DYSFUNCTIONALITY OF SHARE CAPITAL

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Abstract

Share capital is deeply rooted in accounting. The institution of share capital is currently criticized in the legal community. This is also the aim of the article – to show the dysfunctionality of share capital and show the need for reforming the proprietary structure of companies. The author used a critical analysis of the literature on the subject and legal acts as well as a comparison of designed solutions and drew attention to the failure of share capital to perform the guarantee function, which until recently was considered to be the basic function thereof. The article also contains a description of the disadvantages of share capital that make it difficult for companies to operate. The author also outlined earlier, failed attempts at reforming share capital. Many of these proposals were included in the new model of a company without share capital – a simple joint-stock company. The focus was on discussing the features thereof that replace share capital. It addresses the calls for a reform of the company's proprietary structure. The author also discusses reforms of share capital in other countries, and in this context, he indicates the need to reform the proprietary structure of the company to be able to compete with other legal systems of companies within the framework of the EU.

Keywords: share capital, simple joint-stock company, assets structure reform, guarantee function, company model.

1. Introduction

The opinion that the current legal status concerning share capital undermines the authority of the legislator, expressed in 2011 by A. Opalski, has not become outdated. The legislator has radically lowered the minimum amount of share capital, simultaneously maintaining in its entirety the institution, the initial assumptions of which it itself undermined through the lowering of the share minimum (Opalski, 2011). Reform proposals aimed at "breaking with the fiction of protecting creditors through minimum statutory share capital and enabling companies to voluntarily

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abandon this institution" began to appear (Opalski, 2011, pp. 22–23). However, the reform was not implemented.

However, an alternative to a limited liability company and a joint-stock company has recently emerged - a simple joint-stock company (SJS), without share capital and with shares with no-par-values (Commercial Companies Code, 2019).[2] At this point, it is worth citing arguments for abandoning the institution of share capital.

Share capital is deeply rooted in accounting as well as in European company law. However, for many years, Europe has been debating the usefulness of using share capital as a means of protecting creditors. Several countries of the EU introduced solutions for limited liability companies that consisted in, among other things, lowering of the minimum share capital to the amount of, for example, 1 Euro (France) or 1 Euro cent (the Netherlands), allowing shareholders to choose between shares without and with a nominal value (Finland), establishing of a new variant of a limited liability company that does not require the declaration of the minimum share capital at the time of its founding (Germany) (Oplaski, 2012).

In Poland, the debate concerning this subject has been going on for many years, especially since works on the development of assumptions for the reform of the assets structure of a limited liability company began. In 2014, a draft act was developed to amend the Commercial Companies Code (Bill, 2014), which provided for, among other things, the possibility to form the non-par value shares in a limited liability company and making the share capital an optional institution. The reform of assets capital is advocated by the legal community, although there are also sceptical voices questioning the need for such a reform (Janeta, Mahmand, 2011). The debate lacks the voice of professionals and scholars representing financial accounting[3] whose opinions could enrich the discussion on the reform as "accountants" are closely related to the practice of the operation of limited liability companies and for this reason, their comments would make it easier to answer the question whether the reform of the assets structure of limited liability companies is necessary?

The relationship between financial accounting and the problem of share capital under discussion should be indicated. Current financial accounting is aimed at meeting the information function through the preparation and publication of financial statements to protect the interests of external addressees of these reports, including creditors. In one of its rulings, the European Constitutional Court decided that protection through transparency is more important than protection based on share capital (Radwan, 2005). To protect creditors, there is currently contractual protection applied by the participants of the trade, in relation to which the complementary

[2] It is supposed to enter into force on 1 March 2021.

[3] The National Chember of Statutory Auditors participated in the stage of public consultations, but it commented on detailed provisions of the project without taking a position regarding the concept of the reform of assets structure of a limited liability company.

function is performed by financial accounting (Radwan, 2005). We shoud therefore ask whether maintaining share capital is legitimate.

The 2009 amendments to the Commercial Companies Code initiated changes in share capital. In 2015, however, works on the reform of the assets structure of limited liability companies stopped. In this situation, with lowered minimum threshold of share capital and sustained limitations related to contributing and maintaining share capital, the situation of creditors becomes worse and difficulties resulting from regulations concerning share capital arise in the operation of companies. Under these circumstances, the emergence of the new type of company, i.e. simple joint-stock company (SJS) in 2021 urges us to ask whether this fact can replace the reform of assets structure, particularly in respect of limited liability company.

The article aimed to demonstrate the dysfunctionality of share capital and indicate the need for a reform of the company's assets structure, which involves, among other things, the introduction of a new type of company, without share capital.

The author first discussed regulations concerning the protection of creditors based on share capital and then discussed the disadvantages of share capital as the basic instrument of creditor protection. They indicated the need to reform share capital. The article presents the assumptions of the unsuccessful reform, drawing attention to the solutions concerning the protection of the interests of creditors, such as solvency test, periodical assessment of the risk of a significant loss as well as sustenance of sufficient solvency by the company. Finally, the author discusses SJS as a new type of company without share capital, which is supposed to eliminate the disadvantages associated with share capital.

2. The Guarantee Function of Share Capital in Theory and Practice

In additional to its guarantee function, share capital also has an economic and legal function.[4] Further considerations will concern the guarantee function of share capital as many doubts arise in relation thereto. It is believed to be the basic function of share capital. Share capital is supposed to provide both creditors and shareholders with security, in particular by preventing payouts that are not covered by the company's profits (Dąbrowski, 2010).

The difference between share capital and other components of equity capital group consists in the fact that the function of the former is "to limit the impact of a loss incurred by a company (...) on its ability to meet its obligations to its creditors. Share capital increases the margin of the company's solvency and is thus supposed

[4] The economic function consists in the fact that the contributions to the company made by partners constitute its original assets that enable it to commence business. The legal function of share capital means that being broken down into shares/actions allotted to shareholders, it constitutes the basis of their participation in the company (Dąbrowski, 2010).

to contribute to creditor protection" (Opalski, 2012, p. 384). This function is fulfilled by share capital based on two provisions regulating (Radwan, 2005):
— the minimum amount of share capital,
— making contributions to share capital,
— preservation of capital.

The requirement regarding the minimum amount of share capital is widely criticized. It is determined arbitrarily, without any relation to the scale of the conducted activity. The lowering of the minimum amount of share capital in 2008 (from PLN 50,000 to PLN 5,000 for a limited liability company and from PLN 500,000 to PLN 100,000 for a joint-stock company) was a signal indicating that Poland withdraws from using share capital as an instrument of creditor protection (Act – Code). The objective behind the reforms of share capital introduced in recent years in many aforementioned European countries was similar. As a result of the lowering of the minimum amount of share capital to a symbolic level, its guarantee function virtually ceases to exist.

Another group of provisions which is supposed to constitute a guarantee for the company's creditors concerns the making contributions to cover share capital. Before the lowering of the minimum amount of share capital, the making of contributions could be viewed as a price at which a partner "buys" the privilege of not being personally liable. This way, a compromise between the interests of company partners and its creditors was achieved (Modrzejewski, Wiśniewski, 2010). The paid "price" mustn't be ostensible. Regulations dictated thereby, referring to the making of non-monetary contributions (contribution capacity) and their valuation.

Net assets, i.e. the surplus of assets over liabilities and provisions for liabilities, are considered to be assets covering share capital. The level of net assets should be at a minimum equal to the amount of share capital. A. Radwan (2005) observes that it is important that these assets correspond to real assets which will constitute a guarantee of satisfaction for company's creditors. This is why there are provisions that do not recognize contribution capacity in terms of services and work (Art. 14 par. b1 of the Commercial Companies Code). A similar role is played by regulations requiring that contributions at joint-stock companies be valued by auditors (Art. 312 of the Code of Commercial Companies). Although in this respect these regulations are insufficient and in reality, we are dealing with the so-called hidden contributions, which mean that the procedure of contribution valuation is bypassed, in listed companies (Postrach, 2014). The guarantee of making actual contributions to cover share capital is also provided by the provision that prohibits taking up shares at an issue price, below their nominal value. The shortcomings of these provisions will be discussed.

The last of the aforementioned groups of provisions are the regulations on the maintenance of share capital, which aim to reconcile the interest of shareholders to receive distributions representing their income from the invested capital with

the interest of creditors by preserving the company's assets to protect the creditors (Radwan, 2005). Share capital determines the value of assets accumulated to cover it, which cannot be returned to the company partners (Opalski, 2012). Such a return is only possible by reducing the share capital.

The requirement to protect these assets is a result of the lack of personal responsibility of the company partners. The lack of personal accountability encourages the shareholders to pursue higher-risk ventures that are often more innovative and a source of economic progress (Modrzejewski, Wisniewski, 2010). On the other hand, the shareholders may take actions leading to a reduction in the company's assets necessary to fully cover the share capital[5]. Therefore, the regulations protecting the company's assets prohibit the return of contributions (Art. 189 par 1 of the Commercial Companies Codes) and also forbid payments of any kind from the company's assets if this would deplete the full coverage of the share capital[6] (Art. 189 par 2 of the Commercial Companies Codes). The reimbursement of the contributions can only be done by reducing the share capital, which involves tedious procedure (convocation procedure) resulting from Art. 263–265 of the Commercial Companies Codes (in relation to limited liability companies) and Art. 455–458 of the Commercial Companies Codes (in relation to joint-stock companies).

Thus, it can be said that the price for excluding the personal liability of the company partners for the company's obligations is the limitation of their responsibility for the company's assets (Niedzielska-Jakubczyk, 2014). The same group of provisions on the maintenance of share capital also includes the regulations that limit the acquisition of treasury shares by the company (Art. 362–365, Art. 200 of the Code of Commercial Companies).

3. Shortcomings of the Share Capital Institution

The role of the share capital was already insignificant even before its reduction in 2008 (there was no contribution to the improvement of the creditors' situation). The above-mentioned regulations related to the guarantee function of share capital constitute an unnecessary burden for companies and their operation (Opalski, 2012). Hence the term dysfunctionality of share capital. This is evidenced by the aforementioned burdens which are the results of the limitations of:

— contribution capacity,
— payouts to shareholders,

[5] This depletion is a result of the transfer of the company's assets to the assets of shareholders (especially in the event of the company's insolvency). The risk of such activities is much greater in public companies, where such transfers are carried out by the majority shareholders at the expense of minority shareholders.

[6] The company's assets that constitute the full coverage of the share capital shall be understood as net assets (Opalski, 2012).

— acquisition by the company of its own shares,
— restructuring operations.

The limitations on the contribution capacity are the consequence of the aforementioned principle of making real contributions to cover the capital and, at the same time, not recognising any services of the company partners as contributions. This is because such activities do not promote the creation of financial assets which is a guarantee for the company's creditors (Radwan, 2005). With the minimum amount of share capital in force, the above-mentioned limitation of contribution capacity is no longer of great importance when establishing companies. The contribution capacity may be still vital in the case of young high-tech companies that value the innovative approach and services of their founders (Radwan, 2005).

In turn, the restrictions on payouts to shareholders make it difficult to easily withdraw some, or all of the contributions, as required. It should be noted that the prohibition on returning the contributions covers not only the share capital but also the funds in the supplementary capital accumulated as a result of the contributions made to cover the acquired shares. The reimbursement of the funds resulting in a reduction of the share capital requires, as mentioned earlier, a time-consuming and costly convocation procedure,[7]which is often a difficult obstacle for companies to overcome (Opalski, 2011).

What is more, the restrictions on the company's acquisition of treasury shares is also related to the fact that the share capital is often treated as an instrument of creditor protection. The limitations are additional measures to prohibit the return of the contributions[8]. The acquisition and redemption of shares may result from, among other things, changes in the structure of shareholders, elimination of the risk of a hostile takeover. If the redemption is not based on profit, then, the company faces the above-mentioned burdensome convocation procedure.

The last of the aforementioned burdens involves restrictions related to the restructuring of companies. In this case, the impediments to conducting restructuring activities are linked to the ban on acquiring shares below their par value. A similar regulation applies to joint-stock companies. Precisely in those troubled public companies in need of capital, it is visible how the par value of their shares can inhibit the fast raise of capital when the stock market price is below the par value. Admittedly, a company can reduce the par value of its shares to a level below the market price, but such an operation delays the restructuring process and thus the improvement of the creditors' position, as it requires a resolution of the Annual General Meeting

[7] This approach is an obligation for the company to satisfy or secure the creditors who were against the reduction of the share capital.

[8] The restrictions on the acquisition of treasury shares are the result of the need to protect the share capital and are also dictated by the possibility of preferential treatment of some shareholders as well as profiteering from own shares, including the overvaluation of the prices of shares through their acquisition (Dabrowski, 2010).

and registration in court. Listed companies encounter an additional complication connected with the share par-value reduction when performed through a share split. Then, as a result, the shares may transform into a "penny stock" and thus be placed on the alert list, which indicates elimination from continuous trading and usually a decrease in the measurement of such shares.

Meanwhile, each, even the smallest payment made by a shareholder improves the position of creditors, while the acquisition of shares below the par value leads to an increase in the share capital. Therefore, it can be stated that the ban on issuing shares below the par value constitutes the quintessential absurdity of the share capital system in terms of share capital coverage (Radwan, 2005). It is difficult to legitimise this requirement with the necessity to protect the shareholders from capital dilution since it is not determined by the relation between the issue price and the par value, but rather between the issue price and the true value of shares (Radwan, 2005).

4. Reform of the Company's Proprietary Structure

In 2010, the presented criticisms of share capital institution led to the development of a reform project regarding the proprietary structure of a limited liability company by the Team for the Company Law of the Civil Law Codification Commission under the Ministry of Justice Amendments included in the project were described as revolutionary, thus several years had to pass before a bill draft was developed and scheduled to take effect on 1 January 2015. However, it did not happen, as it was decided to introduce an important modification to the bill draft, abandoning the non-par value shares and companies without the share capital. Other postulates, aimed at elimination of certain disadvantages related to the share capital, the minimum required level of which was established at PLN 1, were taken into account. In this version, the act was scheduled to take effect on 1 January 2016, but there was not enough time to conduct the legislative process in such a short period, so it was decided not to commence it. Nevertheless, it is worth to present the project postulates in the version including the no-par-value shares and regarding the share capital as a facultative institution, as the said version was not narrowed to only one model of a limited liability company, but rather broadened the selection of a limited liability company model for the shareholders, just as the simple joint-stock company (SJS) is intended to do now.

The purpose of the amendments proposed was to facilitate the conduct of business activity in the form of a limited liability company by reforming its proprietary structure while providing adequate instruments to protect the company's creditors, which was also aimed at increasing the attractiveness of Polish limited liability companies in the era of rising competition among the company law of the EU countries. This objective was to be accomplished through (Draft Assumptions, 2014):

a. updating and rendering the proprietary structure of the limited liability company more flexible allowing the structure of no-par-value shares;
b. assigning appropriate meaning to the share capital by rendering it facultative institution and abolishing the capital minimum;
c. updating some of the solutions concerning share capital by regulating the system of acquisition its own shares by the company and reducing share capital for restructuring purposes;
d. strengthening the protection of creditors of a limited liability company introducing a solvency test preceding any payouts from the company's assets for the corporate relationship;
e. imposing a mandatory obligation on limited liability companies to establish supplementary capital to cover any future losses;
f. closing the "gap" of the share capital institution consisting in the absence of a normative hierarchy of loss coverage sources;
g. "revitalisation" of the obligation to convene meetings of shareholders in the event the company has incurred significant losses.

Based on the draft assumptions, some of the indicated solutions have been discussed below. The shareholders' equity, arising from contributions to cover the no-par-value shares, was to be established in companies without the share capital, as well as in the mixed model. The essence of the alternative model consisted in the fact that funds forming the share capital were not "company-bound", as in the case of funds lodged in the share capital (Draft Assumptions, 2014). The shareholders would be able to withdraw some, or all of their contributions without having to modify the partnership agreement. No-par-value shares were to facilitate the rapid issuance of new shares at the market price without the necessity to launch the procedure of nominal reduction and the procedure of notifying the creditors of share capital reduction.

Additionally, the draft bill contained solutions applicable to all models of a limited liability company, including those based solely on the share capital. One of such solutions consisted of a mechanism protecting the interests of creditors and reducing the company's credit risk through a solvency test. It assumed that each payment made in favour of the shareholders due to the profit share would require the board of directors to submit a declaration that the fulfilment of the payment by the company would not prompt it to lose the ability to meet its obligations in the ordinary course of business activity, for one year. The board of directors would be held liable to the company for exercising due diligence in adopting a resolution regarding such a prognosis. The board's statement would not constitute a guarantee of an outcome, but merely a prediction. The solvency test was to apply to all limited liability company models (Draft Assumptions, 2014).

The project provided for the protection of the company's creditors by imposing an obligation on the company's board of directors to periodically evaluate the risk of occurrence of a significant loss to the company and the company's capaci-

ty to maintain sufficient solvency. It was assumed that this would "revitalise" the obligation of the board of directors to convene the meetings of shareholders if the company's existence was endangered. Currently, this obligation is disregarded, and its importance is disclosed only when it comes to enforcing liability against the members of the board of directors.

The Draft Assumptions (Draft, 2014) "provides for the replacement of the mandatory obligation to establish and maintain the share capital as a start-up fund to protect the solvency of the company by ordering the allocation of parts of the profit to cover any future losses. The minimum amount of obligatory supplementary capital would depend on the amount of liabilities and constitute its fraction (5%), but not less than PLN 50,000. Adjusting the amount of supplementary capital to the size of the company's aggregate indebtedness was to allow for the creation of a 'buffer' eliminating the company's losses and protecting its solvency on the balance sheet much more effectively than the arbitrary amount of share capital which does not account for the size of the company." The obligation to establish supplementary capital would be similar to the regulation found in connection with a traditional joint-stock company. As already mentioned, these amendments were not introduced. However, many of the proposals contained in the draft bill have been included in a new type of company – a simple joint-stock company[9]. Its detailed description was included in the comprehensive explanatory memorandum to the act introducing the SJS (The Government's Draft Bill, 2019).

At this point, we shall limit ourselves to indicating the solutions to the subject of consideration, which is the institution of share capital. The proprietary structure of a simple joint-stock company is based on the model of no-par value shares and replacement of share capital with joint-stock capital, which constitutes a new type of core capital, different from the share capital found in limited liability and joint-stock companies (The Government's Draft Bill, 2019). It is not disclosed in the partnership agreement, therefore, contributions to and payouts from the joint-stock capital would not require an amendment to the aforementioned agreement. There is no need for the assistance of a notary or a long period of waiting for the payment due to the obligation to summon creditors under the so-called convocation. Therefore, in the case of shareholders, payouts and distributions are made faster, as long as those payouts do not entail a threat of insolvency according to the balance sheet test (Przychoda, 2019). The limit for unrestrained share capital payments is set by a ceiling of 5% of the company's total liabilities arising from approved financial statements for the previous financial year (The Government's Draft Bill, 2019).

This solution aimed at providing the SJS companies with a possibly flexible proprietary structure, particularly a structure that is adjusted to contributions in the form of labour and services rendered in exchange for shares, and thus adapting

[9] Nevertheless, voices were raised that the same objectives might have been achieved under the limited liability company reform (Romanowski, 2019).

the proprietary structure of SJS companies to conditions of various (especially the startup) projects. The solutions of the draft are to generally facilitate undertaking and conducting business activity in the form of a limited company for all types of investors and thus increase the attractiveness of Polish corporate law in the era of growing competition between the regulations of the EU countries. At the same time, the bill also seeks to provide improved protection for the interests of JSA creditors than what is provided for under the traditional share capital model (Government bill, 2019). This is done through such things as prohibiting shareholder benefits that would jeopardise company solvency, as well as requiring the JSA share capital to be injected to absorb future losses (Government bill, 2019).

5. Summary

The case for reforming the limited liability company proprietary structure has been presented above. Nonetheless, the necessity to adapt to changes that occur in this regard in other European Union member states must also be considered. The aim is to make the Polish company law system competitive with other such systems in Europe. However, some claim that "the proposed changes [concerning the limited liability companies] are an attempt to transplant foreign elements into a healthy organism" (Janeta, Mahmand, 2011).

J. Janeta and F. Mahmand (2011) cite S. Sołtysiński, who "also pointed to the looming threat to Poland from the so-called "small flag" companies as an argument for the need for change. It can be deemed that the position expressed in early May 2011 by an expert group established by the European Commission, which strongly advocated for facilitating the movement of companies – especially small ones – between the EU Member States, foreshadowed it."

We have been dealing with an unacceptable situation due to the difficulties related to how companies function. This is due to the constraints resulting from the share capital not playing any particular role in practice. Maintaining this state of affairs would be detrimental to the legislature's authority – as already mentioned. Therefore, introducing JSA, a new type of company without share capital, should be deemed justified. The coming years are bound to show the practical extent to which JSAs become an alternative to companies with share capital.

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DYSFUNKCJONALNOŚĆ KAPITAŁU ZAKŁADOWEGO

Streszczenie

Kapitał zakładowy jest mocno zakorzeniony w rachunkowości. Obecnie w środowisku prawników instytucję kapitału zakładowego poddaje się krytyce. Taki też jest cel artykułu – wykazanie dysfunkcjonalności kapitału zakładowego i wskazanie na potrzebę reformy struktury majątkowej spółki. Wykorzystano krytyczną analizę literatury przedmiotu, aktów prawnych oraz porównanie projektowanych rozwiązań. Zwrócono uwagę na nie spełnianie przez kapitał zakładowy funkcji gwarancyjnej uznawanej do niedawna za jego podstawową funkcję. Opisano wady kapitału zakładowego utrudniające spółkom funkcjonowanie.

Nakreślono wcześniejsze próby reformy kapitału zakładowego, które nie doszły do skutku. Wiele z tych propozycji zostało uwzględnionych w nowym modelu spółki bez kapitału zakładowego – prostej spółce akcyjnej. Skoncentrowano się na omówieniu tych jej cech, które zastępują kapitał zakładowy. Wychodzi ona naprzeciw postulatom reformy struktury majątkowej spółki. Przytoczono również reformy kapitału zakładowego w innych krajach i w tym kontekście wskazano na potrzebę reformy struktury majątkowej spółki, aby sprostać konkurencji ze strony innych systemów prawa spółek w ramach Unii Europejskiej.

Słowa kluczowe: kapitał zakładowy, prosta spółka akcyjna, reforma struktury majątkowej, funkcja gwarancyjna, model spółki.