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**DIRECTORS' AND OFFICERS' LIABILITY  
IN POLAND**

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## **Directors', Officers' and Managers' Personal Liability The Legal Position in Poland**

### **1. STRUCTURE OF POLISH CORPORATE ENTITIES**

#### **1.1 Introduction**

The basic legal act regulating the creation, organisation, principles of functioning, dissolution and transformation of commercial law companies is the Act of 15 September 2000 - the Code of Commercial Partnerships and Companies ("**CCPC**"). The CCPC does not regulate commercial acts to which the Act of 23 April 1964, being the Civil Code, applies ("**Civil Code**"). The structure, organisation and conducting of business activity in Poland is also regulated by other legal acts, such as the Act of 2 July 2004 on Liberty of Commercial Activity ("**LCA**").

#### **1.2 Kinds of commercial companies**

In the CCPC, the principle has been accepted that a closed catalogue of commercial companies exists, which means that the parties cannot establish other kinds of companies by way of an agreement. Commercial companies are divided into private and capital companies. Among private companies are a registered partnership, partnership company, limited partnership and limited-joint stock company. Capital companies are a limited liability company and a joint stock company (also further referred to jointly as "**company**", unless otherwise indicated). Under capital companies, the CCPC makes a division into privately held and publicly traded companies.

Particular regulations also apply to joint stock companies with a particular character, such as banks, investment fund societies, insurance companies, pension fund societies, brokerage houses, etc, among others the regulations of the Act of 29 August 1997 being the Bank Law, the Act of 27 May 2004 on Investment Funds, the Act of 22 May 2003 on Insurance Activity, the Act of 28 August 1997 on the Organisation and Operation of Pension Funds, and the Law of 29 July 2005 on Financial Instruments Trading (also further referred to jointly as "**particular regulations**", unless otherwise indicated).

The most important, for the purposes of this article, are the commercial companies, which will be further discussed. However, it must be noted that Directors & Officers ("D&O") liability also applies, to some extent, to private companies.

The authorities of capital companies are:

- the management board (replaced by liquidators in the period of liquidation),
- the supervisory board,
- the general meeting in a joint stock company / shareholders' meeting in a limited liability company (also further jointly referred to as the "**general meeting**").

##### **(a) The management board**

According to the CCPC, the management board is composed of one or more members appointed from among the shareholders / stockholders of the company (also further referred jointly to as "**shareholders**", unless otherwise indicated) or from outside the company. In a limited liability company, a management board member is appointed and recalled by a shareholders' resolution, while in a joint stock company this happens through the supervisory board. The articles of association / statute (also further referred to jointly as the "**articles of association**", unless otherwise indicated) or particular regulations can

specify a different number of management board members and different principles of appointing and recalling them.

In principle, the mandate of a management board member expires with the lapse of the term of office or as a result of his/her death, resignation or recall.

The management board conducts the company's affairs and represents it externally. In doing so, it makes use of implied competence.

**(b) The supervisory board**

The CCPC differently regulates forms of performing supervision in a joint stock company and a limited liability company. The supervisory board is the sole and obligatory supervisory authority in a joint stock company. In a limited liability company the supervisory authority is appointed only if the articles of association state so, or if the regulations of the CCPC order this on account of the amount of share capital and the number of shareholders. Moreover, an audit committee can also act in a limited liability company apart from or instead of the supervisory board. The supervisory board and audit committee are also further referred to jointly as the "**supervisory authority**", unless otherwise indicated.

Unless the articles of association or particular regulations state otherwise, the supervisory authority is composed of at least three members (in case of publicly held companies at least five members) appointed and recalled by resolution of the shareholders.

Similarly to the management board members, the mandate of a member of the supervisory authority expires with the lapse of the term of the office or as a result of his/her death resignation or recall.

The supervisory authority supervises the company's activities in all areas of its activity. It cannot issue binding instructions to the management board concerning the way the company conducts company matters. In particular, the supervisory authority assesses financial statements and the management board's report on the company's activity and also the requests of the management board concerning the division of profit or coverage of loss, and then submits a report on the results of that assessment to the shareholders. The articles of association and particular regulations can extend the powers of the supervisory authority.

**(c) The general meeting**

The dual division of this corporate body for general or shareholder's meeting is characteristic, by contrast with German or British regulations, for Polish commercial law.

The general meeting is made up of shareholders. This authority primarily has a constitutive and controlling character. Its significance for the liability of members of the management board, liquidators and proxies, and members of the supervisory authority, is manifested, among other things, in the obligation for them to obtain consent to perform certain acts, provided such obligation results from the legal regulations or articles of association. Furthermore, the general meeting acknowledges the fulfilment of duties by members of the management board, supervisory authority and liquidators.

**2. WHO ARE THE DIRECTORS, OFFICERS AND MANAGERS**

The civil liability of some categories of persons exercising functions in a company has been regulated according to particular principles as specified in the CCPC. Such persons are members of the management board, supervisory authority and liquidators. The previously mentioned categories of persons should be classed as Directors, Officers and Managers. Although the CCPC regulates the liability of founders with respect to the company, they are

not counted as Directors, Officers and Managers. Neither are the shareholders. Usually, with D&O insurance one also insures the civil liability of proxies (i.e. commercial representatives whose power of attorney is subject to disclosure in the National Court Register), regulated in the Civil Code. The scope of persons able to be classed as D&O is not specified in the legal regulations and depends on the decision of the insurance company, expressed in the insurance product offered.

According to the CCPC, a member of the management board, supervisory authority or liquidator of a company can only be a natural person with full capacity for legal acts. These functions cannot be exercised by a person who has been sentenced with a legally valid sentence for crimes specified by the regulations in the CCPC.

In addition, particular regulations can provide for additional requirements concerning qualifications and professional experience of the previously mentioned persons, their knowledge of the Polish language, prohibition with regard to carrying out specific activities or occupying positions, or the obligation to obtain consent or inform an appropriate state authority of appointing a given person to a post.

According to the CCPC, the function of a member of the supervisory authority of the company cannot be connected with the function of the management board, proxy, liquidator, manager of a branch office or an enterprise (*zakład*) and the chief accountant employed by the company and the counsel (*radca prawny, adwokat*). This prohibition also covers other persons who are directly subordinated to a member of the management board or liquidator and members of the management board and liquidators of a subsidiary. The articles of association and specific provisions can stipulate further restrictions.

### 3. LEGAL BASIS OF DIRECTORS', OFFICERS' AND MANAGERS' LIABILITY IN POLAND

#### 3.1 Statutory, civil or contractual legal framework

The CCPC specifies the principles of liability of members of the management board, supervisory authority and liquidators.

The liability of members of the management board, supervisory authority and liquidators with respect to a company also depends on their legal relationship with the company. The source of this liability can, with respect to members of the management board and liquidators, be:

- (a) appointment,
- (b) civil law agreement, e.g. managerial agreement,
- (c) employment contract.

If the appointment is the only source of performing their functions by the members of the management board and the liquidators, they are liable only on the basis of the CCPC. If they are also connected with the company through a civil law agreement, they can be additionally liable according to the principles as determined in this agreement and provisions of the Civil Code regulating the liability for failure to perform or for improper performance of the obligation. In the light of the courts' judicial decisions, members of the management board cannot refer to limits of liability of employees provided for in the Act of 26 June 1974, being the Labour Code ("**Labour Code**"). The legal situation of liquidators is similar.

Members of the supervisory board carry out their duties on the basis of their appointment and their liability with respect to the company results from the provisions of the CCPC. If

they are also connected with the company through other agreements, such agreements can impact their liability.

The proxy and the attorney-in-fact, contrary to members of the management board, supervisory authority and liquidators, are not liable, on the basis of the CCPC, for damage caused by their activities. If, however, they have exceeded the scope of the power of attorney or if their limitations have resulted from the internal relationship existing besides the commercial representation (*prokura*) and power of attorney, they will be liable according to the general principles of the Civil Code.

### 3.2 **Duties and requirements of Directors, Officers and Managers**

Contrary to shareholders, members of the management board, supervisory authority, proxies and liquidators are obliged to perform their duties in person. When doing so they should exercise due diligence resulting from the professional character of their activity. In addition, the obligation to be loyal to the company implies their abstention from any activities contradictory to the company's interests, unless such activities are conducted with the company's consent.

#### (a) **Members of the management board (liquidators)**

In a company with limited liability each member of the management board has a right and obligation to conduct the company's matters. Unless the articles of association of the company or specific provisions provide otherwise, a member can, in principle, independently make decisions concerning matters which do not exceed the ordinary acts of the company. In a joint stock company, members of the management board collectively run the company's affairs, adopting resolutions at meetings, unless the statute provides otherwise.

The right of a member of the management board to represent the company concerns all judicial and extra-judicial acts of the company. This right cannot be limited with effect to third persons. However, in the agreement between the company and member of the management board and in a dispute with him/her the company is represented by the supervisory board or the attorney-in-fact appointed by a resolution of the general meeting.

In addition, if to perform a legal act by the company the CCPC requires a resolution adopted by a company authority other than the management board, the performance of this act without this resolution is invalid. If, however, the obligation to obtain the permission results only from the company's articles of association, an act performed without relevant permission is valid. This does not, however, exclude the liability of members of the management board and liquidators towards the company due to violation of the company's articles of association.

As previously indicated the management board can be composed of one or more members. If the management board is composed of several persons, the manner of representation is determined in the company's articles of association. Unless the company's articles of association provide otherwise, co-operation between two members of the management board or one member of the management board with a proxy is required in the case of making statements on behalf of the company. Statements can be submitted to the company and letters addressed to the company can be delivered to one member of the management board or the proxy.

#### (b) **Members of the supervisory authority**

In a company with limited liability each member of the supervisory board can independently exercise his/her supervisory right, unless the company's articles of

association provide otherwise. In a joint stock company the members of the supervisory board collectively perform their duties by adopting resolutions. The supervisory board can, however, delegate its members to independently perform specific supervisory activities. If the supervisory board has been elected as a result of voting by separate groups, each group is entitled to delegate one member elected from among its members of the supervisory board to permanently and individually conduct supervisory activities. These members are entitled to participate in meetings of the management board with an advisory vote.

### 3.3 **Is there an equivalent in Poland to the US Business Judgement Rule?**

One can assume that according to Polish law the principle corresponding to the content of the US Business Judgement Rule is applicable. This means that members of the management board, supervisory authority and liquidators are not liable for the effects of their decisions connected with the company's activity if, when performing their duties, they exercised due diligence resulting from the professional character of their activity. Hence, they are liable for damage inflicted on the company according to the principle of guilt.

### 3.4 **Duties of Directors, Officers and Managers towards the corporation.**

#### (a) **Management board (liquidators)**

The management board calls a general meeting, makes all the notifications required by the regulations of the CCPC and other provisions of law to relevant registers and offices, maintains the share register / shareholders' register (also further referred to jointly as the "**share register**") and may appeal against the resolutions of the general meeting. Moreover, the articles of association may authorise the management board to, among other things, to dispose of shares / stocks (also further referred to jointly as "**shares**"), pay the advance on account of a dividend, and increase the share capital of a joint stock company.

#### (b) **Supervisory authority**

Apart from the general supervisory competences as mentioned in item 1.2 (b), the supervisory board may also call a general meeting unless the management board does so; it can also represent the company in agreements and disputes with the members of the management board. Moreover, the articles of association of the company may contain a provision on authorising the supervisory board to, among other things, appoint and dismiss members of the management board (in a joint stock company such right results directly from the CCPC, but the articles of association can specify otherwise), give consent to the management board to undertake certain actions, to select a chartered auditor of the company, to express its opinion on all matters requiring a resolution of the general meeting or submitted by the management board, give consent to dispose of a share, and in a joint stock company also to give consent to the payment of an advance for a dividend.

### 3.5 **Duties of Directors, Officers and Managers towards the majority and minority shareholders.**

According to the CCPC, the shareholders of the company should be treated equally in the same circumstances, irrespective of the percentage of share capital represented by them.

Taking into account the protection of minority shareholders, the CCPC provides for special rights for them. The management board is obliged to call a general meeting or list specific matters on its agenda if this is requested by shareholder(s) representing at least 10% of the share capital. Moreover, in a joint stock company the management board is obliged, during the general meeting (and in certain situations outside the general meeting), to provide a

shareholder, at his/her request, with information related to the company if this is justified for the assessment of the matter on the agenda. However, the management board shall refuse to provide such information in situations as specified by the CCPC if such refusal is justified in the interest of the company. Moreover, the company's articles of association may provide for other duties of the company's governing bodies towards the minority shareholders.

The CCPC does not provide for specific obligations of the members of the management board, supervisory authority and liquidators towards the majority shareholders.

### 3.6 **Duties of Directors, Officers and Managers in case of bankruptcy.**

According to the Act of 28 February 2003, being the Bankruptcy and Repair Law ("**Bankruptcy and Repair Law**"), if the company becomes insolvent and ceases to fulfil its binding obligations, the members of the management board, proxies or liquidators are obliged to apply to the court within 2 weeks for a declaration of bankruptcy of the company. Once the bankruptcy is declared, they are obliged to deliver the company's assets, the company's books and ledgers, correspondence and other documents to the receiver; they are also obliged to provide required explanations. A person who did not submit an application for a declaration of bankruptcy will bear a penal liability and also be liable for damages towards the company's creditor. Moreover, a person who does not fulfil the previously mentioned obligations may also be deprived of liberty, for a period of 3 to 10 years, of the right to conduct economic activity, represent a company and sit on its supervisory authority.

### 3.7 **Status of the enforcement of Directors', Officers' and Managers' liability with respect to tax, labour and environmental regulations.**

According to art. 116 of the Act of 29 August 1997, being the Tax Law ("**Tax Law**"), the members of the management board are jointly and severally liable with the company and with other members of the management board for the company's tax arrears with all their property, if the enforcement against the company proves ineffective. Such liability covers tax obligations which arose while fulfilling the obligations by members of the company's management board. A member of the management board is exempt from liability if he/she proves that an application for the declaration of bankruptcy has been submitted in due time or if composition proceedings have been initiated, or if such actions have been discontinued without this being his/her fault, or if he/she indicates assets from which enforcement proceedings enable a repayment, in the substantial part, of tax arrears.

Moreover, the members of the management board, the proxies and liquidators of the company may be called to penal liability for crimes and fiscal offences in particular, against fiscal, customs or foreign exchange obligations of the company.

The members of the management board (and directors of the company's branches), proxies and liquidators acting on behalf of the company in employment matters bear penal liability for infringing the provisions of labour law, security and hygiene in the workplace regulations and social insurance regulations. In particular they are liable for illegally concluding or terminating employment contracts, infringing the provisions on working hours and holidays, not paying remuneration and failure to maintain employee records in the required form.

The members of the management board, proxies and liquidators can also bear penal liability in the event of infringing environmental protection regulations, atomic law, geological and mining law, water law, etc.

### 3.8 **Directors', Officers' and Managers' criminal liability.**

Pursuant to the CCPC, members of the management board, supervisory authority and liquidators acting to the detriment of the company are subject to a penalty of deprivation of liberty of up to 5 years and a fine. Moreover, according to the Act of 6 June 1997 being the Penal Code ("**Penal Code**"), if the property damage is considerable and such persons acted in order to obtain material benefit, such acts could entail a penalty of deprivation of liberty for a period of time from 6 months up to 8 years.

According to the CCPC, the members of the management board and liquidators are also subject to a penalty for, among other things:

- (a) disclosing or providing false data to the governing bodies of the company or state authorities;
- (b) acquiring own shares by the company or pledging them;
- (c) illegal issuance of shares;
- (d) failure to submit a list of shareholders to the Registry Court, failure to maintain a share register, failure to call a general meeting, hindering the process of exercising supervision over the company.

The members of the management board, supervisory authority and liquidators of a company are also subject to penal liability on the basis of other provisions, in particular the provisions concerning the protection of competition and consumers, the previously mentioned provisions of labour law and social insurance, penal fiscal law or environmental protection provisions.

#### 4. **STATUTE OF LIMITATIONS**

The members of the management board, supervisory authority and liquidators of a company are subject to limitations provided for by the regulations of the CCPC and particular regulations. The members of the management board and liquidators may also be subject to limitations provided for in the company's articles of association, internal acts of the company (e.g. by-laws) or resolutions of the governing bodies of the company, those limitations not effective towards third parties.

##### 4.1 **Shareholders' actions**

Three years from the day on which the company became aware of the damage and of the person liable to make good the same. The claim shall in any event be barred by limitation on elapse of ten years in case of limited liability companies and five years in case of joint-stock companies from the incidence of the injurious event.

##### 4.2 **Contractual disputes**

The Civil Code provides for two general limitation periods: three years for claims pertaining to periodical performances and claims resulting from an economic activity and ten years for all other claims. Nevertheless, the Civil Code sets out many specific limitation periods depending on the nature of the contract.

##### 4.3 **Discrimination actions**

The limitation period depends on the grounds of the claim.

- (a) If the claim is based on the provisions of the Labour Code, the limitation period is three years from the day of maturity of the claim.

- (b) In case of claims based on the provisions of the Civil Code (infringement of personal rights) the limitation period is three years from the day on which the person who suffered the damage learned about it and about the person liable to redress it. However, this period shall not be longer than ten years from the day on which the event that caused the damage occurred. If the damage was due to a crime or misdemeanour, the claim for its redress is barred by limitation after the lapse of twenty years from the day on which the offence was committed, regardless of when the person who suffered the damage learned about it and about the person obliged to redress it. If the damage was caused to a person, the limitation period shall not terminate earlier than after the lapse of three years from the day on which the person who suffered the damage learned about it and about the person liable to redress it.

#### 4.4 **Sexual harassment actions**

The same rules apply as described above in item 4.3 b).

#### 4.5 **Wrongful termination actions**

- (a) In case of claims brought by employees on the basis of Labour Code the same rules apply as described above in item 4.3 a)
- (b) In case of claims brought by third parties on the basis of provisions of the Civil Code see: item 4.2 above.

#### 4.6 **Fraud**

- (a) In case of claims brought by the company against its director or officer the same rules apply as described in item 4.1 above.
- (b) In case of claims of third parties brought on the basis of provisions of the Civil Code see: item 4.3 b) above.

#### 4.7 **Tax**

The general limitation period applies, which is five years from the end of the calendar year in which tax payment was due

### 5. **WHO CAN SUE?**

#### 5.1 **Corporation: (derivative actions)**

##### (a) **brought by the board of directors on behalf of the company**

The statement of claim on behalf and for the company on account of damage caused to it by a member of the management board (liquidator) is brought by the supervisory board. Such action in place of the supervisory board can also be brought by a proxy appointed by virtue of a resolution of the general meeting. If the damage is caused by a member of the supervisory board, it is the management board that represents the company in the dispute for the redress of such damage.

##### (b) **brought by shareholders on behalf of the company (Is there a share ownership interest to bring such a claim?)**

If the company fails to submit the statement of claim for the redress of the damage incurred by it within the time limit as specified in the CCPC, each shareholder will be able to submit the statement of claim for such redress. This constitutes "*actio pro socio*". If the action turns out to be unjustified, and the shareholder, in bringing such

action, acted in bad faith or committed gross negligence, he/she will be obliged to redress the damage to the defendant member of the management board, supervisory authority or liquidator of the company. In a joint stock company, such claim is also due to a person entitled to another participation title in the profits or division of assets.

(c) **frequency and severity of such suits**

Since 1989, as a result of economic changes in Poland, the number of entities conducting economic activity in Poland has grown, including companies, and the scope of activity conducted by them has also undergone considerable increase. Actions brought by companies or in favour of companies against members of the management board, supervisory authority or liquidators on account of damage incurred due to their actions, contrary to the provisions of law or their company's articles of association, are not very frequent, but their number is on the increase. This is exemplified by the number of claims submitted under D&O insurance.

5.2 **Shareholders: (direct actions and class actions)**

(a) **how can minority shareholders sue under Polish law?**

According to principles as specified in the Civil Code, shareholders of a company, irrespective of the amount of share capital they represent, can pursue redressing of the damage caused to them directly by members of the management board, supervisory authority or liquidators. In bringing an action, shareholders should demonstrate the damage caused and its extent (real loss and lost benefits), the fault of members of the management board, supervisory authority or liquidators, and the causal relationship between their activity and the damage which arose.

(b) **can shareholders bring direct, class and/or derivative actions?**

Shareholders can bring an action on their behalf and for them, acting independently or together with other shareholders (joint participation in civil law proceedings). However, in that case the shareholders will act in their own interest, to the exclusion of those who did not report their claims.

(c) **can shareholders associate in a class action? And if so what are the basic requirements for class action under Polish law?**

Polish law does not know the concept of "class action". However, the Act of 17 November 1964 - the Code of Civil Procedure ("**CCP**") - provides for certain forms of joint participation.

According to the CCP, shareholders can appear jointly as claimants in one case if the subject of the dispute constitutes:

- (i) rights and obligations common to them or based on the same factual and legal basis (substantive joint participation);
- (ii) claims or obligations of a single kind, based on an identical factual and legal basis, if furthermore, the jurisdiction of the court is justified for each of the claims or obligations separately and for all together (formal joint participation).

In principle, each joint participant acts on his own behalf. However, if it follows from the essence of a disputed legal relationship or from a legal regulation that the verdict is to concern all joint participants indivisibly, the acts of legal procedure of joint participants acting are effective with respect to those not acting. The consent

of all joint participants is necessary to conclude a settlement, renounce a claim or confess to an action.

A shareholder can also join proceedings pending against a member of the management board, supervisory authority or liquidator, on the side of the claimant ("secondary intervention"). In reporting secondary intervention, a shareholder should demonstrate that his legal interest is that the matter should be resolved in favour of the claimant, i.e. that the verdict will also influence the rights or obligations to which he/she is entitled. A shareholder can join a dispute until the hearing in the second instance is closed. A shareholder who has effectively entered the proceedings is authorised to all acts of legal procedure admissible according to the state of the matter. They cannot, however, contradict the acts of the party which he/she joined.

(d) **status of the Polish legal evolution on shareholders' rights**

The CCPC introduced additional powers of shareholders in relation to the management board of a company. For example, the management board has been obliged to grant information about the state of the company at the request of the shareholder in cases specified by the regulations of the CCPC (see notes to item 3.5).

The CCPC does not envisage any particular liability of the management board for not granting such information. In that case the management board members can bear liability on general principles. The general meeting can also fail to grant acknowledgement of the fulfilment of duties by members of the management board, if it concludes that they did not perform their duties properly.

(e) **frequency and severity of such suits**

see notes to item 5.1 (c).

### 5.3 Creditors

(a) According to the CCPC, members of the management board of a company and liquidators are liable with respect to the company's creditors jointly and severally with the company if they give false data in the declaration regarding the contributions made by all shareholders to cover the share capital for three years from the day of registration of the company or registration of an increase in the share capital. They are also liable for damage caused to the company's creditors in merging, dividing or transforming the company if their action was culpable or in contradiction to the law or the articles of association of the company. Moreover, they are liable towards creditors on general principles as specified in the Civil Code; (see notes to item 5.2 (a)).

(b) **frequency and severity of such suits**

see notes to item 5.1 (c).

### 5.4 Third parties

(a) According to the principles as specified in the Civil Code, third parties can pursue the redressing of damage caused to them by members of the management board, supervisory authority, proxies or liquidators (see notes to item 5.2 (a)).

(b) **frequency and severity of such suits**

see notes to item 5.1 (c).

## 5.5 **Insolvency administrator**

- (a) According to the Bankruptcy and Repair Law, a receiver represents the company in bankruptcy proceedings. The regulations of the Bankruptcy and Repair Law provide for the possibility of the receiver challenging some acts previously carried out by the company. The receiver can also enter into the place of the claimant with respect to a claim brought by a creditor of the company, who challenged acts carried out by the company.
- (b) **frequency and severity of such suits**
- see notes to item 5.1 (c).

## 5.6 **Regulatory authorities: what type of administrative proceedings and courts actions?**

### (a) **Polish capital market regulator**

The capital market regulator in Poland is Commission for Financial Supervision (*Komisja Nadzoru Finansowego*). According to the Law on Financial Instruments Trading, members of the management board, supervisory authority or liquidators of a company are subject to civil and penal liability in cases as specified in those regulations. For example, they are liable for damage caused by providing false information or not providing information connected with the introduction of financial instruments to public trading. Providing false information could also result in a fine or loss of liberty of up to 5 years. A fine can also be imposed on members of the management board, supervisory authority or liquidators of a company conducting activity in public trading in financial instruments without a required permit, not sending out notifications, announcements and calls provided for by law. In the previously mentioned matters, the Chairman of the Commission for Financial Supervision is entitled to the powers of a prosecutor to initiate and join civil and criminal proceedings.

### (b) **Polish employment and labour regulator**

According to the Polish Labour Code, the labour inspector, supervising and controlling the observance of labour law, prosecutes petty offences connected with the performance of paid work (see notes to item 3.7). In particular, he/she can take part in court proceedings in the character of a public prosecutor.

### (c) **frequency and severity of such suits**

see notes to item 5.1 (c).

## 5.7 **Employees**

### (a) **how and when can employees sue Directors, Officers and Managers for discrimination, sexual harassment and wrongful employment practices?**

The Labour Code bans all discrimination, direct or indirect, in employment, particularly with regard to gender, age, disability, race, nationality, convictions (especially political or religious) and trade-union affiliations. Possible claims to redress damage caused by violating the principle of equal treatment of men and women should be reported to the company that is the employer. An employee (person discriminated against) can also pursue compensation directly from a management board member if it was his or her action which violated the ban on discrimination, on general principles as provided for in the Civil Code (see notes to item 5.4 (a)). This also concerns claims on account of dissolution of the working relationship which breaches the regulations of the Labour Code.

The Polish Labour Code does not provide for particular principles of civil or criminal liability for sexual harassment at work. In practice, complaints regarding sexual harassment at work on the basis of art. 199 of the Penal Code are rarely submitted. This does not, however, stand in the way of seeking financial satisfaction for an injury suffered before a court of common jurisdiction directly from a member of the management board, supervisory authority or liquidator of a company as a private individual, if they engaged in such behaviour.

(b) **frequency and severity of such suits**

Court cases concerning sexual harassment or discrimination of employees tend to be unitary. Usually employees bring actions on account of dissolution of the working relationship which is against the law. However, such claims are directed above all against companies as employers. It is not yet common practice in Poland for employees to direct claims directly against members of the management board, supervisory authority or liquidators of a company as private individuals.

6. **WHAT IS THE ENFORCEABILITY OF A FOREIGN JUDGEMENT ON POLISH DIRECTORS, OFFICERS AND MANAGERS UNDER POLISH LAW?**

In Poland the principles of acknowledging and executing decisions of foreign courts are in general determined by the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Regulation**") and also in the Convention on jurisdiction and execution of judicial decisions in civil and commercial cases, executed in Lugano on 16 September 1988 ("**Convention**"). The Regulation will generally apply where the defendant is domiciled in an European Union Member State, other than Denmark and the Convention will generally continue to apply when the defendant is domiciled in one of the following European Free Trade Association (EFTA) countries - Iceland, Liechtenstein, Norway or Switzerland. The provisions of the CCP apply to judicial decisions of states which are not parties to the Regulation and to the Convention.

According to the Regulation and the Convention, decisions issued in one state of the Regulation or Convention are valid in other states of the Regulation or Convention without the necessity to conduct special proceedings. In addition, decisions issued and feasible in one Regulation or Convention state will be enforced in another state if its court (or another competent authority) recognises its enforceability at the request of the party interested. Proceedings for ascertaining the feasibility of a decision in Poland will be conducted according to Polish regulations.

In general court decisions of states which are not parties to the Regulation and Convention issued in civil cases related to property rights, being subject to recourse to law but not enforceable, are effective only after being recognised by the Polish court after carrying out separate proceedings. In principle, recognition can take place only under the reciprocity condition and only if all conditions listed in the regulations of the CCP are met.

The decisions of foreign courts of states which are parties to the Regulation and the Convention in civil cases which are subject in Poland to recourse to law and enforceable are enforcement titles. However, they are executed in Poland only if they are reciprocal and if all conditions listed in the CCP are met after their feasibility is confirmed in special court proceedings.

7. **CAN THE DIRECTORS, OFFICERS AND MANAGERS BE LIABLE FOR PUNITIVE DAMAGES UNDER POLISH LAW, AND ARE PUNITIVE DAMAGES INSURABLE UNDER POLISH LAW?**

Polish law does not know the concept of "punitive damages".

According to the provisions of the Civil Code, an indemnity on account of property damage has a compensatory character. A member of the management board, supervisory authority, proxy and liquidator obligated to an indemnity can be liable only for normal consequences of acting or failing to act, from which the damage resulted. Within the previously mentioned borders in the absence of a separate legal regulation or agreement provisions, repairing damage covers losses which the injured party suffered and benefits which he/she could have achieved had the damage not been caused.

In the event of causing damage unrelated to property, the Civil Code allows for an appropriate sum to be awarded on account of monetary satisfaction for an injury suffered. Exceptionally, the court can, at the request of the entity whose personal goods were violated, award an appropriate monetary sum to a social cause indicated by it. One can recognise that the penal-preventive character of the sum awarded approximates to "punitive damages".

The previously mentioned performances are directly connected with the liability provided for in the Civil Code and are subject to property insurance.

#### **8. CAN THE COMPANY INDEMNIFY ITS DIRECTORS, OFFICERS AND MANAGERS UNDER POLISH LAW AND UNDER WHICH CONDITIONS?**

According to the provisions of the Civil Code, a legal entity, including a company, is obliged to repair damage caused by its authority. Thus, if a member of the management board, supervisory authority or liquidator acting as authority of the company causes damage, the company will be obliged to repair it.

If a suit is lodged directly against a member of the management board, supervisory authority or liquidator and he/she is obliged to repair the damage, there are no obstacles preventing the indemnity previously paid by a member of the management board, supervisory authority or liquidator on the basis of a separate civil-law agreement from being returned to him/her or being paid directly by the company.

The above concerns only due amounts on account of civil law obligations. Due to the specific character of obligations resulting from criminal decisions and the character of D&O civil liability, the return of fines or other cash penalties awarded from a member of the management board, supervisory authority or liquidator by the company is impermissible. The Act of 20 May 1971 – the Code of Petty Offences prohibits the return of amounts paid on account of such penalties.

#### **9. IS DIRECTORS', OFFICERS' AND MANAGERS' LIABILITY INSURANCE LEGAL?**

In accordance with the Civil Code, on the basis of a civil liability insurance contract, the insurance company undertakes to pay the indemnity as specified in the agreement for damage inflicted on third parties with respect to whom the insuring party or a person in whose favour the agreement has been concluded are liable for damage.

D&O insurance is legal. According to the provisions of law, an insurance company can pay an indemnity for damage caused by members of company's authorities, insofar as a given liability can be the subject of insurance. For example, on the basis of Polish law one cannot insure oneself against fines imposed in criminal proceedings.

##### **9.1 Who can pay the insurance premium?**

The insuring party can be a member of the management board, supervisory authority, a liquidator or proxy, a company or a third party (such as a spouse). If the insuring party is a member of the management board, supervisory authority, a proxy or liquidator, he/she pays

the premium himself/herself. In other cases, the premium is paid by the company or a third party.

The insuring party can also be a parent company with respect to its daughter company (the insured).

**9.2 Must the D&O insurance policy be issued by a local admitted insurer? If yes, does the same rule apply to a Polish subsidiary of a multi-national carrying a D&O insurance policy in the country of incorporation?**

According to Polish law, a resident can enter into an insurance contract not only with an insurance company operating on the basis of the permit issued according to the Insurance Activity Act or with a foreign insurance company operating in Poland through its main branch office but also with a foreign insurance company operating on the basis of freedom to provide services or through a branch. Similar principles apply to a non-resident commencing economic activity in Poland.

One assumes that the civil liability of members of the management board, supervisory authority, a proxy or liquidator of a daughter company operating in Poland can be insured by its parent company with its seat abroad (see notes to item 9.1).

**9.3 Issue of tax allocation of local premium for a local D&O insurance policy under Polish law**

According to the current standpoint of the Polish Ministry of Finance, in a situation where D&O insurance premiums are paid by a Polish company it cannot count those premiums as revenue-earning costs.

On the part of a member of the management board, supervisory authority and liquidator, if the premium is paid by a company or third party, tax revenue will arise on account of free performances. The amount of this revenue will be equal to the total value of premiums paid in a given year. The previously mentioned persons are obliged to pay income tax on this revenue according to general principles.

**10. GENERAL COMMENTS**

Although D&O civil liability has been known in Poland for some time, in principle it has only been used in practice since the beginning of the 1990s. During the first period of its adoption it was described as no-claims insurance due to the small number of claims reported. However, for several years, along with the increase of the number of entities operating on the market and their role in economic relations, an increase in the number of reported claims accompanying this situation can be observed.