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**Status prawny dyrektora prostej spółki akcyjnej – próba
wkomponowania monizmu organów spółek do polskiego systemu
prawa /**

**Legal status of the director of a simple joint-stock company - an
attempt to incorporate the monism of corporate bodies into the
Polish legal system**

STRESZCZENIE PRACY /

ABSTRACT

The purpose of this dissertation is to present the topic of the monism of bodies as a model of corporate governance of companies, on the example of the board of directors of a simple joint-stock company (P.S.A.) governed by the provisions of the Polish Code of Commercial Companies and Partnerships (k.s.h.). The subject of the paper concerns the possibility of incorporating monism into company law, as well as into a broader spectrum of provisions governing the duties and principles of responsibility of persons in charge of performing management and supervisory functions within a commercial company. Therefore, the thesis is of cross-cutting nature and is related to various elements concerning the performance of the function of a director of a simple joint-stock company. The essential part of the dissertation is an analysis of the legal status of a director as a member of a mixed competence body, and assessment of adaptation of provisions of the Act of 19 July 2019 amending the Commercial Companies and Partnerships Code (the amending act). No extensive literature exists on the functioning of the board of directors within the P.S.A. and the status of a director, as those are completely new subjects, although it is noticeable that the literature in this area is developing at a rapid pace. Nonetheless, the greater focus of doctrine

concerning the P.S.A. has been on issues other than the board of directors, particularly those related to the possibility of functioning of a company having no share capital. Therefore, the number of papers dedicated only to directors and their legal position is insignificant, which determined the choice of this paper's subject.

Although monism is a novelty on the grounds of the k.s.h. one cannot lose sight of the fact that significant part of the regulations governing the functioning of directors is modeled on the regulations governing management board as well as (to a lesser extent) supervisory board of a limited liability company (sp. z o.o.) and joint-stock company (S.A). That being the case, some of the conclusions expressed in the literature and case law, which have been formulated on the grounds of commercial companies other than the simple joint-stock company, are applied accordingly in this dissertation. This application, however, even in the face of identical provisions, always takes into account the mixed nature of the board of directors' powers, together with any conclusions derived from that nature.

The main objective of the thesis is to answer the following questions - are the provisions of the k.s.h adequately and clearly adapted to the possibility of establishing a commercial company with a unitary structure of its bodies? Can monism function successfully within the Polish legal order? Was companies and partnerships law, as well as other areas of law, adequately adjusted by the amending act to allow malleability of companies, in particular, is the division of rights and duties of executive directors and directors that are not executive (so-called non-executive directors) clear in light of amended provisions? The delegation of tasks within the body, as a completely new solution on the grounds of the k.s.h., generates a number of questions about the status of non-executive and executive directors, such as recognition of the obligation to file a bankruptcy petition of P.S.A. and possible liability in the event of ineffective enforcement procedures against the company, being subject to non-competition towards P.S.A. or the scope of representative powers of the office holder, which has been entrusted with the supervisory function. These questions may be summed up in a laconic question of great practical importance - can monism, as a model of forming commercial company's bodies, function effectively in the Polish legal system?

In order to answer the questions presented hereinabove, the thesis analyzes not only the provisions of the k.s.h. governing the functioning of directors and the board of

directors, but also other acts that may apply to directors, in particular the bankruptcy law, the tax ordinance, the accounting act, or the criminal code.

As a consequence, the subject matter of this paper is to analyze the legal status of a director being a member of a mixed-competence body, as well as to evaluate the adaptation of the provisions of the amending act, and to answer the questions contained in the previous paragraph.

The dissertation is divided into five substantive chapters. The introduction, which signals the topic of the paper and the questions posed, and the conclusion, which is a summary as well as an attempt to answer the questions posed, are separate chapters. General issues concerning both monism and dualism, as well as the P.S.A. model and the directors are outlined first. The issues analyzed in this chapter are a starting point for assessing the status of a director. As a consequence, the second chapter contains a description of the monistic system and the dualistic system, together with an assessment of the dualistic model, which is well established in Polish commercial companies law, while the description of the foundations of monism on grounds of P.S.A. is described later in the chapter. The chapter contains an analysis of amendments to the acts introduced as part of the amending act and an indication of practical problems connected with monism.

The second substantive chapter (Chapter III) strictly concerns the powers of a director in light of the k.s.h., which governs their rights and obligations in a two-pronged manner, namely through general provisions concerning members of P.S.A. bodies. (Articles 300⁵²⁻⁶¹ k.s.h.) and provisions relating exclusively to the Board of Directors (Articles 300⁷³⁻⁷⁹ k.s.h.). This chapter, based on an analysis of the provisions of the k.s.h. regarding the P.S.A. directors and their comparison with the provisions of the limited liability company and the S.A., is crucial and the most extensive, because it directly touches upon the status of directors on many levels and their relations with shareholders and possible commercial attorneys of the company. It provides an overview of the powers, authority, and duties of the directors including the possibility of modification thereof by the articles of association, as well as an overview of the directors' relationship with the company. The description of a director under the k.s.h. will be discussed, such as the method of appointing members of the body, the principles of representation, the relationship with a possible commercial attorney of the P.S.A, the rules of managing the company's affairs, particularly in the context of the

internal division of powers and the separation of executive and non-executive directors, a description of the director's mandate with the permissible limitations of his powers, a description of the relationship of directors with the general meeting, particularly in the context of their subordination to the resolutions of the ownership body and the institution of binding instructions and a resolution to grant discharge, as well as issue of director's obligations introduced *expressis verbis* in the k.s.h. in the form of a requirement to exercise professional diligence, a requirement to act professionally, or a ban on actions contrary to the company's interest.

The third substantive chapter (Chapter IV) contains a description of the position of a director in other acts which are relevant to the exercise of the mandate of a member of the P.S.A. board of directors. The analysis will be made with particular reference to the position of directors in the event of a division of powers under Article 300⁷⁶ k.s.h. Specifying a complete catalog of duties related to the exercise of a mandate would be extremely difficult and the choice of laws, and consequently the duties of directors, has been limited to the most important issues related to the exercise of a mandate. The position of director is approached in the context of:

- a) personal liability of a body member for tax arrears of a simple joint-stock company in the light of the Tax Ordinance;
- b) the obligation to file a motion for declaring bankruptcy of P.S.A., pursuant to Article 20 sec. 2 item 2) in connection with Article 21 sec. 2 of the Bankruptcy Act, if the prerequisites of the obligation to file a motion arise;
- c) responsibilities of the head of the unit contained in the Accounting Act;
- d) the possibility of committing the crime of abuse of trust in the light of Article 296 of the Penal Code.

Another issue, separate from the substance of the director's duties, is the question of qualification of the director's remuneration in terms of income tax, which for practical purposes is also described in that chapter. The chapter also aims to zoom in on the status of the director in the context of selected legal regulations and to show the problems arising from the inconsistency of the introduction of monism with the provisions of the amending act, which has failed to foresee some of the consequences of the introduction of a mixed competence office holder into the legal system.

The fourth substantive chapter (Chapter V) deals with international issues. It compares the monistic model functioning in other countries (England, France, and the United

States of America) with the model provided for in the k.s.h. Additionally, a description of the administrative council of the European company is given, which is an element of Polish law, but due to the fact that the act defining the European company is an effect of unification of law in the context of the EU law, it has a cross-border element in it. This chapter is of a comparative nature and aims to decide whether the board of directors in P.S.A. is, in principle, a repetition of solutions existing in foreign legal systems or whether it is a slightly modified model due to the need for adaptation to k.s.h., as well as to other legal acts comprising the Polish legal system.

The last substantive chapter is devoted to the widely understood liability of directors under the k.s.h. It analyzes both the compensatory liability and the criminal liability under the provisions of Title V of the k.s.h. The chapter outlines the legal basis for directors' compensatory liability under Chapter VI Section IA of the k.s.h. (civil liability - Articles 300¹²³ - 300¹³⁴ k.s.h.), in particular, the liability of directors described in the general damages provision referred to in Article 300¹²⁵ of the k.s.h. and the possible liability of a director in case of ineffective execution against the company (Article 300¹³² k.s.h.) is analyzed. The subject of civil liability raises the need to assess the limits of narrowing such liability on the basis of internal regulations of the company, which consequently forces the assessment of the same issue within the board of directors. As this liability is similar to the liability of management board members of limited liability company and joint-stock company, the assessment is made with appropriate use of conclusions drawn from the extensive case law and literature developed in relation to the liability for damages of management board members of commercial companies. Assessment of the criminal liability of a director under Title V of the k.s.h is a separate issue. A substantial part of the regulations governing the liability of governing bodies' members was designed in view of office holders having exclusively managerial powers, which makes it necessary to analyze the scope of liability of directors entrusted with supervisory functions.

Such division of topics, in the author's opinion, allows to answer the question being the most important issue of this thesis, that is the possibility of incorporating the monism of corporate bodies into the Polish legal system.

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