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Subject: Legal aspects of the functioning of the monistic model of governance of a European company

Summary

The European Company (hereinafter referred to as SE) was introduced by the European legislator under Council Regulation (EC) No. 2157/2001 of 08.10.2001 on the Statute of a European Company (hereinafter referred to as the Regulation). Its content imposes the obligation to introduce supplementary legal regulations covering the operation of European companies (hereinafter referred to as SE) on the Member States of the European Union (hereinafter referred to as the EU). The legal act of the Polish legal system regulating the functioning of SE is the Act of 04.03.2005 on the European Economic Interest Grouping and the European Company (hereinafter referred to as the European Company Act). As part of the functioning of this form of a company, two management models have been distinguished: a one-tier type, which provides for the functioning of the administrative board, and a dualistic type, under which the management board and the supervisory board operate.

The choice of the subject of this dissertation resulted from the belief that there is a need in Poland to broaden the knowledge about SE management among both legal theorists and practitioners considering starting a business with the use of this form of company and to learn about the level of using SE in business transactions, with particular emphasis on the monistic model. According to the author, demonstrating the advantages of the monistic model of company management could contribute to using it as a real alternative to the dominant dualistic model, which, in turn, could improve the efficiency and effectiveness of the functioning of companies.

The goal of this work is:

1. Getting to know the level of knowledge and assessment of the provisions of the one-tier board SE management model by the authorities of these companies in Poland.
2. The assessment of the impact of the choice of the SE management model on its functioning.

3. Establishing reasons for the low use of the monistic model of SE management in Poland.
4. The identification of factors that may affect the growth of interest in running a business in the form of an SE.

The questions that needed to be answered were as follows:

1. In the Polish Act on the European Company and EU regulations, do the normative solutions concerning the monistic model of company management constitute equivalent solutions to the dualistic model?
2. What factors make the monistic model of company management in Poland almost not used?
3. Which of the normative solutions concerning the monistic model of company management adopted in the legal systems of selected EU Member States could be applied in Polish companies?
4. Could the modification of the normative solutions concerning the monistic management model increase the interest of entrepreneurs in establishing European companies in Poland?

Regarding the above questions, the following theses were formulated:

1. Although both models are provided for not only in the regulation but also in the act on a European company, the monistic model of SE management in practice is not equally available to entrepreneurs in Poland as the dualistic model.
2. One of the most important reasons for not using the monistic model of company management in Poland is the lack of sufficient regulations in the Polish legal system and the knowledge of entrepreneurs regarding this model. Therefore, these regulations should be applied in all capital companies presented in the Polish Code of Commercial Companies (hereinafter referred to as k.s.h.), and not only in a simple joint-stock company (hereinafter referred to as PSA).
3. Polish legislation should specify the legal regulations concerning the monistic model of management, in particular about the introduction of criteria for the selection of candidates for the administrative board, the scope of competencies delegated to executive directors, mechanisms for monitoring the financial condition of SEs to ensure their effectiveness, allowing to avoid the risk of bankruptcy.
4. The experience of countries where national legislation equally regulates both models of company management shows that this is a factor contributing to the growth of interest in running a business in the form of an SE.

In order to verify the theses put forward, the following research methods were used in the dissertation: historical and legal, dogmatic and legal and comparative law. As an auxiliary, the survey was used in the work, which covered SE and their branches registered in Poland.

The historical and legal method was used to learn about the evolution of the concept of the development of the idea of SE, its organizational structure and purpose throughout the 20th century. The use of this research method allowed for the assessment of whether, and if so, which from the legal solutions rejected in the past, they could now be applied in the functioning of the SE.

The second of the methods used was the dogmatic and legal method consisting in making a linguistic, systemic and purposive interpretation. It found application with regard to the study of legal acts relevant to the discussed issues, as well as the analysis of doctrine and jurisprudence. The linguistic interpretation has been given, in particular, to the European Company Act, which contains legal provisions on the monistic management model and the k.s.h. in the part concerning a joint-stock company. The use of the dogmatic-legal method prompted the use of the comparative law method. There was a need to use both methods simultaneously. This concerned a situation where, using the dogmatic and legal method, an act of another legal order was subject to analysis, and the conclusions drawn included comparative legal elements. The adopted model of the comparative legal method was institutional comparative studies, which consist in identifying and comparing institutions that perform the same or similar functions in regulating a given legal relationship. The use of it allowed determining which of the solutions adopted in other legal orders could be applied under Polish law. As part of the comparative legal analysis of the monistic SE management system, the legal systems of Great Britain, the Czech Republic and the Federal Republic of Germany were reviewed. Since there are different trends related to the use of a single-tier system of company management in these countries, their choice was not accidental. The first of the above-mentioned legal orders is dominated by monistic, in the second, dualistic, and in the third, a mixed SE management system.

The questionnaire method was also used in the dissertation. It consisted in preparing, and then sending questionnaires via e-mail to representatives of European companies registered in Poland (including branches). Thus, in this part, it was a complete examination. The content of the questionnaire, its results and analysis, together with conclusions, are presented in chapter III (subchapters 3.2., 3.3.). The use of the survey method allowed determining the reasons for the selection of an appropriate management model by entrepreneurs conducting business activity in the form of an SE. The use of this method also made it possible to get to know the

legal awareness of entrepreneurs in the field of the choice made, the functioning of the single-tier management system and to assess whether the current provisions of the Polish law are favorable to the choice of a monistic management model.

The dissertation consists of three chapters:

Chapter I presents the evolution of the concept of introducing SE provisions into the European legal system. Based on the analysis of the legal nature of the company's bodies, the organizational structure of the company's bodies, their powers, and responsibility for the company's obligations, the essence and most important features of both management models of a capital company were presented. The two-tier management model was subject to a more detailed analysis because, in the further part of the dissertation, the author focused on various aspects of using the monistic model. Despite the noticeable differences between the monistic and dualistic models of SE management, most of them are governed by the same provisions of the Code of Commercial Companies and Partnerships relating to the operation of joint-stock companies. The above fact may in practice cause difficulties related to the correct application of the indicated provisions regulating the functioning of the dualistic SE management model to the management of companies with a one-tier model.

The content of chapter II concerns the characteristics of the monistic model of managing a European company under the provisions of European law, in particular the aforementioned Council Regulation. Based on the legislation in question, its significance has been assessed by determining the degree of use of this form of SE in the EU Member States. Subsequently, the regulation of the monistic model of management in the countries where the most European companies are registered, namely: Great Britain, the Czech Republic and Germany, was analyzed. They searched for answers to the questions - whether the number of these companies is a result of the current shape of legislative provisions or is it caused by non-legal reasons. As a result of the considerations, it was noticed that in the territory of the EU Member States (in particular in the Czech Republic) a significant number of registered SEs do not actually conduct economic activity. Therefore, appropriate legislative measures should be taken to introduce provisions favoring the registration of SEs, the founders of which will conduct business activity. The problem of the independence of non-executive directors in the monistic model of SE management was also noted. It consists in giving these directors the freedom to supervise executive directors in the management and supervisory body.

Chapter III focuses on the comparison of the Polish regulations of the monistic model of the functioning of a European company with European normative solutions. First, the factors influencing the choice of the management model for a European company in the Czech

Republic and Germany were identified. The results of the survey conducted in SE functioning in Poland are also presented. This part of the work also shows the reasons for the low popularity of European companies in Poland compared to their operation in Great Britain, the Czech Republic and Germany. A comparative legal assessment of the Polish normative regulations of the monistic SE model was made. It was also proposed that the solutions concerning the functioning of the monistic model of managing a simple joint-stock company could be applied to SEs. As a result of the analysis, it was found that the Polish legislator is taking steps to broaden the access of entrepreneurs to the monistic model of management, which is reflected in the introduction of the provisions on a simple joint-stock company on July 1, 2021. *De lege ferenda*, these rules should apply mutatis mutandis to the SE. A manifestation of equal access to the monistic and dualistic management models would be the possibility of choosing the first of them in relation to other capital companies (i.e. a limited liability company and a joint-stock company). Under Polish law, legislative measures should also be taken to increase the independence of SE non-executive directors and to reduce the risk of SE bankruptcy.

As part of the final comments, it was indicated that the experience shaped by the dualistic model of management of capital companies adopted in the Polish legal system influences the marginal interest in the monistic model of SE management in Poland. In countries where the basic model of governance is the dualistic model, also this system prevails in relation to the SE. The more precise the solutions for a given model, the more often it is used in practice. Referring to the reasons for the marginal importance of SE in Poland, the lack of knowledge of the analyzed form of running a business, too large formal and legal barriers accompanying the establishment of an SE and the possibility of achieving the assumed economic and organizational effects with the use of other capital companies available in the Polish legal system was indicated. After the introduction of legal solutions concerning: the cross-border provision of services, the freedom to establish companies by citizens of the Member States in the EU country of their choice, the determination by the European Court of Justice of the rules of personal status of companies other than SE – the reasons for establishing an SE lose their importance. The lack of tax preferences may also contribute to the low interest in SE. From the *de lege ferenda* conclusions, the author proposes to supplement or properly apply the provisions on a simple joint-stock company to the monistic model of management.