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Prohibition of Competitive Activities for Members of Housing Cooperative Councils and Boards as well as Consequences of Non-Compliance with the Prohibition

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***Abstract*—The paper refers to the problem of prohibition of competition imposed on the members of the board of directors and the supervisory board of a cooperative. The Author analyses the concepts of "competitive business" and "competitive activity" and their mutual relationship, as well as the consequences of non-compliance with the prohibition. On the basis of interpretation of the existing legal provisions and views of judicature, the Author enunciates *de lege ferenda* conclusions in terms of their clarification and elimination of doubts.**

Index Terms— cooperative, competition, business, activity.

I. INTRODUCTION

In accordance with Article 56 § 3 of the Act of 16.9.1982 - Cooperative Law (Journal of Laws 2018 item 1285, hereinafter referred to as the Cooperative Law) members of the supervisory and the management board of the cooperatives may not engage in the competitive business towards cooperatives. They, in particular, may not participate as partners or members of the business authorities conducting competitive activities towards the cooperatives. Violation of non-competition clause constitutes the basis for dismissal of a member of the supervisory and management board and results in other legal effects provided in separate provisions.

II. THE CONCEPT OF 'COMPETING INTERESTS' AND 'COMPETITIVE ACTIVITIES'

Since the Act does not contain a legal definition of the concept 'competing interests' or 'competitive activity against the cooperatives', it is worth considering which categories of the activity cause a violation of the prohibition referred to in the above-mentioned provision.

The first question is whether the concepts of 'competing interests' and 'competitive activities' should be separated. This separation means that these concepts cannot, taking into account the principles of rational legislation, be regarded as identical. According to the dictionary definition, 'interest' is a matter to be settled, a benefit, a profit or an undertaking that brings material benefit, as well as colloquially in the Polish language a shop or an enterprise (the Polish Language Dictionary PWN). In turn, 'activity' is defined as a set of activities undertaken for some purpose, functioning of something or influencing something (the Polish Language Dictionary PWN). It follows from the above that, in the common sense, the concept of 'interest' is largely linked to the question of material benefits of that interest while the concept of 'activity' is understood more generally as any action carried out for a particular purpose, whether or not it is for profit. Moreover, the wording of Article 56 § 3 of the Cooperative Law seems to indicate that 'competitive activity' constitutes a certain fragment of the concept of 'competitive interests', as indicated by the use of the phrase 'in particular, to participate as partners or members of the authorities of entrepreneurs conducting competitive activity towards cooperatives'.

In the literature on commercial law, in which the concept of 'non-competition clause' is probably most often cited, a relatively broad understanding of 'competitive interest' is assumed. It is also defined as an interest in a certain relationship (connection) with the activity carried out by another person or business entity while the relations between the interests of the 'parent' company and the economic activity of another entity may be very diverse, as it does not only concern the identity, homogeneity of the business (e.g. wholesale or retail trade of a

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certain type of goods) but also all forms of influence on the activity of a given person (e.g. a member of the management board of a commercial company), even those which are only indirectly identifiable from the point of view of his financial and economic interests (Niedbała, 1996). The above definition indicates that the concept of 'interest' in commercial law is understood in a similar way as in the common sense, i.e. in terms of profits generated by the interests. 'Interest' in the above sense is related to economic activity and therefore profit-oriented one.

On the other hand, the concept of 'competitive activity' was primarily analyzed in the jurisprudence in the field of labor law, which, however, focused more on the meaning of the word 'competitive' rather than on the analysis of the concept of 'activity'. It was pointed out that 'competitive activity' is an activity manifested in the same or identical material scope and addressed to the same circle of recipients, overlapping - at least partially - with the scope of the employer's main or secondary activity. As a result, activities that violate or threaten the employer's interest may be prohibited. The term 'competition' means rivalry or competition between entities or persons interested in achieving the same goal. Performing tasks which fall under the definition of competing interests is therefore tantamount to acting for profit or participating in commercial ventures or transactions whose effects are addressed in full or in part (or potentially may be addressed) to the same circles of end-users (see e.g. the judgment of the Gdańsk Court of Appeal of 11.10.2012, reference number act III APa 18/12, Legalis). It follows from the above that the term 'competitive activities' should be understood as profit-oriented activities of an economic nature.

Meanwhile, Article 56 § 3 of the Cooperative Law does not use the concept of 'business activity' at all, but only 'interest' and 'activity'. In accordance with Article 3 of the Act of 6.3.2018 - Entrepreneurial Law (Journal of Laws 2019, item 1292 and 1495), an economic activity is an organized profit activity carried out in its own name and on a continuous basis. As a rule, 'interests' or 'competitive' activities within the meaning of Article 56 § 3 of Cooperative Law will therefore be an economic activity, while doubts may arise when it comes to other than the economic activity of the cooperative.

Pursuant to Article 1 § 1 and 2 of the Cooperative Law, a cooperative may conduct both business as well as social, educational and cultural activities for the benefit of its members and their environment. The activities of specific types of cooperatives may be even less profit-oriented - for example, the object of cooperatives for the blind and handicapped is the professional and social rehabilitation in which the blind and handicapped work in a jointly run enterprise. Folk and artistic handicraft cooperatives create new and cultivate existing values of material culture within broadly understood artistic industry (Article 181a § 1 and 2 of the Cooperative Law). Whereas the primary goal of a housing association is to meet the housing and other needs of members and their families by providing them with independent residential premises or single-family houses as well as premises for other purposes (Article 1 § 1 of the Act of 15.12.2000 on housing cooperatives - i.e. the Journal of Laws of 2018, item 845). The jurisprudence indicates, for example, that a housing cooperative's economic activity is not calculated to achieve a balance sheet surplus i.e. profit, and is only intended to cover the costs with its own income - as part of relations with members. The activity of a housing cooperative is conducted on their behalf and is not of an economic nature because members are beneficiaries, not participants of this activity, while conducted 'outside' for the benefit of other entrepreneurs or consisting in administering other people's resources is of an economic nature (see the judgment of the Court of Appeal in Warsaw of 29.11.2012, reference number VI ACa 681/12, Legalis).

Therefore, the question arises whether, according to Article 56 § 3 of the Cooperative, Law it may be regarded as a violation of the prohibition set out in that provision for members of the cooperative's board or board to deal with interests or activities that are competitive to the cooperative but other than economic (e.g. conducting cultural and educational activities in another cooperative for its members). It seems that since the legislator uses the phrase: '... they cannot be engaged in competing interests against cooperatives, and in particular participate as partners or members of the authorities of entrepreneurs conducting competitive business to cooperatives', 'competitive activity' referred to in this provision is a part of the concept of 'competing interests' and is therefore of an economic nature. Nevertheless, it seems that Article 56 § 3 of the Cooperative Law would require clarification by the legislator, so that there would be no doubt that it concerns interests and activities of an economic nature and not e.g. the socio-cultural ones.

Also the concept of 'competitiveness' of the activities or interests towards cooperatives has not been defined by the legislator. First of all, it should be noted that in the resolution of the Supreme Court of 7.6.2000 (reference number act III CZP 21/00, Legalis) indicated that the prohibition applies to persons mentioned in Article 56 § 3 of the Cooperative Law. Regardless to what extent competitive activity exposes the cooperative to damage as well as that it is absolute in nature and cannot be repealed or limited by the content of the provisions of the statute. Thus, due to cooperative relations, the views of the jurisprudence on labor law cited above, regarding the potential harmfulness of an employee's competitive activity for the employer, do not apply. The prohibition of competition is applied regardless of whether the competitive activities of the members of the board or board of directors may expose the cooperative to harm or not. Any provisions included in the statute of the cooperative giving mandate for the members of the board or council to perform such activities are also ineffective. The provision of Article 56 § 3 of the Cooperative Law is absolutely mandatory.

However, as for the concept of 'competitiveness', according to the Supreme Court, the phrase 'competitive interests' can be properly understood and applied only in the circumstances of a particular case, and after making appropriate arrangements as

to the data and premises determining the existence of a competitive relationship. It is generally accepted that pursuing overlapping interests of a cooperative constitutes competition, but it cannot be excluded that even activities in related fields may justify the existence of a competitive relationship and provide a sufficient basis for protection.

When defining the concept of 'competitiveness', one can refer to Article 4 point 11 of the Act of 16.2.2007 on competition and consumer protection (Journal of Laws of 2019, item 369). The article contains a legal definition of the concept of 'competitors', which states that they are entrepreneurs who (can) introduce or (can) purchase goods on the relevant market at the same time. In accordance with point 9 of the abovementioned provision, the relevant market is the market for goods which, due to their purpose, price, properties and quality, are considered by their buyers as substitutes and are offered in the area, where, due to their type and characteristics, the existence of market access barriers, consumer preferences, significant price differences and transport costs, there are similar conditions of competition.

The jurisprudence in the field of labor law emphasizes that the assessment of the competitive nature of new employment in another company in the same industry cannot be limited to a comparison of the types of their subjects statutory activities. It requires a comparison of the types of their statutory activity, territorial area and the group of recipients of services provided, as well as verifying the possibility of using the acquired knowledge, professional experience and skills (know-how) of the employee in new employment, even if these companies implemented joint ('complementary' or 'symbiotic') investment projects (see the judgment of the Supreme Court of 22.11.2012, reference number I PK 159/12, Legalis).

Undoubtedly, in the process of evaluation of competitiveness of interests or activity conducted by board or council members one should take into account the scope of activity disclosed in the National Court Register, in the register of business activity or in the cooperative's statute. The problem arises, however, in a situation when the scope of activity of the cooperative declared in the abovementioned documents does not coincide with the scope of activity actually carried out. The jurisprudence in the field of labor law indicates that the prohibition of competitive activity may relate to both the subject of activity actually carried out by the employer and to the planned activity (see judgment of the Supreme Court of 24 October 2006, reference number II PK 39 / 06, Legalis). However, in the case-law on cooperative relations, this issue is not dealt with in a uniform manner.

In the judgment of the Court of Appeal in Katowice of 1/12/2015, reference number act V ACa 165/15 (http://www.orzeczenia.katowice.sa.gov.pl) issued in a case regarding a member of the supervisory board of a housing cooperative who was also a member of the management board of another housing cooperative. The judgement stated that 'both cooperatives may conduct activities of management and administration not only on their own real estate or those owned by their members, but also on such properties which belong to other persons (...). It does not matter, however, that some forms of the declared activity are currently not conducted by the cooperative (e.g. urban development) since such a possibility still exists in accordance with the Statute'. Moreover, members of this cooperative did not agree to amend the Statute in this part which justifies the conclusion that they are interested in acquiring funds for activities of cooperative (....). To sum up, a competitive relationship occurs when two entities with the same legal status and identical purpose operate on the same market using the same or almost the same methods. In the opinion of the Court, one cannot agree with the view that only strictly competitive undertaking and not identical activities lead to the application of sanctions provided by law. Firstly, meeting the requirement to prove that sensu stricto competition took place could prove to be impossible in practice. Secondly, such an interpretation violates the purpose of Article 56 § 3 of the Cooperative Law, which protects the interests of a cooperative. In the opinion of the Court, in order to prove that there really was an instance of competing interests against a cooperative within the meaning of Article 56 § 3, the Cooperative Law, it is sufficient for another entity to operate in the same market area, targeted at the same recipients. It is also irrelevant for the assessment of the compliance of the contested resolution with the law that in the process of selection of members of the board or council the selection committee was aware that the person applying for a mandate of a member of the supervisory board performs the function of the president of the management board in another housing cooperative, as the will of the majority of the defendant members expressed in this way cannot repeal the prohibition established by a mandatory legal norm.

This view is also reflected in the doctrine on the competition law in which the concept of 'competitors' is distinguished from the so-called 'actual competitors' on the basis of the Act on competition and consumer protection. For example, actual entrepreneurs are entities who really introduce goods on the relevant market (product-wise and geography-wise) or entrepreneurs who purchase goods at the same time which is understood as the relevant or typical period for the economic activity and potential competitors i.e. those who only 'can enter' or only 'can purchase' goods on the relevant market (product and geographic) 'in the future', so who are not yet active on the relevant market at a given moment but intend to do so (plan to enter the market) or at least would be in a realistic position to do so (Skoczny, 2014). It is emphasized that by the introduction of the conditional mode ('may introduce', 'may acquire') in the statutory definition of competitors, the legislator clearly indicates that the scope of the concept of 'competitors' intends to include not only entrepreneurs currently present on the market on the two aforementioned sides but also entrepreneurs who may only start operations on a specific relevant market (Skoczny, 2014) (Banasiński and Piontek, 2009).

The Court of Appeal in Wrocław took a different position in its judgment of 9.5.2012, reference number act I ACa 393/12

(http://www.orzeczenia.wroclaw.sa.gov.pl) in which the court went along with the previous legal assessment of the Court of the First Instance in a case in which one of the members of the supervisory board of a housing cooperative run an activity with a profile different than the profile declared in the business registers. The court held that the object of activity entered into the business register i.e. real estate brokerage, in which the cooperative industry sees the competitive activity, constitutes only the scope of business opportunities declared by the respondent, as in reality the respondent conducts only the basic activity which is non-specialized cleaning. According to the Court of the First Instance, only the activity actually carried out is relevant for assessing whether a member of the supervisory or the management board is actually engaged in competitive interests.

With regard to cooperative relations, it would appear that the second position is more justified. According to this position one should assess only the actually performed activity and not the one which was only declared. In the jurisprudence, it is right to note that the notorious fact (Article 228 § 1 of the Code of Civil Procedure) may be the practice of including in the National Court Register entries of such activities that the entity subject to registration does not engage in at all, treating them only as potential possibilities that may be carried out in an undefined future (see the Supreme Court's judgment of 13/12/2018, file reference number I PK 182/17, Legalis). It should be noted, however, that the judgments of the Court of Appeal in Katowice quoted above concerned a situation in which the same person was simultaneously a member of the body in two housing cooperatives operating on the same market. Therefore, regardless of the fact whether certain specific forms of activity included in their statutes are actually carried out or not, they are still entities carrying out similar activities therefore these entities can be called competitive entities.

As for the content used in Article 56 § 3 of the Cooperative Law, the concepts of 'dealing with business' and 'participating in business operations', the Supreme Court in its resolution of 7.6.2000 (reference number act III CZP 211/00, Legalis) indicated that the prohibition set forth in Article 56 § 3 of the Cooperative Law also includes performance of such activities through a third party, providing advice to competitive entities and concluding contracts with them. These concepts are therefore very broad, and in principle any involvement in competitive business can be classified as a breach of the prohibition in question.

Addressees of the prohibition under Article 56 § 3 of the Cooperative Law

The prohibition set out in the discussed provision refers to all members of the cooperative's management and supervisory boards. The doctrine indicates that it is not necessary for the addressees of the prohibition under Article 56 § 3 of the Cooperative Law to remain with the cooperative in an employment relationship or in any other work relation stipulated by law (Niedbała, 1996).

According to Z. Niedbała, the subjective scope of the prohibition under Article 56 § 3 of the Cooperative Law seems to be too narrow. The author criticizes the omission of persons occupying the positions of managers and their deputies who run the current business activity of the cooperative, pointing out that this is particularly the case when the so-called cooperative operates social management board whose members are always subject to the ban, while the managers of day-to-day business operations seem to be excluded from this ban although they are the most important individuals with critical impact on the cooperative's economic affairs (Niedbała, 1996). It seems, however, that with respect to persons other than those referred to in Article 56 § 3 of the Cooperative Law, this problem could be solved by concluding non-competition agreements, as provided for by the labor law.

III. Consequences of violating the prohibition of Article 56 § 3 of the Cooperative Law

Pursuant to the sentence 2 of Article 56 § 3 of the Cooperative Law, a breach of a non-competition clause constitutes a basis for dismissal of a member of the supervisory or the management board and results in other legal effects provided for in separate regulations. On the other hand, § 4 of this provision stipulates that in the event a member of the supervisory board violates the non-competition clause specified in § 3, the board may adopt a resolution on suspension of a member of this body from performing his/her duties. The statute specifies the date of convening the meeting of the body that elected the suspended member of the board. The above authority decides of the suspension or dismissal of a suspended board member.

As far as the supervisory board is concerned, it is elected, in accordance with the provisions of the statutes, by the general meeting, the meeting of representatives or the meeting of member groups (Article 45 § 1 of the Cooperative Law). However, in accordance with Article 49 § 2 of the Cooperative Law, the members of the management board are elected by a council or a general meeting.

The procedure of appealing resolutions of the general meeting by the cooperative members is specified in Article 42 of the Cooperative Law. However, there is a question concerning what possibilities the interested persons (e.g. the cooperative members) may have to undermine a resolution of the board on appointing a person dealing with competitive business as a member of the board of directors, if the appointment of members of the management board is within the competence of the supervisory board, if this body does not take any actions to dismiss this person.

The literature indicates that the statutory regulation of the issue of appealing against resolutions of the cooperative supervisory board is included in the provision of Article 24 of the Cooperative Law which concerns termination of the membership relationship by the cooperative by exclusion or removal of a member and this is the only provision in the Cooperative Law that establishes the legal basis for appealing a

supervisory board resolution to the court, while with respect to other supervisory board resolution- that is regarding other matters than exclusion or removal of a member - there is no such regulation (Sikorska-Lewandowska, 2011). However, this does not mean that there is no possibility of appealing against the resolution of the supervisory board regarding the appointment of a member of the management board who violates the prohibition of Article 56 § 3 of the Cooperative Law. The jurisprudence indicates that the resolutions (actions) of the supervisory and the management board, unless the Act provides for a specific procedure for appealing, are subject to legal assessment and appeals on general principles applicable to legal acts (see e.g. the judgment of the Court of Appeal in Warsaw of 7 November 2014, reference number I ACa 631/14, Legalis and judgment of the Court of Appeal in Krakow of 27.09.2016, reference number I ACa 1153/16) i.e. by way of an action to determine, in this case the invalidity of a resolution pursuant to the article 189 KPC in connection with Article 58 of the Civil Code.

As regards the issue of demonstrating the legal interest of a cooperative member in determining the invalidity of a resolution, it seems that the position presented e.g. in the judgment of the Court of Appeal in Warsaw of 24.4.2018 reference number act V ACa 1216/17 (http://www.orzeczenia.waw.sa.gov.pl) in which it was stated that the very fact of the claimant's membership in a housing cooperative gives rise to his legal interest in bringing an action for annulment of a resolution of the supervisory board aimed at annihilation of a resolution that is contrary to the law in the claimant's opinion, regardless of whether he is entitled to any claim in this connection. Otherwise, members of the cooperative would be practically deprived of the possibility of effectively challenging in court the resolution of supervisory board on appointing member of the board of directors dealing with competitive interests as members of the management board. In this situation it is rather difficult to indicate any claim for which declaring the invalidity of the resolution would be necessary for a member of the cooperative. Nevertheless, it seems that the consequences of adopting such a resolution by the supervisory board should be clarified by law, e.g. by adopting a regulation similar to Article 42 of the Cooperative Law concerning the procedure of appealing against resolutions of the general meeting.

IV. CONCLUSIONS

In conclusion to the above considerations, it should be stated that the regulation of Article 56 § 3 of the Cooperative Law would require clarification in terms of unambiguous definition of the concepts of ‘competitive interests’ and ‘competitive activities’ with a clear emphasis on their economic nature, introducing a procedure for appealing against resolutions on the appointment of the cooperative bodies members violating the non-competition clause. It is also worth considering the extension of the addressees of the ban to other persons performing responsible functions in cooperatives. Yet another problem is to define a certain space in which competitive activity is permitted for situations in which some specific areas of activity declared in registers, activities of the housing cooperative or the addressee of the non-competition clause differ from those actually performed.

Conflict of interest

The **author** declares no conflict of interest

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