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Creating a commercial company using the example of a limited liability company – about the role of an advocate

Introduction

Article 1 section 1 of Advocate Law[1] indicates that advocacy[2] is the act of providing legal assistance[3]. There is no statutory definition of legal assistance. Actions that may be performed as legal assistance are illustrative, as indicated by the wording of Art. 4 section 1 of the Advocate Law. In this provision, the legislator has indicated that legal assistance consists in particular of providing legal advice, preparing legal opinions, drafting legal acts and appearing before courts and offices. Limiting the catalog of activities falling within the scope of legal assistance is not needed. If only the entity using the services of an attorney is convinced of the necessity of using an advocate, he or she should

[1] Act of 26 May 1982, Advocate Law (Journal of Law 2019, item 1513 as amended), further Advocate Law.

[2] "Advocacy" and "advocate" in this article refer to a person who, in accordance with Advocate Law, is qualified and entitled to provide legal advice.

[3] In the current legal status, the differences between the procedural and structural position of an advocate and attorney-at-law are becoming blurred. The amendments to the Advocate Law Act and the Act on Attorneys-at-Law have contributed to the possibility of performing activities in the field of applying the law within an almost identical scope. These differences have been minimized to the extent that attorneys-at-law have defense rights in criminal proceedings, after fulfilling the condition of independence referred to in art. 8 item 6 of the Act of 6 July 1982, Attorneys-at-Law, Journal of Law 2020, item 75 further Attorneys-at-Law Act, which reads: "Legal assistance consisting in the attorney-at-law acting as a defense counsel in cases of offenses and fiscal offenses may be provided as part of his practice under a civil law contract, in the office of an attorney-at-law and in partnership (civil contract), a registered partnership, a professional partnership, a limited partnership, or a limited joint-stock partnership, provided that the attorney-at-law is not in an employment relationship. The employment ban does not apply to academic and research-teaching staff. Therefore, the considerations presented in the work refer to representatives of both professions offering legal assistance, i.e., advocates and attorneys-at-law.

be able to receive such assistance. Therefore, it should be recognized that the activities of providing legal assistance should be understood broadly. It is common that lawyers all over the world, among them advocates, are concerned with the private problems of their individual clients, but also with the legal affairs of companies. The participation and role of a lawyer in various apprenticeships is discussed in the literature[4].

This article describes some of the problems that may arise when creating a commercial law company, and how advocates can work to solve these problems. Among others, choosing the organizational form the future business activity and preparing the company's articles of association have been indicated, along with the registration process of the company. It was noted that in the case of a secondary method of creation of a commercial company (i.e., a merger, division or transformation), the participation of an advocate is particularly desirable. The considerations are intended to show that the participation of a professional representative is highly desirable at the stage of creating a commercial company. Maybe the creation of the company itself is not a complicated procedure, but the consequences of making mistakes are momentous. Limiting considerations to a professional advocate may not be required, but this paper aims to demonstrate that for the analyzed issue there is no justification for distinguishing between legal professions (advocates and attorneys-at-law).

Commercial law company concept

The participation of a professional substrate is desirable from the early creation of the company, namely in relation to the concept of the company. A uniform catalog of the admissible legal forms of commercial law companies has not been formed at international or even European levels. Therefore, European Union companies in particular are formed in accordance with the legal system of a Member State[5]. The Polish legislator in the Code of Commercial Companies[6] exhaustively regulates the admissible legal forms of commercial law companies. Among its lists are: a registered partnership, a professional

[4] For example see: T.H. Wilson, J. Sheppard, *In memory of Sergei Magnitsky: The lawyer's role in promoting and protecting international human rights*, "Houston Journal of International Law" 2019, no. 41(2), p. 343–386; R. Feehily, *The role of the lawyer in the commercial mediation process: Critical analysis of the legal and regulatory issues*, "South African Law Journal" 2016, no. 133(2), p. 352–388; J. Heminway, A. J. SulkowskI, *Blockchains, corporate governance, and the lawyer's role*, "Wayne Law Review" 2019, no. 65(1), p. 17–56.

[5] More about EU Company Law: C. Gorriz, *EU Company Law: Past, Present and Future*, "Global Jurist" 2019, vol. 19, issue 1, p. 1–21.

[6] Act of 15 September 2000, the Commercial Companies Code (Journal of Law 2019, item 505), further CCC.

partnership, a limited partnership, a limited joint-stock partnership, a limited liability company and a joint-stock company[7]. Therefore, despite the considerable freedom in choosing the legal form, it is not absolute. Each of the indicated commercial law companies has its own specifics, which means that its structure is appropriate and desirable when conducting one (specific) business activity (e.g., due to the size of the business, liability of shareholders, place of business), and it will not necessarily be beneficial in other circumstances[8]. The choice of the optimal way of organizing economic activities, i.e., a convenient form of company will undoubtedly facilitate consultation with a professional entity[9].

The conceptual phase, which means the choice in which of the organizational form of future business activity will be carried out, does not require any specific legal actions, but is based only on the vision of the business, with the stipulation that some of the business activities may be carried out in strictly defined legal forms. It should be emphasized that the choice of the legal form in which the activity is to be conducted is not completely free, e.g., a private bank may be established only in the form of a joint-stock company[10], or the insurance activity of the insurer only in the form of a joint-stock company, or a mutual insurance or European company[11]. Another example is Art. 4a of the Advocate Law, which contains a closed catalog of forms of practicing this profession.

The choice of a legal form is determined by various factors, including, e.g., fiscal obligations[12] or costs of conducting business in a given legal form (accounting, reporting, corporate obligations). For example, the limited liability company is the legal form of a company that is most used in practice[13]. This company may additionally gain in popularity after the introduction (from January 1, 2021) of taxation of a registered partnership and a limited partnership

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[7] For example, about forms of business entities: B.F. Egan, *Choice of Entity Alternatives*, "Texas Journal of Business Law" 2004, vol. 39, no.3, p. 379–514; F. Karagussov, *Development of Company Law in Kazakhstan,* "Juridica International" 2016, no. 24, p. 91–92.

[8] L.A. Mezzullo, *Choice of Entity*, "CTEC Notes" 1997, vol. 22, issue 4. p. 284–320.

[9] O. Urda, *Authorized individual, sole proprietorship, limited liability company: difficult choice that the small entrepreneur is facing*, "Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice" 2016, no. 62(1), p. 55–62.

[10] Art. 12 of the Act of 29 August, 1997, Banking Law (Journal of Law 2019, item 2357).

[11] Art. 6 section 1 of the Act of 11 September, 2015, Insurance and Restructuring Activity (Journal of Law 2019, item 381 as amended).

[12] See: Act of 26 July 1991, The Natural Persons' Income Tax (Journal of Law 2019, item 1387 as amended); Act of 15 February 1992, The Legal Persons' Income Tax (Journal of Law 2019, item 865 as amended).

[13] According to statistical data for Poland in 2018, limited liability companies constituted 82% of all commercial law companies; see: *Zmiany strukturalne grup podmiotów gospodarki narodowej w rejestrze REGON*, 2018, Warsaw 2019, p. 29. https://stat.gov.pl/obszary-tematyczne/podmioty-gospodarcze-wyniki-finansowe/zmiany-strukturalne-grup-podmiotow/zmiany-strukturalne-grup-podmiotow-gospodarki-narodowej-w-rejestrze-regon-2018-rok,1,23.html (accessed: 20.02.2020).

on the terms applicable to legal persons, i.e., the partnership – with corporate income tax, and partners – with corporate income tax or income tax, respectively, from natural persons[14]. In comparison to other forms of organization, a limited liability company as a noncorporate business form provides its members with many advantages, such as limited liability for a venture's obligations and favorable tax treatment[15]. However, the authors recognize the flaw in this organizational form – especially in a broader economic perspective[16]. Further considerations will be limited to regulations regarding a limited liability company.

The articles of association

After selecting the legal form in which the business activity is to be performed, the entity is obliged to carry out at least several activities that will enable it to operate as part of business transactions. Also, member state law will be applicable here. In art. 163 of the CCC the legislator indicates the prerequisites for creating a limited liability company in Poland (obligatory activities aimed at creating a limited liability company): 1) the conclusions of the articles of association; 2) shareholder contributions to finance the entire share capital, where the share is subscribed for a price higher than the nominal value, and contributions to the balance, subject to art. 158 § 1^1 of the CCC; 3) appointing the management board; 4) the constitution of the supervisory board or the audit committee, if this is required by the law or by the articles of association; and 5) registration.

Among the listed obligatory activities aimed at creating a limited liability company, in particular to avoid consequences of potential errors, the activities in points 1 and 5 may require the participation of an advocate (or other

[14] See the Act of November 28, 2020 amending the act on personal income tax, the act on corporate income tax, and the act on flat-rate income tax on certain revenues generated by natural persons and certain other acts (Journal of Law 2020, item 2123).

[15] Wider: D.K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, "Wake Forest Law Review" 2005, vol. 40, p. 885; P.L. Caron, *The Estate Planning Advantages of Limited Liability Companies*, "Tax Notes" 1996, vol. 70, p. 998–1004; S. Cristea, *Comparative study: Limited liability company versus unlimited liability company*, "Perspectives of Business Law Journal" 2013, no. 2(1), p. 70–78; A. Lupulescu, *Some particularities concerning the limited liability company*, "Perspectives of Business Law Journal" 2015, no. 4(1), p. 68–73, R. Tanajewska, *Charakter majątkowy i korporacyjny praw wynikających z udziału w spółce z o.o.*, "Studia Prawnoustrojowe" 2016, no. 32, p. 71 and following; A. Klimaszewska, M. Mariański, J.J. Zięty, K. Warylewska, *Spółka z ograniczoną odpowiedzialnością (société à responsabilité limiteé) we francuskim kodeksie handlowym. Tekst przepisów wraz z tłumaczeniem oraz porównaniem do polskiego Kodeksu spółek handlowych*, Olsztyn, 2017, p. 39 and following.

[16] J. Freedman, *Limited liability: Large company theory and small firms*, "Modern Law Review" 2000, no. 63(3), p. 352.

professional). Basic doubts may arise when determining the content of the articles of associations as the fundamental act of its functioning. The defectiveness of this document has serious consequence, i.e., dissolution of company by court (art. 21 of the CCC). Therefore, this issue will be discussed in detail. The making by shareholders of contributions depends on the type of contribution. The liability for defects on this field bear specified shareholders and members of the management board (art. 175 of the CCC). It is necessary to know if it is a cash contribution, in which case the transfer consists of making a transfer to a bank account or payment into the company's cash office. If an in-kind contribution is made, the rules are more complicated and depend on the nature of this right. If the subject of the contribution is something that can be physically released to the company, it is necessary to transfer ownership of the items marked as to the species. There is no need for things marked as to identity[17]. No less important are issues connected with the effective appointment of the management board, which requires wide knowledge of the CCC because matters of adopting valid resolution appear here. In accordance with art. 201 § 4 of the CCC, a member of the management board is appointed and dismissed by a resolution of shareholders, unless the articles of association provide otherwise. Therefore, in the absence of different provisions in the articles of association, the members of the first board are appointed by the shareholders (the company's founders). In such a case, the appointment of a management board always requires that the shareholders adopt a resolution separate from the articles of association[18]. Finally, it is necessary to know if the constitution of the supervisory board or the audit committee is required by the law. Moreover, participation of an advocate guarantees the ability to determine competences, operating principles of the supervisory board or the audit committee, etc. Moreover, an advocate will be familiar with special provisions that include additional requirements.

As indicated, the basic element of the company's creation is the articles of association. However, arguments for the participation of an advocate in drafting the articles of association are weakened by the obligation to conclude such a contract in the form of a notarial deed (art. 157 § 2 of the CCC). In Poland, laws do not provide for preventive administrative or judicial control at the time of formation of a limited liability company, which is why the articles of association shall be drawn up and certified in notarial deed form as a due legal form[19]. Therefore, when preparing the act, a professional notary also supervises the

[17] A. Kidyba, *commentary to art. 163*, [in:] A. Kidyba (ed.), *Komentarz aktualizowany do art. 1–300 Kodeksu spółek handlowych*, 2020, Lex.

[18] A. Kidyba, K. Kopaczyńska-Pieczniak, *Organy spółki z ograniczoną odpowiedzialnością,* [in:] A. Kidyba (ed.), *Spółka z ograniczoną odpowiedzialnością*, 2013, Lex.

[19] See Article 10 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017), hereinafter Directive (EU) 2017/1132.

content of the articles of association[20] and its accuracy. However, it seems that an advocate focused on taking care of the party's interests may be more involved in the preparation of a draft of articles of association (later drawn up and certified by a notary).

The articles of association of a limited liability company make an obligatory and creative contract[21], which means that in addition to the obligations that the shareholders assume, it leads to the creation of a new entity[22]. The content of the articles of association of a limited liability company (minimum content) has been set out in Article 157 of the CCC. The aforementioned provision indicates that the obligatory elements of articles of association of a limited liability company are: business name and the seat of the company, the objects of the company, the amount of share capital, whether or not the shareholder may have more than one share, the number and nominal value of the shares subscribed to by individual shareholders, and the term of the company (if it is defined). The last element is no longer obligatory, but optional, and should occur when the time of creation of the company is marked. It can be added that the articles of association of a limited liability company must specify the company's shares, their subject matter and value, and regulate the company's regime and functioning, as well as the rights and obligations of each shareholder. All elements of articles of association of a limited liability company require legal knowledge — not to stipulate the element, but to indicate it as most beneficial for the entity.

It is worth noting that provisions regarding the content of the articles of association are not obvious[23]. A significant problem concerns the scope of application of the principle of freedom of contract. First of all, it is not clear which regulations of the CCC are obligatory and which are relatively binding. The legal form of the limited liability company is a representative example of doubt in the assessment of legal provisions.

Practice has proved that the articles of association contain a wider scope of regulation that goes beyond the statutory minimum. Due to the importance of the articles of association of a limited liability company for the existence and operation of the company, it is justifiable to regulate wider matters, which

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[20] Compare: M. Diakovych, *Notarial Protection and Defence of Corporate Rights of Participants (Founders) of a Limited Liability Company: Civil Legal Aspect. Law of Ukraine*, "Legal Journal (Ukrainian)" 2016, issue 12, p. 106–111.

[21] Judgment of the Supreme National Court from February 27, 2003, IV CKN 1811/00, Lex no. 83832.

[22] The specific juridical nature of a limited liability company is not clear in every legal system of a Member State, A. Lupulescu, *Some particularities concerning the limited liability company*, "Perspectives of Business Law Journal" 2015, no. 4(1), p. 69.

[23] For example, the name of the company should be specified in accordance with Art. 160 of the CCC, as well as Art. 43^2 and following of the Act of 23 April 1964, Civil Code (Journal of Law 2019, item 1145), further PCC, whose regulations the entity creating the company may not know.

leads to a problem with the solution regarding the freedom of shareholders to create the articles of association of a limited liability company. It is assumed that, according to art. 2 of the CCC, when establishing a company, shareholders may benefit from the provisions of art. 353^1 of the PCC. This means that the restrictions of the freedom to shape the content of the articles of association are the principles of social coexistence, legal provisions and the nature of a legal relationship. Other concepts indicate that this freedom does not refer only to Art. 353^1 of the PCC[24]. On the other hand, the CCC uses a number of obligatory provisions (e.g., liability, termination, liquidation)[25] regarding the regulation of a limited liability company. The articles of association of a limited liability company have an important meaning, so its content should go beyond the obligatory elements referred to in art. 157 of the CCC.

In addition, other provisions of the CCC indicate the obligation to enter relevant provisions in the articles of association of a limited liability company if they are to have legal effects. An example is the assignment of special rights attached to shares (art. 174 § 2 of the CCC), recurrent non-pecuniary performances imposed on a shareholder (art. 176 § 1 of the CCC), the obligation to make additional contributions (art. 177 of the CCC), and limitations on joining the company by an heir in place of a deceased shareholder (art. 183 of the CCC).

Every article of association is different as to how it is clarified, which is why the legislator did not introduce a compulsory uniform template[26]. It is worth noting that the template is provided in the IT system. The articles of association of a limited liability company may be made by using a template once the form is filled in and the electronic signature is attached (art. 157^1 of the CCC). In this way, only the original creation of the company is possible[27]. A certain simplification of creating the articles of association in this way is the variability of the template, i.e., the parties are unable to introduce additional provisions that would depend solely on the will of the shareholders[28].

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[24] As a side note, it is worth noting the differences in regulation of a limited liability company and a joint-stock company. Art. 304 § 3 and § 4 of the CCC in relation to a joint-stock company limits the freedom to create the content of the contract. The lack of an equivalent provision allows one to assume that the shareholders of the limited liability company are not limited, and *a contrario* can freely shape the content of the contract.

[25] A. Szajkowski, M. Tarska, *commentary to art. 157 of the CCC,* [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja (eds.), *Kodeks spółek handlowych*, t. 1: *Przepisy ogólne, spółki osobowe*, Warsaw 2012, p. 63.

[26] As intended: flexibility (i.e., freedom of contract) increases to promote efficiency; see: V. Ponka, *The Convergence of Law: The Finnish Limited Liability Companies Act as an Example of the So-Called Americanization of European Company Law*, "European Company Law" 2017, vol. 14, issue 1, p. 22–28.

[27] This means that the transformation is not allowed in this mode due to the complex nature of the transformation process.

[28] P. Kędzierski, *Powstanie i rejestracja sp. z o. o., której umowę zawarto przy użyciu wzorca umowy (spółki s-24)*, Warsaw 2019, Legalis.

In this way, some of the dilemmas associated with the traditional conclusion of the articles of association of a limited liability company have been eliminated, which, however, does not change the level of complexity of its creation.

The articles of association are one of the basic documents which is compulsory for companies to disclose in the national register in order for third parties to be able to ascertain their contents and other information concerning the company[29]. This document should therefore be vetted by a professional.

Registration

An important moment in the process of creating a company is its registration, when a limited liability company acquires legal personality and arises as a so-called competent company, while the company in organization ends its legal entity. Among all the activities that may be the field of the advocate's activity at the stage of creating the company, it seems that this last phase, i.e., registration activities, can be performed by professional proxies under a formally regulated procedure. This is indicated in art. 87 § 1 of the Code of Civil Procedure[30], which regulates the possibility of an advocate or attorney-at-law appearing in the proceedings. Pursuant to the content of the mentioned provision, the listed entities may play a procedural role in any proceedings. Therefore, an advocate may be a representative in registration proceedings – both in the case of submitting letters in writing and of their submission via the ICT system. This circumstance does not raise any doubts because it is only a technical matter (it is not a different way of proceeding).

Directive 2012/17/EU did not harmonize national registers, which meant that each member state retained its own model of company registration[31]. The existing law in Poland provides for two separate registers. First, the Central Business Register and Information System ("CEIDG") collects data on separate categories of entrepreneurs. Second, the register appropriate for the limited liability company is the register of entrepreneurs ("the register") – a subdivision of the National Court Register[32]. It is worth noting that from July 1, 2021[33],

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[29] See recital 8, as well as Article 14 of Directive (EU) 2017/1132.

[30] Act of 17 November 1964, The Code of Civil Procedure (Journal of Law 2019, item 1460 as amended), further CCP.

[31] Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and company registers (OJ L 156, 16.6.2012).

[32] Act of 20 August 1997, The National Court Register (Journal of Law 2019, item 1500 as amended), further the Act on the National Court Register.

[33] According to the legal status as of April 24, 2021, the original date of electronification of the register of entrepreneurs is March 1, 2021, which has not been met.

the register of entrepreneurs will only function in electronic form[34], meaning that applications regarding the entity subject can only be submitted via the ICT system, and therefore the only form of communication with the court regarding the submission of an entity to the register (its creation) will be the electronic form[35]. In the case of entities in the register of associations, other social and professional organizations, foundations and independent public health care institutions, the legislator allowed for dualism in the form of submitting applications for entry in the register, which is possible either in official forms or via the ICT system. In any case, the presence of the advocate at the registration stage is justified due to the complexity of the registration forms and the formalistic nature of the proceedings. This remark is also valid when registering a company using the form provided on the website.

The company is registered under separate registration proceedings regulated by the provisions of the CCP (Articles 694^1–694^8 of the CCP) and partly by the provisions of the Act on the National Court Register. The registration procedure is a very formal procedure in which any improper completion of the form initiating the procedure results in the return of the application. This effect is mitigated by the possibility of re-submitting the application within 7 days from the date of the return of the application. This is a short and severely rigorous deadline.

The registry court examines whether the documents attached to the application in terms of the form and of the content comply with the law, meaning that within the framework of the cognition referred to in Art. 23 in the Act on the National Court Register, the registry court may independently assess the lawfulness of a resolution of the meeting of shareholders of a limited liability company constituting the basis for an entry in the register[36]. Positive verification of the formal side of the application makes substantive research acceptable[37]. The registry court also examines whether the data indicated in the application for entry in the register regarding PESEL[38], NIP[39] and REGON[40] numbers are true, as well as whether the reported data are in accordance with the actual state, if there are reasonable doubts in this regard. This means that the registry court may, for example, request the presentation of the contract

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[34] This is an example of the result of the implementation of Directive (EU) 2017/1132; about digitization, disclosure and interconnection of registers see: Z. Breges, T. Jakupak, *Digitalization [sic] of business register*, "InterEULawEast: Journal for International and European Law, Economics and Market Integrations" 2017, no. 4(2), p. 91–100.

[35] A. Michnik, *Commentary to art. 694^{3a} CCP*, [in:] A. Marciniak (ed.), *Kodeks postępowania cywilnego*, t. 3: *Komentarz do art. 425–729*, Warsaw 2020, Legalis.

[36] Decision of the Supreme National Court from July 24, 2013, III CNP 1/13, Lex no. 1396285.

[37] T. Szczurowski, *Zakres kognicji sądu w postępowaniu rejestrowym*, "Przegląd Ustawodawstwa Gospodarczego" 2013, no. 7, p. 30.

[38] The Universal Electronic System for Registration of the Population in Poland.

[39] Tax Identification Number in Poland.

[40] National Business Registry Number in Poland.

under which the shares or its part thereof were transferred[41]. All this indicates that the registration process is subject to court review in both formal and material (substantive) terms. Therefore, it is not only a clause procedure, which always ends with an entry, irrespective of the content and form of the submitted documents and attachments.

Initially the regulation of the register regarding the submission of financial documents in electronic form was not adapted to the participation of any other entity except persons authorized to represent the registered entity, because their identification was carried out solely on the basis of the PESEL number. In accordance with art. 19e section 2 of the Act on the National Court Register, the application is provided with a qualified electronic signature, trusted signature or personal signature of at least one natural person whose PESEL number is disclosed in the register, entered as a person alone entitled or jointly with other persons to represent the registered entity, proxy, trustee, administrator in restructuring proceedings or liquidator. Therefore, it was not possible to submit applications by persons other than those entered in the register of entrepreneurs and authorized to represent them as members of the bodies or shareholders authorized to represent the company. This meant that in such a situation the participation of the representative was excluded. This solution was criticized because it unnecessarily involved the entity's management in technical matters instead of more capable individuals (like an attorney). The indicated inconvenience was eliminated by amending the Act. Currently, these activities may also be performed by other persons, including lawyers. An appropriate amendment was made by adding to art. 19e of the Act on the National Court Register, section 3a, according to which the application may be made by an advocate, attorney-at-law or foreign lawyer, whose data the Supreme Advocate Council and the National Bar Association have made available to the courts and the Minister of Justice via the ICT system referred to in art. 58a of the Advocate Law and Art. 60^1 of the Attorney-at-law Act, on condition that their PESEL number is disclosed in this system and they are authorized to submit a notification. In such a case, these proxies refer to the power of attorney granted to them and sign the application with a qualified electronic signature, trusted signature or personal signature.

Transformation of commercial law companies

It should be noted that there are possibly two ways to create a commercial law company, namely primarily and secondarily (derivative). The original

[41] Resolution of the Supreme National Court from June 6, 2012, III CZP 22/12, Lex no. 1230237.

method, which was the subject of the considerations carried out so far, consists of concluding the articles of association and then registering it. In turn, as part of the secondary creation, a new legal entity (commercial law company) arises from the transformation of the sense of a large entity.

The secondary way of creating a commercial law company is manifested as more complicated, namely through the creation of a new entity as a result of transformation activities of an already existing entity (company) or its assets. In most cases, the decision to transform is conditioned by many factors, and the most common motive for carrying them out are tax optimization issues. The CCC indicates a merger, transformation or division as a means of transformation. A thorough analysis of the issue is beyond the scope of this study; however, this matter should be signaled.

Merging is a process that leads to the creation of a new company or strengthens an existing one. The legal form that will be created after conducting this business operation will be a capital company. This process consists of preparatory activities (preparatory phase) and adoption of resolutions (ownership phase), as well as registration and announcement (judicial phase). The merger process means that at least one company involved in the transformation is subject to removal from the register. In a merger the process can be distinguished by four merging stages: the preparatory stage, the resolution of the shareholders, the registration and announcement of the merger, and the settlement of the merger in the accounting books. The overview of the provisions of the CCC about merger of capital companies (Art. 498 and following of the CCC) confirm that an advocate should watch over this process.

The opposite of a merger is division, when a new entity is created or the assets of the company being divided are transferred to other entities. Also, in this transformation category the preparatory phase, the resolution phase and the registration phase are distinguished. The most extensive phase is preparatory activities, which includes the written agreement of the division plan, written notification to the registry court, the announcement of the division plan, examination by an expert and the preparation of his or her opinion, notification of shareholders about the intention to divide, and preparation of documents related to the division[42]. Rules for the division of companies can be found in the provisions of Art. 528 and following the CCC.

The last method is transformation, which consists of preparatory activities and adopting resolutions, as well as registration and announcement. The proper transformation proceeding begins with the preparation of the transformation plan together with attachments and an expert opinion. In addition, it is necessary to adopt a resolution on the transformation of the company, appointing members of the organs of the transformed company (specifically the share-

[42] A. Kidyba, *Prawo handlowe*, Warsaw 2019, p. 539.

holders managing the company's affairs and representing it) and concluding the articles of association or signing its statutes. Article 551 and the following of the CCC regulate transformation of companies. Currently, all companies may be transformed: capital into capital, capital into personal, personal into capital, personal into personal and civil law partnerships into commercial companies. The transformation of companies is a series of legal actions, such as: preparing the draft terms of transformation, the examination of the draft term of transformation by an auditor, notification to shareholders, resolution on transformation, the conclusion of the articles of association, registration, and the announcement about the transformation.

The presented characteristics of the ways in which a commercial law company could be founded indicate that the role of an advocate in this mode of company creation is highly desirable. The correctness of such a statement is confirmed by the multifaceted nature of the procedures, which goes far beyond the law of commercial companies and affects the sphere of labor law and competition protection, as well as broadly understood administrative and legal approvals. There is no doubt that each of the transformation processes in the company leads to the creation of a new legal entity acquiring legal subjectivity. The secondary way of creating a company requires more effort, (compared to the original way method). This is due to the fact that the operating company is already a subject of rights and obligations, it has claims against other entities, and it has specific rights. It is impossible to ignore these circumstances, because it involves further liability for newly created entities and their legal succession[43]. Also very important is caring for the position of the company's current shareholders and their participation in the newly created entity. All these circumstances mean that this process extends over time and requires greater commitment, which further intensifies the need for professional representative participation. The role of an advocate in such a process boils down to protecting the interests of the parties to the transaction he or she represents. This manifests itself in the optimal preparation of transaction documents that allows limiting (disable) the risk of disputes between the parties to the transaction. Due to the length of transaction procedures, it is crucial that the advocate's actions minimize the time and thus transaction costs. At this point, it is worth emphasizing the *due diligence* procedure of entities participating in transactions for its needs[44]. It is also worth noting that the transformation of commercial law companies requires the specializa-

[43] Compare, for example, the judgment of the Supreme National Court from September 13, 2017, IV CSK 603/16, Lex no 2390748; judgment of the Administrative Court in Lodz from October 11, 2012, I ACa 620/12, Lex no. 1254375.

[44] H. Sher, *Due diligence investigations*, "Juta's Business Law" 1998, no. 6(1), p. 15–19; J.A. Sherer, T.M. Hoffman, E.E. Ortiz, *Merger and acquisition due diligence: Proposed framework to incorporate data privacy, information security, e-discovery, and information governance into due diligence practices*, "Richmond Journal of Law & Technology" 2014, no. 21(2), p. 1–76.

tion of participating advocates. It can even be postulated that it is desirable to create a team of people conducting the analyzed procedure.

The complexity of procedures and multidimensional nature speak for the legitimacy of compulsory attorney-at-law in the process of establishing and transforming commercial companies. The participation of a professional attorney would contribute to the speed of the proceedings and would guarantee the correctness of the activities performed[45]. In particular, the process of transforming commercial law companies (which requires examination of, e.g., financial documents, regulations on the concentration of entities, environmental protection, administrative and legal and corporate approvals) justifies the correctness of the raised thesis.

Difficulties in enforcing the proposed coercion should also be noticed, mainly because many activities take place outside the court, at the stage of conception and strategy development. However, it is possible to oblige the parties to submit an application for entry through a professional representative.

Summary

The conducted considerations allow us to conclude that the creation of the commercial company is a complicated matter with high risk related to the effects of any error — justifying the participation of a lawyer who can guarantee a correct and efficient process in accordance with the Latin Paremia *morbum evitare quam curare facilius est* [46] ("being given the chance to minimize negative consequences as a preventative function"). It is better to consult the issue than to use legal assistance *post factum*, which not only prolongs the process, but also often generates additional costs. It is worth noting that at any stage of the creation of a commercial company there is no legal coercion. Only in registration proceedings is it mentioned that an advocate or an attorney-at-law may be a representative, but also in this case the provisions do not impose legal coercion. Therefore, the participation of a lawyer and his or her legal assistance in the creation of the commercial company depends only on the decision of the entity.

Presented comments indicate that the creation of a commercial company is a broad field for professional activity. Most of all the choice of the legal form of conducting business is determined by various factors, and in very excep-

[45] The legislator noticed the need to act in proceedings before a court of first instance in relation to proceedings in cases of intellectual property – see Act of February 13, 2020 amending the Act – Code of Civil Procedure and certain other acts (Journal of Law of 2020, item 288). It should be admitted, however, that the complicated nature of creative activities may be too weak an argument for the introduction of compulsory attorney-at-law, due to the significant limitation of the parties' postulation capacity already at the stage of the court of first instance.

[46] To prevent is better than to cure.

tional situations the freedom to choose the concrete legal form is limited. The interpretation of the prerequisites for creatinh a limited liability company, especially about the articles of association of a limited liability company, proves that its content should go beyond the obligatory elements referred to in art. 157 of the CCC; however, proceed with caution due to questions about the scope of the principle of freedom of contract. In terms of the registration procedure, being subject to court review in both formal and material (substantive) terms was emphasized , which means that it is not only a clause procedure that ends with an entry, irrespective of the content and form of the submitted documents and attachments. Finally, transformations such as a merger, transformation and division are more complicated ways of creating a commercial law company. Due to the fact that the operating company is already a subject of rights and obligations, etc., those procedures go far beyond the law of commercial companies and affect the sphere of labor law, competition protection, and broadly understood administrative and legal approvals. It is worth postulating that the transformation of commercial law companies should require legal coercion.

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Summary

Creating a commercial company on the example of a limited liability company – about the role of an advocate

Keywords: commercial company, limited liability company, register, advocate.

This publication discusses the stages of creating a commercial company while reviewing the necessary regulations. The purpose of this paper is to

describe the problems and doubts that may arise, such as choosing the legal organizational form of the future business activity, preparing the company's articles of association, and the registration process. The complexity of the forms used to register the company and the formalistic nature of the procedures required are highlighted. Presented comments indicate that the creation of a commercial company is a broad field for professional legal activity, basically not because of the formalized procedure, but mainly due to the momentous consequences of making mistakes. The considerations show that the participation of a professional representative is highly desirable. For this reason, it is worth postulating the imposition of legal coercion in the case of creating a commercial company, or at least an in-depth analysis of the need for such coercion.

Streszczenie

Tworzenie spółki handlowej na przykładzie spółki z ograniczoną odpowiedzialnością – o roli adwokata

Słowa kluczowe: spółka handlowa, spółka z ograniczoną odpowiedzialnością, rejestr, adwokat.

W publikacji omówiono etapy tworzenia spółki handlowej, dokonując przeglądu niezbędnych przepisów. Celem artykułu jest opisanie problemów i wątpliwości, które mogą pojawić się na różnych etapach tworzenia spółki, takich jak wybór formy organizacyjnej działalności gospodarczej, przygotowanie umowy spółki, proces rejestracji spółki. Zwrócono uwagę na złożoność formularzy służących do rejestracji spółki oraz formalizm postępowania rejestrowego. Z przeprowadzonych rozważań wynika, że powstanie spółki handlowej to szerokie pole dla działalności prawnika, w zasadzie nie tyle ze względu na sformalizowaną procedurę, ale przede wszystkim z powodu doniosłych konsekwencji popełnienia błędów. Rozważania wskazują, że udział zawodowego pełnomocnika jest wysoce pożądany. Wobec tego zaproponowano wprowadzenie przymusu prawnego w przypadku zakładania spółki handlowej lub przynajmniej przeprowadzenie pogłębionej analizy potrzeby takiego przymusu.