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*Marzena Czarnecka, Holger Buck*

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**POWER OF MANAGEMENT  
AND REPRESENTATION, DUTIES,  
RESPONSIBILITY, AND LIABILITY  
OF CEO-MANAGEMENT BOARD  
OF POLISH SPÓŁKA Z O.O. AND  
GESCHÄFTSFÜHRER OF GERMAN GMBH**

## Introduction

In both the Polish and the German legal system limited liability companies play a preeminent role<sup>1</sup>. The private limited company is the favourite corporate structure of national entrepreneurs and of foreign investors. Although the European Community has established three types of supranational European companies: the European Economic Interest Grouping (EEIG)<sup>2</sup>, the Societas Europaea (SE)<sup>3</sup>, and the Societas Cooperativa Europaea (SCE)<sup>4</sup>, the various EC company law directives do not harmonise with the national laws on private limited companies<sup>5</sup>. Therefore each national company law of an EU member state of the EU is able to achieve an uninfluenced national look at the role, duties, and responsibilities of company directors. This article focuses on these topics and compares Polish and German solutions. Polish and German systems of creating the management board are similar, but there are some differences.

As she or he has to choose the adequate corporate form to operate in the targeted market a Polish entrepreneur setting up a business in Germany has to

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<sup>1</sup> In Germany ca 970000 private limited companies/limited liability companies (Gesellschaft mit beschränkter Haftung – GmbH) were registered, in contrast to ca 16000 public limited companies [plc] (“Aktiengesellschaft” – AG); cf. C. Flaßhoff, K. Krömker: *Germany*. In: *European Corporate Law*. Eds. K. van Hulle, H. Gesell. Nomos, Baden-Baden 2006, p. 155 (figures of 2004).

<sup>2</sup> Council Regulation (EEIG) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1.

<sup>3</sup> Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1; consolidated version: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R2157:20070101:EN:PDF>; Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22; H. Buck: *Europäische Aktiengesellschaft: neue Gesellschaftsform für Europa*. In: *Steuer- und Wirtschafts-Kurzpost (StWK) Gruppe 22*. Haufe, Freiburg 2003, p. 63-68.

<sup>4</sup> Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.7.2003, p. 1, which does not violate European law (European Court of Justice [ECJ], judgement of 2.5.2006, case C-346/03); corrigendum to Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 49, 17.2.2007, p. 35; consolidated version: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003R1435:20030821:EN:PDF>; cf. H. Buck: *Europäische Genossenschaft (SCE) – Möglichkeiten und Rechtsrahmen*. In: *Steuer- und Wirtschafts-Kurzpost (StWK) Gruppe 17*. Haufe, Freiburg 2007, p. 447-454.

<sup>5</sup> With exception to the Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies, OJ L 232, 2.9.1999, p. 34, and some directives as regards accounting (e.g. Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect to certain types of companies, OJ L 221, 4.9.2003, p. 13).

know and to respect the German law regarding the private limited company<sup>6</sup>, and vice versa<sup>7</sup>.

## 1. Absence of a limited liability company governed by European Community Law

A supranational private limited company governed by EC law does not yet exist. Therefore it is currently misleading to advertise company services in Germany for an “EU-GmbH”<sup>8</sup>. However, the EU commission plans to establish an European private company (SPE, Societas Privata Europaea) to enable entrepreneurs to set up their business in the form of an SPE using the same company law rules throughout the EU, instead of e.g. a GmbH in Germany or a sp. z o.o. in Poland. On 25 June 2008 the commission therefore submitted to the European Parliament and Council a “Proposal for a Council Regulation on the Statute for a European private company”<sup>9</sup>. It will take years until the law of a SPE comes into force, and certainly its coming into force will not delete the national law of the member states on the private limited company<sup>10</sup>. Still, the SPE will increase competition between national laws and EC law regarding private limited companies. Nevertheless, the national law is and still will be of great importance.

<sup>6</sup> Notwithstanding that the ECJ allows operation of pseudo foreign companies in a member state of the EU, which favours mainly the English Ltd. (Private Company Limited by Shares) and which allows the evasion of stricter provisions on maintenance of capital (ECJ, judgement of 30.9.2003, case C-167/01 – Inspire Art Ltd); cf. K. Sturfels: “Pseudo-Foreign Companies“ in Germany – the Centros, Überseering and Inspire Art Decisions of the European Court of Justice. In: *Key Aspects of German Business Law*. Eds. M. Wendler, B. Tremml, B. Buecker. 3 edition, Springer Verlag, Berlin-Heidelberg-New York 2006, p. 63.

<sup>7</sup> Legal know how is indispensable in international management, e.g. the impact of trademarks in Polish-German business, cf. H. Buck: *Gewerblicher Rechtsschutz im polnisch-deutschen Geschäftsverkehr*. In: *Internationales Marketing und Management*. Eds. M. Glowik, S. Smyczek. Wydawnictwo Akademii Ekonomicznej im. Karola Adamieckiego w Katowicach, Katowice 2008, p. 29; focussing on the conflict of laws of advertising cf. H. Buck: *New German Act against Unfair Competition*. [Australian] “Trade Practices Law Journal” 2006, 14, p. 242.

<sup>8</sup> Landgericht Dresden (County Court), judgement of 11 April 2006 (42 O 386/05), NJW 2007, p. 88.

<sup>9</sup> COM(2008) 396/3, cf. [http://ec.europa.eu/internal\\_market/company/epc/index\\_en.htm](http://ec.europa.eu/internal_market/company/epc/index_en.htm).

<sup>10</sup> With regard to public companies limited by shares after the opening of the SE for registration it has to be pointed out that in Germany the majority of this company type is still organised as German AG’s and that at the moment only 80 SE are registered in Germany, cf. <http://www.unternehmensregister.de>.

## 2. The Polish limited liability company

The Polish legal system is, in general, divided into public and private law. Private law encompasses the relationship between private individuals and covers among other things civil and employment law. Commercial law is also contained in the body of law known as private law. Under the Polish legal system commercial law pertains only to entrepreneurs. The definition of entrepreneur is provided by various bodies of law, including the Polish Civil Code (CC), the Freedom of Business Activity Act amongst others. Since Poland became a member of the European Union in 2004, it has to follow European Community Law. For this reason special consideration has to be given to the Treaty of Rome, new directives, regulations as well as court decisions.

The Polish limited liability company is a rough equivalent of the English private company. There is no numerical limit on its membership. Unlike the English private company, however, a limited liability company is not governed by the same rules as a public company which is subject to certain modifications, but is governed by separate regulations in the Polish Commercial Companies Code (CCC). The limited liability company is a company with a separate legal personality. The member's liability is limited to his/her contribution and, if the formation agreement so provides, to assessment. A limited liability company may be formed by one or more persons. The formation agreement must be executed by every member and completed in the form of a notarial deed which must state the name of the company and which needs to include the additional words “*Spółka z ograniczoną odpowiedzialnością*” as its abbreviation, along with the nature of its business, the amount of its capital, whether or not the members have more than one interest, the number and nominal value of interest each member takes, and the duration of the company if stipulated. The company's capital must be at least PLN 50000, and in addition, each member's interest must have a nominal value of PLN 500 (Article 154 §1 and §2 of the CCC<sup>11</sup>). Contributions may

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<sup>11</sup> S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja: *Kodeks spółek handlowych. Tom III. Komentarz do art. 301-458*. C.H. Beck, Wyd. 2, Warszawa 2008; S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja: *Kodeks spółek handlowych. Komentarz. Tom V: Pozakodeksowe prawo handlowe*. Wyd. 2. C.H. Beck, Warszawa 2008; M. Aslanowicz, A. Herbet, M. Litwińska-Werner, M. Romanowski, T. Siemiątkowski, S. Sołtysiński, A. Szajkowski, A. Szumański (red. A. Szajkowski): *Prawo spółek osobowych. Tom 16: System Prawa Prywatnego*. C.H. Beck, Warszawa 2008; W. Górecki, A. Kappes, M. Litwińska-Werner, M. Pazdan, U. Promińska, A. Rachwał, M. Spyra, S. Włodyka (red. S. Włodyka): *Prawo spółek handlowych. Tom 2A*. Wyd. 1. C.H. Beck, Warszawa 2007; J. Frąckowiak, A. Kidyba, J. Napierała, K. Oplustil, W. Popiołek, M. Spyra, S. Włodyka (red. S. Włodyka): *Prawo spółek handlowych. Tom 2B*. C.H. Beck, Warszawa 2007; S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja: *Kodeks spółek han-*

be made in cash or in kind. The formation agreement must specify the nature and value of any contributions in kind as well as the amount of interest in return for this contribution. Under Article 158 §3 of the CCC, contributions in kind are at the free disposal of the management board before an application for registration can be made<sup>12</sup>.

### 3. The German limited liability company and the recent legal reform

The law relating to the GmbH is laid down in a specific act, the GmbH-Gesetz (GmbHG, Gesetz betreffend die Gesellschaft mit beschränkter Haftung) of 20 April 1992 as lastly amended on 19 April 2007<sup>13</sup>.

The corporate structure of a GmbH is very often used by SME, but is not restricted to them (e.g. the global player ROBERT BOSCH GmbH). The GmbH is a legal entity and possesses itself rights and obligations. It can acquire title and other real property rights. The company is fully liable for all its debts (§13 s 2 GmbHG) and all the company's assets can be seized by the creditor to settle his claim. In contrast, the shareholder is not personally and fully liable for the company debts, unless the corporate veil is to be lifted because severe errors or omissions have been made (Haftungsdurchgriff). However, as usually only the company's assets cover the company's liabilities the GmbH-Gesetz provides provisions with regard to the protection of the creditors as well as a sophisticated

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*dowych*. Tom I: *Komentarz do art. 1-150*. Wyd. 2. C.H. Beck, Warszawa 2006; S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja: *Kodeks spółek handlowych*. Tom II: *Komentarz do art. 151-300*. Wyd. 2. C.H. Beck, Warszawa 2005; S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja: *Kodeks spółek handlowych. Komentarz*. Tom IV + Supplement. C.H. Beck, Warszawa 2003; M. Jasińska: *Podział spółek kapitałowych. Art. 528-550 KSH. Komentarz*. Wyd. 1. C.H. Beck, Warszawa 2003; J. Frąckowiak, A. Kidyba, W. Popiołek, W. Pyziół, A. Witosz (red. W. Pyziół): *Kodeks spółek handlowych. Komentarz*. Wyd. I. LexisNexis, Warszawa 2008; M. Rodzyńkiewicz: *Kodeks spółek handlowych. Komentarz*. Wyd. II (dodruk). LexisNexis, Warszawa 2007; A. Kidyba: *Kodeks spółek handlowych. Komentarz*. Tom I i II. Wolters Kluwer Polska – LEX, Warszawa 2008; R. Czerniawski: *Kodeks spółek handlowych. Przepisy o spółce akcyjnej. Komentarz*. Wyd. 2. Wolters Kluwer Polska – ABC, Warszawa 2004; Z. Koźma, M. Ozóg: *Kodeks spółek handlowych. Komentarz*. ODDK, Warszawa 2005.

<sup>12</sup> R. Lewandowski: *Polish Commercial Law: An introduction*. C.H. Beck, Warszawa 2007, s. 58,5.

<sup>13</sup> The consolidated version is available online: <http://www.gesetze-im-internet.de/gmbhg/index.html> (official website of the German Federal Ministry of Justice). There is no English translation of the updated act as the last English translation dates back to 2000 (M. Peltzer, J. Brook, T. Hopcroft, E. Voight: *GmbH-Gesetz: Deutsch-englische Textausgabe/German Law Pertaining to Companies with Limited Liability: German-English Text*. 4<sup>th</sup> edition. Verlag Dr. Otto Schmidt, Köln 2000).

system of maintenance of capital and liquidity. The company can in its own name sue and be sued before the courts. A German limited liability company is a merchant by law with the consequence, that the German Commercial Code (HGB, Handelsgesetzbuch) is applicable to the whole business of the company. The company shall always use the designation “Gesellschaft mit beschränkter Haftung” or a readily comprehensible abbreviation (§4). All business letters directed to specific addressees shall contain details of the legal form, the domicile, the registration number and of the names of all managing directors (§35a). On websites a detailed legal notice shall be used (§5 Telemediengesetz [act on telemedia services]).

A GmbH may be established by one or more natural persons (German or foreign citizens, German residents or not) or legal entities (with head office in Germany or not) for any legitimate self defined purpose (§1) including even a non-profit aim (gGmbH – gemeinnützige GmbH). There is no limit as to the number of shareholders. A GmbH may be partner of another company (e.g. GmbH & Co. KG).

The incorporation of a GmbH is composed of:

- 1) the signing of the articles of association, which must state the name, the location, and the purpose of the company as well as both the total amount of the nominal capital and the contribution of each shareholder (§3),
- 2) the appointment of the managing director(s) and the rendering on the contribution or the provision of a contribution in kind (at least half of the share capital), and
- 3) the registration in the local commercial register.

The articles of association must be documented by a notary (§2), mainly by a German notary<sup>14</sup>. The registration is the birth act of the GmbH and sets up the liability to being limited to the assets of the company only. But if before the registration business transactions have been carried out in the name of the company, the acting persons are personally and jointly and severally liable.

The shares are freely transferable and inheritable (§15). Nevertheless, the articles of association may require that the prior consent by the company is needed. A change of shareholders does not affect the continuity of the company. As the shares can not be quoted on the stock exchange the transfer of shares requires a notarial deed.

According to §25, the minimum capital of a German GmbH is EUR 25000. The capital can be rendered in cash or in kind. It is expected that on 1 November

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<sup>14</sup> German law courts accept a notarization abroad if it is equivalent with the German, i.e. in Switzerland, Austria, Belgium, France, Italy, the Netherlands, and Spain (*Gehrlein GmbH – Recht in der Praxis*. Verlag Recht und Wirtschaft, Frankfurt am Main 2005, p. 49).

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2008 the modernisation of the GmbH-Gesetz will come into force as the German legislator (Deutscher Bundestag on 26 June 2008 and Bundesrat on 19 September 2008) passed the “Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)”<sup>15</sup>. The main emphasis of this very comprehensive reform is:

- not to reduce the minimum nominal capital from EUR 25000 to EUR 10000 as was discussed intensely to make the GmbH more attractive as a legal structure due to the fact that the GmbH faces disadvantages arising from competition with foreign company structures, i.e. the English Ltd. However, in order to facilitate start-ups, especially to meet the needs of people who are setting up a business and who only need or have very little nominal capital (service sector) the option to form a private limited company, without a certain minimum nominal capital called “Unternehmergesellschaft (haftungsbeschränkt)” (limited liability entrepreneurial company), is introduced. This kind of a private limited company is not able to make a full distribution of profits to the shareholders and must gradually accrue the profits to achieve the minimum capital. The reform reduces the amount of the contribution of each shareholder which must have equal nominal value from EUR 100 to EUR 1,
- to facilitate and accelerate the establishment of a business by facilitating the raising of capital and the transfer of shares, by introducing model articles of association for uncomplicated standard start-ups and by speeding up registration,
- to erase legal uncertainties arising from the legal institution of the undisclosed non-cash capital contribution/payment in kind (verdeckte Sacheinlage) by clearly defining the subject within the act,
- to give the private limited company the chance of choosing to have the administration headquarter apart from the seat of incorporation and allowing the transfer of the administration headquarter abroad,
- to secure cash pooling, which has become the international custom in group financing,
- to deregulate the complex law on shareholder capital substitution,
- to suppress abuse by introducing the responsibility to publish a domestic business address in the commercial register and by introducing the responsibility of the shareholders to file an insolvency petition in cases where the company has no management, and by extending the grounds for exclusion of appointment as a managing director.

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<sup>15</sup> Act to Modernise the Law Governing Private Limited Companies and to Combat Abuses, cf. [http://www.bmj.bund.de/files/-/3181/MoMiG\\_Schwerpunkte\\_260608.pdf](http://www.bmj.bund.de/files/-/3181/MoMiG_Schwerpunkte_260608.pdf).

## 4. The Power of Management and the Representation, Competences/Duties and Responsibility

### 4.1. Polish law

The limited liability company has the following governing bodies:

1. The management board.
2. The supervisory board.
3. The general meeting.

The management board is an organ of a private limited company which runs the business affairs of a company and represents it in relation to third parties. Article 38 of the Civil Code underlines the function of the management board of directors as follows: a legal entity acts through its organs within the scope stipulated in the law and the formation agreement (“Osoba prawna działa przez swoje organy w sposób przewidziany w ustawie i w opartym na niej statucie”). Under Article 201 the management board shall manage the affairs of the company and represent the company. The management board shall be composed of one or more members. Appointments to the management board which lay in the competence of the general meeting may be taken from the shareholders or from thirds outside the company. But we should remember that the composition of the management board and general meeting can be the same, however the functions should be separated. Except when otherwise provided for in the company deed, management board members shall be appointed and recalled under a resolution of shareholders. According to Polish law, for appointing the management board a resolution should be adopted during the general meeting. Of course according to the provisions of the articles of association, it could also be done by the supervisory board or the audit committee or other organs. The composition of the management board should be reported to the register court where the company is registered within 7 days from the date of appointment. Except when otherwise provided for in the company deed, the term of office of a management board member shall expire on the day on which the meeting of shareholders is convened in order to approve the financial statements for the first full financial year in which the member served on the management board. If a management board member is appointed for a term of more than one year, that management board member's term shall expire on the day on which the meeting of shareholders is convened to approve financial statements for the last full financial year in which the member served on the management board, unless the company deed provides otherwise. Where the company deed provides for the management board mem-

bers to be appointed for a common term of office, the term of office of that management board member who was appointed before the elapse of a given term of the management board shall expire at the same time as those of the remaining members, unless the company deed otherwise provides. The term of office of the management board member shall also expire at the member's death, resignation, or removal from the board. Excepting the expiration of a mandate, a management board member may be recalled at any time by a resolution of the shareholders. This shall not deprive him of the right to make claims arising under the relationship of employment or under another legal relationship pertaining to the performance of management board function. The company deed may contain other provisions, it also may, in particular, restrict the general meeting's right of recalling a management board member for important reasons. Except when otherwise provided for in the deed of recall, the recalled member of the management board may and shall, pending preparation of the management board report on the company's activities and of financial statements, furnish explanations covering the period in which he/she performed the function of management board member and participated in the meeting of shareholders. The main principle of this regulation is that the term of office is individual for each member of the management board.

The competence of the management board is as follows: The management board member's right to represent the company shall encompass all court and out-of-court acts of the company. The management board member's rights to conduct the company's affairs and represent the company cannot be subjected to limitations effective against third parties. Where the management board consists of more members than one, the manner of representing the company shall be determined in the company deed. In the absence of any provisions in this matter in the company deed, statements shall be made in the name of the company by two members of the management board acting jointly, or by one management board member acting jointly with the procurator. Statements and letters addressed to the company may be made to and served upon one member of the management board or the procurator. Sometimes there is an obligation to have the resolution of general meeting. Sometimes, according to Article 210 of the CCC, in a contract between the company and a management board member, likewise in a dispute with a management board member, the company shall be represented by the supervisory board or by an attorney appointed under a resolution of shareholders' meeting. Generally this regulation should be used for the single-shareholder company. It is quite important when a single member who is in the management has power of attorney. According to Polish Civil Code Article 108, an attorney cannot be the other party in an act of law which he performs on behalf of the

principal unless something else follows from the contents of the power of attorney or if, in view of the contents of that act of law, the possibility of infringing on the interests of the principal is excluded.

According to the competences of representation of the company, CCC states that where the shareholder is at the same time the sole member of the management board any act of law between this shareholder and the company represented by him/her shall require the form of a notarial deed. The notary shall at all times notify the registration court of having performed such an act of law by means of sending an excerpt copy of the notarial deed. It means that Article 210 §1 of the CCC does not apply. According to Article 253 of the CCC, in the dispute concerning the annulment or declaration of the invalidity of a resolution of the shareholders, the defendant shall be represented by the management board, unless an attorney in fact has been appointed for this purpose under a resolution made by the shareholders. If the management board cannot act for the company, and no resolution made by the shareholders on the appointment of an attorney in fact has been adopted, the court having jurisdiction for the action shall appoint a curator for the company. With the exception of the management board the company could be represented by a liquidator, an attorney or bankruptcy trustee and/or a procurator. The CCC is in a regulating situation when the law requires a resolution made by the shareholders or the general assembly or that of the supervisory board for an act of law in the company; an act of law effected without the required resolution shall be invalid. This consent may be expressed before or after the company makes the relevant representation not later, however, than within two months of the date on which the representation of the company was made. A confirmation expressed after the company makes its representation shall be retroactive as of the date of the act of law. An act of law effected without the consent of the appropriate body of the company shall be valid this, however, shall not exclude the liability of members of the management board vis-à-vis the company for a breach of the articles of association or statutes. In the case of representation for acquiring the declaration of will, according to Article 206 of the CCC, the company's letters and commercial orders addressed to a named person shall include:

- the business name and seat, and address of the company,
- the designation of the registration court and the number under which the company is entered in the register.

The provisions shall apply respectively to the limited liability company's branch with its seat abroad. But this duty shall not apply to letters and commercial orders of the company addressed to persons maintaining permanent business relations with the company.

Because of managing internal affairs there are such a regulations that:

1. Each management board member shall have the duty and right to manage the affairs of the company.
2. Each management board member may, without a previous resolution of the management board, handle matters falling within the ordinary course of business of the company.
3. Notwithstanding the aforesaid, if before disposal of the matter falling within the ordinary course of business of the company at least one of the remaining members of the management board objects to prosecuting this matter, or where such matter extends beyond the ordinary course of business of the company, a previous resolution of the management board shall be required.
4. The consent of all management board members shall be required for the appointment of a procurator.
5. Any member of the management board may revoke the procuration.

The management board shall adopt resolutions by an absolute majority of votes. Such a majority of votes is when more than 50% votes yes. The votes are counted for the members which were present and voted. We do not count absent members of the management board. It is not possible to be represented by another person. Resolutions of the management board may be adopted if all management board members have been duly notified of the management board meeting. There is no obligatory presence during the management board meetings, so the resolutions may be adopted without an obligatory number of members. However, the company deed may provide that, should an equal number of votes be cast, the president of the management board shall have the casting vote and it may vest in the president of the management board certain powers with respect to directing the work of the management board.

Non competition: There is no special non competition regulation for the shareholders, but there is such a regulation for the management board member. The management board member shall not, without the consent of the company, involve himself in a competitive business or participate in a competitive partnership or company, whether as a partner in a civil partnership or another partnership, or as a member of a governing body of a company, nor shall he be involved in another competitive legal person by sitting on its body. This prohibition shall extend also to having interest in a competitive company, in the event that the management board member should hold 10 per cent of or more shares in it, or have the right of appointing at least one member of its management board. This consent of the company shall be given by the governing body entitled to appoint the management board unless the articles of association provide otherwise. According to Article 209 of the CCC, in the event of a conflict of interest between

the company and a management board member, or the member's spouse, relations and in-laws within the second degree and persons with whom the member has a personal relationship, the management board member shall abstain from participating in the determination of such matters and he may request that an entry be made in the minutes to that effect.

## 4.2. German law

A GmbH is quite easy to handle as the administrative structure can be reduced to a minimum. Management and representation of the GmbH<sup>16</sup> (§§35-52) result from the cooperation of the two compulsory corporate bodies:

1. The shareholders' meeting as the supreme decision-making body (§46 with its list of competences) inter alia being responsible for the appointment and dismissal of the managing director(s) as well as for the conclusion of the CEO's employment contract, the approval of the annual financial statements and use of results and measures to check and supervise the management.
2. One or more managing directors (Geschäftsführer). A CEO must be a natural person with unlimited legal capacity to contract and may be a shareholder or not (§6). A foreigner can be appointed CEO (two-tier system). An advisory or supervisory board (Beirat, fakultativer Aufsichtsrat or Gesellschafterausschuss) is optional unless labour participation laws do not require the establishment of a supervisory board. However if the limited liability company has more than 500 employees, a supervisory board with employee participation has to be installed<sup>17</sup>.

German company law distinguishes between the external authority and the internal rights and obligations of the Geschäftsführer. The power of management is effected only internally and is often restricted by the articles of association, by shareholder resolutions, or by the employment contract of the CEO. A single CEO disposes of sole power of representation (Alleingeschäftsführungsbefugnis), whereas in the event that more than one managing directors are ap-

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<sup>16</sup> H. Buck: *Gesellschaft mit beschränkter Haftung (deutsches Recht)*. In: *Das neue Lexikon der Betriebswirtschaftslehre*. Ed. S. Häberle. Vol. 2. Oldenbourg Wissenschaftsverlag, München 2008, p. 490; B. Tremml, B. Buecker: *Recognized Forms of Business Organizations*. In: *Key Aspects of German Business Law*. Eds. M. Wendler, B. Tremml, B. Buecker. 3<sup>rd</sup> edition. Springer Verlag, Berlin-Heidelberg-New York 2006, p. 13; *Zöllner/Noack GmbH-Gesetz, Kommentar*. Eds. A. Baumbach, G. Hueck. 18<sup>th</sup> edition. C.H. Beck, München 2006, Vor §35 Rn. 2ff; G. Herberstein: *Die GmbH in Europa – 50 Länder im Vergleich*. 2<sup>nd</sup> edition. Verlag Österreich, Wien 2006, 85ff.

<sup>17</sup> §1 Drittelbeteiligungsgesetz. In Germany the employee participation is regulated by different acts, cf *Zöllner/Noack GmbH-Gesetz, Kommentar*. Eds. A. Baumbach, G. Hueck. 18<sup>th</sup> edition. C.H. Beck, München 2006, §52 Rn. 249ff.

pointed the act establishes joint power of management (Gesamtgeschäftsführungsbefugnis) of all CEOs. The articles of association may opt out of the statutory principle and grant single power of management to one or to all CEOs (Einzelgeschäftsführungsbefugnis) or to decide that not all CEOs, but at least two of them must act together. Power of representation covers interactions with third parties. The company is entitled to and is bound by legal transactions entered into in its name by the managing directors (§36). Although the power of management may be restricted such restrictions are of no effect concerning the external representation of the GmbH vis-à-vis third parties (§37). The CEO is/are the only person(s) entitled to represent the company in and out of court (§35).

The managing director(s) are responsible to manage the daily business of the GmbH. In conducting the company the managing director(s) shall apply the due care of a prudent businessman (§43). This includes that the managing directors are subject to a broad duty of secrecy in all company matters. Moreover, this has to be interpreted as a general duty of loyalty. This duty of loyalty includes a broad restraint of competition. During the term of office without any stipulation in the employment contract and for a limited time afterwards, but only if stipulated in the employment contract, the managing director is not allowed to competing with the company. The extent of the non competition rule is defined by the purpose/the objects of the company as set out in the articles of association. Without consent of the company a managing director is restraint from any competitive business including being manager, known or hidden partner or shareholder of a competitor, and even including the use of a business opportunity of the company.

That misuse of the power of representation is avoided a managing director, excluded by law (§181 BGB, German Civil Code), from concluding a contract between her/him and the company (e.g. sales contract of the CEO's company car for private use) unless she/he is expressly exempt from this legal restriction by virtue of publication in the company register.

Within the responsibilities of the Geschäftsführer lay inter alia the obligation:

- to arrange for necessary filings to be made with the commercial register,
- to convene the annual general meeting,
- upon demand to provide to each shareholder information concerning the company's affairs and to allow inspection of the accounts and records (§51a),
- to provide a list of shareholders updated after each change (§40),
- to report to the supervisory board if one exists,
- to ensure that the company maintains proper accounting records (§41),

- to draw up the annual accounts within three months of the end of the business year and to submit them to the commercial register/company register. The annual accounts must be in accordance with German GAAP and consist of a balance sheet, a profit, and loss statement, and in certain cases of an annex (§264 Commercial Code),
- to apply for insolvency proceedings according to §64 within a strict period of three weeks after gaining knowledge of one of the two reasons of insolvency, (1) in case that the company is unable to pay its debts (*Zahlungsunfähigkeit*) or (2) if the overindebtedness of the company is determined (*Überschuldung*),
- to obey the rules of the German Corporate Governance Codex if applicable<sup>18</sup>,
- not to distribute to the shareholders company assets required to preserve the share capital (no repayments to shareholders according to §30), and
- not to carry out general meeting’s instructions if they are unlawful.

## 5. Liability of the management

### 5.1. Polish law

The Polish Commercial Companies Code regulates civil liability and criminal liability. Civil liability is divided into liability to the company and liability to the creditors. Most of the code’s regulations are connected with the liability to the company which could be liability for damage or liability for the obligations. This liability could be joint and several liability with shareholders or with the company, or with other members of the management board and third persons outside of the company. Civil liability is divided into:

- a) liability to creditors,
- b) liability to the company,
- c) liability to shareholders<sup>19</sup>.

Ad a) Liability to creditors: Members of the management board bear responsibility (joint and several liability) together with company when:

1. Members of the management board have deliberately or through negligence given false information in a statement that the contributions towards the share capital were made by all shareholders in full or that contributions to

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<sup>18</sup> *Zöllner/Noack GmbH-Gesetz...*, op. cit. Vor §35 Rn. 13 and §43 Rn. 19.

<sup>19</sup> A. Kidyba: *Prawo handlowe*. Warszawa 2002.

- the increased share capital were made in full; they shall be liable to creditors of the company jointly and severally with the company for three years from the company registration date or initial capital increase registration date.
2. Execution against the company has proved ineffective, thus the members of the management board shall be liable jointly and severally for the obligations of the company. However, a member of the management board may extricate himself from this liability by showing that a petition for declaration of bankruptcy was filed or arrangement proceedings were instituted in due time, or that the failure to file a petition for declaration of bankruptcy or institute arrangement proceedings was not due to his fault, or that the creditor suffered no damage even though no petition for declaration of bankruptcy was filed or no arrangement proceedings instituted.
  3. In the case of a merger of companies according to Article 495 of the CCC the assets of each of the merged companies shall be managed separately by the acquiring company or the newly formed company until the date on which the creditors whose claims antedate the merger date, and who, prior to the end of six months of the date of the announcement of the merger, demanded the payment in writing, are satisfied or secured. In this case members of the governing bodies of the acquiring company or the newly formed company shall be jointly and severally liable for the separate management.

As a result, persons acting for a company which is being transformed shall be jointly and severally liable to the company, shareholders, and third parties for damage caused by acts or omissions in breach of the law or the articles or statutes of the company, unless they are not at fault (Article 568 §1 CCC).

Ad b) Liability to the company: Members of management board shall be liable for damages. According to Article 292 of the CCC, not only members of management, but whoever, while taking part in the creation of a company, has contrary to the provisions of law and through his own fault caused damage to the company, shall be liable to make good on the damages. The member of the management board shall be liable to the company for damages inflicted through an action or its omission contrary to the law or provisions of the company deed, unless he is at no fault. This member, likewise the liquidator, shall discharge his duties with a degree of diligence proper for the professional nature of his activities. They are also liable for any damages done during the transformation of companies if they were persons acting for the company, unless they are not at fault. In the dispute the company shall be represented by the supervisory board or an attorney in fact, appointed under a resolution of the general meeting. According to Article 298 of the CCC, the action for damages against members of the company, governing bodies and liquidators, shall be brought before the court

which has jurisdiction for the seat of the company. If the company does not bring an action for a redress of damages caused to it within one year of the date on which the act causing the damage is discovered, each shareholder may file a writ in an action for a redress of damage caused to the company (*action pro socio*). In this case members of the management board may not invoke the resolution made by the shareholders in which they were granted a vote of acceptance confirming the discharge of their duties, or a waiver by the company of its claim for damages. According to Article 297 of the CCC, a claim for relief shall be statute-barred after a period of limitation of three years from the day on which the company became aware of the damage and of the person liable to make good of the same. The aforesaid notwithstanding, the claim shall in any event be statute-barred after a period of limitation of ten years from the incidence of the injurious event. There are some criminal provisions in the Polish Code of Commercial Companies which regulate criminal liability. These provisions are connected with acts as to the detriment of a company, the announcement of false data among others.

Ad c) Liability to shareholders: The members of the management board, the supervisory board or the audit committee and the liquidators of the merging companies shall be jointly and severally liable to the shareholders of such companies for damage caused by acts or omissions in breach of the law, or the provisions of the articles of association or the statutes, unless they are not at fault.

## 5.2. German law

The topic liability within a GmbH covers the liability of the company and the liability of the corporate bodies and the shareholders to the company, but much more rarely the liability of the managing directors to thirds (mainly creditors). The GmbH itself is liable for all company debts. Secondly, the GmbH can be held liable for damages occurred during acts and omissions carried out by a managing director acting with intent or negligently (§31 BGB, German Civil Code). As an example may be mentioned that a managing director commits an act of unfair competition and unlawfully disparages the business reputation or the goods<sup>20</sup> and services of a competitor who as a result experiences a loss in sales.

Ad. a) Liability to the company: Any breach of a manager's duty results in the obligation to compensate the company for damages sustained (§43 s 2).

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<sup>20</sup> H. Buck: *New German Act against Unfair Competition*. [Australian] "Trade Practices Law Journal" 2006, 14, p. 244.

Therefore a Geschäftsführer is personally liable to the company. This liability becomes time-barred after a limitation period of 5 years (§43 s 4). The breach of the obligation to maintain secrecy is a criminal offence (§85) as well as the breach of the duty of bookkeeping.

If false statements are made to enable the company to be formed not only the shareholders, but as well the managing directors are jointly and severally liable to pay to the company any outstanding amounts and to indemnify the company for damages otherwise sustained during the formation procedure (§9a). The act provides again a limitation period of 5 years (§9b).

The managing director(s) can be held liable to the company for any repayment of the share capital which violates the capital maintenance rules (§43 s 3).

The managing director(s) can be held liable for any acquisition of own shares by the company beyond the limits according to §33<sup>21</sup>.

The violation of the strict duty to file an insolvency petition leads to the personal liability of the managing director(s) to the company (§64 s 2). If the bankruptcy trustee becomes aware of such a violation the managing director(s) payment for compensation will increase the assets of the insolvent GmbH with the result that the creditors will lose less money. The violation of this duty is a criminal offence by the CEO.

The liability of the managing director to the company in general is a liability jointly and severally. A prior allocation of duties between managing directors may result in the release of those managing directors who are not responsible for the violated duty from their liability. But it has to be pointed out that very often all Geschäftsführer are declared jointly and severally liable by law courts because the courts acknowledge the failure to supervise the co-managing directors.

The most important topic of the annual general meeting for the managing directors is the voting on personal discharge of the managing directors (Entlastung). This vote releases the managing directors from the company's claims which were apparent to the shareholders.

Ad. b) Liability of the managing directors to third parties: Personal liability of the Geschäftsführer to third parties does not occur very often. The managing directors are not liable to contractual parties for contractual obligations arising from their acting by proxy. Especially in SME the Geschäftsführer who is at the same time the main or an important shareholder deliberately declares his/her additional assumption of debt. This declaration makes him/her personally liable jointly and severally with the company. Banks usually require that the Gesellschafter-

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<sup>21</sup> C. Flaßhoff, K. Krömker: *Germany*. In: *European Corporate Law*. Eds. K. van Hulle, H. Gesell. Nomos, Baden-Baden 2006, p. 158.

-Geschäftsführer signs the loan contract by proxy for the GmbH and on his/her own behalf. Besides, personal liability to thirds might arise from the managing director's fault prior to conclusion of contract (§280, §311 BGB, German Civil Code) or from a tort (§823 BGB).

Personal liability of the managing directors to the tax authorities may arise from violating tax duties if the managing directors do not fulfil their duties with intent or negligently (§34 and §69 Abgabenordnung, German tax levy regulation).

Another reason of personal liability to social insurance institutions arises from non payment or late payment of payroll deductions. The violation of this duty is a criminal offence.

If the GmbH has to fulfil court orders (e.g. a cease-and-desist order, e.g. in unfair competition proceedings) and fails in doing so the Geschäftsführer himself faces arrest for contempt of court may be executed against him/her.

## Conclusion

The concepts of the limited liability company in Poland and in the Federal Republic of Germany are very similar. A major difference is that according to Polish law a supervisory board is necessary whereas in German law a supervisory board is optional. Nevertheless a Polish businessman acting as a Geschäftsführer of a German GmbH and vice versa a German businessman acting as member of the managing board of a Polish spółka z o.o should always be aware of the differences and of the specific duties to best avoid personal liability. As long as an EU-wide limited liability company is not introduced businesspeople acting in both a German and a Polish limited liability company, e.g. as acting as CEO of the producing company in the home country and as co-CEO of the distribution company in the other country should clearly envisage the legal differences.

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