced (Jeżak, Bohdanowicz, Kaźmierska-Jóźwiak, Matyjas, 2016, p. 108) by the Commercial Companies Code (The Act of 15 September 2000, OJ 2020. Pos. 1526, with later amendments).

The establishment of a corporate governance body in a capital company, which is the supervisory board or an audit committee, results from either the mandatory legal provisions or the optional partners' will expressed in the agreement, which in a limited liability company may also provide for the establishment of both bodies (Kulesza, 2002, p. 146). The advisability of establishing one or both supervisory authorities depends on the actual needs of the company and its capital structure. Pursuant to the provisions of Art. 212 CCC of the Act, the shareholders have the individual right to control the company. Moreover, the operating costs of supervisory authorities such as remuneration, per diems, etc., become significant. As a result, the appointment of a supervisory board or committee is advisable only in case of a justified fear that the individual right of control will not allow shareholders, e.g. due to lack of experience, to properly assess the functioning of the company. In view of the above, it is necessary to consider whether there is a need to establish a supervisory board that exercises its audit powers on a permanent basis, or whether it is enough to appoint an audit committee to carry out audits in a definite scope once a year. On the other hand, the establishment of two control bodies is recommended only in companies whose business range and extend justifies the need to be verified by two independent entities (Pabis, 2003, p. 251).

The company's agreement may establish either a supervisory board or an audit committee, or both (Art. 213 § 1 CCC). This provision applies to supervisory authorities of optional nature. If the articles of a limited liability company agreement provide for the appointment of only a supervisory board or only an audit committee, then the amendment to the limited liability company is required only in case of appointing the second supervision body. Appointment of mandatory supervisory bodies takes place when the two conditions listed in Art. 213 § 2 CCC are simultaneously applicable. The share capital must exceed PLN 500,000 and there are more than twenty-five partners (Strzępka, Zielińska, 2015, pp. 546-547). If, due to statutory requirements or a provision in the articles of partnership agreement, the obligation to appoint a supervisory board or an audit commission results from the establishment of the company and the members of this body were not appointed until the company was registered, pursuant to Art. 165 of the CCC, the registration court will set a company in organization an appropriate deadline to rectify the deficiency on pain of refusing to enter the register. On the other hand, if the company was registered without appointing members of the supervisory board or audit committee, pursuant to Art. 172 § 1 of the Commercial Companies Code, the registry court, either *ex officio* or at the request of persons with legal interest, summons the company to rectify the deficiencies with an appropriate deadline being set up. But then again, there are no coercive proceedings in a situation where the obligation to establish a supervisory board or an audit commission arises during the course of the company and the members of the bodies are not appointed. In such a situation, a shareholder or partners representing at least 1/10 of the company's share capital and who are interested in the appointment of members of the supervisory body shall be entitled – pursuant to Art. 236 § 1 of the Commercial Companies Code – to request to convene an extraordinary meeting of shareholders, as well as to include on the agenda of the next meeting of shareholders a resolution to appoint members of the supervisory body. If such a meeting has not been convened by the management board, an authorized partner or partners may apply to the registry court for authorization to convene the meeting (Chomiuk, 2014, p. 853). Furthermore, who – being a member of the management board or liquidator – allows the company to remain without the supervisory board in proper arrangement for more than three months, which constitutes breaching the law or contract provisions – is subject to a fine of up to PLN 20,000 (The Act of 15 September 2000, OJ 2020. Pos. 1526, with later amendments).

The author of this dissertation will defend its main hypothesis that the supervisory board plays a huge role in exercising corporate supervision in a limited liability company. The operation of the supervisory board expected in the everyday practice of Polish companies is based on the supervision exercised in an effective and competent manner. Members of the supervisory board should act in the interest of the company, be independent in their actions, and support the management board in making key decisions. Unfortunately, such a supervision model is relatively rare.

The literature on the subject partially attributes the passive approach of the supervisory board to the provisions of the Commercial Companies Code that are limited only to the controlling and supervisory powers of the supervisory board. However, the CCC allows for the extension of the said powers in the articles of association or other corporate documents.

The concept of supervision and control

The supervisory board is an entity with supervisory powers. M. Bogacz-Miętka points out that the concept of supervision and control should be distinguished. These terms are not identical. The encyclopaedia of law defines supervision as a type of activity involving control and competence to substantively correct the activities of an entity subject to supervision (Bogacz-Miętka, 2011, pp. 16-17). The concept of supervision includes both control, and thus auditing, checking the company's operations as a supervised entity for compliance with the law, contractual provisions and other internal acts in force in the company, as well as the possibility of issuing instructions (Kopaczyńska-Pieczniak, 2013, p. 600), subject to the provisions of Art. 219 § 2 of the Commercial Companies Code – pursuant to which these instructions cannot be binding on the management board as far as running the company's affairs are concerned. For that reason, there is a separation of executive and supervisory functions. As M. Wyrwiński indicates, the concepts of supervision and control do not mean the same. The concept of control is perceived as the possibility of obtaining information on the activities of the controlled entity or body, whereas supervision defines the rights that, in addition to obtaining information, allow for supreme influence over the activities of the supervised entity or body (Wyrwiński, 2004, p.183). K. Kopaczyńska-Pieczniak points out significant differences between supervision and control. First of all, supervision differs from control in the scope of actions that can be taken, because control is the right to inspect the activities of a given entity and to request information and explanations, while supervision also includes the right to take actions binding the supervised entity. Therefore, the concept of supervision is broader than control and it is of permanent nature (Kopaczyńska-Pieczniak, 2013, pp. 626-627).

Model of individual and collegial supervision

The statutory supervisory powers have been defined in Art. 219 § 1 and § 3-4 CCC, according to which the board supervision is permanent and concerns the functioning of the entire company, i.e. it is not limited to financial matters only, but applies to all areas of the company's activities. The specific duties of the supervisory board are indicated in Art. 219 § 3 CCC, which is of semi-imperative nature. The specific duties of the supervisory board include the assessment of the reports referred to in Art. 231 § 2 point 1 of the Commercial Companies Code, i.e. the management board's report on the company's operations and the financial statements for the previous financial year in terms of their compliance with the accounting books, documents, and the actual state, as well as the management board's conclusions regarding either distribution of profit or coverage of loss and submission of an annual written report on the results of this assessment during shareholders' meeting. Art. 219 § 4 of the CCC sets out the basic powers for the supervisory board for the proper exercise of the supervisory function (Strzępka, Zielińska, 2003, pp. 626-627).

The supervisory board has the right to review all company documents: financial, human resources, contracts, the management board resolutions (Kidyba, 2017, p. 1065). The right to view books and documents applies to all documents and collections prepared both in paper and electronic form (Piniór, 2013, p. 429). Members of the management board and employees are required to provide members of the supervisory board with access to accounting books and documents, provide access to all premises, both in the headquarters and branches, and make archives, cash registers and safes available. The review of the indicated documents should

take place at the registered office of the company or its branch (Kidyba, 2017, p. 1066). The supervisory board may also demand access to documents kept outside the company's registered office, e.g. held by an entity providing accounting services. In addition, the supervisory board has the right to demand reports and explanations from members of the management board and employees of the company, as well as to audit the assets. These documents will usually cover specific areas of the company's operations and will contain information on contracts being concluded, financial standing – including the number of loans and borrowings taken – projected development of the company's enterprise, employment status, level of remuneration, etc. (Pinior, 2013, p. 429).

The model of individual supervision by members of the supervisory board of a limited liability company is relative. Pursuant to the articles of partnership agreement, it may be replaced by the principle of collegial action of board members, i.e. the model in force in a public limited liability company (Szumański, 2015, p. 547). Adopting a model of individual supervisory activities in a limited liability company gives individual members of the supervisory board a strong position, as each member of the supervisory board may exercise supervision without the need to obtain separate authorization from the supervisory board.

In fear of abusing the exercise of individual rights by members of the supervisory board, or misusing information obtained by them in this particular way, the shareholders may change the statutory model of exercising control activities in the company in the articles. The articles of agreement of a limited liability company may change the principle of exercising supervision by adopting a collegial model of a public limited liability company. The articles of agreement may indicate that the supervisory board performs its duties collectively, while individual supervisory activities will be performed by individual members pursuant to the authorization expressed in the resolution of the supervisory board. These activities should only be performed in person by members of the supervisory board. It is not possible to authorize third parties to perform supervisory activities on behalf of a member of the board due to the risk of disclosure of information and trade secrets of the company (Pinior, 2013, pp. 432-433).

In accordance with Art. 219 § 3 of the CCC, the supervisory board is obliged to submit a written report on its activities to the shareholders' meeting each year. The wording of this article indicates that the written report must cover the compliance of the management board's report on the company's activities and the financial statements for the financial year with the company's books and documents and with the actual state and assessment of the management board's conclusions regarding distribution of profit or coverage of loss. Regarding the latter issue, the assessment of the supervisory board should take into account not only the compatibility of the proposed distribution of profit or potential loss with the articles of partnership agreement and with accounting books and documents, but also the advisability from the point of view of the company's situation (Litwińska-Werner, 2007, pp. 607-608).

The supervisory board report on the results of the assessment of the reports and conclusions referred to in Art. 219 § 3 of the CCC, should be distinguished from any report by the supervisory board not regulated by the Code of Commercial Companies concerning its activities in the financial year. The report on the activities of the supervisory board submitted to the ordinary meeting of shareholders describes the course of ongoing supervision by the supervisory board over the company's operations and the use by the supervisory board of other supervisory or other instruments, e.g. in the representation of the company in contracts and

disputes with board members, if any were granted in the articles of partnership agreement or result from legal provisions (Nowacki, 2018, pp. 1386-1387).

In addition to the obligations and rights contained in Art. 219 of the Code of Commercial Companies, there are other powers of the supervisory board applicable from the Act. These are as follows:

- representing the company in contracts between the company and a member of the management board and in a dispute with him (Art. 210 of the CCC);
- giving consent to members of the management board to deal with competitive interests, provided that the articles of agreement state so, or if the supervisory board is entitled to appoint a management board (Art. 211 of the CCC);
- convening an ordinary meeting of shareholders, if the management board fails to convene it within the time limit specified in the provisions of the Commercial Companies Code or the articles of agreement; an extraordinary meeting of shareholders, if it deems necessary to convene it and the management board does not convene it within 2 weeks of the request being made by the supervisory board (Art. 235 CCC);
- bringing an action to repeal the resolution of the shareholders (Art. 250 point 1 of the Commercial Companies Code) and for annulment of the resolution of the partners (Art. 252 § 1 in connection with the Art. 250 (1) of the Commercial Companies Code) – the power is vested collectively by the entire body and each member individually;
- selecting the entity authorized to audit financial statements to perform an audit or review of the financial statements, as long as that the company's financial statements are subject to the auditor's audit and the company's articles provide for appropriate authority for the supervisory board (Chomiuk, 2014, pp. 872-873).

Particularly noteworthy is the statutory right of the supervisory board to represent the company in contracts between the company and members of the management board and in dispute between the company and the management board or members of the management board. Art. 210 § 1 of the Commercial Companies Code delegates performing representative activities on behalf of the company to the supervisory board or a proxy appointed by resolution of the meeting of shareholders. (Kidyba, 2009, p. 559). The issue of the company's representation by the supervisory board in contracts with a member of its management board raises many significant doubts, which include, among others, powers of the supervisory board in the situation of appointing a proxy in the company, determining the manner of representing the company by the supervisory board or determining the legal effects of a contract concluded in breach of Art. 210 § 1 of the CCC. From the point of view of a member of the management board, it is important that the contract concluded with the company is valid, and thus concluded in a manner resulting from the mandatory provision of Art. 210 § 1 of the CCC, and truly satisfy the company's internal regulations, which may derive from the provisions of the articles of agreement and the Rules of the Supervisory Board (Oczkowski, 2014, p. 912). The competence of the supervisory board to represent the company covers all types of contracts concluded with management board members; those that constitute the source for performing their functions, e.g. a company management contract, as well as contracts not related to performing the functions of a management board member, e.g. a sale, rental or lease agreement (Kopaczyńska-Pieczniak, 2013, p. 638). In its judgment of August 18th, 2005, the Supreme

Court indicated that Art. 203 CCC and Art. 210 § 1 of the Code of Commercial Companies and Partnerships do not differentiate legal transactions and apply to all contracts between the company and a member of the management board, regardless of whether these contracts are related to their function on the company's management board (Oczkowski, 2014, p. 906).

Suggestions *de lege ferenda*

Article 220 of the CCC indicates the possibilities of extending the powers of the supervisory board to other than those specified in Art. 219 CCC. The powers of the supervisory board can be extended only in the articles of agreement. Increasing the powers of the supervisory board cannot be implemented in a way that violates the functions of other company bodies, especially those resulting from mandatory provisions of the law (Litwińska, 1999, p. 234). The following are statutorily provided possibilities of extending the powers of this body: making the management board's activities specified in the articles of agreement subject to the permission of the supervisory board and the transfer to the supervisory board the right to suspend individual or all members of the board for important reasons (The Act of 15 September 2000, OJ 2020. Pos. 1526, with later amendments). The wording included in Art. 220 CCC indicates that it is possible to grant the supervisory board other powers than expressing consent for certain activities by the management board and suspension of individual or all members of this body (Litwińska-Werner, 2007, p. 608).

The articles of partnership agreement should strictly define the activities for which the management board of the company will be required to obtain the consent of the supervisory board. Examples of the powers of the supervisory board include: passing on the management board by-laws, approval of the company's long-term development plans and annual financial plans and changes in those plans or granting the consent to the payment of interim dividend.

The catalogue of activities may also be specified in an amount, e.g. activities resulting in a liability for the company in the amount exceeding the indicated amount per year (Chomiuk, 2014, p. 875). The following examples of competence of the supervisory board can be added: employment contracts and civil contracts of personnel with an annual value exceeding a certain amount, regardless of the number of contracts conducted, regulation and incurring liabilities exceeding a certain amount under certain conditions.

A distinction should be made between the management board's consent to a specific action and the issuing of binding instructions regarding the conduct of the company's affairs (Art. 219 § 2 of the CCC). A similar regulation exists in a public limited liability company (Art. 375¹ CCC).

If the articles of agreement contain a clause extending the powers of the supervisory board in such a way that the management board will have to obtain the board's consent to carry out certain activities in the external sphere, then Art. 17 § 3 CCC applies. It refers to the effects of performing actions without the consent of the supervisory board. A legal act carried out without the consent of the board will be valid and the management board will be liable to the company for activities contrary to the contract. The premise for the management board's liability will be the damage caused to the company in a causal relationship with the fault of the management board member. Responsible for this will be specifically indicated members of the company's management board (Litwińska-Werner, 2007, p. 608-609).

The second special right to extend the powers of the supervisory board, independent of any power to appoint and dismiss members of the management board, may be the right to suspend individual or all members of the management board for important reasons. The decision to suspend a member of the management board is made by the supervisory board *in corpore* pursuant to a resolution adopted by an absolute majority, unless the articles of partnership agreement impose more stringent requirements in this respect. Important reasons will be defined differently depending on the type of business conducted by the company (Tomczak, 2006, pp. 152-153). The Court of Appeal in its judgment of 20 December 2012 (reference number act I ACa 403/12) pointed out that the *content of Art. 220 CCC gives the company the right to contractually extend the powers of the Supervisory Board, but only to the extent specified in the Act. Since the Act stipulates the extension of the board's powers to suspend management board members with an indication that only valid reasons can be the basis for suspension, there is no justification for the view that the board's competence also exists as to the possibility of suspending board members for any reason. Such an expanding understanding of Art. 220 CCC would be in clear contradiction with the content of Art. 219 § 1-4 of the CCC specifying the basic rights and obligations of the supervisory board of a limited liability company.*

The Act of 16 December 2016 on the principles of managing state property (Act of 16 December 2016 on the principles of state property management, OJ 2020, item 735 with later amendments) gave the supervisory board additional competence, which had to be implemented in accordance with Art. 17 (2) of the Act. The consent of a supervisory authority is required when it comes to concluding, among others, a contract for legal services, marketing services, services in the field of interpersonal relations (public relations) and social communication, as well as management consulting services, if the amount of remuneration in total for the services rendered exceeds PLN 500,000 net on an annual basis.

Good and effective corporate governance should stimulate company bodies to achieve assumed goals and contribute to the implementation of the adopted strategy (Grabowska, 2015, p. 68). The supervisory board's influence on the strategy and development direction of the company is increasing, but the responsibility and tasks delegated to this board are becoming greater and greater, too. It is pointed out that supervisory boards should transform into a body that will not only follow the management board's activities, but will also take over part of the responsibility for business decisions (Pałasz, 2017, p. B10). According to A. Peszko, it can be assumed that the supervisory board has primary responsibility for the entire corporate management process in the strategic area. This approach does not mean, however, that the management board is released from the obligation to actively shape the development directions of the corporation. Therefore, the optimal solution is mutual complementary activity of the supervisory board and the management board in shaping the concept of strategic development of the corporation (Peszko, 2006, p. 84-85).

It is necessary to create opportunities to exchange knowledge and experience between the management board and the supervisory board. For this reason, one of the key elements is to create the partnership relations between the board and the management board, which are bodies of the same company and represent a common economic interest. An example of such cooperation is the participation of members of the management board or the key management in meetings held by the supervisory board, increasing the amount of time spent together to discuss matters relating to the company, e.g. discussing key projects, ongoing discussion about

business prospects and the risks associated with them. The purpose of this relationship is to create opportunities for joint decision making, regardless of how those decisions will subsequently be implemented. For this reason, it is postulated to keep the supervisory board informed about significant events in the company, the most important plans, organization of joint meetings so as to create the opportunity to benefit from the supervisory board's observations, enable the board itself to provide real business support and ultimately to take joint responsibility for decisions made. The supervisory board understood as an advisor and a body jointly responsible for business decisions may contribute to the improvement of the company's operations, elimination of risks related to its operations, increase the company's value and its competitiveness (Kwaśnicki, Nalazek, 2018, p. 16).

The competences of supervisory board members have a crucial impact on the quality of supervision. The key is the selection of candidates with appropriate qualifications and the professionalization of supervisory boards. P. Kozarzewski states that work in the supervisory board requires professional credentials in the field of microeconomics, corporate finances, law, and knowledge of market economy rules (Kozarzewski, 2000, p. 346).

A member of the supervisory board should have not only knowledge and experience, but also a number of personal characteristics. Of great importance in fulfilling their supervisory functions are: (i) the ability to express their own opinion, especially when it is completely different from the opinions of other board members, (ii) a strong will, (iii) the ability to look at various problems from a distance and (iv) the ability to look forward (Jeżak, 2005, p. 66).

In the light of the above, it should be considered that the qualifications of the members of the supervisory board should be closely linked to the company's strategy. The supervisory board should be characterised by diversity in education and experience of its members in terms of expertise, technical and business experience as well as experience in the international environment.

The basic competence of the supervisory board is to exercise constant supervision over the company's activities in all areas of its activity. However, as the results of the study published in the report *Supervisory boards in Poland: functions, responsibilities, priorities* (Deloitte Report, 2019, p. 6) indicate, it is generally believed that even the best board of directors composed of prominent and experienced experts focuses primarily on the evaluation of documents created by the board and usually remains in the shade of the company's activities. Drawing on their extensive professional experience, the surveyed representatives of supervisory boards indicated numerous good practices that can be used to increase the work efficiency and effectiveness of the supervisory board. The most frequently cited proposals are, among others: systematic training and competence development of supervisory board members in the field of basic duties, regular meetings aimed at getting to know the company's business from the practical side (e.g. meeting with the heads of operational departments, visiting the branches or production plants), avoiding discussions without conclusions during the meetings of the supervisory board (Deloitte Report, 2019, p. 30).

An in-depth discussion on the competences of supervisory boards and their members is particularly important in the context of the reform of corporate governance provisions. On 10 February 2020, the ordinance of the Minister of State Assets established the Commission for the Reform of Corporate Governance, the purpose of which is to develop proposals to reform legal regulations in the field of corporate governance, in particular to make recommendations

including the scope of introducing group law, competences of supervisory boards and their members, with strong emphasis on the rights and obligations as well as the role of supervisory boards of parent companies in the area of supervision over capital group assets (*Projekt Reformy Nadzoru Właścicielskiego – Ministerstwo Aktywów Państwowych – Portal Gov.pl* {www.gov.pl}, access: 18 March 2021).

A properly composed supervisory board becomes at the same time a good and cheaper advisor for company managers, as well as a guarantee of security for the owner. The core for good decision making is good communication between the management board and the supervisory board, or even their permanent dialogue, especially in the case of outsized companies and high-value transactions (Kwaśnicki, 2019, p. 14).

R.L. Kwaśnicki accepts that it should be considered that any natural person with full legal capacity may be appointed (delegated) to the supervisory board of a limited liability company (Art. 18 § 1 of the CCC). This rule, however, experiences certain exceptions that may arise from either the provisions of generally applicable law, including the Commercial Companies Code and specific provisions, or the article of partnership agreement (Kwaśnicki, 2005, p. 304).

As D. Wajda indicates, in the literature there is no detailed analysis of the legal nature of the relationship that connects the company with a member of the supervisory body. However, several important features can be indicated, including its content being a commitment to diligent and loyal performance of the function of a member of the supervisory body (Wajda, 2009, p. 166).

In Art. 214 of the CCC, the legislator indicated a group of persons who cannot perform supervisory functions in a limited liability company. The ban was imposed on managers of company branches, lawyers, persons employed in the company who report directly to members of the management board or the liquidator, members of the management board, members of the supervisory board, the audit committee and the liquidators of the company or subsidiary cooperative (The Act of 15 September 2000, OJ 2020. Pos. 1526, with later amendments). The extension of the prohibition is also related to the fact that in relation to the chief accountant, legal adviser and persons who are directly subordinate to the members of the management board or the liquidator, employment in the company – which may also occur on the basis of a legal relationship other than an employment relationship – was assumed as an exclusion condition (Strzelczyk, 2011, pp. 381-382). As emphasized by M. Król-Gajewska and A. Wyrzykowska, this ban applies to a given position at the time of being appointed to the supervisory board. Violation of the ban on joining positions makes the appointment to the supervisory board invalid (Art. 214 § 1 of the CCC in connection with Art. 58 § 1 of the CCC). As a rule, members of the supervisory board are appointed by a resolution of partners. However, the articles of partnership agreement may regulate another way of appointing or removing a supervisory board (Król-Gajewska, Wyrzykowska, 2017, pp. 128-129).

The ban on joining positions cannot be limited in the articles of association or excluded because of its absolute nature. However, an extension of the catalogue of persons who cannot sit on the company's supervisory body should be considered acceptable (Piniór, 2016, p. 327).

The Act on the principles of state property management introduced additional requirements for members of supervisory boards of capital companies with the participation of the State Treasury or the participation of state legal persons. In the case of a candidate for a member of the supervisory board, additional qualifications required are specified in Art. 19

of this Act. Appointment to the supervisory board of a person who does not have the appropriate competence to supervise a given company may be assessed as contrary to decency, and also violating the company's interest, while specific requirements are laid down in the statute (Bilewska, 2016, p. C8).

Members of the supervisory board in connection with the performance of their functions bear not only corporate responsibility manifesting in the possibility of their dismissal before the end of the term of office. They also bear civil liability for any damage caused to the company and criminal liability for the so-called crime of mismanagement or abuse of trust (Report No. 12/2019 Deloitte Polska, p. 13.). The question of abuse of trust is indicated in Art. 296 of the Penal Code.

The members of the supervisory board are obliged to perform supervisory duties properly, resulting from the professional nature of this activity. In accordance with Art. 293 CCC, a member of the supervisory board is liable to the company for damage caused by an act or omission which is contrary to the law or the articles of agreement, unless he is not at fault. This provision constitutes the general basis for liability for compensation of a member of the supervisory board in relation to his or her function (Rachwał 2012, p. 835). The damage referred to in this article means both a loss in the company's assets and lost profits (Act of 23 April 1964 - Civil Code, Journal 2020 r., Pos. 1740 with later amendments) and taking evidence of these circumstances burdens the company (Kwaśnicki, 2005, p. 317). The liability of the supervisory board member for damages is based on the principle of guilt. It is assumed that this is an alleged fault, similarly to Art. 417 of the Civil Code, as a designation of a case where the accused is liable to prove lack of guilt. The existence of fault cannot be equated with due diligence in the performance of the duties of a member of the body. The measure of diligence indicated in Art. 293 § 2 and 483 § 2 of the Code of Commercial Companies is objectified and is a benchmark for the quality of supervision in a capital company (Siemiątkowski, 2007, p. 185).

The responsibility of the members of the supervisory board is also regulated in the provisions of special acts, including the Act of 29 September 1994 on accounting (Journal of Laws of 2021, item 217, as amended). Violation of the provisions of the Act in question in terms of reporting and financial obligations may result in prosecution of obligated persons, including members of supervisory boards. A member of the supervisory board may also be held liable pursuant to the provisions of the Act above, in particular if they have not provided or provided incorrect information, explanations, and statements to the statutory auditor or prevented them from performing their duties. Such actions are punishable by a fine or imprisonment up to two years (Report No. 12/2019 Deloitte Polska, p. 13).

From liability arising from Art. 293 CCC a member of the supervisory board can be released only by obtaining discharge from their duties, unless facts and documents on the basis of which a board member obtained discharge are questioned (Rachwał, 2012, p. 836). In the event of an action brought by a partner to repair damage caused to the company, as referred to in Art. 295 § 1 of the Commercial Companies Code, and also after the declaration of bankruptcy of the company has become legally binding, members of the supervisory board cannot refer to the discharge received or the waiver of damages claims made by the company (Kwaśnicki 2005, p. 319).

As indicated by interviews with respondents carried out during the survey entitled »Super-

visory boards in Poland: functions, responsibilities, priorities», supervisory boards devote most of their attention to aspects related to the results of the organization and monitoring of reports provided by the management board. Control activities, although not always indicated as the most important area of activity in the opinion of the board members themselves, in practice constitute the basic reference point when analyzing the description of activities undertaken by the supervisory board (Kwaśnicki 2005, p. 22). The other important area of the supervisory boards activity is *compliance*, i.e. a state of compliance; a way of doing business in which the corporation complies within all applicable legal frames, supervisory regulations and other standards related to the corporation. The Supervisory Board monitors the risk of management process and examines the areas particularly exposed to that risk. These are: strategy of organisation, operational activities, finances and *compliance*. Therefore, it seems that the most important area of activity of the supervisory board is the strategy from which other activities and risk management arise.

Summary

The supervisory board of a limited liability company is a basic, internal mechanism for its corporate governance. In principle, it is an optional body in the case of a limited liability company. However, it is compulsory to appoint supervisory board members in such a company if the two conditions specified in article 213 of the second paragraph of the Commercial Companies Code are fulfilled cumulatively. This Code also makes it possible to extend the powers of a supervisory board specified in article 219. Nonetheless, this cannot violate any rights or functions of the other corporate bodies.

The competences of supervisory board members have a crucial impact on the quality of supervision, so they should be considered primary strategic competences. It is crucial that members of the supervisory board have knowledge and experience related to the subject of the company's operations and that they actively participate in creating the company's goodwill and processes of strategic importance for the results it achieves. Limiting the role of the supervisory board to exercising its powers related only to control and supervision deprives the company of the possibility to fully use the resources available in the form of unique knowledge, competences and experience contributed by individual members of the supervisory board. Granting the supervisory board with additional rights – specified *expressis verbis* in the limited liability company deed – affects the effectiveness of corporate governance.

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