Review of European and Comparative Law | **2022**
Vol. 51, No. 4, 7–23
https://doi.org/10.31743/recl.14578
Received: 7 October 2022 | Accepted: 26 November 2022| Published: 15 December 2022

Duty of loyalty and due care of the board member under Polish law

Piotr Pinior
Professor, Dr. habil., Faculty of Law, Financial Law, University of Silesia in Katowice, correspondence address: ul. Bankowa 11B, 40-007 Katowice, Poland; e-mail:piotr.pinior@us.edu.pl
https://orcid.org/0000-0003-2084-0325

Keywords:
duty of loyalty,
due care

Abstract: Duty of loyalty and due care of the board's members have been lately introduced to the provisions of the Polish Commercial Companies Code. This paper aims to define the duty of loyalty and due care of the board members, as presented in the Polish doctrine, as well as in the British, Spanish, and German laws. Additionally, the impact of the new provisions on the liability of the board members shall be described.

1. Introduction

Duty of loyalty and due care of the board's members have been widely adopted in the doctrine for a long time. However, the duty of loyalty was not directly regulated in Polish law, and the obligation of due care was regulated in the provision concerning the liability of the board members. Due to the amendment to the Polish Commercial Companies Code[1] adopted by the Act of 19 July 2019,[2] introducing the simple joint-stock company, the duty of loyalty and due care of the board members appeared in the form of a separate provision for the first time. Later on, due to the amendment

1 Act of 15 September 2000 Commercial Companies Code, Journal of Laws, 2022, item 1467, hereinafter abbreviated as CCC.

2 Journal of Laws, 2019, item 1655.

ISSN 2545-384X (Online)

of 9 February 2022[3], the duty of loyalty and due care was introduced in the private limited company and in the joint-stock company.

The latest amendment aims primarily to synchronize the provisions concerning boards' members in all three types of companies, so now the duty of loyalty and due care of the members of the management board, supervisory board, and board of directors is consonantly regulated (art. 209^1, 214^1, 300^{54}, 377^1, 387^1). Under these provisions, a board member, while performing his/her duties, shall act with due care resulting from professional integrity and honor the duty of loyalty to the company.

The priority of the amendment was to modernize the company law by stating *expressis verbis* the general duty of board members, similarly as such obligations have already been regulated in some European countries[4]. Moreover, the necessity to amend the provisions concerning the liability of board members by introducing a business judgment rule made it compulsory to refer to the duty of loyalty and due care. However, as the legislator used a general clause of duty of loyalty, there is a necessity to precise the scope of the duty. This paper aims to define the duty of loyalty and due care of the boards' members, as presented in the Polish doctrine, as well as in a comparative approach taking into consideration British, Spanish, and German law. Additionally, the new provision's impact on board members' liability shall be described.

2. Doctrinal views on the duty of loyalty – credit line

The Polish doctrine has commonly adopted the duty of loyalty[5]. Hence at first, a short description of the up-to-date views shall be described. This obligation of being loyal to the company derives directly from the relationship

[3] Act of 9 February 2022 on the amendment of the Commercial Companies Code, Journal of Laws, 2022, item 807. The amendment of the Code entered into force on 13 October 2022.

[4] Justification of the amendment proposal, www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=1515.

[5] Stanisław Sołtysiński, "Organy spółki akcyjnej," in *System Prawa Prywatnego, Vol. 17B. Prawo spółek kapitałowych*, ed. Stanisław Sołtysiński (Warszawa: C.H. Beck, 2010), 490; Andrzej Szumański, "Organy spółki z o.o.," in *System Prawa Prywatnego, Vol. 17A. Prawo spółek kapitałowych*, ed. Stanisław Sołtysiński (Warszawa: C.H. Beck, 2010), 479; Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* (Warszawa: C.H. Beck, 2010), 498; Piotr Pinior, *Nadzór wspólników w spółce z ograniczoną odpowiedzialnością* (Warszawa: C.H. Beck, 2013), 89; Dominika Opalska, *Obowiązek lojalności w spółkach kapitałowych* (Warszawa: C.H. Beck, 2010), 122; Adam Opalski, "Przed

between the board members (membership in a management board, a board of directors, or a supervisory board) and the company, created due to the appointment to the board. As the shareholders mandate to the members of the boards the management and supervision over the company's assets, this legal relationship, which is of contractual and organizational nature[6], imposes on a board member a duty of loyalty (*fiduciary duty, Treupflicht*)[7] towards the company.

The duty of loyalty has been defined generally as the obligation to refrain from actions contrary to the company's interests resulting from the membership in a company's board, which results from the fact of entrusting the management or supervision over the company to a member of the body, by the shareholders or other authorized body[8]. The Polish doctrine formulated the following elements of the loyalty duty: the primacy of the company's interest, ban of abuse of competencies, the obligation to refrain in case of conflict of interests, prohibition of competition, the obligation to use corporate opportunities, availability to the company, confidentiality duty[9].

The duty of loyalty under the Polish Act has been specified in the form of the obligation to refrain from making decisions in the event of a conflict of interest (Art.209/377 CCC), prohibition of representation in contracts

Art. 368," in *Kodeks spółek handlowych. Komentarz,* Vol. III.A., ed. Adam Opalski (Warszawa: C.H. Beck, 2016), 1167.

6 See more on the legal nature of the membership in boards members: Pinior, *Nadzór wspólników*, 81–91 with the literature cited therein; Andrzej Kidyba, *Kodeks spółek handlowych. Komentarz.* Vol. I. (Warszawa: Wolters Kluwer, 2017), 928; Opalska, *Obowiązek lojalności*, 14; Adam Opalski, "Przed Art. 201," in *Kodeks spółek handlowych. Komentarz,* Vol. II.A., ed. Adam Opalski (Warszawa: C.H. Beck, 2018), 831–834.

7 Stephen Girvin, Sandra Frisby, Alaister Hudson, *Charlesworth's Company Law* (London: Sweet & Maxwell, 2010), 323–370; Derek French, Stephen Mayson, Chistopher Ryan, *Company Law* (Oxford: Oxford University Press, 2010), 480–486; Hans Joachim Priester, Dieter Mayer, *Münchener Handbuch des Gesellschaftsrechts. B. 3. Gesellschaft mit beschränkter Haftung* (München: C.H. Beck, 2009), 898–890; Michael Hoffman-Becking, *Münchener Handbuch des Gesellschaftsrechts. B. 4. Aktiengesellschaft* (München: C.H. Beck, 2007), 298–303.

8 Opalski, *Kodeks spółek*, 2018, 835; Opalska, *Obowiązek lojalności*, 136; Oplustil, *Instrumenty nadzoru*, 500; Marcin Spyra, "Spółka akcyjna," in *System Prawa Handlowego, T. 2B., Prawo spółek handlowych*, ed. Stanisław Włodyka (Warszawa: C.H. Beck, 2007), 413.

9 Pinior, *Nadzór wspólników*, 90; Opalska, *Obowiązek lojalności*, 144 onwards; Opalski, *Kodeks spółek*, 2018, 835–838; Oplustil, *Instrumenty nadzoru*, 501.

and disputes with management board members (Art. 210 § 1/ 379 § 1 CCC), prohibition of competition (Art. 211/380 CCC). Furthermore, the display of loyalty can also be found in Art. 15 CCC, which requires the consent of a shareholders' meeting for the execution by a company of a loan, credit, surety agreement, or a similar contract with a member of the management and supervisory board, or for the benefit of any of those persons. Again here, the legislator gives primacy to the company's interest.

Under these provisions, a general duty of loyalty was interpreted in the doctrine and also jurisprudence. Notwithstanding, in all mentioned provisions, the protection and primacy of the company's interest is the core of the legal relationship between the board member and the company.

As stated in a judgment of the Supreme Court of 11 March 2010[10], the provision of Art. 209 CCC indicates the primacy of the company's interest protection over the private interest of a management board member. Additionally, the Supreme Court stated that the conflict of interests does not have to exist *de facto*, as the hypothetical threat of conflict of interests shall be sufficient to protect the company's interest.

The Supreme Court, in a judgment of 24 July 2014,[11] adjudicated that by managing the company, a member of the management board must act in the best interests of the company, which should be interpreted from the general duty to manage the company's affairs as stated in Art. 201 § 1 CCC. All actions that adversely affect the company's financial situation, such as consulting or granting services to competitive entities, delivering goods and information, or giving loans to such an entity, shall be treated as competitive engagement.

In the Supreme court judgments, the protection of the company's interest, under Art. 15 CCC is extensive. Due to the resolution of the Supreme Court of 12 January 2022,[12] the consent of the shareholders' meeting requires the conclusion of a contract between a company and a third party when based on various factual and legal circumstances, the real beneficiary

[10] Polish Supreme Court, Judgment of 11 March 2010, Ref. No. IV CSK 413/09, Lex No. 677902.

[11] Polish Supreme Court, Judgment of 24 July 2014, Ref. No. II CSK 627/13, Lex No. 1545031.

[12] Polish Supreme Court, Judgment of 12 January 2022, Ref. No. III CZP 37/22, "OSNC" 2022, No. 7–8, Pos. 77.

of such an agreement is a member of the management or supervisory board, or other persons indicated in Art. 15 CCC. Hence it was stated in the justification of this resolution that the cited provision was intended to ensure that the interest of a company would be protected against the improper use by the boards' members of their powers (abuse of function). The Supreme Court, in a judgment of 7 March 2017[13], predicated that "a similar contract" means any contract in which there is a transfer of assets from the company to the persons quoted in Art. 15 CCC, likewise in the judgment of 7 February 2019[14] and in the judgment of the Supreme Court of 5 May 2019[15].

3. Duty of loyalty – a comparative approach

The existence of the duty of loyalty is regulated by statute in other European countries; among others, it is regulated in English law[16]or Spanish law[17]. Apart from the general clause of duty of loyalty and due care, particular displays of loyalty are encountered in national legislation. However, in some countries, the duty of loyalty is not *expressis verbis* stated but has been commonly adopted by the representatives of the doctrine, just like in German literature. These three jurisdictions of Great Britain, Germany, and Spain have been selected as they represent three dominant legal systems: the Anglo-Saxon, the German, and the Roman.

The most extensive displays of the duty of loyalty are indicated in the British Companies Act, that describes general duties of directors (se. 171–177 CA). Pursuant to sec. 172 CA, a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to the likely consequences of any decision in the long term, the interests of the company's employees, the

13 Polish Supreme Court, Judgment of 7 March 2017, Ref. No. II CSK 349/16, "OSNC" 2018, No. 1, Pos. 9.

14 Polish Supreme Court, Judgment of 7 February 2019, Ref. No. II CSK 8/18, Lex No. 2617977.

15 Polish Supreme Court, Judgment of 5 May 2019, Ref. No. V CSK 207/18, Lex No. 2692250.

16 Companies Act 2006, Sections 170–177, www.legislation.gov.uk/ukpga/2006/46/, hereinafter abbreviated as CA.

17 Real Decreto Legislativo 1 / 2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital, BOE-A-2010–10544, Art. 227–229, hereinafter abbreviated as LSA.

need to foster the company's business relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between members of the company. So to achieve these goals, a director of a company must exercise independent judgment (sec. 173 CA), must exercise reasonable care, skill, and diligence (sec. 174 CA), and must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (sec. 175 CA). Furthermore, a director of a company must not accept a benefit from a third party conferred by reason of his being a director or his doing (or not doing) anything as a director (sec. 176 CA[18]). Finally, pursuant to sec. 177 CA, if a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

It is worth mentioning that a person who ceases to be a director continues to be subject to the duty to avoid conflicts of interest (sec. 175 CA) as regards the exploitation of any property, information, or opportunity of which he became aware at a time when he was a director. In a similar vein, a former director continues to be subject to the duty not to accept benefits from third parties (sec. 176 CA) as regards things done or omitted by him before he ceased to be a director. That implies that the interest of the company must also be protected towards persons who terminated their mandate, as they still have information or contacts that might be misused and inflict damage to the company.

In the British Companies Act, the concept of "shadow directors" appears as persons who are not formally a member of the board but may influence the company amidst different connections with the company[19].

[18] A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate. Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party. This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

[19] Pursuant to sec. 251 CA, "shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. A person is not to be regarded as a shadow director by reason only that the

Due to a "particular" position of a shadow director, the duty of loyalty has also been extended to the shadow director. Under the provision of sec. 171 (5) CA, the general duties apply to a shadow director of a company where and to the extent that they are capable of so applying.

The above-mentioned provisions constitute the duty of loyalty, which was also confirmed in the doctrine. As it is underlined in the doctrine, the duty of loyalty deals mainly with two situations: first, transactions of a director, and second, the use of the corporate opportunity[20]. In the English literature as the most crucial displays of duty of loyalty are indicated: the obligation to act within powers, to promote the success of the company, to exercise independent judgment, to exercise reasonable care, skill, and diligence, to avoid conflict of interest, or not to accept benefits from third parties[21].

Similarly, in the German literature, the duty of loyalty (*Treupflicht*) embraces, among others, the requirements to care for the interest of the company and to avoid conflict of interest, the ban on competitiveness, the ban to abuse of function, and the power to represent the company, confidentially duty and the equivalent remuneration of directors[22]. Thus, the main characteristic of the duty of loyalty is special care for the company's interest and acting in a way enabling the maximum use of the possibilities of the company (*Geschäftschancen*).

The German law does not directly indicate the duty of loyalty, apart from its displays like the prohibition of competition (§ 88 AktG[23]) and the ban of self-dealing contracts (§ 112 AktG). Notwithstanding, § 93 AktG imposes on the management board the obligation to act with due care and the obligation of confidentiality duty. In managing the affairs, the members

directors act, inter alia, on advice given by that person in a professional capacity; in accordance with instructions, a direction, guidance or advice given by that person in the exercise of a function conferred by or under an enactment.

20 Carsten Gerner-Beuerle, Michael Schillig, *Comparative Company Law* (Oxford: Oxford University Press, 2020), 551.

21 Girvin, Frisby, Hudson, *Charlesworth's Company*, 323; C. Gerner-Beuerle, M. Schillig, *Comparative company*, 551.

22 Hoffman-Becking, *Münchener Handbuch*, 298; Priester, Mayer, *Münchener Handbuch*, 898.

23 Aktiengesetz of 6 September 1965, BGBl. I. S.1089, latest amendment by the Act of 3.6.2021, hereinafter abbreviated as AktG.

of the management board are to exercise the due care of a prudent manager, faithfully complying with the relevant duties. The members of the management board are to respect the secrecy of any confidential information and secrets of the company, particularly trade secrets or business secrets, of which they have become aware in the context of their activities in the management.

The Spanish legislator adopted a similar approach to the British Companies Act by pointing out that the administrative board members are under a duty of loyalty (*deber de lealtad*), to act in good faith in the company's best interest (Art. 227 LSC). In particular, the duty of loyalty means the obligation to act within the limits of their powers, the prohibition of disclosing company secrets, information, reports, and data, also after the expiry of the mandate, the obligation to refrain from participating in activities in the event of a conflict of interest, the obligation to remain independent in making decisions (Art. 228 LSC). The obligation to take actions necessary to avoid a conflict of interest, among others, the prohibition of using the company's assets for the own purposes of board members, the prohibition of using the company's property and obtained information, or using the company's business situation, the prohibition of receiving remuneration and receiving benefits from third parties in connection with the performance of the function, prohibition of engaging in competitive activities (Art. 229 LSC). The said prohibitions also apply if the beneficiary of benefits obtained contrary to the said obligation will be a person related to a member of the administrative board.

Considering the aforementioned legal systems, it should be underlined that the duty of loyalty shall embrace a similar scope. However, in British Companies Act, the obligation of due care (duty to exercise reasonable care, skill, and diligence) has been regulated as one of the elements constituting the general duties of directors. It has been indicated in the literature that the directors' duty of care is to be distinguished from all other duties, which are categorized as fiduciary duties or duties of loyalty[24].

In German law, the duty of care shall be treated differently, allowing one to assess the degree of guilt amidst the placement of the due care in the

[24] Paul Davies, *Introduction to company law* (Oxford: Oxford University Press, 2010), 154.

provision concerning directors' liability[25]. Under § 93 AktG[26], the management board members are to exercise the due care of a prudent manager, faithfully complying with the relevant duties. Thus in German law, due care is analogously regulated to the provisions of liability that existed in the Polish Commercial Companies Code before the amendment of 2022 (see the comments in part IV below) as an element of the proper performance of managing affairs.

The Spanish legislator indicates the duty of care as a general obligation to act with the due care of an orderly director while holding the office and performing the obligation. According to Art. 225 LSC, the directors must perform their duties and comply with the duties imposed by law and by-laws with the diligence of an orderly business person, taking into account the nature of the position and the functions attributed to each of them.

4. The scope of the duty of loyalty and due care under Polish law

The Commercial Companies Code amendments introduced the duty of loyalty and due care as the general obligations deriving from the membership in the company's board. The general duty of loyalty shall be treated as the primacy of the company's interest over the particular interest of shareholders, members of boards, or any of the stakeholders. Primarily, a member of the company's board must act in accordance with the statutory provisions and the company's by-laws and only exercise powers for the purposes for which they are conferred[27].

Under the provisions of Art. 209^1 §1, 214^1 §1, 300^{54}, 377^1 §1, 387^1 §1 CCC, a board member, while performing his/her duties, shall act with due care resulting from professional integrity and honor the duty of loyalty to the company. It may be assumed that the duty of loyalty must be understood more extensively than only the three aspects specified prior by the

25 Ernst- Thomas Kraft, in Michael Hoffman-Becking, *Münchener Handbuch des Gesellschaftsrechts. B. 4. Aktiengesellschaft* (München: C.H. Beck, 2020), § 26.II.4., mn 12; Priester, Mayer, *Münchener Handbuch*, 922.

26 Accordingly in § 43 GmbHG, Gesetz betreffend die Gesellschaft mit beschränkter Haftung of 6 April 1982, latest amendment by the Act of 15.7.2022.

27 Piotr Pinior, "Komentarz do art. 209 (1)," in *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*, ed. Radosław L. Kwaśnicki, Filip Ostrowski, Andrzej Szumański (Warszawa: C.H. Beck, 2022), 366.

Polish Commercial Companies Code. However, these three formerly regulated aspects may not be omitted while defining the duty of loyalty.
One of the crucial aspects is the conflict of interest. In the event of a conflict of interest between the company and a member of the board and persons related to him or her, the board member is obliged to reveal the conflict of interest and shall refrain from participating in the decision-making process. Even though the provision of the conflict of interest is addressed primarily to the management board or board of directors, after implementing the general duty of loyalty, it shall also be considered by the supervisory board members. In particular, special attention shall be given to the decision of the supervisory board's members, giving consent to transactions planned by the company or within any of the competencies granted to members of the supervisory board in the by-laws (art. 222 par. 4 (3) and art. 388 par. 5 KSH).

A second aspect of the duty of loyalty refers to self-dealing contracts. Namely, the exclusion of the power of representation in contracts and disputes between the member of the management board or director and the company. As highlighted in the literature, such a restriction protects the company in self-dealing contracts and excludes a conflict of interest[28]. In case of misrepresentation, the contract shall be null and void[29]. Naturally, this ban shall be addressed to the members of the management board (directors) because the supervisory board is not empowered to represent the company in general. However, the right of representation shall be granted to the supervisory board or non-executive directors in contracts with the management board or directors, and additionally, under Art. 300^{60} CCC

[28] Andrzej Szumański, "Komentarz do art. 210," in Stanisław Sołtysiński, Andrzej Szajkowski, Andrzej Szumański, Janusz Szwaja, *Kodeks spółek handlowych. Komentarz,* Vol. II. (Warszawa: C.H. Beck, 2005), 525; Janusz A. Strzępka, Ewa Zielińska, "Komentarz do art. 210," in Piotr Pinior, Wojciech Popiołek, Janusz A. Strzępka, Ewa Zielińska, *Kodeks spółek handlowych. Komentarz*, ed. Janusz A. Strzępka (Warszawa: C.H. Beck, 2015), 530.

[29] However due to the amendment of Art. 39 CCC (Where a person who concludes the contract as an organ of a legal person does not have an empowerment or where he goes beyond its scope, the validity of the contract shall depend on its confirmation by the legal person on whose behalf the contract was concluded) it may be also assumed the suspended invalidity (*negotium claudicans*) instead of the nullity, see more: Wojciech Wyrzykowski, "Wpływ nowelizacji art. 39 k.c. na zasady reprezentowania spółki kapitałowej w umowach pomiędzy spółką a jej członkiem zarządu," *Przegląd Ustawodawstwa Gospodarczego*, no. 1 (2020): 23–28.

with the audit firms selected to examine the financial statement in a simple joint-stock company. Moreover, due to the latest amendment, in case of appointment of the supervisory board's experts (advisors) for the examination, at the company's expense, of a specific issue concerning the company's operations or its assets (Art. $219^2$and 382^2 § 2 CCC) the spuervisory board represents the company in contracts with the advisor. These special rules for representation again indicate the priority of the company's interest over the interest of the members of the boards or other stakeholders.

The third aspect is the ban on competitiveness. A board member may not engage in a competitive business, participate in competitive entities as a partner, or as a board member of a competitive legal person. Similarly to the conflict of interest, this prohibition shall also be extended to the supervisory board members, particularly if the participation or engagement in the competitive business may influence the supervision activity over the company. In any case, the board members also have broad access to company information and documents, so the extension of this prohibition is rational and justified. At least, it shall be required to reveal the engagement or participation in competitive entities.

All three aspects mentioned above constitute the duty of loyalty of the board's members towards the company. However, it should be emphasized that the duty of loyalty should also be considered from a broader perspective, comprising the general duty of acting in the best interest of the company, as well as the obligation to exercise independent judgments, to exercise power to manage the company with reasonable care, skill and diligence and confidentially duty. The violation of the duty may result in the liability of the board's members.

Therefore, the obligation of loyalty means the obligation to act in the best interest of the company, in a way contributing to the most significant development of the company, achieving profits, maintaining the company's good position on the market, and the obligation to take actions aimed at taking advantage of corporate opportunities and development prospects, as well as taking into account corporate social responsibility. The decision-making process shall require adequate skill and knowledge, so in order to make a decision, taking into consideration an average economic risk, the members of the board should also respect experts' opinions, and

depending on the circumstances of each particular operation they should collect information necessary to make a decision reasonably.

Another element of the loyalty duty is the obligation not to divulge any information concerning the company. This obligation was not previously *expressis verbis* specified in the act, but its occurrence was accepted in the doctrine, primarily as a manifestation of the obligation of loyalty of a board member[30]. The duty of confidentiality during the term of office is an obligation resulting from both the duty of loyalty and due care (e.g., when negotiating contracts with a third party). The obligation of confidentiality applies to board members while performing their mandate. However, under provisions of Art. 209^1 §2, 214^1 §2, 300^{55} §2, 377^1 §2, 387^1 §2 CCC, the obligation not to divulge any information concerning the company shall be extended after the termination of office. In this respect, it should be assumed that some aspects of the duty of loyalty should be binding on the members of the company's board also after the termination of their function as a member of the body[31].

This obligation implies a prohibition of disclosing information obtained in the course of performing the function, in particular trade secrets and business secrets, but it is not limited only to information for which steps have been taken to keep it secret. The obligation of confidentiality covers all information obtained during the performance of the mandate, resulting from analyzes of the company's situation, development forecasts, commissioned expert opinions, information on relations with contractors, and information on pending court disputes.

At the same time, the duty of loyalty means that it is unacceptable to be guided by the interests of only one shareholder or group of shareholders with the violation of the interests of the company. Hence, a board member acting for a company should take care of its proper development. Therefore he cannot use its potential for his own purposes or act in the interests of other entities, and he should refrain from taking any actions that might infringe the company's interests. Similarly, a board member shall be obliged

30 Opalski, *Kodeks spółek*, 2018, 840; Opalska, *Obowiązek lojalności*, 208.

31 Opalski, *Kodeks spółek*, 2018, 843; Opalska, *Obowiązek lojalności*, 216; Oplustil, *Instrumenty nadzoru*, 502.

to exercise independent judgments in the company's best interest and shall not take into consideration solely the particular interests of shareholders.

The obligation to act with due care means acting with the care, skill, and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the functions in the company's board. Due diligence should be understood as diligence based on conscientious and reliable actions of individual members of the management board, with the use of professional knowledge and experience, which are necessary for the proper performance of the function of a management board member. Moreover, management board members should demonstrate the necessary skills in organizational processes and financial management, as well as knowledge of applicable law[32]. By introducing this obligation as a general duty of the board member, the legal character of due care has extensively changed. The obligation to exercise due care was interpreted differently in the literature and jurisprudence. First, it was treated as an element to be taken into account when assessing the degree of guilt of a board member[33] because due care was regulated in the provision concerning board members' liability (Art. 293 § 2, 483 § 3 CCC, were derogated on 13 October 2022). Second, some representatives of the doctrine claimed it performed a dual function, both as an element of a contractual obligation relationship,

---

[32] Piotr Pinior, "Odpowiedzialność cywilnoprawna członków zarządu spółki z o.o. za wyrządzoną szkodę (wybrane problemy odpowiedzialności na podstawie art. 293 KSH)," in *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi,* ed. Maksymilian Pazdan, Monika Jagielska, Ewa Rott-Pietrzyk, Maciej Szpunar (Warszawa: Wolters Kluwer, 2017), 555.

[33] Tomasz Siemiątkowski, *Odpowiedzialność cywilnoprawna w spółkach kapitałowych* (Warszawa: C.H. Beck, 2007), 177; Jacek Jastrzębski, "W sprawie odpowiedzialności członków zarządu organów spółek kapitałowych," *Przegląd Prawa Handlowego,* 2013, no. 7 (2013):16; Kidyba, *Kodeks spółek*, T. I, 1416; Katarzyna Bilewska, "Bezprawność a niedochowanie należytej staranności w rozumieniu art. 293 KSH," *Palestra* no. 3–4 (2007): 275; Paweł Błaszczyk, "Odpowiedzialność odszkodowawcza menedżerów spółek a przekroczenie tzw. dopuszczalnego ryzyka gospodarczego," *Przegląd Prawa Handlowego*, no. 11 (2009): 42; Wojciech Popiołek, "Obowiązek lojalności członków organów kolegialnych spółek handlowych," *Przegląd Prawa Handlowego*, no. 9 (2021): 33; Polish Supreme Court, Judgment of 9 February 2006, Ref. No. V CSK 128/05, Legalis; Polish Supreme Court, Judgment of 24 September 2008 Ref. No. II CSK 118/08, Legalis.

the breach of which may constitute an independent basis for liability, as well as in the assessment of the debtor's fault in the event of improper performance of an obligation[34]. Therefore, it was emphasized in the literature that the lack of a positive expression in the act of the obligations of members of organs resulting from the organizational relationship weakens the vindication of the responsibility of managers[35]. The sanctioning by law that the exercise of due care is directly related to the existence of an organizational relationship between a member of the body and the company allows to treat the breach of this obligation in the category of unlawfulness, i.e., as an act or omission contrary to the law, within the meaning of Art. 293 § 1 or Art. 483 § 1 CCC, and similarly as an improper performance of duties with the meaning of Art. 300^{125} § 1 CCC in a simple joint-stock company.

Acting with due care has traditionally been treated as a circumstance justifying a board member's guilt that might not itself be a premise of a board member's liability[36]. Amidst the Commercial Companies Code amendment, the duty of care has been regulated under the provisions of Art. 209^1 §1, 214^1 §1, 300^{54}, 377^1 §1, 387^1 §1 CCC as a separate obligation[37]. Independently, the duty of care while performing duties is a general obligation of all debtors under the provision of Art. 355 § 2 CC[38]. By indicating this duty towards board members, the professional character of their offices has been underlined. The breach of the duty of care shall constitute a premise for a boards member's liability, even if the act in consent with the law and the articles of association, for example, while adopting the business

[34] Adam Opalski, Krzysztof Oplustil, "Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych," *Przegląd Prawa Handlowego*, no. 3 (2013): 17; Małgorzata Dumkiewicz, *Kodeks spółek handlowych. Komentarz* (Warszawa: Wolters Kluwer, 2020), Lex Art. 293, 4; Artur Nowacki, *Spółka z ograniczoną odpowiedzialnością. Komentarz.* Vol. II. (Warszawa: C.H. Beck, 2021), 2021, 1460; Robert Stefanicki, *Należyta staranność zawodowa członka zarządu spółki kapitałowej* (Warszawa: Wolters Kluwer, 2021), 139.

[35] Jastrzębski, "W sprawie," 18.

[36] Siemiątkowski, *Odpowiedzialność cywilnoprawna*, 177; Błaszczyk, "Odpowiedzialność odszkodowawcza," 41; Jastrzębski, "W sprawie," 16; Kidyba, *Kodeks spółek*, 1416; Pinior, "Odpowiedzialność cywilnoprawna,"553.

[37] Popiołek, "Obowiązek lojalności," 32.

[38] Act of 23 April 1964 Civil Code, Journal of Laws, 2022, item 1360, hereinafter abbreviated as CC.

decision, thus acting in excessive economic risk shall be a breach of the duty of due care.

Lastly, it must be mentioned that the duty of loyalty and due care shall affect the board member's liability amidst the introduction of the business judgment rule. Pursuant to Art. 293 § 3, 300^{125} § 2, 483 § 3 CCC, members of the board shall not abuse the due care if, being loyal to the company, they act in the frame of justified economic risk based on the information, analyses, and opinions which should be taken into consideration when applying due care. The essence of the business judgment rule is to release the directors from liability for the damage incurred by the company resulting from the wrongful decisions of board members if the decision was reached in a manner the board members reasonably believed to be in the best interests of the company, justified by the circumstances of a specific case and based on the information necessary for the decision to be adopted[39]. Thus a board member must prove the exercise judgments based on information and opinions eligible at the moment of adopting a decision, with reasonable skill and diligence.

5. Conclusions

The introduction of the duty of loyalty and due care of the board member to the Commercial Companies Code is a display of modernizing company law, as it indicates the general duties as standard rules for all the members of boards in Polish companies. Additionally, it has an impact on the liability of board members because the aforementioned obligations shall be a premise of the liability of board members. Hence, it might be helpful for companies to file claims against members for wrongful management or supervision.

[39] Paweł Błaszczyk, "Koncepcja „biznesowej oceny sytuacji" na tle prawa polskiego (uwagi de lege lata i de lege ferenda)," *Państwo i Prawo*, no. 3 (2012): 76; Piotr Pinior, "Monistic system in simple joint-stock company under Polish law," *Przegląd Ustawodawstwa Gospodarczego*, no. 2 (2020): 6; Filip Ostrowski, Komentarz do art. 483 in *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*, ed. Radosław L. Kwaśnicki, Filip Ostrowski, Andrzej Szumański (Warszawa: C.H. Beck, 2022), 573.

References

Bilewska, Katarzyna. "Bezprawność a niedochowanie należytej staranności w rozumieniu art. 293 KSH." *Palestra,* no. 3–4 (2007): 275–279.

Błaszczyk, Paweł. "Koncepcja „biznesowej oceny sytuacji" na tle prawa polskiego (uwagi de lege lata i de lege ferenda)." *Państwo i Prawo*, no. 3 (2012): 75–88.

Błaszczyk, Paweł. "Odpowiedzialność odszkodowawcza menedżerów spółek a przekroczenie tzw. dopuszczalnego ryzyka gospodarczego." *Przegląd Prawa Handlowego*, no. 11 (2009): 37–43.

Davies, Paul. *Introduction to company law.* Oxford: Oxford University Press, 2010.

Dumkiewicz, Małgorzata. *Kodeks spółek handlowych. Komentarz.* Warszawa: Wolters Kluwer, 2020.

French, Derek, Stephen Mayson, Chr istopher Ryan. *Company Law*. Oxford: Oxford University Press, 2010.

Gerner-Beuerle, Carsten, Michael Schillig. *Comparative Company Law*. Oxford: Oxford University Press, 2020.

Girvin, Stephen, Sandra Frisby, Alaister Hudson. *Charlesworth's Company Law*. London: Sweet & Maxwell, 2010.

Hoffman – Becking, Michael. *Münchener Handbuch des Gesellschaftsrechts. B. 4. Aktiengesellschaft*. München: C. H. Beck, 2007.

Hoffman-Becking, Michael. *Münchener Handbuch des Gesellschaftsrechts. B. 4. Aktiengesellschaft* München: C.H. Beck, 2020.

Jastrzębski, Jacek. "W sprawie odpowiedzialności członków zarządu organów spółek kapitałowych." *Przegląd Prawa Handlowego*, 2013, no. 7 (2013): 15–20.

Kidyba, Andrzej. *Kodeks spółek handlowych. Komentarz.* Vol. I. Warszawa: Wolters Kluwer, 2017.

Kwaśnicki, Radosław L., Filip Ostrowski, Andrzej Szumański. *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*. Warszawa: C.H. Beck, 2022.

Nowacki, Artur. *Spółka z ograniczoną odpowiedzialnością. Komentarz.* Vol. II. Warszawa: C.H. Beck, 2021.

Opalska, Dominika. *Obowiązek lojalności w spółkach kapitałowych*. Warszawa: C.H. Beck, 2015.

Opalski, Adam. *Kodeks spółek handlowych. Komentarz.* Vol. II A. Warszawa: C.H. Beck, 2018.

Opalski, Adam. *Kodeks spółek handlowych. Komentarz.* Vol. III A. Warszawa: C.H. Beck, 2016.

Opalski, Adam, Krzysztof Oplustil. "Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych." *Przegląd Prawa Handlowego*, no. 3 (2013): 11–23.

Oplustil, Krzysztof. *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej*. Warszawa: C. H. Beck, 2010.

Pinior, Piotr, Wojciech Popiołek, Janusz A. Strzępka, Ewa Zielińska. In *Kodeks spółek handlowych. Komentarz*, edited by Janusz A. Strzępka. Warszawa: C.H. Beck, 2015.

Pinior, Piotr. "Monistic system in simple joint-stock company under Polish law." *Przegląd Ustawodawstwa Gospodarczego*, no. 2 (2020): 2–7.

Pinior, Piotr. *Nadzór wspólników w spółce z ograniczoną odpowiedzialnością.* Warszawa: C.H. Beck, 2013.

Pinior, Piotr, "Odpowiedzialność cywilnoprawna członków zarządu spółki z o.o. za wyrządzoną szkodę (wybrane problemy odpowiedzialności na podstawie art. 293 KSH)." In *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi, edited by* Maksymilian Pazdan, Monika Jagielska, Ewa Rott-Pietrzyk, Maciej Szpunar, 545–558. Warszawa: Wolters Kluwer, 2017.

Popiołek, Wojciech. "Obowiązek lojalności członków organów kolegialnych spółek handlowych." *Przegląd Prawa Handlowego*, no. 9 (2021): 28–35.

Priester, Hans Joachim, Dieter Mayer. *Münchener Handbuch des Gesellschaftsrechts. B. 3. Gesellschaft mit beschränkter Haftung.* München: C.H. Beck, 2009.

Siemiątkowski, Tomasz. *Odpowiedzialność cywilnoprawna w spółkach kapitałowych.* Warszawa: C.H. Beck, 2007.

Spyra, Marcin. "Spółka akcyjna." In *System Prawa Handlowego, T. 2B., Prawo spółek handlowych, edited by Stanisław Włodyka.* Warszawa: C.H. Beck, 2007.

Sołtysiński, Stanisław. "Organy spółki akcyjnej." In *System Prawa Prywatnego. Vol. 17B. Prawo spółek kapitałowych*,edited by Stanisław Sołtysiński. Warszawa: C.H. Beck, 2010.

Sołtysiński, Stanisław, Andrzej Szajkowski, Andrzej Szumański, Janusz Szwaja. *Kodeks spółek handlowych. Komentarz,* Vol. II. Warszawa: C.H. Beck, 2005.

Stefanicki, Robert. *Należyta staranność zawodowa członka zarządu spółki kapitałowej.* Warszawa: Wolters Kluwer, 2021.

Szumański, Andrzej. Organy spółki z o.o. In *System Prawa Prywatnego. Vol. 17A. Prawo spółek kapitałowych,* edited by Stanisław Sołtysiński. Warszawa: C.H. Beck, 2010.

Wyrzykowski, Wojciech. "Wpływ nowelizacji art. 39 k.c. na zasady reprezentowania spółki kapitałowej w umowach pomiędzy spółką a jej członkiem zarządu." *Przegląd Ustawodawstwa Gospodarczego*, no. 1 (2020): 23–28.