Relidzyński P.

PhD, Department of Commercial and Company Law, Faculty of Law and Administration, University of Silesia in Katowice

SIMPLE JOINT–STOCK COMPANY - SELECTED REGULATIONS CONCERNING THE PROTECTION OF THE INTEREST OF THE COMPANY AND ITS SHAREHOLDERS

1. Introduction

The Polish legislator, as a result of the analysis of the legal environment for the operation of so-called startups in Poland, came to the conclusion that it is not possible to fulfill the needs of the startups sector, most often in the area of new technologies, without a thorough amendment to the Code of Commercial Companies and Partnerships. In the opinion of the legislator, it was impossible to achieve the goal by purely amending the provisions concerning limited liability companies and joint-stock companies only for the following reasons. First of all, as potential obstacles to the amendment of regulations concerning the abovementioned capital companies, the legislator indicated legal limitations, the scope of necessary changes and considerations of trading safety. Secondly, in the legislator's is opinion the amendment of the provisions of the joint-stock company is not adequate as these provisions are subject to harmonization by means of relevant provisions of the EU law enacted in the Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law (Official Journal of the European Union L 169/46).

In view of the circumstances indicated above, with the Act of 19 July 2019 amending the Code of Commercial Companies and Partnerships and some other acts (Journal of Laws of the Republic of Poland, 2019.1655), after almost two years of public consultations and despite opposition of a significant part of the academics, the Polish lawmakers decided to conduct a comprehensive reform of the company law by adding the provision of the simple joint-stock company to the Code of Commercial Companies and Partnerships. Based on legislator's assumptions, the simple joint-stock company, as a new type of private equity company, shall be dedicated to innovative ventures, which is to be widely used primarily in the start-up industry. However, that opinion is not really justified, in particular taking into account the absence of any properties that would allow to classify the simple joint-stock company as a company at all.

The absence of the share capital (in the meaning of the share capital as in the private limited company or in the joint-stock company) and the maintenance of its stability can be cited as an example to justify aforementioned argument (2, p. 27 - 28). However, the most revolutionary, in comparison with traditional companies, is the possibility to make contributions in the form of the performance of work or services. The introduction of such a possibility was justified by the legislator's need to ensure a great amount of freedom in terms of shaping mutual relations between the shareholders of a simple joint-stock company. In the new technologies industry which, as indicated above, was an impulse to start work on the introduction of a new type of company, the most important element is human capital and related innovation and entrepreneurship. According to the legislator, these features, especially at the stage of starting a business, are difficult to estimate.

It should be noted that, like in previously regulated companies, the simple joint – stock company also has a legal personality and the shareholders are not responsible for its obligations. It seems however, that when drafting the discussed new form of company, the legislator was not able to balance the need to protect the interests of shareholders and the company itself with the protection of creditors interests. At an early legislative stage, representatives of the doctrine clearly indicated that the draft almost entirely protects the interests of shareholders, at the expense of the security of trading, in particular creditors (3, p. 13). Considering the critics, the legislator decided to add to the draft a provision corresponding to the content of Art. 299 of the Code of Commercial Companies and Partnerships (hereinafter referred to as CCC). Pursuant to the added provision of Art. 300132 CCC, if the execution against a simple joint-stock company prove ineffective, the members of the management board are jointly and severally liable for its obligations. In view of all the rules governing a simple joint-stock company, the adoption of this provision should have been considered necessary in order to protect the interests of creditors on a legitimate basis.

However, the fact that the new regulation has as many as 133 new articles, the simple joint-stock company should be treated as a new type of company. The provisions on simple joint-stock company refer additionally to the provisions of the limited liability companies or the joint stock companies but a limited extent only. An example of such a solution is the act of excluding a shareholder, provided in Art. 30049 CCC that refers to proper application, in that scope, of provisions on exclusion of a shareholder from a limited liability company. This mechanism is intended primarily to protect the interests of the company and its other shareholders.

In the same chapter, the legislator also decided to add a new mechanism of withdrawal of a shareholder from a company, which was previously absent in the Code of Commercial Companies and Partnerships. In contrast to the abovementioned shareholder exclusion mechanism, the withdrawal serves primarily to protect the interests of minority shareholders.

Such a regulation of exclusion and withdrawal of a shareholder of a simple joint-stock company is accompanied by a conscious abandonment of provisions analogous to those of Art. 418 and Art. 4181 CCC, i.e. provisions on compulsory purchase of shares belonging to minority shareholders of a joint-stock company (also known as squeeze out and reverse squeeze out), which are mechanisms typical for the regulation of corporate relations in pure form in joint-stock company (6, p. 57). The mechanisms of shareholder's exclusion and withdrawal should be considered as one of the most important means to protect the interests of the company and its shareholders.

2. Exclusion of a shareholder from a simple joint-stock company

Exclusion of a shareholder from a company is regulated in the provision of Art. 30049 § 1 of the CCC, and definitely constitutes one of the personal elements of a simple joint-stock company. Under that provision, at the request of a shareholder or shareholders holding the shares representing more than half of the total number of votes, the court, due to important reason concerning the given shareholder itself, may decide to exclude the shareholder is to be withdrawn from the company. However, the articles of association of a company may limit that right to the shareholder or shareholders holding the shares representing more votes. Therefore, introduction of less stringent requirements to the articles of association of a company must be considered as prohibited.

If we compare the solutions included in Art. 30049 § 1 of the CCC to exclusion of a shareholder from a limited liability company, it should be noted that the request does not have to be submitted by all the other shareholders, only the ones representing more than half of the total number of votes. However, it should be noted that, following the reference to Art. 266 § 2 sentence two, included in Art. 30048 § 2 of the CCC, like in the case of exclusion of a shareholder from a limited liability company, the statement of claim shall concern all the remaining shareholders.

Under the contents of the above-mentioned Art. 30049 § 1 of the CCC, the premise for excluding a shareholder from a simple joint-stock company is, like in the case of a limited liability company, occurrence of important reasons concerning the given shareholder. The term important reason has not been defined by the lawmakers, so, in every case, it will be the court that will

determine whether the causes indicated by the plaintiffs, should be considered as justifying the right to file such a statement of claim. The inclusion in the articles of association of a provision specifying important reasons for the exclusion of a shareholder should also be considered admissible. However, such a decision is not binding for the court, which decides on the exclusion of a shareholder (1, p. 646).

Moreover, it seems that also in the case of simple joint-stock company, the reasons indicated by representatives of the doctrine concerning the exclusion of shareholders from a limited liability company, should be considered as important, in particular, dishonest acts against the company, the abuse of the inspection right specified in Art. 30024 CCC for competition purposes, the failure to perform obligations towards the company or long-term illness or absence of a shareholder preventing him from performing his duties towards the company (1, p. 646).

Furthermore, it should be emphasized that also in the scope of the procedure of excluding a shareholder from a simple joint-stock company, the lawmakers decided to apply the mechanisms that had already been applied to limited liability companies. Namely, pursuant to Art. 30049 § 2 CCC, the provisions of Art. 266 § 3 CCC and articles from 267 to 269 CCC, which refer to limited liability companies, shall apply accordingly. As a result, the shares of the excluded shareholder must be taken over by the remaining shareholders or by third parties, and the take-over price is determined by the court based on the actual value thereof on the date of delivery of the statement of claim. As it was stated in one of the Judgment of the Supreme Court, the actual value should be understood as the market value, i.e. the value that the shareholder would have obtained on the market if he/she had sold his/her shares to a third party at a given moment , however, the Act determines this moment of valuation as at the date of delivery of the statement of claim to the shareholder to be excluded from the company (the Judgment of the Supreme Court of 12 December 2013, II CSK 121/13).

Pursuant to Art. 267 § 1 CCC the court shall set a period, within which the takeover price including interest, counting from the date of delivery of the statement of claim, shall be paid to the excluded shareholder. If the payment is not made or deposited with the court by the above date , the decision on exclusion shall become ineffective, and the shareholder subject to the ineffective exclusion will be entitled to request that the plaintiffs redress the damage.

Furthermore, according to the provision of Art. 268 CCC it should be noted that, in order to secure the claim, the court may suspend the shareholder,

against whom the action has been brought, in exercising the rights attached to such shareholder's shares. The reason for suspending a shareholder in exercising his or her corporate rights is the occurrence of important reasons. As in the case of the premise for the exclusion of a shareholder, the legislator did not decide to define this concept. However, it should be emphasized that the examples of important reasons indicated by the representatives of the doctrine as justifying the suspension of the shareholder are similar to those indicated on the grounds of the aforementioned Art. 266 of the CCC, e. g. abuse of the shareholder's right to control to the detriment of the company. Only as a side note, it should be added that according to the prevailing position of the doctrine, the provision of Art. 268 of the CCC is a lex specialis in relation to Art. 730 of the polish Code of Civil Procedure, hence the applicants do not have to substantiate the credibility of the claim or the legal interest in providing security (7, p. 383). The possibility of suspending a shareholder in the exercise of corporate rights until the final and binding settlement of the case should be considered justified, in particular taking into account the possible reasons for exclusion, which are described in the previous section.

If the decision on excluding the shareholder becomes final and valid and the payment for the taken over shares is made on time, the shareholder will be excluded from the date on which the statement of claim is delivered to him or her. However, it should be emphasized that under Art. 269 CCC, applied accordingly to simple joint-stock companies, this does not affect the validity of actions in which such shareholder participated in the company following the delivery of the statement of claim.

3. Withdrawal of a shareholder from a simple joint-stock company

The mechanism of withdrawal of a shareholder from a simple joint-stock company constitutes a new legal institution which the legislator considered as necessary to protect, in particular, the minority shareholders. Pursuant to Art. 30050 § 1 CCC, at the request of a shareholder, the court may decide on shareholder's withdrawal from the company due to an important reason justified by relations among shareholders or between the company and the withdrawing shareholder, resulting in gross detriment to the withdrawing shareholder. As indicated in justification to the act (6, p. 58), the mechanism of withdrawal of a shareholder from a company may be applied in all the cases, in which circumstances not attributable to the minority shareholder, constitute the sole cause of the situation providing the grounds for court's decision. As an example may be given the accumulation of profits in a spare capital of the company without economic justification, when the decision, in fact, is adopted by the majority shareholder. Such a resolution results in depriving the minority

shareholder of the possibility to receive dividend, particularly, if at the same time, the company profits are transferred to the majority shareholder as a result of non-corporate transactions concluded with the company.

It should be noted that, just like in the mechanism of exclusion of a shareholder from a company, the premise of an important reason have to be indicated to file a statement of claim. In the case of shareholder's withdrawal, that reason has to be justified in the relations among shareholder or between the company and the withdrawing shareholder and must result in harming the withdrawing shareholder, however the term "important reason" was not defined by the legislator, so the list of such reasons must be deemed as open. As a result, the court shall determine whether the reasons indicated by the shareholder should be considered as justifying the right to file a statement of calim. There are no obstacles to include in the articles of association a provision specifying important reasons for the shareholder's withdrawal, however, the court deciding on the shareholder's withdrawal will not be bound by such a contractual provision.

Furthermore, it should be emphasized that also in terms of procedures, withdrawal of a shareholder is similar to the mechanism of exclusion. In such a case, the statement of claim shall concern all the other shareholders and the company. The statement should be filed to the court competent for the registered office of the company. Pursuant to Art. 30050 § 3 CCC, the shares held by a withdrawing shareholder shall be taken over by the company for the price equal to fair value, determined by the court on the date of delivery of the statement of claim. Commenting on the provision referred to above, one should consider the legitimacy of using a different application than on the grounds of Art. 266 § 3 of the CCC nomenclature related to share valuation, i. e. based on fair value. The described valuation method is used e.g. in Art. 312 § 1 and Art. 345 § 3 CCC concerning a joint-stock company. Due to the fact that the commented regulation concerns a company with almost the same name, i.e. a simple joint-stock company, the use of fair value by the legislator should be considered justified. Incidentally, it should be underlined that these considerations are purely theoretical since, in the light of the literature, the fair value, like the real value described above, corresponds to the market value (1, p. 750-751).

Just like in the case of exclusion of a shareholder, when making the decision on its withdrawal, the court determines the time limit, within which the buyout price should be paid to the withdrawing shareholder, including interest, counting from the date of bringing an action. However, the buyout mechanism is different, because pursuant to Art. 30050 § 4 CCC, the buyout of

a withdrawing shareholder's stocks is performed by the company to the account of the remaining shareholder, pro rata to the number of stocks held by them. However, it should be emphasized that the company and the shareholders, against whom the action has been brought, are jointly and severally liable for payment of the buyout price.

However, what should be criticized is absence of regulations on the effects of withdrawal of a shareholder from a simple joint-stock company which would allow to determine unequivocally the moment when the shareholder is deemed to have withdrawn from the company. It seems that in such a case, the moment when the decision on shareholder's withdrawal becomes final and valid, should be taken into account. That is because there are no grounds for applying, by analogy, the above-mentioned provision of Art. 269 of the CCC which pertains to limited liability companies, under which the effects of shareholder's withdrawal would take place upon submission of the action.

4. Final Remarks

To sum up the presented considerations, it should be stated that the pace of economic development, in particular in the startup sector, required legislative intervention. At this stage, it is not clear whether the decision taken by the legislator to introduce a new type of company, instead of modifying the existing regulations concerning a limited liability company and/or a joint-stock company, was correct.

It should be further emphasized that the described instruments of protection of the company's and shareholders' interests, i.e. exclusion and withdrawal of a shareholder, should be considered as extremely important due to the fact that no provisions similar to the regulations of Art. 418 and Art. 4181 of the CCC have been introduced. It should be noted that these instruments are similar in terms of premises and procedures. However, their purposes are different. Exclusion of a shareholder services primarily to protect the interests of the company and of all the remaining shareholders. In turn, withdrawal of a shareholder is to primarily protect the minority shareholders. As indicated above, it is a new piece of legislation that should be evaluated as positive, in particular due to the fact that it allows to protect the financial resources invested by a minority shareholder without the need to dissolve the company under a court decision.

Such an instrument does not exist on the grounds of a limited liability company. A minority shareholder of a limited liability company is only entitled to bring an action for dissolution of the company by a court pursuant to Art. 271 s. 1 of the CCC. According to this provision, a court may order the company to be dissolved at the request of a shareholder or of a member of the

management board if it has become impossible to achieve the objective of the company or if there are other important reasons for the company's relationship. Due to this, it is not possible for a minority shareholder of a limited liability company to resign, without the effect of dissolution of the company. Therefore, the formulation of the de lege ferenda postulate on introducing a similar mechanism to limited liability companies should be considered justified. As a side note, what should be criticized is the absence of regulations on the effects of withdrawal of a shareholder from a simple joint-stock company.

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Relidzyński P. Simple joint–stock company - selected regulations concerning the protection of the interest of the company and its shareholders

The article describes the arguments justifying the introduction of a new type of a capital company - a simple joint-stock company and the manner of its regulation. The most important features of the company in question have been presented only to a limited extent. Furthermore, the article describes in a casuistic manner two instruments serving to protect the interests of a simple joint-stock company and its shareholders, i. e. the mechanism of exclusion and withdrawal of a shareholder. The first one is regulated by a reference to the provisions on limited liability companies. The second, however, is a legislative novelty which should be considered necessary to protect the financial resources invested by a minority shareholder. The article also presents a detailed procedure for the exclusion and withdrawal of a shareholder on a comparative basis. The objective of these instruments and the rationale for their introduction were further assessed.

Keywords: Code of Commercial Companies and Partnerships, simple joint-stock company, companies, shareholder