


Interest of the Company- the Discussion on Axiological Choices

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Abstract: The obligation to act professionally and loyal to the managed corporation is a statutory component of the organizational relationship and expresses the essence of these bonds and the sense of entrusting the values of the company to these hubs for the purpose of its proper management. The sources of the administrator's duties cannot be limited to respecting statutory injunctions and prohibitions, since they designate only border points. They do not constitute a casuist regulation of all situations. Assuming the legislator's praxeological and axiological rationality in the process of legislating, it would be necessary to involve a lack of due professional diligence on the basis of civil law liability. However, most courts, as well as the majority of the representatives of doctrine, do not recognize the basis of this responsibility in the mere failure to observe the standards in question, regardless of the seriousness of negligence or inefficiency in the exercise of functions.

1. Introduction

The concept of the company's interest¹ cannot be considered in isolation from the objectives of the company, the principles of cooperation of members of

¹ It is perhaps the only mention of one a most relevant fact in all of the deliberations about problems of contemporary company law (on 13 Summit of Polish academic commercial law departments' lawyers, the John Paul II Catholic University of Lublin 2022). In the book:

the corporate bodies in order to achieve them², as well as respecting the requirement of loyalty in the exercise of competence by board members and shareholders. The initial and crucial construction in commercial company law, which is difficult to overestimate, is the interest of the company, and therefore the correctness of its definition and the indication of the value associated with the need to safeguard it must be given a particular role³. The nature of the company is best reflected in its functional definition in the contract-based relationship, since, by the agreement of a commercial company, the shareholders undertake to pursue a common objective by making contributions and, if the agreement or statute so constitutes by cooperation in another specific way. Since cooperation to achieve a common goal takes place through the obligation to make positive contributions, this duty should also be accompanied by the need to refrain from acts or omissions which will prevent the attainment of a common goal.

2. Attempts to define the concept

Attempts⁴ to define the concept in question should be focused on reading the interest of a particular company, taking into account in this process a number of variables⁵. It would be doubtful to match such a universal definition to companies in which conflicting interests of shareholders often cross. However, developing a flexible, juridical and doctrinal general concept of the company's interest focused on the specifics and objectives of the corporation is in all measure desirable. Thanks to the vague and appreciable

Due professional diligence of a member of the management board of a capital company (Warsaw: Wolters Kluwer 2020) took into consideration the author's a wide-ranging context of the functioning of the law.

² In the interests of clarity and rationality law should be codified, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 46–127, consolidated version 12 August, 2022.

³ More broadly Tadeusz Rowiński, *Legal interest in civil law and non-trial proceedings* (Warsaw: Legal Publishing House, 1971), 9.

⁴ Michał Romanowski, "Nature of the company as a determinant of its system and functions of its authorities — several reflections," in *Effectiveness of management and supervision in a commercial company in search of an optimal model of the company's system*, ed. Katarzyna Bilewska (Warsaw: Wolters Kluwer, 2018), 73.

⁵ See the arguments in this respect provided by the Polish Supreme Court, Judgment of 8 March 2005, Ref. No. IV CK 607/04, Legalis 254158.

language elements of the return of the company's interest and to a large extent the open formula of company law, it is possible to adapt the existing concepts to the changing conditions of their reading.

3. The value of the company's good

The value of the company's good is one of the basic interpretative criteria for the exercise of rights and obligations by shareholders. The interest of the company is an instrument for resolving conflicts between competing values protected by the legal order. This is important for the process of interpreting the desired standards for the performance by board members of the tasks entrusted to them in accordance with the requirements of professional diligence. Managers enjoy a relatively high degree of autonomy and ability to act independently when making decisions binding on the company regarding the management of the funds entrusted to them⁶, while the economic owners bear the risk of failure.

4. The guiding principles

The guiding principles set out in commercial law protect the interests of the company in its pursuit of economic goals. In practice, there are different forms of capital companies and the accompanying differentiation of objectives, preferences and ownership structure, for example in a configuration in which strong management boards, de facto controlling the company, collide with a weak, distributed shareholding⁷, unable to exert a significant influence on the day-to-day management and strategic decisions of the said body. Therefore, in many cases, it will be necessary to balance the individual interests involved, in particular the interests of the majority shareholders, with the interests of small shareholders⁸, including disputes concerning the

⁶ Company managers, incl. in France, are jointly and severally liable with independent company auditors Jacques Mestre, Marie-Ève Pancrazi *Droit commercial* (Paris: LGDJ, 2001), 285.

⁷ A joint-stock company is distinguished by the fact that the merger of capital managed by the company's hubs, Stanisław Sołtysiński, "Commentary on Articles 301–490," in *The Commercial Companies Code*, vol. 3, ed. Stanisław Sołtysiński, Andrzej Szajkowski, Andrzej Szumański, Janusz Szwaja (Warsaw: C.H.Beck, 2013), 10.

⁸ Against this background, it is worth noting the judgment of Polish Constitutional Tribunal, Judgment of 21 June 2005, Ref. No. P 25/02, Legalis 69111, in which the Court, juxtaposing the interests of majority shareholders with minority shareholders in the exercise of forced

further strategy of the undertaking by spreading over several years the development of corporations⁹, conferring a measurable economic advantage and abandoning part of the profits to dividends¹⁰.

5. Is there only value maximization?

The consideration of the concept of the company's interest is intrinsically accompanied by a dispute, particularly in the doctrine of whether there is an interest separate from the interests of its shareholders. The indicator of the company's interest is not to compare the particular interests of the partner with that of the company, but to weigh the interests which merit legal protection¹¹. The common goal of the shareholders is, as a rule, to maximise its value¹². The key position in the company is held by the shareholders (shareholders). The separation of management from ownership is aimed at countering the abuse by members of the board of directors of their powers to manage the corporation as well as to seek a balance between axiological values personalised in the company. Looking for an axiological and praxeological justification for constructing the optimal formula of the company's

buy-out institutions, took into account the guiding interest of corporations to conduct effective economic activity. See also separate sentences to this judgment. For example, the Supreme Court noted in the facts examined that it is not correct to take the view that the exclusion of the possibility of taking an action for determination is detrimental to the interests of minority shareholders. Polish Supreme Court, Judgment of 20 January 2022, Ref. No. III CZP 17/22, Legalis 2651586.

⁹ Jakub Zięty, *Powers of shareholders of Polish public companies in the light of Directive 2007/36/EC* (Warsaw: C.H.Beck, 2015), 52.

¹⁰ See also, for example, on dividend payment policy, CJEU Judgment of 1 August 2022, Case C-352/20, ECLI:EU:C:2022:606.

¹¹ According to Jan Stranz (On the need for an objective interpretation of the company's interest, MOPH 2021, No. 4, in fine), decoding of the company's interest should be based on an objective concept that guarantees a uniform interpretation of the company's interests for each partner, regardless of the particular interests of the other shareholders at a given time. On the other hand, (The significance of the dispute over the method of interpreting the concept of 'interest of a capital company', PPH 2015, no 7, 11), the phenomenon of a capital company as a certain legal concept means that its nature is permeated by contractual and institutional concepts, so that the interest of a capital company cannot be considered objectively and abstractly in isolation from the search for the will of its shareholders who seek to satisfy their subjective interests.

¹² Krzysztof Oplustil, *Corporate governance instruments in a joint-stock company* (Warsaw: C.H.Beck, 2010), 173 et seq.

interest, there is no basis for constructing a separate interest of the company as a legal person, that is to say, its definition of its central position in the company's shareholders¹³.

6. A compromise by valuing

The interest of the company is the resultant of the interests of all the members, determined by the purpose specified in the articles of association which they have undertaken to pursue¹⁴. This centering should be understood as the assumption of reaching a compromise by valuing, balancing rights, values and principles. The balancing process may concern only the legitimate interests of members, i.e. both majority and minority shareholders, in order to resolve disputes between individual interests protected by law by giving priority to one of them in the circumstances. As a result of the permanent conflict between the groups of shareholders, a significant problem may arise of the inability to achieve the assumed objectives and the further functioning of the corporation.

7. Political, social and economic changes

Political, social and economic changes, the challenges of modern times related to technological development and innovation, taking place in the global space, determine that the concept of the interest in question is increasingly perceived in a broader scope, by including the protection of stakeholders, i.e. through the prism of exposed axiological components of law. The proper formation of corporate governance is based on the assumption of a reinterpretation of the concept of the interest of a company by including in it the implementation of social tasks, which are part of the formula of socially

¹³ On the attempt to "balance" the interests of the parent company with that of the subsidiary, Kamil Szmid, "Several comments on the amendment of the Commercial Companies Code," *MOPH*, no. 4(2021): 13–21 remarks on the background of distinguishing the concept of interest of a group of companies.

¹⁴ Judgment of Polish Supreme Court, Judgment of 5 November 2009, Ref. No. I CSK 158/09, OSNC 2010, no 4, item. 63, Paweł Mazur, "The New Paradigm of Corporate Governance. Global trends in the discussion on the interests of the company and their possible impact on Polish law," *PiP*, no. 7(2022): 126. More Anna Maria Weber, Zofia Mazur, Aleksandra Szczęsna, "Sustainable Corporate Governance – Direction for the Evolution of Polish Company Law?," *PPH*, no. 6(2022): 20 and next, also quoted literature; Anna Maria Weber, Zofia Mazur, "Sustainable Corporate Governance All'Italiana," *PPH*, no. 10(2022): 30.

responsible business¹⁵. The implementation of the function of responsible business translates into corporate image assets. Attention is drawn to the growing role of the so-called soft regulations in creating a flexible concept of the interest of modern companies, including defining with them the determinants of the very concept of the company's interest by taking into account the broader social context in the defining findings.

8. The legislator axiological preferences

In many regulations, the legislator expressed consistent axiological preferences. It remains open to the extent to which the normative references to the interest of the company constitute a potential standard for securing the guiding role of this structure in the overall substantive and procedural mechanisms for the proper functioning of the corporation and, consequently, the protection of the good it constitutes. The legislator places the interest of the company within the general framework by imposing injunctions and prohibitions to the extent that it deems necessary detailed arrangements. The interest of the company is, for example, one of the grounds for an action for the annulment of the resolution of the shareholders' meeting, the protection of the interest of the company is also dictated by the obligation of a member of the management board to refrain from participating in the resolution of cases in the face of a conflict of interests, if it is exceptionally in the interest of the company to deprive shareholders of the pre-emptive right, and the safeguarding of the interests of the merging companies is served by the provisions of the Polish Commercial Companies Code. The protection of the interests of the company may therefore constitute a principle of commercial law, which protects the effective in the legislative assumption of counteracting in practice the phenomena of distortion of the mechanisms of a capital company.

¹⁵ On the change of the paradigm of corporate governance in Anglo-Saxon countries, Paweł Mazur, "The New Paradigm," 116 et seq., along with the established literature of the subject and judicature. Sophisticated producers and consumers of such metrics should be interested in these new mechanisms that permit parties to contract out of the duty of loyalty in order to provide a complete picture of governance arrangements, Gabriel Rauterberg, Eric Talley, "Contracting out of the fiduciary duty of loyalty: an empirical analysis of corporate opportunity waivers," *Columbia Law Review*, vol. 117. January 2017): 32.

9. The role of a compass

The company's interest plays the role of a compass for the addressees of the law in making axiological choices. It constitutes a model, that is to say, a criterion of assessment, both of the activities of the shareholders and of the members of the boards of the company and of their mutual relations¹⁶. The legal return of the company's interest deserves an in-depth reflection within the legal discourse, which may constitute a contribution to changes in the law. It appears to be a particular obstacle to the opportunistic behaviour of some privileged groups, a specific legal and factual situation in the company vis-à-vis less favourable entities¹⁷. Manifestations of such activities are seen in three types of conflicts, i.e. between the members of the management board (also the supervisory board) and the shareholders, within the shareholders themselves and in relations with the company of persons associated with it. A member of the management board shall act autonomously within the limits of the powers conferred on him to manage and represent the company. At the core of the relatively wide-ranging normativeness of its independence lies the credit of trust of the shareholders of the company reducing transaction costs¹⁸. The lack of this trust would deprive the economic owners of the business relationship.

10. The consistent axiological preferences

Consistent axiological preferences to protect the interests of the company as a fundamental value can only be said if the principle of co-playing with each other deserving the legal protection of the interests of shareholders, or at least taking measures to reduce the costs of internal conflicts, is sufficiently taken into account. The construction of the relationship of particular trust which we are dealing with is the requirement of loyalty to the members of the board of directors, which is an emanation of their legitimate interests of

¹⁶ Adam Opalski, "On the concept of commercial company interest," *PPH*, no. 11(2008): 17.

¹⁷ Look at Kamil Szmid, *Nature of a joint-stock company as a delimitation of the principle of freedom of contract in Polish and American law* (Warsaw: C.H.Beck 2015), 21 et seq.

¹⁸ Trust is essentially combined with the reasonable expectations of entities that base contracts or other activities on this basis. More broadly Piotr Machnikowski, *Legal instruments for the protection of trust in the conclusion of a contract* (Wrocław: Publishing house of the University of Wrocław, 2010), 59 et seq.

protecting the company's interests¹⁹. It should be noted here that the principle of loyalty towards a company also binds shareholders²⁰. The literature of the subject assumes the existence of a universal duty of loyal conduct of members of the boards of a company²¹, defined as a duty of honest conduct and in accordance with the good customs of conduct²². The imperative of acting in the interests of the company cannot be limited to the statutory obligations of the board members, which are, moreover, generally defined in the Commercial Companies Code.

11. Loyalty?

Loyalty as a fundamental axiological value is to uphold the effective safeguarding of the correctness of the relations between the members of the body in question and the ownership body, which is identified with the interests of the company. This position is consistent with the views of doctrine. The basic measure of integrity, management and supervision of the company concerns entities whose professionalism is to be characterised by professionalism in relations of the type²³ in question, and it is combined with the

¹⁹ Hence, inter alia, the conflict of interests should be understood as a potential threat to the interests of the company related to the personal ties of a member of the management board, Andrzej Szumański, Stanisław Włodyka, *Commercial Companies Law* (SPH T.2A, Warsaw: C. H. Beck 2019) see point 12.6.1.6. Contradiction of interests.

²⁰ Due to the title of the study, it omits no less interesting issues of the duty of loyalty of shareholders and shareholders in the corporate relationship of the company, including their loyalty as a mechanism for limiting the power of the majority, as well as the mechanism of protection against abuse of minority shareholders, Dominika Opalska, *Obligation of loyalty in capital companies* (Warsaw: C. H. Beck, 2015), 237 et seq., Łukasz Gasiński, *Limits of freedom to shape the content of the statutes of a joint-stock company* (Warsaw: C. H. Beck, 2014), 191.

²¹ It is derived primarily from a number of rules laid down in the Commercial Companies Code's provisions. On the phenomenon of informal intersection of boards and supervisory boards, see comments by Joanna Szalachy-Jarmużek, "Individual benefits, organizational losses? Loyalty and the phenomenon of intersection of boards and supervisory boards in the perspective of business practitioners," *Prakseologia*, no. 157, vol. 1 (2015): 103 et seq.

²² For disputes on how to decode the clause, see, inter alia: Małgorzata Modrzejewska, "Right to dividend and resolution of the general meeting excluding profit from distribution — remarks on the background of case-law examples," in *Commercial Companies Code after 15 years in force*, ed. Józef Frąckowiak (Warsaw: Wolters Kluwer, 2018), 600 in.

²³ More broadly Kamil Szmida, *Nature of a joint-stock company*, 296.

ability of an official to distinguish the good of the company²⁴ from actions detrimental to it²⁵. Both the Loyalty Directive and the diligent conduct result from the company's design assumptions, in particular the functional and contractual arrangement of the relationship between the members of the management body and the division of ownership. The requirement of a member's loyal conduct vis-à-vis the company places the provisions of the Commercial Companies Code in the context of resolving standard conflict situations which occur or may occur in a capital company, that is to say, in sensitive areas having an undoubted impact on its proper functioning²⁶.

12. The outlined understanding of competences and obligations

The outlined understanding of competences and obligations is primarily the problem of trust, on which internal relations in the company are to be built and the objectives which in cooperation are to be achieved as a result of business activity in the form of an organizational company²⁷. In the light of the axiological assumption based on the general principle of loyalty by the management board, their behaviour could be expressed, inter alia, by the failure of a member of the body to resign from the mandate in a situation where it would result in significant losses in the company²⁸. Finally, the set of components of the company's interest would be difficult to limit to the determinants set out in expressis verbis by the provisions of positive law.

²⁴ The return of the good of the company is used by some authors, considering it to be an equivalent concept to the structure of the company's interest or a broader, more consistent with the axiology of law.

²⁵ It remains open to the question whether the performance of the mandate may be placed in the category of a qualified breach of care by the administrator in the absence of the appropriate education and experience necessary for the management of the company. The view in this regard presented under the rule of K.H. considered it appropriate, among others. Appellate Court in Łódź, Judgment of 16 April 2014, Ref. No. I ACa 1157/13, Legalis 1067291. Commentators referring to this case-law generally do not state their own position.

²⁶ Andrzej Szumański, in *Company Law*, ed. Wojciech Pyziół, Andrzej Szumański, Ireneusz Weiss, (Bydgoszcz: Publishing House: Branta 2004), 765; Kamil Szmid, *Nature of a joint-stock company*, 299.

²⁷ In its Judgment of 19 July 2007 (Ref. No. K 11/06, Legalis 84111), the Constitutional Court noted that the essence of entrusting a particular management person is the trust in the education, qualifications and experience of a particular manager.

²⁸ Iwona Gębusia, *Company interest in Polish and European law* (Warsaw: C.H.Beck, 2017), 207 and literature established there.

Science and jurisprudence have an important role to play in shaping transparent standards, which general concepts, unspecified phrases and general clauses should be fulfilled by content appropriate to the problem being addressed²⁹. An important role in this respect can and must be given to reading the values of the non-codified³⁰ normatively, a 'sectional' approach to the subject matter would be contrary to the nature of a commercial company in which the pursuit of a common objective is to accompany its entire life³¹. It should be borne in mind that compliance in the material sense also concerns the observance of ethical standards voluntarily adopted by organizations³².

13. The amendment to the Commercial Companies Code

The amendment to the Commercial Companies Code, which entered into force in October 2022, require a separate study. I will outline one element at this point. The work is worth appreciating, but so far acting in the interest of shareholders is acting in the interest of the capital group. Meanwhile, the amendment to the Commercial Companies Code introduces an obligation for the parent company and the subsidiary to be guided by the interests of the company participating in the group of companies, and only next to it the interest of the group of companies. Thus, the question arises whether the project unequivocally qualifies the interest of the company as separate from the interest of the group of companies, and thus separate from the interest of the company's participants? Therefore, does it not affect the partners / shareholders of every capital company in Poland? So, have the conditions

²⁹ In the normative German order, a complex function is assumed, as it grants the measures of professional diligence a double function. They constitute - as in the case of the application of the quoted provisions of the Commercial Companies Code - the basic criterion for the manager's assessment, but moreover, this criterion serves as a general clause there, Marcus Lutter, Peter Hommelhoff, GmbH - Gesetz. Kommentar, Köln: Otto Schmidt 2019, commentary on § 43 GmbHG.

³⁰ At the same time, attention should be paid to the differences between the shareholding structure of native companies and those active especially on the American and English markets, Paweł Mazur, *The New Paradigm*, 123.

³¹ More broadly, Robert Stefanicki, Due professional diligence of a member of the management board of a capital company (Warsaw: Wolters Kluwer 2020) 81–114. Chapter II Requirements of loyalty of board members towards the company.

³² Bartosz Jagura, *Role of the bodies of a capital company in the implementation of the compliance function* (Warsaw: Wolters Kluwer, 2017), 37.

of the discussion around the concept of the company's interest not changed significantly recently, and will the broadly understood social aspects change the perspectives of our perception in the future?

14. Conclusions

The impetus to change the approach to the company's interest status is not only seen in legislative interference. The problem concerns the readiness of the legal community and opinion-forming bodies to accept the change, to read its essence and the consequences of its introduction. It would not seek to strengthen a formalistic approach to law, but should aim at building its openness to the social context and values that company law is supposed to embody. Such openness is supported by the model of economical substantive regulation, setting goals and border points. Procedures are part of this framework. The emphasis on this aspect of private law is justified not only in the servitude of the rules of conduct against substantive law, but also from the perspective of its legitimacy. In the complex process of searching for an optimal model of company management, the starting point of the conducted analyses and legal discourse should be made an attempt to answer the question whether the legal framework, defined by the provisions of the Commercial Companies Code, constitutes an appropriate safeguard for the standards of corporate management set for the efficiency and reliability of intra-corporate relations. Legal standards cover not only the text of the law, its potential quality, but also the functional dimension of its application. Fundamental to modern theory and philosophy of law, discourse focuses on disputes over the interpretation of law and, consequently, the model of its reading.

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