

Aleksandra Sikorska-Lewandowska^{**}

LEGAL ASPECTS OF THE FUNCTIONING OF A LIMITED LIABILITY COMPANY AS A SOCIAL ENTERPRISE IN POLISH LAW

Abstract

The legal form of a limited liability company is the most popular among all commercial companies in Poland. The vast majority of these companies conduct business activities for profit. However, there are a number of companies that are preoccupied with non-economic activities, pursue pro-social goals, and define themselves as non-profit companies or social enterprises.

The article presents the historical outline and legal basis for the conducting of non-profit activities by limited liability companies in Poland. The subject of the research will be the legal conditions for the obtaining of the status of a social economy entity by a limited liability company and the conditions for the obtaining of the status of a social enterprise, in connection with the entry into force of the Act of August 5, 2022 on the social economy. The possibility of conducting business activity by these entities will also be analysed.

Keywords

limited liability company – Poland – social enterprise – non-profit company

* dr Aleksandra Sikorska-Lewandowska, Department of Commercial Law, Maritime Law and Civil Procedure, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, ORCID: 0000-0002-3234-2502, e-mail: asl@umk.pl.

INTRODUCTION

The limited liability company in Poland was first regulated in 1919, after the country regained independence. At that time, the Decree of the Chief of State of February 8, 1919 on limited liability companies was issued.¹ Then, the regulation of this company was included in the Commercial Code issued on June 23, 1934 by the President of the Republic of Poland in the form of a regulation with the force of a law.² Currently, the Code of Commercial Companies is in force, introduced by the Act of September 15, 2001,³ in which four partnerships are regulated: registered partnership, professional partnership, limited partnership, and limited joint-stock partnership, and three capital companies: a limited liability company, a joint-stock company, and a new type of company - a simple joint-stock company.⁴

The limited liability company has been the most frequently chosen form of company in Poland for many years. According to the data as of March 31, 2023⁵ out of the total number of commercial companies registered in the National Court Register, which is 624,741, the number of limited liability companies is 537,246, which constitutes 85.99% of all commercial companies, and thus a vast majority. This proves that this legal structure is trusted and recognized as the best form of doing business, which is usually a profit-oriented business activity.

¹ Journal of Laws of 1919, No. 15, item 201.

² Journal of Laws of 1934, No. 57, item 502.

³ Consolidated text Journal of Laws 2022, item 1467.

⁴ For more: A. Sikorska-Lewandowska, "Report from Poland: Recent Developments in Polish Law", *European Company Law Journal*, 2021, 18 no. 4, pp. 140-142.

⁵ <https://www.gov.pl/web/sprawiedliwosc/SprawozdaniaKRS> [last accessed 1.09.2023].

I. PURPOSE OF THE LIMITED LIABILITY COMPANY

1. LEGISLATION OF FOREIGN STATES

The limited liability company was established in Germany and was regulated by the Act of April 20, 1898 – *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG).⁶ Pursuant to the regulation of this legal act, limited liability companies may be established by one or more persons for any purpose permitted by law in accordance with the provisions of the act (§1).

In Austria, as the third country in the world, after Germany and Portugal, the Act of March 6, 1906 on limited liability companies was adopted.⁷ According to § 1 of this legal act, limited liability companies may be established by one or more persons for any purpose permitted by law in accordance with the provisions of the act. The Austrian solution adopted the model of not limiting the purpose of establishing a limited liability company.

In France, the law on limited liability companies was adopted on March 7, 1925 (SARL - *Société A Responsabilité Limitée*), which was subsequently replaced by the Commercial Companies Act⁸ of July 24, 1966.⁹ The content of art. L. 223-1 does not refer directly to the purpose of the limited liability company, but, in the absence of any limitation, it is assumed that it can be established for any legally permissible purpose.¹⁰

Both the first legal act in the world regulating a limited liability company, i.e. the German law, as well as the subsequent laws adopted in other European countries, assumed that a limited liability company can be established for any legally permitted purpose, and therefore not

⁶ RGBI. S.477.

⁷ Gesellschaft mit beschränkter Haftung (GmbH), RGBI of 1906, No. 58 as amended.

⁸ *Jurrisclasseur Periodique* 1966, p. 32197 as amended.

⁹ P. Nazaruk, „Analiza historyczno-prawna rozwoju instytucji spółki z ograniczoną odpowiedzialnością w Europie Zachodniej i w Polsce”, *Studia Gdańskie. Wizje i rzeczywistość*, 2014, t. XI, p. 393.

¹⁰ A. Klimaszewska, M. Mariański, J.J. Zięty, K. Warylewska, *Spółka z ograniczoną odpowiedzialnością (Société A Responsabilité Limitée) we francuskim kodeksie handlowym*, Wydawnictwo UWM, 2017, p. 39.

only for an economic purpose. It can be said that since the inception of the model of this company, the permissibility of its use has been accepted in various ways.

2. POLAND – THE INTER-WAR PERIOD

Pursuant to the provisions of Art. 2 of the Decree on Limited Liability Companies of 1919, a limited liability company could be set up by two or more persons in order to conduct trade. In accordance with the nomenclature of that time, running a trade meant running a business, and the term merchant was used to describe today's entrepreneur. The admissibility of the purpose for which a limited liability company could be organized was the basic difference between the then Polish regulation and the German and Austrian regulations, which were much more liberal.¹¹

In accordance with the provisions of the Ordinance of October 27, 1933, Law on limited liability companies¹² such a company could be established for economic purposes, as long as the laws did not contain any restrictions. Exactly the same wording was given to the provision of Art. 158 of the Commercial Code of 1934. Representatives of the pre-war doctrine of commercial law emphasized that this kind of company can be established only for economic purposes¹³ that is, running an enterprise or a farm, but not for "politics", scientific, social, or charitable activities. Moreover, it was emphasized that the purpose of the company must be lawful.¹⁴ Another commentator pointed out that the freedom of the company's purpose is appropriate in the case of a joint-stock company, where there is wide openness and control, but not in the case of a limited liability company. The original version of the relevant provi-

¹¹ A. Bielecki, D. Szpoper, „Rys historyczny rozwoju instytucji spółki z ograniczoną odpowiedzialnością na ziemiach polskich na tle wybranych rozwiązań prawnych innych państw europejskich w XX wieku”, in: A. Szpoper, A. Bielecki, I. Zdanowski (eds.), *Przyczynki do historii prawa*, CURRENDA, 2000, p. 93.

¹² Journal of Laws 1933, item 82.

¹³ T. Dziurzyński, Z. Fenichel, M. Honzatko, *Kodeks handlowy. Komentarz*, Łódzka Agencja Informacyjna S.A., 1992, p. 176.

¹⁴ M. Allerhand, *Kodeks handlowy*, Kodeks Spółka Wydawnicza, 1935, p. 274.

sion which was contained in the draft act on limited liability companies of 1932, provided, following the example of the German solution, for the freedom of purpose of the limited liability company, but at the stage of legislative work, this concept was abandoned.¹⁵

Despite the fact that the solutions of the Polish Commercial Code in the interwar period were modelled on German law,¹⁶ as regards the purpose of a limited liability company, it was not decided at that time to accept the arbitrariness of the company's purpose, limiting it to an economic purpose. Thus, in this regard, the Polish limited liability company model diverged from the European model, and the scope of application of the limited liability company was limited only by its economic purpose. This state of affairs remained until the entry into force of the Code of Commercial Companies, i.e. January 1, 2001, when the German model solution was returned to.¹⁷

3. POLAND – THE MODERN PERIOD

The current regulation - the provisions of the Code of Commercial Companies, accepts any purpose of the limited liability company, and it is emphasized in the literature that the adoption of such a solution in 2001 was a significant novelty.¹⁸ As a result of this, the scope of using a limited liability company as a legal form of business activity has been extended,¹⁹ which was a fundamental change.

The doctrine indicates that the purpose must be legally permissible and achievable.²⁰ Owing to such a legal solution, there is no doubt at

¹⁵ J. Namitkiewicz, *Kodeks handlowy. Spółka z ograniczoną odpowiedzialnością z komentarzem i skorowidzem rzeczowym*, Księgarnia Naukowa, 1994, p. 21.

¹⁶ P. Nazaruk, *supra* note 9, p. 396.

¹⁷ A. Moszyńska, in: M. Löhnig, A. Moszyńska (eds.), *Reception of the Limited liability company (GmbH)*, Brill, 2023, in print.

¹⁸ A. Kidyba, *Spółka z ograniczoną odpowiedzialnością. Komentarz*, Wolters Kluwer, 2014, commentary to art. 151.

¹⁹ R. Pabis, in: J. Bieniak, G. Bieniak, R. Nita-Jagielski, K. Oplustil, R. Pabis, A. Rachwał, M. Spyra, G. Suliński, M. Tofel, M. Wawer, R. Zawłocki (eds.), *Kodeks spółek handlowych. Komentarz*, C.H. Beck, 2022, commentary to art. 151 nb 18.

²⁰ S. Włodyka, in: A. Szumański (ed.), *System Prawa Handlowego, Prawo Spółek Handlowych*. Volume 2a, C.H. Beck 2019, pp. 63-64.

present that the classic structure of a limited liability company can be used to conduct activities other than economic activities.

Following the example of the German literature, it should be indicated that these may be goals aimed directly at profit (earning), other economic goals (non-profit-making economic goals), and non-economic goals.²¹ With regard to non-economic goals, it is about the so-called ideal goals, non-profit, and non-economic activity. A limited liability company in Poland is used in a variety of ways, as the current code-based legal structure makes it possible for it to be freely adapted to the needs specified by the shareholders.²²

In practice, there are limited liability companies in Poland, the purpose of which is not to run a business, but to run a different type of activity. This is evidenced by the names adopted by the companies, with specific terms indicating it. Using the search engine for entities entered in the National Court Register, available on the website of the Ministry of Justice,²³ it can be established that currently in the Register of Entrepreneurs there are 73 limited liability companies that use the term “social enterprise” in the names of their companies, and 156 limited liability companies that already have the term “non-profit” in their business names. The register also shows that 22 limited liability companies have obtained the status of a public benefit organization, indicating that such status of a limited liability company is possible, but extremely rare.

It should be assumed that the role of these designations is to indicate that these companies were not established for the purpose of conducting business activity, but for the implementation of other goals, often of a socially useful nature. The circumstance that in the names of limited liability companies there are terms such as: “non-profit” or “social enterprise” suggests that either there is an obligation resulting from legal provisions or there is a practical need that necessitates the use of such designation. From this we conclude that expanding the legal possibili-

²¹ A. Hueck, in: A. Baumbach, A. Hueck, *GmbH-Gesetz*, VERLAG C.H. Beck, 2010, pp. 16-18.

²² A. Sikorska-Lewandowska, “The Status of a Limited Liability Company in the Polish Legal System”, *Journal of Research in Business and Management*, 2021, vol. 9, issue 7, p. 5.

²³ <https://ekrs.ms.gov.pl/web/wyszukiwarka-krs/strona-glowna/index.html> [last accessed 1.09.2023].

ties of using a limited liability company for purposes other than simply conducting business was the right solution. Therefore, it is necessary to examine how the current legal regulations shape the functioning of companies established for a purpose other than conducting economic activity for profit, especially companies that are social enterprises, owing to a new regulation introduced in Poland in 2022.

II. THE CONCEPT OF “SOCIAL ENTERPRISE”

1. THE CONCEPT OF SOCIAL ENTERPRISE IN A DOCTRINAL VIEW

The concept of “social enterprise” does not have a long tradition in Poland and research on this concept is mainly conducted in the economic literature. The idea of a social enterprise emerged in the United States, but was quickly adopted in Europe, where a research network was established to identify the key elements of the phenomenon.²⁴ Alternative models of economics, based on social solidarity, have been the subject of numerous analyses both at the European level²⁵ and in individual member states.²⁶

In the Polish doctrine, a social enterprise is characterized by such features as: operating in a market manner, focusing activities on social reintegration on the scale of a given local community, subordination of ownership relations to the interests of stakeholders, management

²⁴ J. Defourny, „Przedsiębiorstwo społeczne w poszerzonej Europie: koncepcja i rzeczywistość”, in: *Ekonomia społeczna II Europejska Konferencja Ekonomii Społecznej: materiały*, Ministerstwo Polityki Społecznej, 2004, p. 12.

²⁵ S. Buglione, R. Schlüter, *Solidarity-based and co-operative economy and ethical business. Trends Innovations and Experience in Europe*, Rosa Luxemburg Foundation, 2010, p. 6.

²⁶ J.L. Retolaza, M. Ruiz, L. San Jose, “Solidarity-Based Economy in Spain: A Corporate Social Responsibility Perspective”, *European Journal of Social Sciences*, 2008, Volume 5, Number 4, p. 181; D. Carrera, M. Meneguzzo, A. Messina, “Solidarity-based Economy in Italy. Practices for Social Entrepreneurship and Local Development: The Experience of Rome”, 2007, http://www.socioeco.org/bdf_fiche-document-2064_en.htmlp [last accessed 1.09.2023].

culture based on partnership and participation, democratic control by stakeholders, and allocation of surplus for specific purposes.²⁷

The concept of social enterprise is associated with the term *social economy*. The literature indicates that, unlike classical economics, called liberal or neoliberal, for which the basis is the individual ownership and activity of the individual, and the driving force of actions is the desire for profit, it is necessary to identify as a social economy one in which the individual goes beyond the realization of narrow, individual benefits and is guided by ideas such as solidarity, cooperation, and mutual aid.²⁸ The goal of a social economy is to create social enterprises and a new culture of social entrepreneurship, focused mainly on the inclusion of marginalized groups through active participation in it.²⁹ Social economy includes various forms of economic activity, which are primarily oriented towards creating jobs for people at risk of social exclusion and professional marginalization. Social economy entities, in addition to the economic goal, are supposed to carry out a certain social mission, however, recognizing the priority of acting for the benefit of society over maximising profit. Therefore, the social economy responds to needs that neither the public nor the private sector can effectively respond to.³⁰ The functioning of social enterprises contributes to the maximising of social benefits and the reducing of disparities and social exclusion in individual countries.³¹

The concept of social economy entities appeared in the economic literature, where it was assumed that it covered a fairly wide group of entities whose activity is based on such principles as: the supremacy of in-

²⁷ J. Hausner, N. Laurisz, „Czynniki krytyczne tworzenia przedsiębiorstw społecznych”, in J. Hausner (ed.) *Przedsiębiorstwa społeczne w Polsce. Teoria i praktyka*, Małopolska Szkoła Administracji Publicznej Uniwersytetu Ekonomicznego, 2008, pp. 11-12.

²⁸ K. Wygnański, P. Frączak, *Ekonomia społeczna w Polsce – definicje, zastosowania, oczekiwania, wątpliwości*, Fundacja Inicjatyw Społeczno-Ekonomicznych, 2006, p. 5.

²⁹ M. Grewiński, M. Wronka, „Gospodarka społeczna w UE i w Polsce – między przedsiębiorczością społeczną i CSR” in A. Frączkiewicz-Wronka, M. Grewiński (eds.), *Przedsiębiorczość w Polsce – bariery i perspektywy rozwoju*, WSP TWP, 2012, p. 11.

³⁰ P. Sałustowicz, „Pojęcie, koncepcje i funkcje ekonomii społecznej”, in J. Starega-Piasek (ed.), *Ekonomia społeczna. Perspektywa rynku pracy i pomocy społecznej*, Instytut Rozwoju Służb Społecznych, 2007, p. 22.

³¹ E. Florczak, T. Gardziński, “Social Enterprise in the Order of Social Market Economy”, *International Journal of New Economics and Social Sciences*, 2019, No. 1(9), p. 140.

dividual and social goals over capital, voluntary and open membership, democratic control exercised by the members, combining the interests of members/users, or the general interest, the defence and application of the principles of solidarity and responsibility, self-government and independence from public authorities, and the use of most surpluses for the implementation of sustainable development goals, for services in the interest of members, or in the interest of the general public.³² The form of a commercial law company was recognized in the doctrine, only by reference, as an “interesting solution” for conducting business in the area of social economy.³³

The classic entities of the social economy sector include associations and foundations conducting economic activity or paid public benefit activities, as well as mutual insurance companies. In terms of the professional and social reintegration of people at risk of social exclusion, these are mainly social cooperatives, social enterprises, social integration centres, as well as vocational activity centres, and occupational therapy workshops. Only these entities have been included in statistical surveys in Poland so far, and non-profit capital companies have not been included in them.³⁴

2. THE CONCEPT OF A SOCIAL ENTERPRISE IN EU LEGISLATION

The concept of a social enterprise is used by the European legislator in numerous normative and non-normative acts. On July 5, 2018, a resolution of the European Parliament was issued with recommendations to the Commission on the Statute for Social Enterprises and Solidarity Economy Enterprises (216/2237) (2020/C 118/24), which stated the need to clearly define these terms. It was stressed that the need for this aris-

³² M. Małecka-Łyszczek, „Zakres podmiotowy i klasyfikacja pojęcia ‘podmiot ekonomii społecznej’”, in: Blicharz J., Zacharko L. (ed.), *Trzeci sektor i ekonomia społeczna: uwarunkowania prawne, kierunki działań*, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2017, p. 207.

³³ J. Ruszewski, „Formy prawne funkcjonowania podmiotów sektora ekonomii społecznej w Polsce”, in: A. Ejsmont, J. Ruszewski, *Ekonomia społeczna dla rozwoju społeczności lokalnych*, Pryzmat, 2013, p. 217.

³⁴ The third sector in Poland, associations, foundations, faith-based charities, professional and business associations, employers’ organizations in 2010, preliminary results in 2018, Central Statistical Office.

es from the fact that social and solidarity economy make a significant contribution to the development of the economy of the European Union, and that there are significant differences between the Member States in the way social enterprises and solidarity economy enterprises are regulated, and in the organizational forms available to social entrepreneurs in the legal systems of their countries. It has been recognised that the specific organizational forms adopted by social enterprises and solidarity economy enterprises depend, on the one hand, on the applicable legal framework and the political economy of social services, and, on the other hand, on the cultural and historical traditions in a given Member State. This resolution does not specify the legal forms in which social enterprises should operate, but it indicates their features, which include: (1) independence of the entity from state and public authorities, and subjection to private law, (2) the purpose of the activity includes general interest or public utility, (3) the carrying out of socially useful and solidarity activities - *e.g.* support for people at risk or excluded, protection of the environment and climate, (4) limitation of profit distribution, so that most of the profit must be allocated to the statutory purpose, (5) management in accordance with democratic management models with the participation of employees, clients, and entities interested in their activities; the powers of members and their weight in decision-making cannot be based on the capital they may hold.

It should be noted that the above features of a social enterprise, as defined in the 2018 Resolution, can be implemented using the legal form of a limited liability company.

3. SOCIAL ENTERPRISE IN POLISH LAW

3.1. LEGAL BASIS AND CATALOGUE OF SOCIAL ECONOMY ENTITIES

In Poland, there was no legal regulation relating to social economy entities. It was not until October 30, 2022 that the Act of August 5, 2022 on Social Economy entered into force.³⁵ It is a new legal act that defines a number of concepts, and shapes new solutions. The Act introduces

³⁵ Journal of Laws 2022, item 1812.

a statutory catalogue of social economy entities and the rules for acquiring the status of a social enterprise by them.

The group of social economy entities includes the following entities: a social cooperative, an occupational therapy workshop and a professional activity facility, a social integration centre and a social integration club, a work cooperative, including a cooperative for the disabled and a cooperative for the blind, and an agricultural production cooperative, as well as certain non-governmental organizations. This catalogue also includes legal persons and organizational units operating on the basis of the provisions on the relationship of the State to the Catholic Church in the Republic of Poland, on the relationship of the State to other churches and religious associations, and on guarantees of freedom of conscience and religion, if their statutory objectives include the conducting of public benefit activities, associations of local government units and, finally, certain joint-stock companies and limited liability companies, as well as sports clubs operating in the legal form of companies. Thanks to this regulation, the admissibility of including limited liability companies in the group of social economy entities was directly decided. The introduction of this solution was possible because the provisions of the Commercial Code adopted a broad understanding of the purpose of a limited liability company.

3.2. FORMAL REQUIREMENTS FOR LIMITED LIABILITY COMPANIES

With regard to limited liability companies, in order for them to have the status of a social economy entity, the legislator formulates specific requirements for them, which result from the Act of 24 April 2003 on public benefit activity and volunteer work.³⁶ Pursuant to this regulation, they cannot operate for profit and must allocate all income to the implementation of statutory objectives, and not allocate the profit to be distributed among their shareholders, stockholders, and employees.

A limited liability company that meets the above-mentioned criteria, after two years of operation and meeting other statutory requirements, may be recognized as a public benefit organization, i.e. an or-

³⁶ Journal of Laws of 2022, item 1327, as amended

ganization that conducts socially useful activities in the sphere of public tasks specified in the Act. However, this is not obligatory; a limited liability company that conducts socially useful activities, but does not have the status of a public benefit organization, can operate in trade. Such a company will be classified as a social economy entity, and the status of a public benefit organization is additional and optional. Another matter is the status of a social enterprise, which is also additional and optional.

3.3. FORMAL REQUIREMENTS FOR OBTAINING AND HOLDING THE STATUS OF A SOCIAL ENTERPRISE

A social economy entity may be included in the group of social enterprises provided that it meets the criteria set out in the Act. The status of a social enterprise is obtained by way of a decision of the locally competent voivode, at the request of a social economy entity. The loss of such status also takes place by virtue of a decision of the voivode, in cases specified by law. It is envisaged that the minister responsible for social security will keep an electronic list of social enterprises and make it publicly available. Thanks to this, it will be possible to verify quickly whether a given entity is included in the database of social enterprises.

The voivode exercises supervision over social enterprises operating within his local jurisdiction. The instruments of the voivode's supervision over social enterprises are: the right to call on the social enterprise to cease violations of the conditions of operation of the social enterprise, the right to order inspections in the social enterprise, on the voivode's own initiative or at the request of another authority, and the right to issue a decision on the loss of the status of a social enterprise.

The Act imposes certain requirements on entities with the status of social enterprises that they must meet in order to obtain and maintain such a status.

First of all, the activity of a social enterprise is to serve local development and aim at the social and professional reintegration of people at risk of social exclusion or to provide social services. This purpose of activity must result from the statutory documents of this entity and be actually implemented. The next requirement includes the obligation to

employ a minimum of three people under an employment contract (or a cooperative contract, which applies only to cooperatives). In the case of such social enterprises, the aim of which is the social and professional reintegration of people at risk of social exclusion, it is obligatory to employ at least 30% of people at risk of exclusion within this limit. A social enterprise that receives support from public funds in connection with the employment of excluded people is obliged to develop and implement what is known as an individual reintegration plan as specified in detail in the provisions of the Act.

Another requirement formulated in the Act for a social enterprise is that it must have a consultative and advisory body. As a rule, it includes all persons employed in the enterprise, provided that their number does not exceed 10, in which case representatives are elected to this body.

Further requirements for the functioning of a social enterprise include prohibitions on the distribution of social enterprise assets to affiliated entities, such as the granting of loans, various forms of transfer or use of property, and the purchase of goods or services on or at non-arm's length terms. In addition, the Act formulates a general prohibition on the profit or balance sheet surplus of a social enterprise, which cannot be distributed among its members, shareholders, stockholders, or employees.

A social enterprise must remain an entity independent of state control, which is explicitly expressed in Art. 3 sec. 2 of the Social Economy Act. Entities that remain dependent on the State Treasury, local authority, or other entities, even if they belong to the group of social economy entities, cannot obtain the status of a social enterprise.

Social enterprises are required to prepare annual reports, which must be submitted electronically to the voivode supervising them. The role of these reports is to provide information on the implementation of the goals for which the social enterprise is established, the manner of achieving these goals, employment, and the use of support instruments.

Having the status of a social enterprise in Poland in the light of the new Act of August 5, 2022 is associated with the possibility of using the support instruments provided for in this legal act. The basic support instruments include: financing from public funds part of the remuneration of social enterprise employees who are at risk of social exclusion, financing the creation of a job position, financing remuneration costs or

payroll costs, and co-financing the interest on bank loans taken out. The Act also provides for the possibility of awarding public contracts with the use of a subjective reservation - only for social enterprises.

III. LIMITED LIABILITY COMPANY AS A SOCIAL ENTERPRISE

1. SPECIAL PROVISIONS OF THE ARTICLES OF ASSOCIATION OF A LIMITED LIABILITY COMPANY

In the light of the provisions of the Act on Social Economy, the Act on Public Benefit and Volunteer Work, and the provisions of the Code of Commercial Companies regarding a limited liability company, it should be assumed that this type of capital company may obtain the status of a social enterprise if certain requirements are met. First of all, such a company must meet the criteria for being recognized as a social economy entity, and secondly, as a social enterprise.

This requires a specific wording of the articles of association. The founders of a limited liability company are obliged to include in its articles of association a number of provisions that differ from those used in the classic articles of association of limited liability companies, i.e. those that were established to conduct business for profit. These differences include the purpose of establishing a company, the method of defining the subject of the company's activity, the structure of the company's governing bodies, and the provisions on the prohibition of payments from the company's profits to the shareholders.

2. PURPOSE OF THE LIMITED LIABILITY COMPANY

The Code of Commercial Companies does not impose an obligation to indicate the purpose of a capital company in the deed establishing the company.³⁷ The provisions of the Code of Commercial Companies establish minimum requirements for the content of the articles of asso-

³⁷ Z. Jara, in: *Kodeks spółek handlowych, komentarz*, ed. Z. A. Szajkowski, C.H. Beck, 2017, p. 562.

ciation of a limited liability company, but the purpose of the company is not mentioned among them (Article 157 of the Code of Commercial Companies). The purpose of a capital company is not subject to notification to the register, it is not disclosed. However, in accordance with Article 3 of the Code of Commercial Companies, a structural element of a commercial company agreement is the pursuit of a common goal by making contributions and by cooperating in a different way, if the articles of association or the statute so provide. The articles of association of limited liability companies usually specify the purpose for which the company is established, most often indicating that it is to conduct business for profit.

The legislator does not require the purpose of the company to be specified in the articles of association, but it does require an indication of the subject of activity (Article 157 item 2 of the Code of Commercial Companies), which applies to all commercial companies. Pursuant to Article 40 item 1 of the Act on the National Court Register³⁸ the subject of the entrepreneur's activity should be specified in the register in accordance with the regulations of the PKD, i.e. the Polish Classification of Activities specified in the Regulation of the Council of Ministers.³⁹ In the current legal status, there is no doubt that the verbal description of the subject of activity contained in the articles of association of a limited liability company does not have to be identical to the nomenclature used in the PKD, but very often this nomenclature is used directly in the articles of association.

The statutory requirement to specify, not only the subject of the company's activity, but also its nature, results from a legal act other than the Commercial Companies Code and applies to companies conducting public benefit activities. Pursuant to the provision of Article 10 item 3 of the Act on Public Benefit Activity and Voluntary Work, there is an obligation to specify in the articles of association of a limited liability company the scope of public benefit activity, both paid and unpaid. Public benefit activity is defined as a socially useful activity in the sphere of public tasks specified in this Act. The sphere of public tasks includes

³⁸ Act of August 20, 1997 on the National Court Register (Journal of Laws of 2022, item 1683).

³⁹ Regulation of the Council of Ministers of December 24, 2007 on the Polish Classification of Activities (PKD) (Journal of Laws of 2007, No. 251, item 1885).

a number of activities of a pro-social, pro-health, pro-ecological, and pro-educational nature, aimed at the development of culture, art, science, economic development, and helping people in need. The articles of association of a limited liability company must clearly state that it conducts activities in the socially useful sphere, i.e. public benefit activities, so making it possible for the company to be classified as a social economy entity.

First of all, the activity of a social enterprise is to serve local development and to aim at the social and professional reintegration of people who are at risk of social exclusion or to provide social services. It follows from this that the purpose of a social enterprise is socially useful, but it includes selected types of activity that can generally be classified as pro-social activities.

The detailed subject of the activity of a limited liability company must be consistent with the generally formulated objectives for which the company was established.

3. PERMISSIBILITY OF CONDUCTING BUSINESS

The subject of consideration is limited liability companies which have been established to achieve socially useful goals, and not to achieve profits from business activity. However, the question arises of whether such limited liability companies, conducting socially useful activities, can conduct economic activity, or whether the regulations introduce restrictions or prohibitions in this respect. Running an economic activity in Poland is also called running an enterprise, and these terms are synonyms.

First of all, it should be determined whether an entity included in the group of social economy entities can also run a business. In this respect, it is necessary to apply the Act on Public Benefit Activity and Volunteer Work, which allows these entities to conduct both public benefit activity (paid or unpaid) and economic activity, however, with a clear proviso that public benefit activity and economic activity may not be conducted in relation to the same activity. Therefore, it is crucial to separate precisely the objects of activity, in accordance with the Polish Clas-

sification of Activities, and to define clearly for each of them whether economic activity is conducted in this field or not.

A clear distinction is underlined by the provision stating that paid and unpaid public benefit activities do not constitute economic activity within the meaning of the Act of March 6, 2018 – Entrepreneurs' Law.⁴⁰ The possibility of running a business in parallel by entities that also conduct public benefit activities clearly results from Article 10 of this Act. Pursuant to this provision, it is required in such a case to separate these forms of activity in accounting (*i.e.*: unpaid public benefit activity, paid public benefit activity, and economic activity) so that it is possible to determine the revenues, costs, and results of each of these activities.

Pursuant to Article 3 of the Social Economy Act, the status of social enterprise may be granted to such a social economy entity that conducts paid public benefit activity, economic activity, or other paid activity - provided that it meets the statutory requirements.

It follows that the status of social enterprise may also be granted to an entity conducting economic activity, not only public benefit activity. The provision of Article 4 item 2 of the Social Economy Act contains a reservation, according to which activities in the field of social and professional reintegration carried out for persons employed in a social enterprise are not carried out as part of economic activity conducted by a social enterprise.

It follows from the cited regulations that an entity with the status of a social enterprise that conducts socially useful activity may conduct both public benefit and economic activity, but not in the same subject of activity. Therefore, a social enterprise must conduct socially useful activities in certain areas, and additionally - in other areas - it can conduct economic activity without losing this status.

4. ENTRY IN THE REGISTER OF ENTREPRENEURS

Each limited liability company is subject to an obligatory entry in the Register of Entrepreneurs of the National Court Register, regardless of whether it is a company conducting business activity for profit or a com-

⁴⁰ Journal of Laws 2021, item 162.

pany operating for a different purpose. The entry in the register establishes the legal existence of each commercial company, because it has a constitutive meaning, and therefore, the company is established at the moment of entry in the register. Pursuant to the provision of Article 36 of the Act on the National Court Register, all capital companies must be entered in the register of entrepreneurs. The legal effect of entering the company in the register is the acquisition of legal personality by it, which is the foundation of the existence of a legal person.

The regulations do not provide for entering commercial companies into a register other than the register of entrepreneurs, even if they do not conduct business activity at all. Therefore, the Register of Entrepreneurs also includes entities that do not conduct business activity; it includes capital companies established for purposes other than economic, but this does not result in the acquisition of the status of an entrepreneur.⁴¹

The regulations do not provide for any marking of capital companies conducting activities other than business, despite the fact that they are entered in the same register as entrepreneurs. There is also no column reflecting that the company does not conduct business activity, while such information should be disclosed in the register.⁴² Another solution could be to indicate the purpose of the limited liability company, but there is also no such column.

The status of a public benefit organization is disclosed in the register, in accordance with § 50 point 1 lit. f of the Regulation of the Minister of Justice on the detailed manner of keeping registers included in the National Court Register and the detailed content of entries in these registers⁴³ in section 1 of the register of entrepreneurs for a limited liability company and a joint-stock company: the information whether the entity has the status of a public benefit organization is entered in the sixth space.

⁴¹ J.P. Naworski, *Przedsiębiorca w polskim prawie cywilnym (materiałnym i procesowym) de lege lata i de lege ferenda*, Wydawnictwo Naukowe UMK, 2011, p. 283.

⁴² A. Sikorska-Lewandowska, „Spółka kapitałowa non-profit”, in: *Kodeks spółek handlowych po 15 latach obowiązywania*, ed. Józef Frąckowiak, Wydawnictwo Wolters Kluwer 2018, p. 283.

⁴³ Regulation of the Minister of Justice of 17 November 2014 on the detailed manner of keeping registers included in the National Court Register and the detailed content of entries in these registers (Journal of Laws of 2014, item 1667, as amended).

Only this specific status of a public benefit organization can be checked in the register of entrepreneurs. The status of a social economy entity or the status of a social enterprise is not recorded in the National Court Register. The list of social enterprises is kept in electronic form by the minister responsible for social security and is independent of the court register.

5. BODIES OF THE LIMITED LIABILITY COMPANY

A limited liability company which is a social enterprise has an organizational structure identical to that of a limited liability company that conducts only economic activity. The shareholders form the shareholders' meeting and appoint the management board, which is the executive body. The supervisory body in such a company may be the supervisory board or the audit committee. In this respect the founders of the company have a choice. Very often Polish limited liability companies do not have a supervisory body, because the creation of it is not obligatory. Pursuant to the provisions of the Commercial Companies Code, the appointment of a supervisory body in a limited liability company is mandatory only when the share capital exceeds PLN 500,000 and there are more than twenty-five shareholders.

However, it is different in the case of limited liability companies conducting socially useful activities. In order to obtain the status of a social enterprise, it is necessary to appoint a consultative and advisory body, the function of which in a limited liability company is performed by the supervisory board (or audit committee). The conclusion is that, regardless of the amount of the company's share capital and the number of shareholders, it is necessary to appoint a supervisory body owing to the purpose of establishing the company.

Certain doubts in the case of limited liability companies operating in order to conduct socially useful activities are caused by the possibility of appointing a holder of a commercial power of attorney by such a company. According to Art. 109¹ of the Civil Code⁴⁴ a commercial power of attorney can be granted only by an entrepreneur. A limited liabil-

⁴⁴ Act of April 23, 1964 - Civil Code (Journal of Laws of 2022, item 1360).

ity company which is not an entrepreneur in the material sense, but is one only in the formal sense, entered into the register of entrepreneurs, cannot appoint a proxy, because it does not run an enterprise within the meaning of Article 109¹ et seq. of the Civil Code. The doctrine rightly states that the regulation on the representation of limited liability companies (and joint-stock companies) is inconsistent with the regulation providing for the possibility of appointing a holder of a commercial power of attorney only by an entrepreneur,⁴⁵ because in the light of the provisions of the Code of Commercial Companies, a holder of a commercial power of attorney may participate in the representation of any capital company.

As indicated above, limited liability companies established to conduct socially useful activities may also conduct business activities, which means that they are entrepreneurs, and therefore, they can grant a commercial power of attorney. To sum up, the possibility of establishing a commercial power of attorney in a limited liability company having the status of a social enterprise will depend on whether the company conducts business activity, as only then is it possible to appoint a holder of a commercial power of attorney. A limited liability company that conducts only socially useful activities and does not have the status of an entrepreneur cannot grant a commercial power of attorney. In this case, one cannot talk about running a business.

6. PROHIBITION OF PAYMENTS FROM PROFIT AND RESTRICTIONS ON THE DISPOSITION OF ASSETS

The articles of association of a limited liability company that is to have the status of a social enterprise must include a provision according to which the profit generated in the company is allocated in its entirety for statutory purposes, without the possibility of its payment to the shareholders. This regulation applies both to entities included in the group of social economy entities and social enterprises. It follows from the essence of their socially useful activity that their purpose is not to bring

⁴⁵ B. Kozłowska-Chyła, „Sposób reprezentacji spółki kapitałowej nieprowadzącej działalności gospodarczej przez jej zarząd”, *Przegląd Prawa Handlowego*, 2015, no. 3, p. 36.

profits to the partners. Contrary to a classic limited liability company which is focused on profits for the company's shareholders, entities belonging to the group of social economy entities cannot act in order to achieve profit and are obliged to allocate all income for the implementation of statutory objectives, and cannot allocate the profit to be distributed among their shareholders, stockholders, and partners (Article 3(3 (4) of the Act on Public Benefit Activity and Volunteer Work). The provisions of the articles of association must be formulated in such a way that the admissibility of profit distribution between the shareholders of a limited liability company is permanently excluded. This feature is the rule for non-profit organizations.⁴⁶

It should be emphasized that the establishment of a capital company for purposes other than conducting business activity for profit is not a typical situation and proves that these shareholders have a clear will to pursue socially useful goals, as this is associated with the awareness of not receiving profits in the form of dividends. At the same time, however, there is a higher goal for these partners – a socially useful goal that they want to achieve together as part of the limited liability company being created, and their motivation is not the desire for profit, but the desire to undertake activities that bring benefits to selected social groups.

A limited liability company with the status of a social enterprise cannot dispose of its assets in any way for the benefit of related entities, which are organizationally related entities and members of the company's bodies, shareholders, employees, spouses, and their relatives. The prohibition includes granting loans, performing legal transactions resulting in securing the company's property, transferring the company's assets free of charge or on preferential terms, using assets for the benefit of those persons, unless it is consistent with the company's statutory purpose, and making transactions with such entities on non-market terms. The purpose of this regulation is to exclude situations in which the assets of a limited liability company with the status of a social enterprise were to be used for purposes other than those resulting from the Act and which were to be adopted by the shareholders in the articles of association of the limited liability company.

⁴⁶ P. Frumkin, *On Being Nonprofit. A conceptual and policy primer*, Harvard, 2002, p. 4.

7. REQUIREMENT OF OWNERSHIP NEUTRALITY

A limited liability company that wants to obtain the status of a social enterprise cannot be controlled by the State Treasury or a local government unit, or by a state or local government legal person or a natural person. This is about having control within the meaning of all forms of direct or indirect obtainment of powers, which separately or jointly, taking into account all legal or factual circumstances, enable exerting a decisive influence on another entrepreneur or other entrepreneurs. Manifestations of such control are, for example, as follows: holding directly or indirectly a majority of votes at the general meeting of shareholders of a limited liability company, also as a pledgee or usufructuary, or in the management board of another entrepreneur (dependent entrepreneur), also on the basis of agreements with other persons, the right to appoint or dismiss a majority of the members of the management board or supervisory board of another undertaking (dependent undertaking), also on the basis of agreements with other persons, or a situation where members of the management board or supervisory board of one entity constitute more than half of the membership of the management board of another undertaking (dependent undertaking), or when an agreement has been concluded providing for the management of another entrepreneur (dependent entrepreneur) or the transfer of profit by such an entrepreneur.

The status of a social enterprise is to be granted only to a limited liability company that is dependent solely on its shareholders and independent of the influence of any external entities. This is a solution in line with the model set out in the regulations of the European Union. Ownership independence is an important element that guarantees the achievement of the goals adopted by the shareholders of a limited liability company.

CONCLUSIONS

A limited liability company is the basic legal form of running a business in Poland. However, it is possible to establish and run a limited liability

company for a different, non-economic purpose, such as a socially useful purpose. In such a case, a limited liability company may obtain the status of a social enterprise and be entered in the register of such enterprises kept by the relevant minister.

Firstly, it should be pointed out that this requires the fulfilment of a number of conditions resulting from as many as three legal acts. These acts, *i.e.* the Code of Commercial Companies, the Act on Public Benefit Organizations and Volunteer Work, and the Act on Social Economy, must be applied in parallel. This may pose a certain difficulty for the founders and partners of such companies, as this regulation is quite complicated.

Secondly, it should be emphasized that having social enterprise status is not compulsory. Therefore, a limited liability company may conduct socially useful activities without applying for entry in the register of social enterprises. However, obtaining the status of a social enterprise is associated with a number of specific benefits for limited liability companies conducting socially useful activities.

Thirdly, it should be noted that from October 30, 2022, *i.e.* since the date of entry into force of the Social Economy Act, the concept of “social enterprise” has become a legal concept, *i.e.* regulated by law. Article 19 of this Act provides for an electronic list of social enterprises, kept by the competent minister. Meanwhile, in legal transactions there operate limited liability companies which in their business names have the term “social enterprise” because this name was adopted by the founders of these companies in the earlier period, when this act was not yet in force. This leads to a certain dissonance, because currently those limited liability companies with the term “social enterprise” in their name do not have to be entered in the list of social enterprises. Meanwhile, the adopted statutory construction determines that the status of a social enterprise is granted to the entity which has been entered in the list, and not to the entity which has adopted this term in its name. Unfortunately, the legislator did not reserve the exclusive use of this term for entities entered in the list of social enterprises, which should be the case to ensure the safety of trading.

Fourthly, a characteristic feature of the Polish legal regulation concerning limited liability companies that conduct socially useful activities is the general admissibility of conducting classic economic activity

(running an enterprise) at the same time – conditioned by the fact that the objects of activity do not overlap. A clear separation of individual objects of activity is a prerequisite of a correct operation of such an entity. The admissibility of conducting business activity, i.e. in the light of the provision of Article 4 of the Law of Entrepreneurs, of organized profit-making activity carried out in one's own name and on a continuous basis, was introduced in order to provide these companies with sources of financing pro-social activities. For this reason, a clear ban was introduced for social economy entities allocating profits for distribution between shareholders and employees of the company. In fact, such entities are not non-profit organizations: they can earn a profit, but they must allocate it for statutory purposes. Therefore, they fall under the notion of not-for-profit entities, i.e. those that conduct business activity to a certain extent, but not for profit, in the sense – not for profit intended for shareholders, but to support the company's statutory goals, i.e. socially useful activity. In this sense, economic activity is of a somewhat auxiliary nature - as in the case of foundations conducting economic activity - serving to support the statutory objective.

To sum up, the new legal regulation concerning social economy entities has introduced an interesting, though organizationally difficult, possibility for limited liability companies conducting socially useful activities to obtain the status of a social enterprise. It allows the legal form of the limited liability company to be used more widely for purposes other than conducting business, which corresponds to the assumptions of the creators of the construction of this capital company.