Duties & Responsibilities of Directors

September 2012
With increased consolidation of business across Europe, executives of multinational groups can find that they are required to become directors of companies in a variety of jurisdictions, often at short notice.

The rules relating to directorships vary considerably from jurisdiction to jurisdiction. This guide is intended to provide an overview of the duties and responsibilities of directors across 23 countries in Europe, answering the most frequently asked questions for directors coming from another jurisdiction.

In many jurisdictions, there are various forms of company available, and there are different rules for directors according to the type of company used. This guide focuses for each jurisdiction on the most common form of company, and on the rules which apply to executive/managing directors.

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For further information on rules for directors of private companies in Europe, contact any of the people listed in the section ‘Contacts’ from page 132, or your usual contact at CMS.
For each of the jurisdictions we cover the following key question areas: eligibility requirements, method of appointment, method of removal, authority and representation, working rules of the board, contractual relationship with the company, conflicts of interest, duties of a director, liability, limitation of liability, immigration issues, taxation and social security.
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Austria

This guide focuses on the rules relating to private limited companies (‘Gesellschaft mit beschränkter Haftung’, ‘GmbH’). It does not address the rules for other forms of entities, such as the public limited company (‘Aktiengesellschaft’, or ‘AG’). However, rules for private and public limited companies are similar in many cases.

Austrian private limited companies generally have a management board (‘Geschäftsführung’). All directors of the management board are managing directors. An additional supervisory board (‘Aufsichtsrat’) is mandatory if:

- the stated share capital exceeds EUR 70,000 and the number of shareholders exceeds 50;
- the number of employees of the company exceeds 300;
- the company centrally manages or, by means of a direct interest exceeding 50%, controls private or public limited companies, and the total combined number of employees of the controlling and of the controlled companies exceeds 300;
- the company is a general partner (‘Komplementär’) of a private limited liability partnership (‘Kommanditgesellschaft’) and the total combined number of employees of the company and the private limited liability partnership exceeds 300; or
- employee representatives have the statutory right to nominate members of the supervisory board pursuant to Part VIII of the Austrian Labor Relations Act (‘Arbeitsverfassungsgesetz’) as a result of a cross-border merger.

The articles of association may provide for an optional supervisory board. The supervisory board has a controlling function, and thus its directors are non-executive.

Eligibility requirements

There are few restrictions on who can become a director. In particular, a director is not required to be resident in Austria, and there is no nationality requirement. Only a physical person with full legal capacity can be appointed as a director. A legal entity or a partnership may not be appointed. Special provisions apply to directors who are shareholders. A company may have one or more managing directors. Usually the articles of association determines the number of managing directors.

The company must effectively be managed from within Austria. Otherwise it might be regarded as liquidated and taxed on built-in gains. A supervisory board must consist of at least three directors. Additional members may be appointed unless the number of members is restricted by the articles. Usually the number of directors of the supervisory board is determined by the articles.

Members of the supervisory board may not simultaneously be managing directors, permanent substitutes for managing directors, or employees of the company. Also, an individual must not be a member of the supervisory board of more than ten (in certain cases 20; the role as chairman of a supervisory board accounts for two supervisory board positions) private or public limited companies and he must not be a managing director of a subsidiary of the company. If the employees have established a works council (which requires a minimum number of five employees), the works council may nominate one additional member to the supervisory board for every two members of the supervisory board elected by the shareholders.

Method of appointment

Managing directors are appointed by shareholder resolution. Managing directors may also be appointed by a provision in the articles of association, if, and as long as, they are shareholders. The period of appointment is not limited unless the articles provide otherwise.

Notification of the appointment, signed by the managing director(s), together with certified evidence of the
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The directors of the supervisory board are appointed by shareholder resolution. The period of appointment must not exceed five years. Notification of the appointment, signed by the managing director(s), must be filed with the Commercial Register. Again, a small fee is payable.

Method of removal

A director may be removed at any time by a resolution of the shareholders. A director may resign at any time by giving notice to the company. However, such a resignation may constitute a breach of duty or a breach of contract. The resignation has immediate effect in cases where there are substantial grounds for it to do so, otherwise it is effective after 14 days following notification of the general assembly or of each shareholder. Even if only one managing director was appointed, resignation is still possible. A director has certain obligations to clarify to the company any business activities carried out by him in the course of his term and during the five years following his removal or his resignation. If directors are appointed for a fixed term, or are subject to ‘rotation’, their appointment will terminate if they are not re-appointed.

Notification of the removal or resignation of a director, signed by the new or remaining managing director(s), must be filed with the Commercial Register. A small fee is payable.

Authority and representation

The managing directors can only represent the company together. The articles of association may provide for a different form of representation and usually provide that one or two managing directors or, if there is more than one managing director, one managing director together with a ‘Prokurist’ (agent with limited power to represent) may represent the company.

The actions of managing directors properly representing the company – i.e. exercising such powers as are conferred by law or by the articles – are valid and binding regardless of whether prior approval by the shareholders or by the supervisory board is required or not.

A managing director has full authority to manage the company. However, such authority may (only internally) be restricted by the articles or by shareholder resolution. In many cases the articles will provide that certain key managing acts will be subject to prior approval by the shareholders or by the supervisory board. With few exceptions, a breach of such restrictions of his/her authority to represent the company by a managing director does not invalidate the director’s actions vis-à-vis third parties.

Working rules of the board

All directors have the same rights and duties and are jointly obliged to manage the company. However, and notwithstanding each director’s overall responsibility, certain management roles may be allocated to specific persons by the articles, by shareholder resolution, by resolution of the supervisory board, by internal guidelines for directors and/or by the management board itself.

The shareholders may give binding instructions to the directors on any managing acts unless otherwise provided by the articles or unless there is a supervisory board.

Contractual relationship with the company

Appointment by a shareholder resolution as a director does not of itself constitute a contract with the company, or entitle a director to remuneration. A company’s articles will generally only entitle members of the supervisory board to reimbursement of expenses. Supervisory board directors’ fees commensurate with their duties may be payable to the extent specified in the articles of association or approved by a resolution of shareholders.

A managing director may also have a contractual relationship with the company, for example as an employee under a service agreement or as an independent contractor providing services under a consultancy agreement. Termination of any such contract will not automatically terminate the directorship. Termination of the directorship will not automatically terminate, but may constitute a breach of, the related contract.

Conflicts of interest

In the case of a conflict of interest, a director must refrain from any action that might be detrimental for the company.

A managing director cannot represent the company in dealings with himself or herself, or with a third party represented by himself or herself unless the company consents by shareholder or supervisory board resolution or unless the company’s interests are not negatively affected. A managing director being the sole shareholder of the company may represent the company in dealings with
liable to creditors. Moreover, wilful or negligent injury to creditors’ interests or failure to file for insolvency proceedings on time may constitute a criminal offence.

In cases of wilful or negligent default on payment of taxes or social security contributions, a managing director may be personally liable to the tax authorities for amounts outstanding, or may even commit a criminal offence. A managing director may also be criminally liable in cases of wilfully incorrect statements, including financial statements, statements to shareholders or the supervisory board or filings with the Commercial Register.

Limitation of liability

A director’s liability to the company cannot be limited by agreement. However, it is common practice to pass a resolution on the approval of the director’s acts (‘Entlastung’) after the close of each business year, thus waiving any recognisable claims of the company.

A director’s liability to the company is excluded, if the shareholders give their consent by a shareholder resolution. A private limited company may purchase directors’ liability insurance in favour of its directors.

Immigration issues

Foreign directors generally require:

— a residence permit for Austria; and
— a labour permit.

EU, European Economic Area and Swiss nationals are exempt from these requirements with a temporary counter-exception regarding a labour permit for nationals of two ‘new’ EU member states (Romania and Bulgaria until 31 December 2013). Nevertheless, if EU, European Economic Area and Swiss nationals reside in Austria for a period longer than three months, they must register with the competent authority in order to obtain a registration card (Aufenthaltsbescheinigung). After five years of uninterrupted residence they are entitled to apply for a permanent registration card (Daueraufenthaltskarte), which is valid for ten years.

In all other cases a residence permit and a labour permit are required. There are different types of residence permits. The permits for highly qualified persons (e.g. Rot-Weiß-Rot-Karte, Blaue Karte EU) include the labour permit. They are not subject to quotas, but are rather issued in consideration of the applicant’s qualifications. Other permits, on the other hand, do not directly entitle the
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Social security

If a director qualifies as an employee, pension contributions, health insurance, casualty insurance and unemployment insurance are mandatory. Social security contributions amount to 39.90% of gross salary (21.83% employer contribution and 18.07% employee contribution). The basis is currently capped at EUR 4,230 per month.

If a director qualifies as an independent contractor (this will generally be the case if his or her share exceeds 25%), pension contributions, health insurance, provision for self-employed persons and casualty insurance are mandatory. Social security contributions amount to 26.68% of gross fees (7.65% health insurance, 1.53% provision for self-employed persons and 17.5% pension contribution) and monthly payments of EUR 8.25 casualty insurance (plus a flat amount of approx. EUR 85). The basis again is currently capped at EUR 4,935 per month.

Individuals contributing to the above schemes are entitled to payments in cash or in kind in cases of retirement, sickness, disability, casualty, in case of an employed individual unemployment and so on, subject to specific pre-conditions under each scheme (for example minimum contribution periods).

Taxation

If an individual is resident in Austria, his or her worldwide income is subject to Austrian income tax. If an individual is not resident in Austria, only certain sources of income, including income from employment in Austria or consultancy services provided in Austria, are subject to Austrian income tax. Numerous double taxation treaties limit Austria’s or the foreign country’s right to tax, in particular, if the director performs his services partly or totally outside of Austria, his income may be exempt from income tax in Austria.

Income is generally taxed at a progressive rate, with brackets reaching from 0% to 50% for income exceeding EUR 60,000 per year. The average tax rate is approximately 44%. Tax treatment of service fees depends on whether the director is qualified as an employee or as an independent contractor (this will generally be the case if his or her share exceeds 25%). The tax rate is generally the same, except in the case where the director qualifies as employee

— one sixth of employees’ fees is taxed at a flat rate of 6%; and
— the income tax is levied by way of withholding i.e. the employer has to retain the income tax on the remuneration and forward on behalf of the employee to the competent tax authority.

holder to access the job market, but require an additional labour permit, which is issued subject to availability of quotas. The first-time labour permit is restricted to a certain employment relationship and is granted for a period of one year. Subsequent permits are granted for a maximum period of two years and entitle the holder to access the job market in the whole region. Similarly, the residence permits are limited in time, but are eligible for extension.

Directors holding 25% or more of the shares of the company, while exempt from the requirement of a labour permit, nonetheless require a quota-bound residence permit.

Directors holding less than 25% are only exempt from the regular labour permit requirement if the authority confirms the exercise of essential influence on the management of the company.

Furthermore, under the new Austrian immigration laws, applicants – apart from certain exceptions – are required to prove basic German language skills (level A1 of the European Common Frame of Reference) when the application for the residence permit is filed.
Co-optation is only mandatory if there are less than three directors remaining. A general meeting of shareholders must always have a free choice of appointment. The articles of association prescribe the duration of the director’s term of office, which may not exceed six years. Unless the articles of association provide otherwise, the directors are eligible for reappointment. In the event of an early vacancy, a newly appointed director serves for the period of the person he or she replaces.

Method of removal

A general meeting of shareholders may remove any director at any time. A director may resign at any time. However, his or her resignation must not cause damage to the company and should therefore be done carefully. A director may be required to settle any current business. The removal or resignation of a director must be published in the Belgian Official Journal and filed with the office of the Commercial Court in the district in which the company has its registered office within fifteen days.

The removal or resignation of a director does not shield him from liability. He or she can still be liable for faults committed during his or her office, even if the damage occurs after his or her removal or resignation.

Authority and representation

The board of directors has all of the powers that are necessary or useful to implement the corporate object of the company, save for those powers expressly reserved for the general meeting of shareholders by law or by the articles of association. The board of directors represents the company towards third parties.

The articles of association may grant one or more directors the power, solely or jointly, to represent the company in all...
acts, deeds and before the courts and public authorities. Such authority must be published in the Belgian Official Journal.

**Working rules of the board**

A company limited by shares must have at least three directors. However, if the company has only two shareholders, the board may consist of only two directors. There is no maximum number of directors, unless the articles of association provide otherwise.

The board of directors is a collegiate body. Its decisions are taken with a majority of votes, unless the articles of association provide otherwise. The directors can take decisions in writing (i.e. without a formal meeting) only if such decisions are taken unanimously and are absolutely necessary in the interests of the company. If such possibility is provided for by the articles of association of the company, the board of directors may appoint an executive committee (‘comité de direction’ – ‘directiecomité’) to whom the management of the company is entrusted.

The members of the executive committee are appointed by the board of directors and need not be directors. The working rules of the executive committee are indicated in the articles of association or, if no such working rules are mentioned, are decided on by the board of directors. If a member of the executive committee has a direct or indirect personal and conflicting interest of a financial nature within the authority of the executive committee, the same procedure applies as for a conflict of interest within the board of directors.

**Contractual relationship with the company**

A director in a company limited by shares is an agent (‘lasthebber’) of the company. A director may, but need not, be remunerated. The general meeting of shareholders determines the remuneration of the directors, unless the articles of association grant this power to the board of directors.

A director can also be an employee of the company, provided his or her tasks as an employee are separate from his or her duties as a director. A management company, being a company that contracts with the company to provide the director’s services, is allowed.

**Conflicts of interest**

If a director has a direct or indirect personal and conflicting interest of a financial nature in a decision or transaction within the authority of the board of directors, he or she must disclose such interest to the other directors prior to such decision or transaction. If the company has one or more statutory auditors, the director concerned should also inform the auditors of his or her conflicting interest.

The statement of a director and the reasons justifying his or her conflict of interest must be recorded in the minutes of the board meeting. Directors who have a conflicting interest at a board meeting in a company which has made a public offer of securities, may not participate in the deliberation of the board regarding the decision or transaction concerned, nor vote on such matter.

The directors are personally and severally liable for any loss sustained by the company or by a third party as a result of decisions or transactions which have secured for them (or one of them) an unlawful financial advantage to the prejudice of the company, even if such decisions or transactions have taken place in accordance with the above-mentioned disclosure rules. The company may request the cancellation of decisions or transactions which have taken place in breach of the conflict of interest rules.

**Duties of a director**

Each director must act in the best interests of the company as a whole and not only for its shareholders. The directors must make and implement their decisions in the ‘corporate interest’ of the company. The board of directors also has the obligation to inform the shareholders in certain circumstances and for specific operations, mainly relating to the equity of the company.

The board of directors is entitled to do whatever is necessary or useful for the implementation of the corporate object of the company, except for certain decisions reserved by law or by the articles of association to the general meeting of shareholders. In particular, the following powers of the general meeting of shareholders cannot be delegated to the board of directors:

- appointment and removal of directors or statutory auditors;
- approval of annual accounts and distribution of profits;
- liability suits against directors; and
- amendments to the articles of association.

The articles of association may limit the powers granted to the board of directors. Such restrictions, however, may not limit the fundamental powers of the board of directors (for example the power to call a general meeting of shareholders or the preparation of the annual accounts).
A director can be liable for shortcomings in the implementation of his or her duties, as well as for a breach of the provisions of the Commercial Companies Code or the articles of association of the company.

**Liability**

The directors are not personally liable for any obligations of the company. The company is bound by the acts of the board of directors and the individual directors representing the company as well as the managing directors. The company is bound even if such acts are beyond its corporate object, unless the company proves that the third party was aware thereof.

A particular liability for directors is provided in articles 527 and 528 of the Commercial Companies Code. Pursuant to article 527 of the Commercial Companies Code, each director is individually liable to the company for management faults. In other words, if a director fails to exercise reasonable care in managing the company (‘duty of care’), the general meeting of shareholders may decide to sue such director for damage to the company.

Moreover, pursuant to article 528 of the Commercial Companies Code, directors are jointly liable to the company, as well as to third parties, for breaches of the Commercial Companies Code or breaches of the articles of association. As the directors’ liability for breaches of the Commercial Companies Code or of the articles of association is a joint liability, it also applies to directors who are not actively involved in the management of the company, unless these ‘passive’ directors are able to demonstrate:

— that they did not in any way participate in the breach; and
— that they reported the breach to the general meeting of shareholders in due time. Article 528 thus forces every member of the board to monitor the management of the company and to refer to the general meeting of shareholders whenever a breach of the articles of association or of the Commercial Companies Code has been committed.

Liability suits against directors on the basis of articles 527 and/or 528 of the Commercial Companies Code can be brought either by the general meeting of shareholders or by an individual shareholder acting on behalf of the company (‘derivative suit’). Shareholders not only have the right to see the company managed in a proper way (‘duty of care’), they also may expect the rules on conflicts of interest to be strictly observed (‘duty of loyalty’).

Article 523 of the Commercial Companies Code provides that if a director has a personal interest in a decision or transaction to be acted upon by the board of directors, he or she must declare such interest to the board and apply for the board to report to the general meeting of shareholders. Liability may result from omitting to implement such procedure or from personally obtaining an unlawful financial advantage, which prejudices the company.

Moreover, a special provision of the Commercial Companies Code (article 530) provides that, in the event of bankruptcy, the receiver in bankruptcy or an individual credit holder may bring a liability suit against the former directors of the company for gross negligence. If the court finds the directors’ gross negligence to have contributed to the bankruptcy, the directors can be forced to assume all or part of the company’s obligations and liabilities. With effect from 1 September 2006 directors may, in the event of bankruptcy, also incur several and personal liability for unpaid social contributions. This liability is only triggered when a serious mistake on their part was at the origin of the bankruptcy or if they were previously involved in at least two bankruptcies (or similar situations) where outstanding debts were owed to the social security institutions.

In addition, with effect from 28 July 2006, the liability of the directors can also be triggered for the failure of their company to pay wage withholding tax (‘précompte professionnel’/’bedrijfsvoorheffing’) and VAT. Any failure of a director(s) in charge of the daily management to pay wage withholding tax and/or VAT will trigger the several liability of the director(s) if it is demonstrated that he (they) has (have) committed a fault in running the company. This liability can be extended to other directors whose faults have contributed to such failure.

Finally, the permanent representative of a company director is severally liable with the company director for the execution of the office as director of the company.

However, it is worth noting that, pursuant to article 554 of the Commercial Companies Code, the annual general meeting of shareholders is required to expressly decide whether or not relief from liability should be granted to the members of the board. If the annual meeting decides to grant such relief, the directors are, as a rule, shielded from
liability to the company for the period prior to the annual meeting. They will not, however, be shielded from liability to individual shareholders or to third parties.

A guarantee arrangement can be entered into to limit the liability of the directors. Such arrangement guarantees the director against the financial consequences of liability incurred. This does not affect the liability itself but only the financial consequences thereof. Such arrangement may not guarantee the director against criminal fines or against an intentional fault or fraud. The guarantee arrangement can be provided for by a shareholder, a parent company or a third party.

Another possibility to limit the financial consequences of director liability is to take out insurance. The company or the director can subscribe to such insurance. The insurance does not guarantee the director against criminal fines or against an intentional fault or fraud. Again, the insurance does not affect the liability of the director but only its financial consequences. All proceedings against directors become statute-barred after five years.

**Taxation**

A director who resides in Belgium will be taxed in Belgium. To calculate the tax, all forms of remuneration are taken into account, such as director’s fees and all benefits granted to the director in the context of the exercise of his or her function.

The tax rate is progressive. The costs related to the exercise of the director’s function are tax deductible. The director may deduct a flat amount, fixed by the tax administration, or he or she can prove his or her real costs. The company is required to withhold an advance tax payment. If the director is a member of the board of several companies, each company must withhold an advance tax payment separately. Because of the progressive tax rate, these advance tax payments will be less than if the whole remuneration was paid by one company.

**Social security**

A director is deemed to be self-employed, even if he or she does not receive remuneration for his or her function as a director. Immediately after the start of his or her activity, he or she must be registered with a social insurance company. Based on new rules, the Social Security Administration may require the payment of a contribution fee to foreign directors of a Belgian company, even though they are not remunerated by the Belgian company.

**Appointment of managing directors**

The day-to-day management of the company, as well as the representation of the company in relation to management matters, may be entrusted to one or more managing directors. A managing director is appointed and removed by the board of directors. As a rule, the articles of association regulate the appointment, the removal and the powers of managing directors.

Managing directors act jointly or severally as provided in the articles of association. The appointment and removal of one or more managing directors must be published in the Belgian Official Journal. Notice of the appointment and removal must also be filed with the office of the Commercial Court in the district in which the company has its registered office within 15 days.
This guide focuses on the rules relating to the management of private limited liability companies. It does not address the rules relating to other types of companies.

Introduction

The legal structure of Bosnia and Herzegovina ("BiH") is very complex, which directly impacts on legislation as well as policies regulating and supervising companies and their directors. BiH consists of two separate and distinct administrative entities: Federation of Bosnia and Herzegovina ("FBIH") and Republika Srpska ("RS"), as well as the Brčko District which belongs to both of the above entities. The two entities and the Brčko District, have their own governmental structures as well as legislation, regulations and policies which means that this, as well as any other area, may be subject to legislative provisions at entity level i.e. FBIH or RS or Brčko District. Therefore, in preparing this guide we took into account relevant legislation at all levels in order to provide a comprehensive overview of the situation in BiH.

Company law is regulated at the entity level, through the Company Act of Federation of Bosnia and Herzegovina ("ZPD FBIH"), the Company Act of Republika Srpska ("ZPD RS"), as well as the Company Act of the Brčko District ("ZOP BD").

— Pursuant to ZPD FBIH, the management of a company is run by one or more members of the management board, but since the provisions relating to joint-stock companies are expressly applied mutatis mutandis, this means that one director or one director with one or more executive directors run the company. There is an established hierarchy between a director and executive director(s), as the extent of an executive director’s authority is determined by a written resolution of the company’s director(s).

— According to ZPD RS, a company may have a single director or a management board as a collective management body, which is determined by the company’s memorandum of association.

— ZOP BD states that the management of a company may have one or more members i.e. directors.

The existence of a supervisory board is discretionary pursuant to ZPD FBIH and ZOP BD, however under ZPD FBIH it is obligatory in the case of a company which has either more than 10 shareholders or an initial capital of more than BAM 1,000,000 and at least two shareholders. The ZPD RS does not envisage a supervisory board; however, an internal revision, a board of revision or an independent auditor may be established or appointed by the company.

Eligibility requirements

Any natural person with full legal capacity may become a director, an executive director or a member of management board (hereinafter referred to as “member/s of management”). In addition, the company laws of entities expressly state certain restrictions on who can be a member of management of a company, namely relating to persons who were convicted of financial crimes, fraud, violations of laws relating to labour relations, social security, management of natural resources, or who have violated the provisions of company law relating to unlawful payments. ZPD FBIH, through an analogy with a joint-stock company, provides that a member of management may not be older than 65 years on the day of appointment. Restrictions of ZOP BD and ZPD FBIH also relate to persons barred or suspended from their professions, while ZPD RS expressly states the incompatibility between the functions of any bodies vested with oversight duties (since ZDP RS does not envisage one supervisory board) and functions of management. Additionally, unlike ZPD RS, restrictions named in ZOP BD and ZPD FBIH are of temporary nature.
Appointment

Pursuant to ZPD FBiH the company determines the method and duration of appointment of members of management in the articles of association and memorandum of association.

ZPD RS and ZOP BD provide that the shareholders assembly appoints the member(s) of management, although ZPD RS states that the first director/members of management board may be named in the company’s memorandum of association. ZPD RS also leaves the determination of the number of members of management board to the memorandum of association or the articles of association, but also stipulates that a management board will have a president elected by the members of that management board. ZOP BD delegates the appointment of the member(s) of management to the supervisory board (if such supervisory board is established), and further states that the articles of association may envisage that the members(s) of management can be appointed for a limited period of time, but not for less than two years.

Removal

Pursuant to ZPD FBiH the rules for removal of the member(s) of management are set out in the company’s articles of association. However, an analogy with the joint-stock companies would indicate that removal may be effected by the shareholders assembly if: the management or any of its members lose the confidence of the shareholders of the company; if the shareholders assembly refuses to adopt the yearly report of the company; or, if the shareholders assembly determines the responsibility of the management or a member of the management is conflicted with the interests of the company.

ZPD RS and ZOP BD appoint the shareholders assembly as the body that can remove the management i.e. its member(s) with or without giving the reasons for such removal. ZOP BD expressly provides indemnity rights to the member(s) of management if it/they is/are removed without a justifiable reason, while ZPD RS states that the removal does not affect the rights of the member(s) of management after removal provided in the contract with the company.

Authority and representation

Unless provided otherwise in the memorandum of association or the articles of association, the member(s) of management have full authority to manage the company. In general, the directors or the management board, or the president of the management board under the ZPD RS, represent the company. Additional persons (e.g. authorised representatives – “procurators”) may be determined to represent the company through the memorandum of association or articles of association. Members of management are either entitled to represent the company jointly, or they can be granted sole power of representation if the memorandum of association or articles of association provide for such sole representation. The method of representation is registered in the registry of companies. Persons thus registered are authorised to undertake all acts and conclude contracts that are usually performed or arise with the tasks that have been entrusted to that person. The company is liable for any obligations that have arisen by the acts of a member of management who has exceeded his authority, if the third person did not know or did not have a means to know that the member of management was exceeding his authority.

Working rules

ZPD FBiH provides that if the management board has more members, their respective authorities and responsibilities are determined in the articles of association. ZOP BD states, in similar manner, that in the case that there is more than one member of management, the articles of association determine whether they manage the company jointly or separately.

Under the ZPD RS the general rule when there is a management board, is that all members of the management board are vested with the same rights and duties, and every member may act individually unless otherwise provided by the memorandum of association. If it is provided that a decision can only be made jointly then the approval of all members of management board is required to carry out any act or undertaking, except if the delay would adversely affect the company. The memorandum of association may also determine that a member of management board must follow the instructions of another member of management board. If a member of management board deems such instruction to be inappropriate, he may inform the other members of management board so that they can take a joint decision on such specific issue. Among other issues the management board may form one or more commissions, which may be composed of its members or other persons and also determine their conditions and methods of work. Decisions of such commission would be subject to prior approval by the management board, unless stated otherwise in the memorandum of association or articles of association.
Contractual relationship with the company

In accordance with the labour legislation of FBiH, members of the management are considered to be employees of the company, thereby having to have an employment contract as well as an established and concluded employment relationship. On the other hand, under RS labour legislation, members of management may either be employees of the company or may have their relationship regulated in a different manner i.e. through special or service contracts.

Conflict of interest

ZPD FBiH and ZOP BD state, in a similar manner, that member(s) of the management may not be engaged in an activity which is or may be in conflict with the business of the company, whether as an employee of a different company, or as an independent entrepreneur. The articles of association may determine that this prohibition will survive the termination of appointment as a member of management for up to two years. ZOP BD further provides that a member of management may not enter into a contract on behalf of and on account of the company, among other things, if the execution of such undertaking would amount to an unlawful gain for him or certain third persons.

The conclusion of contracts between a company and another company in which a member of management of the first company has an indirect interest needs to be approved either by the supervisory board, the shareholders assembly or by another organ of the shareholders. Indirect interest is determined by the fact that the other contractual party is a member of the family or a legal person in which a member of the family of some member of management has a material or financial interest, or is a responsible person in such an entity.

ZPD RS regulates this matter in more detail through a specific loyalty clause indicating that a member of management may not use the assets of the company or privileged (insider) information for his personal interest, or commit any abuse of his position in the company for his personal enrichment. ZPD RS further elaborates the meaning of personal interest as in existence when a member of management, or his family members: (i) finds himself as a contractual partner of the company; or (ii) appears to be in a financial relationship with a person which concludes a contract or other act with the company, and it can be reasonably expected that such a relation would adversely affect his conduct with respect to the interests of the company; or (iii) when a person entering into a contractual relationship with the company has a controlling influence over the member of management in a way that it can reasonably be expected to adversely affect his conduct vis-à-vis the company. ZPD RS broadly interprets the notion of family member, in a way that it also includes any person living in the same household with the member of management. A member of management may also not be directly or (through his family members) indirectly involved in a competing company unless he receives permission in accordance with ZPD RS. This prohibition may survive termination of the appointment as a member of management for a period of up to two years.

Duties

The management i.e. its members must manage the company in line with its business purpose, in the best interests of the company, with a diligence of an orderly businessman and in a reasonable belief that they are acting in the company's best interests. In general, the management is subject to a wide range of different statutory duties, *inter alia*:

— to represent the company and manage the company's business;
— to ensure that all statutory filings are made;
— to maintain accounts;
— to manage the book of shares;
— to convene the assembly meetings and determine the proposed agenda for such meetings;
— to set a date for:
  • determining a list of company shareholders entitled to receive notice;
  • determining dividend amount;
  • determining dividend payments;
  • voting and other questions ;
— to conclude loan agreements;
— to deal with other matters stipulated by the articles of association or by the contract.

Liability

In general, the management, i.e. its members, must act in accordance with the due diligence standard and with a belief that they are acting in the company's best interests. It cannot be reasonably concluded that the management acts in such a manner if it relies on information that it knows or should have known is incorrect.

Any party suffering damage caused by member(s) of the management acting intentionally or as a result of misconduct or negligence has the right to an indemnity given directly by the management. In general, although the company is liable to third parties for damage caused by
its employees, it may receive compensation from individual members of the board who caused damage, if they acted intentionally or negligently, or if the damage was caused as a result of their misconduct. However, the different Company Acts provide for slightly different modalities of this. ZOP BD provides that the company may reimburse the expenses that the responsible persons had to take as a result of litigation because of their position in the company, if they acted with due diligence or had reasonably believed that they have acted in the best interest of the company and not contrary to law. The company will have to compensate the member of management for “all founded expenses” if he was successful in such litigation, and the member of management can bring a claim against the company if it does not comply with this obligation.

Limitation of liability

It is not possible to limit the liability of the management in respect of misconduct or negligence by an agreement. Also, it is not expressly regulated whether a company may waive its claims against a director ex-post. It is further provided that a director “may rely” on different acts of other responsible bodies or employees of the company, unless he knows or should have known such acts are false.

D&O insurances are not common in practice, although it should be noted that most insurance companies offer general insurances to companies covering damage claims by third parties.

Immigration issues

A foreign person who is appointed as a member of management of a company has to obtain, prior to appointment as a member of management and conclusion of the employment relationship, the following:

— a working permit (which is issued for a period of one year but can be extended); and
— a residency permit (on the basis and for the duration of the working permit).

However, a foreign person, who obtains a permanent residency permit in BiH, or international protection in BiH, or temporary protection, is entitled to work in RS under the same conditions as citizens in RS, without having to obtain the working permit.

Foreign individuals appointed as members of management have to register with the closest police office within 24 hours of entering the country and acquire a “white carton” confirming their residence address as well as their contact details. This document is very important in the future procedure of acquiring work and residence permits.

The procedure for acquiring work and residence permits is highly bureaucratic and complex in nature. The competent authorities have great discretionary powers to approve or deny work or residence permits to foreign professionals.

According to the recent draft of the new law on employment of foreigners of FBiH, a foreign person who will be appointed to a director’s position in a company where the majority shareholder is a foreign company, will not be obliged to obtain the working permit. However this law has not yet been adopted and is currently before the FBiH parliament.

Taxation

Members of management are considered employees for the purpose of personal income tax. In FBiH, personal income tax amounts to 10% of the net wage (net wage represents the amount an employee receives as actual salary i.e. the amount remaining after obligations towards the state, such as social security payments and other taxes, are deducted from the gross wage.).

The personal income tax rate is now equalised in the entire country and amounts to 10% of the net wage in all BiH territorial units.

Social Security

Social security payments (in BiH, called “contributions”) have to be made by members of management in the same way as any other employees.

In FBiH, part of the contribution is paid by the employee and part is paid by the employer. The amount payable by each party depends on the below explained percentages established by the relevant laws as well as the amount of the gross wage payable to the employee. The same is applicable in RS and Brčko District.

Therefore, employees pay:

— FBiH: 17% pension insurance, 12.5% health insurance, 1.5% unemployment insurance (total of 31% of the gross wage).
— RS: 18% pension insurance, 12.5% health insurance, 1% unemployment insurance, 1.5% child protection (total of 33% of the gross wage).
— Brčko District: 17% for pension insurance, 12% for health insurance (total of 29% of the gross wage).
On the other hand, **employers** pay:

— FBiH: 6% pension insurance, 4% health insurance, 0.5% for unemployment insurance (total of 10.5% of the gross wage).
— RS: no contributions paid by employer.
— Brčko District: 6% pension insurance (in total: 6% of the gross wage for employers who apply FBiH Law).
This guide focuses on the rules relating to limited liability companies ("LLC") and joint stock companies ("JSC") only.

The Bulgarian Commercial Act (the "Commerce Act") published in the State Gazette No. 48, dated 18 June 1991 (as amended) defines five types of companies: a general partnership, a limited partnership, a limited liability company, a joint-stock company, and a partnership limited by shares. Only the companies set forth in the Commerce Act may be established in Bulgaria. General and limited partnerships are personal, whilst a joint stock company and a limited liability company are equity companies.

The duties and responsibilities of the directors vary depending on the type of company.

The management bodies of a JSC are: (i) a general meeting of shareholders, and (ii) either a board of directors (one-tier system), or a supervisory board and a management board (two-tier system).

A JSC is managed by the executive members of the board of directors, in the one-tier system, or by the members of the management board, in the two-tier system. The supervisory members of the board of directors in a one-tier system, or the members of the supervisory board in a two-tier system, supervise the management of the company.

In an LLC the management bodies are: (i) a general meeting of the quotaholders, and (ii) a manager. Often the quotaholders are closely involved in the management of the LLC.

Where the shares/quota of a company are held by one person, the functions of the general meeting of shareholders/quotaholders are performed by the sole owner.

Eligibility requirements

Joint Stock Company
A board member can be an individual or a legal entity, where the articles of association of the company so provide. Where the board member is a legal entity it must designate a representative for the performance of its duties on the board of the JSC. The liability of the legal entity arising from the actions of its representative on the board is unlimited and is joint and several with the other board members. However, Bulgarian law stipulates that a person may not be a director if s/he:

— has been a board member of a company which has been dissolved on the grounds of insolvency within the two years preceding the date of his appointment and the claims of its creditors were not fully satisfied; or
— does not meet other requirements provided for in the articles of association of the company.

Board members must be registered in the Commercial Register of the Bulgarian Registry Agency (the "Commercial Register") by presenting a notarised consent and a statement certifying that there are no obstacles to them becoming board members.

Limited Liability Company
The manager of an LLC does not necessarily have to be a quotaholder but must be an individual, rather than a legal entity. An LLC may have more than one manager, who can represent the company jointly or severally, depending on the provisions of the company’s articles of association. The managers of an LLC must be registered in the Commercial Register and they must file at the Commercial Register a notarised consent to manage the company and a specimen signature.
Appointment

Joint Stock Company
The members of the board of directors (one-tier system) or of the supervisory board (two-tier system) are elected and released by a general meeting of shareholders. A general meeting also determines the remuneration of the supervisory board members, including their right to receive part of the company’s profits or to acquire shares and debentures of the company.

The board members are elected for a term of office not exceeding five years. However, the term of office for the members of the first board upon incorporation of the company cannot be longer than three years. Board members may be re-elected without limitation. The general meeting of shareholders can release the board members from office at any time.

Two-Tier System
— The company is managed by a management board which is controlled by the supervisory board. Members of the management board are appointed by the supervisory board, which also determines their remuneration and may release them from office at any time. One person cannot serve simultaneously on both the management board and the supervisory board.
— The number of members of the management board ranges between three and nine people and is determined by the articles of association. The rules of procedure for the management board are approved by the supervisory board.
— The supervisory board may not take part in the management of the company. The supervisory board represents the company only in its relationship with the management board. Members of the supervisory board are appointed by a general meeting of shareholders. There may be between three and seven members.
— The supervisory board adopts its own rules of procedure and appoints a chairperson and vice-chairperson from among its members. The supervisory board meets regularly and at least quarterly. The chairperson calls meetings of the supervisory board on his own initiative, as well as upon requests of members of the supervisory board or members of the management board.

One-Tier System
— The company is managed and represented by a board of directors, consisting of a minimum of three and a maximum of nine directors. The board of directors adopts its own rules of procedure and elects a chairperson and vice-chairperson from among its members. The board of directors meets at least on a quarterly basis per year to discuss the company’s state of affairs and prospects for development. The board of directors assigns the management of the company to executive members, elected from among its numbers, and determines their remuneration. The number of executive members must be lower than the number of the remaining (supervisory) board members. Each board member must immediately inform the chairperson of the board of directors of any circumstances which are material to the company. Each board member may request the chairperson to call a meeting to discuss particular matters.
— A person nominated as a board member must, prior to his/her election, give notice to the general meeting of shareholders (or the supervisory board, if a member of the management board) of: (i) his/her participation in any companies as an unlimited partner, (ii) his/her holding of over 25 per cent of the equity in any other company, and (iii) his/her participation in the management of other companies or co-operatives as a procurator, manager or board member. If a serving board member acquires or is appointed to any of the above, s/he must issue a written notice of the acquisition or appointment to the shareholders or to the supervisory board.

Limited Liability Company
The manager is appointed by the general meeting of the quotaholders of the company, which also determines his/her remuneration and releases him/her from liability.

Release from office

Joint Stock Company
A board may be released from office at any time by the general meeting of shareholders or by the supervisory board. A board member may request his/her release from office by serving a written notice addressed to the company. Within six months of the receipt of such notice, the company must apply for de-registration of the board member from the Commercial Register. If the company fails to do so, the board member may notify the Commercial Register directly and file personally the notice for the release from office. The board member will then be de-registered from the Commercial Register regardless of whether another person has been elected to replace him/her on the board.

Limited Liability Company
The manager may be released from office by the general meeting of quotaholders at any time. The manager may request his/her release by serving a written notice addressed to the company. Within one month of receiving such notice, the company must apply for the registration of the discharge with the Commercial Register. If the company
Any transaction concluded in violation of the above requirements shall be valid with respect to third parties, but the person who concluded it on behalf of the company shall be liable for any damages incurred by the company.

**Limited Liability Company**
The manager organises and directs the activities of the company in accordance with the resolutions of the general meeting of quotaholders. Without the consent of the company the manager may not: (i) effect commercial transactions which are similar to those of the company on his/her own behalf or on a third party’s behalf; (ii) participate in partnerships, partnerships limited by shares, or in limited liability companies; or (iii) hold management positions in other companies. The manager shall indemnify the company for any damage caused to the company from a violation of his/her obligations.

**Rules of Procedure**

**Joint Stock Company**
The executive members of the board of directors, or the members of the managing board respectively, represent the company collectively, unless otherwise provided by the articles of association. The board of directors or the management board (subject to approval by the supervisory board) may delegate the authority to represent the company to one or more of its members. Authority so delegated may be revoked at any time.

The names and specimen signatures of the authorised representatives of the company are registered in the Commercial Register.

A company’s articles of association may provide that certain transactions can be entered into only with the prior approval of the supervisory board, or upon the unanimous decision of the board of directors. Such restrictions may also be imposed by the supervisory board or the board of directors. The following transactions require, by operation of law, a resolution of the shareholders at a general meeting:

- transfer or provision of the use of the entire commercial enterprise;
- disposal of assets, (the total value for the current year which exceeds half of the value of the total assets of the company as per its latest audited annual financial statements);
- assumption of liabilities or the provision of collateral to one person or to related parties, the amount of which exceeds, in the current year, half of the value of assets of the company as per its latest audited annual financial statements.

The company’s articles of association may expressly provide that the above transactions will be within the competence of the board of directors or the management board, in which case a unanimous resolution of the board of directors or consent from the supervisory board given in advance will be required.

**Contractual relationship with the company**

**Joint Stock Company**

**Two-Tier System**

The relations between the company and a member of the management board are governed by a management agreement. The agreement is executed in writing on behalf of the company through the chairperson of the supervisory board or another board member authorised by the chairperson.
Duties & Responsibilities of Directors

Board members shall not disclose any confidential information which has come to their knowledge in relation to the performance of their duties, if such disclosure could affect the activities or the interest of the company. The confidentiality obligation survives the release of the board member from office.

Specific obligations for managers and board members arise where the company becomes insolvent. Within 30 days the manager or the executive director of the relevant company must file for insolvency. If the manager/executive director fails to fulfil this obligation, s/he shall be liable towards the creditors for the damages incurred. In addition, the defaulting manager/executive director may be subject to criminal liability.

Liability

The directors of a joint stock company are required to deposit a guarantee for their potential liability in an amount determined by the general meeting of shareholders. This amount cannot be lower than three months gross remuneration of the board member and can be deposited with the company in the form of cash, shares or debentures.

The directors are liable jointly and severally to the company for any damage caused as a result of their actions. Any director may be released from liability if it is established that s/he has no fault for the damage suffered by the company. Shareholders holding at least ten per cent of the company’s equity may file a claim demanding that board members be held liable for damage caused to the company.

Board members of JSCs are obliged to notify the board of directors in writing when they or parties related to them enter into agreements with the company out of the ordinary scope of activities of the company or in deviation from normal market conditions. Such agreements shall be executed only upon the approval of the transaction by the board of directors. However, if executed without the board’s approval, such transaction shall be valid but the person who has knowingly executed it shall be liable for damages to the company. Much stricter rules concerning related party transactions apply to public companies.

Release from liability

The general meeting of shareholders may release the board members of the JSC from liability. A general meeting of quotaholders may release the manager of the LLC from liability. Normally, such release from liability is made yearly,

One-Tier System

Limited Liability Company

Conflicts of interest

Duties

The relations between the company and a member of the supervisory board are governed by a services agreement. The agreement is executed on behalf of the company through a person authorised by a general meeting of shareholders or by the sole owner.

The relations between the company and an executive member of the board of directors are governed by a management agreement. The agreement is executed in writing on behalf of the company through the chairperson of the board of directors.

The relations between the company and the supervisory members of the board are governed by a services agreement executed on behalf of the company through a person authorised by the general meeting of shareholders or by the sole owner.

The relations between the company and the manager are governed by a management agreement. The agreement is executed in writing on behalf of the company, by a person authorised by the general meeting of quotaholders or by the sole owner.

Without the consent of the company a board member or a manager in either a JSC or LLC may not, when the activities carried out are similar to those of the company: (i) enter into commercial transactions on his/her own behalf or on a third party’s behalf; (ii) participate in partnerships and partnerships limited by shares or in limited liability companies; or (iii) hold managing positions in other companies.

Board members have equal rights and obligations, regardless of any internal allocation of responsibilities, management and representation powers amongst them. Board members must perform their functions with the highest professional care and in the interests of the company and of all the shareholders.

Members of a board of directors and the management board may not, on their own behalf or on behalf of others, execute business transactions or serve as procurators, managers or board members of other companies or co-operatives, if these compete with the company. This restriction does not apply where the articles of association expressly allow such competing activities, or where the body which elects the board member has given its express consent.

The relations between the company and a member of the supervisory board are governed by a services agreement. The agreement is executed on behalf of the company through a person authorised by a general meeting of shareholders or by the sole owner.

The relations between the company and an executive member of the board of directors are governed by a management agreement. The agreement is executed in writing on behalf of the company through the chairperson of the board of directors.

The relations between the company and the supervisory members of the board are governed by a services agreement executed on behalf of the company through a person authorised by the general meeting of shareholders or by the sole owner.

The directors of a joint stock company are required to deposit a guarantee for their potential liability in an amount determined by the general meeting of shareholders. This amount cannot be lower than three months gross remuneration of the board member and can be deposited with the company in the form of cash, shares or debentures.

The directors are liable jointly and severally to the company for any damage caused as a result of their actions. Any director may be released from liability if it is established that s/he has no fault for the damage suffered by the company. Shareholders holding at least ten per cent of the company’s equity may file a claim demanding that board members be held liable for damage caused to the company.

Board members of JSCs are obliged to notify the board of directors in writing when they or parties related to them enter into agreements with the company out of the ordinary scope of activities of the company or in deviation from normal market conditions. Such agreements shall be executed only upon the approval of the transaction by the board of directors. However, if executed without the board’s approval, such transaction shall be valid but the person who has knowingly executed it shall be liable for damages to the company. Much stricter rules concerning related party transactions apply to public companies.

The general meeting of shareholders may release the board members of the JSC from liability. A general meeting of quotaholders may release the manager of the LLC from liability. Normally, such release from liability is made yearly,
upon the approval of the annual financial statements and
the annual management report by the general meeting.

**Immigration issues**

A foreign manager or director working under a management
agreement in Bulgaria is not required to obtain a work
permit and can apply for a long-term residence permit in
Bulgaria under the condition that the company managed
by the foreign manager or director has at least ten
Bulgarian employees for the whole term of residence of
the foreigner.

**Taxation and social security**

Personal income tax at a flat rate of 10% is levied on the
remuneration of managers and directors, net of mandatory
social and health insurance contributions.

The remuneration of managers and directors would
normally be subject to social and health insurance
contributions of about 29% of their gross income,
capped at EUR 1,000 per month. Thus, the part of the
remuneration which exceeds EUR 1,000 per month is
not subject to social and health insurance contributions.
Furthermore, the articles of association may contain certain conditions or set additional requirements for the nomination of directors, such as holding specific diplomas or having requisite professional skills. However, these conditions may not limit the free choice of the Assembly to appoint directors.

Appointment

Directors are appointed by a resolution of the Assembly, unless otherwise stated in the articles of association. The appointment is effective upon adopting the respective resolution. In practice however the appointed directors will only be able to prove their authority after being registered with the Commercial Court’s Register. The period of appointment of a director is not limited unless the company’s articles provide otherwise.

Notification of the appointment signed by any and all director(s), together with certified evidence of the appointment, certified acceptance of appointment, as well as a certified sample signature of the director(s), needs to be filed with the Commercial Court’s Register.

Any change concerning directors, which is registered with the Commercial Court’s Register (e.g. director’s residence etc.) must be re-filed.

Future directors (who are non-Croatian citizens) are now required to obtain Personal Identification Number (in Croatian “OIB”) before filing notification of the appointment. The Personal Identification Number is issued by the relevant Tax Office on the request of such future director.

Removal

Generally, pursuant to the Companies Law, the Assembly can remove a director at any time without giving a reason for the removal.
Removal of a director is subject to any entitlements the director may have arising from their employment contract or management agreement (a type of service agreement), or the provisions of Croatian employment legislation. Note that the Croatian employment legislation does not apply to the management agreement. However, it could be the subject of a dispute if a director is only employed under a management agreement or an employment agreement. Therefore, such agreements should be drafted precisely.

Dismissing a director from their position removes their authority to represent the company but does not affect any agreements signed between the company and the director.

Although a director’s dismissal has immediate effect, third parties may rely on the director’s authority to represent the company as long as the director is registered in the Commercial Court’s Register. Therefore any appointment/revocation should be immediately registered with the Commercial Court’s Register.

Authority and representation

Under Croatian law, the Management Board members jointly represent the company.

The articles of association may provide a different form of representation and usually provide that one or more directors each solely or two directors jointly or, in cases of more than one director, one director together with a ‘Procurist’ (agent with limited power to represent) are entitled to represent the company. The method of representation is registered with the Commercial Court Register, thereby notifying third parties of the extent of authority granted to particular individuals.

A director has full authority to manage the company. However, such authority may be restricted by the articles of association or by shareholder resolutions, for example: by requiring the approval of the Assembly prior to certain decisions being made; by providing for a particular way of rendering decisions; or by requiring approval of certain transactions.

These limitations on a director’s authority have no legal effect vis-à-vis third parties, so if the authority is exceeded, the company will be bound and the validity of a contract cannot be challenged on the basis of a director’s lack of authority to conclude a given contract. If a director exceeds his authority in this manner, the company can sue him personally for damages.

Working rules of the board

Under Croatian law, all directors are vested with the same rights and duties. Generally, the directors are required to jointly manage the company. The shareholders, articles of association, internal guidelines for directors and the Management Board itself may modify this concept and allocate certain tasks to one or more director(s).

Nevertheless, such distribution of responsibilities does not affect the overall responsibility of each director for the company’s business as a whole.

Contractual relationship with the company

Appointment to the position of a director does not in itself create a contractual relationship between the director and the company.

The company therefore usually enters into a management contract with the director, specifying the director’s duties and remuneration, as well as any other important aspects of the relationship with the director such as confidentiality, non-compete provisions, termination provisions and benefits in kind.

Under Croatian law, the directors are entitled to remuneration proportionate to their engagement, as well as the company’s business results.

Removal of a director does not automatically terminate his or her management agreement and vice versa. The management agreement may, however, expressly stipulate that if an individual ceases to be a director, then his or her management agreement shall automatically terminate as if notice of termination had been given.

Conflicts of interest

A director is subject to a statutory covenant not to compete with the company’s business during the tenure of their directorship. Any non-competition and non-solicitation covenants going beyond the statutory covenant must be set out in the management agreement.

Directors cannot, without the consent of the Assembly, engage in business activities of the company for their own benefit or for the benefit of others. Furthermore, directors are prohibited from acting as members of the Management Boards or the Supervisory Boards of companies that engage in the same business activities as the company of which they are directors.
Liability of directors

Due care standard
The standard of due care for directors is to act in a manner of a prudent businessperson and to keep confidential the business secrets of company that they represent.

Directors that breach this standard are jointly and severally liable to the company. In proceedings to establish whether a breach exists, the directors bear the burden of proof to show that they exercised due care.

Actions specifically defined as breaches by the Companies Law
Pursuant to the Companies Law, breaches of due care related to the following is considered as exceptionally grave:

— returning assets invested in the company to the members of the company;
— making payments in the event that the company becomes insolvent or over-indebted;
— distributing the assets of the company;
— paying interests or profits to company members;
— acquiring treasury business interests in the company; and
— issuing business interests in the company before the corresponding contribution for the business interest is paid to the company in full.

Also, a breach of the director’s obligations under tax and social security legislation may lead to the imposition of fines in accordance with special laws.

Limitations periods for filing claims
The limitation period for filing claims arising from a breach of the duty of due care is five years from the date on which the claim arises.

Unlawful return of capital
Apart from the payment of dividends, the Companies Law prohibits the return of contributed share capital to the shareholders. Therefore, if the Management Board would execute a non-arms length agreement with the company’s shareholder(s), the company’s creditors would be entitled to claim damages against the shareholders and the Management Board members.

Additionally, if such payments were made to the company’s shareholders abroad, which resulted in a reduction of the...

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1 “Small companies” is a term defined by the Croatian Accountancy Act. The “small company” is any company which does not fulfil two of the following conditions: (1) overall assets in the amount of HRK 32.5 million, (2) income of HRK 65 million and (3) average no. of employees during the business year up to 50.
company’s profit, the Croatian Tax Authorities would be entitled to tax the Croatian company as if such an agreement had an arm’s length consideration.

**Limitation of liability**

Directors may be excluded from liability if there are justified grounds for such exclusion, or if the directors succeed in proving that they have acted in compliance with the due care standard. According to the Companies Law, directors will be exempt from liability if their actions are based on lawful decisions of the Assembly.

Despite the mentioned exemption, where debts towards creditors cannot be settled from the company’s assets, the creditors can claim damages from the directors, if the directors breached the due care standard.

**Immigration issues**

A foreign person who is appointed as a director of a company has to obtain the following:

- entry visa (unless the respective country and Croatia have stipulated differently); and
- residency and work permit (issued for a maximum period of one year).

Work permits are granted on a quota basis. The quotas are defined by the Government of the Republic of Croatia. However, the quota policy does not apply to EU citizens holding managing directors’ positions in a company owned by a company located in a respective EU country and in some other specified cases.

**Taxation**

If a director has Croatian residency, his or her income shall be taxed under Croatian Income Tax provisions according to the ‘world income’ principle. If the director has no residency in Croatia, only certain income connected to his or her activities in Croatia will be taxed under Croatian Income Tax. The income tax rates vary from 12% to 40%. Croatia has entered into many double taxation treaties, which ease the taxation burden on foreigners who are subject to Croatian income tax.

**Social security**

If a director is also an employee of the company, the respective pension (20%), health (15%), unemployment (1.7%) and casualty (0.5%) contributions have to be calculated and paid by the employer i.e. the company. If a director is not an employee of the company, the company has to calculate and pay those contributions based on his or her income, unless the director is already insured on that basis abroad.
This paper focuses on the law relating to directors’ duties in respect of directors of joint stock companies (‘JSC’) and private limited companies. It does not cover the rules of partnership, state enterprises or other legal forms of organisations operating in the non-profit sector.

All comments relate to both types of companies, unless specified otherwise.

Eligibility requirements

A natural person may become a director. A director can not simultaneously be a director of another company with an identical or similar business activity, unless the companies have the same holding company (i.e. they are part of one group).

Method of appointment

In the case of a JSC:
— the method for appointment of a director is determined by the general meeting, unless the articles of association expressly provide for appointment of directors by the supervisory board. The appointment period may not exceed five years although directors may be re-elected;
— the minimum number of directors is three (or such higher number as is prescribed by the articles of association). This does not apply if there is only one shareholder; and
— the articles of association must include the precise number of members of the board.

In the case of a limited liability company:
— a director is appointed at the general meeting, or by a written resolution of the shareholders; and
— the minimum number of directors is one (or such higher number as is prescribed by the memorandum of association). The law does not limit the term of office and appointments are usually made for an unlimited term.

In both cases, the appointment is effective immediately or at the date determined in the decision, but the name, address, date of birth (birth certificate number) and the date of appointment of the director must be registered with the Commercial Register (Companies Register) kept by Regional Courts.

Method of removal

A director may resign from his/her office by giving notice of his resignation to the relevant statutory body (i.e. the supervisory board or at the general meeting) which the director is a member of, or which appointed the director. The Memorandum of Association or the Articles of Association of the company may set out that in order to effect the resignation, it is sufficient for the director to merely notify the relevant statutory body. In the event that the director notifies his/her resignation prior to the meeting of the relevant statutory body, the director’s tenure terminates at the forthcoming meeting. In the event that the director notifies his/her resignation at the meeting of the relevant statutory body, the director’s tenure terminates two months following the notification, unless otherwise determined by the relevant statutory body based on the director’s request.

A director is always subject to removal by resolution of the general meeting (or by the Supervisory Board, if the articles of association so provide). If directors are appointed for a fixed term, their appointment will terminate if they are not re-appointed at the relevant time.
Any change in the director’s office has to be registered in the Companies Register kept by the relevant Regional Court. The registration has a declaratory effect towards third parties.

**Authority and representation**

The directors are ‘statutory bodies’ (“statutární orgány”) of the company and their actions are deemed to be the actions of the company itself. This means that the directors have full authority to represent the company (solely or jointly – see below) and that this authority can not be limited in any way towards third parties. There is no need for the directors to have special authorisation for certain acts to be valid (for example, the sale of real property), although certain material legal actions do require the approval of the general meeting or Supervisor Board (and an expert opinion in related party transactions).

The directors will always bind the company, unless any director acts outside the powers conferred by general law. For example, if under general law the consent of the general meeting is required for a contract, and such consent is not obtained, then a contract signed by a director would be invalid. Under the general law, a general meeting must decide (amongst other things) on: changes to the articles of association, changes to the registered capital, changes of directors (limited liability company) or members of the board of directors (JSC) or Supervisory Board members, and decisions as to a sale of business or (in the case of a JSC) a decision to seek permission for shares to be publicly traded, and on such other matters set out in law or the memorandum of association of the company.

In the case of limited liability companies, the corporate documents of the company specify whether each director may bind the company or whether two or more signatories are necessary. This information is one of the prerequisites for the incorporation of the company and will be entered on the publicly accessible corporate register. If there is no information concerning signing authority, each member of the board of directors may act independently.

Notwithstanding the above, and regardless whether the internal signing requirements are publicly accessible, the company will be bound by an act of a director (limited liability company) or the board of directors (JSC) towards third parties; even if such an act is contrary to the memorandum and articles of association of the company (but is otherwise lawful).

Any limitation on the authority of the directors to represent the company (apart from the limitation described above, whereby a director acts contrary to the law) which is included in the memorandum or articles of association, or is given by a decision of the general meeting, will have no effect towards third parties. However, the company may sue the director who acted outside of his or her authority for damages.

**Working rules of the board**

A single director can manage a limited liability company but the company’s memorandum or articles of association may provide for virtually any number of directors. If more directors are appointed, the memorandum or articles of association may state that each of them acts on behalf of the company separately, or that certain numbers of directors (or even all of them) must act jointly.

The board of directors of a JSC must have at least three members and, again, the law sets no maximum limit. Only JSCs with a sole owner have an exception – one director is sufficient in these companies.

The directors/board members must be individuals, not entities.

The board of directors adopts its resolutions by a simple majority of votes of the total number of its members, unless the company’s articles of association provides for a qualified majority. The company’s articles of association may even permit voting in writing, or by means of communication with persons outside the meeting room, if all members of the board concerned agree.

**Contractual relationship with the company**

Any payment by the company to a director, that is not specified by law, or the internal rules of the company, can be made only with the general meeting’s approval – unless such payment is explicitly stated in the director’s management...
contract approved by the general meeting. The company shall not make such payment if the director’s performance has contributed to the company’s adverse business results or if the director has failed (deliberately or negligently) to fulfill his or her duties.

Conflicts of interest

The Commercial Code sets out restrictions on a director’s activities so as to prevent conflicts of interest situations. The articles of association may stipulate additional limitations. Under the Commercial Code, a director:

— carry on, either on his or her own behalf or on behalf of a person connected with, any business activity that is of the same kind as, or is connected to, a business activity of the company, or enter into business relationships with the company;
— mediate business activities of the company for other persons;
— take part in the business activities of another company as an associate with unlimited liability, or hold a controlling interest in another company with the same or similar scope of business; and/or
— perform the office of a director or other statutory or other body, or its member, of another legal entity which carries on the same or similar business, unless the companies are members of the same holding group.

Duties of a director

The duties of a director are set out in the Commercial Code, and are supplemented by a number of other binding prescriptions. The directors must keep all mandatory evidence, accounting books and a list of shareholders and keep shareholders informed of matters regarding the company.

The directors must convene a general meeting at least once a year. This period may be shortened, but not prolonged, by the company’s memorandum or articles of association, or by law.

The directors must follow the principles and instructions approved by the general meeting, provided that they conform to law and the articles of association. The directors must exercise their range of powers with due diligence and not disclose confidential information and facts to third parties if such disclosure might be detrimental to the company.

The directors must act in the best interests of the company and in accordance with the standard of care of a diligent businessperson. The burden of proof lies on the director if he or she is allegedly in breach of such duty of care.

The directors must file, without undue delay, an insolvency petition to initiate insolvency proceedings in respect of the company if the conditions stipulated by insolvency law are met. If this duty is breached (even negligently) the directors will be liable for any damage that occurred from the day after the moment when the director breached his/her duty.

The directors are, in certain cases, obliged to convene a general meeting of the company (for example, upon shareholder’s request or if the company is in a poor financial situation etc).

The directors shall arrange for the minutes from the general meeting and in the case of private limited companies, distribute these to all shareholders and prepare (as required by law) notifications to the Commercial Register and other authorities, relevant decisions of the general meetings and updated revisions of the corporate documents, annual financial statements etc.

Liability

Although the company will be liable for any breach, a director is also personally liable for ensuring the company complies with all of the following requirements:

Commercial law
A director will be held liable for violation of contractual obligations. Such violation constitutes an objective liability, i.e. no negligent or intentional conduct is required. All obligations resulting from the Commercial Code have to be met.

Taxation law
A director will be held liable for ensuring that the company pays its taxes and advances in time and submits the respective tax declarations.

Financial law
A director will be held liable for ensuring that the company makes payments in time, especially those regarding the company’s employees’ social security insurance, health insurance and contribution to the State Employment Policy.

Penal law
A director might be found personally liable for crimes defined by the Penal Code, especially economic crimes committed by him during the performance of his or her duties.

Administrative law
A director is liable for ensuring that all administrative law requirements are met fully and in a timely manner, especially
those concerning business licences or other titles for executing business and environmental law requirements etc.

**Labour law**

A director must ensure that the requirements of the Labour Code and any secondary legislation regarding employees’ conditions are met.

**Civil law**

A director must ensure that the company meets all the liability requirements specified in the Civil Code as “special liability” cases.

**Insolvency**

The directors must submit without undue delay an insolvency petition to the court if the company becomes insolvent under the Insolvency Act. The term “insolvency” is defined in the Insolvency Act. A violation of this obligation results in the directors effectively guaranteeing liabilities of the company arising after they knew or should have known that the obligation to submit the insolvency petition had arisen.

The Commercial Code imposes an automatic three years disqualification from corporate directorship on any individual who has served as a director of a bankrupt company at any time during a period of one year prior to the filing of the bankruptcy petition (or prior to the date when such petition should have been filed), save where he or she can prove that he or she acted according to the standards of care of a diligent business person.

However, the shareholders of a company may confirm the appointment of an incumbent director or appoint a person who has disclosed the issue, who would otherwise be disqualified, by a two-thirds majority vote.

The provisions of the Commercial Code and other related legal regulations concerning the liability of the members of statutory bodies are also applicable to persons who exercise substantial influence over a company, through an agreement, ownership interest or otherwise (shadow directors). Such persons are liable under the Commercial Code and other legal regulations to the same extent as the company’s directors, irrespective of the nature of their relationship with the company.

**Limitation of liability**

Any arrangement between the company and a director, relieving him from liability for damage caused by him to the company or limiting it, is null and void.

**Immigration issues**

Generally, a foreign individual who wants to become a director or a board member of a Czech company, or a Czech affiliate of a foreign company, does not need a visa or work permit. However, in some specific cases individuals from outside the EU will need a visa and a work permit.

Notwithstanding the above, under Czech law a person becomes a director/board member at the moment of effectiveness of his or her election by the general meeting. As of that moment the director/board member can fully exercise his or her powers, and is burdened by his or her duties, and the consequent registration in the public corporate register has no further effect except publicity.

**Taxation**

In the event that the director works in a different EU member state than the EU member state in which the director resides, the director’s salary is subject to tax in the EU member state in which the director works (i.e. the “state of income”). International treaties may however provide that the director’s salary is subject to tax in the EU member state in which the director resides (i.e. the “state of origin”). The Czech Republic has concluded such treaties with all EU countries, the USA and many other countries.

**Social security**

Czech directors have to pay both social security and health insurance if they receive payments in the Czech Republic. With regard to foreign directors managing either Czech entities, or Czech affiliates of foreign companies, they are also subject to Czech law if they are also employees of such companies and receive their payments in the Czech Republic. Consequently, they also must pay social security and health insurance in the Czech Republic from their income, regardless of their actual place of stay with respect to taxes and the treaties on double taxation.

Directors are either expected to pay tax on all of their income in their state of tax residency, or, if they stay over 183 days in the Czech Republic during a calendar year, they must pay tax on all of their income (worldwide) in the Czech Republic. The payments of social security and health insurance by foreigners in the Czech Republic can only be offset in their respective countries if an international treaty so provides.
A. The Limited Company – Société Anonyme (SA)

Eligibility requirements

There are few restrictions applicable to the person who is entitled to be a director, namely: persons without legal capacity to act (mentally impaired or non-emancipated minors) and persons who have been disqualified from acting as a director.

Directors do not have to hold qualifying shares. However, the articles of association may provide that they have to, except in state-owned companies.

However, in listed companies, it is recommended for directors to hold a significant number of shares.

The articles of association may also contain other requirements, for example a requirement of specific skills (confirmed by a diploma or professional qualification) or age limitation.

A director is not required to be a French national, nor must he/she be resident in France.

A legal entity can be appointed as director. In such a case, a permanent representative (représentant permanent) has to be appointed to represent the legal entity on the board. This permanent representative has to satisfy all the eligibility requirements applying to directors.

Method of appointment

At the time of the company’s incorporation, the first directors are designated in the articles of association.

Following incorporation, the directors are appointed at the ordinary general shareholders’ meeting. However, the articles of association may provide that some directors have to be elected by employees (up to a maximum of four directors, and five if the company is a listed company).

If there is a vacancy on the board of directors (through death or resignation), the board of directors can temporarily fill such vacancy. Any such temporary appointment has to be ratified at the next general shareholders’ meeting.

All relevant information about proposed directors have to be communicated or made available to the shareholders prior to any general meeting to appoint directors. The articles of association set out the length of directors’ term of office, which may not exceed six years.

Directors are eligible for re-appointment, unless the articles of association provide otherwise. At the expiry of a director’s term of office, the board of directors has to convene a general meeting to consider the vacancy. The appointment of a director has to be published in a legal notice bulletin, filed with the office of the commercial court (greffe du tribunal de commerce), registered with the trade and companies register and notified through the official bulletin of civil and commercial notices. Details of directors’ remunerations are set out in a report of the annual accounts, but only in listed companies or in companies that are controlled by a listed company.

Method of removal

Shareholders in ordinary general meetings may dismiss a director at any time. There is no need to provide reasons for the dismissal, but such a decision must not be taken in insulting or hurtful circumstances, but after a ‘proper hearing’. Otherwise the company could be liable to pay damages.

A director may resign at any time, without giving any reason. However, when the resignation is reckless, the director may be ordered to pay damages to repair any loss incurred.
by the company. A director who is struck by incapacity or a disqualification order must resign. The removal of a director has to be published in a legal notice bulletin, filed with the office of the commercial court, registered with the trade and companies register and notified through the official bulletin of civil and commercial notices. The removal of a director does not put an end to his or her liability. He or she can still be liable if he or she have breached his or her directors’ duties prior to his or her removal.

**Authority of the board**

The board of directors plans the company’s activities and supervises their implementation. It has all the powers to carry out the company’s corporate object, except for matters expressly reserved to the general shareholders’ meeting by law or by the articles of association. Practically, the managing director exercises most of these powers.

The board carries out the inspections and verifications which it considers appropriate. The chairman or the managing director is required to send all the documents and information needed to perform this task to each director. However, certain decisions are expressly reserved to the board (convening general meetings, adopting the company’s accounts and annual management reports, co-appointing directors, nominating and dismissing the chairman and the managing director).

**Working rules of the board**

A company has to be composed of at least three directors and at the most eighteen (excluding directors elected by employees). The articles of association set out the number of directors required within these limits.

The board of directors is a collegiate body. Its decisions have to be taken by an absolute majority of the directors present or represented. In principle, the chairman of the meeting has a casting vote.

**Contractual relationships with the company**

Agreements entered into between the company and a director are ‘free’ (i.e. no need for any authorisation or approval) only if they are ‘arm’s length’ agreements and relate to ordinary business. These ‘free’ agreements are no longer subjected to any formality.

Several specific agreements are prohibited: loans raised from the company; guarantees and other supports given to a director for his or her commitments towards a third party; and overdraft agreements.

All other agreements entered into, directly or indirectly, between the company and one of its directors, or one of its shareholders holding more than 10% of voting rights in the company, have to follow a specific procedure. Such agreements must first be authorised by the board of directors. If such authorisation is not obtained, these agreements may be terminated if they have been harmful to the company. Moreover, these agreements have to be approved by the general shareholders’ meeting, following the presentation of a special report from the auditors. If such approval is not obtained, these agreements may not be terminated but the directors concerned will be liable for these towards third parties.

A limited number of directors (in principle a third of the directors in office) may also be employees of the company in specific conditions:

— a director may become an employee of the company in the board of which he or she sits if:
  - the company does not exceed, at the end of a fiscal year, the following thresholds defining small and medium-sized companies:
    - 250 employees; and
    - annual turnover of 50 million Euros and/or annual balance sheet total of 43 million Euros,
  - and if his or her employment agreement relates to an effective job.
— an employee of the company may become a director without losing the benefit of his or her employment agreement, provided he or she still fulfils specific and effective tasks as an employee and remains in a subordinated position towards the company.

Directors are remunerated by directors’ fees at an annual basic amount, to reward regular attendance of directors at board meetings. Additional extraordinary remunerations may be granted by the board to directors who carry out specific activities (specific missions or mandates), they have to be approved using the specific ‘control’ procedure detailed above. The remuneration of the chairman and managing director is determined by the board of directors. Details of such remuneration are published in the report of the annual accounts, but only in listed companies or in companies which are controlled by a listed company.

**Conflicts of interest**

According to case law, if a director has a personal interest in a decision which is to be voted upon, he or she still may...
participate in the voting, unless his or her conflicts of interest go against the corporate interest. When there is a conflict between the corporate interest and his or her interests as a shareholder, a director must favours the company’s interest.

Duties of a director

The director has to act according to the corporate object. The board of directors has powers only within the frame of the corporate object. However, this rule has only effect in relation to the shareholders. Indeed, in its relationships with third parties, the company is bound even by acts exceeding the corporate object.

The director has to attend board meetings. Even if he or she is absent, he or she is still liable for the decisions that have been harmful to the company or a third party.

The director has a duty of confidentiality concerning all the board’s proceedings.

Generally, the director must always act according to the corporate interest, and must also be particularly careful if the company has financial difficulties.

Liability

A director may be held liable for the following categories of breaches towards the company and third parties:

- breaches of the law and regulations applicable to limited companies;
- breaches of the articles of association; and
- mismanagement.

Directors are personally liable only if they have breached their duties towards third parties who are not shareholders, and if such breach is not intrinsically connected with the performance of these duties.

Moreover, a director’s liability is only engaged if the breach he has committed has caused personal damage to the victim.

Directors are liable individually or jointly, depending on whether a director individually or several directors collectively have breached their directors’ duties. Directors may also be criminally liable for offences committed during the exercise of their duties. Directors may be liable for certain specific offences such as misuse of company property, misuse of power and distribution of fictitious dividends.

In the event of bankruptcy, a specific action may be brought against directors, who may be ordered to pay off all or part of the company’s debts. This sanction is the only one that directors may be subjected to.

Liability suits brought against directors by third parties suffering damages, by shareholders acting individually or on behalf of the company (action ut singuli) lapse after three years as from the commission of the harmful act.

Limitation of liability

French law prohibits any limitation of directors’ liability in the articles of association. Articles of association which require the consent of a shareholders’ meeting for an action brought against a director, or provide an anticipated waiver of this action, will be ineffective. Regardless of any decision voted by the shareholders in a general meeting, a director who acted outside the scope of his or her powers may still be sued.

Immigration issues

Except as otherwise provided for in the articles of association, foreigners (EU residents or non-EU residents) may be directors of limited companies without need to meet several requirements. They do not have to obtain a temporary visa (carte de séjour temporaire) or to issue a statement to the prefect (préfet). This rule is only enforceable if the foreign directors do not perform their director’s duties concurrently with offices of chairman or managing director.

Taxation

Director’s fees paid to directors of limited companies are taxable in France whether or not the director lives in France. The chairman’s remuneration is subject to income tax (employees’ regime).

National insurance scheme

Directors’ fees are not subject to the national insurance scheme, as long as directors’ work undertaken is not salaried, that is to say, if they are not employees of the company. The chairman and the managing director are mandatorily subject to the national insurance scheme, even if they are not holders of a contract of employment.
Managing directors

The chairman of the board and the managing director may be the same person or two individuals depending on the provisions of the articles of association.

The chairman of the board is in charge of organising and managing the board. The chairman makes sure that the company’s management bodies are properly run and that the directors are capable of fulfilling their offices. The chairman may not substitute himself or herself for the board of directors or for the shareholders’ general meetings. In practice, the chairman has a non-executive role whilst the managing director fulfils the executive office. The chairman is designated from the directors of the company, by an absolute majority decision of the board of directors, unless the articles of association prescribe a qualified majority. The chairman may be dismissed at any time by the board of directors; provisions in the articles of association which restrict this rule have to be considered as ineffective. There is no need to provide reasons for the dismissal, but such a decision must not be taken in insulting or hurtful circumstances, but after a ‘proper hearing’.

The managing director is in charge of the general management of the company. He or she has all powers to act in the name of the company except in relation to such matters as are expressly reserved to the general shareholders’ meeting or to the board of directors by law or by the articles of association. The managing director represents the company in its relationships with third parties. As regards third parties, the company is even bound by acts exceeding the corporate object, unless the company can show that the third party was aware of this. The managing director is appointed and may be dismissed at any time by the board of directors. The managing director may be assisted in the exercise of his or her duties by a maximum of five deputy-managing directors appointed by the board after a managing director’s proposal. The deputy-managing director’s status is effectively the same as the managing director.

Appointment and removal of the chairman and of the managing director has to be published in a legal notice bulletin, filed with the office of the commercial court, registered with the trade and companies register and notified through the official bulletin of civil and commercial notices. The chairman and the managing director have to comply with strict rules as to the number of offices they may hold. Managing director may hold a second office in a controlled company and a third one in a non-listed company. The chairman and the managing director are in principle liable in the same way as directors. However their liability is likely to be invoked more often since they are in charge of day-to-day management.

Management bodies of the limited companies with managing board and supervisory board

The limited company with managing board (directoire) and supervisory board (conseil de surveillance) has two bodies: a managing board, which has all powers to carry out the corporate object of the company in all circumstances and to act in the name of the company except in relation to such matters as are expressly reserved to the general shareholders’ meeting or to the supervisory board; and, a supervisory board, which has a permanent supervisory mission to control management of the managing board. It therefore has specific powers such as power to carry out any useful verification at any time, such as verification of the annual accounts.

The managing board may not appoint more than five members, seven if the company is a listed company. They must be individuals, but not necessarily shareholders of the company. They are appointed by the supervisory board, which has sole jurisdiction for this. The supervisory board must be composed of at least three members, but not more than eighteen members (without taking into account members elected by employees). The eligibility requirements for members of the supervisory board are effectively the same as those required to be a director of limited company.

Members of the managing board may be dismissed by the general shareholders’ meeting or, if it is provided for in the articles of association of the company, by the supervisory board. Members of the supervisory board may be dismissed at any time by the ordinary general shareholders’ meeting.

Members of the managing board and members of the supervisory board have to comply with strict rules as to the number of offices they may hold. Members of the managing board may hold a second office in a controlled company, and a third one in a non-listed company. Members of the supervisory board can hold up to five offices.

The remuneration of the members of the managing board is determined by the supervisory board at the time of their appointment. The remuneration of the members of the supervisory board is similar to that of directors in limited companies (director’s fees, extraordinary remuneration following the specific ‘control’ procedure). The supervisory board votes the chairman’s remuneration. Details of such remuneration have to be published in the report of the annual accounts, but only in listed companies or in companies which are controlled by a listed company.

Members of the managing board are liable in the same way as directors of limited companies, if they have civilly or
or a supervising body may reserve the decision to dismiss a manager. This decision of dismissal does not have to be justified. However, such a decision has not to be taken in insulting or hurtful circumstances, but after a ‘proper hearing’. Managers may resign at any time in accordance with the procedure set forth in the articles of association (such as respecting a notice). The articles of association may provide for the payment of damages in the event of a manager’s removal and set forth the basis of the payment.

**B. The Simplified Limited Company – Société par Actions Simplifiée (SAS)**

**Eligibility requirements**

Shareholders have all the powers to determine freely the management bodies' organization in the articles of association. However, the shareholders have to appoint a chairman who represents the company in its relationships with third parties. There are few restrictions applicable to any person who is entitled to be a manager in a simplified limited company (carrying out an activity incompatible with the duties of management of commercial companies and personal bankruptcy).

The articles of association may prescribe specific requirements, such as a requirement of specific skills or age limitation, even a requirement to hold shares. A legal entity may be appointed as a manager of a simplified limited company, unless the articles of association provide otherwise. In such a case, the permanent representative of the legal entity must comply with the same eligibility requirements as if he or she was manager in his or her personal capacity.

**Method of appointment**

The method of appointment of the chairman and other managers is freely determined by the articles of association. A collective decision of the shareholders is not necessarily required. At the time of the company’s incorporation, the first managers are appointed in the articles of association. The chairman and all the persons having actual powers to manage the simplified limited company, including the permanent representatives of legal entities appointed as managers, have to be published in a legal notice bulletin, which in turn must be filed with the office of the commercial court, registered with the trade and companies register and notified through the official bulletin of civil and commercial notices.

**Method of removal**

Managers of a simplified limited company are dismissed in accordance with the procedure set forth in the articles of association. The articles of association will determine whether the shareholders, a group of shareholders, or a supervising body may reserve the decision to dismiss a manager. This decision of dismissal does not have to be justified. However, such a decision has not to be taken in insulting or hurtful circumstances, but after a ‘proper hearing’. Managers may resign at any time in accordance with the procedure set forth in the articles of association (such as respecting a notice). The articles of association may provide for the payment of damages in the event of a manager’s removal and set forth the basis of the payment.

**Authority and representation**

The chairman represents the company in its relationships with third parties. Provisions of articles of association that restrict this rule have to be considered as ineffective. He or she has all powers to fulfil the corporate object of the company in all circumstances and in the name of the company. However, the articles of association may limit the powers granted to the chairman in its relationships with the shareholders. Such restrictions are not enforceable against third parties. In the absence of specific legal provisions, the powers of the other managers have to be precisely set out in the articles of association. In principle, they are not the legal representatives of the company towards third parties, but they may be granted a delegation of powers by the chairman (the powers delegated, however, are necessarily limited).

**Contractual relationships with the company**

As in a limited company, agreements entered into between a manager and the simplified limited company are ‘free’ (i.e. no need of any authorisation or approval) only if they are ‘arm’s length’ agreements and relate to ordinary business. These ‘free’ agreements are no longer subjected to any formality.

Several specific agreements are prohibited: loans raised from the company; guarantees and supports given to a director for his or her commitments towards a third party; and overdraft agreements.

All other agreements entered into between a manager and the simplified limited company have to follow a prior approval procedure. They have to be approved by the shareholders, following the presentation of a special report from the statutory auditors.

The articles of association set forth the basis of remuneration of the managers of the simplified limited company. In all cases, the remuneration has to be considered as an agreement requiring prior approval. A manager of a simplified limited company may also
be an employee of the company, unless the articles of association provide otherwise, and only if he or she still fulfils specific and effective tasks as an employee and remains in a subordinated position towards the company.

The entry into, or modification, of an employment agreement with a manager in the exercise of his or her duties has to follow the prior approval procedure mentioned above.

**Liability**

Managers of a simplified limited company are liable on the same basis as for directors of a limited company. In other words, they may become liable for: breach of the law and regulation applicable to simplified limited companies; breach of the articles of association; and mismanagement.

They are also subject to the criminal penalties applicable to specific offences committed in the exercise of their duties such as misuse of company property, misuse of power and distribution of fictitious dividends. French law prohibits any limitation of the manager’s liability in the articles of association.

**Taxation**

Managers of a simplified limited company are subject to income tax (employees’ regime).

**National insurance scheme**

Managers of a simplified limited company are mandatorily subject to the national insurance scheme, even if they are not holders of a contract of employment.

**Supervision of the management**

The shareholders’ meeting is considered as a supervising body, particularly when they approve the annual accounts.

The articles of association may also provide for the appointment of a supervising body. In such a case, the articles of association provide for its composition and working rules. As in the case of limited companies, certain simplified limited companies are subject to supervision by one or more statutory auditors.
This guide focuses on the rules relating to companies with limited liability (‘Gesellschaften mit beschränkter Haftung’ or ‘GmbH’). It does not address the rules for other forms of company, such as joint stock corporations (‘Aktiengesellschaften’) or partnerships (‘Personengesellschaften’).

The rules which apply to the management of stock corporations differ substantially from the rules governing limited liability companies. While the management board (‘Vorstand’) of a stock corporation can, as a general rule, independently manage the company, subject to supervision by the supervisory board (‘Aufsichtsrat’), the shareholders’ meeting (‘Gesellschafterversammlung’) or the sole shareholder of a limited liability company may influence every single management issue by giving instructions to the managing directors (‘Geschäftsführer’). The shareholders are therefore more closely involved in the operation of the company.

German limited liability companies have one or more managing directors. They may have a voluntary advisory board (‘Beirat’). However, this is not very common for companies which are part of a larger group. Note, however, that due to the German co-determination rules, companies with more than 500 employees are required to have a supervisory board. Where this is the case, a number of the supervisory board members are elected by the employees.

Eligibility requirements

There are generally very few restrictions on who can become a managing director. Only individuals (as opposed to companies or other corporate entities) may be appointed as a managing director. Managing directors are not required to be German citizens and do not need to be resident in Germany. The practice of some commercial registers (‘Handelsregister’) is, however, to require foreign managing directors to be capable of entering Germany at any time.

Method of appointment

The method of appointing managing directors is determined by law and the articles of association (‘Satzung’) of the company. A managing director is normally appointed by a resolution of the shareholders or, if permitted under the articles of association, by a committee of shareholders or the advisory board. If there is a mandatory supervisory board and the company has more than 2,000 employees, managing directors are appointed by the supervisory board. In this instance, one of the company’s managing directors must be a labour director (‘Arbeitsdirektor’), with special responsibility for labour matters.

Notification of the appointment and an affidavit, signed by the managing director and notarised by a notary public, must be filed with the competent commercial register. The minimum number of directors is one (or such higher number as is set forth by the company’s articles). Where a labour director is required, the minimum number is two.

Time-wise, appointments are frequently open-ended, but can also be made for a fixed term. In addition to the formal appointment, companies regularly enter into service agreements with their managing directors.

Removal of directors

A managing director may resign from his or her office at any time by giving notice to the company (although such resignation may constitute a breach of contract). A managing director is subject to removal by shareholders’ resolution at any time (although he or she may still be entitled to his or her salary and other benefits under a service agreement).

Resignation or removal of a director must be notified to the competent commercial register in notarised form.
Authority and representation

Under German law, the authority to conduct the business of the company (‘Geschäftsführung’) and the power to represent the company in dealings with third parties (‘Vertretungsbefugnis’) must be distinguished. While the internal authority may be limited, the external power to represent the company is generally unlimited.

The company therefore usually enters into a service agreement with the managing director, specifying the managing director’s duties and remuneration, and containing provisions on, inter alia, confidentiality, non-solicitation, non-competition and fringe benefits. The service agreement is entered into by all shareholders on behalf of the company (unless there is a supervisory board) and the managing director.

Removal of a director does not automatically terminate a complementary service agreement and vice versa. The service agreement may, however, expressly stipulate that if an individual ceases to be the managing director of the company, then his or her service agreement shall terminate as if notice of termination had been given.

Conflicts of interest

A managing director is subject to a statutory covenant not to compete with the company’s business while holding his or her office. The shareholders may release the managing director from this covenant at any time. Any non-competition and non-solicitation covenants which go beyond the statutory covenant must be set out in the service agreement. A managing director cannot represent the company in dealings with himself or herself or with a third party represented by him or her (such as another ‘affiliated’ company for which he or she acts as managing director as well), unless authorised by a shareholders’ resolution (§ 181 German Civil Code – BGB). Such a resolution has to be permitted by the company’s articles and entered in the commercial register.

Duties

The duties of the managing director are complex and this section merely provides a basic introduction to the subject. A managing director must comply with mandatory provisions of the law, the articles of association, the provisions of a service agreement, if any, and shareholders’ resolutions. He or she must, in all circumstances, act in the best interests of the company, which are not necessarily identical to the shareholders’ interests. As far as the company’s interests are concerned, a breach of these duties can normally be ratified by the company’s shareholders.

Nevertheless, such distribution of responsibilities does not affect the overall responsibility of each managing director for the company’s business as a whole.

Contractual relationship with the company

Appointment as a managing director does not in itself create a contractual relationship between the director and the company, or entitle the director to remuneration.

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Duties & Responsibilities of Directors

is a criminal offence. One of the consequences of a conviction would be the preclusion from being a managing director of a company for a period of five years.

A breach of the managing director’s obligations under tax and social security laws may have implications extending beyond liability to the company. In the event of misconduct or gross negligence, the relevant governmental authorities may have a cause of action against the managing director and in extreme cases, criminal sanctions may ensue.

Limitation of liability

It is somewhat doubtful under German law whether the managing director’s liability to the company can be validly limited in advance by any kind of general agreement. The company, however, may waive specific claims against a managing director. The shareholders of a company regularly resolve upon the managing director’s formal approval of the management (‘Entlastung’) after the close of each business year. Such formal approval operates as a waiver of any claims which were identifiable at the time of the resolution.

The managing director’s potential liability towards third parties is not subject to limitation or waiver by the company. Equally, there can be no limitation or waiver where the managing director’s liability to the company is related to the interests of the company’s creditors (most particularly, in an insolvency situation). The personal exposure of a managing director may be covered by the parent company – if so agreed and to the extent permitted by law – by granting an indemnity. Furthermore, the company may take out D&O insurance cover in favour of its managing directors.

Immigration issues

A foreign managing director who wishes to establish a residence in Germany is required to obtain a residency permit (‘Aufenthaltserlaubnis’). As a matter of principle, a separate labour permit is no longer required, but is integrated in the residency permit which generally requires the consent of the labour office. As regards managing directors, such consent by the labour office is, however, not needed.

EU and European Economic Area nationals are neither required to obtain a residency permit nor a labour permit. However, as regards the nationals of Bulgaria and Romania that joined the union in 2007 certain transitory provisions should therefore be obtained as a matter of course.

In all matters concerning the company, a managing director must employ the diligence of an ‘orderly businessman’. The test is objective and requires the director to exercise reasonable care, without regard to his or her own individual level of skill and experience.

A managing director is subject to a wide range of specific statutory duties, requiring him or her to, inter alia:

— ensure all statutory filings with the trade register are made;
— comply with the statutory requirement to maintain accounts;
— uphold the principles of capital maintenance (i.e. not to pay back to the shareholders the stated share capital of the company) – a doctrine that has led to very complex case law and which particularly affects intra group transactions such as cash pooling or upstream loans/upstream securities;
— prepare for and convene the annual shareholders’ meeting;
— report to the shareholders and answer their requests for information.

Furthermore, the managing director must ensure that the company meets its obligations under public law – in particular tax and social security laws.

Liability

A managing director who negligently or intentionally breaches his or her duties to the company, is liable for damages vis-à-vis the company. However insofar as a managing director’s action has been (validly) approved or ratified by the shareholders, the company is, as a general rule, precluded from claiming damages in relation thereto.

If misconduct can be attributed to several managing directors, they are liable on a joint and several basis. Particular liabilities may arise in connection with the managing director’s duty to monitor the contribution and maintenance of the company’s share capital.

If the company becomes insolvent or over-indebted, the managing director must file a petition for the institution of insolvency proceedings without undue delay, but in any case within three weeks of the company becoming insolvent or over-indebted. In default of this obligation, the managing director is liable for damages not only to the company but also to third parties – in particular to creditors of the company. Moreover, the failure to file for insolvency proceedings in time

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apply. In all other cases, a residency permit will only be issued – on a discretionary basis – if there is a ‘special local requirement’ or ‘a major German economic interest’. Experience shows that a permit will not be refused if the director is a citizen of the country of the head office of the employer and if the director meets certain professional criteria. However, a permit may also be granted to directors who do not qualify in this sense. The residency permit will be issued for a limited period of time and subsequent permits are granted when necessary. Foreign managing directors other than EU and European Economic Area nationals must generally apply for an immigration and residency permit from outside of Germany. There are further exceptions (for example USA, Japan, Switzerland). The processing of the application usually requires at least two months.

**Taxation**

If a managing director is resident in Germany, his or her worldwide income is subject to German income tax. If he or she is not resident in Germany, only certain sources of income, including income from employment in Germany or consultancy services provided in Germany, are subject to German income tax. Numerous double taxation treaties limit Germany’s or the foreign country’s right to levy taxation. Income is generally taxed at a progressive rate, ranging from approximately 15% to about 47% (including solidarity surcharge and the top tax bracket, the so called ‘Reichensteuer’).

There are various tax deductions which may apply – with certain restrictions in case of non-resident taxation. For example, for the maintenance of two households. If the director is also a shareholder of the company, the dividends received might be subject to different rules depending on whether they qualify as salary or as income from capital investments.

**Social security**

If a director is classed as an employee, as would normally be the case, pension contributions, health insurance, casualty insurance and unemployment insurance will be deducted on a mandatory basis, regardless of whether the director is resident in Germany or not. As of today, the director’s social security contributions amount to about 20% of his or her gross salary up to certain caps. The company has to contribute the same amounts as the employee.

The German social security laws do not apply to EU and European Economic Area nationals who are sent to Germany by foreign employers for not more than 12 months. Numerous treaties with other countries also limit the applicability of the German social security laws.

If a director is classed as an independent contractor (for example because he or she holds more than 50% of the shares of the company or he or she has a blocking minority), pension contributions, health insurance, casualty insurance and unemployment insurance are not mandatory.
This guide focuses on the rules of private limited companies (‘Korlátolt Felelősségű Társaság’ or ‘Kft.’). It does not address the rules for other forms of company, such as private or public joint stock limited liability companies (‘Zártkörűen Működő Részvénytársaság’ or ‘Zrt.’ and ‘Nyilvánosan Működő Részvénytársaság’ or ‘Nyrt.’). Special rules also apply to single-member private limited companies.

Senior officers of a private limited company are called "managing directors".

Eligibility requirements

There are certain restrictions governing who can become a managing director, as follows:

— a person who has been sentenced to imprisonment by a final judgment for committing a crime may not be a managing director of a company until such person is relieved from the detrimental legal consequences related to his or her criminal record;
— a person who has been barred by a final judgment from being a senior officer may not be a managing director of a company during the effective period of such ban;
— a person who has been banned by a final court verdict from any profession may not serve as an executive officer in a company whose main business activity is such profession during the effective period of such ban;
— a person who, at the time of the initiation of winding-up proceedings (‘megszüntetési eljárás’) or in the year of the deletion or in the year preceding the deletion, served as an executive officer at a company or was a member holding an exclusive or majority control in a company, for a period of five years after the deletion of the company from the companies register based on the winding-up proceedings, may not be an executive officer of another company. This exclusion applies only if the relevant company was terminated by winding-up proceedings because it could not be found at its registered seat and its branches and the persons entitled to represent it could not be found either;
— if the liability of a person, in his/her capacity as the executive officer of a company that terminated without a legal successor or the member of such company with exclusive or majority control, has been declared by a final court decision in accordance with the Bankruptcy Act or the Company Registration Act for any claims that remained unsatisfied in the proceedings leading to the termination of such company without legal successor and if this person failed to effect the payment obligations in compliance with the final court decision, then this person may not be the executive officer of another company;
— not strictly defined as restrictions but the below also apply when a new person is appointed as executive officer (the "Relevant Person"). The Relevant Person is not eligible if he/she has been involved in the operation of another company as a member or executive officer (although there are some circumstances exempt from these exclusions):

(a) that has tax arrears exceeding HUF 15,000,000 (ca. EUR 50,000) (in the case of taxpayers with the highest taxing capacity of HUF 30,000,000, i.e. ca. EUR 100,000) on the day of submitting the request to have a tax number issued and had such tax arrears continuously existing for 180 days, provided that the Relevant Person was an executive officer or a member of such company on the 180th day preceding the 180th day of the existence of the tax arrears or at any time after this date;
(b) that has terminated without a legal successor within five years preceding the request to have a tax number issued, leaving behind tax arrears exceeding HUF 15,000,000 (in the case of taxpayers with the highest taxing capacity of HUF 30,000,000), provided that the Relevant Person was an executive officer or member of such company on the
Method of removal

A managing director may resign at any time by giving notice to the company. If so required for the operation of the company, any resignation shall only take effect on the sixtieth (60th) day after the announcement of the resignation, unless the members’ meeting has already provided (or could have already provided) for the appointment of a new managing director beforehand.

During this period, the managing director must participate in making any urgent decisions and taking any such measures required for the operation of the company. The members’ meeting may remove the managing director at any time by means of a resolution passed by way of a simple majority vote (higher voting requirements may be stipulated in the articles of association). Appointments and removals of managing directors must be registered with the Court of Registration.

Authority and representation

The articles of association of a company will regulate whether the directors sign individually or jointly on behalf of the company. The members’ meeting may deprive a managing director of such authority only to the extent provided for in the articles of association or in the Companies Act. A managing director’s duties regarding the company, its bodies and other company officers within the internal operation of the company may only be carried out in person and no representation is permissible.

Working rules of the board

By law, the managing directors of a Kft. do not form a board. This means that a managing director’s right to represent the company may only be restricted by stipulating a requirement for joint signatures. Although it is possible for the constitutional documents to provide for a division of matters between the different directors, this division would not be effective vis-à-vis third parties (i.e., if a managing director signed a document outside his or her authority, the signature would still bind the company). Similarly, the articles of association may require the prior approval of the members’ meeting to enter into certain agreements. However, any agreement entered into in breach of this requirement would nonetheless bind the company.

Although legally there is no board for a Kft., a quasi board can be created by prescribing joint signatory requirements and by setting out the procedural rules in the articles of association that have the practical effect of creating a board framework.
Contractual relationship with the company

A managing director may, but need not, be remunerated by the company under a service or an employment agreement for acting as a managing director. It is also possible to engage the managing director under a service contract for his/her duties of managing director and at the same time employ him/her under an employment agreement for tasks different to those carried out as managing director. Further, a managing director may also have a contractual relationship with the company as a consultant providing services under a consultancy agreement.

Which structure is chosen is mainly a tax-driven decision. Termination of the directorship does not automatically terminate the employment/consultancy contractual relationship and vice versa. However, an agreement may provide that it terminates forthwith upon the individual concerned ceasing to be a managing director of the company.

Conflicts of interest

To avoid possible conflicts of interest, managing directors may not acquire ownership (except for the acquisition of shares in a public joint stock limited liability company) and may not accept an executive office in any company whose main business activity is similar to that of the company where he/she serves as executive officer, unless the articles of association of the relevant company so permit or if a members’ meeting of the company has granted its consent. The articles of association may specify that such restriction applies to companies pursuing the same activity (i.e. not the same main activity).

Managing directors and their close relatives (including their common law spouse) may not conclude contracts on their own behalf (or for their own benefit) that fall into the main scope of activity of the company, unless the articles of association permit this. The managing director, his/her close relatives or common law spouse may not be elected as a member of the supervisory board at the same company.

Duties of a director

The managing directors carry out the day-to-day management that does not fall within the exclusive scope of the members’ meeting or other company organs pursuant to law or the articles of association. The managing directors are authorised to represent the company before third parties, courts and other authorities.

Managing directors are obliged to report any amendments of the articles of association and any changes in the registered data of the company to the Court of Registration. Managing directors exercise the employer’s rights in relation to the employees of the company unless the articles of association provide otherwise.

The managing director is obliged to keep an up-to-date list of members of the company. The list of members must be amended by any changes of members or quotas (capital) held by them. The up-to-date list of members must be filed with the Court of Registration.

Managing directors are required, upon the request of the members, to provide information on the affairs of the company and to allow inspection of its books and documents. The Court of Registration may compel the company to provide such information in the event of non-compliance.

Liability

The managing directors must conduct the management of the company with the standard of care generally expected from persons occupying such positions and must give priority (with the exception described below) to the interests of the company.

A managing director will be liable to the company, in accordance with the general rules of civil law, for damages caused to the company by violation of the law or by breach of the articles of association, the resolutions of the members’ meeting, or his/her management obligations. In the case of independent signing rights, the managing director bears full liability for the damage caused to the company, whilst in the case of joint signatures, the directors have joint and several liability for their actions. Managing directors also have unlimited liability for damages resulting from reporting untrue facts to the Court of Registration and from any delay or default of reporting any required information.

Generally, the company is liable to third parties for damages caused by the managing director in any performance (properly or improperly performed) of his duties on behalf of the company. However, the company may claim compensation from the managing director afterwards.

If the company is dissolved without a legal successor, claims may be brought by members against the managing director for a period of up to one year following final judgment dissolving the company. Such claims may only be made up to the proportion of assets due to that member following dissolution.
In the following exceptional case, the managing directors may be held liable directly to the creditors of the company. If a situation that threatens the solvency of the company occurs, the managing directors have to perform their management tasks by giving priority to the interests of the creditors of the company and not to the interests of the company itself. The occurrence of a threatened insolvency situation runs from the date and time from which the managing director foresaw or should have foreseen that the company would not be able to satisfy its liabilities as they fell due. If the company eventually became subject to a liquidation procedure or an involuntary deletion (‘kényszertörlés’) and the managing director had not complied with the above obligation, and due to this, the assets of the company decreased or the full discharge of the creditors’ claims was not possible or environmental obligations were not fulfilled, then the managing director may be held liable to the creditors of the company. This rule applies to managing directors serving as such at the time of the initiation of the liquidation/involuntary deletion procedure and during a period of three years preceding such date. It also applies to persons exercising de facto dominant powers in the decision-making process of the company (i.e. shadow management). The company’s creditors, or in case of a liquidation the liquidator as well, may file such charges within 90 days from the termination of the liquidation/involuntary deletion procedure becoming final and binding.

The managing director is exempt from the liability described in the preceding paragraph if he/she can prove that following the occurrence of a threatened insolvency situation, he/she has taken all measures that could be expected in such a situation in order to reduce the losses to creditors and to initiate measures to be taken by the members’ meeting of the company. The creditors’ interests are deemed aggrieved if, for example, the managing director did not comply with certain specific reporting and information obligations during the liquidation/involuntary deletion procedure.

Limitation of liability

In a single-member company the rules of the liability of the managing director differ somewhat, as the managing director may be instructed in his capacity by the single member in writing, in which case the managing director shall be exempt from liability.

If the articles of association of the company so stipulate, the members’ meeting may evaluate the work of the managing directors annually for the previous financial year in order to decide whether to grant a discharge of liability to the managing directors. By granting a discharge of liability, the members’ meeting verifies that the managing directors have performed their work during the period under review by giving priority to the interests of the company. The discharge of liability will become ineffective if a court ruling subsequently declares that the information on which the discharge of liability was granted was false or incomplete.

A company is permitted to purchase directors’ and officers’ insurance on behalf of its directors.

Immigration issues

As an exception from general Hungarian employment rules, no work permit is required for managing directors of companies who are foreign individuals and not Hungarian citizens or residents. This exception does not apply to further activity carried out by the managing director exceeding the scope of duties as a managing director for the company.

Foreign individuals coming to Hungary from a member state of the European Economic Area (EEA) to fulfil a managing director’s position must apply for an EEA resident permit at the relevant regional directorate of the immigration office in Hungary.

Foreign individuals entering Hungary from a non-member state of the EEA to fulfil a managing director’s position must apply for a visa or a residence permit for income-earning activities in advance. Such visa can generally be obtained at the Hungarian Embassy or Consulate in the director’s home country. To obtain such visa, the managing director must submit all the company documents indicating his or her position in the company. As a subsequent step, before the date of expiry of the visa, the managing director must apply for a residence permit at the relevant regional directorate of the Office of Immigration and Nationality. It is possible to first apply for a residence permit without the obligation of obtaining a visa for nationals of states listed in Council Regulation 539/2001/EC. Such nationals may lodge their applications for a residence permit at the regional directorate of the immigration office in Hungary.

Taxation

Hungary has concluded Double Tax Treaties with most European and North American countries. Based on most of these treaties, income received by directors of companies is taxable in the country where the company is resident for tax purposes (i.e. in Hungary).
According to Hungarian personal income tax legislation, income received by managing directors (with respect to their activities as such) is considered as income from non-independent activity and the whole amount should be taken into account when calculating the taxable income. For annual gross income up to HUF 2,424,000 (ca. EUR 8,000), no tax base increasing element should be added; however, above this limit a 27% tax base increasing element is applicable. Therefore, the effective tax rate of personal taxation is 16% for annual gross income up to HUF 2,424,000, but above this limit the excess is taxed at the effective tax rate of 20.32%.

**Social security**

Foreign managing directors of a Hungarian company are covered by the Hungarian social security system, and they are liable to pay social security contributions, except if they are exempt by relevant EU rules (i.e. Regulation 883/2004/EC).

Foreigners who are not covered by the Hungarian social security system may enter into an agreement with the Social Security Authority and pay voluntary contributions in order to be eligible for healthcare benefits in Hungary.
This guide focuses on the rules relating to companies limited by shares (‘Società per Azioni’ or ‘S.p.A’). It does not address the rules on other limited liability companies, such as the ‘Società a Responsabilità Limitata’ which are generally companies with smaller capital. Nevertheless, the liability rules relating to the directors of companies limited by shares, as well as limited liability companies, are similar.

The management of Italian companies limited by shares may consist of one director (‘amministratore unico’) or a Board of Directors (‘consiglio di amministrazione’). The Italian Civil Code provides that the By-laws of the company should indicate the exact number of directors or the minimum and the maximum number of Directors, in which event the ordinary Shareholders’ Meeting shall set the number.

In addition to the Board of Directors, a Board of Statutory Auditors (‘collegio sindacale’) has to be appointed. This is an internal supervisory body whose role is to check that the company operates in compliance with the law. The Board of Statutory Auditors includes effective auditors and alternate auditors. At least one effective auditor and one alternate auditor must be certified auditors. Should the other member of the Board of Statutory Auditors not be certified auditors, they have to be registered on certain professional registers or to be permanent professors of economy or law at university. The auditors cannot be directors of the company. The main function of the Board of Statutory Auditors is monitoring the management and the procedures for the functioning of the company.

Moreover, the Italian Civil Code, as modified according to corporate law reform entered into effect on January 1, 2004, set forth in the legislative decree of January 17, 2003, n. 6 and following amendments, and legislative decree January 27, 2010 no. 39 provide for the appointment of a certified person or company to be vested with the audit of the accounts of the company. Companies that do not need to draft consolidated annual accounts may grant this power to the Board of Statutory Auditors. In this case, all the members of the Board of Statutory Auditors shall be certified auditors.

Also listed companies must have their accounts certified by external auditors. The Consob (Italian securities market Regulator) may request information, documentation, make inspections, interview the external auditors, the shareholders, the directors, the statutory auditors and the managers of the auditing firm and whoever may be informed of the facts.

The Italian Civil Code, as modified according to corporate law reform, has introduced two alternative management schemes to the ordinary system of management:

— The so-called ‘dualistic scheme’, by which a ‘Management Board’ carries out its duties in collaboration with a ‘Supervisory Board’. The appointment of the first members of the Management Board will be made in the Articles of Incorporation and any further appointment will be made by the Supervisory Board (for example in the event of early resignation of one of the members). The By-laws set the number of members of the Management Board, which may not be less than two. Such members hold office for three financial years and may be re-appointed after this time unless the By-laws provide otherwise. With the exception of certain particular provisions, the same rules regulating the ordinary Board of Directors also apply to the Management Board. The Supervisory Board is comprised of at least three members. Such members need not necessarily be shareholders, but at least one of them needs to be a certified auditor. In the ‘dualistic scheme’ the Supervisory Board has a general duty to control the activities of the Management Board and also has some of the powers that commonly pertain to the Shareholders’ Meeting in the ordinary system, such as the approval of the annual accounts of the company.
Upon incorporation of the company, the directors are appointed in the constitutional documents of the company. During the life of the company, all directors must be appointed by a resolution of the Shareholders’ Meeting (with some exceptions for the dualistic scheme: see above). The company’s By-laws commonly contain detailed provisions relating to the appointment of Directors, the quorum and majority requirements and, in some cases, the specific expertise and reputation that the director should have. Furthermore, the appointment of directors is frequently governed by provisions contained in shareholders’ agreements.

The minimum and maximum number of directors is established in the company’s By-laws.

If there are one or more vacant positions on the Board of Directors but the majority of the Board of Directors hold office, the remaining directors have the right to co-elect a director. However, this resolution is subject to the approval of the Board of Statutory Auditors of the company. The co-opted director will remain in office until the next Shareholders’ Meeting, which may confirm the appointment of the co-opted director or may appoint someone else. In the ‘dualistic scheme’, the co-optation of a director is not possible.

If there are one or more vacant positions on the Board of Directors and the majority of the Board of Directors do not hold the office any more, the remaining directors must convene a Shareholders’ Meeting for the appointment of the requisite number of directors.

Directors’ appointments may only be for a term of up to three financial years. Such appointments expire at the Shareholders’ Meeting convened for the approval of the annual account referred to the last financial year of such office. In the event of directors resigning or being removed from office prior to the expiry of the term, a new director will need to be appointed, serving for the remaining period of office of the person he or she replaces. The directors may be re-elected if the company’s By-laws do not provide otherwise.

The By-laws very often provide for a “simul stabunt simul cadent” clause (if one director resigns, all other members of the Board of Directors cease to hold office).

The Board of Directors often delegates its powers to an executive committee consisting of some of its members, or to one or more managing directors (‘amministratori delegati’). The relevant mandate, which is always revocable, may be of a general nature or limited to single acts. However, there are some powers, which cannot be delegated (for example the drafting of the annual financial statements).
Once appointed, the directors need to register with the Companies Register within 30 days of acceptance of the appointment and will need to specify whether or not they have been granted representative powers and, if so, whether these have to be exercised jointly or not.

Method of removal

A director may resign from office at any time by notice to the Board of Directors and to the Chairman of the Board of Statutory Auditors, stating the reasons for the decision. Resignation is effective immediately. However, in the event of a resignation of the majority of the directors or of the sole director, resignation will only be effective once the majority of the new Board have been appointed.

The Shareholders’ Meeting has the exclusive right to remove a director from his or her office at any time, although the director in question has the right to challenge such decision. If the resolution is not supported by a ‘just cause’, the director may claim damages and seek compensation. Removal is immediate and the Shareholders’ Meeting will need to nominate an immediate replacement.

Normally the By-laws of the company will contain provisions relating to the removal of members of the Board of Directors in the event of one or more directors ceasing office or in the event of the company’s equity holders substantially changes.

The Board of Statutory Auditors must notify the termination of office of any Director to the Companies Register within 30 days of such termination.

Authority and representation

The Board of Directors has all the necessary powers to pursue the company’s objectives, save for those powers expressly reserved to the Shareholders’ Meeting by law or by the By-laws. All members of the Board of Directors represent the company in its relations with third parties unless the Articles of Incorporation or the By-laws provide for restrictions on such representative powers. In practice, authority is commonly delegated to one or more managing directors or to an executive board. It is also common practice to appoint a chief executive (‘direttore generale’) who is not a member of the Board of Directors. If such person is appointed by the Shareholders’ Meeting, he has the same responsibilities as a Board member.

Restrictions on the powers of the directors contained in the By-laws or resulting from decisions taken by the competent bodies do not affect the rights of third parties, even if such decisions are duly made public, unless it can be proven that the said third parties intentionally acted in a manner which was prejudicial to the company.

Working rules of the Board

As previously stated, the management is carried out either by a sole director (‘amministratore unico’) or by the Board of Directors (‘consiglio di amministrazione’). All directors have the same rights and duties and manage the company jointly.

The Board of Directors is a collective body and its meetings are validly held with the majority of the directors in office. Its decisions must be taken by 50% + 1 majority of the directors attending the meeting. However, the By-laws may provide for higher attendance quorums and voting requirements.

The By-laws commonly contain provisions describing in detail the duties, responsibilities and powers of each director and the rules governing the Board meetings.

Contractual relationship with the company

Directors are entitled to remuneration for services provided. The amount due will be fixed in the By-laws of the company or by the Shareholders’ Meeting. When special tasks are delegated to a director by the Board of Directors, additional remuneration may be granted by the Board.

A director may also be an employee of the same company, as long as his or her working relationship with the company meets all the requirements of subordinate employment.

Conflict of interest

Any director must inform the other directors and the Board of Statutory Auditors of any interest he has, directly or as a representative of third parties, in a certain transaction/business of the company. If the director is a managing director, he must abstain from carrying out the transaction and require the relevant resolution of the Board of Directors. If the director is a Sole Director he must inform also the Shareholders’ Meeting at the next meeting.

In the above cases, the resolution of the Board of Directors must be adequately justified by explaining the reasons and the convenience for the company of the transaction.

In addition, any resolution of the Board of Directors may be challenged within a period of ninety days, by any director,
Duties & Responsibilities of Directors

The Italian Civil Code as amended, provides for certain additional duties for directors of a company belonging to a group. Such directors must duly minute any decision of the company involving either the parent company, or any other company in the group, in the minutes of meetings of the Board of Directors. Furthermore, the directors must state in all correspondence and acts of the company that the company is controlled by a parent company and must register the company in a list of ‘controlled companies’ with the Company Registry. These references must be deleted and the registration in the list of controlled companies must be cancelled as soon as the company is no longer a member of the group. Directors who do not comply with the above requirements are directly liable for any damage suffered by the shareholders or any third party as a consequence of their failure to do so.

Liability

Directors are not personally liable for the commitments of the company. Directors are liable for damages in the case of non-compliance with their statutory duties and prohibitions (see above). Normally, all directors of the Board are jointly liable towards the company, the shareholders and third parties for all damages due to the unlawful conduct of one member of the Board.

The company may bring legal action against a director, within five years of the termination of the director’s office, provided that the Shareholders’ Meeting approves such proceedings. Approval of the resolution by shareholders representing at least one-fifth of the share capital will result in the automatic removal of the director against whom the legal proceedings are commenced.

Even without a resolution of the Shareholders’ Meeting, minority shareholders representing at least one-fifth of the company’s capital (one-fortieth or less in listed companies) or a different percentage (not higher than one-third of the company’s capital) as provided in the By-laws, may institute legal proceedings on behalf of the company in respect of the liability of the directors for the violation of their corporate duties.

It is commonly accepted that the creditors of the company may hold the directors liable for damages if they did not comply with their statutory duties to safeguard the company’s equity (for example omitting to call a Shareholders’ Meeting to raise the company’s capital in case of losses) or if the directors’ negligent management causes the company’s insolvency. For a period of five years, the Board of Directors is liable for damages to the single shareholder or third parties for any fraudulent conduct in its management duties (for example, false information).
Limitation of liability

A director shall not be held liable in the event that:

— he did not attend the relevant Board meeting, provided that he verified the minutes, recorded his disagreement in the relevant corporate book, and informed the Chairman of the Board of the Statutory Auditors immediately of the unlawful resolution; or
— he attended the relevant Board meeting but voted against the resolution and informed the Chairman of the Board of the Statutory Auditors.

Crimes committed by directors pursuant to legislative decree no. 231/2001

The Legislative Decree n. 231 of June 8, 2001 (the “Decree”) provides an administrative liability of a company in connection with criminal actions performed directly by its directors, chief executive officers or employees in the interest of and/or to the advantage of the company itself.

More precisely the company may be held liable, for criminal actions performed by: directors, chief executive officers or persons with organizational or managerial roles within the company, and employees subject to the control of the persons with such directors, chief executive officers or persons with organisational or managerial roles.

The criminal actions put in place by the above directors/officers/employees of the company may generate also a liability of the company, if they are deemed to have been executed in the interest of or in order to bring an advantage to the company.

Moreover, if the criminal action is committed by the persons subject to the control and supervision of directors/chief executive officers, the company shall be held liable if the criminal action has been executed as a consequence of the failure to comply with the duty to control their activity.

The Decree provides for a list of possible crimes which may be committed by directors/officers/employees and which, under certain circumstances, may generate a liability of a company. Only by way of example, among these crimes, there are corruption, bribery, misappropriation to the detriment of the State, false accounting, corporate crimes, violations in terms of health and safety, money laundering, cybercrimes, environmental crimes etc.

One or more of the following penalties may be issued to a company for a criminal action committed by one of its directors/officers/executives (provided that a proper Model, as explained below, has not been implemented and concretely followed within the company): a pecuniary penalty and, in some circumstances, a penalty prohibiting the practice of the activity or the suspension of the administrative authorisations needed for business, or other provisional measures.

According to the Decree, a company shall not be deemed liable, provided that it can prove that:

— the company has approved a Model of organisation (the “Model”) which has been introduced and implemented before the relevant crime was committed;
— the control on the implementation of the Model has been assigned to a particular body of the company with management and control tasks (the “Supervisory Body” or “Organismo di Vigilanza”). According to recent new rules, the Board of Statutory Auditors may be appointed as Organismo di Vigilanza of the company;
— the criminal action has been executed infringing the rules provided by in the Model; and
— the Supervisory Body, which must control the implementation of the Model, has correctly fulfilled its obligation.

To consider a Model adequate, it is necessary that:

— it identifies the activities of the company concretely exposed to the risk of crimes;
— it provides proper protocols directed to plan the forming and the implementation of the company’s decisions;
— the procedures of management of the financial resources are suitable to avoid the commission of crimes;
— it provides information duty towards the Supervisory Body;
— it provides a disciplinary system to directly sanction the violation of the Model.

Immigration issues

Employees from outside the EU must first be employed by an Italian company in order to obtain a work permit. The application must be made by the employer who has to guarantee, amongst other things, an adequate remuneration to the employee. Once the employer has obtained the work permit, the employee may apply for a residence permit, which has a maximum duration of two years. The Italian government has limited the number of non-EU residents allowed to work in Italy. The above limitation does not apply to those directors or to those other highly specialised members of personnel who have been employed at least six months prior to their temporary transfer (for example posted workers). People with regular residence permits (students,
families etc) may require an alteration to the purpose of their permit in order to work in Italy.

**Tax issues**

All fees received by the directors for services in Italy are subject to income tax, whether or not the director lives in Italy. In calculating the amount due, all forms of remuneration are taken into account, such as director’s fees, all payments in kind and benefits granted to the director in connection with the exercise of his or her function. Costs are only deductible within the limits set out by the Italian Tax law. The company to which the director provides his services is required to withhold an advance tax payment. The income of the director is subject to a progressive tax rate.

**Social security**

If a director also holds the position of employee of the company, may benefit from certain Italian social security services and benefits, such as:

— sickness and maternity benefits;
— invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
— old age benefits;
— survivors’ benefits;
— benefits in respect of accidents at work and occupational diseases;
— death grants;
— unemployment benefits; and
— family benefits.

Social security contributions are mandatory and have to be paid by the company for all employees regardless of their nationality, with some exceptions for posted workers. Reduced social security contributions are payable in respect of directors who are not employees of the company.

Introduction

This guide focuses on rules relating to Luxembourg public limited liability companies (société anonyme) and private limited liability companies (société à responsabilité limitée) provided for in the Luxembourg law on commercial companies dated August 10, 1915, as amended (the “Company Law”). It does not include the regulations applicable to partnerships, or other legal forms of organisations operating in the non-profit sector. All comments relate to both types of companies, unless stated differently.

In public limited liability companies, the Company Law provides that the management is exercised either by (i) a single tier management board or (ii) a two tier structure.

— A single tier structure consists of a board of directors composed of at least three members or a minimum of one director if the company has a sole shareholder.
— A two tier structure consists of a management board (directoire) exercising the same duties/liabilities as the board of directors under the supervision of a supervisory board (conseil de surveillance).

In private limited liability companies, the Company Law provides for one tier management structure and the company is managed by one or several managers. In the case of plurality of managers, they can form a board.

Eligibility requirements

The general principle is that the shareholders of a company can freely designate the directors. There are practically no legal limitations on the suitability criteria for electing directors. The main exceptions to the general principle are minors, incapacitated and persons declared bankrupt.

Neither qualification nor Luxembourg nationality is required in order to be elected as a director. Non-residents can be elected as directors; however it may be advisable from a tax perspective to appoint a Luxembourg resident director for substance reasons.

With the exceptions of Luxembourg general partnerships (sociétés en nom collectif) and limited partnerships (société en commandite simple) it is not necessary for the directors to also be the shareholders of the company. Where a legal entity is designated as a director it shall appoint a permanent representative to carry on the director’s functions and to act in the name and on behalf of the legal entity. Such representative shall be held responsible and liable to the same extent as if he had carried out those functions in his own name.

Appointment

Directors are appointed by the general meeting of shareholders of the company.

Directors are appointed for a period of time stated in the articles of association of the company and should never be more than six years. They can then be re-elected.

Removal

Directors may be removed by the general meeting of shareholders at any time with or without fair reasons. If a company removes a director without a fair reason, they will have to indemnify him/her. Where the director has been designated in the articles of association, he/she will only be removed by a unanimous decision of the shareholders where the director is also a shareholder. The director can be removed by any shareholder in the case of director’s gross misconduct.

A director may resign at any time. However, his/her resignation must not cause damage to the company and
should, therefore, be done carefully. The removal or resignation of a director must be published in the Luxembourg Official Journal “Memorial C”. The director’s resignation will never be effective immediately, and will not produce effects to third parties until its publication in the Memorial C.

Directors’ mandate can be terminated for other reasons; for example, in the case of the director’s death.

Authority and representation

The board of directors has the power to take any action necessary or useful to realise the corporate object of the company, subject to any contrary provision in the articles of association of the company and limited number of acts which are reserved (either as a matter of law or as a matter of the articles of association) to the general meeting of shareholders (for example, among others, the declaration of dividends, the approval of the annual accounts, the appointment or removal of directors and/or statutory auditor, any changes to the articles of association and merger demerger). The board of directors has the widest management powers, including day-to-day management, which the board of directors may delegate to one or more persons acting either alone or jointly. A clause to that effect is valid vis-à-vis third parties if it is published in the Luxembourg official gazette.

Working rules of the board

Board meetings are held and organised either on the basis of internal procedures or in accordance with the regulations provided for in the articles of association of the company. The articles of association of the company may, for instance, provide for a detailed meeting schedule and procedures. Thus, it can be stipulated that any director/manager may participate in any meeting of the board either by telephone or video conference or by any other similar means of communication. The participation in the meeting by such means is deemed to constitute participation in person at such meeting. Circular resolutions are also widely used in Luxembourg.

Contractual relationship with the company

A director is an agent of the company. A director may, but need not, be remunerated. The general meeting of shareholders determines the remuneration of the directors, unless the articles of association grant this power to the board of directors.

A director can also be an employee of the company, provided his or her tasks as an employee are separated from his or her duties as a director. A management company, being a company that contracts with the company to provide the director’s services, is allowed.

Conflict of interest

Each director must act in the best interest of the company. Any Director having an interest in a transaction, submitted for approval to the board of directors conflicting with that of the company, shall be obliged to advise the board of directors and a record of his/her statement is to be included in the minutes of the meeting. He/she may not take part in these deliberations.

At the next following general meeting, before any other resolution is voted, a special report will be issued on any transaction in which any of the directors may have had an interest conflicting with that of the company.

If the company has only one director, the transactions that have a conflicting interest between the sole director and the company will be registered in the decisions register.

The above will not be applicable to current operations carried on under normal circumstances either by the board of directors or by the sole director.

Duties of directors

Each director must act in the best interest of the company as a whole and not only for its shareholders, such duty being known as “théorie de l’organe”. Directors act in name and on behalf of the company and, most importantly, for the company. Directors are responsible towards the company. The directors express the company’s aims. They must make and implement their decisions in the ‘corporate interest’ of the company. The board of directors has the responsibility to define the company’s plan of action and to improve the company. The articles of association may specify the duties of the directors.

The board of directors should do whatever is necessary or useful for the implementation of the corporate objects of the company, subject to certain decisions reserved by law or by the articles of association to the general meeting of shareholders (as mentioned above).

The articles of association may limit the powers granted to the board of directors. These restrictions, however, may not limit the fundamental powers of the board (for
example, the power to convene a general meeting of shareholders or the preparation of the annual accounts).

The restrictions on the powers of the board are not enforceable against third parties, even if these restrictions have been published in the articles of association. It is possible to assign certain powers reserved for the board of directors to certain individual directors. This assignment cannot, however, be appealed against third parties, even if the restriction has been published.

A director can be liable for shortcomings in the implementation of his/her duties, as well as for a breach of any provision contained in the Company Law and/or in the articles of association of the company.

### Liability of directors

A distinction must be made between the civil liability and the criminal liability of a director.

#### Civil Liability

In terms of civil liability, a distinction is to be drawn between: (a) contractual liability; (b) liability for violations of the articles of association and violations of the Company Law; and (c) tort liability.

##### (a) Contractual liability

Directors are agents of a company. In the framework of this contractual relationship they are liable vis-à-vis the company for the fulfilment of their tasks and for any shortcomings in the performance of their duties. It is generally accepted that this ground of liability can only be invoked by the company.

A finding of liability requires the establishment of three factors: (1) fault; (2) damage; and (3) a causal link between the fault and the damage.

Legal proceedings based on contractual liability, the *actio mandati*, can only be brought before the court by the company after a simple majority decision of the general shareholders meeting. The company may appoint one or several proxy holders to implement this decision. No *actio mandati* can be brought by the company if discharge was validly granted to the directors by the annual general shareholders meeting.

In principle, the contractual liability imposed by the Company Law is an individual liability as a personal fault must be involved. Insofar as the fault can be attributed to a specific director, his/her civil liability cannot be extended to the other directors who did not commit the fault. However, in many cases, the damage results from concurring faults committed by different directors such that without the fault of one of the directors, the faults of the others would not have been sufficient to cause the damage. In such cases, each director will be held liable *in solidum*, meaning jointly and severally liable. Directors will be held jointly and severally liable if the damage is triggered by a joint fault, i.e. where different people knowingly contributed to the act causing the damage. So, each director must account for the entire amount of the damages. Any director may be sued and the payment by one director releases all other liable directors from any obligation to the third party.

##### (b) Liability for violations of the articles of association and of the Luxembourg Company Law

The Company Law states that directors may be held jointly and severally liable to the company and to third parties for all damages resulting from a violation of the Company Law or of the articles of association. Again, fault, damage and a causal link must be established for legal proceedings to be successful.

Legal proceedings can be brought by the company, according to the same rules as those applying to contractual liability. Third parties, such as public authorities, creditors, employees or an individual shareholder of the company may also initiate legal actions. A discharge granted to the directors by the annual shareholders general meeting does not bar third party actions.

If the fault is proven, a presumption of joint and several liability rests on all directors. Any individual director can be held liable for the payment of the entire damage caused by a violation of the Company Law or the articles of association, without the plaintiff having to prove who specifically committed the violation.

A director can only escape joint and several liability if he can establish that:

(a) he did not participate in committing the violation;
(b) he was not otherwise negligent; and
(c) he had no knowledge of the violation, or informed the shareholders of the violation at the first shareholders meeting following the date on which he obtained knowledge of the violation.

##### (c) Tort Liability

The common rules of tort liability, provided for in the Luxembourg Civil Code, are also applicable to directors. If a tort is committed, the injured person is entitled to claim indemnification for the damage caused by the tort.
A tort is committed if the general duty of due care and diligence or a provision imposing a specific obligation of a non-contractual nature is infringed upon.

For a director to be held liable for a tort, the essential elements (fault, damage and a causal link between fault and damage) must be proven on an individual basis, meaning that it must concern the violation of a personal obligation to the director.

Legal proceedings can be brought by the company itself or third parties.

Where the fault is both a breach of an agreement between the director and the company and a breach of the general duty of due care and diligence that applies to everyone, the company can bring a claim if the actual damage is different from the damage that would have resulted from a fault in the execution of the director’s management tasks (i.e. contractual liability).

Third parties, including creditors and shareholders, can hold directors personally liable for all damages suffered due to the violation of a specific legal provision or the general duty of due care and diligence under certain conditions.

Criminal Liability
A fault committed by a director may, in addition to triggering his civil liability, also constitute a criminal offence for which he can incur criminal liability. Examples include forgery, breach of trust and fraud.

The Company Law provides for criminal sanctions if directors infringe upon certain obligations.

If a director of a company is prosecuted and punished for an offence committed by the company, the company can be held liable under civil law for damages and costs of the proceedings.

Liability for breach of obligations vis-à-vis the tax authorities
Under certain circumstances, the directors can be held personally liable towards the tax authorities, for example in not fulfilling filing obligations.

The right of a public prosecutor to request the dissolution of the Company
According to the Company Law, a Court may, at the request of the public prosecutor, order the dissolution and the liquidation of any company governed by Luxembourg law which pursues activities contrary to criminal law or which seriously contravenes the provisions of the commercial code or the laws governing commercial companies, including those laws governing authorisations to do business.

Directors’ liability in case of insolvency of the company
Civil Liability
The general principles of contractual liability, liability for violations of the articles of association and of the Company Law and tort liability (set out above) continue to apply if the company becomes insolvent.

Both the bankruptcy receiver and the creditors can bring an action against the directors based on gross and manifest negligence. The court can grant the creditors an indemnity, limited to the damage they have suffered.

Criminal Liability
The Luxembourg Criminal Code provides for criminal sanctions against directors of a bankrupt company under certain conditions and in certain circumstances.

Limitation of liability
The liability of company directors in Luxembourg is a matter of public policy (“ordre public”). Therefore, it is not possible to derogate, by contract or otherwise, from the principles described above.

Immigration issues
As a general principle, if the director is not a Luxembourg resident and is not remunerated, there are no immigration issues. In other cases, a distinction must be made between EU residents and non-EU residents.

EU residents have the right, in accordance with European Community Law, to work in any Member State. There are no special requirements, apart from the obligation to register with the town hall where the director has his/her residence.

For a non-EU resident director to live and be remunerated in Luxembourg in their capacity as an employee of the company, they must obtain a residence card.

Professional cards can be obtained from the Luxembourg Ministry of International Business and Immigration (“Ministère des Affaires Etrangères et de l’Immigration”).

Taxation
The directors’ fees are subject to withholding tax at the rate of 20% of the gross amount (25% if the tax is withheld of the net amount) which is levied by the company paying the fees. Such a withholding tax may
satisfy, in full, a tax liability on fees received by a non-resident director earning less than EUR 100,000 per tax year (provided he has no other Luxembourg source income). Other directors (i.e. Luxembourg tax resident directors or non-residents directors who receive more than EUR 100,000 in gross directors’ fees or non-residents directors who opt to be taxed by assessment) have to file a Luxembourg tax return.

**Social security**

Directors may be registered with the social security at the beginning of their activities.

Directors can be employees or self-employed.

Directors of companies that have commercial, trade, agricultural or intellectual objects are considered to be self-employed persons provided that the director holds more than 25% of the company shares and he/she is listed as business manager on the business license. Such directors must be affiliated with the Joint Social Security Centre (Centre commun de la sécurité sociale – CCSS).
Eligibility requirements

There are no legal restrictions on who can become a managing director. The articles of association may, however, contain specific requirements in respect of the eligibility of possible managing directors or may contain requirements in respect of the right to nominate candidates.

An individual managing director is not required to be resident in the Netherlands and there is no nationality requirement, unless required otherwise by the articles of association. If the articles of association contain such a requirement, a distinction between Dutch subjects and subjects of other EU countries is not permitted. Another company – whether incorporated in the Netherlands or elsewhere – can also be appointed as a managing director. There is a minimum of one and no maximum to the number of managing directors of a company, except for any minimum or maximum prescribed by the articles of association.

Appointment

A managing director is normally appointed by the general meeting of shareholders. However, if the company has a mandatory supervisory board, the managing directors are appointed by such board. Notification of the appointment, together with the signature of the managing director, must be filed by the company with the trade register of the relevant chamber of commerce. Except if the filing is performed by a civil law notary, the trade register will also require a legalised copy of the director’s passport and evidence of his or her private address. A small fee is payable. Managing directors are usually appointed for an indefinite period of time. Appointments for limited periods or reappointments are possible, but unusual, and, where the managing director has an employment relationship with the company, may be incompatible with Dutch labour
law. If the company has a works council, the management board is required to give the works council prior notice of any proposed candidate for appointment to the board if the managing director will actually be managing the company. The works council should have the opportunity to render non-binding advice before the appointment is made. If the appointment is made by the supervisory board, the latter must notify the general meeting of shareholders of any proposed nomination.

Removal

A managing director may resign his or her office at any time by notice to the company. Such notice will automatically lead to termination of the employment contract (although such resignation may constitute a breach of the employment contract). As a rule, a managing director can be discharged at any time. A dismissal requires a resolution of the shareholders. If the company has a mandatory supervisory board, the managing directors are normally discharged by such board. Prior to any dismissal, the supervisory board must seek the opinion of the general meeting of shareholders. The works council should also be granted the opportunity to render non-binding advice on any proposed termination. Prior to any contentious termination, the managing director should be informed of the reasons for the proposed dismissal, and be given the opportunity to give his or her views.

The employment contract of a managing director usually terminates upon his or her removal from the board, but the contractual notice period should be observed. If the company does not respect the contractual notice period, it must pay fixed damages to the managing director. In such case, the managing director can not be obliged to abide by his or her obligations pursuant to an applicable non-compete clause. If the termination of the employment contract was obviously unreasonable, unjustified or improper, the managing director may also be entitled to damages. In most cases a settlement is reached concerning the effective date of termination and financial compensation. Suspension may also be possible. Any resignation, suspension or removal of a managing director must be notified to the Trade Register.

Authority and representation

Each managing director has the authority to represent the company. The articles of association may, however, provide that the company may only be represented by two or more managing directors, acting jointly or with certain third parties. The full management board is always authorised to represent the company. Although the articles of association may require internal approval for specific resolutions, they cannot limit the (external) transactional powers of the managing directors in respect of specific matters or in respect of the size or nature of any one transaction.

Working rules of the board

The managing directors, as members of the management board, jointly have all powers to manage the company, except for those (limited) powers which by law are, or may be, attributed to the shareholders or to the supervisory board. Depending on the content of the articles of association, those limited powers may include the right to approve certain decisions of the board of managing directors beforehand.

Furthermore, for listed and certain other large companies, approval of the shareholders shall always be required in respect of a number of important decisions regarding the core identity of the company. The members of the management board have collective responsibilities. They share responsibility for all decisions and acts of the management board and for the acts of each individual managing director. However, certain tasks may be allocated to one or more managing directors. Nevertheless the main lines of the policy and financial management of the company always have to be decided by the management board as a whole. The same applies to any important decisions.

Within the aforementioned limits, the management board may adopt internal working rules, which describe in detail the duties, responsibilities and powers of each managing director as well as the rules applicable to board meetings. The adoption thereof can be made subject to prior supervisory board or shareholders’ approval in the articles of association.

Contractual relationship with the company

An appointment as a managing director does not in itself constitute a contract with the company or entitle a managing director to remuneration. Unless the articles of association prescribe otherwise, the shareholders have the right to decide on the remuneration of the managing directors. Furthermore, for listed and certain other large companies, it is in any case mandatory that the policy of the company in respect of the remuneration of directors shall be determined by the shareholders.

A managing director may also have a contractual relationship with the company:
However, from case law it seems to follow that for some cases a more severe test will also be applied; would any other competent director, who acted reasonably, have made the same decisions?

In a one-tier board structure which new legislation (to be introduced) provides for, the above basic rule of collective responsibility will continue to apply. Non-executive directors, however, may find it easier to evade liability for mismanagement by invoking the attribution of tasks and their role within such a management board.

The managing directors are also subject to a duty of good faith. The duty of good faith is part of the reasonableness and fairness requirement that is imposed on the relationship among corporate bodies such as the management board, the supervisory board, the general meeting of shareholders and the works council. A special corporate governance code is applicable to listed companies. Listed companies are supposed to include elements thereof, at least as much as possible, in their own internal corporate governance structure. They are to report on the extent to which these elements have been included in their annual accounts. Specific, additional duties and obligations for directors are an important part of this corporate governance code. Various elements of the code may also be of relevance for non-listed companies.

**Conflicts of interest**

In case of a conflict of interest between the company and a managing director, the company can only be represented by the supervisory board (if any). However, the articles of association may provide (and in practice often do) that the company may even be represented by the management board and/or individual managing directors in the event of a conflict.

In case of a conflict of interest the shareholders always have the right to appoint one or more others who will represent the company in that specific case. This right cannot be excluded by the articles of association.

The management board and the supervisory board are under a duty to inform the shareholders promptly in case of a (possible) conflict of interest.

**Duties**

The management board is entrusted with the management and the representation of the company. In principle this is a collective responsibility, for which each individual managing director is liable. The managing directors must act in the best interests of the company. The managing directors may allocate the management tasks among themselves, but the above principle of collective responsibility entails that the managing directors must always resolve collectively on the main lines of company policy and its financial management and on important issues.

Each managing director is under a duty of care vis-à-vis the company to perform ‘properly’ his or her part of the management task as assigned to him or her. The managing director is under a duty to use all reasonable endeavours to achieve this, but he or she does not have to guarantee any results. In case of improper performance a managing director is, as a rule, only liable for any losses of the company in the case of serious mismanagement.

However, from case law it seems to follow that for some cases a more severe test will also be applied; would any other competent director, who acted reasonably, have made the same decisions?

In a one-tier board structure which new legislation (to be introduced) provides for, the above basic rule of collective responsibility will continue to apply. Non-executive directors, however, may find it easier to evade liability for mismanagement by invoking the attribution of tasks and their role within such a management board.

The managing directors are also subject to a duty of good faith. The duty of good faith is part of the reasonableness and fairness requirement that is imposed on the relationship among corporate bodies such as the management board, the supervisory board, the general meeting of shareholders and the works council. A special corporate governance code is applicable to listed companies. Listed companies are supposed to include elements thereof, at least as much as possible, in their own internal corporate governance structure. They are to report on the extent to which these elements have been included in their annual accounts. Specific, additional duties and obligations for directors are an important part of this corporate governance code. Various elements of the code may also be of relevance for non-listed companies.

**Conflicts of interest**

In case of a conflict of interest between the company and a managing director, the company can only be represented by the supervisory board (if any). However, the articles of association may provide (and in practice often do) that the company may even be represented by the management board and/or individual managing directors in the event of a conflict.

In case of a conflict of interest the shareholders always have the right to appoint one or more others who will represent the company in that specific case. This right cannot be excluded by the articles of association.

The management board and the supervisory board are under a duty to inform the shareholders promptly in case of a (possible) conflict of interest.

**Duties**

The management board is entrusted with the management and the representation of the company. In principle this is a collective responsibility, for which each individual managing director is liable. The managing directors must act in the best interests of the company. The managing directors may allocate the management tasks among themselves, but the above principle of collective responsibility entails that the managing directors must always resolve collectively on the main lines of company policy and its financial management and on important issues.

Each managing director is under a duty of care vis-à-vis the company to perform ‘properly’ his or her part of the management task as assigned to him or her. The managing director is under a duty to use all reasonable endeavours to achieve this, but he or she does not have to guarantee any results. In case of improper performance a managing director is, as a rule, only liable for any losses of the company in the case of serious mismanagement.

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that he or she did not fail in his or her duty to take action to avoid or prevent the consequences of the mismanagement. Certain important matters, however, by definition always belong to the tasks and duties of each director.

If the company is unable to pay certain of its taxes or social premiums it must notify the relevant authorities of its inability to pay within 14 days after the due date. In the absence of such notification, or if the inability to pay is caused by apparent negligence of the management board, the managing directors are jointly and severally liable for the relevant taxes and social premiums. Individual managing directors have the right to exculpate themselves, but in practice exculpation will only be possible under exceptional circumstances. If the company is declared bankrupt the managing directors are personally liable for the deficit in bankruptcy. Again, individual managing directors have the right to exculpate themselves, but in practice exculpation will only be possible under exceptional circumstances. If the company is declared bankrupt the managing directors are personally liable for the deficit in bankruptcy. If the bankruptcy is to a significant extent caused by apparent negligence of the management board during a three-year period prior to the date of bankruptcy.

If the company has not kept proper financial records or has not filed its annual accounts with the trade register in a timely manner (i.e. at latest 13 months following financial year end), there is a binding presumption – which cannot be challenged or proven wrong – that there has been apparent negligence and a further presumption that such apparent negligence has to a significant extent caused the bankruptcy. Again, individual managing directors have the right to exculpate themselves, but in practice exculpation will only be possible under exceptional circumstances. Except in certain combinations of complex and unusual circumstances, current Dutch law does not provide for shareholders’ derivative suits. A breach of the duty of care may give rise to an action by the company or the receiver in bankruptcy against the management board or members thereof for mismanagement.

An important legal basis for liability of the managing directors towards third parties is tort. Creditors of the company for example may hold a managing director liable on the basis of tort if he or she entered into a transaction on behalf of the company when he or she knew (or reasonably should have known) that the company would not be able to fulfil its obligations under that transaction. Managing directors may also incur (personal) liability for example in case of environmental pollution, fraudulent transfer of assets, unjustified inequality in the treatment of creditors, erroneous or misleading financial statements, a misleading prospectus or certain breaches of the competition laws. It is now also contemplated to establish such personal liability for a failure by managing directors to assess the admissibility of dividend distributions.

Under Dutch criminal law a company can commit a crime. The individual who is directly responsible for the criminal behaviour of the company may commit a crime as well. Accordingly, members of the management board may, in the event of (personal) liability for mismanagement under civil law, sometimes also face criminal sanctions. Finally, it should be noted that in specific instances, some form of director’s liability may also arise: (i) in respect of individuals who, without being appointed, effectively manage the company as if they were directors; (ii) for an individual being the managing director of a company that is a managing director; or (iii) for supervisory directors.

**Limitation of liability**

No statutory provision or case law exists which relates directly to the validity and enforceability of indemnities by the company. However, indemnification clauses are rare because their effectiveness is generally considered to be limited. A company is permitted to take out directors’ insurance on behalf of its managing directors. However, insurance policies contain many exclusions and limitations.

**Immigration issues**

Employees from non-EU countries (except for Switzerland) require a work permit prior to being employed in the Netherlands. The same applies to employees from EU countries Bulgaria and Romania (for the time being).

Applications must be made by the prospective employer with the competent local authority, which is called ‘UWV WERKbedrijf’. The duration for the procedure to obtain a work permit is limited by law to five weeks (as of the moment of submission of the complete request). In general, a work permit will not be granted if suitable candidates from the European Economic Area (EEA) are available for the vacancy. The prospective employer is required to demonstrate that efforts to hire an EEA resident were unsuccessful. There are exemptions to this general rule, one of which is applicable to employees considered key personnel, who are transferred within an international group of companies. The procedure for such employees is simplified.

Apart from a work permit a residence permit has to be obtained by any non-EEA resident desiring to take up residence in the Netherlands.

**Taxation**

**Directors’ fees**

Fees paid by a company to a managing director/individual for activities performed in his or her capacity
as director of the company, are subject to Dutch personal
income tax at the normal progressive rates, regardless
of the place where the activities are performed. If the
directors’ remuneration is paid by a non-Dutch group
company, it may be advantageous to allocate part
of the remuneration to the Dutch company by means
of a salary split, so that the director can benefit in the
Netherlands from a low effective tax rate on this part
of his or her remuneration.

Directors’ fees paid to a foreign company which is
appointed as a managing director of a Dutch company
are normally deductible for Dutch corporate income tax.

**Service agreement**
A distinction should be made between fees of a managing
director/individual for activities performed in his or her
capacity as director of a company and fees for other
services, for instance services performed as a sales manager
or consultant. Under most tax treaties fees for these other
services provided by a foreign director/individual are only
taxable in the Netherlands if the activities are actually
performed in the Netherlands during more than
183 days per year.

**Consultancy contract with company/firm**
Fees paid to a foreign company which performs
consultancy or other services to a company are normally
deductible for corporate income tax. However, if the
foreign company is managed and controlled by an
individual who actually performs the services as if he or she
were an employee of the Dutch company, the fees may
under circumstances be taxable in the Netherlands with
wage tax and/or personal income tax. Foreign employees
and executives of international enterprises temporarily
(maximum period 96 months) assigned to the Netherlands
on the basis of their specific skills may apply for the 30%
ruling within four months after the starting period of their
assignment. It is not required that the activities are also
actually carried out in the Netherlands, so the 30% ruling
could also be granted to directors of a Dutch company
who live and work abroad.

The employees qualifying for the 30% ruling are entitled
to receive a tax-free cost allowance of 30% of their
gross income. The effective personal income tax rate
for a foreign employee will, as a result of the 30% ruling,
be considerably lower. The standard travel deduction
and business deductions are also available. Furthermore,
allowances paid to the employee for costs of an
international school are also tax-free. Finally, a qualifying
employee could during the period of his or her Dutch
assignment request to be considered a non-resident
taxpayer, in case this would be more beneficial.

**Social security**
A managing director who is also an employee of the
company (see above) may be entitled to certain social
security benefits, such as disability insurance and
unemployment benefits. The company is obliged to
withhold social security premiums from his or her salary
and to pay the other part of the relevant premiums, which
are to be for its own account. Any managing director who
is also a major shareholder in the company that employs
him or her is not entitled to social security benefits.

**Future legislation**
It is anticipated that new legislation regarding N.V.’s
and/or B.V.’s will come into force as per 1 October 2012
and January 2013. The most important changes regarding
managing directors under this new legislation are:

— Formalisation of one-tier boards for N.V.’s and B.V.’s
  consisting of executive and non-executive directors as
  an alternative to the existing two-tier system, in which
  a management board and supervisory board exist
  side-by-side.

— Managing directors of listed N.V.’s will no longer be
  allowed to enter into an employment contract with the
  company. Existing employment contracts, however, will
  not be affected.

— The current rules in the case of a conflict of interest
  between the company and a managing director will be
  replaced by new rules pursuant to which a conflict of
  interest will in principle only affect the company’s
  internal decision-making and not a managing director’s
  ability to represent the company externally.

— Certain specific duties of the management board may
  be allocated among the managing directors in or
  pursuant to the articles of association (for instance a
division of tasks between executive and non-executive
directors in a company with a one-tier system).

However, the basic rule of collective responsibility will
continue to apply and each managing director can in
principle be held liable for mismanagement. However,
in the event of mismanagement an individual
managing director can avoid liability if he proves that
the mismanagement was not attributable to him –
taking into account the duties allocated to him – and
that, in addition, he was not negligent in acting to
prevent the mismanagement by the management
board.

— A managing director of a large N.V. or B.V. will be
  prohibited from holding more than two supervisory
  positions at another large N.V., B.V. or Dutch foundation.
  In no event must such managing director occupy the
  position of chairman of such supervisory board.
— Large N.V.’s and B.V.’s will have a best efforts obligation to have a balanced gender distribution in its management board (and supervisory board), meaning that of the seats occupied by individuals, at least 30% are to be occupied by women and at least 30% by men.

— The management board must first approve a resolution of the shareholders of a B.V. to distribute dividend before such distribution is made. The managing directors will be jointly and severally liable towards the B.V. for compensation of any shortfall resulting from the distribution if the managing directors granted their approval to the distribution knowing or reasonably foreseeing that the company would be unable to continue paying its debts after the distribution.
The supervisory board consists of at least three members, appointed and dismissed by the shareholders, unless the articles of association set out a different appointment method.

Eligibility requirements

There are certain restrictions on who can become a management or supervisory board member. In particular, only a natural person may be appointed to the management or supervisory boards. Polish law does not allow companies to be appointed to the boards. Furthermore, a management board or supervisory board member must have full capacity to undertake legal transactions. This means that, for example, a juvenile cannot sit on any of the boards.

It is also important to note that: (i) a management board member may not at the same time be a supervisory board member in the same company; and (ii) within a group of companies a management board member of a subsidiary company cannot be a supervisory board member of the parent or holding company.

Further restrictions may apply to companies acting in regulated sectors, for example: banking, insurance or betting services.

Method of appointment

Generally, the articles of association provide the method of appointment to the management board. Usually the management board members are appointed by shareholders. However, the articles of association may set out a different method of appointment, for example, by a resolution of the supervisory board or by means of designation by a shareholder or a third party.
If the articles of association do not provide a method of appointment, then management board members are appointed by means of a shareholders’ resolution.

The appointment is effective immediately, or on a certain date in the future as set out in the appointment resolution. Nevertheless, the appointment requires registration with the National Court Register for public information purposes. The registration process usually takes between two and three weeks.

The articles of association may provide that an appointment to the management board is either for a fixed term or for an unlimited period. If the articles of association say nothing on this subject or if the appointment is for an unlimited period, then the appointment expires on the day on which the annual shareholders’ meeting is convened to approve the financial documents for the first full year in which a given management board member performed his function.

Method of removal

A management board member may be removed from the management board by means of dismissal, resignation or due to other factors.

A management board member may resign from his position at any time by providing written notice to the company.

A management board member may be dismissed at any time without a reason, unless the articles of association provide otherwise. Usually the dismissal method is provided in the articles of association. If the articles of association do not provide any dismissal method, then a shareholders’ resolution is required to dismiss a management board member.

Other removal factors include, among others, death or conviction of certain criminal offences.

Authority and representation

A management board member has the authority to both run and represent the company.

The articles of association set out the rules on how a management board member runs the company. If the articles of association say nothing on this subject, then: (i) each management board member may manage the company individually to the extent his decisions do not exceed the scope of the ordinary acts of the company; and (ii) a management board resolution is required for acts exceeding this scope.

The articles of association set out the rules on how a management board member represents the company. If the articles of association say nothing in this respect, then the company is represented by two management board members or by one member acting jointly with a commercial proxy.

A management board member’s right to represent the company cannot be effectively limited before third parties otherwise than by imposing a joint representation requirement.

Management board by-laws

It is possible to set out detailed rules concerning the authority and organisation of the management board in the company’s internal corporate documents, i.e. in the management board by-laws.

The management board by-laws are solely binding between the company and the management board members. This means that the by-laws are not enforceable by third parties. Consequently, if the management board by-laws provide for an internal division of obligations between the management board members and if a given management board member acts outside his authorisation, then the actions of such a member are effective and bind the company against third parties, but the management board member may be held liable by the company for any breach the company suffered.

Contractual relationship with the company

Appointment to the position of management board member establishes a contractual relationship between the company and the newly appointed management board member. The scope of this relationship results from Polish law, the articles of association and the content of the resolution of appointment. In particular, a management board member: (i) is obliged to perform his actions with a level of due care that corresponds to the professional character of his function; (ii) cannot, without the consent of the company, be involved in any entity competitive towards the company (for more information, please refer to para. ‘Conflicts of interest’ below); and (iii) is obliged to avoid conflicts of interest.

The appointment to the management board is often supplemented with an additional contract, for example: a management contract, a service contract or an employment contract. The choice of contract depends on various factors, such as tax efficiency, stability, supervision, etc.
The appointment itself does not give a management board member a right to remuneration. However, remuneration may be provided for in the appointment resolution or in an additional contract signed by the company with a management board member.

Conflicts of interest

A management board member cannot, without the consent of the company: (i) involve himself in any competitive business; (ii) participate as a partner in a competitive partnership; (iii) sit on a management board or supervisory board of a competitive limited liability company or a competitive joint stock company; (iv) own 10% or more shares in such competitive companies; (v) be authorized to appoint one or more management board members in such competitive companies.

Duties of a director

Duties of a management board member are described in para. ‘Authority and representation’ and ‘Conflicts of interest’ above.

Liability

A management board member may be liable for performing his duties under civil, criminal and organisational liability.

Civil liability is liability for damage. A management board member is liable towards a company, and may be liable towards shareholders and third parties (in particular the company’s creditors), as the case may be, under: (i) general rules on liability; and (ii) rules on liability set out in the Commercial Companies Code.

Under the general rules of liability, whoever culpably causes damage is obliged to compensate for such loss. This provision sets out a general base for ‘tortious’ liability of a management board member. To be successful, the claimant must prove that it suffered damage due to the culpable acts of the management board member, which may be difficult in practice. Therefore, claims based on this general provision are very rare.

Under the Commercial Companies Code, a management board member is liable towards the company for damage the company suffered due to the member’s acts. To hold a management board member liable, the following premises must be jointly fulfilled: (i) the company must suffer damage; (ii) the damage must result from an act or omission of the management board member that either breached the law or the articles of association; (iii) the management board member’s act must be culpable and then he must fail to maintain the standard of due professional diligence. All these premises must occur jointly in order to trigger a potentially successful claim.

If more than one management board member caused damage, all members involved may be jointly and severally liable.

A management board member may be criminally liable for intentional actions or omissions. An offence is committed with intent if the perpetrator has the will to commit it, that is, is willing to commit the offence or, foreseeing the possibility of perpetrating it, chooses to do so. However, Polish law also penalises certain situations where an offence is committed unintentionally.

Organisational liability of a management board member means that a management board member can be dismissed from his position at any time.

Limitation of liability

A number of legal tools are available for management board members which mitigate the risk that any civil or criminal claims will be successful. However, in the case of court proceedings, it is always subject to the discretion of the court to decide if the circumstances presented by a management board member are sufficient to release him from liability.

The tools available include: (i) proving lack of fault and performance of professional care; (ii) implementing internal division of responsibilities; (iii) acquiring the approvals of the supervisory board or shareholders’ meeting; or (iv) obtaining civil liability insurance coverage.

Immigration issues

Companies looking to hire foreign employees in Poland, must obtain a work permit from the relevant authority. Foreigners may only be employed for the period of time specified in the work permit (which can be issued for a maximum of three years with a possibility of this being extended), but no longer than for the period of stay established in a work visa or the period specified in a temporary residence permit in Poland. If on the day of issuing a petition for a work permit for a management board member a company is employing over 25 people, a work permit can be issued for up to five years. A work visa/temporary residence permit is a separate travel (or residence certification) document to the work permit and is obtained by the foreign employee himself.
Generally, work permits are not required for EU or EEA citizens or citizens of other countries linked to the EEA by bilateral agreements with EU countries and the European Community itself (e.g. Switzerland).

Subject to the above, work permits are not required e.g. if a foreign national from another country as specified above: (i) works as a management board member of a Polish company for less than six months during any 12 consecutive months and stays in Poland on the basis of an appropriate work visa/temporary residence permit; (ii) is posted to work in Poland as a management board member of a Polish company by an employer from another EU country provided that he has a relevant work authorisation enabling him to be employed in another EU country and that he retains a permanent residency in an EU country; (iii) is a citizen of Belarus, Ukraine, Russia, Georgia or Moldova and works for less than six months during any 12 consecutive months and his employer registers his employment in the relevant Labour Office.

In general, management board members who enter into an employment contract are covered by the general rules of employment law. However, there are minor exceptions to these rules, for example executives generally do not have the right to additional remuneration for work performed beyond normal working hours. In addition, different rules apply to management board members in relation to working during night time, minimum rest periods and, generally, time recording.

Taxation

The tax consequences of receiving remuneration depend on the tax residency status of the management board member.

As a rule, a management board member who: (i) has a close personal and economic relationship with Poland (i.e. has the centre of his vital interests in Poland); or (ii) stays in Poland for more than 183 days in a given tax year, is deemed to have his place of residence in Poland. Consequently, he is subject to Polish personal income tax on his worldwide income (so-called “unlimited tax liability”).

A management board member who does not have his place of residence in Poland is subject to Polish personal income tax only on income earned in Poland (so-called “limited tax liability”).

The above-mentioned tax regulations apply, unless a relevant tax treaty between Poland and a management board member’s country of residence provides otherwise.

Taxation of a management board member’s income differs depending on the legal basis of his remuneration.

In case of an employment contract, a Polish company that remunerates a management board member is obliged to calculate and withhold monthly tax advances on his salary (at the progressive tax scale – 18% and 32%).

Income received under management contract is subject to similar tax implications. However, the tax advances on such remuneration are withheld on a monthly basis at 18% and then the income is subject to reconciliation according to progressive scale through annual tax return.

Generally, if the legal basis for a management board member’s remuneration is expressly provided for in the appointment resolution, then no social security contributions are payable by the company.

Social security

In the case of employment contracts, social security contributions are paid partly by the company and partly by the management board member (respectively at approx. 16% and 20%). However, these rates apply only to a management board member’s cumulative income from the beginning of 2012 up to approx. EUR 25,000 (PLN 105,780). Any excess is subject to lower rates.

Similar social security rules apply to management contracts. However, in a non-residency scenario, due to lump sum taxation, social security contributions are non-tax deductible.

If the legal basis for the management board member’s remuneration is expressly provided for in the resolution for his appointment, then no social security contributions are payable by the company.

Expenses

Any additional expenses that are incurred by the employer on behalf of a management board member (i.e. rent for accommodation, travel expenses for non-business travel etc.) constitute part of the management board member’s taxable income. However, some exceptions to this rule apply.
Eligibility requirements

The company’s management body may consist of either one or more individuals. When a private limited liability company has two or more directors, they may act jointly or collegiately. The articles of association of a private limited liability company may also establish that the company is managed by a board of directors, in which case this body will function collegiately.

Public limited companies are managed by a board of directors – consisting of more than one individual – but may have a sole director provided that the share capital does not exceed EUR 200,000.

Both private individuals and legal persons, such as corporations, are eligible to be appointed for directorship positions. This is specifically established for public limited companies and is also an accepted practice by certain scholars in relation to private limited liability companies (although there is case-law which rejects this possibility). In the event that a legal person is appointed as a director, it must appoint a private individual to represent it. The legal person will share liability with the private individual appointed to represent it.

A director is not required to be a shareholder in the company and need neither be a resident in Portugal nor be a Portuguese national. Nevertheless, a foreign director will need to obtain a Portuguese Tax Identification Number (NIF).

Minors, incapacitated persons or persons pronounced legally disable by the courts are ineligible for directorship positions.

Method of appointment

As a general rule, directors are appointed by the shareholders in a shareholders’ meeting of the company (such appointment may also occur at the moment of the company’s incorporation, whereby the founding shareholders may include a provision in the incorporation document of the company in order to readily appoint the relevant directors).

The articles of association of a public limited liability company may grant minority shareholders (with at least 10% of the shares representing the share capital of the company) the possibility of appointing one director.

If one or more directors of a public limited liability company are permanently absent he/she/they may be substituted by alternate director(s) – if one or more have been appointed – or if alternate directors do not exist, the board of directors may co-opt a new director. If no new director is appointed by co-optation, the audit board or the audit committee are entitled to appoint a new director. In both these situations, such appointment requires ratification of the shareholders in the subsequent shareholders’ meeting.

Directors of private limited companies are appointed for an indefinite term, unless the articles of association establish otherwise. On the other hand, the directors of a public limited company are appointed for a period of time set out in the articles of association of the company up to a maximum of four years.
Authority and representation

The directors are the company’s managing body with full authority to represent the company in all actions related to the company’s corporate purpose.

The company will always be liable to third parties acting in good faith in respect of actions taken by its directors, even when acting outside its corporate purpose. The authority to represent the company becomes effective upon acceptance of the directorship position. However, in relation to third parties, the appointment is not enforceable until registration with the Companies Registration Office occurs.

In case of private limited liability companies, it is not common for a board of directors to be established to carry out the management of the company. When there is more than one managing director, the respective powers and authority are exercised jointly, whereas the company is deemed bound by the transactions concluded by the majority of managing directors.

When the company’s management body is organized as a board of directors (not common in private limited liability companies but common in public ones), corporate authority belongs to the board of directors as a whole, whereas the powers to exercise such authority belong to the directors, acting jointly. The company is bound by the majority of the directors (or ratified by such majority), unless the articles of association establish that a lower number of directors is required.

Method of removal

A director may resign from office at any time by notifying the company.

The resignation of a director of a private limited liability company becomes effective eight days after the notification has been received. The resignation of a director of a public limited liability company becomes effective at the end of the month following the notification, except if a substitute director is appointed in the meantime.

Directors shall also be removed upon expiry of the term they have been appointed for. It should be noted that if a term for which the directors have been appointed has expired without a shareholders’ meeting having convened, the directors shall remain in their position until the next shareholders’ meeting.

In addition, removal of directors may occur, at any time, by resolution of a shareholders meeting. Such removal may be (i) based on just cause or (ii) without just cause, in which case the company shall be liable to pay compensation to the dismissed director for the damages the latter suffered as a result of the dismissal.

The compensation resulting from a removal without just cause is capped and will not exceed the amount the director would have received until the end of the period he had been elected for. For private limited liability companies, in the event there is not a time limitation in the articles of association of the company for the appointment of the directors, there is a legal presumption that such period is no longer than four years.

Removal or resignation of a director is subject to registration with the Companies Registration Office.

In both cases, directors can be re-elected unless the articles provide otherwise. Directors must accept the appointment (this acceptance is deemed implied if directors start acting in such capacity) and the appointment must be registered with the Companies Registration Office.

In certain situations (in particular if the management of the company is jeopardized by the permanent or temporary absence of one of the directors or if the board does not have sufficient quorum to function), the directors or the shareholders may request the court to appoint a new director. For public limited liability companies, such request can only be submitted to the courts by shareholders.
delegate(s)/executive committee have the same authority to represent the company as the board within the powers that have been attributed thereto. There are, however, certain powers that cannot be delegated, such as inter alia the approval of the annual accounts, creation of guarantees, mergers, transformations, share capital increases and change of registered office.

In both private and public limited liability companies, the board of directors or managing directors (with the necessary authority) can grant powers of representation to third parties to act, with full authority, on behalf of the company.

Contractual relationship with the company

The matter of characterizing the relationship of a director with the company is a disputed issue in Portugal. The appointment of a director is generally deemed to be a corporate relationship in which a “sui-generis” contractual relationship is also established between the company and the director, comprising aspects of mandate, services and employment agreements.

In public limited liability companies, it is common that an administration agreement (incorporating elements from typical services and mandate agreements) is entered into between the company and the director.

As a general rule, the directors are remunerated, although the bylaws of a private limited liability company may establish otherwise.

In public limited liability companies if the appointed director was previously an employee of the company, the employment agreement is deemed automatically suspended, ceasing to be effective at the moment of appointment. It will however return to effectiveness when such person ceases to be a director (irrespective of the method of removal).

Conflicts of interest

Portuguese law does not have a specific legal provision regulating conflict of interest rules applicable to a director. Nevertheless, it does establish conduct rules, specifying that the directors shall have a duty of loyalty towards the company.

It is generally accepted that directors should not make decisions when there is a conflict of interest situation (i.e. the director has a personal interest in a particular decision which may not be in line with the company’s interest). In such cases, the director may be liable towards the company for any damages resulting from breach of this duty.

To avoid potential conflicts of interest and unless the shareholders give their consent, directors are prohibited from conducting, directly or indirectly, any competing activity with the company, being liable towards the company for any breach of this obligation. Portuguese law also establishes a general prohibition for the company to enter into agreements with the directors, unless the board of directors has previously passed a resolution to that effect. In addition, Portuguese law also establishes a specific prohibition on the companies to facilitate loans to directors, make payments on their behalf or create guarantees to cover their obligations.

Duties of a director

The main fiduciary duties of the director are (i) a duty of care, which entails that a director has the necessary availability, skills and knowledge of the company's business while performing his/her function with the diligence of a cautious, thorough and organized businessperson and (ii) a duty of loyalty, acting in the company’s interest and taking into account the long term interests of the shareholders, while also considering the interests of other stakeholders (e.g. employees, clients and creditors).

These general fiduciary duties are the basis of several specific duties established under the Portuguese Companies Code which are applicable to directors of both private and public limited liability companies.

Liability

Liability vis-à-vis the company

Directors are jointly and severally liable vis-à-vis the company for unlawful actions or omissions resulting from a breach of their legal or contractual duties and which have caused damage to the company, except in the event that the director was not in attendance at the meeting when such a decision was taken or has voted against it. Legal action may be taken by the company or, on its behalf, by shareholder(s) holding at least a 5% stake in the company (or 2% if the company is listed). The company is not required to prove that the conduct of the directors resulted from wilful misconduct or negligence, as there is a legal presumption to that effect.

Liability vis-à-vis the company shall not exist if (i) the directors are able to prove that they were properly informed, that their actions were taken without conflicts
of interest and were based on rational criteria from a corporate/economic standpoint or (ii) if the unlawful actions or omissions of the directors resulted from a shareholder resolution.

Liability vis-à-vis the company’s creditors
Directors are liable vis-à-vis the company's creditors when the assets of the company are insufficient to meet the company's indebtedness towards the creditors. If no action is taken by the company or its shareholders (as a result of the mechanism described above), the company's creditors may exercise the rights thereof and claim the relevant damages directly from the directors.

Liability vis-à-vis shareholders or third parties
Directors may also be liable vis-à-vis shareholders or other third parties for any direct damages that are caused by the performance of their management functions. In this case, directors shall only be liable if all general requirements for civil liability are met, i.e., there is an unlawful action or omission by the directors, the conduct is carried out with wilful misconduct or negligence, such action or omission has caused damages and there is a link between said action or omission and the damages. The concept of third parties includes any party which is not the company, directors or shareholders (while acting in such capacity) and may include employees, suppliers, clients, the State or any other creditors.

Liability arising from company tax debts
In the event a company is considered to be liable pursuant to tax law, and the company does not possess enough assets to cover such liability, directors may be jointly and severally liable for any tax debt which derives from actions or facts occurring during their term of office.

In addition, directors may as well be found criminally liable for such actions or facts.

Criminal liability
In addition to criminal liability deriving from tax debts, there are several actions that may result in criminal liability for the directors, including, inter alia: (i) refusal of information related to the preparation of shareholder meetings to interested parties; (ii) misrepresentation of company information to persons with the right to receive information; (iii) irregular issuance of share or bond certificates; or (iv) rendering the company insolvent (either as a result of wilful misconduct or negligence).

Limitation of liability
Liability of the directors cannot be limited by agreement. Such clause, if it exists, shall be deemed null and void. In addition, the shareholders may only waive their right to receive compensation or agree on a reduction thereof by a resolution of the shareholders representing more than 90% of the company’s share capital.

Notwithstanding this, insurance policies may be used to cover directors’ liability. It is generally accepted that the company pays for insurance premiums arising therefrom. Directors are bound to cover potential liabilities with the creation of a performance guarantee (which may be replaced by the aforementioned insurance), unless at least two of the following thresholds are not exceeded for a period of two consecutive years:
— aggregate assets – EUR 100,000,000;
— aggregate turnover – EUR 150,000,000; and
— number of employees – 150.

Immigration issues
European Economic Area (“EEA”) citizens do not have to fulfil any immigration-related requirements to become directors of a Portuguese company.

Non-EEA citizens shall require a residence permit which is granted on the basis of a working relationship with a Portuguese entity. These rules apply to nationals from all non-EEA countries, unless otherwise established by International Treaties ratified by Portugal.

In order to evidence that there is a working relationship with a Portuguese entity and given that the appointment as a director is not subject to a written agreement, the Immigration and Borders Services usually accepts the Company’s permanent commercial certificate showing the appointment of said director or a copy of the relevant shareholder resolution (other documentation may be requested on a case-by-case basis).

Direct taxation

When the director is a natural individual – Portuguese Personal Income Tax (IRS)

Resident
Income earned by an individual who is a Portuguese resident for tax purposes is considered to be subject to IRS on a worldwide income basis (notwithstanding, notably, double taxation treaties and EU law).

IRS is assessed by dividing income received among baskets: fees received by corporate bodies (e.g. directors) are considered to be a paycheck/workers’ remuneration and are thus liable to (i) IRS at a rate varying from 0% to 46.5% (the Portuguese government established an
In case the MOE has been appointed as a director when he/she has been an employee of the company for more than one year, he/she will still be considered to be a subordinate employee for Portuguese Social Security purposes and therefore the contribution due to the social security authorities shall remain unchanged – an aggregate contribution of 34.75% over said MOE’s income shall be due, the MOE being responsible for contributing 11% of its income and the company for the remaining 23.75%. In such cases, the director is entitled to an unemployment subsidy in the event he is made redundant. On the other hand, if a director was not registered with the social security first as an employee of the company, he/she will not be entitled to the unemployment subsidy upon termination/expiration of his MOE position.

When registered and contributing for the Portuguese Social Security as MOEs, the directors shall be entitled to social welfare in the following situations: family charges, death, illness, incapacity, professional illnesses, parenthood and old age.

Social security

In general, a member of a corporate body (membro de órgão estatutário or “MOE”) is subject to the Portuguese Social Security contribution scheme and all effectively earned income shall be subject to a 29.6% contribution, the MOE being responsible for contributing 9.3% and the company for the remaining 20.3%.

Non-resident

Income earned by a non-resident individual is considered to be liable to IRS on a source basis, i.e. only if it is considered to be earned within Portuguese territory (notwithstanding, notably, double taxation treaties and EU law).

In this sense, fees received by a Portuguese company’s non-resident director will usually be liable to a final withholding tax of 21.5%.

When the director is a corporation – Portuguese Corporate Income Tax (IRC)

Resident or non-resident with permanent establishment

IRC is assessed in accordance with IFRS/IAS, subject to tax law corrections and adjustments. Income earned by a Portuguese resident company for tax purposes is considered to be liable to IRC on a worldwide income basis (notwithstanding, notably, double taxation treaties and EU law). Fees or income received as director will thus be accrued to profits and subject to IRC at a rate of 25% at which a maximum 2.5% municipality surcharge (depending on where the company or permanent establishment is incorporated) and/or, during 2012 and 2013, a state surcharge of 3% (for income of EUR 1,500,000.00 to EUR 10,000,000.00) and of 5% (for income in excess of EUR 10,000,000.00) may be added.

Notwithstanding the aforementioned, fees or income received by a company as director will be liable to a 21.5% withholding tax in account of tax to be paid.

Non-resident (without permanent establishment)

Income earned by a non-resident company is considered to be liable to IRC on a source basis, i.e. only if it is considered to be earned within Portuguese territory (notwithstanding, notably, double taxation treaties and EU law).

In this sense, fees or income received by a Portuguese company’s non-resident corporate director will usually be subject to a final withholding tax of 25%.

Non-resident

Income earned by a non-resident individual is considered to be liable to IRS on a source basis, i.e. only if it is considered to be earned within Portuguese territory (notwithstanding, notably, double taxation treaties and EU law).

In this sense, fees received by a Portuguese company’s non-resident director will usually be liable to a final withholding tax of 21.5%.

In case the MOE has been appointed as a director when he/she has been an employee of the company for more than one year, he/she will still be considered to be a subordinate employee for Portuguese Social Security purposes and therefore the contribution due to the social security authorities shall remain unchanged – an aggregate contribution of 34.75% over said MOE’s income shall be due, the MOE being responsible for contributing 11% of its income and the company for the remaining 23.75%. In such cases, the director is entitled to an unemployment subsidy in the event he is made redundant. On the other hand, if a director was not registered with the social security first as an employee of the company, he/she will not be entitled to the unemployment subsidy upon termination/expiration of his MOE position.

When registered and contributing for the Portuguese Social Security as MOEs, the directors shall be entitled to social welfare in the following situations: family charges, death, illness, incapacity, professional illnesses, parenthood and old age.

Social security

In general, a member of a corporate body (membro de órgão estatutário or “MOE”) is subject to the Portuguese Social Security contribution scheme and all effectively earned income shall be subject to a 29.6% contribution, the MOE being responsible for contributing 9.3% and the company for the remaining 20.3%.
This guide focuses on the rules relating to joint stock companies (‘Societate pe actiuni’ or ‘S.A.’) and to limited liability companies (‘Societate cu raspundere limitata’ or ‘S.R.L.’). It does not address the rules relating to other forms of companies.

**Joint stock companies (SA)**

The management structure of a Romanian joint stock company is generally based on a one-tier management system, consisting of a single director or a board of directors. Alternatively, the management structure can be based on a two-tier system, consisting of a management board and a separate supervisory board.

— The management board, which is also the executive body, carries out the management of the company on a day-to-day basis and represents the company in relation to third parties and in front of official bodies;
— the supervisory board mainly supervises the company’s activities, including those of the management board, and appoints members of the management board.

Members of the supervisory board may not simultaneously be members of the management board, or employees of the company.

Generally, the supervisory board does not have any managing powers but the constitutive deed may provide that certain matters require the prior consent of the supervisory board. The constitutive deed of the company also governs the relationship between the two bodies.

**Eligibility requirements**

Generally, both individuals and legal entities may be appointed as directors or members of the supervisory board. However, a legal entity must designate an individual as a permanent representative.

There are no citizenship, residency or work permit requirements for directors or for members of management or supervisory boards.

However, there are certain restrictions on who can become a director, such as for those that are legally declared incapable or convicted of fraudulent administration, breach of trust, forgery, use of forgery, fraud, embezzlement, perjury, bribery and other crimes provided by the law.

Also, it is important to note that:

— If the directors of a joint stock company were appointed among the employees, their employment agreement must be suspended for the term of the mandate.
— An individual can be a director and/or member of the supervisory board of no more than five other joint stock companies headquartered in Romania. This prohibition shall not apply where the director holds 25% of the shares of the company or acts as member of the board of directors or member of the supervisory board of the joint stock company owning 25% of the said shares. This restriction also applies in the case of the representatives of the directors/members of the supervisory board’s legal person.

**Method of appointment**

Directors are appointed at an ordinary general meeting of shareholders. The first directors are nominated in the constitutive deed of the company and their mandate cannot exceed two years. The mandate of subsequent directors is for four years. The directors may be re-elected, unless the constitutive deed does not permit this.
There must not be an even number of directors. Joint stock companies, whose financial statements must be audited according to the law, must have at least three directors.

The Trade Registry Office must be notified of any new appointments and resignations of managers or directors and these must also be published in the Romanian Official Gazette.

In the case of a two-tier system, members of the management board shall be appointed by the supervisory board for a term prescribed by the constitutive deed of the company, but their mandate shall not exceed a period of four years.

Members of the supervisory board are appointed at the general meeting of shareholders but the initial members are appointed through the constitutive deed of the company and their mandate cannot exceed two years. The number of members on the supervisory board is also established in the constitutive deed and must be between three and eleven.

**Method of removal**

Directors may resign at any time by giving notice to the company. They need not give a reason for their resignation. If a sole director manages the company, he must convene a general meeting of shareholders upon his resignation.

Directors may be removed at any time by the decision of a general meeting of shareholders. Under Romanian law, directors removed without cause are entitled to claim damages.

In a two-tier system, members of the management board may be removed at any time by the supervisory board. The constitutive deed may also provide for their removal by a decision of shareholders at a general meeting. If their removal is decided without cause, they are entitled to claim damages.

Members of the supervisory board may be removed at any time by a decision of the shareholders at a general meeting by a majority of at least 2/3 of the votes of those shareholders present at the meeting.

**Authority and representation**

Generally, the directors are authorised to perform all acts necessary and useful for the conduct of the business of the company, other than those acts requiring the approval of shareholders at a general meeting. These acts are found in the constitutive deed of the company or are expressly provided for by Romanian law.

Directors with powers to represent the company cannot subdelegate such powers unless they are expressly authorized to do so. Failure to observe this may result in the company claiming any ensuing benefits from the person to whom the director delegated his authority. Liability in such cases is joint with the person to whom the director delegated his authority.

The directors, or, in the case of a two-tier system, the management board, acting in the name and on behalf of the company, can only acquire, alienate, lease, or grant security over assets relating to the company, with a value exceeding half of the book value of the company’s assets, with the prior approval of the shareholders.

— In the case of a one-tier system, the board of directors represents the company in relation to third parties and in courts. In the absence of a different provision in the constitutive deed, the board of directors represents the company through its chairman. Furthermore, the constitutive deed may appoint the chairman and one or several directors to represent the company, acting jointly or individually.

The names and specimen signatures of the persons empowered to represent the company must be filed with the Trade Registry Office.

The board of directors may also delegate the management of the company to one or several managers, appointing one of them as general manager. In the case of joint stock companies which are subject to mandatory financial audits, it is compulsory to delegate the management of the company to manager/s.

— In the case of a two-tier system, the management board is authorised to represent the company in relation to third parties and in court. Unless otherwise provided in the constitutive deed, the members of the management board may only jointly represent the company. In such case, by unanimous decision, the members of the management board can authorise one of them to perform certain operations or types of operations.

**Working rules of the board of directors**

The organisation and working rules of the board of directors, management boards and supervisory boards are usually set out in the constitutive deed of a company and in general provisions of Romanian law.
The board of directors must appoint a chairman from amongst its members. The constitutive deed may provide for the chairman to be nominated by the shareholders in a general meeting.

The board of directors may also create consulting committees of at least two members, who advise the board in respect of matters such as audit, remuneration of staff or nomination of candidates for various managerial positions.

The decisions of the board of directors, the management board or the supervisory board are taken by a simple majority of the votes of the members present at the meeting, unless otherwise provided in the constitutive deed of the company. Decisions regarding the appointment and dismissal of the chairmen of such bodies are taken by the vote of the majority of the board’s members. Members may only be represented by other members. A member present at the meeting can only represent one absent member.

Unless otherwise provided for in the constitutive deed, the chairman of the board of directors or of the supervisory board shall have a casting vote in cases of deadlock. This shall not apply if the chairman of the board of directors also acts as manager.

If the current chairman of the board of directors, the directorate or of the supervisory board cannot or is barred from voting inside the respective body, the other members may elect a chairman of the respective meeting, having the same rights as the current chairman.

In the case of deadlock and if the chairman does not have a casting vote, the motion is considered denied.

The constitutive deed of a company may also approve participation at board meetings by means of electronic communication. Also, the constitutive deed can limit the decisions to be taken in such situations and can also provide for a right to object to the manner of holding the meeting in favour of a certain number of members of the respective body.

**Contractual relationship with the company**

Under Romanian law, the legal relationship between directors and the company is regarded as a commercial mandate.

Throughout the fulfilment of the mandate, directors of joint stock companies cannot enter into employment agreements with the company. Directors may therefore be retained on the basis of management or mandate agreements, specifying their duties and remuneration/benefits, and including, inter alia, confidentiality and non-compete provisions.

The remuneration of board members, and in the case of a two-tier system, of the supervisory board members, is decided at a general meeting of shareholders or through the constitutive deed.

**Conflicts of interests**

The directors of a joint stock company must exercise their mandate with loyalty and in the interests of the company.

Any director who is in a position of conflict of interests relating to a transaction must inform the board of directors and the auditors of such a conflict and abstain from voting in respect of that transaction. The same obligations apply in cases where the conflict of interest is generated by the director’s relatives or affiliates. Failure to observe this obligation may render the director liable to the company for any damage sustained by the company as a result.

A director may transact with the company for his own benefit, subject to such transactions receiving prior approval from the shareholders at an extraordinary meeting, if the value exceeds 10% of the net assets of the company. This may be done under a sanction of nullity, unless otherwise provided in the constitutive deed.

**Duties of a director**

The duties of directors vary depending on which governance system is adopted:

— In the case of a one-tier system, the members of the board of directors are entrusted with the fulfilment of all acts necessary and useful for the conduct of business activities of the company, including: (i) the establishment of accounting policies and financial control system; (ii) the supervision of managerial activities; and (iii) the drawing up of an annual report.

Additionally, the shareholders at a general meeting may delegate certain actions to members of the board of directors, such as changing the headquarters of the company, increasing the share capital (in this case, for a period of maximum five years, the board of directors/the management board is authorized to increase the subscribed share capital of the company up to a specific nominal value, by issuing new shares, provided that the nominal value of the share capital does not exceed half
of the subscribed share capital of the company as at the date of granting the authorization).

— In a two-tier system, the management board has executive powers, while the supervisory board only has a supervisory role. The management board represents the company in relation to third parties and in court.

**Liability**

The directors are liable to the company for the non-fulfilment of the obligations placed upon them pursuant to their mandate, as determined by the constitutive deed of the company, by decisions of a general meeting of shareholders or as provided by law.

Under Romanian law, the directors are jointly liable to the company for breach of obligations relating to: the contributions made by shareholders, the actual existence of paid dividends, the existence of the company’s registers as required by the law, the strict implementation of the resolutions of the general meetings of the shareholders, the strict fulfilment of their duties imposed by law and by the constitutive deed of the company.

Directors’ liability may also be triggered by creditors of the company (subject to the opening of insolvency proceedings) or by any third parties who incur a loss as a result of their unlawful actions. As directors act on behalf of the company, personal liability towards third parties may be triggered only if they act beyond the scope of their powers. Directors are also subject to criminal liability under Romanian company law.

**Limitation of liability**

Romanian company law does not contain specific provisions permitting the future limitation of liability of a director. However, general principles of law restrict agreements limiting the liability of a debtor to cases when the debtor acted negligently or imprudently and not with intentional wrongdoing. Accordingly, a director’s liability for intentional wrongdoings vis-à-vis third parties may not be limited by the company.

**Immigration issues**

As the Romanian company law provides that directors and members of the management board and supervisory boards must not be employees of the company, no requirements as to work permits or residency are applicable. Under general law, there are no restrictions for companies to conclude management or mandate agreements with foreign citizens.

**Taxation**

The directors’ remuneration is subject to income tax in Romania, whether they are resident or non-resident.

Romania has concluded double taxation treaties with most of the EU countries and many other countries. In cases where a director is resident in a country party to such treaty, the income tax applied in Romania shall not exceed the tax provided in the treaty. If the tax contributions are different in the internal legislation or in the treaty, the more favourable tax shall apply.

**Social security**

It is mandatory for directors (even if they are retained based on management or mandate agreements) to pay social security contributions to the Romanian public social security system. Such requirements apply to Romanian citizens, as well as to foreigners domiciled or resident in Romania.

**Limited Liability Company (SRL)**

A Romanian limited liability company is managed by one or more directors, who can also be shareholders of the company.

The constitutive deed of a limited liability company must include provisions with respect to the appointment of directors, the powers granted to them and the manner of exercise of these powers (whether jointly or individually).

**Eligibility requirements**

There are no residency or nationality requirements for directors of a limited liability company.

Non-resident directors must submit to the Trade Registry Office a statement of their own responsibility, stating that he or she has no fiscal debts in Romania.

**Method of appointment**

Directors of limited liability companies are appointed by the general meeting of shareholders, or through the constitutive deed.
Duties of a director

Generally, a director of a limited liability company is entrusted with taking all measures or acts necessary for the conduct of the business activities of the company, except for those matters reserved by law or by the constitutive deed for the ambit of the general meeting of shareholders.

The main responsibilities of a director include the organisation of general meeting of shareholders and the implementation of resolutions adopted at the meeting, the drawing up of a shareholders’ registry, keeping the accounting records and financial statements of the company and participating in all of the company’s internal meetings.

Liability

The directors are jointly liable to the company for breach of obligation relating to the real existence of the contributions made by the shareholders, the real existence of paid dividends, the maintenance of the company’s registries required by law, the strict implementation of the resolutions passed at general meetings of shareholders and the strict fulfilment of their duties imposed by law and by the constitutive deed of the company.

Directors’ liability may also be triggered by creditors of the company if insolvency proceedings are started. Directors are also subject to criminal liability under Romanian company law.

Limitation of liability

As there are no specific provisions in this respect for limited liability companies, general principles of Romanian law apply. These allow agreements to be concluded limiting the liability of a debtor in cases where the debtor’s fault takes the form of negligence or imprudence and not intentional wrongdoing.

Immigration issues

Generally, a work permit may be granted to foreign citizens upon request and subject to obtaining a residency visa. These requirements are not needed for EU or EEA nationals. Furthermore, citizens of states with which Romania has concluded bilateral treaties with respect to residency and work permits, are not required to obtain such permits.
**Taxation**

Remuneration received by directors is subject to income tax. If directors are employees of the company, the income tax is withheld from their salary.

**Social security**

Social Security contributions are mandatory regardless of whether the director is an employee or works pursuant to a management or mandate agreement. These provisions apply to Romanian citizens, or foreign citizens domiciled or resident in Romania.
This chapter focuses on the rules relating to the management of Russian legal entities and the duties and liabilities of their officers. Russia has three main kinds of legal entity including a limited liability company (‘Obschestvo s Ogranichennoy Otvetstvennostyu’ abbreviated to ‘OOO’), a closed joint stock company (‘Zakritoe Aktsionernoe Obschestvo’ abbreviated to ‘ZAO’), and an open joint stock company (‘Otkritoe Aktsionernoe Obschestvo’ abbreviated to ‘OAO’). The limited liability company form is often used as the form of company for wholly owned subsidiaries in Russia.

Management Bodies in Russian Companies

The main management body of both a limited liability company and a joint stock company can be either:

— an individual executive manager, usually referred to as the General Director; or
— a general director together with a collective executive body, usually referred to as the Management Committee, that must be chaired by the General Director unless the managerial functions are delegated to an outside management body (see below); or
— an outside management body, if the charter of the company provides that management may be delegated.

The General Director of either a limited liability company or a joint stock company must be an individual. The company can, by way of contract, delegate the authority of the General Director to an outside management body, such as a management company or to an ‘individual entrepreneur’ (meaning an individual who is registered with the tax authorities as self-employed).

A limited liability company and a joint stock company may appoint a manager. A manager will have whatever authority is delegated to him by the company’s Charter and by any agreement for services entered into between the manager and the company. Managers may be appointed either by a majority decision of the general meeting of participants, or as the case may be, shareholders, or in the case of a limited liability company only, by decision of the company’s Board of Directors. There is a requirement to file a notice of appointment of a manager with the Registration authorities.

Both a limited liability company and a joint stock company may, and in some cases must, also have a Board of Directors (‘soviet direktorov’). A joint stock company with fifty or more shareholders holding voting shares must have a Board of Directors. Such a board is a supervisory, rather than management body with the powers stipulated by the respective laws on limited liability companies and joint stock companies. As such it is the General Director or management committee rather than the ‘Board of Directors’ which most equates to the English law concept of a director.

Method of appointment

The General Director and members of the Management Committee are appointed by a resolution of the general meeting of the company. The resolution is by simple majority unless, in the case of a limited liability company only, the charter specifies a different majority. The charter of a limited liability company and a joint stock company can provide that authority to appoint the General Director and members of the Management Committee is delegated by the General Meeting to the Board of Directors.

The appointment of the first General Director is recorded in the minutes of the Founding Meeting of the company and these minutes are filed with the registration authorities. The company is required to notify the registration authorities of subsequent changes.
Any employment contract that is entered into between a company and a General Director or a member of the Management Committee will be subject to the provisions of the Russian Labour Code many of which are mandatory and override any contrary terms and conditions specified in the individual employment contract.

The employment contract must be approved by a resolution of the general meeting of participants or by a decision of the Board of Directors. In a limited liability company, the employment contract with a General Director can be signed either by the chairman of the general meeting of participants or by a participant who has been appointed by the general meeting to sign on behalf of the company. Alternatively, if the power to appoint the General Director has been conferred on the Board of Directors, the employment contract may be signed on behalf of the company by the chairman of the Board of Directors or a person authorised to do so by a decision of the Board of Directors. In a joint stock company an employment contract with a General Director is signed by the chairman of the Board of Directors or a person authorised by the resolution of the Board of Directors.

Interested parties include the General Director, members of the Management Committee, members of the Board of Directors (if established) and participants holding, either alone or with affiliates, 20% or more of the company’s voting capital as well as their respective close relatives. There are obligations to disclose information about

There is no limitation imposed by law as to the maximum number of members of a Management Committee but the charter may stipulate a minimum and maximum number. The charter may also define the period of appointment and the procedure for re-appointment. It is not necessary to file details of the Management Committee members with the registration authorities.

General Director’s contractual relationship with the company

Any employment contract that is entered into between a company and a General Director or a member of the Management Committee will be subject to the provisions of the Russian Labour Code many of which are mandatory and override any contrary terms and conditions specified in the individual employment contract.

The employment contract must be approved by a resolution of the general meeting of participants/shareholders or by a decision of the Board of Directors. In a limited liability company, the employment contract with a General Director can be signed either by the chairman of the general meeting of participants or by a participant who has been appointed by the general meeting to sign on behalf of the company. Alternatively, if the power to appoint the General Director has been conferred on the Board of Directors, the employment contract may be signed on behalf of the company by the chairman of the Board of Directors or a person authorised to do so by a decision of the Board of Directors. In a joint stock company an employment contract with a General Director is signed by the chairman of the Board of Directors or a person authorised by the resolution of the Board of Directors.

Interested party transactions

Russian law contains regulations on transactions between a company and interested parties ("interested party transactions"). The rules are similar with regard to either a limited liability company or a joint stock company.

Interested party transactions require approval of the general meeting of the participants. Authority to approve interested party transactions may be delegated to the Board of Directors by the company’s charter but only in relation to transactions which are valued at less than 2% of the company’s assets as reported in its latest accounts.

‘Interested parties’ include the General Director, members of the Management Committee, members of the Board of Directors (if established) and participants holding, either alone or with affiliates, 20% or more of the company’s voting capital as well as their respective close relatives. There are obligations to disclose information about

There is no limitation imposed by law as to the maximum number of members of a Management Committee but the charter may stipulate a minimum and maximum number. The charter may also define the period of appointment and the procedure for re-appointment. It is not necessary to file details of the Management Committee members with the registration authorities.

Resignation and Dismissal of General Director and Management Committee Members

The General Director may resign from office at any time by giving not less than one month notice to the company. This is an exception to the standard two weeks’ notice provision for all employees provided for by the Russian Labour Code.

A General Director may be removed by a resolution of the general meeting of the company (unless this power has been delegated to the Board of Directors). The resolution is by simple majority. The Charter of a limited liability company may make provision for a different majority.

Similarly, any member of the Management Committee may be removed by a resolution passed by simple majority at a general meeting of the company. In the case of a limited liability company only, the charter may make provision for a different majority. The law stipulates that a company may dismiss an outside manager at any time but we note that the terms of any such dismissal may be further governed by the management contract.

Authority and representation

The General Director’s power to act on behalf of the company arises as a matter of civil law and does not require a power of attorney. The General Director, by virtue of his office, has authority to bind the company. The General Director may delegate his authority to any person by way of power of attorney. The General Director deals with all issues not falling within the scope of authorities of the general participants meeting and the Board of Directors (if there is one). Certain restrictions on the General Director’s authority, such as a limit on certain transactions, can be set out in the company’s charter and the internal regulations of the company but restrictions which are set out in the internal regulations and are not set out in the Charter will be invalid and ineffective against a third party (including a third party with actual knowledge of those restrictions).
interested parties. Approval of interested party transactions is by a majority vote of all participants who are not interested in the transaction.

**Duties and liability**

The basic principles of liability of the General Director, members of the Board of Directors and Management Committee are set out in the Civil Code of the Russian Federation and the federal laws on limited liability companies and joint stock companies and are in all material aspects the same for each type of company. Under the current law, the General Director, members of the Board of Directors and Management Committee are expected to act in the best interest of the company, and to discharge their actions in good faith. If a breach of this duty causes any harm to the company, directors guilty of the breach may be liable to compensate the company. The principles rest on the general rule that directors are liable to the company and not to the shareholders/participants. Legal action can be initiated by the company or by its shareholders holding more than 1% of the shares but in either such case the director will be liable only to the company. The only current exception relates to a breach in connection with a mandatory offer (in the case of the acquisition of more than 30% of the shares in an OAO) and, in the case of all joint stock companies, in the context of a squeeze out which we mention below. In these two cases, a claim can be brought by any shareholder for his own loss.

Russian law in its current form has only a very undeveloped concept of directors’ duties. The law provides that the General Director, members of the Management Committee and members of the Board of Directors as well as any outside manager appointed by contract, may be liable to the company for their ‘guilty actions’ (‘виновные деяствия’) but fails to define this phrase. It is therefore in practice difficult to impeach a director under current law for lack of clear regulatory guidance or precedent as to the nature of directors’ duties. Furthermore, currently members of the Board of Directors and members of a Management Committee can generally escape liability by remaining passive as it seems that they will only be liable if they vote for the decision which caused losses to the company and cannot be liable if they voted against such decision or did not participate in voting. It follows that there are few decided cases in this area.

When considering the liability of a General Director or other officer, the court will take into account the normal conditions of business in the industry concerned, as well as any other relevant circumstances. Where a court decides that several officers of the company have acted negligently, they will have joint liability.

Given the uncertainty and other shortcomings of the current law on directors’ duties, it is highly significant that the Russian Government has introduced to the Parliament a draft law (the “Draft Law”) aimed at improving the regulation of directors and officers by defining their legal duties more clearly and identifying a broader scope of persons to whom they might be liable in the case of a breach.

The Draft Law will make directors and officers liable for losses resulting from their acting unreasonably or in bad-faith or supporting such actions through their voting. The draft law proposes to define these concepts as follows:

- acting where there is a personal conflict of interest;
- where the director knew or ought to have known that his acts or omissions and or decisions he supported in a vote, were contrary to the interests of the company;
- where the director fails, without good cause, to carry out his duties;
- where the director’s acts or omissions/decisions he supported, breach federal law or normative acts, the charter or internal regulations of the company.

The proposals appear to contemplate that a director should be able to be interested in a contract without this being a conflict of interest, if the transaction is notified to the board of directors – the concept of a disclosed, as opposed to ‘secret’ profit.

In an important change, where the breach concerns a failure to fulfil directors’ functions or a breach of the law or the company’s statutes, the burden of proof will transfer to the director to show that his actions were not unreasonable and/or did not amount to bad-faith.

The Draft Law also lists the persons to whom directors may be liable. These now include as well as the company, a new legally defined subsidiary liability (ie together with the company), to the company’s shareholders, holders of other securities and, in some cases, other third persons.

The reforms including greater definition of the potential offence, the shift of the burden of proof to the director where the offence is a breach of the law or a breach of statutes and the ability of shareholders and other stockholders to claim, are highly significant developments. They will undoubtedly make it much easier to impeach delinquent officers who expropriate assets or otherwise profit at the expense of shareholders which is a major concern of international equity investors, by creating a regime in which all officers of Russian companies need to be very vigilant. In particular, directors and officers will need to be aware of any restrictions on their power.
Other bases of legal responsibility of directors

In case of a joint stock company, the General Director, a member of the Board of Directors, a member of the Management Committee as well as any manager is liable to the company and, as an exception to the general law that directors are liable to the company alone, to shareholders for the losses caused by their wrongful or negligent actions or omissions in connection with a mandatory offer (which applies in the case of the acquisition of more than 30% of the shares in an OAO) and in connection with a squeeze out – that is to say the right of mandatory acquisition of a remaining (less than) 5% tranche of the share capital of an open joint stock company.

A General Director as well as a member of the Management Committee and Board of Directors can also be held liable for committing certain specified administrative offences in accordance with the Administrative Code of the Russian Federation (i.e. for breach of labour, migration, environmental, bankruptcy or securities legislation). The penalties for an administrative offence may vary from a fine to disqualification (for the period of six months to three years). By way of example, a breach of the labour legislation by a director (meaning the General Director as well as a member of the Management Committee and Board of Directors) on a second offence can result in the disqualification of such director for the period of three years.

A General Director as well as a member of the Management Committee and Board of Directors can be held liable for committing a criminal offence in cases stipulated by the Russian Criminal Code. Examples of where criminal liability is expressly stipulated include offences connected with the operation of bank accounts (unlawfully obtaining of credit through provision of false information to a bank), competition (entering into agreements limiting competition), commercial bribery, breach of legislation relating to the provision and disclosure of information to the securities market, insolvency (intentional or false bankruptcy) and tax (tax evasion).

Insolvency offences

2009 marked a turning point in Russian insolvency law. Some of the developments are directly applicable to directors. Under the present rules, generally a General Director must file an insolvency petition within one month of the applicable circumstances (‘insolvency’ as defined by insolvency laws) arising and the failure to do so may lead to the relevant officer incurring legal liability to third party creditors for allowing new debts to arise after the obligation to file an insolvency petition became due. A director will also bear subsidiary liability if the relevant obligations of the debtor company regarding accounting and reporting documents are not complied with as at the date of the commencement of supervision proceedings against the company, or as at the date of the declaration of the company as bankrupt.

Finally, although this chapter concerns the duties and liabilities of ‘directors’, it is worth noting that the insolvency legislation has developed the concept of ‘Controlling Persons’, broadly defined as an individual or a legal entity with the right to give binding instructions to the debtor or otherwise to determine the debtor’s actions, including via pressure on the debtor’s officers or management bodies. Where the actions or instructions of controlling persons have infringed the property rights of the debtor’s creditors, and the debtor’s assets are insufficient to satisfy all of the creditor’s claims, the controlling persons may bear subsidiary liability to creditors for the debtor’s monetary obligations and/or mandatory payments.

Insurance

The Draft Law referred to above further sets out the legal basis for a company to acquire liability insurance for directors and officers. Such insurance is only possible if permitted by the law and to date there has been no such provision.

The draft law will classify directors’ and officers’ liability insurance as contractual liability insurance pursuant to Article 932 of the Civil Code and will amend Russian company law accordingly. The Draft Law will provide that the material terms of a D&O liability insurance contract will need to be approved by the general meeting at the request of the company’s board of directors.

Immigration issues

A personal work permit is required for any foreign national in order to be employed by a Russian company, including the General Director. In recent years the laws governing the employment of foreign nationals have placed a heavy administrative burden on employers. A personal work permit confirms the right of a particular foreign individual to work in a particular company in Russia and is not transferable between companies. Work permits have been subject to quotas limiting the number of foreign workers a company can employ.
On 1 July 2010, a new category of foreign employees was introduced, entitled ‘highly qualified specialists’. This beneficial regime allows the permit to be extended for up to three years for such individuals (previously it was renewable annually), takes this category out of the ‘quota’ regime and expedites the process for obtaining the work permit.

The regime for highly qualified specialists will not apply to all employers. In particular, representative offices of foreign legal entities (which will now enjoy a separate dispensation) are not included. Furthermore, employers will lose the right to take advantage of the new rules if they have been subject to any administrative liability for illegally employing foreign citizens within the past two years.
The initial managing director(s) may also be appointed by the company’s memorandum of association. This option is not considered the most efficient way to appoint company officers, since any changes in the identity of a managing director would, in this case, require amendments to the memorandum of association. However, this problem is minimized under the CA, since amendments to the memorandum of association no longer require court authentication.

Method of removal

A managing director(s) may be removed at any time by a decision passed by the general meeting (in a one-tier system) or the supervisory board (in a two-tier system) and the reasons for the removal need not be given (unless reasoning is explicitly required under the memorandum of association).

A managing director(s) may also resign from this position at any time, but in certain circumstances such a resignation may constitute a breach of the director’s employment or service contract (as defined below) with the company. The CA allows for the de-registration of a particular director from the commercial registry to be made pursuant to his/her letter of resignation. In case a sole director resigns, he/she is obliged to continue performing the activities of the company that may not be postponed, until appointment of a new director, but not longer than 30 days from his/her de-registration from the commercial registry.

In practice, the duration of a director’s term of office is usually reflected in his/her employment contract and in any contract regulating the rights, duties and responsibilities of a director (‘service contract’).
Authority and representation

An LLC is represented by its managing director(s). This authority may be subject to restrictions, which will be set out in the memorandum of association of the company. However, only the restrictions in the form of a double signature rule may be used against third parties.

The personal information of individuals authorized to represent the company, as well as the extent of the restrictions on this authority, must be filed with the commercial registry of the Serbian Business Registers Agency (hereinafter referred to as the ‘Agency’). Copies of identity cards or passports (in case of foreign citizens) and certified signature specimens in a prescribed format must also be filed with the Agency. The Agency must be notified of any change within 15 days.

Besides directors, the authorization to represent the company may also be granted to other persons (natural or legal) – representatives and procurators.

Working rules of directors

If an LLC has two or more directors, they represent and manage the company jointly, unless specified otherwise in the memorandum of association. In case the memorandum of association stipulates that each of the directors manages the company independently, none of them may undertake the contemplated activity if any of the other directors disagrees. In the case they disagree, relevant instructions should be requested from the general meeting (in a one-tier system) or from the supervisory board (in a two-tier system).

Contractual relationship with the company

An employment contract or a service contract underpins the contractual relationship between a Serbian company and its directors. According to the Serbian Labour Act, a director may have a permanent or temporary employment relationship with the company under his/her employment contract. All rights and obligations arising from the Labour Act are mandatory terms of the employment contract. On the other hand, the director’s service agreement allows for more flexible arrangements between the director and the company.

A director is entitled to an adequate salary, which is determined in accordance with the general Serbian regulations, by-laws, and his/her employment or service contract. The tax treatment of the income a director receives pursuant to either an employment or a service contract is the same.

Conflicts of interest and competition ban

Directors who have a personal interest in the company must not use the company's assets for their own 'personal interests' (as defined below), misuse the confidential information about the company, abuse their position in the company for personal gain, or use the business opportunities presented to him/her in the course of their tenure as officers of the company for personal benefit.

The ‘personal interests’ of a director are considered to be the following:

— himself/herself (or a party related to him/her) being a party to a contract concluded with the company;
— legal actions (actions in court and other proceedings, waiver of rights, etc.) that the company takes toward the director or a party related to him/her;
— entering into a legal transaction between the company and a third party or taking a legal action toward such third party if the third party is in a financial relationship with the director (or a party related to him/her) and if it can be expected that the existence of that relationship will affect his/her actions; or
— entering into a legal transaction or taking legal action by the company in which a third party has commercial interest, if the third party is in a financial relationship with the director (or a party related to him/her) and if it can be expected that the existence of that relationship will affect his/her actions.

The above activities will not be considered restricted, if they are approved by a majority of the members of the general meeting (in a one-tier system) or the supervisory board (in a two-tier system).

However, a director will not be responsible for compensating the damage incurred to the company as a result of a conflict of interests, if he/she proves (in the proceedings upon the court action) that (i) the transaction has been in the interest of the company, or (ii) there has been no personal interest in the case referred to in para. ‘Method of removal’ or ‘Authority and representation’ above of this Section.

By the provisions of the CA, a director is prohibited from being directly or indirectly or otherwise engaged in another company which has the same sphere of activity (as the company managed by the director), unless he/she is granted the appropriate approval from the company.
By the provisions of the memorandum of association, this ban may be prolonged for a period following the termination of the director’s term of office, which may not be longer than two years.

This prolongation may also be specified in the director’s employment contract if by working for the new company the director would gain important know-how, a broad sphere of business contacts, or would obtain important business information and secrets. However, the competition clause would entitle the director to an appropriate pecuniary compensation for a period following the termination of his/her employment contract.

Duties of directors

Pursuant to the CA and unless specified otherwise in the company’s memorandum of association, a director(s) of an LLC represents and manages the company. As a general rule, the director(s) undertakes all activities that are not vested with the general meeting (in a one-tier system) or the supervisory board (in a two-tier system).

A director(s) is also responsible for proper keeping of business books, accuracy of financial statements and proper keeping of a record of all resolutions passed by the general meeting. A director(s) is obliged to inform the general meeting and the shareholders about all facts relevant for the business operation of the company or about extraordinary circumstances that may have a substantive effect on the business or standing of the company.

The managing director(s) is obliged to act on behalf of the company, with due care and diligence, in a reasonable belief that he/she is acting in the best interests of the company. A director(s) is obliged to avoid conflicts of interests and observe the competition ban, as well as keep business secrets.

Liability

Under the new CA, the liability of directors is regulated in more detail and has been expanded to a certain extent.

A director(s) is liable for the damage caused to the company or the company shareholders by a breach of his/her duties, for the damage caused by overstepping his/her authorisations (except in the case he/she has acted in accordance with a decision passed by the competent body), for non-compliance with their obligation to inform the shareholders, as well as for refunding unauthorised payments made to the company shareholders.

A director, as a responsible person in the company, shall be held liable and may be penalized, in addition to the company, for minor offences or commercial offences of the company.

The new CA provides even for the criminal liability of directors in the following cases: giving a false statement, entering into a legal transaction or taking an action involving personal interest, breach of a duty to avoid conflict of interests and breach of a duty of a representative to act in accordance with the imposed limitations. However, directors are liable also for other criminal offences as provided for by the Criminal Code.

Regarding third parties, as a rule, a company is responsible for the damage caused by corporate governance bodies. However, a company is entitled to receive compensation from individuals (managers) who have caused the damage as a consequence of wilful misconduct or gross negligence.

Limitation of liability

As a general rule, it is not possible to limit the liability of a director (or any other person) in respect of wilful misconduct or gross negligence by an agreement.

A cap on the amount of potential pecuniary compensation may be agreed, but only if it is not disproportionate to the damage suffered. If such damage results from wilful misconduct or gross negligence, the limitation of the compensation amount will not apply and the company will be obliged to pay the full amount.

Immigration issues

Foreign nationals contemplating employment in Serbia should have the following documentation:

— a permanent or temporary Serbian residence permit; and
— consent for entering into an employment contract with the relevant company.

Foreign nationals arriving in Serbia to conduct professional services or as directors of a company must apply for a temporary residence permit. Foreign nationals must report their residence within 24 hours of entering the Serbian territory.

Temporary residence permits are issued for a period of one year, on the condition that the passport of a foreign national is valid for the duration of this period. If the directorship is extended for a further period of one year, the residence permit will also be extended accordingly.
Taxation

Individuals in Serbia are subject to a ‘dual’ taxation system – firstly, individual income is taxed in accordance with certain rules, and then, if the total amount of personal income exceeds a certain threshold specified by law, it will be subject to additional taxation in the form of an annual income tax.

Income from employment, as well as income from temporary employment, is taxed at a rate of 12%. The basis for tax assessment is the amount of:

— the gross salary; or
— the gross salary reduced by RSD 5,000 for income arising from employment contracts.

The basis for tax assessment (for annual income tax) is the total amount of income subject to taxation, reduced by the amount of taxes and contributions paid during the year (including amounts paid abroad) and also reduced for prescribed personal deductions. Tax rates are progressive and range from 10% to 15%.

Generally, taxation of foreign nationals working in Serbia will depend on whether they are considered to be Serbian residents. Serbian residents are taxed in Serbia on all of their income, including income earned abroad, while non-residents are taxed only on the income earned in Serbia. In relation to the annual income tax, only resident foreign nationals (not non-resident foreign nationals) are obliged to file a tax return and pay the annual income tax.

The rate of taxation of foreign nationals in Serbia will also depend on the double taxation treaties between Serbia and the countries of origin of foreign nationals. Such treaties contain rules on resident determination and determine the tax jurisdiction of the countries that are parties to the treaty. Serbia has concluded treaties with the majority of countries in the EU, with all countries of former Yugoslavia and a number of other countries.

Social security

A director who is an employee of the company can benefit from social services. These include:

— pension and disability insurance;
— health insurance; and
— unemployment insurance.

Social security contributions are mandatory and have to be paid by the company for all employees regardless of their nationality. Contribution rates are determined on the basis of the amount of the monthly salary of a director. The following rates apply to the following categories of social services:

— pension and invalidity insurance – 22%;
— health insurance – 12.3%;
— unemployment insurance – 1.5%.

Serbia has entered into bilateral agreements with all countries of the former Yugoslavia, many EU countries and other countries, such as Austria, Germany, Norway, Czech Republic and Bulgaria, based on which citizens who have insurance in their home countries are not obliged to pay social security contributions in Serbia, for a certain, initial period of their work in Serbia.
This guide focuses on the rules relating to duties of directors of limited liability companies ("konatel") and members of the board of directors of joint stock companies ("predstavenstvo"). It does not address the rules of other legal forms of corporations (e.g. cooperatives, limited/unlimited partnership companies, state enterprises or other legal forms of organisations).

The statutory body of the limited liability company is one or more directors and in case of the joint stock company it is a board of directors, which is a collective body.

The supervisory board is, as its name suggests, the supervisory body of the company, which e.g. supervises the activities of the directors, inspects business documents and the account books, examines ordinary, extraordinary and consolidated financial statements, etc. Creation of the supervisory board is obligatory in case of the joint stock company and is optional in case of the limited liability company. The supervisory board members are elected by the shareholders at the general meeting.

All information in this guide relates to both directors of a limited liability company and a joint stock company, unless specified otherwise.

Eligibility requirements

There are certain restrictions on who can become a director. Amongst other things, it is important to note that:

— only a natural person with full legal capacity may become a director;
— a member of a supervisory board of a company may not at the same time be a director of the same company;
— due to conflict of interests provisions (see below) a director of a company cannot be at the same time a director of another company with an identical or similar business activity unless the companies are holding companies (within one group).

Directors of a limited liability company and members of the board of directors of a joint stock company, from the EU or OECD member states, are not required to be resident in Slovakia. There is no nationality requirement. Directors can be company shareholders, who are natural persons, or other natural persons who are not shareholders.

Method of appointment

In the case of a limited liability company:
A director is appointed at the general meeting by the shareholders (i.e. by the resolution of the general meeting). Upon incorporation, the first director/directors have to be designated in the articles of association of the company. The law prescribes neither a minimum nor a maximum number of directors. Directors are eligible for re-appointment and may be elected either for definite or indefinite periods of time.

In the case of a joint stock company:
Members of the board of directors are appointed at the general meeting by the shareholders. The articles of association of the company may determine that members of the board of directors shall be appointed and dismissed by the supervisory board in the manner stipulated in the articles. The term of office of the members of board of directors shall be provided in the articles of association and may not exceed five years. The number of directors is not prescribed by law and has to be determined by the articles of association. Directors are eligible for re-appointment.

The articles of association may provide that the board of directors may co-opt substitute directors until the next meeting of the respective appointing body of the company, provided that the number of directors originally appointed by that body has not dropped below one half.
**Method of removal**

A director can be dismissed by the resolution of the general meeting taken by the shareholders or, in the case of a joint stock company, by a decision of the supervisory board if the articles of association so provide.

With both types of companies the appointment or dismissal can be effective immediately or at a later date determined by the decision of the general meeting/supervisory board. If the directors are appointed for a fixed term, their term of office will terminate if they are not re-appointed at the relevant time.

A director may resign from office at any time. The company must, however, be notified of his resignation. Subject to the memorandum of association or the articles of association providing otherwise, such resignation is effective as of the date of the next meeting of the company body authorised to elect a new director (the general meeting or the supervisory board). If the director resigns from his office during a meeting of that body, the resignation is immediately effective. If the authorised body does not convene a meeting within three months after the notification of the resignation, the resignation is effective after the expiry of that period. The dismissed or resigning director is required to inform the company of steps which should be undertaken to avoid any potential damage to the company.

Any change in the director’s office has to be registered in the Commercial Register. Such registration only has a declaratory effect towards third parties.

**Authority and representation**

The directors are “statutory bodies” of the company and they manage all the company’s business, unless such business falls within the power of another company body. The directors have full authority to represent the company and there is generally no need for the directors to have special authorisation for certain acts to be valid. However, for certain material legal actions as specified by the Commercial Code, the approval of the general meeting or supervisory board is required (e.g. sale of business as a going concern).

Each director is authorised to act solely on behalf of the company, unless the memorandum of association (in the case of a limited liability company) or articles of association (in the case of a joint stock company) require that two or more directors act jointly on behalf of the company. The way in which the company is represented must be registered in the Commercial Register. Where a director does not act and sign on behalf of the company in accordance with the prescribed way of representation of the company, then such act is invalid and will not bind the company. The authority of the directors to act on behalf of the company can be restricted by the memorandum of association or by a decision of the general meeting, and in the case of a joint stock company by the articles of association or by a decision of the general meeting or supervisory board. However, such restriction, even if it is registered in the Commercial Register, will have no effect towards third parties, and the company will be bound by the acts of the director even if the relevant acts violate this restriction.

In relation to third parties, a company is bound by the conduct of its directors even if the director/directors act outside the company’s scope of business activity. Only if a director acts outside the powers entrusted by law will the company not be bound by the acts of the director.

The company may sue a director who has acted outside his or her powers, for damages by way of compensation.

**Working rules**

The memorandum of association in the case of a limited liability company, or articles of association in the case of a joint stock company, may provide for virtually any number of directors and any combination of signing authorities.

In case of a joint stock company the board of directors is a collective statutory body. Unless the Commercial Code or the company’s articles of association provide otherwise, the board of directors may make a decision only if more than half of the board members are present at the meeting; the decision is approved if the majority of the members present vote for it. The course of the board of directors meeting is recorded in minutes of the meeting, which should be signed by the chairman of the board and the minutes recorder.

Even if there is more than one director in a limited liability company, from a legal perspective they do not constitute a collective body as is the case with the board of directors of a joint stock company. However, according to the Commercial Code, on matters concerning the company’s business management the directors are required to take decisions collectively and such decisions can be adopted only if they are approved by a simple majority of all directors, unless the memorandum of association requires a higher majority. On other more common issues, like signing of labour contracts or issuance of powers of
Conflict of interests

Directors are subject to a ban on competitive conduct. Unless the memorandum of association in the case of a limited liability company, or the articles of association in the case of a joint stock company, impose further restrictions, a director may not:

— make transactions in his own name or on his own account, which are related to the business activities of the company;
— act as an intermediary in respect of the company’s business activities towards third persons;
— participate in the business activity of another company as a partner with unlimited liability; and
— act as, or be a member of, a statutory organ of another legal entity engaged in an identical or similar line of business as the company, unless the companies are members of the same group.

A company, through its shareholders, may demand from a director who violates this prohibition, that he surrenders to the company any benefit gained from the transaction by which he violated the ban on competitive conduct, or that he transfers the corresponding rights to the company. These rights may be claimed against the liable director within three months of the company becoming aware of the relevant fact. However, a claim cannot be made later than one year after the day the prohibition was violated.

The company also has the right to require the directors to compensate any damage caused by any breach of the ban on competitive conduct.

Duties of a director

The directors have many duties set out in the Commercial Code, supplemented by a number of other binding provisions. They include:

— making arrangements for the proper maintenance of the prescribed records and accounting;
— providing for maintaining a list of shareholders;
— informing members and shareholders, and the company’s bodies, about the company’s affairs;
— submitting annual financial statements to the general meeting for approval, proposals for profit or loss distribution and annual reports;
— applying for the proper registration of relevant facts into the Commercial Register. Directors submit proposals for the registration of (and any changes to) the relevant data in the Commercial Register and are responsible for the ensuring that the registered information conforms with the actual situation;
— summoning a general meeting under conditions stipulated in the Commercial Code;
— submitting to the general meeting a report on the company’s businesses and assets at least once a year;
— notifying and explaining obligations to the supervisory board (or in the case of a limited liability company, when a supervisory body is not established, to the general meeting) with regard to the main business plans, and the assumed development of the company’s business and assets;
— immediately informing the supervisory board of all facts that can impact on important company business or assets; and
— convening an extraordinary general meeting and submitting proposals for remedies, if the company losses exceed one third of its registered capital.

Directors shall exercise their range of powers with due managerial care and in accordance with the interests of the company and all of the company partners or shareholders. If a director is allegedly in breach of such duty of care, the burden of proof lies on the director. Directors are obliged to obtain and take into account all accessible information regarding a decision and not to disclose confidential information and facts to third parties, if such disclosure might be detrimental to the company, partners or shareholders. A director may also not put his own interests, interests of third parties or interests of some partners before the interests of the company.

The directors have to ensure that the company complies with all statutory requirements, that the company fulfils in a proper way and on time its duties and obligations (e.g. administrative law requirements, business licences, environmental requirements, proper payments, social security insurance, payment of taxes, tax declarations, labour law, commercial law requirements). The law sets out many, particularly financial, sanctions for breaches of a director’s duties.

Upon bankruptcy a director must submit without undue delay a bankruptcy petition to the court, if the company becomes insolvent or overindebted under the Bankruptcy Act. If this duty is breached (even negligently) the responsible director will bear full responsibility for the damage incurred to the creditors, unless the director can prove that he acted with due managerial care.

Such violation constitutes an objective liability i.e. no negligent or intentional conduct is required. However, directors are not liable for damage if they can prove that they acted with due managerial care, in good faith and that the act was in the interests of company. They are also not responsible for an act related to exercising resolutions of the general meeting, unless the resolution is in conflict with the law, memorandum of association or articles of association of the company. Directors are not relieved from liability even if the supervisory board approves their acts.

A director might be found personally liable for crimes defined by the Criminal Code, especially for economic crimes (e.g. credit fraud, abuse of information in commercial relations) he committed during the performance of his duties.

Limitation of liability

An arrangement between the company and a director, relieving him of liability for damage he caused to the company or limiting it, is null and void. Directors may also not be relieved from liability and such liability may not be limited by the provisions of the memorandum of association or articles of association of the company. There is however no absolute ban on a holding company indemnifying the director of a subsidiary (unless granting such indemnity would conflict with parent company’s directors’ duty of care), nor on a company taking out directors’ and officers’ liability insurance.

The company can surrender its claims for damage against the director or enter into a settlement with the director not earlier than three years after these claims have arisen. Such a surrender or settlement will be effective only if the general meeting approves it and the partners (shareholders) with a 10% share (5% in the case of a joint stock company) do not raise an objection against it.

The creditor and/or third party, is entitled to claim the damages caused by the company against the director, provided that his claim cannot be satisfied from the assets of the company.

Immigration issues

A foreigner, from the EU or OECD member country, who wants to become a director of a Slovak limited liability company or a member of a board of directors of a Slovak joint stock company or of a Slovak affiliate of a foreign
company needs no work permit. However, individuals outside the EU or OECD countries will need a residency permit. Additionally, if a director outside the EU or EEA is at the same time an employee of the company, he will need to obtain a work permit.

**Taxation**

If a director is a resident of Slovakia, his or her worldwide income will be subject to Slovak income tax. If the director is not a resident of Slovakia and is in Slovakia during a year for a period of at least 183 days (and provided that certain additional conditions are also fulfilled), only certain sources of income, including income from employment in Slovakia, are subject to Slovak income tax. It is necessary to take into account any relevant Double Taxation Avoidance Treaties, which can provide otherwise. Income is taxed at 19%.

**Social security**

If a director has health insurance in another EU member country in a form comparable to Slovak health insurance, the director is not obliged to conclude health insurance in Slovakia. However, this shall not apply to a director from third countries (i.e. outside the EU). The director is not obliged to pay social security insurance in Slovakia but he can voluntarily contribute to the social security system. If a director is at the same time an employee of the company, he is obliged to pay social security in Slovakia, but not mandatorily health insurance in Slovakia as described above.
A Slovenian limited liability company (hereinafter: the company) has one or more managing directors (“poslovodja”). The managing director is together with the shareholders’ meeting a compulsory body of a company. A company may also have a supervisory board (“nadzorni svet”), but it is not very common for a Slovenian limited liability company to have one. The managing director represents the company in business dealings and other situations where representation is required and manages the internal operation of the company. The managing of company’s daily business lies with the managing director and cannot be delegated to the supervisory board or shareholders’ meeting.

The managing director conducts the business of the company in accordance with the Slovene legislation, the company’s articles of association, other internal acts of the company and the mandatory instructions of a shareholders’ meeting.

Eligibility requirements

There are only few restrictions on who can become a managing director. Any natural person with full legal capacity can be appointed as a managing director. A managing director of a company may also be a shareholder in the same company. A managing director is not required to be a resident of Slovenia and there is also no nationality requirement. Furthermore, it is not mandatory that the managing director is employed by the company.

Slovenian Companies Act (Official Gazette of Republic of Slovenia No. 42/2006 et seq., Zakon o gospodarskih družbah, hereinafter: ZGD-1) stipulates that a managing director may not be a person:

— who has been convicted of a criminal offence against the economy, against work contract and social security, against legal business, against property, against the environment, space and natural assets. Such a person cannot be appointed as a managing director for five years after final judgement and two years after imprisonment;

— against whom a security measure has been passed prohibiting the pursuit of a profession, for the duration of the prohibition; or

— who, acting as a member of the management body of a company against which bankruptcy proceedings were instituted, has been found liable for damages to the creditors in accordance with the law regulating the financial operations of companies for the period of two years after the court ruling became final.

A managing director has to make a written statement about the non-existence of the above cited legal impediments that would prevent his appointment. Signature of the managing director on this statement has to be verified by a public notary.

Method of appointment

It is up to the shareholders to decide on the appointment procedure of a managing director. Shareholders may stipulate the appointment procedure in the articles of association. If there are no provisions on the appointment in the articles of association, the shareholders would appoint a managing director by a shareholders’ resolution passed by a majority vote of all shareholders present at the shareholders’ meeting. If the company has a supervisory board, this body is responsible for appointing a managing director (the articles of association may however stipulate otherwise).

A managing director may also be appointed in the articles of association, although this is not very practical, as with
Authority and representation

A managing director is a legal representative of a company. His/her powers to represent the company derive directly from the law. A managing director may carry out all legal activities within a company’s legal personality.

A company may have one or more managing directors. Each of the managing directors represents the company independently, unless (in case of two or more managing directors) the articles of association or a shareholders’ resolution (if envisaged by the articles of association) provide for a collective representation. Articles of association can stipulate that two or more managing directors or one managing director together with a proxy holder (agent with limited power to represent) may represent the company. Articles of association may also stipulate that only some managing directors represent the company collectively or that managing directors represent the company collectively only when dealing with certain legal transactions. Collective representation is subject to the entry into the court register and is, if entered, enforceable toward third persons.

Apart from collective representation, no other restrictions of the managing director’s authority and representation can be enforceable against third parties, even if such restrictions have been published in the court register. Thus, any other restrictions on the managing directors’ authority imposed either by the articles of association or by a shareholders’ resolution do not have any effect against third parties. If acting counter to such restrictions, a managing director may be held liable by the company.

Method of removal

If a managing director is appointed for a fixed period of time, his/her mandate ends with the expiry of the appointment period. There is no automatic renewal of the mandate or the transformation of the fixed period into the indefinite period. A new appointment as a managing director is however possible.

Before the expiry of the appointment period a managing director may be removed. Generally, the shareholders’ meeting can remove a managing director at any time without giving a reason for the removal. Articles of association can however stipulate that the managing director can be recalled only for certain reasons determined in the articles of association. Furthermore, the articles of association can vest the supervisory board or even some shareholder with the right to recall a managing director.

Contracts regulating the relationship between a company and a managing director usually stipulate that in case of an unjustified removal the managing director is entitled to a severance payment. Failing such provision, in the case of an unjustified removal, a managing director may claim damages according to the general principles of tort.

ZGD-1 does not provide for a board system. Although there may be more managing directors, they shall not be regarded together as the board. Each of them solely represents the company and validly concludes contracts in the name and to the account of the company unless collective representation is required as stated above.
All managing directors are vested with the same rights and duties. Therefore, the decisions are not made by a majority of the votes.

The articles of association, shareholders’ resolution, resolution of the supervisory board, or internal guidelines may allocate certain duties to one or more managing directors. Nevertheless, such distribution of responsibilities does not affect the overall responsibility of each managing director for the company’s business as a whole.

The shareholders’ meeting may give binding instructions to the managing directors, unless otherwise provided by the articles of association. Non-compliance with such instructions may lead to the recall of the managing director and potentially also to indemnification claims.

**Conflicts of interest**

A managing director is bound to carry out his duties in the best interest of the company.

A managing director may not participate as a managing director in a limited liability company, a member in a partnership, a shareholder in a private limited or unlimited company, a member of a management or supervisory board of another company, a private entrepreneur, a procurator of another company or an employee of another company, if the activity of such company or the private entrepreneur could present competition to the first company where such managing director operates.

Articles of association may stipulate conditions under which a managing director may participate in another company that engages in the same business activities as the company of which he/she is director.

Additionally, articles of association may stipulate that the ban on competition continues even after the managing director no longer holds its position. Such ban may last up to two years, except when a managing director has been recalled by a shareholders’ meeting. In the latter case the prohibition may not last longer than six months.

If the managing director violates the ban on competition the company may claim compensation. The company may also require the offender to cede to the company any operations concluded for his/her own account as operations concluded for the account of the company, or require a managing director to transfer to it any benefits from operations concluded for his own account, or to cede to the company his right to compensation.

A managing director is also restricted from entering into contracts with companies in which either he or his close relatives (as laid down by ZGD-1), alone or jointly, have a share of 10% of the share capital (or are in any other way entitled to a corresponding part of company’s profit) or higher. Such contracts require prior approval of the supervisory board or - in case of its absence - shareholders’ meeting in order to be valid. If such contract is not pre-approved, it is deemed to be null and void. If the shareholding of the managing director and/or his close relatives lies below 10% of the share capital, he does not require prior approval, but is only obliged to notify the supervisory board about the signed contract within three working days of the signing. If there is no supervisory board, he is obliged to inform the shareholders about the contract in the next shareholders’ meeting. The company’s articles of associations may also impose other/additional restrictions in this regard.

**Contractual relationship with the company**

Appointment to the position of a managing director does not in itself create a contractual relationship between the managing director and the company, or entitle a managing director to remuneration.

The company and the managing director therefore usually enter into a management contract or employment contract. A management contract is a type of service agreement specifying the managing director’s duties and remuneration, as well as all other important aspects of the relationship between the company and the managing director such as, inter alia, confidentiality, non-compete provisions, termination provisions and non-cash benefits.

Another common contractual relationship for a managing director with the company is an employment contract. When such a contract is concluded, many aspects of the relationship between the managing director and the company are regulated by the rules of labour law. Slovenian Employment Act (Official Gazette of Republic of Slovenia No. 42/2002 et seq., Zakon o delovnih razmerjih) specifically stipulates which elements of the relationship between the managing director and the company may be regulated differently than the statutory provisions (those are, inter alia, rules regarding remuneration, overtime work, breaks and rests during a working day and week, duration of a fixed-term contract).

Removal of the managing director does not automatically terminate the related contract, but may constitute a breach of such contract. Termination of the contract would also not necessarily terminate the directorship. However, the contract can stipulate that it terminates with the notice of the director’s recall from the position of a director.

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Duties of a managing director

A managing director must manage the company and act on behalf of the company in line with its business purpose, in the best interests of the company, in accordance with instructions given by shareholders and in accordance with the valid legislation. A managing director must act with the diligence of a conscientious and fair manager. Under the rules on financial operations, insolvency proceedings and compulsory dissolution a managing director has to act with a stricter standard of diligence, as stated below.

A managing director is generally responsible for the operative management of the company. Many of the directors’ duties are regulated by law, while some additional duties may be included in the management contract, employment contract or any other contract regulating the relationship between the company and the director. Breach, neglect or omission of his statutory or contractual duties will constitute a valid reason for the removal of the director.

Managing directors’ duties, inter alia, include the following activities:

— to enter the establishment of the company into the court register and to enter changes to the entered data;
— to convene a shareholders’ meeting;
— to prepare and execute the decisions of the shareholders’ meeting;
— to set up financial statements and disclose financial statements to shareholders and to the public;
— to execute a decision of the shareholders to decrease the company’s share capital; and
— to bring an action against a shareholder, who has not paid in his subscribed contribution(s).

Additionally, some of the director’s duties refer to the financial management of the company. The managing directors have to ensure that the company is operating in accordance with the financial operations, insolvency proceedings and compulsory dissolution laws and the rules of corporate finance. The managing directors have to act with the diligence of corporate finance professionals and endeavour to ensure that the company is always short term and long term solvent.

Duties related to the financial management of the company require managing directors to, inter alia, submit a financial restructuring plan to the shareholders or supervisory board (if existent) when the company becomes insolvent, to initiate court insolvency proceedings in due time, to submit financial statements and reports (annual, quarterly) to the shareholders’ meeting and the supervisory board (if existent) and to competent national agencies/bodies.

Furthermore, the managing director must ensure that the company meets its obligations under public law – in particular tax and social security laws.

Liability

A managing director is liable to the company for damage arising as a consequence of a violation of his tasks, unless he demonstrates that he fulfilled his duties fairly and conscientiously. In case of breach of duty of two or more managing directors, they are jointly and severally liable.

A compensation claim by the company against the managing directors may also be pursued by creditors of the company if the company is unable to repay them.

The managing directors and the members of the supervisory board (if existent) are jointly and severally liable to the company, for damage arising as a consequence of a violation of their tasks, according to the rules on financial operations, insolvency proceedings and compulsory dissolution, unless they demonstrate that they fulfilled their duties with the diligence of corporate finance professionals and the corporate governance rules.

The managing directors are liable for the fulfilment of tax and social security obligations of the company, in the same manner as described in the previous paragraph.

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The liability of the managing directors cannot be excluded on the basis that an act was approved by the supervisory board (if existent).

The company may only refuse compensation claims or offset them three years after the claims arose provided that the agreement of the shareholders’ meeting is obtained and provided no written objection is made by a minority holding at least one-tenth of the subscribed capital.

A single managing director is liable to the creditors for damage (if their claims were not repaid fully in the
Taxation

If an individual is resident in Slovenia, his or her worldwide income is subject to Slovenian income tax. If an individual is not resident in Slovenia, only the income that has a source in Slovenia is subject to Slovenian income tax.

In order to avoid double taxation, bilateral agreements on double taxation avoidance have been concluded with several countries.

Generally income is taxed at a progressive rate. Income earned in 2012, and therefore taxed at the rates for 2032 assessment of duty, will be taxed as follows:

— for net taxable amount up to EUR 7,840.53 the income tax is 16%,
— for net taxable amount exceeding EUR 7,840.53 and below EUR 15,681.03, the income tax is EUR 1,254.48 + 27% of the amount exceeding EUR 7,840.53,
— for net taxable amount exceeding EUR 15,681.03 the income tax is EUR 3,371.42 + 41% of the income exceeding EUR 15,681.03.

According to Slovenian tax legislation all the income which the managing director receives as a natural person on the basis of an employment contract is subject to taxation. For income tax purposes, work or services of a managing director and carrying out functions of management (for example, holding the office of a managing director) are always qualified as employment – i.e. also the management fee received on the basis of a business contract is considered as income from employment.

The taxable amount is the income, reduced by the social security contributions, which is paid by the employee.

Tax assessment is based on an annual tax return for the previous calendar year. In most cases the annual tax return is prepared by the tax authorities as provisional calculation of the income tax. Taxable persons – residents receive a provisional calculation of the income tax by 31 March in each year. Under certain conditions such provisional calculation can be considered as a final decision on income tax. Taxable persons – residents, who do not receive such calculation in due time, need to file a tax return.

There are monthly tax prepayments, based on the income tax rates – see above.

Social security

If a managing director qualifies as an employee, according to the labour law, pension contributions, health insurance,
disability insurance, unemployment insurance and parental protection contributions are obligatory.

Social security contributions amount to 38.2% of a gross salary (22.1% employee contribution and 16.1% employer contribution) and are mandatorily deducted from salary by employer.

Social security contributions are also obligatory if the managing director provides management services on the basis of a business contract. Rates and basis depend on whether the managing director has a status of entrepreneur or not.

Persons who pay pension contributions and disability insurance abroad can under certain conditions apply for a waiver of such social security contributions (based on EU regulation or bilateral international treaties). Persons, who pay health insurance abroad, do not, under certain conditions, need to pay health insurance in Slovenia.

Directors contributing to the above schemes are entitled to payments in cash or in kind in cases of retirement, sickness, disability, casualty and unemployment, subject to specific pre-conditions under each scheme.
Eligibility requirements

The company’s managing body may consist of either an individual, two or more individuals acting jointly or jointly and severally, or a board of directors with a minimum of three members. Both individuals and legal persons, such as corporations, may become directors. A director is not required to be a shareholder in the company and need neither be resident in Spain nor be a Spanish national. Nevertheless, a foreign director needs to obtain a Spanish Tax Identification Number (NIE). Minors and incapacitated persons cannot be directors.

The following are restrictions on who can become a director:

— persons barred by reasons of bankruptcy or undischarged insolvency; those barred from holding public office by a judgment; and those who have seriously breached the law or social rules;
— persons whose current positions are incompatible with a directorship, for example, those who cannot trade by reason of their post (Magistrates, judges etc); high public officers (Members of government); public Administration Civil Officers; and
— persons who may not become company directors for other reasons, for example if they are the company’s auditors (note this prohibition lasts for three years from cessation of appointment as the company’s auditor), or if they are the directors of a competing business.

Notwithstanding the above, the company’s articles may impose further conditions, such as the need to be a shareholder at the time of appointment or the necessity of a period of time after the acquisition of the shares, or to be of Spanish nationality.

Method of appointment

Directors are ordinarily appointed at a general shareholders’ meeting, except in cases when directors
are appointed in the incorporation deed of the company. Further exceptions to the general rule (applicable only to public limited companies) are the appointment of a number of members of a board of directors proportionally representing the minority shareholders and co-opting appointment by the board of directors itself. Co-opting is possible when there is a vacancy on the board of directors, whereby the board can temporarily appoint a director from among the shareholders until the next general shareholders' meeting.

The directors of a public limited company are appointed for a period of time stated in the articles of the company, which may not exceed six years. Directors of private limited companies can be appointed for an indefinite term, unless the articles state otherwise. However, in both cases, directors can be re-elected for the same period of time unless the articles provide otherwise. Directors must accept the appointment and the appointment must be registered with the Mercantile Register.

**Method of removal**

A director may resign from office at any time by notifying the board of directors or the shareholders at a general meeting. In this case, the director may be required to settle current business.

Directors can be removed at any time without good reason by a resolution of a general meeting and without the necessity of the cessation proposal being included in the shareholders’ meeting agenda. A director’s appointment may expire if he or she is not re-appointed. In the event of a director’s appointment expiring before a shareholders meeting is in session, his office is extended until the next general shareholders’ meeting. A director who is disabled from acting as a director, as referred to above, must be removed.

A director may be dismissed from his post for miscellaneous reasons such as death, court decision, or the commencement of a liability claim against him. Removal or resignation of a director must be registered in the Mercantile Register. Resignations, other than in writing, have not always been legally recognised.

**Authority and representation**

The directors are the company’s managing body with full authority to represent the company in all acts related to the company’s corporate purpose. This authority cannot be limited as regards third parties. The company will always be liable to third parties acting in good faith in respect of the acts of its directors, even when acting outside its corporate purpose. The authority to represent the company becomes effective upon acceptance of the post. However, in relation to third parties, the appointment is not recognised until the post is registered in the Mercantile Register.

When the company’s managing body is organized as a board of directors, the board as a whole has the authority to represent the company. Since this representation is cumbersome when decisions are carried out, it is common practice to delegate the board’s powers to a managing director or to an executive committee. In this case, the delegate(s) have the same authority to represent the company as the board as a whole. However, the powers to render the company’s accounts and to present the company’s balance sheet and other documents that relate to the company’s accounts to the general shareholders’ meeting, are expressly reserved for the board and cannot be delegated. Unless the articles of association provide otherwise, managing directors can grant powers of representation to third parties. Notwithstanding this power, the grantee can never be considered the company’s managing director. To be effective before third parties, both the delegation and the powers of representation, must be registered in the Mercantile Register.

**Contractual relationship with the company**

The appointment of a director does not constitute a contract itself, but rather a corporate relationship. As a rule, the office of a director is not remunerated. However, remuneration is agreed in most companies. In this case, the company’s articles need to state the remuneration system.

Under Spanish law, activity limited to the mere exercise of the position of a member of the board or management bodies is excluded from the scope of employment law, provided that the activity is limited to the functions inherent to such a position. Consequently, a director’s relationship with a company is not an employment relationship but a mercantile relationship. Notwithstanding this, if a person holds the position of a director and other positions in the company through an ordinary employment contract, compatibility between the mercantile relationship and the employment relationship is possible, provided that the functions corresponding to each position are clearly differentiated with the employment contract describing a function other than the generic management activity of a company.

Therefore, a director can receive remuneration by virtue of a services or employment contract with the company.
A special labour relationship of senior executive employees exists whenever the employee executes powers inherent to the legal ownership of a company and related to the company’s general objectives, and acts with independent authority and full responsibility, only restricted by the criteria and instructions given by a director or members of the board who are considered executives.

The Spanish Supreme Court has established that the functions of a director and of a senior executive employee are the same. Therefore, in cases where the same individual occupies both positions in a company, a dual mercantile and labour bond would co-exist in such individual, but not implying diversification of the functions to be performed. In such cases, Supreme Court case law favours the prevalence of the mercantile relationship over the labour one. In some exceptional cases, case law has acknowledged the compatibility of both relationships whenever the by-laws of the company envisage the possibility of entering into a senior executive employment contract with a director, differentiating clearly the functions to be performed in each position.

Conflicts of interest

A conflict of interest between the directors and the company may arise for personal reasons and, in that case, the directors must inform the other directors, the board of directors or the general meeting of that situation. They shall refrain from taking part in any decision which relates to the situation of conflict. In this case, unless a director resigns, he will be likely to incur personal liability. Usually, this situation occurs when a director is appointed as a director of a competing company or of a company with opposing interests. Consequently, a permanent conflict of interests arises. A director may then be removed at the request of any shareholder and by agreement of the general meeting. A general meeting of a private limited liability company can expressly authorise its directors to act as directors of a competing company.

Duties of a director

Duties of directors are broadly defined under Spanish company law. Directors must act with diligence, caution and loyalty. They are subject to a duty of confidentiality, even after their removal or resignation. They shall inform of any situation that may involve conflict of interest and are under specific prohibitions of competition or of taking advantage of business opportunities.

Directors of public limited companies have, amongst others, the following main duties: lodging the incorporation deed at the Mercantile Register; informing the company’s shareholders of onerous acquisitions involving more than 10% of the share capital of another company (during the first two years after incorporation); issuing share certificates; calling ordinary and extraordinary general meetings; assisting at general meetings; representing the company; preparing and disclosing annual accounts and the director’s report (if applicable); proposing distributions of profits; appointing experts; calling a general meeting to dissolve the company; challenging resolutions of the general meeting when they are contrary to the interests of the company; and keeping the minutes book.

Directors of private limited companies have, amongst others, the following main duties: lodging the incorporation deed at the Mercantile Register; updating the shareholders’ book; calling general meetings; representing the company; preparing and disclosing the annual accounts and the directors’ report; calling a general meeting to dissolve the company; challenging resolutions of the general meeting when they are contrary to the objects of the company; and keeping the minutes book.

Liability

Directors will be liable for unlawful actions or omissions which cause damage to the company, provided that there is sufficient causality between the action and/or omission and the damage. Directors are also liable if they do not dissolve or request the insolvency of the company when they should do so. Directors are jointly and severally liable, unless they can prove that they were not aware of the decision or act causing the damage, or that despite being aware of it, they did everything in their power to avoid the damage or expressly opposed such unlawful decision or act. Not only de jure directors, but also de facto and shadow directors could also be declared liable.

There are two main legal claims in relation to a director’s liability for unlawful actions: (i) corporate legal action; and (ii) individual legal action. A corporate legal action is appropriate when damage is suffered by the company, whilst an individual action is relevant in the event of damage suffered by shareholders or third parties.

Corporate legal action

Corporate legal actions aim to recover damage suffered directly by the company as a consequence of a director’s actions or decisions. Such actions can be brought by the company itself, by the shareholders or by the company’s creditors. Exercise of legal claims by the company need to be approved at a general meeting. The resolution to bring about such a claim can be passed even if it was not stated in the agenda of the meeting. Public limited
Criminal liability
Directors may be personally found to be criminally liable for crimes defined by the Penal Code, including:

— misrepresentation of company information;
— harmful abusive agreements;
— taking advantage of harmful agreements agreed by fictitious majorities;
— denial of rights (i.e. the information right);
— disloyal and/or fraudulent administration; and
— obstructing administrative supervision and inspection.
— Liability may also arise in respect of administrative, environmental or other issues.

Liability in case of insolvency
Directors’ liability in case of insolvency has been a recurrent question since 2004, when the Spanish Insolvency Law providing special rules for this case was passed. Directors could be declared personally and jointly liable for any company debt not fully paid to creditors in case of liquidation if the insolvency is classified as tortious. This would be the case, among others, when the generation or aggravation of the state of insolvency has involved malicious intent or gross negligence. Court decisions have not been homogeneous on the nature of this liability, differing on the consequences in terms of distribution of liability among different directors or the need of proof of damages and the causation relationship between them and the directors’ acts. A recent and very relevant Spanish High Court decision of October 2011 has finally denied any strict liability construction of this provision.

Limitation of liability
A director’s liability cannot be limited by agreement. Notwithstanding this, directors may enter into insurance contracts which cover liability in relation to the company and third parties. This insurance cannot cover wilful misconduct.

Immigration issues
A director who is a national of countries outside the European Economic Area needs work and residence permits when he has an employment contract with the company and before the commencement of his services for the company. The company has to obtain a prior administrative authorization to employ a foreign person (a national outside the EEA) and has to pay a rate to the Spanish government. International treaties ratified by Spain may provide otherwise. European Union nationals have the right, in accordance with European Community law, to work in any Member State.
Direct taxation

When the director is a natural individual:
Spanish Personal Income Tax (IRPF)
If a director has his or her tax residence in Spain, Spanish Personal Income Tax Law applies. According to the provisions of this law, directors’ fees are considered, in principle, work profit. In general terms, the fee payer will have to lodge and pay a withholding tax at the rate of 35% of the full amount of the fee. Fees have to be integrated into the taxable base and are not subject to any specific tax system (the tax rate will depend on the amount of the taxable base). The withheld amount will be taken into account as a reduction of the tax due by the director. Director’s fees paid by non resident corporations are subject to Spanish Personal Income Tax as well. Under most double tax treaties entered into by Spain, these fees can also be subject to tax in the country of residence of the fee payer. In these cases, the foreign tax is creditable in Spain with the limit of the Spanish tax due.

Spanish Non-Resident Income Tax Law (IRNR)
If a director does not have his or her tax residence in Spain, the fee payer will have to lodge and pay a withholding tax at the rate of 24% of the full amount of the fee.

When the director is a corporation:
Spanish Corporate Income Tax
If the director is a company and is a Spanish tax resident, the fee payer will have to lodge and pay a withholding tax at the rate of 18%.

The fees have to be integrated into the taxable base and are not subject to any specific tax regime (the common Corporate Income Tax rate is 30%). The withheld amount will be taken into account as a reduction of the tax due by the director-company. Foreign taxes (where applicable, in case the fee payer is tax resident in another country) are creditable against Spanish tax liability, with the limit of the Spanish tax due.

Spanish Non-Resident Income Tax Law (IRNR)
If the company is a Spanish Tax Non-Resident without Permanent Establishment in Spain, the withholding tax rate is 24%.

Social security
Under Spanish law persons who provide management functions as directors or members of the board and persons who usually, directly and personally render remunerated services to a company, provided that such persons effectively control the company, are necessarily included in the Social Security scheme of self-employees.

— A director has effective control of a company when he owns at least half of the company’s share capital. Furthermore, a director is presumed to have effective control of the company when: a) at least half of the company’s share capital is distributed between relatives that live with him as a spouse, or as close family until second grade; or b) he owns at least one third of the company’s share capital; or c) he owns at least 25% of the company’s share capital and he exercises management functions; or d) the Spanish administration proves the existence of this control.

— In addition, directors and members of the board are included in the General Scheme of Social Security as assimilated to ordinary employees but without unemployment and Wage Security Fund (‘FOGASA’) contributions and benefits provided that they comply with the following conditions: a) they do not have effective control of the company; b) they exercise effective managing and representation functions in the company; and c) they are remunerated.

Members of the board who do not carry out managing functions, i.e. the ‘mere directors’ that only attend the board meetings giving their opinion and voting, are not included in the Social Security system.
This section focuses on the rules relating to the share corporation pursuant to Articles 620 seqq. of the Swiss Code of Obligations (CO). It does not address the rules applicable to other legal entities under Swiss company law, which are the general and the limited partnership, the corporation with unlimited partners, the limited liability company and the co-operative.

**Eligibility requirements**

The only Swiss specific mandatory requirement prescribes that at least one person domiciled in Switzerland must be able to validly represent the company (i.e. have sufficient signatory power). Such person can either be a board member or an officer. If neither of such persons has single signatory power, the requirement can also be met by two persons domiciled in Switzerland having collective signatory power (i.e. being able to validly represent the company jointly).

Further, the law provides that at least one board member (whether domiciled in Switzerland or abroad) must be in a position to validly represent the company (i.e. have single or collective signatory power jointly with another director).

The Swiss company law does not contain a shareholding requirement anymore. As an offset the directors are entitled to attend the shareholders’ meeting and to make motions.

Unlike in other jurisdictions, companies – whether or not incorporated in Switzerland – cannot be appointed as directors. Only the individuals who represent these companies can be appointed as such.

**Appointment**

Generally a director may only be appointed by resolution of the shareholders’ meeting. In the absence of particular quorum requirements in the articles of incorporation, the appointment must be approved by an absolute majority of the votes allocated to the shares represented at the meeting. The chairman is appointed by the members of the board of directors or by the shareholders’ meeting, if the company’s articles of incorporation so provide. Further, the board of directors may establish a nomination committee setting out the governing rules for the selection of candidates and for their re-election.

Notification of the appointment, signed by two members of the board of directors or one member with sole signatory power, must be filed with the Commercial Register of the canton where the corporation is incorporated. The minimum number of directors is one (or such higher number as is prescribed by the corporation’s articles of incorporation). However, if there are different classes of shares, the articles of incorporation must provide for at least one representative of each class to the board. There is no maximum number of directors unless so provided by the corporation’s articles of incorporation.

Appointments are generally made for a fixed term of three years, unless otherwise provided in the articles of incorporation; a director’s term of office must, however, not exceed six years. Reappointment at the end of the term is possible.

**Resignation and removal**

The director may resign from the board at any time by notice to the corporation (although such resignation may constitute a breach of contract).

Further, a director may be removed by resolution of the shareholders’ meeting at any time and without cause by an absolute majority of the votes allocated to the shares represented at the meeting unless the articles of incorporation provide for a different quorum. Delegates
(i.e. managing directors) may on the other hand be removed from their position by the board of directors at any time. Such removal may, however, constitute a breach of contract (cf. para. ‘Contractual relationship with the company’ below) between the corporation and the respective director or delegate.

In any case, resignation or removal of a board member or delegate must be filed with the Commercial Register of the canton where the corporation is incorporated. Although the liability of a board member towards good faith third parties usually ends with the removal from the board, such removal must be filed with the Commercial Register immediately. The resigning or removed board member may notify the Commercial Register itself if the company fails to do so.

Authority and representation

As a general rule, each member of the board of directors has the authority to represent the corporation individually and can perform all legal acts that may arise within the corporation’s purpose. If a special delegation of powers of the board to a managing director, a committee of directors or to independent external officers has been validly made (cf. para. ‘Working rules of the board’ below), the delegates have the same authority to represent the corporation. Internally (i.e. between a director or delegate and the company) the articles of incorporation or other internal regulation may limit such authority in any way.

Internal restrictions on the powers of directors to represent the company, however, are not enforceable against third parties acting in good faith unless those restrictions were filed with and entered into the Commercial Register and either relate to the fact that (i) the company may only be validly represented collectively by several directors (usually two) or (ii) the authority of certain directors is limited to the representation of either the principal establishment or a given branch. Good faith third parties are further protected by the fact that courts usually interpret the corporate purpose – within which a director may validly represent the company – very broadly. Moreover, the good faith of a third party is presumed unless the party knew or should have known that there was an internal limitation of authority.

Finally, notwithstanding the restrictions registered in the Commercial Register, good faith third parties may also be protected under concepts of apparent and ostensible authority (e.g. in case of a delegate’s transgression of such restrictions which the board was aware of and tolerated; misleading statements of the board about the representative’s authority to represent the company).

Working rules of the board

The Swiss share corporation normally has a one-tier board of directors which may take decisions on all matters which by the law or the articles of incorporation are not allocated to the shareholders’ meeting. However, the CO allows for a limited delegation of the board’s powers to a managing director, to a committee of the board or to independent external officers, which may in fact lead to a two-tier management structure. Such delegation of the board’s powers is admissible provided that the board is expressly authorised to do so according to the company’s articles of incorporation. If these requirements are met, the delegates have the authority to act – within the matters defined in the organisational by-laws – in the name and on behalf of the corporation without prior board approval.

If the company’s articles of incorporation provide for delegation, the establishment of a second-tier management structure is always a matter for the board of directors provided that the appointment of any director will be approved by the shareholders’ meeting. Members of the board of directors as well as delegates of the board have to be registered in the Commercial Register of the canton where the corporation is incorporated.

Contractual relationship with the company

Directors do not have to be (and are usually not) employed by the company. However, a director may have a formal contractual relationship with the company (i) as an employee under a service agreement; (ii) as a consultant providing services under a consultancy agreement or (iii) through a company or firm which contracts with the company to provide the director’s services. In any case, according to Swiss case law as well as the prevailing opinion of legal scholars, a director is entitled to reasonable remuneration in exchange for his services. Such remuneration is determined by the board in compliance with general principles of company law (e.g. duty of care and loyalty, reimbursement of unjustified benefits). The company may also set up a compensation committee which issues the rules governing directors’ and senior management’s remuneration. Such remuneration may consist of a share of the corporation’s profit (if so provided in the company’s articles of incorporation). Except for profit sharing bonuses, the director’s remuneration does not require shareholder approval unless stated differently in the articles of incorporation.

The tax treatment of these options is different in each case (see para. ‘Taxation’ below). Termination of the above outlined contracts will not automatically terminate the directorship (although the contract may require that
the director resigns in such circumstances) and removal of the director will not automatically terminate the director’s contract. Termination of the directorship may constitute a breach of the related contract.

With regard to the remuneration of directors and managing officers, the CO provides that listed companies (but not private companies) must disclose (by specifying the names and roles of the beneficiaries) in the annex to the financial statements, in particular (i) the aggregate amount of remuneration awarded or outstanding to the board of directors as a whole as well as the amounts awarded or outstanding to each board member individually; (ii) the aggregate amount of remuneration awarded or outstanding to the board of managing officers as a whole as well as the highest amount awarded or outstanding to a managing officer individually; (iii) if the articles of incorporation provide for an advisory board, the aggregate amount of remuneration awarded or outstanding to the board of advisors as a whole as well as the amounts awarded or outstanding to each member of the advisory board individually.

Further, listed companies must disclose similar information regarding any loans granted to directors, managing officers and (if any) members of the advisory board.

Additionally, remuneration and credits to affiliated persons must separately be disclosed in the annex to the financial statements.

Finally, for listed companies the CO also requires that all participations in the company’s share capital (as well as the convertibles and option rights) held by current directors, senior managers and members of the advisory board (including affiliated persons) must be disclosed accordingly in the annex of the annual financial statements.

**Conflicts of interest**

Generally, a director must disclose to the board any conflict of interest and not participate in a decision taking process if there are conflicting interests. Alternatively, the other directors should ensure that she/he does not do so.

Further, a director is not allowed to enter into a transaction with the company except in cases where either (i) the transaction has been approved by the board or by the shareholders’ meeting or (ii) the transaction does not jeopardise the company’s interests (i.e. is carried out at arm’s length). Whenever a director acts for himself (or a third party) and for the company, then the pertinent transaction must be concluded in written form to be valid unless the value of the consideration given by the company in such transaction does not exceed CHF 1000 and qualifies as an ordinary business transaction.

Finally, the Swiss Federal Supreme Court has ruled that, as a consequence of his fiduciary duty, a director must not usurp corporate opportunities, i.e. take personal advantage by means of transactions in which the corporation itself may have an interest.

Since the board member’s remuneration is generally determined by the board itself, conflicts of interests inevitably develop in relation to the board members’ remuneration. For disclosure requirements regarding remuneration and loans granted to directors and officers of listed companies see para. ‘Contractual relationship with the company’ above.

**Duties**

Directors have a duty of loyalty towards the company and must safeguard its interests. Although this general duty of care is basically owed to the corporation, a director is also under a limited duty of care towards the shareholders (such as the duty to treat shareholders equally) and the creditors of the corporation.

In safeguarding the interests of the corporation, a director is required to exercise reasonable care with regard to his or her own level of skill and experience; the standard of care being the one of an ordinarily prudent person in the same position and in similar circumstances. A director’s general duty of care under Swiss law entails numerous specific duties, which cannot all be listed here.

The law defines some particularly important duties of the board as non-transferable (i.e. they cannot be delegated to a committee of the board, to a managing director or to independent outside officers). These non-delegable duties are

- general management of the corporation and the issuing of necessary directives;
- establishment of the organisation of the corporation;
- corporate finance planning and supervision, including structuring of the accounting system;
- appointment, supervision and removal of persons entrusted with managerial functions;
- preparation of the annual report and the financial statements;
- preparation of the shareholders’ meetings; and
- notification of the courts in case of over-indebtedness of the corporation.

If the board of directors has validly delegated certain specific duties to a committee of the board, to a managing
director or to an independent external officer, the standard of care to be observed by the respective delegates is determined by the specific scope of the delegation.

With regard to the company’s creditors, the directors are under a legal duty to call a shareholders’ meeting and propose adequate restructuring remedies if the last annual balance sheet shows a capital loss (i.e. half of the share capital and the legal reserves are no longer covered by the company’s net assets). Moreover, in case of substantiated concern of over-indebtedness, an interim balance sheet must be prepared and submitted to the auditors for examination. If the interim balance sheet shows that the company’s liabilities are no longer covered (whether the assets are appraised on a going concern basis or at liquidation value), the board of directors is under a legal duty to notify the court unless certain company creditors subordinate their claims to those of all other company creditors in the amount of the over-indebtedness.

Upon receiving such notification, the court opens insolvency proceedings. Nevertheless, on application by the board of directors or by a creditor the court may grant a stay of insolvency proceedings provided that there is a prospect of financial restructuring (i.e. prospect of sustainable financial reorganization of the company and recovery of its profitability); in such case the court prescribes measures to preserve the company’s assets.

**Liability**

The members of the board of directors, any delegate of the board and any persons engaged in the management of the company (including shadow directors) are personally liable towards the company, its shareholders and (upon opening of bankruptcy proceedings over the company) creditors for any damage caused by intentional or negligent violation of their duties (cf. para. ‘Duties’ above). Upon opening of bankruptcy proceedings, however, the right of shareholders and creditors to sue the liable persons is suspended and the bankruptcy trustee is first entitled to recover damages in favour of the company or the bankruptcy estate, respectively. In any case, unless the shareholders and the company’s creditors suffer direct damages, any indemnity granted by the court will only be paid to the company and not to the shareholders or the creditors.

With respect to company and securities law, the Swiss Penal Code provides for criminal liability of directors in the event of (amongst others) false statements about the commercial business (i.e. statements made in the prospectus for a public offer of shares), filing false statements to the Register of Commerce, the artificial reduction of assets to the prejudice of creditors, price manipulation on the stock exchange, disclosing of trade or commercial secrets, mismanagement, granting of preferences to certain creditors, appropriation of seized property, economic espionage, the failure to comply with accounting regulations and insider trading.

Further, directors may incur (civil) liability whenever they fail to promptly notify the courts of the company’s over-indebtedness (cf. para. ‘Duties’ above).

Apart from liability towards the company, the relevant persons may become directly liable towards individual shareholders or creditors (in particular in case of misrepresentation and fraud).

A recent study of the University of St. Gallen (HSG) has shown that in Switzerland every year around 1500 directors are prosecuted in court due to violation of their duties pertaining to an aggregate loss amount of CHF 140 Million. The majority of the liability actions refer to unpaid social security contributions in order to overcome liquidity shortage.

**Limitation of liability**

Directors cannot limit their responsibility beyond the general possibilities to limit the board’s liability by means of delegation of certain duties, if admissible (cf. para. ‘Working rules of the board’ above). In such case, the responsibility of the directors for properly delegated tasks is limited to using due care in selecting, instructing and supervising the delegated persons.

Apart from the above, the directors’ liability may be limited if the general meeting has granted them a full and unqualified discharge of and from personal liabilities. Such discharge, however, is only valid with regard to (i) facts that have been duly disclosed to the shareholders and (ii) claims of the company and of those shareholders who have consented to the discharge resolution. Shareholders who have not consented to given resolutions have six months to bring their claims before a court.

**Immigration issues**

Regarding residence and work permits of foreign directors, two significantly different regimes apply for EU/EFTA-nationals on the one hand and nationals of other countries (third-country nationals) on the other hand.

EU17/EFTA-nationals enjoy unrestricted free movement rights and are generally entitled to the relevant permits provided that (i) they provide the authorities with...
a confirmation of employment or (ii) a confirmation regarding their self-employed status. For one year these unrestricted free movement rights have also applied to EUB-nationals, however, since 1 May 2012 category B residence permits granted to citizens of EUB member states are subject to quotas. In addition, complementary measures in the field of accompanying measures as well as integration are currently being reviewed.

EU2-nationals (i.e. citizens of Bulgaria und Rumania) still face broad material restrictions until 31 May 2016 at the latest and are subject to quotas, the priority rule, as well as to restrictions regarding wages and working conditions.

Third-country nationals, are only admitted to work and reside in Switzerland, if (i) their skills are required; (ii) they are well qualified and (iii) no Swiss or EU17/EFTA-national can be recruited for the vacant position (priority rule). In addition, admission of third-country nationals is subject to quotas.

**Taxation**

Directors’ fees constitute taxable income subject to federal, cantonal and municipal taxation. The tax liability of a foreign director can be unlimited or limited, depending on how long he or she stays and works in Switzerland.

**Unlimited tax liability**

If the director resides and works 30 days or more in Switzerland, he or she is unlimitedly tax liable, i.e., has to pay Swiss income tax based on the director’s total global gross income unless otherwise provided in a Double Taxation Treaty. The longer, so-called 183-day, period which can be found in most of Switzerland’s double taxation treaties does not normally apply to foreign directors, since (i) their fees are often paid from a source in Switzerland, and since (ii) their respective work is related to a permanent establishment or a fixed base of the employer in Switzerland (in order to qualify for the 183-day income tax free period, both criteria would have to be fulfilled in the negative). If, without having permanent residence in Switzerland, a foreign director works as an employee for a Swiss share corporation under a service agreement for a period of 30 days or more, all income from the employment relationship is subject to tax at source. The employer is liable for the tax and must withhold the due amount and pay it to the cantonal tax administration. This tax at source settles all federal, cantonal and communal tax liabilities.

If the foreign director has a permanent residence permit, his or her fees are subject to the ordinary federal, cantonal and municipal income tax. In case the foreign director is a consultant of a Swiss share corporation under a consultancy agreement, his or her fees are subject to the same tax regime as under a service agreement (see above). A director’s fee cannot be sheltered from Swiss taxation by setting up an offshore company as the formal employer of the consultant, i.e. of the director.

Consequently, if a foreign director works for a Swiss share corporation based on a contract between a foreign company and the Swiss corporation, and he or she performs an income-generating activity in Switzerland for a period of at least 30 days, the same tax regime applies as described above in relation to the resident director. Both ordinary income tax and tax at source as mentioned above are calculated on the basis of gross income. For directors subject to ordinary taxation, standard deductions for items such as employment costs and insurance fees are granted. For executive employees and specialists, such as directors of a share corporation, during a limited period of time, additional allowances for professional expenses are provided which vary from canton to canton. For directors taxed at source, the possibility for deductions is restricted, as the tax tariff applicable already takes into account the familial situation of the taxpayer.

**Limited tax liability**

If the director stays and works in Switzerland for less than 30 days, he or she has limited tax liability, i.e., has to pay Swiss income tax based on the director’s Swiss remuneration only. This tax is normally a tax at source, although some of Switzerland’s double taxation treaties may provide otherwise. As with respect to unlimited tax liability, the distinction between service and consultancy agreements and contracting with another company is irrelevant for the purpose of taxation of the director’s remuneration (please see above under ‘Unlimited tax liability’). Fees received as a member of the board of directors are usually taxed with a separate tax at source, which is usually a flat tax at a rate of 25%.

**Social security**

Social security in Switzerland includes old age and survivors’ insurance, disability insurance, supplementary benefits to old age, survivors’ and disability insurance, unemployment insurance, compulsory employee pension, medical and accident insurance. For Swiss social security legislation purposes, a foreign director who works to a considerable extent for a Swiss share corporation (be it as an employee or as a consultant) normally qualifies as an ‘employee’ of such corporation. Consequently, the corporation will be under a legal obligation to pay Swiss social security contributions on the remuneration paid to its director. Exemptions may be available under international social security treaties.
This guide focuses on the rules relating to limited liability companies ("Tovarystvo z obmezenoyu vidpovidalnistyu" or "TOV"), the most common type of company used by foreign investors to establish subsidiaries in Ukraine.

Ukrainian limited liability companies ("LLCs") are companies which have a charter capital divided into participation interests, the size of which is determined in the constituent documents and which correspond to each participant’s contribution to the charter capital. The maximum number of participants of an LLC is 100 persons. The highest governing body of the LLC is the general meeting of participants. The management of the LLC may be carried out by either an individual director acting on his/her own or by a board of directors, depending on the provisions of the LLC’s charter. The board of directors is headed by a ‘general director’, and a ‘director’ is a common term for an individual manager. For the purposes of this guide, the term ‘Director’ refers to both a director, in his/her capacity as an individual manager, and a general director, as the head of the board of directors.

Ukrainian law provides for the creation of a mandatory audit commission, whose members are appointed from the participants at the general meeting of participants (the main governing body of the LLC). Legal entities represented by individuals may also be appointed to the audit commission. The audit commission’s functions include controlling the financial affairs of the LLC and reviewing the annual accounts before their approval by the general meeting of participants.

A supervisory body may also be appointed in accordance with the LLC’s charter, although this is not a mandatory requirement under Ukrainian law. If appointed, the supervisory body performs continuous control over the commercial and financial activities of the LLC.

All members of the board of directors, supervisory body (if any) and the head of the audit commission are considered to be officers of the LLC. Ordinary members of the audit commission are not officers of the LLC.

**Eligibility requirements**

Only an individual with full legal capacity can be appointed as the Director. The law does not establish any restrictions regarding the nationality of the Director, however as a practical matter (due to certain peculiarities of Ukrainian law) at the moment of establishment of a new LLC only a Ukrainian citizen may be appointed as the Director. After the registration of such new LLC a Ukrainian Director may be replaced with a foreign national in this position.

A participant may also be the LLC’s Director as long as this is an individual. In certain businesses, such as insurance or banking, only individuals having the required level of education and professional qualifications can be appointed as the Director.

The Director and the members of the board of directors cannot simultaneously occupy a position in a controlling body of the LLC, such as the audit commission or the supervisory body, or be in the chair of the meeting of participants, alongside their board appointment.

**Method of appointment**

The Director is appointed by a resolution of the general meeting of participants requiring a simple majority vote of present participants. Participants have an amount of votes proportional to the size of their participation interests in the charter capital. The law applicable to joint stock companies clearly requires that a director and every member of the board have an employment agreement with the company. As regards other companies, such as LLCs, Ukrainian law is somewhat ambiguous and requires that a written employment agreement or contract be concluded.
Authority and representation

The Director is entitled to represent the LLC before third parties without a power of attorney and his/her actions will be binding upon the LLC. The Director may also delegate his/her authority by granting a power of attorney to third parties.

The LLC’s charter may restrict the powers of the Director, for example, the execution of certain agreements by the Director on behalf of the LLC by requiring prior approval of these by the supervisory body or by the participants at a general meeting. However, if the Director exceeds the authority granted to him/her, his/her actions shall be binding on the LLC if the LLC subsequently approves them.

The Director may be held liable for exceeding the extent of his/her authority when representing the LLC vis-à-vis third parties. However, as a practical matter holding a Director liable in such cases may be difficult.

The State Register of Companies contains information on the extent of authority granted to the Director to represent the LLC before third parties and on other officers of the LLC authorized to represent the LLC without a power of attorney. It also contains information about any restrictions on this authority. The information in the State Register of Companies is considered to be accurate and can be relied on by third parties in cases of disputes regarding the authority of the Director to represent the LLC.

If the LLC fails to update the information in the State Register of Companies, new information that is not on the register cannot be subsequently used in disputes against third parties, except when such third parties knew or could have known about it.

Method of dismissal

The Director can be dismissed by a resolution of the general meeting of participants by a simple majority of votes. Removal of the Director must be in compliance with both general corporate and employment laws.

Ukrainian employment laws provide for very limited instances for dismissal of the Director. It is therefore important to conclude an employment contract with the Director, which provides for the possibility of his/her dismissal on a broader scope of grounds that the participants consider appropriate.

Under general Ukrainian employment legislation, the Director may voluntarily resign at any time by giving two weeks’ notice to the LLC.

There is no requirement to notify the State Registrar, the State Statistics Committee or the Tax Authorities about the dismissal or resignation of the Director. However, the above authorities must be notified about the appointment of a new Director so that the respective changes to the State Register of Companies are made. It is in the best interests of the LLC to make the notification as soon as possible after the appointment is made, since third parties may rely on information in the State Register of Companies.

Working rules of the board

The LLC may be managed by a single Director or a board of directors. The working rules of the board are usually provided for in the charter of the LLC and may be further specified in the internal regulations of the LLC. The corporate documents normally specify the scope and the distribution of duties, responsibilities and powers between the members of the board, as well as rules applicable to convening and holding the board meetings etc.

The decisions of the board are generally taken by a majority of votes of members of the board present at the board meeting with the chairman of the board having the casting vote.

The Director of the LLC and members of the board have to adhere to the job descriptions (‘posadova instruktsia’).
which are adopted by the LLC for each employee, including the Director or the board member, if the LLC wishes to specify his/her duties as set forth in the charter. The job description provides specific job responsibilities, entitlements and liabilities of each employee. Introducing such job descriptions, although advisable, is not obligatory for the LLC.

**Contractual relationship with the company**

Ukrainian employment legislation is designed to protect employees. Special provisions may, however, be established in respect of certain categories of employees, including the Director. These provisions may be set out in the employment agreement (contract) with the Director.

Generally, employment agreements must be concluded for an unlimited term. However, in a few circumstances, the Labour Code allows for an employment agreement to be concluded for a limited period.

The Labour Code allows for a limited term employment agreement only if the nature of work or the employee’s interests makes it impossible to establish an employment relationship for an unlimited term. These statutory requirements, however, affect only employment agreements and are not applicable to employment contracts. Under Ukrainian law, an employment contract, which is a special form of a written employment agreement, can be concluded only with the Director.

The parties to an employment contract have more discretionary powers in setting terms of the employment that deviate from standard terms provided by the Labour Code. The parties may, in particular, agree on the following:

— the parties’ rights, obligations and liabilities, including the term of employment, the terms of the employee’s material (financial) liability;
— the remuneration and organisation of the employee’s labour; and
— additional grounds for termination of the contract.

In the absence of an employment contract between the Director and the LLC, dismissing the Director may prove difficult.

The employment agreement (contract) with the Director must be signed by a person who has been specifically authorised to do so by the general meeting of participants.

**Duties of a Director and conflicts of interest**

The Director is required to act in the best interests of the LLC, in good faith, reasonably and within his/her authority. The Director cannot represent the LLC in transactions which benefit him/her personally or for the benefit of a third party if that third party is represented by him/her.

As a general rule, the Director manages all matters of the LLC’s activity apart from those that lie within the exclusive competence of the participants. There are also certain specific statutory duties of a Director, which include:

— setting up a system of accounting and documenting of all transactions;
— organising financial reporting, signing and submitting tax returns and financial reporting to the relevant authorities on the LLC’s behalf;
— sending yearly balance and financial statements to the State Registrar;
— submitting financial statements to the participants of the LLC (as provided by the LLC’s charter); and
— initiating court proceedings in case of insolvency.

Additional duties and powers of the Director may be specified in the LLC’s charter and employment agreement (contract) with the Director.

**Liability**

The Director is liable to the LLC and not to its participants. In accordance with Ukrainian law and the LLC’s charter, officers of the LLC are liable to the LLC for direct damage and loss of profit caused by them. For example, the law provides that the Director (members of the board of directors) may be personally and jointly liable for damage caused to the LLC if they act on behalf of the LLC beyond the limits on their authority. In addition, the Director may be liable for damages caused to the LLC as a matter of labour law. The LLC’s charter and/or employment contract may also establish additional grounds for liability of the LLC’s officers to the LLC.

Moreover, the Director may also face criminal liability for:

— illegal dismissal of employees for personal reasons and other gross violations of employment laws;
— illegal opening or use of the LLC’s currency accounts in foreign countries and other types of embezzlement or fraud;
— causing the LLC’s failure to fulfil a court judgment or to pay taxes and other mandatory duties;
— causing the LLC’s insolvency in the interests of a third party or concealing of such insolvency;
Additionally, the LLC within three business days from the commencement of employment should notify the relevant employment authority and ensure the registration of the foreign national’s passport at the relevant local internal affairs authority (Central Immigration Authority). The same actions must be taken in case of termination of the foreigner’s employment.

In addition to the type D visa, a foreign employee may obtain a temporary residency permit. The advantage of the temporary residency permit is that it allows multiple entries into Ukraine during the validity of the work permit, while a work visa is a single entry visa and allows a foreign national to stay legally in Ukraine for 45 days only.

**Taxation**

Persons who are tax residents in Ukraine are subject to personal income tax (“PIT”) on their worldwide income, whereas non-residents are only taxed on income originating from Ukraine. Hence, if director is a Ukrainian tax resident, his or her worldwide income is taxed in Ukraine, whereas only a non-resident director’s salary paid by a Ukrainian employer is subject to Ukrainian PIT.

A residency test (based on the one used in the OECD Model Tax Convention) is used to determine a particular individual’s permanent place of residence and whether or not he/she is a Ukrainian tax resident. As a matter of practice Ukrainian tax authorities primarily consider whether an individual has stayed in Ukraine for more than 183 days in determining whether that individual can be viewed as a Ukrainian tax resident. Generally, a standard PIT rate of 15% applies to a Ukrainian tax resident’s income for the portion of income equivalent to up to ten times the official minimum wage (around UAH 10,000 (approx. EUR 952)), while any income in excess of this amount is subject to tax at a 17% rate.

Certain types of income are subject to reduced tax rates. For example, a 5% rate applies to dividends, interest on bank deposits, interest on bonds, etc. However, certain types of income are subject to increased tax rates. For example, prizes and winnings are subject to 30% tax (except for the state lottery which is subject to the standard tax rate).

Income received by non-residents is generally subject to the same tax rates as above. However, a 15% tax rate may apply to income received by a non-resident from the sale or lease of real estate in Ukraine depending on the circumstances.
Social security

The salary paid to the Director is subject to social security levies. Generally, these contributions amount from 36.76% to 49.7% of the employee’s gross salary depending on the LLC’s business sector and are paid by the employer. Additionally, 3.6% of the gross salary is paid by the employee. Such social security contributions’ ceiling is currently set at a gross salary amount of approximately EUR 1,770 per month.
A director is required to disclose personal details, including his or her full name, home address and date of birth. Normally a service address is also provided so that this appears with the other personal details on the public register at Companies House instead of the home address.

Method of appointment

It is necessary to distinguish between appointment as a director and appointment as an executive, since each is legally a separate matter. The method for appointment of a director is determined by the constitution (that is, the articles of association) of the company. However:

— a director can normally be appointed either by the existing directors, or by resolution of shareholders.
— in the case of a subsidiary, the parent is often permitted to make an appointment by written notice to the company.
— notification of the appointment, signed by the director, must be filed with Companies House. No fee is payable.
— the minimum number of directors is one (or such higher number as is prescribed by the articles of association).
— there is no maximum number of directors unless a maximum is prescribed by the articles of association.

Appointments are generally made on an open-ended basis, and not for a fixed term, as the term will be a function of the related contractual relationship. If desired, the articles of association can provide for fixed term appointments, with the need for reappointment at the end of the term.

Appointment as an executive director involves the creation of an additional contractual relationship. The forms which this can take are discussed below. This aspect of the appointment is normally a matter for the board.

Persons who have not been formally appointed but who in reality act as directors can be liable in the same way as...
A director may resign his or her office at any time by notice to the company (although this may constitute a breach of his or her employment or consultancy contract). A director is always subject to removal by resolution of shareholders under a statutory procedure, which gives the director the right to protest. The articles of association (particularly in the case of a wholly-owned subsidiary) will often permit the parent company to remove a director by notice to the company. It is unusual for directors to be able to remove one of their number from the board, although the board may resolve to terminate the director’s service contract, termination of which may require the director’s immediate resignation. If directors are appointed for a fixed term, or are required to seek reappointment periodically, their appointment will terminate if they are not reappointed at the relevant time. The resignation or removal of a director must be notified to Companies House.

Conflicts of interest

The Companies Act 2006 imposes duties relating to conflicts of interest: to avoid actual or potential conflicts of interest (especially in relation to the exploitation of property, information or opportunities), not to accept benefits from third parties and to declare any interest in a transaction or arrangement that the company proposes to enter into. A director must also declare his or her interest in an existing transaction or arrangement of the company if not declared before it was entered into. As a rule, no breach will occur where the conflict is authorised by non-conflicted directors or by shareholders, or the relevant interest is appropriately declared, but the authorisation or the articles of association may impose restrictions that prevent the conflicted director from taking part in decision-making as regards the matter giving rise to the conflict.

The tax treatment of these options is different in each case. Broadly, shareholder approval is required if the agreement gives the director a guaranteed term of more than two years (unless the company is wholly-owned by another corporation). Termination of any such contract will not automatically terminate the directorship (although the contract may require that the director resigns in such circumstances). Termination of the directorship may constitute a breach of the related agreement.

Method of removal

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Authority and representation

As an internal matter, unless approved by the board (for example, by the delegation of powers to a managing director, or by the passing of a specific resolution), no director is entitled to commit or act on behalf of the company. In practice, directors are usually granted a level of delegated authority consistent with their role in the company.

As regards third parties, a director will be regarded as having ostensible authority to bind the company, even if he or she has no actual authority to do so. Consequently, a director acting without proper authority (and therefore in breach of his or her duties) may nevertheless cause the company to become liable to a third party, but not if the third party knows that the director is not authorised.

Working rules of the board

Generally, a company is permitted considerable flexibility regarding the operation of the board. All directors must be given notice of each meeting, although there are no specific requirements as to the form this should take, unless the company chooses to prescribe rules in its articles. Some companies’ articles provide that notice need not be given to a director who is out of the country. This can often be inappropriate and can be changed. The articles usually permit the board to delegate most of its powers to committees, which may include non-directors. Typically such delegation is for specific purposes – for example, to allow the efficient handling of an M&A transaction.

The articles of association often allow directors to appoint alternates – that is, a person who can act as a director in his appointor’s absence.

Contractual relationship with the company

Appointment as a director does not of itself constitute a contract with the company. The articles of association will generally entitle a director to remuneration on terms agreed by the board and to reimbursement of expenses. An executive director will also have a contractual relationship with the company:

— as an employee under a service agreement; or as a consultant providing services under a consultancy agreement; or
— through a company or firm which contracts with the company to provide the director’s services.

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Other duties of a director

The Companies Act 2006 also imposes a number of other general duties on directors: to act within their powers; to promote the success of the company; to exercise independent judgement; and to exercise reasonable skill, care and diligence. Of these, the duty to promote the success of the company is usually seen as the most fundamental. It requires a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so to have regard (amongst other matters) to:

— the likely consequences of any decision in the long term
— the interests of the company’s employees
— the need to foster the company’s business relationships with suppliers, customers and others
— the impact of the company’s operations on the community and the environment
— the desirability of the company maintaining a reputation for high standards of business conduct
— the need to act fairly as between members of the company.

Directors are also subject to a wide range of statutory duties (for example, health and safety) and specific duties under the Companies Act 2006 (such as the duty to keep accounting records). There are also restrictions on certain dealings between the company and its directors (and persons connected with them), such as sale and purchase transactions, and on loans to directors.

Liability

Most of the general duties under the Companies Act 2006 are fiduciary duties and as a result a director in breach may be liable to compensate or account to the company without the company having to prove a loss. As well as being liable to fines and other penalties for breaches of various statutory duties and offences (for example, under the Bribery Act 2010), directors can also be personally liable to the company in other ways, such as for making unlawful distributions of the company’s assets. It is also possible for directors to assume personal liability to third parties if the circumstances show that they held themselves out as doing so, or if they led the third party to believe that they had authority to act on the company’s behalf when in fact they did not.

If the company goes into insolvent liquidation directors can be ordered to contribute to the company’s assets where losses are due to their failure to stop the company from trading when there was no reasonable prospect of its avoiding the liquidation; and there are other insolvency-based remedies against directors.

There is a statutory regime for derivative claims, enabling members, subject to the court’s permission, to require action to be brought on behalf of the company against directors who are or have been in breach of their duties or have been negligent. In the case of private limited companies, the main threat of legal action against directors for breach of duty is likely to emerge only in the event of the company’s insolvency.

Immigration issues

Nationals of countries outside the European Economic Area and Switzerland require immigration permission before they are able to take up employment in the UK. UK immigration has a 5 tier Points Based System (“PBS”) to cover most economic migrants, although work permits are still required for Bulgarian and Romanian nationals. Directors who wish to work in the UK are required to apply for permission to work under the PBS, unless they can derive an immigration status from their relationship with a person present and settled in the UK or an EEA national, or through ancestry. There are three main routes for a foreign national to enter the UK to take up the role of
a director; these are via the Tier 1 or Tier 2 route of the PBS or as a Business Visitor, if his function is simply to attend board meetings or undertake other non productive activities in the UK.

**Tier 1 (Investor) and Tier 1 (Entrepreneur)**

Tier 1 (General) was the most common category previously used by high level, high earning directors. This was closed to all new entrants in April 2011 although migrants who have obtained this status can apply to extend or qualify for indefinite leave to remain. Directors may wish to seek either a Tier 1 (Investor) visa which requires transferring at least GBP 1 million to the UK and investing at least GBP 750,000 in UK Government bonds or in share or loan capital of UK registered companies. Investors can work in the UK and may qualify for indefinite leave to remain after five years (this may be accelerated if larger amounts are invested). Alternatively the Tier 1 (Entrepreneur) route may provide an option. This requires an investment of at least GBP 200,000 in a UK business and the creation of at least two full time jobs for settled workers in the UK with indefinite leave to remain achievable after five years (or sooner if higher investment is made and more jobs are created). In practice however, Tier 2 is the most used solution for employees as it removes the need for personal investment and/or directly attributable job creation.

**Tier 2 (skilled worker)**

To apply under this category the director must have a job offer from a licensed sponsor (an employer), who will issue a valid certificate of sponsorship (“CoS”) once the individual has passed the points-based assessment. Points are awarded based on the level of the role on offer, prospective earnings, English language skills, whether s/he satisfies the resident labour market test or qualifies as an intra company transfer (“ICT”) and maintenance funds must also be shown (As an alternative to showing he has the necessary funds himself, an A rated sponsor may certify that if necessary they will maintain and accommodate the director during his first month of employment in the UK to the amount of GBP 900 and GBP 600 per dependant). Applicants are all required to apply for entry clearance at an overseas diplomatic post (or apply to the UK Border Agency if they are based in the UK, in a category which allows switching). The two types of Tier 2 permission which would be applied for a director are:

**Tier 2 (General)**

This category is for migrants coming to the UK with a skilled job offer. If the position attracts a guaranteed annual salary of more than GBP 150,000, the sponsor can apply for an unrestricted Certificate of Sponsorship (“CoS”) and the application will not be considered as part of the annual quota of 20,700. If the role will pay less than GBP 150,000, the sponsor must complete the resident labour market test and show that no suitably qualified settled worker is able to fill this vacancy. The test is satisfied by showing that an adequate recruitment search has been carried out in line with the UKBA guidance. If the role of director pays less than GBP 70,000 it must be advertised on Jobcentre Plus and by one other method as prescribed by the appropriate Code of Practice (which can be found on the UKBA website at [http://www.ukba.homeoffice.gov.uk/employers/points/sponsoringmigrants/employingmigrants/codesofpractice]). If it pays between GBP 70,000 and GBP 150,000, the requirement to advertise on JobCentre Plus is removed. However advertising will still have to be undertaken via one other appropriate media, as outlined in the Code of Practice. The requirement to search the resident labour market cannot be waived in any other circumstances. If the appointment is intended to be permanent (i.e. more than five years) an application should be made under Tier 2 (General) as this is the only Tier 2 category which can lead to settlement.

Any Tier 2 (General) migrants who entered after 6 April 2011 will be required to apply for indefinite leave to remain at the end of either year five or before the end of their sixth year in the UK if they do not apply or cannot qualify they will be required to leave the UK. They will then be barred from returning as a Tier 2 migrant for either the same sponsor or any other UK sponsor for 12 months. This is known as the “cooling off period”.

**Tier 2 (Intra Company Transfer) (“ICT”)**

The ICT category is for employees of multi-national companies who have worked for an entity connected to the UK sponsor for at least 12 months and are being transferred to a skilled job in a UK-based branch of the organisation, without displacing a UK worker. They must not be subject to any cooling off period imposed as the result of previous UK employment with any UK sponsor. There is no requirement to satisfy the resident labour market test. The ICT route does not lead to settlement and for all migrants entering under this category after 6 April 2011, they will have to leave the UK at the end of the five years (if they have come in as a Long Term ICT migrant) or six years (if they spent the first 12 months as a Short Term ICT migrant). The cooling off period will then apply to preclude them from coming back as a Tier 2 migrant for 12 months from that date.

**Business Visitor**

Visitors are not allowed to work in the UK, although they can transact business directly linked to their employment or business abroad. The Home Office publishes a list of activities which visitors are permitted to undertake in the UK. These include attending meetings and negotiating and signing contracts with UK businesses. As a result, a non-EEA national employed overseas who is a director of a UK company and wishes to travel to the UK solely in
order to attend board meetings may be able to do so as a visitor. However, if the director is paid in the UK (although s/he may receive a fee for attending the meeting and reasonable expenses) or wishes to undertake productive work in the UK, it will be necessary to apply under PBS for appropriate immigration permission.

General grounds of refusal

It is also crucial to note that the general grounds of refusal mean that a mandatory ban will be imposed on any individual who works in the UK illegally or overstays their visa by more than 28 days. This may mean that the individual could be refused entry for up to ten years.

Taxation

General

As holders of an office directors are subject to income tax on the earnings from their office.

Benefits in kind and expenses

In general, the amount of any benefit and expenses payments are treated as earnings chargeable to tax subject to a deduction for any items qualifying for an expenses deduction and any amounts for which the director reimburses the person making the payment or providing the benefit. Where an Inspector of Taxes is satisfied that no tax would be payable because an equivalent expenses deduction would be due, a dispensation can be given which exempts the expenses and benefits from charge.

In general three requirements must be satisfied if an expense is to be deductible. First, it must be incurred in performing the duties in question. Secondly, the expense must be necessarily incurred in the performance of the duties. This is an objective test in that the expenditure must arise from the nature of the director’s contract and not from his or her personal choice. The third requirement is that the expense should be incurred ‘wholly and exclusively’ in the performance of the duties. In practice, the harshness of these requirements is mitigated by a number of concessions by HM Revenue & Customs and by certain statutory deductions. Where a benefit is provided, the amount that is to be brought into charge depends on the nature of the benefit that is received. There are specific rules for certain benefits. In some cases, the amount brought into charge will be the cost to the person providing it and in others it may be a scale charge or some other amount. In some cases, benefits received may be made specifically exempt from any charge.

The receipts basis

Emoluments are assessed as income for the year in which they are received. For directors the date of receipt is the earliest of:

— the time when the payment is made of or on account of the earnings; or
— the date when the director becomes entitled to the payment; or
— the date the earnings are credited in the company’s records or accounts; or
— the end of the period of account if the earnings for that period are determined before the period ends; or
— the date earnings are determined if the amount is not determined until after the period ends.

Earnings are regarded as being credited in the company’s accounts even if the director cannot immediately draw the money because of a restraint known to HM Revenue & Customs as a ‘legal fetter’ or if the account credited is not in the director’s name. However, if the amount credited represents an amount to which the director will only be entitled if certain conditions are met, it will not be ‘received’ until the conditions are met. It should be noted that a ‘fetter’ merely delays payment of an amount to which the director is entitled whereas a ‘condition’ is something which must be satisfied before there is a right to remuneration.

Foreign element

The scope of the income tax charge is dependent on the director’s residence and domicile status. There is no statutory test for determining residence status. Instead the meaning of residence has developed through case law. Traditionally the approach has been based on day counting, but recent case law has favoured an approach based on an individual’s connections to a particular country. The Government held a consultation in the summer of 2011 on the introduction of a statutory residence test and the reform of the ordinary residence test. In the 2012 Budget it was confirmed that the statutory residence test will be introduced on 6 April 2013 and draft legislation was due to be published in May 2012. Following the consultation, the Government confirmed that it intends to abolish the ordinary residence test for tax purposes from 6 April 2013 with draft legislation due to be published.

Resident/ordinarily resident

Where the office holder is both resident and ordinarily resident in the UK he or she will be taxable on all worldwide earnings on an arising basis unless such earnings equate to ‘overseas earnings’, in which case the earnings for duties performed wholly outside the UK are taxed on a remittance basis (see ‘Remittances’ below). Overseas earnings are defined as earnings of a person not domiciled in the UK from an office with a person who is not resident in the UK (or the Republic of Ireland). Where such a director performs duties in the UK, which are merely incidental to his or her work abroad, such duties will be treated as being performed outside the UK. The test as
to whether duties are incidental or not is one of quality rather than quantity.

Therefore, it is the nature of the work rather than the amount of time spent in the UK that is the important factor, although HM Revenue & Customs will not ordinarily accept duties as being ‘merely incidental’ where the director works in the UK for more than three months in any tax year. Attendance at a director’s meeting in the UK by a director of the company who normally works abroad will not be considered non-incidental work.

Please note that terms that appear in bold above are defined below.

Not resident/not ordinarily resident
Where the office holder is not resident in the UK or, if resident, not ordinarily resident in the UK, tax is charged on earnings received in respect of duties performed in the UK. Any such duties which are merely incidental to the overseas duties will be treated as performed outside the UK. Where the director works under a single service contract under which he or she performs duties outside the UK (which fall outside the scope of UK income tax) and duties within the UK then an apportionment of his or her emoluments will need to be made. HM Revenue & Customs would ordinarily accept an apportionment by reference to the number of days spent working in the UK as compared with the number of days spent working overseas unless the remuneration was clearly significantly increased to take into account the fact that the employment now covers duties performed in the UK.

Remittances
Where a UK resident director is either not domiciled or not ordinarily resident in the UK he or she may make a claim for the “remittance basis” to apply. The effect of making such a claim is to exclude unremitted foreign income/gains earned in a specific tax year from UK tax. Those who make a claim will lose the annual allowances and exemptions that are otherwise available to UK taxpayers (these are in effect amounts that one can earn without incurring a liability to tax). The remittance basis will apply automatically (and annual allowances and exemptions be preserved) if unremitted foreign income/gains for a tax year are less than GBP 2,000 (or the director has no UK income/gains and no remitted foreign income/gains for that tax year).

The rate of the remittance basis charge (“RBC”) is dependent on how many years the director has been resident in the UK. If the director has been resident for seven out of the last nine years (including the year in which a claim is made) then the annual RBC will be GBP 30,000. If the director has been UK resident for more than 12 of the last 14 tax years (including the year in which a claim is made) then the annual RBC will be GBP 50,000.

The RBC is paid on nominated foreign income/gains not remitted to the UK in a particular year and is in addition to any tax liability on any remitted income/gains in the same tax year. However, where nominated income/gains, in relation to which the RBC has been paid, are remitted to the UK in any subsequent year there will be no further tax to pay on their remittance to the UK (although where a director has both nominated income/gains, on which the RBC has been paid, and untaxed income/gains that remain unremitted, then the untaxed income/gains are treated as being remitted first, and so would be taxed on remittance).

Subject to consultation, it is currently proposed that a number of tax reliefs in relation to investments in trading companies be introduced for those individuals who are subject to the remittance basis.

Double taxation relief
An office holder may well find that he or she is subject to tax on certain earnings in the UK and overseas. For example, a director resident in the UK may find that he or she is taxed in the UK in respect of duties performed overseas and also subject to tax in the country in which he or she performs his or her duties. Where the UK has entered into a double taxation agreement with an overseas country the treaty will determine which country is entitled to tax the earnings. Where the UK has not entered into a double taxation agreement with that particular country, UK unilateral relief may be available.

Dual contracts
A tax planning technique that may be beneficial in two situations where the director is not domiciled in the UK is the use of dual service contracts. First, the foreign domiciliary resident in the UK who performs some duties abroad might have one contract for his or her duties in the UK and a separate contract for his or her duties outside the UK. Earnings from the overseas employment will be taxed on the remittance basis. Second, where a director is resident but not ordinarily resident in the UK and therefore taxed in respect of his or her UK duties and has duties both in the UK and outside, the UK dual contract may be beneficial in separately identifying the remuneration attributable to each contract. It should be borne in mind however, that the HM Revenue & Customs have power to adjust the earnings attributable to the UK contract where they have been manipulated in order to reduce the UK tax charge. Clearly, there also need to be separate employers in order to have genuinely separate contracts and the commercial implications of separate contracts should be considered. It is also necessary to give substance to the respective contracts by clearly defining the respective duties to be performed under each.
Examples of this include where an individual marginally overstays a three-year period because a work project over-runs or a house purchase falls through. In such instances, the individual would be required to provide satisfactory evidence that their continued presence in the UK is neither ordinary, nor for a settled purpose. Where an individual comes to the UK, and either has a change of intention so that the length of stay exceeds three years or the individual purchases accommodation or leases it for three years or more and either change occurs before the beginning of the tax year after the third anniversary of arrival, ordinary residence will commence from the day of arrival if the change occurs in the tax year of arrival, or from the beginning of a tax year in which the change occurs if later. In certain circumstances the availability of accommodation can be ignored in determining residence.

The Government announced in the 2012 Budget that it intends to abolish the concept of ordinary residence with effect from 6 April 2013.

Please note the qualification to this definition in the paragraph above headed ‘Foreign element’.

**Domicile**

Domicile is distinct from citizenship or residence. A person may be resident in more than one country but at any given time he or she can only be domiciled in one. A person acquires a domicile of origin at birth and this is normally the domicile of his or her father and therefore is not necessarily the country where he or she is born. A person retains this domicile until he or she acquires a different domicile of choice. A domicile of choice can only be acquired by someone over the age of sixteen. If, before reaching sixteen, the person whose domicile determined the minor’s domicile of origin acquires a new domicile of choice, the minor’s domicile changes in line with this.

To acquire a domicile of choice a person must sever his or her ties with the country of his or her domicile of origin and settle in another country with the clear intention of making his or her permanent home there.

**Social security**

As an ‘employed earner’ a director is liable for Class 1 employees National Insurance Contributions (“NICS”) unless he or she has reached pensionable age (65 for men and 60 for women (but will gradually increase to 65 for women between 2010 and 2020)). Employers are obliged to pay employer’s NICs of 13.8% on all earnings above the ‘Threshold’ (£7,605 in the 2012/13 tax year) and directors are liable to pay employees NICs of 12% on
If the director is sent to work temporarily in the UK by an employer in a country which is outside the EU and not covered by a bilateral agreement, the general rule is that neither the director nor the employer has to pay UK NICs for the first 52 weeks of employment in the UK. NICs are payable from the 53rd week. If the foreign employer does not have a place of business in the UK, NICs are due from the UK ‘host’ employer.

If the director is sent to work permanently in the UK by such a foreign employer, the director will be liable to pay NICs from the outset of his employment in the UK.

Foreign element
Where a director arrives from abroad and takes up employment with a UK employer he will generally be required to pay UK NICs but there are some exceptions to this rule.

— Arriving in the UK from an EU country

If an employer in another EU country sends the director to work in the UK for up to two years, the director may be able to continue paying social security contributions. If form A1 is issued by the foreign social security institution, confirming that the director continues to contribute to the foreign scheme, he will not have to pay UK NICs.

— Working in two member states

If the director works in two EU member states at the same time he will be subject to social security contributions in either:

- the member state in which he resides if he spends 25% of his working time or is employed by various employers whose registered office or place of business is in different member states; or
- in the member state in which his sole employer has its registered office or place of business if he does not spend 35% or more of his working time in the member state in which he resides.

In the UK an application for a certificate confirming the member state in which contributions are payable is made on form CA8421. In consideration of an application the other member state is consulted.

— Arriving in the UK from a country with a bilateral agreement

If the director is sent to work temporarily in the UK by an employer in a country which has a bilateral Social Security Agreement covering NICs, the director may be able to continue paying foreign social security contributions. If a certificate is issued by the foreign social security institution, confirming that the director continues to contribute to the foreign scheme, the director will not have to pay UK NICs.

— Arriving in the UK from another country which is not within the EU and does not have a bilateral agreement covering NICs with the UK.
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