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The company control threshold in Poland after the reform of mandatory takeover bids

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Abstract

This article is devoted to the problem of mandatory takeover bids in Poland on the grounds of previously binding regulations and the new legal provisions. After many years of waiting by the Polish investors, on 30 May 2022, amendments to the Public Offering Act came into force. They primarily concern changes in the rules regarding conducting mandatory takover bids for the sale or exchange of shares in public companies on a regulated market. The most important change, which also constitutes the main subject of this article's discussion, is the introduction of the so-called control threshold for companies, at the level of 50%. The aim of this article is to present the former regime on takeover bids as well as to critically analyze the newly adopted one. Moreover, the author gives comparative insight into the matter and criticizes the current Polish regulation as inconsistent with the European law. The paper concludes with a *de lege ferenda* call for revision of the control threshold under Polish capital market laws in order to ensure investor protection safeguards compliant with the EU law.

Introduction

After several years of waiting by the Polish investors, on 30 May 2022, the provisions of the Act on amendments to the Act on mortgage bills and mortgage banks and certain other Acts concerning amendments to the Public Offering Act (ustawa z dnia 7 kwietnia 2022 roku o zmianie ustawy o listach zastawnych i bankach hipotecznych oraz niektórych innych ustaw, Dz.U. z 2022 r. poz. 872; hereinafter:

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the Amendment) came into force in Poland. The amendment to the Public Offer of Financial Instruments Act (ustawa z dnia 29 lipca 2005 roku o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Dz.U. Nr 184, poz. 1539 ze zm.; hereinafter: the POA) is crucial from the perspective of individual investor protection and a great victory for investment circles (especially the SII — the Association of Individual Investors). Several solutions introduced to the POA aimed, i.a., at improving the protection of individual investors and the security of the entire Polish capital market. They primarily concern changes in the rules of announcing and conducting tender offers for the sale or exchange of shares in public companies admitted to trading on a regulated market (hereinafter: bids / tender offers). The most important change, which is the main subject of this article's discussion, concerns the introduction of the so-called control threshold for companies, at the level of 50% instead of the previous two thresholds at 33% and 66%. Exceeding the threshold obliges a company to announce a mandatory bid for the sale or exchange of all shares.

The previous regulations have been heavily criticized by the doctrine, practice, and investors, who have accused them of being inconsistent with the EU law, especially with the so-called 13th Directive (Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142 from 30 April 2004; hereinafter: the Directive). The current structure of tender offers for the sale or exchange of shares in public companies has led to numerous pathological situations in which the interests of minority shareholders have been significantly marginalized. Previous experience of the Financial Supervision Authority also shows that the institution of tender offers was not very clear for capital market participants and inadequately protected their interests (Ministerstwo Finansów, 2014; SII, 2021A). The hitherto regulations did not fulfill their purpose, as they allowed entities acquiring control over public companies to meet the obligations related to this institution only formally, which posed a real threat to the interests of minority shareholders.

This article is devoted to discussing the issue of mandatory bids on the grounds of previously binding regulations and the new legal provisions. Moreover, the paper gives comparative insight into the matter.

1. Research methodology

The work uses methods mostly known to legal studies: the formal-dogmatic (legal-analytical) and legal-historical methods, the economic analysis of law, comparative legal research, critical and systematic analysis, and critical-legal dogmatics. The formal-dogmatic (legal-analytical) method is based on the exegesis of normative material and is used to study the law from a static perspective. The

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provisions of takeover bids law are subject to a detailed critical analysis and interpretation, taking into account the views expressed in the doctrine and the achievements of judicial decisions, as well as decisions of market supervision authorities. A comparative method is used to study law from a dynamic perspective. In the work, it is primarily applicable to the legal-comparative analysis of the relationship between the quasi-harmonized European legal systems regarding the implementation of the Directive. This method will allow the author to answer the question whether given institutions and solutions fulfill their role in the legal system and to assess the effectiveness of a given regulation in comparison to another legal system. The economic analysis of law helps to understand the problems and motives for the regulator's specific actions from different perspectives — especially from the perspective of investor protection. The legal-historical method is used to analyze the interpretation of law from a chronological standpoint in order to evaluate the dynamics within the legal framework of takeover bids as well as the direction in which the regulator is going.

2. The role of mandatory bids in the legal and economic background

A safe and effective capital market is a significant segment of the economy. It enables economic entities to raise funds for financing investments and business ventures. At the same time, a capital market is a place which creates an opportunity for investors to attractively invest part of their savings (Ministerstwo Finansów, 2014, 1).

An institution of the law which is aimed at ensuring the proper functioning of the capital market is the institution of mandatory tender offers for the sale or exchange of shares in public companies (the so-called mandatory bids) (Ministerstwo Finansów, 2014, 1). A tender offer or a bid can be defined as an offer to purchase a certain number of shares addressed to all existing shareholders (Regucki, 2012, 69).

The obligation to announce a bid for the sale or exchange of shares is one of the most important consequences of a company becoming a public company in the first place (Regucki, 2012, 69). As a rule, this obligation arises in connection with an acquisition of control over a public company. Therefore, as a rule, bids are announced by significant investors who seek to acquire a significant block of shares in a public company (Ministerstwo Finansów, 2014). The main aim of a mandatory bid is to protect the interests of minority shareholders in a situation when the position of dominant persons in the company is considerably strengthened. The purpose of a mandatory bid is to enable the remaining minority shareholders of a public company which is being acquired to "exit" from the company and withdraw their investment by selling shares at a fair, equitable price (Regucki, 2012, 71). The

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point of departure is the assumption that in the case of acquisition of control, certain changes in the company's management strategy may — and often in fact do — take place, which has a potential impact on the market price of the shares (Opalski, 2010, 487). It is worth pointing out that the regulation of mandatory bids itself is sometimes subject to criticism from the doctrine (Hansen, 2018; Enriques, 2004).

The notion of *control premium* is inherently relevant to mandatory bids. It is assumed in the literature that control in itself has a certainly added value, influencing the share price. At the moment of acquiring a controlling block of shares, a shareholder pays not only for a fraction of the share capital, but also for the possibility to decide on the future fate of the company and direct its strategy. Therefore, the institution of a mandatory call is complemented by regulations concerning the minimum price the calling party should offer. The assumption is that this price has to be at least equivalent to the price paid by the dominant shareholder for a block of shares giving real control of the company. In pure market conditions, the absence of mandatory bids at a certain price would threaten a significant drop in price after a sucessful takeover, e.g., due to the risk of majority shareholders using techniques obstructing the minority investors (tunneling, withholding of dividend, poor information policy), or even potential delisting. Moreover, many empirical studies point out the phenomenon of an instant decrease in the real value of the remaining shares at the moment of taking control over the company due to the consumption of such control premium (Opalski, 2010, 487).

Some recognize the control premium as an expected added value for the majority/dominant investor, resulting from the possibility to use the full potential of the acquired company more efficiently (Lewandowski, 2008, 131; Moska, 2018). The value of the control premium varies and depends on several factors, such as the company's financial condition, size, industry (Bem and Bącal, 2014, 267–278), prospects, or even its prestige, among others. For example, a larger premium will, as a rule, be offered if the company wants to delist (KPMG, 2021). It can also be assumed that the amount of the control premium will depend on the degree of information efficiency of the capital market in question. The value of the control premium may also be dictated by subjective factors, e.g., when the acquired company becomes a crown jewel in the capital group or the functional synergy between numerous companies arises.

A Polish study, based on 56 public bids for shares announced between 2006 and 2013, showed that the average level of the control premium proposed to shareholders was about 20% (Bem and Bącal, 2014, 267–278). Another empirical study based on 92 bids for the acquisition of shares announced in 2008–2012 showed that the average bonus proposed to shareholders was around 25% (Regucki, 2013, 455). It is noteworthy that there has been a clear decrease in the control premium in recent years in Poland. Research conducted in Poland on the basis of public calls for the acquisition of shares announced in 2010–2019 showed that the average level of the bonus proposed to shareholders was already only about 11% (KPMG, 2021).

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For the sake of comparison, it is worth adding that in mature capital markets, such as the United Kingdom or the United States, premiums at the level of 20–30% are not uncommon (Paćkowski, 2020).

In theory, in addition to protecting investors, the institution of mandatory bids fulfills yet another important role: an opportunity to exit from the company increases the confidence of individual investors in the capital market and, for many, provides an incentive to place their savings there, which indirectly increases the attractiveness of the market, also on the part of issuers and capital formation (Spyra, 2016, 64). The basis for Polish legal solutions concerning mandatory bids is European law — the relevant provisions of the POA implement the Directive. The provisions of the Directive introduced minimum standards concerning the acquisition of control over companies with securities admitted to trading on a regulated market. Its enactment was primarily aimed at creating a uniform, transparent regulations in case of taking control over public companies, and protecting the interests of minority shareholders (Mataczyński, 2010; Kuska-Żak and Żak, 2006). The objectives of the Directive (cf. recitals 1–3, 9) are therefore to create an effective control market by coordinating the safeguards required to protect the interests of shareholders of companies whose securities are admitted to trading on regulated markets in the EU, as well as of the holders of securities of those companies when they are subject to takeover bids or control changes (Oplustil and Bobrzyński, 2004, 47).

When a natural or legal person as a result of his/her acquisition or the acquisition by persons acting in concert with him/her holds securities of a company which, added to any existing holdings of those securities of his/her and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of it, pursuant to Art. 5(1) of the Directive the member states shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at an equitable price. In other words, the institution of a mandatory bid, introduced by the EU law, thus allows minority shareholders to “exit” from a dominant company by selling all their shares at a fair price and undertake other investments instead (Oplustil, 2005, 45). A bid under the provisions of the Directive must be addressed to all remaining shareholders and involve all remaining shares (it would be incompatible with European law to carry out any form of reduction) (Regucki, 2013, 446).

Pursuant to Art. 5(4) of the Directive, the equitable price is the highest paid for the same securities by the offeror — or by persons acting in concert with him/her — over a period to be determined by the member states, but of no less than six months and no more than 12 before the bid. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in con-

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cert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

To summarize, European bidding law is based on two assumptions. First, it allows investors to sell their shares in case of a change of control in the company. Second, it allows the determination of a fair price, which is the highest price paid by the offeror for the shares of the targeted company. It is worth noting that the Directive does not define the very notion of control and thus does not establish a control threshold (threshold of the number of votes at the general meeting) which would cause the obligation to carry out a mandatory bid. The Directive only creates a framework for which member states are free to set national regulations, such as the control threshold or the determination of a fair and equitable price (Regucki, 2013, 447). However, as the doctrine aptly points out, this threshold should be determined in such a way so that the acquirer of control is subject to the said obligations (Domański and Goszczyk, 2008, 7; Opalski, 2010, 500).

3. The existing provisions on mandatory bids in Poland

Polish regulations have been significantly expanded compared to the European normative model (Regucki, 2013, 447). The issue of mandatory bids has been regulated primarily in the provisions of Art. 73–81 of the POA. Under the previous legal status (from October 2005) there were two thresholds — 33% of votes and 66% of votes. Pursuant to Art. 73.1 of the POA, an entity exceeding the 33% threshold shall announce a mandatory bid to exchange or sell only such a number of shares which will enable it to reach the 66% threshold (a possible bid to sell or exchange all shares was only optional). Meanwhile, under Art. 74 of the POA, it was only upon exceeding the 66% threshold that the obligation to announce a mandatory bid for all remaining shares arose. According to POA, failure to comply with the obligation to carry out a mandatory call would result in deprivation of the voting right attached to all shares. The rule was the announcement of so-called *ex-ante* bids, i.e., an acquisition of control resulting from a prior bid. The provisions of Art. 73 sec. 2 and Art. 74 sec. 2 of the POA, however, regulated the so-called *ex-post* bids, where a mandatory call was a consequence of becoming a dominant shareholder in a public company. A follow-up call may have taken place as a result of various legal actions and events, including, but not limited to, acquisition of newly issued shares, merger or division, or change of the articles of association. But the most important practical case was an indirect acquisition of shares — this consists in taking control of a public company through the acquisition of shares, outside the regulated market, in another company which holds a block of shares in the public company. Indirect acquisitions have been associated with the widespread problem

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of circumventing the rules on mandatory bids (more on this furthers). It is worth noting that in European law, it is the *ex-post* calls that are the rule and the *ex-ante* calls that are the exception (Regucki, 2013, 448).

For years, the Polish regulations have been subjected to enormous criticism from the doctrine, which has accused them of being incompatible with EU law as well as of failing to meet their primary objective of protecting minority investors (Oplustil, 2005; Domański and Goszczyk, 2008; Romanowski, 2008; Mataczyński, 2010; Regucki, 2012; 2013; Moska, 2018). So far, the construction of mandatory bids has led to numerous pathological situations in which their interest was significantly marginalized. First of all, none of the above-mentioned thresholds constitutes a proper implementation of Art. 5 of the Directive (Oplustil, 2005, 52). Exceeding the 33% threshold only imposes an obligation to announce a bid for the number of shares leading to the 66% threshold — instead of all remaining shares. This means that an important part of the shareholders will not have a viable option to exit the company at a fair price. At the same time, exceeding the 66% threshold leads to the obligation to carry out a mandatory bid offer for all shares, but on the grounds of the Polish capital market realities the acquisition of control over a company requires a much smaller block of shares than the said 66% (Oplustil, 2005, 53). Unfortunately, the EU law does not contain any definition of effective control, leaving this issue to the discretion of the member states. This, however, is not an oversight on the part of the EU legislator, but a deliberate nod to the relevant authorities.

The issue of control varies from one member state to another and depends on a number of legal and economic factors such as local company law, the degree of development of the capital market concerned, etc. Moreover, in each company, the control threshold will depend on the articles of association, the specific structure, and activity of the shareholders. A one-size-fits-all approach will therefore always be highly questionable and the threshold should be set at a level which reconciles the legitimate interests of the potential majority and minority investors. In case of doubt, the issue should be resolved in favor of minority shareholders, among whom the most vulnerable are individual investors who bear the greatest risk of investment failure (too many to fail).

On the grounds of Polish law, it is not possible to define unequivocally what constitutes actual control in a company. Pursuant to the Polish Commercial Companies Code (ustawa z dnia 15 września 2000 roku — Kodeks spółek handlowych, Dz.U. Nr 94, poz. 1037 ze zm.; hereinafter: KSH), as a rule, resolutions are adopted by an absolute majority of votes (Art. 414 of the KSH). This applies to appointing members of managerial bodies as well as to decisions concerning the payment of dividends. However, in some crucial matters, a qualified majority is required. A substantial change of the subject matter of the company's business activity requires a two-thirds majority (Art. 416 of the KSH), and a number of decisions of a systemic nature (such as amendment of the articles of association, merger, or

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division of the company, dissolution of the company, or disposal of the enterprise) require a 3/4 majority (Art. 415, 506, 522, 541 of the KSH). Taking into account only the provisions of law, it should be assumed that an absolute majority of votes (over 50%) is in each case sufficient enough to exercise actual control over the company and freely create the direction of its further development.

As mentioned above, effective control in a company also depends on factors other than the prerogatives granted by law. Theoretically, from the point of view of corporate governance, a dispersed and diverse shareholding is preferable — provided that it is an active and well-organized one. However, the Polish capital market is characterized by a small number of significant shareholders (above 5% at the general meeting) and a relatively high concentration of capital — which *de facto* means the power of the main shareholder prevails (Regucki, 2012, 79; 2013, 450). In Poland, significant shareholdings of several percent are held by institutional investors who actively participate in general meetings of shareholders and often have a decisive influence on the activities of companies, which often leads to the violation of minority shareholders' interests (Ministerstwo Finansów, 2014, 2).

An empirical study from 2011 of 400 listed companies showed that only in 16% of the companies the main shareholder exceeded the control threshold set by the Polish legislator at 66% (Regucki, 2012, 80). Moreover, in half of the analyzed companies, the strongest shareholders held less than 40% of the votes. This situation has not changed significantly over the last 10 years. As of 26 March 2020, in the case of the 140 largest companies listed on the Warsaw Stock Exchange (included in the WIG20, mWIG40, and sWIG80 indices), the threshold of 66% share in the total votes was exceeded only in about 16% of the companies (Komisja Prawna, 2021, 56). Interestingly, in 2015–2020, out of 169 calls announced for all remaining shares of a public company, only 54 bids (about 1/3) were related to the obligation to announce a mandatory bid after exceeding 66% of the total number of votes (Komisja Prawna, 2021, 56). Thus, it can be assumed that, in order to achieve actual control over the company, major shareholders did not need to exceed the 66% threshold which would force them to carry out a costly mandatory bid.

It is worth noting that the Polish capital market is characterized by a low activity of individual shareholders, who rarely decide to participate in shareholders' meetings, and even if they do, their voting power is negligible when adopting any resolutions. A survey of individual investors in 2021 showed that about 95% of small shareholders do not participate in annual general meetings (the main reasons cited were lack of time and influence on the course of the meeting) (SII, 2021B). At the same time, investors declare that they would participate in general meetings if they were more investor-friendly. About 73% of investors believe that companies should be obliged to enable investors to participate in general meetings remotely. Unfortunately, even the Polish soft law in the form of the Companies Code of Best Practice (GPW, 2021) does not impose any obligation on issuers to organize a general meeting or to broadcast its sessions in real-time.

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Disregarding the voting power of small shareholders, it may be safely concluded that in 65% of the companies the main shareholder had at least simple control (absolute majority of votes), and in more than 40% it enjoyed "full control," which allows adopting resolutions on matters requiring a qualified majority of votes (Regucki, 2012, 82). Thus, although, as indicated above, only in 16% of the companies the main shareholder exceed the control threshold of 66%, in as many as 40% of the companies the main shareholder had the real voting power at the level of over 75%, which gave him/her full control over the company. This makes the 66% control threshold all the more incomprehensible. The study also showed that among the companies where the main shareholder exercised ordinary control, the average number of his/her votes was 41%, and among the companies where he/she exercised full control — 59% (Regucki, 2012, 83). It is worth mentioning here that the exercise of simple control should already be equated with the exercise of control within the meaning of Art. 5(1) of the Directive.

Another problem of the current regulation was the abuse of Art. 73 and 74 of the POA by using the institution of the aforementioned indirect acquisition of shares to circumvent the EU regulations on mandatory bids for all remaining shares of minority shareholders (Art. 5(1)) and the minimum price offered to them (Art. 5(4)) (SII, 2020A, 3). Avoiding the obligation of a mandatory bid for a block of 66% of shares was possible through the use of investment vehicles (special purpose vehicles). The entity intending to sell a significant block of shares made an in-kind contribution to the established Special Purpose Vehicle (SPV) in the form of public company shares, the number of which was close to the 66% control threshold (e.g. constituting 65.9% of votes) and then sold all shares in the SPV to the entity which acquired a significant block of shares in the public company (Ministerstwo Finansów, 2014, 2). As a result, an obligation arose to announce a follow-up bid for shares constituting only 0.1% of the total number of votes (the purpose of the call for shares corresponding to 66%, according to Art. 73 of the POA), which led to such a significant reduction in subscriptions that *de facto* minority shareholders could not exit and the whole institution was nothing more than a fiction.

Numerous empirical studies confirmed that this problem was not purely theoretical. A study of companies conducted by Tomasz Regucki between 2008 and 2012 showed that among 40 mandatory bids under Art. 74 (a call for all shares after exceeding 66% of votes), 30 were *ex-ante* bids and only 10 — *ex-post* bids (Regucki, 2013, 450). Meanwhile, among the 42 bids under Art. 73 (a bid for a stake of up to 66% in connection with exceeding the 33% threshold), only 17 were *ex-ante* bids, but as many as 26 were *ex-post* ones, resulting from indirect acquisitions. Moreover, the study showed that among such *ex-post* bids, the average share of votes covered by the bid remained within the range of 3% only, the median share of votes — 2%, and the first quartile — only 0.05%. Incredibly, in one out of every four cases, shares representing up to 0.05% of the votes were covered by the call — making the institution completely illusory. In the most extreme case, in

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2013, a company called LU Chemie made a call for 1 Permedia Company share, which represented 0.000044% of the total number of votes at the company's general meeting (Asyngier, 2017, 9). The above-mentioned study also showed that in the case of follow-up bids under Art. 73(2), the average reduction rate was 79% and the median was as high as 94%. At the same time, it is worth remembering that in numerous cases, no subscriptions were submitted — most often because investors, seeing such a minimal number of shares, resigned from subscription altogether (Regucki, 2013, 454). One may even be tempted to conclude that if in some individual cases the bids fulfilled their role, it was either due to the goodwill of the bidder or other investment motives that guided their decision. In effect, the problem of the low control premium in Poland (at ca. 25% in 2008–2012 and ca. 10% in recent years) was only the tip of the iceberg in the case of *ex-post* bids (exceeding the 33% voting threshold). Indeed, the massive reduction made it impossible for any shareholder to exit in line with EU law.

According to the research of the Ministry of Finance, between 2008 and 2010, out of 12 cases in which the obligation to announce a follow-up bid to obtain 66% of the votes in public companies arose, in 8 of them the obligation was fulfilled by announcing bids for shares representing 2% or less of the total number of votes in the acquired public companies (Ministerstwo Finansów, 2014, 3). Thus, the right of minority shareholders to sell their shares so far has been significantly limited in practice.

If that were not enough, the flawed indirect acquisition mechanism also led to the notorious circumvention of the minimum price in the mandatory bid, to the detriment of minority shareholders. This issue was regulated by Art. 79 of the POA, which specified in detail the manner of calculating the minimum price in a bid, which formally extended the minimum protection of European law with additional price requirements, but introduced incomprehensible differentiated protection of shareholders regarding the fair price depending on the type of bid (Regucki, 2013, 449). The best guarantee for minority shareholders was the implementation of Art. 5(4) of the Directive in the form of the provision of Art. 79(2). According to this provision, the share price proposed in a mandatory bid may not be lower than the highest price paid for the shares in the public company within 12 months prior to the announcement of the bid. This regulation, however, did not apply to indirect acquisition of shares, because in such a case, shares of another company — which is in possession of shares in the relevant public company — are acquired. As a result, the actual value of the shares and the control premium paid for the shares of the company in which the change of control occurs was regularly concealed in the transaction of indirect acquisition of shares over the counter (Ministerstwo Finansów, 2014, 3).

As a result of the above controversies, the former legislation failed to achieve its primary objective of investor protection and was a rare example of bad implementation of the EU law in this regard. Consequently, the Polish law has been subjected to constant criticism from the doctrine, practice, and, above all, the invest-

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ors' community, which has unsuccessfully attempted to change the regulations in a direction consistent with the Directive. Particularly active in this respect was the Association of Individual Investors (SII) led by its chairman, Jarosław Dominiak, which submitted numerous petitions and appeals to the Ministry of Finance, the Financial Supervision Authority, and other authorities. In the years 2012–2014, SII complained, i.a., twice to the European Commission about the defectiveness of regulations in force in Poland and their contradiction with the EU regulations (SII, 2022). It also referred to the solutions in other EU countries, which pursued their goals of investor protection much more actively (more on this further).

This problem was finally recognized by the Polish legislator, which in 2014 resulted in a draft of the Act amending the Public Offering Act by the Ministry of Finance (Rządowe Centrum Legislacji, 2014). It assumed, i.a., establishing 33% and 66% of the total number of votes in a company as the thresholds for taking control of a public company. Exceeding one of these thresholds was to result in the obligation to announce a mandatory bid for all remaining shares in that company, and thus it would mean the introduction of the so-called *ex-post* bids in place of the so-called *ex-ante* bids.

Unfortunately, as a result of the Treasury Ministry's objections, the draft was abandoned by the Council of Ministers in 2015. This happened despite the explicit acknowledgment in the project's explanatory memorandum that the existing provisions are detrimental to minority shareholders and constitute a flawed implementation of the Directive (Ministerstwo Finansów, 2014).

4. New rules on mandatory bids — analysis

The breakthrough came in 2019 when the Supreme Court's judgment of 18 July 2019 was issued (case number I CSK 587/17). The Supreme Court unequivocally sided with minority shareholders, reminding us that the institution of a mandatory bid is intended to protect them by allowing them to exit the company on financially favorable terms (the so-called control premium). When interpreting Art. 79 sec. 2 item 1 of the POA, the court stressed that omitting in the bid the price paid for the indirect acquisition of shares constitutes a direct violation of the regulations (SII, 2020A).

Finally, as a result of numerous actions of the investors' community — including the SII petition of 23 March 2020 (SII, 2020A) and the draft amendment initiated by the Financial Supervision Authority (KNF) — work began on the draft amendment, which became effective on May 30, 2022. The amendment revised the approach to the institution of mandatory bids and introduced a number of significant changes, including:

1. liquidating the hitherto 33% and 66% mandatory bid thresholds and establishing in their place a single threshold of 50% of the total number of votes at the

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general meeting as the threshold for taking control (amendment of Art. 73 and liquidation of Art. 74 of the POA). It creates the obligation to announce a bid to sell or exchange all remaining shares within three months;

2. eliminating the existing dualism of bids with the division into *ex-ante* and *ex-post* bids, as well as introducing a uniform model of *ex-post* bids;

3. taking into account the price of indirect acquisition of shares in a public company when determining the minimum price in a bid;

4. introducing an optional voluntary bidding mechanism for all remaining shares in a public company;

5. determining the minimum price in the bid based on the fair value determined on the basis of a valuation performed by an independent auditing company at the request of the bidding party in the event of insufficient turnover in the shares subject to the bid (previously there were serious legal doubts in this respect).

The most significant change resulting from the amendment, which is the main subject of interest in this article, is undoubtedly the introduction of a single 50% control threshold. This change was welcomed by experts and investors as a decisive step in the right direction. However, doubts remain over the level of the threshold, as — in the opinion of market participants — in practice, control is usually already acquired in the case of holding as many as 33% of the total number of votes (SII, 2021A). This is particularly puzzling in the face of a lower control threshold which has been adopted in the majority of EU countries (more on that further). Perhaps the rationale for adopting a relatively high threshold was the specific nature of the Polish capital market, which is dominated by small companies with a concentrated ownership structure. This argument was already invoked during the 2014 discussion of the previously binding 66% threshold. According to the Ministry of Finance, it was aimed at protecting the developing capital market, maintaining liquidity, and reducing the number of issuers by countering the dematerialization of shares (Komisja Prawna, 2021). It is hard to agree with this argument — artificially maintaining public companies with a low free float in the Polish market realities by creating the illusion of dispersed shareholders and corporate governance leads to disadvantaging minority shareholders and them losing trust in the public market. A public market aspiring to sustainable growth should not be concerned with the liquidity of companies. The argument involving dematerialization, on the other hand, is reminiscent of a situation in which the state agrees to disregard the rights of minority shareholders in favor of majority shareholders so long as the latter group does not delist it.

In an explanatory memorandum to the statute, the legislator draws attention to the definitions of a dominant entity and control contained in the EU regulations and national legislation. According to them, it is assumed that a controlled undertaking is an undertaking in which a majority of voting rights belongs to one natural or legal person, and this majority is understood as a level exceeding 50%, including 50% plus 1 vote (it is worth noting, by the way, that in the case of an odd

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number of votes the definition of 50% plus 1 vote will not be adequate). However, these provisions are more concerned with inter-company relations within a holding than with intra-corporate relations. In practice, Polish public companies are often controlled by shareholders holding even less than 33% of the votes.[1]

Another argument cited by the Ministry in defense of the 50% threshold is the recent change introduced to the Polish Commercial Companies Code which promotes holding general meetings remotely, using electronic communication means. These modifications are supposed to contribute to changing the perception of participation of dispersed shareholders in the life of the company: "The frequently raised logistical barrier of attending a general meeting in person will be broken down, which should significantly increase the number of votes represented at the AGM, and thus also significantly increase the number of votes necessary to take effective control of the company" (Komisja Prawna, 2021, 57). The legislator is therefore convinced that also the hitherto widely used EU control thresholds of 30–33% may soon become highly unjustifiable in the light of the Directive.

This argument is also misplaced. For years, the main reasons for poor investor turnout at general meetings have been indicated by surveyed investors as lack of time (ca. 50%), lack of influence on the proceedings (ca. 35%), high travel costs (ca. 20%), and lack of possibility to participate online (ca. 20%). The amendment to the Companies Act promoting the organization of general meetings remotely, using electronic means of communication, has not changed the turnout at general meetings. The reason is that this solution is optional. The lack of a mandatory general e-meeting has been and will continue to be a factor in the low participation of minority shareholders in general meetings (Ławrowski, 18.08.2021). In practice, public companies have been very reluctant to hold general meetings using various means of communication, virtually limiting themselves only to cases when they were forced to do so by the pandemic — and even then, it was not that common a practice (SII, 2020C). It would be naive in this context to count on the goodwill of the companies' management boards — the Polish market is already characterized by a long history of making it difficult for minority shareholders to participate in general meetings (Tychmanowicz and Dzierżanowski, 2017). At the same time, the reservations raised to the draft amendment by SII (2021A), which pointed out that "in matters as important as the acquisition of control over a company, one should not expect the management board to organize a general meeting in a manner which could deplete its voting power against the largest shareholder," are also justified. It should be noted with regret that the amendments to the Code of Companies Best Practices of the Warsaw Stock Exchange of 2021 did not take into ac-

[1] A good example of such a situation is PKN Orlen controlled by the State Treasury, which, thanks to favorable provisions in its articles of association, has full control over the company despite holding less than 28% of the votes at the general meeting.

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count the demand for the absolute necessity of holding a general e-meeting, introducing only a directional directive.[2]

In the context of considering the height of the threshold, it is worth analyzing the solutions which have been in place for years in other EU countries (ESMA, 2019). Poland, next to only Estonia, Latvia, and Malta, is one of the few countries where the percentage of voting rights which confers control of the company under Art. 5(1) of the Directive (the "primary control threshold") has been set at 50% (50% + 1 in Malta). However, Estonian law provides another alternative method to define a controlling influence — that is, as a shareholder who has the right to appoint or remove a majority of the management or supervisory board members or has a dominant influence or control over the company, or the possibility of exercising it.

In 11 member states, the primary control threshold has been set at 33% or 1/3. These include: Bulgaria, Denmark, Greece, Hungary, Lithuania, Luxembourg, Norway, Portugal, Romania, Slovak Republic, and Slovenia. In 14 member states,[3] the threshold has been set at around 30%. These include: Austria, Belgium, Cyprus, Czech Republic, Finland, France, Germany, Iceland, Ireland, Italy, the Netherlands, Spain, Sweden, and the UK. In one member state (Croatia), the primary control threshold is set at 25%. Interestingly, in Italy, when it comes to SMEs (Small and Medium Enterprises), the threshold of 25% applies if no other shareholder holds a higher stake. It may also be voluntarily included by SMEs in their articles of association as a minority shareholder safeguard. In Hungary, the threshold is 25% if no other shareholder holds at least a 10% interest.

In addition, 11 member states have introduced some additional measures to ensure proper minority shareholder protection. In some, a shareholder who, together with persons acting in concert, holds securities carrying a percentage of the voting rights in a company equal to or exceeding the primary threshold, may also trigger a mandatory bid to all remaining shareholders if he/she acquires further securities carrying a specified additional percentage of voting rights, in some cases within a specified period ("creep-in" threshold). For instance, in Austria, any increase of at least 2% of voting rights between 30% and 50% within 12 months triggers yet another mandatory bid to all remaining shareholders. The creep-in threshold in France is at least 1% within 12 months, in Spain and Italy — 5%, in Slovenia — 10%, and in the UK any increase between 30% and 50% will trigger a mandatory bid. These kinds of measures also apply in Bulgaria, Cyprus, Denmark, Greece, and Ireland. These provisions aim to further ensure that minority shareholders can

[2] A company should enable its shareholders to participate in a general meeting using electronic means of communication (general e-meeting) if this is justified by the shareholders' expectations communicated to the company, supposing that the company is in a position to provide the technical infrastructure necessary for holding such a general meeting.

[3] Including Iceland, Norway, and the UK.

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exit from the company by selling securities for all of their holdings at an equitable price. The creep-in threshold does not apply under Polish law.

Moreover, six countries introduced an additional, secondary threshold which also triggers an obligation to conduct a mandatory bid for all remaining shares. It varies between 40% and 90% and can be found in Bulgaria (2/3), Finland (50%), Iceland (90%), Norway (40% and 50%), Portugal (66%), and Slovenia (75%). Such a measure aims to provide shareholders with yet another opportunity to exit shall the majority shareholders further solidify their control over the company.

Keeping in mind that the control threshold will always be somehow arbitrary, some countries have decided that, when national thresholds are reached or exceeded, a mandatory bid may not always be necessary — because the national definition of control requires additional conditions to be met or because some kind of an exemption is available. A good example of such a solution is Portugal — if the 1/3 threshold is exceeded, the mandatory bid when the acquiring entity is able to provide evidence to the Portuguese Security Markets Commission (CMVM) that it does not control the target company or is not in a holding relation with such a company (CMS, 2017). In such a case, the 50% threshold is applicable. This solution is a kind of the inverse of the Estonian one, where despite not reaching the 50% votes threshold, the mandatory bid would be triggered if the majority shareholder does in fact have a controlling influence. Such flexible solutions for control threshold determination seem more viable than the one-size-fits-all approach known in most jurisdictions.

Taking the above into consideration, it can be concluded that the Polish solution is the least competitive in the whole European Union and does not take into account the due interest of investors. With the exception of Latvia and Malta, all member states have set control thresholds of a maximum of 1/3 of the votes. Moreover, half of the countries (15) have established additional safeguards for minority shareholder interests in the form of creep-in thresholds and secondary thresholds, exceeding which triggers the mandatory bid for all remaining shares. One may wonder whether this solution changes anything in the Polish capital market, taking into account the fact that many entities exercising actual control over the company hold less than 50% of the votes. One may also wonder whether this solution will not lead to the opposite. So far, a shareholder holding more than 33% of votes at least had to make a more or less creative effort and raise sufficient funds to satisfy the obligation to make a mandatory bid for a number of shares amounting to a 66% stake. In the current legal state, the majority shareholder may safely dispose of a 35%, 40%, or 49% block, which will certainly ensure his/her control over the company and at the same time does not expose him/her to unnecessary “costs” connected with mandatory bids. Time will tell whether or not the Polish legislator has done minority shareholders a disservice regarding the level of the control threshold.

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Conclusions

In conclusion, the amendment of the takover bids law in Poland regarding the control threshold in a publicly listed company is a step in the right direction. Undoubtedly, the removal of two control thresholds will significantly reduce pathological phenomena in the bidding market, especially in the form of *ex-post* calls following indirect acquisition of shares with the help of SPVs. At the same time, the efficiency of the amendment is undermined by the fact that the control threshold was set at an exceptionally high level of 50+%, while in the vast majority of European countries it is set at between 25–33%. Among all EU and EEA countries, the Polish control threshold, alongside Latvia and Malta, was set at the highest level (with the level not being as noticeable there due to the sizes and other specifics of those markets). Given the size and structure of the Polish capital market, one might be tempted to conclude that the Polish solution is one of the worst in the entire EU.

It is difficult to understand the Polish legislator's insistence on the high control threshold level, especially given the numerous appeals from doctrine, practice, and investors, as well as empirical studies showing the impact of the threshold level on the protection of vulnerable individual investors. Instead, it would be worth considering the establishment of a control threshold at a level similar to other EU countries, that is, a maximum of 33%. In addition, it would be beneficial to introduce an alternative method of determining the control threshold in the form of, e.g., the possibility of appointing a certain number of company body members. Alternatively, bearing in mind the interests of the majority shareholder, it would be worthwhile to enable him/her to prove that — despite exceeding the control threshold at, for instance, 25% — he/she does not exercise control in the company. For example, a rebuttable control threshold of 25% and an absolute control threshold of 50% could be established. In addition, it would be a good idea to introduce, following the example of other countries, creep-in thresholds which would trigger a renewed obligation to issue a mandatory tender bid for all the remaining shares. This would increase the opportunities for individual investors to exit their investments as the dominant shareholder successively accumulates capital.

The above changes require a decisive and courageous stance on the part of the legislator, who must simultaneously reckon with the consequences in the form of a potential wave of delisting during the transition period, as well as limited demand for entry into the stock market by entities remaining in the hands of highly concentrated capital. However, the legislator should realize that only consistent and certain protection of the minority shareholders' interests will encourage individual investors to invest in the stock market long-term. After all, the possibility of exiting on fair terms is the *sine qua non* condition for making an informed decision to invest one's savings in the stock market. Restoring the individual investor's faith in a transparent financial system is the only way forward for the Polish

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stock market, and effective mandatory call provisions are one of the crucial pillars of investor protection.

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