



Current report no. 03/2024

dated 31 January 2024

KERNEL'S POSITION ON COMPLIANCE WITH CORPORATE GOVERNANCE BEST PRACTICES FOR WSE-LISTED COMPANIES

Kernel Holding S.A. (the "**Company**") informs that on 26 January 2024 the Company received a letter from the Warsaw Stock Exchange's Corporate Governance Consultation Committee (the "**Committee**"), a team of experts independent from the Warsaw Stock Exchange (the "**WSE**") and operating at the WSE. As pointed out in the letter, the position of the Committee is independent and cannot be identified with the position or opinions of the WSE.

The letter states that on 25 January 2024, after an in-depth analysis and discussion, the Committee adopted a position on violation of Principle 4.13. of the "Best Practices for WSE Listed Companies 2021" (the "**Best Practices**") by the Company, as further elaborated in the [press release on the WSE website](#) and attached as Appendix 1 to this current report (the "**Position**"). While the Company holds the Committee's decision in high regard, the Company would like to point out that the communication between the Committee and the Company in the abovementioned matter was very limited and consisted of only a single round of information exchange. No preliminary discussions were held, which would have allowed the Company to present further compelling evidence on the relevant matter. The Company believes that because of this restricted communication, the Committee's conclusions regarding violation of rule 4.13 of Best Practice are premature and not sufficiently justified.

Share Pricing Process

The Company notes that the Committee's Position primarily addresses a perceived violation of Principle 4.13, point (c) of the Best Practices by the Company, which ensures that "*the purchase price of the shares is in a rational relation with the current share price of the company or is to be determined in book-building on the market*". We acknowledge with appreciation that the Committee did not raise concerns regarding our adherence to the other aspects of Principle 4.13, specifically:

- a. *"the company has a rational, economically justified need to urgently raise capital or the share issue is related to rational, economically justified transactions, among others such as a merger with or the take-over of another company, or the shares are to be taken up under an incentive scheme established by the company; and*
- b. *the persons granted the pre-emptive right are to be selected according to objective general criteria*".

Regarding the indicated breach of Principle 4.13, point (c), we firmly believe that our actions during the share issuance in September 2023 were in full compliance with this principle as the share price **was determined in book-building on the market** via the fair and transparent process.

Qualified Investor Participation

The Company would like to address and respectfully counter some of the Committee's conclusions as detailed in the Position, specifically regarding the choice of qualified investors for the subscription:

"Considering the group of entities entitled to subscribe (qualified investors only; however, in view of the

intention not to list the shares on the stock exchange, the group was in fact limited to the exclusion of investors most relevant to the Polish capital market, such as pension funds and open-ended investment funds) ... the process of determining the share price of the issue cannot be deemed market-based".

Restriction to Qualified Investors: The decision to offer shares exclusively to qualified investors is a standard market practice, particularly under circumstances requiring expedited processes such as primary offerings in the form of an accelerated book-building. This approach was adopted primarily because it eliminates the need for drafting and publishing a prospectus, thereby accelerating significantly the transaction process. This was crucial given the war-related risks Kernel faced, which could have unpredictably prolonged the capital raising process and jeopardizing our debt restructuring efforts. It should further be noted that already in the past, the Company conducted several share capital increases to a restricted group of individuals. This approach is fully in line with Luxembourg law and the Company's articles of association.

Shareholder Base Composition: Following the delisting tender offer held in March-May 2023 (the "**Delisting Tender Offer**" as detailed in the Company's [Current Report No. 11/2023](#)), the Company's list of shareholders included a substantial contingent of at least 50 institutional investors, based on the lists of shareholders provided to the Company by the National Depository for Securities after the delisting tender offer. This fact illustrates the confidence of the institutional investors in the Company. All these shareholders and others as allowed by relevant prospectus exemptions provided in EU Prospectus Regulation No. 2017/1129 were openly invited to participate in the offering.

Non-Exclusion of Polish Pension and Open-Ended Funds: We affirm that there was no exclusion of any category of qualified investor (shareholders of the Company), including Polish pension funds and open-ended investment funds. It is pertinent to highlight however that these groups were not major stakeholders in our shareholder makeup during the period of the offering. This was largely due to their choice to divest their holdings in the course of the Delisting Tender Offer, which as we understand was a move aimed at reducing their involvement in a potentially privately-held enterprise.

Decision Against Listing of New Shares: The choice not to admit new shares to trading on the WSE was a strategic decision aligned with the anticipated future delisting of the Company's shares, a fact well-communicated to the market. Therefore, offering of the unlisted shares was not expected to deter shareholders who had already demonstrated their commitment to the Company. i.e. remaining as shareholders in the potentially private enterprise following the Delisting Tender Offer.

In summary, the above-mentioned decisions were made considering the best interest of the Company and its stakeholders, within the framework of prevailing market practices and conditions.

Timing for Participation in the Shares Offering

The Company respectfully disagrees with the Committee's assertion that the timing of subscriptions made the share pricing process non-market-based:

*"Considering the ... **timing of accepting subscriptions**... the process of determining the share price of the issue cannot be deemed market-based".*

Contrary to the Committee's claim that "*...investors had to submit a complete subscription within the next four business days and make a payment within the next three business days*", the actual timeline was more accommodating:

- The information on shares offering was publicized on 22 August 2023, prior to market opening, with details made available in the ESPI system at 7:40 am CET.
- The Company accepted the required documents from the investors, as outlined in the Subscription Rules in [Current Report No. 30/2023](#), until 6:00 pm CET on 28 August 2023. This schedule provided investors with five business days, or seven calendar days, including weekend for additional deliberation. In reality, the time used by the investors was even less, as all eligible investors completed their document submissions between 24-25 August 2023.
- Regarding the payment deadline set for 6:00 pm CET on 31 August 2023, investors in fact had more than three business days for preparation and payment. We communicated payment details immediately after verifying the required documents on 25 August 2023. Consequently, we received payments between 28-30 August 2023, up to three days before the set deadline.
- The entire process spanned eight business days or ten calendar days in total. Shareholders had the option to submit their application as early as possible, i.e. 22 August 2023, receive payment details the same day, and then have up to seven business days or nine calendar days for payment.
- We would like to point out that almost all primary share offerings executed on the Polish market by way of accelerated book-building have a tighter timetable than the August 2023 offering and historically, our equity offerings had much tighter deadlines – one to two days of book-building. (e.g. March 2008: two days for book-building ([Current Report No. 13/2008](#)); April 2010: one day for book-building ([Current Report No. 14/2010](#)); March 2011: two days for book-building ([Current report No. 14/2010](#))).

Given this context, we believe the timeframe provided for the August 2023 shares offering was more than adequate for shareholders' (being professional qualified investors) participation.

Shareholder Non-Inclusion and Its Effect on Share Price

The Company disagrees with the Committee's conclusion that a significant number of the Company's shareholders expressing interest in participating in the new issue were unable to do so:

"As a result of the conditions described above, a large number of the Company's shareholders who declared an interest in participating in the new issue were unable to participate in it."

In the information provided by the Company to the Committee on 19 December 2023, it was clarified that the total amount offered by the shareholders who expressed interest but were not eligible to participate in the book-building process amounted to only USD 2.7 million. This amount can be further broken down as follows:

- USD 1.3 million was offered by shareholders who had no issues with their documentation, but they did not provide proof of being recognized as professional qualified investor;
- Another USD 1.3 million was offered by investors who made errors in their documentation and did not rectify those errors upon the Company's request and they did not provide proof of being recognized as professional qualified investor; and
- The remaining amount was offered by investors who missed the deadline for submitting the required documents.

Even if we entertain a hypothetical scenario in which all these investors had submitted properly filled documents within the specified timeframe, met the professional qualified investor criteria in compliance with relevant EU legislation, and were allowed to participate in the book-building process, it would not have affected the final share price of the offering. Out of the USD 2.7 million offered, USD 0.2 million would not

have received any share allocations because their offered price was lower than the final price of USD 0.2777 per share. The remaining USD 2.5 million constituted a relatively small amount (less than 5% of the minimum capital raise target of USD 60 million). Consequently, the so-called Dutch auction process would have still resulted in the same outcome, with a share price of USD 0.2777 per share. Should Namsen Limited have chosen not to participate, and assuming all other offers were accepted, the offering would have led to the issuance of 120 million shares, priced at USD 0.03 per share. This scenario would have generated total proceeds of only USD 3.6 million for the Company.

Furthermore, considering the Committee's statement that "the price of USD 0.2777 per new issue share of Kernel Holding S.A. cannot be considered to have been set as a result of a market-based process in view of the fundamental limitations imposed as regards investors who could subscribe for the Company's shares." the fact that the price would have remained unchanged in the hypothetical scenario reinforces the Company's argument that the Committee's assertion is unjustified.

The importance of the Company's strategic decision-making to adopt a Dutch auction approach is evident when comparing the share price at market close on 21 August 2023 (PLN 13.74, equivalent to USD 3.35 per share, the "**Closing Price**") with the prices proposed by shareholders excluding Namsen Limited. Of the total USD 3.6 million offered, which includes USD 2.7 million from investors excluded from the book-building and USD 0.9 million from those included:

- Offers totaling USD 1.0 million were made at or below USD 1 per share, a steep discount of over 70% compared to the Closing Price.
- Another USD 1.0 million was offered at prices ranging between USD 1 and USD 2, marking a 40-70% discount.
- USD 1.4 million came in at prices between USD 2 and USD 3.35, showing a discount of up to 40%.
- Only a minor portion, USD 0.2 million, was offered above the Closing Price.

This data reveals that 94% of the offers were below the Closing Price, with a significant average discount of 47%. Despite these considerable discounts, offers fell short of meeting the Company's financing requirements. This scenario also illustrates that nearly all of those shareholders who submitted offers were not prepared to pay the Closing Price, let alone to pay a price that would have been significantly higher.

Response to Committee's Position on Shares Offering and Capital Increase Process

The Company challenges the Committee's assertion that the shares offering was an "atypical subscription process". In navigating the shares offering, the Board recognized the difficulty in proposing an issue price ahead of offering amidst market instability and uncertainties surrounding the Company's outlook. Therefore, a so-called Dutch auction was employed, enabling potential investors, all of which were existing shareholders of the Company, to decide on the share price and quantity of shares to be issued within the authorized capital limit. The Company conducted the book-building process, evaluating all bids to ascertain the final price and share quantity as outlined in the Subscription Rules. Namsen Limited, the majority shareholder, proposed USD 0.2777 per share, meeting the Company's entire requirement of USD 60 million. However, the overall outcome was predominantly influenced by other shareholders' limited or no interest. Following a review of the offering, the Board concluded that the primary objective of raising USD 60 million, as necessitated by creditors, was accomplished. The process was transparent and equitable, allowing participation of all eligible shareholders. Consequently, the Board endorsed the offering's outcome and proceeded to issue new shares.

The Company also refutes the Committee's view that the issuance of new shares by Kernel Holding S.A.

was manipulatively designed to benefit a specific shareholder:

"The issue carried out by Kernel Holding S.A. was used instrumentally to favour the goals of one of its shareholders".

The capital increase was motivated by the Company's needs and aimed to serve all shareholders' interests. The willingness of some shareholders to support the Company in uncertain business conditions and in response to heightened Russian attacks on its assets, (while hesitation of other shareholders), should not be misconstrued as favoring a single shareholder's goals. This situation does not reflect the Committee's claim of "favoring the goals of one of Company's shareholders, thus ignoring the essence of a public company as a community of interests of different groups of its owners".

The offering was accessible to all professional qualified shareholders. Those interested in participating were able to do so, and neither the timing nor the process's constraints hindered their involvement. The successful participation of some shareholders (not affiliated with Namsen Limited) in the offer serves as evidence of the offering's transparency and its availability to all eligible shareholders. Consequently, the final share price, as viewed by the Company, represents the shareholders' evaluation of the risks inherent to both Ukraine and the Company at the time of the offering.

The Company remains receptive to additional open discussions with the Committee regarding this matter and continues to uphold the highest standards of corporate governance, as detailed in the Company's report dated 12 August 2021 ([report on 12 August 2021](#)). This report is accessible on the Company's website, with further elaboration provided in the [Current Report No. 19/2022](#).

Legal grounds: Art. 17 of REGULATION (EU) No 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

Signatures of individuals authorized to represent the Company:

Anastasiia Usachova

Sergiy Volkov

**Position of the Corporate Governance Committee
on breach of Principle 4.13 of the “Best Practice for GPW Listed Companies 2021”
by Kernel Holding S.A.**

Kernel Holding S.A. (“Company”) is a company incorporated under Luxembourg law which operates in Ukraine through members of the holding. The Company’s shares have been listed on the Main Market of the Warsaw Stock Exchange since 2007. The Company has published the information required by the Warsaw Stock Exchange Rules on the status of compliance with the “Best Practice for GPW Listed Companies 2021” (“Best Practice”, “Corporate Governance Principles”). In the information, the Company declared, among others, that it complies with Principle 4.13 of the Corporate Governance Principles, which provides:

Resolutions concerning a new issue of shares with the exclusion of subscription rights which grant pre-emptive rights for new issue shares to selected shareholders or other entities may pass subject at least to the following three criteria:

- a) the company has a rational, economically justified need to urgently raise capital or the share issue is related to rational, economically justified transactions, among others such as a merger with or the take-over of another company, or the shares are to be taken up under an incentive scheme established by the company;*
- b) the persons granted the pre-emptive right are to be selected according to objective general criteria;*
- c) the purchase price of the shares is in a rational relation with the current share price of the company or is to be determined in book-building on the market.*

It is clear from the wording of the quoted principle that a public company which complies with the principle should undertake to issue new shares with the exclusion of subscription rights only on an exceptional basis and only under strictly defined circumstances. As such issues pose a risk of disadvantage to existing shareholders by at least diluting their shareholding position, not to mention the obvious additional risk of a reduction in the value of their shares, they are subject to special requirements, as defined by law and additionally by the principles of the Code of Best Practice. Principle 4.13 of the Corporate Governance Principles expressly provides that, in order to be deemed compliant with the principle accepted by the Company, a resolution concerning an issue of new shares with the exclusion of subscription rights must, as an absolute minimum standard, meet each of the criteria set out therein, that is: (a) there is a rational, economically justifiable and urgent need to raise capital, (b) the investors are to be selected according to objective criteria, and (c) the price of the new issue shares is market-based or the manner in which it is determined is market-based.

The Corporate Governance Committee (“Committee”) wishes to emphasise that Principle 4.13 of the Corporate Governance Principles is one of the key principles of the Code of Best Practice due to the potential negative consequences of non-compliance from the point of view of protecting shareholders’ interests.

The Board of Directors of Kernel Holding S.A. adopted a resolution on 21 August 2023 concerning the issue of shares with the exclusion of subscription rights (ESPI Report No. 30/2023), under which the Company subsequently issued shares.

In connection with the adoption of the resolution and its enforcement, after reviewing the published documents and the explanations provided by the Company in response to the questions raised by the Committee, **the Committee has found that Kernel Holding S.A. has breached Principle 4.13 of the Code of Best Practice, which the Company undertook to comply with by making the relevant statement.**

It should be noted that it is sufficient for a breach of Principle 4.13 of the Corporate Governance Principles that a failure is identified to comply with at least one of the minimum requirements set out in points (a) to (c) of that Principle. It is evident that the biggest disadvantage for shareholders who are deprived of the opportunity to subscribe for shares due to the exclusion of subscription rights or other specific conditions of the issue is that the price is set in breach of the rules set out in point (c) of Principle 4.13.

Kernel Holding S.A. issued 216 million shares with the issue price set at USD 0.2777 (PLN 1.15). By approaching several qualified investors with the issue, the Company raised a total of USD 60 million. It should be noted that not only was the set issue price drastically lower than the price of the Company's shares as quoted before Namsen Limited's announcement in March 2023 of its tender offer for all shares of Kernel Holding S.A. and its intention to delist the Company (it should be recalled that the valuation was anyway impaired by Russia's invasion of Ukraine: just before the aggression, the price oscillated around PLN 50), but it was significantly lower even than the price of the Company's shares just before the announcement of its intention to issue shares with the exclusion of subscription rights. Furthermore, the price was not in a market-based proportion to the price per share of the Company set in the tender offer announced by Namsen Limited in March 2023, i.e., PLN 18.5. Moreover, the price of USD 0.2777 per new issue share of Kernel Holding S.A. cannot be considered to have been set as a result of a market-based process in view of the fundamental limitations imposed as regards investors who could subscribe for the Company's shares. Considering the group of entities entitled to subscribe (qualified investors only; however, in view of the intention not to list the shares on the stock exchange, the group was in fact limited to the exclusion of investors most relevant to the Polish capital market, such as pension funds and open-ended investment funds) and the manner and timing of accepting subscriptions (in practice, investors had to submit a complete subscription within the next four business days and make a payment within the next three business days), the process of determining the share price of the issue cannot be deemed market-based. The absence of market considerations and the atypical subscription process are also corroborated by the Company's failure to hire a market intermediary who is, in such cases, responsible for the professional execution of the process and ensures that the market standards are upheld for the sake of the transparency of the transaction. As a result of the conditions described above, a large number of the Company's shareholders who declared an interest in participating in the new issue were unable to participate in it.

For the above reasons, the Committee has found the Company's manifest breach of Principle 4.13; in combination with the declarations to the contrary made by the Company regarding the scope of compliance with the Corporate Governance Principles, such conduct undermines the confidence of shareholders and other market participants. In the Committee's view, the capital increase carried out by Kernel Holding S.A. with the exclusion of subscription rights should be strongly censured also on the grounds that the breach of the principle of the Code of Best Practice caused a violation of the fundamental rules on which the capital market relies.

The Committee notes that the introduction to section 4 of the Best Practice for GPW Listed Companies 2021 emphasises that, when making decisions, joint-stock companies should first and foremost respect the "legitimate interests of different groups of investors." However, by its manifest breach of Principle 4.13 of the Code of Best Practice, the Company has violated the fundamental principles on which the capital market relies, in this particular case concerning relations among all shareholders, violating the fundamental rights of the Company's shareholders, including the right to equal treatment. The issue carried out by Kernel Holding S.A. was used instrumentally to favour the goals of one of its shareholders, thus ignoring the essence of a public company as a community of interests of different groups of its owners, including minority shareholders and financial shareholders managing assets entrusted to them. The Committee strongly objects to any such practice by companies listed on GPW which cannot under any circumstances meet with its approval.

Corporate Governance Committee

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The Corporate Governance Committee is an advisory body to the Warsaw Stock Exchange, taking independent action and forming independent opinions. The Committee is composed of experts representing the interests of various groups of capital market participants. The Committee's activities focus on issues related to the principles of the Code of Best Practice applicable to companies listed on GPW. The Committee's mission is to raise the standards of corporate governance principles applicable to listed companies and to raise the profile of the principles of the Code of Best Practice on the Polish capital market.