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COUNTERTYPE OF ACCEPTABLE RISK IN CONDUCTING A BUSINESS ACTIVITY

KONTRATYP DOPUSZCZALNEGO RYZYKA W PROWADZENIU DZIAŁALNOŚCI GOSPODARCZEJ

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Abstract: The purpose of this article was to present and discuss the issue of economic risk in the context of due diligence of people managing an organisation. A special role in the study is devoted to presenting the type and nature of the risks taken from the perspective of the functioning of enterprises in changing environmental conditions. The article discusses the essence and interpretation of the concept of 'due diligence' resulting from the professional nature and legal form of the business. The main goal of the submitted article was to answer the following research question: What actions of the people managing the organisation fall within the limits of permissible economic risk and what types of risks occurred in connection with the emergence of the COVID-19 pandemic. The risks resulting from the pandemic in the first year of its duration were characterised on the analysis of the financial statements of companies listed on the Stock Exchange with mWIG40. The admissibility limits of activities related to economic risk were assessed in the context of current achievements of jurisprudence and economic practice. The following study is of an interdisciplinary nature. The article attempts to formulate a countertype of permissible risk in business activity while presenting the types of risk that may appear in connection with random events.

Keywords: economic risk, management, due diligence, economic environment

Streszczenie: Celem artykułu było zaprezentowanie i omówienia problematyki ryzyka gospodarczego w kontekście zachowania należytej staranności przez osoby zarządzające organizacją. W opracowaniu szczególną rolę poświęcono przedstawieniu rodzaju i charakteru podejmowanych ryzyk z perspektywy funkcjonowania przedsiębiorstw w zmieniających warunkach otoczenia. W pracy omówiono istotę i interpretację pojęcia „zachowania staranności”, wynikającego z zawodowego charakteru działalności oraz formy prawnej prowadzonej działalności gospodarczej. Głównym celem przedłożonego artykułu była odpowiedź na następująco sformułowane pytanie badawcze: Jakie działania osób zarządzających organizacją mieszczą się w granicach dopuszczalnego ryzyka gospodarczego, a także jakiego rodzaju ryzyka wystąpiły w związku z pojawieniem się pandemii COVID-19? W oparciu o przeprowadzoną analizę sprawozdań finansowych spółek notowanych na Giełdzie Papierów Wartościowych z mWIG40 dokonano scharakteryzowania ryzyk, będących następstwem pandemii w pierwszym roku jej trwania. Granice dopuszczalności działań powiązanych z ryzykiem gospodarczym oceniono w kontekście aktualnego dorobku judykatury oraz praktyki gospodarczej. Poniższe opracowanie ma charakter interdyscyplinarny. W artykule podjęto próbę sformułowania kontratypu dopuszczalnego ryzyka w działalności gospodarczej przy jednoczesnym zaprezentowaniu rodzajów ryzyk, które mogą się pojawić w związku ze zdarzeniami losowymi.

Słowa kluczowe: ryzyko gospodarcze, zarządzanie organizacją, należyta staranność, otoczenie gospodarcze

Introduction - Concept and definition of "economic risk"

The purpose of the research undertaken was to assess the types and levels of risks associated with the conduct of business activities; and also to admit the admissibility of risks in the light of current legislation and the body of jurisprudence. In order to assess the acceptability of the risk in the context of possible consequences in terms of possible damage to the company's property; or on the part of its creditors, the literature study method was used and the case law of common courts was reviewed. In the framework of this study, a survey was conducted based on reporting data of listed companies in the WIG40 index. The study focused on the first year of the pandemic due to the presence of the greatest economic restrictions on business. The main objective of the study was to identify the risks determining the financial situation of companies.

The subject of the study was companies operating in different sectors of the economy in order to determine the nature and extent of risks depending on the type of business. The study took into account both internal and external risks relating to various levels of the company's operation, both in the area of management and finance.

The running of any business is inevitably linked to the need to make business decisions that are subject to risk. "In the most general terms, risk can be defined as the deviation of possible outcomes from expected returns, or the possibility that future profits will deviate from expected returns. It is often pointed out in the literature that the concepts of risk and uncertainty are erroneously equated. Uncertainty refers to changes that are difficult to predict or the probability of their occurrence cannot be estimated. Risk, on the other hand, is the deviation from the expected state of affairs, which can be predicted to a certain extent and thus exploit a potential opportunity to achieve extraordinary results or avoid possible negative consequences of the occurrence of future events" (Narkiewicz, 2011, p. 61).

We distinguish between many types of risks in business practice. The approach tends to be very practical, usually guided by the financial plan of the organisation. In legal terms, the dimension of risk and its acceptability is assessed from the point of view of being able to foresee its occurrence and taking appropriate measures to minimise it. "Risk is understood as an objective and quantifiable phenomenon that occurs particularly in business activities. Risks create chances for success and, at the same time, threaten the realisation of the tasks undertaken. In business activities, risk is a tool and a means to obtain certain benefits, verified, however, by the potential losses that may accompany the undertaken activity" (Thlon, 2013, p. 19). Risk can be interpreted multidimensionally, both in terms of the individual from the perspective of the decision-maker and the market dimension, reflecting the influence of various factors. "Autonomy is defined as the ability to make decisions autonomously, independent of any influence by the entity as such or its statutory bodies" (Rutkowska-Brdulak, 2018, p. 239). "Risk management is a process typical of an organisation, dependent on a number of factors specific to it, both internal and related to the environment" (Zapała, 2011, p. 106).

Types and nature of risk undertaken in business activities

When it comes to the practice of a daily business operation, proper risk management is not only a source of competitive advantage but also a form of protection against legal liability. The way in which an entrepreneur deals with business risk is primarily influenced by the organisation's micro and macro environment. "In entity terms, the micro-environment includes those entities that have a direct relationship with the enterprise. Participants in the micro-environment are suppliers, customers, competitors and other participants in distribution channels, as well as interest groups. In the material sense, on the other hand, the microenvironment characterises the market in which the enterprise operates. It takes into account the size, structure and potential of the market, the conditions for entering the market, its current state as well as its possible development" (Wolański, 2013, p. 45). Elements of the environment influencing increased risk in business decision-making can include: increased competition in the sector, recession and economic fluctuations, new competition in the sector and the emergence of substitutes, adverse demographic changes and a decrease in the

availability of labour. With regard to the business case, problems associated with an inadequate assessment of a company's financial health and capabilities can lead to an increase in risk. These may include: inability to invest due to lack of sufficient financial resources, low profitability of the enterprise determined by lack of demand for the company's products or inappropriate financial policy of the organisation, lack of sufficient human resources and inability to make strategic decisions. The literature indicates that strategies are ways of implementing tasks and processes, describing the dynamic nature of a phenomenon, indicating the flexibility of a company's behaviour in the changing conditions in which it operates. The business model is the concretisation of much of the content given to the concept of strategy. It gives strategy a specific, practical meaning, indicating the need to make clearly defined choices (Skrzypek, 2019, p. 30). A particularly important role in strategic decision-making is knowledge of the financial aspects of a company's operation and therefore of financial risk. "Financial risk refers to the possibility of achieving business results that are different from those expected. This divergence of results is the result of three types of causes which include: the volatility of the environment, resulting from the uncoordinated actions of a very large number of economic entities, the rigidity of the production process (inertia of the decision-making process), the correctness of the production decisions taken (incorrect recognition of the environment)" (Szopa, 2012, p. 23). An adequate assessment of financial risks in business activities is also mandatory taking into account the information needs of the various market participants (customers and counterparties) in terms of awareness of the entity's exposure to risks and how to deal with them. International Financial Reporting Standards (MSSF 7, 2008) impose an obligation to disclose information arising from the financial instruments of the risks to which the entity is exposed during the reporting period as well as how the risks are managed. Under the current Standards, the nature and extent of risks arising from financial instruments include both qualitative and quantitative information. In terms of qualitative information, the enterprise is required to disclose: the degree of risk exposure and how it arises, the risk management objectives, policies and processes, as well as the risk valuation methods used. With regard to qualitative information, for each type of risk, the enterprise shall present summary quantitative data on the risk exposure at the reporting date. The data disclosed must be based on information provided internally to the key management personnel of the enterprise. This information relates to the three categories of financial risks: credit, liquidity and market, all of which fall under strategic risk. In practice, strategic risk refers to the impediments to the achievement of the originally intended business objectives, which may include the achievement of profits from particular business segments. "Strategic objectives are typically a composite of five types: financial (objectives relate to tangible metrics, satisfying stakeholders or shareholders), core business (objectives relate to productivity and quality), stakeholders or customers (objectives relate to ensuring that reputation is managed and demand for services is strong and predictable), organisational capabilities (objectives relate to assurances of the organisation's adequacy and ability to respond to future needs), resources (objectives relate to ensuring that employees and suppliers offer the right skills and goods needed in the organisation)" (Fanning, 2007, p. 73). The inability to meet strategic objectives increases the operational risks associated with the implementation of internal processes. "The lowest operational risks are those transactions in which the company expands its product line or increases its market share" (Machała 2014, p. 542).

Economic (financial) risk from the legal perspective

According to Article 20 of the Constitution of the Republic of Poland, the social market economy is based on freedom of economic activity, private property and solidarity, dialogue and cooperation between social partners. A restriction of the freedom of economic activity is only permissible by way of a law and due to an important public interest (Article 22 of the Constitution of the Republic of Poland) (Konstytucja RP, 1997). As indicated in the case law, economic activity is a legally defined situation, which has to be assessed on the basis of an examination of specific factual circumstances, fulfilling or not fulfilling the characteristics of this

activity. Conducting an activity is therefore an objective category, regardless of how this activity is assessed by the entity conducting it itself (...).

The following characteristics are considered to define such activity: professionalism, independence, profit-making purpose, subordination to the rules of profitability and profit or to the principle of rational economy, permanence of conduct, performance in an organised manner and participation in economic turnover (Uchwała SN, 1991; Uchwała SN 1991, Uchwała SN 2000). The jurisprudence as well as the legal and economic literature indicate a connection between the interpretation of economic activity and the risk of its conduct, immanently connected with commercial activity. This risk is treated as a natural and permitted element of economic activity (Wyrok SA, 2019; Długosz, 1999, p. 15)

Considering the pragmatic dimension and consequences of the risks taken, 'maintaining an acceptable level of security for the company is a prerequisite for survival in times of turbulence. The emergence of a crisis is akin to a strategic surprise: it is unexpected, unlikely and its effects destructive. By developing an early warning system, crises can be better survived and in some cases even avoided (Stabryła, Wawak, 2012, p. 126).

The currently established line of jurisprudence on the assessment of admissible economic risk sets the course of action that should be taken into account when making investment decisions in order to minimise or limit the possibility of losses to business property. "In the light of the provisions on criminal liability, the so-called acceptable economic risk is included as one of the counter-truths and thus as a criminal law circumstance excluding the unlawfulness of a prohibited act within the framework of economic crimes" (Kaźmierczyk, 2019, p. 407). It should be noted that under the applicable provisions of commercial law, a person responsible for the affairs of a company is obliged to exercise due diligence in managing the affairs of the business entity. This obligation is also included in Article 355 of the Civil Code, which states that a debtor is obliged to exercise due diligence generally required in relations of a given type, while due diligence of a debtor in the scope of his business activity is defined taking into account the professional character of this activity.

The risk itself in business activities should therefore be treated as a permanently occurring phenomenon, and, for example, the mere fact of failure to achieve the expected economic results cannot exaggerate excessive risk-taking or culpable action. This position was shared by the Court of Appeal in its ruling of 17 April 2019, indicating that it is obvious that economic activity involves risk and some of the planned economic actions end in failure, loss, and in the conditions of the market economy and the private sector, it is pointed out that economic, civil law, organisational and other instruments should be appropriate, rather than criminal ones, when there has been damage to property and only as a result of mismanagement of property affairs or activities the expected profits have not been achieved (Wyrok SA, 2019). Some case law indicates that there can be no discussion whatsoever about the fact that conducting business activities is always burdened with the risk of some problems (including financial problems) or even the occurrence of various business failures, which is always calculated in the nature of this type of activity (Wyrok SA, 2016).

From an economic point of view, which is also referred to by the ordinary courts, the extent of the risk taken is conditional on a proper assessment of the economic viability of the venture undertaken by the authority. This assessment is important for the sake of both the company itself and its stakeholders.

"The manner in which the indemnity liability is shaped may either lead to the inhibition of their initiative and willingness to take risks, creative management or act in another desired direction. Assertive behaviour by a board member is not in the interest of the company because it may counteract its growth and competitiveness in the market" (Stefanicki, 2020, p. 366). The assessment of the correctness of actions focuses primarily on the elimination of actions aimed at achieving the managers' own economic benefits at the expense of the company's property interests.

The object of the protection provided by Article 296 of the Criminal Code is the proper management and handling of the property or business affairs of the persons mentioned in this provision. Dealing with

someone else's property or business means the duty to manage them, to take care of the principal's interests and to take or participate in taking decisions concerning this property. The executive features of the offence in question include the abuse of powers or failure to fulfil a duty incumbent on the perpetrator. Abuse of power encompasses both actions going beyond the scope of powers granted, as well as actions formally falling within this scope but clearly contrary to the interests of the principal or the duties of a "good steward". According to the case law, a failure to act in accordance with the authority granted or the principles of good stewardship will be a failure to fulfil a duty (Wyrok SA, 2019).

The key to determining the correctness of the decisions is to draw up the actions that can be considered safe for the company and its environment and therefore those that can be considered an acceptable risk. Analysing the body of jurisprudence, it can be noted that the doctrine points to specific actions (grounds) for assessing the degree of economic risk, the most relevant of which are as follows:

- checking whether the probability of possible damage at the time of the action (omission) was less than the probability of economic (property) gain, i.e. assessing the account of potential benefits and losses,
- determining whether the actions taken corresponded to the economic purpose of achieving profit or avoiding losses and the nature of the specific business activity,
- assessing the extent to which the enterprise was protected against the negative consequences of the risks.

Business risk assessment for managers involves a multifaceted treatment of the company, which entails the need to increase due diligence and develop a specific due diligence pattern. A key aspect becomes the ability to foresee unexpected economic events, e.g. an economic downturn as occurred in 2020 with the COVID-19 pandemic.

Categorising the nature of increased economic risk during the COVID-19 pandemic

According to the available survey data (KRD, 2020), in the first six months of the pandemic nearly 50% of SME entrepreneurs gave a positive assessment of their economic situation. The largest proportion of respondents whose assessment was strongly negative was in the services industry, and the smallest in the construction industry. More than 60% of respondents felt the impact of the pandemic in production, sales or service provision. This impact depended primarily on the size of employment and the nature of the business. Micro enterprises employing no more than nine people were in the worst situation. 64% of enterprises reduced production and sales to a rudimentary level after the onset of the pandemic. Due to the fact that the published research results do not elaborate on the factors that increase the risk of operations, a qualitative study was carried out.

The objective of the study was to identify the risks resulting from pandemic COVID-19 in its first year. The study considered the types of risks identified in the financial statements for 2020 related to the impact of the COVID-19 pandemic on the financial situation and the possibility of continuing business operations. The choice of the 2020 reporting year was due to the introduction of strict sanitary rules and restrictions on certain business activities in Poland, which significantly translated into increased business risks. Companies listed on the mWIG40 stock exchange were eligible for the analysis. "The mWIG40 index is a price index, covering average listed companies in terms of market value and turnover" (GUS, 2023).

The analysed companies were active in the following market sectors (according to the classification adopted by the Stock Exchange): chemicals and raw materials: chemicals (2 entities), chemicals and raw materials: wood and paper (1 entity), chemicals and raw materials: mining (2 entities), chemicals and raw materials: recycling (1 entity), consumer goods: automotive (2 entities), consumer goods: clothing and cosmetics (1 entity), finance: banks (4 entities), finance: capital market (2 entities), trade and services: gaming (4 subjects), trade and services: trade and services (2 subjects), trade and services: media (1 subject), trade and services: leisure and recreation (1 subject), health care: biotechnology (1 subject), health care: drug

distribution (1 subject), health care: drug production (2 subjects), fuels and energy: energy (3 subjects), manufacturing and construction: electrical machinery industry (1 subject), manufacturing and construction: transport and logistics (1 subject). A total of 40 businesses took part in the survey.

In order to achieve the research objective, an assessment was made of the nature of the risks to which enterprises were exposed during the first year of the pandemic. The external and internal dimensions of risk were considered: strategic, financial, operational and market risks. The nature of the risks was determined based on the information contained in the Financial Statements and Management Reports of the companies' activities for 2020.

Tab. 1. Types of economic risks directly related to the pandemic affecting the operations of mWIG40 companies

	Market	Financial	Strategic and operational
Chemistry and raw materials (wood and paper, mining, chemistry)	Decrease in demand on the domestic and international markets, restrictions in economic activity among other entrepreneurs, restrictions in the supply chain	deterioration of financial liquidity and operational security	Inability to meet all strategic objectives, downtime in the production process, reduction in production at selected production sites
Consumer goods (automotive, clothing and cosmetics)	Decrease in consumer purchasing power, reduced customer mobility, increased difficulties at interstate borders, decline in domestic market demand	Difficult to implement financial plans	implementation of the strategy made more difficult
Finance (banks)	Not identified	reduction in receipts due to deferrals applied	not identified
Trade and services (games, commerce, services, leisure and recreation, media)	Reduction in meetings with Investors and Shareholders (Investor Conferences), decrease in demand, supply chain disruptions, increase in economic uncertainty	increase in asset price volatility, currency fluctuations, reduction in fee income	temporary restrictions on activities
Health care (drug production, drug distribution, biotechnology, drug manufacturing)	not identified	not identified	not identified
Fuels and energy (energy)	Reduced demand for coal and falling demand for electricity, fluctuations in global electricity prices	the development of energy commodity prices	not identified
Industrial and construction/assembly production (construction, electromechanical industry, transport and logistics, business procurement)	Economic downturn, decrease in availability of qualified staff due to reduced movement between countries, delays in administrative decisions, suspension of execution of some contracts by domestic contractors, decrease in electricity consumption, weakening of international trade	falling prices on world markets	Risks related to logistics and transport of materials, reduction of selected business segments, disruptions in operational continuity, reduction in production
Technologies: information technology	Not identified	risk of late payment by customers	not identified

Source: own study.

The survey made it possible to categorise and systematise the various risks that had a significant impact on the operation of companies during the pandemic period. According to an analysis of the financial statements (tab. 1), including the management reports for 2020-2021, for some companies the COVID-19 pandemic led to an increase in demand for products and therefore reduced the risk of the business. The company 11BIT, whose core business was the production of computer games, indicated that global game sales exploded in 2020 due to the pandemic, which meant that gamers locked out of their homes due to lockdowns had significantly more free time and used it for their favourite pastime. Experienced gamers were also joined by crowds of people who had previously had no contact with games which particularly stimulated the growth of the mobile gaming segment in 2020 (Raport BIT 11, 2020, p. 84).

Also for the remaining IT and video game companies, no increase in business risk was observed in connection with the first year of the pandemic. Companies specialising in the supply of healthcare products also did not identify any significant risks that could threaten the security of their business. Most risks were identified in the group of manufacturing companies specialising in assembly production and construction, which based their cooperation on international relations. This group was dominated by risks of a market nature, classified as external risks mainly relating to the decline in demand and weakening of international cooperation. Increased operational risks were observed in the group of companies in the chemical sector, where the pandemic caused delays and downtime in the supply chain. For companies in the consumer goods sector, the predominant strategic risk was the hampered implementation of previous plans both financially and in terms of business development, which was conditioned by the retail ban.

As part of mitigating the business risks associated with the COVID-19 pandemic, companies took measures to ensure that they could continue their operations and that their supply chain would not be disrupted. In particular, the risk of doing business increased significantly among companies linked to transport and dependent on the availability of raw materials. While risks increased significantly among companies operating in different segments, diversification allowed companies to stay in business. High diversification by industry, product and geography ensured that WSE-listed companies remained financially stable in 2020. Companies in the IT industry were least affected by the pandemic. According to an analysis of the consolidated financial statements for the 2020 financial year, these companies did not experience a decline in revenue, while the companies that worsened their financial performance in some segments saw an increase in turnover in online sales, logistics and telemedicine

The ways of dealing with the risk mainly concerned changes in the area of the company's operation itself, were adaptation and optimisation measures and concerned: relations with employees, changes in the work organisation system, internal procedures and health and safety regulations. Actions taken by companies led to an increase in operating costs, usually involving a change in employment levels.

In conclusion, according to the study carried out on the identification of risks directly related to the COVID-19 pandemic, their nature in the first year of the crisis was not significantly different from the problems faced by entrepreneurs in the implementation of business ventures. Their scale was influenced by the nature of the business and the nature of the risks. The pandemic exacerbated the impact of the risks by creating additional market barriers

Summary - actions that reduce economic risk and are within the limits of acceptable risk

Summarising the considerations presented in this article and attempting to formulate a counter-truth of acceptable risk in business activities, taking into account the exercise of greater care by managers and the impact of the company's external conditions, it is possible to formulate certain patterns of behaviour that increase protection both against the occurrence of possible consequences of legal liability, but also reduce the risk of worsening the company's material situation. These can include:

- prudence and ability to foresee the consequences of actions taken, in terms of evaluating specific business transactions,
- compliance with the rules generally accepted in business dealings adequate to the specificity and nature of the activity conducted, taking into account the conditions arising from the environment and the terms of contracts not contravening generally accepted customs,
- the possibility of anticipating the consequences of actions taken with regard to the possibility of a worsening of the company's financial situation by taking measures to protect against the negative effects of risk,
- compliance with good manners resulting from generally accepted, applied and acceptable rules of business transactions,
- undertaking of supervision and control activities in the company by persons with high qualifications or practical experience, which enable them to make decisions anticipating possible economic risks,
- exercising due diligence in carrying out reliable analyses of important areas of the company's operation.

As the impact of the COVID-19 pandemic has shown, it is not possible for companies to fully hedge against risk due to its complex nature and unpredictability. The experience of companies during the pandemic and the risks they were exposed to showed that due diligence in business is preceded by the ability not only to identify risks but also to make decisions to minimise them. According to the research, companies with an established position on the market (listed on the WSE), despite the negative consequences of the pandemic, did not take radical measures to limit business activities, but tried to adapt the company to operate in the new market conditions.

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