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What are your duties as a director of a joint stock company?

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Introduction
General duties of directors and liability regime
Other duties

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Introduction

Boards of directors are the administrative and representative bodies of joint stock companies. The general assembly of shareholders of a joint stock company appoints the directors that receive the most votes in a shareholders' meeting for a maximum of three years. Both real persons and legal entities can be elected as directors. If a legal entity is elected as a director, it must appoint a real person representative. Boards must have at least one director.

Boards have the authority to resolve all matters and take necessary actions relating to joint stock companies, except on matters reserved by law for the general assembly of shareholders or the articles of association (eg, capital increases, balance sheet approval and the release of directors from liability). They are also authorised to represent and bind joint stock companies in the widest manner pursuant to Article 365 of the Commercial Code. The power of boards can be increased by the articles of association (eg, the authority to increase capital, issue premiums and privileged shares or distribute advance dividends).

The primary duties and powers of boards as set out in the Commercial Code are:

- representing and binding joint stock companies;
- conducting activities within the scope of the company's articles of association;
- calling the general assembly of shareholders for ordinary or extraordinary meetings;
- preparing the agenda for the general assembly of shareholders;
- preparing annual reports, profit loss accounts and proposals for the distribution of dividends;
- implementing general assembly of shareholders' resolutions;
- registering relevant matters with the trade registry; and
- maintaining the company's corporate ledgers.

Boards can transfer and delegate some of their duties and power; however, a number of duties and powers are non-transferable, as set out in Article 375 of Commercial Code, including:

- overseeing the company's top-level management and providing instructions in this regard;
- determining the company's management structure;
- establishing a financial planning, accounting and auditing system as required;
- appointing and dismissing managers and authorised signatories;
- conducting high-level supervision of management to ensure that it acts in accordance with the law, articles of association, internal regulations and written instructions of the board of directors;
- maintaining share books, board resolution books, general assembly-related documents and the discussion register;
- preparing the annual report and corporate governance disclosure and submitting it to the general assembly of shareholders;
- organising the general assembly of shareholders and enforcing its resolutions; and
- notifying the courts in the case of the company's excess of liabilities over assets.

General duties of directors and liability regime

In general, directors are believed to benefit from the business judgement rule under the Commercial Code, unlike under the previous regime. Thus, directors act as prudent managers. The level of diligence and responsibility expected from directors who act as prudent managers is based on their qualifications and level of ability and knowledge.

Directors are liable to companies as well as their shareholders and creditors for damages incurred in proportion to their failure to take action to prevent said damages.

In case of the delegation of duties and power among company directors and managers, directors cannot be held liable for damages incurred by a company due to a breach of such duties by other directors or managers, unless the former failed to fulfil their general duty of care and due diligence in the designation of power.

Directors must also take an active role and participate in matters concerning the management of joint stock companies. If a director disagrees with the rest of the board on a matter, they can record their view in the board's resolution. If liability arises from such resolution, the director will be free from liability.

Directors also have a duty of loyalty to joint stock companies, which requires them to prioritise the company's interests over their own. A breach of this duty will leave a director liable for damages.

Further, directors must treat all similar shareholders equally. This duty aims to prevent the discretionary and subjective treatment of shareholders (eg, inviting all shareholders to general assembly meetings and distributing dividends evenly). A breach of this duty may leave a director liable for damages and result in the annulment of any relevant board decisions.

Other duties

Other directors' duties include the following:

- Directors cannot execute commercial contracts with their company without the consent of the general assembly or authorisation in the articles of association. Such action may be deemed null and void and the directors could be liable for a breach of this restriction.
- Directors cannot compete with their joint stock company, including by entering into commercial transactions that fall within the scope of the company's activities. However, exemptions may be granted in a general assembly decision. In case of a breach of this restriction, directors may be liable for damages and all profits from the relevant transaction may be attributed to the company.
- Directors must abstain from board meetings in the event of a conflict of interest. A conflict of interest will be deemed to exist where discussions concern the relevant director or their relatives up to the third degree of kinship. A breach of this duty may result in the director being liable for damages.
- Directors must take measures in the event of loss of significant capital. Pursuant to Article 376 of the Commercial Code, in the event of the loss of more than two-thirds of a joint stock company's equity capital, the board must call a general assembly meeting to decide whether to compensate the loss through an equity injection, reduce capital or make no decision, which would effectively mean liquidating the company. In addition, the board must draft an interim balance sheet where there are signs that the company faces a significant loss of capital. If it is concluded that the company's assets are insufficient to cover its debts, the board will notify the relevant commercial court and apply for bankruptcy (unless the company's creditors, the receivables of which add up to an amount that could eliminate the distressed situation, have agreed in writing that their receivables can be paid after settlement of other debts and the applicability and validity of such an arrangement have been confirmed by the relevant court-appointed experts).
- Directors must ensure share capital is properly recorded. Where a company's records indicate that shareholders have fulfilled their share capital subscriptions but no payment, or insufficient payment, has been made, the directors will be liable for the unpaid amount, together with damages and interest. A breach of this duty may lead to imprisonment and monetary fines.
- Directors must ensure the accuracy, truth and completeness of documents, prospectuses, covenants, declarations and warranties regarding a company's incorporation, capital increases or reductions, mergers, divisions, spin-offs or structural changes.
- Directors must refrain from misrepresenting the value of capital in kind put into entities or assets merged into the company.
- Directors must report transactions between the company and its group companies or controlling shareholders.
- Joint stock companies must pay social security premiums to employees. Pursuant to the Social Security and General Health Insurance Law 5510, where a joint stock company fails to fulfil such an obligation fully and timely with no justification, its senior managers, officers and legal representatives (including directors) will be jointly and severally liable to the Social Security Institution (along with the company) for any unpaid or delayed premiums (together

with the accrued default interest and fine).

- Under the Tax Procedure Law 213, legal representatives will be personally liable for a joint stock company's tax liabilities on strict liability grounds regardless of whether they are at fault or negligent. The company will primarily be subject to the legal consequences that apply to a failure to perform tax liabilities. Further, the company's legal representatives may be held liable secondarily and on a joint and several basis if:
  - the tax authorities initiate collection proceedings against the company for a tax payment obligation due to its failure to meet its tax liabilities in a timely and proper manner;
  - as a result of such collection proceedings, the relevant tax authority fails to collect overdue taxes due to insufficient assets or believes that it is unlikely to collect the overdue taxes owing to the company's financial state; or
  - the company's tax obligation arises due to the failure of its legal representative to perform their duties with respect to the payment of taxes.

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