

THE DUTY OF CARE IN COMPANY LAW IN POLAND

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Abstract: The liability of directors for failure to perform their duties in a lawful manner is based on general rules of civil liability, however with some modifications making it suitable for corporate application. The duty of care is considered as one of the major directives that must be followed by directors while executing their corporate duties. Polish company law provides for similar rules of directors' liability for violating duty of care in all types of companies. Over the last two decades, many judgements and authors have strived to determine the content of the duty of care and identify rules that could be useful to declare liability in certain cases. Currently, as amendments of applicable regulations are being processed, liability rules for violations of the duty of care in Polish company law shall become more unambiguous and effortless for application.

Keywords: company; duty of care; directors; management board; directors; liability; professional diligence; business judgement rule

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INTRODUCTION

Because of the division between assets' ownership and management in companies, the primary duty of directors is to manage the business affairs of a company. Company directors are expected to fulfil their duties with respect to the best interest of the company. However, they may not bear consequences of all impacts that would turn out to be negative. Polish company law provides for a special regime of civil liability of directors for a violation of their duty of care featuring a professional level of diligence that has to be performed by company directors. Apparently, Polish regulations in the questioned field are undergoing amendments that are focused on explicitly introducing the duty of care as well as aid to determine a lawful pattern of conducting business affairs by adopting the business judgment rule. This paper presents the legal concept of corporate duty of care in Polish law together with major viewpoints on its understanding that can be found in jurisprudence and legal literature.

PURPOSE AND BENEFICIARIES OF THE DUTY OF CARE

The duty of care in company law sets out the desired standard of performing duties by the directors. Hence, their capacities and role in conducting

a company's business, nature of the duty, and grounds for liability of directors are slightly different from the standard tort and contractual liability rules provided by civil law regulations.

Setting this autonomous specification is essential for at least two reasons. Firstly, provisions of law provide for the desired and expected level of diligence in conducting the business of a company by its managers. Secondly, duty of care is used for distinguishing between lawful and unlawful actions taken by managers, whereas the latter may lead to corporate, civil, and penal liability.

Trying to generally express the essence of the said duty, directors act accordingly with their duty of care if they use the best knowledge and all necessary information, act in good faith, and take actions to achieve the company's interests, especially by avoiding suffering any damages or losses by the company.¹ Failure to comply with the corporate duty of care that would negatively impact a company shall be recognised as a breach of a contractual obligation by directors and may result in consequent claims against them.

In order to maximize the efficiency of managing the assets of shareholders, the corporate duty of care provides for a professional level of diligence for directors, which is definitely above the standard level which is applicable under normal conditions in most legal relations. A professional level of diligence is recognised as having proper knowledge and experience by managers, as well as providing enough time and efforts to conduct company business. Managers shall also be aware of their limitations and weaknesses, therefore they shall seek support in decision-making processes provided by e.g., external experts and analyses. The same professional level of diligence is applicable to entrepreneurs while executing their obligations and assessing their contractual liability.²

The duty of care in Polish company law is definitely owed to a company. However, its indirect beneficiaries are shareholders as well as other stakeholders of the company whose interests are related in a derivative way to the interests of the company. Nevertheless, it is basically the company that is entitled to raise claims for a breach of duty of care obligation by its directors. The action may be invoked by the management board, yet it requires approval of shareholders,³ without which it would be considered null.

If a company would not claim for a compensation against a director who had breached their duty of care, any shareholder may invoke a claim on behalf of a company

¹ OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018.

² Article 355 § 2 of Civil Code (the Act of 23 April 1964, consolidated text: Journal of Laws of 2020, item 1740).

³ Article 228 pt. 2 and Article 393 pt. 2 of the Act of 15 September 2000 Commercial Companies Code (consolidated text: Journal of Laws of 2020, item 1526, further amended), further referred to as CCC, stating that “[i]n addition to other matters stipulated in this Division or in the articles of association, the following matters shall require a resolution of the shareholders: 2) decisions on claims for redress of damage caused upon formation of the company or its management or supervision”. Judgment of the Appeal Court in Katowice of 7 May 2013, V ACa 44/13; judgment of the Appeal Court in Wrocław of 12 April 2012, I ACa 1024/11; judgment of the Appeal Court in Warsaw of 30 August 2011, VI ACa 1273/10.

by means of an *actio pro socio* claim.⁴ In general, there are no provisions that would indicate the obligations of directors directly towards shareholders or other third parties, which would constitute the basis of their liability against company stakeholders. A minor exception may be where the insolvency law regulation that that constitutes liability of managers against company creditors for omission to fill for insolvency as soon as the company becomes incapable of repaying its outstanding debts.⁵

A COMPARISON OF DUTY OF CARE IN COMPANY LAW WITH SIMILAR DUTIES IN CIVIL LAW

The legal roots of the duty of care in Polish company law are of a similar nature to other European legal systems that have been based on fundamentals of the Roman legal culture. The corporate duty of care concept is based on the liability of persons who manage entrusted assets that are owned by third parties. Historically, it was developed in the Roman concept of *mandatum* and fiduciary legal relations (*pactum fiduciae*), where confidence in exceptional and professional capabilities as well as the reasonable decisioning of a person who would perform their obligations have major meaning. Moreover, usually no strict outcomes of performance may be anticipated at the time of establishing the obligation.

Currently the duty of care may be compared to other legal relations in two ways. The first one is related to legal institutions with common roots reaching back to Roman law and which are present currently in civil law. These include the relationship of mandate or carrying out someone else's affairs without a mandate (*negotiorum gestio*). Their adaptation took place, among others, in inheritance law (executor of the will,⁶ curator of the estate)⁷ and family law (management of child's property by parents).⁸

In a narrower sense, the problem of liability of persons managing foreign property for damage caused in connection with the wrongful performance of their duties is characteristic for other legal relationships in which a third party has the right (and obligation) to direct an entity or property related to conducting the business activity, which does not have legal capacity. Examples here include partners who manage the business affairs of partnerships,⁹ directors in cooperatives,¹⁰ succession manager of a natural

⁴ Article 295 § 1, Article 300¹²⁷ § 1 and Article 486 § 1 of CCC.

⁵ Article 21 sec. 3 of the Act Insolvency law of 28 February 2003 (consolidated text: Journal of Laws of 2020, item 1228).

⁶ Article 986 § 1 of the Civil code (act of 23 April 1964, consolidated text: Journal of Laws of 2020, item 1740).

⁷ Article 667 § 1 of the Code of civil procedure (act of 17 November 1964, consolidated text: Journal of Laws of 2021, item 1805).

⁸ Article 101 § 1 of the Family and guardianship code (act of 25 February 1964, consolidated text: Journal of Laws of 2020, item 1359).

⁹ Article 45 of the CCC.

¹⁰ Article 58 of the Act Cooperative law of 16 September 1982 (consolidated text: Journal of Laws of 2021, item 648).

person's enterprise,¹¹ administrative receiver in insolvency law,¹² and restructuring administrator in restructuring law.¹³

In case of company directors, the diligence standard is the highest and always remains at the professional level. In other cases of the above regulations, they do not indicate the measure of diligence, which may be ordinary or professional for succession manager, partners in partnerships, and managers of cooperatives. Administrative receivers and the restructuring administrators must provide for a professional measure of diligence, determined by the provisions on the competence requirements of persons performing these functions.

THE LEGAL GROUNDS OF CIVIL LIABILITY FOR VIOLATING CORPORATE DUTY OF CARE

As of February 2022, the legal concept of the corporate duty of care in Poland is undergoing slight changes which are focused on introducing an explicit obligation to perform duties with professional care by directors as well as a general pattern of their proper behaviour in the decision-making process. The traditional and current provisions of Polish company law that are applicable to a limited liability company and joint-stock company do not express explicitly the duty of care.¹⁴ Instead, this obligation is stated indirectly by the wording of provisions that set out civil liability of directors for damages caused to the company.¹⁵

Newly introduced in 2021, provisions on a simple joint-stock company expressly state the duty of care and duty of loyalty of directors¹⁶ as well as slightly modify their grounds of liability by introducing the business judgment rule, as explained further.¹⁷ Consequent changes to provisions of the Commercial Companies Code (CCC) on limited liability companies and joint-stock companies are being processed by the parliament and are supposed to come into force in Q3 2022. Hence, within a short-term, the duty of care regulations referring to all three types of companies (four types including European company) available in Polish law shall become unified and updated.

According to the most common opinion presented in legal doctrine and jurisprudence, the company law provisions on directors' liability are not standalone liability grounds, but they are based on and complete civil law regulations on contractual

¹¹ Article 33 of the act of 5 July 2018 on succession management of a natural person's enterprise and other facilities related to the succession of enterprises (consolidated text: Journal of Laws of 2021, item 170).

¹² Article 160 sec. 3 of the Act Insolvency law of 28 February 2003 (consolidated text: Journal of Laws of 2020, item 1228).

¹³ Article 25 sec. 1 of the Act Restructuring law of 15 May 2015 (consolidated text: Journal of Laws of 2021, item 1588).

¹⁴ OPALSKI, A. – OPLUSTIL, K. Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych [Failure to exercise due diligence as a premise of civil liability of managers of companies]. *Przegląd Prawa Handlowego*. 2013, No. 3, pp. 11–23. This is supposed to change as Article 209¹ § 1 and Article 3771 § 1 of the CCC will come into force on 13 October 2022.

¹⁵ Article 293 § 2 and Article 483 § 2 of the CCC, will come into force on 13 October 2022.

¹⁶ Article 300⁵⁴ of the CCC.

¹⁷ Article 300¹²⁵ of the CCC.

liability.¹⁸ Hence, legal elements of this liability are constituted of a behaviour (action or omission) of a director that was contrary to provision of legal norms or company statutes, losses suffered by a company, and adequate causal relationship between the unlawful behaviour and the losses. All the elements must be evidenced by the company claiming compensation, while the duty of care liability regulations of Commercial Companies Code provide for a presumption of fault.¹⁹ Therefore, a director must deliver proof that they have acted with professional diligence in case of an alleged violence of duty of care (reversed burden of proof).

THE PATTERN OF CONSIDERING BEHAVIOUR OF DIRECTORS UNLAWFUL

Primarily, unlawful behaviour of company directors may originate from a failure to comply with obligations (orders, prohibitions) expressed in legal acts aimed both at the company (e.g., tax, accounting, environmental, consumer, competition regulations) and the directors (e.g., duty of loyalty). Definitely the pattern of proper behaviour in question is not limited to company law regulations, but it comprises all regulations of applicable law.

Secondly, directors' behaviour leading to their liability against the company may be a violation of corporate regulations. They include not only company statutes, but also other internal regulations such as e.g., board's rules of operation, company's policies, or compliance regulations – if a duty to comply with them has been included in a company's statutes.²⁰ A common example of such may be executing a business decision

¹⁸ DUMKIEWICZ, M. – KIDYBA, A. *Komentarz aktualizowany do art. 1–300 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych* [Updated commentary to Art. 1–300 of the Act of September 15, 2000, Commercial Companies Code]. Warszawa: LEX/el. – Wolters Kluwer Polska, 2022, commentary on Article 293, pt. 2; OPALSKI, A. Commentary on Article 293, pt. I.A.3. In: OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018; STRZELCZYK, K. in: SIEMIĄTKOWSKI, T. – POTRZESZCZ, R. et al. *Kodeks spółek handlowych: komentarz. Tytuł III, Spółki kapitałowe* [Commercial Companies Code: Commentary. Title III, Companies]. Warszawa: Wolters Kluwer Polska, 2011; NOWACKI, A. *Spółka z ograniczoną odpowiedzialnością. Tom II, Komentarz: Art. 227–300 KSH* [Limited liability company. Volume II, Commentary: Articles 22–300 of the Commercial Companies Code]. Warszawa: C. H. Beck, 2021, commentary on Article 293, pt. I.4; SZCZUROWSKI, T. Commentary on Article 293, pt. III.B. In: JARA, Z. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 3rd ed. Warszawa: C. H. Beck, 2020; POPIOŁEK, W. in: STRZĘPKA, J. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 7th ed. Warszawa: C. H. Beck, 2015, pp. 1177–1178; OPLUSTIL, K. *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* [Instruments of corporate governance in a joint-stock company]. Warszawa: C. H. Beck, 2010, pp. 757–758; judgement of the Supreme Court of 10 November 2004, II CK 186/04; judgement of the Supreme Court of 24 September 2008, II CSK 118/08; judgement of the Supreme Court of 15 June 2005, IV CK 731/04; judgement of the Appeal Court in Warsaw of 19 April 2013, VI ACa 1342/12.

¹⁹ Article 293 § 1 *in fine* and Article 483 § 1 *in fine* of CCC.

²⁰ NOWACKI, c. d., commentary on Article 293, pt. III; OPALSKI, A. Commentary on Article 293, pt. II.B. In: OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018. A contrary view was presented by SZCZUROWSKI, T.

taken without shareholders' or supervisory board approval if such corporate governance requirement had been provided for in company statutes.

Directors of a limited liability company and a simple joint-stock company must additionally follow and execute resolutions of shareholders.²¹ They may include soft suggestions, expectations, or strict orders to take certain business decisions. Unless shareholders' resolutions would not include an order (expectation) that would be contrary to the regulations of applicable law, failure of directors to comply with the resolution may result in their liability. However, until a court verdict would declare a resolution to be void as contrary to applicable law, directors have to assume its validity and execute it.²² To avoid potential liability for breach of the duty of care, directors may claim for declaring a shareholders' resolution void.²³ Directors cannot only be obedient contractors, but must independently ensure that their activities are legal, thus following the shareholders' instructions or striving to meet their expectations does not exculpate directors from breaching the duty of care if they would consequently behave unlawfully.²⁴

On the contrary, a supervisory board may not express orders to directors on conducting business affairs of a company, neither in a limited liability company,²⁵ joint-stock company²⁶ nor in a simple joint-stock company.²⁷ A similar limitation applies to expressing orders by shareholders in a joint-stock company and European company.²⁸ Thus, directors do not have to follow such orders expressed in resolutions and would not be liable for a breach of duty of care in such case.

For a correct judgement of potential liability of directors, it may be relevant to analyse the allocation of duties between them that may be determined by company statutes.²⁹ A director shall act unlawful if they would fail to take care of company's business only within the field of assigned competence (e.g., financial affairs, technical issues, risk management etc.) – if such an assignment has been agreed in the company statutes or e.g., in a resolution on director's nomination. In the latter case, a director would behave unlawfully by violating a legal norm that orders directors to follow the resolutions of shareholders.³⁰ Directors may not decide themselves on the field of their competence and accordingly on the scope of their potential liability.

Commentary on Article 293, pt. V.B.d. In: JARA, Z. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 3rd ed. Warszawa: C. H. Beck, 2020. See also judgement of the Appeal Court in Szczecin of 30 March 2015, IACa 825/14.

²¹ Article 207 and Article 300⁵³ of the CCC.

²² Resolution of the Supreme Court of 18 September 2013, III CZP 13/13.

²³ Article 252 § 1 in connection with Article 250 pt. 1 and Article 425 § 1 in connection with Article 422 § 2 pt. 1 of the CCC.

²⁴ SIWIAK, T. Instytucja miernika staranności w przepisach regulujących odpowiedzialność członków zarządu wobec spółki z ograniczoną odpowiedzialnością w prawie niemieckim i polskim [Institution of a diligence measure in the provisions regulating the liability of management board members towards a limited liability company in German and Polish law]. *Folia Iuridica Universitatis Wratislaviensis*. 2016, Vol. 5, No. 1, p. 113.

²⁵ Article 219 § 2 of the CCC.

²⁶ Article 375¹ of the CCC.

²⁷ Article 300⁶⁹ § 2 of the CCC.

²⁸ Article 375¹ of the CCC.

²⁹ Judgement of the Supreme Court of 9 February 2006, V CSK 128/05.

³⁰ Valid for limited liability companies and simple joint-stock companies only – Article 207 and Article 300⁵³ of the CCC.

FAILURE TO ACT WITH PROFESSIONAL DILIGENCE

A professional level of diligence constitutes the element of fault, however, further unlawful behaviour of a manager has to be proved in order to determine civil liability. Hence, if a director fails to act with professional diligence, such omission itself may not be recognised as sufficient grounds for their liability. Also, acting with no professional diligence shall not be considered *per se* unlawful.

However, here we must recognise a distinction, which may be hard to see. Without conflicting the abovementioned consideration of a professional diligence standard for the duty of care concept, reckless conducting business affairs of the company may be recognised as unlawful by virtue of a dereliction of management duties originating from directors' role as company's board members. This issue is however troublesome on grounds of the Polish CCC and results in different opinions.

On one hand some authors believe that the duty of care should be perceived as a statutory element of the organizational relationship between directors and the company.³¹ Provisions of the CCC that define the basic competences of corporate bodies – and thus the obligations of the members of these organs – contain the implicit requirement of exercising them with due diligence at a professional level. The essence of the organizational relationship is to impose an order to proceed on the mandate with due diligence, which allows for the satisfaction of the company's interest as a creditor.³² Therefore, a breach of obligation to perform directors' duties with professional diligence is considered as unlawful and as such may constitute an independent basis for liability. The duties of a director result from Article 201 § 1 of the CCC and when deciding on the conduct of company's affairs, the manager should be guided solely by its interests, and culpable actions exceeding the limits of economic risk are contrary to the company's interest and violate the general order specified in Article 201 that justify the liability of a director pursuant to Article 293 § 1 of the CCC.³³ In other words, according to this concept, all activities of directors shall be executed with professional care – even though until Q3 2022 it had not been explicitly stated in the provisions of the CCC – and failure to execute a certain obligation with due care may be recognised as leading to a director's liability against the company. This viewpoint will be sustained after the completion of undergoing amendments of the CCC provisions on civil liability of directors for violation of duty of care.

On the other hand, there is another view shared by most of the Polish jurisprudence claiming that failure to act with due diligence “*resulting from the professional nature of*

³¹ OPALSKI, A. – OPLUSTIL, K. Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych [Failure to exercise due diligence as a premise of civil liability of managers of companies]. *Przegląd Prawa Handlowego*. 2013, No. 3, pp. 11 and further; OPLUSTIL, c. d., pp. 763–767; POPIOŁEK, W. in: STRZEPKA, c. d., p. 1178; NOWACKI, c. d., commentary on Article 293, pt. V.

³² OPALSKI, A. Commentary on the Article 293, pt. II.C.1. In: OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018.

³³ Judgement of the Supreme Court of 24 July 2014, II CSK 627/13. A similar view was presented in the judgement of the Supreme Court of 14 April 2016, II CSK 430/15.

his activity” (Article 293 § 2 of the CCC³⁴) does not qualify as an act contrary to the law or provisions of the company statutes. The measure of diligence indicated in Article 293 § 2 of the CCC is the fault criterion and its fulfilment is not a release from the obligation to separately establish the unlawfulness of the actions of a director. Thus, unlawfulness should be demonstrated by indicating a specific legal provision or company statutes that have been violated.³⁵

FACTORS DETERMINING PROFESSIONAL DILIGENCE OF DIRECTORS

Due to complexity and variety of cases it is impossible to precisely determine a desired way of managing business affairs of a company in a way that could serve as a valid pattern of professional diligence. Also, specific circumstances regarding the company in question such as e.g., its size or scope of business activity may influence the issue. Hence, only some typical and general guidelines applicable in some cases have been provided here by the Polish jurisprudence and authors. Furthermore, it has to be underlined that a partial solution for determining the proper attitude of company directors may be a business judgement doctrine which will be presented further in this paper.

The duty of company directors to act with professional diligence includes a presumption that they are considered as professionals in the field of managing business affairs of a company, even though they would not actually have proper education nor experience. Thus, taking up the duties of a director in the absence of appropriate education and knowledge or experience needed to conduct the company’s affairs should qualify as a breach of the required diligence.³⁶ The fact that a director does not have the necessary education or does not have sufficient knowledge of legal regulations may not exclude their liability for damages caused to the company. By agreeing to be appointed to the management board of a limited liability company, the director guaranteed having necessary skills to perform the entrusted post.³⁷

The Polish jurisprudence emphasises that although a lack of education, skills, or experience may not release directors from bearing fault and liability against the company, a precise description of their desired level and shape of education, skills, or experience

³⁴ Repealed since 13 October 2022 and substituted by newly introduced Article 2091 § 1 and Article 3771 § 1 of the CCC.

³⁵ Judgement of the Supreme Court of 9 February 2006, V CSK 128/05; judgement of the Appeal Court in Warsaw of 18 August 2011, I ACa 54/11; judgement of the Appeal Court in Łódź of 19 December 2012, I ACa 946/12; judgement of the Appeal Court in Białystok of 22 October 2014, I ACa 375/14; judgement of the Appeal Court in Kraków of 12 January 2016, I ACa 1413/15; DUMKIEWICZ – KIDYBA, *c. d.*, commentary on Article 293, pt. 6; SZCZUROWSKI, T. Commentary on Article 293, pt. V.B. In: JARA, Z. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 3rd ed. Warszawa: C. H. Beck, 2020; SIEMIĄTKOWSKI, T. *Odpowiedzialność cywilnoprawna w spółkach kapitałowych* [Civil liability in companies]. Warszawa: C. H. Beck, 2007, pp. 177–179.

³⁶ Judgement of the Supreme Court of 6 June 1997, III CKN 65/97; judgement of the Appeal Court in Łódź of 16 April 2014, I ACa 1157/13; judgement of the Appeal Court in Łódź of 15 January 2016, I ACa 1003/15; judgement of the District Administrative Court in Szczecin of 12 October 2017, I SA/Sz 471/17.

³⁷ Judgement of the District Administrative Court in Warsaw of 15 February 2021, VII AGa 763/19.

that would be valid universally or in the most common circumstances cannot be provided here. As a matter of fact, allegations of improper competence to deal with the business affairs of a company have to be confronted with a desired model of knowledge and skills *ad casum*.

Assuming that no one possess absolute and comprehensive knowledge – and also directors have to be aware of their limitations in that field – company directors shall seek professional advice provided by experts.³⁸ Failing to do so would be recognised as an inability to recognise circumstances correctly that would reveal a lack of professional diligence.³⁹ At the same time, it has to be also accentuated that the mere fact of entrusting a problem to a person dealing with it professionally and having an appropriate education is not tantamount to exercising professional diligence by directors. Possessing the competence to manage a company's affairs, they cannot shift responsibility for decisions made to a person subordinate to directors or acting on their behalf.⁴⁰ This concept remains true both for business decisions made on the basis of internal analyses drafted by a company's employees as well as opinions provided to company managers by external experts. Accordingly, opinions and analyses shall only be recognised as desired support measures in a properly conducted decision-making process and cannot substitute own assessment made by directors.⁴¹

BUSINESS JUDGEMENT RULE IN POLISH COMPANY LAW

Conducting business affairs of a company by its managers is associated with a possible risk of causing damage. From the point of view of their responsibility, it is of key importance to determine the scope of acceptable risk – bearing the amount of risk which is justified considering the diligence measure applicable to managers. Excessive protective measures against bearing potential liability would not be beneficial for a company and its economic owners as the company most likely would be less competitive compared to other enterprises, thus its profits would be lower. On the other hand, excessive risk would also not be appropriate – of course when, as a result of unwise overestimation of opportunities, the company's outcome on the business decision made would be different from the one assumed.⁴²

Because of the legal nature of duty of care, it is impossible to precisely describe the correct and lawful behaviour of directors in a certain case. In other words, application

³⁸ Judgement of the Supreme Court of 17 May 2016, II UK 246/15.

³⁹ Judgement of the Supreme Court of 2 April 2014, IV CSK 404/13.

⁴⁰ Judgement of the Appeal Court in Poznań of 11 October 2012, I ACa 336/12; judgement of the Appeal Court in Gdańsk of 29 July 2014, V ACa 781/13.

⁴¹ WAJDA, D. Jeszcze o należytej staranności członków zarządów spółek kapitałowych [More about the due diligence of members of management boards of companies]. In: BILEWSKA, K. – KREKORA-ZAJĄC, D. (eds.). *Wykonanie zobowiązań: księga jubileuszowa dedykowana profesorowi Adamowi Brzozowskiemu*. Warszawa: C. H. Beck, 2021, pp. 575–577.

⁴² OKOLSKI, J. – MODRZEJEWSKI, J. – GASIŃSKI, Ł. Odpowiedzialność członków zarządu w spółkach kapitałowych – miernik staranności [Liability of directors in companies – a measure of diligence]. In: NÓWICKA, A. (ed.). *Prawo prywatne czasu przemian: księga Pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*. Poznań: Wydawnictwo Naukowe UAM, 2005, p. 503.

of generally phrased legal norms in actual circumstances actually may not lead to unambiguous results and strict answers. As a result, directors are uncertain of the accuracy of their decisions in legal perspective and prone to bear future liability as the decisions would turn out to be unlawful and detrimental for the company. In order to protect directors against an excessive and unaccepted risk of bearing liability for damages caused to the company as a result of business decisions that have been made reasonably, a concept referred to as business judgment rule appeared in the legal doctrine and jurisprudence. It may be considered as “safe harbour” or “safe pattern” for directors in a business decision-making process, saving them from potential accusations of violating the corporate duty of care they should have obeyed.

When analysing the business judgment rule, it is clearly indicated that the centre of gravity of the assessment should be shifted from the effect of a decision to the process of reaching it. For example, we shall not assess the very fact of concluding the contract, which turned out to be unfavourable, but examine the process that brought the management board to signing the contract, i.e., proper analysis of financial situation of the contractor or introduced collaterals against non-performance of a contract.⁴³

Focusing on Polish company law, the business judgment rule concept initially appeared in 2005 in a soft-law recommendation of the Warsaw Stock Exchange titled *Best practices code for public listed companies*.⁴⁴ Also, company law doctrine raised interest on this approach and started to promote it. It has been acclaimed as compliant with in-force regulations and therefore many authors argued that it may be possible to use the concept even without its direct adoption into the CCC provisions.⁴⁵ Finally, the concept of business judgment was explicitly introduced in 2021, together with newly regulations of a simple joint-stock company. Consequently, parallel amendments have been adopted to provisions applicable to limited liability and joint-stock companies in February 2022.⁴⁶

The newly adopted provisions in question provide that a member of the management board, supervisory board, audit committee, and liquidators do not violate the obligation to exercise due diligence resulting from the professional nature of their activity, if, acting loyally to the company, they act within the limits of justified economic risk, including on the basis of information, analyses, and opinions that should have been taken into

⁴³ SIEMIĄTKOWSKI, *c. d.*, p. 183; FLESZER, D. Należyta staranność członków organu zarządzającego spółki kapitałowej [Due diligence of members of the management body of a company]. *Studia z Zakresu Prawa Pracy i Polityki Społecznej*. 2019, Vol. 26, No. 3, p. 286.

⁴⁴ “When taking decisions on the company’s matters, directors should act within the limits of justified economic risk, i.e., after considering all information, analyses and opinions that – in the reasonable judgment of the management board – they should, in a given case, be taken into account in the interests of the company.” (Komitet Dobrych Praktyk, Forum – Corporate Governance. *Dobre praktyki w spółkach publicznych 2005* [Good Practices in Public Companies 2005] [online]. Warszawa: Komitet Dobrych Praktyk, 2004, practice no. 33 [cit. 2022-05-20]. Available at: https://www.gpw.pl/pub/GPW/files/PDF/dobre_praktyki/dp2005.pdf).

⁴⁵ OPLUSTIL, *c. d.*, p. 786 and further; NOWACKI, *c. d.*, commentary on Article 293, pt. VII; OKOLSKI – MODRZEJEWSKI – GASIŃSKI, *c. d.*, pp. 505–506; SIEMIĄTKOWSKI, *c. d.*, p. 183; HOTEL, M. Modyfikacja zasad odpowiedzialności członków organów wobec spółki kapitałowej [Modification of the rules of liability of board members towards a company]. *Przegląd Sądowy*. 2015, No. 9, p. 85.

⁴⁶ The amendments will come into force on 13 October 2022 (the act of on amendments to the Commercial Companies Code and other acts of 9 February 2022, Journal of Laws of 2022, item 807).

account in making a careful appraisal under the circumstances.⁴⁷ This can be identified as a pattern of behaviour which is considered as compliant with the duty of acting with professional diligence, even though the aftermath may result in a loss to the company.

It can be clearly seen here that obeying the duty of loyalty constitutes a prerequisite of acting with professional diligence. Moreover, the legal norm is based on the general phrase of “justified economic risk”, which can be flexibly interpreted according to actual circumstances. However, the provisions in question also provide a kind of a guideline by considering gathering proper information, analyses, and opinions used for making a decision as proofs of acting with professional diligence and a desired pattern of a decision-making process. Nevertheless, their deployment *per se* may not be recognized as relieving directors from liability, as explained earlier.

So far, the Polish jurisprudence has rarely analysed opportunities to apply the business judgement rule in proceedings focusing on violating the corporate duty of care. In the Supreme Court verdict made in 2014, the court noticed that making decisions which are beyond normal and acceptable business risk violates the company’s interest and directors’ duties expressed in the Article 201 of the CCC, thus justify their liability against a company based on the Article 293 of the CCC.⁴⁸

A similar viewpoint has been expressed in a judgement of the Supreme Court made in 2018 claiming that it is possible that – when assessing the behaviour of a director who, in accordance with the Article 201 of the CCC, is obliged to behave in such a way that would not cause damage to the company – to recognize that in a specific situation it has exceeded the acceptable business risk and, therefore, violated the law.⁴⁹

In another judgment of 2018, the court also presented some arguments originating from the business judgement approach which also touched on the hindsight bias issue. On one hand, a director should strive to minimize costs and expenses of a company, in particular to avoid losses. On the other hand, they are obliged to use the company’s development opportunities as much as possible, in particular to use any marketing and image benefits, which gave real opportunities for a measurable increase in the demand for the products of the claimant’s enterprise. Thus, a director may be liable only if the decisions taken – assessed in the context of the entirety of management actions taken – were undoubtedly flawed, i.e., they were associated with the risk of disproportionately high damages and more probable damages in relation to the amount and probability of obtaining the expected benefits. A potential violation of professional diligence shall be assessed *ex ante*, i.e., taking into account the state of affairs existing at the time when the decisions was made and directors’ state of consciousness at that time, not taking into account the events that took place later.⁵⁰

Amendments of the CCC made in 2021 and 2022 that have introduced the business judgement rule as a pattern of professional diligence will raise further discussion on its exact meaning for determining the boundaries of civil liability of directors under provisions of the Polish company law.

⁴⁷ Article 293 § 3, Article 300¹²⁵ § 2, Article 483 § 3 of CCC.

⁴⁸ Judgement of the Supreme Court of 24 July 2014, II CSK 627/13.

⁴⁹ Judgement of the Supreme Court of 9 February 2018, I CSK 246/17.

⁵⁰ Judgement of the Appeal Court in Kraków of 29 May 2018, I AGa 192/18.

SUMMARY

The corporate duty of care in Polish company law has not been explicitly provided for by earlier regulations of the CCC. Although its validity has not been denied, its legal source was questionable and seen partially in general provisions related to directors' duties and partially in provisions related to their liability for acting without professional diligence. The latter definitely have to be linked with the general rules of contractual liability as they share basically the same legal concept. Major differences include an elevated level of diligence which is expected from directors while executing their duties and a shifted burden of proof which facilitates company claims in cases of an alleged violence of duty of care. In most cases determining whether a director has acted lawful or unlawful does not raise problems. However, to find grounds of their liability, lack of professional diligence must be further evidenced. Although it is not feasible to provide an exact manner of proper behaviour that would constitute a positive wording of duty of care, Polish jurisprudence and legal authors have managed to develop some general guides that may be used for understanding professional diligence. Hopefully amendments to the CCC newly adopted in 2021 and 2022 will contribute to a clearer perception of duty of care and professional diligence in Polish company law.

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