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Share capital in the Polish simple joint-stock company in light of the existing law and proposed European legislation

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Abstract: In recent years we have witnessed an almost unprecedented effort of legislators and legal academics in Europe to make limited liability companies in various jurisdictions more modern, simpler and more accessible. These endeavors are usually related to the liberalization of statutory requirements regarding the minimum share capital amounts. Lively debates among academics and practitioners, as well as regulatory competition, seem to be the factors making the legislative changes dynamic and evolutionary. The issue of limited liability companies' regulatory reform was also the subject of proposed European legislation, including the now abandoned proposal of a harmonized single-member limited liability company model known as *Societas Unius Personae* (SUP). In Poland there has also been, for almost a decade, a discussion on whether and how to follow the example of Germany (and its *Unternehmergeellschaft*) and other European countries and liberalize the capital requirements for the Polish limited liability company. Lately the Polish legislator has introduced the so-called simple joint-stock company (*prosta spółka akcyjna*), which had been drafted to be an attractive offer for start-ups, aiming, in the perception of its proponents, to achieve the modernization and simplification desired by contemporary legislators and supposedly accomplished in other jurisdictions, all the while maintaining serious levels of creditor protection. The author employs formal-dogmatic and comparative methods to describe the capital structure of the new company type and to confront it with certain other statutory developments, especially the *Societas Unius Personae* as a serious and well-thought-out, nonetheless failed venture, to try to assess the solutions set forth by the Polish legislator.

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Kapitał zakładowy prostej spółki akcyjnej w świetle dotychczasowych przepisów i projektów prawodawstwa europejskiego

Abstrakt: W ostatnich latach europejscy ustawodawcy i przedstawiciele nauki prawa podejmowali nieomalże bezprecedensowe wysiłki w kierunku modernizacji, uproszczenia i zwiększenia dostępności spółek z ograniczoną odpowiedzialnością. Działania te zazwyczaj zmierzały do liberalizacji ustawowych wymogów dotyczących minimalnych kwot kapitału zakładowego. Czynniki dynamizującymi zmiany legislacyjne wydają się żywe dyskusje w środowisku akademickim oraz na łonie praktyki, a także konkurencja regulacyjna. Kwestie reformy spółek z ograniczoną odpowiedzialnością były również przedmiotem projektów prawodawstwa europejskiego, w tym projektu dyrektywy w sprawie zharmonizowanego modelu spółki z ograniczoną odpowiedzialnością jednoosobowej, znanego jako *Societas Unius Personae* (SUP). Także w Polsce od prawie dekady toczy się dyskusja w przedmiocie zmian dotyczących spółek z o.o., w szczególności tego, czy polskie ustawodawstwo powinno podążać za przykładem Niemiec (i znanej z niemieckiego porządku prawnego *Unternehmersgesellschaft*) oraz innych krajów europejskich i zliberalizować wymogi kapitałowe dla tego typu spółek. Sejm przegłosował niedawno ustawę wprowadzającą tak zwaną prostą spółkę akcyjną. Ten nowy typ spółki ma w założeniu stanowić atrakcyjną propozycję dla start-upów, prowadząc — zdaniem jej zwolenników — do modernizacji i uproszczenia pożądanego przez współczesnych prawodawców przy jednoczesnym utrzymaniu stosownego poziomu ochrony wierzycieli. Autor próbuje ocenić rozwiązania zaproponowane przez polskiego ustawodawcę w zakresie struktury kapitałowej nowego typu spółki, konfrontując je z innymi rozwiązaniami, w szczególności z projektem *Societas Unius Personae* — przedsięwzięciem ostatecznie nieudanym, choć przemyślanym i zasługującym na uwagę.

1. Introduction

In academic discourse as well as among legal practitioners, both in Poland and in Europe, the idea of introducing simple and accessible non-public companies into the legal system has been considered for a long time.¹ The reason for this is the desire to improve the legal environment for entrepreneurs and to facilitate the conducting of business activities.

In Poland, an act² introducing the so-called simple joint-stock company (in Polish: *prosta spółka akcyjna*, abbreviated and hereinafter referred to as: PSA) has recently been passed by the Polish Sejm and is now subject to legislative proceedings in the Senate. The PSA is designed as an interesting tool for innovative entrepreneurs, especially IT start-ups. The new company type is intended to be a middle-ground solution between the limited liability company, whose shares are thought to be insufficiently liquid for start-ups' needs, and the overregulated joint stock company, which

¹ Such a simplification can be achieved in two ways — either by modifying the existing law concerning companies or by introducing a new type of a company into the system.

² Act of 13 June, 2019 on amending the Commercial Companies Code and other acts (hereinafter referred to as the “PSA Act”); previously under legislative works as Government bill — an act on amending the Commercial Companies Code and other acts, Polish Sejm Bill No. 3236.

is a form hard to employ and difficult to manage. The issue of simplifying or even waiving minimum capital requirements³ seems to be of fundamental importance.

The PSA Act has been criticized, both with respect to specific solutions employed, as well as the concept of PSA itself.⁴ However, there were opinions arguing that PSA could become a vital step in removing barriers met by innovative entrepreneurs that stem from the shape of the Polish limited liability company.⁵ Among these barriers four were listed: 1) the statutory shape of the articles of association limiting the possibility of flexibly arranging the relations between founders and investors in the company's "constitution," 2) the statutory ban on issuing securities incorporating the shares or some proprietary rights in the company, 3) the statutory ban on making contributions in the form of performance of work or provision of services to the company, 4) the creditor protection system being based on the institution of share capital.⁶

This text will concentrate on whether and how the model PSA regulation deals with the fourth of the above-mentioned obstacles. For all company types, the way their share capital is regulated is a fundamental issue, intertwined with issues related to incorporation (raising and increasing share capital, issuing and taking up shares), creditor protection (the role of capital as furthering creditors' interests), as well as civil liability (for failure in making contributions, improper performance or capital depletion). According to the PSA Bill's explanatory statement, the bill's proponents consider the flexibility of its capital structure a great advantage of the proposed legislation.

2. Simplification of non-public companies' models: The idea of "almost capital-less companies"

All over Europe, proposed reforms of companies' regulations are supposedly thought out to make an attractive offer for small and medium-sized enterprises

³ This is how the minimum capital requirement of 1 PLN should be perceived.

⁴ See M. Romanowski, "Metoda Einsteina i księdza Twardowskiego jako sposób analizy koncepcji Prostej Spółki Akcyjnej," *Monitor Prawa Handlowego* 2016, no. 2, pp. 44–48; P.M. Wiórek, "O braku potrzeby wprowadzenia prostej spółki akcyjnej (PSA) z perspektywy prawnoporównawczej," *Przegląd Prawa Handlowego* 2018, no. 5, pp. 4–9. The number of PSA Act provisions referring to the provisions concerning the limited liability company was criticized, mistakes in the use of certain notions were pointed out, indicating that certain elements were introduced to the PSA unnecessarily (terminological inflation, multiplication of entities beyond measure). However, the criticism should be seen as very serious, first and foremost because it can be seen that it indicates the PSA Act itself fails to simplify the law, contrary to what had been assumed.

⁵ See T. Sójka, "O potrzebie zmian unormowań niepublicznych spółek kapitałowych — uwagi na kanwie projektu przepisów o prostej spółce akcyjnej," *Przegląd Prawa Handlowego* 2018, no. 9, pp. 12–18.

⁶ Ibidem, p. 13.

(SMEs) or for innovative and modern enterprises,⁷ especially start-ups⁸ (putting aside the doubts whether start-ups are a class of enterprises requiring special laws). The simplification is usually aimed at reducing the organizational barriers for SMEs. This, in turn, is supposed to lead to economic growth, unemployment reduction as well as an increase in the quality of goods and services available to consumers, thus contributing to the overall well-being of society.⁹ The need to modify corporate law to better adapt to challenges posed by globalization and economic competition facilitated by it is also a factor. Also, the vital need for states to participate in innovative processes (and not fall behind in economic progress) is emphasized. Despite the important role that SMES play in Europe,¹⁰ only 8% of them participate in cross-border trade. The phenomenon of regulatory competition¹¹ may also be relevant here. It is particularly strong within the European Union¹² as an organism based on the principles of free movement of capital and freedom of establishment enshrined in the TFEU.¹³ In a globalized economy, this competition

⁷ In this respect, the broadly defined IT industry is naturally at the forefront.

⁸ Among the defining features of start-ups we would include: 1) high degrees of innovativeness concerning the product, production process, target customer, or distribution form, 2) the need to finance the enterprise with external capital, 3) high development pace and dynamic changes in the business environment, 4) high risk of failure (only 2 or 3 out of 10 enterprises achieve the success assumed in the beginning), 6) activity in areas where previous market experience is lacking, therefore forcing the business predictions to be based on causal reasoning; see J.B. Kühnapfel, *Prognosen für Start-up-Unternehmen*, Wiesbaden 2019, pp. 1–2.

⁹ Assuming that companies law is not a value in itself and for itself, but should further social well-being; see J. Armour et al., “What is corporate law?,” [in:] R. Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd ed., Oxford 2017, pp. 22–24.

¹⁰ They account for 99% of enterprises in the European Union and 67% of employment in the single market and 57% of the value added in turnover in the single market. See Draft SPE, p. 2, Eurostat data at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=sbs_sc_sca_r2&lang=en (accessed: 5.06.2019).

¹¹ Although it bears indicating that there are also voices calling into question the existence of this phenomenon. See M. Kahan, E. Kamar, “The myth of state competition in corporate law,” *Stanford Law Review* 55, 2002, no. 679.

¹² Ch. Kirchner, R.W. Painter, W.A. Kaal, “Regulatory competition in EU corporate law after inspire art: Unbundling Delaware’s product for Europe,” *Illinois Law & Economics Research Paper* 2004, no. LE04-001.

¹³ These issues are outside the scope of this article, but it is worth recalling that Art. 26(2) of the Treaty on the Functioning of the European Union (OJ C 326, hereinafter “TFEU”) provides in general for the free movement of goods, persons, services and capital, Art. 44 TFEU requires the establishment and operation of undertakings in any other Member State of the Union to be permitted. Art. 54 TFEU, in turn, indicates the necessity to apply the provisions on, inter alia, the freedom of establishment to commercial companies, according to the interpretation adopted in the case law of the Court of Justice of the European Union, see the cases of *Segers*, *Daily Mail*, *Centros*, *Überseering*, *Inspire Art*, *Cartesio*, *Vale* and *Polbud — Wykonawstwo*. According to the CJEU, from the freedom of establishment stems that it is permissible to transfer a company’s registered office to another Member State without a permanent presence there. See also, inter alia, the following: W. Frenz, *Europarecht*, Berlin-Heidelberg 2016, p. 108; P.A. Hinderer, *Insolvenzstrafrecht und EU-Niederlassungsfreiheit am Beispiel der englischen private company limited by shares*, Tübingen

exists also at an even higher level, noticeable in the area of competition¹⁴ between continental European corporate law and the less-formalized, liberal and modern Anglo-American company law.¹⁵

One of the proposed ways of simplifying the regulation of companies and making them more attractive for shareholders' purposes is to simplify their capital structure, particularly by liberalizing or even waiving the minimum share capital requirements.¹⁶ This idea is systematically transformed into real legislative efforts. Appropriate reforms of the capital structure of limited liability companies have been carried out in a number of states.¹⁷ A corresponding draft legislation, allowing the shares in limited liability companies to be shaped as without par value and shifting the creditor protection role to balance-sheet and cash-flow tests, was also proposed in Poland.¹⁸ Simplified limited liability companies with reduced

2010, pp. 11–16; G. Baumgartner et al., *Europäisches und öffentliches Wirtschaftsrecht*, vol. 1, Wien 2010, pp. 157–159.

¹⁴ For an interesting comparison of both systems, see I. Lynch Fannon, *Working Within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding — US and EC Perspectives*, Oxford-Portland, Oregon 2003.

¹⁵ In the UK, the Companies Act 2006 is a fairly recent statute. In the United States, there is a process of continuous modification of corporate law, which is an area of states' exclusivity. Internal regulatory competition, in which certain states, i.a. New York and — especially — Delaware play an avant-garde role, is strengthened by the operation of judge-made law based on the *stare decisis* principle. It is of particular importance in the case of Delaware, which has a separate corporate law judiciary, well-versed in it an eager to maintain the state's lead, all that intertwined with the unifying and modernizing operation of model acts such as the Model Business Corporation Act.

¹⁶ Providing for a symbolic minimum share capital of 1 national currency unit should be deemed tantamount to waiver; A. Bartolacelli suggest that such companies should be called *almost capital-less companies*; see A. Bartolacelli, "Almost capital-less companies in Europe: Trends, variations, competition," *European Company and Financial Law Review* 14, 2017, no. 1, pp. 187–233.

¹⁷ In German law a subtype of German limited liability company (*GmbH*) has been introduced: the so-called *Unternehmergesellschaft (haftungsbeschränkt)*, with a share capital of EUR 1, as compared to the a general requirement of a minimum share capital (*Mindestkapital*) of EUR 25,000 for an "ordinary" GmbH, see §5a(1) GmbHG (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, Limited Liability Companies Act, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1, last amended by Art. 10 of the Act of 17 July 2017, Federal Law Gazette I p. 2446, hereinafter referred to as: "GmbHG"). Similar resolutions were introduced in France (apart from the simplified joint-stock company *Société par Actions Simplifiée — SAS*, it bears indicating that in France there is no minimum share capital requirement in the limited liability company — *société à responsabilité limitée, SARL*), in Chechia (for the local limited liability company, *spoločnosť z ručením omezením — s.r.o.*) and in Slovakian (local simple joint stock company, *jednoduchá spoločnosť na akcie*), with both company types having a minimum capital amounting to EUR 1, as well as in other states, such as the Netherlands, Belgium, Portugal, Spain, Denmark; cf. A. Bartolacelli, op. cit., pp. 188–215. A similar reform was carried out in Italy, cf. A. Bartolacelli, "The new Italian almost capital-less private companies: A brand new tile in the mosaic," *European Company and Financial Law Review* 13, 2016, no. 4, pp. 665–707.

¹⁸ Draft bill amending the Commercial Companies Code published in the *Przegląd Prawa Handlowego* (A. Opalski et al., "Projekt reformy struktury majątkowej spółki z o.o.," *Przegląd Prawa*

capital requirements were also discussed in European legislation, resulting in the *Societas Privata Europaea* (SPE) proposal,¹⁹ and the more recent *Societas Unius Personae* (SUP) proposal,²⁰ subsequently developed into the general approach.²¹ In July 2014, the SUP project was abandoned,²² but the proposed structure of the company and its legislative evolution may provide important comparative arguments, both with regards to the solutions adopted and the implementation of the assumptions made. Academic and legal practitioners' discussions about SUP may serve as a source of arguments and inspirations for the purpose of future Polish legislation.

3. The Polish simplified joint-stock company (PSA) and its capital

3.1. General remarks

A PSA, in accordance with the new provisions of the law and the bill's explanatory statement, may be incorporated to serve any legally permissible purpose, by one or more natural or legal persons (with the exception that the incorporation of a single member PSA by a single-member liability company is inadmissible), allowing the shareholders to enjoy the benefit of limited liability in exchange for contributions made to the company in consideration for subscribed shares. Another characteristic feature of PSA is that the shareholders would be free to choose between one- and two-tier systems of the company's governing bodies, and free to flexibly shape the said bodies' position and competences. PSA is supposed to be an attractive vehicle for conducting business activity in innovative industries, especially for start-ups.²³ This company type is supposed to facilitate running business activities by allowing to associate the interests of potential start-up enterprise founders (who usually are "responsible" for the innovative concept underlying the enterprise and who personally manage the concept's

Handlowego 2010, no. 12, pp. 5 ff.) and discussion commencing in the same journal; see also A. Radwan, "Sens i nonsens kapitału zakładowego — przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych," [in:] M. Cejmer, J. Napierała, T. Sójka, *Europejskie prawo spółek*, vol. 2. *Instytucje prawne dyrektywy kapitałowej*, Kraków 2005, pp. 59 ff.

¹⁹ Proposal for a Council Regulation on the Statute for a European Private Company of 25 June 2008, COM(2008) 396, 2008/0130 (CNS), hereinafter referred to as the "Draft SPE."

²⁰ Commission proposal of 9 April 2014 — Directive of the European Parliament and of the Council on single-member private limited-liability companies, COM(2014) 212 final, 2014/0120 (COD), hereinafter referred to as the "SUP Project."

²¹ Commission proposal of 9 April 2014 — Directive of the European Parliament and of the Council on single-member private limited-liability companies, COM(2014) 212 final, 2014/0120 (COD), hereinafter: "SUP Compromise."

²² Communication on the withdrawal of the Commission's proposals of 4 July 2018 2018/C 233/05, OJ C 233/6.

²³ Cf. the justification of the PSA Bill (Sejm paper 3226).

implementation and the business affairs of the company) with investors who have capital but do not essentially want to engage in the day-to-day business of the company.²⁴ The attractiveness of PSA is to stem from far-reaching simplifications of its capital structure and the company's management. Potentially vital seems the liberalization of minimum capital requirements, as well as the ability to easily make distributions (payments derived from the company's assets), limited only by the need to maintain the minimum share capital of 1 PLN. To achieve this objective, PSA's shares are shaped as shares without par value, and the burden of creditor protection is shifted toward the balance-sheet- and solvency (cash-flow) tests.

The PSA Act deliberately abandoned the concept of adapting the Polish limited liability company model to the needs and aims set for the new legislation.²⁵ The reasoning was that bringing the existing limited liability company model to the desired shape would involve too many legislative and practical difficulties — especially for about 450,000 existing limited liability companies and their shareholders. The limited liability company's properties indicated in the PSA Act as incongruent with the ideas behind PSA are: the inadmissibility of non-monetary contributions in the form of obligations to perform work or rendering of services, practical difficulties related to selling shares (including the required written form with notarized signatures) and the statutory minimal par value of shares of PLN 50 being too high and making it difficult to obtain capital from dispersed investors (crowd-funding). Regardless of the assessment of these arguments, the capital structure of PSA has been shaped as quite simple. This would not have been possible, had the legislators chosen to modify the existing limited liability company. In such case — as could be seen from the 2010 draft — the reform would have to cope with the complicated issue of co-existence of “old” and “new” companies with different capital systems.

3.2. Share capital in the PSA Act as compared to existing company models

The PSA Act is comprised essentially of 134 new articles that will, after the Act will have been passed by the Senate, supplement the existing provisions of the Polish Commercial Companies Code²⁶ (new Art. 300¹ to 300¹³⁴ CCC²⁷). These provisions encompass what is (almost) a complete regulation of the new

²⁴ It is, hence, difficult not to notice that this model corresponds with the limited partnership (*spółka komandytowa*) and the limited joint-stock partnership (*spółka komandytowo-akcyjna*) models.

²⁵ Cf. Explanatory Statement of the PSA Bill, pp. 3–5, 8–10.

²⁶ Act of 15 September 2000 — Commercial Companies Code (consolidated text: Journal of Laws of the Republic of Poland of 2019 item 505 as amended, hereinafter: CCC).

²⁷ The provisions of the PSA Act will hereinafter be referred to in accordance with their order and numbering as set forth in the bill as passed by the Polish Sejm.

company type.²⁸ The PSA Act deliberately resigns from the institution of share capital as used in CCC (now named in Polish the *kapitał zakładowy*), replacing it with the notion of *kapitał akcyjny* (new Art. 300³ § 1 CCC).²⁹ For the lack of a better English phrase, the newly introduced notion will be hereinafter referred to as the “PSA share capital” or the “PSA capital.” The explanatory statement of the PSA Bill explains that this change results from significant features differentiating the PSA share capital from the share capital of other companies. The fundamental difference seems to be that the PSA share capital is variable (it does not have a set amount, possible to change only in formalized procedures of share capital increase and decrease) and is not divided into shares, which is associated with character as shares without par value.

The PSA share capital is to be expressed in PLN and be comprised of cash and in-kind contributions made to the company (new Art. 300³ § 1 CCC). The bill’s novelty is that contributions consisting of obligations to perform work or render services to the company will be admissible (currently Art. 14 § 1 CCC excludes such a possibility;³⁰ hence the above-mentioned contributions will obtain what is academically labeled “in-kind-contribution capacity”³¹). However, such contributions will not be allocated to the PSA share capital (Art. 14 § 1 CCC as amended by the PSA Act). This will help avoid conflict with European law, which precludes such contributions from being allocated to share capital.³² The contributions, in accordance with the PSA Act, should be distributed evenly over all shares of the shareholder in question — unless the articles of association would provide otherwise (new Art. 300⁹ § 3 CCC), and the contributions should be made within the time limit specified in the articles of association or in a shareholders’ resolution (should the articles of association authorize the shareholders to do so). Otherwise, the time limit is to be specified by the management board³³ (new Art. 300⁵ § 2

²⁸ “Almost complete” is well-deserved, as the proposed PSA regulation is also based on numerous references to regulations concerning other capital companies (limited liability companies) — in respect of certain aspects of proceedings concerning registration of a company, exclusion of a shareholder, a joint-stock company — in respect of liquidation of the company and certain provisions on reduction of share capital).

²⁹ It is not a new concept in Polish law — share capital used to be a basic fund in a joint-stock company under the governments of the Commercial Code (Regulation of the President of the Republic of Poland of 27.06.1934 — Commercial Code (Journal of Laws No. 57, item 502, as amended, hereinafter referred to as: “CCC”), cf. Art. 309 § 1 point 4 of CCC.

³⁰ Thus, the Polish legislator refers to the regulation of Art. 46 of Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law (OJ L 169 of 2017, p. 46), which states that the subscribed capital may include only assets that can be valued, and furthermore excludes from this group obligations to perform work or provide services.

³¹ In Polish: *zdolność aportowa*.

³² See footnote 30.

³³ It is worth mentioning that the first version of the project did not confer this competence on the company’s management board.

of the CCC). Irrespective of the above, the time limit may not in any case exceed 3 years (new Art. 300⁹ § 1 of the CCC). That the contribution will have been made in full is to be recognized immediately by a management board resolution (new Art. 300⁹ § 2 of the CCC).

The PSA share capital should amount to at least PLN 1 (new Art. 300² § 1 CCC). One might call this as tantamount to waiving the minimum capital requirement. This constitutes a significant liberalization of the contemporary minimal share capital requirements, amounting to: for limited liability companies — PLN 5,000 (Art. 154 § 1 CCC) and for “ordinary” joint stock companies — PLN 100,000 (Art. 308 § 1 CCC). The PSA share capital is not to be numerically specified in the articles of association, and any change of the PSA share capital will not constitute an amendment to the articles of association (new Art. 303³ § 2 CCC). Further to the bill’s explanatory statement, such a solution stems from the inherently variable nature of the PSA share capital. The PSA share capital subscribed and paid up shall be determined in numerical terms on the basis of the sum of values of contributions made and allocated to the share capital (new Art. 300¹² § 3(2) CCC; hence, as mentioned above, contributions in the form of obligations to perform work or render services will not be allocated toward the PSA share capital and will not be taken into account while calculating the capital’s amount). However, the PSA share capital is to be disclosed in numerical terms in the register and stated in letters and order forms (calculated as of the date of making thereof or as of the last day of the previous financial year, or, if the company is not obliged to make a financial statement — as of the date of registration, cf. new Art. 300⁶¹ § 2 CCC).

The requirement that the shareholders need pay up the PSA share capital will remain a necessary requirement for the incorporation of the company, but only to the extent that the minimal capital of PLN 1 is paid (new Art. 300⁴ item 3 of the CCC). This constitutes a significant change in comparison to the current regulation of the limited liability company, which can only be incorporated after contributions are made and the share capital is paid up in full (Art. 163 § 2 of the CCC), as well as to the joint-stock company, whose shares acquired for cash contributions must be paid up in at least one fourth of their par value, and shares taken up even partly for in-kind contributions must be paid up to one fourth of the statutory minimum share capital amount, i.e., PLN 25,000 (Art. 306 § 2, 309 § 3 and § 4 and 308 § 1 CCC).

Another significant proposed change is that the shares of PSA are not to represent any part of the PSA share capital (new Art. 300² § 3 CCC), unlike in the case of existing company models, where the share capital is the sum of all shares belonging to all shareholders.³⁴ Moreover, the shares in PSA are to be without par value and indivisible (new Art. 300² § 3 CCC). So, further to the PSA Act, the shares will no longer express a portion of the share capital which had been

³⁴ W. Pyzioł, A. Szumański, I. Weiss, *Prawo spółek*, Warszawa 2014, p. 704.

raised by the shareholders by making contributions to cover the nominal value of the share. Shares in PSA will only bear the right of participation, representing the shareholder's proprietary interest in the company that he will have had acquired in exchange for consideration which he will have had paid, in economic sense, by making a contribution(s).

Where the value of in-kind contribution is overestimated in relation to its fair value, the shareholder who made the contribution is liable to compensate the company for the shortfall; the shareholder cannot be released from this liability (new Art. 300¹⁰ § 1 CCC). The breakdown of the relation linking the shares and the amount of PSA share capital is evidenced by the rule according to which in cases where undistributed profits, which may be the subject of dividend, will have been allocated to the share capital pursuant to the shareholders' resolution, it will not entitle them to acquire new shares (new Art. 300²⁰ CCC), nor will the shares' par value increase, as the PSA shares must be without par value.

One of the aims of the PSA Act is to de-formalize the process of increasing and decreasing the PSA share capital. Although the increase of PSA share capital is not to require a resolution, being an automatic consequence of issuance of new shares, the issuance in question will nevertheless require a resolution (new Art. 300¹⁰² CCC). Practically, therefore, any increase of the PSA share capital by issuance of new shares will require a resolution to that. However, PSA share capital may be increased by way of successive making of previously agreed contributions allocated to the PSA share capital (during the course of the maximum time limit of three years after the incorporation or after any increase of share capital and issuance of new shares).

3.3. PSA share capital protection

The main instrument protecting the PSA share capital against unauthorized distributions seems to be the balance-sheet test, limiting the amount of dividends. Like all such checks on the shareholder's autonomy, it seems that it will simultaneously serve as a creditor protection instrument. The mechanism is supposed to work in the following way. The amount distributed among the shareholders may not exceed the sum of profit for the last financial year, retained profits from previous years, reserves created from profit which may be allocated for distribution, and of the PSA share capital (new Art. 300¹⁵ § 2 of the Polish Commercial Companies Code). This sum shall be reduced by unabsorbed losses, the company's own shares, and amounts which, pursuant to statute or articles of association, should be transferred from the profit for the last financial year to reserves that cannot be for distributed. This is in consistence with the existing Polish regulations regarding the limited liability company (Art. 192 CCC) and the joint-stock company (Art. 348 § 1 CCC). A significant difference is that the PSA share capital amount is added to the amounts

that can be distributed as dividends. Another restriction may be found in the new Art. 300¹⁵ § 4 clause 1 CCC, stating that any distribution to shareholders from the PSA share capital may not lead to this capital being reduced below the minimum threshold for PSA, i.e. PLN 1. The share capital protection and creditor protection is also to be facilitated by the requirement, construed by reference to the provisions of Art. 456 § 1 and 2 CCC, to conduct a procedure of notifying creditors of the distribution of a part of the share capital constituting 5 per cent of the company's total liabilities for the last financial year, and to call upon creditors to submit claims against the company within three months of the notification (new Art. 300¹⁵ § 4 clause 1 CCC). The PSA Act provides also for a cash-flow test, making illegal distributions that could lead to the company losing its ability to pay liabilities within six months of them falling due (new Art. 300¹⁵ § 5 CCC). The above tests are supplemented by the requirement that PSA share capital reduction be entered in the commercial court register. The application for entry should include a statement of all members of the management board, stating that creditors who had filed claims against the company within the time limit specified in Art. 456 § 1 CCC were satisfied secured (new Art. 300¹⁵ § 6 CCC and Art. 458 § 2 item 4 CCC).

Any transfer (sale) of shares not fully paid up will require written consent of the company, till the date of making the contribution in full (new Art. 300⁴⁰ § 1 CCC). Another instrument protecting the PSA share capital is also the liability of the shareholder to compensate the company for the shortfall resulting from the overestimation of contribution's value, supplemented by joint and several liability of the members of the management board at fault in accepting an overestimated valuation (new Art. 300¹⁰ § 1 and § 2 CCC).

One vital feature of the PSA Act is that the protection of PSA's share capital will be effected by an obligatory write-off for the reserve capital: the company will be obliged to transfer to the PSA share capital, in order to cover for losses, amounts constituting at least 8% of profit for a given financial year, till the moment that the amount of PSA share capital will have reached 5% of the company's total liabilities indicated in an approved financial statement for the last financial year (new Art. 300¹⁹ CCC).

4. The PSA Act in light of the European single-member limited liability company proposal

The PSA Act and the EU proposals (SPE, SUP) differ in how they perceive ideal shape of new companies is perceived. This seems to result from the basic difference in concepts — SPE and SUP were to be addressed to small and medium enterprises desiring to carry out cross-border activities within the framework of a single-member company, enjoying the benefit of limited liability, while the PSA Act is intended to serve the needs of innovative multi-member enterprises, start-ups

in particular. It is not surprising, therefore, that EU projects are founded on a single-member limited liability company, and the Polish PSA Act assumes that a new type of a joint-stock company needs to be created.³⁵ SPE and SUP were supposed to appeal to entrepreneurs with the practical lack of capital requirements combined with a simple regulation of the company's affairs (company management and representation), as well as with the features of such companies being unified throughout the EU (what was supposed to gain the trust of business partners). PSA is proposed to be an attractive vehicle for start-ups. In this context, the multi-member nature of the company seems essential, and its advantages are that its outstanding shares are easily transferrable and new shares easy to issue, all the while keeping the option to allow the original shareholders to retain control over the company despite the acquisition of new shares by investors.³⁶

The capital structure of SUP, as a single-member company (Art. 6(1) SUP Project), was supposed to be much simpler than in the case of PSA. The company was to be entitled to issue one share not subject to being split (Art. 15(1) SUP Project). The minimum share capital of SUP in the Commission's SUP Project was to be EUR 1 (or a single unit of another national currency, as per Art. 16(1) Project).³⁷ The proposal initially provided for the exclusion of SUPs from national regulations imposing mandatory write-offs to reserves (Art. 16(4) SUP Project), but this was modified in the SUP Compromise,³⁸ allowing Member States to construct a requirement that SUP create reserves, defined either as a given percentage of the company's profits or by indicating a target ceiling (e.g., the minimum share capital required for "ordinary" domestic limited liability companies). The lack of minimum share capital and the initial ban on write-offs for reserves were to supplant by the balance-sheet test (Art. 18(2) SUP Project) and cash-flow (solvency) test (Art. 18(3) SUP Project). SUP could not make a distribution³⁹ to the

³⁵ In any case, the construction of a sole shareholder company does not make sense in the context of a public limited company, where the basic assumption is the transferability of shares, as highly liquid securities incorporating shareholder rights.

³⁶ See new Art. 300²⁶ CCC, according to which preferred stock in the PSA may be vested with a special right according to which any issuance of new shares may not infringe on the given ratio of voting rights of the preferred stock to the voting rights of other stock.

³⁷ Moreover, the contribution was to be paid in full at the moment of registration, with the reservation that in case of on-line registration it had to be a mandatory cash contribution and had to be made to the company's bank account (Art. 17(1) and (2) of the SUP Project).

³⁸ However, it should be noted that the SUP Compromise has also negatively affected the SUP capital regulation, e.g. by abandoning the obligatory conjunction of balance sheet and solvency tests; it would be sufficient to employ only one of them. The provisions relating to contributions have also been removed, including the requirements as to the subject (cash or in-kind contributions) and the obligation to pay up before registration; the solvency test had also been changed by reducing the relevant period for the solvency forecast to six months.

³⁹ At the same time, the definition of "distribution" was deliberately shaped as broad, covering basically all payments made to a member from SUP, cf: Section 2(3) of the SUP Project: "any

sole shareholder if its net assets on the last day of the last financial year (according to the financial statement for that year) would have been lower (or would become lower after the distribution) than the sum of the share capital and such reserves that according to the SUP articles of association could not be distributed as dividend. The cash-flow test, in turn, determined that distribution would be inadmissible if, as a result of it, SUP would not be able to pay debts that would fall due after the distribution. Both these tests would have to be fulfilled in case of share capital reduction (Art. 20 of the SUP Project).⁴⁰ Hence, significant differences could be seen in comparison with the Polish PSA Act.

In the course of the academic debate regarding the SUP Project it was argued, with reference to studies both empirical and speculative, that a minimum share capital requirements do have certain advantages. They protect the system against abuse, deterring potentially dishonest entrepreneurs, or enterprises active in the field characterized with an increased tendency to fall into financial difficulties, with an above-average number of insolvencies.⁴¹ Law and economics studies⁴² show that the liberalization of minimum capital requirements “may give rise to abusive market behavior incongruent with public policy or morality, which may prove to be legally impossible or uneconomic to be dealt with before the courts,”⁴³ all the while putting the minimum share capital “at a relatively low level plays, as empirical and praxeological arguments show, a limited yet positive role in the system of creditor protection for limited liability companies.”⁴⁴ It serves as a test of seriousness,⁴⁵ verifying an entrepreneur’s attitude and capacity to operate on the market, as well as an instrument to discourage “accidental” entrepreneurs from enjoying the benefit of limited liability. Most interestingly, the usefulness of the obligatory reserve write-off, especially in combination with the cash-flow/solvency test, has been

financial benefit derived directly or indirectly from the SUP by the single-member, in relation to the single share, including any transfer of money or property. Distributions may take the form of a dividend, and may be made through a purchase or sale of property or by any other means.”

⁴⁰ The solvency test was connected with the management board’s duty to make a solvency statement. In it, the Management Board had to certify in writing that, having made full inquiry into the affairs and prospects of the SUP, it had formed a opinion that the SUP will be able to pay its debts as they fall due in the normal course of business in the year following the date of the proposed distribution.

⁴¹ W. Niemeier, “What kinds of companies will a ‘One-Euro-EPC’ generate? Market data and observations from the German ‘laboratory,’” [in:] Ch. Teichmann, H. Hirte, *The European Private Company — Societas Privata Europaea (SPE)*, Berlin 2013, pp. 293–348.

⁴² M. Żurek, “W poszukiwaniu optymalnego modelu regulacji struktury majątkowej spółki z o.o. — ujęcie prawno-ekonomiczne,” *Przegląd Prawa Handlowego* 2016, no. 5, p. 39.

⁴³ *Ibidem*, p. 38.

⁴⁴ *Ibidem*.

⁴⁵ Positively about share capital as a test of seriousness: P. Kindler, *The Single-Member Limited Liability Company (SUP): A Necessary Reform of EU Law on Business Organizations?*, Munich 2016, p. 21.

convincingly proved as means of limiting improper distribution from the company's assets and, consequently, of protecting the creditors.⁴⁶

However, the view taken by the PSA Act, indicating that the statutory minimal capital requirements adversely affect the practical aspects of companies incorporation and operation, and that the amount of PLN 5,000 hardly serves its purpose as a seriousness test, seems to be true and well justified. How can these problems be addressed without facilitating the negative effects discussed in the paragraph above? A reasonable compromise lies in crafting a system where creditor protection is achieved through balance-sheet and solvency tests, complemented by the obligation to establish adequate reserves⁴⁷ and a strict regulation of personal liability of managers and shareholders for illegal distributions.

This seems to be the stance taken by the authors of the PSA Act, which, hence, is worthy of approval, especially in the context of the PSA Act being based on balance-sheet and solvency test frameworks. These were constructed very similarly to the SUP Project, except for differences attributable to the variability of PSA share capital amount. This solution may be beneficial for potential shareholders, encouraging them to use PSA as a vehicle for their enterprises, owing to the possibility to easily withdraw the invested funds. Nevertheless, it is worth considering whether creditors who may have had concluded agreements with a company having a certain amount of share capital, as evidenced in the court register, do not deserve a higher level of protection against the depletion of share capital, higher than that owing to a creditor notification procedure. Creditor protection would certainly be fostered by a certain one-way variability of the share capital, similar to that regulated in the SUP Project: the share capital's change would not constitute an amendment to the articles of association, and the share capital would increase with paying up the contributions. However, the amount of the share capital thus increased would not be added to the quantum of assets that may be distributed to shareholders in the form of dividends. This, however, can only be considered *de lege ferenda*. As in the case of the SUP Project and the SUP Compromise, one may also consider the appropriate time horizon for the solvency forecast. The six-month period seems to be too short to allow to reliably assess the influence of distributions from the company's assets, which may be significant, on the payment of long-term liabilities.

The obligation to create write-offs to reserve capital, as provided for in the PSA Act, is also worthy of appraisal. Similar solutions are positively assessed by legal academia and practice, indicating that regulations

⁴⁶ M. Żurek, *op. cit.*

⁴⁷ It is worth noting that the obligation to create reserve capital through obligatory profit deductions was decided by the German legislator within the framework of the UG (*die Unternehmersgesellschaft*) regulation. See J. Schmidt, "Die SUP aus der Sicht der Kommission und ihr Kapitalschutz," [in:] M. Lutter, J. Koch, *Societas Unius Personae (SUP)*, Berlin 2015, p. 9.

requiring *almost capital-less companies* to raise reserves up to a certain ceiling constitute an effective way of protecting creditors, also making it more difficult to abuse the limitation of liability typical of companies. An example is the so-called *Thesaurierungspflicht*,⁴⁸ known from the German *Unternehmergeinschaft*, and the solution introduced in the SUP Compromise (previously explicitly prohibited in the SUP Project), which intended to allow Member States to impose an obligation on SUPs to raise reserve capital. It seems, however, in the context of the PSA Act, that the obligation to build up reserves up to the ceiling of only 5% of the total liabilities of the company indicated in the financial statements is too modest. Although such a ceiling can be praised for its flexibility (a fixed amount of required reserves, as in the case of the German *Unternehmergeinschaft*, will always be dissociated from the nature and size of the enterprise), it seems that it would be beneficial that it be supplemented by some fixed amount which would have to be reached even in small companies. The separation of a company's ability to meet due liabilities from its financial result in one given year and from the size of its assets, mentioned in the PSA Act's Explanatory Statement, does in fact exist, but seems to apply to companies with significant liquidity and a large turnover, i.e., larger companies. In the case of smaller companies it is not exactly the case, and the ability to pay liabilities is more closely linked to its assets; in such companies, the risk for creditors is obviously lower, yet 5% of the sum of their liabilities is too low a sum to guarantee a minimal level of protection.

The fundamental difference between the SUP Project and the PSA Act is that the shares in the PSA shall be without par value (not representing a part of the share capital). This idea is worthy of positive assessment, as it helps to deformalize and make easier the dealings of the company, in particular with respect to fundamental changes, without in any way putting creditors and other contracting parties at risk.

5. Conclusion

Having compared the proposed PSA capital structure with other contemporary proposals aimed at simplifying the structure of companies, especially with the SUP Project, one can easily point to certain differences, mostly resulting from different aspirations and aims of the proposals. However, significant similarities exist in the area of methods employed to protect the companies' capitals against improper distributions. These solutions also serve as forms of creditor protection and include the balance-sheet and solvency tests, as well as the framework

⁴⁸ § 5a III GmbHG, according to which an *Unternehmergeinschaft* must transfer to the reserves at least a quarter of its profits, until the reserves reach the threshold of EUR 25,000 (the minimal capital for an "ordinary" *GmbH*), after which the *UG* becomes a *GmbH* and other restrictions typical to the *UG* cease to exist.

for civil liability of board members and shareholders for improper distributions. Apart from these areas, the extensive PSA Act consists of provisions that do not contribute much to its capital structure. As it seems, the Polish proposal has gone a rather circular path to arrive at solutions similar to the now-discontinued draft capital structure reform of the limited liability company of 2010. However, it is hard to say whether the proponents of the PSA Act have considered whether a new, third type of a company in the Polish law (moreover, one could argue that due to substantial differences between public and non-public joint-stock company models, these constitute further types, hence making the total number of companies four) is actually necessary. Will regular limited liability companies and, particularly, non-public joint-stock companies be used in practice? Hence, all the more resonant are the opinions of academics emphasizing that, instead of introducing another type of joint-stock company into Polish corporate law, the legislation should return to the concept of amending the provisions on the limited liability company, shifting division within the companies' framework from one separating limited liability companies and a joint-stock companies to another, emphasizing the division between private companies vs. public companies.⁴⁹ However, the PSA as modeled by the PSA Act is a successful effort in introducing new models of share capital regulation and creditor protection for non-public companies in Poland.

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