

Liability of members of governing bodies of juristic persons

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Abstract

The aim of the presented doctoral thesis entitled “Theoretical Concept of Liability of Members of the Governing Bodies of Juristic Persons” is to determine what requirements can be placed on natural persons who act as members of the governing bodies of juristic persons, and to specify the substance of due managerial care as a legal basis for potential liability. The Civil Code lays down the duty of a governing body member to act with due managerial care in the discharge of his/her office in its general part; the relevant provisions thus apply to members of the governing bodies of all juristic persons under both private and public law, provided that this is compatible with their legal nature. Compliance with the duty of due managerial care – in cases where the governing body members act as representatives of the juristic person – is the decisive criterion for determining whether or not they will be liable to the juristic person for any damage caused in the discharge of their office. However, it is questionable whether this is a case of fault-based liability for breach of a legal duty or strict liability for breach of a contractual obligation. The question of whether we will conceive liability of members of juristic persons’ governing bodies as fault-based or strict liability is then decisive in terms of the criteria based on which these persons will or will not be liable.

Summary

Due Managerial Care. The introductory chapter of the first part of the present thesis illustrates the broader context of the structure of fiduciary duties imposed on governing body members in a juristic person and shows that this umbrella notion comprises two different duties, in particular the duty of care and the duty of loyalty. The second chapter outlines the contradictory relationship between the duty of due managerial care and the duty of loyalty in the Czech doctrine before recodification of private law. Chapter three presents the concept of due managerial care as enshrined in the currently applicable Civil Code and analyses its aspects: the fiduciary nature; the principle of legality; professionalism; the degree of effort required; and the rules of delegation. The fourth chapter provides a comparison of the duty of due managerial care with the *duty of care, skill and diligence*, as enshrined in the Companies Act 2006. The first part is then concluded with a summary of the contemporary legislation governing due managerial care, in comparison with the corresponding provisions on the duty of care applicable in the United Kingdom.

Duty of Loyalty. The first chapter of part two outlines the function and character of the duty of loyalty in terms of the concept of fiduciary duties. In the second chapter, the author presents

the current understanding of the duty of loyalty in Czech jurisprudence as a positively formulated duty to act in the interest of the juristic person, on the one hand, and a negatively formulated duty to avoid a conflict of interest, on the other hand, where she sees the core of the duty of loyalty in the latter, negative component. Further, the author analyses the prohibition of a conflict of interest imposed by the Civil Code on a representative in relation to the principal, as well as the solutions to and consequences of a conflict of interest in various types of juristic persons. In the third chapter, the author describes the regulation of a conflict of interest applicable in the United Kingdom, which is based on the concept of fiduciary duties. The final chapter – chapter four – then provides a summary of the Czech legislation relating to the duty of loyalty in comparison with the corresponding UK regulation of fiduciary duties.

Business Judgement. The objective of part three is to clarify, in its first three chapters, what a business judgement rule is and to what it pertains, primarily based on the Czech legislation and its comparison with the German laws, which served as a source of inspiration for the Czech version of this rule. Subsequently, the fourth chapter describes the legislation applicable in the UK, which does not lay down this rule as such; nonetheless, the court practice comes close to establishing a business judgement rule in view of the courts' self-restraint. Chapters five and six then discuss which entities are subject to the business judgement rule. The last chapter of this part provides a summary.

Theoretical Concept of Liability for Acting with Due Managerial Care. The fourth part aims to answer the question of whether possible liability for acts taken with due managerial care is based on fault-based liability or not. In the first chapter, the author recalls the legal regulation of liability of members of companies' governing bodies which applied before the recodification of private law and which is necessary for understanding the core of the current dispute on the concept of liability. In chapter two, the author discusses the repercussions of the recodification of private law on the provisions governing the position of governing body members and their liability. In chapters three and four, she outlines the thesis that, to resolve the issue of liability for a breach of due managerial care, it is first necessary to answer the questions of how a juristic person acts, how acts of a juristic person are influenced by various theories of theories of juristic persons, and in what way these theories are manifested in the applicable legislation. In the fourth chapter, the author deals with the theories of juristic persons and their recent understanding. Chapters five and six focus on the recent contradictory views in jurisprudence and case-law of the nature of representation of a juristic person by a governing body member and the nature of liability. In the final, seventh chapter,

the author places these opinions under scrutiny and offers her own opinion, where she defends the concept of fault-based liability for acts taken with due managerial care.

Fault-based Liability as a Sanction for Breaching the Duty to Act with Due Managerial Care.

The objective of part five is to specify the substance of due managerial care as a legal basis for potential liability. In the previous part the author argued in favour of the fault-based concept of liability for acting with due managerial care. Therefore, in the first and second chapter of this part, the author provides a description of individual wrongs as laid down in the Civil Code and in the German BGB, the source of their inspiration. In the third chapter, the author analyses in detail the prerequisites for the creation of the duty to pay damages, including especially unlawfulness and culpability, their mutual relationship and the role played by the standard of due managerial care within the above prerequisites. In the final, fourth chapter, the author summarises the presented concept of fault-based liability as a sanction for violating the duty of due managerial care.

Conclusion. In the conclusion, the author presents the principal ideas and findings she made, and offers a comprehensive theoretical concept of liability of members of juristic persons' governing bodies for acting with due managerial care. The author summarises the substance of the duties comprised in the duty of due managerial care, as well as the significance and personal scope of the business judgement rule. Furthermore, the author introduces a fault-based concept of liability for acting with due managerial care which is based on assessing culpability.