

Protection of shareholders against unfavourable share exchange rate in capital companies merger process

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Introduction

By assumption, the process of merging capital companies is advantageous from the point of view of the merging companies and their shareholders. However, sometimes, as a result of the merger, a shareholder may receive fewer shares in the acquiring company than he or she should have. Therefore, the merger is disadvantageous from an economic and corporate power point of view. In such a context, the question that arises is whether the protection of shareholders' interests against an unfavourable share exchange rate is possible under Polish law and, if so, how it can be accomplished.

Limiting possibility of challenging merger resolutions

The Commercial Companies Code on the merger of capital companies contains a specific regulation concerning the possibility of challenging these resolutions. This is because Article 509(3) of the Commercial Companies Code prohibits basing an action to overturn or declare the invalidity of a merger resolution on reservations concerning the share or stock exchange rate and therefore substantially narrows the objective prerequisites of an action in comparison to a general regulation. However, as provided in the abovementioned provision, it does not exclude shareholders' right to seek compensation under general principles. In this way, the legislation aims to secure the merger transaction on one hand and consider the asset-related interests of shareholders of merging companies on the other.

Notably, the ban defined in Article 509(3) of the Commercial Companies Code has been interpreted broadly in case law. In a December 7 2012 decision (Case II CSK 77/12),⁽¹⁾ the Supreme Court stated that since Article 509(3) expressly provides that a general shareholders' meeting resolution regarding the merger of companies cannot be challenged based on reservations concerning only the stock exchange rate, challenging such a resolution due only to a violation of procedural regulations which were to be used in establishing whether the exchange rate is correct is impossible. This stance rules out the possibility of circumventing the ban discussed hereto by basing an action on a violation of the provisions regulating the exchange rate and thus prevents the challenging of merger resolutions on the basis of provisions pertaining to the so-called 'management' stage of the merger process.

Possibility of pursuing compensatory claims

The legislature found that a cash equivalent constitutes sufficient protection for securing shareholders' interests in the case of the faulty establishment of the stock or share exchange rate. As a result, a shareholder who after a merger received fewer shares than expected from a correctly performed market valuation of both merging companies may seek compensation by way of an action

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against the acquiring company. This pertains to situations in which the market valuation was performed both correctly and incorrectly, but in which the shareholders ultimately decided to change exchange rate at the adoption of the merger resolution.

Comment

The legislative solution adopted by the legislature aims to reconcile interests that are often extremely divergent (ie, those of merging companies and shareholders opposing such a merger). The legislature assumed that it is necessary to secure the difficult and time-consuming merger transaction against attempts by individual shareholders to perform corporate blackmail and limit their right to challenge merger resolutions linked to their own asset-related and corporate interests. Such a solution surely guarantees an increased certainty of commercial transactions and minimises the risk of the entire transaction. Conversely, it does not deprive shareholders of the right to have their interests protected by way of a compensatory action against the acquiring company. This peculiar legislative compromise appears, in principle, to be positive.

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Endnotes

(1) The Supreme Court decision dated December 7 2012 in the case to file ref II CSK 77/12, SIP LEX.

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