

File ref. no. 9609/18/879

Date of decision: 2018-04-17

File reference numer: Wa XII NsRejKRS 9609/18/879

KRS [National Court Register number] 353754

COPY

Decision

17 April 2018

The District Court for the capital city of Warsaw in Warsaw

XII Commercial Department of the National Court Register

Judge: Ewa Maciejewska

Following the consideration, at a closed door session on 17 April 2018,

of the case carried out on the basis of a motion filed by the Minister of Foreign Affairs with the participation of the Open Dialog Foundation

regarding suspension of the Foundation's Management Board and appointment of a compulsory administrator

as a result of the Applicant's complaint against the decision of the Court Referendary of 7 December 2017, file reference number Wa XII Ns Rej KRS 73508/17/997

has decided to:

1. dismiss the motion,
2. rule that the applicant and the participant should bear the costs of the proceedings related to their participation in the case.

Judge of the District Court Ewa Maciejewska

Senior court Secretary Małgorzata Pietrzak

Justification

On 25 August 2017 (according to the postmark date), Applicant - Minister of Foreign Affairs (hereinafter also referred to as 'Minister'), acting as the supervision authority, submitted a motion for suspension of the Open Dialog Foundation's Management Board (hereinafter referred to as 'Foundation' or 'Participant') and appointment of a compulsory manager for the Foundation.

In the justification of the motion, the Minister indicated that the submission of the motion became necessary due to ineffective expiry of the deadline referred to in Article 14 para. 2 of the Act on Foundations of 6 April 1984 and non-compliance of the Foundation's Management Board with the demand to remove from the websites, pages on community portals and other public websites, managed, owned or operated by the Foundation, and supporting the Foundation, information calling for illegal activities, including those addressed to the state authorities, and, in particular, actions calling for

non-payment of taxes, included in the publication of Bartosz Kramek, the Chairman of the Foundation's Board, posted on Facebook; a copy of the article has been attached to the motion (p. 482).

The Participant requested that the motion be dismissed, citing, inter alia, the absence of an effective request under Article 14 para. 1 of the Act on Foundations, non-violation of the law by the Foundation's Management Board, and failure to specify, by the Applicant, the law provisions, that allegedly had been violated (pp. 505- 511).

By decision of 7 December 2017, reference number Wa XII Ns Rej KRS 73508/17/997, the Court Referendary dismissed the motion in question.

The aforementioned decision was appealed on 20 December 2017 (according to the postmark date) by the Applicant requesting that the motion be granted (pp. 542- 543).

Having considered the case under Art. 398 22 § 2 and 3 of the Code of Civil Procedure in relation to Article 13 § 2 of the Code of Civil Procedure, the Court established the following facts:

The Open Dialog Foundation has been registered in the Register of Associations, Other Social and Professional Organisations, Foundations and Non-Public Health Care Establishments and in the Register of Entrepreneurs of the National Court Register under the KRS No. 353754.

Currently, the register indicates that a sole member of the Management Board of the Foundation is its president, Lyudmyla Kozlovska, while Bartosz Kramek is indicated in the register as a member of the Foundation's Board and its proxy. The Minister of Foreign Affairs fulfills the role of a supervisory body over the Foundation.

/ D: KRS file 353754

In July 2017, Bartosz Kramek published a post on his private page on the Facebook social network; the text was entitled 'Let The State Come To a Stop; Let's Shut Down The Government'. The publication includes, among others, the following theses:

- point 4. "It is worth considering an open and wide temporary action which would consist in abstaining from paying taxes and other budgetary receivables, for example, under the slogan I'm not paying for PiS. Of course, it can and should be thought over in detail. Let us remember that it is all about pressure — to force the government to repent, or change it in a peaceful way".

-point 8 "It is necessary that the leading PiS politicians and officers bear personal consequences; the goal of this measure is to induce social ostracism. With methods such as protests in front of houses (don't let Kaczyński sleep while he's destroying Poland!), or ubiquitous leaflets, posters and billboards exposing their hypocrisy and inferiority complex (including Kaczyński's statements of treacherous muzzles and scoundrels) reaching their families and neighbours on a daily basis. Maybe in front of Mr. Kaczyński's house in Żoliborz, one could place big posters with Lech Kaczyński's words about the need to respect the Constitution and judgements of the Constitutional Tribunal. The majority in PiS is insignificant, and strong pressure and discomfort in its parliamentarians' daily lives may cause them to break and cross over to the citizens' side. Almost from the beginning of Maidan, individual MPs were leaving Yanukovich's Party of Regions, and the final decision made by many of them to change the front has sealed the victory of the revolution".

/ uncontested circumstance

On 21 July 2017 and 23 July 2017, comments describing the current position and comment of the Foundation were published on the Foundation's official page on Facebook. The posts were supplemented by a note from Bartosz Kramek's private page, in a form of an attachment, covering his publication 'Let The State Come To a Stop; Let's Shut Down The Government' /D; printouts pp. 499, 500.

On 19 December 2017, the Minister of Foreign Affairs called on the Foundation's Management Board to immediately, i.e. no later than on 31 December 2017, remove from the websites, pages on social networks and other public websites, managed, owned or operated by the Foundation, information calling for illegal activities, and, in particular, those indicated in the publication by Mr B. Kramek entitled 'Let The State Come To a Stop; Let's Shut Down The Government' / D; the letter p.551

In response to the call of 19 December 2017, the Foundation pointed out, inter alia, that the publication by Bartosz Kramek had been posted on its author's private page and does not constitute a publication of the Foundation; at the same time, the Foundation requested that legal norms, which, in the Minister's opinion, have been violated by the Foundation's Management Board, be indicated.

/ D; the letter p.552-553.

In response to the Foundation's letter, the Minister did not specify particularly which legal norms had been violated by the Foundation's Management Board; he only referred to the theses formulated in points 4 and 8 of the critical publication, assessing that they constitute incitement to stop paying taxes and to harass people.

/ D; p. 554-555

In light of the above, the Court ruled as follows:

The motion filed does not deserve being granted.

According to Art. 14 (1) and (2) of the Act on Foundations of 6 April 1984 (consolidated text: Polish Journal of Laws of 2016, item 40), (hereinafter referred to as 'Law on Foundations'), if the action of the foundation's management board significantly violates provisions of the law or provisions of its Charter, or is inconsistent with its objective, the supervisory body may set an appropriate deadline to remedy these defects in the activities of the management board, or may request that the change of the foundation's management board be replaced within the prescribed period.

Only after ineffective expiration of the deadline or in the event of continued and persistent activity of the Foundation's management board, which is contrary to the law, the Charter or the objective of the foundation, may the authority apply to the court for suspension of the foundation's management board and appointment of a compulsory manager.

In the present case, in the opinion of the Court, the conditions laid down in that provision were not met.

It should be emphasised that the Minister, when sending a demand to the Participant's Management Board on 19 December 2017, did not specify which provisions of the law had been infringed by the Board. And yet, it is the fact of a violation of specific legal provisions of the law that gives the basis for the supervisory body to send a demand specified in Art. 14 para. 1 of the Act on Foundations.

Following the receipt of the demand, the Management Board must, after all, know exactly what the supervisory body is accusing them of and which legal norms, in the opinion of the supervisory board, are being violated by them. It is important that the management board itself can respond to the allegations and make a rational decision on whether there is an obligation on its part to comply with the demand of the supervisory authority.

The court does not share the opinion presented in the statement of the supervisory body representative, presented in the letter addressed to the Foundation's representative that 'it is inappropriate' to explicate to a professional proxy, the provisions of laws which penalise the activities incriminated to the Foundation's management board (the letter, p.555).

In the demand addressed to the Foundation's management board, the management board should receive determined legal norms which - according to the supervisory body - had been violated by them. The foundation is not obliged to use the services of a professional legal assistance.

In addition, it should be stated that the Applicant has not demonstrated unequivocally that the actions of the Foundation's management board itself, in the person of Lyudmyla Kozlovska, significantly violate the law.

The mere act of publishing, on the Facebook's Foundation's official page, of posts presenting the current comment and position of the Foundation, which was supplemented with an attachment with a note from Bartosz Kramek's private page containing his publication 'Let The State Come To a Stop; Let's Shut Down The Government' with the theses presented in the findings of the facts, cannot be considered as the action of the Foundation's management itself, which significantly violates the law.

Bartosz Kramek has never been a member of the Foundation's management board. Therefore, his own actions cannot be considered tantamount with the activities of the Foundation's management board.

At the same time, the fact that Bartosz Kramek is the Chairman of the Board and the Proxy of the Foundation, is of no relevance.

The Chairman of the Board is not a body authorised to represent the Foundation, and it is possible actions of the Board of the Foundation, and not the Chairman of its Board that may give the supervisor the right to exercise the powers set out in Article 14 of the Act on Foundations.

A proxy is a representative who represents the Foundation solely in matters related to its business - when carrying out its business activity (Art. 109 § 1 of the Civil Code). The actions incriminated by the Applicant to the Participant's Management Board, do not fall within the scope of its business activity.

The fact that the information about Bartosz Kramek's function in the Foundation is indicated on his private page on Facebook as part of the information about the user of the page cannot directly prove in any way that the posts published on this page represent the position of the Foundation itself.

Even if we assume that the publishing of the content of B. Kramek's study 'Let The State Come To a Stop; Let's Shut Down The Government' on the Foundation's official page is equivalent to the activity of the Foundation's Management Board, in the opinion of the Court, there are still no unequivocal grounds to consider such action, a significant violation of legal

provisions within the meaning of Art. 14 §1 of the Act on Foundations.

It is because mere presenting of reflections regarding the possibility of conducting a temporary suspension of tax payment cannot be considered a serious violation of the law.

Also, the presentation of ideas about forms of civic protests against representatives of the currently ruling party cannot be considered to be such a violation.

The theses, expressed in the critical publication, questioned by the Applicant (points 4 and 8 – see the findings of the facts) fall within the constitutionally guaranteed freedom of speech (Article 54 of the Constitution).

The Constitution also provides citizens with the opportunity to organise gatherings in public places where they can manifest their political views (Article 57 of the Constitution).

It can be noted that the Foundation itself, in its post of 23 July 2017 on Facebook, clearly states that all actions that can be taken as part of the protest should be 'firm but they should not include violence, aggression is not the way" (c. 500)

In the light of the above, the motion in the present case had to be dismissed.

Referring to the Participant's requests regarding the admission of evidence from the hearing of the participants of the proceedings and testimony of the witness Bartosz Kramek, the Court decided that there is no need to take the requested evidence, as the documents attached to the motion fully allow the case to be resolved at a closed door session.

Therefore, on the basis of the provisions cited, it was ruled as stated in the operative part of the decision, whereas the costs of the proceedings were settled on the basis of Article 520 § 1 of the Code of Civil Procedure.

Judge of the District Court Ewa Maciejewska

[Rectangular stamp:] Senior Court Secretary Małgorzata Pietrzak

[Round seal:] District Court for the Capital City of Warsaw in Warsaw, *2*

z/ 1. Annotate the decision,

2. A copy of the decision should be served to the representatives of the Applicant and the Participant without instruction.

Judge of the District Court Ewa Maciejewska