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DELEGATING MEMBERS OF THE SUPERVISORY BOARD OF A LIMITED LIABILITY COMPANY TO ACT IN THE MANAGEMENT BOARD

Abstract

So far, it has not been decided whether a limited liability company may delegate a member of the supervisory board to temporarily perform the duties of a member of the management board. Practice is in favour of this possibility, while the doctrine expresses diverse views. The purpose of this paper is to analyze the subject matter in question. The principle of freedom of contract under company law and differences in the regulation of partnerships and capital companies, including the method of appointing the management board, are pointed out. It discusses the consequences of the assessment of delegation in the absence of explicit regulation, as well as the absence of a referral to use Article 383 of the Commercial Companies Code analogically. It demonstrates a number of doubts which are caused by delegation (when the thesis about its admissibility is approved), in particular the status of the delegate (the question of the continued existence of a legal relationship in the supervisory board). The paper employs the dogmatic method.

The conclusion is that delegating a member of the supervisory board in a limited liability company *de lege lata* is not acceptable. However, it is desirable, which is why it should have a regulation modelled on Article 383 § 1 CCC.

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Introduction

A limited liability company operates in trading using the legal personality conferred upon it (Article 12 of the Commercial Companies Code[1]). Therefore, it has the structure of bodies equipped with specific competences and authorized to perform acts prescribed for them (Article 38 of the Civil Code[2]). The management board in a limited liability company is an obligatory body[3], while the supervisory board[4] is optional[5] as a rule.

The management board is a single or multi-person body. In both cases, it may occur that none of the management board members will be able to serve the term of office, and at the same time it will not be possible to appoint a new management board member immediately. Meanwhile, a limited liability company cannot operate and participate in the market without an appropriately staffed management board. In such circumstances, with regard to the company in question, the legislator, apart from the option of appointing a new management board member, does not provide for any other specific form of supplementing the composition of this body. First of all, it does not indicate the possibility of delegating a member of the SB to perform temporarily duties in the management board which was implicitly expressed for a joint-stock company. The absence of a provision in the regulation of a limited liability company which would correspond to Article 383 CCC is the axis of the dispute and makes it possible to have different directions of interpretation of the applicable legal status.

[1] Act of 15 September 2000, the Commercial Companies Code, consolidated text, Dz. U. (Journal of Laws) of 2017, item 1577, as amended, hereinafter CCC.

[2] Act of 23 April 1964, the Civil Code, consolidated text: Dz. U. (Journal of Laws) of 2018, item 1025, as amended, hereinafter CC.

[3] The management board is an "executive" body with the authorization to run the company's affairs and represent it. It uses the presumption of competence, which means that affairs that are not explicitly reserved to the competences of other bodies, belong to the management board, cf. Rachwał, A., in: Włodyka S. (ed.), *System Prawa handlowego, v. 2A Prawo spółek handlowych*, Warszawa 2007, p. 962 et seq.

[4] Hereinafter the SB.

[5] The cases of obligatory occurrence of the SB are based on Article 213 § 2 of the Commercial Companies Code.

Doubts in delegating a member of the SB to perform management board duties have permeated into current reflections of the Commercial Code.[6] As early as then, some authors believed that the articles of association could authorize the SB to delegate its members to temporarily perform management board duties[7], while others thought that the transfer of institutions regulated for a joint-stock company onto a limited liability company was not admissible.[8] One may also ask why, despite the existing discrepancies, the legislator did not regulate the delegation issue in a limited liability company in the current Commercial Companies Code.

The presented position aims to show that delegating a member of the SB in a limited liability company is not acceptable under current law. Therefore, it opposes the practical approach to the issue[9], but finds a juridical basis in the legal order.

Position of the doctrine on admissibility of delegating

Principle of freedom of contract

The subject matter in question entails looking at the principle of freedom of contract under company law. It is ether an argument for accepting the view on admissibility of delegating a member of the SB to act in the management board or a specific obstacle to it.

Representatives of the doctrine, according to whom it is allowed in a limited liability company to delegate a member of the SB to act as a management board member, point as their main argument to the principle of freedom of contract. The

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[6] Ordinance of the President of the Republic of Poland of 27 June 1934, the Commercial Code, Dz. U. (Journal of Laws) of 1934, no. 57, item 502, as amended, hereinafter the Commercial Code.

[7] Dziurzyński, T., in: Dziurzyński, T., Fenichel, Z., Honzatko, M. (eds.), *Kodeks handlowy. Komentarz*, Łódź 1990, p. 241.

[8] Namitkiewicz, J., *Kodeks handlowy. Komentarz v. III*. Warszawa 1937, p. 155; Allerhandt, M., *Kodeks handlowy. Księga pierwsza Kupiec. Komentarz*, Lviv 1935 (reprint Warszawa, 1991), p. 345. Ambiguous statements by Julian Tomkiewicz and Józef Bloch, pointing out that the supervisory board, in the event of the incomplete composition of the management board due to suspension of management board members, should take steps to complete the management board, referring to Article 383 § 1 of the Commercial Code, in: Tomkiewicz, J., Bloch, J., *Spółki z ograniczona odpowiedzialnością. Kodeks handlowy art. 158–306 i 491–497 Komentarz*, Warszawa 1934, p. 119.

[9] Cf. the facts of the case pending at the Supreme Court, judgement of the Supreme Court of 6 June 2013, II UK 329/12, LEX No. 1331292.

basis for the application of the provision of Article 353[1] CC to the commercial law is a reference to the Civil Code made in Article 2 CCC (commercial law is part of the civil law).[10] While for a joint-stock company the freedom of contract following Articles 304 § 3 and 4 CCC was clearly limited, there is no corresponding provision for a limited liability company. On this basis, it is concluded that the principle of the autonomy of the will is applicable to shaping the content of the articles of association of a limited liability company.[11] Some commentators claim that regulating the issue of delegating by way of relevant provisions of the articles of association does not preclude restrictions under Article 353[1] CC, in particular the nature of a limited liability company.[12] Therefore, the absence of an equivalent of Article 383 CCC does not indicate inadmissibility of delegating because the legislator did not prohibit it on the basis of a general clause.

Some authors condition the application of Article 353[1] CC on the number of shareholders, allowing for this principle to be invoked only with regard to companies other than single-shareholder companies,[13] because in such a situation it is not possible to speak strictly about the company's articles of association. This view, due to the wording of the provision of Article 4 § 2 CCC, which introduces equality between the founding act and the articles of association, is rightly questioned. It is recognized that the indicated documents have the same juridical character, and their distinction is justified only in the name.[14] It should be agreed that the position referred to is an interpretation *contra legem*, which additionally leads to the emergence of inequality of limited liability companies. The legislator does not introduce a distinction in this matter, using it explicitly in situations requiring it (for example, Article 210 § 2 CCC). *A contrario*, in other situations the possibility of transferring regulations between the companies is wrong.

[10] Kopaczyńska-Pieczniak, K., in: Kidyba, A. (ed.), *Kodeks spółek handlowych v. I. Komentarz do art. 1–150*, Warszawa 2017, p. 54.

[11] Kwaśnicki, R. L., *Autonomia woli w kształtowaniu postanowień umowy (aktu założycielskiego) spółki z o.o.*, "Prawo Spółek" 2003, No. 7-8, pp. 20, 36.

[12] Strzelczyk, K., in: Siemiątkowski, T., Potrzeszcz R. (eds.), *Kodeks spółek handlowych. Komentarz v. 2*, Warszawa 2011, p. 402; Rodzynkiewicz, M., *Kodeks spółek handlowych komentarz*, Warszawa 2012, p. 406–407.

[13] Litwińska, M., *Glosa do wyroku Sądu Najwyższego z 5 maja 1996, sygn. akt: II CRN 29/96*, "Przegląd Prawa Handlowego" 1997, No. 1, p. 28.

[14] Cf. Kwaśnicki, R. L., *Autonomia*, p. 20; Siemiątkowski, T., Potrzeszcz R., in: Siemiątkowski, T., Potrzeszcz R. (eds.), *Kodeks spółek handlowych. Komentarz. Tytuł I. Przepisy ogólne. Tytuł II. Spółki osobowe, v. 1*, Warszawa 2011, p. 48.

Representatives of the doctrine, according to whom the principle of freedom of contract is limited in company law, indicate that company law is not based on the principle of sovereignty and self-government. Relying on the security of trading and the creative nature of the articles of association of a commercial company (creating an independent and self-operating organizational unit equipped with personality), the legislator reserves broad powers to interfere in the content of the articles of association, providing shareholders with a narrow scope of freedom to create a company's relationship.[15] This leads to the assertion that the legislator does not think that the shareholders know best how to shape the content of the articles of association.[16] In capital companies it is argued that the separation of competences between the company's bodies constitutes a rule which indicates their nature. Therefore, any deviations in this matter should be treated as precisely as possible. Each company body has its own competence reserved statutorily, which may be modified if there is a legal norm in this regard. Therefore, it is recognized that even the exemplary (open) nature of listing additional competences of the SB (Article 220 CCC), shows that delegating (which is not listed in the catalogue of Article 220 CCC) is outside the contractual freedom of the parties[17] as going beyond the nature of a limited liability company. Therefore, delegating members of the SB to act temporarily in the management board is not admissible, because the competences of the supervisory body may not be expanded against the statutory model under the articles of association.[18] It results from the perception of the separation of competences of the managing and supervisory bodies as a regulation that constitutes the essence of a limited liability company[19], in which wider powers and a stronger position are attributed to shareholders.[20]

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[15] Romanowski, M., in: Szajkowski, A. (ed.), *System Prawa Prywatnego v. 16. Prawo spółek osobowych*, Warszawa 2008, p. 176–177.

[16] Ibidem, 177.

[17] Nowacki, A., *Komentarz do art. 220 KSH*, in: *Spółka z ograniczoną odpowiedzialnością*. *Volume I. Komentarz do art. 151–226 KSH*, available in Legalis 2018 database, accessed on: 24.01.2019.

[18] Tarska, M., *Zakres swobody umów w spółkach handlowych*, Warszawa 2012, p. 404.

[19] Szumański, A., *Ograniczona wolność umów w prawie spółek handlowych*, "Gdańskie Studia Prawnicze" 1999, No. II, p. 417; Tarska, M., *Zakres*, p. 404.

[20] Cf. Article 212 of the CCC, the counterpart is missing in the case of a joint-stock company.

Method of regulating companies in the CCC

When interpreting the admissibility of delegating a member of the SB of a limited liability company to act in the management board, the method of regulating partnerships and capital companies should be considered. It should be emphasized that all partnerships, except for a registered partnership, are governed in a non-quorum manner by referring to relevant application of provisions on the registered partnership.[21] The Code only regulates their *differentia specifica*. In turn, in relation to capital companies, the legislator uses a different legislative technique because each company type is governed comprehensively, without the use of a reference (the provisions of the act constitute a functional whole). In this context, reaching for models of a joint-stock company for the needs of a limited liability company is doubtful.[22] Since the legislator does not apply provisions referring to another capital company, it should be assumed that it is not possible to draw on this regulation. Admitting such a possibility would mean that provisions referring to other rules in the case of a professional partnership, limited partnership and limited joint-stock partnership are unnecessary, since "referring" still occurs without them.

One should agree with the view that the natures of a limited liability company and a joint-stock company are different, even though both are capital companies.[23] In the case of a joint-stock company, the legislator expressly provided for and regulated delegating, which was not performed for a limited liability company. Considering the legislator's rationality, this proves the expediency of the legislative measure and thus the acceptance that the legislator did not intend to legalize delegating in a limited liability company.[24] It is worth noting that Arti-

[21] Article 89 CCC, Article 103 § 1 CCC, Art. 126 § 1(1) CCC refer to the proper application of the provisions on registered partnership.

[22] On the contrary, Andrzej Szajkowski, Monika Tarska, Andrzej Szumański argue that some issues (including delegating a member of the SB to perform duties of the management board) deliberately found themselves outside the text of the act, because a limited liability company is less "governed" than a joint-stock company. Therefore, it is possible to apply forms of a joint-stock company, with the absence of possibility to apply it in the opposite direction, because regulations of a limited liability company are not tailored to the essence of a joint-stock company, in: Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.), *Kodeks spółek handlowych, v. II. Spółka z ograniczoną odpowiedzialnością. Komentarz do art. 151–300*, Warszawa 2014, pp. 575–576.

[23] Szumański, A., *Ograniczona*, p. 416.

[24] Strzępka, J. A., Zielińska, E., in: Strzępka, J. A. (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa 2015, p. 556; Strzępka, W., *Rozszerzenie uprawnień rady nadzorczej w spółce z o.o.*, "Prawo Spółek" 2001, No. 5, p. 26.

cle 220 CCC and Article 383 CCC show some similarity, which may confirm that the aforementioned difference is not accidental.[25] According to some authors, the fact that the list included in Article 220 CCC serves as an example does not allow for accepting the position that delegating is prohibited.[26] However, it is pointed out that exhaustive and precise regulation of powers of the SB leads to the conclusion that this list is the maximum catalogue of competencies affecting the operation and shape of the management board.[27] In addition, the division of competences between bodies and their statutory specification (including in relation to the supervisory body) are an element constituting the essence of a limited liability company, therefore they may not be contractually expanded.[28] The arguments about a closed catalogue of commercial companies which state that one may not freely select items and transfer them onto other legal forms, unless the legislator allows it, are convincing. The circumstance of the creative nature of a contract cannot have no impact on the freedom of contract. Furthermore, one needs to agree with the statement that "the risk for the company, shareholders and third parties associated with the use of the discussed institution speaks against acknowledging the admissibility of delegating members of the supervisory board to act temporarily as management board members in a limited liability company under the articles of association".[29]

It is worth mentioning here the recommendation of the Team for developing recommendations regarding draft regulations governing a simple joint-stock company (proposal of amendments to the Commercial Companies Code).[30] This document provides for a new model of a capital company, i.e. a simple joint-stock company.[31] The recommendation expressly states the possibility of delegating in a SJSC (Article 300[66] of the Recommendation is equivalent to Article CCC), leaving no freedom of interpretation, and even solving some existing doubts regarding delegating. The planned regulation confirms that the legislator, with

[25] Nowacki, A., *Komentarz*, available in Legalis 2018 database, accessed on: 24.01.2019.

[26] Rodzynkiewicz, M., *Kodeks spółek handlowych komentarz*, Warszawa 2012, p. 406.

[27] Kopaczyńska-Pieczniak, K., in: Kidyba, A. (ed.), *Kodeks spółek handlowych v. II. Komentarz do art. 151-300*, Warszawa 2018, p. 497.

[28] Tarska, M., *Zakres*, p. 404.

[29] Ibidem, 405.

[30] The recommendation introduces amendments to other parts of the Code, related to a SJCC; it does not interfere with the content of Article 220 CCC, unpublished.

[31] Hereinafter, a SJCC.

the intention of allowing the delegation of a member of the SB to act temporarily in the management board, does so clearly. Therefore, it allows one to conclude that the absence of regulation regarding delegating in a limited liability company is not accidental, but it is a deliberate intention of the legislator.

The historical interpretation proves the absence of accidentality of the current regulation. The Commercial Code did not regulate delegating for a limited liability company, while doing so in the case of a joint-stock company.[32] The discrepancies existing in this matter did not prompt the legislator to regulate the analysed issue. It seems that the legislator employed negative regulation.[33] Namely, not wanting delegating in a limited liability company to be applied, it simply neither explicitly indicated it nor allowed it in the form of a provision referring to another rule. Therefore, it may not be argued against the legislator that in the absence of a provision it is possible to create a contractual standard, as if there was a legal gap in this area which should be filled somehow.

Argument of the competence to appoint the management board

The provision of Article 383 CCC and the lack of its equivalent in Division I of Title III of the CCC should also be considered taking into account the provisions of Article 368 § 4 CCC and Article 201 § 4 CCC, indicating entities authorized by law to appoint and dismiss management board members. While in the case of a joint-stock company the power (but also an obligation, cf. Article 383 § 2 CCC[34]), to appoint management board members was vested in the supervisory board, in a limited liability company, as a general rule, it is the shareholders who have such a power (Article 201 § 4 of the CCC is dispositive[35] and the articles of association may authorize another entity, including the SB, to appoint manage-

[32] Cf. Strzępka, W., *Rozszerzenie*, p. 28.

[33] Cf. Morawski, L., *Zasady wykładni prawa*. Toruń 2010, p. 150.

[34] The authors state that the SB has an obligation to make changes in the composition of the management board (the need for the SB to work for the good of the company), the conceptual scope of which includes delegating, cf. Szwaja, J., Mika, I. B., in: Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.), *Kodeks spółek handlowych v. III Spółka akcyjna. Komentarz do art. 301–490*, Warszawa 2013, p. 733.

[35] An exception to this rule involves municipal limited liability companies, in which management board members are appointed by the supervisory board, Article 10a (6) of the Act of 20 December 1996 on Municipal Management, consolidated text, Dz. U. (Journal of Laws) of 2017, item 827, as amended.

ment board members). In a limited liability company, it is as a rule the general meeting of shareholders that should have influence over the composition of the management board, and thus over the shape and image of the company. In this context, a positive interpretation, i.e. allowing a member of the supervisory board to be delegated to act temporarily in the management board in a limited liability company, appears to be in contradiction with the intention of the legislator. Granting the above competence to the SB introduces a breach in the systemic recognition of powers of the bodies appointing management board members, making the body that has no *ex lege* powers to appoint this body to have the competence to supplement it in an emergency. Such an interpretation appears to be accidental and violates the coherence of the Code in this matter, because the role of the SB in a joint-stock company was, pursuant to Article 368 § 4 CCC, clearly strengthened with respect to a limited liability company with significant personal powers.[36] The appointment also involves dismissing them, and these competencies systematically include the right to a temporary delegation in connection with the incompleteness of composition of the executive body.

Doubts associated with delegating in practice

No explicit regulation of delegating a member of the SB to act in the management board in a limited liability company, as well as no indication as to the application of Article 383 CCC *per analogiam* raise a number of ambiguities not only as to the admissibility of this institution in a limited liability company, but also as to the premises for delegating and assessing its legal consequences should the thesis about its admissibility be approved. The literature presents different theories as to the status of the delegated member (although valid for a joint-stock company, also relevant for a limited liability company). The existing doubts do not support the admissibility of delegating in a limited liability company.

Delegating as an exceptional institution

It needs to be emphasized that delegation regulated on the basis of a joint-stock company is perceived as an exceptional institution, allowed if the manage-

[36] Szajkowski, A., Tarska, M., Szumański, A., in: Sołtysiński, S., Szajkowski, A., Szumański, A., Szwaja, J. (eds.), *Kodeks spółek handlowych v. III Spółka akcyjna. Komentarz do art. 301–490*, Warszawa 2013, p. 570.

ment board cannot function properly.[37] Specifically, it involves only a temporary obstacle to acting as a management board member, not a definitive impossibility (this does not fall within the statutory premise of delegating).[38] Therefore, when the management board is duly-staffed, delegation may not take place, for example, to support the management board with personnel.[39] Delegation is possible when a management board member cannot currently hold a seat but there is a chance to restore it within a predictable and short period of time.[40] Delegation should not be allowed if the time period for reinstating a management board member in the office is possible to be defined (predictable) but long.[41]

It should be pointed out that despite its uniqueness, delegating to the temporary performance of activities in the management board is an independent institution and does not require co-occurrence of another activity, e.g. suspension of a management board member.[42] The circumstance introducing the need for delegating is therefore irrelevant and not subject to research.

The institution of delegation should be perceived as an exception to the general rules of appointing management board members in a procedure ensuring stability of its composition. Therefore, it may not be applied in a scope wider than the legislator provides for (*exceptiones non sunt extendendae*). Perceiving delegation as an exception, in the absence of explicit regulation in relation to a limited liability company, makes one believe that the legislator prefers the use of "ordinary" procedures for the appointment of a new member.

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[37] Naworski, J. P., *Delegowanie członków organów nadzoru spółki kapitałowej do zarządu*, "Prawo Spółek" 2002, No. 2, p. 3.

[38] The option of delegation is excluded, e.g. if the mandate expires due to death (there is no doubt that the person holding the office of a management board member will not return to perform the mandate), see Szumański, A., in: Pyzioł, W., Szumański, A., Weiss, I. (eds.), *Prawo spółek*, Warszawa 2014, p. 998.

[39] Opalski, A., in: Opalski, A. (ed.), *Kodeks spółek handlowych, v. IIIA. Spółka akcyjna. Komentarz do art. 301–392*, Warszawa 2016, p. 1490.

[40] Cf. Naworski, J. P., *Delegowanie*, p. 6 et seq.

[41] Ibidem, p. 4.

[42] Kwaśnicki, R. L., Korniluk, M., *Delegowanie członka rady nadzorczej spółki akcyjnej do czasowego wykonywania funkcji członka zarządu*, Monitor Prawniczy 2009, No. 1, available in Legalis database, accessed on: 3.02.2019; similar: Bieniak, J., in: Bieniak, J., Bieniak, M. (eds.), *Spółka akcyjna. Komentarz*, Warszawa 2005, p. 308.

Obligation to enter delegating in the register of entrepreneurs

With regard to a limited liability company,[43] the register does not provide an appropriate heading for the data of persons delegated to perform management board duties (it has no physically separate place to make an appropriate entry). In the case of delegating, the relevant information is included in section 2, subheading 1 of heading 1, in the field specifying the function in the representing body. Such a practice appears to be wrong, because the term "member of the supervisory board delegated to perform the function of president" does not specify the function but the status of the person. On the other hand, accepting the correctness of this practice would dispel doubts about the status of this person, because it should be recognized that they become a management board member, since they are given an entry in heading 1 referring to the body authorized to represent. However, one may see the cascading nature and the possibility of assumptions guiding the above arguments.

Considering the certainty of trading and protection of the interests of third parties (company's counterparties), the statute should provide for the obligation to enter delegation of a member of the SB to temporarily perform duties in the management board of a limited liability company. The entry should be obligatory, although declarative, and delegating itself should be effective upon the supervisory board passing a resolution. It should be assumed that the adoption of a resolution by the SB should have the effect of delegating.

Time frames of delegating

The current state of (not)regulating delegation in a limited liability company, in particular in view of admissibility of delegating on the basis of the freedom of contract, results i.a. in the freedom of shaping the time frames of the institution in question. While the provision of Article 383 CCC expressly indicates the temporary nature of delegation, allowing its application for a maximum period of three months, in the case of a limited liability company there are no legal indications regarding the period of admissibility of delegating. This makes it seem possible to indicate a time frame for a period exceeding the time limit specified for a joint-

[43] Article 39 of the Act of 20 August 1997 on the National Court Register Dz. U. (Journal of Laws) of 2018, item 986, as amended) does not differentiate between capital companies in this respect, thus also with reference to a joint-stock company there is no relevant legal norm requiring an entry or a field in the register itself.

stock company or, for example, by reference to an indefinite future event, such as the phrase "the date of convening the next meeting of shareholders".

The institution of delegating, as an exceptional institution, must have a temporary, strictly-defined nature. Its statutory regulation is desirable, as it may be seen that it creates the risk of freedom and arbitrariness of casuistic solutions.

Status of a member of the SB delegated to perform management board duties

Part of the doctrine indicates that a delegated member of the SB assumes the rights and obligations of a management board member, which, however, does not determine the acquisition of the status of a management board member.[44] This is supported by the literal interpretation of the provision of Article 383 CCC, in which it refers to "delegating to perform duties of a management board member" and not delegating to the management board.[45] There are opinions that if the intention of the legislator was to make the delegated person a management board member, it would be simply pointed out in the text of the act, instead of using a longer linguistic form referring directly to the performance of duties of a management board member.[46] At the same time, the current absence of regulation (provision) makes it impossible to accept a delegated person's suspension of acting in the SB while they are delegated to the management board and while there are views confirming the non-acquisition of a management board member status.[47]

In turn, the second position recognizes the delegated person as a management board member, claiming that the performance of duties of a management board member makes them a management board member.[48] It is assumed that the delegated member of the SB becomes a manager with all related consequences, and thus, upon the adoption of a relevant resolution they become a management board member.[49]

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[44] Opalski A., in: *Kodeks*, p. 1486; Chomiuk, M., in: Jara, Z. (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa 2014, p. 874; similarly on the basis of a joint-stock company: Szwaja, J., Mika, I., in: *Kodeks*, p. 729.

[45] Nowacki, A., *Delegowanie członków rady nadzorczej do czasowego wykonywania czynności członków zarządu*, "Przegląd Prawa Handlowego" 2010, No. 10, p. 13.

[46] Ibidem, 13.

[47] Strzępka, J., *Rozszerzenie*, p. 27.

[48] Naworski, J.P., *Delegowanie*, p. 9.

[49] Judgment of the Supreme Administrative Court in Warszawa of 12 April 2013 I GSK 1263/11, LEX No. 1336162.

The delegated person assumes the general rights and obligations of a management board member.[50] In addition, jurisprudence considers a delegated person to be a management board member within the meaning of Article 116 § 1 of the Tax Ordinance Act[51], which in terms of content is an equivalent of Article 299 CCC.

Approving of one of the two aforementioned positions regarding the status of a delegated person is not a purely doctrinal question, but affects the functioning of a company, in particular the responsibility of the delegated person for the company's obligations and the possibility of applying a non-competition clause for them.

A consequence of the approval of the concept that the delegated member of the SB does not acquire the status of a management board member, would involve an exemption from the application of certain regulations with regard to such a person, such as remuneration, non-competition, disputes with the company or liability.[52] Therefore, in a situation where a non-competition rule has not been imposed on a member of the SB, this prohibition will not be binding on them in the case of being delegated (Article 390 § 3 sentence 3 of the CCC). *A contrario*, even if an appropriate contractual prohibition has not been introduced and we believe that the delegated member of the SB becomes a management board member, the non-competition rule will be binding on them during the delegation period and will cease after that time (Article 211 § 1 CCC; temporary nature of the non-competition rule).[53] Therefore, the acknowledgement that the delegated person becomes a management board member eliminates legislative imperfections in this matter.

It is worth recalling here the amendment of the CCC[54] adding Article 299[1] CCC, by virtue of which liability of management board members under Article 299 CCC was expanded to apply also to the company's liquidators. This amendment proves that the circle of liable entities pursuant to Article 299 CCC must be strictly interpreted, all the more that Article 276 § 1 CCC establishes the principle that management board members shall act as the liquidators, unless other regu-

[50] Ibidem.

[51] Judgment of the Supreme Court of 12 May 2011, II UK 308/10, LEX No. 1165771.

[52] Cf. Nowacki, A., *Delegowanie*, p. 13.

[53] Naworski, J.P., *Delegowanie*, p. 15.

[54] Act of 15 May 2015 Restructuring Law Dz. U. (Journal of Laws) of 2015, item 978, there is a later consolidated text of the act, however, it is not relevant for incidental amendment of the CCC, etc.

lations are included in the articles of association of a limited liability company or a shareholders' resolution. Therefore, following the approval of the position according to which a member of the SB delegated to perform duties in the management board is not a member, a situation arises where they are not liable under Article 299 CCC. The delegated person will not be held liable, even though they perform the same duties as a management board member appointed in a traditional procedure who will be held liable. Such an interpretation seems unfair and is a manifestation of unequal treatment of entities in the same situation.[55] Currently, there is no legal norm imposing liability on persons delegated to perform management board duties.

It should be assumed that it is the scope of performed activities (duties), not the manner (procedure) of appointment that should be the circumstance indicating the same position (the status of the delegated person). The thesis that delegation is a source of establishing a membership relationship in the management board seems to be correct, which is why the delegated person has a status (temporary membership) of being part of the management board.[56] In other words, authorization to act on behalf of the company in a specific scope of matters and not the source of authorization (decision-making body) to act as a manager should be key.[57]

It should be noticed that specifying the status of a member of the SB delegated to perform duties of the management board is important from the point of view of proper functioning of both the management board and the supervisory board, in particular where compositions of both bodies were settled in the articles of association in a rigid manner (not involving a range). A decrease in the number of members below a certain number means that the body is not properly staffed (non-quorum body) and is therefore unable to act on behalf of the company.

Finally, it should be noted that as a result of delegating, a member of the SB acquires the right to perform the activities of the management board, i.e. they may manage the company's affairs and represent it. Performing management

[55] Nowacki, A., *Delegowanie*, p. 15, in the opinion of whom, a person delegated to perform functions of the management board may not be liable under the provisions on liability of management board members, because he or she is not a member. The author refers his own view to criminal responsibility, which may not be based on a provision used in a corresponding way, but this view also applies to civil law liability, including Article 291 CCC or Article 299 CCC.

[56] Judgment of the Supreme Administrative Court in Warszawa of 12 April 2013 I GSK 1263/11, LEX No. 1336162.

[57] Judgment of the Supreme Court of 12 May 2011, II UK 308/10, LEX No. 1165771.

duties affects many areas of the company's activity, at the same time excluding impartiality of the delegated person. The simultaneous performance of management and audit activities is contrary to the rule of Article 214 § 1 CCC, which prohibits combining membership in these bodies (the prohibition applies to all audit activities and is absolute). For this reason, a member of the SB delegated to perform tasks of the management board while holding a position in the management board, should not have the competence to perform duties in the supervisory board.[58] In this situation it is important that the mandate of a member of the SB carries on, and therefore it is not possible to appoint a new one. Due to these difficulties, delegating appears as a troublesome institution, not very simple in everyday use for the company. *De lege ferenda*, it is worth considering in the CCC a suspension of *ex lege* membership in the SB for the time of delegation.

Incidentally, it is worth noting that as a result of delegating, a member of the SB may *de facto* control his or her activities, although such a situation may arise in the ordinary course of proceedings and filling mandates in the bodies of the company, as the CCC does not prohibit the performance of duties in the SB immediately after fulfilling the mandate of a management board member. *De lege lata* there is no legal norm ordering one to refrain from evaluating previous actions, which seems desirable *de lege ferenda*.[59]

In connection with the aforementioned observations, it should be pointed out that Article 214 CCC introduces a prohibition of combining positions in the management board and the supervisory board on the basis of a limited liability company. The possibility of delegating a member of the supervisory board, assuming the belief that the mandate in the supervisory does not expire, is against this regulation. Opponents of this view indicate that it has its counterpart in a joint stock company – i.e. Article 387 CCC,[60] without noticing a seemingly important difference that on the ground of a limited liability company there is a *lex specialis* in the form of 383 §1 CCC, which explicitly allows delegating.[61]

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[58] Chomiuk, A., in: *Kodeks*, p. 874; similarly on the basis of a joint-stock company: Szwaja, J., Mika, I., in: *Kodeks*, p. 729.

[59] A model to work on this regulation could involve Articles 209 or 244 CCC.

[60] Opalski, A., *Komentarz do art. 220 k.s.h*, in: Opalski, A. (ed.), *Kodeks spółek handlowych. Volume II A. Spółka z ograniczoną odpowiedzialnością. Komentarz do art. 151–226*, available in Legalis 2018 database, accessed on: 4.02.2019.

[61] Nowacki, A., *Komentarz do art. 220 KSH.*

Summary and conclusions

Delegating a member of the SB to temporarily perform management board duties in a limited liability company is an ambiguous measure. This feature is demonstrated not only by the possibility of delegating but also by its legal consequences. It is fully justified to raise the argument about the impossibility of its occurrence in a limited liability company due to the absence of a standard allowing the possibility of delegating members of the SB to perform management board functions. The existing cases should be treated as an interpretation creating an institution that does not have a clear normative basis.

Although the position is contrary to the practical approach to the issue, it finds a juridical basis in the legal order (negative regulation). First of all, the legislator regulates capital companies in a comprehensive manner, which makes reaching for forms of a joint-stock company for the needs of a limited liability company doubtful. I do not think that a limited liability company is "unregulated" and that it is necessary to apply the standards governing a joint-stock company. The legislator does not use a provision referring to another rule, without which it seems not possible to fall back on the regulation of another company. Within their characteristics, capital companies divide competences between their bodies. Any deviations in this matter should be treated as precisely as possible. Each company body has its own statutorily reserved competence which may be modified if there is an explicit legal norm in this regard. The provision of Article 383 CCC allows the adoption of the uniqueness of the regulation, which may not be freely transferred onto a limited liability company, in particular by referring to the principle of the freedom of contract. The example involves the Recommendation in the scope of draft laws regulating a simple joint-stock company, which, for a SJSC, which is a category of a joint-stock company, explicitly provide for self-regulation in the matter of delegating, not for referring to Article 383 CCC.

It is puzzling how far the creative interpretation of shareholders of a limited liability company that creates institutions that are not explicitly indicated in the act can go. The freedom of shareholders *in casu* in this respect weakens the argument of the legislator's rationality and the resulting conclusion that the absence of regulation is not accidental, but fully intended. It should be added that one may conclude from the provisions of the CCC that the composition of the management board, and thus the shape and image of a limited liability company, should be influenced by the company's shareholders. All in all, despite the discrepancies

already existing on the grounds of the CC regarding the admissibility of delegating in a limited liability company, the legislator did not comment in the CCC in this regard. A specific complement to the above arguments involves ambiguities arising in relation to the assessment of delegating, the legal consequences of its application, as well as specifying the status of a delegated member of the supervisory board.

Numerous doubts regarding delegation to perform temporarily duties in the management board, being a consequence of creative legal interpretation processes, make their definitive removal possible only through the legislator's interference in the text of the CCC. Delegation in practice raises a number of ambiguities. Despite the position taken and the comments made, in my opinion, the amendment to Section II of the CCC "Supervision", more precisely its Article 220, should aim at allowing the possibility of delegating a member of the SB to temporarily perform duties in the management board (similar to Article 383 § 1 CCC), with a precise determination of the limits and premises of delegating and a settlement of the status of the delegated person. Although the proposed amendment could be accused of "statutory overregulation", it must be remembered that legal certainty is a value in itself, which requires firmness and precision.

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