

**REFORM OF THE LAW OF COMMERCIAL COMPANIES
(Conference, Warsaw 29 June 1998)**

The conference organized by the Ministry of Justice, the Institute of Law Studies at the Polish Academy of Sciences and the Faculty of Catholic Law at the Catholic University of Lublin, was devoted to the draft of the Act - Law on Commercial Companies, prepared by a special team of the Commission for the Codification of Civil Law, composed of Prof. S. Soltysinski, Prof. A. Szajkowski and Dr. hab. A. Szumański. Participants of the conference included recognised civil law specialists, as well as representatives of practice and the press.

The conference was opened by Dr. H. Suchocka, Minister of Justice. Addressing her thanks to the co-organizers: Prof. Z. Radwański, President of the Commission for the Codification of Civil Law at the Ministry of Justice, Prof. A. Szajkowski, Director of the Institute of Law Studies at the Polish Academy of Sciences and Rev. Prof. M. Stasiak, Dean of the Faculty of Law at the Catholic University of Lublin, she stressed the importance of the problems to be discussed.

Papers containing observations concerning the draft were presented by Prof. J. Frąckowiak, head of the Department of Economic and Commercial Law at the University of Wrocław, Prof. K. Kruczałak, head of the Chair of Commercial Law and Private International Law at the University of Gdańsk, Prof. W. Popiołek from the Silesian University of Katowice and Dr. A. Wisniewski from the University of Warsaw.

At the very outset, Prof. J. Frąckowiak stated that the draft of the Act - Law on Commercial Companies is a valuable work, although he described some parts of it as highly controversial. The speaker underlined that the authors of the draft, basing themselves on the regulations contained in those provisions of the Commercial Code which have not been repealed, and making use of foreign regulations in the field of company law, introduced many improvements, which will be decisive for Polish company law to remain up-to-date. Prof. J. Frąckowiak stressed also the fact that in his opinion questions concerning companies deserved to be treated as a code matter. However, in his view, such problems should constitute part of a comprehensive code, which would comprise all fundamental questions of private law. In reference to the draft, Prof. J. Frąckowiak observed that it was necessary for the solutions contained therein to be clearly synchronised with the provisions of the Civil Code. He also pointed out that once the assumption of the unity of civil law had been adopted, doubts arose as to leaving civil partnership out of the regulation of the Act in question. Contrary to the draft of the Act, Prof. J. Frąckowiak spoke in favour of granting legal personality to a personal company, and suggested adopting, in relation to such companies, the institution of company in organisation, identical to the solution adopted in the case of capital companies. He described as purposeful the introduction of the institution of the invalidity of a company, a solution adopted with a view to the dispositions of the first directive of the Council of EC concerning company law.

Prof. K. Kruczałak began with the statement that the need to prepare a statute on commercial companies resulted both from the necessity to adjust the law of commercial companies to the requirements of trade, and from the need to harmonise the law of commercial companies with EU

directives, as well as to adjust and introduce the law of commercial companies to the provisions of civil law, particularly the Civil Code. He gave a positive evaluation of the introduction of two new kinds of companies: partners' company and limited joint-stock company, adding that no one should question their usefulness in economic trade. However, the author expressed doubts whether a limited joint-stock company should be treated as a personal company. As regards the limited liability company, Prof. K. Krucalak declared that the draft specified the purpose of company activity too broadly, and suggested preserving the current specification of the purpose of such a company. He observed also that although, in comparison to the existing legal status the draft regulates to a greater degree the sole shareholder limited liability company, it fails to regulate a number of fundamental questions and should be expanded in that field (e.g. as regards legal actions "with oneself"). Prof. K. Krucalak also expressed doubts as regards those solutions, which reduce shareholders' powers in relation to the existing legal status or which impose more duties on them (the question of preferred shares and requirements pertaining to the form of sale of shares). He indicated solutions which, in his view, provided insufficient protection of creditors' interests in the case of a company in organisation and a sole shareholder company. The speaker also criticised the institution of the invalidity of a company.

Prof. W. Popiołek emphasised that in his opinion the idea of repealing the Commercial Code is justified, both with regard to the requirements of legislative technique and, above all, for substantial reasons. Among them he mentioned the principle of the unity of civil law, which excluded the possibility of a comprehensive codification of so-called commercial law. Prof. W. Popiołek stated that the authors of the draft were right to leave outside statutory regulation such questions as register, business name or commercial representation, since they should apply also to other kinds of entrepreneurs. Prof. W. Popiołek proposed a positive evaluation of the fact that the provisions regulating civil partnership had not been included into the statute, underlying that, in principle, this form should not be used as a legal form of the entrepreneur. He considered omitting problems of so-called concern law positive, although he suggested establishing, apart from the liability of the dominant company in holding structures, regulations envisaging the liability of members of the board of the dominant company. The author judged favourably the institution of conditional initial capital and the institution of company in organisation, and thought it desirable to introduce new types of companies: the civil partnership and the limited joint-stock company. Prof. W. Popiołek expressed the opinion that personal companies should not be granted legal personality.

Dr. A. Wisniewski stated that the draft should be considered as an important step in legislative works, and described it as a good basis for further work on the uniformisation of conceptions and an adequate regulation of relationships among subjects in the area of economic law. The author presented four possible conceptions of amending provisions of the Commercial Code. While discussing the question whether it was purposeful to reinstate the duality of private law, he observed that if commercial law was to lose its autonomy, it was doubtful whether the term "commercial law" should still be used, and suggested applying in this context the term "law of economic subjects". Dr. A. Wisniewski went on to describe as a certain inconsistency of the draft the fact that the basic regulation of the relationship between commercial personal companies and civil partnership was left, traditionally, within the area of the regulation of registered partnership, since the limit of the "greater size of the undertaking" is a very general term and as such may be applied to limited partnership, limited joint-stock company or partners' company. In his opinion, it was correct for the authors of the draft to refrain from granting legal personality to personal companies. The speaker also gave a positive evaluation of the institution of company in organisation, pointing out that this solution, adopted in relation to the limited liability company,

should be extended so as to include the joint-stock company. He indicated certain inconsistencies in the draft as regards the invalidity of a company, and suggested preserving the invalidity of the deed of the company formation as the grounds for dissolving the company.

During the discussion, Prof. W. Katner considered questions concerning, among other things, the definition of an entrepreneur, the notion of economic activity, and the commercial register. Informing about the results of a review of Polish legislation in the field of the legal regulation of the activity of small and medium-sized enterprises conducted within the framework of negotiations with EU Member States, he pointed out, among other things, the necessity of repealing the Act on Companies with Foreign Shareholdings. Prof. G. Domański, recognized the novelty of certain solutions of the draft, and accentuated the necessity of harmonising the dispositions of the draft with the new tax system. He pointed out that, in practice, many of the barriers in applying the provisions of commercial law result from the existing tax law in force, which frequently denies basic constructions of civil law. He also expressed the opinion that the draft did not take account certain amendments to the Act on Public Trade in Securities. Prof. M. Pniak-Niedzielska reflected on the possible repercussions of adopting the Act on Commercial Companies in relation to other statutes, where the only link between them would be the term "entrepreneur". She warned against the danger of creating a particular law of economic subjects, which is merely an annex to the Civil Code. Dr. A. Kidyba was of the opinion that the draft provided insufficient regulation as regards personal companies. He went on to state that reducing the role of a limited partner in limited partnership to a passive one was a rather controversial solution and, as a consequence, would lead to an impoverishment of the structure of such a partnership. Dr. A. Jakubecki underlined the need to provide a regulation, by a general act, of employees' participation in supervisory and management bodies. Rejecting the conception of company in organisation, he questioned the purposefulness of adopting it in the Polish legal system, and asked whether it was necessary to treat company "in organisation" as a subject. Dr. M. Romanowski stressed that the preparation of such a draft should take into consideration the capital market, and indicated the danger of creating two legal regimes regulating the questions of the capital market provisions of the draft in question and those of the Act on Public Trade in Securities.

In the second part of the conference, the authors of the draft of the Act - Law of Commercial Companies responded to observations and suggestions presented in the reviews and in the course of the discussion.

Prof. S. Sołtysiński underlined that none of the reviews and opinions presented in the course of the discussion questioned the general direction of the solutions provided for in the draft, and that concrete suggestions were made. He went on to present the arguments which influenced the authors' choice of the conception of the regulation of matters concerning commercial companies. Furthermore, the author declared that recreating a modernised Commercial Code should not be attempted in the name of the unity of civil law. Prof. S. Sołtysiński said that due to the legal nature of personal companies there was no need to introduce the institution of company in organisation, nor was it necessary to grant it legal personality. Prof. A. Szajkowski indicated difficulties resulting from the obligation to adjust Polish law to the requirements set in EU directives concerning company law; in particular, he discussed the question of the invalidity of a company, which was raised in reviews and during the discussion. Next, he pointed out the importance of the legal environment for the law on the system of commercial companies, stating, at the same time, that a choice was to provide a general regulation of the model of company law. Responding to remarks concerning specific regulations, Prof. A. Szajkowski discussed, among others, the question of company in organisation. Confirming the existence of a basic link between company law and tax law, Dr. A. Szumański emphasised the importance of synchronising systemic provi-

sions with provisions relating to taxation. As for the construction of the limited joint-stock company, he stressed that the intention of the authors of the draft, which envisaged the personal nature of this kind of company, was to attach more importance to the position of a complementary, who has the right to issue a share, providing thereby additional capital for the company. Dr. A. Szumański raised also the question of concern law, which the draft regulated only to such an extent so as to avoid violating the basic systemic mechanisms of the law of capital companies, including the fundamental principle that a shareholder of a capital company is not personally liable for the company's obligations.

Summarising the discussion, Prof. Z. Radwański addressed the question of the purposefulness of placing the regulation of commercial companies in a separate statute instead of provisions of the Commercial Code. Emphasising that the conception of a separate codification is not developed and implemented in European countries, the speaker indicated unified comprehensive statutory regulations exemplified by the Swiss Code of Obligations, the Italian Civil Code, the Dutch codification and the new Russian code of 1994. Prof. Z. Radwański rejected the idea of creating different conceptions, based on the duality of private law, as unjustifiable. He declared that, from the pragmatic point of view, this proposal was relevant and rationally justified, although the autonomy of commercial law should not be questioned, either in a didactic or interpretative sense. There are sufficient grounds for treating commercial law as a separate domain of legal sciences.

Closing the conference, Prof. Z. Radwański declared that the materials from the conference will be carefully examined and used, and that new material would be sought. He informed that the authors of the draft will also approach German specialists for an analysis of the draft from the point of view of the conformity of its solutions to the EU law.

Barbara Bajor