Społeczeństwo i Edukacja
Society and Education

Wydawca / Publisher:
Instytut Studiów
Międzynarodowych
i Edukacji HUMANUM
www.humanum.org.pl

15 (3) 2014
ISSN: 1898-0171

Peter Strapáč
University of Zilina

Responsibility of the member of board of directors in stock corporation in Commercial Law

Abstract

The article deals with responsibility of a member of a board in Stock Corporation, which is inseparably linked with his funkcion and the member of the board cannot divest of that. The article comparatively refers to the valid legislation in the Slovak republic, the Czech Republic and Poland. The author not only mentions the valid legislation, but also points out the decisions of the Courts of the mentioned countries. The article refers to terminology issues and compares term „proffesional diligence "which is used in the Slovak republic with term" diligence of due manager"which is used in the Czech republic.

Key words: responsibility, board of directors, authorized representaive

The way of performing the function of a member of a board and his responsibility is modified in § 194 section 5 to 9 of Commercial Code. The way of procedure of a member of a board is expressed by requirement to make decisions with appropriate diligence. The terms appropriate dilligence includes obligation of making decisions with proffesional dilligance and obligation of making decisions in accordance with the interests of the stock corporation and all stockholders. „ Proffesional dilligence is represented defined obligation of creating that type of information system of the company, in which members of the board as a decision – making body (controlling and strategical decisions by the managing of a company)will be able to decide with such knowledge of object clause , which will be in objective menanig sufficient."[1]

Commerial Code shows by examples, how can authorised representative perform in accordance with that principle. It is especial obligation to obtain all available information and during making decisions cosider all of that. Another obligation is maintaining confidentiality about private informations and facts , which can (by relevation to third person) demnify company, or jeopardize the interests of company or interests of stockholders. Stockholders cannot prefer their own in-

1 Patakyová, M. a kol. Obchodný zákonník. Komentár. 1. vydanie. Praha: C. H. Beck, 2006, s.474

terests, or interests of some stockholders, or interests of third persons before the interests of the company. In my opinion it would be necessary to synchronize term proffesional dilligence in § 135a section 1 and term appropriatte diligence in § 194 section 4 Commercial Code, because I think, that responsibility and procedure of authorised representative should be equal. Explanatory note to Act n. 500/2001 Z.z. brought even more confusion to obligation of the member of the board of directors with diligence, because in that document we can find the term sufficient diligence. I agree with the opinion to synchronize those terms to term appropriatte diligance, because it is much more general term than proffesional diligence (grammatical interpretation §194 section 5 Commercial Code).

In Czech law Act about Commercional Corporations n. 90/2012 Sb. is using term diligence of due manager. Diligence of due manager is the same procedure of a memeber of the board of directors, which he would do, if he managed with his own property. So the same procedure, which he would do with his own property, is neccesary with managing property of stock company. Czech law teory explains this term: „ The term diligence of due manager we can imagine the same diligence, as the responsible and principeld due manager, who has all necessary knowledge and abilities, takes care of his own property.“ [2]Černá explains this term like this: „ for normal work of a member of the board of directors is necssary the same quality and level of care, which invests the responsile and normally working due manager. Specific content of obligation for function due manager is only the way of interpretation. It includes scrupulosity and caution during the fukcion, proffesional managment of company. Proffesional managment of company includes ablity to recognize the need Professional assessment of this mater by another expert, because every member of board of directors does not have to be an expert in every activity of the company.“[3]Eliáš says: „those who work for the company in some function, have to do this function personally, with proffesional diligence, and in interests of the company.“[4] Štenglová was dealing with obligation of a member of a board of directors to use his own abilities and knowledge, thus to use his education and experience. She thinks, that „ general summary about requirement for the function of due manager with proffesional diligence does not include every proffesional knowledge and ability of board of directors. But when a member of the board of directors has these abilites and knowledge, he has to use it. In that way the term diligence of due manager includes using of those abilities and knowledge.“[5] Havel says, that „diligence, which should administrator do, includes his ability to recognize and evaluate information , or recognize his own inability - reaction for that is to leave the fukcion, or using abilities of another person. Using third person and his abilities is the part of the funkcion of due manager. If this choice is not good, the due manager has to calculate with the conseqencies. If the member of the board of directors does not have all neccesary knowledge he has to obtain it.

2 Štenglová, I, In Štenglová, I., Plíva, S., Tomsa, M. a kol. Obchodní zákonník. Kometár. 10., podstatne rozšírené vydanie. Praha: C. H. Beck, 2005, s. 738

3 Černá, S.: Obchodní právo. Akciová společnost. 3. díl, Praha: Aspi, 2006

4 Eliáš, K., Bartošíková, M., Pokorná, J., a kol.: Kurs obchodního práva. Právnické osoby jako podnikatelé. 5. vydání. Praha. C.H. Beck citované z Dědič, J., Štenglová, I., Čech, P., Kříž, R.: Akciové společnosti. 6., přepracované vydání. Praha: C. H. Beck, 2007, str. 480

5 Štenglová, I. in Dědič, J., Štenglová, I., Čech, P., Kříž, R.: Akciové společnosti. 6., přepracované vydání.Praha: C. H. Beck, 2007, str. 480

Othertwise he does not perform with Professional diligence. It is only his choice, how to obtain those information, but he has to evaluate those information subsequently. It is not profesional diligence when due manager relys on another person, although that person has some professional abilities."[6]

The question is, if professional abilities are neccesary for the member of board of directors. Commercial Code in the Slovak republic and Law Actabout commercial corporations in the Czech Republic do not contain any prelim limits. The only limitis , which law acts neccesitate are the age of 18 , legal competence, blamelessness and the same person cannot be a member of supervisory board, and a member of board of directors , or a proctor and member of a board of directors in the same stock corporation. It is beyond doubt that stockholders should want, that leaders of the company would be personalities, who have for the leadership of the company those prelim abilities. Havel says, „It depends of the company how engages the functions – and it depends of lojality and care of those people if they accept this offer. We can consider, that if somebody, who does not have those abilities accpets this offer, it is not the diligence of due manager, and this person is responsible for that (civil and criminal).[7] In Žak opinion, „in present days we can see very close specialization of managers for some time of the business, while it is necessary to take into account temporarry change of law documents, which those managers have to know and it is necessary to solve the problem of unifikation interests of the comapny with interests of members and deptors on the first side, and on the other side with interests of the directors."[8] He also says, that „ law documents about responsibility of a member of a board of directors protect mainly company and third persons from negative actions from the member of a board of directors. It is necessary for members of a board of directors not to be parlized from temporary ideas about possible responsibility from his funkcion."[9] We can see obvious fear, that if a member of a board of directors has temporary fear from the damage which can happen, his working is not good for the company , because member of a board of directors will lose his ability to make rational and fast decisions. This is one of the reasons to make D&O insurance. In those situations it is understandable argument of managers after accepting the job offers in some companies in the USA, Great Britain and Germany and in some companies in Poland, which has D&O Insurance. This is so-called D&O policy which prevents the members of a board of directors of the company from taking responsibility alone. This is the reason which helps members of a board of directors with making good decisions for the company.

In Commercial Code of the Slovak republic we can see very interesting principle of loyalty of members of a board of directors. We can find this principle in § 194 section 5, where law document expresses , that members of a board of directors have to make decisions in accordance with the company and all of its stockholders.

6 Havel, B.: Obchodní korporace ve světle proměn. Variace na neuzavřené téma správy obchodních korporací.Auditorium. Praha. 2010, str. 155

7 Havel, B.: Obchodní korporace ve světle proměn. Variace na neuzavřené téma správy obchodních korporací.Auditorium. Praha. 2010, str. 161

8 Žak, T. in Walerjan, D., Žak, T.: Odpowiedzialność członków zarządu spółek kapitałowych. Oraz praktyczne sposoby jej organiczenia. Hogan Lovells. Difin. Warszawa 2010, str. 213

9 Žak, T. in Walerjan, D., Žak, T.: Odpowiedzialność członków zarządu spółek kapitałowych. Oraz praktyczne sposoby jej organiczenia. Hogan Lovells. Difin. Warszawa 2010, str. 213

This principle of loyalty is not limited with law boarders, for example prohibition of abuse the right, and discharge function in accordance with interests fair business transaction. So we can simply say that a member of a board of directors has to make decisions in accordance with interests of the company and its members and of course all the time he has to make decisions in accordance with all valid law documents, because interests of a company are not more important than law.

Responsibility in commercial law is objective responsibility, which is in accordance with § 66 section 3 of Commercial Code of the Slovak republic written in an agreement about performance a function , in which we can use sections from mandatory agreement. Members of a board of directors are responsible for breaking obligations from obligations relation, and responsibility of damage from § 757 of Commercial Code. We can see in § 757, that responsibility for damage from breaking obligations is similar to § 373 and next. Supreme Court of the Slovak republic says about that: „ *Commercial Code of Slovak republic defines premises of acknowledgment law for damages, but only if there aren´t any circumstances excluding the illegality from § 374, in the agreement relations, or from breaking the duty provided, that other conditions are observed. In Commercial Code Damages is based in principle of objective responsibility. That means that if one side of an agreement breaks duty, that side has to replace the damage. It doesn't matter if that side causes damage with violation of obligations or not.*"[10]

Law requires these premises for taking responsibility:

- nifikation interests of the comapny with interests of sible for that – illegal act
- consequence of illegal act
- casual relation between illegal act and consequence
- predictability of damage
- absence of circumstances excluding the illegality[11]

„The stringency of objective responsibility is mentioned by another things, which are predictability of damage and possibility of liberation by circumstances excluding the illegality."[12] Members of board of directors, who broke their obligations , have to replace the damage together and equally , which was made by these acts:

- provides admission to stockholders contrary with this legal act
- acquires property contrary with §59a
- provides admission contrary with §196a
- subscribes for shares, acquires or creates own shares or shares of another company contrary with this legal act
- issues shares contrary with this legal act
- do not publicises annual report and consolidated annual report

10 rozsudok Najvyššieho súdu SR z 29. mája 2008, sp. zn. 1 Obdo V 80/2007 dostupný na www.concourt.sk.

11 Porovnaj aj Šilhán, J.: Náhrada škody v obchodních vztazích a možnosti její smluvní limitace. C. H. Beck, 2007, str. 6.

12 Tamtiež.

This responsibility is only general and there is no problem to edit responsibility more detailed in bylaw of the company. Modification of responsibility in internal acts of company or documents of the company is modification, which members of authorized representatives have to respect and when they do not, company can take responsibility to them. Ideal way is obligation of members of authorized representatives elaborates in Agreement about discharge a function in detail and establishes sanctions from the company for members of authorized representatives if they break their obligations. Of course we have to say, that those statues of charters which make obligations for member of authorized representative, which would by contrary to legal acts are not valid. Typical statue, which we can often find in internal acts of company, is responsibility of members of board of directors from the stock corporation, which is made by exchange differences in export or Import products. The substance of problems with Exchange differences is, that from the signature of agreements to performance some time passes and Exchange rate changes every day. When these Exchange differences are made, company can take some financial benefit which can be not small, or it can suffer some loss in case of big volume contracts. So sleight of member of authorized representatives and getting important information and monitoring of foreign exchanges are very important from short and long-term time. The way how to avoid the risk is to insure the Exchange difference if the company negotiates fixed Exchange, which will be decisive for both sides. This statue can help the company to avoid the loss. This insurance of Exchange differences is called hedging. Hedging or ensuring is creation such a position (by one or more Instruments) in which the change in real value of Instruments. The change in real value of instrument is partially or completely compensated with change of real value or with cash flow of derivative contract. Hedger primarily orientates to minimize loss which is made by risk. In arguments with big Money value the member of board of directors can have the agreement approved by general assembly. This procedure is very often used in statutes of many companies. But it is not very good decision from practical side, because making decisions of the company is much more difficult, laborious and protracted. Convening of general assembly needs some time horizon for sending invitations and for preparing and this horizon cannot be shorter . This time loss can defeat contract. The other thing is, that in stock corporations with a lot of stockholders convening of general assembly is a costly thing. So as we can see, this way of making contracts has a lot of disadvantages. The only one advantage is, that the risk is minimized. But it is necessary to know, that during the election of a member of board of directors shareholders should choose somebody, who has enough professional abilities and who could bear the risk and evaluate it in favour of company. The other disadvantage, which is in my opinion essential, is that stockholders are not very often professionals and they will make decisions more instinctively than professionally and it can be bad for the company. In my opinion the better way of doing that is if the member of board of directors requires the analysis from external company which is specialized for that business. That procedure is one of the obligations of members of board of directors to make decisions with appropriate diligence. I think, that specifying that obligation would be problematic, because company has a lot of commitments and general treatment in

agreement would be very hard to identify and ultimately unperformable. Because of that, I inclined to opinion that obligation to require analysis from external company is part of obligation from § 194 section 5 Commercial Code.

In statute § 194 section 8 Commercial code is prohibition of making contracts between the company and a member of a board of directors which expel or confine responsibility of the member of board of directors. Articles of association also cannot expel or confine responsibility of a member of board of directors. I think that this statute is duplicated and surplus, because the same obligation is in § 386 section 1, which says that nobody can divest the claim of compensation of the damage before breaking obligation, from which damage can arise. In my opinion this statute applies for corporations and for cooperative associations, what we can see in § 757.

For the caused damage organs of company are responsible together and severally, if everybody made the decision , which caused the damage. If only one of the authorized representatives acted, for example making a contract, he is responsible for the damage himself. The member of board of directors is not responsible for the damage, if he vindicates, that during that decisions he was proceeded with appropriate diligence and with interests of the company. Members of board of directors are not responsible for the damage, which was caused during performing resolution of general assembly, which is contrary to law acts or charters of the company. Only court can decide, if resolution of general assembly is contrary to law acts.

If general assembly took instruction which was unsuitable for board of directors, but in accordance with law acts, in that case members of a board of directors are not responsible for caused damage. But when general assembly took instruction which was contrary to law acts and members of a board of directors followed it , they would be responsible for the caused damage. If instructions of general assembly are in accordance with law acts but contrary to interests of the company, in my opinion members of a board of directors have to require general assembly for revocation of previous instruction directly at general assembly which took that instruction. Then will be principle of appropriate diligence followed. If they did not do that and they followed that instruction, which is in accordance with law act, but contrary to interests of the company, and they knew which consequences can happen ,they would leave stockholders in general assembly in the dark, they are not acting in accordance with appropriate diligence and in my opinion they will be responsible for the caused damage. But it will be very difficult to prove, that the board of directors knew that instruction was bad and they did not ask for revocation. If board of directors asks for revocation and warns stockholders about the consequences of that instruction and general assembly nevertheless will insist on that instruction , it is no doubt that members of a board of directors cannot be responsible for their procedures. In accordance with judicial statement Supreme Court of Poland I. CR 883/57 from 15th September 1958 „ *are between perpetrators of damage persons, who didn't prevent to act which committed damage, if that persons had this obligation. Accepting of that instruction means, that accomplices for damage are members of a board of directors, who didn´t respond for members of*

directors who caused the damage, although they didn't do any activities contrary to law or contract themselves. The solidarity of responsibility will be applied in relation with that persons, who outraged."[13] The another members of board of directors cannot ignore these decisions of members of a board of directors , which caused damage to the company, but they have to take action against it. If they do not do that, they are responsible too, because it is not acting with appropriate diligence from their side.

Commercial Code of the Slovak republic allows, that company can renounce claims for damage compensation against the members of the board of directors, or make settlement agreement within three years from their formation, but only if general assembly agrees and if minority of stockholders ,whose nominal value of shares is at least 5 percent of capital, do not rise protest to the minute-book. In that case responsibility of member of the board of directors terminates. Here we can see difference between modification of termination of responsibility in criminal law, administrative law and private law. In criminal and administrative law responsibility of member of the board of directors finishes by death, while responsibility in private law does not finish by death, but it passes to heirs, who are responsible for dept at most to the amount of heritage. Thy only option for the heirs is waiver of heritage, but it is impossible only for the part of heritage, heirs have to waive all heritage.

CONCLUSION

Discharge of function of member of board of directors is inseparably related to responsibility for decisions, which he made during the function. Responsibility for caused damage does not finish by ending the function. Company can discover later, that authorized representative caused damage and his decisions were in contrary to principle of professional diligence and he did not represent interests of the company or its members . So it is correct, if members of a board of directors are responsible for the damage after ending function. But it is necessary to know, that responsibility for damage caused during the function is subject of statute limitation and in case that it is statute-barred claim, the right does not terminate, but it is weakened if member of a board of directors take the pleading the limitation statute.

BIBLIOGRAPHY

- Černá, S.: Obchodní právo. Akciová společnost. 3. díl, Praha: Aspi, 2006,
- Dědič, J., Štenglová, I., Čech, P., Kříž, R.: Akciové společnosti. 6., přepracované vydání. Praha: C. H. Beck, 2007,
- Eliáš, K., Bartošíková, M., Pokorná, J., a kol.: Kurs obchodního práva. Právnické osoby jako podnikatelé. 5. vydání. Praha. C.H. Beck citované z Dědič, J., Štenglová, I., Čech, P., Kříž, R.: Akciové společnosti. 6., přepracované vydání. Praha: C. H. Beck, 2007,
- Havel, B.: Obchodní korporace ve světle proměn. Variace na neuzavřené téma správyobchodních korporací. Auditorium. Praha. 2010,

13 Rozhodnutie Najvyššieho súdu Poľskej republiky sp. zn. I. CR 883/57 zo dňa 15. septembra 1958 inWalerjan, D., Żak, T.: Odpowiedzialność członków zarządu spółek kapitałovych. Oraz praktyczne sposoby jej organiczenia. Hogan Lovells. Difin. Warszawa 2010, str. 38

- Mazák, J. a kol. Základy občianskeho procesného práva, tretie, podstatne prepracované a doplnené vydanie. Iura edition. Bratislava 2007,
- Patakyová, M. a kol. Obchodný zákonník. Komentár. 1. vydanie. Praha: C. H. Beck, 2006
- Suchoža, J. a kol.: Obchodný zákonník a súvisiace predpisy. Komentár. Bratislava:Eurounion, 2007,
- Šilhán, J.: Náhrada škody v obchodních vztazích a možnosti její smluvní limitace. C. H. Beck, 2007,
- Štenglová, I, In Štenglová, I., Plíva, S., Tomsa, M. a kol. Obchodní zákonník. Kometár.10., podstatne rozšírené vydanie. Praha: C. H. Beck, 2005,
- Walerjan, D., Żak, T.: Odpowiedzialność członków zarządu spółek kapitałovych. Orazpraktyczne sposoby jej organiczenia. Hogan Lovells. Difin. Warszawa 2010.