



# Obligations and liabilities of Members of the Management Board

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# Obligations of Members of the Management Board I

## **Basis of obligations:**

- Management Board Member Agreement;
- Articles of Association and resolutions of bodies of the company;
- Commercial Code

In addition should be taken into account: different tax laws, Accounting Act, General Part of the Economic Activities Code Act, regulations and requirements regarding the field of activity of a company

## **Main obligations of a Member of the Management Board: to perform his/her duties with loyalty and due diligence**

### **Loyalty**

avoiding conflict of interest (personal gain vs business gain);

prohibition of competition;

obligation to maintain business secret.

# Obligations of Members of the Management Board II

## **Due Diligence**

- management has a duty to perform with due diligence before the company (not before shareholders or supervisory board)
- a member of the management board must perform his or her duties with due diligence in a way a reasonable person in similar occupation would perform;
- a member of the management board must act in good faith and cannot undertake unreasonable risks;
- a negative outcome for the company does not automatically mean the management board member is at fault (business risk);
- obligation to make advised resolutions, this includes asking for help from experts if needed (considering the principle of reasonableness);
- management board may make transactions out of scope of everyday economic activities only with the consent of supervisory board. The member of the management board shall not be liable when he/she acted in accordance with a lawful decision of the general meeting or the supervisory board.

# Due diligence of management board member vs business risk

## Resolution of the Civil Chamber of the Supreme Court on 18.12.2019 2-17-10474/80

“Obligation to act in the most economically efficient manner” is not a separate obligation of a member of the management board, but is covered by a general due diligence, which is determined by assessing whether the member of the management board performed his/her duties with due diligence (Commercial Code § 187 (1)). It is a standard of conduct determined by the rule of commercial judgment which is observed when a member of the board is not personally interested in his/her activities, is informed to a degree that is reasonable in the circumstances, **and can reasonably believe that a management board member acting in a similar situation his/her action or decision is in the best interests of the association. If the above requirements have been met, the member of the management board has not violated his or her duty of care, regardless of the actual consequence of his or her activities** (see also the judgment of the Supreme Court of 24 November 2015 in civil case no. 3-2-1-129-15, § 17). (section 20)

Failure to enter into a security agreement may, depending on the circumstances, constitute an excessive risk that the counterparty will fail to perform its obligation (see, for example, the judgment of the Supreme Court of 15 March 2017 in civil case no. 3-2-1-152-16, section 14), and such risk is generally breach of due diligence of the management board member. (section 21)

# Standard of due diligence

## **Resolution of the Civil Chamber of the Supreme Court on 04.03.2015. 3-2-1-169-14**

**The standard of diligence of a member of the management board may be slightly different for different types of legal entities. This standard may also differ depending on the scope and extent of the legal entity's activities. Thus, for example, the standard of care of a member of the management board of a credit institution cannot, at least in general, be compared with the standard of care of a member of the management board of a small non-profit association.**

If a member of the management board of a legal person is an expert in a certain field, his or her standard of diligence is higher than of an ordinary member of the management board of an apartment association. However, in order to attribute such an enhanced standard to a member of the board, it must be clearly established that the person was a professional in the relevant field (ie that he or she was an entrepreneur in that field or had the necessary knowledge and experience). The mere fact that a person has never been educated or worked in that field is not, in the Chamber's view, sufficient to impose on a member of the Management Board an obligation to observe a higher standard of diligence.

# Division and delegation of responsibilities

## **Resolution of the Administrative Chamber of the Supreme Court on 11.12.2019 3-17-2235/52**

The duty of due diligence of a member of the management board also includes the obligation to make informed decisions, including requesting additional information and explanations from experts if necessary. However, such an obligation to obtain additional information must be assessed in the light of the principle of reasonableness (see the resolution of the Civil Chamber of the Supreme Court in Case No. 3-2-1-54-17, section 13.1 and 13.2 and the case law cited therein). For different types of legal entities, the standard of diligence of a member of the management board may slightly differ. This standard may also differ depending on the field of activity and scope of activities of the legal person and whether the member of the management board is an expert in a certain field (see the resolution of the Civil Chamber of the Supreme Court decision in case no. 3-2-1-169-14, section 19 and 20). (section 13)

However, the obligations of a member of the management board provided for in § 8 (1) of the Taxation Act presuppose that a reasonably acting member of the management board generally keeps abreast of even what is not his/her responsibility according to the division of responsibilities, ie he is **obliged to be reasonably informed**. If necessary, he/she must gather additional information and check the activities of other members of the management board and assisting third parties (section 14)

The plaintiff's finding that the company's accounts and declarations were made with the assistance of a professional accountant who can be expected to act properly is not decisive. **Indeed, the use of a professional accountant increases the ability of a board member to rely on the presumption that accounting duties have been performed correctly and do not require constant attention and control. However, this does not release a member of the management board from the obligation to be aware of what is happening in the company's accounts, which according to the division of responsibilities may not be his/her responsibility.** (section 21)

# Reduction of risks

- Division of responsibilities and specializing;
- Including other members of the management board in the decision-making process;
- Including experts;
- Including supervisory board.

The board needs consent of the supervisory board for conclusion of transactions which are beyond the scope of everyday economic activities:

- the adoption of business plan and budget;
- the acquisition or termination of holdings in other companies;
- the foundation or dissolution of subsidiaries;
- the acquisition or transfer of an enterprise, or the termination of its activities;
- the transfer or encumbrance of immovables or registered movables;
- the foundation or closure of foreign branches;
- the making of investments exceeding a prescribed sum of expenditure for the current financial year;
- the assumption of loans or debt obligations exceeding a prescribed sum for the current financial year;
- the granting of loans or the guarantee of debt obligations if this is beyond the scope of everyday economic activities;
- concluding agreements and holding legal disputes with the members of the management board, paying remuneration to the members of the management board.

# Claiming damages

## **Preconditions of liability:**

- the member of the management board has violated his/her obligations
- the company has suffered financial damages or will suffer in the future
- the violation has caused the damages
- the member of the management board has not acted with due diligence

**Presumption that the members of the management board are solidarily liable for violations.**

## **Proving:**

The company must prove upon claiming damages that:

- the member of the management board has violated his/her obligations
- the violation has caused the damages

The member of the management board must prove that he/she has acted with due diligence.

## **Expiry:**

The date of expiry begins from the moment of the violation and lasts for 5 years (if not otherwise agreed upon in the Articles of Association or in other agreements).



# Liability of members of the management board before third parties

- The members of the management board are not liable for the obligations of the company before its creditors. The third party may in some cases claim that the member of the management board pays damages to the company.
- The members of the management board may only be liable before third parties if they violate an obligation arising from the law which has been set to protect the creditors (e.g. submitting bankruptcy application, wasting company's money, submitting annual reports compliant to the law etc.)
- The creditor or trustee in bankruptcy has the right to file a claim even if the company has waived the claim or entered into a compromise agreement or the claim or its submission has been otherwise restricted or the limitation period has shortened as a result of the agreement.

# Obligations before supervisory board and shareholders

- Obligation to organize the general meeting
- The management board shall convene an extraordinary general meeting in cases specified in the articles of association and if:
  - 1) the net assets requirement is not met;
  - 2) it is requested by shareholders whose shares represent at least 1/10 of the share capital;
  - 3) it is required by the supervisory board or the auditor;
  - 4) it is necessary in the interests of the public limited company (§ 292 of the Commercial Code)
- A shareholder has the right to receive information on the activities of the public limited company from the management board at the general meeting. The management board may refuse to give information if there is a basis to presume that this may cause significant damage to the interests of the public limited company. (§ 287 of the Commercial Code)
- The supervisory board has the right to receive information from the management board about the activities of the public limited company and to demand an activity report and the preparation of the balance sheet from the management board.



Questions?

