

S24 SYSTEM AND ITS DEVELOPMENT AS AN INNOVATION IN BUSINESS

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Abstract: This article describes the system used for electronic registration of companies, called “S24”, as a development in business. The article presents reasons behind the creation of said system, its legal basis, development and impact, especially in the case of small and medium-sized enterprises. This paper also describes some of the difficulties encountered when using the system.

Keywords: electronic registration, S24 system, commercial law companies, innovations in business.

1. Introduction

One of the most important elements for the development and operation of the economy of modern countries is the activity carried out in the sector of small and medium-sized enterprises (SMEs). The European Commission, after carrying out extensive research in this sector, began in 2008 to launch the Small Business Act for Europe. The content of the communication inaugurating the programme primarily indicated the importance of SMEs for creating jobs and highlighted their key role in the development of local communities. Along with this, as one of the most important barriers limiting their operation, administrative burdens were defined, i.e. the need to maintain compliance with administrative regulations. In view of the above, the Commission pointed to the need to simplify legal regulations, in particular regarding the registration and start-up process (European Commission, 2008).

From among a number of legal solutions introduced by Poland in response to the Commission's recommendations, this article addresses the issue of registration of a commercial law company through an ICT system. Originally, such a possibility was only provided for a limited liability company, as the most-established of commercial companies. However, with the passage of time, the catalogue of entities whose registration is possible via the Internet

has expanded. Statistical data of the Ministry of Justice indicates a steady increase in interest in establishing commercial companies in this form, which - while maintaining current trends – may result in the marginalisation of the registration process with the use of a notarial deed and written requests.

This situation indicates the utility of the said ICT system as an innovation in business. It should be noted that registration in the described form is by no means obligatory. A voluntary, more frequent selection of the company's establishment via the Internet all the more confirms that the discussed legal regulation is useful for the SME sector.

The article presents the creation of an ICT system and the legal basis for registration of commercial law companies with its use, as well as the development and increasing interest in its application. At the outset, the genesis of the colloquial name of the above system still needs explanation, as it is often referred to as "S24". This results from the possibility – at least theoretically – of starting and completing the company registration process within 24 hours.

2. Legal basis

The draft law, for the first time including the possibility of registering a company via the Internet, appeared in the Sejm RP on 24 November 2010. It was submitted jointly with the draft act on limiting administrative barriers for citizens and entrepreneurs. The draft amended the act – the Code of Commercial Companies (Kodeks spółek handlowych, hereinafter referred to as k.s.h.) by adding, first of all, art. 157¹, according to which the creation of a limited liability company is also possible using the model agreement of the company made available in the ICT system (Sejm RP, 2010). The proposed change was also intended to cover several other acts containing provisions related to the company's registration¹. The Minister of Justice received the appropriate statutory delegation to issue a regulation specifying the model of the agreement (Article 157¹ § 4 k.s.h.). As the project justification suggests, the purpose of implementing the above solutions was to accelerate and facilitate the establishment of an LLC and to simplify the procedure. The project assumed acceleration to a significant extent, because – as was pointed out in its content – the period between submitting the application for registration until registration was made lasted several weeks (Sejm RP, 2010). The justification for the Sejm print emphasised that the form of electronic registration does not lead to the creation of a new, previously unknown type of company, but only provides a procedure for setting up a company already existing under the provisions of k.s.h. The key to the project was the regulation establishing an unprecedented one-day deadline by which the registration court should recognise the application for entry of the LLC in the register (Article 20a paragraph 2 KRS). However, the representatives of the doctrine drew attention to the weakening of its

effectiveness, due to the lack of the sanction provided for in the event of its failure (Sołtysiński et al., 2015)

An essential element of shortening the registration process was to reduce the work of the registry court, hence the company's model agreement allowed for a limited scope of content and allowed for few modifications (consisting of choosing between two or three variants). The legal doctrine criticized the above regulation as limiting the freedom of contracts (Strzępka, 2017; Szajkowski et al., 2014); however, an analysis of the issue based on the purposefulness of the provision indicated the need to do this to achieve the assumed results (Opalski, 2018). Another limitation of the freedom of shaping the articles of association was the admissibility to pay only cash contributions (Article 158 § 1¹ k.s.h.). The intention of the legislator was, in this case, to avoid legal complications that could arise when making a contribution (Strzępka, 2017). However, it is necessary to indicate that the abovementioned restrictions were not permanent. After the registration process, the legislator provided for the possibility of amending the articles of association, made in the form of a notarial deed (Article 157¹ § 3 k.s.h.)². A similar assumption was made for making contributions, because after the registration of a company, it was possible to pay them in cash, as well as in kind, on a general basis (Sejm, 2010). In addition to the company agreement form, the telecom system also had a draft of a list of shareholders containing the name, surname (name) of the shareholder and the number and value of the nominal shares vested by each of them. Both documents were supposed to be signed with an electronic signature. This could mean both a qualified signature (verified by means of an electronic certificate) and any other signature that meets the definition contained in the Act on Electronic Signature (Strzępka, 2013). This possibility, which was used to improve registration, did not mean, however, a total abandonment of the "traditional", handwritten signature; until January 2015, this obliged the persons authorised to represent the established LLC to submit their signatures authorised by notary or submitted before a judge or authorised employee of the court (Strzępka, 2015)³. For the purpose of streamlining the registration, it was also possible to pay contributions to cover the share capital within 7 days from the date of registration of the company. The provision only required submission of a statement confirming the payment to the registry court. In practice, verifying the truthfulness of such a statement was difficult, mostly due to the lack of a company account where the payment could be recorded.

3. System development

The system, organised in the manner described above, officially began functioning on 1 January 2012, as of the entry into force of the act amending k.s.h. In its assumption, it enabled a much more efficient, informalised and faster establishment of a limited liability company. The justification for the draft law (drawn up in 2010) introducing the S24 system did not

indicate in any way that during its formation did the legislator plan to extend it to other commercial law companies. However, only a two-year period, during which the possibility of registering a company in the ICT system was available, proved to be sufficient to see both the need to modify the system and the usefulness of extending the contracts of other companies. For this reason, the draft of another act amending k.s.h was created. It contained five main assumptions that the amendment was supposed to implement: firstly, in addition to the already existing provisions regarding the LLC, in the S24 system, the possibility of registering a general partnership and limited partnership with the use of a contract template was to appear. Secondly, the project allowed for the amendment of the articles of the company's agreement, concluded in the aforementioned manner, as well as via the ICT system. Thirdly, each of the above companies, registered using the contract template, could also be dissolved using the template of the resolution made available in the S24 system. The fourth assumption was a change in the scope of reducing the typical economic barrier, leading to a reduction in the amount of court fees on the application for registration and a change of the company's agreement submitted via the ICT system. The last of the assumptions concerned the possibility of signing documents in that system using the trusted Public Service Platform profile (called ePUAP for short)⁴. The project - as the legislator itself specified - was aimed at further facilitating the establishment and running of business activities in the form of commercial law companies (Sejm, 2014).

The changes included, among others, introduction of statutory definitions: the contract template, the provisions of the variable contract and the company whose contract was concluded using the contract template. The changes in the admissibility of registering a limited and registered partnership with the use of an ICT system constituted, in fact, a repetition of the regulations that applied in this matter to the LLC (Articles 23¹ and 106¹ k.s.h.). The legislator also planned, in the case of registration of a registered partnership⁵, the possibility of contributing the rights to a computer program and providing work by a partner as an input, indicating that an analysis of the possibility of submitting them is not a complicated process. Ultimately, however, the draft introduced an amendment providing – as in the case of other companies – the possibility of making only cash contributions (Sejm, 2014). Other amended articles of k.s.h. broadened the original assumptions of the S24 system in a significant way. The legislator provided for the possibility of changing the articles of a company's agreement with the use of a template of the partner's resolution, also available in the ICT system. According to the project, the company's commercial proxy could also be appointed in a similar form, its address changed and its financial statements approved (Sejm, 2014). With the entry into force of these regulations⁶, the S24 system ceased to play the role of merely improving and accelerating the registration; it also began to facilitate the companies already operating in undertaking different activities in the field of changing the entry in the court register. The above resolutions, indicated *expressis verbis* in the act, were not the only templates available in the ICT system. The general concept of “variable provisions of the contract” has been clarified by means of the regulations, issued on the basis of a statutory authorisation included in the code

of laws. Only an analysis of the contents of these regulations allows one to obtain a full picture of the possibilities offered by the S24 system. For example, in the case of an LLC using the resolution template, it was possible to divide the profit, determine the method of covering the loss or appoint an attorney to conclude an agreement with a member of the management board. The ordinance even took into account the draft of share purchase agreement (Ministerstwo Sprawiedliwości, 2015), and thus allowed for the possibility of making changes in the group of shareholders using the S24 system⁷. Due to the above, it became important to distinguish whether a company registered with the use of a contract template is still considered as such. The statutory definition explained that the company registered in the ICT system would lose the right to take advantage of the facilities resulting from this fact as soon as it made changes to its form in a different way than the model available in the S24 system⁸. Therefore, until any change in a manner different than the ICT system way was done, entrepreneurs had the opportunity to make significant changes to the company's agreement, and even its composition, in a much shorter time than before. The regulation also introduced a significant economic advantage for entrepreneurs using the ICT system, as it reduced by half (from PLN 500 to PLN 250) the fee for the application for registration of a company submitted using the contract template. A reduction of fee by 1/5 (from PLN 250 to PLN 200) was made in the case of making the application for registering a change, made on the basis of the model resolution from the S24 system.

Comparing the regulations of Polish law to similar regulations contained in legal acts of other countries, both similar and different regulations of the same matter can be found. For example, in Belgium, the difference in the fee depending on the chosen form is much higher, as it is €140 for registering in electronic form and €2004 for registering in paper form (Willie et al., 2011). In the United Kingdom, it is possible to set up a business in one day, regardless of the form of registration, which means that the choice between said forms only affects the costs – which are, respectively, £100 for paper or £30 for electronic form (Hannigan, 2018). In Spain, the process of registering a company in electronic form takes up to 48 hours (Andenas, Wooldridge, 2010). There is a mixed system in Germany. All entries in the register (Handelsregister) may be made only in electronic form (Oetker et al., 2015). However, the conclusion of a limited liability company agreement (GmbH) is only allowed in the form of a notarial deed (Gehrlein et al., 2019).

4. Practical importance

The aforementioned laws and regulations introduced into the Polish legal system the regulation relevant for many entrepreneurs conducting or starting operations, mainly in the SME sector. The financial burden which so-far was inextricably linked to the founding of the

company decreased significantly; in addition to the reduction of court costs indicated directly in the act, the partners did not have to pay the costs of the notarial deed. The amount of funds saved in this way has become a noticeable advantage for small enterprises deciding to operate in the form of a commercial law company, noticeable all the more as the expenditure would be incurred at the very beginning of the company's operations. Significant – not only for the entrepreneurs themselves, but also for the broadly understood legal situation – was a side effect of aforementioned regulations that shortened to a minimum the period in which the limited liability company in the organisation functioned, i.e. the institution emerging between the conclusion of the contract and the company's registration, which raised significant disputes and complications (Opalski, 2019). Acceleration of the registration process also had a positive impact on the moment of starting operations, as the company (both personal and capital), in a short time, had the opportunity to obtain a NIP number (at the time of registration in the National Court Register). This is significant, first of all, because of the possibility of registering for VAT purposes and then issuing and accepting invoices – and, therefore, an extremely important element of business transactions⁹. For many start-up companies, using the S24 system means the ability to quickly obtain a fully functional company. It was not uncommon practice to set up a company in an ICT system, submit relevant applications (such as a VAT-R or NIP-8 form) and then change its contract by adding regulations that were unable to be chosen when using a template or making non-cash contributions. Certainly, the efficiency of the procedure is positively affected by the lack of compulsion to gather future partners of the company at the same time and place. The signatures made via the Internet can, for example, take place when one of the partners resides outside the country. In addition, since the introduction of the regulation regarding the signing of documents using the trusted ePUAP profile, the company may be established without the need for any prior visit to the notary's office or to the administrative bodies¹⁰. For many entrepreneurs, the opportunity to make quick changes in the composition of the company's partners is certainly valuable, especially since it can also be done without the participation of a notary. From the point of view of the doctrine, it was also indicated as a favourable limitation of the possibility of errors in the application and contract, due to the requirement to indicate the scope of activity by reference to PKD codes, entering the company's head office address based on data from the national TERYT register, inability to provide lower share capital than the law required and disclosure of shares of less than PLN 50, as well as automatic imposition of provisions on the supervisory board, if required by the articles of the contract (Strzępka, 2015).

The accuracy of the observations described above is indicated by statistics. Within only 3 months from the date of entry into force of amendments to the Act enabling registration in the ICT system, 2,850 user accounts were created, and 481 applications submitted in this way were completed with an entry in the register (with only 26 dismissed) (Ministerstwo Sprawiedliwości, 2012). This upward trend is proven via a comparative study by Ministerstwo Sprawiedliwości, according to which solely in the first half of 2016, 14,642 applications for

registration filed via the ICT system were submitted to registry courts; in the first half of 2017, this number amounted to 15,970 applications (Ministerstwo Sprawiedliwości, 2018). This trend is still valid in 2018, though to a smaller extent (22,616 applications submitted by the third quarter of 2017 and 22,705 applications submitted by the third quarter of 2018) (Ministerstwo Sprawiedliwości, 2018). When it comes to the comparative relation of registration by the S24 system to the form of “traditional” registration, the data collected by the Sejm of the Republic of Poland indicated that in 2016, out of all created companies, 49.95% was registered using the contract template (Sejm RP, 2016). In turn, when analysing only the statistics in the scope of limited liability companies, the same authority presented the percentage of registration in the ICT system in the whole registration process of these companies, respectively, as 15.43% in 2012, 26.4% in 2013, 31.47% in 2014 and 47.25% in 2015 (Sejm RP, 2017). The above data indicates a growing interest in the possibilities made available in the S24 system. If the percentage indicated by the Sejm RP continues to increase, there will be a situation in which more companies will be registered using the contract template rather than in the form of a “traditional” agreement.

5. Controversies and difficulties

As with any solution, the ICT system was not (and still is not) free of errors or risks; some elements of its functioning arouse criticism and cause controversy. In the course of the amendment to the k.s.h., which extends the system’s possibilities to register a registered and limited partnership, the National Council of the Judiciary (Krajowa Rada Sądownictwa) submitted comments to the project, claiming that the one-day deadline for hearing the application is not within the real capacity of the registry court (Krajowa Rada Sądownictwa, 2014). In practice, however, it turns out that in the absence of formal defects, this deadline can be met (Sąd Rejonowy Katowice-Wschód w Katowicach, 2018; Sąd Rejonowy w Olsztynie, 2019). The next controversial element of the system was a simple electronic signature chosen by 80% of users due to the ease of its use (Sejm RP, 2017). However, such a form – in which the identity was confirmed only on the basis of data from the PESEL register – was criticised by the doctrine as not providing authenticity of the signed documents (Kidyba, 2014), which ultimately led to the removal of this possibility from the law in July 2017¹¹. Limiting contributions in kind also met with a negative rating. The representatives of the doctrine indicated that the contribution in enterprises in the form of a general partnership or limited partnership does not fulfil the function of covering the share capital, and thus does not generate the need for a meticulous analysis of its valuation by the registry court (Bieniak, 2019); maintaining excessive restrictions in this respect was perceived as reducing the attractiveness of this form of company registration (Strzępka, 2015). It is obvious that in the process of

registering with the use of a contract template, errors can arise, primarily on the part of the applicants; however, it must be noted that the judges ruling in the case, accepting the application submitted through the system, also became its users. Difficulties occur, for example, at the moment when the situation requires supplementing or correcting documents, and the assigned judge or legal secretary is not sure whether the appropriate action can be implemented via the Internet. It sometimes happens that the judge issues an order containing recommendations for further actions, at the same time taking precautions to add what steps should be taken if it turns out that the technical capabilities of the system do not allow for the implementation of the recommendation (Sąd Rejonowy Katowice-Wschód w Katowicach, 2017). On the side of the users of this system, excessive formalism when evaluating the application can also happen, an example of which is recognition as invalidate the document, the draft of which was created minutes before the last partner signed the partnership agreement (Sąd Rejonowy w Olsztynie, 2019)¹². A significant difficulty in the functioning of the S24 system was introduced by the amendment to the Act on Land Acquisition by Foreigners¹³, according to which, when establishing a company, a declaration was required as to whether the company is or isn't a foreigner¹⁴ within the meaning of this Act. Since no draft of such a statement was placed in the ICT system, it had to be provided in paper form, which significantly slowed the registration process. This situation has been stabilised by allowing the attaching of such a statement as an external document (in practice, this could have been done by attaching a PDF file signed with a trusted profile or a qualified signature). The problem, however, has not been resolved completely, as some courts refuse to give credibility to such documents, claiming that it is not possible to verify in the system whether the file has actually been signed (Sąd Rejonowy w Gliwicach, 2019); however, it should be noted that such an interpretation of law remains valid to the vast minority¹⁵.

6. Summary

Despite the existence of the abovementioned errors, controversy, as well as the unquestionable limitations appearing when using the S24 system, it is still growing in popularity. While maintaining the current trend, one should not exclude that the share of applications for registration made via the Internet, in total, will exceed 50%. It is necessary to underline that in the absence of a statutory requirement to register any company using the contract template, the use of the ICT system is entirely voluntary. Statistical data on the number of applications submitted to registry courts clearly indicates that any disadvantages resulting from using the S24 system are less important than the benefits associated with registration in this form. The system described above is therefore a significant technological innovation, facilitating the start-up and running of operations, in particular in the SME sector.

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Footnotes

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- ¹ Among others, the Code of Civil Procedure, the Act on the National Court Register and the Act on Court Costs in Civil Matters.
- ² This requirement was modified by the Senate by way of an amendment, ordering in the same way the situation of the company registered in the S24 system and in the “traditional” form; only the partners’ resolution on the amendment of the contract of the company had to be kept in the form of a notarial deed, while the uniform text of the contract could be drawn up in a standard written form (Senate RP, 2011)
- ³ This obligation - in a slightly changed form - has been transferred to the Act on the National Court Register, as it imposes an obligation on the procurers and members of the board to submit consent to their appointment, signed by themselves. Therefore, the court *de facto* receives a pattern of signature of the persons representing the company, although it is not certified by a notary.
- ⁴ This signature, although introduced into the legal system from 2010, was not so common at the time when the draft law enabling the registration in the S24 system was created and, probably, therefore was not taken into account at the time of its adoption in 2011.
- ⁵ The above considerations were also applicable to a limited partnership due to the reference in the draft to the appropriate application of the regulations concerning a general partnership (Article 103 § 2 k.s.h.)
- ⁶ Since the preparation of a relatively simple resolution on the appointment of a proxy was admissible only at the time of filing an application for company registration, it was possible to introduce it into the legal system relatively quickly (i.e. from January 2015); for the remaining resolutions, it was necessary to have a longer *vacatio legis*, lasting until April 2016 (Bieniak et al. 2019).
- ⁷ The regulations applicable to a general partnership and a limited partnership were similar, as they contained a model agreement on the transfer of rights and obligations in each of the above companies.
- ⁸ The lack of direct indication of the form of a notarial deed is justified in this case, because even though in the case of a limited liability company, where the regulations required that the resolution which was supposed to amend the company’s contract has to be recorded in the form of a notarial deed, it is sufficient to conclude a general partnership agreement - both for the contract and its amending resolutions - simply in written form (more on this topic Bieniak et al., 2019).
- ⁹ In the scope of registration for VAT, see art. 88 par. 4 of the Act on Tax on Goods and Services (ustawa o podatku od towarów i usług); as regards the NIP number, see art. 106e para. 1 point 4 and 5 of this Act.
- ¹⁰ While the establishment of the ePUAP profile was carried out in principle by confirming its identity in the relevant confirmation point, more and more entities currently allow the establishment of this profile using the electronic banking system, based on data provided by a natural person when setting up a bank account.
- ¹¹ Currently, next to the qualified signature and the trusted signature, the Act allows signing documents in the S24 system with a personal signature. This is a new form of advanced electronic signature, confirmed by a certificate placed in an e-ID card. Due to the short duration of this regulation (since 4 March 2019), it is not possible to assess its effectiveness at the moment.
- ¹² The court called for the resubmission of the list of partners, because: “the document attached to the application was prematurely drafted at 8:59 in a situation when the effective conclusion of the company agreement and the appointment of the management board took place only at the moment of signing the partnership agreement by the last partner, i.e. at 9:39”.
- ¹³ And the subsequent amendment to the Act on the National Court Register.
- ¹⁴ In the case of companies, of course, this concerned partners who are foreigners; however, the content of the statement in accordance with the Act must literally state that the company is or is not a foreigner.
- ¹⁵ Sąd Rejonowy w Olsztynie in the cases cited above, as well as Sąd Rejonowy w Gliwicach in another case, did not raise any objections to the statements attached as “external documents”.