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## Performing legal transactions based on entries in public registers. Selected issues<sup>1</sup>

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### ABSTRACT

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The article concerns the analysis of the consequences of making further legal transactions with entities which should not be disclosed in public registers due to the invalidity of legal transactions on the basis of which the entry in the public register has been made. As a result of the conducted research it was found that, despite an absolutely invalid deed/founding act, the partnership/company can be disclosed in the National Court Register, and further legal transactions are valid. If the real estate is purchased on the basis of an absolutely invalid legal transaction, disclosure of the purchaser in the second section of the land and mortgage register is not covered by the principle of public credibility of land and mortgage registers. This also applies to the subsequent business real estate trading.

**Keywords:** public register, credibility, legal transaction, absolute invalidity

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## 1. Introduction

Public registers are open and the data contained in them are covered by the principle of public credibility. It is presumed that the data entered in public registers are true, consistent with the actual and legal status [Article 3, 5 of the Act on LMR&M,<sup>2</sup> Article 17 section 1 of the Act on NCR,<sup>3</sup> Article 33 of the Act on FEA<sup>4</sup>]. Legal transactions, on the basis of which entries are made in public registers, are carried out by natural persons, legal persons, organizational units without legal personality, and it may happen that the said legal transactions are absolutely invalid. In such a case, no entry should be made in the relevant public register. However, it may happen that, despite the absolute invalidity of a legal transaction, it will be disclosed in the public register. This applies to situations where a court referendary, judge or official (regarding entries in the Central Registration and Information on Economic Activity) who makes an entry, does not notice that the legal transaction is absolutely invalid. This can be illustrated by two cases.

In 2014, a deed of a registered partnership was concluded between a natural person R, B sp. z o.o. [limited liability company] and C spółka z ograniczoną odpowiedzialnością spółka komandytowo-akcyjna [limited liability company limited joint-stock partnership]. Among the shareholders of B sp. z o.o. there were: the natural person R (99 shares) and the natural person D (1 share). The only shareholder of C spółka z ograniczoną odpowiedzialnością S.K.A. was the natural person R and the sole general partner was B sp. z o.o. The only member of the management board of B sp. z o.o. was person R. In the deed of the registered partnership, B sp. z o.o. was represented in accordance with Article 210 §1 [The Code of Commercial Partnerships and Companies, 2000] by a proxy appointed by a resolution of the shareholders' meeting due to the fact that the deed was concluded between a member of the management board R and that natural person R. In contrast, C spółka z ograniczoną odpowiedzialnością S.K.A. was represented by the sole management board member of the general partner, i.e.

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<sup>2</sup> The Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage, Dz. U. [Journal of Laws] of 2017, item 1007; the abovementioned provisions are worded as follows: Article 3 section 1. It is presumed that an entry of a right evidenced in the land and mortgage register reflects the actual legal state. Article 3 section 2. It is presumed that the right deleted does not exist. Article 5. In the event of inconsistency between the legal state of real estate disclosed in the land and mortgage register and the actual legal state, the content of the land and mortgage register decides in favour of the person who has, by performing a legal transaction with the person entitled under the contents of the land and mortgage register, acquired the right of ownership or other property rights (the principle of public credibility of land and mortgage registers).

<sup>3</sup> The Act of 20 August 1997 on the National Court Register, Dz. U. [Journal of Laws] of 2017, item 700; the said provision has the following wording: Article 17 section 1. It is presumed that the data entered in the Register are true.

<sup>4</sup> Act of 2 July 2004 on the Freedom of Economic Activity, Dz. U. [Journal of Laws] of 2015, item 1206; the said provision has the following wording: Article 33. It is presumed that the data entered in the CEIDG (Central Registration and Information on Economic Activity) are true. If the data entered in the CEIDG are inconsistent with the application or are entered without the application, a person entered in the CEIDG may not excuse themselves against a third party acting in good faith, with a charge that the data are not true, if, after becoming aware of the entry, the person fails to immediately apply for rectification, supplementation or deletion of the entry.

the natural person R. In accordance with Article 126 § 1 point 2 of the CCPC, provisions on joint-stock companies are applied accordingly to the limited joint-stock partnership. The provision of Article 379 § 1 of the CCPC stipulates that in contracts between a joint-stock company and its member of the management board, a joint-stock company is represented by the supervisory board or a proxy appointed by a resolution of the general meeting. Appropriate application of this provision to a limited joint-stock partnership, in which the sole general partner is a legal person, as in the analysed case, means that in a contract between a limited joint-stock partnership and a member of the management board of the sole general partner which is a limited liability company, a limited joint-stock partnership should be represented by a proxy appointed by a resolution of the general meeting. The minutes of the general shareholders' meeting must be drawn up in the form of a notarial deed [Article 421 § 1 of the CCPC in conjunction with Article 126 § 1 point 2 of the CCPC]. In the analysed case, C spółka z ograniczoną odpowiedzialnością S.K.A. was not represented by a proxy appointed by a resolution of the general meeting, but by a member of the management board of B sp. z o.o. It was an improper representation, so the deed of the registered partnership is absolutely invalid. Nevertheless, the registered partnership was registered in the register of entrepreneurs of the National Court Register. The court referendary did not notice that C spółka z ograniczoną odpowiedzialnością S.K.A. was improperly represented and made an entry in the public register, that is in the register of entrepreneurs of the National Court Register. A registered partnership is incorporated upon its entry in the register of entrepreneurs of the National Court Register [Article 25<sup>1</sup> § 1 of the CCPC]. This entry is of a constitutive nature, which means that after signing a deed of registered partnership, there exists the so-called pre-registered partnership and only after its entry in the register of entrepreneurs a registered partnership is incorporated – an organizational unit without legal personality [Article 33<sup>1</sup> § 1 of the Civil Code, 1964<sup>5</sup>]. In 2004, the housing cooperative U concluded an agreement for the establishment of a cooperative ownership title to a dwelling unit in favour of the president of the management board of that cooperative, the natural person P. The agreement was concluded in the form of a notarial deed and the housing cooperative U was represented by two management board members, other than the natural person P. According to Article 46 § 1 point 8) [Act of the Cooperative Law, 1982], the adoption of resolutions on legal transactions between a cooperative and a member of the management board or transactions carried out by a cooperative in the interest of a member of the management board and representation of the cooperative in such transactions is the competence of the supervisory board; two supervisory board members, authorized by the board, are sufficient to represent the cooperative. In the analysed case, in the agreement with the president of the management board member P, the housing cooperative U was improperly represented by two other management board members, while it should have been represented by two members of the supervisory board. In this case, the agreement for the establishment of a cooperative ownership title to a dwelling unit

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<sup>5</sup> The Civil Code Act of 23 April 1964, Dz. U. [Journal of Laws] of 2017, item 459.

in favour of the president of the management board the natural person P is absolutely invalid, as it was concluded in a manner inconsistent with the principles of representation. It cannot be validated. Nevertheless, the land and mortgage register was established for a cooperative ownership title to a dwelling unit, and the natural person P was entered there as a person entitled to the said unit. The notary who drafted the notarial deed made an error, as he failed to ensure that the housing cooperative U was properly represented in the agreement with the president of the management board. The housing cooperative was a regular customer of the notary office in which the transaction was carried out. The president of the management board, acting in the name of the housing cooperative U, had previously carried out many transactions in the notarial office concerned. The said notarial deed was drafted by a retired notary, a deputy of the notary running the office, which partly explains why the housing cooperative U could be improperly represented. The retired notary might not have known that the transaction was carried out between the housing cooperative U and its president of the management board, if before or during the transaction the appearing party had not informed the retired notary thereof and he had not asked about it. In the notarial deed there was no indication that the natural person P was the president of the management board of the housing cooperative U. The court establishing the land and mortgage register for the cooperative ownership title to the premises was unable to conclude, on the basis of the notarial deed, that the cooperative had been improperly represented; hence the court established the land and mortgage register for the premises and entered the natural person P as an authorized entity.

The invalidity of the abovementioned agreements, i.e. the deed of the registered partnership and the establishment of the cooperative ownership title to a dwelling unit, drew attention of the author of this part of the article when the natural person R turned to the author, who is a notary, to amend the deed of the registered partnership by making a contribution in kind in the form of a real property and when the natural person P wanted to conclude a contract of donation of the cooperative ownership title to the dwelling unit for the benefit of his daughter. During a conversation with the notary, the natural person P informed that, at the time when the transaction of establishing the cooperative ownership title to premises was carried out, he was the president of the management board of the housing cooperative U. In both cases, the notarial transactions were refused, i.e. amending the deed of registered partnership by making a contribution in kind in the form of real estate and the donation of the cooperative ownership title to the premises for the benefit of the daughter.

The aim of the article is to analyse the consequences of further legal transactions with entities who should not be disclosed in public registers due to the invalidity of legal transactions that provided the basis for making an entry in the public register, whereby the scope of the conducted research will be limited to two public registers: the National Court Register and the land and mortgage register.

The study mainly used the formal-dogmatic method based on the analysis of the applicable legal provisions. The article provides a substantive interpretation of legal provisions with the use of the directive of criticism. Analyses that were conducted were as follows: the analysis

of scientific publications, the analysis of court judgments related to the topic of the article and the analysis of the practice of applying law and its improvement. The formal-dogmatic method is insufficient to indicate legal solutions to the real problems of functioning of public registers described above. The text also includes the axiological analysis of the existing legal regulations in the scope of application of the principle of transparency and equality in the economic turnover, which allowed formulating conclusions regarding the directions of changes in the analyzed legal provisions.

## **2. Effects of making an entry in the National Court Register on the basis of an absolutely invalid legal transaction**

The provisions of Article 25<sup>1</sup> § 1, 94, 109 § 1, 134 § 1, 163 point 5, 306 point 4 of the CCPC stipulate, respectively, that registered, professional, limited, limited joint-stock partnerships, and limited liability and joint-stock companies are incorporated upon an entry in the register, i.e. the register of entrepreneurs of the National Court Register. Similar solutions are provided for in the provisions concerning: foundations [Article 7 of the Act of 6 April 1984 on Foundations], associations [Article 8 section 1 of the Associations Act of 7 April 1989], state budget management institutions [Article 23 of the Act of 27 August 2009 on Public Finance], an independent public health care unit [Article 50a section 2 of the Act of 15 April 2011 on Medical Activity]. The above-mentioned provisions indicate that the entry of the above entities in the National Court Register is of a constitutive nature, i.e. the above entities are incorporated upon an entry in the register. In the resolutions of the Supreme Court of 15 March 1991, III CZP 13/91 [LEX No. 3633], of 10 January 1992, III CZP 140/91 [LEX No. 3740] it is pointed out that a limited liability company registered in the relevant register exists regardless of the type of shortcomings that occurred at the conclusion of the articles of association. In both analysed cases, entries in the relevant register were made for limited liability companies incorporated on the basis of absolutely invalid articles of association. The statement of the reasons to the Resolution of the Supreme Court of 10 January 1992, III CZP 140/91, specifies that despite the significant shortcoming occurring during the company incorporation process, the legal transactions made by it at the time before being removed from the register are undoubtedly effective, because the company existed and could therefore acquire rights and incur obligations. Although the above Supreme Court rulings were issued at the time when the Commercial Code<sup>6</sup> and Commercial Register<sup>7</sup> were in force, they are fully valid. With reference to the companies, i.e. the limited liability company and the joint stock

<sup>6</sup> Ordinance of the President of the Republic of Poland of 27 June 1934 on the Commercial Code, Dz. U. [Journal of Laws] of 1934, No. 57, item 502, the act has lost its binding force.

<sup>7</sup> Ordinance of the Minister of Justice of 1 July 1934 issued in consultation with the Minister of Industry and Trade, and as regards §§ 5, 8, 55, 62, 65–69 and 77 in consultation with the Minister of Treasury, and as to §§ 60 and 64 in consultation with the Minister of Communications, Posts and Telegraphs on the Commercial Register, Dz. U. [Journal of Laws] of 1934, No. 59, item 511, the act has lost its binding force.

company, Article 21 § 1 point 1) of the CCPC stipulates that the registry court may decide to wind up a company entered in the National Court Register if no articles of association have been concluded, and Article 21 § 6 of the CCPC specifies that the ruling on the winding-up of a company does not impair the validity of legal transactions of the company that has been registered. The judgment of the Court of Appeal in Białystok of 9 November 2012, I ACa 534/12 [LEX No. 1235980], concerning an improperly formed registered partnership, stipulates that upon entry in the register, the registered partnership is given the benefit of the doubt concerning the official nature of the information published therein and that it is reasonable to limit the effects of a defectively concluded founding act, which is mainly dictated by the security of trade and the protection of this partnership's business partners who concluded contracts therewith having been unaware of the defects of the founding act.

From the above-mentioned provisions of the Code of Commercial Partnerships and Companies and court rulings, it can be concluded that registration in the National Court Register of any company whose deed is absolutely invalid makes this company being formed, makes it operate in trade, and legal transactions made after its registration in the National Court Register are valid and fully effective. Registration in the National Court Register of any entity whose deed/founding act is absolutely invalid does not result in restoration of the company's absolutely invalid deed/founding act. This applies to every entity which is subject to entry in the National Court Register, i.e. entrepreneurs and entities that are not entrepreneurs, e.g. foundations, associations not conducting business activity.

The above-mentioned practical examples indicate that there are cases of registration in the public register, i.e. the National Court Register, of the entities established under contracts that are absolutely invalid, due to the fact that, among others, the court referendary or the judge failed to notice that the articles of association or the deed are absolutely invalid. Such entities may operate in trade for a long time, concluding various short- and long-term contracts, which are valid in accordance with Article 21 § 6 of the CCPC, the resolution of the Supreme Court of 10 January 1992, III CZP 140/91, the judgment of the Court of Appeal in Białystok of 9 November 2012, I ACa 534/12. However, this state of affairs may not last long.

Persons establishing companies, foundations, associations and other entities may not be aware that a legal transaction aimed at establishing a given entity, under which the entity was registered in the National Court Register, is absolutely invalid. This also applies to most business partners of these entities. In everyday trading between companies, associations, foundations, when sales agreements are concluded, etc. and between the aforementioned entities and consumers, it is very rare that the parties check the articles of association or deeds in terms of their validity. Entry of the entity in the National Court Register is a sufficient condition to conclude agreements both within the ordinary course of business and going beyond the ordinary course of business.

In practice, however, it may happen that other participant of a business transaction will notice that the deed/founding act of the entity disclosed in the National Court Register is absolutely invalid. Such cases may occur when an entity seeks to obtain bank financing or

concludes a lease agreement. Such contracts are usually concluded for quite long periods and ensuring the return of financial resources/repayment of obligations under the lease agreement requires, among other things, becoming familiar with the deed/founding act establishing the entity, in order to check whether the conclusion of a financing agreement (credit, guarantee, surety, bond issue, leasing) requires the consent of any of the bodies, e.g. the shareholders meeting, general meeting, the supervisory board, etc. By becoming familiar with the deed/the founding act, employees of, for example, a bank, may state that the deed in question is absolutely invalid and cannot be validated. In such cases, it should be assumed that the principle of public credibility of a public register is excluded and the entity that has discovered that the deed/founding act of an entity disclosed in the National Court Register is invalid, cannot conclude a financing agreement with the entity entered in the National Court Register on the basis of an absolutely invalid deed/founding act. The same should be done by any other participant of trading who knows that the deed/founding act preceding an entry in the National Court Register is absolutely invalid. Any entity that decides to conclude a contract with an entity disclosed in the National Court Register, despite being aware that the deed / founding act preceding the entry is absolutely invalid, acts in bad faith. This also applies to the entity disclosed in the National Court Register, whose deed/founding act preceding the entry is absolutely invalid, and who is aware of the invalidity thereof.

The absolute invalidity is an objectively existing condition that anyone can refer to (*ab initio* and *erga omnes*) and there is no need for this to be found earlier by the court [Radzikowski, 2015, p. 193]. Any entity that notices that any company/partnership, foundation or association disclosed in the National Court Register was entered in the said register in spite of an absolutely invalid deed/founding act, cannot enter into legal transactions with such companies/partnerships, foundations, associations, because it would act in bad faith. This also applies to persons performing public trust professions, i.e. professional lawyers, who were to for example, make amendments to the deeds/founding acts, e.g. notaries.

### **3. The effectiveness of employment contracts concluded with entities that should not be entered in the National Court Register**

According to Article 3 [The Labor Code], organisational units<sup>8</sup> and natural persons have the capacity to be an employer. These entities are entitled to the employer's status if they

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<sup>8</sup> The literature of the subject emphasises that one can distinguish three types of organizational units having legal capacity to employ employees. These are: legal persons (e.g. joint-stock companies and limited liability companies), independent organizational units without legal personality which may acquire rights and incur liabilities on their own behalf and may sue and be sued (registered, professional, limited and limited joint-stock partnerships companies under organisation, tenants' associations, ordinary associations) and some organizational units forming part of legal entities. Z. Hajn. *Pracodawca*. ABC. Retrieved from: <https://sip.lex.pl/#/publication/469830881/hajn-zbigniew-pracodawca?cm=URELATIONS> [accessed: 3 January 2018].

hire employees. However, it follows from Article 22 § 1 of the LC, as well as the nature of the employment relationship that it is enough to employ one employee to become an employer.

Employers may be independent organizational units without legal personality, which may acquire rights and incur liabilities on their own behalf, sue and be sued, if they hire at least one employee. A registered partnership, as an organizational unit, can be regarded as an employer.

However, it needs to be considered whether a defective registered partnership, which should not be entered in the National Court Register, may have the employer's status and whether employment contracts concluded with such a partnership will be effective. At the same time, it should be pointed out that the legislator, in the current state of law, ignores the issue of defective partnerships. The analysis of Polish legal literature indicates that few authors attempt to analyse the legal consequences associated with the formation of a defective partnership [Nowak, 2010, p. 325].

Some authors point out that a defective deed of registered partnership, in principle, does not affect the subjectivity of the partnership [Nowak, 2010, p. 325]. In support of this position, it should be pointed out that at the moment of registration, the company is established as a legal entity, which is directly stated in case of registered partnerships in Article 25<sup>1</sup> of the CCPC. It should also be emphasized that upon entry in the register, a registered partnership uses the benefit of the doubt related to the official nature of information contained and published therein. Thus, employees who concluded a contract of employment not knowing about the defects of the partnership's founding act should not suffer any adverse effects in accordance with the principle of free access to the court register. In addition, this position is also supported by the principle of permanence of the employment relationship and the principle of protection of the employee's interest, among others expressed in the case of a person who not being at least 14 years of age in light of the law concluded an effective contract of employment.<sup>9</sup>

With regard to the above-mentioned arguments, it should be stated that the effects of concluding a defective deed of registered partnership should be limited to only *ex nunc*<sup>10</sup> effects. This position is also reflected in case-law.<sup>11</sup> The Court of Appeal in Białystok found

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<sup>9</sup> The Supreme Court found that "a minor who, not at least 14 years of age, has entered into a contract of employment and suffered a bodily injury in connection with employment as a result of an accident, is entitled to seek – before bodies appointed to settle disputes over claims of employees on account of the employment relationship – benefits based on the provisions of the Act of 12 June 1975 on cash benefits on account of accidents at work and occupational diseases (Dz. U. [Journal of Laws] No. 20, item 105)". Resolution of the Supreme Court of 26 January 1982, V PZP 8/81, OSNC 1982/7/94. It should be indicated at the same time that the position in question was expressed on the basis of the legislation in force until 1 September 2002. As of the day of entry into force of, among others, the Ordinance of the Minister of Labour and Social Policy of 5 December 2002 on cases in which it is exceptionally permitted to employ minors who have not graduated from middle high school (gimnazjum) yet, people who are not at least 16 years of age who have graduated from middle high school, and people who are not at least 16 years of age and have not graduated from middle high school (Dz. U. [Journal of Laws] of 2002 No. 214, item. 1808), it is exceptionally permitted to employ people under 16 (i.e. not yet minors), and there is no minimum age required for employment. It should also be emphasized that on the basis of the labour law, there are different views on the capacity to be an employee (understood as the ability to conclude a valid employment contract); see J. Stelina (Ed.), 2016. *Prawo pracy*. Warszawa, pp. 129–131; T. Liszcz, 2010. *Prawo pracy*. Warszawa, p. 121.

<sup>10</sup> D. Nowak, 2010. *Wadliwa spółka partnerska*, Warszawa, p. 360.

<sup>11</sup> Judgment of the Court of Appeal in Białystok of 9 November 2012, I ACa 534/12, LEX No. 1235980.



that a defectively incorporated registered partnership is still effective against both third parties and internal relations between the partners.<sup>12</sup> Therefore, it should be acknowledged that a defectively incorporated registered partnership has no impact on its status as an employer, and the employment contracts concluded with such a partnership are effective. These contracts should also provide grounds for the retirement and disability rights, and contributions paid to the Social Insurance Institution (ZUS) should not be questioned, among others on the grounds of a defectively incorporated registered partnership. Similar conclusions apply to any other entity disclosed in the National Court Register, which concluded an employment contract, despite the fact that its deed/founding act is absolutely invalid.

#### **4. Taxes paid by entities that should not be disclosed in the National Court Register**

The constitutive entry in the National Court Register enables the entities disclosed therein to participate in business trading, earn revenues, incur costs, generate income and pay taxes on the income obtained. This means that such entities can be taxpayers and paymasters. The invalidity of legal transactions preceding the entry in the National Court Register shall not affect the possibility of seeking a refund of tax paid by entities that should not be disclosed in the National Court Register. This follows, among other things, from the following provisions:

- 1) Article 79b [The Tax Ordinance];
- 2) Article 89 [The Goods and Services Tax];
- 3) Article 42 section 9, Article 82, Article 107 [The Excise Duty];
- 4) Article 11 [The Tax on Civil Law Transactions];
- 5) Article 18da [The Legal Persons' Income Tax];
- 6) Article 11a [The Local Taxes and Charges];
- 7) Article 6a section 13 point 3 [The Agricultural Tax];
- 8) Article 6 section 13 section 11 point 3 [The Forest Tax];
- 9) Article 6 section 5 [The Retail Sales Tax].

The Acts of: 24 August 2006 on Tonnage Tax, 2 March 2012 on Extraction of Certain Minerals do not contain provisions regarding tax refund. The assumption made by the legislator (Article 21 §6 of the CCPC) and case-law (resolution of the Supreme Court of 10 January 1992, III CZP 140/91, judgment of the Court of Appeal in Białystok of 9 November 2012, I ACa 534/12) that legal transactions carried out by an entity disclosed in the National Public Register are valid, although the legal transaction preceding the entry in the National Court Register is absolutely invalid, means that these entities are taxpayers. The absolute invalidity of the deed/founding act of an entity disclosed in the National Court Register is not, for

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<sup>12</sup> Ibidem.

example, a prerequisite for the application of Article 6 of the Goods and Services Tax Act<sup>13</sup> to transactions that are subject to the goods and services tax, carried out after the disclosure of the entity in the National Court Register.

The partnership deed is subject to tax on civil law transactions pursuant to Article 1 section 1 point 1) letter k) of the Act on Tax on Civil Law Transactions. In the case when the the partnership deed/founding act is absolutely invalid, there is no tax obligation under Article 3 section 1 point 1 of the Act on Tax on Civil Law Transactions, and the tax paid, if any, is not due and constitutes an overpayment subject to refund [Radzikowski, 2015, pp. 192–193]. Pursuant to Article 199 § 3 of the Tax Ordinance Act, the tax authority may on its own *ex officio* conclude that the partnership deed/founding act is absolutely invalid.

## 5. Termination of the legal existence of the entity disclosed in the National Court Register in spite of the invalidity of the legal transaction preceding the entry

Based on Article 23 of the Act on the NCR, the registry court examines the deed, e.g. of a registered partnership for irregularities. In a situation when the registry court finds that the deed is invalid (among others, due to improper representation of the parties), it should refuse its registration *ex officio* [Nowak, 2007, p. 26]. Nevertheless, as in the case described in the introduction, it may happen that a registered partnership is entered in the register despite the invalidity of its deed. The question arises how to treat such defects, which, despite their existence at the stage of registration, were revealed only upon an entry of a registered partnership in the National Court Register. It should be noted at the same time that in the current state of law there is no provision in the Act on the NCR regulating this matter.<sup>14</sup> Therefore, it is necessary to consider the possibilities that are available in this respect and are provided for, among others, in the CCPC.

The literature of the subject presents several proposals to solve the problem of a defective partnership, which would fill the legal gap caused by the lack of regulations in this respect and would not require a unanimous resolution of the partners [Article 58 of the CCPC] in the matter concerning declaration of invalidity of the partnership on the basis of Article 189 of the Code of Civil Procedure, dissolution of the partnership on the basis of Article 63 of the CCPC nor treating the company in accordance with the rules applicable to companies through

<sup>13</sup> This provision has the following wording: the provisions of the Act on the Goods and Services Tax do not apply to transactions that cannot be an object of a legally effective contract.

<sup>14</sup> Application of an extensive interpretation of Article 12 section 3 of the Act on the NCR would be incorrect. The article in question applies only if the application for entry in the National Court Register or documents, the filing of which is mandatory, have not been submitted despite the expiration. In addition, as some authors rightly point out, citing the decision of the Supreme Court of 5 May 2005, IV CK 18/05, LEX No. 311345, that “The court rightly found that it is not permissible, on the basis of Article 12 section 3 the Act on the NCR, to delete the entity previously entered in the register, since the cited provision cannot lead to the circumvention of the procedure for cooperative liquidation provided for by the Co-operative Law”. D. Nowak, 2010. *Wadliwa spółka partnerska*. Warszawa, p. 330.

appropriate application of Article 21 of the CCPC in conjunction with Article 33<sup>1</sup> of the Civil Code [Nowak, 2010, pp. 325–326]. In this study, considerations regarding a defective partnership will be examined within the scope of the last two proposals. Declaration of invalidity of the partnership on the basis of Article 189 of the Code of Civil Procedure would mean that transactions performed by the defective partnership are invalid and applicable *ex tunc*. As mentioned above, upon registration a partnership is established as a legal entity, even if the deed of the partnership is invalid. Acknowledging that the partnership has no legal capacity would constitute a significant threat to the partnership itself, its employees and business partners. In addition, regarding partnerships/companies already registered in the National Court Register in the literature and case-law a correct standpoint is presented, namely that it is advisable to limit the effects of a defective founding act due to the safety of business trading and protection of business partners who concluded contracts with the partnership/company, being unaware of the defects of the founding act [Szajkowski, 2008, p. 795]. Therefore, it should be noted that the proposal to declare the partnership invalid on the basis of Article 189 of the Code of Civil Procedure is not appropriate in respect of a defective registered partnership due to the excessive far-reaching effects thereof.

As regards the dissolution of the partnership pursuant to Article 63 of the CCPC, it should be pointed out that in accordance with this article each partner may, for important reasons, demand that the partnership be dissolved by the court. However, the legislator did not include in the analysed provision an exhaustive list of important reasons. The decision was left to the partners, who can determine it in the deed of the partnership, and to the court.<sup>15</sup> The literature of the subject assumes that important reasons may be of objective or subjective (culpable and non-culpable) character [Kidyba, 2017]. Some authors emphasize that objective reasons, which make any further existence of the partnership unreasonable or virtually impossible, include for example, a permanent inability of the partnership, demonstrated by structural reasons, to function in a competitive market. On the other hand, subjective reasons of non-culpable character include, among others, a chronic illness of the partners whose personal work for the company, due to their qualifications, is indispensable. The subjective reasons of culpable character are, for example, the conduct of criminal activity by the other partners under the cover of the partnership, or persistent violation by the other partners of the rights of the plaintiff's partner of the partnership [Rodzynkiewicz, 2014]. In the literature of the subject, it is also noted that important reasons for dissolution of a partnership must occur after the conclusion of the deed of the partnership [Nowak, 2010, p. 332], i.e. in the case of "subsequent" defects in the partnership relationship, which should be distinguished from a situation in which any irregularities that might be potentially regarded as "important reasons" for the dissolution, already existed even before the formation of the partnership" [Nowak, 2010, p. 332]. It should be pointed out that Article 63 of the CCPC does not limit important reasons only to those

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<sup>15</sup> It should be pointed out that Article 63 of the CCPC has the character of *ius cogens* norm, which cannot be amended in the deed of the partnership or the resolution of the partners.

that occur after the formation of the partnership. Therefore, it seems reasonable to assume that the assessment of the validity of the reasons for dissolution of the partnership should lie within the court on the basis of a specific factual circumstances and regardless of the moment of its formation. The most appropriate is general interpretation of an important reason, under which it covers all the circumstances whose existence or continuation creates an obstacle to the existence of the partnership. It should also be emphasized that the partner may make such a claim at any time. Competence in this area is not vested in persons who have a legal interest and the court which could act in this respect *ex officio*. *De lege ferenda* one should postulate the dissolution of the partnership for important reasons also by the court *ex officio* or at the request of persons who have a legal interest.

The proposal to treat a defective registered partnership in the same manner as in case of defective companies finds its justification in the scope of legal effects made by the defective company. The provision of Article 21 of the CCPC provides grounds to state that a decision to dissolve the company does not affect the validity of the legal transactions of the company that has been registered. The analysed article, in contrast to Article 63 of the CCPC, allows for the dissolution of the company by the court which can act *ex officio*. The cited provision of Article 21 of the CCPC also temporarily limits the possibility of requesting a company's dissolution. It should be pointed out, however, that the linguistic interpretation of Article 21 of the CCPC clearly indicates that the analysed provision applies only to companies, i.e. limited liability companies and joint-stock companies, and does not include partnerships. In addition, one should agree with the position presented in the literature that Article 21 of the CCPC may be *de lege lata* applied to defective partnerships due to the fact that, among other things, "in the period from the entry into force of the CCPC until the entry into force of the Act of 14 February 2003 on amendment of the Civil Law Act and Some Other Acts, which introduces to the legal system, *inter alia* Article 33<sup>1</sup> of the CC, there were grounds to apply the said provisions by analogy, whereas beginning from 26 September 2003, these provisions could be applied accordingly" [Nowak, 2010, p. 334].<sup>16</sup> Nevertheless, the above position can be considered an example of a *praeter legem* interpretation. In connection with the above, the *de lege ferenda* postulate should be made that the solution adopted in Article 21 of the CCPC should be also extended to partnerships.

Bearing in mind the above, it should be stated that after registration, the legal existence of a partnership is challenged with the use of the instruments provided for in the CCPC. A defective registered partnership can be dissolved pursuant to Article 58 of the CCPC and Article 63 of the CCPC. However, the dissolution of such a partnership can only be effected by partners of a registered partnership. Thus, it should be pointed out that the legislator has differentiated

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<sup>16</sup> It should be also noted that it is something else to properly apply specific provisions "resulting from a reference to a specific separate regulation, dictated by legislative technique (reducing the number of repetitions) and the need to modify this regulation due to a different subject matter thereof, and a different thing is application of provisions by analogy, which is actually justified by the lack of a proper regulation". Resolution of the Supreme Court of 29 September 2009, II CZP 41/09, OSNC 2010/3/33.

the legal situation of partnerships and companies. However, such a differentiation has no legal justification. In addition, it places a registered partnership in a less favourable legal position than a company, in particular due to the period in which it is possible to demand dissolution of a company. *De lege ferenda* one should postulate introduction of the same legal solutions for defective partnerships and companies.

## **6. Effects of further real estate trading in case of a disclosure of the owner in the land and mortgage register despite an absolutely invalid contract as the basis for entry in the land and mortgage register**

In real estate trading, the absolute invalidity of a legal transaction takes place in the following cases: when a legal person was improperly represented, a foreigner acquired real estate without the required permit of the competent minister of internal affairs [Article 6 section 1 on the Acquisition of Real Estate by Foreigners], in violation of the statutory pre-emption right which is vested under the Act to the State Treasury, local government unit, co-owner of the real estate, tenant [Article 599 §2 of the CC], co-holder of the co-operative ownership title to a dwelling unit [Article 17<sup>2</sup> section 6 on Housing Cooperatives]. In each of the above mentioned cases, despite the conclusion of an absolutely invalid agreement to transfer the ownership of real estate, agreement for perpetual usufruct right to land, the cooperative ownership title to the premises, and in the case of the pre-emption right, conclusion of an absolutely invalid sales contract, the purchaser may be disclosed in the land and mortgage register as a result of an error made by a notary drawing up the notarial deed and the court referendary making an entry in the land and mortgage register in the ICT system.

The Supreme Court in its judgment of 24 January 2002, III CKN 405/99 [LEX No. 53722] ruled that the principle of public credibility of land and mortgage registers does not protect the purchaser if the agreement to transfer the ownership of the real estate was invalid. The entity who is disclosed in the land and mortgage register, on the basis of an absolutely invalid agreement, as the owner, perpetual usufructuary, holder of the cooperative ownership title to the premises, while performing further disposal-related transactions, does not effectively transfer the titles disclosed in the second section of the land and mortgage register if he does not hold them himself or herself. It should be consistently assumed that further trading in the real estate, perpetual usufruct right to land, cooperative ownership title to premises does not protect the subsequent purchasers, regardless of whether they act in bad or good faith, when one of the preceding legal transactions was absolutely invalid.

A notary drawing up the notarial deed should read the document providing grounds to the seller in the capacity of the owner, perpetual usufructuary of the land, holder of the cooperative ownership title to a dwelling unit in order to, among others, verify whether the document in question, for example a sales contract in the form of a notarial deed, is valid. If the notary

determines that the contract under which the purchase was made is absolutely invalid, he/she is obliged to refuse to carry out any further notarial actions. A notary is not authorised and, therefore has no obligation, to inform the land and mortgage register court of the inconsistency between the legal state disclosed in the land and mortgage register and the actual legal state. It may happen that the person whom the notary refuses to perform any further notarial actions due to an absolute invalidity of the previous legal transaction, will approach another notary, who will not notice the said invalidity of the preceding legal transaction or will not become familiar with the notarial deed on the basis of which the acquisition took place. The latter cases may occur when the seller assures that he or she does not have a copy of the notarial deed of the preceding contract and the notary does not read a copy of such a notarial deed which is filed in the land and mortgage register. The seller, informed by another notary that the contract, under which he/she was disclosed in the second section of the land and mortgage register, is absolutely invalid, trying to sell the real estate may intentionally conceal the content of the contract before another notary. A notary is not obliged to read the document on the basis of which the seller is disclosed in the second section of the land and mortgage register, although he or she should do so within his/her professional diligence. The principle of public credibility of land and mortgage registers does not protect free of charge dispositions or dispositions made for the benefit of the buyer acting in bad faith (Article 6 § 1 of the Act on LMR&M). For the existence or non-existence of the principle of public credibility, the good or bad faith of the seller does not matter.

The further the real estate will be traded upon the contract that is absolutely invalid, the more difficult it will be to discover that one of the previous purchases was absolutely invalid. For example, the second purchaser has a copy of the notarial deed of the contract under which he/she purchased the real estate but does not have the purchase contract of his/her predecessor. He or she presents to the notary only the copy of the last notarial deed and the notary is not obliged to verify in the land and mortgage register all the preceding documents that provided grounds for entries in the second section of the land and mortgage register.

In case of discovery that the contract under which the entry in the second section of the land and mortgage register is absolutely invalid, it is necessary to conduct court proceedings to reconcile the inconsistency between the legal state of the real property disclosed in the land and mortgage register and the actual legal state (Article 10 of the Act on LMR&M).

## 7. Summary

The possibility of invoking the absolute invalidity of a legal transaction by anyone does not solve the problem of the presence in business trading of entities disclosed in the National Court Register, despite the fact that the deed/founding act is invalid or further trading in real estate, the perpetual usufruct right to land, cooperative ownership title to the premises, when the entry in the second section of the land and mortgage register has been made despite the

invalid agreement for the transfer of ownership, perpetual usufruct right, cooperative ownership title to the premises. The partners/shareholders of partnerships/companies disclosed in the National Court Register, despite invalidity of the deed/founding act, instead of dissolution, will seek to sell the shares, transfer all the rights and obligations to other persons, i.e. to cease to be partners/shareholders in the defective partnerships/companies. The same applies to the person disclosed in the second section of the land and mortgage register on the basis of an absolutely invalid contract. Instead of reconciling the content of the land and mortgage register with the actual legal state under Article 10 of the Act on LMR&M, which is unfortunately time-consuming and expensive, such a person may strive to sell the real estate, perpetual usufruct right to land, cooperative ownership title to the premises, if only the notary performing the legal transaction and the purchaser do not notice that the grounds for its acquisition have been absolutely invalid. This does not solve the problem of absolutely invalid legal transactions that give rise to the occurrence of subsequent events, but rather accumulates them.

In order to improve the security of business trading in the event of a discovery that disclosure of an entity in the National Court Register or in the second section of the land and mortgage register has been made on the basis of an absolutely invalid legal transaction, any person who notices such an irregularity should be entitled to submit an application to the registry court or the land and mortgage register court to examine whether the legal transaction on the basis of which the entry has been made is valid. There is a danger that this entitlement may be abused by persons intending to impede real estate trading or undermine the credibility of entities disclosed in the National Court Register. If the court finds that the application is unfounded, it should obligatorily charge the costs of the application to the applicant and award damages therefrom for the benefit of the entities disclosed in the second section of the land and mortgage register, as well as order the publication of notices to correct the unfounded application at the expense of the applicant. The provision of Article 21 of the CCPC should apply to all the companies, i.e. to both partnerships and companies, as this would enable the court to dissolve partnerships in the same situations as companies.

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