

Judgment of 21st June 2005, [P 25/02](#)
**COMPULSORY PURCHASE OF SHARES HELD BY MINORITY
 SHAREHOLDERS (SQUEEZE-OUT)**

Type of proceedings: Questions of law referred by courts; Abstract review Initiators: District Court for Tarnów; Regional Court for Poznań; Commissioner for Citizens' Rights	Composition of Tribunal: 5-judge panel	Dissenting opinions: 2 judges
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Legal provisions under review	Basis of review
Permissibility and rules governing compulsory purchase of shares belonging to minority shareholders in joint stock companies [Commercial Companies Code 2000: Article 418 § 1 and 2 (in their original wording, operative until 2004), read in conjunction with Article 417 § 1]	Rule of law Conditions permitting expropriation Conditions permitting limitation of constitutional rights and freedoms Right to court Protection of ownership Two-instance system of judicial proceedings [Constitution: Articles 2, 21(2), 31(3), 45(1), 64 and 176(1)]

The compulsory purchase of shares (squeeze-out) is a legal institution found within certain countries, consisting in the removal of minority shareholders from a joint stock company following the purchase of their shares by majority shareholders. This institution serves to improve the functioning of companies, primarily by eradicating complications associated with the exercise of so-called minority rights (e.g. initiating court proceedings to challenge resolutions adopted in a company's general meeting) and, thereby, making the company more attractive to strategic investors or facilitating the model of a "closed" or "family" joint stock company.

The procedure for compulsory purchase of shares was introduced to the Polish legal system by the Commercial Companies Code 2000, replacing provisions of the Commercial Code 1934 which remained operative until that time.

Article 418 § 1 of the Commercial Companies Code 2000, in its wording challenged in the present case (subsequently amended by the Amendment Act 2003, entering into force on 15th January 2004), envisaged that the aforementioned procedure should apply to shareholders representing less than 5% of the company's share capital. Compulsory purchase could be performed by no more than five shareholders collectively holding no less than 90% of the company's share capital. A company resolution authorising compulsory purchase must be adopted by a 90% majority of votes cast, unless the company's corporate constitution (i.e. the articles) envisaged stricter requirements. Furthermore, § 2 of the aforementioned provision required the authorising resolution to specify the shares subject to compulsory purchase, the shareholders having committed to purchase them and the amount of shares acquired by each purchaser.

An auditor selected either by the company's general meeting or by the court determines the price to be paid for compulsorily purchased shares (Article 418 § 3, read in conjunction with Article 417, of the

Commercial Companies Code 2000). In the event of a difference of opinion between the shareholders and the auditor, Article 312 § 8 of the Commercial Companies Code 2000 (applied as appropriate by virtue of a reference in Article 417 § 1) permits the initiation of court proceedings to resolve the dispute. However, the legislator explicitly excluded the possibility of appealing against a court's decision in this matter.

The initiators of proceedings in the present case – being courts (referring questions of law) and the Commissioner for Citizens' Rights (under the abstract review procedure) – alleged that the institution of compulsory share purchase in the form adopted by the Polish legislator infringed numerous constitutional provisions (see table above).

In particular, it was submitted that shareholders having acquired their shares prior to the entry into force of the Commercial Companies Code 2000 (i.e. at a time when Polish law did not contain the compulsory purchase institution), did not foresee the possibility of compulsory share purchases. Accordingly, given the absence of appropriate transitional provisions, the challenged provisions infringe the principles of protecting acquired rights and citizens' trust in the State and its laws, as stemming from the rule of law clause (Article 2 of the Constitution).

Judges Teresa Dębowska-Romanowska and Bohdan Zdziennicki submitted a joint dissenting opinion referring exclusively to the reasoning for the judgment, in particular as regards the understanding of point 1 of the ruling (being a so-called interpretative judgment) and the burden of proof when a resolution authorising a compulsory share purchase is challenged by a shareholder prejudicially affected thereby.

RULING

1. Article 418 § 1 of the Commercial Companies Code 2000, understood as not excluding the right of a shareholder prejudicially affected by the compulsory purchase of shares to challenge a resolution authorising such purchase, conforms to Articles 2, 31(3), 45(1), 64, read in conjunction with Article 31(3), and to Article 176(1) of the Constitution and is not inconsistent with Article 21(2) of the Constitution.

2. Article 418 § 2, read in conjunction with Article 417 § 1, of the Commercial Companies Code 2000 conforms to Articles 2, 31(3), 45(1), 64, read in conjunction with Article 31(3), and to Article 176(1) of the Constitution and is not inconsistent with Article 21(2) of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The principle of protecting acquired rights, connected with the principle of protecting trust in the State and its laws, being an implication of the rule of law principle (Article 2 of the Constitution), expresses the endeavour to guarantee individuals legal security and to enable them to rationally plan their future actions, whilst also prohibiting the arbitrary abolition or limitation of rights vested in the individual.
2. When reviewing the permissibility of imposing limitations on the protection of acquired rights, it is necessary to consider the following: firstly, whether such limitations were based on constitutional values; secondly, whether it is possible to realise the given constitutional value without infringing acquired rights; thirdly, whether the constitutional values requiring a limitation on the protection of acquired rights may, in the given situation, be accorded priority over the values representing the bases for

such protection; fourthly, whether the legislator has undertaken the essential actions aimed at guaranteeing individuals the conditions to adapt to the new regulation.

3. The fact that an individual did not foresee the possibility of a change in the law does not mean that such a change will automatically lead to an infringement of the principle of citizens' trust in the State or the principle of protecting acquired rights.
4. The rights of shareholders in commercial companies, obtained prior to the entry into force of the new Commercial Companies Code 2000, remain operative and their content is subject to the hitherto operative provisions (Article 613 § 1 and § 2 of the Commercial Companies Code 2000). The Code's provisions apply only to changes in the content of, or disposal of, shareholders' rights following its entry into force (Article 613 § 3 of the Commercial Companies Code 2000). Accordingly, as a rule, the hitherto provisions (i.e. the provisions of the former Commercial Code 1934) shall be applied, with application of the new legislation being an explicitly specified exception to this rule. Such an approach is permissible and rational and, accordingly, does not infringe Article 2 of the Constitution.
5. Where legal provisions have considerable significance, such as those of the Commercial Companies Code 2000, the *vacatio legis* period should be as long as possible in order to provide addressees with sufficient time to acquaint themselves with the content of the new provisions. Whilst a period of 50 days is relatively short from this perspective, it conforms to statutory rules governing the promulgation of legal acts (cf. Article 4 of the Act on Promulgation of Normative Acts and Certain Other Legal Acts 2000). Accordingly, no infringement of Article 2 of the Constitution occurred.
6. The institution of expropriation, mentioned in Article 21(2) of the Constitution, belongs to the sphere of public law and primarily encompasses a compulsory deprivation of ownership in favour of the State Treasury or another public-legal entity. Private law provisions envisaging the involuntary transfer of an ownership right from the hitherto owner to another person(s) should not be reviewed on the basis of Article 21(2) of the Constitution.
7. The aforementioned provision provides for greater protection of ownership, permitting expropriation solely "for just compensation". "Just compensation" means fair, i.e. equivalent, compensation. It should enable the owner to replace the thing they lost or, more generally, restore the proprietary situation to that existing prior to expropriation. Under no circumstances may compensation be decreased by the manner in which it is calculated, nor the procedure by which it is paid.
8. Article 418 of the Commercial Companies Code 2000 regulates the involuntary transfer of ownership between private-legal entities. Whilst this does not amount to expropriation in the constitutional sense (cf. point 6 above), it involves similar consequences, consisting in the deprivation of ownership. This fact should be taken into account by the legislator, at least to the same extent as in the case of expropriation for public purposes. In particular, the person acquiring ownership should conduct a mutual performance.
9. The values enumerated in Article 31(3) of the Constitution, justifying the limitation of constitutional rights and freedoms, express all aspects of public interest as a general determinant of the limits of an individual's rights and freedoms. Whilst the Constitution makes reference to the notion of "public interest" (cf. Article 22), in the case of Article 31(3) it was considered appropriate to sub-divide the general public interest

category into six more detailed categories (security of the State, public order, protection of the natural environment, protection of health, protection of public morals and protection of rights and freedoms of other persons). In light of Article 31(3) of the Constitution it is also crucial to determine whether an infringement of the principle of proportionality has occurred, i.e. whether an appropriate relationship exists between the aim intended to be served by the challenged legal provision and the means leading to fulfilment of this aim. The discussed provision permits only such limitations as are indispensable to achieve one of the aims enumerated therein. It is possible, from Article 31(3), to derive three requirements to be fulfilled by a provision limiting the exercise of constitutional rights and freedoms: indispensability, functionality and proportionality.

10. The motive for introducing the institution of compulsory purchase of shares was to protect companies' interests. In light of the principle of majority rule, permitting the common interest to prevail over individual interests, it should be assumed that a company's interests coincide with the interest of the majority shareholders. Accordingly, the discussed institution conforms to the nature of the joint stock company.
11. Within the scope of the reviewed provisions, the interests of a joint stock company (the interests of the majority shareholders), as well as the company's right to develop and pursue efficient economic activity are values which contrast with the rights of minority shareholders. Accordingly, mechanisms for protecting the latter are crucial, especially as regards providing an equivalent for a lost property right. This is achieved by the appropriate valuation of compulsorily purchased shares, performed on the basis of Article 418 of the Commercial Companies Code 2000.
12. The discussed provision does not require that the reasons for compulsory purchase be stated in the authorising resolution. Nevertheless, this does not signify that minority shareholders are deprived of the right to court protection, nor that they are unable to claim to have been prejudicially affected or have had their rights abused by the majority shareholders. The view present in judicial practice, according to which Article 418 of the Commercial Companies Code 2000 is deemed *lex specialis* vis-à-vis Article 422 (motion to quash a resolution), may not be upheld. This means that a shareholder whose shares were compulsorily purchased may claim that the resolution infringes good customs or the corporate constitution (i.e. articles), or is intended to affect him prejudicially. Such a shareholder may also challenge the resolution on the basis of Article 425 of the Commercial Companies Code 2000 (motion to declare a resolution invalid). The legislator introduced an indirect mechanism for reviewing a resolution and did not, *ipso facto*, deprive minority shareholders of the right to have their case considered on its merits by a court, nor to have a final judgment issued in their case. Accordingly, no infringement of Article 45(1) has occurred.
13. Article 417 § 1, read in conjunction with Article 418 § 3, of the Commercial Companies Code 2000 refers to Article 312 § 8 of the Code, which envisages the possibility of litigation before the registry court between the "founders of the company and the auditor" where their views differ as regards valuation of the compulsorily purchased shares. The notion of a "founder" should be understood as including a shareholder whose shares were compulsorily purchased. In this manner, such a shareholder acquires the right to have a court review the auditor's valuation of the shares. This constitutes an alternative mechanism for protecting such a shareholder's interests, alongside the possibility of challenging a resolution adopted in a general meeting before the commercial court pursuant to the procedure contained in Article 422 § 1 and § 2 point 2 of the

Commercial Companies Code 2000, as regards the requirement for a shareholder to have been prejudicially affected as a result of an undervaluation of compulsorily purchased shares.

14. Article 78 of the Constitution guarantees an individual, whose legal status is the subject-matter of a given case, the right to appeal to an organ of higher instance against a judgment or decision, in order to review the correctness of the latter. This concerns legal measures initiating review by a higher instance organ, i.e. ordinary appellate measures which are essentially devolutionary in character. The constitutional principle of the two-instance system of proceedings concerns both court and administrative proceedings. This principle is not absolute, however, and allows for statutory exceptions. Nevertheless, statutory solutions concerning court proceedings must take into account the requirement, stemming from Article 176(1) of the Constitution, that court proceedings shall have at least two-instances. The final of the enumerated guarantees of the two-instance system of proceedings relates only to cases which are, from their outset to conclusion, within the jurisdiction of the judiciary.
15. As regards the reviewed regulation, appointment of the auditor is the first stage of proceedings. The interested shareholder may appeal to the registry court against the auditor's decision. The issue of share valuation is not, therefore, considered by the court from its outset to conclusion. Accordingly, the legislator did not infringe Article 176(1) of the Constitution.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 21. [...] 2. Expropriation may be allowed solely for public purposes and for just compensation.

Art. 22. Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 64. 1. Everyone shall have the right to ownership, other property rights and the right of succession.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

Art. 78. Each party shall have the right to appeal against judgments and decisions made at first instance. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

Art. 176. 1. Court proceedings shall have at least two instances.

2. The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute.