t. LXXIV • nr 7/2021 (877) • DOI 10.33226/0137-5490.2021.7.1

ARTYKUŁY

Dr hab. Piotr Pinior, prof. UŚ

University of Silesia in Katowice
ORCID: 0000-0003-2084-0325
e-mail: piotr.pinior@us.edu.pl

Remuneration policy and remuneration report in listed companies

Polityka wynagrodzeń i raport wynagrodzeń w spółkach publicznych

Abstract

Due to the amendment to the Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organized trading, and listed companies introduced by the Act of 16 October 2019, a new obligation was imposed in listed companies on the shareholders' meeting to adopt a remuneration policy and the supervisory board to draw up a remuneration report. The first issue to be considered in this paper will be selected aspects concerning the adoption of a remuneration policy by the shareholders' meeting and its implications for the remuneration system of members of the management board and supervisory board, as well as its implications for concluding contracts with management board members. The second issue will concern the remuneration report with respect to liability towards the company.

Keywords: listed company, remuneration policy, remuneration report

Streszczenie

Na podstawie ustawy z 16.10.2019 r. zmieniającej ustawę z 29.07.2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, na spółki publiczne nałożono nowy obowiązek w postaci przyjęcia przez walne zgromadzenie uchwały w sprawie polityki wynagrodzeń oraz obowiązek sporządzania przez radę nadzorczą sprawozdania o wynagrodzeniach. Celem artykułu jest przedstawienie wybranych aspektów związanych z podejmowaniem uchwały przez walne zgromadzenie w sprawie polityki wynagrodzeń i jej skutków w zakresie systemu wynagradzania członków zarządów i rad nadzorczych oraz zawierania umów z członkami zarządów. Przedstawiona także zostanie problematyka sporządzania sprawozdania z wynagrodzeń i związanej z tym odpowiedzialności.

Słowa kluczowe: spółka publiczna, polityka wynagrodzeń, sprawozdanie z wynagrodzeń

JEL: K15, K20, K22, K33

Introduction

Due to the amendment to the Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organized trading, and listed companies[1] introduced by the Act of 16 October 2019,[2] a new Chapter 4a "Remuneration policy and remuneration report" (Art. 90c–90g) was introduced into the Act, imposing on listed companies new obligations with respect to the remuneration system of members of the management board and supervisory board. The competence to determine the remuneration of management board members shall be vested in the supervisory board, while the competence to determine the remuneration of supervisory board members shall be vested in the shareholders' meeting. The introduction of the obligation to adopt a remuneration policy and publically disclose the remuneration system will in both cases strengthen the influence of the shareholders' meeting. It reflects the intention of the European legislator to strengthen the influence of the shareholders over the company (Pinior, 2018, pp. 66–75). Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017, amending Directive 2007/36/EC on the encouragement of long-term shareholder engagement,[3] introduced the said obligation so as to strengthen the link between pay and performance of directors and to improve shareholders' oversight of the remuneration system (Gerner-Beuerle, Schillig, 2019, p. 109; Kosmin, Roberts, 2020, p. 103).

The new obligation is addressed to the shareholders' meeting and supervisory board. First, pursuant to Art. 90d sec. 1 POA, the general meeting of the company shall adopt, by way of resolution, a remuneration policy with regard to management board and supervisory board members. The company shall immediately and publicly disclose its remuneration policy and the resolution on the remuneration policy on its website, along with the date of its adoption and the results of the vote (Art. 90e sec. 5 POA). Second, pursuant to Art. 90g sec. 1 POA, the supervisory board of a company shall draw up an annual remuneration report presenting a comprehensive review of remuneration, including any and all benefits, regardless of their form, received by individual members of the management board and supervisory board in the last financial year. The supervisory board members shall be responsible for the information contained in the remuneration report.

The aim of this paper is to present the role of the remuneration system in listed companies. It discusses the following issues: the adoption of a remuneration policy by way of a resolution of the general meeting; the granting of remuneration to management board and supervisory board members; the consequences of breaching the remuneration policy and the preparation of a remuneration report.

Resolution on a remuneration policy in listed companies

The shareholders' meeting of a company shall adopt, by way of a resolution, a remuneration policy with regard to the management board and supervisory board members. The resolution on a remuneration policy may be adopted both at an ordinary (annual) or extraordinary meeting and this resolution shall be adopted at least once every four years (Art. 90e sec. 4 POA). The statutes of the company may provide for the adoption of such resolution more frequently or, alternatively, confirm the policy every year. However, frequent alterations of the remuneration policy are not recommended, as they may undermine the stability of the company.

The resolution shall require an absolute majority of votes, unless the statutes provide otherwise. The proposal for a remuneration policy may be drafted by the supervisory board or its remuneration and nomination committee, provided that such committee is appointed within the supervisory board. Given that the policy predominantly concerns the remuneration of management board members, it seems reasonable to entrust the preparation of the draft to the remuneration and nomination committee because of its experience in determining the managers' remuneration and familiarity with the remuneration structure in the company. Such draft shall not be binding on the general meeting, as the role of the committee is to facilitate the adoption of professional decisions and improve the board's operation, taking into consideration effective supervision over the company in consent with the company's interest (Oplustil, 2010, p. 477; Opalski, 2016, p. 1386). Moreover, the liability for the preparation of the draft shall be borne by the supervisory board as a whole.

Some parts of the remuneration policy may be determined by the supervisory board. Pursuant to Art. 90d sec. 7 POA, the general meeting may authorize the supervisory board to specify certain elements of the policy, within the limits previously set by the general meeting, such as fixed and variable remuneration components, criteria for financial and non-financial results required for the granting of variable components (see p. 3 below). In that case the specification becomes an integral part of the policy.

The remuneration policy should contribute to the implementation of the business strategy, long-term interests and stability of the company. The policy should therefore determine or refer to the business activity (object) of an individual company by indicating the company's strategy in consent with its object of activity, such as holding or strengthening its market position. It should then indicate the long-term interests, for instance, maintaining the project yields or an increase in the profitability. Finally, it should refer to the issue of the stability of the company, taking into account the economic and managerial aspects as well as human resources. In addition, the remuneration policy should allow for social interests and the company's contribution to the environmental protection, as they should also be included in the determination of the variable remuneration components. The environmental and employee matters shall play an important role also in the management report, as under Art. 49b of the Act on Accounting of 29 September 1994[4], a statement of non-financial information shall include among others a description of policies followed by the entity concerning social, employee, and environmental issues, the issue of respect for human rights, and the issue of anti-corruption, as well as a description of the effects of those policies. Thus adopting the remuneration policy may also be noted in the non-financial information of the management report. Furthermore, the obligation to prepare the non-financial information shall extend to a larger number of companies due to the adoption of the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM/2021/189 final).

The company shall publicly disclose its remuneration policy, along with the date of its adoption and the results of the vote, on its website, where it shall remain available for at least as long as they apply. The resolution on the remuneration policy is adopted at least once every four years, so the policy may change or, alternatively, be confirmed in the unchanged version. However, pursuant to Art. 90e sec. 4 sentence 2 POA, a major change in the remuneration policy requires that it is adopted by way of a resolution of the general meeting. This provision seems to be disputable in respect of its use and aim. It is true that this provision duplicates the provision of Art. 9a sec. 5 of Directive 2017/828, but the Polish Commercial Companies Code does not differentiate between "change" and "major change" as

regards the shareholders' meeting. The only envisaged exception is "a substantial change in the objects of the company," as referred to in Art. 416–417 CCC[5] which sets out a special procedure for that type of amendment to the statutes. It must be recalled that every amendment to the statutes, whether "substantial" or "non-substantial", requires a resolution of the general meeting.

The use of the term "major change" permits the assumption that some changes that are not major do not require a resolution of the shareholders. This generates some uncertainty, in particular in relation to the extent to which such changes may be introduced and who decides upon them. This provision does not refer to the admissible specifications that are drawn up by the supervisory board, as they do not change the policy and do not require an alteration to the policy at all. This provision appears not to refer to any situation at all. Given that no other organ than the general meeting of the company is empowered to determine the policy, even slight changes require a resolution of the general meeting. This provision may be misused and a derogation from this provision is therefore recommended.

An alteration to the policy should be separated from a temporary withdrawal from the application of the remuneration policy. A withdrawal shall be permissible in order to implement the long-term interests and ensure the financial stability of the company or guarantee its profitability. It shall require a resolution of the supervisory board defining the conditions and manner of such temporary withdrawal and the elements that are subject to derogation (Art. 90f POA). The following may be indicated as the circumstances justifying a withdrawal: a significant loss in the company's assets; reorganization of the company's enterprise or branches; important change in the object of the business activity; merger or division of the company; threat of insolvency or declaration of bankruptcy. The provisions on the withdrawal do not indicate the date within which such a derogation is valid, however, it may be assumed to last no longer than the period of validity of the remuneration policy. Since the policy is adopted at least once every four years, the withdrawal should not exceed that term. In practice, a shorter term is recommended because the supervisory board's resolution on the withdrawal may be readopted. Where the supervisory board adopts a resolution on a withdrawal from the application of the policy without reasonable grounds and inflicts damage towards the company through the withdrawal, the board shall bear liability towards the company for acting contrary to law (Art. 483 CCC).

Remuneration of management board members as defined in the remuneration policy

The management board has the right and obligation to manage the company derived from a special contractual and organizational legal relationship between a company and its board members by virtue of their appointment by an empowered authority (Opalska, 2015, pp. 13–15; Pinior, 2013, pp. 81–91). Apart from this relationship between a board member and the company, an additional contract is usually concluded. Consequently, management board members are as a rule remunerated based on the contract, but they may also be remunerated by virtue of holding the office under the aforementioned relationship. Pursuant to Art. 378 CCC, the remuneration of management board members shall be set by the supervisory board, however, the general meeting may set the principles governing the directors' remuneration, in particular the maximum amount of remuneration, the right to additional benefits and their maximum amount. Further, it may authorize the supervisory board to establish that the remuneration should also include the right to participate in the company's annual profit (Szumański, 2008, pp. 704–708; Opalski, 2016, pp. 1379–1387; Kidyba, 2017, pp. 424–426). In listed companies, in addition to complying with the regulations of the Commercial Companies Code, the decision of the supervisory board must meet the criteria of the remuneration policy. The policy shall also include a description of the decision-making process applied to implement this policy.

The remuneration may include fixed and variable components, along with bonuses and other cash and non-cash benefits (Art. 90d sec. 3.1 POA). The policy should also indicate the mutual proportions of such remuneration components (Art. 90d sec. 3.2. POA). The fixed component is a constant part of the remuneration, paid monthly on the date indicated in the contract. It is independent from the company's financial performance criteria. The variable components are not mandatory and may be connected with the business strategy, goals, management risks and long-term interests of the company. The variable part may be treated as an additional system of awarding for the performance of additional duties, a contribution to strengthening the company's market position or an important initiative. The variable components are usually granted in the form of discretionary bonuses or awards because of their motivational nature and in recognition of effective management. Where the company grants such variable remuneration components, the remuneration policy shall also include clear, comprehensive, and diverse criteria for financial and non-financial results that relate to granting variable remuneration components, including criteria for the recognition of social interests and the company's contribution to the environmental protection, along with the methods used to determine to what extent the criteria have been met. As stated above, such criteria may be specified by the supervisory board. The mutual proportion between fixed and variable components depends on the goals that the company seeks to achieve, in particular, the greater the emphasis on the board's motivational factors is, the larger the proportion between variable and fixed components. Bearing in mind that the real amount of the variable component granted to each board member may be determined no earlier than after the performance of the task, the maximum proportion shall be indicated (e.g. not higher than 2:1).

Financial instruments (shares, bonds, warrants) are a separate form of remuneration indicated in the provisions on the remuneration policy. Where a company grants financial instruments to the management board members, the remuneration policy shall also define the periods in which the right to receive remuneration in this form is acquired, the principles on which these financial instruments are sold, unless it is to be specified by the supervisory board, based on the shareholder's resolution on the instruments' issue.

The following special benefits may be taken into account as a specific form of remuneration: the right to a company car, computer, or phone; costs of internal and external business travels; funding of participation in courses, trainings, studies, etc.; coverage of living costs outside the manager's hometown; private health insurance; directors liability insurance (D&O), additional pension and disability pension program. In the case where these benefits are a form of remuneration and do not constitute a type of company costs, the policy should indicate the permissible form of such benefits. Management contracts may also provide that some specific forms of remuneration are granted, such as a payoff after the end of the contract, compensation for non-competition clause, bonuses paid on starting the cooperation (sign-on fee) or in order the prevent the member from relocating to another company (retention bonus).

Pursuant to Art. 90e sec. 1 POA, the company shall pay remuneration to the management board members solely in accordance with its remuneration policy, thus the main issue concerns the consequences of granting remuneration or some parts of it contrary to the remuneration policy.

First, the adoption of a remuneration policy does not constitute the obligation to pass a resolution articulating the consent of the shareholders' meeting for concluding a contract with a management board member, thus Art. 17 CCC shall not apply and the contract shall be valid. Second, the competence of the supervisory board to conclude a contract results from Art. 379 CCC, consequently, this body has the competence to conclude a contract and determine its conditions. Hence Art. 39 CC[6] cannot apply in this matter either, the contract shall be valid, except in a situation where a supervisory board member concludes a contract in excess of the frames set by the supervisory board's resolution authorising the conclusion of the said contract. In such a case the validity of the contract shall depend on its confirmation by the supervisory board. Third, where the supervisory board concludes a contract with a management board member in excess of the scope of the remuneration policy or contrary to any of its parts, then the supervisory board members shall be liable to the company for the damage inflicted through that act (Art. 483 CCC).

Remuneration of supervisory board members as defined in the remuneration policy

The determination of remuneration of supervisory board members must also recognize the remuneration policy in listed companies. Pursuant to Art. 392 CCC, the amount of such remuneration shall be set forth in the statutes or by way of a resolution of the general meeting (Szwaja, 2008, pp. 853–855; Opalski, 2016, pp. 1615–1624; Kidyba, 2017, pp. 535–537). Taking into consideration the possible alterations to the remuneration policy, the determination of remuneration in the statutes of the company is not recommended, as any alteration to the remuneration policy would then force amendments to the statutes.

In general, no additional contract is concluded in connection with the membership in the board (in contrast to management board members), and the remuneration of supervisory board members results directly from their membership in the board. It is true that a special additional contract with supervisory board members is reasonably possible, however, as stated in a judgment of the Supreme Court of 3 November 2009 (II CSK 181/09), a contract in which the management board has the power to terminate the contract is invalid as being contrary to the essence of the obligation (Art. 353^1 CC). In practice, apart from state-owned companies in which employees may have the right to elect their representatives into the supervisory board, supervisory board members hold the office without an additional contract and obtain remuneration solely based on their membership in the board, which is counted from the moment of their appointment to the supervisory board by an empowered authority (judgment of the Supreme Court of 30 January 2014, III CZP 104/13).

The remuneration of supervisory board members typically differs from the remuneration of management board members, as in practice a fixed remuneration is granted. However, variable components may also be part of the remuneration, which is explicitly indicated for both organs (Art. 90d sec. 4 POA). Given the aim of variable components, an additional fixed remuneration is recommended instead. Remuneration in the form of financial instruments is also mentioned for both organs (Art. 90d sec. 5 POA), but the general permissibility of granting such instruments depends on a resolution of the general meeting on the issue of financial instruments.

The fixed remuneration shall be paid periodically, independently from the involvement in the board activity. It may alternatively be connected with the function in the board, as well as with participation in the audit committee or the nomination and remuneration committee, for which an additional fixed remuneration may be granted. Due to a closer involvement in the board activity, the remuneration may vary within the supervisory board, in particular, a different amount shall be paid to the chairman and vice chairman of the supervisory board or to a chairman of the committee. An additional remuneration shall also be granted where the supervisory board delegates its member to independently perform specific supervisory tasks (Art. 390 § 1 CCC), or when a group of shareholders, due to the elections of supervisory board members in separate groups, delegates its representative to individually perform supervisory tasks on a permanent basis (Art. 390 § 3 CCC). Furthermore, a separate remuneration shall be granted

where the supervisory board delegates its members, for a period of no longer than three months, to temporarily perform the duties of management board members who have been removed, resigned or who, for other reasons, are incapable of performing their duties (Art. 383 § 1 CCC). Finally, some additional benefits may be granted, e.g. reimbursement of business travels or directors liability insurance (D&O).

The provisions on the remuneration policy do not indicate separately the elements of the policy referring to the management board or supervisory board. However, it is recommended that the remuneration of the management board and supervisory board is specified in a shareholders' resolution on a remuneration policy, particularly in view of the fact that such elements tend to be more detailed.

The consequences of granting the supervisory board a remuneration, or some parts of it, contrary to the remuneration policy seems to be rather hypothetical because the remuneration is determined by a resolution of the general meeting. A resolution contrary to the remuneration policy may be appealed against by filing a statement of claim for repealing such resolution as being in conflict with good practice and detrimental to the company's interest (Art. 422 CCC).

Remuneration report

Pursuant to Art. 90g sec. 1 POA, the supervisory board of the company draws up an annual remuneration report presenting a comprehensive review of remuneration, including any and all benefits, regardless of their form, received by individual members of the management board and the supervisory board or due to individual members of those boards in the last financial year, as defined in the remuneration policy. It has been underlined in the literature that the report will summarize the company's remuneration principles and how the policy aligns with the company's business strategy and the way it will be implemented (Kosmin, Roberts, 2020, p. 103). The draft of the report may be prepared by the nomination and remuneration committee of the supervisory board (Kosmin, Roberts, 2020, p. 103), but the final reports requires to be adopted in the resolution of the supervisory board.

In particular, the report shall include for each member of the boards, among others (Art. 90g sec. 2.1–7 POA): the total amount of remuneration broken down into fixed and variable components and the mutual proportions between them; explanation of the manner in which the remuneration is compliant with the remuneration policy, including how it contributes to the achievement of long-term results of the company; the number of financial instruments awarded or offered and the main conditions for exercising rights under these instruments. A temporary withdrawal from the application of the remuneration policy requires that the report includes an explanation of the premises and procedure, as well as an indication of the elements to which the deviations were applied (Art. 90g sec. 2.8 POA). Furthermore, where the remuneration of members of the management board and the supervisory board includes cash or non-cash benefits granted to the close relatives of such persons, the remuneration report shall include information on the value of such benefits (Art. 90g sec. 5 POA).

Pursuant to Art. 90g sec. 6 POA, the general meeting adopts a resolution expressing an opinion on the remuneration report and this resolution is of an advisory nature. It is not entirely clear how the advisory nature of the resolution should be understood. First, it does not mean that the remuneration policy must be changed because this opinion takes account of the remuneration granted in the previous year, so it ultimately shows whether the remuneration was paid in compliance with the remuneration policy. Second, the resolution is addressed to the supervisory board and refers to the remuneration paid to the management board members. Since the general meeting determines the remuneration of the supervisory board, it may be assumed that the general meeting itself is not the addressee of the resolution. The advisory vote on the remuneration report means that the company should take into account the recommendations and opinions included in the report, and the report produced the following year will indicate the manner in which the advisory resolution of the general meeting has been taken into account.

The opinion of the general meeting may refer to other elements of the remuneration policy, such as the manner in which the working conditions and remuneration conditions of the company's employees other than members of the management board and supervisory board were taken into account; the decision-making process used in order to establish, implement, and review the remuneration policy; description of measures taken to avoid conflicts of interest related to the remuneration policy or the management of such conflicts of interest; or the contribution of the policy to the achievement of a business strategy, long-term interests and stability of the company.

In smaller companies described in Art. 90g sec. 7 POA, the general meeting may hold a discussion instead of adopting a resolution on the remuneration report.

It should also be underlined that the newly introduced provision of Art. 395 § 2^1 CCC lays down the obligation for the annual general meeting to pass a resolution expressing an opinion on the remuneration report or to hold a discussion as referred to in Art. 90g sec. 7 POA. It seems to be an inadequate amendment to the Code, as the whole regulation concerning the remuneration policy was inserted into the Act of 29 June 2005 on Public Offering and it would be more proper to include this obligation in this Act (Kidyba, 2020). Nevertheless, a resolution expressing an opinion on the remuneration report or a discussion on the report will be a mandatory element of the ordinary meeting's agenda in listed companies.

The remuneration report shall be assessed by a statutory auditor to determine whether it contains the required information (Art. 90g sec. 10 POA). The opinion of the statutory auditor may have a pivotal role in the evaluation process, as it serves as an important indication for the

shareholders when they decide on the resolution concerning acknowledgement of the fulfilment of duties by members of the company's authorities (Art. 395 sec. 2.3 CCC). It should therefore be made accessible to the shareholders before the general meeting.

Where the remuneration report includes objections as to the accuracy of the company's remuneration system, confirmed by the statutory auditor, the management board or supervisory board may not obtain the acknowledgement of the fulfilment of duties and, consequently, the board members may be removed and they shall bear liability towards the company for damages inflicted through improper action or omission. In particular, this may be the case where the management board does not achieve the aims and goals of the company typically specified in the management contract, but receive remuneration for that. In case of improper preparation of the remuneration report, analogous implications may incur for the supervisory board members, as pursuant to Art. 90g sec. 1 sentence 2 POA, the supervisory board members of the company are responsible for the information contained in the remuneration report. Supervisory board members may also bear liability in case of conclusion of contracts with the management board contrary to the remuneration policy.

The company shall publicly disclose its remuneration report on its website and make it available free of charge for at least ten years from the end of the general meeting during which the resolution expressing an opinion on the report was passed or during which the discussion on the report was held (Art. 90g sec. 9 POA).

Final remarks

Primarily, the implementation of Directive 2017/828 imposed new obligations on listed companies which should contribute to the business strategy, long-term interests and sustainability of the company. Shareholders are granted the right to vote on the remuneration policy and the right to vote on the company's remuneration report. The resolution of the shareholders at the annual general meeting should express an opinion on the remunerations of the management board members and supervisory board members in the previous financial year and a resolution on the remuneration policy must be adopted at least every four years. This should contribute to the transparency of the remuneration system, but it is doubtful whether it exerts a real influence on the remuneration system. Nevertheless, the obligation to publish both the remuneration policy and remuneration reports on the company's website allows the investors to have a broad overview of the remunerations paid by the company and it may contribute to the adoption of a sustainable remuneration system.

Przypisy/Notes

[1] The Official Journal of Laws of the Republic of Poland 2020.2080, hereinafter abbreviated as POA.

[2] The Official Journal of Laws of the Republic of Poland, 2019.2217.

[3] Official Journal of the European Union L 132/1.

[4] The Act of 29 September 1994 on Accounting, the Official Journal of Laws of the Republic of Poland, 2021.217. The obligation to present the non-financial information covers now companies which in the year preceding that financial year, exceed the following three values: 1) 500 persons — in the case of average annual employment in full-time equivalents; 2) 85,000,000 PLN in the case of the total of balance-sheet assets as at the end of the financial year or 3) PLN 170,000,000 PLN — in the case of net revenue from the sale of goods and products for the financial year.

[5] The Act of 15 September 2000 — Commercial Companies Code, the Official Journal of Laws of the Republic of Poland, 2019.505, as amended, hereinafter abbreviated as CCC.

[6] The Act of 23 April 1964 — Civil Code, the Official Journal of Laws of the Republic of Poland 2020.2320, hereinafter abbreviated as CC.

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Dr hab. Piotr Pinior, prof. UŚ

Professor of the University of Silesia; director of the Institute of Law, Deputy Dean for Research, Faculty of Law and Administration, University of Silesia in Katowice.

Dr hab. Piotr Pinior, prof. UŚ

Doktor habilitowany, profesor Uniwersytetu Śląskiego; dyrektor Instytutu Nauk Prawnych, prodziekan ds. Badań Naukowych na Wydziale Prawa i Administracji Uniwersytetu Śląskiego w Katowicach.