

IS THIS THE END OF SHARE CAPITAL? LIMITED COMPANY LAW REFORMS IN POLAND AND OTHER EUROPEAN COUNTRIES

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Summary. The article defines the current trends in European legislations concerning the issue of share capital in private limited companies, its necessity and fixed amounts. The analysis covers proposed amendments of legal provisions at both EU and national level, with a particular reference to Polish and German regulations. Moreover, the Author discusses the mechanisms applied worldwide to create and maintain the statutory capital, as well as the key arguments raised by the opponents and supporters of the commented institution.

Key words: share capital, statutory capital, limited company, private company, creditors' protection

1. GENERAL: THE NOTION AND FUNCTIONS OF SHARE CAPITAL

Traditionally speaking, share (statutory) capital is a mandatory and basic fund held by a company and reported in the company's balance sheet as liabilities. The amount of the capital, which is set out in the articles of association and cannot be lower than the required statutory minimum, corresponds, in principle, to the sum of the nominal value of shares representing the members' rights in the company as well as defining the minimum amount of the total members' contributions, while, at the same time, determining the extent of restrictions on the disposal of the company's assets by the shareholders. As a result, there are three basic functions of the share capital that can be distinguished: corporate (legal), commercial (economic) and safeguarding (protective) [Opalski 2002, 16ff, 18ff; Szumański 1997, 79ff; Weiss 2002, 336]. The consequence of the requirement to create, pay, and maintain such a fund (Ger. *Kapitalerbringung und Kapitalerhaltung*) is an extensive system of standards defining, among others, the principles of acquiring shares or stocks, the criteria for the capability of making a contribution, liability by way of improper performance of the obligation to contribute; on the other hand, these standards limit the possibility of profit sharing, acquisition of own shares or stocks and

the transfer of assets between the company and its members, both *causa societatis* and – within certain limits – based on non-corporate entitlements.

The construct of the share capital, including the gradually evolving system of rules of its payment and maintenance, stem from the 19th century dogma of (mostly German) company law. Its role in the design and development of the idea of the company is also unquestionable.¹ It has also laid the foundation for the harmonisation of the law on joint stock companies at the European level.² However, the latest domestic and foreign literature reveals an influential trend that questions the effectiveness of the protection of company creditors by means of the institution of statutory capital and calls into question the need to maintain it, at least in the current shape [Opalski 2004, 435ff; Oplustil 2006, 551ff; Radwan 2005, 23ff; Komarnicki 2007, 33f]. This raises a more fundamental question about the aim and scope of the legislator's interference in the legal and economic relations and involves a shift in the approach to the role of the company law.

2. STUDIES ON PROPOSED AMENDMENTS TO THE SECOND COUNCIL DIRECTIVE (CAPITAL DIRECTIVE)

A doctrine-centred discussion about the economic meaning of the institution of statutory capital, largely determined by the direction of the evolution of the company law in the US and increasing pressure of the capital markets, has had an impact on the projected legislative initiatives at the level of European law [Komarnicki 2007, 57ff; Opustil and Wiórek 2004, 4-8; Herbet 2015, 249ff]. First limited proposals to amend the Second Council Directive and addressing the payment and maintenance of share capital were put forth under the SLIM project (Simpler Legislation for the Internal Market),³ initiated by

¹ For example, in the formation of the principle of members' non-liability for the company's obligations.

² See Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 8, special edition, OJ Special Edition, Chapter 17, vol. 1, p. 8), replaced by Directive 2012/30/EU of the European Parliament and of the Council 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of para. 2 of Art. 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

³ Report from the Commission to the European Parliament and the Council – Results of the fourth phase of SLIM, 4 February 2000 (COM (2000) 56).

the European Commission in 1996 [Drygala 2001, 291ff]. They were subjected to a thorough analysis conducted by the High Level Group of Company Law Experts established in 2001 and headed by Prof. Jaap Winter. An assessment of the institution of share capital and an outline of an alternative model of creditor protection are contained in the Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, dated 4 November 2002. The experts found categorically that the institution of share capital does not safeguard company creditors in a satisfactory manner (Item IV.2 REG), does not offer the assumed benefits, and, no doubt, entails an increase in operating expenses (Item IV.1 REG). The amount of the share capital is a much simplified and imprecise indicator of the company's capacity to repay its debt, and if it is disproportionate to the total assets, the company is relatively free to distribute its assets to the benefit of the shareholders regardless of its actual liquidity (Item IV.4.a REG). The work undertaken by the expert group was reflected in the European Commission's Communication to the Council and the European Parliament dated 21 May 2003, proposing an action plan with regards to the modernization of company law and the strengthening of corporate governance in the European Union.⁴ Among the long-term objectives (reaching beyond 2009), the European Commission pointed to, for example, the implementation of an alternative system of creditor and shareholder protection. A change in the approach was occasioned by the global economic slowdown of the years 2007–2009; the European Commission recognized that they would not propose any further revision of the Second Council Directive in the nearest future.⁵

Notwithstanding the foregoing, the concept of liberalization or departure from the strictly viewed structure of the share capital with a statutory minimum – also under EU law – keeps returning in the subsequent drafts. The idea of the share capital amounting to EUR 1 (or one unit of currency of a relevant member state) surfaced in the recently abandoned draft regulation on a European Private Company (*Societas Privata Europaea*, SPE).⁶ A similar approach is seen in the draft directive on single-member private limited liability company (*Societas Unius Personae*; SUP) of 9 April 2014.⁷ The work

⁴ Communication from the Commission to the Council and the European Parliament Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM (2003) 284 final.

⁵ Results of the External Study on the Feasibility of an Alternative to the Capital Maintenance Regime of the Second Company Law Directive and the Impact of the Adoption of IFRS on Profit Distribution, http://ec.europa.eu/internal_market/company/docs/capital/feasibility/market-position_en.pdf [accessed: 25.10.2019].

⁶ See the Proposal for a Council Regulation on the Statute for the European private company of 25 June 2008 (CO (2008) 396 final – 2008/0130 CNS).

⁷ See the Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies (COM/2014/0212 final – 2014/0120; COD) and

on this directive has also been suspended. Finally, among the proponents of this approach there is a team of experts headed by Prof. Paul Krüger and Prof. Theodor Baums. They are developing a project of “soft” regulation intended to determine a specific regulatory standard, thus influencing the formation and approximation of the national company laws, i.e. the European Model Company Act [Baums and Krüger 2008; Idem 2009, 5–17; Krüger 2010, 303–25; Cleff 2011, 156–70].

Parallel to the activities endorsed by the European Commission, the matter in question was investigated and proposals were made by two research teams: one led by Prof. John Rickford (United Kingdom) and the other headed by Prof. Marcus Lutter (Germany) and operating within the framework of the “Arbeitskreis Capital in Europa” project. The solution put forward by the Rickford Group (2004) implied the departure from the minimum capital and the rules of its maintenance. The role of an instrument limiting the payments to members (shareholders) was to be filled by the solvency test: the company must be capable of satisfying its debt throughout the following financial year, without the need to produce a separate balance sheet test. If, however, the payments to members (shareholders) occur in the absence of surplus, the Management Board should be able to explain why this will not affect the company’s solvency. The project by the Lutter Group (2006), on the one hand, proposed to uphold the requirement of the minimum capital and the principle of its maintenance, but, on the other, opted for the choice of the creditor protection system by the capital companies governed by a specific legislation (Ger. *Unternehmenswahlrecht*). Capital companies that prepare their financial statements per the IAS/IFRS would be able to choose a two-stage system, combining the balance-sheet criteria and the solvency perspective. The necessary condition to be fulfilled to make payments to the members (shareholders) would be to maintain the coverage of equity and a positive result of the solvency test of the company (Ger. *Solvenztest*) over the next 24 months as verified by certified auditors.

the Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council of 9 April 2014 on single-member private limited liability companies, SWD (2014) 123 final. Moreover, the proposal does not provide for the obligation to establish a reserve capital from earnings because it might prevent the formation of companies. On the other hand, there is a strong resistance of many industry groups highlighting the risk of approaching this type of companies as a vehicle for establishing non-reliable entities (the “European Panama” syndrome) [Koster 2015, 5–6].

3. CHANGES IN THE CREATION AND MAINTENANCE OF SHARE CAPITAL IN SELECTED EUROPEAN COUNTRIES

The recent years have seen significant modifications in the British company law, traditionally considered liberal. The new Companies Act of 2006 [Davies and Rockford 2008, 48 ff; Rickford 2004, 262ff] ultimately withdrew from the construct of statutory capital, although it was already under the Companies Act of 1985 that private companies were exempted from the obligation to establish the minimum capital, and the instances of establishment of “one-pound companies” were not isolated. Today, British law does not require a contribution of any specific part of own capital at the stage of company establishment, and the eligibility of a company to trade depends on the result of the fluency test or the negative result of the insolvency test. Similar processes can be also traced in those European legal systems that traditionally advance the concept of protection of share capital. In 2003 France abolished the requirement for a limited company (SARL) to possess any minimum capital, previously amounting to EUR 7,500 [Becker 2003, 706–707; Meyer and Ludwig 2005, 346ff].⁸ The same situation is in Ireland, Netherlands and Estonia. The relevant requirements for private limited companies have also been eased in other European legislations, for example in Czech Republic, Croatia or Latvia, where investors can create such a company with minimal share capital of 1 CZK (EUR 0,04), 10 HRK (EUR 1,3) or 1 LVL (EUR 1,43). Currently, among the 28 member states of European Union of the 16 it is possible to create a company having limited liability of shareholders with a minimum capital of approximately 1 EURO [Žurek 2018, 49ff, 77ff].

The conclusive evidence of this Europe-wide deregulatory trend is the recent and profound reform of the German law on limited companies. Pursuant to the already mentioned Law of 23 October 2008 to Modernize the Law Governing Private Limited Companies and to Combat Abuses (MoMiG),⁹ the process of company establishment was simplified (Art. 2(1)(a) GmbHG); the rules for contributions in kind were relaxed, the rules for the so-called hidden contributions were radically simplified and modernized (Art. 19(4) GmbHG) along with the rules governing loans made to the company by the shareholders (Art. 39 and 135 InsO); provisions were introduced to associate the admissibility of payments to the benefit of shareholders with the determination of their

⁸ Act of 1 August 2003 on Economic Initiative (*Loi n° 2003-721 du 1.8.2003 por l'initiative économique*; J.o. n° 179 du 5.8.2003, 13449ff).

⁹ Already the adoption of draft MoMiG (Law for the Modernisation of the German Limited Liability Company Law and the Prevention of Misuse) sparked a vivid debate across the German legal literature [Bormann 2006, 1021–1025; Freitag and Riemenschneider 2007, 148ff; Hölzle 2007, 729ff; Noack and Grunewald 2005, 189ff; Schmidt 2007, 1ff; Seibert 2007, 673ff; Veil 2007, 1241ff].

impact on the projected company solvency; an option was offered to a person acting in good will to acquire an interest in the company (Art. 16(3) GmbHG); the list of punishable acts was expanded to include more offences that prevent the offender from sitting as a member of the Management Board (Art. 6(2) GmbHG). A German response to the increasingly widespread phenomenon of establishing quasi-foreign companies was the introduction of a new subtype of a limited company, *Unternehmergeellschaft (hafungsbeschränkt)* or UG, referred to colloquially as “GmbH-light,” with a share capital from EUR 1 to 24,999, repaid in cash only and maintaining a mandatory reserve for the future contribution to the share capital (Art. 5a GmbHG) [Lutter 2008, 126ff; Herbet 2015, 251ff, Žurek 2018, 57ff]. By contrast, the German legislator did not decide to lower the amount of the minimum capital of the regular limited liability company from EUR 25,000 to EUR 10,000.

4. DRAFT AMENDMENT TO THE PROVISIONS OF THE POLISH CODE OF COMMERCIAL COMPANIES AND PARTNERSHIPS CONCERNING LIMITED COMPANIES

The discussion in question as well the changes in company laws in other countries have also influenced the legislative concepts and drafting effort in Poland. Under the auspices of the Codification Committee for Civil Law (CCCL), a draft law amending the Code of Commercial Companies and Partnerships (CCCP) was proposed as early as in 2010.¹⁰ It envisaged a thorough upgrading of the underlying idea of the capital and proprietary composition of a limited liability company. In simple terms, the proposed changes may be divided into two basic sets.

First, it should be allowed to establish limited liability companies without a (obligatory) fixed initial capital but with a variable equity capital falling outside the existing principles (proposed Art. 151² and Art. 154, para. 3 CCCP). In such companies, the membership would be made up of the so-called non-nominal shares, i.e. without a specified nominal value (proposed Art. 151¹ and Art. 153 CCCP). This model was referred to as “alternative” to the “traditional” system of protection of creditors based on share capital and the corresponding type of company was defined as “light” or “bis” limited liability company. A manifestation of the lack of equity capital was to be the possible division of assets covering for the capital in the course of business, as part of

¹⁰ The draft was produced by A. Opalski and K. Oplustil working in the CCCL subgroup tackling company law. Other team members were S. Sołtysiński, T. Siemiątkowski, A. Szumański, and J. Warchoł. The draft text, also incorporating the proposals made during a conference held at the Ministry of Justice in 28 October 2010, was published in the 12th issue of the *Przeгляд Prawa Handlowego* (Review of Commercial Law – PPH) (hereinafter “the 2010 draft”) [Herbet 2015, 252ff].

the distribution of the dividend or other disbursements made *causa societatis* (proposed modification of Art. 192, para. 1 and Art. 199, para. 6¹ CCCP). What seems crucial, both in the context of the comments made after the comparative analysis and during the subsequent evaluation of the proposals by the scholarly community, the “traditional” and “alternative” models (i.e. the “light” company model) were not seen as separate solutions. It was assumed that limited liability companies might as well be established in the “mixed” model, that is, having both (relatively) fixed initial capital and variable equity capital (proposed Art. 151² *in fine* CCCP) as well as having members holding both shares with a certain nominal value and non-nominal shares.

Second, the changes to the financial and proprietary structure and the operation of all limited liability companies, including companies formed based on the existing regulation, i.e. having share capital and issuing shares with a specific nominal value. Some of the basic proposals include: a reduction in share capital and the minimum nominal value of the share to PLN 1 and the optional nature of this fund (proposed modification of Art. 152, para. 2 and 4, and Art. 151² CCCP), a prohibition of any benefits to shareholders above the fair value (proposed modification of Art. 189, para. 1 CCCP), liberalization of the rules of disposal of supplementary capital (also, insofar as it comes from *agio*; proposed modification of Art. 189, para. 2 and Art. 192, para. 1 CCCP), the introduction of the so-called solvency test as a prerequisite for the payment of the dividend (proposed modification of Art. 192, para. 2 and 3 CCCP) and the obligation to create a provision for future losses in the form of a mandatory allocation from net profit to supplementary capital (proposed Art. 231¹ CCCP), clear specification of the sequence of covering for company losses (proposed Art. 231² CCCP), extension of the responsibilities of the management board pertaining to the periodic monitoring of the financial situation of the company and detailed specification of the responsibilities of this body in the event of the so-called significant loss (proposed modification of Art. 233 CCCP), simplification of the rules of increasing share capital based on the existing provisions of the articles of association (proposed modification of Art. 257 CCCP) and through the capitalization of reserves (proposed modification of Art. 260 CCCP), liberalization of the rules of acquisition of own shares (proposed modification of Art. 200 and Art. 200¹ CCCP) and the reduction of share capital (proposed modification of Art. 262 and Art. 264¹ and 264² CCCP), etc.

The proposed 2010 reform of limited liability company aroused a strong interest in the literature where opinions ranged from enthusiastic to highly critical [Frąckowiak 2011; Kappes 2011; Katner, Kappes, and Janeta 2011; Kidyba and Kopaczyńska–Pieczniak 2011; Kidyba 2011; Koch 2011; Leśniak 2011; Weiss and Szumański 2014, 254ff; Wasilewski 2011; Zięty 2011; Opalski 2011; Opalski and Romanowski 2009a; Idem 2009b; Oplustil 2011;

Sołtysiński 2011; Wiśniewski 2011; Pabis 2011; Nowacki 2011; Osajda 2011; Sobolewski 2011a; Idem 2011b].¹¹ Following the objections raised, including the position of prominent representatives of the academia, the drafting effort was finally halted. The drafted law on the amendment of the Code of Commercial Companies and Partnerships and other acts of 11 August 2014, submitted to the Ministry of Justice, was also rejected.¹² The changes to the financial and proprietary structure of the company were set in the same conceptual framework as before and were additionally associated with a collection of proposals aimed at the so-called computerization of incorporation of companies, amendments to articles, and memorandums of association.

The idea of the reform of the financial and proprietary composition of a limited liability company was revisited in 2015. In a Ministry of Justice's draft law amending the Code of Commercial Companies and Partnerships and the Act on Commercialization and Privatization of 18 May 2015,¹³ the earlier solutions were reconsidered (including the proposed modification of Art. 154, para. 1 and 2, Art. 189, Art. 192, Art. 200 and Art. 264 CCCP and proposed, though somewhat revised, Art. 231¹ and proposed Art. 264¹ CCCP). After social consultation, the concept of variable equity capital and non-nominal shares, which faced a massive resistance, was abandoned. Unfortunately, because the term of the Parliament expired, the draft never made it to the parliamentary agenda.

5. AMENDMENT TO THE PROVISIONS OF THE POLISH CODE OF COMMERCIAL COMPANIES AND PARTNERSHIPS CONCERNING SIMPLE JOINT-STOCK COMPANY

For the enthusiasts of the reform of the traditional system of creditors protection and the business environments supporting this concept, the failure of the project of modernization of CCCP regulations concerning a limited liability company became an impulse to search for alternative solutions. In 2017, the Minister of Development and Finance appointed a group of experts

¹¹ It is worth noting that none of the critical opinions rejected the proposal of the reform or supplementation of the institution of share capital in its current form (especially classified as group II), and some opponents questioned primarily the legitimacy of the recognition of a company established in the alternative model as a limited liability company and the admission of the mixed model [Frąckowiak 2011; Koch 2011; Osajda 2011; Leśniak 2011; Wasilewski 2011; Zięty 2011].

¹² The draft is accessible at the website of the Ministry of Justice: <http://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-gospodarcze/> [accessed: 10.07.2015]; hereunder "the 2014 draft."

¹³ The draft is accessible at the website of the Ministry of Justice: <http://bip.ms.gov.pl/pl/projekty-aktow-prawnych/prawo-gospodarcze/> [accessed: 10.07.2015]; hereunder as "the 2015 draft."

– representatives of legal science and practitioners – to develop the assumptions of CCCP amendment introducing a new type of capital company – a simple joint-stock company (SJSC). The general model for this initiative were the solutions adopted in France, Luxembourg, Slovakia and Italy, allowing the creation of such a company with a capital of at least 1 EUR, however, the Polish legislator turned out to be far more daring. The act amending CCCP, establishing a new Section Ia (Art. 300¹–300¹³⁴) in Title III of the Code, was adopted on 19 July 2019¹⁴ and according to the original assumptions is to enter into force on 1 March 2020.¹⁵ The proposed draft, as well as the final amendment act of 2019, have raised extremely different opinions, mostly critical but also positive or partly positive [Dzierżak 2016; Kappes 2018; Kruczałak–Jankowska 2018; Nowacki 2018; Opalski 2019a; Idem 2019b; Podleś and Siwik 2018; Romanowski 2016; Sójka 2018; Wiórek 2018].

A simple joint-stock company is about to merge the features of a limited liability company (relatively simple and inexpensive establishment, functioning and liquidation) with the advantages of a joint-stock company. Its main, commonly mentioned characteristics are: no entry barriers related to the minimal share capital, fast electronic registration via a form (in addition to the possibility of incorporation by the traditional method), simplification and electronification of the company proceedings, simplified electronic register of shareholders (potentially also using blockchain technology), simple and flexible bodies' structure (lack of obligatory supervisory board and the possibility to appoint a board of directors in accordance with the so-called one-tier system) and a simplified liquidation. On the grounds of presented assumptions, however, the most far-reaching appear to be the changes in the capital structure. In terms of CCP regulations on a simple joint-stock company, the Polish legislator decided to abandon the construction of a traditionally defined share capital, in favor of equity (stock) capital of at least 1 PLN (Art. 300³, para. 1 CCCP). The amount of the equity capital is not specified in the articles of association, its change does not require their amendment (Art. 300³, para. 2 CCCP) and is not governed by the principle of permanence (maintenance). As a result, the SJSC stocks do not have a nominal value or constitute a part of the equity capital (Art. 300², para. 3 CCCP) and can be covered by both contributions with balance sheet capacity and contributions lacking such capacity, in particular in the form of provision of work or services. Lack of the minimum

¹⁴ Journal of Laws of 2019, item 1655.

¹⁵ According to the information available at the date of submitting this text, on 7 January 2020, due to alleged delays in the introduction of electronic registration proceedings, the Parliamentary Committee on Justice and Human Rights, deliberating, inter alia, on the amendments to the Code of Civil Procedure concerning – what is interesting – proceedings for the protection of intellectual property rights, recommended a change of the provision setting the date of entry into force of the CCCP amendment of 19 July 2019.

“start-up” capital is to be compensated by a compulsory write-off from profit to the equity capital of 8% per annum, executed until the amount of this capital reaches 5% of the sum of company’s liabilities resulting from the financial statements for the last financial year, assigned exclusively for loss coverage (Art. 300¹⁹ CCCP). Due to the absence of the principle of permanence (maintenance) of capital, distributions made *causa societatis* (dividends, payments on redemption of shares, price for acquisition of company’s own stocks) can be also financed from the contribution funds, including the equity capital (Art. 300¹⁵, para. 1–2 CCCP). An element referring to the market observation, where the reason for companies’ bankruptcy are mainly liquidity rather than balance sheet conditions, as well as to the concepts developed in the common law systems, is the appearance of a specific, standardized solvency test. In accordance with Art. 300¹⁵, para. 4–5 of the CCCP, the disbursement to shareholders shall be allowed unless it causes the company to lose, in normal circumstances, its capacity to settle the financial liabilities due within six months from the date of disbursement. The solvency forecast is assessed independently by the management board, however the obligation of the board to make a separate statement in this respect has been finally waived.

6. ARGUMENTS OF THE OPPONENTS AND SUPPORTERS OF THE INSTITUTION OF SHARE CAPITAL

Objections raised by the critics of the institution of the share capital focus on the economic justification, or else a balance of benefits and losses, of the traditional principles of creditor protection [Oplustil 2011, 554–58]. Firstly, the minimum amount of share capital provided for in the act is completely arbitrary. On the other hand, the amount of capital decided for a particular company is a purely historical indicator. It does not have to reflect the subject and scale of the company’s operation; there is also the lack of a requirement to maintain a certain proportion of the share capital to the total equity, or the proportion of equity to liabilities. The classical model, therefore does not, in principle, safeguards against the phenomenon of the so-called material sub-capitalization of the company [Opalski 2004, 30ff; Miecinski 1998, 14ff]. Second, a comparatively low effectiveness of such a protection is highlighted. Share capital does not guarantee the company’s solvency for there is a lack of grounds for both the prohibition of disposal by the company of the contributed assets as well as for the legal obligation to maintain the so-called pure assets at the level of the share capital. Share capital is not an “untouchable deposit” or a “separate fund to safeguard the creditors against the company’s insolvency [Wiśniewski 1994]”. The protection of creditors’ interests in the so-called

classical model is indirect and relative;¹⁶ this protection covers the unlawful capital distributions to shareholders from assets other than the surplus, but it fails to cover the losses resulting from the company's regular business. Third, the "safeguards" so understood and associated with the institution of share capital are not, in practice, relevant to smaller creditors (e.g. involved in manual transactions), or to long-term creditors (financial or institutional) who use more effective ways to protect their receivables. Fourth, the requirement of a minimum share capital and the set of instruments based on its balance sheet recognition arrests the development of enterprises, especially by individuals who intend to contribute their own know-how, work, etc. to the company. Fifth, share capital undermines the "liquid" dividend policy based on the concept of shareholders value, thus limiting the payments to the shareholders at the expense of its own assets, even when they do not affect the company's solvency in the foreseeable future. Sixth, the principle of full payment of the share capital impedes the reorganization of companies that find themselves in a situation of financial disadvantage (in negative balance), preventing the acquisition of shares at the current market value, lower than the nominal one.

Many arguments against the institution of share capital presented above are hard to counter. Still, we can point out also some positive aspects of the traditional model of creditor protection.¹⁷ The cost-benefit balance of its implementation can be assessed differently. First, in many continental systems of company law, the legally determined minimum amount of share capital is regarded as the so-called "threshold of seriousness" (Ger. *Seriositätsschwelle*) [Wiedemann 1980, 202]. It is intended to enforce a serious membership in the company and curtail the possibility of running a business in a legal form that reduces the personal liability of entrepreneurs who do not have a minimum capital base, or are not willing to contribute such funds, hoping for an external, yet repayable financing.¹⁸ Second, the need to pay the share capital should eliminate the establishment of companies with no assets, especially in their initial phase of business when the company is the most vulnerable to

¹⁶ This is also emphasised in the German doctrine [Raiser and Veil 2015, 634].

¹⁷ It is hard to resist the impression that the nature and role of share capital are somewhat fetishized these days, both by the advocates and opponents of this institution. The argument for the necessary existence of the relationship between the structure of a capital company and the institution of share capital is – at least considering some foreign legislations – rather stale. On the other hand, it goes without saying that of greater importance for business development would be, for example, the liberalization of tax law, more efficient judicial procedures and enforcement in commercial matters, or the elimination of administrative and legal barriers that hinder business-making.

¹⁸ Meanwhile, to obtain external financing in this situation is as unlikely as the possibility of starting a business with such symbolic initial assets. Regardless of the actual wording of Art. 159, para. 1 CCCP, it is therefore advisable to establish limited liability companies with the share capital significantly higher than the statutory minimum.

bankruptcy, at the same time defining the scope of risk that the members themselves are willing to run. Third, the provisions governing the rules of the full payment and maintenance of share capital are a universal and relatively complete juridical mechanism which, in the company's partners' interests, can be employed by the long-term creditors (e.g. lenders) by demanding the recapitalization of the company up to a level corresponding to the scale of operations and the size of liabilities. The institution of share capital may therefore be seen as a statutory equivalent of the financial covenants, common to the Anglo-Saxon contract-making practice and beneficial due to the low transaction costs [Miola 2005, 478ff¹⁹]. Fourth, a solution based on the insolvency test cannot be regarded as fully alternative in creditor protection. This instrument can be supplementary to the balance sheet criteria by reducing the possibility of payments to the shareholders while the company is likely to face solvency issues in the near future. It should also be pointed out that, in this case, the "protection" of creditors' interests is only indirect, its conditions are much more flexible, and the effectiveness is likely to be inversely proportional to the pressure exerted by the members on the Management Board, especially in companies of a concentrated ownership structure.

At the same time, it should be stressed that the share capital can (potentially) play the role named above only based on the assumption that its level is maintained at a certain (considerable) level. Meanwhile, Poland has failed – as any other country upholding this institution – to develop solutions that would force the adjustment of the level of capital to the actual scale of corporate operations; additionally, by the act of 23 October 2008, one of the fundamental elements of the share capital system of solutions was abolished. Consequently, investors' freedom in determining the level and method of recapitalisation of the company is very broad today – it is in inverse proportion to the intensity of protection of its creditors which, in many cases, is anything but adequate.²⁰ Moreover, it is hard to ignore other drawbacks of the traditional model of creditor protection identified in practice and in the literature: the absence of association payments made *causa societatis* with the current standing and liquidity, limitations on the possibility of redistribution of contributed funds, even in the positive economic position of the company and with acceptable limits, or hindrances in the restructuring of companies that find themselves "under the balance sheet."

¹⁹ The author speaks about share capital directly as "financial covenant provided by law" or "implied covenant."

²⁰ Kidyba and Kopaczyńska-Piecznia share a relevant observation in the context of the discussion on the proposed amendments to the Code of Commercial Companies and Partnerships of 2010 [Kidyba and Kopaczyńska-Pieczniak 2011, 11]; yet, the proposal of departing from the practical significance of the instrument of share capital is still valid also regarding the existing minimum capital of PLN 5000 [Sołtysiński 2011, 5; Opalski 2011, 11].

CONCLUSIONS

Going back to the question posed in the title: Is this (really) the end of share capital? This phenomenon seems to unveil before our very eyes. The necessity for the revisiting of the model of protection of creditors of capital companies is becoming increasingly evident and even urgent in some areas. The arguments for come not only from a comparative analysis, the results of studies conducted, or the emerging phenomenon of competition of legislations²¹. They come, first of all, from the practical observation of transactions, especially in corporate legislations dramatically reducing the level of the minimum initial capital, which, as pointed out above, brings it down to a theoretical and sublime legal construct while undermining its practical significance. Still, there are some positive aspects of the changes and the debate itself. No doubt, it has been conducive to a deeper understanding of the mechanisms of the protection of property and company creditors and has led to the challenging of several dogmas and assumptions previously taken for granted. As regards the heart of the matter, it seems possible to both maintain the construct of the permanent share capital (coupled with a liberalization of its payment and maintenance) as well as replacing it with (for example) a variable equity capital. In my opinion, in both cases, the admissibility of payments to shareholders should be contingent upon both the balance sheet criteria (balance sheet test; another issue is what rules it should follow)²² and the criteria covering the liquidity of the company or its future solvency. In both cases, it is also recommendable to seek instruments forcing a certain level of own capitalization (e.g. a mandatory profit write-off to cover the future losses, or a need to maintain an

²¹ At the level of EU law, this is a derivative of the ECJ case-law on the freedom of incorporation of companies. See the Judgement of the European Court of Justice of 9 March 1999, in Case C-212/97 *Centros Ltd. Erhvervs-og Selskabsstyrelsen*, ECR 1999, p. I-1459; Judgement of the European Court of Justice of 5 November 2002 in Case C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH*, ECR 2002, p. I-9919 and Judgement of the European Court of Justice of 30 September 2003 in Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art. Ltd.*, ECR 2003, p. I-10155. For the discussion on the phenomenon and the current trends in case-law [Szydło 2008; Napierała 2003, 89ff]. Recent years have seen a growing number of foreign companies established by Polish entrepreneurs (quasi-foreign companies or *lettebox* companies; Ger. *Briefkastengesellschaften*), also in the sector of middle-sized enterprises. Yet, fairly speaking, it must be noted that the attractiveness of investment in some territory governed by law is determined, to a greater extent, by factors other than the concept of the capital and proprietary composition of a company (the level of tax burden and payroll, including the exemptions, and the provisions of double taxation agreements, the procedure of incorporation of a company, the scope of reporting obligations, the requirements for officers, etc.). Good examples are: Luxembourg, Lithuania, and Slovakia.

²² This argument is raised in the European Commission paper, *Results of the External Study*. Only the construction of such a balance sheet test would be different.

appropriate proportion of equity versus liabilities). Finally, special attention should be paid to the principle of accountability of shareholders, managers and experts involved in the assessment of the financial position of the company in the event of ungrounded payments to the benefit of the shareholders.

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KONIEC KAPITAŁU ZAKŁADOWEGO? REFORMY PRAWA SPÓŁEK
Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ W POLSCE
I INNYCH PAŃSTWACH EUROPEJSKICH

Streszczenie. Niniejszy artykuł określa aktualne tendencje w prawodawstwie europejskim, dotyczące instytucji kapitału zakładowego w prywatnych spółkach kapitałowych. Analiza obejmuje proponowane zmiany prawne, zarówno na poziomie unijnym, jak i krajowym, ze szczególnym uwzględnieniem polskich i niemieckich regulacji. Ponadto, Autor omawia mechanizmy tworzenia i utrzymywania kapitału założycielskiego, przywołując również kluczowe argumenty zwolenników i przeciwników komentowanej instytucji.

Słowa kluczowe: kapitał zakładowy, kapitał założycielski, prywatna spółka kapitałowa, spółka z ograniczoną odpowiedzialnością, ochrona wierzycieli

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