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The Risk of Destabilising Pension Fund Bodies, and the Procedural Position of Candidates for Members of the Governing Bodies of Supervised Entities

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Abstract

The author analyses the position of a candidate for member of a governing body in an entity supervised by the Polish Financial Supervisory Authority (PFSA) and discusses the related problems. The aim of the article is to identify the area of an increased risk level in financial institutions in the process of appointing members of the governing bodies of supervised entities. The PFSA assumes that the selection of the candidates for members of the governing bodies in Pension Fund Companies may be carried out by either the management board or the supervisory board. This leaves a large space for the activity of the boards. The management board can gain influence over the course of these proceedings. When the selection is conducted by the supervisory board, the risk is significantly reduced. The second aspect addressed therein concerns the position of a candidate for member of the governing bodies in supervised entities in legal proceedings. In jurisprudence it has been established that a candidate is to be treated as a party to the proceedings. The administrative courts found that inadmissibility of a candidate as a party would violate Article 77(2) of the Constitution by closing the

judicial path for the candidate and preventing them from asserting protection of their rights and freedoms. Despite this, the Act of 21 July 2006 on Financial Market Supervision (Journal of Laws of 2020, item 2059, as amended) was amended in April 2021 to the effect that a candidate was not a party to the proceedings thus enhancing the risks, including conflicts of interest. The effect of these provisions has been instrumentalisation of those to whom a great deal of responsibility is entrusted – if the approval of the PFSA is obtained. The PFSA's decisions may affect the career path of candidates. In certain cases, they may even 'block' it, leaving little room for defence and narrowing the possibilities of adjusting the competence level to the positions held. There is also no timeframe for the PFSA's decision. The risks associated with such situation have been described in the article.

Keywords
societal security, COVID-19, pandemic, non-governmental organisations, aid activities, Warsaw

Introduction

Candidates for members of supervised entitys' governing bodies have been deprived of their rights in the proceedings before the Polish Financial Supervisory Authority. This directly introduces a number of procedural and litigation risks, including the risk that the introduced solution would be declared unconstitutional.

The April amendment (enacted on 25 February 2021) to the Act of 21 July 2006 on Financial Market Supervision (Journal of Laws of 2020, item 2059, as amended), hereinafter referred to as the 'Act on Financial Market Supervision', the risks for the governing bodies of pension fund management entities have been exacerbated. The risks described below were already in place, but have been aggravated as a result of the amendment. The consequences of these changes have affected candidates for the position of a board member of an entity supervised by the Polish Financial Supervisory Authority, hereafter referred to as the 'PFSA'. However, the effects of the changes will be more far-reaching as they also affect future members of supervisory boards of these entities. The amendment made

by the legislator is contradictory to the Constitution and seemingly well-established jurisprudence of the administrative courts. As a result of the adoption of these provisions, instrumental treatment has been given to persons who are entrusted with great responsibility in the event that they receive approval from the PFSA. At the same time, a great deal of room for action has been left to the management board – a body that is not and should not be the company's representative in its relations with the PFSA under the procedure approving appointment of candidates to the management board or the supervisory board.

Status of supervised entities:

- risk of failure to maintain independence of their governing bodies,

- risk of inadequacy of representation of their bodies,

- risk of instability of the pension fund market.

Appointment of members of the governing bodies of supervised entities – Polish Financial Supervisory Authority

Appointment of members of the governing bodies of supervised entities

The procedure for the appointment of members of the governing bodies (management board and supervisory board) is subject to significant restrictions in entities supervised by the PFSA. The restrictions consist in the obligation of the supervisory body – the PFSA[1] to consent to the appointment of a given candidate in supervised entities such as banks, insurance companies, investment fund companies, brokerage houses or universal pension fund companies.

When it comes to universal pension fund companies, for example, the regulations are not specific as to who is to initiate and conduct proceedings before the PFSA on the part of a company – the party concerned themselves or perhaps the pension company. Everything points to the fact that it is the latter, since the newly added Article 11aa(2) of the Act on Financial Market Supervision provides that a copy of the PFSA's decision shall be delivered also (and therefore additionally?) to the person concerned under the application. This is a logical premise.

1. See: Artykuł 59(1) ustawy z dnia 28 sierpnia 1997 r. o organizacji i funkcjonowaniu funduszy emerytalnych, Dz.U. 2020 poz. 105 z późn. zm., [Article 59(1) of the Act of 28 August 1997 on the organisation and operation of pension funds, Journal of Laws 2020, item 105 as amended]; artykuł 22b(1) ustawy z dnia 29 sierpnia 1997 r. - Prawo bankowe, Dz.U. 2021 poz. 2439 z późn. zm., [Article 22b(1) of the Act of 29 August 1997 - Banking law, Journal of Laws 2021, item 2439 as amended]; artykuł 42b(1) ustawy z dnia 27 maja 2004 r. o funduszach inwestycyjnych i zarządzaniu alternatywnymi funduszami inwestycyjnymi, Dz.U. 2021 poz. 605 z późn. zm., [Article 42b(1) of the Act of 27 May 2004 on investment funds and management of alternative investment funds, Journal of Laws 2021, item 605 as amended].

Therefore, since the circle of potential applicants is limited to a universal pension company, one wonders which of its bodies is competent in this respect. As regards obtaining approval for the appointment of a board member in a universal pension fund company, two types of proceedings have become established in practice.

In one variant, such a request is made by a company in accordance with the rules of representation, i.e. the board of management, possibly a proxy or an agent duly authorised by the board of management. This is, however, a very controversial situation, as it appears that not only the body authorised to do so under the articles of association or the law[2] (usually the supervisory board), but also the body itself, which is to include the candidate seeking PFSA's approval, is actively involved in the process of appointing management board members in such a cardinal manner. This raises a fundamental issue of allowing the activity of the body to which another person is appointed to fill a vacant seat (or a person to replace someone who, for example, is in office until the PFSA grants approval to the already selected candidate). Additionally, there is a potential of polarisation between the candidate and the current board members. Thus, this is a situation that meets all the indications that could lead to a conflict of interest.

The above-described scenario has to be assessed critically, as it is not difficult to imagine a situation when, as a result of certain events (e.g. due to sudden resignation of one of the members of the management board or due to their prolonged inability to perform their function due to sudden events or illness), one or two members of the management board remain in the company. At the same time, in accordance with the provisions of the Act on the Organisation and Operation of Pension Funds and consequently any articles of association, it is required for the management board in a pension fund to include at least three members.[3] In such situation, two members of the management board constitute a so-called non-quorum board, which is a requirement for appointing an administrator under e.g. Article 42 of the Civil Code.[4] Such a situation is therefore unlawful as it violates both the Act on the Organisation and Operation of Pension Funds and (arguably) the articles of association of the pension fund management company. It should be noted that in practice the PFSA does not request supervisory boards (by means of admonition or clear indication or expectation) that one of their members be delegated (for the duration of the selection or consent procedure). This creates not only a potential conflict of interest, but, as already mentioned, a space for the administrator to act.

2. Artykuł 201 § 4, artykuł 368 § 4 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz.U. 2020 poz. 1526 z późn. zm., [Article 201 § 4, Article 368 § 4 of the Act of 15 September 2000 Commercial Companies Code, Journal of Laws 2020, item 1526 as amended].

3. Artykuł 39(1a) ustawy z dnia 28 sierpnia 1997 r. o organizacji i funkcjonowaniu funduszy emerytalnych, Dz.U. 2020 poz. 105 z późn. zm., [Article 39(1a) of the Act of 28 August 1997 on the organisation and operation of pension funds, Journal of Laws 2020, item 105 as amended].

4. Artykuł 42 ustawy z dnia 23 kwietnia 1964 r. - Kodeks cywilny, Dz.U. 2020 poz. 1740 z późn. zm., [Article 42 of the Act of 23 April 1964 - Civil Code, Journal of Laws 2020, item 1740 as amended].

If we take into account the positions of doctrine[5] and jurisprudence[6] and assess that an entity operating with an incomplete board of management actually has no representation we are faced with the question whether such a proposal made by a non-quorum board of management is valid.

The second option – the classic one – involves the supervisory board (possibly another body with power to appoint members of the management board) appointing a member of the management board. This solution most fully implements the provisions of the Commercial Companies Code[7] regarding the principles of commercial companies. This is because they provide specifically for the obligation of the body authorised to appoint a board member (usually the supervisory board, or an agent, or a nomination committee appointed by the supervisory board) to act with a view to the perceived potential risk of a conflict of interest.[8]

Practice shows, however, that the PFSA allows for both options regardless of the non-negligible risks involved.

Appointment of a company's supervisory board member

The procedure in place generates an even greater risk considering how the PFSA authorises the appointment of a supervisory board member. If the first option is followed, the authorisation is granted in the same way, i.e. after an application is submitted by the company's board of management (or a person authorised by the board – a lawyer or an employee). This means that, actually, the controlled body (the board of management) influences the process of appointing members of the controlling body (the supervisory board), which is supposed to supervise the activities of the board of management. If we take into account the fact that every mistake requires correction of the forms, which protracts the procedure, the question of overt or covert intentions or interests of the board - understood as a benefit of the board, a more favourable solution - arises again. It should also be taken into account that the board of management may actively acquire knowledge in a wide range of areas or exert influence on lengthening the PFSA approval process.

5. K. Rudnicki, *Glosa do uchwały SN z dnia 22 października 2009 r., III CZP 63/09*, PS 2010, No. 11-12, pp. 175–183; M. Dumkiewicz, *Składanie rezygnacji przez członka zarządu spółki z o.o.*, PPH 2012, No. 7, pp. 18–24.

6. Wyrok Sądu Rejonowego w Białymstoku z dnia 27.03.2015 r., sygn. VII K 312/14, [Judgment of the District Court in Białystok of 27.03.2015, ref. VII K 312/14]; Postanowienie Sądu Administracyjnego w Katowicach z dnia 11.05.2015 r., sygn. V ACz 362/15, [Decision of the Administrative Court in Katowice of 11.05.2015, ref. V ACz 362/15].

7. Artykuły 201 § 4, 209, 210, 211, artykuły 368 § 4, 377, 379, 380 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz.U. 2020 poz. 1526 z późn. zm., [Articles 201 § 4, 209, 210, 211, Articles 368 § 4, 377, 379, 380 of the Act of 15 September 2000 Commercial Companies Code, Journal of Laws 2020, item 1526 as amended].

8. Artykuły 209, 210, 211, 377, 379, 380 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz.U. 2020 poz. 1526 z późn. zm., [Articles 209, 210, 211, 377, 379, 380 of the Act of 15 September 2000 Commercial Companies Code, Journal of Laws 2020, item 1526 as amended].

Serving as a member of a company's management board or supervisory board

Pursuant to the Act of 28 August 1997 on the Organisation and Operation of Pension Funds, management boards of such funds may not comprise less than three persons.[9] The legislation does not specify the time limit for the authorisation of the PFSA to be granted to a person appointed by a competent body as a member of the management board of a universal pension fund company (usually subject to authorisation by the PFSA). There is no stipulation as to the time limit for the PFSA to issue a decision on granting permission (or refusing to grant thereof) to perform the function of a member of the company's management board or supervisory board. In practice, there are cases when such a procedure takes longer than one year. A postulated solution is to specify in the law a timeframe for the PFSA to issue a decision in this matter.

Let's put the situation under scrutiny when as a result of the sudden resignation or death of one of the members of the three-member management board of a fund this body is not fully staffed, thus being a so-called non-quorum body. Such a scenario contradicts the provisions of the Act[10] and the statutes of the entity representing a universal pension fund company. The pension fund (or the company acting on its behalf) does not have a properly functioning body, which means that it is not able to represent the entity and direct its activities. However, an attempt to appoint the missing member of the body requires approval by the PFSA. As indicated above, in practice such a procedure may take (and often does) even longer than one year, and this puts the fund's activities at risk during that time as its decisions may be declared invalid.

In such situation, mechanisms should be actively in place to ensure safe and reliable participation in business, especially as regards entities supervised by the PFSA. In accordance with the Civil Code, an administrator should be appointed - by the competent court – for this entity, which, however, generates further risks. This risk can be ruled out should the supervisory board act appropriately by supplementing the composition of the management board and delegating one of its own members for a specific period of time necessary for the PFSA to grant permission for the new management board member to perform their function, or when the PFSA, having noticed the absence of such decision, intervenes, with (in this case) the supervisory board as a party to the proceedings. However, with a view to the safety of business transactions, the request to specify a timeframe for the PFSA to issue a decision concerning authorisation for a new board member to perform their function remains valid.

9. Artykuł 39(1a) ustawy z dnia 28 sierpnia 1997 r. o organizacji i funkcjonowaniu funduszy emerytalnych, Dz.U. 2020 poz. 105 z późn. zm., [Article 39(1a) Act of 28 August 1997 on the organisation and operation of pension funds, Journal of Laws 2020, item 105 as amended].

10. Ibidem.

With regard to the time limit for processing the case, it is true that one may invoke the provisions of the Code of Administrative Procedure (which are probably only theoretically applicable here[11]), which provide for the obligation to process the case without undue delay and, in case there is a need to conduct an investigation, within one month, or two months if the case is particularly complicated.[12] However, the PFSA does not respect these deadlines. The failure of the PFSA to respect the time limit regime in its decision-making process, as well as failure to respect the controlling regime in the process of appeal to an institution other than the PFSA, raises a number of risks at the organisational level and even poses danger threat of losing the stability and credibility of the system which the PFSA is currently overseeing.

The situation becomes even more complicated when members of the supervisory board become an active party – they act on behalf of the supervised entity during the procedure for obtaining the approval of the PFSA and, for example, for personal reasons or due to the ownership structure of the representative of a universal pension fund company, are not favourably disposed towards the nominee. This can happen if, for example, the company representing the universal pension fund company has several shareholders who may represent different strategies for growth and each of them has the right to appoint their own board member whom other members do not want on their board. Then, the lack of a regulation on a deadline for the PFSA's consent is in their favour – they can effectively procrastinate the proceedings by actively generating new information or documents for the body.

In such case, the candidate for the position of a board member and the entity representing the universal pension fund company itself land in a vacuum of several months, uncertain even as to when the supervisory authority shall finally issue a decision, let alone what that decision will be. This uncertainty is also reinforced by the fact that the PFSA is guided by very vague and evaluative criteria when assessing a candidate, e.g. as to their independence of judgment or the guarantee of proper exercise of functions.[13] Although prudential supervision may require it, the situation of the entity and the candidate becomes difficult when there is no timeframe for obtaining a decision.

11. Artykuł 11(5) ustawy z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym, Dz.U. 2020 poz. 2059 z późn. zm., [Article 11(5) of the Act of 21 July 2006 on the supervision of the financial market, Journal of Laws 2020, item 2059 as amended].

12. Artykuł 35 § 1 oraz 3 ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 2021 poz. 735 z późn. zm., [Article 35 § 1 and 3 of the Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 2021, item 735 as amended].

13. Artykuł 41(1)(5) ustawy z dnia 28 sierpnia 1997 r. o organizacji i funkcjonowaniu funduszy emerytalnych, Dz.U. 2020 poz. 105 z późn. zm., [Article 41(1)(5) of the Act of 28 August 1997 on the organisation and operation of pension funds, Journal of Laws 2020, item 105 as amended].

Protraction of proceedings in the selection of a candidate for a member of a company's management board or supervisory board

A complaint for protraction of the proceedings would be a good idea if it were not for the provisions of the April amendment[14], which introduced a direct norm stipulating that only the applicant[15] (the supervised entity – the company – and, on its behalf, either the supervisory board or the management board, or the company's agent or employee, perhaps the one who shall soon be a subordinate to the person awaiting the PFSA's decision) is a party to the proceedings in question, thus excluding the management board candidate themselves from this circle (and, consequently, this also applies to the proceedings concerning the supervisory board candidate). This is important because, as we read in the Code of Administrative Procedure,[16] access to the files of the proceedings is, as a rule, only granted to a party (entities acting as parties are omitted, which, however, does not include the candidate). In addition, the Code of Administrative Procedure provides[17] that a complaint (and, accordingly, at the administrative-court stage also a complaint against the protracted conduct of the proceedings) may be lodged only by a party to the proceedings. A rather strict approach in this respect has been also expressed by the Supreme Administrative Court.[18]

The statement of the grounds for the act introducing the above-mentioned change attempts to use certain procedures that most often cause surprise or bewilderment. As the authors of the statement of the grounds themselves point out, the Supreme Administrative Court has recently (even before the entry into force of the amendments) adopted a line of jurisprudence according to which the status of a party in the proceedings concerning the consent of the PFSA is also granted to a candidate to this body (judgment of 31 October 2019 – II GSK 2725/17,[19] of 20 September 2019 – II GSK 1407/18,[20] and the order of 6 November 2019 – II GZ 137/19[21]).

At the same time, as we further read in the statement of the grounds, the administrative courts perceived that the failure to admit the candidate as a party would constitute a violation of Article 77(2) of the Constitution of the Republic of Poland by closing the judicial path to them, which prevents such a candidate from pursuing the protection of their rights and freedoms.

Despite the existing clear jurisprudence, the legislator unfortunately just closed access to administrative proceedings to persons applying for the position of a board member – offering them only the possibility to appeal to an administrative court against the PFSA's decision refusing permission to serve as a board member.

14. See: Artykuł 5 ustawy z dnia 25 lutego 2021 r. o zmianie ustawy - Prawo bankowe oraz niektórych innych ustaw, Dz.U. 2021 poz. 680, [Article 5 of the Act of 25 February 2021 amending the Banking Law and certain other acts, Journal of Laws of 2021, item 680].

15. Artykuł 11aa ustawy z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym, Dz.U. 2020 poz. 2059 z późn. zm., [Article 11aa of the Act of 21 July 2006 on the supervision of the financial market, Journal of Laws 2020, item 2059 as amended].

16. Artykuł 37 § 1 ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 2021 poz. 735 z późn. zm., [Article 37 § 1 of the Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 2021, item 735 as amended].

17. Ibidem.

18. See, *inter alia*: Wyrok Naczelnego Sądu Administracyjnego z dnia 7.07.2016 r., sygn. I OSK 3389/15, [Judgment of the Supreme Administrative Court of 07.07.2016, ref. I OSK 3389/15].

19. Wyrok Naczelnego Sądu Administracyjnego z dnia 31.10.2019 r., sygn. II GSK 2725/17, [Judgment of the Supreme Administrative Court of 31.10.2019, ref. II GSK 2725/17].

20. Wyrok Naczelnego Sądu Administracyjnego z dnia 20.09.2019 r., sygn. II

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The significant deterioration of the position of a candidate for a member of the governing bodies in a supervised entity may have, and often does, radical consequences concerning further path of their professional development, especially as the facts to which the candidate themselves is not privy are being verified. Thus, the candidate cannot comment on them: neither as to their reliability and importance, nor as to the context that may affect the assessment. As the Ombudsman has aptly observed: "(...) basing the criteria imposed on candidates for positions subject to the Commission's supervision on a predictive method, which consists in examining past facts and drawing conclusions from them as to the candidate's future behaviour in the role of manager of an insurance company, results, in the event of a negative review by the PFSA, in the destabilisation of their professional career and, not infrequently, in the loss of confidence or exclusion from the professional environment"[22] and "(...) The decision on the outcome of the verification also has an impact on the situation of the person affected by the lack of administrative consent to take up a position in the company and – as a consequence – on the right of the assessed person to choose the exercise of their profession within the meaning of the first sentence of Article 65(1), of the Constitution of the Republic of Poland."[23]

Such state of affairs arouses justified doubts of a constitutional nature, e.g. the introduced Article 11aa of the Act of 21 July 2006 on Financial Market Supervision, as it may violate the constitutional right to a fair trial – expressed in Article 45(1) of the Constitution of the Republic of Poland – which is the foundation of a democratic state of law. This right is also realised through the possibility to participate as a party in administrative proceedings, which precede the admissibility of transferring a dispute to the court.

The above reasoning is supported by the position of the Constitutional Tribunal expressed in the judgment of 12 May 2021, ref. no. SK 19/15, in which Article 41(2) of the Geological and Mining Law of 9 June 2011 (Journal of Laws 2020, item 1064 as amended)[24] was found to be incompatible with Article 45(1) of the Constitution of the Republic of Poland: "According to the position of the Court, the value indicated by the Sejm, in the form of the speed of the concession proceedings, can in no way be perceived as an adequate and equivalent value to the right to a fair trial - it cannot be treated as a value justifying deprivation of persons having a valid and obvious legal interest, unequivocally justifying the necessity of their participation in these proceedings, of this important constitutional right."[25]

As is well known, the proceedings before the Voivodship Administrative Court take months, if not years, of further waiting, which, in the context of the inability of a universal pension fund compa-

GSK 1407/18, [Judgment of the Supreme Administrative Court of 20.09.2019, ref. II GSK 1407/18].

21. Postanowienie Naczelnego Sądu Administracyjnego z dnia 6.11.2019 r., sygn. II GZ 137/19, [Decision of the Supreme Administrative Court of 6.11.2019, ref. II GZ 137/19].

22. R. Stefanicki, *Kilka uwag w sprawie weryfikacji administracyjnej kandydatów na członków zarządu zakładu ubezpieczeń i reasekuracji*, "Wiadomości Ubezpieczeniowe", 2021, No. 2, p. 12. DOI: 10.33995/wu2021.2.1

23. Ibidem, p. 13.

24. Ustawa z dnia 9 czerwca 2011 r. – Prawo geologiczne i górnicze, Dz.U. 2020 poz. 1064 z późn. zm., [Act of 9 June 2011 Geological and Mining Law, Journal of Laws 2020, item 1064 as amended].

25. *Prawo geologiczne i górnicze – strony postępowania koncesyjnego*, https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11530-prawo-geologiczne-i-gornicze-strony-postepowania-koncesyjnego, (access 26.10.2022).

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ny to operate legally owing to the incomplete composition of a governing body, is a threat to financial market participants. Irrespective of this, the owner of the entity representing the universal pension fund company (or the body authorised to appoint it), as a result of the PFSA's refusal (over which it had no influence) and given the spectre of the continuation of an unlawful state of affairs (a non-quorum body), may not be interested in maintaining its decision to appoint the candidate in question.

It is, therefore, reasonable to ask the question: What consequences do then arise for the company and for the candidate? In such case, the procedure starts from the beginning. The company permanently has an incomplete body, with all the risks that this state of affairs entails. So it reappoints the successful candidate and decides which path it will follow to appoint a new person to the post. Which solution does carry less risk? And what does happen if, in the meantime, the board loses the qualified composition provided for in the articles of association? Would then the non-quorum board have to act as a party before the PFSA and take action to complete the composition of the supervisory board, which is then to supervise it? Only if this procedure is successful, the supervisory board would select a new candidate, whose documents it (or perhaps again the non-quorum board) can proceed before the PFSA.

It should be noted that a candidate for a management board member who has not obtained approval of the PFSA, and then appealed the decision to the Voivodship Administrative Court (even if the Voivodship Administrative Court has recognised the complaint filed as legitimate) cannot feel satisfied. Each month of delay for a universal pension fund company is tantamount to the lack of proper representation, while for the candidate it is tantamount to the loss of remuneration and impossibility of even estimating when they will be able to start performing their functions and receive remuneration. It is also difficult for a candidate for a member of the board of management to take up a similar position in another entity on a temporary basis – as such functions cannot be combined.[26] On the other hand, possible claims for loss of revenue are virtually unenforceable - it would then be necessary to prove fault on the part of the PFSA (which will probably defend itself with having been overladed by cases) or the board members of the applicant entity.

In the latter case, the responsibility for the actions of the members of the management board is of course borne by the company, but proving the advisability of prolonging the proceedings also remains a challenge in this case. Particularly if both the PFSA and the supervised entity start to shift responsibility. At the end of the entire procedure (including the proceedings and litigation), the candi-

26. Artykuł 42 ustawy z dnia 28 sierpnia 1997 r. o organizacji i funkcjonowaniu funduszy emerytalnych,Dz.U. 2020 poz. 105 z późn. zm., [Article 42 of the Act of 28 August 1997 on the organisation and operation of pension funds, Journal of Laws 2020, item 105 as amended].

date for a member of the management board, while waiting for the decision of the supervisory body, cannot actually take up any other gainful employment (at an adequate position), and it is in practice impossible to obtain reimbursement of lost benefits.

Amendments to the Act on Financial Market Supervision – bogus provisions and institution

The authors of the amendment created an artificial problem and carried out the amendments in question by merely adding a provision stipulating that a contender for a member of a governing body has the right to file a complaint with an administrative court. However, a copy of the decision (comprising the reasons for the refusal) served on the candidate may exclude "statutorily protected information"[27] – which also does not give them the opportunity to read the full argumentation of the PFSA and probably the case files, so constructing a complaint is sometimes going to be an arduous job or a task for a fortune teller rather than a lawyer. In other words, how is a complainant supposed to address such a decision of the PFSA without having a chance to read the full argumentation or case files? Not to mention the lack of influence on these proceedings.

Moreover, in the proceedings before the administrative court, only the legality of the issued decision is reviewed, while the evidentiary proceedings in this respect are significantly limited. Even if the administrative court agrees with the complainant and issues a verdict overturning the PFSA's decision, the case shall consequently be referred back to the PFSA for reconsideration. Then the procedure starts anew, unless, following the PFSA's decision, the designating entity has already withdrawn the candidate and adopted a resolution appointing another candidate to the management board or supervisory board, in which case further proceedings become unwarranted despite the apparent success. This procedure may prove to be completely unnecessary.

It should be noted that with regard to pension fund companies so far none of the specific provisions has determined who is a party to the PFSA's consent proceedings. The circle of entities with the status of a party to the proceedings has been determined, as in any administrative case, on the basis of legal interest.[28] It was the bodies and, above all, the administrative courts that have decided who had such interest. Therefore, if, as a consequence of the regulations in force to date, the case law of the Supreme Administrative Court has become firmly established, according to which a candidate for a member of the management board in a supervised entity was entitled to the status of a party, the person concerned was also entitled to file a complaint with the Voivodship Administrative Court, and subsequently with the Supreme Administrative Court.

27. Artykuł 11aa(3) ustawy z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym, Dz.U. 2020 poz. 2059 z późn. zm., [Article 11aa(3) of the Act of 21 July 2006 on the supervision of the financial market, Journal of Laws 2020, item 2059 as amended].

28. Artykuł 28 ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 2021 poz. 735 z późn. zm., [Article 28 of the Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 2021, item 735 as amended].

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This introduction of the aforementioned ('new') time limit in Article 11aa added by the April amendment to the Act on Financial Market Supervision seems to be meaningless. After all, the applicant could have already, during the course of the PFSA proceedings, supplemented the information or provided data that the PFSA could have taken into account when making its decision. They could also later file a complaint on the basis of the case files to which, as a party, they could have had access without the need to guess what the body had gathered in the file. However, if the intention of the introduction of the new provision was to take away the possibility for them to act as a party before the PFSA, it is apparent that this is neither in the interest of the fund nor of market participants. It also raises the risk that the provisions which exclude a candidate for a new member of the management board from participating as a party in the proceedings before the PFSA are deemed to be inconsistent with the Constitution of the Republic of Poland.

Certainly, an interesting issue worth considering is the question as to what a complaint against a decision of the supervisory authority would look like. Firstly, according to the amendment, a complaint may be lodged within 30 days of the delivery of the decision.[29] However, decisions are only served on the parties to the proceedings,[30] i.e. the entities that may have an interest therein in order to be able to challenge it. Under the current state of the law, there is an obligation to serve a copy of a decision (to a limited extent, however) on the candidate to the position of a member of a governing body. Thus, the discussed April amendment to the Act on Financial Market Supervision and, in particular, its new Article 11aa directly confirm that despite the fact that at the stage of the administrative proceedings before the PFSA the rights of a candidate for the position of a member of the board are weighed the candidate is excluded from active participation in these proceedings – a rather specific form, introduced contrary to well-established positions of the courts expressed in judgments and statements of reasons.

Secondly, it is unclear how the legislator has envisaged the filing of a complaint against an administrative decision in the issuance of which the complainant did not participate, not only actively, but also passively. After all, according to the provisions of the Code of Administrative Procedure,[31] only a party has access to the files of the proceedings. Of course, they are also available to entities acting in lieu of a party, but the applicant' status is far from that– they have been actually excluded. How, then, would a potential complainant be able to find out about the shortcomings, inaccuracies in the evidence or misinterpretation of the rules applied on an ongoing basis during the proceedings? On the basis of the statement of the grounds for the decision, which may be incomplete? Despite the

29. Artykuł 11aa(4) ustawy z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym, Dz.U. 2020 poz. 2059 z późn. zm., [Article 11aa(4) of the Act of 21 July 2006 on the supervision of the financial market, Journal of Laws 2020, item 2059 as amended].

30. Artykuł 109 § 1 ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 2021 poz. 735 z późn. zm., [Article 109 § 1 of the Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 2021, item 735 as amended].

31. See: Artykuł 73 § 1 ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 2021 poz. 735 z późn. zm., [Article 73 § 1 of the Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 2021, item 735 as amended].

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nature of the hearing, one feels like telling a joke: a visit to a fortune-teller will be necessary. The scope of such a complaint may indeed cover only the document, i.e. the decision with its statement of the grounds (but it is no longer possible to challenge violation of a party's right to participate in the proceedings, or evidentiary issues). However, the authors of the amendments have assured that even this is not fully possible, as according to the amendment statutorily protected information is additionally redacted in such decision.

Thirdly, granting the person concerned only the possibility to file a complaint to the Voivodship Administrative Court means that the decision, issued without their participation in the proceedings, becomes final and thus enforceable. The applicant is therefore deprived of the possibility to file a request for reconsideration of the case, even though it clearly concerns their legal interest. In legal terms, such person is treated as not fulfilling the requirements for a member of the board of management of a supervised entity, which significantly limits their possibility of finding employment. On the other hand, the filing of a complaint means additional months or years of waiting for the final hearing of the case, in which the person concerned stands in principle on a losing position, since they have no knowledge of the content of the files and the evidence that led to the refusal.

Recommendations and conclusions

The body entitled to make an appointment initiates and hosts the proceedings before the PFSA

The regulations to date, although not ideal, have, with the help of the courts, taken on a bearable framework that allows for the protection of the interests and rights of the stakeholders and, most importantly, of the market (because they allow for avoiding conflicts of interest).

It is common practice not to intervene in the flawed provisions under which a well-established jurisprudence has developed, compensating for these shortcomings without the need to make unnecessary amendments, and when amendments are introduced, it is rather to ensure that the provisions reflect the practice developed in jurisprudence. In the case under review (the amendment made), it is difficult even to say that the case law has been forced to rectify legislative sloppiness – after all, no provision took away from the candidate for a member of the board of management the attribute of a party – well, maybe the long-established practice of the PFSA, but this is not a source of law. Furthermore, the rulings introduced in the April 2021 amendment are in clear contradiction to

the interpretations of the legislation provided in the judgments and their statements of the grounds, which indicated a stable rational solution.

A clarification in the precise indication could be a reflection of the case law, whereas an absolute requirement is the introduction of provisions stipulating maintenance of a sharp competence limit. This could look, for example, as follows: the party appearing before the PFSA on behalf of the company is at all times the appointing body or, on its behalf, a designated agent unrelated to other bodies either directly or indirectly, or a nomination committee. Thus, only the supervisory board or its agent or, respectively, an agent appointed by the general meeting may be a party before the PFSA in the procedure of documenting and verifying the candidate.[32] Thus, there would be no space for overt and covert actions of the management board (or, respectively, the supervisory board) in relation to the board's candidate. The board of management could, for the purposes of such proceedings, only make the company's infrastructure available for reception and secretarial needs – even without the right to inspect the documentation relating to the candidate for a board member.

Determining the time limit and the consequences of its non-observance by the PFSA

The problem that has arisen can be rectified in a number of ways. One of them would certainly be to clearly define the time limit within which the PFSA is obliged to issue a decision, for example 3 months. Upon its ineffective expiry, consent for the appointment of the person concerned would be deemed to have been given. There is also a reverse option (as applied in France[33]), in which silence would mean a refusal, but it is highly regrettable to note – given the speed with which public bodies do function – that few applications would pass as a result of such option. External circumstances that are difficult to foresee (e.g. COVID) would also come into play.

Restoration of the status of a party

It would make sense to bring the principles under consideration to at least a decent standard, where the rights of a person are respected. This must start with the repeal of the bizarre provision depriving a candidate for a management board or supervisory board member of the status of a party to the proceedings. This is what Germany, for example, has done.[34] It would then be necessary to clarify which body of the company is the applicant in the given case, and specifically to establish that it is

32. This is advocated, for example, by: M. Bielecki, *Dopuszczalność zawierania umów pomiędzy członkiem rady nadzorczej a spółką kapitałową*, "Monitor Prawniczy", 2007, No. 14, pp. 777–785.

33. *Délivrance de l'agrément*, https://acpr.banque-france.fr/autoriser/procedures-secteur-assurance/regime-administratif/agrement-administratif/delivrance-de-lagrement, (access 26.10.2021).

34. Federal Financial Supervisory Authority, *Guidance Notice on management board members pursuant to the German Banking Act (Kreditwesengesetz – KWG), the German Payment Services Supervision Act (Zahlungsdiensteaufsichtsgesetz – ZAG) and the German Capital Investment Code (Kapitalanlagegesetzbuch – KAGB)*, Bonn/Frankfurt am Main, 4 January 2016 (as last amended on 31 January 2017).

the body entitled to appoint members of the management board (supervisory board) and, as far as appointment of members of the supervisory board is concerned – for example, an agent – appointed by a resolution of the general meeting. Then this body, as a party to the proceedings, designates an agent unconnected with the board (concerned), while the board of the supervised entity in question acts merely as a secretariat – perhaps even without seeing the documents. Such a step would resolve the problem of conflicts of interest and guarantee that the actual will of the bodies entitled to make appointments is realised without conscious or hidden competing actions by unauthorised persons.

The current legal state of affairs is all the more incomprehensible as, in order to avoid doubts with regard to the election of board members in a bank[35] or an investment fund company,[36] the legislator has specified that the applicant is the supervisory board. However, in view of the completeness and coherence of the legal system, such specification is probably not necessary. Indeed, there is a mandatory article 379 § 1 of the Commercial Companies Code, which states: "In an agreement between the company and a member of the management board, as well as in a dispute with him/her, the company shall be represented by the supervisory board or an agent appointed by a resolution of the general meeting".[37]

The doctrine unequivocally indicates that: "The dispute to which Article 379 § 1 of the Companies Act relates does not necessarily have to be of a judicial nature and may also be conducted before an arbitration court or public administration bodies. (...) Article 379 § 1 of the Companies Act regulates the representation of a joint-stock company in agreements and in a dispute between the joint-stock company and a member of the management board. As indicated in the judgment of the Administrative Court in Białystok of 9.12.2015 (III AUa 599/15, Legalis), Article 379 of the Companies Act is intended to protect the company, its shareholders and creditors from decisions of the management board that are unfavourable to the company. The legislation does not require that a conflict of interest actually exists. This is because it is about a potential collision of the interests of the persons managing the company, with the interests of the company."[38]

It is certain, however, that this situation (dualism of regulations) is far from the legislative standards and should be brought into line with them as soon as possible by either removing the provisions referring to the supervisory board as the initiator of the procedure for the PFSA to grant consent for a member of the management board, or by introducing into the Act on Pension Funds such regulations as those for investment fund companies or banks. The current state of the law may raise doubts.

35. Artykuł 22b(1) ustawy z dnia 29 sierpnia 1997 r. - Prawo bankowe, Dz.U. 2021 poz. 2439 z późn. zm., [Article 22b(1) of the Act of 29 August 1997 - Banking law, Journal of Laws 2021, item 2439 as amended].

36. Artykuł 42b(1) oraz (2) ustawy z dnia 27 maja 2004 r. o funduszach inwestycyjnych i zarządzaniu alternatywnymi funduszami inwestycyjnymi, Dz.U. 2021 poz. 605 z późn. zm., [Article 42b(1) and (2) of the Act of 27 May 2004 on investment funds and management of alternative investment funds, Journal of Laws 2021, item 605 as amended].

37. Artykuł 379 § 1 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz.U. 2020 poz. 1526 z późn. zm., [Article 379 § 1 of the Act of 15 September 2000 Commercial Companies Code, Journal of Laws 2020, item 1526 as amended].

38. Commentary to Art. 379 k.s.h., in: *Kodeks spółek handlowych (i.e. Commercial Companies Code)*, ed. Z. Jara, Series: Duże Komentarze Becka (i.e. Beck's Large Commentaries), C.H. Beck, Edition 3, Warsaw 2020.

Subsequent consent of the PFSA

Perhaps an acceptable option is to take the main ideas from the institution provided for in the construction law, specifically the possibility of a subsequent objection by a public administration body. By implementing such a solution, a supervised entity could, without the consent of the PFSA, appoint a new member of the management board or supervisory board, thus enabling uninterrupted and continuous operation of the company. This action would be subject to notification to the PFSA, which would have a specified period (e.g. two months) to raise an objection. Alternatively, the decision could impose an obligation on the entity's governing bodies to take certain actions, and failure to do so would be subject to a severe sanction.

Resolution of the Constitutional Court

In addition to the legislative route, the possibility of the Constitutional Court resolving this issue as a result of at least an enquiry by a court (specific control) or the Ombudsman (special control) certainly deserves attention. As mentioned above, the Supreme Administrative Court has indicated that inadmissibility of a candidate for a member of a governing body as a party to the consent procedure violates the Constitution of the Republic of Poland.

Conclusion

The purpose of addressing this topic is to analyse in greater depth the position of a candidate for member of the governing bodies of supervised entities and their procedural position. The instrumentalisation of the candidate's position and their 'professional fate' is thoroughly unconstitutional as proven by the cited sources and mentioned even by the authors of the amendment – unfortunately misappropriating the spirit of the law and the letter of the statements of the grounds for judgments. The Rule of Law begins with the relationship between citizens and institutions. The relationship described in the article needs to be repaired, which is possible only on the basis of the recommendations given above.

One more solution should be noted, the application of which at all times would exclude the necessity to correct such legal regulations. This antidote is the creation of law in accordance with the state of the art and the archetype of human honesty and respect for the human being affected by the actions taken by the armed (with resources and law) administrative apparatus.

Of course, the law must be made in accordance with the Constitution of the Republic of Poland and in a manner consistent with the legal system.

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