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GOLDEN SHARE AS A SPECIAL PRIVILEGE OF THE STATE TREASURY IN THE POLISH LEGAL SYSTEM

DOI: 10.30729/2541-8823-2019-4-2-104-113

Abstract: The main purpose of this article is the synthetic analysis of the golden share institution in the Polish legal system. In the face of the progressing privatization process of the majority of state-owned enterprises after – which began in Poland in 1989 – the State Treasury wished to ensure itself a real possibility to influence the strategic companies decisions. The perfect instrument to do this was nothing but golden share. The author wants to present the functioning of the golden share in the Polish legal system and also briefly discuss the term State Treasury company. The explanation of this term – from the author's point of view – is necessary for the reader to understand the divagations about the golden shares of State Treasury companies. The author intends to make it possible for the readers who do not deal with these issues during everyday business to understand the basics and the core of the institution of golden share as well as to enable more experienced persons to extend and consolidate their knowledge and furthermore – via rulings of Polish Supreme Court and Court of Justice of the European Union included in the article – to allow them to see this type of contract in practical terms.

Keywords: Golden share, State Treasury company, commercial law, Commercial Companies Code, company, enterprise, Supreme Court, rulings, European law.

Introductory remarks

The core of this article is an analysis of the golden share (owned by State Treasury companies) in the Polish legal system. First and foremost it should be stressed that

this kind of share is not and also has never been defined by law¹. In accordance with the *Lexicon of commercial companies*², golden share in the broadest sense is a specific privilege which enables its owner to retain a significant influence on decisions taken by the company, related *inter alia* to the shareholding structure or management of the company³. Moreover, this privilege is associated with the specific, precisely defined share⁴. In this article the author will focus on the golden share as an impact instrument of State Treasury companies. To enable readers to understand this topic well, the author will also explain the term State Treasury company as well as the specificity of this company. The author is aware how broad the issue of golden share is in Polish and European law. For that reason it should be noticed in the introductory remarks that the aim of this work is the description of a special privilege of the State Treasury in the Polish legal system in the context of the golden share instrument. Therefore – due to limited scope of this work – the author will not be dealing with the issues connected to the trading process with the participation of State Treasury companies. It should be emphasized that in this article the author will discuss such issues as specificity of the State Treasury ownership policy, special treatment of the State Treasury in the context of golden share and the statutory privileges of the State Treasury.

The choice of this topic seems natural for the author, especially in the context of the high influence that State Treasury companies still have on the financial market. From the economical point of view, ownership of the State Treasury has got a social nature – it belongs to the society. Therefore it can be claimed that the State Treasury and – consequently – State Treasury companies represent the general public⁵. Furthermore – as the author already pointed out – in this article readers will find some examples from the judicature. The author would like to stress that he is aware of the fact that the Republic of Poland adheres to the continental civil law system, as opposed to case-based common law systems. Nonetheless, certain trends arise in Polish case law, which contribute to the growing uniformity of the interpretation of some provisions and are not without influence on their functioning.

State Treasury company – significance and legal regulations

As the author pointed out earlier, the explanation of this term (State Treasury Company) is necessary to understand the divagations about golden shares, which belong to these type of companies. *Ad rem*, State Treasury company is a special type of company used for running a business by the state. It is a state-owned legal entity, which

¹ J. Dąbrowska [w:] A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 296.

² B. Gliniecki, *Leksykon spółek handlowych*, Warszawa 2012.

³ *Ibidem*, p. 437.

⁴ J. Okolski, J. Jacyszyn, E. Marszałkowska-Krześ, S. Krześ, *Leksykon Kodeksu Spółek Handlowych*, Wrocław 2004, p. 243.

⁵ J. Krucalak-Jankowska [w:] A. Kidyba, M. Michalski, *Spółki skarbu państwa na rynku kapitałowym*, p. 115.

is based on state-owned property and its shareholder is the State Treasury. State Treasury Company remains a state legal entity as long as all its shares are the property of the State Treasury or another state legal person¹. The company, which is formed as a result of the commercialization of a state-owned enterprise, enters into all legal relationships of this enterprise². Employees of a state-owned enterprise *ex lege* become employees of the State Treasury Company and the company's opening balance sheet is also the closing balance of the state-owned enterprise. The relevant provisions of the Commercial Companies Code³ apply to State Treasury Companies⁴. From the historical point of view, it is worth to note that after 1990 in Poland many state-owned enterprises have become municipal and most of them are now a municipality sole proprietorship companies (for instance local transport companies or waterworks *et cetera*)⁵.

Polish Civil Code is also important for the discussed topic. In accordance with article 34 of this Code, the State Treasury is considered as the entity having rights and obligations related to state property which does not belong to other state legal persons⁶. Whereas the State Treasury's legal personality results directly from article 33 of the Civil Code. In accordance with this article, the legal persons are the State Treasury and organizational units which are given legal personality by specific regulations⁷. What is also important in this context, due to the wording of article 44 paragraph 1 of the Civil Code, ownership and other property rights constituting state property are vested in the State Treasury or other state legal persons⁸. In accordance with the ruling of the Polish Supreme Court⁹, the special nature of the State Treasury as a legal person stems from the fact that the State Treasury does not have classical authorities which are acting on behalf of the company. The State Treasury operates by state organisational entities which do not have legal personality (so-called *stacions fisci*). In the literature it is indicated that empowerment of state units and granting them property rights does not invalidate the principle that – in the economic sense – the owner of state property is the state and the personification of the state is the State Treasury¹⁰. A feature which distinguishes the

¹ W. J. Kanter, *Prawo gospodarcze i handlowe*, Warszawa 2018, p. 138.

² Art. 1, ustawa z 30.08.1996 r. o komercjalizacji i niektórych uprawnieniach pracowników, Dz.U. z 2017 r. poz. 1055 ze zm.

³ Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz. U. 2000 no. 94 poz. 1037.

⁴ W. J. Kanter, *Prawo gospodarcze i handlowe*, Warszawa 2018, p. 139.

⁵ *Ibidem*, p. 139

⁶ Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, Dz. U. 1964 no. 16 poz. 93.

⁷ *Ibidem*

⁸ *Ibidem*

⁹ Wyrok SN z 04.08.2006 r., III CSK 138/05, OSNC 2007, no.4, poz. 63.

¹⁰ M. Bednarek, *Przemiany własności w Polsce, podstawowe koncepcje i konstrukcje normatywne*, Warszawa 1994, p. 92 and following.

State Treasury as a legal person is the lack of a registered office and the fact that it is not incorporated into any register. It exists as long as the state exists¹. From the statements presented above it can be concluded that the State Treasury is the state's emanation in the sphere concerning civil law aspects².

Golden share as a special privilege of the State Treasury

Having discussed the term State Treasury Company, we can now move on to the subject (in the strict sense) of this article, *id est* – to a golden share. First of all it should be pointed out, that the term “golden share” has never been defined in any statute or law act³. In the Polish legal doctrine, the golden share is defined as a right or set of rights (mostly corporate) that facilitates control by the shareholder over strategic decisions in the company. However, we have to notice that these rights are not related to the shareholder's capital share⁴. The concept of a golden share does not imply the necessity of incorporating special rights in the share itself. Any special right (also personal right) results from the company's statute⁵. Moreover, it should be pointed out that any additional privileges may arise directly from provisions of law (for instance from appropriate Act of Parliament) or from acts of public authorities (including administrative acts)⁶.

¹ A. Brzozowski, W. J. Kocot, E. Skowrońska-Bocian, *Prawo cywilne. Część ogólna*, Warszawa 2010, p. 128.

² A.-M. Weber-Elżanowska, *Wpływ instytucji prawnych rynku kapitałowego na efektywność spółek skarbu państwa*, Warszawa 2017, p. 140.

³ J. Dąbrowska [w:] A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 296.

⁴ J. Dąbrowska [w:] A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 297, za: Ł. Gasiński, *Dopuszczalność wprowadzenia „złotej akcji” do konstrukcji spółki*, Przegląd Prawa Handlowego 1999, no. 3, p. 28; A. Szumański, „Złota” akcja w prawie polskim, Przegląd Prawa Handlowego 1998, no. 12, p. 1; M. Bałtowski, *Spółki Skarbu Państwa – próba typologii* [w:] A. Kidyba, *Spółki z udziałem Skarbu Państwa a Skarb Państwa*, p. 24; S. Sołtysiński, M. Mataczyński [w:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja (red.), *Kodeks spółek handlowych*, t. III. *Spółka akcyjna. Komentarz do artykułów 301-490*, Warszawa 2013, p. 417; S. Sołtysiński [w:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja (red.), *Kodeks spółek handlowych*, t. IV. *Łączenie, podział i przekształcanie spółek. Przepisy karne. Komentarz do artykułów 491-633*, Warszawa 2012, p. 1600; A. Opalski [w:] Sołtysiński (red.), *System Prawa Prywatnego*, t. 17B, *Prawo spółek kapitałowych*, Warszawa 2016, p. 361.

⁵ Wyrok SN z 30.09.2004 r., IV CK 713/03; Ł. Gasiński, *Dopuszczalność wprowadzenia „złotej akcji” do konstrukcji spółki*, p. 28.

⁶ J. Dąbrowska [w:] A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 297, za: S. Sołtysiński, „Złota akcja” Skarbu Państwa w świetle prawa unijnego i polskiego [w:] A. Łazowski, R. Ostrowski (red.), *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. Urodzin Profesora Eugeniusza Pionka*, Kraków 2005, p. 307; I. Karasek-Wojciechowicz, *Komentarz do ustawy o szczególnych uprawnieniach Ministra Skarbu Państwa oraz ich wykonywaniu w niektórych spółkach kapitałowych lub grupach kapitałowych prowadzących działalność w sektorach energii elektrycznej, ropy naftowej oraz paliw gazowych* [w:] S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja (red.), *Kodeks spółek handlowych*, t. V. *Pozakodeksowe prawo handlowe. Komentarz*, Warszawa 2015, p. 1261 oraz M. Szydło, *Złote akcje posiadane przez państwo w prywatyzowanych przedsiębiorstwach a swoboda przepływu w Unii Europejskiej*, *Prawo Spółek* 2006, no. 3, p. 22-23; A. Bodnar, D. Sześciło, „Złote veto” Skarbu Państwa a prawo wspólnotowe, *Europejski Przegląd Sądowy*, no. 5, p. 12.

In general, the idea of the golden share institution is to strengthen the privileges of its shareholder in relation to the other shareholders inside the company. It is demonstrated in a number of issues such as veto right, need for the shareholder's (who holds a golden share) approval to pass a resolution by the company and so on and so forth¹. Golden share may also entitle a shareholder to appoint or dismiss members of the management board and the supervisory board². With regards to all these regulations and privileges, it is important to take any action in accordance with the proportionality principle. In this context it is worth to note one of the judgments of the Supreme Court. This court ruled that the statutory provision which makes the validity of resolutions dependent on the participation of a representative of the State Treasury (holding a personal, privileged share) in the general meeting is invalid and does not have legal significance³. This ruling is related to the Polish Civil Code and to the Commercial Companies Code. In accordance with article 58 paragraph 1 of the Civil Code, a legal action which is contrary to the law or which is designed to circumvent the law is invalid unless a relevant regulation envisages a different effect, in particular that the invalid provisions of the legal act are to be replaced with relevant provisions of law⁴. This ruling is also connected with article 20 of the Commercial Companies Code, which covers the issue of equality of shareholders. In accordance with this regulation, the shareholders in a capital company shall be treated in the same manner where similar circumstances apply⁵. Therefore the Supreme Court found that – in accordance with article 58 of the Civil Code – the aforementioned provision of the company's statute is contrary to article 20 of the Commercial Companies Code and – consequently – it has no legal force⁶. However, there are a couple of exceptions which justify the differentiation of shareholders' rights. Nevertheless there are some circumstances under which those exceptions can exist. If there are no relevant reasons justified by the company's interests or other circumstances in which shareholders are involved, than the limits of differentiation of the rights and obligations of the shareholders should be determined only by the principle of proportionality, which I have mentioned in the previous part of this article⁷. We shall now continue this article with discussing some examples in which the shareholders privileges, as mentioned above, could exist legally.

¹ J. Dąbrowska [w:] A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 298.

² W. J. Katner, *Prawa mniejszości w spółkach kapitałowych*, p. 4; A. Szumański [w:] A. Szumański (red.), *System prawa prywatnego*, t. 19, *Prawo papierów wartościowych*, p. 141.

³ Wyrok SN z 30.09.2004 r., IV CK 713/03.

⁴ Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, Dz. U. 1964 no. 16 poz. 93.

⁵ Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz. U. 2000 no. 94 poz. 1037.

⁶ J. Dąbrowska [w:] A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 298,

⁷ M. Romanowski, *Zasada „jedna akcja – jeden głos” a natura spółki akcyjnej*, Czasopismo Kwartalne Całego Prawa Handlowego, Upadłościowego oraz Rynku Kapitałowego 2008, no. 4, p. 465 and 476.

Realization of public interest

Special rights can be obtained considering realization of public interest. First and foremost, in accordance with the Court of Justice of the European Union, a Member State fails to fulfil its obligations under Article 56 EC when it maintains for that State and for other public bodies special rights in a limited liability company, allocated in connection with golden shares held by that State in the share capital of that company, relating to the exemption from the 5% voting ceiling applying to the votes of other shareholders, the right to appoint a director of the company, when the State has voted against the nominees successfully elected as directors of that company and the right of veto over resolutions of the general assembly of the shareholders in relation to: a) amendments of the articles of association, including increases of share capital, mergers, divisions and winding-up, b) the conclusion of certain contracts concerning the structure and control of groups of companies, c) the removal or restriction of the preferential rights of shareholders in the case of an increase in share capital¹. Special rights and privileges connected with such actions shall be considered as activities in the exercise of public authority (not as private actions)². The free movement of capital, as a fundamental principle of the Treaty on European Union, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty on European Union or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality³.

To conclude – in accordance with the Court of Justice of the European Union judicature (*inter alia* mentioned above in footnotes) – golden share is admissible if:

- the restriction on free movement of capital is justified by the necessity of protection of important public interest,
- it is adequate and proportional to the assumed purpose,
- it takes the form of a subsequent control of the company's decision,
- important national interest would be jeopardized,
- it is temporary limited and it can be launched within a strictly specified period,
- it is based on clear and transparent criteria that the company can challenge in court,
- this preference is non-discriminatory and provides legal procedural guarantees⁴.

¹ Wyrok TSUE z 11.11.2010 r. w sprawie C-543/08 *Komisja Wspólnot Europejskich przeciwko Republice Portugalskiej*, LEX no. 612138.

² Wyrok TS z 07.05.2009 r. w sprawie C-443/08 *Komisja Wspólnot Europejskich przeciwko Republice Francuskiej*, LEX no. 504565.

³ Wyrok TS z 04.06.2002 r. w sprawie C-503/99 *Komisja Wspólnot Europejskich przeciwko Królestwu Belgii*, LEX no. 111986.

⁴ J. Dąbrowska [w]: A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 303-304.

State Treasury privileges in the Commercial Companies Code

In accordance with article 625 paragraph 1 of the Commercial Companies Code (which provides voting privileges of State Treasury shares), prior to 31st December 2004, the statutes of companies formed after the entry into force of this Act, with the State Treasury as a shareholder, may provide for a voting privilege of State Treasury shares greater than that stipulated in article 352; however, the State Treasury may not be granted more than five votes per share. But – in accordance with article 625 paragraph 2 of the Commercial Companies Code – the provisions of paragraph one shall cease to apply on the date on which the Republic of Poland accedes to the European Union. As of the date of the accession of the Republic of Poland to the European Union, the statutes of the companies in which the State Treasury is a shareholder may provide for a preference for State Treasury shares as far as the matters referred to in articles 351-354 are concerned. Moreover, in accordance with article 625 paragraph 3 of the Commercial Companies Code, article 613 shall apply to the rights of the State Treasury in joint-stock companies acquired in accordance with the paragraph one. Meanwhile, this article 613 provides that the rights of shareholders of commercial companies acquired prior to the date this act enters into force shall remain valid (paragraph one). What is more, the contents of the rights referred to in paragraph one shall be governed by the existing provisions. The provisions of this act shall apply to a change to the contents of the rights and to dispositions of the rights of the shareholders effected after the entry into force of this act¹.

The abolition of limitation of the possibility of privileging State Treasury to cases (issues) where it is important for the public interest (in particular protection of state security) has been criticized in doctrine². The current regulation excludes a possibility of privileging shares in a wider scope than the scope resulting from the Commercial Companies Code. The shape of this regulation is (in a large extent) a result of the approach that the Supreme Court presents in this matter. This court ruled that the privileges of the State Treasury shares cannot violate the regulations of articles 351-354 and also article 625 paragraph 1 of the Commercial Companies Code and they shall not unduly restrict the interests of the owners of ordinary shares and violate the equality of shareholders rule determined in article 20 of the Commercial Companies Code, according to which the shareholders in a capital company shall be treated in the same manner where similar circumstances apply³.

¹ Ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz. U. 2000 no. 94 poz. 1037.

² A. Kidyba, *Komentarz aktualizowany do art. 1-300 Kodeksu spółek handlowych*. LEX/el. 2017, stan prawny: 31 marca 2017 r.

³ J. Dąbrowska [w]: A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 306; wyrok SN z 30.09.2004 r., IV CK 713/03, OSNC 2005, no. 9, poz. 160; ustawa z dnia 15 września 2000 r. Kodeks spółek handlowych, Dz. U. 2000 no. 94 poz. 1037.

Conclusion

To sum up it should be noted that while discussing the golden share in the Polish law system, it shall be always considered in compliance with the European law. In the light of those deliberations, it is necessary to consider whether the rules vesting in any Member State a golden share in the State Treasury company, whereby any holding of shares or voting rights which exceeds certain limits must be authorised in advance by Member State and a decision to transfer or use as security the majority of the capital of four subsidiaries of that company may be opposed, constitute a restriction on the movement of capital between Member States¹. Article 73b of the Treaty on the Functioning of the European Union lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets².

Admittedly, the Court of Justice of the European Union in most cases recognizes special rights granted by Member State to State Treasury companies as incompatible with the Treaty but in some cases the Court allows exceptions, which the author have already mentioned in this article. As it has been said previously, the abolition of limitation of the possibility of privileging State Treasury to cases (issues) where it is important for the public interest (in particular, protection of state security) has been criticized in the Polish doctrine³. It is also argued that currently there are no particular restrictions on the privileging of State Treasury shares in the Commercial Companies Code whereas in the light of Court of Justice of the European Union rulings such privileging should only be allowed exceptionally if there are specific reasons (such as, for instance, public security). It seems that it was necessary to clarify precisely cases in which State Treasury shares may be favored in the Commercial Companies Code⁴. The author cherishes the hope that the legislator will take this into consideration on the occasion of next amendments in the Polish law.

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¹ Wyrok TSUE z 04.06.2012 r. w sprawie C-483/99 *Komisja Europejska przeciwko Francji*,

² *Ibidem*

³ A. Kidyba, *Komentarz aktualizowany do art. 1-300 Kodeksu spółek handlowych*. LEX/el. 2017, stan prawny: 31 marca 2017 r.

⁴ J. Dąbrowska [w]: A. Kidyba, *Szczególne formy spółek*, Warszawa 2017, p. 306-307.

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Recommended citation

Rojewski M. Golden share as a special privilege of the state treasury in the polish legal system. *Kazan University Law Review*. 2019; 4 (2): 104–113. DOI: 10.30729/2541-8823-2019-4-2-104-113