СТАТЬИ

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A simple joint-stock company: An innovative model of protection for creditors and investors in Poland*

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The article discusses the most important features of a new type of company in Poland, namely the simple joint-stock company (SJSC) introduced to the Commercial Companies Code by the bill of 19 July 2019. The new company form combines the limited liability of shareholders with a large degree of flexibility, both in terms of shaping mutual relations between shareholders and the company's management system. There are no significant limitations to the structure of preference shares. Shareholders can choose between different board models. SJSC is characterised, on the one hand, by a lack of excessive formalities associated with its establishment, and on the other, by an agile mechanism to protect the company's creditors based on a liquidity test. The legal capital concept was abandoned; work and services are permitted as in-kind contributions. Ownership rights in a SJSC are incorporated in dematerialised shares, and the use of them in private trading raises a number of new legal problems. This study focuses, among other things, on the protection of investors purchasing company shares under the provisions of the MIFID II Directive (Markets in Financial Instruments Directive). Considering the sociological foundations of the changes in corporate law taking place in Poland, the author notes that projects based on modern technologies, in particular information technologies, are becoming a prevailing component of the modern economy. The use of these technologies leads to far reaching changes in the structure of individual market segments (market destruction). Current business models are gradually losing relevance and are being replaced by dynamically developing technology companies. An example is the slow decline of traditional linear television and the emergence of enterprises offering so-called "streaming" of selected audiovisual content over the Internet directly to consumers (for example, Netflix), or a reduction in the distribution of music content on CDs for music playback by online integrators (for example, Spotify). However, technology companies have their own far reaching specifics. They are based not only on the latest technological solutions, but also on the visionary entrepreneurship of their founders

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regarding the potential market applications of these technologies (Bill Gates, Steve Jobs, Jeff Bezos and others). It is safe to say that without the charismatic and visionary personalities of founders, companies like Apple or Amazon would not have appeared as we know them. This is due to the fact that recognizing the potential needs of consumers that can be met with new technological solutions requires creativity that is characteristic of geographical explorers or inventors, and not stereotypical entrepreneurs. Human capital — knowledge and entrepreneurship are beginning to dominate the market economy in the modern world.

Keywords: simple joint-stock company, company law reform, creditor protection, investor protection, investment services.

Introduction

The provisions on a simple joint-stock company (hereinafter SJSC) were introduced to the Code of Commercial Companies (hereinafter CCC) under the Act of 13 June 2019[1]. The aforementioned amendment to the CCC was dictated by the need for a deeper reform of the regulations on non-public companies in the interests of start-ups — young, rapidly developing companies operating on the basis of modern technologies. This need results primarily from the fundamental changes taking place in the sphere of economic turnover as a result of the digitization process and the new business models related to it as well as specific forms of financing companies.

The subject of this article is to present the basic features of a SJSC as a new type of company introduced into the Polish CCC. In particular, this study focuses on the most basic practical problems related to the functioning of a new type of capital company — protection of creditors and investors purchasing shares in a SJSC. First of all, the issue of resignation from the share capital of the company for the protection of creditors by means of the solvency test was analysed. Another important issue is the protection of investors purchasing the company's shares, which have been entered in the register of shareholders kept by an investment company (brokerage house), and in particular their protection under the provisions of the MIFID II Directive (Markets in Financial Instruments Directive)[2].

1. Rationale for a new type of company

Projects based on modern technologies, in particular information technologies, are becoming a dominant element of the modern economy. The use of these technologies leads to far-reaching changes in the structure of individual market segments (market disruption). The current models of running a business are slowly becoming irrelevant and are being replaced by dynamically developing technology companies. An example is the slow decline of traditional linear television and the emergence of enterprises offering the so-called "streaming" of selected audiovisual content via the Internet directly to consumers (e. g. Netflix), or the decline of distribution of music content on CDs for music playback by online integrators (e. g. Spotify). However, technology companies have their own far-reaching specificity. They are not only based on the latest technological solutions, but also on the visionary entrepreneurship of their founders regarding the potential market applications of these technologies (Bill Gates, Steve Jobs, Jeff Bezos and others). It is safe to say that without the charismatic and visionary personalities of the founders, companies

[1] Ustawa z dnia 19 lipca 2019 r. o zmianie ustawy — Kodeks spółek handlowych oraz niektórych innych ustaw // Dziennik Ustaw. 2019. Poz. 1655. Available at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190001655 (accessed: 01.11.2020) (all other Polish legal acts referenced can be accessed through this database).

[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

such as Apple or Amazon would not have come into being as we know them. This is due to the fact that recognising the potential needs of consumers that can be satisfied by new technological solutions requires creativity, typical of geographic explorers or inventors, rather than stereotypical entrepreneurs. Human capital — knowledge and entrepreneurship begins to dominate the market economy in the modern world[3].

Unfortunately, human capital is only half the battle. Projects based on innovative technologies require huge financial outlays for their development. In a highly competitive market, the technological advantage itself and a unique idea for its use are a relatively short-term advantage. The only way to achieve a more sustainable competitive advantage is to rapidly and radically increase the scale of operations of such a company[4]. Today, no one remembers many search engines that used to compete with each other on the market (e. g. Yahoo), which today is dominated by Google. Similarly, no one remembers Myspace in the era of Facebook's dominance. However, rapid increase of the scale of operations in order to escape competition is an extremely costly strategy — requiring huge financial outlays — which in turn entails the involvement of financial investors.

The strategy of the market "blitzkrieg" and the rapid increase in the scale of operations applied by technology companies also sheds new light on the definition of a start-up, useful for further considerations — it is not just about a newly founded company, but about a company with an innovative business model that will rapidly expand its scale of operations based on new technologies, the unique economic idea of the founders and considerable financial capital resources.

The understanding of a modern start-up outlined above entails new dynamics in terms of the distribution of interests of entities involved in the functioning of such a company and the shape of contractual relations between them. The managers-founders of such a company guarantee the achievement of a specific unique economic idea. Therefore, despite the significant financial needs of the project, they strive to maintain control over the company despite successive share issues. Start-ups, due to their light asset structure and early stage of business development are rarely financed to a large extent with debt. The key managers are significantly remunerated with the company's shares due to the fact that most of the company's financial resources are spent on business development. In turn, investors of such companies agree to increased risk and a long-term investment horizon in exchange for various types of control mechanisms in relation to managers and founders. It is important, however, that each technology company of this type has its own specificity, which entails a unique shape of contractual relations between its founders, investors and managers — largely a function of the type of business and its financial needs[5].

The high level of risk, the significant level of the required financial commitment and the long-term nature of investing in start-up companies require a specific form of financing their activities. In their search for sources of external financing, technology companies reach for the help of specialised venture capital funds, which can diversify their investment risk and secure their interests through subtle contractual relations. Therefore, modern technology companies do not first of all seek financing by way of stock exchange debut.

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[3] Cf. in this regard classic volumes, e. g.: *Horowitz B.* The Hard things about hard things. New York: Harper Business, 2014. P. 243 et seq.; *Thiel P.* Zero to One: Notes on Startups, or How to Build the Future. New York: Crown Business, 2014. P. 23 et seq.; *Christensen C. M.* The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail. Boston: Harvard Business Review Press, 2016. P. 97 et seq.

[4] *McAfee A., Brynjolfsson E.* Machine, Platform, Crowd. Harnessing Our Digital Future. New York; London: W. W. Norton & Company, 2017. P. 9 et seq.

[5] See: *McCahery J. A., Vermeulen E. P. M.* Venture capital, IPOs and Corporate Innovation // Lex Research Topics in Corporate Law & Economics Working Paper. 2013. No. 4. P. 3 et seq. Available at: http://ssrn.com/abstract=2298315 (accessed: 01.12.2021).

Stock market investors have too short-term investment horizon for such companies[6]. As a result, technology companies decide to go public at a much later stage than was the case in the 1990s. In this context, corporate and company relations between venture capital funds and technology companies and their founders become even more important[7].

Modern technology companies also show some specificity in terms of the type of assets on which they operate. The balance sheets of these companies are characterised by a low value of fixed assets in relation to the scale of activity. Most often they operate on the basis of intangible assets (asset light activity)[8]. As vividly presented in the literature: Uber, the world's largest taxi corporation, does not own cars; Airbnb — the world's largest travel company — does not own the properties that its customers use, and Facebook and Youtube do not produce content that their customers "consume"[9]. At the same time, even the rights to the software managing the Internet platform of such a company do not have such great value in isolation from clients, i. e. the masses of users who decide to use its services. A significant part of start-up funds is therefore devoted to dynamic customer acquisition — whether through marketing activities or through acquisitions of other companies with a similar profile. The assets of such companies rarely provide greater security for their creditors. Its liquidation value is not significant in comparison with the scale of operations of these entities.

In the light of the features of a technological start-up outlined above, it is easy to indicate those features of Polish regulations regarding non-public companies that generate the most problems. Firstly, there are restrictions on the freedom of contracts in the scope of shaping the articles of association or statutes resulting from, *inter alia*, a principle of severity of the statute of a joint-stock company, preventing flexible shaping of corporate relations between founders and financial investors. Secondly, the lack of incorporation of the share rights of the limited liability company in securities facilitating the issue and trading of these rights. Thirdly, a prohibition on contributing work and services to the company. Fourthly, and finally, basing the system of protection of the company's creditors on the institution of share capital. It should be pointed out that the above-mentioned difficulties in organising business activities of a technological start-up based on the dominant model of a non-public company are not specific to Poland only, but are perceived with varying intensity in most countries of continental Europe[10]. It is worth emphasising that the investment risk related to modern technological projects completely excludes in practice the use of partnerships in this area. The structure of partnerships does not show the above-mentioned disadvantages, however, it also assumes unlimited liability of at least some of the partners[11].

The provisions on a SJSC are an attempt to solve the problems outlined above. The basic constructional features of a SJSC render it a peculiar hybrid legal structure — it is supposed to combine the limited liability of partners for the company's obligations with a high degree of flexibility, both in terms of shaping mutual relations between partners and the management system of such a company[12].

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[6] *McCahery J. A., Vermeulen E. P. M.* Venture capital, IPOs and Corporate Innovation.

[7] *McCahery J. A., Vermeulen E. P. M.* New private equity models: How should the interests of investors and managers be alighed? // The Journal of Financial Perspectives. 2015. Vol. 3, iss. 1. P. 5 et seq.

[8] *McAfee A., Brynjolfsson E.* Machine, Platform, Crowd. P. 6 et seq.

[9] Ibid.

[10] *Kuntz T.* Gestaltung von Kapitalgesellschaften zwischen Freiheit und Zwang. Tübingen: Mohr Siebeck, 2016. S. 3 et seq.

[11] Construction of a limited partnership with the participation of a limited liability company as a general partner, also does not seem to be a rational solution due to the complicated legal structure.

[12] Ibid.

2. A simple joint-stock company as a hybrid legal structure

A simple joint-stock company is a hybrid legal structure — combining the features of partnerships and capital companies. The flexibility of shaping the relationship between shareholders and the lack of share capital makes it similar to partnerships. However, the limited liability of all its shareholders as well as legal personality combined with the presence of bodies will definitely bring it closer to capital companies, and the legislator rightly provided the place of the SJSC provisions in Title III of the CCC. The construction of the SJSC provides for many innovative and interesting solutions that may be a response to the needs of young, emerging technological projects in Poland. It is certainly a company simpler than a typical joint-stock company, although the regulations concerning it should be considered relatively complex. However, they enable flexible shaping of the organisational structure of this company, which can "grow" along with the changing needs of shareholders — from an extremely simple structure to a quite complex one.

The amendment to the CCC introduces a new form of a commercial company instead of attempting to reform the structure of one of the existing capital companies. The explanatory memorandum to the bill rightly indicates that the modification of the provisions relating to a joint-stock company is not possible, as they are subject to harmonisation by the relevant provisions of EU law[13]. In other words, the reform of a joint-stock company aimed at making this form of a company more flexible bounces off the provisions of EU law.

In view of the above, the solution that may enable the achievement of the outlined objectives is of course the reform of the limited liability company. The problem, however, is the remaining significant scale of changes needed to adapt this legal form to the needs of modern start-ups, the introduction of which could be a problem for many thousands of limited liability companies already operating on the market. The legitimate assumption of the legislator was, therefore, to "avoid any form of destabilisation of turnover for those ventures that still successfully use the traditional form of a limited liability company"[14]. Relatively quick introduction of changes necessary for technological companies to the provisions on limited liability companies would require the introduction of far-reaching multivariation within the structure of the limited liability company. In fact, this would lead to the functioning of two very different types of a limited liability company in the market — new and old. Therefore, the introduction of a new form of company turned out to be a simpler solution.

3. Freedom of shaping relations between shareholders

A characteristic feature of the provisions concerning contractual relations between shareholders of a SJSC is the extensive freedom of contract. For example: the Act does not contain restrictions on the creation of share privileges. While the legislative work was still in progress, the draft contained a provision expressing the principle of the freedom to shape relations between shareholders. It was supposed to constitute a kind of reversal of the principle of the severity of the statute, which was expressly stipulated by the legislator in relation to a joint-stock company (Art. 304 § 3 and 4 of the CCC), but in practice it also affects the understanding of the freedom to shape articles of association of the limited liability company[15]. However ultimately, the legislator did not decide to explicitly articulate

[13] Draft act amending the act — Code of Commercial Companies and some other acts of 15.05.2018 (hereinafter referred to as the Draft) with explanatory memorandum (hereinafter Explanatory Memorandum). P. 6. Available at: https://legislacja.rcl.gov.pl/projekt/12311555/katalog/12507978#12507978 (accessed: 01.12.2021).

[14] Explanatory Memorandum. P. 9.

[15] Instead of many, see: *Tarska M.* Zakres swobody umów w spółkach handlowych. Warsaw: C. H. Beck, 2012. P. 95 et seq. — Cf. e. g. classic studies on the matter: *Szumański A.* Ograniczona wolność

the principle of freedom to shape the articles of association of a SJSC in a legal provision due to the risk of subsequent *a contrario* interpretation, which could erroneously lead to the conclusion that in a limited liability company there is no such freedom.

The provisions on a SJSC are therefore based on the need to ensure a lot of freedom in terms of shaping the mutual relations between the company's shareholders. This is mainly due to the disproportion of the financial potential between the company's founders and financial investors. It cannot be ruled out that sometimes some of the managers will contribute their work or services to the company, and the rest of the shareholders will contribute financial capital. Therefore, it seems that the partners of a technology company should be allowed a lot of freedom in shaping corporate relations. The point is that it should take into account the specificity of a given venture and the nature of partners.

It should be taken into account that companies operating in the field of new technologies require huge resources of financial capital for development allowing them to achieve an appropriate scale of activity in a relatively short period of time. Financial capital providers are often characterised by an insufficiently long-term investment horizon, which usually leads to underestimation of the value of the originators and founders of companies. Therefore, the parties should be allowed a wide range of contractual freedom in the scope of shaping the mechanisms of control over the company by shareholders. In particular, it is a question of the freedom to shape preference shares, which would allow the founders to obtain capital through subsequent share issues without the risk of losing control over the company.

Thus, the Act rightly does not provide for any restrictions on the preference of the SJSC's shares, which allows the founders of such a company to maintain control over it even in the case of multiple capital raising by issuing shares. Moreover, it is generally permissible to create silent shares as well as so-called founding shares which are special types of preference shares. The privilege resulting from the founding shares is that "each subsequent issue of new shares may not violate the specified minimum ratio of the number of votes attributable to these preference shares to the total number of votes attributable to all shares of the company" (Art. 300^{26} § 1 of the CCC).

The freedom to shape the content of the articles of association entails the need to maintain the non-public nature of the SJSC. The shares of this company may not be subject to organised trading within the meaning of the Act on Trading in Financial Instruments (Art. 300^{36} § 2 of the CCC), in particular on the regulated market. The admission of the SJSC shares to public trading would require a much greater standardisation of the structure of the shareholding rights of such a company in order to protect minority shareholders and take into account the applicable regulations of European Union Law. Meanwhile, the legislator's assumption is that the structure of the SJSC's share rights is adapted to the specifics of a given business venture, the participants of which are able to perceive the risks associated with acquiring share rights in a company with a non-standard structure of organisational relations.

4. Admissibility of contributions in the form of work or services

Paradoxically, for the development of companies operating on the basis of new technologies, the greatest importance is human capital — in particular the creativity and entrepreneurship of the people who create them. People not only invent and develop these technologies, but most of all find their most effective and useful application. Proper appreciation of the innovativeness and entrepreneurship of managers is therefore a neces-

umów w prawie spółek handlowych // Gdańskie Studia Prawnicze. 1999. Vol. 2. P. 411; Pyzioł W., Szumański A., Weiss I. Prawo spółek. Bydgoszcz: Branta, 2004. P. 519 et seq. and later studies: *Gasiński Ł.* Granice swobody kształtowania treści statutu spółki akcyjnej. Warsaw: Wolters Kluwer Polska, 2014. P. 107 et seq.

sary condition for creating a motivational ecosystem for technological start-ups. These features are the most important drive of economic growth nowadays. At the same time, however, these properties of entrepreneurs are extremely difficult to be accurately assessed — especially in the early stages of business development. Therefore, in a modern, non-public company, contributions in the form of work or services should be allowed. In Poland, it is also dictated by the low level of savings and accumulation of investment capital in the society, with a high level of knowledge and experience of Polish specialists — e. g. in the field of IT.

The provision of Art. 300^2 § 2 of the CCC states that any contribution of material value, including the provision of work or services, may be a contribution in kind. From the legal and comparative point of view, this is not a novelty, considering the experience of the British Company Limited by shares[16]. However, this does not change the fact that such a solution opens up many complex problems related to the valuation of such in-kind contributions, liability for the improper performance of an obligation to make these contributions, or trading in shares subscribed for in exchange for work or services. The framework of this study prevents a detailed analysis of this issue, but it will certainly require considerable work on the part of practice, doctrine, and law enforcement.

5. Lack of share capital — protection of creditors based on a modified liquidity test

According to the assumptions of the amendment, the structure of the SJSC is to be characterised, on the one hand, by the lack of excessive formalities related to its establishment, and, on the other hand, by a modern mechanism of protection of company's creditors based on the prohibition of providing benefits to shareholders that would threaten the company's solvency[17]. This means resignation from the minimum amount of share capital as an instrument of creditors protection. According to Art. 300^2 § 3 of the CCC, shares of a SJSC do not have a nominal value, do not constitute a part of the share capital and are indivisible.

The amendment introduces an innovative solution in this respect under the Polish law of commercial companies. However, it is not an institution alien to other European legal systems. As indicated in the Explanatory Memorandum, companies without a minimum share capital or with "symbolic" capital have been introduced by a number of European countries: since 2009, the minimum share capital of a French simplified joint-stock company (*Société par Actions Simplifiée — SAS*) is EUR 1; On 1 January 2017, the provisions introducing a SJSC (*Jednoduchá Spoločnosť na Akcie*) with a minimum share capital of EUR 1 entered into force in Slovakia; in Finland, since 2006, the rule is that shares in a limited liability company have no face value; in the Netherlands, the minimum share capital of a limited liability company (*Besloten Vennootschap — B. V.*) is EUR 1, in 2012; in Germany, the *haftungsbeschränkte Unternehmensgesellschaft* operates as a sub-type of limited liability company, also with a minimum share capital of EUR 1; a simplified limited liability company has been operating in Luxembourg since January 2017 (*Société à responsabilité limitée simplifiée — S. à R. L. S.*), the share capital of which should be in the range from EUR 1 to 12 thousand. The resignation from the institution of share capital as a mechanism of creditor protection is also a characteristic feature of companies operating in common law systems[18].

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[16] *Davies P. L.* Gower and Davies: The Principles of Modern Company Law. London: Sweet & Maxwell, 2008. P. 247 et seq.

[17] Explanatory Memorandum. P. 1 et seq.

[18] Ibid. P. 2.

It is impossible to even briefly describe the debate that in the doctrine of European law has been going around the institution of share capital as a mechanism for the protection of creditors over the past 20 years in this article[19]. Despite some advantages of this institution, the prevailing position seems to be that the costs of this model of creditor protection in terms of establishing and functioning of companies are higher than the benefits resulting from it. The above-mentioned legislative trends in individual European countries confirm this conclusion. It is indisputable that the high level of equity in the company is beneficial for creditors. From the legislative point of view, however, it is impossible to establish in a universal manner the minimum level of share capital that would effectively protect the creditors of the largest entities and at the same time would not constitute an excessive administrative barrier for establishing companies operating on a smaller scale. In practice, the appropriate level of equity of business entities is contractually determined between the company and its largest creditors (banks and bondholders) under covenants included in credit agreements or bond issue conditions.

Above all, however, the institution of share capital does not protect the company's creditors against insolvency due to losses incurred in the ordinary course of business of the company. The principle of real contribution of the share capital and maintenance of the share capital protects only the company's assets against its unauthorised return to the shareholders. In practice, most companies go bankrupt as a result of wrong decisions of their managers, and not the return of contributions to shareholders. In order to protect creditors against losses resulting from operating activities, much more sophisticated legal instruments are required — combining a minimum level of equity with supervision over the quality of assets of such a company and the obligation to recapitalise it in a crisis situation — provided for by the Capital Requirements Directive (CRD IV Directive) and the Capital Requirements Regulation (CRR Regulation) for financial institutions[20].

It also seems that the institution of share capital is rooted in the vision of business activity largely based on fixed assets — e. g. machinery and real estate — with a measurable liquidation value in the event of the company's bankruptcy. In the era of business activities largely based on intangible assets — e. g. internet platforms and the clientele related to them — assets contributed to the company often do not increase the liquidation value of the company's assets in the long term. The basic expense for this type of business ventures is increasing the scale of operations through mass and paid acquisition of customers. This can be done through marketing, but also by taking over competing platforms or paying various rewards to newly acquired clients. The clientele, however, is not a good from which creditors can satisfy themselves in the event of the company's insolvency.

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[19] See e. g.: Report of the High Level Group of Company Law Experts, *A Modern Regulatory Framework for Company Law in Europe* (The Winter Report), Brussels, 4 November 2002. Available at: https://ecgi.global/sites/default/files/report_en.pdf (accessed: 20.11.2020); *Mulbert P. O., Birke M.* Legal capital: Is there a case against the European legal capital rules? // European Business Organisation Law Review. 2002. No. 3. P. 698; *Kraakman R.* et al. The Anatomy of Corporate Law: A Comparative and Functional Approach. Oxford: Oxford University Press, 2004. P. 115 et seq.; *Kubler F.* A comparative approach to capital maintenance: Germany // European Business Law Review. 2004. No. 5. P. 1031; *Kahan M.* Legal Capital Rules and the Structure of Corporate Law: Some Observations on the Differences between European and US Approaches // Capital Markets and Company Law / eds K. Hopt, E. Wymeersch. Oxford: Oxford University Press, 2003. P. 145 et seq.; *Schön W.* The future of legal capital // European Business Organization Law Review. 2004. No. 5. P. 429; *Rickford J.* Reforming capital — Report of the Interdisciplinary Group on capital maintenance // European Business Law Review. 2004. No. 15. P. 919 et seq.; *Ferran E.* The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the EU // ECGI Law Working Paper. 2005. No. 51. P. 1–31; *Armour J.* Legal capital: An outdated concept? // European Business Organization Law Review. 2006. No. 7. P. 5 et seq.

[20] Directive 2013/36/EU [2013] // OJ L176/338; Regulation EU No. 575/2013 [2013] // OJ L176/1. See more: *Moloney N.* The 2013 Capital Requirements Directive IV and Capital Requirements Regulation: implications and institutional effects // Zeitschrift für öffentliches Recht. 2016. Bd. 3. S. 385 et seq.

It is also worth mentioning that the market practice in Poland has been successfully testing the functioning of capital companies without share capital for a long time. It is difficult to treat PLN 5000, which is the amount of the minimum share capital in a limited liability company as the level of equity capital that protects the creditors of the entity conducting even the smallest business activity. The problem, however, is that in this form the structure of the provisions on the limited liability company seems to be a legislative misunderstanding. Its structural core is precisely the share capital, which was lowered to grotesque levels by the arbitrary decision of the legislator, without establishing alternative mechanisms for the protection of creditors.

The protection of creditors of a SJSC was essentially based on the so-called solvency test. According to Art. 300^{15} § 5 of the CCC, "the payment to the shareholders may not lead to the loss by the company, under normal circumstances, of the ability to meet its due pecuniary obligations within 6 months from the date of payment". The amount of share capital is not specified in the articles of association. The provisions on amendments to the articles of association do not apply to changes in the amount of share capital. The legislator seems to assume that for legal transactions involving technological start-ups, protection of creditors has never been a significant legal problem due to common knowledge that companies of this type operate on the basis of a very low level of fixed assets in the balance sheet[21]. At this point, it can only be concluded that the shape of the solvency test seems to be a key point in the discussion on the SJSC creditors protection, and not the problem of lack of share capital.

The structure of the share capital provided for in the SJSC is rather informative for the creditors as to the scale of the company's business venture, as there is practically no minimum amount of this capital (PLN 1 — Art. 300^3 § 1 of the Act) and the funds covered by it may, in principle, be returned to shareholders (Art. 300^{15} § 2 of the Act). The share capital is allocated to the contributions in cash and in kind, subject to Art. 14 § 1 of the CCC (Art. 300^3 § 1 of the Act). This means that contributions to share capital may not be related to work or services — i. e. they may be contributed to the company to subscribe for shares, but may not increase the amount of the share capital. The amount of share capital therefore serves as a measure that reveals to creditors the value of "hard" contributions made to the company. The amount of the share capital is not specified in the articles of association, and the provisions on amendments to the articles of association (Art. 300^3 § 2 of the Act) do not apply to changes in the amount of share capital.

6. Form of shares and trading

Technological companies at an early stage of development show a significant need for financial capital necessary to dynamically increase the scale of operations. A modern non-public company should therefore be able to use a wide range of various financial instruments to raise capital. This applies in particular to shares. Companies of this type rarely have high creditworthiness due to the initial stage of activity and a "light" property structure, so they have to turn towards financing with shares and hybrid debt instruments (e. g. bonds convertible into shares). For this purpose, institutions such as the equivalent of a conditional increase in capital and authorised capital are necessary and important, as they enable the issue of financial instruments convertible into shares (subscription warrants, convertible bonds) and easy construction of management option programs based on the company's shares. The SJSC regulations provide for both a conditional share issue

[21] *Królak J.* Start-upy bronią swojej spółki // Puls Biznesu. 2018. Available at: https://www.pb.pl/start-upy-bronia-swojej-spolki-934427 (accessed: 01.12.2021).

(Art. 300[114] of the Act) and an authorisation to issue shares by the management board modelled on the issue of shares within the authorised capital (Art. 300[110] of the Act).

Although non-public companies usually take the form of companies with a "closed" shareholder structure, in which the transferability of shares is subject to restrictions, trading in the share rights of such companies should in principle benefit from the facilitated transferability of securities. The incorporation of share rights in securities is also of great importance for the security of trading in these rights. First, trading in share rights falls within the scope of application of the rules of capital market law which have a protective function towards investors. It is worth mentioning that the shares in the limited liability company are not subject to these regulations as they are not securities. Second, it enables the construction of a mechanism to protect the *bona fide* purchaser of shares from unauthorised persons.

7. Mandatory dematerialisation

According to Art. 300[29] § 1 of the Act, SJSC shares do not have the form of a document. It should be assumed that they are dematerialised securities, which results from the reference to the traditional terminology of shares as securities. However, this provision provides for the complete and mandatory dematerialisation of SJSC shares. The abolition of bearer shares in the form of a document and their complete replacement with dematerialised shares seems justified, for example, due to the provisions of the Fifth Anti-Money Laundering Directive, which requires full disclosure of the shareholding structure of all companies[22]. The complete elimination of registered shares in documentary form is more questionable. They provide the required transparency of the shareholding structure and are among the commonly used types of securities. On the other hand, in the age of digitisation, the dematerialisation of securities is an inevitable direction of development of securities institutions. The end of traditional securities in the form of a document is thus a foregone conclusion.

Pursuant to Article 300[30] § 1 and Article 300[31] § 1 of the Act, shares are subject to registration in the register of shareholders. The register of shareholders is kept by: an entity authorised to keep securities accounts under the Act on Trading in Financial Instruments, or a notary public. The tasks of the entity keeping the share register include ensuring compliance of the number of shares registered in the register with the number of shares issued and making entries of data changes.

The acquisition of shares or the establishment of a limited property right on it takes place upon entry in the register of shareholders indicating the purchaser, pledgee or user, as well as the number, type, series and numbers of shares purchased or encumbered (Art. 300[37] § 1 of the Act). A person entered in the register of shareholders is considered a shareholder towards the company (Art. 300[38] § 1 of the Act).

8. Protection of non-professional investors purchasing shares of a simple joint-stock company in the light of the MIFID II Directive

Despite the fact that a SJSC is structurally a "closed" capital company, the marketability of its shares remains the principle (Art. 300[36] § 1 of the CCC). This principle is har-

[22] Proposal for a Directive of the European Parliament and of the Council laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA of 17.04.2018. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20180417_directive-proposal-facilitating-use-information-prevention-detection-investigation-prosecution-criminal-offences_en.pdf (accessed: 01.12.2021).

monised with the relatively liberal requirements regarding the form of legal transactions involving the disposal of a SJSC shares. The disposal or encumbrance of these shares should be made in a documentary form, otherwise null and void (Art. 300^{36} § 4 of the CCC). This opens the way for trading in a SJSC shares based on contracts concluded through the exchange of e-mail messages, text messages or other electronic communicators, including the so-called smart contracts based on blockchain technology, i. e. specific computer programs that automate trading in digital goods within a distributed, decentralised database. Theoretically, this enables the creation of electronic mechanisms for trading in a SJSC shares. Deformalising the acquisition of new issue shares also facilitates the acquisition of capital by a SJSC through the issue of shares in the form of crowdfunding. The provision of Art. 300^{105} § 3 of the CCC, concerning the form of the share subscription agreement, also provides for a documentary form. It seems, however, that in practice the transferability of a SJSC shares will be subject to the limitations provided for in the articles of association, which the law explicitly allows by specifying only the most common of these limitations — such as making the sale of shares conditional on the consent of the company (Art. 300^{39} of the CCC) or the pre-emptive right to acquire shares by other shareholders of the company (Art. 300^{42} of the CCC).

A specific limitation of the principle of the transferability of shares is the prohibition of admitting or introducing the SJSC shares to organised trading within the meaning of the provisions on trading in financial instruments (Art. 300^{36} § 2 CCC), i. e. to trading on the regulated market or in the alternative trading system[23] carried out on the territory of the Republic of Poland (Art. 3 (9) of the Act on Trading in Financial Instruments). The concept of an alternative trading system is used by the Polish capital market law as an equivalent of the EU MTF (multilateral trading facility) under Art. 4 (1) point 22 of the MIFID II Directive. For the safety of trading, Art. 300^{36} § 3 of the CCC, however, stipulates that dispositive legal acts performed in breach of this prohibition remain valid. The legislator's assumption was to leave trading in a SJSC shares only on the private market. The lack of standardisation of PSA share rights, manifested, for example, in the absence of restrictions on various share privileges, speaks in favour of limiting access to the free acquisition of these shares by non-professional investors.

It is permissible to organise electronic mechanisms for trading in a SJSC shares as long as they do not display the characteristics of an alternative trading system, i. e. they are not a multilateral system operating outside the regulated market associating offers to buy and sell financial instruments in such a way that transactions are concluded within this system, in accordance with specific rules and in a non-discretionary manner (Art. 3 point 2 Act on Trading in Financial Instruments). The key importance for considering a specific mechanism of trading in shares as an unacceptable alternative trading system will be the existence of rules (e. g. regulations) of this system and the non-discretionary nature of matching buy and sell offers of shares.

The investment company keeping the register of shareholders is not under the burden of obligations specified in Art. 25 MIFID regarding the method of providing investment services (conduct of business rules), in particular the obligation to obtain information about its client (KYC — know your client rule) and the obligation to recommend investment services and securities that are appropriate for a given client. Keeping a register of shareholders is not an investment service within the meaning of Annex I, section A of the MIFID II Directive, but at most an additional service within the meaning of section B of the said Annex to the MIFID II Directive. These obligations will only apply when the investment company provides an investment advisory service or management of a portfolio of

[23] An alternative trading system is a term that stands for MTF (multilateral trading facility) — according to Art. 4 (1) p. 23 of the MIFID II Directive.

financial instruments, the subject of which will be the SJSC shares. In practice, therefore, the protection of non-professional investors purchasing the SJSC shares will be based on: possible information obligations resulting from the Prospectus Regulation[24] in the case of a public offering of these shares, limiting the admissible mechanisms of trading in a SJSC shares to the non-public market, and regulation of brokerage distribution channels financial instruments essentially based on investment advice.

9. Flexible system of company bodies

The arguments presented above referring to the need to ensure high flexibility in shaping corporate relations between the shareholders of a modern non-public company remain fully valid in relation to the system of management and supervisory bodies. The decision on the shape of these bodies should depend on the company's shareholders, who are able to take into account the real needs of a given organisational structure resulting from the shareholding structure and the type of business. The provision of Article 300^{52} § 1 of the Act stipulates that the SJSC establishes either a management board or a board of directors. The monistic organ system is generally valued by foreign shareholders from Anglo-Saxon legal culture. The decision to establish a supervisory board alongside the management board was also left to the discretion of the shareholders (Art. 300^{52} § 2 of the CCC).

Conclusions

The new company form (SJSC) combines the limited liability of shareholders with a large degree of flexibility, both in terms of shaping mutual relations between the shareholders and the management system. There are no significant limits to the structure of preference shares. Shareholders have a choice between different board models. SJSC is to be characterised, on the one hand, by the lack of excessive formalities associated with its establishment, and on the other, by an agile mechanism to protect the company's creditors based on the liquidity test. The legal capital concept was abandoned; work and services are permitted as in-kind contributions. Ownership rights in the SJSC are incorporated in dematerialised shares. The operation of dematerialised shares in private trading raises a number of new legal problems. In this article I try to justify the need for a balanced interpretation of the provisions concerning the obligations of the entity keeping the register of shareholders, which must take into account both the need for the integrity of the data contained in the registry, but also the efficiency and effectiveness of making entries in it. The investment company keeping the register of shareholders is not under the obligation of Article 25 MIFID II regarding the method of providing investment services (conduct of business rules), in particular the obligation to obtain information about its client (KYC — know your client rule) and the obligation to recommend investment services and securities that are suitable for a given client.

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[24] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. Text with EEA relevance.

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Простое акционерное общество: инновационная модель защиты кредиторов и инвесторов в Польше*

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В статье рассматриваются основные особенности нового типа общества в Польше, а именно простого акционерного общества (ПАО), введенного в Кодекс хозяйственных

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товариществ и обществ Законом от 19.07.2019. Новая форма общества сочетает в себе ограниченную ответственность акционеров с большой гибкостью с точки зрения формирования взаимоотношений между акционерами и системы управления обществом. Существенных ограничений на формирование привилегированных акций нет. Акционеры могут выбирать различные модели управления обществом. Простое акционерное общество характеризуется, с одной стороны, отсутствием излишних формальностей, связанных с его созданием, а с другой — гибким механизмом защиты кредиторов компании, основанным на проверке ликвидности. Произошел отказ от концепции акционерного капитала; разрешается вносить в капитал компании неденежные вклады в виде работ и услуг. Права на акции ПАО не имеют формы документа, а представляют собой нематериальные акции. Использование таких акций в обороте порождает ряд новых юридических проблем. В статье основное внимание уделяется, в частности, защите инвесторов, приобретающих акции ПАО в соответствии с Директивой MIFID II. Рассматривая социологические основания происходящих в Польше изменений корпоративного права, автор отмечает, что проекты, основанные на современных технологиях, в том числе информационных, становятся доминирующим элементом современной экономики. Использование этих технологий влечет существенные изменения в структуре отдельных сегментов рынка (разрушение рынка). Нынешние модели ведения бизнеса постепенно утрачивают актуальность и заменяются динамично развивающимися технологическими компаниями. Примером может служить медленный упадок традиционного линейного телевидения и появление предприятий, предлагающих так называемую потоковую передачу выбранного аудиовизуального контента через интернет непосредственно потребителям (например, Netflix) или сокращение распространения музыкального контента на компакт-дисках в пользу воспроизведения музыки онлайн-интеграторами (например, Spotify). Однако технологические компании имеют значительную специфику. Они основаны не только на новейших технологических решениях, но и на дальновидном предпринимательстве основателей (в числе которых Билл Гейтс, Стив Джобс, Джефф Безос и др.) в отношении потенциального рыночного использования этих технологий. Без харизматичных лидеров их основателей многие компании (например, Apple или Amazon) не стали бы такими, какими мы их знаем. Это связано с тем, что распознавание потенциальных потребностей потребителей, которые можно удовлетворить с помощью новых технологических решений, требует от топ-менеджеров творческого мышления, характерного для географических исследователей или изобретателей, а не для стереотипных предпринимателей. Человеческий капитал, предполагающий знания и предпринимательский талант, начинает доминировать в современной рыночной экономике.

Ключевые слова: простое акционерное общество, реформа корпоративного права, защита кредиторов, защита инвесторов, брокерские услуги.

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