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CONTINUING CONVERGENCE OF CORPORATE GOVERNANCE MODELS? TOWARDS EFFICIENCY OF POLISH REGULATIONS ON SUPERVISORY BOARDS IN COMPANIES AND COOPERATIVES

Abstract

The presented paper concerns the problem of efficiency in institutional supervision exercised under both company and cooperative law by the supervisory board. The paper also includes an international perspective involving convergence processes between different board systems. The convergence syndrome consists of developing common standards of corporate governance aimed at efficiency, irrespective of board structures. In 2022, the Polish legislator introduced extensive amendments to the regulatory framework, remodelling the legal position of the supervisory board. Despite the fact that the said amendments have been introduced only under company law, there are important arguments for conducting a comparative legal analysis involving both companies and cooperatives. It is unclear how the remodelled regulatory framework fits into the said convergence phenomenon and, eventually, whether the introduced solutions will allow for improvement in the field of corporate governance.

KEYWORDS

company, cooperative, supervisory board, convergence, corporate governance, due care, business judgement rule

SŁOWA KLUCZOWE

spółka kapitałowa, spółdzielnia, rada nadzorcza, konwergencja, ład korporacyjny, należyta staranność, *business judgement rule*

1. INTRODUCTION

The struggle for efficient internal management control is at the centre of the corporate governance debate. **Corporate governance** – which in essence is about management and control[1] – provides a system of tools and structures that enable mitigation of conflicts that are involved in managing a corporate entity. This paper addresses the problem of efficiency in institutional supervision exercised in the dual-board scheme by the supervisory board. In the introductory part, the author presents basic corporate governance models and main characteristics of Polish companies and cooperative law with reference to board structures, as well as similarities between the mentioned (corporate) entities (1.). Furthermore, the paper examines the convergence phenomenon (2.) and investigates legislative changes introduced under company law in Poland in 2022 in the field of supervision (3.). The presentation of this background will allow for a more detailed examination of the problem in question, namely the problem of efficiency in supervision (4.). In this part of the paper, the author's intention is to examine the significance and potential efficiency of specific legislative changes introduced under Polish company law in 2022 which affect the functioning of the supervisory board, i.e. the remodelled regulatory framework governing the duty of care and liability of board members, as well as the business judgement rule. The author also intends to assess the relevance and potential impact of this framework for cooperative law, especially with reference to the interpretation of board members' duties and liability. The overall objective of the paper is to assess whether the introduced amendments fit into the convergence phenomenon and, eventually, whether they will enhance corporate governance.

a) CORPORATE GOVERNANCE MODELS AND BOARD STRUCTURES UNDER POLISH COMPANY AND COOPERATIVE LAW

Board structures and, as a consequence, corporate governance models vary. Boards can operate as one- or two-tier organs. A one-tier or a single board

[1] *Cadbury Report (Report of the Committee on the financial aspects of corporate governance)*, December 1992, section 2.5.

entrusts both management and control to the board of directors, who are vested with universal powers. In turn, a two-tier or a dual board scheme separates these functions into two distinct bodies: the management board and the supervisory board. Under Polish law, boards in companies and cooperatives operate mainly under a **dualistic model of governance**. In such a setting, the supervisory board is identified as a key actor of internal corporate governance.[2] To be more specific, Polish joint-stock companies (**JSC**) and almost all **cooperatives** (with minor exceptions) must have a supervisory board.[3] In turn, in limited liability companies (**LLC**) the supervisory board becomes mandatory if the share capital exceeds 500.000 PLN and there are more than 25 shareholders.[4] A simplified joint-stock company (**SJSC**), introduced in Poland in 2021, has a flexible model of governance, which allows for the introduction of a dual-board system, with a management board and, optionally, a supervisory board or a one-tier board system.[5] If the simplified joint-stock company has a monistic model of governance, both the management of the company's affairs and supervision remain within the scope of the duties of the board of directors.[6] A monistic model of governance can be adopted, in both company and cooperative law, also on a multinational level (*Societas Europea*, *Societas Cooperativa Europea*).[7]

b) SIMILARITIES BETWEEN COMPANIES AND COOPERATIVES

In 2022, the Polish legislator remodelled the legal position of the supervisory board, especially in joint-stock companies, due to extensive amendments of the Code of Commercial Companies[8] (CCC). These amendments have been intro-

[2] Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* [*Corporate governance instruments in joint-stock companies*], Warszawa 2010, 380.

[3] See: Art. 381 of the CCC, as well as Art. 35 § 1 item 2 and Art. 46a of the Cooperative Law.

[4] See: Art. 213 § 2 of the CCC. More on institutional supervision in limited liability companies: Piotr Pinior, *Nadzór wspólników w spółce z o.o. [Supervision in limited liability companies]*, Warszawa 2012, 405.

[5] See: Art. 300(52) § 1 and 2 of the CCC. More on the model of governance applicable to simplified joint-stock companies: Adam Opalski, *Prosta spółka akcyjna – nowy typ spółki handlowej (część II)* [*Simple joint-stock company – a new type of company (part 2)*], PPH 2019/12, 6, Krzysztof Oplustil, *Zarządzanie i nadzór w systemie monistycznym w prostej spółce akcyjnej [Management and supervision in a monistic system in a simplified joint-stock company]*, PPH 2023/9, 46.

[6] See: Art. 300(73) § 1 of the CCC. The articles of association (or a resolution of the board) may, however, delegate business management to executive directors. In such a case, other directors (called the non-executive directors) exercise supervisory functions (Art. 300(76) § 1 of the CCC).

[7] Act of 4 March 2005 on the European Economic Interest Grouping (EEIG) and European Company (SE), Journal of Laws 2022, item 259; Act of 22 July 2006 on the European Cooperative Society (SCE), Journal of Laws 2018, item 2043.

[8] Act of 15 September 2000 – Code of Commercial Companies, Journal of Laws 2024, item 18.

duced only under company law; however, a comparative legal analysis involving both companies and cooperatives seems justified due to a **significant structural similarity** between the mentioned legal entities. Both companies and cooperatives should be classified as legal persons of corporate type. Moreover, many institutions of both company and cooperative law have been shaped in a similar way; the respective provisions of Cooperative Law[9] governing the legal position of the supervisory board resemble in many aspects the ones provided for in the CCC. There are also common areas of research resulting from both the regulatory framework (i.e., relating to internal audit) and soft law.

c) RESEARCH QUESTIONS

The problem of efficiency in institutional supervision requires an international perspective involving convergence processes between the two distinguished board systems. The **convergence syndrome** consists of developing common standards of corporate governance irrespective of board structures and transplanting some elements (rules, mechanisms) primarily inherent to one board system towards another in order to improve corporate governance and internal control mechanisms; a certain convergence – within the same objective – is also visible between legal systems based on similar assumptions when it comes to board models. It is unclear how the amendments to the regulatory framework introduced in Poland in 2022 fit into the said convergence phenomenon and, eventually, whether these amendments will allow for improvement in the field of corporate governance. Among others, it is uncertain how the currently remodelled regulatory framework has influenced the **liability** of the supervisory board members (towards the company) and the **standard of due care** applicable to them. As under Cooperative Law, there is no explicit regulation on the duty of care attributable to supervisory board members, an important question concerns the standard of due care applicable to the said members. The addressed problem plays a crucial role in the field of liability for damage caused to the cooperative within wrongful (negligent) supervision. Another important research question refers to the interpretation and potential functioning of the so-called **business judgement rule** in relation to supervisory board members. It is unclear how to apply this rule in the case of the said members, given the fact that they usually perform tasks other than making business decisions.[10]

[9] Act of 16 September 1982 – Cooperative Law, Journal of Laws 2024, item 593.

[10] Andreas Cahn, David C Donald, *Comparative Company Law. Text and Cases on the Laws Governing corporations in Germany, the UK and the USA*, Cambridge University Press 2018, 449.

As a final introductory remark, it should be noted that the proper functioning of both companies and cooperatives has significant consequences not only for the parties involved (and their members), but also more broadly for a multiple group of **stakeholders**, including employees, customers, local and even global communities. Recurring financial crises show the importance of institutional supervision exercised in the dual board system by the supervisory board.

2. THE CONVERGENCE PHENOMENON

a) TOWARDS FLEXIBILITY IN BOARD STRUCTURES

It is claimed that **neither of the board systems is inherently better**;[11] there seems to be no fundamental advantage of one organizational model over another, especially when it comes to efficiency in supervision. Each of the systems (models) has its own advantages and disadvantages. Due to this observation, some jurisdictions allow for a **flexible model of governance**; the parties involved are thus empowered to choose an adequate board structure. The trend towards greater structural flexibility on the board level is visible in Europe, especially in France and Italy.[12] Also in Poland, apart from the simplified joint-stock company, it is postulated to introduce – as one of the possible scenarios for joint-stock companies and cooperatives – a monistic model of governance, both in company[13] and cooperative law.[14]

b) THE ROLE (OBJECTIVE) OF CONVERGENCE AND ITS EXEMPLIFICATION

The said observation – claiming that neither of the board systems is better – also provokes the **convergence syndrome,** which has the objective to promote

[11] Klaus J Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, ECGI, January 2011, Law Working Paper No 170/2011, 74.

[12] Klaus J Hopt, Patrick C Leyens, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, ECGI, January 2023, Working Paper No 567/2021, 4; Hopt, Leyens, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy*, ECGI, Law Working Paper No 18/2004, 21.

[13] Adam Opalski, *Rada nadzorcza w spółce akcyjnej* [*The supervisory board in joint-stock companies*], Warszawa 2006, 512.

[14] Grzegorz Kozieł, *One-tier model in the cooperative operating under general rules of Polish Law as one of the options of governance of this cooperative, proposed for the law as it should be*, Studia Prawnicze KUL 2022/4, 98.

efficiency in corporate governance. In dual-board systems, this process consists of strengthening the strategic role of the supervisory board and improving the information flow (as these are presented as key advantages of the monistic model of governance). Due to these changes, the supervisory board is expected to be not only a supervisor and controller, but also an advisor to the management board, exercising a strategic function. In turn, in larger entities run under a monistic model of governance, the introduction of non-executive and independent directors, as well as the separation of the positions of the CEO (chief executive officer) and board chairman, can be identified as elements of the convergence phenomenon.[15] Executive directors are usually employed as managers. As opposed to that, non-executive directors are not involved in running the day-to-day business.[16] They play particularly important roles in matters such as risk management, financial reporting and internal financial controls. They also have significant responsibilities on the nomination, audit and remuneration committees.[17] Under the UK Corporate Governance Code (principle G), the board (of premium listed companies) should include an 'appropriate combination' of executive and non-executive directors. Within the convergence phenomenon, there are also some common trends regarding standards of independence, expertise and diversity, board committees (esp. audit committees). Similar problems also arise with respect to mitigating conflicts of interest, self-dealing or related-party transactions. It has been held that there is a trend in Europe towards specialised rules for listed companies and growing **convergence of internal control mechanisms** independent of board structures.[18]

3. REMODELLED REGULATORY FRAMEWORK (POLAND, 2022)

a) INFORMATION FLOW, ADVISORS AND BOARD APPROVAL

In 2022, the Polish legislator introduced important **amendments to the regulatory framework**.[19] As pointed out in the justification of the amending act,

[15] Hopt, Leyens, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy*, ECGI, Law Working Paper No 18/2004, 19.

[16] Derek French, *Mayson, French & Ryan on Company Law*, Oxford University Press 2023, 345, Brenda Hannigan, *Company Law*, Oxford University Press 2018, 255.

[17] Hannigan, *Company Law*, Oxford University Press 2018, 255.

[18] Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, ECGI, January 2011, Law Working Paper No 170/2011, 19, Cahn, Donald (n10) 94.

[19] Act of 9 February 2022 amending the Code of Commercial Companies and some other acts, Journal of Laws 2022, item 807. The amendment entered into force on 13 October 2022.

these amendments are intended to improve the efficiency of supervision in companies.[20] The new regulatory framework consists of several elements, whereby the most extensive changes affect joint-stock companies. First of all, in the field of **information flow**, the legislator introduced an obligation, on the side of the management board of joint-stock companies, to inform the supervisory board, without additional request, about certain key aspects of the company's operations (Art. 380[1] of the CCC). The newly introduced regulation is very detailed and complex. Another important element of the remodelled regulatory framework is the extension of the reporting obligations on the side of the supervisory board itself (Art. 382 § 3[1] of the CCC). Moreover, the institution of **the supervisory board advisor** is presented as a way to 'empower' the board in the process of obtaining information; novelty derives not from the possibility to appoint an advisor (because this institution was already known prior to amendments), but from the representation model. Currently, the supervisory board is authorized to represent the company when concluding a contract with a supervisory board advisor. The new regulatory framework also aims to strengthen the powers of the supervisory board in the field of **board approval**. Under the current provisions of the law (Art. 384[1] § 1 of the CCC), a so-called related-party transaction (if it exceeds a certain amount in relation to the company's total assets) requires the supervisory board's approval in private (non-listed) companies; a regulation governing related-party transactions in listed companies already existed before the said amendment. New regulations also concern the appointment of board committees and certain other elements of internal functioning (Art. 390[1] of the CCC). Some of the introduced solutions also apply to limited liability companies and simplified joint-stock companies.[21]

b) DUTY OF CARE, DUTY OF LOYALTY AND THE BUSINESS JUDGEMENT RULE

Another important element of the remodelled regulatory framework is the codification of the **duty of care**, **duty of loyalty** and the **business judgement rule** (i.e., Art. 387[1] and Art. 483 § 3 of the CCC); an amendment affecting board members in joint-stock companies and limited liability companies, as an analogous regulation already existed in the regulatory framework of simplified joint-stock companies. Currently, a supervisory board member of each company should act,

[20] Justification of the amendment proposal, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1515>.

[21] Piotr Pinior, *New provisions on supervisory board under Polish Commercial Companies Code*, Právny obzor 105/2022 (special issue), 44.

when exercising his/her duties, with due care resulting from the professional nature of his/her activity and remain loyal to the company. Furthermore, a board member (including a supervisory board member) does not breach the duty of care if, being loyal to the company, he/she acts within the limits of justified economic risk based on the information, analyses, and opinions which should be taken into account in the given circumstances when making a diligent assessment.

4. TOWARDS EFFICIENCY IN SUPERVISION: BETWEEN CONVERGENCE AND DIVERGENCE

a) PLURALITY OF REGULATIONS IN THE FIELD OF SUPERVISION

When addressing the question whether the introduced solutions will allow for improvement in the field of corporate governance, to begin with, it should be noted that there is a visible plurality of regulations concerning supervision applicable to certain business actors among companies and cooperatives (i.e. listed companies, supervised institutions, public interest entities), resulting both from the relevant provisions of the law and soft law regulations.[22] These regulations provide for numerous legal instruments and rules in the field of corporate governance, relating to (among others): audit committees, statutory auditors, related-party transactions, standards of independence and expertise, which constitute the very essence of supervision and internal control. What is also important, the above-mentioned regulations are adapted to the specific nature and size of a given corporate entity. This allows for the conclusion that for listed companies, the amendments of the regulatory framework adopted in Poland (in 2022) do not introduce revolutionary changes in the field of supervision; the situation seems substantially different when it comes to private (non-listed) companies.[23]

[22] This includes, among others: the Act of 29 September 1994 on accounting (Journal of Laws 2023, item 120), applicable to both companies and cooperatives, the Act of 11 May 2017 on statutory auditors, audit firms, and public oversight (Journal of Laws 2024, item 1035), applicable to public interest entities, the Act of 29 July 2005 on public offering, conditions governing the introduction of financial instruments to organized trading and listed companies (Journal of Laws 2024, item 620), applicable to listed companies, as well as soft law regulations, such as: *Best Practice for GPW listed companies 2021* <https://www.gpw.pl/pub/GPW/files/PDF/dobre_praktyki/en/DPSN2021_EN.pdf>, GPW – Warsaw Stock Exchange) and *Principles of corporate governance for supervised institutions* <https://www.knf.gov.pl/knf/en/komponenty/img/principles_of_corporate_governance_39736.pdf>.

[23] Michał Romanowski, Piotr Haiduk, *Ocena przepisów poświęconych funkcjonowaniu Rad Nadzorczych w związku z projektem ustawy – o zmianie ustawy – Kodeks spółek handlowych oraz*

b) RELATED-PARTY TRANSACTIONS

Moreover, the amended regulatory framework (Poland, 2022) – which can be seen as a paradox – is to some extent **divergent**; the existing trend towards growing convergence of internal control mechanisms independent of board structure is observed and identified in relation to listed companies and not to companies of all types. For example, the regulation on **related-party transactions** – applicable to private companies (Art. 384[1] of the CCC) – differs from the regulation adopted in § 111b of the *Aktiengesetz* (applicable to listed companies; *börsennotierte Gesellschaften*). Also under UK law, despite a different method applied in order to safeguard the fairness of related-party transactions (shareholder approval), the mechanism relates to listed companies (with a premium listing), in accordance with FCA[24] Listing Rules.[25] This raises the question whether the remodelled regulatory framework – which applies to all companies of a given type – will enhance and strengthen corporate governance or rather have a contrary effect. It can be argued that a regulation that is 'divergent' in nature – imposing extensive and strict obligations on private (non-listed) companies – is too burdensome for these entities and, as a consequence, will not enhance efficiency in institutional supervision. It can be argued that a model regulation in the field of institutional supervision – applicable to all companies regardless of their character and type – is not needed and that the 'one size fits all' approach adopted by the legislator is incorrect.

c) DUTY OF CARE AND LIABILITY OF BOARD MEMBERS

In turn, the codification of the duty of care, of the duty of loyalty and of the business judgement rule can be viewed as an important element of the **convergence phenomenon**. With regard to the **duty of care** and duty of loyalty, the relevant provisions of the law in this field are identical (e.g., in joint-stock companies: Art. 377[1] and Art. 387[1] of the CCC), regardless of management board or supervisory board member status. This fits into an international trend; under UK law all directors owe specific duties to the company; duty to promote the success of the company (art. 172 CA[26] 2006), duty to exercise reasonable care, skill and diligence (sec 174 CA 2006); it is even held that the distinction between executive

niektórych innych ustaw [*Assessment of the provisions on the functioning of Supervisory Boards with regard to the draft Act amending the Commercial Companies Code and certain other acts*], 26.

[24] FCA – Financial Conduct Authority.

[25] Hopt, Leyens, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, ECGI, January 2023, Working Paper No 567/2021, 24.

[26] Companies Act 2006 (CA 2006).

and non-executive directors has no significance in company law.[27] Under German law, the situation is somewhat different; the regulation on the duty of care (*Sorgfaltspflicht*) and on some elements of the duty of loyalty (*Treupflicht*) provided for in § 93 of the *Aktiengesetz*[28] and § 34 of the *Genossenschaftsgesetz*[29] is designed for management board members; however, the said regulations apply, by analogy, also to supervisory board members of joint-stock companies or cooperatives (§ 116 of the *Aktiengesetz* and § 41 of the *Genossenschaftsgesetz*). Regardless of the differences observed, the Polish codification of the duty of care and of the duty of loyalty can be viewed not only as an element of the convergence phenomenon, but also as an important instrument towards efficiency in supervision. Under the remodelled regulatory framework, there are significantly more arguments to support the position that the (mere) breach of the duty of care and of the duty of loyalty is to be viewed as illegal;[30] as a consequence, a board member may be held liable for damage caused to the company which results (solely) from the breach of the said duties.[31] This allows for the conclusion that the remodelled regulatory framework leads to the improvement in the field of corporate governance; it gives a chance to broaden liability of board members (Art. 483 § 1 of the CCC), including supervisory board members, and to abolish the unfortunate concept supported by a part of the Polish jurisprudence, which – for a long time – held that board members are not liable for damage caused to the company which results from the (mere) breach of the duty of care; the said breach was, according to this standpoint, relevant only for the estimation of the fault of a board member.[32] Under the currently remodelled regulatory framework, the obligation to act with due care seems to have a dual function; firstly, the abuse of the statutory duty of care (objective standard) constitutes a prerequisite of a board member's liability for damage caused to the company, as such abuse is to be viewed as illegal. In addition to that, the breach of the duty of care is also relevant for the estimation

[27] French, *Mayson, French & Ryan on Company Law*, Oxford University Press 2023, 345.

[28] The German Stock Corporation Act (AktG) of 6 September 1965.

[29] The German Cooperative Law (*Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften*, GenG) of 1 May 1889.

[30] Pinior, *Duty of loyalty and due care of the board member under Polish law*, Review of European and Comparative Law 2022/4, 20.

[31] That opinion was presented also before the amendment of the regulatory framework which led to the codification of the duty of care and the duty of loyalty. See Adam Opalski, Krzysztof Oplustil, *Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych* [*Breach of the duty of care as a ground for civil liability of company's directors*], PPH 2013/3, 17.

[32] See the Polish Supreme Court's judgements: of 9 February 2005 (V CSK 128/05, TPP [Transformacje Prawa Prywatnego] 2006/2/133), of 24 September 2008 (II CSK 118/08, OSNC 2009/9/131). A significant change in this jurisprudence was introduced within the Supreme Court's judgement of 24 July 2014 (II CSK 627/13, OSNC-ZD 2015/4/61).

of the fault; as a consequence of that, a board member may be freed from the said liability by proving that in the given circumstances, the required standard of due care was upheld and that he/she exercised all the diligence necessary in the given situation.[33]

Despite this general remark, it should be noted that there are significant differences in the exact wording of the relevant provisions of the CCC governing liability of board members in companies of the given type (LLCs, JSCs and SJSCs). In JSCs, LLCs and cooperatives, the relevant provisions of the CCC and Cooperative Law refer to the breach of the law or to the breach of the provisions of the statutes (the articles of association) (see: Article 293 § 1, 483 § 1 of the CCC, and Article 58 of the Cooperative Law). In turn, the regulatory framework governing SJSCs refers to the failure to perform or improper performance of a board member's duties, including failure to exercise due care resulting from the professional nature of his/her activity or failure to maintain loyalty (Article 300(125) § 1 of the CCC). These differences can be interpreted as the legislator's intention to establish **different prerequisites of** the said **liability**, depending on the type of entity in question.[34] *Prima facie* the said liability would appear stricter in simplified joint-stock companies (as opposed to joint-stock companies, limited liability companies and cooperatives). Such a conclusion must be seen as a paradox, given the fact that the SJSC has been designed for start-ups and innovative entrepreneurship. From a comparative perspective, the regulatory framework governing liability of board members in simplified joint-stock companies very much resembles directors' liability for the breach of duty under German and UK law and can be viewed as a part of the convergence phenomenon. As mentioned earlier, under the current provisions of the CCC, there are important arguments to support the position that board members are liable for the damage caused to the company resulting from the breach of their duties (including the duty of care) also in LLCs and JSCs, as such conduct can be interpreted as illegal within the meaning of Article 293 § 1 and Article 483 § 1 of the CCC (also Article 58 of the Cooperative Law). A differentiation of the legal status (situation) of board members in SJSCs, as opposed to LLCs and JSCs, is not justified; however, for avoidance of

[33] Some scholars claim, however, that in such a setting, a board member can no longer be exempt from liability towards the company; the introduction of an 'absolute' (unlimited) liability is argued. This is due to the fact that by proving a violation of the duty of care (by the claimant), a board member (acting as the defendant) is deprived of the possibility to prove the contrary. See Jacek Jastrzębski, *W sprawie odpowiedzialności członków organów spółek kapitałowych [On the liability of corporate directors and officers]*, PPH 2013/7, 20.

[34] Paweł Słup, *Odpowiedzialność cywilna członków organów wobec prostej spółki akcyjnej* [*Civil Liability of Members of Governing Bodies Towards a Simple Joint Stock Company (Part 2)],* PPH 2023/3, 22.

confusion, the respective provisions of the law should be unified, in accordance with the standard applicable to SJSCs (Article 300(125) § 1 of the CCC) which establishes a broad concept of board members' liability.

d) IMPLICATIONS FOR COOPERATIVE LAW

As far as cooperative law is concerned, it is uncertain how to interpret the current regulatory framework with regard to board members' duty of care, as no explicit regulation referring to this concept is provided for in the Cooperative Law. Given the lack of regulation, it is also crucial to examine how to supplement the existing regulatory framework for the future; the most relevant question concerns the standard of due care applicable to board members. *De lege lata*, despite a uniform regulation on board members' liability for damage caused to the cooperative (Article 58 of Cooperative Law), the applicable standard of due care should be differentiated, depending on the actual status of a given board member. In case of supervisory board members – who, by force of the law, must be chosen from among the cooperative's members[35] – the standard of due care will be usually established in accordance with the general rule resulting from Article 355 § 1 of the Civil Code; the applicable standard is thus of ordinary (average) nature and appears to be less strict than the professional one established for companies' board members. If, however, a cooperative's board member (especially a management board member) exercises his/her function as a professional, the applicable standard of due care should be estimated in accordance with the professional rule introduced in Article 355 § 2 of the Civil Code; such board member is obliged to act with due care resulting from the professional nature of his/her activity, despite no explicit rule on that higher standard in Cooperative Law.[36] *De lege ferenda*, in order to enhance efficiency of supervision and corporate governance in cooperatives, a uniform and strict regulation should be introduced, analogous to that provided for supervisory board members of companies in Article 387[1] of the

[35] See Art. 45 § 2 of the Cooperative Law.

[36] A different position on this topic was presented by the Supreme Court in the judgement of 27 September 2023, II PSKP 3/23, OSNP 2024/3/28, where it was held that the standard of due care applicable to management board members of a cooperative should be established in accordance with the general rule resulting from Art. 355 § 1 of the Civil Code, and not with reference to the professional standard established in Art. 355 § 2 of the Civil Code. According to the Supreme Court, this is due to the fact that under Cooperative Law, there is no specific regulation on the standard of due care applicable to board members, analogous to that provided for in Art. 293 of the CCC. The presented standpoint can be disputed, especially when it comes to board members professionally exercising their function. There seems to be little justification for the general approach adopted by the Supreme Court.

CCC. The respective provisions of Cooperative Law should state explicitly that a board member (including a supervisory board member), when exercising his/her duties, must act with due care resulting from the professional nature of his/her activity and remain loyal to the cooperative. Such regulation would also apply to board members who are chosen from among cooperatives' members, imposing a strict standard of conduct (i.e., in the field of supervision). Moreover, under the Cooperative Law, the legislator should also provide for a regulation according to which a violation of the statutory duties (i.e., the duty of care and the duty of loyalty) may result in liability of a cooperative's board member.[37]

e) TOWARDS A STRICTER STANDARD OF DUE CARE

As a separate remark, it should be noted that the remodelled regulatory framework governing the powers and duties of the supervisory board may increase the standard of due care applicable to supervisory board members under company law, especially in joint-stock companies. This is due to the fact that the supervisory board has currently gained new legal instruments which allow it to overcome the so-called information asymmetry, as provided for in Article 380[1] of the CCC, which imposes on the management board the obligation to inform the supervisory board about certain key aspects of the company's operations. Given the fact that the standard of due care applicable to the company's board members is of a professional nature, a prudent and skilful supervisory board member is expected to examine and investigate the relevant information, which he/she has currently broad access to. Moreover, the attribution of the power to represent the company in the contract to be concluded with a supervisory board advisor is designed as an instrument of the board's 'empowerment' in the process of obtaining the relevant

[37] However, it can be argued that also under the currently existing regulatory framework (Art. 58 of Cooperative Law), a board member (including a supervisory board member) should be held liable for damage caused to the cooperative which has resulted from the breach of statutory duties. An analogue position was supported under company law (before the amendment of the regulatory framework) by the Supreme Court in the judgement of 24 July 2014 (II CSK 627/13, OSNC-ZD 2015/4/61). When elaborating that judgement and applying its argumentation towards cooperatives, it must be noted that, on the one hand, a board member (including a supervisory board member) may be held liable only for damage caused by acts or omissions in breach of the law or the provisions of the statutes. However, when estimating compliance with the law, also statutory obligations towards the cooperative must be taken into account. The supervisory board is obliged to exercise supervision and control over all areas of the cooperative's activity (Art. 44 of Cooperative Law). When exercising that function, a supervisory board member shall act prudently and in the cooperative's best interest; actions contrary to that interest violate the general rule specified in Art. 44 of Cooperative Law and constitute sufficient grounds for a board member's liability in accordance with Art. 58 of the Cooperative Law.

knowledge and information, which, as a consequence, may increase the applicable standard of due care. Currently, under the remodelled regulatory framework, the supervisory board can seek additional (external) knowledge relevant for the supervision process, irrespective of the management board's approval of the contract (to be concluded with the supervisory board's advisor).

f) THE BUSINESS JUDGEMENT RULE

Finally, as far as the **business judgement rule** is concerned, as pointed out earlier, the application of the said rule towards supervisory board members may differ depending on the type of power executed by the supervisory board.[38] When it comes to representing the company in contracts with management board members, as well as board approval, the application of the business judgement rule is similar, as in the case of management board members. Under German law, the business judgement rule is limited to 'business decisions' (*unternehmerische Entscheidungen*), which narrows the applicable scope of the said rule towards supervisory board members.[39] Since under Polish law, the business judgement rule is not limited to business decisions, there seems to be more room for the application of the said rule also when executing (mere) supervisory functions. The business judgement rule allows to release supervisory board members from liability for damage caused to the company within the supervision process, if that process – although estimated *ex post* as wrong and harmful to the company – was conducted with diligence, which involves, among others, collecting the relevant information, analyses and opinions which should be taken into account in the given circumstances when making a diligent assessment of the company's activities. The said rule – applicable to supervisory board members – allows to create a certain balance; the standard of liability seems currently strengthened, but at the same time, a supervisory board member may be exempt from the said liability, if within the supervision process he/she acted prudently. As mentioned earlier, the obligation to act with due care currently has a dual function; a potential breach of the said duty is also relevant for the estimation of the fault. In the given circumstances, when proving that no fault is attributable to a supervisory board member, he/she may question having substantial access to the relevant information on the company's activities, or even argue disinformation on the side of the management

[38] Cahn, Donald (n 10) 449.

[39] Judgement of the German Federal Court of Justice (Bundesgerichtshof, BGH), 21 April 1997, II ZR 175/95, known as *ARAG v Garmenbeck*. See also L. Strohn, *Pflichtenmaßstab und Verschulden bei der Haftung von Organen einer Kapitalgesellschaft*, Corporate Compliance Zeitschrift, 2013/5, 177.

board. Despite the codification of the management board's obligation to inform the supervisory board on different aspects of the company's activity, it may turn out, in the given case, that the supervisory board is regularly 'flooded' with thousands of documents containing irrelevant information or that some documents (the relevant ones) are kept hidden. In such a case, the proper execution of the supervisory function becomes substantially difficult or even impossible, also for a prudent, skilful and diligent supervisory board member. Moreover, in the given circumstances, when proving that no fault is attributable to a supervisory board member, he/she may show opinions and analyses collected within the supervision process, which would be relevant for the estimation of the correctness of the said process. As pointed out earlier, the supervisory board is currently empowered to represent the company when concluding a contract with a supervisory board advisor, which *prima facie* makes it easier for that board to gain additional knowledge (collect the relevant information, analyses and opinions). However, it might not be the case, due to limitations of the said power provided for in the statutes and/or actual (mis) conduct of the management board. In the given case – where the proper execution of the supervisory function required additional (external) knowledge relevant for the supervision process – a supervisory board member may argue that he/she was unable to make a diligent assessment of the company's activities due to the fact that the power to represent the company in the contract to be concluded with a supervisory board's advisor was excluded by the statutes and the management board refused to sign such a contract. In the given circumstances, this may lead to the conclusion that no fault is attributable to a supervisory board member.

As far as cooperative law is concerned, there is an important gap in this field. Similarly, as is the case in company law, the business judgement rule should also be codified under cooperative law. The respective provisions of Cooperative Law should state explicitly that a cooperative's board member (including a supervisory board member) does not breach the duty of care if, being loyal to the cooperative, he/she acts within the limits of justified economic risk based on the information, analyses, and opinions which should be taken into account in the given circumstances when making a diligent assessment.

5. CONCLUSIONS

To sum up, the following conclusions should be formulated:

1. A model regulation in the field of institutional supervision – applicable to all companies and cooperatives, regardless of their character and type

– is not needed. The growing convergence of internal control mechanisms independent of board structures, aimed at increasing efficiency in corporate governance, and observed within other jurisdictions, has a very narrow scope of application and is not of a general nature.
2. The codification of the duty of care and of the duty of loyalty can be viewed as an important element of the convergence phenomenon and as an instrument towards efficiency in supervision. Such codification affects and broadens the scope of liability of board members.
3. The remodelled regulatory framework governing powers and duties of the supervisory board in company law may increase the standard of due care applicable to supervisory board members.
4. The standard of due care applicable to supervisory board members and the business judgement rule should be codified under cooperative law.

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