Katarzyna Franczak (Uniwersytet Jagielloński)

CONTROVERSIES OVER AN INSTITUTION OF COMPULSORY BUYOUT OF MINORITY SHAREHOLDERS

1. The Concept and Structure of the Institution of Compulsory Buyout of Minority Shareholders: 1.1. Legal Structure of Compulsory Buyout of Shares in the Code of Commercial Companies, 1.2. Act on Public Offering, 1.3. "Squeeze-out" in the Countries of the European Union – 2. Arguments Brought Forward Against the Institution of "Squeeze-out": 2.1. Substantial Prerequisites Issue, 2.2. Violation of Principle of Citizens' Confidence in State and Law-making Process; Problem of Acquired Rights Theory, 2.3. Scope of Judicial Verification of the "Squeeze-out" Resolution – Violation of Right to a Fair and Merits-based Hearing of a Case before a Court, 2.4. The Issue of Valuation of Buyout Shares – 3. Judgment of the Constitutional Tribunal of 21st of June 2005: 3.1. Position of the Constitutional Tribunal on the Requirement of Giving Reasons for the "Squeeze-out" Resolution, 3.2. Criticism of Tribunal's Reasons for the Judgment – 4. Final Conclusions.

1. Since its enactment in the Commercial Companies Code in the year 2000[1], the institution of compulsory buyout of shares of minority shareholders caused much controversy in literature which were accompanied by disputes on the ground of judicature. The essence of the compulsory buyout institution consists in that majority shareholders may adopt a resolution, within the general meeting, according to which a minority shareholder shall be obliged to sell all the shares for the benefit of majority shareholders, with simultaneous obligation of majority shareholders to repurchase them. Basically, the result of application of the institution is the loss of status of a shareholder by minority shareholders whose shares are subject to compulsory buyout. The process is conducted against their will and has an effect of taking over company by acquiring shareholders[2].

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[1] Ustawa z dnia 15 września 2000 r. – Kodeks spółek handlowych (Commercial Companies Code of Sept. 15, 2000) (Dz.U. 2000. Vol. 94, item 1037, with amendments). It replaced Commercial Code of June 27, 1934.

[2] See A. Szumański [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz do art. 301–458* (Commercial Companies Code. Commentary on Art. 301–458), vol. III, Warszawa 2003, p. 935.

The abovementioned structure is often defined by a broader notion of "squeeze-out"[3]. The concept of "squeeze-out" consists of numerous methods which lead to exclusion or significant reduction of influence of minority shareholders on running the company[4]. It is underlined, that the aim of the institution is protection of majority shareholders against minority shareholders who act disloyally and who expose the company to loss and damage by abusing their rights. At the same time the institution was introduced in order to protect financial interest of minority shareholders, who shall be awarded adequate price for the shares[5].

1.1. Polish legislator arranged the institution of "squeeze-out" in a double-track manner: in the Commercial Companies Code and the Act on Public Offering[6]. Code's regulation concerns only "private"[7] companies, to which model of qualified resolution of general meeting of shareholders has been adopted, on the grounds of which the decision of compulsory buyout is taken. Act on Public Offering defines conditions of the buyout only with reference to public[8] companies, where "squeeze-out" takes place through the other method – the right to demand the sell of shares by remaining shareholders.

The idea of compulsory buyout comes down to possibility of deprivation of minority shareholders its status (a status of shareholder of a joint-stock company) on condition that they represent no more than 5 percent of the share capital, irrespectively to their number. Majority shareholders, but no more than five, on the basis of a resolution passed by majority of 95 percent of votes, and in aggregate holding no less than 5 percent of the share capital, can carry out compulsory buyout. Moreover, each of majority shareholders shall hold no less than 5 percent of the share capital. In such a form the "squeeze-out" institution has functioned since its amendments in 2003[9]. Among the requirements of applying the institution of compulsory buyout there are no substantial prerequisites, which means that the institution is not dependent on existence of important causes. The statute also does not provide the need for justification of the resolution.

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[3] The term comes from the USA, means taking up actual activity in order to discourage shareholder's further participation in company, as opposed to "*freeze-out*", elimination of shareholders which is permitted by law. See M. Cejmer, *Koncepcja przymusowego wykupu akcji drobnych akcjonariuszy (squeeze out)* (The Conception of Compulsory Buyout of Shares of Minority Shareholders) [in:] *Europejskie prawo spółek* (European Company Law), eds. M. Cejmer, J. Napierała, T. Sójka, vol. I, *Instytucje prawne dyrektywy kapitałowej* (Legal Institutions of the Capital Directive), Kraków 2004, p. 296.

[4] See M. Litwińska-Werner, *Kodeks spółek handlowych. Komentarz* (Commercial Companies Code. Commentary), Warszawa 2005, p. 965.

[5] See A. Szumański [in:] S. Sołtysiński *et al*., *Kodeks*, vol. III, p. 935.

[6] Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych (Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies of July 29, 2005) (Dz.U. 2005. Vol. 184, item 1539, with amendments).

[7] Companies are called "private" because the circle of shareholders is definite. See A. Szumański, *Prawo spółek. Suplement* (Company Law. Supplement), Bydgoszcz–Kraków 2005, p. 12.

[8] In accordance with article 4 point 20 of Act on Public Offering, the company is public, when at least one of shares is intangible.

[9] Ustawa z dnia 12 grudnia 2003 r. o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw (Act on Changing Commercial Companies Code and Some Other Acts of December 12, 2003) (Dz.U. 2003. Vol. 229, item 2276), which came into force on January 15, 2004.

Code's "squeeze-out" is generally regulated in the provisions of article 418 of the Commercial Companies Code. The legislator used technique of sending back to other provisions, so the regulation of article 418 is not exhaustive. In the scope of method of voting on the resolution of compulsory buyout the provision sends back to article 416 § 2 and 3 of the Code, methods of making appraisal of buying out shares are set forth in the article 417 § 1–3 and procedure of cancelling share certificates is carried out on the basis of article 358 of the Code. One of the references has multi-stage character, because article 417 § 1 sentence 3 of the Code sends back further to article 312 § 5, 6, 8 which regulates work of a certified auditor. These provisions shall be applied correspondingly, with respect to specific character of the institution of compulsory buyout, which means that some of them shall be applied "directly", the others with modifications, and some shall not be applied at all. The general provisions pertaining general meeting as well as provisions on appealing resolutions also shall be applicable.

1.2. Contrary to Code's regulation, in the public company there is no requirement for passing a resolution on compulsory buyout. In the provision of article 82 sec. 1 the Act on Public Offering introduces construction of the claim on behalf of the shareholder who attained or exceeded 90 percent of total number of votes in the public company. He can claim from the other shareholders of this company selling all of the shares possessed by them. Such a claim is vested also with the group of shareholders that have at least 90 percent of votes in a company which is part of a capital group, connected by the agreement provided by article 87 sec. 1 point 5 of the Act on Public Offering. All of minority shareholders must be subject to buyout[10].

Requirements of "squeeze-out" arising from the Act on Public Offering are regarded to be much lenient than those in the Code. Apart from absence of the need to adopt a resolution the requirements on the corporate supervision are more liberal, but also there is no limitation on the number of buying-out shareholders and representing by them the fraction of share capital[11].

Regulation of "squeeze-out" in the Act on Public Offering did not meet with major criticism or discussion comparing to the parallel institution in the Commercial Companies Code, and that is why only the Code's regulation would be further discussed.

1.3. The institution of compulsory buyout is new not only to the Polish legal system but has got a relatively short history also in other countries of the EU. Its implementation stems from the changing economic relations and was the answer to the economic and legal requirements of running the businesses.

From the technical point, "squeeze-out" is regulated differently in each country. "Squeeze-out" can be executed on the basis of the court's decision (so-called external mode), resolution of the body of the company (like in Poland) or unilateral statement of the taking over shareholder (so-called internal modes)[12]. It is emphasized, that irrespec-

[10] See M. Rodzynkiewicz, *Kodeks spółek handlowych. Komentarz* (Commercial Companies Code. Commentary), Warszawa 2007, p. 747.

[11] *Ibidem*, pp. 747–748.

[12] See A. Radwan, *Regulacja przymusowego wykupu akcji drobnych akcjonariuszy – uwagi de lege ferenda* (Regulation of Compulsory Buyout of Minority Shareholders – De Lege Ferenda Remarks), MP, vol. 11: 2003, no. 11, p. 502.

tive of the technical method of constructing the institution, in all legislatures it is a regulation that aims to protect rights of majority shareholders[13].

2. Compulsory buyout was introduced to the Polish law by the Commercial Companies Code on 15th September 2000 and since the very beginning has raised numerous opinions in the legal doctrine[14], namely that the regulation of article 418 is burdened with a number of drawbacks that give reasons for its radical revision. Some part of the doctrine ascertained that the mode of executing compulsory buyout in the way of the resolution of a general meeting is from the juridical point of view incorrect itself[15], but frequently it was also charged that rights of minority shareholders are not protected enough[16]. Critical opinions aimed at regulation of article 418 of the Code has led to the change of the institution which was amended on 12 December 2003. Provisions of article 418 on the one hand aggravated prerequisites of admissibility of applying the institution, on the other provided more efficient protection of the interests of minority shareholders.

As the aim of enacting the institution of compulsory buyout, it was indicated in the explanatory statement of the Commercial Code Companies that it would be easier to transform an "open" company into a "private" or "family" company[17]. At the same time, without any substantial arguments, it was indicated that similar regulations exist in the legal systems of Holland, France and Belgium. Justness and correctness of argumentation based on comparison of the solution adopted in article 418 with other legal systems was also subjected to criticism[18].

The institution of compulsory buyout of the shares allows to change the existing ownership's relations in the joint-stock company without the necessity of acquiring the agreement of minority shareholders for it. Many contradictory opinions and ideas pertaining both the aims for which "squeeze-out" should serve but also the procedure itself can be met in the literature and jurisdiction. Apart from numerous doubts about the shape of the institution, there are also disputes concerning the legal character of the resolution of general meeting, its validity and the choice of the way of appealing it. It is in due course to incline to the most popular opinion and to recognize resolution as a type of legal action (act in the law)[19], to which, beside provisions of the Commercial Companies Code on appealing resolutions, it is also possible to apply (however in limited scope) provisions of the Civil Code on defects in declarations of will. It is proper to opt for the

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[13] See A. Szumański [in:] S. Sołtysiński *et al.*, *Kodeks*, vol. III, p. 934.

[14] See i.a. A. Radwan, *Regulacja*, pp. 500–505.

[15] *Ibidem*, p. 500.

[16] See P. Wierzbicki, *Sposoby sądowej ochrony mniejszościowych akcjonariuszy w procedurze przymusowego wykupu akcji* (The Judicial Measures of Minority Shareholders Protection in the Procedure of Compulsory Buyout), PPH, 2005, no. 9 (156), p. 11; see also A. Radwan, *Regulacja*, pp. 500–501.

[17] See *Prawo spółek handlowych, projekt z 31.03.1999 r. Uzasadnienie projektu ustawy* (Commercial Companies Law, Bill of March 31, 1999. Grounds for the Bill), St. Pr., 1999, no. 1–2 (139–140), p. 177.

[18] See A. Całus, *Przymusowy wykup akcji drobnych akcjonariuszy – uwagi prawno-porównawcze* (Compulsory Buyout of Minority Shareholders – Comparative-law Remarks) [in:] *Studia z prawa prywatnego gospodarczego. Księga pamiątkowa ku czci Profesora Ireneusza Weissa* (Studies on Commercial Private Law. Memorial Book Dedicated to Prof. Ireneusz Weiss), Kraków 2003, pp. 25–72.

[19] Z. Radwański, *System prawa prywatnego. Prawo cywilne – część ogólna* (Private Law System. Civil Law – General Part), vol. II, Warszawa 2002, p. 174.

idea which distinguishes, apart from resolution void by the virtue of law, resolutions non-existing[20]. This distinction is of significant importance in case of the necessity to appeal the resolution of general meeting of shareholders.

2.1. The lack of substantial prerequisites which would be a condition to execute compulsory buyout caused particular controversies in the legal doctrine since its introduction. These substantial prerequisites of general clauses allowed to limit the interference with minority shareholders' rights, pointing at the circumstances such as important reasons or action contradictory to company's business. The symptom of requirement of substantial prerequisites is the most common necessity for justifying resolutions.

This part of the doctrine, which saw the necessity to introduce substantial prerequisites and justify resolution on compulsory buyout, compared this institution to a similar one, which is exclusion of a limited liability company's shareholder (the article 266 § 1 of the Code)[21]. In a limited liability company the prerequisites of applying said institution are exactly "important reasons" concerning given shareholder. It is correct to incline to the opinion that this prerequisite contains personal component of capital character of a limited liability company and to come to a conclusion that a joint-stock company as of full capital character does not have to provide similar requirement. It is also worth noting that in a limited liability company this is the court who decides to exclude a shareholder, whereas the compulsory buyout in a joint-stock company takes effect in the way of a correctly adopted shareholders' resolution. The duty of court is reduced only to cognizance of the claim to repeal such a resolution (the article 422 of the Code) or to declare the resolution invalid (the article 425 of the Code).

Polish legislator shaped compulsory buyout as an institution which is founded on objective prerequisites and which can not be judged. If the legislator wanted to introduce legal requirements for giving reasons for a resolution he would have provided them in the provisions.

When the prerequisites of article 418 of the Code are met, the majority shareholders are not obliged to disclose to anyone the reasons for which they adopted the resolution in question. The reasons for this can be e.g. intention to decrease costs of running the company through reduction of shareholders' number or to apply sanctions against minority shareholders, when they abused their rights (minority rights) as well as other reasons[22].

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[20] See A. Szajkowski, M. Tarska [in:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, *Kodeks spółek handlowych. Komentarz do artykułów 151–300* (Commercial Companies Code. Commentary on Art. 151–300) vol. II, Warszawa 2005, pp. 703–704; similarly J.P. Naworski, R. Potrzeszcz, T. Siemiątkowski, *Komentarz do kodeksu spółek handlowych. Spółka akcyjna i przepisy karne* (Commentary to the Commercial Companies Code. Joint-stock Company and Penal Regulations), vol. I, Warszawa 2003, pp. 778–779; similarly M. Rodzynkiewicz, *Kodeks*, pp. 439–440. See also T. Szczurowski, *Nieistniejące uchwały zgromadzenia spółki kapitałowej* (The Non-existing Resolutions of the Capital Company Meeting), MP, vol. 15: 2007, no. 6, p. 303–304 and indicated literature.

[21] See A. Szumański, *Pokrzywdzenie akcjonariusza oraz sprzeczność z dobrymi obyczajami jako przesłanki uchylenia uchwały walnego zgromadzenia spółki akcyjnej o przymusowym wykupie akcji* (Shareholder's Detriment and Inconsistency with Good Practices as the Prerequisites of Repealling General Meeting of Shareholders' Resolution on Compulsory Buyout of Shares), PPH, 2006, no. 3 (162), p. 5.

[22] See A. Szumański [in:] W. Pyzioł, A. Szumański, I. Weiss, *Prawo spółek* (The Company Law), Bydgoszcz–Kraków 2005, pp. 688–689.

By not introducing substantial prerequisites legislator enabled ipso facto to exclude minority shareholders at any time.

In practice, at the basis of the application of compulsory buyout will lie the interest of the company, which corresponds with the interest of majority shareholders. There are also opinions, that there is no conflict of interest, if majority shareholders adopt a decision on buyout in order to accomplish their own interest[23]. It is worth noting, that majority shareholders are those who make the decision in this case, not the company per se.

2.2. Institution of compulsory buyout of shares of minority shareholders came into force (just like the Commercial Companies Code) on 1st January 2001. In accordance with the wording of transitional provisions of articles 612 and 628 of the Code, to legal relations within commercial companies that existed on the day of coming into force of the Code, the provisions of the Code itself shall be applicable, unless any exceptions have been established. As for the "squeeze-out" there are no particular transitional provisions which would prescribe application of the previously binding provisions. Moreover, in case of doubt whether previous provisions or provisions of the Commercial Companies Code shall be applicable, it is correct to apply the latter. Concluding, also shares acquired or taken-up before the date of 1st January 2001 can be the subject of compulsory buyout[24].

It should be noted[25] however, that the theory of acquired rights shall not be applicable towards the institution of compulsory buyout. This theory consist in maintaining in force those rights which were acquired before the new regulation of the Code came into force, and the new regulation does not provide them or even banns them. The theory assumes existence of conflict between those two regulations[26]. In this case however we deal with regulation which is entirely new to the Polish legal system. "Furthermore [...] the theory of acquired rights can apply only to particular rights not the whole (general) rights vested with entitled person, so it cannot cover all rights from the shares, but only particular rights"[27].

2.3. Since its introduction to the Code compulsory buyout has been met with various opinions of scope of judicial verification of the resolution.

Fundamental charge which has been put forward by the judicature, directed at the legislator, was reduced to the issue that the legislator has not guaranteed the opportunity of substantial judicial verification of resolution. As critics argued, legislator has not provided necessity of proving existence of substantial prerequisites of "squeeze-out" as well as condition of giving reasons for such a resolution[28]. In the doctrine was discussed, in turn, the scope of admissibility of the claim of the minority shareholder to repeal resolution of the general meeting on the grounds of article 422 § 1 of the Code, because at the

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[23] See M. Litwińska-Werner, *Kodeks*, p. 969.

[24] See A. Szumański [in:] S. Sołtysiński *et al.*, *Kodeks*, vol. III, pp. 940–941.

[25] *Ibidem*.

[26] As the examples are given voting privileged shares, which under the Commercial Code permitted at most 5 votes per share, while at present Code of Commercial Companies provides maximum 2 votes per share (in private companies).

[27] A. Szumański [in:] Sołtysiński *et al.*, *Kodeks*, vol. III, p. 941.

[28] See position of Poznań's District Court expressed in judicial question to the Constitutional Tribunal.

assumption that article 418 of the Code is *lex specialis* towards to article 422 § 1 of the Code, it would hinder to minority shareholders effective recourse to the law[29].

2.4. Granted that participation of minority shareholder comes down to the sphere of economic interest, awarding appropriate "compensation" for buying-out shares does not breach any reasonable interest of minority shareholder, but is only "a change in a form of investment". The problem comes down to valuation of buying-out shares so that the valuation would be equal to their economic, market price. The price should take into account not only entirety of the financial relations of the company, but also the status of the minority shareholder in the company (e.g. shares privileges). Besides, minority shareholder must be guaranteed that the "buyout price" will be paid and paid in a short period of time. Until he gets the whole sum, he keeps all of the rights from shares he is entitled to. The Commercial Companies Code implements foregoing postulates on the grounds of the provisions that effectiveness of buyout is dependent upon the payment of a whole sum before shares are delivered. The matter of selection of certified auditors and their possible partiality still brings about doubts.

3. As the result of bringing to the Constitutional Tribunal judicial questions of the courts as well as the motion of Ombudsman, the Tribunal on 21st June 2005 issued ruling about compliance of the Commercial Companies Code's article 418 § 1 with the Constitution[30].

This final judgment of the Tribunal was supposed to bring end to the disputes about the institution of "squeeze-out". However, the opinion of the Tribunal included in the reasons for the judgment was commonly recognized to be incorrect. Contrary to the regulation of article 418 of the Commercial Companies Code, the Tribunal indicated the necessity of stating in the resolution reasons for compulsory buyout, so that courts could supervise these resolutions, which is guaranteed by the Constitution. In connection with this fact court, while examining the lawsuit on repealing the resolution under the article 422 of the Code, could also exercise substantial, not only formal supervision of lawfulness of resolution, stated in article 45 sec. 1 of the Constitution.

The judgment on compulsory buyout was qualified to "positive interpretation judgments" category which means that the provision examined by the Tribunal can be regarded as consistent with the Constitution only due to granting to the provision of additional content. Provisions of an article 418 of the Code do not provide for the necessity of stating in the resolution reasons for compulsory buyout. Therefore Tribunal created

[29] A. Szumański recognized as inadmissible such a claim, only in case when minority shareholder would invoke on prerequisite of wrong, because article 418 of the Commercial Companies Code was to be *lex specialis* towards to article 422 § 1 of the Commercial Companies Code within this domain. See A. Szumański, *Przymusowy wykup akcji drobnych akcjonariuszy* (Compulsory Buyout of Minority Shareholders), PPH, 2001, no. 11 (110), p. 5; similarly Ombudsman regarded article 418 of the Commercial Companies Code as a special provision towards article 422 § 1 of the Commercial Companies Code. Opposite see M. Litwińska-Werner, *Kodeks*, pp. 970–971, not recognizing article 418 of the Commercial Companies Code as *lex specialis* towards to article 422 § 1 of the Commercial Companies Code.

[30] Judgment of Constitutional Tribunal of 21st June 2005, P 25/02; conclusion of a judgment was published on July 8, 2005 in Dz.U. 2005. Vol. 124, item 1043. The Constitutional Tribunal ruled that article 418 § 1 of the Commercial Companies Code is consistent with article 2, article 31 sec. 3, article 45 sec. 1, article 64 in connection with article 31 sec. 3, article 176 sec. 1 and article 21 sec. 2 of the Constitution of Republic of Poland.

substantive prerequisite of applying the institution on its own. In the doctrine, position of the Tribunal was considered to be wrong and it was noticed that the proposed interpretation could be in conflict with the EU law[31]. It is then necessary to carry out the analysis of the abovementioned judgment and to determine its practical implications.

3.1. Provision of article 418 of the Code, in its first sentence, introduces the institution of compulsory buyout and then specifies the conditions on which the application of the institution is dependent. All these prerequisites are of formal nature, i.e. capital requirements or majority required at voting on resolution, which enable automatic application of institution. There is absence of substantial prerequisites as well as the requirement of stating in the resolution reasons for compulsory buyout. According to the Tribunal judges[32], without the requirement of two-part structure of resolution of the shareholders (conclusion of a decision together with reasoning) the minority shareholder would lose basis for filing a lawsuit based on article 422 § 1 of the Code, due to the lack of possibility of giving reason for his claim. The second part of resolution, comprising reasons for compulsory buyout shall, according to the Tribunal, indicate prerequisites that justify its passing. As an example that sufficiently justifies passing such a resolution can be indicated activities of minority shareholders that are of real danger for the interest of the company.

What is more, in case of absence of reasoning of the resolution, the whole burden of taking evidence would lie only on the bought-out shareholder. The Tribunal wanted to prevent a situation in which such proving not only would be difficult, but in the first place always result in failure and introduced requirement of stating in the resolution reasons for compulsory buyout.

The Constitutional Tribunal in the judgment of 21 June 2005 adjudicated that article 418 of the Code is consistent with article 45 sec. 1 of the Constitution (right to fair and public trying case by the court) and article 176 sec. 1 (rule of two stages court proceedings) on condition, that it does not exclude right of the shareholder who is harmed by compulsory buyout to appeal this resolution. Provision of article 190 sec. 1 of the Constitution confers to the decisions of the Tribunal universal binding force and decides that they are final. It can be therefore claimed that the judgment of the Tribunal finally ruled the possibility of vesting the court with control over the resolution on "squeeze-out".

3.2. The judgment of the Tribunal was regarded ambivalently by the doctrine. On the one hand, the Tribunal confirmed the possibility of court protection of minority shareholders. On the other, however, the Tribunal introduced preterlegal prerequisite of compulsory buyout institution, acting by this as a legislator[33]. Article 418 of the Code provides for exhaustive regulation of prerequisites for the buyout, among which there is no require-

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[31] See A. Radwan, *Przymusowy wykup akcji w świetle stanowiska Trybunału Konstytucyjnego* (Compulsory Buyout of Shares in the Light of Constitutional Tribunal's Position) [in:] *Kodeks spółek handlowych po pięciu latach* (Commercial Companies Code After Five Years), ed. J. Frąckowiak, Wrocław 2006, pp. 590–593.

[32] See point V of dissenting opinion of Judges of the Tribunal – T. Dębowska-Romanowska and B. Zdziennicki, to reasons for the judgment of 2[1st] June 2005, P 25/02.

[33] See A. Szumański, *Pokrzywdzenie*, p. 5; see also O. Lipińska-Długosz, *Ochrona spółki akcyjnej i jej akcjonariuszy przed niewłaściwym wykonywaniem prawa* (The Protection of Joint-stock Company and Its

ment of stating in the resolution reasons for compulsory buyout. It is claimed, that the interpretation of article 418 of the Code, other than this presented by the Tribunal, shall be recognized as unconstitutional.

The main objection of the doctrine was the altering, previously adopted by the Polish legislator, concept of compulsory buyout as an institution based on objective, not evaluative, prerequisites[34]. It is approved that the legislator by adopting so-called extra-judicial model of "squeeze-out", i.e. through resolution of general meeting of shareholders, intended to guarantee automatism of applying this institution in order to accelerate and simplify buyout process[35]. It is emphasized also, that the requirement of giving reasons of "squeeze-out" resolution leads to the acceptance of the thesis that each resolution of general meeting, regardless of the subject-matter, shall have reasons, because to each resolution of shareholders prerequisites of repealing from article 422 sec. 1 of the Code are applicable[36]. Thus, court on the grounds of reasons for compulsory buyout stated in the resolution could decide if prerequisites of e.g. infringement of good customs were met.

It is worth noting that by accepting additional requirement for giving reasons for resolution, the Tribunal brought about violation of article 6 of the Civil Code (in connection with article 2 of the Commercial Companies Code) which regulates division of burden of proof[37]. The shareholder whose shares are subject to buyout is a plaintiff in lawsuit for repealing resolution of general meeting of shareholders, so the *onus* of proof of proving prerequisites of article 422 § 1 of the Code lies on him not on the company (as the Tribunal understands)[38].

4. Code's regulation of compulsory buyout is undoubtedly complex, and despite the amendment of article 418 of the Code, still raises interpretative doubts. Controversial is not only the procedure of carrying the "squeeze-out" institution itself (by the way of resolution), but also its exclusion in relation to public companies. The issue of shares that are burdened by right of pledge or right of usufruct, in spite of numerous postulates, was not regulated unambiguously. Furthermore, there is absence of regulation of shares that are possessed by legal subsidiaries[39].

In the light of the provisions pertaining institution of compulsory buyout, especially articles 418 and 417 of the Code, legal structure of acquirement of shares subjected to compulsory buyout can raise doubts. Despite the amendment of article 418 of the Code, the issue in which moment minority shareholders transfer rights from shares and when majority shareholders acquire these shares remains controversial[40]. It is still not clear on behalf of whom rights from shares of "bought-out" shareholders are transferred.

Shareholders Against the Improper Use of Law), Warszawa 2006, p. 119; see also A. Radwan, *Przymusowy wykup*, p. 582.

[34] See M. Rodzynkiewicz, *Kodeks*, p. 750.

[35] See A. Szumański, *Pokrzywdzenie*, p. 6.

[36] See M. Rodzynkiewicz, *Kodeks*, p. 750.

[37] See A. Szumański, *Pokrzywdzenie*, p. 6.

[38] *Ibidem.*

[39] See A. Radwan, *Regulacja*, p. 502.

[40] See W. Popiołek, *Przeprowadzenie przymusowego wykupu akcji w trybie art. 418 kodeksu spółek handlowych – zagadnienia wybrane* (Conducting Compulsory Buyout on the Grounds of Art. 418 of the Commercial Companies Code – Selected Issues), "Rejent", vol. 13: 2003, no. 6, pp. 154–155.

Until the moment of taking a stand by the Constitutional Tribunal discussion in the doctrine concerned mainly consistency of provisions on compulsory buyout with the Constitution. After the judgment of the Constitutional Tribunal, in which such consistency was adjudicated the problem seemed to have been resolved. Yet, critical charges are raised towards the introduction by the Constitutional Tribunal preterlegal duty of giving reasons of "squeeze-out" resolutions.

However one ought to emphasize the fact, that common courts of law and the Supreme Court are bound only by a conclusion of a decision of the Tribunal, but not its reasoning[41], in which controversial opinion was expressed. For that reason it should be considered, that the institution of compulsory buyout can be applied by the courts in accordance with the wording of provisions of article 418 of the Code, which do not provide requirements of stating in the resolution reasons for compulsory buyout. Thanks to this measure, the institution would remain in harmony, both with the intention of the legislator that deliberately has not introduced substantial prerequisites, and generally comprehended nature of a joint-stock company, where in the name of economic interest membership can be sacrificed.

KONTROWERSJE WOKÓŁ INSTYTUCJI PRZYMUSOWEGO WYKUPU AKCJI DROBNYCH AKCJONARIUSZY

Streszczenie

Instytucja przymusowego wykupu akcji drobnych akcjonariuszy (*squeeze out*) od momentu jej wprowadzenia do kodeksu spółek handlowych w 2000 r. wywoływała liczne kontrowersje w piśmiennictwie, którym towarzyszyły spory toczące się na gruncie judykatury. Istota instytucji przymusowego wykupu polega na tym, że akcjonariusze większościowi mogą podjąć uchwałę w ramach walnego zgromadzenia, na której mocy akcjonariusze mniejszościowi będą zobowiązani do sprzedaży na ich rzecz wszystkich swoich akcji. Skutkiem zastosowania art. 418 k.s.h. jest przymusowe pozbawienie drobnych akcjonariuszy statusu wspólników spółki akcyjnej oraz przejęcie spółki przez akcjonariuszy dokonujących wykupu. Przedmiotem dyskusji była zasadniczo kwestia samej dopuszczalności instytucji przymusowego wykupu oraz jej zgodności z Konstytucją, jak również z naturą spółki akcyjnej. W doktrynie podnoszono, że uchwała o *squeeze out* powoduje naruszenie własności i innych praw majątkowych akcjonariuszy, których akcje stanowią przedmiot przymusowego wykupu. Krytyce poddano także naruszenie prawa do sprawiedliwego i merytorycznego rozpoznania sprawy przez sąd oraz naruszenie zasady zaufania obywateli do państwa i stanowionego prawa. W wyniku skierowanych do Trybunału Konstytucyjnego pytań prawnych Trybunał orzekł w wyroku z 21 czerwca 2005 r. o zgodności wspomnianego przepisu kwestionowanej normy z Konstytucją.

Mgr Katarzyna Franczak – obecnie jest doktorantką IV roku prawa na Wydziale Prawa i Administracji Uniwersytetu Jagiellońskiego. Pracę doktorską przygotowuje w Katedrze Prawa Gospodarczego Prywatnego z zakresu problematyki działalności fundacji. Zainteresowania skupiają się wokół problematyki prawa spółek handlowych i fundacji.

[41] *Ibidem*; see also L. Garlicki, W. Skrzydło, *Sądy i Trybunały w Konstytucji i w praktyce* (Courts and Tribunals in Constitution and Practice), Warszawa 2005, p. 25.

Katarzyna Franczak, MA – at present a fourth-year student of law at the Department of Law and Administration of the Jagiellonian University of Cracow. Prepares a dissertation on the activity of foundations at the Faculty of Economic Private Law. Her interests focus on the topics connected with the company law and foundation law.