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RESPONSIBILITY OF BANK MANAGERS

Introduction

Moral and legal responsibility is an inherent feature of managerial functions. In the praxeological cycle: act (decision) – effect – evaluation – responsibility – consequences, there is a range of theoretical and practical problems concerning responsibility. The responsibility of high-managers in banks seems to be of particular importance; a topic that received relatively little space in the literature of management. In practice, there are ethical problems concerning the level of requirements and qualifications versus salary and the level of legal and financial liability, especially against top-managers of the largest banks; often in a situation of extensive social impact of their decisions.

The problem of a manager’s responsibility has a dual nature. On the one hand the manager is charged with overall responsibility for all financial and PR losses of a company, on the other hand the manager takes moral, legal and financial responsibility for particular decisions. This article considers the latter area.

The subprime financial crisis has sparked a discussion about the responsibility of financial institutions’ top management in the context of disclosure of large bonuses paid to the senior managers and lack of consequences for bankruptcies [Krugman 2012, Dec, Masiukiewicz, 2013]. Very high salaries the executives were paid, were not sufficiently related to the system of contractual and administrative as well as civil and criminal liability.

The following discussion is limited to the issue of manager’s personal liability and not to the financial institutions’ liability.

The thesis of the article is as follows: negative experiences of financial crises have transformed the state administration authorities’ approach to the issue of bank executives’ responsibility and accountability.
1. Theoretical aspects of responsibility in business

In business there is a distinction between moral and legal responsibility of executives and employees. The author believes that additional three categories of responsibility can be distinguished: subjective – as regards a subject (person or institution) characterized by taking responsibility for its acts (including decisions), objective – where responsibility is seen as a formal condition (person or institution responsible for certain issues) and attributable – if the entity took responsibility for an act in the sense of moral or legal consequences. In this case, not only obligation to take, but also failure to act is associated with the threat of consequences.

In contrast, moral responsibility is a feature of human behavior, manifesting itself in readiness to bear the consequences of good and bad deeds, and it is the result of moral convictions (internalization of ethical standards). According to B. Klimczak responsibility is a moral characteristic of human behavior stretching in relation to the intentions, choices, actions and consequences of actions [Klimczak, 1998, p. 36]. Studies have confirmed that the utilitarian justification is one of the more important of the options considered by managers when they are formulating moral judgments and making decisions in accordance with business ethics [Kujala J., Lamsa A.M., Penttila K., 2011].

Due to the conflicting grounds of moral choices, the moral responsibility is not always unequivocal [Banajski, 2006, Gasparski, 2006].

Conflict of interests is a common factor affecting the decision-making process in financial institutions. W. Gasparski points to the general multiplicity of conflicts and dilemmas associated with different roles in society [Gasparski, 2013]. Bank managers, for example, serve on the supervisory boards of various companies, including their bank’s subsidiaries, in economic chambers and associations and may have social ties with their clients, etc. Some regulations prohibit managers from participation in decision-making in situations of conflict of interest.

Business decisions sometimes cause unintended side-effects. In practice, there is the principle of double effect, which causes moral dilemmas and increases the time of decision-making. Its essence is the problem of justifying decisions resulting in the expected, positive effects, but also causing negative consequences for the company or the environment [Sokołowska, 2013].
Achieving one will destroy the other – it is therefore problem of dual qualification of moral consequences, which the manager must settle.

Managerial responsibility should be connected with the decision-making dilemmas that make it difficult to decide and soften the attributes of responsibility. The most important of these are:

- dissonances between personal preferences and the imperative of increasing the company’s value,
- contradictory objectives of motivational packages and standards set out in the codes of professional conduct,
- bank’s long – and short-term objectives,
- internal and external conflicts of interests,
- occurrence of the double effect principle,
- legality and effectiveness of the action,
- moral hazard and the risk of bankruptcy,
- changes in psychological contract in the company and justice; polyphonic nature of justice.

In the theory of management, the attributable responsibility is also defined as a consequence of failure to comply with obligations stemming from moral, political, or customary norms or law. Managers may be responsible for specific faults or general risk. Course of the subprime financial crisis indicates that the second area is largely ignored [Krugman, 2009]. Management theory also distinguishes so called functional responsibility (legal, professional and moral) for exercising certain activities such as managerial positions.

Area of responsibility is another important issue. The answer to the question whether a manager should bear the consequences for decisions he made, despite the lack of formal competences, must always be positive. Similarly, with regards to the decision’s timing, a manager should bear consequences for late decisions. More difficult to resolve is the responsibility for ‘indecisiveness’. For example, if a manager did not have any information related to making a decision and had no possibility of obtaining them then he should not be held responsible for failure to act.

In institutional terms, organization’s (a company, charity or authority) responsibility may be considered. However, decisions giving rise to subjective and attributable responsibility are taken by executives and not institutions in organizational terms – hence the responsibility falls on these persons. In this perspective, there is also a collegial decision making and collective responsibility, which complicates the determination of individual consequences. [Santoro, Strauss, 2012].
In the literature, there is also the notion of responsibility in the praxeological sense. According to Pszczolowski’s definition, responsibility in this sense should be understood as the relationship between the decision-maker, the result of his actions and evaluating entity, which has means to reward or punish the decision-maker. [Pszczołowski T. 1978, p. 143].

Various sectors of the economy are characterized by different levels of business ethics and managers’ tendency to risk taking, law violation and corruption, or more broadly by different levels of the sense of legality. Legal liability arises from specified regulations and agreements. In formal terms, two types of legal responsibility can be distinguished: public responsibility (civil, criminal, employment or administrative – e.g. penalties imposed by a financial supervisor) and contractual responsibility (arising from agreements and managerial contracts). [Gregg P., Jewell S., Tonks I., 2013]. Any legal sanctions are authorized for use on the basis of legal acts and employment regulations, whereas moral sanctions are usually determined by deontological codes.

The subprime financial crisis has demonstrated a widespread occurrence of managers’ moral hazard combined with little accountability [Globalny..., 2009, Krugman 2009, 2012, Santoro, Strauss, 2012]. It was possible due to the widespread use of the ‘right to errors’ in executive activities [Masiukiewicz, 2011a,b]. The application of legal consequences for errors or for causing excessive risk of loss, were rare in the financial markets; whereas profits were rewarded with ridiculous bonuses – which could blunt the sense of responsibility [Schaefer-Munoz, 2010, Masiukiewicz, 2011b]. Faulty motivational schemes for bank managers, favoring short-term profits and not linked to the system of financial liability, were an important factor in the financial crisis. [Masiukiewicz P., 2011b, Lucchetti A., Rappaport L., 2010]. In addition, according to a recent research, high salaries were not always linked with the highest results in the banking system. [Folwarski M., Kil K., 2013].

2. Responsibility and the right to errors

In practice, managers use the principle of the right to errors. This is particularly true for those who have tendencies to take excessive risk and other behavioral dysfunctions. [Masiukiewicz, 2011b]. According to various analyses, the following pejorative types of behavioral preferences can be distinguished among the top-managers of large institutions [Dec, Masiukiewicz, 2013]:
Responsibility of bank managers

- appetite for high risk to satisfy personal ambition, receive high bonuses, etc.,
- abuse of the right to errors combined with civil liability insurance (from liability for decisions taken) – giving a sense of impunity,
- self-confidence and infallibility combined with ineffective corporate governance and state supervision,
- tendency to circumvent the law in the name of higher business goals,
- low business ethics,
- awareness of the strength of support for the manager (from the owners, politicians, etc.), instead of the professional and ethical requirements.

Many managers managed to avoid liability (also during the recent financial crisis). Usually, the only consequence was the loss of positions without giving reasons of dismissal. Members of the supervisory boards making such decisions were sometimes related to the management and co-responsible for wrong decisions. In this model of solving the problem ethics were lost and favorable conditions for subsequent precedents of avoiding consequences were created. [Międzynarodowe..., 2010].

Table 1. Legal consequences for managers of financial institutions who led to large bankruptcies or scandals. Selected cases

<table>
<thead>
<tr>
<th>No.</th>
<th>Institution</th>
<th>Country – HQ</th>
<th>The form of cessation of activity</th>
<th>Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bernard Madoff Fund</td>
<td>USA</td>
<td>Bankruptcy</td>
<td>B. Madoff, the fund’s owner and president, was convicted for 150 years of imprisonment and forfeiture of property</td>
</tr>
<tr>
<td>2</td>
<td>Bear Sterns Cos. (hedge fund)</td>
<td>USA</td>
<td>Bankruptcy</td>
<td>Temporary arrest for 2 managing directors, civil lawsuit – acquitted</td>
</tr>
<tr>
<td>3</td>
<td>Barings Bank (including Barings Futures Singapore)</td>
<td>UK</td>
<td>Segmentation and sale to other banks</td>
<td>N. Lesson, Trader at Barings Futures Singapore, was sentenced for 6,5 years of imprisonment</td>
</tr>
<tr>
<td>4</td>
<td>New Castle Funds (hedge) connected with Galleon Fund</td>
<td>USA</td>
<td>liquidation</td>
<td>M. Kurland, the founder and CEO of NCF was fined USD 900K and sentenced to 27 months of imprisonment (extraordinary mitigation of punishment for collaborating on the Galleon bankruptcy)</td>
</tr>
<tr>
<td>5</td>
<td>Northern Rock Bank</td>
<td>UK</td>
<td>Nationalization and the continuation of the activities</td>
<td>FSA imposed GBP 504K fines on the Vice-President D. Baker, and GBP140K on the credit director R. Barclay and banned both from performing management functions in financial institutions</td>
</tr>
<tr>
<td>6</td>
<td>Societe Generale Bank</td>
<td>France</td>
<td>continuation of the activities</td>
<td>J. Kerviel, a trader, was sentenced for 4 years of imprisonment</td>
</tr>
</tbody>
</table>
Temporary arrest of the co-owner and chairman of the Supervisory Board, P. Bykowski. Criminal trial against 10 CEOs, members of the Executive and Supervisory Boards lasts for 9 years without a decision.


In the limited number of cases concerning the largest scandals and bankruptcies in the banking sector, particularly harsh sentences were usually given in the USA (table 1).

An example of a bank president who has not suffered the consequences of the loss incurred by his institution is Ch. Prince, former CEO of Citigroup Incorporation, who assumed the position in 2003. At that time the stock price was $47. Later, the bank has created a highly risky portfolio of assets and entered into the zone of losses in 2007, and the share price fell to $0.72. The President was paid $138 million for his efforts in the good period. He suffered no consequences for the disaster that happened in the bank and resigned in November 2007 [Masiukiewicz, 2011b]. In connection with the fines given to the directors of the Northern Rock Bank (table 1) M. Cole, chairman of the FSA, said that it is also a message for the financial market, how seriously the actions against top-managers in the sector are treated when the institutions exceed acceptable standards of functioning [Enrich, 2010].

The broad criminal activity of the CEO of Amber Gold as well as the low sentence for the failed Animex Bank (4 years of imprisonment without forfeiture of property and a trial lasting for 10 years) and many other examples demonstrate that the legal norms and court orders are not being executed for various reasons and that the inefficiency of the of justice is very significant in Poland. [Morawska, 2013, Masiukiewicz, 2011a].

| 7 | Staropolski Bank | Poland | Bankruptcy (the largest in Poland) | Temporary arrest of the co-owner and chairman of the Supervisory Board, P. Bykowski. Criminal trial against 10 CEOs, members of the Executive and Supervisory Boards lasts for 9 years without a decision |
3. The tightening of financial responsibility and remuneration regulations

The problem of tightening financial responsibility of managers was expressly outlined in the EU and the U.S. in the light of published guidelines and directives as well as in the light of the practice of financial supervisors. It is a kind of revolution in the approach to the managers’ responsibility. The U.S. government has introduced restrictions on the payment of dividends and salaries for managers of enterprises and banks benefiting from state aid based on the TARP program as a result of the crisis and the Dodd-Frank Act, among others, prohibited granting of bonuses that would encourage to take a large, short-term risk [McGrane, Lucchetti, 2011].

The European Commission has issued several documents governing the system of remuneration and responsibilities of managers. In 2009, the commissions has issued recommendations concerning the remuneration of directors of listed companies on the regulated market (No. 2009/385/EC) and the Recommendation on remuneration policies in the financial services sector (No. 2009/384/EC). They recommend, among others, binding of bonuses to long-term results, while advising that the severance package in the event of early termination of a contract should not exceed two years’ basic salary. In cases of termination due to unsatisfactory results severance packages should not be paid in principle.

The Directive on the supervisory review of remuneration policies obliged credit institutions to introduce remuneration policies that are consistent with the business strategy, objectives, values and long-term interests of the institution [Directive..., 2010]. The most important provisions of the Directive, which was implemented in Poland, include:

- the management body (supervisory) should adopt the general principles of the remuneration policy and periodically assess the implementation of the remuneration policy,
- in large institutions remuneration committees should be set up, – fixed and variable components of remuneration should be balanced so as to allow the operation of a fully flexible variable remuneration policy, including the possibility to pay no variable remuneration,
– payments for early termination of the contract should reflect performance achieved over longer time, and adopted rules should not reward poor results,
– at least 50% of variable remuneration should consist of shares or similar titles or related instruments or equivalent non-cash instruments in the case of a non-listed credit institution,
– at least 40% of variable remuneration components must be spread over (for payments) a period of not less than three to five years,
– the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the credit institution as a whole, and justified according to the performance of the credit institution, the business unit and the individual concerned. Also, in case of worsening of results, previous bonuses may be taken back,
– staff are required to undertake not to use personal hedging strategies or remuneration – and liability-related insurance.

As a result of implementation of the principles listed above the clawback arrangements, governing the return of previously earned bonuses as a part of contractual liability, have been introduced in financial institutions. Clawback arrangements have been used in Lloyds Bank in 2013 to revoke bonuses paid to 13 directors in the total amount of GBP 1,45m. due to loss of GBP 3,2 bn. incurred by the bank as a result of excessively risky sale of insurance. They were also used in the HSBC Bank in Mexico for drug cartels and terrorist organizations money laundering.

Further proposals of tightening the sanctions for bank top-managers are being discussed in the EU as a result of the Liikanen Report. The report includes, among others, the following proposals: special tests in the selection of the management board and supervisory board, legal framework for motivational systems in conjunction with the financial liability of the Management Board, sanctions in the form of a ban from working in any financial institutions and taking back previously paid remuneration [High-level Expert..., 2012].

An attempt to introduce a pan-European regulation in this regard is controversial. In Poland it is necessary to consider repealing, or at least amending, so called Chimney Law so as to ensure a differentiated approach to different firms depending on their profile and risks associated with their operations. The Polish Law has not defined all notions e.g. of ‘a variable remuneration’ or ‘a person having significant influence on risk’. The Polish regulations also need
to take into account the proportionality principle e.g. exclusion of small banks and cooperative banks from certain provisions of the quoted EU directive regulating remuneration policies.

The author believes that any potential regulations governing the motivational systems should be defined on the national level and use economic instruments (such as taxes) and not administrative standards.

4. The use of sanctions in practice. Polish example

4.1. Moral consequences

The palette of instruments containing moral consequences is not large, but they may be very severe. Measures such as informing the public about criminal activity or about bringing companies to bankruptcy and non-payment of obligations seem to be effective. Commonly known instruments of this kind include publishing of lists of unreliable debtors (including judicial list), institutions violating the Law (the Polish Financial Supervision Authority list), or an international blacklist of socially irresponsible firms (by the UN) etc. A judicial ban on economic activity is a moral and legal punishment at the same time. Moral sanctions imposed by professional or industry business ethics committees are also important. The role of the media in this area seems to be invaluable as well.

Table 2. Banks’ ethics in the light of Pentor International Research

<table>
<thead>
<tr>
<th>No.</th>
<th>Banks act ethically towards their clients</th>
<th>Public opinion in %, N = 1007</th>
<th>Entrepreneurs in %, N = 300</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Strongly agree</td>
<td>4,0</td>
<td>4,0</td>
</tr>
<tr>
<td>2</td>
<td>Rather agree</td>
<td>22,0</td>
<td>26,0</td>
</tr>
<tr>
<td>3</td>
<td>Neither agree nor disagree</td>
<td>37,0</td>
<td>37,0</td>
</tr>
<tr>
<td>4</td>
<td>I rather disagree</td>
<td>17,0</td>
<td>19,0</td>
</tr>
<tr>
<td>5</td>
<td>I strongly disagree</td>
<td>6,0</td>
<td>11,0</td>
</tr>
<tr>
<td>6</td>
<td>I do not know, it’s hard to say</td>
<td>14,0</td>
<td>3,0</td>
</tr>
<tr>
<td>X</td>
<td>Average rating in pts.</td>
<td>3,2</td>
<td>2,9</td>
</tr>
</tbody>
</table>


Financial supervision authority may sanction financial institutions CEOs and members of management boards in the form of official rebuke or by denying a positive recommendation for executive positions. It also has a legal right
to call the supervisory board to dismiss a member of the management board. Practice proves that bank managers punished by the KNF have difficulties in finding positions in other financial institutions or need to take lower positions.

Important role in shaping ethical attitudes in the banking sector is played by the Code of Good Banking Practice (issued by the Polish Banks Association) and the activity of the Association’s Ethics Committee.

A research by Pentor carried out during the Subprime Crisis suggests that the banks in Poland are not particularly ethical towards their customers. The research was carried out among entrepreneurs and retail customers. The average score given by retail customers amounted to 3.2 pts. whereas the score given by entrepreneurs amounted only to 2.9 pts. (table nr 2).

4.2. Administrative and legal sanctions

Managers in Polish enterprises are subject to criminal, civil, administrative and contractual liability. For example, the Code of Commercial Companies (art. 585) clearly defines rather harsh sanctions for acting to the detriment of the company or incitement to such activities (against members of the management and supervisory boards, audit committee and receivers). Sanctions of this kind include fines and up to 5 years of imprisonment. A serious conflict of interest can occur if a company is a part of a holding and the management board makes a decision that is in line with the holding’s (owner) interests but against with the company’s interests. In such situation, the management board will justify its actions. In Poland there is no holding law. It has to be noticed that the notion of ‘acting to the detriment of the company’ is rather broad. It includes not only actions causing damage but also failure to act (e.g. not making a decision in the right time). In case of violation of the prohibition of competition as referred to in the Code of Commercial Companies, the Company may require compensation from the disloyal board member. Apparent bankruptcy, occurring in practice is subject to sanctions (art. 301 Criminal Code) as a kind of economic offense. If a person (e.g. a CEO) hinders or limits satisfaction of the company’s (the debtor) creditors by defrauding the company assets or leads it to bankruptcy, is punishable by imprisonment. A ban from economic activity can also be imposed. The issue of criminal and civil liability requires a broader legal analysis. Practice of administrative liability is presented below in a wider perspective.

In this regard, the financial supervisor has broad powers against three types of enterprises: public companies, financial institutions and non-bank financial
intermediaries that are subject to the KNF’s supervision. The supervisor has a broad palette of sanctions available against the supervised institutions as well as financial sanctions (fines) against presidents and members of the management boards of all public companies (table 3).

Table 3. Scope of the PFSA sanctions against members of the boards of supervised financial institutions

<table>
<thead>
<tr>
<th>No.</th>
<th>Moral/legal sanctions</th>
<th>Lp.</th>
<th>Financial sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Reprimand in writing</td>
<td>1</td>
<td>Financial penalty of up to 3 gross salaries for managers of banks, insurance companies, investment funds</td>
</tr>
<tr>
<td>2</td>
<td>Suspension in the functions of the President / Board member</td>
<td>2</td>
<td>Financial penalty of up to 5 minimum wages in the economy for SKOK managers</td>
</tr>
<tr>
<td>3</td>
<td>Application to the supervisory board for the dismissal from office of the President / Board member</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Refusal to issue a positive opinion for the function of the President / Board member</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: own

Severe legal-organization sanction is the suspension of the President or a board member of a financial institution supervised by the PFSA. Financial penalties imposed by the PFSA on both public companies and financial institutions and their managers are constantly increasing (Table 4).

Table 4. The penalties imposed by the PFSA for the members of governing bodies, public companies and financial institutions

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of penalties imposed</th>
<th>Net value of the penalties in m PLN</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>12</td>
<td>0,70</td>
</tr>
<tr>
<td>2007</td>
<td>30</td>
<td>2,08</td>
</tr>
<tr>
<td>2008</td>
<td>55</td>
<td>4,03</td>
</tr>
<tr>
<td>2009</td>
<td>50</td>
<td>2,61</td>
</tr>
<tr>
<td>2010</td>
<td>51</td>
<td>5,40</td>
</tr>
<tr>
<td>2011</td>
<td>53</td>
<td>7,17</td>
</tr>
</tbody>
</table>

Including: penalties for management and supervisory boards over l. 2006–2012

|                                | 46 | –   |


The special law on aid to financial institutions in the event of a crisis situation (in force in 2010) imposed limitations on the remuneration policies in banks benefiting from the state aid (as defined in the agreement on the use of assistance). That law applied to bank executives and included the following restrictions: monthly salary of a board member could not exceed the average salary in the enterprise sector by more than twelve times, and additional components (e.g. bonuses) could not exceed the board’s member monthly salary.
by more than three times in a year. In the case of dismissal in connection with the nationalization of the institution – a board member was entitled to only one month check.

Special sanctions against managers of financial institutions were defined in the Polish recovery and resolution regulations. In the event of introduction of receivership or declaration of bankruptcy, the top-level managers are not entitled to any bonuses or severance packages arising from their contracts. In case of the bank’s bankruptcy its managers (not only at headquarters but also branch managers) are deprived of any compensation in the deposit-guarantee scheme.

In the light of the guidelines and directives of the European Union a significant increase of the financial consequences for the managers of public companies and financial institutions can be expected. However, this creates unequal conditions in comparison to other businesses.

Conclusions

In many countries, and especially in the financial sectors, the inadequate publicizing of consequences, low financial penalties, and lack of a mechanism of taking back previously paid bonuses in case of losses as well as incompetence and the excessive length of judicial proceedings have created the basis for the spread of the principle of the top-managers’ unrestricted right to errors, moral hazard and were one of the factors of the financial crisis.

Simultaneous increase of the managers’ financial responsibility and limiting the right to errors seems to be the appropriate direction of regulatory change. Also, J. Kornai’s principle of „too big to jail” should be abandoned.

Decisions of the European Parliament and of the Council of Europe, regarding regulations in the area remuneration of managers of credit institutions have been introduced and may assure greater transparency and adequacy of remuneration in relation to the long-term effects. In the banks’ stakeholders assessment, these will rather be ethical solutions. There is also a new approach to the financial responsibility of managers (the clawback arrangement). In different countries there are different motivational systems resulting from the business experience, management culture or traditions concerning the methods of remuneration.

In Poland, the condition of responsibility in subjective and attributable terms leaves much to be desired.
In particular, the following problems require further research and proposals for solutions:

- greater penalization and tightening financial sanctions,
- greater precision in specifying the managers’ responsibility in contracts, including defined financial liability,
- improving the judiciary system (the duration of criminal trials requires separate analysis and conclusions de lege ferenda),
- solutions concerning the financial liability of managers at financial institutions should be extended to the shadow banking sector, and some elements (e.g., deferred payment of bonuses) to all sectors of the economy.

National and the EU regulators still have the dilemma of how much regulations and how much self-regulation and ethics in business. In the process of harmonization of EU regulations the principle of proportionality, i.e. less regulation for small and micro enterprises, is important.

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