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SAFETY PROTECTION OF COOPERATIVES FUNCTIONING IN THE CONTEXT OF CRIMINAL LIABILITY OF MEMBERS OF ITS BODIES

The article presents the issues of protecting the security of cooperatives functioning against threats resulting from the criminal behavior of members of its bodies, which is penalized in the Cooperative Law and in the law on housing co-operatives.

The organs of the cooperative are: the general meeting or the meeting of representatives, the board of directors, the board, and the cooperatives in which the general meeting is replaced by the gathering of representatives - a meeting of member groups. The statute may provide for the appointment of other bodies composed of members of the cooperative.

The article is an attempt to analyze selected prohibited acts which are the basis of responsibility of members of cooperative bodies, in particular the management board and the supervisory board. Criminal liability of members of cooperative bodies is provided for in the following provisions: from cooperative law: art. 267b – a failure to report for bankruptcy, art. 267c – a failure to comply with obligations related to lustration, art. 267d – an announcement of false data of cooperatives, from the Act on housing co-operatives: art. 27³ – a failure to provide documentation of cooperatives and untimely settlement of construction costs. The provisions presented contain sanctions primarily for acts that are covered by analogous liability in relation to members of capital bodies of commercial companies, which, like cooperatives, are legal persons, which is dictated by the normative, organizational and functional similarity of running a business as a cooperative and in the form of commercial companies or for acts covered by the specificity of cooperative law, in particular concerning one of the most popular types of cooperatives, that is, housing cooperatives, which harm the proper functioning of cooperatives.

Keywords: safety, security protection, criminal liability, cooperative bodies, management board, supervisory board, cooperative, housing cooperative.

1. INTRODUCTION

The issue of criminal liability that can be borne by members of legal entities is regulated in many legal acts of a statutory nature. The liability of this type of entities is provided in particular in the Penal Code (The Act of June 6, 1997...), the Code of Commercial Companies (Act of 15 September 2000 – Code of Commercial Companies...) and in many special acts.

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These laws contain regulations that determine the specific behavior of members of the bodies of these entities, considered by legislators as socially harmful, and especially dangerous primarily for the security of business transactions. It should be noted that the management of a given entity is the body whose members are most often subject to criminal liability. The supervisory authority (e.g. the supervisory board) is placed as the second, and practically exceptionally the organs with the widest competence such as partners meeting, general meeting etc.

This type of responsibility was also introduced into the cooperative's political acts, i.e. in 2005 to the Cooperative Law (The Act of 16 September 1982 on Cooperative Law...) and in 2007 to the Act on housing co-operatives (The Act of December 15, 2000 on housing co-operatives). An introduction of this type of criminal liability was the adaptation of the provisions to the current economic situation that enforces proper protection of the interests of members of the cooperative from negligence of persons who are part of cooperative bodies (See: Uzasadnienie rządowego projektu nowelizacji ustawy – Prawo spółdzielcze...).

Inadequate protection of members of the cooperative against improper activities of cooperative bodies was signaled by the Ombudsman indicating that the limits of material liability of members of the cooperative bodies are too narrow to protect effectively the cooperatives (Uzasadnienie rządowego projektu nowelizacji ustawy – Prawo spółdzielcze...). It should be noted that the National Council of Cooperatives and the Audit Union of the Housing Cooperatives welcomed the proposal to introduce provisions on criminal liability of members of cooperative bodies (Uzasadnienie rządowego projektu nowelizacji ustawy – Prawo spółdzielcze...).

2. TYPES OF CRIMES OF MEMBERS OF THE CO-OPERATIVE BODIES

The cooperative's bodies are: the general meeting or meeting of representatives, the supervisory board, the board, in cooperatives, where the general meeting is replaced by a meeting of representatives - a meeting of member groups. The statute may provide for the appointment of other bodies composed of members of the cooperative. In this case, the statute specifies the scope of powers of these bodies and the rules for the election and dismissal of their members.

In general the crimes which members of the cooperative bodies are responsible for can be divided into crimes specified in the penal code, in the constitutional laws of housing co-operatives, i.e. in the Cooperative Law and the Housing Cooperatives Act, as well as crimes under extra-perpetual provisions. For the purpose of this study, a basic analysis of criminal laws contained in the current and current version of the Cooperative Law and the Act on housing co-operatives was made.

Criminal liability of members of cooperative bodies is provided in the following provisions: from cooperative law: art. 267b – a failure to report for bankruptcy, art. 267c – a failure to comply with obligations related to liquidation, art. 267d – an announcement of false data of cooperatives, from the Act on housing co-operatives: art. 27³ a failure to share documentation of cooperatives and untimely settlement of construction costs.

According to art. 267b Cooperative Law “Who, being a member of the management board of a cooperative or liquidator, does not file for the bankruptcy of the cooperative in spite of the existence of conditions justifying the bankruptcy of the cooperative, is subject to a fine, restriction of liberty or imprisonment for a year”. This provision provides for penal liability of members of one of the cooperative's bodies, the executive body, i.e. the board of

directors for the mere fact of failing to submit an application for the declaration of bankruptcy of the cooperative in due time. The moment of the obligation to submit the request results from the Bankruptcy Law (The Act of 28 February 2003 Bankruptcy Law...). According to art. 10 the condition for filing for bankruptcy is insolvency of the debtor. In turn, art. 11 defines the concept of insolvency, which occurs when the debtor has lost the ability to perform their pecuniary liabilities. In the case of cooperatives, due to the fact that they are legal persons (Article 11 § 1 Cooperative Law) their insolvency also occurs if their liabilities exceed the value of their property, even if they perform these obligations on an ongoing basis, and this state maintains for a period that exceeds 24 months. After determining the insolvency of the cooperative, a general meeting must be convened, which may prevent the insolvency proceedings from being initiated. The obligation of the management board of the cooperative to promptly apply to the court for the declaration of its bankruptcy becomes valid only when the general meeting adopts a resolution on putting the cooperative into bankruptcy (Judgment of the Supreme Court of 19 May 2010...). The Management Board is not entitled to take the decision on taking the court from above the application, despite the insolvency of the cooperative, and cannot do so against the resolution of the general meeting, which decided about the further existence of the cooperative (Stefaniak, 2018). The offense referred to in art. 267b is an individual offense that can only be committed by a person occupying a given function in a cooperative, i.e. a board member or liquidator. The prevailing opinion is that this applies to both the management board members and liquidators who refrained from submitting the application at the time when the conditions for filing the application arose, as well as those (in the case of personal changes in these positions) who after the deadline did not submit such an application to the court. The offense referred to in art. 267b is a deliberate crime, possible to commit both in direct and possible intention (Kwapisz-Krygel, 2014). This is a formal offense for which performance is not necessary. It can be committed only by omission, as indicated by the sign "does not report" requiring the inactivity from the perpetrator in the desired direction (Żak, 2005). The crime is, alternatively, punishable by a fine, restriction of liberty and imprisonment for up to one year, which means that it constitutes vice. It is a public offense and it is prosecuted *ex officio*.

Another crime is laid down in art. 267c of the Cooperative law on the basis of which "Who, being a member of a cooperative body or liquidator against the provisions of the Act: 1) does not submit a lustration to a cooperative, 2) does not give factual explanations to the auditor, does not allow to perform their duties or not submits relevant documents, 3) does not provide the members of the cooperative with a lustration report, 4) does not convene a general meeting, representatives or meetings of member groups preceding the meeting of representatives, 5) does not prepare the documents regarding the division of the cooperative referred to in art. 108b, is subject to a fine or imprisonment. "The offense penalizes the behavior of members of the cooperative's bodies or the liquidator who do not comply with the obligations related to the cooperative's vetting. The obligation to review the cooperative is contained in art. 91 of Cooperative Law. There are two types of lustration: obligatory and optional. The obligatory one should be carried out at least once every three years, and during the liquidation period annually. In the case of housing co-operatives that build residential buildings settled on cooperative principles, the lustration should also be carried out annually. However, the optional lustration is carried out only at the request of the cooperative (Hrymak, 2011). The lustration covers the period of a co-operative activity from the previous lustration, regardless of whether it was a three-year or annual vetting. In the absence of

more precise guidance in the provision, it should be assumed that the period subject to new lustration counts from the end of the previous lustration indicated in the lustration report (Korus, 2005). The lustration examination includes examining the legality, thrift and reliability of its entire operation. Its purpose is, among others, to check compliance by the cooperative with the law and the provisions of the statute; examining the cooperative's compliance with the conduct of its activities in the interest of all members; controlling the economy, purposefulness and reliability of the cooperative's implementation of its economic, social and cultural goals; pointing members to irregularities in the activities of cooperative bodies; providing organizational and instructional assistance in removing identified irregularities and improving the cooperative's activities. The subject of lustration is the activity of the cooperative as such, but in reality it boils down to controlling the activities of cooperative bodies. Therefore, the lustration protects the cooperative's interests against the malfunctioning of its bodies, and indirectly also the interests of the members of the cooperative (Žak, 2005). The obligation of timely submission of the lustration to the cooperative rests, in principle, on the board, and during liquidation on the liquidator. Failure to comply with this obligation, which will also include untimely performance, is a misdemeanor. Other acts related to lustration will also be punishable, including not providing or providing untrue explanations, failure to submit documents and preventing the luster from operating, which will prevent or obstruct the luster's actions, failure to provide a lustration protocol to a cooperative member or failing to convene a general meeting (meeting of representatives and meetings) member groups) (Kwapisz-Krygel, 2014). It should also be noted that the obligations listed in art. 267c points 1, 3 and 4 may only be charged to the liquidator and members of the cooperative's management board, while the duties related to the lustration proceedings specified in item 3 may also apply to the member of the supervisory board of the cooperative and even the member of the general assembly of the cooperative (meetings of representatives, member groups) who are simultaneously in the category of members of cooperative bodies. Offense under art. 267c is a formal offense, it is not necessary to make an effect. The offense under art. 267c can be committed both by omission and by action. The sign of "no" indicates the form of omission, e.g. "grants" or "makes available", whereas the action may be committed in the case of crime committed in point 2, as indicated by the form of executive action described as "grants". The offenses specified in art. 267c can only be allowed deliberately, no liability for unintentional action is anticipated. The offense in question is punishable by a fine, restriction of liberty and deprivation of liberty for up to one year, which means that it constitutes vice. This crime is an offense publicly prosecuted *ex officio*.

The next offense envisaged by the Co-operative Law is an offense under art. 267d, according to which "Anyone who, being a member of a cooperative body or liquidator, publishes false data or presents them to cooperative bodies, state authorities, members of a cooperative or a luster, is subject to a fine, restriction of liberty or imprisonment of up to 2 years" unintentional form, which is punishable by a fine, limitation of liberty or imprisonment for up to one year. The Act penalizes the behavior of announcing or providing false data by members of cooperative or liquidator bodies. The data that are related to the activities of cooperatives and at the same time are not truthful, reality, factual, false, invented, unreal are considered to be false data (Stefaniak, 2018). This is an individual crime, as it can only be committed by a member of the management board, supervisory board, general meeting (representatives' meeting, member groups) of the cooperative. However, due to the scope of competences and the fact that the management represents the cooperative outside

and conducts its affairs most often, this will concern information provided by members of the board (Żak, 2005).

The publication of false data means transferring them to a wide range of recipients, which however does not mean an indeterminate circle. In turn, the presentation of false data to cooperative bodies may refer to relations between various cooperative bodies, but may also be implemented within a single body – in a situation where a member of the body transmits information to this body. Another form of a prohibited act, consisting in presenting data to a state body, indicates that penalization is not subject to submission to the local government authority, if it is not also the announcement of such data. The last form penalizes the behavior of presenting false data to members of the cooperative and the auditors.

The offenses referred to in Article 267d § 1 and § 2 are formal offenses, because for them it is not necessary to have an effect. They can be committed only by action, as indicated by the sign “presents” and “announces”. Due to the fact that they are only threatened with a fine, limitation of liberty and deprivation of liberty for up to 2 years, in the basic type, and in the form of unintentional fines, restriction of liberty and deprivation of liberty for one year constitute both offenses. They are public offenses and prosecuted *ex officio*.

In the current legal status, the Act on housing co-operatives provides for one offense in art. 27³ of the said Act, according to which “Who, being a member of the housing cooperative, a plenipotentiary or liquidator, contrary to the obligation allows the cooperative: 1) not to provide the housing cooperative with copies and copies of documents referred to in art. 8¹, 2) does not account for the cost of building the premises on the dates referred to in art. 10 par. 3 or art. 18 par. 4, is subject to a fine. “The legislator in the next article, i.e. 27⁴, clearly indicates that the above prohibited act is only an offense and adjudicates under the provisions of the Code of Conduct in misdemeanor cases” (The Act of 24 August 2001 Code of conduct in offense cases...). This regulation protects the rights of members of housing co-operatives in terms of access to the documentation of the cooperative of which they are members, as well as the timely settlement of the costs of building premises (Kotowski, Kurzępa, 2008). This provision penalizes admission by board members of housing co-operatives, their plenipotentiaries, or in a situation where the cooperative is put into liquidation – liquidators, to a situation where the cooperative does not fulfill the obligations specified in art. 8¹ of the Act on housing co-operatives. These duties include in particular preparing members of the Cooperative at their request: for a fee, copies of resolutions of cooperative bodies and minutes of debates of cooperative bodies, lustration protocols, annual financial statements, invoices and contracts concluded by a cooperative with third parties and a copy of statutes and cooperative regulations free of charge. The second form is untimely settlement of the costs of construction of a dwelling, in relation to which a tenancy will be established, which should take place within six months from the date of commissioning the building or untimely settlement of the cost of constructing a dwelling or a flat, in relation to which a right of separate ownership will be established, which should take place within three months from the day the building is put into use.

The offense of art. 27³ is an individual offense, as it can be committed only by a member of the management board, a proxy or a liquidator of a housing cooperative. It is formal because it is not necessary to make an effect. It can be committed both by an omission and an action. The sign of “no” indicates the form of omission (“does not make available”, “does not account”), while the offense referred to in point 2, as indicated by the executive action, which may consist of a late payment, i.e. the settlement of the construction costs of the premises will occur, but with exceeding the statutory deadline. The liability provided for in

this provision results from the culpable action of the above-mentioned persons, and consequently, if the reasons for such behavior are not on their side or there is a civil law dispute over the right to issue specific documents, justified by the legal assessment of entitled persons, as a rule it will not be possible to apply sanctions set out in this regulation. An offense may occur intentionally or unintentionally (Dziczek, 2010). This article makes it possible to impose a fine (See: Bończak-Kucharczyk, 2018) on the management board members, plenipotentiaries or liquidators, the amount of which may be determined on the basis of art. 24 of the Code of offenses (The Act on the Act of May 20, 1971 Code of Offenses...) from 20 to 5000 PLN.

3. CONCLUSIONS

As can be seen from the above considerations, the legislator decided to penalize certain acts related to cooperative activity. Due to the volume of this study, the analysis covered only prohibited acts specified in the Co-operative Act in the current legal status, deliberately omitting crimes and offenses that are no longer subject to criminal liability, such as art. 267a Co-operative Law, art. 27² of the Act on housing co-operatives, art. 8 sec. 2 of the Act of 14 June 2007 amending the Act on housing co-operatives and amending certain acts (The Act of 14 June 2007 amending the Act on housing co-operatives and amending certain acts...). In general, current regulations contain sanctions primarily for acts that are covered by analogous liability in relation to members of capital bodies of commercial companies, which, like cooperatives, are legal persons, which is dictated by the normative, organizational and functional similarity of running a business as a cooperative and in the form of companies commercial matters, or for acts covered by the specificity of cooperative law, in particular regarding one of the most popular types of cooperatives, that is housing cooperatives, which harm the proper functioning of cooperatives. This leads both to cohesion within the legal system, as well as to the protection of cooperative property, against its improper and uneconomical management, and direct protection of its members' interests, in particular by securing access to information, documents and control of its activities. This regulation seems to be sufficient, keeping in mind the security of the cooperative's functioning, all the more that it should be remembered that the members of the cooperative bodies are also subject to criminal liability provided for members of the legal entities in the penal code and other non-code penalties.

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