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ARTYKUŁY

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Monistic system in the simple joint-stock company

System monistyczny w prostej spółce akcyjnej

Abstract

Due to the amendment to the Polish Commercial Companies Code introduced by the Act of 19 July 2019, a new type of company will be introduced into the Polish legal system, with effect from 1 March 2021: namely, the simple joint-stock company. The simple joint-stock company is innovative through its free choice between a monistic and dualistic management system. This paper aims to consider selected aspects as regards the legal position and competences of the board of directors in the monistic system, including the new provisions covering i.a. the duty of loyalty, flexibility of the boards' structure and business judgment rule.

Key words: simple joint-stock company, monistic system, board of directors.

Streszczenie

Na podstawie ustawy z 19.07.2019 r. o zmianie ustawy — Kodeks spółek handlowych oraz niektórych innych ustaw, do polskiego systemu prawa wprowadzony został z dniem 1.03.2021 r. nowy typ spółki kapitałowej — prosta spółka akcyjna. Prosta spółka akcyjna jest innowacyjną instytucją dzięki wprowadzonej swobodzie wyboru pomiędzy monistycznym a dualistycznym systemem organów. Celem artykułu jest przedstawienie wybranych aspektów związanych z pozycją prawną i kompetencjami rady dyrektorów, z uwzględnieniem nowych regulacji obejmujących takie zagadnienia, jak: obowiązek lojalności, elastyczność struktury organu w systemie monistycznym oraz zasad biznesowej oceny sytuacji.

Słowa kluczowe: prosta spółka akcyjna, system monistyczny, rada dyrektorów

Introduction

Due to the amendment to the Polish Commercial Companies Code[1] introduced by the Act of 19 July 2019,[2] a new type of company will be introduced into the Polish legal system, with effect from 1 March 2021: namely, the simple joint-stock company (primarily, the simple joint-stock company was intended to take effect from 1 March 2020). This type of company is not common in the European countries, although it was firstly regulated in France in 1994 (*societe par actions simplifiee*) and then in Slovakia in 2015, with effect from 1 January 2017 (*jednoduchá spoloènost' na akcie*). A similar type of company in the form of simplified private limited company (*societe a responsabilite limitee simplifiee*) was adopted also in Luxemburg in 2016, with the effect from 16 January 2017. The new type of company is aimed to open the possibility for startups to create a company without the need of having the minimum share capital and to give a wide range of contractual freedom as regards establishing corporate rights of shareholders in the articles of association. It should be noted that in the Polish literature the introduction of the company without minimum share capital was opposed as potentially creating a threat to the interests of its creditors (Kappes, 2018, p. 13; Kruczalak-Jankowska, 2018, p. 28).

The simple joint-stock company is innovative through its free choice between a monistic and dualistic management system, as it shall comprise a general meeting of shareholders and — depending on the form adopted in the articles of association — either board of directors (in monistic *i.e.* one-tier system) or a management organ and supervisory board (in dualistic *i.e.* two-tier system). However, the supervisory board shall not be mandatory as the shareholders have individual right for control, similarly to private limited company.

As the idea of the simple joint-stock company is to give the founders (shareholders) of the company a flexible legal institution with the possibility to create the company's structure suitable for their specific needs, so it is surprising that the Polish legislator decided to regulate the company in a rather detailed manner. The provisions of the joint-stock company cover 134 articles with additional reference provisions to the private limited company and joint-stock company. In contrast to French or Slovak regulations, also

the structure of the Polish simple joint-stock company was regulated in much detail (Art. 300^{52} — 300^{79} CCC), as was the liability of the members of the boards (Art. 300^{123} — 300^{134} CCC). In the French simplified joint-stock company the only obligatory body is the director (*président*), representing the company towards third parties, whereas the appointment of additional bodies such as chief (*executive*) directors (*directeurs généraux*) or executive committee and supervisory board (*conseil de surveillance*) only depends on the provisions of the articles of association. The provision concerning the liability of members of the administrative council in joint-stock company shall be applicable for simplified joint-stock company (L227-6 — L227-8 of the French Commercial Code[3]). In the Slovak simple joint-stock company, the mandatory body is the board of directors (*predstavenstvo*) and the appointment of the supervisory board (*dozorná rada*) shall not be necessary (§ 220zc — 220ze of the Slovakian Commercial Code[4]).

Appointment and removal of the directors

The board of directors consists of one or more members (Art. 300^{73} § 2 CCC). The number of members of the management body or the rules for determining it shall be laid down in the articles of association (Art. 300^{5} § 1 p. 7 CCC), which may, however, specify a minimum and/or a maximum number of board's members. The directors shall be appointed or removed and suspended, for important reasons, by the resolution of shareholders, unless the articles of association provide otherwise (Art. 300^{73} § 3 CCC). In particular, the articles of association may provide for an individual right of the shareholder to appoint and/or to remove one or more members of the board of directors (Art. 30028 § 1 CCC). The appointment system may also be combined, depending on the number of directors, thus the directors may be partially appointed by the resolution of the shareholders and partially by an individual shareholder or shareholders. The director may be removed at any time by means of a resolution of the shareholders, however the articles of association may also restrict the right to remove a member of the board of directors for important reasons. The right to remove the director by the shareholders' resolution may be restricted, however it may not be totally excluded. In any case, the resolution of shareholders shall require an absolute majority of votes, unless the articles of association provide otherwise.

Unless the articles of association provide otherwise, a mandate of the member of the board of directors shall expire on the date the shareholders' meeting is held approving the financial statements for the first full financial year. However, the articles of association may provide for a longer period of holding the office by the members of the board or even for an indefinite period. The members of the board may be reappointed once or more than once for the period specified in the articles of association.

In case of holding the office for a longer definite period, the term of office shall be counted in full financial years. This solution enables to avoid practical problems which have appeared in private limited companies and joint-stock companies, concerning the counting the terms of office either correspondingly to full financial years or correspondingly to full years starting from the appointment (Pinior, 2017, p. 13). Unfortunately, the problem still remains in those companies, as it could reasonably be argued that since the same Code contains different regulations concerning different types of companies, it might have been the legislator's intention. Nevertheless, still in private limited companies and joint-stock companies the manner of counting the term of office in full financial years should be supported. In order to avoid the dispute on counting the terms of office, it should be recommended to make amendments in the Commercial Companies Code, so as to provide the same rules for all types of companies (Pinior, 2019, p. 113).

In case of holding the office for an indefinite period, the director shall be empowered to perform his/her duties in the company until his/her removal by the competent body, his/her resignation, death or other circumstances resulting in the mandate expiring, e.g. opening the liquidation of the company.

Pursuant to Art. 300^{76} § 1 CCC, articles of association may delegate some or all competences in conducting a business enterprise to one or more executive directors, thus in that case the rest of the director's board members shall exercise the supervision over the company (non-executive directors). The articles of association may also provide for direct appointment, by way of the shareholders' resolution, to the function of executive and non-executive directors, or the appointment by shareholders' resolution shall generally concern the membership in the board of directors, and the division of competences between executive and non-executive directors shall be made later solely by the resolution of the board of directors.

The appointment of the directors results in creation of a special relationship between the company and its directors, which is a contractual and organizational legal relationship, independent from any additional contracts concluded with the members of the board of directors, such as an employment contract or manager's contract. In contracts between the company and the members of the board of directors, the company shall be represented by a proxy appointed by way of a shareholders' resolution, unless the articles of association stipulate the representation of the company by a non-executive director, designated by the resolution of non-executive directors. Anyway the remuneration of the directors shall be determined by the shareholders' resolution.

3. Legal position of the directors

The legal position of members of the board of directors in the simple joint-stock companies corresponds to the legal position of members of the board in private limited

companies and joint stock companies. The board of directors has both the right and obligation to manage the company, derived from a special relationship between the company and members of its board by virtue of their appointment by an empowered authority — shareholders' meeting. Notably, the provisions on simple joint-stock companies determine the position of members of the board more precisely, including the duty of loyalty, explicitly phrased in Art. 300^{54} CCC. Under that provision, while performing their duties, members of the board shall act with due care resulting from professional integrity and shall honor the duty of loyalty to the company. Furthermore, the provisions also provide for restrictions which result from the duty of loyalty, such as the conflict of interest (Art. 300^{55} § 1 CCC), as well as the non-competition clause (Art. 300^{55} § 3 CCC), and the confidentiality clause, even after the tenure of office (Art. 300^{55} § 2 CCC).

In the English literature the duty of loyalty is understood as the obligation to act within powers, to promote success of the company, to exercise independent judgment, to exercise reasonable care, skill and diligence, to avoid conflict of interest, not to accept benefits from third parties (Girvin, Frisby, Hudson, 2010, p. 323). Similarly, in the German literature and jurisdiction, the duty of loyalty (*Treupflicht*) includes, among others, the requirements to care for the interest of the company and to avoid conflict of interest, the competition ban, the ban to abuse function and the power to represent the company, the obligation of confidentiality, and the equivalent remuneration of directors (Hoffman — Becking, 2007, p. 298; Priester, Mayer, 2009, p. 898). Thus, the main characteristics of the duty of loyalty are to extend special care for interests of the company and to act in a way that fosters the maximum use of the company potential (corporate opportunity, *Geschäftschancen*).

While the imposition of the duties of loyalty and of confidentiality should be seen as proper legislation concerning the boards, a question arises concerning the interpretation of law, whether such duties also relate to members of the boards in private limited companies and joint stock-companies, unless they are stated *expressis verbis* by law. Concededly, the duty of loyalty has been commonly adopted by the Polish doctrine (*e.g.* Sołtysiński, 2010, p. 490; Szumański, 2010, p. 479; Oplustil, 2010, p. 498; Pinior, 2013, p. 89; Opalska 2015, p. 122; Opalski, 2016, p. 1167), however, has not been regulated in the provisions of the Code so far. It could reasonably be argued that since the same Code contains different regulations concerning different types of companies, this was the legislator's clear goal. If it had been the legislator's intention to impose the duty of loyalty on other types of companies, it would have been introduced as well. However, such an interpretation should be opposed, as it would produce negative effects in business environment. It must be stated then that the duty of loyalty is an inherent feature in corporate relations between members of the board and the company, regardless of whether it is stipulated by law or not. However, here again it should be recommended to make amendments in the Commercial Companies Code so as to provide the same rules for all types of companies.

Pursuant to Art. 300^{53} CCC, in relationship with the company, the directors shall be subject to restrictions set forth in the articles of association and — unless the articles of association provide otherwise — in resolution of shareholders. This provision stipulates the possibility to give binding instructions to the directors by the shareholders, which enables the shareholders to exert influence on managing the company (Opalski, 2019, p. 6). The binding instructions have been allowed only in private limited companies so far (Pinior, 2013, p. 287), but adopting the binding instructions in simple joint-stock company shall be of greater importance, especially if a shareholder may easily gain dominant position by means of granting privileged shares, without the limitation of privileged votes or by means of founders' shares (Art. 300^{26} CCC). The founders' shares may stipulate the minimum stake of votes granted to such shares, in proportion to the total number of votes in the company, and every new shares issue shall increase the number of votes granted to the founders' shares proportionally to the foregoing stake of votes. In fact, it is an instrument that enables having permanent influence on managing the company by a single shareholder or a group of shareholders. Therefore, the independence of the directors in relationship with the company may be reduced considerably.

Competences of the board of directors

Pursuant to Art. 300^{73} § 1 CCC, the board of directors shall manage and represent the company, as well as shall exercise supervision over the company management. It should be observed that actually the supervision shall cover the company's activities in all aspects of its business, not limited to the supervision over conducting the company's affairs by the directors. This is why the wording used by the legislator seems not quite adequate (Pinior, 2019, p. 116).

Where the board of directors is composed of more than one member, all its members shall have the right and duty to jointly conduct the company's affairs, unless the articles of association or the by-laws of the board of directors provide otherwise. In particular, the articles of association may stipulate the division of competences between the directors, including the distinction between executive and non-executive directors. In order to conduct the affairs of the company's enterprise, an executive committee may be appointed, consisting of executive directors exclusively (Art. 30076 § 2 CCC). The appointment of the executive committee may be stipulated for in the articles of association, as well as in the by-laws or the resolution of the board of directors. However, the resolution of the entire board of directors shall be required for: strategic decisions concerning the company, the setting of annual or multiannual business plans, and the arrangement of organizational structure of the company's enterprise.

As for the power to represent the company, where the board of directors is composed of more than one member, the joint action of two members of the board of directors, or one of the directors jointly with a holder of a commercial power of attorney, shall be required to make statements on behalf of the company, unless the articles of association provide otherwise. The right to represent the company shall cover all court and out-of-court actions, except for contracts and disputes between the member of the board and the company (Art. 300^{79} § 1 CCC) and contracts with the audit firm (Art. 300^{60} § 1 CCC), as in those circumstances the company shall be represented by a proxy appointed by way of a shareholders' resolution. However, the articles of association may stipulate in those cases the representation of the company by a non-executive director, designated by the resolution of non-executive directors. Despite the division of competences between executive and non-executive directors, the power of representation, apart from the above-mentioned, shall be a prerogative of all the directors (Opalski, 2019, p. 8).

Pursuant to Art. 300^{73} § 1 CCC, the board of directors shall exercise supervision over the company management, however the provisions of the Code do not precise the supervisory competences of the board. The supervisory competences are stipulated only in case of the division of competences between executive and non-executive directors. Every non-executive director may inspect all documents of the company, request reports and explanations from the directors and employees, and review the assets and liabilities of the company (Art. 300^{76} § 5 CCC). Special duties of the non-executive directors are connected with the closure of the financial year and shall include evaluation of the reports on the company's operation and financial statements in respect of their compliance with the booking documents, and the facts and evaluation of the proposal of the management board concerning distribution of profits or coverage of losses (Art. 300^{76} § 3 CCC). Non-executive directors shall submit to the general meeting annual reports in writing, presenting the outcomes of such evaluation. In order to exercise permanent supervision, a committee of the board may be appointed, consisting of non-executive directors exclusively (Art. 300^{76} § 4 CCC). It is questionable why the legislator does not use the term audit committee in that case (Pinior, 2019, p. 116), which is characteristic to the monistic system. Anyway, the term audit committee may indisputably be used by the articles of association or the by-laws of the board of directors. As mentioned above, the appointment of the committee may be stipulated for in the articles of association, as well as in the by-laws or resolution of the board of directors.

Flexibility of the board

As regards the competences of the board of directors, it is a flexible structure which allows to adjust the board and the competences of the members of the board to specific needs of the company (Opalski, 2019, p. 9). Significantly, the changes in the management system and the delegation of competences may directly derive from the resolution of the board of directors, which may improve the current management, especially in respect of the day-to-day operations. Only the articles of association may stipulate for restrictions in that respect, as the resolutions of the board of directors should be in concordance with the restrictions set forth in the articles of association.

Thus the board of directors, being a flexible structure, enables alternatives in the management system and in the supervision over the simple joint-stock company. The board of directors may consist of one member (single-member body) or more members (collective body). The single-member body shall be adequate only in small companies (similarly to private limited company), whereas in medium-sized companies the board of directors should consist of more members. In the board of directors all the directors shall exercise the same competences, the management and the representation, including the supervision over the company management, which shall be exercised by directors by means of common management system. Collective decision-making by the board shall enable to control the conducting of the company's enterprise. In larger companies the division of competences between executive and non-executive directors should be recommended. As mentioned above, the division of competences may stem from the articles of association, by-laws of the board of directors or from the resolution of the board of directors. The division of competences may also be achieved by establishing of permanent committees, one of them as an executive committee and another one as a non-executive (audit) committee. Where the articles of association so provide, the committees may be appointed by the shareholders' resolution and unless the division of competences shall be stipulated for in the articles of association, the committees may be appointed by the board of directors itself. Creating two different committees (executive and audit committee) likens the monistic system to the dualistic one.

The division of competences between executive and non-executive directors, as well as appointment of the committees by means of the resolution of the board of directors, is very useful, since the competences may be changed while holding the office of the board's member. For example, the appointment to the committee may be for just one year, even if the terms of office totals five years, so the changes in the committees membership are allowed later, during the terms of office. Consequently, the committee does not have to be nominated for the period covering the entire terms of office. Nevertheless, the removal of a member of the board by the shareholders' resolution results in the loss of all the rights in the board, including participation in the committees.

Apart from the appointment of permanent committees, there is also a possibility of establishing interim committees, if the articles of association or the by-laws of the board of directors so provide (Art. 300^{57} § 2 CCC). The aim of such

interim committees shall be the preparation of the board's resolutions or the performance of the board's resolutions. The board of directors may adopt the by-laws of such a committee, setting forth the organization and the manner of operation thereof. The committee consists of at least two members of the board of directors, and may also include other persons with a consultative voice.

Business judgment rule

The provisions on simple joint-stock companies contain new premises concerning the liability of members of the board of directors. Pursuant to Art. 300^{125} § 1 CCC, a member of the board shall be liable towards the company for any damage inflicted through non-performance or improper performance of his/her duties, including due diligence resulting from professional integrity and duty of loyalty, unless no fault is attributable to such a person. However, pursuant to Art. 300^{125} § 2 CCC, members of the board shall not abuse the due diligence if, while remaining loyal to the company, they act under conditions of justified economic risk, based on the information, analyses, opinions which should be taken into account when applying due diligence. This provision introduces the so called business judgment rule into the Polish company law. The essence of that principle is to release the directors from the liability for the damage incurred by the company, resulting from wrongful decisions of the directors, if the directors, while making such decisions, had good reasons to believe they were in the best interests of the company, justified by the circumstances of a specific case, and based on the information necessary for any such decision to be made (Oplustil, 2010, p. 220; Błaszczyk, 2012, p. 76; Opalski, 2019, p.10).

The introduction of the business judgment rule into the Polish regulations on simple joint-stock companies should be appreciated, given that it has been postulated for a long time by representatives of the Polish doctrine. Moreover, it should also be recommended to amend the provisions concerning the liability of members of the management board and supervisory board in private limited company and in joint-stock company, to make the system really coherent and in order to avoid improper interpretation of the law.

Final remarks

The choice between the monistic and dualistic bodies system is commonly applied in different types of companies throughout European countries. As the simple joint-stock company is considered an innovative type of company with a great contractual freedom, the application of the choice of governing system into the Polish Commercial Companies Code should be considered as the proper step in innovating the Polish company law. However, the introduction of some provisions, such as counting the terms of office in full financial year, the duty of loyalty or the business judgment rule, should be followed by amendments in private limited companies and joint-stock companies in order to achieve the coherent legal system of companies.

Przypisy/Notes

[1] Act of 15 September 2000 Commercial Companies Code, the Official Journal of Laws of the Republic of Poland, 2019.505, as amended, hereinafter abbreviated as CCC.

[2] The Official Journal of Laws of the Republic of Poland, 2019.1655.

[3] Code de Commerce, consolidated version on 1 of Janaury 2020, www.legifrance.gouv.fr

[4] Obchodný zákonník Law Nr 513/1991, www.zakonypreludi.sk/zz/1991-513

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Polecamy

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Od wielu lat toczy się międzynarodowa debata publiczna na temat współpracy międzysektorowej w zakresie realizacji projektów infrastrukturalnych w ramach szeroko rozumianego partnerstwa publiczno-prywatnego (PPP). Zagadnienia PPP doczekały się już znaczącej literatury. Jednak debata nad tym zagadnieniem nie doprowadziła ani do ujednolicenia definicji partnerstwa, ani też ogólnych ocen efektywności modeli PPP. Ze względu na swe rozmiary, dynamikę zmian i istotne kontrowersje tematyka ta staje się nieprzejrzysta i coraz trudniejsza do analizy. Prezentowana książka wychodzi naprzeciw zapotrzebowaniu na syntetyczne opracowania monograficzne, które stanowią punkt wyjścia badań i analiz szczegółowych, mogą stanowić wsparcie w kształceniu menedżerów publicznych i prywatnych, a także praktyków poszukujących źródeł ramowej, kontekstualnej wiedzy do podejmowania decyzji operacyjnych. Książka prezentuje elementy toczącej się międzynarodowej debaty na temat PPP i projektów infrastrukturalnych w pięciu rozdziałach dotyczących:

- problematyki definicyjnej i klasyfikowania modeli PPP w ramach różnych nomenklatur kontraktowych,
- charakterystyki PPP jako jednej z form polityki i praktyki tzw. outsourcingu administracyjnego,
- kontekstu teoretycznego i doktrynalnego debaty publicznej na temat PPP,
- ocen efektywności modeli PPP,
- niektórych formułowanych w debacie publicznej sugestii odnośnie do warunków efektywności modelu PPP.