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THE POSSIBILITIES FOR AND BARRIERS TO SUSTAINABLE COMPANIES IN POLISH COMPANY LAW*

By Arkadiusz Radwan and Tomasz Regucki***

PART A: TOPIC, BACKGROUND, SOURCES AND CHALLENGES

1 INTRODUCTION

1.1 The role of company law with regard to the environment protection

Enterprises are in general the entities responsible for producing goods and providing services in the free-market economy. Along with private households and the public sector (state and municipalities), business enterprises constitute a major pillar of the economy and they account for the supply of goods and services as well as job creation. The economy itself, from a macroeconomic point of view, is all about the relations between enterprises and private households as well as the constant circulation of goods and capital from one group of entities to another.[1] One of the most important factors of economic growth is the increase of productivity resulting from innovation and technological progress. This is possible mainly because of research and development activity conducted largely by the enterprise sector.[2] The condition of private businesses has a decisive impact on employment, while the reverse also holds true: labour laws affect the competitiveness of companies. Through buying labour, the enterprise sector supplies private households with financial resources and by doing so it perpetuates the economic bloodstream.

The core issue of a well-functioning economy is the proper regulation of the enterprise sector. It determines the incentives for economic growth,

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[1] See e.g. David Begg, Stanley Fisher and Rudiger Dornbush, *Economics* (8th Edition, McGraw-Hill Higher Education 2005) 337 – 347, Paul A. Samuelson and William D. Nordhaus, *Economics* (18th Edition, McGraw-Hill/Irwin 2004) Chapter 19.

[2] David Begg, Stanley Fisher and Rudiger Dornbush (n 1) 521,523.

productivity and employment. It is also an essential factor determining enterprises' competitiveness. Proper regulation of the enterprise sector is interrelated with a number of broader issues concerning redistribution and income inequality and therefore is capable of influencing such factors as crime rate, poverty level, long-term unemployment and other social matters. It can be said that regulation of the enterprise sector affects the widely understood social welfare and its indicators. Moreover, the regulatory environment should be designed to address the externalities problem inherent to many industries. Policies and legal tools are needed to embrace environmental responsibility of companies – because the environment is particularly vulnerable to the creation of externalities.

Among the available forms of business organization the company merits special attention. The statistics and macroeconomic data demonstrate its social and economic significance. Across jurisdictions, there is a variety of corporate forms, but they do share some common features that can be referred to as the defining factors or the common denominator of what constitutes a corporation. The company can be defined as a legal vehicle created for aggregating financial capital and other factors of production (such as human capital, know-how etc.), enabling better control over economic risk arising from business activity (limited liability) and thus increasing efficiency and generating profits. The defining characteristics of a corporation upon which most jurisdictions agree are enlisted and elaborated in *The Anatomy of Corporate Law*[3] which readers should consult for further details. More specific understandings of the company, as well as the emphasis made in dealing with definitional problems, depend on the legal system and socio-political, microeconomic, macroeconomic and even philosophical doctrine. These factors also influence way the problem of the economic purpose of the company is approached, which varies across countries, legal cultures and time periods.

In jurisdictions whose legal system is based on the principles of market economy,[4] companies concentrate on profit-loss account and utility maximization, usually analysed in financial terms. The market mechanism proved to be the most effective form of economic system in terms of facilitating productivity, welfare and creativity. Nonetheless, it also tends to produce certain undesirable side-effects which reduce efficiency (leading to sub-optimal allocation) and may cause negative economic or social effects. Public regulation, supervision and enforcement are called for

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3 Reinier H. Kraakman et al, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Second Edition, OUP 2009) 5,16.

4 Free market economy as understood in a wide meaning – the general principles of economic system. The significant differences among free market economies (especially the distinction between liberal systems such as United States of America and more social systems such as Nordic countries) are not the subject of analysis of this paper.

to remedy some of the inherent deficits of free market economy associated with monopolies, information asymmetries, entry barriers, collective action problems, free riding, rent-seeking, moral hazard etc. The ongoing economic, political and philosophical discussion concentrates on the issue of how large those market failures are and what kind of state intervention would be optimal to properly address them, and in particular to curb and internalise the externalities that the undisturbed operation of market forces tends to produce. In fact, a large part of 20th century economics deals with market failure problems, which are mainly: the issue of public goods, external effects, information asymmetry, monopolies and bounded rationality.[5] The first two mentioned problems are great relevance to any analysis of the connection between company law and the environment.

The environment itself is one of the best examples of a pure public good. According to Paul Samuelson[6] pure public goods are goods which are non-rival and non-excludable, which means that consumption of such goods by any number of individuals does not lead to a decrease in their availability to others (the non-rival attribute) and that no individual can be excluded from consumption (the non-excludable attribute). The non-rival attribute makes the pricing of such goods impossible and the non-excludable attribute leads to the free rider problem. This creates a case for state intervention.

External effects occur whenever actions taken by a given individual affect others without adequate compensation. The best example is pollution as a by-product of certain industrial activities. Pollution directly affects the entire society and there is little economic incentive for a company to change its actions, unless a framework for public or private enforcement is put in place. Voluntary self-regulation to reduce pollution entails costs and create an uneven playing field – an example of individual efforts running into a collective action problem. So here again some form of coordination via regulatory intervention or creation of legal framework designed to internalise costs is called for.[7]

5 More about the market failure problems e.g.: Joseph E. Stiglitz, *Economics of the Public Sector* (Third Edition, W. W. Norton & Company) 76 – 93; Francis M. Bator, 'The Anatomy of Market Failure', (1958) 72 The Quarterly Journal of Economics 351,379. See also the analysis of the impact of 19th century economics on contemporary market failure approach: Steven G. Medema, 'The Hesitant Hand: Mill, Sidgwick, and the Evolution of the Theory of Market Failure' (2007) 39 *Journal of Political Economy* 331,358.

6 Paul A. Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 *Review of Economics and Statistics*, 387,389.

7 For further references on market failure approach to environmental policy see: Mollie Lee, 'Environmental Economics: A Market Failure Approach to the Commerce Clause', (2006) 116 *Yale Law Journal* 456,492.

The effects mentioned above are obviously not just a theoretical digression. Rapid technological development of human civilization entails certain effects which harm the environment. The basic environmental classification distinguishes (i) prevention of damage to the air, (ii) prevention of damage to water and (iii) protecting endangered species.[8] The first group consists of activities aiming at protection of the ozone layer, reduction of the acid rain phenomenon, reduction of air pollution and prevention of the greenhouse effect.

The link between the abovementioned environmental phenomena, the challenges facing regulators and core company law is far from obvious. Nonetheless, the purpose of this paper is to present the current status and future prospects of sustainable development within Polish company law. In the first part a brief outline of Polish company law will be offered, followed by a sketch of environmental law in Poland. The second part focuses on how Polish law regulates companies with regard to protection of the environment. It will examine the mutual relations of company law and environmental law. The third part will broaden the scope of investigation by embracing the law and practice of corporate groups in Poland.

1.2 Types of companies in Polish law

Poland began its transformation towards a market economy in 1989. Before that time, for almost fifty years, it was forced into the eastern bloc of centrally planned economies. This unfavourable geopolitics and the consequent imposition of a socialist economy affected virtually every field of social life, including constitutional rights and the entire legal framework.[9] Company law was saved from formal abolition, but it soon became dead law. The beginning of economic transformation during the early 90's was very challenging: the legal framework was outdated, case law and doctrine was limited, and few people were experienced in handling commercial operations.[10] It wasn't until 2000 that a new Code

[8] This classification comes from: Stiglitz (n 5) Chapter 9.

[9] Further reading about corporate law in Central and Eastern Europe: Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds), *Private Law in Eastern Europe. Autonomous Developments or Legal Transplants?* (Mohr Siebeck Gmbh & Co. K 2011); Marie-Agnes Arlt, Cécile Bervoets, Kristoffel Grechenig and Susanne Kalss, 'The Status of the Law on Stock Companies in Central and Eastern-Europe: Facing the Challenge to Enter the European Union and Implement European Company Law' (2003) 4 *European Business Organization Law Review* 245,272.

[10] See: Krzysztof Oplustil and Arkadiusz Radwan, 'Company Law in Poland: Between Autonomous Development and Legal Transplants' in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds), *Private Law in Eastern Europe. Autonomous Developments or Legal Transplants?* (Mohr Siebeck Gmbh & Co. K 2011) 446,493; Arkadiusz Radwan, '*Non ex regula ius sumatur* or about a few endangered truths' (2007) 1 Czasopismo Kwartalne Całego Prawa Handlowego, Upadłościowego i Rynku Kapitałowego „HUK" 6.

on Commercial Companies[11] (CCC) was enacted and came into force at the beginning of 2001. Unfortunately, the entry into force of new Polish company law legislation coincided with a wave of major reform endeavours all across Europe, following the ECJ's *Centros-Überseering-Inspire Art* jurisprudence.[12] Due to this unfortunate coincidence, from the very beginning, the new Polish company law was destined to become outdated sooner rather than later. The widespread European trend for deregulation and enabling legislation did not encounter a proper resonance in Poland for reasons related to unfortunate timing: it was all just after the adoption of a new companies act of 2000, the CCC. Hence any major revision of the then brand-now legislation right after its enactment would not be politically feasible nor easy to digest by the business community.. On the other hand, Europe tightened its grip on corporate governance in response to the corporate scandals of Enron/WorldCom/Parmalat, and, as a new member of the European Union, Poland had to implement European law.

The CCC embraces six forms of business associations. Polish language (unlike English but similar to German) uses the same term "*spółka*" (germ. "*Gesellschaft*") to encompass both partnerships and companies. The distinction is made through reference to persons or capital respectively, similar to how the German language distinguishes between *Personengesellschaften* (Pol. "*spółka osobowa*") and *Kapitalgesellschaften* ("*spółka kapitałowa*"). Throughout this paper we focus on companies rather than partnerships, but to give a flavour of the broader spectrum of legal forms available to businesses, we will briefly present the partnership forms partnerships as well.

The important distinction in Polish law is that between (commercial) partnership and (capital) company. This dividing line follows the pattern known in most modern jurisdictions and it has been developed by legal doctrine with the emergence of the legal personality theory. A Partnership is not a fully-fledged legal person. Polish legal terminology denotes the partnership as a "deficient legal person" [13] which embraces a set of features making it fit for commercial dealings. It is equipped with legal capacity, can act on its own behalf, including acquiring rights and obligations, suing and being sued in its own name. Except for the limited partners in a limited partnership, the partners are in principle liable for the partnership's obligations. What makes partnership in Poland

11 Dz U 2001 Nr 94 poz 561.

12 Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

13 Art. 33^1 of the Polish Civil Code and Art. 8 of CCC.

attractive, is the possibility of avoiding double taxation i.e. partnerships are not subject to corporate income tax (CIT). This means that partners pay only their personal income tax (PIT) from revenues arising from their membership in the partnership, whereas in case of capital companies a double taxation applies firstly profits are taxed at 19% for corporate income tax and then the payouts are subject to further 19% deduction for dividend tax.

The four partnerships in the Polish legal system are: general partnership, professional partnership, limited partnership and limited joint stock partnership. The first one (*spółka jawna* – sp.j., equivalent to the German *Offene Handelsgesellschaft*) is the basic form of partnership in Polish law; other types are always based on general partnership, although they reveal some important differences. The professional partnership (*spółka partnerska* – sp.p.) is reserved for specified professions (attorneys, doctors, architects etc. Art. 88 CCC provides the catalogue), and its most important feature is that professional partners are not personally liable for partnership's obligations resulting from each others' misconduct (Art. 95 CCC). This provides an element of limited liability (or more accurately speaking, partitioned liability) for certain professions, namely those which heavily rely on professional skills and personal services rendered by professionals like attorneys, architects, doctors, nurses etc. Limited partnership (*spółka komandytowa* – sp.k., equivalent to the German *Kommanditgesellschaft*) also includes an element of limited liability: the liability of at least one partner the limited partner (*komandytariusz*) is limited to the sum set out in the partnership's articles of association (Art. 111 CCC), whereas the personal liability of the other partners – the general partners' (*komplementariusz*) – remains unlimited. The limited joint stock partnership (*spółka komandytowo-akcyjna* – S.K.A., equivalent to the German *Kommanditgesellschaft auf Aktien*) goes one step further. Investors who are shareholders can limit their liability to the amounts paid for their shares, while general partners have unlimited liability. Interestingly, in Poland limited joint stock partnership (which is the Polish form of partnership limited by shares) is classified as a partnership, something which differs from many other jurisdictions where partnership limited by shares comes closer to the joint-stock company and is usually acknowledged as a full legal person. The partnership limited by shares was heralded as a vehicle designed to reconcile access to the capital market with organisational flexibility, favourable taxation (PIT rather than CIT) and takeover immunity, but these hopes never became reality. This failure was mainly due to a mismatch between tax law and the CCC[14] – quite contrary to the

[14] Przemysław Molik, 'Prawo podatkowe ogranicza wejście spółek na giełdę' *Gazeta Prawna* (2nd March 2010).

underlying assumptions. It needs to be pointed out, that issues regarding taxation of limited partnerships and limited joint stock partnerships rank among the most contested and most controversial in Polish legal doctrine and jurisprudence. This situation has undergone significant changes in recent years and its evolution is far from settled. Firstly, The Supreme Administrative Court in the verdict of 16.01.2012[15] ruled that the income of joint stock partnership is the subject to taxation only at the time of dividend payment. This dictum was extremely beneficial for joint stock partnerships tax optimization. Such line of interpretation was later confirmed by Ministry of Finance in their General Interpretation of 11.05.2012.[16] Surprisingly, shortly thereafter it was announced that the Ministry of Finance was working on the amendment of tax law which would make the limited joint stock partnerships subject to corporate income tax (CIT). This would eventually entail double taxation, which would make joint stock partnerships far less attractive business vehicles. The initial project was meant to come into force in the beginning of 2013, still due to long legislative process those plans failed. Nonetheless the project was not abandoned, and on 8 November 2013 the amendment of Polish tax law was adopted. Limited joint stock partnerships are now subject to corporate income tax on the similar rules as joint stock companies. Those changes have limited some tax optimization structures. However, in spite of initial assumptions, limited liability partnerships have so far remained outside of the scope of CIT.

The so called capital companies (*spółki kapitałowe*) enjoy full legal personality. In Polish law there are two types of capital companies – the limited liability company (*spółka z ograniczoną odpowiedzialnością* – sp. z o.o.) and the joint stock company (*spółka akcyjna* – S.A.). The former is the equivalent of the German GmbH, and the latter is the equivalent of the German *Aktiengesellschaft*. Similarly to Germany – and to many other continental European jurisdictions – the joint stock-company can issue shares to the public, but not all joint-stock companies in fact do so. This is quite different from the UK typology, which differentiates between private and public companies, with the latter able to have their shares listed on the stock exchange. To embrace the typological incompatibilities revealed by comparative legal analysis, the Report of the High Level Group (HLG)[17] came up with a threefold distinction, namely between closed, open and listed companies. Nonetheless, since the distinction between private and public companies is the most widely used in comparative legal writing, we will use this typology throughout of the rest of our analysis. To

[15] The Verdict of Supreme Administrative Court of 16.01.2012, II FPS 1/11.

[16] Ministry of Finance – General Interpretation of 11.05.2012, DD5/033/1/12/KSM/DD-125.

[17] Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels November 4th, 2002.

make sure, by public company we will understand the public limited liability company in the meaning of the second company law directive, i.e. all joint-stock companies, irrespective of their shares being or not being admitted to trade on regulated market, which corresponds to the combined categories of open and listed companies in the HLG's typology.

The private company is a form designed for small and medium-sized enterprises. It is also the preferred legal vehicle employed by big multinationals for establishing their polish subsidiaries[18]. The private company's legal structure is based on share capital paid up by shareholders, who receive titles (shares) in exchange for their contributions (in cash or in kind). The institution of share capital is based on German legal system – it is obligatory and is designed to bond shareholder with the company[19]. The concept of mandatory share capital has been subject to growing criticism and there is currently a draft law under consideration which allow companies to choose between minimum capital and a solvency test – all this with a view to enhancing the flexibility and competitiveness of the Polish legal framework for small and medium sized businesses. However, resistance to the liberalisation of the capital regime remains strong among more conservatively minded scholars and it is quite difficult to predict whether the draft will become law any time soon. As a result of the lesser degree of Europeanisation of the laws of private companies in the European Union, private companies are less stringently regulated than public companies. Private companies have some characteristics which are more typical of partnership than of corporate form. Again we note a similarity to the German model: in principle, a private company's articles of association may deviate from the statutory model as long as this is not prohibited by mandatory provisions. In general, mandatory rules do not prevail over default rules. Like partnerships, private companies may impose contractual limitations on the transferability of shares,[20] and this is

[18] See: Krzysztof Oplustil and Arkadiusz Radwan (n 10) 449.

[19] The share capital is mandatory for public companies in EU countries by virtue of the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L 026. It has been subject to strong criticism in European company law scholarship as well as in Polish legal doctrine. See: Arkadiusz Radwan, 'Sens i nonsens kapitału zakładowego - przyczynek do ekonomicznej analizy ustawowej analizy wierzycieli spółek kapitałowych' in Mirosław Cejmer, Jacek Napierała and Tomasz Sójka (eds), *Europejskie Prawo Spółek. Tom 2 – Instytucje prawne dyrektywy kapitałowej, cz. 2* (Wolters Kluwer Polska 2005); Eddy O. Wymeersch, 'Company Law in Europe and European Company Law' (April 2001) Financial Law Institute Working Paper No. 2001-06. Available at SSRN: http://ssrn.com/abstract=273876 accessed 29 August 2012.

[20] Art. 182 CCC.

a common practice in Poland. Another important characteristic of private companies is the possibility for members of the board to be personally responsible for company's debts in case of insolvency if they fail to submit to the bankruptcy court in due time.[21] This is a form of wrongful trading similar to the German concept of *Insolvenzverschleppungshaftung*. Like the German law, it is based on time-span criteria, rather than an assessment of what the director ought to have known, which is the UK's approach. Since in small private companies the shareholders often serve as directors, this form of liability (strengthened by the reversal of burden of proof) may de facto result in the corporate veil being pierced. However, the lack of any doctrine of shadow director makes it possible for controllers of companies to avoid liability through the employment of men of straw.

The public company is a legal structure designed for big enterprises. It allows them to reach large numbers of investors via the stock market. Public companies are subject to a far-reaching mandatory legal regime, which is amplified by the principle of *Satzungsstrenge* that restricts shareholders' freedom to design a company's articles of association. That principle (anchored in Art. 304 Sec. 3 and 4 CCC) – again borrowed from Germany – may be explained somewhat simplistically by saying that every deviation from the statutory model is prohibited, unless it is permitted. The share capital must not be lower than 100,000 Polish złoty (PLN), which is actually in breach of the Second EU Company Law Directive since the Euro appreciated against Polish zloty and the required amount of EUR 25,000 exceeds the PLN 100,000 as provided by CCC).

The above overview shows that the Polish system of company law displays many features typical of the continental European tradition, with historical developments creating a particular affinity to the German model.

If the shareholders of a public company decide to issue stock to the public, the company must obey the rules applicable to listed companies, in particular with respect to disclosure, corporate governance, inside information, mandatory bids etc. To a considerable extent subject, these rules have been harmonized by the EU, and Polish law meets the standards required by the EU's directives. Some of the specific rules applicable to listed companies will be presented below in section 3.

Now a glimpse at the statistics: according to Polish Central Statistical Office,[22] as of December 2012, there were 348,952 registered companies

[21] This should take place within two weeks from the date of insolvency (Art. 299 CCC).

[22] Statistics from Central Statistical Office (Główny Urząd Statystyczny), 'Concise Statistical Yearbook of Poland 2013, Chapter 20: PRIVATIZATION. ENTITIES OF NATIONAL ECONOMY' 501.

in Poland. The most common corporate form was the private limited company – there were 290,291 (83.19%) of them registered, as compared to just 10,182 public companies (2.92%). A total of 48,479 partnerships were registered, of which 33,388 (68.87%) were general partnerships, 10,500 (21.66%) limited partnerships, 2,816 (8.07%) partnerships limited by shares and 1,775 (3.66%) professional partnerships.

From the aforesaid total of 10,182 public companies, as of December 2012 only 438 (4.30%) were listed on the Warsaw Stock Exchange (WSE) and a further 429 were quoted on NewConnect, which is the Polish alternative trading system also operated by the WSE.

The most widespread corporate governance typology distinguishes between the insider-controlled (closed) system and outsider-controlled (market-oriented) system[23]. The former is characterised by concentrated shareholdings, a lesser role for the stock market in funding companies (bank credit is a more common instrument for financing enterprises than public offerings), a smaller stock market[24] and less significance of institutional investors. The Polish corporate governance system may be regarded as an example of an insider-controlled or closed system[25].

The ownership structure of Polish listed companies remains concentrated. As of April 2011 the median voting power of the largest shareholder amounted to 39.94% and the average was 42.07%[26]; these figures did not change during the last decade. In 2002 the median voting rights of the largest shareholder amounted to 39.5%.[27] In every listed company there is at least one shareholder who has more than 5% of voting rights – there are no companies with the strongly dispersed ownership that characterizes Anglo-American systems of corporate governance (the market-oriented model).

[23] See e.g. Ronald J. Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 *American Journal of Comparative Law* 329. More about comparative view on corporate governance systems see e.g. Marc Goergen, 'What Do We Know About Different Systems of Corporate Governance' 8 *Journal of Corporate Law Studies* 1, 15; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership around the World' (1999) 54 *Journal of Finance* 471,517.

[24] Smaller stock market given the criterion of market capitalization, turnover volume and number of listings.

[25] Krzysztof Oplustil and Arkadiusz Radwan (n 10) 453; Krzysztof Oplustil, *Intrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* (C. H. Beck 2010) 277.

[26] Tomasz Regucki, 'O potrzebie zmian regulacji wezwań do zapisywania się na sprzedaż lub zamianę akcji – uwagi na podstawie analizy struktury własności polskich spółek giełdowych' Transformacje Prawa Prywatnego 3/2012 69,86.

[27] Piotr Tamowicz and Maciej Dzierżanowski, 'Ownership and Control of Polish Listed Corporations' (October 2002), available at: http://ssrn.com/abstract=386822 accessed 29 August 2012.

1.3 Other business-related legal structures

The previous section presented a brief overview of business association forms available in Poland. Apart from that, a significant number of businesses in Poland continue to operate under the simple form of a civil law partnership. In legal terms, this structure is not even a "deficient legal person" but a contractual relationship between the partners. As of 2010 there were 271,869 civil law partnerships registered in Poland.

There are also some supranational company structures provided by European Law i.e. Societas Europaea and European Economic Interest Grouping. Those structures will not be considered further in this paper.

The most common form of enterprise in Poland remains the sole proprietorship. At the end of 2010 there were 2,942,965 individual enterprises. This figure may exaggerate the number of sole proprietorships in Poland because of the widespread practice of using self-employment as a means of avoiding the high costs of employment – former or prospective workers are incentivised to provide labour as sub-contractors.

1.4 Polish environmental law – the general issues

Protection of the environment and the doctrine of sustainable development are enshrined in the Polish Constitution. Article 5 states the general principle that "the Republic of Poland (...) shall ensure the protection of the natural environment pursuant to the principles of sustainable development". Moreover, Articles 74 and 86 of the Constitution also refer to environmental protection. The former consists of a few rules: (1) the public authorities shall pursue environmental policy that ensures ecological safety for both present and future generations, (2) environmental protection is a duty of public authorities, (3) the state of the environment and its protection is deemed to be public information, and (4) public authorities shall support the activities of citizens to protect and improve the quality of the environment. Article 86 of the Constitution states that everyone is obliged to take care of the state of environment and should be held responsible for causing its degradation.

Those constitutional principles are specified and detailed in a number of legal acts. In Poland there is no single environmental code in a sense of a comprehensive act covering all environmental issues. Instead, relevant provisions can be found in different laws dedicated to or dealing with various aspects of the environment.[28]

[28] Jerzy Stelmasiak (ed.), *Prawo ochrony środowiska*, (2nd edition, LexisNexis 2010).

The most important legislation is the Act on Protection of the Environment of 2001[29]. Even though – as was mentioned – the act does not attempt to encompass the whole field of environmental law, it sets out the general principles of Polish environmental law and creates a general system of environmental protection, the detail of which is filled in by specified acts dedicated to particular environmental issues.

One of the most important environmental laws is the Act on Environmental Degradation Prevention and Environmental Damages Responsibility of 2007.[30] It specifies the enterprises' duties concerning prevention of environmental damage and restoration of any environmental degradation connected with its activity. The constitutional right to information on the state of environment is detailed in the Act on Sharing Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessment of 2008.[31]

PART B: CORE ISSUES CONCERNING THE COMPANY

2 THE PURPOSE OF THE COMPANY AND THE DUTIES AND COMPETENCE OF THE COMPANY ORGANS

2.1 The purpose and interest of the company

2.1.1 Terminological issues

The distinction between the purpose of the company and the interest of the company is firmly established in Polish legal doctrine. Whilst the former addresses the reason for which the company was created, the latter is used for solving intra-corporate disputes.

2.1.2 The purpose of the company

In principle, the purpose of all companies is to make profit. The company is a legal vehicle suitable for running business activities largely because it enables the members (shareholders) of a company to aggregate economic resources and to limit their liability.

However, it is not stated in the general provisions of the CCC that the purpose of all companies is to manage an enterprise and make a profit.

[29] *Ustawa – Prawo ochrony środowiska*, Journal of Laws, Dz U 2008 Nr 25 poz 150.
[30] *Ustawa o zapobieganiu szkodom w środowisku i ich naprawie*, Dz U 2007 Nr 75 poz 493.
[31] *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko*, Dz U 2008 Nr 199 poz 1227.

The legal definition of the company's articles of association states that the partners (or shareholders) agree to pursue a common endeavour by making contributions and, to the extent provided, cooperate in other ways (Art. 3 CCC). Therefore the mandatory elements of an association agreement are contribution and cooperation, and not necessarily the pursuit of an economic goal. It is far from obvious why the law makes different provision with respect to the partnerships, where we find a clear rule saying that the objective of a partnership must be economic.[32] There is no such requirement applicable to corporations. Art. 151 CCC provides that a private limited company may be set up for any lawful purpose. Art 301, which deals with public companies, does not refer to the company's purpose, which means that public companies may be established for the pursuit of non-economic goals as well. Consequently from the corporate law point of view, both private and public companies may be created for any purpose, e.g. of charitable or scientific nature.[33] The aforementioned provisions allowing for companies to be set up to pursue any lawful objective are not in harmony with the provisions of the National Court Register Act. According to Art. 40 of that Act, it is mandatory to indicate a so-called "enterprise specification" according to the Polish Enterprise Classification.[34] This provision requires all companies to manage an enterprise, or they will not be registered and will not obtain legal capacity, as the entry in the register is conclusive as to the company's legal personality.[35]

Still the fact that company has to run an enterprise does not mean that gaining profit must be its sole purpose. There are some examples of companies which run enterprises, but whose purposes extend beyond gaining profit. In other words the company always has to be an entrepreneurial entity, but its purpose (understood as a common goal pursued by the shareholders or partners) does not have to be financial in. nature. Mandatory law does not prohibit companies where the whole of the profits are allocated to the activities specified in the company's articles e.g. research & development. Such a company would then be a very specific non-profit enterprise. It is though a rather theoretical example – there are legal entities like associations and foundations which are much more suitable for fulfilling non-profit goals.

Still, there are some prominent examples of companies with mixed purposes. It is worth mentioning that the National Depository

32 Technically it is stated that a partnership "runs an enterprise" – Art. 22, 86, 102, 125 CCC.

33 Mateusz Rodzynkiewicz, *Kodeks spółek handlowych. Komentarz*, (3rd edition, LexisNexis, Warszawa 2009) 247 and 558.

34 *Polska Klasyfikacja Działalności* – PKD – this is required for the purpose of state statistics.

35 Rodzynkiewicz (n 34) 248.

for Securities,[36] the entity responsible for managing the trading of dematerialized financial instruments in Poland (clearing and settlement) is established in the form of a joint-stock company. There are also some governmental agencies operating as commercial companies. One example is the Polish Agency of Information and Foreign Investment.[37] According to Art. 3 of its Articles of Association "*The aim of the company is to promote Poland and Polish regions in the world, with particular emphasis on the promotion of the Polish economy, goods, companies and brands, and the inflow of foreign direct investment to Poland.*" It is clear that even though the agency runs an enterprise its primary purpose is to support and promote other entities in the Polish economy.

When analyzing Polish company law with regards to Corporate Social Responsibility, it should be emphasized that even though the company itself runs an enterprise, the company's articles may provide that the company must also fulfill other goals, and that it must spend a specified share of its profit on those goals.

2.1.3 The interest of the company

The notion of the "interest of the company" has been considered in Polish legal doctrine,[38] but remains far from being methodically clarified in scholarship and judicial practice. The term "interest of the company" is a general clause which is referred to by a few provisions of the Code of Commercial Companies.

The references to the "interest of the company" in CCC are:

- Art. 209 and Art. 377 CCC which state that a member of the Management Board shall withdraw from any decisions in which there may be a conflict between the interest of the company and his personal interest (or the interest of his family members or other persons with whom he is personally linked);
- Art. 249 and Art. 422 CCC which cover appeals against the resolutions of General Meeting and General Assembly. One of the grounds for challenging such resolutions is that they are inconsistent with the "interest of the company";
- Art. 433 provides that the "interest of the company" may justify the exclusion of stockholders' pre-emption rights to subscribe for newly issued shares;

[36] *Krajowy Depozyt Papierów Wartościowych S.A.*

[37] *Polska Agencja Informacji i Inwestycji Zagranicznych S.A.*

[38] Adam Opalski, 'O pojęciu interesu spółki handlowej' Przegląd Prawa Handlowego 11/2008 16,23.

- Art. 163 sec. 3 and Art. 317 sec. 2 CCC refer to "interest of the company", stating than the court of registration may not refuse to register the company because of minor misconduct which does not violate the interest of the company;
- Art. 212 sec. 2 CCC states that the Management Board of a limited liability company may refuse to give shareholders specified information if revealing the information may threaten the "interest of the company". A similar rule applies to the General Assembly in a joint-stock company – according to Art. 428 CCC, the Management Board may refuse to reveal information to stockholders during the General Assembly meeting;
- Art. 56 states that in partnerships the partners are obliged to withhold any activity that would be contrary to the interest of that partnership.

The CCC does not define the meaning of the "interest of the company", nor does any other legal act. Instead, the term remains subject to specification and ad hoc definition through case law and legal scholarship.

In analyzing the idea of the "interest of the company", it is firstly important to determine whether the existence of the company's interest may be acknowledged as an abstract concept, and whether it may be understood as distinct and separate from that of the shareholders or other corporate constituencies. The legal person is a legal fiction i.e. it comes into existence through conventional deeds and actions and its legal capacity is granted by law. Although a company is intangible, it can acquire and own tangible assets, with its property being separated from that of its founders and shareholders. The question is whether the established legal entity may have an interest completely separated from those of other entities and individuals, but at the same time the will-molding and decision-making processes within and for the corporation must be conducted by humans. Having noted that the main reason for establishing companies is profit-making, it could be intuitive that companies have their own interest which is self-contained and independent from the interest of other parties. However, such an argument would not be supported by the wording of the law, nor by Polish legal doctrine or jurisprudence.

It is important to state that even though company has its own rights and properties it cannot be entirely self-interested and it cannot have interest unrelated to and fully independent of the interest(s) of its shareholders. The company interest is always instrumental in relation to other parties' interests. Any other conclusion would be inconsistent with both economic reality and mandatory provisions of the CCC.

The founders of a company establish it to pursue particular interests. The existence of a company is therefore never autonomous; it is always

connected to other interests. Through this assertion it may be stated that company does not have its own interest separated from the interest of its founders or shareholders. The interest of the company has to be understood as the resultant of the interests of other entities.[39]

A strictly legal argument can also be relied on to support this. The assumption that a company has its own interest, being essentially its survival, self-perpetuation, constant growth and accumulation of resources is difficult to reconcile with some of the fundamental pieces of legal regime applying to every corporation: dividend pay-offs, share redemptions, company dissolution and winding-up, spin- offs, and sometimes also mergers, pursuance of group policy etc. If anyone asserted that a company has its own interest independent of any other constituency, any of the aforementioned operations could be challenged on the grounds that they violate the "interest of the company".

Still there are some other provisions that support the view that the company's interest may be separated from the interests of other entities,[40] e.g. the right of management board to refuse to provide particular information to shareholders during shareholder meetings on the grounds that revealing trade secrets would potentially harm the company;[41] and the right to exclude shareholders' preemption rights where this is justified in the 'interest of the company'[42]. In these examples there is a conflict between particular shareholders and the company; the interest of the company is separated and contradictory to the interest of a particular shareholder or class of shareholders. Still this does not justify the statement that the interest of the company is self-contained. While the 'interest of the company' is instrumental to the interest of shareholders as residual claimants of the company's assets, this does not mean that the company's interest cannot be in conflict with the interests of a particular shareholder, nor that the former may not prevail over the latter.

In this case the company's interest may be understood in an abstract way as an aggregation of other parties' interests. By this token, the company's interest can be seen as a benchmark against which any given corporate action can be measured to check if it furthers the company's management and prosperity in the long term. This benchmark can be applied to actions that can be regarded as allocative, i.e. causing shifts in shareholders wealth or distributing value among shareholders (or – in broader terms – among

[39] ibid 17.
[40] Olga Sachanbińska, 'Interes spółki akcyjnej' (2011) 7 Internetowy Przegląd Prawniczy 115,139.
[41] Art. 428 sec. 2.
[42] Art. 433 sec. 2.

various corporate constituencies). Examples include the limitations on revealing company's trade secrets or possibility of excluding shareholders' preemption rights discussed above. The pre-eminence of the 'interests of the company' in the above examples can be explained on the basis that a company which loses its secrets may become less competitive, while shareholder's preemption rights could make it more difficult to raise necessary capital. For other actions, namely those intended to serve value creation, the business judgment rule should apply – although the concept of business judgment rule as such is not literally acknowledged in Polish legal doctrine.

Having stated that the 'interest of the company' cannot be fully separated from the interests of the various parties involved in the corporation, it is essential to discuss what underlying interests the company aggregates, and therefore to which the concept remains instrumental.

This question refers to the international debate between shareholder value and stakeholder models of the interest of the company. The shareholder value approach is based on the assumption that the main goal of the company is to maximise utility for shareholders i.e. the success of the company may be measured in terms of creating long-run value for shareholders[43]. The stakeholder approach postulates that not only the shareholders but also other parties such as, workers, creditors, and others who interact with the company should be recognized as constituencies that together with the shareholders make up what is referred to as the company's interest. Consequently, it would be the interests of all these groups and classes that need to be taken into account in defining the 'interest of the company'.[44]

In the current state of Polish company law there appears to be incidental support for some form of the stakeholder value approach in the legal doctrine, but it is rather random and it lacks sophisticated theoretical support. The prevailing view is cautious about the stakeholder approach and sticks to the view that the corporate interest is a resultant of the interests of shareholders.[45] This view is based on the economic foundations of the corporation, where shareholders are the residual claimants i.e. they are the ultimate beneficiaries of company's existence as well as the main risk-bearers of the company's performance. Economically speaking, they are the owners of the company, and they enjoy decision-making

[43] William Lazonick and Mary O'Sullivan, 'Maximizing shareholder value: a new ideology for corporate governance' (2000) 29 *Economy and Society* 13,35.

[44] R. Edward Freeman and John McVea, 'A Stakeholder Approach to Strategic Management' (2001) *Darden Business School Working Paper No. 01-02* available at SSRN: http://ssrn.com/abstract=263511 accessed 29 August 2012.

[45] Opalski (n 39); Oplustil (n 26) 175.

powers concerning its strategy, dividend policy and even company's very existence. The tradeoff is the shareholders' inherent risk exposure from the subordination of their claims in case of corporate insolvency. The wording of the CCC does not provide any support for the stakeholder concept. However, legal practice offers some examples deviating from the shareholder value approach. The court of Appeal in Łódź in its judgment of March 7th, 1994[46] concerning a bank organised as a public company, held that the interest of account holders depositing money with the bank should be taken into account in determining the 'interest of the company'. The case was brought to court when the preemption rights of existing shareholders had been excluded to facilitate the raising of new capital by issuing new equity to an external investor.[47] The legal question that arose was whether the interests of bank customers can be taken into account to justify disapplying the preemption rule. The court answered this question in the affirmative. However, it is difficult to draw universal conclusions from this case, as it dealt with a financial institution. It is a long established view in Europe that banks and some other financial institutions should be recognized as entities of public interest and their long term sustainability is essential for the systemic stability. Therefore the ratio decidendi of the cited judgment cannot be fully applied to any non-financial company.

Another practical example is a provision contained in the articles of association of Polish Petroleum and Gas Mining[48] – the biggest Polish state-controlled company dealing with the exploration and production of natural gas and crude oil. According to § 17 of PGNiG's articles, the State may consent to the company taking actions or making investments that permanently or temporarily reduce the company's economic efficiency, but are necessary for maintaining the energy security of the country.[49] This clearly exemplifies that pure economic performance and gaining profit does not have to be the only purpose of the company.[50] Yet it also shows that the cited provision does also allow for actions contrary to the company's interest. Regardless of its qualification the existence of such provision is of little avail for the formulation of any universal wisdom: the fact that a company adopted particular provisions in its articles of

46 ACr 21/94, Wokanda No 11/1994 54.

47 J. Okolski, J. Modrzejewski, Ł. Gasiński, 'Natura stosunku korporacyjnego spółki akcyjnej' Przegląd Prawa Handlowego 8/2000 11, J. Okolski, J. Modrzejewski, Ł. Gasiński, 'Zasada równego traktowania akcjonariuszy na gruncie k.s.h.' Przegląd Prawa Handlowego 10/2002 24

48 *Polskie Górnictwo Naftowe i Gazownictwo S.A.* – PGNiG S.A.

49 PGNiG Articles of Association, available in English at: http://www.pgnig.pl/pgnig/10199/10362/?s,main,language=EN accessed 29 August 2012.

50 See supra 2.1.2.

incorporation says more about the passivity of dispersed shareholders than about the lawfulness of the clause in question.

The aforesaid does not dismiss the importance of the protection of other corporate stakeholders. It only says that it is not necessarily the company law where this protection should be sought. There are other areas of law addressing the need for other constituencies' protection, e.g. labor law, insolvency law, capital market laws, contract law, and – last but not least – environmental law.

But even if the company's interest is conceptually comprehended as excluding such interests as workers, creditors or the environment, it does not entail the complete irrelevance of those interests for the choices made by corporate organs and officers.

Environmental law is one of the many sets of rules put in place to protect local communities and its environment. However, none of those regulations are directly connected with the 'interest of the company', nor do they create any general principle concerning the company's actions[51]. Like all legal persons, companies must obey those mandatory regulations, but this duty arises because these are provisions in force, rather than because they can be interpreted as a part of a more widely understood interest of the company.

Having the above remarks in mind it is important to state that company's decisions must respect stakeholder interests. Even though they are not acknowledged as conceptual components of the notion of the interest of the company, taking account of other parties' interests may be crucial for the successful pursuit of the company's own objectives, and as a result, may be consistent with the company's interest. It is in the company's long term interest to develop proper relations with its stakeholders i.e. workers, business partners and local communities. While not a component of company's interest, these interests still have a very strong influence on the company's performance in the long run. In other words, the interests of other parties are secondary to the interest of the company, but are still very important for the company itself. The management board has a large margin of discretion as regards taking other parties' interests into account while making decisions concerning the company. Polish legal doctrine hasn't developed the business judgment rule as such, but it de facto acknowledges the boards' wide discretionary powers in managing company's affairs and making decisions choices to take account of various external factors closer or looser related to the company's business. Such actions may include corporate philanthropy, profit sharing schemes (e.g.

[51] Opalski (n 39).

ESOPs), expenditures on environmental protection or other activities in line with the corporate social responsibility policy adopted by the company. The limit to such involvement is set by the long term interest of shareholders i.e. any taken actions must not be against the shareholders[52]. Balancing long term returns against short term expenditure is not an easy task and legal practice leaves it up to the board's discretion with virtually no reported cases of shareholders bringing actions against the CSR policies of Polish companies.

The approach described above is defined as enlightened shareholder value.[53] The concept found its way into the best practices formulated for Polish listed companies – the Warsaw Stock Exchange Corporate Governance Code of 2005. The 2005 Code's General Rule No. I, which deals with the Objective of the Company, read as follows:

"The main objective of a company's authorities is to further the company's interests, i.e. to increase the value of the assets entrusted to them by the shareholders, taking into consideration the rights and interests of entities other than the shareholders that are involved in the functioning of the company, especially the company's creditors and employees".[54]

However, the last version of the code, which is effective as of 01.01.2012, does not contain any similar provision nor does it refer to CSR.[55]

As mentioned above, the interest of the company is the resultant of the interests of its shareholders. But the shareholders as a class tend to be a heterogeneous group – the control of corporate Poland is characterized by concentrated ownership. So the primary line of agent-principal conflict lies between controlling block-holders and minority shareholders. This is precisely where the notion of the 'interest of the company' comes into play in order to curb dominant shareholder's temptation to engage in rent-seeking behavior. The most significant tool to solve the majority-minority conflicts in situations where the minority gets outvoted and co-decision rights do fall short, is the dissenting shareholder's action for annulment or rescission of a resolution of the General Assembly (dominated by the controlling shareholder). This action aims at preventing the majority

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52 Oplustil (n 26) 176.

53 Further reading on the Enlightened Shareholder Value concept e.g. Virginia Harper Ho, 'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 *Journal of Corporation Law* 59.

54 Best Practices in Public Companies 2005, available in English at: http://www.corp-gov.gpw.pl/assets/library/english/best2005.pdf accessed 29 August 2012.

55 Code of Best Practice for WSE Listed Companies, available in English at: http://www.corp-gov.gpw.pl/assets/library/english/regulacje/bestpractices%2019_10_2011_en.pdf accessed 29 August 2012.

shareholder from carrying out business operations or other actions which violate the interests of the minority. One of the yardsticks to measure the lawfulness of the operation pursued by the majority is consistency with the 'interests of the company'. According to Art. 422 § 1 CCC, which applies to public companies[56]

"A resolution of the general assembly which contravenes the statutes or good practices and harms the interests of the company or is aimed at harming a shareholder, may be challenged in an action brought against the company for an annulment of the resolution".

Other limitations to minority oppression can be found in the principle of equal treatment enshrined in Art. 20 CCC, and the duty of loyalty, although the latter is being questioned with respect to public companies.[57]

The possibility of challenging resolutions of General Assembly has been widely analyzed in Polish jurisprudence, and there is also plenty of case-law on the issue. In one of the leading cases, the Supreme Court stated that

"inconsistency with good practices occurs when it may be considered unethical in commercial trade. However, this involves, not an ethical assessment by an average honest man, but rather an assessment aimed at ensuring the smooth functioning of the company in economic terms".[58]

In another judicial decision it was emphasized that the

"commercial interest of the company (Art. 422 CCC) corresponds to the interests of its shareholders of all groups including the common objective defined in the company's articles of association".[59]

Another example of harming the minority shareholder is the Supreme Court verdict of 15.03.2002.[60] The court stated that a resolution to increase share capital was inconsistent with decency and was aimed at harming the minority shareholder because there was no economic reason to increase

[56] For private companies there is an analogous provision repeating the same wording (Art. 249 § 1 CCC).

[57] The prevailing view is that shareholders of public companies do not owe any fiduciary duties.

[58] Verdict of the Supreme Court – Civil Chamber – IV CK 607/04 – 2005-03-08, published: Legalis (our own translation).

[59] Verdict of the Supreme Court – Civil Chamber – I CSK 158/09 – 2009-11-05, Published: Jurisprudence of the Supreme Court Civil Chamber 2010, No 4, entry 63, p. 82 (our own translation).

[60] Verdict of the Supreme Court – II CKN 677/00 – 2002-03-15, published: Legalis.

share capital. Instead, the main objective of increasing share capital was in fact the dilution of equity and reducing the minority shareholder's voting power.

Yet another case confirmed that is lawful to dismiss permanently a supervisory board member who is also engaged by a competing company, where the access of this individual to the company's files and data was deemed by the court to endanger the company's interest.[61]

2.2 The competence and duties of the company organs

2.2.1 Overview

The organs are different in each type of company. In principle, partnerships do not have organs, although there are a few exceptions to this traditional distinction between partnerships and corporations.

In a general partnership there are no organs. The partners are responsible for managing the partnership and its representation,[62] with the details of their competences and duties specified in the partnership agreement. The same is true for the limited partnership. Contrary to this, for professional partnerships there is an opt-in rule enabling the establishment of the Management Board.[63]

Interestingly, unlike in the majority of legal systems featuring partnership limited by shares, the Polish limited joint stock partnership (SKA) does not enjoy full legal personality, as a result of its classification as a partnership rather than corporation. In an SKA there is always a mandatory General Meeting. The Supervisory Board is optional in principle but once the number of SKA's shareholders exceeds twenty five, it becomes mandatory. Technically, there is a reference to the provisions governing the organisational structure of joint-stock corporation when it comes to the legal framework applicable to the SKA's shareholder meeting and Supervisory Board.[64] However, SKAs never have a Management Board as the general partners are responsible for managing the partnership.

As a result of the influence of the German legal system, Polish company law has traditionally adhered to a two tier board structure.

[61] Verdict of the Supreme Court of Poland of 17.06.2009 – III CSK 290/09.
[62] Art. 29 and Art. 39 CCC.
[63] Art. 97 CCC.
[64] Art. 126 CCC.

In private limited liability companies there is always a Management Board and a General Meeting. The Supervisory Board or Review Commission is optional, until the number of shareholders exceeds twenty five and company share capital exceeds 500 000 PLN (approx. 110 000 EUR), at which point the establishment of a Supervisory Board becomes mandatory.

In a public company it is mandatory to have a Management Board, Supervisory Board and a General Assembly. When it comes to comparing the governance structure of private and public companies, structural similarities prevail over differences. Differences include cumulative voting in electing public company's supervisory board members, increased independence of the public company's management[65] and stricter formalism for General Assembly.[66] More specific rules apply to listed companies.

There are certain shortcomings and inefficiencies associated with the Polish two-tier governance model, including: poor information flow between Management and Supervisory Boards; bad communication between the Supervisory Board and external auditors; and insufficient commitment on the part of Supervisory Board, all of which effectively impede the Board's monitoring function.[67]

In principle, the Polish legal system does not mandate worker codetermination in company organs. However, there is one exception to that principle: according to the Act on Commercialisation and Privatisation[68] in companies which emerged from the former state-owned enterprises, the employees have the right to appoint some of the Supervisory Board members as their representatives. In companies in which employment exceeds 500 workers they also have the right to appoint one member of the Management Board. This is the legacy of the Polish economic transformation: some extraordinary governance tools were given to the workers as a tradeoff with a view to mitigating the social tensions associated with the transformation process. However, it is important to note that – at least de jure – the workers representatives are obliged to act in the interest of the company as a whole and not solely in the interest of their own electorate.

In the following subsections of this paper the organs of companies in Polish legal system will be subject to further scrutiny.

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[65] Art. 375[1] "The general assembly and the supervisory board may not give the management board any binding instructions with respect to the management of the affairs of the company".

[66] E.g. Art. 402[1]-402[3] CCC.

[67] Oplustil, Radwan (n 10) 480.

[68] Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i prywatyzacji, Dz U 1996 Nr 118 poz 561.

2.2.2 *The Management Board*

The Management Board is the main administrative organ in companies, with responsibility for managing the company's affairs and acting on its behalf (representation). There is a legal presumption that the management board has powers of management and representation[69]. Even though the role of Management Board is the same in both types of company, there are some significant differences between the Management Board in private (sp. z o.o.) and public companies (S.A.).

In a private company, the members of the Management Board are appointed by the General Meeting unless the articles of the company provide otherwise.[70] For example, members of the Management Board may be appointed by the Supervisory Board or they may even be appointed by a particular shareholder if the company articles so provide. Irrespective of who was entitled to or actually did appoint any given Management Board member, the General Meeting preserves its residual power to dismiss any Board Member.[71] This power of dismissal does not require any reasons to be given unless company's articles provide otherwise.

Internal relations among members of the Management Board have to be specified in company articles. Unlike in the public company, the principle of collegiality does not apply to Boards of private companies. This means that every board member has the right and the obligation to manage the affairs of the company individually, unless company's articles provide otherwise. In matters beyond "ordinary management", a resolution of the Management Board is required.[72]

In private companies, the General Meeting has the right to give binding instructions to the members of the Management Board, which reflects person-oriented nature of private company (Germ: *personalistische Kapitalgesellschaft*), where there a typically personal ties between the small number of shareholders and they also tend to be personally involved in running the business[73]. Things look different for public companies where Management Board independence from the owners' influence is safeguarded by the law.[74]

The most important distinction between the Management Boards of private and public companies is the increased risk for private company

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69 Art. 210 and Art. 368 CCC.
70 Art. 201 sec. 4 CCC.
71 Art. 203 CCC.
72 Art. 208 CCC.
73 Rodzynkiewicz (n 34) 376.
74 Cf n 68 supra.

directors of personal responsibility for the company's liabilities. Art. 299 CCC states that when the execution against the company proves unsuccessful Directors may be held liable for company's obligations. The Directors can avoid liability if they can prove that either (i) a motion for opening insolvency proceedings was filed in a due time; or (ii) they were not culpable in failing to file for insolvency; or (iii) the position of creditors has not deteriorated as a result of the failure to apply to the bankruptcy court. However, it remains unclear in Polish judicial and legal doctrine whether this liability is of compensatory or guarantee[75] nature[76].

In public companies the Management Board is appointed by the Supervisory Board unless the company's articles provide otherwise. In particular the right to appoint the Management Board may be vested in the General Assembly (as in private company); it may be granted to the holders of specified preference stock;[77] it may be granted as a personal right to a given shareholder;[78]or – as is expressly recognised – it may even be granted to third parties. The term of office for Management Board members is not to exceed five years, but there are no restrictions on reappointing the same board.

In both private and public companies, the Management Board may consist of one or more members. If there are two or more members, the company's articles should specify how the company is to be represented in external dealings. In the absence of relevant provisions in the articles, representation requires cooperation of two Management Board members or a Board member and a holder of Commercial Proxy.[79]

According to Art. 3751 CCC, in a public company neither the Supervisory Board nor the General Assembly may give the Management Board binding instructions as to running the company's affairs. While the Management Board may be formally autonomous, however it may in practice be inclined to follow the Supervisory Board or controlling blockholder's instructions, being mindful of their power to dismiss them. In companies with concentrated ownership, the dominant shareholder uses their position to influence the Board's decisions and they frequently determine corporate strategy. The role of the Management Board in such situation may be limited to implementing the strategies imposed them. The articles of association may also require Supervisory Board approval

75 Compensatory liability remains limited to the losses caused by wrongdoing, whereas so-called "guarantee" liability arises for any violation, regardless of the relationship between the extent of the damage and the triggering event.

76 Andrzej Kidyba, *Spółka z ograniczoną odpowiedzialnością. Komentarz* (C.H. Beck, 2009).

77 Art. 351 CCC.

78 Art. 354 CCC.

79 Art. 205 and Art. 372 CCC.

for certain transactions or corporate operations – beyond what is required by law. Since there is no *ultra vires* doctrine in Polish law (in accordance with the First EU Company Law Directive), failure to observe a particular Board approval requirement as laid down in the articles of association does not affect the validity of corporate obligations, but it may expose the Directors to liability for failing to follow internal corporate decision making procedures.[80]

2.2.3 The Supervisory Board

The Supervisory Board exercises permanent supervision over the company's activities in all areas of its business.[81] Even though the principle is that the Supervisory Board acts periodically, meeting whenever the need arises, and not less than three times in a financial year,[82] it also has an ongoing, broader duty of supervision. In particular, the Supervisory Board may inspect the company's assets, and request reports from the Management Board and other persons working for the company.[83] Moreover, the company's articles may extend the Supervisory Board's powers to include a requirement that it approve specified transactions of the Management Board.[84] In the supervisory board objects to a transaction, the Management Board may request the General Assembly to pass a resolution authorising the transaction in question.[85]

One important difference between the Supervisory Board in public and private companies is that, in the former, it sticks to the principle of board collegiality,[86] whereas in the latter each of the Supervisory Board members may take actions on their own. However, in public companies, the collegiality rule is not absolute and the Supervisory Board may delegate defined supervisory actions to individual members to perform.

Minority shareholders in public companies may have the chance to elect a member of the Supervisory Board via cumulative voting. According to Art. 385 sec. 3 CCC, minority shareholder may request that Supervisory Board members be elected by so-called "group voting". This means that at the request of a group of shareholders representing at least one-fifth of the share capital, the members of Supervisory Board are appointed by

[80] Art. 17 sec. 3 CCC.
[81] Art. 382 sec. 1 CCC.
[82] Art. 389 sec. 3 CCC.
[83] Art. 382 sec. 4 CCC. See also: Rodzynkiewicz (n 34) 400.
[84] Art. 384 sec. 1 CCC.
[85] Art. 384 sec. 2 CCC.
[86] Art. 390 sec. 1 CCC.

a vote in separate groups.[87] Cumulative voting is a mandatory minority right which prevails over any inconsistent provisions in the articles dealing with the appointment of the Board. However, it is pointed out that cumulative voting as designed in Polish law does not improve the position of a minority shareholder whenever the number of board members is less than five, because mathematically the minority cannot establish a separate electoral group.

2.2.4 The duties and responsibilities of officers

When analyzing the duties and responsibilities of corporate officers, it is useful to distinguish between duty of loyalty and duty of care. The duty of loyalty refers to the prohibition of any actions undertaken by the officer that would be against the interest of the company, whereas the duty of care is interlinked with the increased level of diligence expected from the officers. In assessing whether a manager performed his duties with sufficient care, a comparison is made with an average manager, taking into account the scale and profile of the company. Diligence is the officer's attitude towards his managerial duties. Yet it is important to stress that breach of duty of care is not enough to make the manager liable – evidence of breach of a particular statutory or contractual provision is required.[88]

The duty of loyalty is an element common to all companies, partnerships and other enterprise-related legal structures. However its specification may differ across various organizational forms. In partnerships, which are not fully-fledged legal persons, the duty of loyalty is based on the horizontal contractual relationship between partners, whereas in

[87] Art. 385 § 3. "Upon an application of the shareholders, representing at least one fifth of the share capital, the election of the supervisory board shall be made by the next general assembly by way of a vote in separate groups, even if the statutes provide for a different procedure for appointing the supervisory board.; § 4. If the supervisory board comprises a person appointed by a body specified in a different law, only the remaining members of the supervisory board shall be elected. § 5. The persons representing at the general assembly the portion of shares which represents the result of the division of the total number of the represented shares by the number of members of the board, may create a separate group for the purpose of electing one member of the board, and shall not participate in the election of the remaining members. § 6. The positions on the supervisory board not filled by the appropriate group of shareholders created in accordance with § 5, shall be filled by way of a vote held with the participation of all shareholders whose votes were not cast in the election of the members of the supervisory board elected by a vote in separate groups. § 7. If at the general assembly, referred to in § 3, not even a single group capable of electing a member of the supervisory board is created, the election shall not be held."

[88] Supreme Court Judgment of February 9th, 2006 r. (V CSK 128/05) followed by appeal courts decisions inter alia of the Warsaw Court of Appeal of August 18th 2011 (I ACa 54/11); see critical assessment by Arkadiusz Radwan, Między nieudolnością a bezprawnością, Rzeczpospolita of August 30th 2012 at p. C7.

corporations, the duty of loyalty is the result of vertical (agency) relation between the officer (agent) and shareholders (principals).[89]

The duty of loyalty in company law results from the general principles of civil law,[90] as well as specific provisions of CCC which we present below. It can also be noted that the corporate relation between the company and its officers displays some affinity to the service contract which, as one of its most important components, imposes a duty of loyalty.[91]

The CCC contains specific regulations on the duty of loyalty which extend to Management Board members in both private and public companies. According to Art. 211 and Art. 380 CCC, board members need the company's permission in order to engage in any activity that involves competitive interest (understood as any activity, that may be in contradiction to activity of the company), as well as to become a partner in competing partnership (it refers to both commercial and civil partnerships), to hold position as an officer in other capital company or any other competitive legal person. This prohibition also extends to being a shareholder in a competing enterprise with at least 10 percent of share capital or a right to appoint at least one board member. Other regulations that are emanations of the duty of loyalty principle are Art. 209 and Art. 377 CCC, which state that a board member must refrain from participating in any decisions that give rise to a conflict of interests between the company and the board member, or other persons with whom the director is related. It is emphasized in Polish doctrine that the duty of loyalty is very broad, and extends far beyond the requirements of loyalty in ordinary civil relations.

Loyalty is owed to the company as a whole and the notion of the company's interest is used as a benchmark to determine whether the Directors are complying with their duty. There are situations in which particular officers are appointed by certain groups of shareholders, in particular via cumulative (group) voting (discussed above), or by employees in worker co-determined companies. Still, the officers are not the representatives of their electorate but are obliged to act in the interest of the whole company.

[89] Here we refer to the terms of principal-agent theory, which is the part of new institutional economics. For more on this matter see: Michael C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305,360.

[90] Art. 354 of the Polish Civil Code imposes a general requirement of acting in good faith, and in a manner complying with the obligation's social and economic purpose and the principles of community life.

[91] Adam Opalski, 'Obowiązek lojalności w spółkach kapitałowych' Kwartalnik Prawa Prywatnego 2/2008.

According to Art. 293 and Art. 483 CCC, officers owe the company a higher level of care and diligence. In other words, the requirements of the duty of care are elevated by the professional nature of the officers' position. The officers of the company are the members of the Management Board, the Supervisory Board and the liquidators, and, as such, they are responsible for any unlawful[92] action that causes damage to the company. There is also a presumption of culpability which shifts the burden of proof to the officers. The business judgment rule is yet to be developed in Polish jurisprudence and legal doctrine. So far courts have tended to take a casuistic approach and require violation of specific legal or contractual provisions rather than general breach of duty of care to hold corporate officer liable[93]. The prevailing view is that a lack of care and diligence is a yardstick for measuring culpability rather than the unlawfulness of the operation in question.[94] For this reason parties to corporate disputes became inclined to instrumentalise criminal liability for actions causing damage to the company (former Art. 585 CCC). Controversies around this provision led to its recent abolition.[95]

2.2.5 The General Meeting and General Assembly

The General Meeting (or General Assembly) is acknowledged as the organ aggregating residual interests and thus enjoying powers with respect to fundamental corporate decisions. It is sometimes referred to as "the highest organ in the corporate hierarchy"[96], although this may be questioned given the prominent role of the Management Board in some public companies (de facto), and the Board's autonomy under the law (de jure).

Most importantly, the General Meeting has the power to directly or indirectly appoint the Management Board. In a private company, the General Meeting appoints members of the Management Board unless the company's articles state otherwise.[97] Moreover the General Meeting may also dismiss the members of the Management Board at will, a right which may not be

[92] The term unlawful is understood broadly. A particular action is unlawful when it is inconsistent with any civil, criminal or administrative regulation.

[93] Cf. n 85.

[94] See the judgment of the Polish Supreme Court of February 9th, 2006 holding that the plaintiff suing the Managers need to prove, what exact legal or contractual obligation has been violated, insufficient duty of care is not specific enough, it merely may be used as a benchmark for assessing officers fault. The judgment was subject to criticism, see: Radwan, 'Odpowiedzialność cywilna a uznaniowość decyzji członków zarządu spółek kapitałowych' *Dziennik* (20 November 2008) 7.

[95] Art. 585 CCC was abolished due to Act of 9th of June 2011 on Amendment of Criminal Code and other Acts, Dz U 2011 Nr 133 poz Entry.

[96] Oplustil (n 26) 516 – 517.

[97] Art. 201 sec. 4 CCC.

derogated from by the company's articles.[98] The General Meeting in private companies can also give binding instructions to members of Management Board, although in practice instructions are given in a less formal way by controlling shareholders. In public companies the principle is that the General Assembly appoints the members of the Supervisory Board who appoint Management Board. Even though General Assembly does not directly appoint the members of Management Board, nor have a right to give the Management Board binding instructions regarding conduct of company's affairs, it may influence the Management Board's decisions because of its direct or indirect appointment and dismissal powers.

According to Art. 393 CCC, a number of powers are reserved to the General Assembly of a public company on matters such as consideration and approval of the report of the management board on the operations of the company and the financial report for the previous financial year and the granting of approval of the performance by the members of the company governing bodies of their duties, transfer or tenancy of enterprise, its organised part or real estate, any actions concerning company capital including issue of shares or other securities as well as other operations specified in CCC regulations. The powers of the General Meeting of a private company are laid down in Art. 228 CCC and, for the most part, they correspond to those of a public company. In addition to these powers, there are several other specific statutory regulations to be found across the CCC requiring shareholder approval of certain corporate actions. Moreover, the company's articles may extend the list of matters for which shareholder approval is required. Polish legal doctrine does not acknowledge implied powers of the General Meeting, i.e. the General Meeting may operate only on the basis of specific empowerment contained in the pertinent provisions in the CCC, other statutes or the articles of association. The interpretation of the statutory powers tends to be more literal than functional, e.g. in cases where all assets are held by the company indirectly, i.e. via wholly owned subsidiary, the sale of all shares in such a subsidiary is not deemed a sale of assets and thus does not require shareholders' approval.

Minority shareholders of a listed company who hold not less than 5% of voting rights may request the General Assembly to appoint a special auditor to investigate a particular matter concerning the company's affairs. If the Assembly does not comply, the Registry Court assigns the special auditor – Art. 84 and Art. 85 Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies dated July 29, 2005 ("Act on Public Offering")[99].

[98] Art. 203 sec. 1 CCC is a mandatory provision.

[99] Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej I warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Journal of Laws No. 184, pos. 1539 of 2005.

3 REPORTING AND AUDITING

3.1 Financial reporting

The core regulations concerning accounting, financial reporting and auditing can be found in the Act on Accounting of 1994[100]. Art. 2 lists the entities which are obliged to draw up and (under specified conditions described in the next paragraphs) publicize financial statements, as well as have them examined by an independent auditor. In principle all enterprises (along with other entities such as local government units), as well as civil partnerships (which merely are contractual agreements between entrepreneurs as was described in section 1.3. supra) are subject to the provisions of the Act on Accounting. However, the conditions and range of legal obligations to which they are subject differ across legal forms and the scale of their businesses. Individuals (sole proprietorships), civil partnerships of individuals, general partnerships of individuals, professional partnerships and welfare co-operatives are subject to the mandatory rules of the Act on Accounting only if their net proceeds from sales of goods, products and financial operations for the previous financial year amounted to no less than the Polish currency equivalent of EUR 1,200,000.[101] Otherwise, there is no mandatory obligation, although they may voluntarily draw up financial reports. Where those entities decide not to produce full financial reports, any corporate law regulations that refer to a financial report[102] are fulfilled using the simplified accounting based on tax revenue and expense ledger and other records kept for tax purposes, as well as physical inventory and other documents that enable a financial analysis.[103]

Other entities mentioned in art. 2 of Act on Accounting, such as limited partnerships, partnerships limited by shares and especially corporations (private and public companies) are obliged to draw up a full financial report which, in principle, consists of: balance sheet; profit and loss account; cash flow statement; statement of changes in equity; and additional information[104].

According to art.64 sec. 1 of Act on Accounting, public companies are obliged to draw up a full financial report which must be examined by an

100 Ustawa z dnia 29 września 1994 r. o rachunkowości, Journal of Laws No. 121, Entry 591 of 2005.

101 Art. 2 sec. 1 item 2 Act on Accounting.

102 E.g. the calculation of the value of shares in case of a partner leaving the partnership – art. 65 CCC, or in case of company's liquidation – art. 81 CCC.

103 Art. 10^1 CCC.

104 Art. 45 of Act on Accounting.

auditor and published in Polish Monitor B,[105] as well as attached to the files of the company according to regulations on National Court Register. Moreover, listed companies are subject to disclosure requirements – the full financial report forms part of each periodic report (disclosure requirements are described in the next section of this paper).

Some companies and partnerships (limited partnership, partnership limited by shares, private company as well as general partnership and professional partnership with turnover in excess of 1,200,000 euro) are entitled to produce simplified financial reports. They are obliged to draw up full financial reports only if two out of three of the following conditions are met: (1) average annual employment calculated as full time jobs did not exceed 50 people; (2) total balance sheet assets as of the end of the financial year did not exceed the Polish currency equivalent of EUR 2,000,000; (3) net proceeds from sales of products, goods and from financial operations did not exceed the Polish currency equivalent of EUR 4,000,000. As long as less than two of these conditions are met, the aforesaid entities can draw up a simplified financial report that consists of: balance sheet; profit and loss account; and additional information[106]. Moreover, the simplified financial report does not need to be examined by the auditor nor does it need to be published.[107]

As for corporate groups, the parent company is obliged to draw up a consolidated financial report which reports on the financial situation of all companies in the group (parent and subsidiary companies of all levels).[108]

In the European Union it is recommended (Recommendation 2005/162/EC)[109] that the Supervisory Board (or Management Board in one-tier board jurisdictions) sets up three specified committees: the audit committee, the remuneration committee and the nomination committee. The purpose of creating such bodies is to improve the effectiveness of supervision, increase the board's autonomy and enhance the standards of financial reporting. In Polish law there is no direct regulation (besides the requirement to create an audit committee described in the next paragraph) which would give a direct legal basis for the establishment of those committees. However, such a basis could be derived from Art. 390 CCC, which states that members of Supervisory Board may have specified duties delegated to

105 "Monitor Polski B" which is the public journal established for enterprise financial data disclosure.
106 Art. 45 of Act on Accounting.
107 Art. 64 of Act on Accounting.
108 Art. 55 of Act on Accounting.
109 Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, OJ L 52 (25.2.2005).

them for independent performance.[110] As the Recommendation 2005/162/EC provides only examples of committees, it should be stated that other committees may also be appointed. For example, in some companies there may be particular reasons for the establishment of environmental or CSR committees to work as auxiliary and advisory bodies. However, no Polish companies have yet taken such steps.

Besides the soft law Recommendation just discussed, there is also a Directive 2006/43/EC[111] on statutory audits of annual accounts and consolidated accounts. According to this Directive, all public-interest entities (inter alia entities whose transferable securities are admitted to trading on a regulated market, credit institutions and insurance companies[112]) must create an audit committee. This regulation was implemented in the Polish legal system through the Act on Auditors and Their Council of May 7th 2009.[113]

3.2 Listed companies' disclosure requirements

All markets can fail to allocate goods optimally and set prices efficiently where there is information asymmetry. The problem of information asymmetry is particularly noticeable in the field of financial markets, where prices are flexible and the reaction to upcoming information is immediate.[114] Information asymmetry has serious consequences both at the microeconomic level (e.g. the opportunity to gain unfairly through using insider information) and at the macroeconomic level (e.g. the possibility of invalid price setting which leads to underestimated or overestimated cost of capital).[115]

According to Art. 56 of Act on Public Offering each listed company is obliged to publicize three kinds of information: inside information, current reports and periodic reports. Art. 154 of the Act on Trading in Financial

110 Oplustil (n 26) 477.

111 Directive 2006/43/EC of The European Parliament and of The Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, OJ L 157 (9.6.2006).

112 Art. 2 item 13.

113 Ustawa z dnia 7 maja 2009 r. o biegłych rewidentach i ich samorządzie, podmiotach uprawnionych do badania sprawozdań finansowych oraz o nadzorze publicznym, Dz U 2009 Nr 77 poz 649.

114 Such observation is consistent with the Efficient-Market Hypothesis. See one of the most important articles on this subject: Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance*, Papers and Proceedings of the Twenty-Eighth Annual Meeting of the American Finance Association New York, N.Y. December, 28-30, 1969 383,417.

115 More about this issues, see: Ricardo N. Bebczuk, *Asymmetric information in Financial Markets* (CUP 2003).

Instruments,[116] defines inside information as any precise information concerning at least one issuer or at least one financial instrument, which is not public and has the potential of affecting the price of at least one financial instrument. The constitutive features of inside information are (i) its non- public nature, price-sensitivity and precise character. Any information fulfilling these criteria should be made public without delay, and at the latest within 24 hours by revealing the information on company's website, sending it to the Financial Supervision Authority, to the Warsaw Stock Exchange and to the information agency.[117]

The other categories of disclosure requirements concern publication of the company's current reports. Inside information is not defined by reference to a list of enumerated events that are always considered as inside information which needs to be revealed – it only specifies the conditions which constitute the inside information. On the other hand, the Ordinance on Periodic and Current Reports of Issuers[118] released by the Minister of Finance specifies a list of events that need to be publicized in the form of current reports. It may be stated that this list details the information that must always be publicized. In other words there are two different sets of conditions that determine what information a company must reveal – information which fulfills the conditions of inside information or information which is specified on the list of current reports.

The list of information required to be published by the Ordinance consists of some 30 items – events that have a significant impact on the performance of the company, e.g. conclusion of significant contracts, General Assembly resolutions, audit, personnel changes in the company's organs, commencement of litigation etc.

The complexity of the current regime in Poland has been criticised[119]. It has been argued that maintaining a long list of notification duties increases the information noise and imposes unjustifiable costs on companies. It is suggested that the duty of inside information disclosure is sufficient and the definition of inside information specified in Act on Public Offering is precise enough. The other argument is that Polish mandatory regulations regarding current reports and inside information disclosure are far wider

[116] Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi, Dz U 2005 Nr 183 poz. 1538.

[117] Art. 56 and Art. 58 Act on Public Offering.

[118] Rozporządzenie Ministra Finansów z dnia 19 lutego 2009 r. w sprawie informacji bieżących i okresowych przekazywanych przez emitentów papierów wartościowych oraz warunków uznawania za równoważne informacji wymaganych przepisami prawa państwa niebędącego państwem członkowskim, Dz U 2009 Nr 33 poz 259.

[119] M. Kanicki, 'Szykują się zmiany w obowiązkach informacyjnych. Czy aby na lepsze?' Akcjonariusz 4/2010 6,9; P. Biernacki, 'Informacje istotne – czy jest potrzeba definicji?' Akcjonariusz 1/2011 22,23.

and more restrictive than the regulations of the biggest capital markets such as United States and United Kingdom.

On top of the above described disclosure requirements, each listed company is obliged to make periodic reports: quarterly report, semi-annual report and annual report.[120]

3.3 Enforcement of the Best Practices Code

Poland's tradition of regulating corporate governance through soft law dates back to 2002, when the first version of the Best Practices Code[121] was adopted.[122] Nowadays, European law, through disclosure requirements, mandates a certain link between soft law and state law. The annual report consists inter alia of the annual financial report and the activity report drawn up by Management Board. The latter document has to include a statement on whether the company observes the corporate governance principles contained in the Code.[123] This is known as the 'comply or explain principle'. In the Polish legal system there a few regulations regarding the comply or explain rule. Firstly, Art. 49 sec. 2 of Act on Accounting states that in listed companies, the Management Board's annual report on the company's activities (which is contained in the annual report) has to include a report on compliance with rules of the Best Practices Code. Secondly, Par. 91 of the Ordinance on Periodic and Current Reports of Issuers enacted by the Minister of Finance confirms that this report on Best Practices Code compliance must be included in the annual report of each listed company. Lastly, the 'comply or explain' principle is stated in the Warsaw Stock Exchange Regulations.[124]

3.4 Warsaw Stock Exchange RESPECT index

Throughout the last decade a number of the world's major stock exchanges developed indices that refer to corporate social responsibility, ethical investment and sustainable development[125]. Such indices include

[120] Art. 56 of Act on Public Offering.

[121] Dobre praktyki w spółkach publicznych w 2002 roku.

[122] Further information on Best Practices Code are presented in section 5 of this paper.

[123] Art. 49 sec. 2 Item 8 of Act on Accounting.

[124] § 29 of The Warsaw Stock Exchange Rules.

[125] The first CSR index was created in United States in 1999 – it was the Dow Jones Sustainability Index. Since that time various initiatives have been developed, and as of November 2011 there were 18 indices in the Dow Jones Sustainability Indices Group, drawn from stock markets from all over the world. The second index referring to CSR was The Calvert Social Index developed in 2000 by the Calvert Investments. In the next years there were created more indices referring to CSR including FTSE4GOOD series. For further information about those indices see the websites: http://www.sustainability-index.com/, http://www.calvert.com/, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp accessed 29 August 2012.

companies that promote certain ethical values such as environmental protection, corporate philanthropy, human rights etc. It is emphasised that corporate social responsibility is not about one defined strategy but it is rather a complex multidimensional array of strategies that includes policies aimed at improving the firm's environmental footprint, its community involvement, its labour relations record, its diversity measures and a range of other issues, addressing the needs and concerns of a wide range of stakeholders[126]. These initiatives to create CSR indices are firstly a tool for investors which helps them identify companies which are committed to sustainable development, and secondly an efficient instrument for promoting certain CSR ideas without resorting to mandatory rules. Corporate social responsibility should not be dealt with by mandatory regulation, because this would run counter to the very idea of CSR. CSR is about doing more than is required by legal obligations[127]. Creating CSR indices encourages companies to act in accordance with principles of sustainable development and promotes awareness of environmental and social issues by drawing investors' attention to those matters. Moreover, CSR activities are recognized both by investors (there are investment funds which allocate assets into the stocks of socially responsible companies) and other financial market actors[128] such as financial analysts.

In 2009 the Warsaw Stock Exchange created its own index (RESPECT) referring to corporate social responsibility. It was the first sustainability index in Central and Eastern Europe.[129] The purpose of the RESPECT index is to identify companies which pursue policies of responsibility and sustainability and are attractive to investors i.e. produce transparent information and good investor relations.

The evaluation of RESPECT index companies consists of three phases. The first phase aims to identify companies with the highest liquidity i.e. the companies which are components of three major indices – WIG20, mWIG40 and sWIG80.[130] The second phase consists of evaluating the

[126] Ioannis Ioannou and George Serafeim, 'The Impact of Corporate Social Responsibility on Investment Recommendations' *Harvard Business School Working Papers, Working Paper No 11-017 13*, available at: http://www.hbs.edu/research/pdf/11-017.pdf accessed 29 August 2012.

[127] See Communication from the Commission to The European Parliament, The Council, The European and Social Committee and The Committee of regions, COM(2011)681, Brussels 25.10.2011.

[128] For the empirical analysis regarding the relation between CSR and financial recommendations see: Ioannou, Serafeim (n 127).

[129] More information can be found on the website of RESPECT index (available in English): http://www.odpowiedzialni.gpw.pl/ .

[130] The Warsaw Stock Exchange Indices are composed through rankings based on both liquidity and market value.

corporate governance practice and investor relations of these companies. The first step is to determine whether the company had any sanctions imposed by the Polish Financial Supervision Authority.[131] The next step is to evaluate the company's current reports and corporate governance reports. The criteria taken into consideration are e.g. the quality of reports and the number of mistakes (measured by the number of subsequent adjustments). The assessment of investor relations includes evaluation of the website of the company (each listed company is obliged to maintain its own website[132]) by the criteria of insertion of relevant corporate governance information such as company articles and General Assembly resolutions, the professional resumes of members of Management Board and Supervisory Board, current and periodic reports, information on shareholding structure, calendar of corporate events etc.

Phase three is done based on questionnaires filled in by companies and verified by the Warsaw Stock Exchange. It is crucial for the composition of the index. It consists of evaluating the degree and complexity of measures undertaken by the companies in the interest of stakeholders and CSR as widely understood. The first criterion is strategy and management, which consists of inter alia organizational management, ethical culture and dialogue with stakeholders. The second criterion is the evaluation of environmental factors which are crucial for sustainable development and CSR. The aspects taken into account include: environmental management, reduction of materials and commodities consumption, reduction of energy and water use, management of waste, and fines imposed by authorities because of environmental wrongdoings. The final criterion concentrates on internal affairs (relations with workers and HR policy) and external affairs (the products, customer relations and personal data protection).

So far no such index exists for the alternative trading system – the NewConnect, where as of January 2012 shares of as many as 359 companies were traded.

To conclude it must be stated that the creation of the RESPECT index should be seen as an important initiative for promoting sustainable development and corporate social responsibility. The non-mandatory nature of this instrument contributes to the internalization of environmental compliance and it increases the broader societal perspective of running business.

[131] Komisja Nadzoru Finansowego.

[132] Art. 402^3 CCC.

4 LIABILITY AND ENFORCEMENT

4.1. General issues

In the Polish legal system (as in many others) the main distinction is between civil, criminal and administrative liability. A civil (e.g. contractual) relationship is horizontal and is marked by equality and autonomy of the parties, whereas administrative relationship are vertical and based on hierarchy and authority. The essential elements of a criminal norm are (1) order or prohibition of specified behaviour addressed to individuals and (2) warrant for the state organ (i.e. the court) to take specified actions in case of the order or prohibition not being obeyed (criminal condition).[133]

The general principles of Polish tort law are laid down in Art. 415 – 44911 of Polish Civil Code. Polish law follows the French model of broad tortious liability, unlike in Germany, where numerous quasi-contractual concepts have been developed to supplement the narrow scope of German tort law. The main principle is the rule of negligence (*culpa*) i.e. every person (natural or legal) is responsible for any damage caused by their negligent action (Art. 415). The conditions for liability are unlawfulness of the action and culpability or fault. The liability encompasses the actual damage caused (*damnum emergens*) and the lost profits (*lucrum cessans*) (Art. 361 Civil Code).

The rule of negligence is the general principle of civil liability. The two other liability regimes in Poland are strict liability and equitable liability ("rule of justice"). As they are exceptions to the basic rule of negligence, an explicit statutory provision is required before liability will be imposed on either of these bases. Strict liability is the most far-reaching tort liability regime. It is provided inter alia for the environment-related torts which will be presented in the next section of this paper.

On top of substantive laws, there are procedural laws designed to streamline the enforcement of rights Notably, for the first time in Polish civil procedure a new law on class action[134] was adopted in December of 2009 making it possible for groups to bring cases before the court, provided certain conditions are met. There is a potential to use class actions as a tool for boosting private enforcement in tort cases where environmental damage is involved. There was a discussion in Poland about whether the class action is well suited to be transplanted from the American into

[133] Włodzimierz Wróbel and Andrzej Zoll, *Polskie prawo karne. Część ogólna* (Znak Kraków 2010) 108.

[134] Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym, Dz U 2010 Nr 7 poz 44.

the Polish legal system. Among the cons there was an argument that the class action will make the legal framework less competitive by imposing increased risks on companies operating in Poland. In this context the argument of inequality of procedural rights between companies and individuals was put forward. But before we start feeling sympathy for businesses with their procedural handicaps let's try to look at the alleged distortion of equality of weapons from the legal evolutionary perspective. As recently as some 120-150 years ago the landscape looked very different. Before 1860 there were hardly any corporate businesses with more than 50 employees. The remedies then known were private law remedies with little state administrative regulation.[135] The emergence and proliferation of large public corporations contributed to the effective pooling of financial and human resources that could be used to serve the interests of controlling corporate insiders. This led to a striking asymmetry between the market power of big business vis-a-vis dispersed consumers, small investors and employees. The regulatory state emerged as a mean of reducing these asymmetries with public authorities acting as agents of dispersed interests. Now with the introduction of a class action, an attempt is being made to develop a corresponding nexus to bring together dispersed interests of clients, consumers, employees or investors to counterbalance the power of big business that emerged with the large public company. So far there have been no reported cases of class actions resulting in environmental liability, but there is one pending class action that includes some environment-related controversies, namely the action brought by flood victims seeking compensation from the state for alleged failures in floodbank system design and maintenance.

4.2. Specific regulations on environmental issues – civil liability in Polish environmental law

The general rules governing civil liability for environmental damage are set out in the Polish Civil Code. This results from the general reference in Art. 322 of Environment Protection Act according to which, the general provisions of Civil Code are applicable, unless the Act provides specific liability rules and claims. Those general provisions embrace in particular property law and tort law.

Among the relevant Civil Code provisions on property there are two that merit attention: the tort of nuisance[136] and the restitution claim[137]. According to Art. 144 CC, a property owner should refrain from actions

[135] It has been interestingly demonstrated by Edward Glaeser and Andrei Schleifer in their persuasive article of 2003. See: Edward L. Glaeser and Andrei Shleifer, 'The Rise of the Regulatory State' (2003) 42 *Journal of Economic Literature* 401,425.

[136] Art. 144 CC.

[137] Art. 222 sec. 2 CC.

that would interfere with the use of adjacent properties to a greater than average extent resulting from socio-economic purpose of this property as well as local relations. This criterion must be assessed on the basis of objective conditions appropriate for local community. If the behaviour or operations of the property owner go beyond the scale as defined by the aforesaid conditions, the other party may resort to the restitution claim (actio negotaria) requiring both cessation of actions that cause the interference and discontinuation of any actions that are likely to result in interference in the future. Those institutions constitute the general protection on environmental issues in Polish property law.

When it comes to tort law, the most relevant provision is the Art. 435 CC stating that anyone who runs an enterprise which is propelled by the forces of nature shall be responsible for any damage caused by the enterprise unless the damage is caused by force majeure (vis maior), the sufferer himself or a third-party alone. The said norm provides the broadest liability regime (strict liability) disregarding the requirement of negligence. The criterion 'propelled by the forces of nature' is understood in a wide sense – enterprise has to be propelled by electricity, nuclear energy, liquid fuel, gas etc. Consequently, the rule of strict liability would apply to most cases where a company causes environmental damage.

Those general principles of Civil Code are further broadened by inter alia the Environment Protection Act and Act on Environment Degradation Prevention and Environmental Damages Responsibility.

According to Art. 323 of Environment Protection Act everyone who suffers from or is threatened by unlawful action that harms the environment may request that the entity responsible return to lawful state and can also take action aimed at prevention, e.g. requesting installation of protective facilities if it is not possible to stop interference (action negatoria). When the unlawful action harms or threatens to harm the environment (as a public good) the state, local government or environmental organisation may make this claim as well (Art. 323 sec. 2. Moreover, the Environment Protection Act further widens the scope of civil liability for damages to the environment based on Art. 435 of Polish Civil Code. Enterprises which pose extended or high risk[138] - they do not need to be propelled by the forces of nature – are subject to the broadened strict liability regime.

[138] The term "enterprise of extended or high risk" is defined in Art. 248 of Environment Protection Act. According to Sec. 1 of this Article the plant with a certain amount of dangerous substance which creates the risk of a major industrial accident is considered a plant of increased risk or a plant of high risk, depending on the type, category and quantity of this substance.

5 OTHER INCENTIVES AND DISINCENTIVES

As was mentioned above, Sustainable Development and Corporate Social Responsibility do not have to be the result of mandatory regulation. In fact, their constitutive features are better suited to self-regulation, internalisation and voluntary implementation. It follows that, in any analysis of the potential for Sustainable Companies in Poland, the main emphasis must be placed on questions of implementation and feasibility of means designed to promote these ideas and principles, rather than on possible mandatory regulation. It is really a question of what could be done in terms of encouraging companies to act in accordance with the principles of Sustainable Development.

Another matter is Polish soft law concerning the companies – the Best Practices Code of 2007. The first version of Best Practices Code was adopted in 2002. It was drawn up by the Best Practices Committee – a body composed of academic experts, law firms, business organizations and representatives of the financial market. The second Best Practices Code was adopted by Warsaw Stock Exchange Supervisory Board in 2005. According to the preamble of the 2005 Code, "best practices constitute a set of detailed rules of conduct addressed not only to company authorities and the members of such authorities but also to majority and minority shareholders. This compilation of best practices, worked out for the needs of the Polish capital market, sets out the fundamentals of corporate governance standards in a public joint-stock company."[139]

A new Code was adopted in 2007, revised in 2010 with a further revision in force as of January 2012. Unlike the Codes of 2002 and 2005, the most recent version was not created by the Best Practices Committee but by the Warsaw Stock Exchange. The Best Practices Codes of 2007 and 2010 have been subject to fierce criticism because of their focus on technical aspects of companies' performance and corporate governance and their neglect of the introduction and promotion of certain standards of conduct for shareholders and organs of the company.[140] In particular, the current version of the Best Practices Code does not refer to business judgment rule nor does it cover the issue of the company's interest. It does not – either directly or indirectly – refer to the principles of Corporate Social

[139] Best Practices in Public Companies 2005, available in English: http://www.corp-gov.gpw.pl/assets/library/english/best2005.pdf accessed 29 August 2012.

[140] The critique of Best Practices Code may be found in: Adam Opalski, 'Nowe Dobre Praktyki w spółkach publicznych' Przegląd Prawa Handlowego 3/2008. The evolution of Best Practices Code in Poland may be found in: Magdalena Jerzemowska, Krzysztof Najman and Kevin Campbell, 'Reminiscencje na temat polskich regulacji nadzoru korporacyjnego' Prace i Materiały Wydziału Zarządzania UG 1/2009 151,165.

Responsibility. This appears to be in line with the general tendency noticeable since 2007 towards laxer self-regulation.

Revision of the Best Practices Code to accommodate references to CSR appears to be an easily identifiable measure that could be capable of promoting Sustainable Companies in Poland. The Code has some spill-over potential and may also influence the interpretation of the statutory law (CCC), where many general or open-ended clauses can be found, such as decency, good practices, good faith etc.

PART C: CORE ISSUES CONCERNING GROUPS OF COMPANIES

6 PARENT/SUBSIDIARY: MONITORING, CONTROL AND DUTIES OF THE COMPANY ORGANS

Poland, unlike Germany, Portugal, Slovenia or – more recently – Hungary does not have a codified system of group law (Germ: *Konzernrecht*). Statutory regulation remains limited, leaving most of the problems inherent to corporate groups to jurisprudence and legal doctrine. Some fragmentary statutory regulation may be found in companies act, capital market laws and accounting law. It is worth mentioning that there is no universal definition of parent and subsidiary units; instead there are four independent definitions formulated for four different legal acts: – the CCC, the Act on Public Offering, the Act on Accountancy and the Act on Competition and Consumer Protection.[141]

According to Art. 4 sec. 1 CCC, domination arises when the parent company (1) has the right to appoint most members of Management Board or Supervisory Board of other company (the personal condition), or (2) holds directly or indirectly the majority of votes at the General Meeting, or (3) the members of its Management Board constitute more than half of the members of other (subsidiary) company, or (4) has the factual major influence on the subsidiary company due to other circumstances, especially due to the so called "agreement for management of dependent company" (Art. 7 CCC).

In the field of company law there are several consequences of parent-subsidiary relation. Firstly, the parent company has the duty to inform the subsidiary whenever domination occurs under the sanction of not being able to exercise control (it may not exercise voting rights above 33% of share capital). Secondly, the subsidiary may not acquire the

[141] Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz U 2007 Nr 50 poz 331.

shares of parent company (Art. 362 sec. 4 in connection with Art. 364 sec. 2). There are some exceptions to this rule, but still the subsidiary never exercises voting rights attaching to shares it holds in its parent company. Another example of parent- subsidiary regulations is the right of a member of Management Board to refuse to answer questions asked during the General Meeting if it could harm the company's subsidiary.

Although the German-style group law has not found enough support in Poland, there is one element of *Konzernrecht* that has been incorporated into the Polish Code of 2000, namely the contractual group (Germ. *Vertragskonzern*). Art. 7 CCC provides for the so called "agreement for management of dependent company" which in fact covers two kinds of such contracts: (1) agreements providing management of subsidiary by the parent company and (2) agreements providing profit transfer from the subsidiary to the parent company. An agreement for management of dependent company is not further specified in any other legal act – those contracts can be formed within the scope of parties' contractual freedom as set out in Art. 3531 of the Polish Civil Code. Apart from this fragmentary regulation of Art. 7 CCC, Polish law does not prescribe rights, duties or liabilities that would arise from such a management agreement. Management contracts are seldom seen in legal practice.

In the field of capital market regulation, all rights and duties related to substantial blocks of shares i.e. information disclosure regarding holding of shares, takeover bids, squeeze out and sell out rights apply to shares held either directly or indirectly i.e. through a subsidiary[142].

In the field of accounting law, the parent company has a duty to draw up consolidated financial statements i.e. financial statements of the whole group of companies which consists of financial statement of parent company and of all subsidiaries summarized as if the group of companies constituted one single unit.[143]

7 SPECIAL ENFORCEMENT ISSUES RELATING TO GROUPS OF COMPANIES

The question of how far the management of the parent company can lawfully interfere with the business of their subsidiaries has been subject to fierce debate in Poland for the last a couple of years.[144] There is a draft

142 Art. 87 sec. 5 of Act on Public Offering.

143 Art. 55 of Act on Accounting.

144 See R.L.Kwaśnicki, „Legalne" działanie na szkodę spółki kapitałowej (z uwzględnieniem projektu nowelizacji k.s.h. z 28 lipca 2009 r.), in: W.J. Katner, U. Promińska, Prawo handlowe po przystąpieniu polski do Unii Europejskiej (2010), 173.

law on groups of companies designed to mitigate the current tensions between smooth running of the group and creating safe harbors for managers on the one hand, and taking care of the interest of creditors and minority shareholders, on the other. The future fate of this draft law is however difficult to predict. The current state of affairs is characterized by continuous contradiction between the law that maintains its primary focus on a single, i.e. not-group-embedded company and the business reality dominated by corporate groups.

One of the hot topics associated with group law is the parent company's liability for debts incurred by their subsidiaries (veil piercing or veil lifting). Under Polish law there is no specific legal basis to disregard the legal personality of a corporation. Neither there is any case-law that would specifically provide a precedent that might be relied upon to allow a creditor to reach the controlling shareholder's assets in cases of a wrongdoing by the subsidiary. However, there are some general company law and civil law provisions that may be capable of opening up the way to pierce the corporate veil, or to achieve a similar effect in terms of liability. Moreover, there are a limited number of judicial cases that could be interpreted as favoring the "abuse of legal entity" doctrine. Research of legal literature reveals further points of departure to create a legal basis for some form of veil piercing. Piercing corporate veil is a special form of setting aside the legal personality. Thus the analysis of acknowledged examples of when the legal entity (of a corporation) may be disregarded is the first step in proper reasoning. It must be noted that veil piercing is a subcategory of veil lifting or disregarding legal personality. The special qualification of this subcategory of veil piercing lies with the liability-issue, whereas the remaining examples of veil lifting are non-liability cases. On this occasion it deserves mentioning that Polish judicature has developed the veil lifting concept. In other words if we assume the dichotomy of liability and non-liability lifting cases as two subcategories of disregarding legal entity, it is acknowledged that the very notion of veil lifting is familiar to Polish courts and gains increasing support of legal commentators. There is a quite recent case of February 7th 2007 by the Warsaw Court of Appeal[145]. The ruling concerned housing regulation (Act on the property of residential and commercial estate of June 23rd 1994) [146]. Whenever one person holds more than a half of the entire share in the estate, the remaining owners or members of that community may request voting to take place on a per capita rather than a per share basis, so as to empower dispersed interests vis-à-vis the dominant co-owner and to curb the

[145] I ACa 1033/06.

[146] Ustawa z dnia 23 czerwca 1994 r. o własności lokali, Dz U 2004 Nr 141 poz 1492.

latter's omnipotence.[147] In the case presented to the court, the dominant owner was a company controlled by an individual X. In order to avoid limitations to his voting power X decided to split his ownership in the community by selling such a part of his property that would enable him to go below the statutory threshold of half of the shares in that estate. The acquirer was another company controlled by X, so that at the end nothing has changed as a matter of factual influence. In its precedential ruling the court decided to disregard the legal personality of the two companies and to attribute control to the natural person behind the two companies. As for the purpose of attributing control rights, the court regarded the two companies as one entity, despite the lack of any direct legal basis for such an assumption. Although the case discussed above was not a liability case, it definitely is worth mentioning in this context as it indicates a shift in the way courts approach the notion of legal personality so as to allow for it to be disregarded in appropriate cases where functional interpretation is necessary.

In this context it must be noted that the law contains a few provisions that directly allow for ascribing to the parent company certain actions of their subsidiaries.[148] In addition to these statutorily defined or judicially approved lifting cases, legal doctrine identifies a couple of additional non-liability lifting cases, e.g. limitations to the bona fide-doctrine in cases, when a real estate transaction is effectuated between male fide individual acquirer and a further corporate acquirer controlled by that individual – it is argued that in such a case the entries to the land registers cannot be relied on[149] (similar qualification should be made with regard to reverse transactions undertaken with the same purpose[150]).

Still, courts and commentators tend to adhere to a strict interpretation of the limited liability rule (Article 151 § 4 CCC). However, a convincing opinion expressed in the Polish literature makes a point that the principle of limited liability should be interpreted narrowly to embrace solely the exclusion of liability based on the mere feature of being company's shareholder. In contrast, the limited liability rule[151] does not mandate disapplication of any remaining civil liability grounds, be it contract or tort. For example if a shareholder avails herself of a corporate entity to the detriment of other party's interest, such a shareholder should be

[147] Article 23 Sec. 2a.

[148] E.g. acquiring companies' own shares – Article 200 Sec. 1, Article 362 Sec. 4 CCC; acquisition of substantial block of shares in a public company – Article 87, Sec. 1 (a) Act on Public Offering.

[149] Tomasz Targosz, *Nadużycie osobowości prawnej* (Zakamycze 2004) 177; Adam Opalski, 'Granice podmiotowości prawnej spółek kapitałowych' Glosa 4/2008 41.

[150] Andrzej W. Wiśniewski, *Prawo o spółkach. Podręcznik praktyczny* (2nd edition, 2008) 56.

[151] Article 151 § 4 CCC.

held liable for her own act, provided the general tort liability conditions are met.[152] Other possible legal bases for veil piercing, such as Art. 5 of the Civil Code dealing with rights abuse[153] or Art. 430 of the Civil Code regulating general vicarious liability in torts[154] or the general rule of tort liability as set out in Art. 415 of the Civil Code remain untested.

152 Tomasz Targosz, 'Odpowiedzialność wspólnika wobec wierzycieli spółki' Przegląd Prawa Handlowego 4/2003 23.

153 "One cannot exercise a right in a manner which would contradict its socioeconomic purpose or the principles of community life. Such act or omission on the part of the person entitled shall not be considered the exercise of that right and shall not be protected."

154 "Anyone who, on his own account, entrusts an act to a person who, while performing the act, is under his management and is obliged to follow his instructions is liable for any damage caused due to a fault on that person's part when performing the act."