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THE CONTRACTUAL POSITION OF DIRECTORS IN COMMERCIAL COMPANIES IN SLOVENE LAW

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In the Republic of Slovenia, the Companies Act in force regulates the position of directors only from the perspective of the functioning of a commercial company and not also from the perspective of the protection of their personal position. With reference to such, the Companies Act suggests that a contract be concluded between the commercial company and its director (a contract to perform the function of director). In practice, the aforementioned contract is as a general rule concluded as an employment contract and only rarely as a civil-law contact. The Employment Relations Act namely allows that a contractual relation between a company and a director be regulated as an employment relation and at the same time determines certain particularities of the labour-law position of directors, which the author discusses in the present article. The question that the author raises in this respect is whether and under what conditions a contract to perform the function of director can be an employment contract. Employment contracts namely regulate employment relations which are defined by the subordinate position of employees and the condition of work carried out upon instructions provided by employers and under their supervision.

Key Words: *director, manager, contract to perform the function of director, employment contract with a director*

1. INTRODUCTION

Commercial companies are legal entities and as such are artificial social structures which need natural persons in order to function, through whom they express their will. In Slovene law, the natural person who manages a company's operations and is entitled to represent the company is the director.

The corporate position of directors is regulated by laws which regulate the status of commercial companies, first of all by the Companies Act (ZGD-1 - hereinafter referred to as CA-1)[1] and by the statutes of the company. With reference to the regulation of the rights and obligations between commercial companies and directors, which surpass such corporate aspects (this concerns foremost the regulation of the company's obligations towards its director), CA-1 suggests that a contract be concluded between the company and its director. In the majority of cases directors perform the function of director for payment and as their principal

[1] Official Gazette of RS, No. 42/06.

activity, which provides a means for their existence, and therefore in practice a contract between a commercial company and a director is usually concluded by which the rights and obligations of both parties to the contract are determined. Directors are thus in a corporate relation as well as in a contractual relation with the company.

The scope and content of the protection of the director's personal position which arise from such contract also depend on the type of the contract. With reference to such, the question is raised whether a relation between a commercial company and a director can be regulated by means of an employment contract (as an employment relation) or rather by means of a civil-law contract.

In this article, the concept of director is treated, the relations between the corporate and contractual positions of a director is discussed, the essence of a contract to perform the function of director is outlined, the regulation of the contractual position of director in the Republic of Slovenia is presented, and finally, a position is taken with reference to the question whether a contract to perform the function of director can be an employment contract.

2. THE CONCEPT OF DIRECTOR

In Article 10 of CA-1, the body which is authorised to manage the operations of a commercial company is defined by a common (generic) term, i.e. *the management (*in Slovene *poslovodstvo)*. The management are bodies or persons authorised to manage the company's operations pursuant to CA-1 or pursuant to the statutes of the company. The management of an unlimited company are the company's partners or third persons in the event of the transfer of the authorization to manage operations; the management of a limited partnership are the general partners or third persons in the event of the transfer of the authorization to manage operations; the management of a public limited company (in Slovene *delniška družba*, in German *Aktiengesellschaft*) is the management board (in Slovene *uprava*, in German *Vorstand*) or the board of directors (in Slovene *upravni odbor,* in German *Verwaltungsrat)*;[2] and the management of a limited liability company (in Slovene *družba z omejeno odgovornostjo*, in German *Gesellschaft mit beschränkter Haftung*) are one or more managers (in Slovene *poslovodja*, in German *Geschäftsführer*).

The above-mentioned statutory provision alone indicates that the management can be the members of the management board, the members of the board of directors, and the managers. In my opinion, however, the circle of persons who can be considered the management is thereby not closed. It namely follows from the

[2] In cases in which public limited companies choose a two-tier management system, the management body of the company is the management board (in addition, the company's bodies also include the supervisory board - in Slovene *nadzorni svet*, in German *Aufsichtsrat* and the general meeting of shareholders – in Slovene skupščina, in German *Hauptversammlung*), and in cases in which public limited companies choose a one-tier management system the management and supervisory body of the company is the board of directors (in addition, the company's bodies also include the general meeting of shareholders).

provisions of CA-1 which refer to the management of operations and representation in cases of individual types of companies that also other persons (not merely those explicitly determined in Article 10 of CA-1) are authorised to manage the company's operations pursuant to CA-1 or pursuant to the statutes of the company. This is the case in public limited companies with a one-tier management system. The board of directors is the management, supervisory, and representative body in such companies (the first paragraph of Article 285 and the first paragraph of Article 286 of CA-1). In view of the fact that the board of directors in public limited companies with a one-tier management system has the powers which the management board and the supervisory board have in public limited companies with a two-tier management system, it is not necessary that all members of the board of directors manage the company's (regular) operations and represent the company. In the case of public companies,[3] the management of regular operations and the representation of the company is, on the basis of CA-1 alone (as a general rule),[4] within the competence of one or more executive directors (in Slovene *izvršni direktor*, in German *geschäftsführende Direktor*) who must be appointed by the board of directors. In non-public companies, the board of directors may appoint one or more executive directors and assign the management of regular operations and other tasks to them.[5] As a general rule it thus applies that only in non-public limited companies in which the board of directors does not appoint executive directors do the members of the board of directors also manage regular operations and represent the company.

If the board of directors appoints executive directors who manage the company's regular operations, the management of a public limited company are undoubtedly the executive directors, regardless of the fact that Article 10 of CA-1 does not explicitly mention them among the management.[6] In order not to raise (unnecessary) doubts regarding their legal position,[7] it would be correct if executive directors were explicitly listed in Article 10 of CA-1 in addition to the board of directors, however their position could depend on the transfer of the authorization to manage regular operations.[8]

In view of the above-mentioned, it can be concluded that the management of limited liability companies are managers, and the management of public limited companies are the management board, the board of directors, and the executive

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[3] A public company is a company whose stock is traded on a regulated market. See the first paragraph of Article 291 of CA-1.

[4] Unless otherwise provided by the articles of association. See the second paragraph of Article 286 and the first paragraph of Article 291 of CA-1.

[5] See the first and fourth paragraphs of Article 290 of CA-1.

[6] Such a position can also be found in Bratina, B. and D. Jovanovič, J. Vindiš, Zakon o gospodarskih družbah (ZGD-1), Uvodna pojasnila, Uradni list Republike Slovenije, Ljubljana, 2006, p. 41.

[7] See Bratina/Jovanovič/Vindiš, 2006, p. 41.

[8] For example: "…the management of a public limited company is the management board, the board of directors, or executive directors in the event of the transfer of the authorization to manage operations,…".

directors (those who are appointed from among the members of the board of directors as well as those who are appointed from among third persons).[9]

With reference to the management or persons who are considered to be the management, CA-1 also uses the term *director* (in Slovene *direktor*). CA-1 uses such term not only for managers of limited liability companies, but also for the members of the management board of public limited companies (with a two-tier management system).[10] However, in public limited companies with a one-tier management system, the term *director* is not used for the members of the management board,[11] but the term (*executive*) *director* is used for persons who are appointed by the board of directors and who manage the regular operations of the company and are therefore considered to be the management.

Using such terminology, CA-1 in fact retains the established terminology in Slovene law that refers to persons who manage operations of commercial subjects and represent such. The Companies Act[12] implemented in 1993, used the term *director* for the members of management boards and managers and thereby undoubtedly took into consideration its established use in Slovene commercial practice. Neither German nor Austrian legislation,[13] which otherwise served as models for the regulation of these bodies in the Slovene Companies Act, namely do not use this term for the members of the management board of public limited companies or for managers of limited liability companies.[14] CA-1, which replaced the Companies Act of 1993, retained the above-mentioned terminology for managers (in limited liability companies) and for the members of the management board (in public limited companies with a two-tier management system), and, in addition, it appropriately regulated persons who manage operations in public limited companies with a one-tier management system.[15] The term (*executive*) *director* is used for persons who in fact manage the (regular) operations of the company and as a general rule represent the company (regardless of the fact whether they are also members of the board of directors or not), whereas the term *director* is not used for members of the board of directors. If executive directors

[9] For a different view, see Samec, N., Izbira upravljalskega sistema v d.d. z vidika določitve plačil organov, Gospodarski subjekti na trgu (XIV. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 25th-27th May 2006, Portorož), Pravna fakulteta, Inštitut za gospodarsko pravo, Maribor, 2006, p. 68. The author, by applying a grammatical interpretation of Article 10 of CA-1, adopted the standpoint that the management are only the members of the board of directors and thereby only those executive directors who are members of the board of directors.

[10] See the first paragraph of Article 515 and the second paragraph of Article 265 of CA-1.

[11] See, for example, Articles 286 and 287 of CA-1.

[12] Official Gazette of RS, Nos. 30/93, 29/94, 82/94, 20/98, 84/98, 6/99, 45/01, 57/04, and 139/04.

[13] Compare Article 76 of the German Aktiengesetz (AktG) and Article 70 of the Austrian Aktiengesetz (AktG). See also Article 35 of the German Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG).

[14] Although the use of this term is allowed in commercial practice. For a manager, see, for example, Scholz, F. and G. Crezelius et al., Kommentar zum GmbH-Gesetz, I. Band, Verlag Dr. Otto Schmidt, Köln, 2000, p. 382.

[15] In addition to a two-tier management system of public limited companies, CA-1 also regulated a one-tier management system of public limited companies. Commercial companies themselves decide between both systems.

are appointed, the members of the board of directors only adopt basic decisions regarding the management of the operations of the company and primarily perform a supervisory function.

The term *director* is in Slovene company-law regulations thus used for persons who in fact perform management and representative tasks in the company - either as members of the management and representative body (members of the management board or managers) or as persons appointed by such body (executive directors),[16] and does not include members of the board of directors nor members of the supervisory board.

The Employment Relations Act[17] (hereinafter referred to as ERA) does not use the term *director* but uses the term *manager* (in Slovene *poslovodna oseba)* and regulates the particularities of this position from the viewpoint of labour law. However, ERA does not determine who is considered to be a manager. In view of the fact that ERA only regulates the position of persons who have concluded an employment contract with employers, managers in the senses applied by ERA include persons who are part of the management of the company and have concluded an employment contract with the company. If we consider the management to be the members of the management board (directors), the members of the board of directors, executive directors, and managers (directors), whereby as a general rule the members of the board of directors do not conclude a contract with the company, it can be concluded that the term *manager,* as applied by ERA, in general overlaps with the term *director*. Therefore, hereinafter the term *director* is used also for managers as determined by ERA.

3. THE CONTRACTUAL POSITION OF DIRECTORS AS COMPARED TO THEIR CORPORATE POSITION

Company law (primarily CA-1, as well as other regulations and the statutes of the company) regulates how a person becomes director and how their position terminates, it determines the powers, obligations, and responsibilities of persons who are directors of commercial companies and their relations to other bodies of the company.[18] Pursuant to such regulation, a person who is appointed director may either function as a management body or a member of the commercial company's management body.

CA-1 as a corporate regulation regulates the position of directors only from the perspective of the functioning of a company. With reference to the regulation

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[16] CA-1 uses the term *executive director* for all persons who are appointed by the board of directors (not only the members of the board of directors but also third persons).

[17] Official Gazette of RS, No. 42/02.

[18] See also Kocbek, M. et al., Veliki komentar Zakona o gospodarskih družbah (ZGD-1), GV Založba, Ljubljana, 2007; see also Kranjc, V., Gospodarsko pogodbeno pravo, GV Založba, Ljubljana, Pravna fakulteta Univerze v Mariboru, Maribor, 2006.

of the rights and obligations between commercial companies and directors, which surpass such corporate aspects, foremost regarding the regulation of the company's obligations towards the director, CA-1 suggests that a contract be concluded between the company and its director.[19]

The corporate and contractual positions of director are separated in law (in German law a separation theory (*Trennungstheorie*) has been established with reference to such),[20] while at the same time there exist certain connections and interactions between both positions.

The corporate and contractual positions of directors arise separately, the first with the appointment, and the latter with the concluding of a contract. The contract is neither necessary nor obligatory and directors may perform their function also if a contract is not (validly) concluded. However, a person must be validly appointed to the position of director, which is a condition for a contract to perform the function of director to be valid, as a contract to perform the function of director with a person who is not a director does not have cause (*causa*).[21]

Company law regulates the position of directors from the perspective of their functioning as the company's management body, whereas a contract regulates the protection of their personal position. Both positions overlap only in one part and only in this part must the contractual regulation be in compliance with company-law regulations. In view of the fact that directors assume all obligations which pertain to the position of director (and which are determined by the provisions of CA-1) by a contract, such contract must be in compliance with company-law regulations in the part which stipulates their obligations. The same applies regarding the remuneration of directors, with reference to which the parties to the contract must respect (if it is a case of a contract with the member of the management board or the executive director) the provisions of CA-1 which regulate this issue. Otherwise both positions are independent and are reviewed according to the rules that apply for each case respectively. Company law does not interfere with the rights of directors stemming from the contractual relation or with their rights in the event of the termination of the contract. On the other hand, it is not allowed that the statutorily regulated corporate position of directors be changed by means of a contract (e.g. relations between the director and the bodies of the company, the manner of the termination of such corporate position).

Regarding the functional connection between contractual and corporate positions, the termination of the corporate position will undoubtedly be followed by the termination of the contract. Thereby, the separate nature of both positions is demonstrated once again. The corporate position (function) of director is

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[19] See the second paragraph of Article 270, the eighth and eleventh paragraphs of Article 290, and the third paragraph of Article 515 of CA-1.

[20] See Schmidt, K., Gesellschaftsrecht, Carl Heymanns Verlag KG, Köln, Berlin, Bonn, München, 2002, p. 416; Scholz, 2000, p. 251; see also Senčur Peček, D., Delovnopravni položaj direktorjev, doktorska disertacija, Murska Sobota, 2007, pp. 102-103.

[21] See Senčur Peček, 2007, p. 111.

terminated according to company-law regulations, whereas the rules which apply for contracts (either the rules of civil or labour law) apply for determining the duration and termination of the contract.[22]

The aim of company-law regulations is to ensure as successful functioning of a company as possible. This aim is also served by the statutory regulation regarding the termination of the corporate position of directors, which ensures that competent bodies of the company freely appoint and dismiss them. The aim of the contractual regulation of the position of directors is, on the other hand, to protect directors not only while they hold such position (by means of ensuring them payment for the work performed), but also in the event of the termination of their position, which entails the loss of their source of income (by means of ensuring them certain rights, e.g. the period of notice, severance pay). A company may thus dismiss a director (also without reason if company-law regulations provides for such). In addition, various circumstances may force a director to resign, i.e. the corporate position of director is terminated on a certain day**.** Nevertheless, as a general rule, the director does not at the same time lose all the rights that were agreed upon by the contract. The reason for the termination of the corporate position may be taken into consideration if determined by the contract, and appropriate protection (e.g. the period of notice, severance pay) can be ensured in cases in which the termination of their position as director occurred through no fault of the director.

4. A CONTRACT TO PERFORM THE FUNCTION OF DIRECTOR

By means of a contract, a director assumes the obligation to manage the company's operations, to represent the company, and to perform all other tasks which pertain to the position of director, whereas a company undertakes the obligation to provide payment to the director for performing these services. It is thus a contract which regulates the rights and obligations between the company and the director with reference to performing the function of director.[23]

Such contracts are concluded between a person who was appointed director and the commercial company in which this person will be director. It follows from the aforementioned that such contracts must be concluded between a natural person and a legal entity.[24]

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[22] The connection between them can only be established if there is an explicit contractual clause which determines that the contractual relation is terminated with the termination of the holder's position as director (i.e. a connection clause). See Senčur Peček, 2007, pp. 124-125.

[23] This is the feature which distinguishes this contract from all other contracts which the members of the company's bodies conclude with the company with reference to services that they perform for the company and that do not pertain to their position in the company. This foremost involves contracts between the company and the members of the supervisory board (or the board of directors) which refer to consulting and similar services which they perform for the company outside the scope of their position as members of the supervisory board (the board of directors). The second paragraph of Article 262 of CA-1 refers to such contracts.

[24] This is the feature which distinguishes this contract from management contracts and business contracts which are concluded between two legal entities. For more on this, see Senčur Peček, 2007, pp. 98-99.

A suitable term for such contract appears to be *a contract to perform the function of director,* as it clearly indicates the subject of the contract. In addition, also CA-1 (the eighth paragraph of Article 290 and the third paragraph of Article 515 of CA-1) uses such terms (*a contract to perform a function* and *a contract to perform the function of manager*). Thus, a contract to perform the function of director is a general term for contracts concluded between a company and director, similarly in German law the term *Anstellungsvertrag* is used.[25] The above-discussed term does not indicate the legal nature of the contract and comprises all possible types of contracts which can be concluded to perform the function (work) of director.

The scope of protection which is ensured to directors by the contract to perform a function depends to a great extent on the circumstance whether a contractual relation between the company and the director can be defined as a relation in which the director must follow the instructions of the employer and is recognized the position of an employee, or as a relation of two equal subjects in which the director is recognized the position of an independent party to the contract. The discussed definition has far-reaching consequences for the position of directors, foremost from the perspective of the application of protective labour-law regulations and the rights of directors stemming from social insurance schemes.

In German and Austrian law, where the above-discussed dilemma has been present for a long time, the *Anstellungsvertrag* is considered a civil-law service contract, i.e. *Dienstvertrag*, and directors are not recognized the position of employees (except in exceptional cases).[26]

During the period of the system of social property and self-management in the Republic of Slovenia, the regulation of commercial subjects and the position of persons who managed such subjects were adapted to the existing social economic system. The members of management bodies (directors) were in a labour relation and to a great extent on a level with other employees regarding their labour-law position. Following the implementation of the Companies Act in 1993, which introduced commercial companies into the Slovene legal order, which were regulated following the models of other European countries (primarily countries with a Germanic legal tradition), also in Slovenia there has been a much debated question whether it is appropriate that the contractual position of directors is considered to be an employment relation and whether the regulation of their labour-law position is appropriate. Nonetheless, the Employment Relations Act adopted in 2002 by means of the "Solomonesque" Article 72 retained the possibility that directors (managers) can conclude an employment contract, and also allowed the possibility that directors and the company can conclude a contract which does not have the nature of an employment contract.

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[25] See Articles 84 and 87 of German AktG. See also, Schmidt, 2002, p. 1073; Scholz, 2000, p. 1516.

[26] For more on this, see Senčur Peček, 2007, pp. 176 and following.

5. THE REGULATION OF THE CONTRACTUAL POSITION OF DIRECTORS IN THE REPUBLIC OF SLOVENIA

5.1. General

It follows from Article 72 of ERA that in cases of employment contracts with directors, the parties to the contract may regulate certain issues differently than determined in the Act. The diction "in the case of concluding an employment contract with directors…" indicates that a contract to perform a function may be an employment contract, but not necessarily so. In practice, the above-cited provision is interpreted in a manner such that the parties to the contract freely choose between an employment contract or a civil-law contract. In the majority of cases, directors are in an employment relation with the company that they manage. This is to a great extent a consequence of the deeply rooted labour-law position of directors in the Slovene legal environment which is rooted in the period in which the system of social property and self-management was in force in the Republic of Slovenia; to a certain extent, however, it is also a consequence of the fact that the legal position of directors who concluded a civil-law contract is not appropriately regulated.

5.2. A Contract to Perform the Function of Director as an Employment Contract

For directors who conclude an employment contract with a company all provisions of the labour-law regulations apply, except for those which explicitly determine that they do not apply for directors, and thus not regarding issues which are regulated differently for them. The fact that directors are not merely employees of the company (they are not merely in an employment relation with the company) but are also members of the company's management body and perform managerial and representative tasks, namely requires certain particularities in the regulation of their labour-law position. ERA does take this fact into account, however, not sufficiently. The sparing and unclear statutory regulation causes problems in practice, most of all with reference to the termination of the employment contract of directors.

The particularities of the regulation of the employment relations of directors refer to the employer's representative when concluding an employment contract with a director, to exceptions from the public advertising of vacancies, to fixed-term employment contracts, and to the regulation of working time. In addition, Article 72 of ERA, which provides for an employment contract with directors, explicitly determines that parties to the employment contract may differently regulate the rights, obligations, and responsibilities arising from employment relation related to conditions and the limitation of a fixed-term employment contract, working

time, breaks, and time off, payment for work, disciplinary responsibility, and the termination of the employment contract.

5.2.1. The Company's Representative when Concluding an Employment Contract with a Director

In general, directors as representatives of commercial companies (employers) conclude employment contracts with employees. However, the third paragraph of Article 18 of ERA determines that in cases in which an employment contract is concluded with directors, the employer is represented by a body determined by law, the founding act, or the articles of association (in absence of such body, the employer is represented by the owner and during the period of founding the employer, by the founder). Pursuant to ERA, the body determined by CA-1, the founding act, or the articles of association to act in the name of the commercial company when dealing with directors also has the power to conclude employment contracts with them. A supervisory board or its president, respectively, has the power to conclude an employment contract with the members and the president of the management board of a public limited company (Article 293 of CA-1), the general meeting of partners has the power to conclude an employment contract with a manager of a limited liability company (Article 505 CA-1); if a company has a supervisory board, the supervisory board has power to do so (unless otherwise provided by the contract of the partners), the board of directors has power to conclude an employment contract with an executive director, and the general meeting has the power to conclude an employment contract with the members of the board of directors.[27]

5.2.2. Exceptions to the Obligation to Publicly Advertise Vacancies

When employing new employees employers must publish a public advertisement of vacancies. An employment contract may exceptionally be concluded without the prior public advertising of vacancies only in cases determined by law. In accordance with the first paragraph of Article 24 of ERA, an employment contract may be concluded with directors without prior public advertising of such vacancies. In view of the fact that the competent body of the company is free to decide who shall be appointed director and is not obliged to look for candidates by means of an open competition, the public advertising of vacancies for directors would not make any sense. An employment contract is in such cases namely concluded with a person who has already been appointed to the position of director by the competent body.

5.2.3. Fixed-Term Employment Contract

ERA lays down the rule that employment contracts must be concluded for an indefinite period of time, whereas fixed-term employment contracts may be concluded only in cases determined by law or by sector/branch collective

[27] See also Senčur Peček, 2007, pp. 82, 84; for a different view, see Samec, 2006, p. 65.

agreements. It follows from the first paragraph of Article 52 of ERA that a fixed-term employment contract may be concluded with a director.

While in cases of fixed-term employment contracts a two-year limitation applies, fixed-term employment contracts with directors may be concluded for a period which exceeds two years. The reason for such statutory regulation is undoubtedly the fact that the corporate position (function) of directors is usually for a limited period of time (with regard to the members of the management board and executive directors, already on the basis of the law, and with regard to managers, if such is determined by the contract of the partners), which is usually longer than two years.[28] With the above-discussed regulation, ERA enables that parties to the contract tie the duration of their contractual relation to the planned duration of their corporate relation.

5.2.4. Working time

Article 157 of ERA determines that in cases of employment contracts with directors, employers are not obliged to respect the statutory provisions concerning the limitations of working time, night work, breaks, and daily and weekly time off. With reference to such, the special position of directors is taken into consideration, and thus the nature of their work does not allow that their working time be planned in advance (by some other body in the company), i.e. that they plan their working time themselves. With regard to the employment relation of directors, it is not necessary to respect certain statutory provisions concerning the limitations of working time which are intended to protect other employees, however, also directors must be ensured a safe and healthy work environment.

5.2.5. The Particularities of the Contractual Regulation of Rights and Obligations which follow from Article 72 of the Employment Relations Act

In addition to a fixed-term employment contract and working time, the particularities of which are explicitly regulated for directors by law, Article 72 of ERA also allows that with regard to employment contracts with directors, parties to the contract differently regulate payment for work, disciplinary responsibility, and the termination of the employment contract.

Payment for Work

Article 72 of ERA allows that in a contract the payment for the work for directors is regulated differently, as determined by ERA in Articles 126 through 140. Parties to the contract are not bound by the types of remuneration as determined in Article 126 of ERA, and may freely agree upon the amount and type of payment for the work of a director (e.g. salary, bonuses, bonuses in the form of shares and options, various benefits), and thereby take into account the position of the director in the company – most of all the fact that as a member of the management body he

[28] The first paragraph of Article 255, the first paragraph of Article 290, and the second paragraph of Article 515 of CA-1.

or she independently manages the company's operations and can influence the performance of the company.[29]

In cases of employment contracts with members of the management board and executive directors, the parties to the contract must respect the first paragraph of Article 270 of CA-1, which lays down rules for determining the remuneration of members of the management board and executive directors.[30]

In practice, in determining payments for directors, companies and directors to a large extent consider the Recommendations of the Managers' Association of Slovenia on Concluding Individual Contracts with Senior Managers in Commercial Companies and the Recommendations of the Association of Supervisory Board Members on the Appointment, Discharge, and Management of Remunerations of Management Board Members.

Regarding questions which refer to the remuneration of directors which are explicitly determined by the employment contract, the contractual and not the statutory regulation applies, whereas regarding all other questions, the provisions of ERA apply also for directors. If individual rights which are determined by ERA are not regulated differently by the contract, these rights are recognised to directors to the same extent as determined by ERA (e.g. salary compensation, pay for annual leave, retirement bonus).[31]

Disciplinary Responsibility

The disciplinary responsibility of employees is an institution regulated by ERA, which also applies for directors – employees. A body which in CA-1 is determined to be the body that represents a company against the management, would in such cases act in the name of the employer, taking into consideration the third paragraph of Article 18 of ERA. Conducting disciplinary proceedings against directors is not a usual task of the supervisory board (the management board or general meeting of partners). These bodies do act in dealings with directors also as employers' representatives, but their relation is based on trust, and therefore the issues of the possible (minor) violations of directors are resolved outside the scope of complex disciplinary proceedings, i.e. in confidential meetings. In cases in which directors gravely violate their obligations, commercial companies have other means (e.g. dismissal) against directors which follow from their corporate position. In my

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[29] On the remuneration of directors, see also Korpič-Horvat, E., Plače poslovodnih oseb v zasebnem in javnem sektorju, Gospodarski subjekti na trgu (XIII. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 26th-28th May 2005, Portorož), Inštitut za gospodarsko pravo, Maribor, 2005, pp. 275-288.

[30] The supervisory board is responsible for ensuring that all remunerations of the members of the management board are appropriately proportional to the tasks of the members of the management board and to the financial situation of the company. The same responsibility applies mutatis mutandis to the management board when deciding on the remuneration of executive directors (the eleventh paragraph of Article 290 of CA-1).

[31] As a general rule, (sector/branch and managerial) collective agreements do not apply for director s. If collective agreements determine a higher level of rights for employees in individual fields, this does not apply to directors, except in cases in which their employment contracts refer to collective agreements which bind the employer or if the same (or a higher) level of rights, as determined by the collective agreements, is explicitly recognised by their employment contract.

opinion, these are the reasons for which Article 72 of ERA allows that parties to the employment contract stipulate disciplinary responsibility differently.

The Termination of the Employment Contract

The chapter of ERA which in detail regulates the termination of the employment contract does not contain special provisions regarding the termination of the employment contract of directors, whereas in Article 72 the termination of the employment contract is determined to be one of the areas that parties to the contract may regulate differently. In reference to this, the question is raised as to what exactly such different contractual regulation can refer, and most of all whether the parties to the contract may agree on a different manner of the termination of the employment contract, as determined by ERA, with the intention that the termination of their corporate relation (could) result in the termination of the employment relation.

Various positions have been adopted in theory. Some authors recognize this possibility[32] and some do not. The latter substantiate their disagreement either by the fact that Article 75 of ERA exhaustively lists the possible manners of the termination of the employment contract, whereas in all other cases the law should determine such, and therefore Article 72 of ERA, which allows that the parties to the contract agree otherwise also regarding the termination of the employment contract, is inconsistent with Article 75 of ERA,[33] or by the fact that the second paragraph of Article 7 of ERA (according to which employment contracts may only stipulate rights which are more favourable for employees) also applies for Article 72 of ERA, and therefore it is not allowed that an employment contract with a director stipulates an additional reason for cancellation (e.g. the termination of the term of their position) not respecting the reasons determined by ERA, since for directors as employees this is not more favourable.[34]

In my opinion, in considering the contractual regulation of the termination of the employment contract and also other issues determined in Article 72 of ERA, it must also be taken into consideration that Article 72 is an exception to the general rule "*in favorem laboratoris*", which follows from the second paragraph of Article 7 of ERA. The purpose of this exception is to regulate the contractual relation of directors considering the fact that directors are in a different position than other employees, as they are also in a corporate relation with the company, whereby the contractual regulation is in certain cases more favourable for directors than the statutory one, and in others less favourable. A different interpretation according to which also in cases of directors the parties to the contract may not stipulate

[32] Belopavlovič, N., Položaj direktorja po spremembi zakona o delovnih razmerjih, Gospodarski subjekti na trgu (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17th-19th May 2001, Portorož), Inštitut za gospodarsko pravo, Maribor, 2001, p. 365.

[33] Klampfer, M., Položaj managerjev po sodni praksi, Gospodarski subjekti na trgu (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17th-19th May 2001, Portorož), Inštitut za gospodarsko pravo, Maribor, 2001, p. 344.

[34] Cvetko, A., Odprta vprašanja pri sklepanju in odpovedi pogodb o zaposlitvi s poslovodnimi osebami, Podjetje in delo, No. 6-7/2005, p. 1617.

less rights than determined by law,[35] causes Article 72 to lose its purpose. There seems to be no apparent reasons why Article 72 of ERA explicitly determined that regarding certain issues the parties to the contract may determine more rights for employees (directors) than determined by law, if such already follows from the second paragraph of Article 7 of ERA, which applies regarding all rights for all employees.

It would undoubtedly be appropriate if ERA more precisely determined the termination of the employment contract of directors (either by explicitly referring to contractual regulation or by a more detailed statutory regulation), and thereby take into account that the termination of the function of director must necessarily be followed by the termination of the employment contract. In my opinion, Article 72 of ERA alone can be an appropriate basis for the contractual regulation of the termination of the employment contract in a manner such that is also adapted to the corporate position of directors. The parties to the contract could, for example, determine as a(n) (additional) reason for a regular cancellation of the employment contract of a director the dismissal of the director, the fact that the director resigned as a member of the body, or other reasons for the termination of the corporate position, and agree that the right to severance pay and its amount as well as the duration of the period of notice depend on the specific reason for cancellation. Such contractual regulation would not entail a departure from Article 75 of ERA, which is cited in theory as an obstacle to such contractual regulation. Article 75 of ERA determines as one of the manners of terminating the employment contract also the cancellation of the employment contract. Thus, the parties to the contract would not determine an additional manner of the termination of the employment contract, but would only differently (additionally) regulate the reasons for cancellation.

With reference to the above-discussed question, the case law of the Supreme Court has not yet provided a straightforward solution. Nonetheless, it can be concluded from Judgment VII Ips 36/2006 of 28 February 2006 that the Supreme Court allows that in an employment contract different reasons for its cancellation, as determined by ERA, be agreed upon.

If the employment contract with a director does not determine the termination of such employment contract (and also if we do not allow a different contractual regulation in this respect), the statutory regulation applies. In cases in which the position of the director is terminated and it is in the interest of the company that the employment contract also terminates, the company (employer) must respect the general statutory regulation of the termination of the employment contract. With reference to such, it can be established that in cases in which a director is dismissed for reasons which do not stem from the director's side (e.g. the member of the management board is dismissed for other economic and business reasons pursuant to the fourth indent of the second paragraph of Article 268 of CA-1) or when the agreed term of this position expires, none of the statutorily determined reasons for the termination of the employment contract is applicable. In the above-mentioned

[35] Cvetko, 2005, pp. 1615, 1617-1619.

example a reason for the termination of the employment contract does not stem from the employee's side, and thus the extraordinary cancellation or ordinary cancellation for reason of the breach or neglect of obligations or for reason of incapacity cannot be applied.[36]

The only reason for cancellation which stems from the employer's side is an ordinary cancellation for a business reason. The essence of such cancellation is that the need for certain work, under the conditions determined by the employment contract, has ceased. There is no need for this work, and not that there is no need for the employee who carries out such work.[37] On the other hand, in cases in which a director is dismissed, the company without a doubt still needs its operations to be managed, i.e. the work which pertains to the position of director, only the person who hitherto performed such work is no longer required. Also the business reason as determined by ERA cannot be applied for the cancellation of the employment contract of a director who is dismissed for a reason which stems from the employer's side (or whose agreed term of the position expired and is not reappointed).

However, the fact is that in practice a business reason (as the only reason for cancellation determined by ERA which stems from the employer's side) is applied in such cases, and courts consider such to be legitimate (Higher Labour and Social Court Judgment, No. Pdp 163/2004 of 23 November 2005).

5.3. A Contract to Perform a Function as a Civil-Law Contract

A contract to perform a function can also be concluded as a civil-law contract and not only as an employment contract. The Code of Obligations[38] (hereinafter referred to as CO) does not explicitly regulate a contract to perform a function, which is a *sui generis* contract. In Slovene theory[39] the term *management contract*

[36] Employers may cancel an employment contract by either applying extraordinary or ordinary cancellation. Extraordinary cancellation is allowed in cases which are explicitly determined by ERA and in all cases the reason for the cancellation stems from the employee's side. Ordinary cancellation may be applied for reason of breach or neglect of obligations (if an employee violates his/her obligations), for reason of incapacity (if an employee does not achieve expected work results or he/she does not fulfil the conditions for carrying out work), or for a business reason (if the need for certain work has ceased). See Articles 80 through 95 of ERA.

[37] Such position is adopted in theory (Cvetko, A. et al., Pogodba o zaposlitvi in podjetniška kolektivna pogodba, GV Založba Ljubljana, 2004, p. 245. It is stated therein that the fact that the need for certain work has ceased refers to work determined in the contract and not to the individual employee), and in case law (it follows from Judgment VS RS VIII/Ips 72/97 of 23 September 1997 that the work of individual employees cannot become permanently unnecessary due to necessary functional reasons if an organization (formally or informally) employs other employees for the work which the redundant employees carried out).This also follows from the statutory obligation of employers that in cases in which they employ new employees within one year after the employment contracts of former employees were cancelled for business reasons, the employees whose employment contracts were cancelled for business reasons shall have preferential right to employment. See Article 102 of ERA.

[38] Official Gazette of RS, No. 83/01.

[39] See Kocbek, M. et al., 2007, Volume II, p. 311.

is used for such a contract, which has the elements of a contract of mandate and a contract for work. The latter are regulated by CO.[40]

In cases of a civil-law contract concluded between a company and a director, the parties to the contract are allowed much greater freedom in determining their contractual relation than in cases involving an employment contract. The protection of the position of directors, however, depends only on the contractual regulation of the rights and obligations. Due to the fact that CO does not regulate a contract to perform a function as a special contract, and neither regulates a service contract (as a contract by which a person agrees to perform work either for a fixed-term or for an indefinite period of time for someone else whereby such person is not in an subordinate position to the employer), in Slovene legislation provisions regarding the minimal rights of persons who perform work on the basis of civil-law contracts cannot be found (e.g. minimal duration of the period of notice), as contained in German BGB.[41] Directors who have concluded civil-law contracts are not in an employment relation, thus the provisions of the Slovene labour-law regulations [42] or international labour-law acts do not apply to them. Finally, the rights of directors stemming from social insurance schemes in cases in which they have concluded civil-law contracts are regulated inconsistently and to a certain extent inappropriately.[43]

6. WHETHER AND WHEN A CONTRACT TO PERFORM A FUNCTION CAN BE AN EMPLOYMENT CONTRACT

In Slovene theory, opinions regarding the inappropriate regulation of a contractual relation between a company and a director as an employment relation could be found already before the implementation of the new Employment Relations Act[44] and also subsequently.[45]

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[40] CO (differently than the German Bürgerliches Gesetzbuch - BGB) does not regulate a service contract (service or employment contract, *locatio conductio operarum,* or in German *Dienstvertrag*).

[41] Bürgerliches Gesetzbuch of 18 August 1896; BGB.S.195.

[42] Except for the Health and Safety at Work Act (Official Gazette of RS, Nos. 56/99 and 64/01), which determines that employees are not only persons who perform work on the basis of an employment contract, but also persons who perform an independent or self-employed occupational, agricultural, or other activity, and persons who perform work as part of a training scheme. See the first paragraph of Article 3 of the Health and Safety at Work Act.

[43] See Senčur Peček, 2007, pp. 131-133.

[44] See Dobrin, T., Nekatera vprašanja delovnopravnega in socialnovarstvenega statusa poslovodnih oseb, Podjetje in delo, No. 8/1995, pp. 1120-1121; Bohinc, R., Delovnopravni in korporacijski položaj direktorjev, Podjetje in delo, No. 2/1999, pp. 290-292; Klampfer, 2001, pp. 333-334; Senčur Peček, D., Pravni položaj direktorja gospodarske družbe, Gospodarski subjekti na trgu (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17th-19th May 2001, Portorož), Inštitut za gospodarsko pravo, Maribor, 2001, pp. 298-300.

[45] Mežnar, D., Pogodba o zaposlitvi s poslovodnimi osebami po novi ureditvi, Podjetje in delo, No. 1/2003, p. 77; Cvetko, 2005, p. 1618.

I do agree with the position in the theory[46] that the question whether directors are in an employment relation or not is a question which falls within the field of labour law. The answer to this question indicates whether employment legislation is applied in such cases. The decision on the application of employment legislation cannot be left to the parties to the contract, as the (compulsory) application of labour law cannot be decided by the parties to the contract but the employment legislation itself must set the boundaries of its application (i.e. to which relations it refers to and which legal relations it regulates). Whether in an individual case there exists an employment relation must be reviewed from the nature of such individual legal relation (and not from the label given to the relation by the parties to the contract).[47] The above-mentioned applies regardless of the somewhat misleading diction of Article 72 of ERA.

It is indeed true that the parties to the contract are in principle free to regulate their relation in which one of the parties carries out work for the other. They may regulate their relation in a manner so as to either include the elements of work which is carried out upon the instructions provided by the employer or other elements of an employment relation,[48] or in a manner such that their relation is based on equality, i.e. as a civil-law relation. How the parties to the contract in fact regulate their relation and how they carry it out is decisive and not how they label the contract they have concluded. The question remains, however, whether a commercial company and a director may in all instances include the elements of an employment relation in their contractual relation. The company and director are namely not only in a contractual but also in a corporate relation, which is determined by CA-1, and may not regulate their contractual relation contrary to their corporate relation. How the contractual relation of an individual director (a member of the management board, manager, or executive director) is regulated, thus to a certain extent depend on their corporate position (i.e. what their relation to the bodies of the company is, whether any of the bodies may provide instructions for their work, whether CA-1 alone recognises their independent position, and other circumstances, e.g. whether a director is also a majority partner who is controlling the company and therefore cannot be in an subordinate position).

In view of the fact that with reference to directors ERA did not set limitations to the application of labour law or limitations with regard to which directors may conclude employment contracts, I am of the opinion that such questions will have to be addressed by theory[49] as well as case law, which will have to take

[46] Kresal, B., Pravni položaj managerjev z vidika ureditve njihovega plačila, Gospodarski subjekti na trgu (IX. Posvetovanje o aktualni problematiki s področja gospodarskega prava, 17th-19th May 2001, Portorož), Inštitut za gospodarsko pravo, Maribor, 2001, p. 325.

[47] The above-mentioned also follows from ILO Recommendation No. 198 of 2006 on employment relationships.

[48] The elements of an employment relation follow from Article 4 of ERA, which defines an employment relation as a relation between the employee and the employer, whereby the employee is voluntarily included in the employer's organised working process, in which in return for remuneration he or she continuously carries out work in person according to the instructions and under the supervision of the employer.

[49] A contribution to such is Chapter III.D in Senčur Peček, 2007.

into consideration the corporate position of individual directors (the members of the management board, managers, or executive directors) and the compatibility of such with a contractual relation whose main features are the subordinate position of the employee and the condition of work carried out upon instructions provided by the employer. Only within such boundaries will the parties to the contract be able to freely regulate their relation, either as an employment relation or a civil-law contractual relation.

Also Article 72 of ERA ("…if directors conclude an employment contract…") must be understood in this sense. If parties to the contract (a company and a director) regulate (determine and carry out) their contractual relation in a manner such that the contract in fact contains the elements of an employment relation, employment legislation with certain particularities applies to their relation, and if this is not the case, their relation is regulated by some other type of contract. In my opinion, Article 72 of ERA, regardless of its ambiguous diction, does not provide a basis for the parties to the contract to simply choose the type of contract. Finally, it does not depend on the name of the contract whether the contract is an employment contract (and thus an employment relation) or some other type of contract (and thus a civil-law relation).

7. CONCLUSION

If a contractual relation between a company and a director is regulated and carried out in a manner such that the director is in a subordinate position towards the company and their relation has all the other elements which define an employment relation, a contract to perform a function has the legal nature of an employment contract, otherwise it is a civil-law contract. In cases in which a director concludes an employment contract, certain particularities apply to the regulation of his or her labour-law position, which ERA should regulate more precisely and in more detail. On the other hand, however, in Slovene law the rights of directors stemming from social insurance schemes who are in a civil-law relation with the company should be appropriately regulated.

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UGOVORNA POZICIJA DIREKTORA U TRGOVAČKIM PODUZEĆIMA PREMA SLOVENSKOM PRAVU

Važeći slovenski Zakon o poduzećima regulira položaj direktora jedino iz perspektive funkcioniranja trgovačkog društva, ali ne i s pozicije zaštite njihove osobne pozicije.

Imajući to u vidu Zakon o poduzećima sugerira da zaključenje ugovora izmedu trgovačkog poduzeća i njegovog direktora (ugovor o obnašanju funkcije direktora). U praksi je takav ugovor po pravilu ugovor o zapošljavanju, a rijetko je kada civilno-pravni ugovor. U članku autor diskutira o tome da Zakon o radnim odnosima izričito dozvoljava da se ugovorni odnos između poduzeća i direktora regulira kao odnos o zapošljavanju čime se istodobno određuju određene radnopravne posebnosti u poziciji direktora. Pitanje koje autor postavlja tiče se uvjeta pod kojima ugovor koji omogućuje direktorsku funkciju može postati ugovor o zapošljavanju. Naime, ugovori o zapošljavanju reguliraju odnose zaposlenja koji su definirani podređenom pozicijom zaposlenika i uvjetima rada koje su date u instrukcijama koje osigurava i kontrolira poslodavac.

Ključne riječi: *direktor, upravitelj, ugovor o obnašanju direktorske funkcije, ugovor o zapošljavanju s direktorom*