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The legitimacy of introducing a simple joint-stock company into the Polish legal order

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Abstract

Motivation: The paper focuses on the legitimacy of introducing the simple joint-stock company (PSA) into the Polish legal order by referring to the financing of the initial phase of business operations. Describes the issue of capital gap, especially significant for capital-intensive innovative enterprises that have a problem obtaining financing due to high operational risk. The work also shows the importance of choosing capital financing sources due to financial risk and development opportunities. It presents an unconventional solution on raising funds for activities through crowdfunding. The paper attempts to answer questions about the legitimacy of introducing a simple joint-stock company into the Polish legal system and potential benefits and threats from the use of this type of company by startups.

Aim: The paper proposes two research aims; verification of the legitimacy of introducing a simple joint-stock company in-to the Polish legal order and presentation of possible impact of the introduction of PSA on the use of crowdfunding as a start-ups financing source.



Results: Thanks to the analysis of the acts and the literature on the subject, potential advantages and disadvantages of introducing PSA into the Polish legal system were identified. The authors take the position that combining the features of a limited liability company with a joint stock company may be the legislator's response to the needs of the startup community.

Keywords: start-ups; simple joint-stock company; PSA; crowdfunding
JEL: G32; L25; L26; K220

1. Introduction

The demand for capital is not the same throughout the entire period of operation of the given enterprise. The enterprise life cycle, being an analogy to the human life cycle is contractual and consists of several stages distinguished by different development dynamics, demand for capital and available sources of financing (Targalski, 2009, pp. 27).

The classical approach distinguishes such stages as the birth (uprising), growth, maturity and decline (liquidation) of an enterprise. This division has been modified many times. Depending on the selected model, 3 to 10 stages of enterprise development can be distinguished. Some models describe the life cycle of the enterprise in great detail, others in a very general way. However, the distinction between the stages of the emergence of a new enterprise on the market, the growth or expansion phase and the functioning of a mature enterprise is clearly visible in all proposals. Some models include the pre-birth or fall stage as the end of the enterprise's life cycle. Some authors also distinguish the restructuring phase (Poznańska, 2011, pp. 33–34; Wasilczuk, 2004, pp. 71).

Each phase has a different capital demand due to the different level and dynamics of costs and revenues achieved by the enterprise. Such variables as size, results achieved, investment needs, risk of investing in activities determine the availability and profitability of financing sources.

2. Startup financing in Poland according to literature of subject

2.1. Sources of financing in the stage of initial development of the enterprise

The initial stage of activity, referred to as the start-up, start-up phase, founding phase or initial development phase (Kordela, 2018, pp. 181) according to some authors, concerns the first two or three years of operation of an enterprise, in some cases it lasts up to seven years (Timmons & Spinelli, 2007, pp. 261). The features of this stage of enterprise development most frequently mentioned in the literature are high growth potential (Aronsson, 2004, pp. 289–292) and innovation (Baruk, 2006, pp. 94) understood as the introduction of a new

or improved product or service, process or organisation. A start-up is often indicated as a temporary organisation that is looking for a repeatable, scalable and profitable business model (Blank & Dorf, 2013 pp. 19).

At this stage, the demand for capital is very high. Available funding sources are significantly limited. The organisation does not yet have a stable market position, investment risk is high. Short market experience causes limited credibility of the entity in the eyes of potential lenders. At the initial stage, the financial risk is the highest because it is the period of the first market verification of the investment project — its acceptance or rejection by potential recipients. For this reason, capital is the most expensive and the most difficult to obtain. Classic sources of financing play an important role. One of the sources of financing, especially at the beginning of the start-up's existence, is bootstrapping, i.e. financing from own savings, from the capital allocated under the credit card, loans and so-called FFF — capital acquired from family, friends and fools (those who believe in the success of the venture) (Ebben & Johnson, pp. 851–856) which, however, is largely insufficient to carry out activities, which creates a capital gap. The first phase of the enterprise's operation is characterised by very high operational risk, and on the other hand, it often has a very high demand for capital. At the outset, the company's operating profitability is usually low or even negative, net flows are also negative. The presented characteristics of this phase show that the company has a high demand for capital, which increases with development. At the same time, the sources of its acquisition are significantly limited. Due to high operational risk and unfavourable net flows, potential creditors are not determined to invest in the company. Due to the frequent lack of high value collateral, as well as low creditworthiness, the company has difficulties in obtaining a bank loan or loan on favourable terms, which was confirmed in studies conducted by Hazudin et al. (2015 pp. 436–443) and also Beck and Demirguc-Kunt (2006, pp. 2931–2943). In addition to classic financing sources, sources such as crowdfunding, business angels and venture capital as well as subsidies from EU funds are mentioned as relatively available in this phase of the company's existence (Zwilling, 2015).

Venture capital and private equity are funds that create financing opportunities that are beneficial to the enterprise because it does not reduce the entity's financial liquidity. The organisation does not pay income tax costs on an ongoing basis, and the fund often supports the enterprise with knowledge. It is directly involved in the risk associated with the failure of the venture and interested in increasing its value, so it shows significant commitment (Ostaszewski, 2000, pp. 23–24). Business angels are one of the few sources of funding that is often dedicated to new ventures that are high risk and have difficulty obtaining funds from traditional sources of financing. In addition to capital, business angels usually share their knowledge and experience, a network of contacts (Argerich & Cruz-Cázares, 2017, pp. 310–330).

However, it should be noted that both the Slovak simple joint-stock company and the Polish simple joint-stock company are not listed in the annex

to Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (I+R Directive), unlike SAS which is included in this annex, which may have negative tax consequences when choosing these organizational forms of the enterprise.

2.2. Use of crowdfunding in Poland

Crowdfunding or literally crowd financing; from the combination of the words crowd and funding is a phenomenon of accumulating funds for the implementation of the project using a virtual community. One definition defines crowdfunding as a system that allows you to invest in a variety of projects and ventures, often with the help of low amounts and using online platforms that allow contact between the person collecting funds and investing in the project (Agrawal et al., 2011, pp. 4).

There are three basic crowdfunding models (Dziuba, 2015, pp. 23–24):

- donation,
- lending,
- investment,
- hybrid.

The donation model is the most common in Poland. In its classic approach, there are no benefits to the donor. However, there is a sub-model under which the supporters receive a non-financial gratification for the payment of a specific amount, usually the gratification has much lower value than the donor's payment. This is the model on which platforms such as Kickstarter.com, Rockethub.com or Indiegogo.com are based. There is also a sub-model called pre-sale. Financers support the creation of a product, which is later sold to them at a lower price or receive it for making the prepayment only.

Lending model allows to borrow money bypassing traditional financial institutions. Under this model, sub-models of micro-loans and social loans can be distinguished.

The investment model gives the opportunity to raise capital, while supporting the investor to invest free financial resources in enterprises in order to achieve financial benefits. There are such investment sub-models as (Dziuba, 2015, pp. 23–24):

- an investment sub-model — a joint-stock;
- a sub-model of investing in other securities;
- an investment (equity) sub-model — social actions (securities issued to finance projects addressed to the local community);
- a real estate investing sub-model;
- a sub-model for purchasing invoices and other company obligations;
- a sub-model based on royalties, investment model for bitcoin and other cryptocurrencies;
- a sub-model of an investment fund based on crowdfunding.

The hybrid (mixed) model is a combination of all or part of the previously mentioned models.

Literature analysis indicates that equity crowdfunding is particularly attractive for enterprises, especially in the start-up phase (Piekunko-Mantiuk, 2016, pp. 41–51). Supporters not only provide funds for the development of the enterprise. They often become clients as well as promote the product, especially when they participate in the income distribution. Contrary to business angels or venture capital funds, they do not have a significant impact on business decisions. Another advantage of crowdfunding, compared to other forms of financing, is that the geographical distance between the entrepreneur and the investor does not play any role. Crowdfunding naturally allows for product verification and customer interest due to interaction with the crowd. The campaign itself for raising funds can also be treated as a marketing campaign. It is not surprising that it is most often used by companies in the initial development phase. There are also initiatives in Poland aimed at promoting crowdfunding as a form of financing. In 2017, an agreement was signed between the WSE and the Beesfund platform to create a joint platform to promote Polish start-ups (Szopa, 2018, pp. 151). In 2016, legal changes were introduced enabling the disposal of shares online in the S24 system (Mizińska & Chudzik-Marczewska, 2019), but only for limited liability company.

On the other hand, this investment model is still not popular in Poland. According to research, only 2% of Polish start-ups indicate crowdfunding as a source of financing, however, 11% of the surveyed entities declare their intention to raise capital through crowdfunding in the next 6 months (Startup Poland, 2018, pp. 36). One reason may be sceptical attitude of investors towards projects. Due to the small number of Polish crowdfunding portals operating in the share model, investors have limited information possibilities in terms of portal reliability, determining the rate of return or investment risk. There is also a small awareness of entrepreneurs about this form of financing. On the other hand, the development of the crowdfunding market in other countries indicates significant prospects for its expansion also in Poland. Currently, the lack of appropriate legal regulations is indicated as a factor inhibiting the development of this form of financing in Poland. In the case of equity crowdfunding, the problem is e.g. statutory requirements related to trading shares in limited liability companies, restrictions related to Polish regulations on public offering (obligation to prepare the issue prospectus and to use brokerage house when offering shares over EUR 100,000.00) (Kordela, 2018, pp. 181). The regulations governing the new type of capital company — the simple joint-stock company (PSA), are indicated as an opportunity to solve these problems.

3. Methods

Two research goals were established as part of the research:

- verification of the legitimacy of introducing a simple joint-stock company into the Polish legal order;
- presentation of possible impact of the introduction of PSA on the use of crowdfunding as a start-ups financing source.

In order to achieve both aims a literature review was conducted. Authors divided the research into two parts.

1. First, the PSA legal acts (*Act amending the Code of Commercial Companies...*, 2019; *Act amending the Code of Civil Procedure...*, 2020) were analysed in terms of the features distinguishing the solution from other existing legal solutions and advantages and uses suggested by the legislator.
2. In the next stage, statements of the doctrine representatives on the introduction of PSA were identified in order to define the advantages and disadvantages of the solution.

On the basis of the conducted analysis, the authors made their own assessment of the legitimacy of introducing simple joint-stock company to the Polish legal order and presented their point of view about possible impact of the introduction of PSA on the use of crowdfunding as a start-ups financing source.

4. Results

By the *Act amending the Code of Commercial Companies and certain other acts* (2019), the legislator introduced a new type of company to the Polish law, i.e. the simple joint-stock company (PSA) (Business Insider, 2019). By the *Act amending the Code of Civil Procedure and certain other acts* (2020), the legislator introduced further provisions regarding the simple joint-stock company and postponed the date of entry it into force by one year.

The simple joint-stock company, although it did not enter into force on March 1, 2020, raised great interest in both the doctrine and the practice. It is also called the “Company for start-ups” (PAP MediaRoom, 2020) because of its goal, which is to be support and development of start-ups in Poland.

In connection with the aforementioned goal of the simple joint-stock company, the postponement of the entry into force of its provisions for one year was negatively accepted, i.e. from March 1, 2020 to March 1, 2021. The Ministry of Development (2016) announced in a statement that the postponement of the entry into force of the PSA regulations is a consequence of postponing the introduction of the electronic registration proceedings (Ministry of Development, 2016).

Due to Art. 7 of the *Act amending the Code of Administrative Procedure and certain other acts* (2021), the entry into force of a simple joint-stock company was postponed to July 1, 2021, while pursuant to Art. 5 point 4 lit. a) of this act, the fundamental provisions amending the proceedings before the registration

courts operating the National Court Register also entered into force on 1 July 2021.

The goal of PSA is to facilitate innovative entrepreneurs in Poland to raise capital, establish and operate the company. The framework of the existing commercial companies, in particular capital companies, is inadequate for this activity.

The doubts regarding the definition of the simple joint-stock company as the capital company may be indicated by the takeover or significant similarity to solutions from partnerships, i.e.:

- possibility of making a non-cash contribution to non-joint-stock capital to the simple joint-stock company in the form of a non-transferable right or the provision of work or services (in the case of a limited liability company and the joint-stock company this is not possible at all);
- simplified liquidation, which differs from the liquidation envisaged for both partnerships and capital companies, however the assumptions of the regulation refer to the liquidation envisaged for partnerships;
- only the formal obligation to have share capital, due to the symbolic obligatory amount of PLN 1.00.

Regarding the amount of share capital, an analogy can be seen to the French Simplified Joint-Stock Company (SAS), where it has been EUR 1.00 since 2009, and the Slovak simple joint-stock company (Jednoduchá spoločnosť na akcie), which is also EUR 1.00 (Sójka, 2018, pp. 15). In addition, non-cash contributions in the form of work or services have been approved for SAS (Wiórek, 2018, pp. 6).

“The simple joint-stock company is to be based on flexibility and low requirements for its establishment. The minimum share capital was set at PLN 1.00, it was possible to take up shares in exchange for providing work or services to the company and an instant 24-hour online registration path was introduced (S24). Also new is the lack of the need to appoint a supervisory board, freedom in shaping the articles of association or the simplified liquidation. Everything tailored for start-ups that today have to deal with the stringent requirements for running even limited liability company” (Lis, 2020).

According to the government portal, the benefits of this regulation are as follows:

- “very low share capital required when establishing a company (PLN 1.00);
- flexible approach to company bodies, including the possibility of appointing a board of directors that combines the features of a management board and a supervisory board;
- simpler procedures and greater freedom in adopting resolutions remotely, e.g. via email or instant messengers;
- greater flexibility in terms of types of shares and the company’s operating principles, including actions for work or services;
- the possibility of establishing via the Internet in the S24 system;

- the digital register of shareholders kept by a notary public or a brokerage office;
- easier management of company funds — no <<frozen>> share capital;
- simple rules regarding the liquidation of a company and shorter time needed for liquidation” (Biznes.gov.pl, 2020).

The *Outline of the simple joint-stock company (PSA) concept* (Ministry of Development, 2016) presented by the Ministry of Development in June 2016 indicates the justification for the existence of a new type of the capital company by the following motives “The impulse to consider the need to introduce a new type of capital company into the Polish legal order was the analysis of the legal environment of the so-called start-ups, i.e. innovative companies, most often operating in the area of new technologies. The characteristics of start-ups include, in particular, low start-up costs, higher risk than conventional ventures, and potentially higher return on investment. The main sources of financing for this type of ventures are venture funds, business angels and crowdfunding” (Ministry of Development, 2016).

According to the justification: The Simple Joint-Stock Company concept aims to achieve the following basic goals (Ministry of Development, 2016):

- “the easy establishment of a company (including electronic registration);
- the minimum capital requirements for founders and the possibility of flexible shaping of the company’s property structure;
- the ensuring the possibility of easy and various forms of investment in the undertaking (including crowdfunding financing);
- the reconciling the interests of the founders with the attractiveness of the venture for investors, by facilitating the relationship between the founders and between the founders and investors while reducing the risk of imposing terms of investor agreements on the founders or regulating solutions that facilitate investment;
- the liquidation of the company as fast and uncomplicated as possible”.

This justification pointed out that both the limited liability company and the joint-stock company are not suitable for start-ups. No silent shares, the amount of the minimum value of shares and already limited by the amendment to article 180 of the CCC, the rigour of the sale of shares are negative elements in the limited liability company. Relatively expensive and complicated establishment of the joint-stock company (Ministry of Development, 2016).

It is worth emphasising that one of the advantages of the simple joint-stock company is the possibility of establishing it by means of a shared template in the ICT system, as it is currently the case for a general partnership, a limited partnership and the limited liability company.

All of the above-mentioned advantages of PSA are to encourage investors to establish start-ups in Poland in the form of the simple joint-stock company and constitute an alternative to the joint-stock company, which serves crowdfunding purposes in Poland (Ryszkowski & Witoszek-Kubicka, 2020, pp. 71–88).

Of course, it can also be used for other purposes, to put it more precisely — “for any legitimate purpose unless the law provides otherwise” (according to article 300¹ § 1 of the CCC), if for a given activity the provisions of specific acts do not require a given type of company other than the simple joint-stock company (Adamus, 2021, pp. 42). An example of the operation of the simple joint-stock company, and also a model according to the Outline of the Simple Joint-Stock Company concept, is France, where the Simplified Joint-Stock Company (*Société par Actions Simplifiée* — SAS) has been operating in the company law system since 1994, and Slovakia, where the Simple Joint-Stock Company (*Jednoduchá spoločnosť na akcie*) entered into force on January 1, 2017 (Ministry of Development, 2016).

It is also necessary to point out the opinions of the representatives of the doctrine, which are divergent, but helpful to the legislator if it will be necessary to change the provisions concerning the PSA.

Kappes (2018, pp. 12) points out that the expectations of start-up creators relate primarily to the sphere of public law, and not the issue of a new type of company, thus pointing to the inaccuracy of the PSA’s construction through the wrong assumption of the Ministry of Development. This author further indicates that there is no need to introduce a new type of company dedicated to start-ups. While changes to public law could be considered, as it will be shown later in the Polish system of companies, there is no hybrid capital company.

Kappes’s doubts regarding the lack of balance between the company’s and creditors’ interests in PSA are shared by Kruczalak-Jankowska (2018, pp. 28).

Dzierżak (2016, pp. 38) also remains sceptical about the PSA. “It is good that the ministry has recognised the flaws in existing company law regulation. The question, however, is whether the correct way to carry out the reform is to multiply legal forms rather than try to improve existing types of companies? The creation of PSA does not seem to be the right way to eliminate entrepreneurs’ problems. The presentation of the concept of the new company should, however, contribute to the resumption of discussions on the legitimacy of introducing new solutions into Polish company law under existing legal forms, primarily a limited liability company”.

Wiórek (2018, pp. 6), criticising the PSA, postulate making the regulations on the limited liability companies more flexible.

As opposition to this is PSA supporter Sójka (2018, pp. 15), who indicates that: “The legitimate assumption of the project promoter is to avoid any form of destabilisation of turnover for those enterprises that still successfully use the traditional form of the limited liability company. Relatively quick introduction of changes necessary for technological companies to the provisions on the limited liability company it would require the introduction of far-reaching multi-variability within the structure of this company. In fact, this would lead to two very different types of the limited liability company trading on the market. Perhaps a simpler and more accurate solution is to introduce a new form

of the company”. I agree with this view because it was introduced by a modification of the limited liability company its multi-variability would lead to many practical problems and to somehow “blur” of this type of company, a problem with the identification of a particular company of this type and the principles of its functioning on the market.

Opalski (2019) indicates that the PSA is a consequence of the historical evolution of Polish company law and the needs of business participants. Just these reasons justify the provisions governing the PSA. The PSA solutions introduced to the CCC seem to meet the needs of practice, although only time will tell if it will work in practice.

The location of the provisions governing a simple joint-stock company in Section 1a, Simple Joint-Stock Company, Art. 3001 to Art. 300134 of the Commercial Companies Code, i.e. between a limited liability company and a joint-stock company, indicates the legislator’s intention to define the characteristics of that company and, at the same time, the niche it is to occupy in the legal system (Ministry of Development, 2016).

On the other hand, the regulation of the simple joint-stock company may cause some doubts, including systemic nature. According to the current version of article 14 § 1 of the CCC: “§ 1. The subject of the contribution to a capital company may not be a non-transferable right or the provision of work or services”.

A certain analogy arises for the limited joint-stock partnership, which is also a hybrid company, combining the features of the capital company — the joint-stock company and a partnership — the general partnership. This is *expressis verbis* expressed in art. 126 § 1 of the CCC.

Thus, it can be concluded that the legislator, by regulating the simple joint-stock company, has supplemented the system of companies with the missing hybrid type in capital companies.

Some similarities in hybrids are noted in the doctrine: “The possibility of contributing work and services to the PSA should be understood as introducing the personal element into the structure of the capital company, just like e.g. the capital element is the limited partner’s membership in the limited partnership as a partnership. Even a strongly personally shaped PSA retains at least the features of excluding the personal liability of shareholders for the company’s obligations to entrust the management of the company’s affairs to an elected management body” (Opalski, 2019).

It should be added that the capital element is also the shareholder’s membership in a limited joint-stock partnership as a partnership.

Opalski (2019) points out the capital features of a simple joint-stock company, which means that it should be included in capital companies. In addition, it should be noted that one of the differences compared to the other hybrid company, i.e. a limited joint-stock partnership, is the lack of a general partner or partner who is liable without limitation for the company’s obligations.

Moreover, Piniór (2020, pp. 2) points out that the simple joint-stock company is innovative through its free choice between a monistic and dualistic management system.

5. Conclusion

Drawing on French patterns may prove to be a good idea, since SAS has been very popular from the very beginning, since the introduction of the new legal form has quickly led to a significant reduction in the interest of entrepreneurs in the French limited liability company (SARL) (Dzierżak, 2016, pp. 38). A similar trend can be expected in Poland due to the adoption of similar solutions in the regulation of PSA.

Moreover, it would be a valuable change if, following the example of SAS, the Polish simple joint-stock company would be listed in the annex to I+R Directive.

Introducing a simple joint-stock company into the Polish legal order may have significant impact on Polish start-ups. To further develop crowdfunding, it is necessary to take a number of other actions including not only legislative but also information areas. There are still many doubts in the case of equity crowdfunding. As for the information area, crowdfunding is based on a developed community, which is why promoting successful projects and media interest is crucial for the further development of this funding source. The future will show how PSA will be adopted in practice and whether it will really facilitate the creation of start-ups in Poland, but the adopted project and its justification seems to be optimistic.

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