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Introduction

In the last decades we may have globally observed an on-going trend of legislative and judiciary efforts channelled to reform companies law, especially in the area of corporate governance[1]. The overriding principle usually sought by legislators and commentators both from the academic community and the practice of law alike is the simplification of law, designed to make companies more accessible to potential shareholders, thus facilitating economic growth and easing business transactions[2].

The lower house of Polish parliament has recently passed legislation[3] introducing a new type of company, branded the simple joint stock company (in

[1] See e.g. Th. G. Arun, J. Turner, *Corporate governance and development: reform, financial systems and legal framework – an overview* [in:] Th. G. Arun, J. Turner, *Corporate governance and development: reform, financial systems and legal framework*, Cheltenham-Northampton 2009, pp. 1-6.

[2] Reducing the organizational barriers for entrepreneurs, especially small and medium enterprises (which account for 99% of enterprises in the European Union, 67% of employment in the single market and 57% of the value added in turnover in the single market, as per Eurostat data, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=sbs_sc_sca_r2&lang=en; access: 7 July 2019, 18:32), should facilitate economic growth, unemployment reduction as well as an increase in the quality of goods and services available to consumers, thus contributing to overall well-being of the society.

[3] Act of 13 June 2019 amending the Commercial Companies Code and other acts (hereinafter referred to as the "PSA Act"), previously under legislative works as Government bill – an act on amending the Commercial Companies Code and other acts, Polish Sejm Bill No. 3236.

Polish: *prosta spółka akcyjna*[4]). The law, after it will have been passed by the Polish Senate and signed into by the President[5], will enter into force on 1 March, 2020[6]. A key feature of the new company type is that shareholders interested in utilizing the new type of company will be able to choose between a one-tier and two-tier board models. Such possibility exists already in Polish law, within the Polish framework of the European public company model, *Societas Europaea* (SE)[7]. However, popularity of SEs in Poland is, according to statistics, just as elsewhere in the EU, quite modest. SEs are utilized mostly by large multi-national enterprises. Due to that, a system allowing for choice of board structure has not yet been tested in practice of multiple entities of various sizes. In light of the above, the PSA an important step worthy of analysis and assessment.

I. Board Structures In General: Existing Models And Their Assesment

A key corporate governance factor affecting the activity of all companies, from small, single-member, often family-run, limited liability companies, whose scale and ambitions put them on par with simple partnerships, to large, multi-national entities domineering over their industries, is how the law arranges the structure of corporate boards. This issue, though of utmost importance itself, stems from what constitutes a primary problem in companies law – the separation of ownership and control and resolving the conflicts stemming therefrom.

Globally, there hardly exists consensus as to the role that boards play in managing a company, and to whom their loyalty and accountability is owed[8]. Historically, there have arisen two substantially differing models of board structures.

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[4] Due to its Polish name it is often abbreviated to "PSA", as it shall be referred to hereinafter.

[5] Both occurrences being more than likely given that the bill was sponsored by the government (which since 2015 is steadily backed by the Senate and the President).

[6] Or an insignificantly later date, e.g. if legislative procedures are slowed down and the Senate decides to prolong the *vacation legis*, i.e. the period between enactment of the law and its coming into force.

[7] Introduced in 2004 by the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJ L 294, 10.11.2001, p. 1–21, and governed in Poland, with respect to matters not regulated in the Regulation, by the Act of 4 March 2005 on the European economic interest grouping and the European company (consolidated text: Journal of Laws of the Republic of Poland of 2018, item 2036 as amended, hereinafter: the "2005 Act").*

[8] R.B. Adams, B.E. Hermalin, M.S. Weisbach, *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey*, Journal of Economic Literature 48:1 (2010), pp. 58 et seq.

First, the one-tier model, also referred to as monist, based on a single, unitary board of directors, is now mostly prevalent in common law jurisdictions and states of Romanesque legal tradition[9]. The second is the two-tier (dualist) model, crafted by the German[10] legislators in the 19th Century[11], based on an idea of separating the board into a management (or executive) board and supervisory board, with a clear-cut division of powers among these bodies, as well as a personal separation (members of one of the bodies may not simultaneously be members of the other body)[12]. This is the model prevalent not only in Germany, but also picked by Austrian and Polish law.

These two models currently coexist all over the world and neither may be said to dominate[13]. This is particularly noticeable in the European Union, where, due to intensive trade relations, facilitated by the principles of free movement of goods and people, as well as the freedom of establishment[14], companies originating in states representing either of these models trade, compete and cooperate in common commercial or organizational contexts.

Different approaches taken by the two systems stem from how conflicts of interests in companies are perceived in different jurisdictions[15]. Proponents of one-tier systems assume that the distinction between executive and non-executive directors and the separation of their duties, combined with instruments of civil liability for improper execution of directors' duties, are instruments sufficient to address the issue of conflicts of interest. The dualist system, on the other hand, that originated in Germany in late 19th Century, stands firmly on

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[9] I. Weiss, A. Szumański [in:] W. Pyzioł, A. Szumański, I. Weiss, *Prawo spółek*, Warszawa 2014, p. 442; K. Oplustil [in:] A. Szumański (ed.), *System Prawa Handlowego. Prawo spółek handlowych. Tom 2b,* Warszawa 2019, s. 682.

[10] Though the first well-known example of a company with a two-tier structure is the Verenigde Oostindische Compagnie (the Dutch East India Company), where the *Heren IX* (committee of Nine Gentlemen) was entrusted with the task to oversee the activity of the board; Cf.: M. de Jongh, *Shareholder activists* avant la lettre*: the "Complaining Participants" in the Dutch East India Company, 1622-1625* [in:] J.G.S. Koppel, *Origins of Shareholder Advocacy*, New York 2011, p. 79.

[11] Establishing a supervisory board was made mandatory in 1870, and since 1884 simultaneous membership in both of these bodies was prohibited; see: H. Fleischer, *Einfluss der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts,* Archiv für die civilistische Praxis 204(2004) pp. 523-4.

[12] *Ibidem.*

[13] For a detailed comparison of the models chosen worldwide, see the OECD Corporate Governance Factbook 2019, retrievable at: https://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf (access: 5 July 2019, 15:43:12).

[14] Article 26(2) TFEU provides for free movement of goods, persons, services and capital.

15 I. Lynch Fannon, *Working Within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding - US and EC Perspectives*, Oxford-Portland 2003.

the viewpoint that, in order to protect shareholders and public interest[16], a separation of the managing and the controlling (supervisory) bodies is required, thus preventing occurrences of interest clashes affecting the proper supervision of company's managers.

II. Isany of the models preferable?

Hence, the two-tier system is based on the idea of formalistic, abstract prevention of conflict at the very foundation of company relations, while monist system is founded on belief that a single board equips the company with more initiative, energy and, due to its cohesion, ensures proper information flow – consequently, also proper supervision.

Those who prefer two-tier systems indicate that the separation of powers and duties is clearer and easier to comprehend. In contrast, in the dualist model the company is usually dominated by the management board, the supervisory body being foreshadowed, as the management board's members have better – constant and unobstructed – access to vital corporate information. Members of the supervisory board on the other hand meet a few times a year, often dealing with the company's issues only from time to time[17]. Hence, some indicate, a serious disadvantage of the two-tier model is in that it becomes passive and lacks initiative, becoming inefficient both in furthering the company's interests as well as in executing the duties of corporate oversight[18]. Generally, the role of a supervisory board, as a body occupied with oversight, makes it reactive rather than active[19], and prone to excessively conservative behavior[20]. These observations remain valid in the context of Polish corporate law, where, it has been observed, supervisory boards are too passive and concentrated on monitoring and control[21].

On the other hand, full-fledged critique of supervisory boards may be deemed undeserved in that it accuses these boards of actually doing precisely what they

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16 P.O. Mülbert, *Shareholder Value aus rechtlicher Sicht*, Zeitschrift für Unternehmens- und Gesellschaftsrecht 26 (1997), pp. 129-171.

17 B. Tricker, *Corporate governance: Principles, Policies, and Practices*, Oxford 2009.

18 A. Cadbury, *Corporate Governance and Chairmanship: A Personal View*, Oxford 2002.

19 C. Jungmann, *The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems*, Company and Financial Law Review Vol. 3, 4(2006).

20 A. B. Gillette, Th. H. Noe. M. J. Rebello, *Board Structures Around the World: an Experimental Investigation*, Review of Finance 12/2008, p. 93.

21 J. Jeżak, *Ład Korporacyjny: Doświadczenia światowe oraz kierunki rozwoju*, Warszawa 2010.

were intended to do – never having been designed to compete with management boards in dealing with day-to-day activities and with indicating the development trends and aims[22]. Question, then, remains, whether the costs related with the existence of supervisory boards are justified by their role. This role, which may seem diminished by the usually proactive management boards, is to substitute, in overseeing the company, the shareholders who suffer from the *rational apathy* syndrome[23].

Certain commentators argue that boards in monist system are associated with the risk that the co-existence of executive and non-executive directors may result in factional disputes, with the executive members using their discretion and concentration on day-to-day activities to obstruct proper information flow to non-executive members[24]. On the other hand, similar disputes may arise under two-tier system, as it seems that mere existence of two separate bodies does not preclude their members from becoming conflicted. And in two-tier systems both boards are equipped in instruments allowing them to obstruct each other, at the practical and economic expense of the company – in consequence: the shareholders. Both systems are also inevitably prone to the risk that both managers or executive directors as well as supervisory board members or non-executive directors would turn out to be, because of various reasons, less-than-dilligent or disinterested in proper execution of their duties[25].

Sometimes it is contended that an advantage of the two-tier system is that it enables the functioning of the co-determination system (*Mitbestimmung)*, i.e. employee participation in overseeing the company's activities – a value deeply enshrined in the German and Austrian corporate law and social imagination[26]. However, it is a fact that some system of employee representation exist in half of

[22] Although additional "soft functions" of supervisory boards have been also underlined. See: P. Davies, *Board Structure in the UK and Germany: Convergence or Continuing Divergence?* International and Comparative Corporate Law Journal 2(2001), p. 450 et seq.

[23] J. Velasco, *Taking shareholders rights seriously*, 41 UC Davis Law Review (2007), p. 622; I. Gębusia, *Interes spółki w prawie polskim i europejskim*, Legalis/el. 2017;

[24] P. Böckli, *Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystems* [in:] P. Hommelhoff, K. J. Hopt, A. v. Werder (eds.), *Handbuch Corporate Governance*, 2009 268

[25] Readers may recall the Enron scandal as arising out of lack of oversight, see: Committee on Governmental Affairs, *The Role of the Board of Directors in Enron's Collapse, Report prepared by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, United States Senate, July 8, 2002.

[26] Famously, the controversies regarding co-determination have led to the demise of the *Societas Privata Europaea* project, and, in the context of Societas Europaea, to supplementing the SE Regulation with Council Directive supplementing the Statute for a European Company with regard to the involvement of employees

the EU Member States[27], and there exist jurisdictions with one-tier board system and mandatory representation (like Sweden) and systems with two-tier boards and no co-determination provisions (e.g. Italy)[28].

Apparently the way one perceives and weighs each of the systems' advantages and disadvantages is the matter of individual preference or idiosyncrasies. Oftentimes exactly the same properties of a system are perceived as either pros or cons, dependent on the context. Regard must also be had to the on-going convergence processes as to management and controls systems in companies[29]. Board structure models are not isolated from each other, they rather coexist within frameworks of economic cooperation and market competition. The convergence is as much propelled by inspiration as it is by the phenomenon of regulatory competition[30].

Consequently, it is hardly surprising that commentators often reach the conclusion that there is no evidence that one system is better than the other[31]. Given that it may be assumed that companies law should best address the needs of modern business and globalized economy and serve the purposes of interested parties (shareholders, employees) and the society as a whole[32], question remains as to who shall be equipped to choose one of these models – should it be the lawmaker on a centralized level, or the companies?

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[27] P. Davies, K.J. Hopt, R. Nowak, G. v. Solinge, *Corporate boards in law and practice: A comparative analysis in Europe*, Oxford 2013, p. 7-8.

[28] *Ibidem.*

[29] K. J. Hopt, P. C. Leyens, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy,* European Company and Financial Law Review 2004, pp. 135-168.

[30] See: M. Gelter, *The Structure of Regulatory Competition in European Corporate Law*, Journal of Corporate Law Studies 5(2) 2005, pp. 247-284; M. J. Roe, Regulatory Competition in Making Corporate Law in the United States - and its Limits, Oxford Review of Economic Policy 21(2)/2005, pp. 232-242; for an interesting viewpoint questioning the significance of regulatory competition, readers may want to see: M. Kahan, E. Kamar, The Myth of State Competition in Corporate Law, 55 Stanford Law Review 679 (2002).

[31] See e.g.: C. Jungmann, *op.cit,*., p. 426; European *Model Company Act (2017)*, available at: https://ssrn.com/abstract=2929348 (access: 10 July 2019, 15:43:02), Comments to Section 8.01, p. 173.

[32] Many argue that corporate law does not exist for its own sake only, but its role is to facilitate social well-being; see: J. Armour, H. Hansmann, R. Kraakman, M. Pargendler, *What is corporate law?* [in:] R. Kraakman et al., *The Anatomy of Corporate Law. A Comparative and Functional Approach*, 3.Ed., Oxford 2017, pp. 22-24; on the contemporary concepts as to the relations between business and society, see also: T. Rudebeck, *Corporations as Custodians of the Public Good? Exploring the Intersection of Corporate Water Stewardship and Global Water Governance,* Cham 2019, pp. 31-42.

III. Legislative choice of the preferable board structure

In light of the above it would seem that the choice between one- and two-tier systems is an arbitrary one, left for the legislators to make, bearing on their minds whatever interests and preferences they would like to give precedence. With respect to that, arguments related to tradition would play a vital role – if there exists no compelling evidence that either of the systems is better, then why fix what does not need to be fixed and infringe on customs of staheholders? Certain jurisdictions, especially in Europe[33] nevertheless, decide to allow the shareholders to choose one of these models as ruling in their company. The number of such jurisdictions has historically grown to reach 14 European Union Member States as of last year. Obviously this number does not take into account the *Societas Europaea,* which is a creation of EU law.

Recently, by passing the PSA Act, Polish legislators have decided that Poland shall in near future (as it now seems: in March 2020) join the group of states that allow companies to pick their preferred model. Such a development constitutes a positive change in Polish law, one worthy of appraisal. Though the issue in question would require further examination, including statistical and sociological research, to offer conclusive assessment, there is a growing body of compelling empirical evidence coupled with congruent and convincing doctrinal theories showing that the system mostly beneficial for the companies, stakeholders and the general public, is the system allowing the companies to choose their board structure themselves[34]. Such conviction lay at the foundation of the Societas Europea, and also fuelled the choice-of-structure solutions of the European Model Company Act[35].

That the free choice of board structure by companies is a positive development may be also supported by purely rational, non-empirical arguments. The contention that research offers no convincing evidence as to which system is

[33] Though Brazil i salso an important exception, see: the OECD Corporate Governance Factbook 2019, *infra*.

[34] For instance, extensive studies were conducted of the French system, which since 1966 has allowed a board structure choice. See: B. Millet-Reyes, R. Zhao, *A Comparison Between One-Tier and Two-Tier Board Structures in France*, Journal of International Financial Management & Accounting, Vol. 21, No. 3, pp. 279-310; see also: J. Jeżak, L. Bohdanowicz, *Zmiany polskiego modelu organów statutowych spółek w kontekście tendencji występujących w krajach Unii Europejskiej*, Zarządzanie i Finanse 14 2/2016, s. 7-20; L. Bohdanowicz, *Directions of change in the Polish two-tier board model*, Journal of Positive Management Vol. 5, 1/2014, pp. 21-30.

[35] *European Model Company Act (2017),* Comments to Section 8.01, p. 173.

better, does not necessarily have to hold in the long run. Given, yet, that the legislatures in interested countries act – due to the aforementioned lack of evidence – without reasonable, verifiable grounds to pick either of the models, the choice effected by them will be little more than arbitrary, bordering on a hunch, influenced by tradition and following the footsteps of others. In this context it is advisable that the companies make these choices themselves, thus allowing them to clash and compete. Absent market irregularities and statutory incentives for market failure – which we know nothing of – long-term coexistence and competition of models may only help determine the one better suiting the needs of businesses and stakeholders.

The possibility to choose a board structure model, when implemented in various countries, its framework supervenient on existing corporate regulation and traditions, can also help boost the regulatory competition even further[36] – allowing scholars and practitioners to compare the cooperation and synergy of the main models with certain more or less detailed and differing provisions of the law on management, numerous variables

Another advantage of allowing companies to choose the board structure is the one indicated in the explanatory statement accompanying the PSA Bill[37] – namely, that investors from Anglo-American and other legal systems opting for the monist board structure will be able to find solutions substantially similar to those known from their own jurisdiction, and, to the extent that they differ, modify local solutions – provided that, as it is the case with PSA Act, the law allows for flexibility. That PSA Act does it should be perceived as a vital advantage.

IV. The simple joint stock company (psa) in polish law – general remarks

The PSA was, as mentioned above, projected with simplification as its main aim. The rules governing PSAs state that a PSA may be established for any legally acceptable purpose by one or more shareholders, who are not liable for the company's obligations by virtue of having prior contributed to company by making contributions (in cash or in kind) in exchange for shares (which in

[36] Taking into account serious arguments indicating that the regulatory competition in European Company Law may have run out of steam. See e.g.: L. Hornuf., J. Lindner, *The End of Regulatory Competition in European Company Law?*, Andrássy Working Paper Series No 33, Available at SSRN: https://ssrn.com/abstract=2494309

[37] Explanatory statement to the PSA Bill (Polish Sejm paper no. 3236), p. 71.

PSA are indivisible and without par value and do not constitute parts of share capital)[38]. The PSA is designed as vehicle to be utilized by innovative entrepreneurs, especially IT start-ups[39], as a middle-grounds solution[40] between the limited liability company, whose shares are thought to be insufficiently liquid for start-ups' needs, and the overregulated joint stock company, which is hard to employ and difficult in everyday management. Some commentators raised that the new company type could help address certain hardships that entrepreneurs face, stemming from the disadvantages of the Polish limited liability company regulation[41]. One of these hardships is apparently that the statutory framework limits the founders' freedom and flexibility in crafting the relations between founders and investors in the articles of association.[42]

Others have remarked[43] that any efforts to reform the Polish system of corporate law need concentrate on providing for clear and unambiguous regulation distinguishing two major types of companies (especially taking into account that the statutory regulation of joint-stock company differs in cases of private and public joint-stock companies to such extent that some describe these as two further models of companies). To maintain conceptual purity of that concept, one of the statutory models of companies will need to be redesigned to meet the requirements of private companies, the other – the public ones. This has not yet, as of now, been considered by the doctrine and legislators. Can, however, the PSA and its regulation offer any findings, any prospective conclusions? Or will, at least, the practical functioning of PSA offer such?

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[38] See: Explanatory Statement of the PSA Bill (Polish Sejm paper no. 3226), p. 10.

[39] For an analysis of clou elements of start-ups, see: J. B. Kühnapfel, *Prognosen für Start-up-Unternehmen*, Wiesbaden 2019, p. 1-2; J. Torres, *Guia da Startup*, Sao Paulo 2014, pp. 9-14, *O que é uma startup?*

[40] It bears underlining that certain commentators have likened the PSA model, due to it having taken middle grounds between the limited liability company and the joint-stock company, to be obsolete and unnecessary, constituting an example of improper legislative "multiplication of beings" effected without due justification. See: M. Romanowski, *Metoda Einsteina i księdza Twardowskiego jako sposób analizy koncepcji Prostej Spółki Akcyjnej*, Monitor Prawa Handlowego 2016 nr 2, pp. 44-48; P. M. Wiórek, *O braku potrzeby wprowadzenia prostej spółki akcyjnej (PSA) z perspektywy prawnoporównawczej*, Przegląd Prawa Handlowego [hereinafter: PPH] 5/2018, pp. 4-9.

[41] See: T. Sójka, *O potrzebie zmian unormowań niepublicznych spółek kapitałowych – uwagi na kanwie projektu przepisów o prostej spółce akcyjnej,* PPH 9/2018, pp. 12-18.

[42] *Ibidem,* p. 13.

[43] M. Romanowski, *op.cit.*, p. 45.

V. The monist system in polish simple joint stock company (psa)

The rules regarding the governing bodies of the PSA comprise the third Chapter of the new Section Ia of the Commercial Companies Code. Among them, of interest to us are Parts One through Four. In Part Four the rules regarding the board of directors – a novelty in Polish corporate law – are to be found. Part One contains general provisions applicable without regard to the management structure chosen for the company. The remarks below will concentrate on these two Parts, introducing the framework of the system allowing for the choice of board structures and providing default statutory rules governing the board of directors. As Part Two and Three deal with the management and supervisory boards in a two-tier system and are structured thus that they possess substantial similarity to the solutions employed in theretofore existing companies' types, these Parts will be discussed only briefly.

VI. Board structure in psa

Unlike in the EMCA Draft, whose Section 8.01(2) represents explicitly that the company's management structure should be decided in the articles of association, and states what options can be chosen, the basic rule of the new provisions of CCC requires some interpretation to decode its meaning in that it essentially lays the foundations for the newly established choice-of-structure system. And so, the newly enacted Article 300^{52} § 1 CCC states that in a PSA either a management board or a board of directors shall be established. The use of an "exclusive or" (*either… or…*) coupled with indicative (*realis*) mood stipulate clearly that in a PSA there shall be one mandatory governing body, and that that body shall be either of the aforementioned bodies, but not both of them. Hence, the basic framework of a system of choice between monist and dualist board structures is lain. According to § 2 of Article 300^{52} CCC, a supervisory board may exist in PSA, though this is an option dependent on the articles of association providing for that (clearly, due to the one-tier vs. two-ties systems' divide, only in cases where a management board has been established). As we may see, the PSA in this respect is modelled after the limited liability company, not the joint-stock company.

Which other provisions of the general Part One are important from the perspective of the newly designed one-tier system?

Article 300[53] sets forth a general rule regarding restrictions binding the members of governing bodies. Apart from those embedded by the very statute (CCC), such restrictions may be found in the articles of association and shareholders' resolutions. Article 300[54] draws attention to the nature of the members' duties as a result of the professional nature of their activities. Article 300[55] confers upon members of governing a duty to disclose conflicts of interest and to abstain from participation in settling issues where the conflict has arisen, as well as a duties to observe loyalty and not to pursue competitive businesses or acquire interests in competing organizations. These rules do not differ from those already existing in the case of limited liability companies (Articles 207, 209 and 211 CCC) and joint-stock companies (respectively, Articles 375, 377 and 380 CCC). Yet an interesting novelty may be found in § 2 of Article 300[55], which clarifies that a member of a company's governing bodies may not disclose confidential information even after the expiry of that member's mandate. Prior to that this problem has been directly subject only to the regulations of the unfair competition law[44], and it has been inferred that an indirect purpose of Articles 211 or 380 CCC was to prevent the board members from delinquently utilizing clandestine corporate information[45], thus stripping companies of "corporate opportunity"[46]. Usually moreover, the duty of governing bodies' members to keep confidential certain categories of sensitive information would arise from contractual relations constituting the basis for employment or, more broadly, the performance of activities by members of the body within the scope of corporate duties. That the new law introduces a direct, clear-cut duty of confidentiality, extending it also to the period after mandate's expiry, is a development worthy of positive assessment. Such legislative measure also removes any potential doubts as to persons not related to the company by contract, among whom non-executive directors may be found. However, it appears that the provision in question mistakenly omits other persons who are not members of the company's governing bodies but who may be members of a committee pursuant to Article 300[57] § 2 and 3.

Another new solution may be found in Article 300[57] § 1, which obliges the chairpersons of PSA's governing bodies to facilitate the proper organisation of

[44] Act of 16 April 1993 on combating unfair competition (consolidated text: Journal of Laws of the Republic of Poland of 2019 item 1010 as amended); see: Article 11 ss. 1-2 of the Act.

[45] Cf. A. Opalski [in:] A. Opalski (ed.), *Kodeks spółek handlowych. Tom IIA. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 151–226*, Legalis/el. 2018, commentary to Article 211, mn. 1; Z. Jara [in:] Z. Jara (ed.), *Kodeks spółek handlowych. Komentarz*, Legalis/el. 2018, commentary to Article 211, item 1.

[46] A. Nowacki, *Spółka z ograniczoną odpowiedzialnością. Tom I. Komentarz. Art. 151–226 KSH*, Legalis/el. 2018, commentary to Article 211, item 5.

that body's activities, in particular to adopt, whenever necessary, by-laws that organizing the activities of that body. This is a substantial change in comparison to the limited liability company, where the statute remains tacit as to management boards' by-laws[47] or the presidents' duties as to the organisation of the management board's activities, stating only that the articles of association may confer special powers upon the president of the management board in respect of managing the work of the management board (Article 208 § 8 CCC). This novel provision could prove important with respect to chairpersons of boards of directors operating under one-tier structure, imposing upon them a duty to properly organize the activities of the board and manage it thus as to facilitate the proper cooperation of executive and non-executive (independent) directors.

Finally, Another key innovation is the provision allowing for the creation of committees within PSA's governing bodies, based on the articles of association or by-laws of a given body, with the possibility of entrusting them with tasks of preparing or implementing resolutions of said body. Interestingly, the committee, apart from a minimum of two members of a given body, may also include other persons, i.e. both members of another body in a dualistic system, as well as third persons (Article 300^{57} § 2 and 3 of the CCC).

As we know from the above considerations, the obvious assumption of the one-tier system is the existence of one body in the company. In PSA, it is the board of directors (Article 300^{73} § 1 CCC), whose duties include managing the company's affairs, representing it and executing supervision over its activities (therefore, it is a combination of the duties of management and supervisory boards known from the regulations of a limited liability company vested in a single body). The board of directors may be comprised of one or more directors, appointed and dismissed at any time by shareholders, unless the articles of association provide otherwise (Article 300^{73} § 2 and 3 CCC read in conjunction with Article 300^{74} CCC); in this respect, it is possible to envisage that the right to appoint board members will be vested in shareholders or in third persons. The articles of association may also provide for the right to appoint new members of the board of directors by way of co-optation. The PSA may also restrict the right to dismiss a board member to important reasons, Article 300^{74} § 2 CCC (such a restriction would be beneficial in situations where co-option is chosen as the essential means of appointing board members: thence granting the board

[47] Yet by-laws regulating day-to-day activity of management boards do exist in practice. Cf.: A. Szumański, *Regulaminy zarządów i rad nadzorczych spółek kapitałowych*, PPH 1/2003, p. 1–10.

of directors the power to determine its composition in this way would become a fiction if the shareholders could discretely dismiss them).

The PSA Act makes it a rule that all directors are entitled to conduct the affairs of the company – unless the agreement or the board's by-laws provide otherwise. This means that individually designated directors or even certain categories of directors may be precluded from acting on certain matters, hence providing for a presumption of collegiality (Article 300^{75} § 2). Nevertheless, paragraph 2 of Article 300^{75} provides for three categories of matters for which a resolution of the board will be always required: decisions of strategic importance, the establishment of annual and multiannual business plans, the establishment of the structure of the company's undertaking and the essential functions associated with its management. As it seems, this provision may not be modified neither in the articles of association nor in by-laws.

As in the case of a limited liability company (Article 208 § 6 and 7 CCC) and a joint stock company (Article 371 § 4 and 5 CCC), the appointment of a commercial proxy will require the consent of all the directors, yet the dismissal of the commercial proxy will be a matter for a single director (Article 300^{75} § 3).

Arguably the most important of provisions regulating PSA is Article 300^{76}. This is the rule that deals with the possibility of delegating some or all management activities to a certain director or directors (tantamount to nominating them to executive directors), with supervisory powers being vested in other directors (non-executive directors). Both types of directors may be grouped in committees, respectively the executive and supervisory ones.

While executive directors will be delegated to execute the management functions that a management board executes in the traditional two-tier board system, the responsibilities of non-executive directors will include assessing the accuracy and fairness of the preparation of the company's financial statements. In order to perform these duties, the Act grants them the power to examine all documents of the company, demand explanations, documents or reports from directors and employees (as it seems: also persons employed on other bases).

With respect to the authority to represent PSA in dealings with third parties, the PSA Act (Article 300^{78} CCC) sets forth rules identical to those applicable to management boards in PSAs and in other companies: this authority shall be exercise collectively in the case of a multi-person board of directors, subject to modification in the articles of association (hence, what is important, not in the by-laws), and the option for third parties of serving statements ant notices on the company to a single director. Hence, as regards the issue of representing PSA in dealings with third parties, the statute separates it from the issue of directors' status as executive

and non-executive; hence, the status of directors as executive ones plays a role only with respect to what the CCC refers to as the management of company affairs. This problem will prove practically important, as e.g. in the case of a two-member board with one executive director and one non-executive director, failure by the shareholders to stipulate in the articles of association that the executive member is authorized to single-handedly represent the company will entail the need to apply the default statutory rules concerning the joint representation.

All directors, importantly, have been included in the group to which the provisions of the CCC and other laws relating to members of management boards apply. This was done by way of modifying Article 4 CCC by adding thereto a § 2^1, according to which whenever other provisions refer to a management board or a member of the management board, this should be understood as the board of directors or a director, respectively. This means, inter alia, applying stricter rules on liability (also: criminal) to directors, without having regard to whether in a given company there is a divide between executive and non-executive directors[48]. This provision pertains also to application of Article 18, precluding persons convicted for certain categories of crimes (against the protection of information, against commercial transactions and financial and securities transactions, against credibility of documents, against property) from becoming directors in companies.

VII. One-tier system in polish companies law – assesment and conclusions

We have seen that there exist strong arguments in favour of allowing companies to choose their board models. As already stated above, the very fact that the newly amended Polish law will allow for a choice of board structure is a positive one, deserving of appraisal.

As is easy to see, the rules allow considerable flexibility in the composition of the board of directors. The possibility of appointing a one-person board makes it similar to the management board in a limited liability company where neither a supervisory board nor an audit committee have been established. An individual

[48] Hence, this solution differs from the one chosen in the 2005 Act which states: "Unless the law provides otherwise, the provisions of the Commercial Companies Code and of separate acts on the management board and supervisory board and their members shall apply mutatis mutandis to the administrative board of an SE and its members. In case of doubt as to whether the provisions on the management board or supervisory board should apply to the administrative board or its members, the provisions on the management board and its members shall apply" (Article 29 of the 2005 Act, author's translation).

member of a board of directors becomes practically sovereign in the course of the company's day-to-day business. In such a situation, it is, of course, impossible to separate powers in the same way as for the appointment of executive and non-executive directors. The new rules also allow for great flexibility in the realm of determining the operation of the board of directors.

This flexibility should be also appraised, since the greater the flexibility in the formation and functioning of the board, the easier it would be for the potential shareholders to craft the constitution of their company in a manner desired, be it from the perspective of how they want the company to praxeologically function or how the business necessity dictates. All this should lead to better economic turnover. That in practice many different empirical models of companies' boards will function could facilitate fruitful theoretical research located at the junction of corporate law, corporate governance economics, management studies and (legal) sociology. Forecasting any and all possible business and organizational implications of methods of governance chosen by numerous companies is a task exceeding both the framework of this text, as well as the possibilities of an *a priori* analysis – time shall show how these issues develop. Certainly, however, as empirical studies on the functioning of companies show, the practice of trading and day-to-day company dealings, the market competition making various models of governance meet and compete, are the best means of verifying and measuring the effectiveness of certain ideas and practical resolutions of both the legislatures as well as shareholders.

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Streszczenie

Wkrótce w życie wejść mają przepisy o prostej spółce akcyjnej, nowym typie spółki kapitałowej pośród znanych polskiemu prawu spółek handlowych. Prosta spółka akcyjna, w skrócie zwana PSA, ma stanowić atrakcyjną ofertę dla przedsiębiorców, w szczególności

startupów. Obok licznych zalet i wad tej konstrukcji, doniosłą zmianą, którą wprowadza do polskiego systemu prawnego, jest odejście od dwupoziomowej struktury zarządczej (tzw. model dualistyczny), do tej stanowiącej jedyne dopuszczalne w przypadku polskich spółek kapitałowych rozwiązanie – tak akcjonariuszy, jak i potencjalnych inwestorów. Akcjonariusze PSA będą mogli zdecydować się na wybór systemu dualistycznego, bądź monistycznego (z jednym organem zarządzającym i nadzorującym działalność spółki). Na aprobatę zasługuje zarówno sam zamysł uregulowania tej kwestii w sposób umożliwiający spółce wybór pożądanej struktury zarządu, jak i zastosowana metoda regulacji. W tekście wskazano doniosłe argumenty przemawiające za umożliwieniem spółkom wyboru modelu zarządu. Regulacja zaproponowana przez polskiego ustawodawcę pozwala na szeroką elastyczność w zakresie określenia składu rady dyrektorów i sposobu jej codziennej działalności. Pozwoli to, zdaniem autora, na konwergencję i konkurowanie ze sobą bardzo zróżnicowanych w praktyce modeli. W efekcie powinno to prowadzić do ustalenia rozwiązań bardziej efektywnych i praktycznych, lepiej przystosowanych do potrzeb gospodarczych.

SŁOWA KLUCZOWE: spółka, organy, ograniczona odpowiedzialność, prosta spółka akcyjna.

Summary

The new type of a company, dubbed the simple joint stock company (prosta spółka akcyjna, abbreviated as: PSA) will soon become a part of the Polish law, intended to be an attractive offer for entrepreneurs, especially start-ups. Apart from its many advantages and disadvantages, one significant change that it brings about to the Polish legal system is the departure from the two-tier board structure (so-called dualist model) being thus far the only option allowed for Polish companies. Shareholders of a PSA will be able to choose either the above-mentioned or a newly designed one-tier board system. Both the very idea of regulating the issue in this manner (i.e. allowing the company to choose its desired board structure) as well as the way it has been put into life in the PSA Act are worthy of appraisal. Firstly, as indicated in the text, there exist strong arguments in favour of allowing companies to choose their board models. Secondly, the rules set forth by the Polish legislators allow deep flexibility as to the composition of the board and the structuring of its everyday operations. This, in the author's opinion, will allow highly varying models to converge and compete against each other, allowing the determination of models more efficient, more practical, better accustomed to the challenges of business.

KEYWORDS: company, governing bodies, limited liability, simple joint stock company

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