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**RESIGNATION FROM THE SUPERVISORY BOARD'S MEMBERSHIP  
BY ONE OF ITS MEMBERS – LEGAL EFFECTS  
AND LEGAL INTEREST RELATED TO THE DETERMINATION  
OF SUCH A RESIGNATION'S INVALIDITY**

The article considers the issue of resignation from the Supervisory Board's membership. Additionally, the author attempts to determine here-in whether under Art. 189 of the Code of Civil Procedure (CCP),<sup>1</sup> a limited liability company (LLC) [*spółka z o.o.*] has a legal interest to determine the invalidity of the statement made by Supervisory Board's member on his membership resignation. According to the provisions of the Code of Commercial Companies (i.e. Art. 385), the Supervisory Board must be composed of at least three members or, in the case of public law companies, five members. The problem occurs when the above-mentioned entity is composed of a minimum number of members, and one of them makes a statement on his resignation from Supervisory Board's membership. Hence, the company's Supervisory Board is composed of merely two members from the moment such a statement has been made, i.e. it is unable to undertake actions.

**1. Legal effects of the statement on resignation from Limited Liability Company Supervisory Board's membership made by one of its members**

Pursuant to Art. 218(3) and in connection with Art. 202(5) of the Code of Commercial Companies (CCC), resignation from the limited liability

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<sup>1</sup> Art. 189 of the Act of 17 November 1964, Code of Civil Procedure (Journal of Laws of 1964 No. 43, item 296).

company's Supervisory Board's membership by its member is subject to the provisions on notice to terminate the mandate by the party accepting the mandate. Therefore, a Supervisory Board's member who intends to resign from his membership should make a relevant declaration of will within this scope. It should be addressed to the company's Management Board. This results from the principle of assumed competence, which is binding for the Management Board of a limited liability company.

Moreover, it should be noticed that according to the doctrine's postulates, members of the bodies, including Supervisory Board members, should submit their resignations in writing.<sup>2</sup> Pursuant to general rules resulting from Art. 61(1) of the Civil Code, this statement shall be deemed submitted when received effectively by the addressee, who can then become familiar with it. Concurrently, resignation is a unilateral action that does not have to be confirmed by a company, for example, in the form of a resolution on the resignation's rejection or acceptance.<sup>3</sup>

Furthermore, it should be emphasised that a Supervisory Board's member may submit his resignation at any time, and it is not restricted by any special requirements since a person submitting resignation exercises his rights ensuing from his membership in this body.<sup>4</sup> The essence of resignation is, most of all, associated with the freedom to make such a decision. A Supervisory Board's member is entitled to resign from his membership at all and any time, and his right should not be restricted as the result of a specific factual situation developing in a company.<sup>5</sup> Even in the event of the occurrence of relevant prerequisites against the resignation, the mandate expires<sup>6</sup> if the company received a declaration of will from, for example, the Management Board's member. In effect of a statement on resignation from Supervisory Board's membership, a legal relationship that has been formed as a result of the appointment thereto ceases to exist regardless of the company's opinion within this scope. It should only be checked whether a statement on resignation from Supervisory

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<sup>2</sup> A. Kidyba, *Komentarz aktualizowany do art. 1–300 Kodeksu spółek handlowych*, 2019 [LEX database], Commentary to Article 202.

<sup>3</sup> There: SN Judgement of 21 January 2010, II UK 157/09, LEX no. 583805.

<sup>4</sup> M. Dumkiewicz, *Kodeks spółek handlowych. Wybór orzecznictwa. Komentarz orzecznicy*, 2015 [LEX database], Commentary to Article 202.

<sup>5</sup> SN Judgement of 3 November 2010, V CSK 129/10, LEX no. 677783

<sup>6</sup> A. Kidyba, in: *Komentarz aktualizowany do art. 1–300...*, Commentary to Article 218.

Board's membership has been submitted properly. That is, if it is formally valid and effective.

A statement that has been formally properly submitted may be questioned under the regulation contained in Art. 58(2) of the Civil Code. Pursuant to its content, a legal act contrary to the principles of community life is invalid. The term of the principles of community life should be understood as a general clause evoking values that are commonly recognised and accepted in a given community which designate the principles of decent and honest conduct embracing both moral and social norms. With regard to professional legal transactions, the principles of community life should be understood as the principles of commercial honesty and reliability limited to the observance of good practices, honest trade, reliable conduct or loyalty and trust to the contract's partner.<sup>7</sup> Furthermore, it should be emphasised that the purpose of a legal action is contrary to the principles of community life if a legal action or obligation performed in result thereof violate a moral norm regardless of the fact that the content of a legal action is not contrary to this norm.<sup>8</sup> Nevertheless, we should pay attention to the fact that special circumstances must attest to the assessment of legal action's invalidity due to its contradiction of the principles of community life. According to the subject literature, applying the above-mentioned regulation may cause certain unpredictability of the legal system's operation. For this reason, the application of the general clause of the principles of community life is admissible solely in exceptional cases where it is strongly axiologically justified.<sup>9</sup> A questioned legal action must explicitly entail violation of the principles of community life, which makes one party to the relation decisively win and the other decisively lose.

Within this context, it should be noticed that a person resigning from membership in a company body does not have to provide any reasons for his decision when submitting a declaration of will.<sup>10</sup> Nevertheless, in practice, when resigning, Supervisory Board members usually give personal reasons and emphasise their importance, saying, for example, that they made such a decision due to other Supervisory Board's member acting to

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<sup>7</sup> A. Janas, in: *Kodeks cywilny. Komentarz*, vol. 1: *Część ogólna (art. 1–125)*, eds. M. Frasz, M. Habdas, 2018 [LEX database], Commentary to Article 58.

<sup>8</sup> P. Nazaruk, in: *Kodeks cywilny. Komentarz*, eds. J. Ciszewski, P. Nazaruk, 2019 [LEX database], Commentary to Article 58.

<sup>9</sup> A. Janas A., in: *Kodeks cywilny. Komentarz*...

<sup>10</sup> WSA Judgement in Łódź of 24 March 2009, I SA/Łd 1452/08, LEX no. 550368.

the detriment of the company. It goes without saying that such a situation is a significant cause of the inability to cooperate with other members of the body. Hence, according to the subject literature, an important cause of resignation may directly concern a member of the company body (an illness, a new place of residence, or a difficult life situation), or it may be connected with his situation in the company (e.g. failure to fulfil conditions guaranteed to the members of the body by the company, disagreement or misunderstandings within the body, and discrediting the body or a person resigning from the body by other persons in the company). Therefore, it cannot be treated as contrary to the principles of community life. However, I personally believe that forcing a person resigning from Supervisory Board's membership to work with other members when it is impossible to fulfil any obligations or cooperate would be contrary to the principles of community life.<sup>11</sup>

The management board is always the authority competent to receive on behalf of the company a declaration of intent to resign from the position on the supervisory board. It is a body generally authorised to conduct company affairs and represent the company. In this respect, the management board shall be supported by a presumption of competence of this body in matters not reserved for other bodies of the company. Thus, delivering a resignation to the management board in a manner enabling it to become acquainted with its contents is sufficient to recognise the legal effectiveness of the resignation. The body managing the matters and representing the company is the default body (recipient) through which the company obtains the opportunity to become acquainted with the content of resignation.

It must be stated with the utmost firmness that the differentiation of the effects of a submitted resignation from the function of a supervisory board member depending on the circumstances of its submission is unacceptable from the point of view of civil law and does not find any axiological basis.<sup>12</sup> A number of arguments support the position presented above.

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<sup>11</sup> A. Kidyba, *Komentarz aktualizowany do art. 1–300...*, Commentary to Article 212.

<sup>12</sup> E.g. A. Stokłosa, *Odbiorca oświadczenia woli o rezygnacji z funkcji członka rady nadzorczej spółki akcyjnej. Glosa do wyroku Sądu Najwyższego z dnia 24.05.2013 r. (V CSK 313/12)*, Glosa 2015, no. 1, p. 43 and P. Popardowski, *Organy spółek kapitałowych i ich członkowie w najnowszym orzecznictwie Sądu Najwyższego – przegląd orzecznictwa*, Glosa 2014, no. 1, p. 1213.

In the light of the general principle expressed in the provision of Article 61 § 1 of the Civil Code, it is neither necessary for the addressee to become familiar with the content of the declaration nor legally relevant when it is made. According to the above-mentioned provision, it is crucial that the content of the declaration of intent to be submitted to another person should reach him/her in such a way that he/she could get acquainted with it. Thus, the effectiveness of a declaration of resignation from the supervisory board is not determined by the moment when the addressee acquires knowledge of its contents. The requirement to acquaint oneself with it is more far-reaching than the requirement of service. Adopting a different position would lead to the imposition of restrictions on the resigning entity, which are not provided for by the legislator itself. In the context of the question posed, it should be pointed out that differentiation of the way in which the effectiveness of resignation from a function on the supervisory board is assessed, depending on whether this leads to a reduction in the composition of the supervisory board below the minimum threshold set out in the articles of association or in the law, would be an unlawful difference in the legal situation of individual members of the supervisory board. It would introduce a state of uncertainty on the part of a supervisory board member wishing to resign. In many situations, he or she would not be aware of whether, when submitting a declaration of resignation, he or she ceases to be a member of the supervisory body at the moment when the declaration of will reaches the addressee or at an unspecified moment. A resigning supervisory board member may not know if more or even all members of the board are resigning independently of each other, whether their resignation would lead to them going below the minimum composition of the board and thus when their statement would take effect. The provision of Article 61 § 1 of the Civil Code unambiguously resolves this issue, and an attempt to introduce any modifications in this respect would be contrary to the mandatory provisions of law.

Moreover, the fact that the relationship between a member of the supervisory board and the company is similar to the relationship of providing services should be stressed. In turn, Article 746 § 2, in conjunction with Article 750 of the Civil Code, provides for the right to terminate such a relationship at any time. The Commercial Companies Code does not indicate that the resignation of a member of the supervisory board requires a special acceptance, consent or another form of prior or retrospective recognition of its effectiveness. The provisions of the Commercial Companies

Code also do not introduce additional rules according to which the resigning member should have special regard to the company's interest or other circumstances. Therefore, there are no grounds to order a member of the supervisory board to refrain from resigning on the grounds of the company's interest, even if it is a special, legitimate, essential, legitimate interest, etc. Since the regulations do not explicitly restrict voluntary resignation by nature, no one can be forced to perform this function. The right to resign should also not be restricted by the formation of a specific factual situation in the company. Adopting a different position would lead to too much interference in the autonomy of the individual's will. Thus, each member of the supervisory board should have an equal right to resign, regardless of whether this leads to a reduction in the composition of the supervisory board below the minimum threshold specified in the articles of association or in the law or not. The effectiveness of a supervisory board member's statement should, therefore, be assessed in an identical manner, in accordance with the aforementioned principles provided for in the Civil Code.

To sum up, it should be pointed out that the resignation of a supervisory board member should be withdrawn by the management board (at least one multi-member board member). The company's proxy or attorney may also be entitled to receive it. The resignation itself does not become effective as soon as it is known to any corporate body. It is effective upon reaching the recipient, i.e. the body of the addressed company, in a manner enabling the recipient to get acquainted with it. Since then, the resignation is binding for the company. There are also no grounds for differentiating the effectiveness of a board member's resignation in relation to the circumstances of its submission resulting in a board decomposition. The Management Board is not competent to determine the moment of the effectiveness of the resignation. The effect is independent of the will or even knowledge of the management board or other body of the company, which results from Article 61 § 1 of the Civil Code. Therefore, it should definitely be pointed out that there are no normative, axiological or other grounds which would entitle to a different application of Article 61 § 1 of the Civil Code in relation to members of the Supervisory Board, depending on whether this leads to a reduction of the composition of the Supervisory Board below the minimum threshold specified in the articles of association or in the Act or not.

The question arises whether it is necessary to convene a meeting of shareholders in order to accept the resignation of a member of

the supervisory board. The Commercial Companies Code does not directly regulate the issue of the effectiveness of resignation from the function of a supervisory board member. Therefore, pursuant to Article 2 of the Commercial Companies Code in conjunction with Article 1 § 1 of the Commercial Companies Code, a supervisory board member must resign from his function. The provisions of the Civil Code should apply in this respect. The effectiveness of making declarations of will by legal entities is regulated in Article 61 § 1 of the Civil Code. According to its content, the declaration of will, which is to be made to another person, is made at the moment when it occurs in such a way as to enable him/her to become familiar with its content. Thus, resignation from the function of a member of the Supervisory Board takes place by submitting a declaration of intent and is effective pursuant to Articles 61 and 746 of the Civil Code in conjunction with Articles 218 § 3 and 202 § 4 of the Commercial Companies Code at the moment when it is communicated to the recipient, i.e. the company. The manner of operation of a legal person, i.e. a limited liability company, is defined in Article 38 of the Civil Code. It stipulates that a legal person acts through its bodies in the manner provided for in the Act and the statute based on it. In limited liability companies, the authority competent to receive the declaration of will of a member of the supervisory board will be the management board. This results from the principle of presumption of competence, which is assigned to the management board. Therefore, there can be no question of assigning competence in this respect to the shareholders' meeting or other members of the supervisory board. The validity of this thesis is confirmed, among others, by the judgment of the Supreme Court of 8 February 2018,<sup>13</sup> which additionally emphasises that the rules on the resignation of a member of the supervisory board resulting from Article 205 § 2 in connection with Article 202 (§ 3–5) in connection with Article 218 § 3) of the Code of Commercial Partnerships and Companies cannot change the provisions of the regulations of the supervisory board adopted by the shareholders' meeting.<sup>14</sup> Therefore, taking the position that the shareholders' meeting is the body to which a statement of intent

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<sup>13</sup> The judgment of the Supreme Court of 8 February 2018, II CSK 280/17, LEX no. 2468612.

<sup>14</sup> As well as P. Popardowski, *Komentarz do wyroku Sądu Najwyższego z dnia 8 lutego 2018 r., II CSK 280/17*, Glosa 2018, no. 3, pp. 5–7 and D. Wajda, *Glosa do wyroku Sądu Najwyższego z dnia 8 lutego 2018 r., II CSK 280/17*, Glosa 2019, no. 4, p. 49 et seq.

to resign a member of the supervisory board should reach is an unacceptable transfer of the presumption of competence to this body. In the case of the shareholders' meeting, the competences of this body are enumerated and cannot be presumed. Therefore, it should be assumed that the company which is the recipient of the declaration of intent is in such a case passively represented by the management board.

It should also be pointed out that the opposite view, according to which it would be necessary for the effective submission of a declaration of intent to resign from the supervisory board if the member of the supervisory board were to reach the shareholders' meeting, could lead to a situation where this meeting is not convened. The consequence of this state of affairs would be a significant extension of the resignation procedure, which in turn could be detrimental to the interests of the company itself. Excessive extension of the period during which a declaration of intent to resign from the function of a member of the supervisory board can reach the right addressee, however, makes it impossible to appoint a new person in its place, which is, after all, in the interests of the company. On the other hand, a person resigning from the board exercises his or her rights connected with the fact of being a member of a body. The essence of resignation is connected with the freedom to make such a decision.<sup>15</sup> It should be stated in the strongest possible terms that in order to accept the resignation of a member of the supervisory board, it is not necessary to convene a shareholders' meeting.

However, in the case of joint-stock companies, by virtue of the reference contained in Article 386 § 2 of the Commercial Companies Code. The entire Article 369 of the Polish Commercial Companies Code, and thus also the newly added § 5<sup>1</sup> and 5<sup>2</sup> of that provision, applies accordingly to determine the rules for the resignation of a member of the supervisory board (Article 369 of the Polish Commercial Companies Code was amended by the Act of 9 November 2018 amending certain acts in order to introduce simplifications for entrepreneurs in tax and business law.<sup>16</sup> The principle is that the company should be passively represented by the management board in the process of resignation by a member of

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<sup>15</sup> See: A. Kidyba, *Komentarz aktualizowany do Kodeksu spółek handlowych, Articles 1–300*, 2020 [LEX database], Commentary to Article 218, item 2 of the Code of Commercial Companies. 3.

<sup>16</sup> Journal of Laws of 2018, item 2244.

the supervisory board unless no mandate in the management board would be filled. In such a case, by virtue of the appropriate application of Art. 369 § 5<sup>2</sup> in conjunction with Art. 386 § 2 of the Polish Commercial Companies Code, it should be assumed that a resignation is submitted to the shareholders while summoning the general meeting referred to in Art. 397<sup>1</sup> of the Polish Commercial Companies Code, unless the company's articles of association provide otherwise. Thus, in exceptional situations specified in the provisions of law, the power of passive representation, related to accepting the resignation of a supervisory board member, is assigned to the general meeting of shareholders.

As a rule, the rules and consequences of the resignation of supervisory board members and management board members are the same in a limited liability company. There are no normative grounds for adopting separate general rules for the resignation of management board members and supervisory board members. This applies first and foremost to the recipient of this declaration of intent on behalf of the company. It should be stated that the addressee of the statement, and thus the recipient of the resignation from the function both in the supervisory board and the management board itself, should be the company's management board (at least one member of a multi-person board). In general, this principle remains unchanged regardless of the circumstances of resignation. Secondly, it must also be assumed that pursuant to Articles 61 and 746 of the Civil Code in conjunction with Articles 218 § 3 and 202 § 4 of the Commercial Companies Code, the submission of a declaration of will to resign both in the case of members of the management board and the supervisory board becomes effective at the moment when the addressee is able to become acquainted with its content.

Differences between the principles and effects of the resignation of members of the supervisory board and members of the management board can only be found in the scope of principles and effects of the resignation of the last member of the management board. Pursuant to Art. 202§6 of the Polish Commercial Companies Code, if as a result of the resignation of a member of the management board no seat on the management board would be filled, the member of the management board resigns to the shareholders and convenes the shareholders' meeting, unless the articles of association provide otherwise. In such a case, the resignation shall take effect on the day following the day on which the shareholders' meeting is convened. Due to the fact that pursuant to Article 218 § 3 of

the Code of Commercial Partnerships and Companies, only Article 202 § 3–5 of the Polish Commercial Companies Code applies to the resignation of members of the supervisory board, the rules of the resignation of the last member of the management board indicated above will not apply to the last member of the supervisory board. Thus, the last supervisory board member, like any other board member, has full freedom to submit a declaration of resignation. Such resignation should be addressed to the members of the management board and shall become effective at the moment when at least one member of the management board has been reached in such a manner that he or she is able to become acquainted with its contents.

## **2. The issue of a legal interest in the determination of invalidity of the statement on resignation from Limited Liability Company Supervisory Board's membership made by one of its members**

Undeniably, it is not in the company's interest to have a supervisory body of an incomplete composition. Hence, the question arises whether it is rightful to bring a lawsuit against the company and Supervisory Board's member who submitted the resignation to request a determination of his resignation's invalidity as being contrary to the principles of community life in the light of Art. 58(2) of the Civil Code.

Pursuant to Art. 189 of the Code of Civil Procedure, a claimant (plaintiff) may request the court to determine the existence or non-existence of a legal relation or right if he has a legal interest thereto. The purpose of the proceedings may be both positive and negative determination.<sup>17</sup> What is more, a legal action to establish the existence of a legal relation or right is possible not only when a legal interest results from a direct threat to the claimant's right but also when it is aimed at the prevention thereof. A legal relation is understood as the conduct or competence of an authorised entity that another entity's specific obligations are subordinated to.<sup>18</sup> On the other hand, a legal interest occurs when the consequence of a final

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<sup>17</sup> M. Jędrzejewska, K. Weitz, in: *Kodeks postępowania cywilnego. Komentarz*, vol. 2: *Postępowanie rozpoznawcze*, ed. T. Ereciński, 2016 [LEX database], Commentary to Article 189.

<sup>18</sup> SN resolution of 30 December 1968, III CZP 103/68, OSNCP 1969, no. 5, position 85.

and binding ruling on the above-mentioned determination itself would guarantee the protection of the claimant's legally protected interests, i.e. if it definitely ends an existing dispute or prevents the occurrence of such a dispute in the future.<sup>19</sup> I hereby emphasise that the existence of a legal interest is assumed whenever a legal status is uncertain. Furthermore, a conditioned possibility to sue depending on the determination of a legal interest should be understood flexibly, including purposefulness of its interpretation, concrete (specific) circumstances of a given case, widely understood access to courts, and consideration of whether a party may obtain full protection in another lawsuit (a claim for redress).<sup>20</sup>

It is essential for a legal interest to exist objectively. It must justify the demand to determine a right or legal relation. It means that there must be a real, not only hypothetical (i.e. subjective from the party's point of view) legal need to obtain a ruling of appropriate content. It occurs in the event of a real violation or threat of violation of a specific legal sphere.<sup>21</sup> While assessing a legal interest, it is also crucial to acknowledge that the determination of a legal relation or right aimed at the elimination of uncertainty about the specific legal relation or right is justified.

A content-related prerequisite of a legal interest may be examined by the court only after the prior determination of the admissibility of civil proceedings.<sup>22</sup> A lack thereof may only be acknowledged during a content-related examination of the case. Nevertheless, a claimant seeking legal protection under Art. 189 of the Code of Civil Procedure is absolutely burdened with the obligation to specify facts justifying a legal interest mentioned in the relevant provision (Art. 6 of the Civil Code).<sup>23</sup>

A partner (company member) has a legal interest in the operation of a supervisory body, which is entrusted with the task of attending to the partners' interests. Such an interest exists in particular when, due to the personnel composition that does not meet a statutory request as to its minimum number, this body is not entitled to undertake supervisory acts.

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<sup>19</sup> SA Judgement in Poznań of 5 April 2007, III Aua 1518/05, LEX no. 257445.

<sup>20</sup> M. Jędrzejewska, K. Weitz, in: *Kodeks postępowania cywilnego...*

<sup>21</sup> SA Judgement in Białystok of 7 February 2014, I ACa 408/13, LEX no. 1437870.

<sup>22</sup> P. Telenga, in: *Kodeks postępowania cywilnego. Komentarz aktualizowany*, vol. 1: *Art. 1–729*, ed. A. Jakubecki, 2019 [LEX database], Commentary to Article 189.

<sup>23</sup> O.M. Piaskowska, in: *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz do niektórych przepisów*, ed. O.M. Piaskowska, 2019 [LEX database], Commentary to Article 189.

Moreover, a partner's legal interest could result from the company's articles of association if they exclude the individual right of control in relation to other partners. He cannot undertake any supervisory acts himself as a partner.

Nevertheless, it should be noticed that a legal interest to be acknowledged in the proceedings on the determination of the existence or non-existence of a legal relation or right must be consistent with the law and principles of community life as well as the purpose thereof set forth in Art. 189 of the Code of Civil Procedure. According to the doctrine and relevant case law, the legal protection of interests shall not be granted if the outcome of the established legal relation was to contradict decent practices<sup>24</sup>. For instance, we deal with such a situation when suing the company and Supervisory Board's member resigning from it, a partner endeavours to force him to work with other Supervisory Board members when it is impossible to fulfil any obligations or cooperate. It refers to situations when the cause for making a statement on resignation from Supervisory Board's membership is an important personal reason, i.e. due to other two Supervisory Board's members acting to the detriment of the company. It is absolutely undeniable that such a situation is a significant cause of the inability to cooperate with other members of the body. A purpose of actions undertaken by a person resigning from Supervisory Board's membership was to free himself from the situation when it could be impossible to fulfil his duties therein with due care and diligence. Hence, despite a potential existence of a legal interest in the acknowledgement of invalidity of the statement made by a resigning Supervisory Board's member, determination of the existence or non-existence of a legal relation within this scope would contradict decent practices. We must not forget that there are no obstacles for the company's competent body, i.e. shareholders meeting, to appoint another member of the Supervisory Board so that it may operate in a personnel composition required by the law.

In the doctrine of law, it is generally accepted uniformly that a legal interest is a substantive (otherwise substantive, material) premise for an action to determine the existence or non-existence of a legal relationship or law. Consequently, the premise of a legal interest is located not in the sphere of admissibility of substantive examination and resolution of

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<sup>24</sup> T. Żyznowski, in: *Kodeks postępowania cywilnego. Komentarz*, vol. 1: *Artykuły 1-366*, ed. H. Dolecki, T. Wiśniewski, 2013 [LEX database], Commentary to Article 189.

the case but in the sphere of substantive assessment of the claim.<sup>25</sup> This premise is seen either as a condition for the effectiveness or legitimacy of an action for determination. It determines the admissibility of the court's assessment of whether or not there is a legal relationship or law in a given case consistent with the claim for determination. If the court finds that the claimant has no legal interest in the requested determination of the existence or non-existence of a legal relationship or law, it shall dismiss the action. The position regarding the material and legal nature of the legal interest as a prerequisite for an action for determination is also widely accepted in the judicature, especially in the jurisprudence of the Supreme Court.<sup>26</sup> At this point, it should also be pointed out that recognition of a legal interest as a substantive premise of an action for determination results in an obligation on the part of the court to examine *ex officio* whether it exists in a given case, both at the stage of proceedings at first instance and at the appellate court.<sup>27</sup>

The legal doctrine indicates that the "substantive" nature of the legal interest as a prerequisite for an action for determination is justified, *inter alia*, by the fact that it determines the admissibility of examining the existence or non-existence of a legal relationship or right covered by the claim, and thus determines the possibility of considering the claim. The above also stems from the fact that the legal interest is one of the circumstances which, according to substantive law, constitute substantive legal conditions for seeking legal protection through the courts.<sup>28</sup>

To sum up, it should be pointed out that the view on the location of the legal interest as a prerequisite for an action for determining the merits of the claim is, in fact, well established. Therefore, it should be assumed that this is by no means a prerequisite of a procedural nature, which determines the admissibility of substantive examination and resolution of

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<sup>25</sup> K. Weitz, *Charakter interesu prawnego jako przesłanki powództwa o ustalenie (art. 189 k.p.c.)*, Przegląd Sądowy 2018, no. 7-8, p. 16.

<sup>26</sup> Such as the decision of the Supreme Court of 18 November 1992, ref. III CZP 131/92, LEX no. 37447; Judgment of the Supreme Court of 6 June 1997, ref. II CKN 201/97, LEX no. 31356; Judgment of the Supreme Court of 21 June 2007, ref. IV CSK 63/07, LEX no. 485880; Judgment of the Supreme Court of 18 April 2012, ref. V CSK 149/11, LEX no. 1250574.

<sup>27</sup> See Judgment of the Court of Appeal in Warsaw of 3 April 2020, ref. I ACa 622/18, LEX no. 3044775.

<sup>28</sup> K. Weitz, *Charakter interesu prawnego...*, p. 19.

the case, but a prerequisite of a material nature, which determines the substantive assessment of the merits of the claim. Lack of legal interest in bringing an action for determination under Article 189 of the Code of Civil Procedure should, however, result in the dismissal of the action by the court and not in its rejection.

Additionally, it should be emphasised that the very existence of a legal interest itself cannot be treated as a sole prerequisite deciding about consideration of proceedings on the determination. It is merely a condition allowing further examination to the extent of the existence or non-existence of a specified legal relation or right. Pursuant to Art. 189 of the Code of Civil Procedure, a lawsuit shall be admitted if two fundamental prerequisites are satisfied, i.e. the existence of a legal interest in the request to provide legal protection by the issue of a ruling determining the existence or non-existence of a given legal relation or right (depending on the type of a request to provide legal protection).<sup>29</sup> However, both prerequisites must be satisfied concurrently. All circumstances accompanying the submission of a statement on resignation from Supervisory Board's membership must always be verified, the ensuing arguments considered, and all formal requirements checked. In other words, we must be absolutely certain that the statement made by Supervisory Board's member is not contradictory to the principles of community life and, consequently, it is not burdened with invalidity under Art. 58(2) of the Civil Code.

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## Summary

According to the provisions of the Code of Commercial Companies (i.e. Art. 385), Supervisory Board must be composed of at least three members and, with regard to public law companies, five members. The problem occurs when the above-mentioned entity is composed of a minimum number of members and one of them makes a statement on his resignation from Supervisory Board's membership. Hence, the company's Supervisory Board is composed of merely two members from the moment such a statement has been made, i.e. it is unable to undertake actions. The article considers the issue of resignation from Supervisory Board's membership. Additionally, the author attempts to determine herein whether under Art. 189 of the Code of Civil Procedure (CCP), a limited liability company (LLC) [*spółka z o.o.*] has a legal interest to determine invalidity of the statement made by Supervisory Board's member on his membership resignation. I also

analyse legal effects of the statement on resignation from Limited Liability Company Supervisory Board's membership made by one of its members.

**Key words:** Membership, supervisory Board, resignation from LLC Company Supervisory Board's

## REZYGNACJA Z CZŁONKOSTWA W RADZIE NADZORCZEJ - SKUTKI PRAWNE I KWESTIA INTERESU PRAWNEGO ZWIĄZANEGO Z USTALENIEM NIEWAŻNOŚCI TAKICH REZYGNACJI

### Streszczenie

Przepisy kodeksu spółek handlowych (art. 385 K.s.h.) określają minimalną liczbę członków rady nadzorczej – co najmniej trzech, a w spółkach publicznych co najmniej pięciu członków. Problem powstaje, gdy przy minimalnej liczbie członków tego organu jeden z nich złoży oświadczenie o rezygnacji z członkostwa w radzie nadzorczej spółki. Tym samym rada nadzorcza spółki od momentu złożenia takiego oświadczenia składa się zaledwie z dwóch członków, tj. poniżej wymaganego minimum składu osobowego, co skutkuje niemożnością podejmowania przez nią działań. Przedmiotem artykułu są rozważania dotyczące rezygnacji członka rady nadzorczej z pełnienia w niej funkcji oraz określenia, czy spółka z o.o. posiada –na podstawie art. 189 K.p.c. – interes prawny w ustaleniu nieważności oświadczenia członka rady nadzorczej o rezygnacji z członkostwa w tej radzie. Dodatkowo analizowane są skutki prawne złożenia oświadczenia o rezygnacji z pełnienia funkcji w radzie nadzorczej spółki z ograniczoną odpowiedzialnością przez jednego z jej członków.

**Słowa kluczowe:** członkostwo, rada nadzorcza, rezygnacja z członkostwa w radzie nadzorczej spółki z o.o.

## ОТКАЗ ОТ ЧЛЕНСТВА В НАБЛЮДАТЕЛЬНОМ СОВЕТЕ - ПРАВОВЫЕ ПОСЛЕДСТВИЯ И ВОПРОС О ЗАКОННОМ ИНТЕРЕСЕ, СВЯЗАННЫЙ С УСТАНОВЛЕНИЕМ НЕДЕЙСТВИТЕЛЬНОСТИ ОТКАЗОВ

### Резюме

Положениями Кодекса хозяйственных товариществ и обществ (статья 385 Кодекса) указано минимальное количество членов наблюдательного совета - не менее трех, а в публичных компаниях не менее пяти. Проблема возникает, когда при минимальном количестве членов этого органа - один из

них подает заявление об отказе от членства в наблюдательном совете компании. Таким образом, наблюдательный совет компании с момента подачи такого заявления состоит всего из двух членов, то есть меньше необходимого минимального количества личного состава, что приводит к невозможности действовать. Предметом статьи являются соображения об отказе члена наблюдательного совета от занимаемой им должности и определения того, имеет ли общество с ограниченной ответственностью - в соответствии со ст. 189 Гражданского процессуального кодекса - законный интерес в установлении недействительности заявления члена наблюдательного совета об отказе от членства в этом совете. Дополнительно анализируются правовые последствия заявления об отказе от должности в наблюдательном совете общества с ограниченной ответственностью одним из его членов.

**Ключевые слова:** членство, наблюдательный совет, выход из состава наблюдательного совета общества с ограниченной ответственностью

