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Problem of Liability of Management Board Members of a Capital Company for Liabilities under Social Security Contributions Arising during the Proceedings with the Possibility of Concluding an Arrangement

Problem odpowiedzialności członków zarządu spółki kapitałowej za zobowiązania z tytułu składek na ubezpieczenie społeczne powstałe w czasie trwania postępowania z możliwością zawarcia układu

SUMMARY

The study is devoted to the problem of management board members' liability for social insurance contributions arising during the course of proceedings with the option of concluding an arrangement based on the provisions of both the Bankruptcy and Reorganization Law and the Restructuring Law. It defends the view that a member of the management board is not responsible for liabilities under social security contributions arising during the course of proceedings with the option of concluding an arrangement, initiated in good time, conducted on the basis of the provisions of the Bankruptcy and Reorganization Law as well as on the provisions of the Restructuring Law.

Keywords: limited liability company; management board member's liability; social security contributions; tax liability

This study concerns the problem of the existence of liability of members of the management board of a capital company, with the registered seat in Poland, for the company's obligations under social security contributions arising during the course of the procedure with the option of concluding an arrangement (between a capital company and its creditors), conducted on the basis of the provisions of the Bankruptcy and Reorganization Law Act (bankruptcy with the possibility of an

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arrangement[1]) as well as on the provisions of the Restructuring Law Act (accelerated arrangement proceedings, arrangement proceedings, sanation proceedings[2]).

It sometimes happens in practice that during court proceedings whose purpose is to enter into an arrangement, a capital company does not pay social security contributions despite the absence of a statutory moratorium. Therefore, a dilemma arises whether members of the management board may be liable for such public law liabilities of a capital company or not.

In the first part of this study, there are presented issues related to the general principles of member liability for social security contributions not paid by a capital company. The second part presents arguments for the concept that this responsibility does not arise after the opening of the procedure leading to the conclusion of the arrangement, if this occurred in due time.

MANAGEMENT BOARD MEMBERS' LIABILITY FOR PUBLIC LAW OBLIGATIONS OF CAPITAL COMPANIES

In accordance with Article 31 of the Act of 13 October 1998 on the Social Insurance System[3], to social security contributions shall apply, i.a., Article 116 of the Tax Ordinance[4] on the third party liability[5]. In the judgement of the Supreme Court

[1] Act of 15 May 2015 – Restructuring Law (consolidated text Journal of Laws 2017, item 1508 as amended) entered into force on 1 January 2016 (Article 456 of the Restructuring Law). However, according to Article 449 of the Restructuring Law in matters in which before the date of entry into force of the Restructuring Law it has been submitted a bankruptcy petition previous regulations apply. Therefore, the issue of bankruptcy proceedings with the possibility of entering into an arrangement for several years will have its significance for the theory and practice of law.

[2] In accordance with Article 9a of the Act of 28 February 2003 – Bankruptcy Law (consolidated text Journal of Laws 2017, item 2344 as amended), a bankruptcy court may not declare bankruptcy of an entrepreneur in the period from the opening of the restructuring procedure to its termination or final discontinuation. In this context, it should be recalled that pursuant to Article 189 (1) of the Restructuring Law the day of issuing the decision on opening accelerated arrangement proceedings, arrangement proceedings or sanation proceedings is the day on which restructuring proceedings are opened. However, according to Article 189 (2) of the Restructuring Law in the proceedings for approval of the agreement, it is considered that the effects of opening the restructuring proceedings arise from the so-called arrangement day. Immediately after the commencement of the arrangement by the supervisor, the debtor determines the arrangement day (Article 211 (1) of the Restructuring Law). The arrangement day falls no earlier than three months and no later than the day prior to the date of submission of the application for approval of the arrangement (Article 211 (2) of the Restructuring Law). However, it is only the approval of the agreement that releases the members of the management board from their responsibility, and as soon as this provision becomes final, the proceedings are terminated.

[3] Consolidated text Journal of Laws 2019, item 300 as amended.

[4] Act of 29 August 1997 – Tax Ordinance (consolidated text Journal of Laws 2019, item 900 as amended).

[5] For more details, see J. Strusińska-Żukowska, [in:] *Ustawa o systemie ubezpieczeń społecznych. Komentarz*, red. B. Gudowska, J. Strusińska-Żukowska, Warszawa 2011, p. 488 ff.; *Ustawa*

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of 13 June 2012, it was stated that the provision of Article 116 of the Tax Ordinance, in conjunction with:

> […] Article 31 of the Act on the Social Insurance System establishes the property liability of members of the management board of a capital company for unpaid and overdue social security and health insurance contributions, as well as the Labour Fund and the Guaranteed Employee Benefits Fund, in the event of total or partial ineffectiveness of their execution on the company's assets. If the execution against the company proves to be ineffective, the members of the board guarantee with all their property the fulfilment of the public obligation of the company they manage, with the provisions that their liability is excluded by the exonerative premises provided for in Article 116 § 1 *in fine* of the Tax Ordinance[6].

In the further part of the judgement, the Supreme Court stated, i.a., that "the premise of liability is the fault consisting in the improper conduct of the company's affairs and leading to the loss of its »financial property«, resulting in ineffective execution against the company"[7]. In turn, in accordance with Article 32 of the Act on the Social Insurance System, contributions to the Labour Fund, Guaranteed Employee Benefits Fund and the Bridging Pensions Fund as well as to health insurance in the scope of third party liability shall apply accordingly to provisions on social security contributions.

The legal nature of third party liability for public law obligations of independent legal entities belongs to the theoretically contentious issues in science, however, a more detailed theoretical analysis of this issue exceeds the scope of this study[8]. The essence of the legal nature of the board members' responsibility is reflected in the judgement of the Supreme Court of 16 May 2016[9], whose clear lecture is a good introduction to the analysis of the legal problem to which this study is devoted.

First of all, "third party liability for tax liabilities (contributory, respectively) occurs in the event of non-performance or improper performance of a tax (contributory) liability by the taxpayer (contribution payer), so it is an institution of law

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o systemie ubezpieczeń społecznych. Komentarz, red. J. Wantoch-Rekowski, Toruń–Warszawa 2007, p. 229 ff.; P. Kuźmiak, *Odpowiedzialność członka zarządu spółki z o.o. za zaległości spółki z tytułu składek ZUS*, „Monitor Podatkowy" 2006, nr 11, p. 365; P. Prusinowski, *Wina a odpowiedzialność członków zarządu spółek kapitałowych za zobowiązania z tytułu składek na ubezpieczenie społeczne*, „Monitor Prawniczy" 2012, nr 9, p. 227; J. Majka, *Odpowiedzialność osób trzecich z tytułu składek na ubezpieczenia społeczne – wybrane problemy orzecznicze*, „Prawo Budżetowe Państwa i Samorządu" 2017, nr 1, p. 27.

[6] Judgement of the Supreme Court of 13 June 2012, II UK 307/11, not published.

[7] *Ibidem*. Cf. judgement of the Supreme Court of: 28 November 2003, IV CK 219/02, not published; 13 July 2005, I UK 292/04, OSNP 2006, No. 5–6, item 100; 27 October 2004, IV CK 148/04, not published.

[8] This fact is highlighted by, among others, J. Strusińska-Żukowska (*op. cit.*, pp. 490–491).

[9] II UK 246/15, not published.

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binding the effects of the existence of a tax (contributory) liability with an entity other than tax-paying person (contribution payer)"[10].

Secondly, "this liability depends on the existence of the taxpayer's (contributory) tax liability (contribution payer), which means that it is an accessory, follow-up and guarantee because it cannot arise without the prior existence of the (contributory) tax obligation on the side of the original debtor"[11].

Thirdly, "it is also a subsidiary (subsidiary) liability, since the tax creditor (contributory) is not free to submit a claim to the taxpayer (contribution payer) or a third party, but must first seek claims from the taxpayer or contribution payer"[12].

Fourthly, "third parties are liable for someone else's debt, however, this liability does not release the debtor from his liability, but only extends the group of entities from which the tax creditor (contributory) can claim"[13].

Fifthly, "this responsibility must result from a specific provision of the Act. The »third parties« catalogue has been mentioned in Articles 110–117 of the Tax Ordinance and it is closed"[14].

The liability of the members of the management board of a capital company in the analysed case is undoubtedly of a sanction nature. Responsibility for the company's public law obligations is assigned to members of the management board due to a negative, from the legal point of view, assessment of their behaviour. The liability of management board members is neither absolute nor absolutely guaranteed. In turn, according to the rule of law standards – at the level of lawmaking and its application by state authorities – the practical scope of the sanction should not exceed the content of the legal norm governing the sanction, interpreted according to the principles of linguistic (grammatical) interpretation. The provision of Article 116 of the Tax Ordinance is an expression of the protection of the financial interests of the broadly understood State against the behaviour of citizens negatively assessed by law. This protection may not exceed the content of legal norms.

The analysis of the problem of management board members' liability for public law obligations of a capital company arising during the course of the procedure leading to the conclusion of the arrangement should be preceded by a brief historical introduction to illustrate the fact that the issues described here are not a completely new legal problem. The Act of 15 March 1934 – Tax Ordinance[15] did not provide for the liability of members of the management board for tax liabilities incumbent on the company. It was assumed that the members of the management board are

[10] *Ibidem*.
[11] *Ibidem*.
[12] *Ibidem*.
[13] *Ibidem*.
[14] *Ibidem*.
[15] Journal of Laws No. 14, item 134.

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responsible for these debts pursuant to Article 298 of the Commercial Code. The judgement of the Supreme Court of 1 January 1936[16] stated that "the settlement of the dispute based on Article 298 of the Commercial Code the liability of management board members […] for paying taxes imposed on the company belongs to the ordinary courts"[17]. A similar view was expressed by the Supreme Administrative Court in its judgement of 13 March 1935, which – according to the Court – cannot be claimed for tax due by the company from the administrator of the company by way of administrative procedure[18]. By the decree of 16 April 1946 on Tax Liabilities, a solution regarding the liability of managers was introduced into tax law. Article 20 (1) provided that for tax liabilities of a limited liability company there are personally and jointly and severally liable both to the current and former members of the company's management board when the enforcement implemented to the company's assets was in whole or in part ineffective. This principle was maintained in the decree of 26 October 1950 on Tax Liabilities. It was also extended to members of the management board of a joint-stock company. At the same time, the decree stipulated in Article 24 (1) liability of each shareholder with all his assets for the company's tax obligations for the period of his participation in the company. Amendment to the decree of 26 October 1950, made by the Act of 16 November 1960[19], expanded the scope of liability of shareholders and managers who are not shareholders – members of the board were also responsible for the tax obligations arising in connection with their participation in the company. As amended by Article 24 (1) of the decree, each shareholder was jointly and severally liable with the other partners and the company not only for the company's tax liability but also for such obligations of other shareholders arising in connection with their participation in the company. The Act of 19 December 1980 on Tax Liabilities[20] in Article 47 maintained the wide scope of liability of shareholders for the tax liabilities of the company and other shareholders, while it gave up the burden of management board members (limited liability company and joint-stock company) liability for tax liabilities of the company and partners. For the recovery of tax receivables from managers, Article 298 of the Commercial Code[21] has become current again. The liability of partners has been repealed by Article 47 of the Act of 23 December 1988 on Economic Activity with the Participation of Foreign Parties[22]. Its restoration (Article 6 (2 k.) of the Act of 6 March 1993 Amending Certain Acts

[16] CI 2847/35, not published.
[17] OSN in tax and administrative cases 1936, item 2522.
[18] OSN in tax and administrative cases 1935, item 1268.
[19] Journal of Laws No. 51, item 300.
[20] Journal of Laws No. 27, item 111 as amended.
[21] Regulation of the President of the Republic of Poland of 27 June 1934 (Journal of Laws No. 57, item 502 as amended).
[22] Journal of Laws No. 41, item 325.

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Regulating the Principle of Taxation and Some Other Acts[23]) has rightly caused numerous doctrinal protests[24].

In accordance with Article 116 § 1 of the Tax Ordinance[25] in the previously binding wording (i.e. before the entry into force of the Restructuring Law) for tax arrears of limited liability companies, limited liability companies in organization, joint-stock company or joint-stock company in the organization, the members of its management board are jointly and severally liable with all their assets, if enforcement of assets the company turned out to be in whole or in part ineffective, and a member of the management board: 1) did not prove that: a) the bankruptcy petition was filed in due time or proceedings preventing bankruptcy were initiated (arrangement proceedings)[26], or b) failure to file for bankruptcy or the bankruptcy proceedings (arrangement proceedings) were not initiated without his fault[27]; 2) does not indicate the

[23] Journal of Laws No. 28, item 127.

[24] For example, see A. Szajkowski, *Odpowiedzialność wspólników i członków zarządu w spółce z o.o.*, „Monitor Prawniczy" 1993, nr 1, p. 6; R. Kubacki, *Zasady odpowiedzialności zarządów spółek kapitałowych za zobowiązania podatkowe*, „Przegląd Podatkowy" 1998, nr 2, p. 3.

[25] For more details, see S. Babiarz, [in:] S. Babiarz, S. Dauter, B. Gruszczyński, R. Hauser, A. Kabat, M. Niezgódka-Medek, *Ordynacja podatkowa. Komentarz*, Warszawa 2013, p. 597 ff.; A. Trochim-Tuchorska, *Odpowiedzialność podatkowa osób trzecich w orzecznictwie podatkowym sądów administracyjnych w latach 2007–2008*, Warszawa 2009; D. Walerjan, T. Żak, *Odpowiedzialność członków zarządu spółek kapitałowych oraz praktyczne sposoby jej ograniczenia*, Warszawa 2010; M. Bąba, *Odpowiedzialność członków zarządu za publicznoprawne zobowiązania spółki kapitałowej*, „Monitor Prawa Pracy" 2011, nr 1, p. 6; D. Jankowiak, *Odpowiedzialność podatkowa podatnika, płatnika, inkasenta i osób trzecich*, Warszawa 2003, p. 394 ff.; *Ordynacja podatkowa*, red. B. Dauter, Warszawa 2007, p. 350; R. Mastalski, [in:] R. Mastalski, J. Zubrzycki, *Ordynacja podatkowa*, Warszawa 2011, p. 545; A. Olesińska, *Odpowiedzialność osób trzecich za zobowiązania podatkowe*, Lublin 2000, p. 491 ff.

[26] In the jurisprudence of the Supreme Court it is emphasized that the features determining the "right" time of filing for bankruptcy are objective and verifiable (cf. judgements of the Supreme Court of: 22 June 2006, I UK 369/05, not published; 14 September 2007, III UK 24/07, OSNP 2008, No. 21–22, item 324; 2 October 2008, I UK 39/08, OSNP 2010, No. 7–8, item 97; 10 February 2011, IV CSK 335/10, OSNC-ZD 2011, No. C, item 58; 4 October 2011, I UK 113/11, OSNP 2012, No. 23–24, item 293). "Right time" within the meaning of Article 116 § 1 (1) (a) of the Tax Ordinance is, therefore, neither a temporary suspension of payment of debts due to temporary difficulties, nor a complete cessation of payment of debts as a result of the company's disposal of all (or almost all) assets, but the time when it is already known that the debtor will not be able to meet all its obligations (judgement of the Supreme Court of 2 October 2013, II UK 66/13, not published).

[27] Ignorance of the company's finances by a member of the management board is not a circumstance exempting him from liability for contributions arrears pursuant to Article 116 of the Tax Ordinance (according to the judgements of the Supreme Court of: 5 July 2011, I UK 422/10, not published; 20 January 2011, II UK 174/10, not published; 6 December 2010, II UK 136/10, not published). According to Article 116 § 1a of the Tax Ordinance, in its current wording, if the obligation to file for bankruptcy arose and existed only when enforcement was carried out by the forced management board or by selling the enterprise under the provisions of the Code of Civil Procedure, it is considered that the failure to file for bankruptcy was not attributable to the board member.

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company's property, the enforcement of which will enable[28] the company to satisfy its tax arrears to a significant extent.

In the context of the interface between regulations of the Tax Ordinance in the previous wording and the Bankruptcy and Reorganization Law, it is necessary to point to the intertemporal provisions of this last act – Articles 543 and 544. The legislator assumed then that whenever separate provisions refer to "bankruptcy proceedings", this means insolvency proceedings involving the liquidation of the assets of the bankrupt, and whenever separate provisions refer to "arrangement proceedings", this also means insolvency proceedings with the possibility of concluding an arrangement.

According to the current wording of Article 116 § 1 of the Tax Ordinance (established upon the entry into force of the Restructuring Law) for tax arrears of limited liability companies, limited liability companies in organization, joint-stock company or joint-stock company in organization, the members of its management board are jointly and severally liable if the execution of the company's assets turned out to be in whole or in part ineffective, and the member of the management board did not demonstrate (on his own initiative and at his own risk) one of the following circumstances excluding his liability. First, that a bankruptcy petition was filed[29] in due time[30]

[28] The case law of administrative courts indicate that this is a matter of indicating by a member of the management board such property that would allow the debt to be satisfied, and not of indicating any assets or values (judgement of the Voivodeship Administrative Court in Bydgoszcz of 16 January 2008, I SA/Bd 767/07, not published; judgement of the Voivodeship Administrative Court in Opole of 11 October 2006, I SA/Op 145/06, not published). Therefore, it is not sufficient to indicate property from which enforcement is only potentially, presumably possible (judgement of the Voivodeship Administrative Court in Gdańsk of 27 January 2009, I SA/Gd 657/08, not published). The legislator's will was to guarantee that public law liabilities are not satisfied in any part, but to a significant extent. In the jurisprudence of administrative courts, a significant degree of satisfaction should be associated with such a situation where the repayment of receivables will be real, in addition, satisfaction will relate to at least half of the receivables (judgement of the Voivodeship Administrative Court in Gliwice of 17 July 2009, III SA/Gl 1500/08, not published).

[29] It doesn't matter who filed for bankruptcy. It is important that a) the application is successfully submitted, i.e. that it is not returned, and that b) its application is received in due time.

[30] In accordance with Article 21 (2) of the Bankruptcy Law, if the debtor is a legal person or other organizational unit without legal personality, which is granted legal capacity by a separate act, the obligation to submit an application for declaration of bankruptcy in the bankruptcy court no later than within 30 days from the day on which (objectively and not subjectively) there is a basis for declaration of bankruptcy, rests with anyone who, under a statute, articles of association or statute, has the right to run the debtor's affairs and to represent him, alone or together with other persons. The deadline of 30 days referred to in Article 21 (2) of the Bankruptcy Law should be calculated from the date of the objective occurrence of the debtor's insolvency grounds. Therefore, it is a period counted from the day of the fact specified in the Act. However, this deadline is not counted from the date of becoming aware of insolvency by the debtor's representative. This deadline should be calculated according to the principles of Article 110 ff. of the Civil Code (Article 165 § 1 of the Civil Procedure Code in conjunction with Article 35 of the Bankruptcy Law)

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or that a restructuring procedure was opened[31] or the arrangement was approved in the arrangement approval procedure. Since submission of an application for bankruptcy, submission of an application to open a restructuring procedure, submission of an application for approval of the arrangement has a common denominator, which is insolvency of a capital company within the meaning of Articles 10 and 11 of the Bankruptcy Law Act, the legislator correctly treated several events in an equal manner. Secondly, that failure to file for bankruptcy[32] was due to no fault of the board member. Thirdly, that there is company property, the enforcement of which will make it possible to satisfy the company's tax arrears to a significant extent.

NO GROUNDS TO ACCEPT THE RESPONSIBILITY OF A MANAGEMENT BOARD MEMBER FOR THE PUBLIC LAW OBLIGATIONS OF THE CAPITAL COMPANY ARISING AFTER THE OPENING OF THE PROCEDURE AIMED AT CONCLUDING AN ARRANGEMENT

Against the background of the cited normative basis, using the rules of linguistic interpretation, there are no grounds for accepting the liability of a member of the management board for public law obligations of a capital company arising after the opening of proceedings aimed at concluding an arrangement, which proceedings were initiated in due time. In other words, if a member of the management board led in time to open proceedings involving a capital company aimed at concluding an arrangement, it means that the capital company is in the legal state desired by the legislator (respectively "in arrangement bankruptcy" or "in restructuring"), and consequently a member of the management board cannot be responsible for

[31] In accordance with Article 232 of the Restructuring Law, the court examines the application for opening accelerated arrangement proceedings in camera only on the basis of documents attached to the application. According to Article 270 of the Restructuring Law, the court examines the application for opening arrangement proceedings in camera. An application for opening arrangement proceedings shall be recognized within 2 weeks from the date of submission of the application, unless there is a need to schedule a hearing. In this case, the application is recognized within 6 weeks. In accordance with Article 288 (1) of the Restructuring Law to examine the application for the opening of sanation proceedings, the cited provision of Article 270 of the Restructuring Law shall apply accordingly. All the deadlines listed above for the activities of the restructuring court are for information only. In practice, the restructuring court may need a longer period of time than 2 or 6 weeks to examine the application and hear the case about opening the restructuring proceedings even after a few months. However, a restructuring application for a capital company may also be submitted if its insolvency is threatened.

[32] Filing for bankruptcy of a capital company is the legal obligation of the representative of a capital company. This is a public obligation, as the consequence of its failure to do so may be to incur criminal liability as well as a decision prohibiting business operations and sitting in some bodies of legal persons. In turn, the legislator does not impose on the representatives of a capital company (or on other persons) the obligation to subject a capital company to restructuring. For this reason, no fault in the abandonment of restructuring is irrelevant.

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company's obligations. Similarly, after bankruptcy of a capital company has been declared – the essence of which is the forced liquidation of the bankruptcy estate – further public law liabilities of the company in bankruptcy may arise. However, because bankruptcy is a desirable legal status for an insolvent capital company, a board member is not responsible for the company's obligations arising after the declaration of bankruptcy.

Next, reference should be made to the lack of grounds for a broad interpretation of the provisions on liability for third party obligations. The liability of a member of the management board for public law obligations of a capital company is exceptional and is very strict. The uniqueness of this liability is manifested in the fact that a member of the management board is responsible for the obligation of another person (capital company), who is not released from liability for this obligation.

In the event of a liability being questioned by a member of the management board of the company, the member of the management board should, on his own initiative, prove the existence of a premise for release from liability, because – in accordance with the construction of the act – it is upon him the entire burden of proving that he is not responsible. Undoubtedly, the matter of the existence or non-existence of premises excluding the liability of a member of the management board pursuant to Article 116 § 1 of the Tax Ordinance is a key circumstance, but it is clear from the wording of this provision that the burden of proof (*onus probandi*) lies with the member of the board[33]. With this structure of the premise of liability, a non-linguistic interpretation that extends the regulations to the detriment of board members is not allowed.

Further on, the argument of completeness of exonerative premises should be referred to. The jurisprudence emphasizes that the regulation of Article 116 of the Tax Ordinance:

> […] provides for three exoneration premises that allow a member of the board to free himself from responsibility. He may show that the bankruptcy petition has been filed in due time or arrangement proceedings have been initiated or that no such petition has not been filed through his fault or indicate the property of the company, the enforcement of which will make it possible to satisfy the arrears to a significant extent[34].

Filing in due time a bankruptcy petition or having opened the arrangement proceedings is an exhaustive exoneration premise. The legislator does not require any further conditions to be fulfilled by the board member for release from liability.

There is an argument of existence of a sanction for a member of the management board in Article 116 of the Tax Ordinance for failure to submit a request to initiate

[33] Judgement of the Supreme Administrative Court of 14 September 2005, FSK 2062/04, not published.

[34] Judgement of the Court of Appeal in Szczecin of 17 November 2015, III AUa 117/15, not published.

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appropriate proceedings, and non existence of any sanctions for a board member for any dysfunctions in proceedings ending in an arrangement. The Court of Appeal in Szczecin in its judgement of 12 January 2016 indicated that "it should be clarified that the liability of the members of the management board of a debt limited liability company is associated with the lack of due diligence in managing the company's affairs and failure to submit a request to the insolvency court in due time"[35].

In addition, the sanction is a consequence of the behaviour of a particular person negatively assessed by law, but the behaviour remaining in the sphere of competence of that person. Meanwhile, in the case of bankruptcy proceedings with the possibility of concluding an arrangement conducted under the Bankruptcy and Reorganization Law, a member of the management board of a capital company did not decide on the course of these proceedings. The bankruptcy court had key competencies here. The provision of Article 17 (1) of the Bankruptcy and Reorganization Law provided that "the court may change the bankruptcy order with the possibility of concluding an arrangement into a bankruptcy order covering the liquidation of the debtor's assets, if the grounds for conducting such proceedings were revealed only in the course of the proceedings"[36]. The design of this provision assumed that the court was acting *ex officio*, without the need to submit any application. The correctness of the thesis formulated here emphasizes the content of Article 3 of the Bankruptcy and Reorganization Law in the wording: "[…] the proceedings governed by the Act may be initiated only upon an application submitted by the entities specified in the Act". Therefore, insofar as the initiation of insolvency proceedings required (and still requires) the application of the entitled person, the very procedure of insolvency proceedings from composition to liquidation bankruptcy court could and – if there were statutory reasons – it should have changed *ex officio*.

Also, the discontinuation of bankruptcy proceedings with the option of entering into an arrangement was within the competence of the court acting *ex officio*. The provision of Article 361 (1) of the Bankruptcy and Reorganization Law stated that "the court shall terminate the bankruptcy proceedings if the assets remaining after excluding the debtor's property items encumbered with a mortgage, pledge, registered pledge, tax lien or sea mortgage are not sufficient to cover the costs of the proceedings".

Should the bankruptcy court know that the company's debt in arrangement bankruptcy is increasing due to unsupported social security contributions arising after the date of declaration of bankruptcy? In accordance with Article 168 (1) of the Bankruptcy and Reorganization Law, "the trustee, court supervisor and

[35] Judgement of the Court of Appeal in Szczecin of 12 January 2016, III AUa 225/15, not published.

[36] R. Adamus, *Zmiana trybu postępowania upadłościowego upadłej spółki handlowej*, „Prawo Spółek" 2011, nr 1, p. 23 ff.

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administrator shall submit to the judge-commissioner within the time limits set by him, at least every three months, a report on their activities and a statement of account with justification". The accounting report of the court supervisor should, therefore, indicate an increase in public debt. Thus, the bankruptcy court had not only competences, but also the tools needed to properly exercise its competences.

The Bankruptcy and Reorganization Law Act, due to the fact that the court was empowered to act *ex officio*, did not impose on members of the management board of a company in arrangement bankruptcy the obligation to submit an "application" to change the bankruptcy procedure or to discontinue the proceedings. Moreover, Article 116 of the Tax Ordinance does not introduce any sanctions in connection with the failure of a member of the company's management board in arrangement bankruptcy to change the bankruptcy procedure or to discontinue the proceedings.

Therefore, if there were dysfunctions in the proceedings ending in an arrangement in the form of accumulation of unpaid social security contributions, the bankruptcy court had full competence to act *ex officio*, as well as appropriate tools to learn about the need to take specific decisions.

Finally, in the case of bankruptcy proceedings with the possibility of entering into an arrangement it did not matter – from the point of view of the problem analysed here – that a member of the management board of a capital company exercised the so-called bankrupt's own management. It only meant that a board member was running day to day business. What is very important, the very course of the bankruptcy proceedings with the possibility of entering into an arrangement was directed by the judge-commissioner in accordance with explicit Article 152 (1) of the Bankruptcy and Reorganization Law. In addition, in accordance with Article 180 (1) and (2) of the Bankruptcy and Reorganization Law, if bankruptcy has been declared with the option of entering into an arrangement and the bankruptcy board has been established, the court supervisor should immediately take supervisory activities. As part of the supervision, the court supervisor was able to control the activities of the fall at any time as well as the enterprise of the bankrupt. Moreover, Article 76 (1) of the Bankruptcy and Reorganization Law provided that the bankrupt's own management is exercised under the supervision of a court supervisor, and the bankruptcy court had the power to *ex officio* overturn the bankrupt's own management and appoint a liquidator if the bankrupt even unintentionally violated the law in the field of management or the manner of exercising his management gives no guarantee implementation of the system.

Therefore, if a member of the management board of a capital company in arrangement bankruptcy was not a guardian of the correct course of the insolvency proceedings, as it was the role of the state authorities, he cannot be liable to the State for the public liabilities of the bankrupt arising during the course of these proceedings.

Similarly, *de lege lata*, the Restructuring Law prevents dysfunctions related to the course of restructuring proceedings through a number of legal solutions.

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First, by introducing by the legislator instruments to accelerate the course of restructuring proceedings.

Secondly, through the institution examining the grounds for opening the restructuring proceedings. It should be indicated here on Article 8 (1) of the Restructuring Law, according to which the court is obliged to refuse to open restructuring proceedings if its opening would lead to harm to creditors. In addition, pursuant to Article 8 (2) of the Restructuring Law, the court will refuse to open arrangement or sanation proceedings if the debtor's ability to meet the costs of the proceedings and the obligations arising after the opening has not been proved probable.

Thirdly, by introducing the possibility of taking away the own management of the debtor and appointing the administrator in accelerated arrangement proceedings and arrangement proceedings (Article 67 (1) of the Restructuring Law) by entrusting the management board of the debtor's assets to the administrator in sanation proceedings.

Fourthly, by means of ongoing monitoring – through the institution of monthly reports of the court supervisor – whether the debtor (including, among others, a capital company under restructuring) settles liabilities arising after the opening of accelerated arrangement and arrangement proceedings (Article 31 (2) (1) of the Restructuring Law). In the case of an application for opening arrangement proceedings and an application for opening sanation proceedings (and thus, by definition, the longest-lasting proceedings), the debtor is required to substantiate his ability to perform his obligations after the opening date of the proceedings (Article 266 (1) and Article 284 (1) (4) of the Restructuring Law).

Fifthly, through the institution of a simplified bankruptcy petition (Article 334 ff. of the Restructuring Law).

Sixthly, through the institution of discontinuation of restructuring proceedings (Articles 325 and 326 of the Restructuring Law). For example, according to Article 325 (1) (1) of the Restructuring Law, the court must compulsorily discontinue the restructuring proceedings if the proceedings were aimed at harming creditors. *Lege non distinguente* falls within this premise that the non-company creditor, social security authority, is injured due to contributions arising after the opening of the restructuring proceedings. Also obligatorily, the court discontinues arrangement proceedings or sanation proceedings, if the debtor has lost the ability to meet the current costs of the proceedings and obligations arising after its opening and obligations that cannot be covered by the arrangement. It is presumed that the debtor has lost the ability to meet his obligations if the delay in their performance exceeds 30 days (Article 326 (2) of the Restructuring Law). Finally, the court must compulsorily discontinue sanation proceedings if there is no real possibility of restoring the debtor's ability to perform his obligations (Article 326 (3) of the Restructuring Law). In accordance with Article 325 (2) of the Restructuring Law, the court may discontinue restructuring proceedings if the circumstances of the case, in particular the debtor's behaviour, show that the arrangement will not be carried out.

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Further, one should rely on the argument that the thesis that a member of the management board is responsible for public law obligations arising during the course of the proceedings, the initiation of which, in due time, excludes liability for public law obligations, is affected by a logical error. The proceedings referred to in Article 116 of the Tax Ordinance in the context of exonerative conditions excluding liability, are treated by the legislator as proceedings, at least in theoretical terms, best protecting the interests of all creditors in the event of financial failure of the debtor. However, these proceedings may not be initiated by state authorities *ex officio*. Therefore, there is a need to introduce sanctions for persons obliged to submit an appropriate application, including members of the management boards of limited companies. Such provisions previously included Article 298 of the Commercial Code and Article 5 § 3 of the Bankruptcy Law of 1934. Currently, reference should be made to Article 116 of the Tax Ordinance, Article 299 of the Code of Commercial Companies, provisions on the prohibition of conducting business activity, Article 586 of the Code of Commercial Companies (penal provision). From 1 January 2016, there is a particularly strict Article 21 (3) of the Bankruptcy Law[37]. However, if the bankruptcy proceedings or proceedings leading to the conclusion of the arrangement have already been initiated in due time, a member of the management board of a capital company may not bear any consequences for its possibly incorrect course, as the courts have systemic powers in this respect.

If the initiation of proceedings excludes liability, the conduct of such proceedings by the court may not – without violating the logic rules – restore this liability[38].

[37] The Supreme Court assumed that a member of the management board cannot be held liable pursuant to Article 299 of the Commercial Companies Code for liabilities arising in the period in which – while remaining on the board – he could not, as a result of special regulations (e.g. a bankruptcy court decision), perform his function (see judgement of the Supreme Court of 14 April 2016, IV CSK 485/15, not published). A view was also expressed that filing a bankruptcy petition leads – in relation to the obligations of a limited liability company arising after the act – to break the causal link between holding the office of the company management body and the creditor's damage under liability for damages pursuant to Article 299 of the Commercial Companies Code (judgements of the Supreme Court of: 14 February 2003, IV CKN 1779/00, OSNC 2004, No. 5, item 75; 30 September 2004, IV CK 49/04, not published; 25 November 2010, III CNP 3/10; 25 September 2014, II CSK 790/13, not published).

[38] The Supreme Court in its resolution of 8 October 2015 (III CZP 54/15, not published) accepted that "liabilities due to the remuneration of the temporary court supervisor, not enforced from a limited liability company for which a petition for bankruptcy was dismissed pursuant to Article 13 (1) of the Bankruptcy and Reorganization Law, are covered by Article 299 § 1 of the Commercial Companies Code responsibility of board members". However, this view was motivated as follows: "[…] although the obligation for the company – the debtor to pay court costs including remuneration of the temporary court supervisor arises after filing for bankruptcy, in circumstances such as those in the case, there are no grounds to establish that there is no causal link between the damage resulting from the impossibility of enforcing this obligation from the company and failure to submit a bankruptcy petition in due time. Due to the dismissal of the late bankruptcy petition due to the fact that

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CONCLUSIONS

The considerations carried out allow to draw a final conclusion that a member of the management board of a capital company is not responsible for the company's social security obligations arising during the course of the procedure with the option of concluding an arrangement (in principle regardless of the specific form of the procedure) initiated during proper time, conducted based on the provisions of the Bankruptcy and Reorganization Act as well as on the provisions of the Restructuring Law.

The opening of a court proceeding of a capital company, the intended purpose of which is to enter into an arrangement with creditors and during which the company is subject to judicial oversight, is the state desired by the legislator. *De lege lata* even recognizes the primacy of restructuring over bankruptcy. In accordance with Article 3 (1) of the Restructuring Law, the purpose of the restructuring proceedings is to avoid the bankruptcy of the debtor by enabling him to restructure by means of an arrangement with creditors, and in the event of sanation proceedings – also by carrying out sanation measures while safeguarding the legitimate rights of creditors. A member of the management board cannot be held responsible for the obligations of a capital company arising during the course of court proceedings, the opening of which is in itself an exonerative premise for a member of the management board of a capital company.

The provisions on court proceedings aimed at concluding an arrangement do not allow this procedure to be carried out in a lawful manner despite the fact that the capital company has not settled its current public law liabilities.

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the company's assets were not even sufficient to meet the costs of the proceedings, this petition could not lead to the opening of proper bankruptcy proceedings and thus granting the company's creditors protection in any scope that could justify a causal link of costs the remuneration of the interim court supervisor only with the proceedings brought by that application". The views presented here do not devalue the view adopted by the Supreme Court in its resolution of 30 January 2019 (III CZP 78/18, not published) as "a member of the management board bears responsibility for the obligations of a limited liability company pursuant to Article 299 § 1 of the Commercial Companies Code, arising after filing for bankruptcy, including for court costs awarded in a case against a trustee, if they are related to the legal relationship existing at the time of filing for bankruptcy".

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STRESZCZENIE

Opracowanie dotyczy problemu odpowiedzialności członków zarządu za zobowiązania z tytułu składek na ubezpieczenie społeczne powstałe w czasie trwania postępowania z możliwością zawarcia układu, prowadzonego w oparciu o przepisy zarówno ustawy Prawo upadłościowe i naprawcze, jak i ustawy Prawo restrukturyzacyjne. Broniony jest w nim pogląd, że członek zarządu nie odpowiada za zobowiązania z tytułu składek na ubezpieczenie społeczne powstałe w czasie trwania postępowania z możliwością zawarcia układu, wszczętego w czasie właściwym, prowadzonego w oparciu o przepisy ustawy Prawo upadłościowe i naprawcze oraz ustawy Prawo restrukturyzacyjne.

Słowa kluczowe: spółka kapitałowa; odpowiedzialność członka zarządu; składki na ubezpieczenie społeczne; zobowiązanie podatkowe