

Pinior Piotr

*Dr hab., Faculty of Law and
Administration, Department of
Commercial Law, University
of Silesia in Katowice*

Пініор П.

*доктор габілітований,
викладач кафедри
господарського та
торговельного права
Сілезького університету,
м.Катовіце*

DUTY OF LOYALTY IN COMPANIES' CORPORATE RELATIONSHIPS

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1. Introduction

A corporate structure of a company embraces many different relationships. The contract (deed, articles, statute) of the company leads to contractual relationships between authorities (members of board of directors or supervisory board) and the company, shareholders and the company, not mentioning relations to third parties. Nowadays in the literature and jurisdiction as well as in legislation there can be observed continuous growth of interest to duty of loyalty, that on one hand is supposed to be a consequence of the recent economic crisis and on the other hand is the consequence of the evolution of corporate law. Especially important seems to be the duty of loyalty in respect to the authorities of the company and to the shareholders. So as to provide wider view to this issue and in respect of limited frames of the thesis, there shall be presented the matters as a brief overview in selected legal systems.

2. Authorities' duty of loyalty

The structure of the company differs depending on the type of a company and of course depending on the corporate system adopted in national legislations. Either in one-tier (monistic) system or in two-tier (dualistic) system the status of the companies' authorities is more or less similar. For example, when you look at the status of the directors in monistic system in Great Britain or the membership in Board of Directors or Supervisory Board in Germany, you can recognize a severe emphasis on their duty of loyalty towards the company and the shareholders.

The company legislation in Great Britain gives wide space for contractual freedom within the structure of the company, nevertheless the Companies Act of 2006 has significantly modified the provisions concerning duties of directors, including the duty of loyalty. The range of principal directors' duties

shall be governed especially by provision 170 – 177 Companies Act of 2006. The directors shall be obliged to act within powers, to promote the success of the company, to exercise independent judgment, to exercise reasonable care, skill and diligence, to avoid conflict of interest, not to accept benefits from third parties [1, p.323-370]. In the literature the main accentuation is put on acting in the interest of the company, its shareholders and stakeholders [2, p.480-486].

In the German company law the duty of loyalty (*Treupflicht*) is widely considered in the literature and jurisdiction. The duty of loyalty in Germany embraces among others: to care of the interest of the company, to avoid conflict of interest, ban of competitiveness, ban to abuse function and the power to represent the company, confidentially duty [3, p.890-898; 4, p.298-303]. In frame of duty of loyalty there is also a question of equivalent remuneration of directors which should be not overestimated, thus in case of poor economic situation the directors should agree to reduce their remuneration [5, p.529]. This is also a new trend in EU legislation, where in association with a recent economic crisis there has appeared a proposal of a new amendment of directive 2007/36/WE enabling the shareholders to adopt a remuneration policy for the company¹.

The main characteristic of the duty of loyalty in corporate company relationships concerning the directors is a special care of interest of the company and acting in a way enabling the maximum use of the possibilities of the company (corporate opportunity, *Geschäftschancen*). On the other hand however, the interest of company cannot exceed in importance the interest of shareholders and stakeholders what means that corporate opportunity should be considered taking into account other interests. Moreover the power of director to manage a company cannot be used for his own interest, what would abuse simultaneously the corporate opportunities [1, p.303].

The concept of the directors' duty of loyalty occurs in the Polish literature as well [6, p.323-370].

3. Shareholders' duty of loyalty

The duty of loyalty should be considered also with regard to the shareholders, as their influence on the company is unavoidable by passing the general meeting's resolutions. The measure of the duty cannot be treated

1 Proposal for a Directive of the EP and of the Council on amending Directive 2007/36/EC as regards the encouragement of long - term shareholder engagement and directive 2013/34/EU as regards certain elements of the corporate government statement SWD (2014) 127 final p. 52: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2014:0127:FIN:EN:PDF>

equivalently for all shareholders especially in the public limited companies (joint stock companies), in which the shareholders' position can differ significantly depending on the amount of shares, taking obviously into account free-float of shares. On the other hand in private limited companies, the influence of shareholders can be much greater, especially in those legal systems, where the shareholders are empowered to give binding instructions to the directors, that is why the duty of loyalty must be in such circumstances considered as indispensable.

In Polish Commercial Companies Code of 2000 (further as: CCC) the duty of loyalty is not *expressis verbis* stated, but it can be interpreted out of different provisions concerning companies. The most important source for the shareholders' duty of loyalty is the definition of the commercial company contract (deed, articles). According to art. 3 CCC by executing the contract of a commercial company, the shareholders shall agree to achieve common purposes by making contributions and, if the contract of the company so provide, by cooperating in other manner. One of the *essentialia negotii* of the contract is the agreement about the achievement (realization) of the common purposes of shareholders, so the duty of loyalty is the effect of the obligation of shareholders incorporated in the contract and becomes that way the component of the shareholders membership [6, p.298]. Among those provisions, which enable to interpret the duty, there are also provision concerning repealing resolutions of general meeting. Any resolution which is in conflict with company's contract or good practice and detrimental to the company's interest or aimed at harming a shareholder may be appealed against by claim for repealing such resolution. The jurisdiction on that basis has frequently adopted the duty of loyalty as one of the shareholders' corporate duties. The Supreme Court in judgment of 5th of November 2009 (I CSK 158/09, OSNC 2001/4/63) stated, that the shareholders are bound by the duty of loyal cooperation, which is the effect of concluding the contract of the company and the effect of realizing common purpose.

Shareholders' duty of loyalty should be defined as the obligation to execute corporate rights (esp. voting rights) in accordance with the good practice and avoiding conflict of interests, so as the interest of the company and interests of shareholders would not be harmed and the common purpose of shareholders could be realized [6, p.298]. Of course, to define precisely the duty, it is necessary to determine what does the interest of the company mean. In one of the judgment (22.10.2009 III CSK 63/09) the Supreme Court stated that the interest of the company has an autonomous character and should be understood as the resultant (compromise) of – often contradictory – interests

of all groups of shareholders (majorities and minorities) and its content should include reasonable interest of all those groups. In the literature the Supreme Court's statement have been also approved.

Shareholders' duty of loyalty has already been for a long time widespread assumed in German literature. The membership in the company itself is recognized as the source of the duty of loyalty. The essence of the duty of loyalty is acting in consent with the interest of the company and the duty embraces: ban of causing harm to the company, ban of discrediting company to the third parties, ban of revealing information about the company and ban of using company's assets for own purposes [3, p.898-899].

4. Violation of the duty of loyalty

The violation of the duty of loyalty by the authorities of the company usually cause damage to the company, and for the authorities the provisions of national legislation usually contain individual base for claiming against the member of boards. For instance, in Great Britain the directors shall be liable towards the company for damages caused by their acting or omission and breach of duties. The general meeting decides about the claim, but if the meeting does not take up a resolution, every shareholder is enabled to rise claim (derivative claim) against the director in the name of a company, on ground of art. 260 Companies Act [1, p.551]. The legal base for claims against directors exist also in German and Polish law.

As for the violation of the duty by the shareholders in German Law, the provisions of the act for private companies, *expressis verbis* give the possibility of raising claims against the shareholders (§ 46 p. 8 *das Gesetz betreffend die Gesellschaften mit beschränkter Haftung*) and violation of duty of loyalty, especially caused by binding instruction, may cause claims against the shareholders [5, p.908-910]. The act for public companies (*das Aktiengesetz*) does not contain similar provisions but raising claims against shareholders has been accepted in the literature [4, p.183]. The Polish Commercial Companies Code does not contain any provisions about raising claims against the shareholders because of the violation of duty of loyalty either in private or in public companies, but in the Polish literature the possibility of rising claims on base of the provisions concerning liability in the Civil Code (contractual art. 471 CC or tortious art. 415 CC) has found the acceptance [6, p.308].

5. Summary

The duty of loyalty in companies' relationships is a matter of great importance taking into account the different position of the authorities and shareholders of the company, the interest of the company and individual interest of shareholders, not mentioning the influence on the stakeholders. The

main characteristic of the duty of loyalty in corporate company relationships concerning the directors is a special care of interest of the company and acting in a way enabling the maximum use of the possibilities of the company (corporate opportunity). Shareholders' duty of loyalty should be defined as the obligation to execute corporate rights (esp. voting rights) in accordance with the good practice and avoiding conflict of interests. Being involved in a company cannot be considered only from the perspective of profits but also from the perspective of responsibility, that is why the question of loyalty finds interesting in the literature and jurisdiction concerning corporate law.

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5. H. Fleischer, W. Goette, *Munich Handbook of Company Law, 3. Vol. Private limited company. (Münchener Kommentar zum Gesetz betreffend die Gesellschaft mit beschränkter Haftung.)* 2. Vol. München 2012
6. P. Pinior, *Shareholders' supervision in private limited companies (Nadzór wspólników w spółce z ograniczoną odpowiedzialnością).* Warszawa 2013

Пініор П. Обов'язок лояльності у корпоративних відносинах товариств – об'єднань капіталів.

Обов'язок лояльності в корпоративних відносинах товариств – об'єднань капіталів має істотне значення з точки зору диференційованої позиції членів органів і учасників в товариствах капіталів, інтересів товариства та індивідуальних інтересів акціонерів, а також впливу на ситуацію зацікавлених сторін (стейкхолдерів).

Основною характерною ознакою обов'язку лояльності в товариствах капіталів у відношенні до членів органів управління є особливе дбання про інтерес товариства, а також здійснення дій, що роблять можливим використання потенціалу товариства максимальною мірою. Обов'язок лояльності учасників повинен бути окреслений як обов'язок виконання корпоративних прав, в особливості права голосу, згідно з добрими звичаями через уникнення конфлікту інтересів. Участь в товаристві не може бути розглянута виключно з точки зору майнових вигод, а й із врахуванням відповідальності у корпоративних відносинах товариств, тому проблематика обов'язку лояльності є предметом зацікавлення доктрини і виступає в судовій практиці, яка торкається корпоративного права.

Ключові слова: обов'язок лояльності, корпоративні відносини, товариства капіталів.

Piniór P. Obowiązek lojalności w stosunkach korporacyjnych spółek kapitałowych.

Obowiązek lojalności w stosunkach korporacyjnych spółek ma istotne znaczenie z punktu widzenia zróżnicowanej pozycji członków organów i wspólników w spółkach kapitałowych, interes spółki i indywidualne interesy akcjonariuszy a także wpływ na ogół interesariuszy.

Główną cechą charakterystyczną obowiązku lojalności w spółkach kapitałowych w odniesieniu do członków organów zarządzających jest szczególna dbałość o interes spółki oraz podejmowanie działań umożliwiających wykorzystanie potencjału spółki w maksymalnym stopniu. Obowiązek lojalności wspólników powinien być definiowany jako obowiązek wykonywania praw korporacyjnych, w szczególności prawa głosu, zgodnie z dobrymi obyczajami oraz unikanie konfliktu interesów. Uczestnictwo w spółce nie może być rozpatrywane wyłącznie z punktu widzenia korzyści majątkowych ale również z uwzględnieniem odpowiedzialności w stosunkach korporacyjnych spółek, dlatego problematyka obowiązku lojalności jest przedmiotem zainteresowania doktryny i występuje w orzecznictwie sądowym odnoszącym się do prawa korporacyjnego.

Ключові слова: обов'язок лояльності, стосунки корпоративні, компанії капіталові.

Пиньор П. Обязанность соблюдения лояльности в корпоративных отношениях капитальных обществ.

Обязанность лояльности в корпоративных отношениях обществ – объединений капиталов имеет существенное значение с точки зрения дифференцированной позиции членов органов и участников в обществах капиталов, интересов общества и индивидуальных интересов акционеров, а также влияние на ситуацию заинтересованных сторон (стейкхолдеров).

Главным характерным признаком обязанности лояльности в обществах капиталов по отношению к членам органов управления является особая забота об интересах общества, а также осуществление действий, которые делают возможным использование потенциала общества в максимальной степени.

Обязанность лояльности участников должна быть очерчена как обязанность исполнения осуществления корпоративных прав, в особенности права голосования, согласно добрым традициям через избежание конфликта интересов. Участие в обществе не может быть рассмотрено исключительно с точки зрения имущественных выгод, но также с учетом ответственности в корпоративных отношениях обществ, поэтому проблематика обязанности лояльности является предметом интереса доктрины и выступает в судебной практике, которая касается корпоративного права.

Ключевые слова: обязанность соблюдения лояльности, корпоративные отношения, общества – объединения капиталов.

Pinior P. Duty of Loyalty in Companies' Corporate Relationships

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The main characteristic of the duty of loyalty in corporate company relationships concerning the directors is a special care of interest of the company and acting in a way enabling the maximum use of the possibilities of the company (corporate opportunity). Shareholders' duty of loyalty should be defined as the obligation to execute corporate rights (esp. voting rights) in accordance with the good practice and avoiding conflict of interests. Being involved in a company cannot be considered only from the perspective of profits but also from the perspective of responsibility, that is why the question of loyalty finds interesting in the literature and jurisdiction concerning corporate law.

Keywords: duty of loyalty, corporate relationships, companies.