

„Liability for damages of actual board members of the company and its creditors”

The practice of exercising the powers inherent in the board of directors of a capital company by persons who have not been appointed to the board, whether due to a defect in the nomination act or lack thereof, is present in business - both domestic and foreign.

The category of actual board members is distinguished at the level of normative acts or in jurisprudential practice in most EU countries. There is also discussion of this practice in foreign literature.

The practice of management of companies by persons who are not members of the management board should be assessed negatively, primarily because its element is the transfer of key, from the perspective of the company's functioning, competencies to entities that make decisions under conditions of lack of risk of bearing the consequences for them - both on the property and non-property level (mainly image). This state of affairs generates the so-called moral hazard, which may ultimately result in damage to the company, its shareholders or creditors.

At the same time, the practice in question contributes to lowering the level of protection of creditors of capital companies. This is because it leads, among other things, to the marginalization of legal regulations aimed at strengthening the protection of the subjects in question. The importance of the regulations in question is diminished, in particular, by appointing as a member of the management board a person who is a so-called "pillar" - i.e. an entity with no assets from which the creditors of a capital company could satisfy themselves.

The existence of the effect of the practice in question in the form of damage to the company or its creditors implies the question of the possibility and manner of its indemnification.

The starting point for consideration will be a presentation of how the concept of actual board member is shaped in the British legal order. The analysis of the manner and ratio of its functioning will not only allow us to formulate conclusions as to the legitimacy and scope of the implementation of British solutions in the Polish legal order, but will also affect the distribution of accents as to the issues raised in the remaining chapters.

Thus, Chapter I will deal with such issues as: the concept of a board member in British law, the definition and scope of de facto board member liability, the definition and scope of shadow director liability, the differences between the concept of a de facto board member and the concept of piercing liability.

The subject of consideration in Chapter II will be the justification of the functioning in the Polish legal order of the concept of actual board members and the construction of a doctrinal definition of a actual board member under Polish law.

The justification of the functioning of the concept of de facto board member in the Polish legal order will be largely related to its purpose. It will therefore boil down to a discussion of:

- 1) key elements of the phenomenon of actual board members and expose their negative consequences;
- 2) selected structural principles of capital companies, with the aim of highlighting the contradiction of the phenomenon of actual board members with these principles;

- 3) current contexts: social, axiological and economic, relating to capital companies, which will show the contradiction of the phenomenon of actual board members with these contexts;
- 4) the consistency of the concept of actual board members with the security of trading.

At this stage, the use of the concept of actual board member will refer to the empirical aspect of the phenomenon.

For the purpose of justifying the functioning of the concept of actual management board member in the Polish legal order, I adopt the perspective of the existence of the phenomenon of actual management board members in business, without at the same time applying the exegesis of legal facts in a way that could counteract it (i.e., to include actual management board members in the hypothesis of regulations that could be the source of their liability for damages). In the case of the provisions of the Companies Act and the Bankruptcy Act, the considerations will be based on the assumption that to rely on the directives of linguistic interpretation, with regard to the provisions governing the liability of board members, is in fact tantamount to allowing the phenomenon of actual board members to "operate". Such a point of view is related to sharing the position that indemnification liability mechanisms have a preventive and mobilizing function and are capable of counteracting this phenomenon.

Next, the definition of an actual board member will be constructed. Within its framework, the element of exercising the powers inherent in board members will be highlighted. In this regard, the considerations will include such issues as: presenting the definition in question at a general level, pointing out the possible ways of exercising actual management *de lege lata*, discussing the types of actual board members, explaining how to interpret the phrase "exercise of powers inherent in board members."

Given the lack of a legal definition of actual board member, the following discussion should undoubtedly be considered in terms of a doctrinal definition.

The order of consideration is due to the fact that the definition of actual board member is an element of the actual board member concept. The wording of the definition has a direct impact on the degree to which the purpose of the concept, which is to prevent the occurrence of the phenomenon of *de facto* board members (by introducing appropriate liability rules), is achieved. Therefore, it is not appropriate to construct a definition of actual board member before justifying the functioning of the concept of actual board member in the Polish legal order. The discussion of this issue will, at the same time, affect the content of the definition, including, in particular, the decision to use indefinite phrases or general clauses (which require recourse to non-legal criteria) when constructing it. The considerations in question will also be important from the perspective of how to interpret it.

At the same time, consideration of the justification of the functioning of the actual concepts of board members in the Polish legal order will be useful from the perspective of proving the thesis of the legitimacy of giving primacy to the purposive interpretation, the restoration of the values preferred by the legislator (which requires an analysis of the social, political or economic reality in which the interpreted provision operates), determining the content of general clauses, including the nature of the capital company and the principles of commercial integrity.

The subject of Chapter III is the analysis of the possibility of applying the rules of exegesis, specifically, the directives of purposive interpretation, the directives of systemic interpretation

and inference per analogiam in relation to the provisions of the Companies Act and Insolvency Act regulating the indemnity liability of members of the management board of capital companies.

First of all, selected provisions of the Companies Act and Insolvency Act will be analyzed.

Then the issue of giving primacy to the directives of purposive interpretation over the directives of linguistic interpretation will be discussed, in the context of actual board members.

The considerations will be aimed at demonstrating that the phenomenon of actual board members should be considered in terms of obvious contradiction to the values accepted by society at large, and this is due to the current, particularly negative, perception of behavior involving, in simple terms, the improper use of privileges arising from the construction of a capital company, which is precisely what this phenomenon is characterized by.

Both in the case of the application of the directives of purposive interpretation and inference per analogiam, an important role will be played by the established current social, axiological and economic context in relation to the issue at hand, which was discussed in Chapter II.

At the same time, it should be noted that in order to be able to associate legal consequences with any fact as a result of inference per analogiam, it is necessary to make assumptions of a value-oriented nature. A discussion of the axiological context is also a necessary part of the process of applying the said inference.

Chapter IV addresses the bases of liability of actual board members under the Civil Code. From the perspective of the possibility of liability under the contractual regime, article 753 of the Civil Code and article 471 of the Civil Code et seq. were discussed. Attention was also paid to the breach of the duty of loyalty by shareholders. Under the tort liability regime, the provisions of article 415 and article 422 of the Civil Code will be analyzed, taking into account the prerequisites for the actual liability of board members. It is worth noting that the lack of an unambiguous regulation on the subject of the liability for damages of actual members of the board of directors results in the need to search for available grounds for liability in Polish law, or possibly a concurrence of these grounds. The discussion of the regulations in question should be treated precisely in these terms. This means that the choice of application of a particular one depends on the preference of the subject.

Finally, *de lege ferenda* proposals for regulating the indemnity liability of actual board members will be presented.