# Company Law in Poland: Between Autonomous Development and Legal Transplants

KRZYSZTOF OPLUSTIL and ARKADIUSZ RADWAN

# I. Introduction

## *1. Polish Law in Continuous Transformation*

At the turn of the 1980s and 1990s Polish business law was at a point where it was burdened with a fifty-year long gap in development as well as the distortions inherent to a centrally planned economy. This heritage therefore included a lack of any case law, minimal domestic experiences with business law practice and a weak contemporary legal doctrine. Not surprisingly, the special circumstances of this "new opening" leaned in favour of quick solutions – an urgent need emerged to search for practical solutions to the daily problems of commercial dealings.[1] The growing demand created a gap on the market large enough to accommodate nearly any offer. This undiscriminating market accepted any product regardless of conceptual quality. The resultant law and legal scholarship were an outcome of several factors: (1) voluntary (legal transplants) or mandatory (implementation of the *acquis communautaire*) import of foreign legal institutions, (2) reanimation and revitalization of pre-war concepts,[2] (3) patterns of legal services and legal know-how brought along with the expansion of foreign law firms into Poland, or domestic firms modelled on

[1] See Radwan, A., *Non ex regula ius sumatur or about a few endangered truths*, Quarterly for the Entire Commercial, Insolvency and Capital Market Law (HUK) 2007, No. 1, p. 3.

[2] Not only in Poland but also in many other countries, e.g. in Czech Republic the very first available literature were reprints of pre-war commentaries and handbooks, see Radwan, A., *25 thoughts on European Company Law in the EU of 25*, European Business Law Review (EBLR) 2006, No. 4, p. 1171 and note No. 11.

Anglo-Saxon law offices,[3] (4) a search for quick solutions to emerging problems of everyday legal practice, and (5) autonomous, and sometimes light-hearted writing in the rediscovered field of business law, which consequently became a part of the academic curriculum and required supplementation with new content.[4]

This paper reviews company law development in Poland over the last twenty years as seen in the context of overall economy transformation and corresponding developments in foreign legal systems. The latter are mentioned predominantly in connection with their impact on Polish law. In order to more conveniently convey the patterns of legal development, a brief outline of the governance structure of a Polish company is provided in this paper. Special attention is paid to the impact of the *acquis* on a rapid transformation before Poland's accession to the EU peaking with the enactment of a new Code of Commercial Companies (CCC 2000) of 15 September 2000.[5]

## *2. The Course of Analysis*

The analysis takes the following course. First the overall legal framework of Polish company law with references to the relevant provisions of the capital market law will be discussed in Chapter II. Then, in Chapter III we will turn to a more detailed analysis of the economic context of the corporate governance system in Poland including ownership structures and other relevant market conditions under which the laws and self-regulations have developed. Chapter IV shall examine the influence European Law has exerted on the development of Polish company law. Chapter V is designed to extend the analysis of exogenous input so as to discuss foreign sources of inspiration and provide case-studies of successful and unsuccessful legal transplants. In the further course of this analysis a detailed structure of the two types of capital companies in Poland will be delivered (Chapter VI)

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[3] See Sołtysiński, S. *Complying with EU Corporate Standards: A Practitioner's View from Poland* [in:] Bermann, G.A./Pistor, K. *Law and Governance in an Enlarged European Union*, Hart Publishing, Oxford and Portland, Oregon 2004, p. 289; Stroiński, R. *Zasady dobrych praktyk w spółkach publicznych notowanych na Giełdzie Papierów Wartościowych – wybrane zagadnienia na tle prawnoporównawczym* [in:] Cejmer, M./Napierała, J./Sójka T. (eds.), *Europejskie prawo spółek*, Volume III, *Corporate Governance*, Wolters Kluwer, Kraków 2006, pp. 79–81.

[4] See Radwan (*supra* note 1), p. 6–7.

[5] On the history of the Code and the general regulatory landscape see Sołtysiński (*supra* note 3), p. 297; Sołtysiński, S. *Reform of Polish Company Law* [in:] Grossfeld B., et al. *Festschrift für Wolfgang Fikentscher zum 70. Geburtstag*, Mohr Siebeck, Tübingen 1998, et pp. 419; Radwan A./Kołacz, J. *Legal history, foreign inspirations and recent developments in Polish company law* [in:] *Company Law and Corporate Governance in the Enlarged Europe – Central and East European Perspective* (forthcoming).

with particular emphasis on the duties of directors, their scope and the liability associated therewith (Chapter VII). The overall picture is supplemented by another important piece of the entire corporate governance framework puzzle, i.e. the role of soft law, self-regulation and codes of best practices for public companies (Chapter VIII). Final Chapter IX concludes the analysis and provides an outlook for further development and research.

## II. The Legal Framework of the Polish Company and Capital Market Law

### *1. Types of Partnerships and Companies in the Polish Commercial Companies Code of 2000*

The primary source of business company law regulation in Poland is the Code of Commercial Companies (CCC 2000) of 15 September 2000. The CCC constitutes a comprehensive regulation for all types of commercial partnerships and companies provided for under Polish law as well as mergers (including cross-border mergers), divisions and transformations. Both CCC and its predecessor, the Commercial Code of 1934 (CC 1934), were mainly based on the German and Austrian legal tradition.[6] While Polish law has long been under the influence of both German and French law for historical and cultural reasons (with certain recent noticeable impacts of Anglo-American law), the CCC 2000 is essentially rooted in the tradition of German company laws.[7] The choice of the German model for modernizing Polish company law is mostly due to the fact that the predecessor of the CCC 2000 – the CC 1934 was influenced by German developments to a considerable extent, i.e. the German Commercial Code of 1897. This notwithstanding, the 1934 codification earned itself an excellent reputation

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[6] See also Sołtysiński (*supra* note 5), p. 422 who expresses the opinion that the majority of the Commercial Code rules can be characterized as a "slavish" imitation of their German models.

[7] For a description of the main features of the CCC, as well as of the sources of foreign inspiration in its drafting, see Sołtysiński, S. *Sources of foreign inspiration in the draft of the Polish Company Law (1999)* [in:] Baums, T./Hopt, K.J./Horn, N. (eds.) *Corporations, Capital Markets and Business in the Law*, Kluwer Law International 2000, p. 533; Stroiński, R., *Takeovers in Poland – current regulations and towards implementation of the takeover directive*, EBLR 2005, p. 1443. See also Sołtysiński, S. *Transfer of Legal Systems as seen by the "Import Countries": A View from Warsaw* [in:] Drobnig, U./Hopt, K.J./Kötz, H./Mestmäcker, E.J: (eds.), *Systemtransformation in Mittel- und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten* (Tübingen Mohr Siebeck 1998), pp. 70–72.

and survived until the new Millennium, although in the era of planned economy it held no practical significance.

Polish law provides for four types of commercial partnerships, i.e. the general partnership (*spółka jawna* – s.j.), limited liability partnership (*spółka komandytowa* – s.k.), limited partnership for free professions (*spółka partnerska*) and partnership limited by shares (*spółka komandytowo-akcyjna* – SKA, equivalent of the German *Kommanditgesellschaft auf Aktien*). Commercial partnerships are not formally a legal person but they do possess legal capacity i.e. they may acquire rights and obligations, sue and be sued in their own name (Art. 8 CCC[8]).[9] The main reason why partnerships (and especially the partnership limited by shares) were not granted a formal legal personality was the enabling of a structural avoidance of double taxation of corporate income provided for in Polish tax law. This paper focuses on the formally incorporated companies ("capital companies") which are the private limited liability company (*spółka z ograniczoną odpowiedzialnością – sp. z o.o.,* equivalent to the German GmbH) and the joint-stock company (*spółka akcyjna – S.A.,* equivalent to AktG, i.e. an open or public company with access to the capital market).

Both types of capital companies provided for in the CCC share some core structural characteristics of the business corporation, i.e. legal personality, lack of shareholders liability for the company's debts and transferability of its shares[10].[11] Another common feature of the limited liability company and joint-stock company is that legal capital is divided into shares which have to be paid up with contributions in cash or in kind. The limited liability company is the most popular company form for doing business in Poland[12], used by small and medium-sized enterprises (including family businesses) as well as by big multinationals for establishing their Polish subsidiaries. Similar to the German GmbH, a typical *spółka z o.o.* is a closed company with two or three (rarely more than three) share-

[8] Unless otherwise indicated, all the references shall be understood as those referring to the provisions of CCC 2000.

[9] A civil law partnership regulated in the Civil Code (Articles 860–975) does not possess legal capacity and is regarded by the majority of the doctrine as a mere legal relationship between partners.

[10] However, the Polish law contains an opt-in provision to allow that the partnership deed provide for the transferability of the aggregated rights and duties in the partnership (Art. 10 sec. 1 and 2 CCC).

[11] See Kraakman, R./Hansmann, H. [in:] Kraakman, R./Armour, J. /Davies, P./ Enriques, L. /Hansmann, H./ Herig, G./ Hopt K.J./Kanda, H./Rock, E. *The Anatomy of Corporate Law. A Comparative and Functional Approach*, Oxford University Press 2nd ed. 2009, p. 5.

[12] According to the data of the Polish Central Statistical Office (GUS), there were 216,887 limited liability companies registered in Poland at the end of 2007.

holders who often work for the company and are involved in managing its affairs.

The joint-stock company is typically the legal form for the enterprises looking for access to the wide range of investors on the organized capital market.[13] The joint-stock company is subject to a mandatory legal regime. According Art. 304 sec. 3 and 4 CCC, which is based on the German provision of sec. 23 para. 5 *Aktiengesetz*, ("*Satzungsstrenge*") a company's articles may only incorporate provisions different from those provided for by law if the law so permits. The articles may incorporate additional provisions unless the law provides sufficient regulation or such additional provision of the articles would be in conflict with the nature of the joint-stock company or good practice. In spite of a striking resemblance to its German prototype, the CCC 2000 is set in a slightly different regulatory setting, in that Polish law allows for a broader range of opt-outs and opt-ins so that some degree of contractual autonomy with regard to internal structure of the company is left up to the shareholders. The 'in principle' mandatory character of the law governing the joint-stock company is welcomed by the majority of the Polish doctrine which justifies it with the need to protect minority shareholders (in particular investors on the capital market) and stakeholders (in particular company's creditors).[14] Moreover, the reference to the nature of joint-stock company provides an explicit legal basis for a doctrinal definition of the "nature of the company", promoting a more functional approach to legal interpretation. For similar reasons some CCC 2000 commentators take the surprising view that the limited liability company is in principle also governed by mandatory provisions.[15] However, the legal regime of the limited liability company is far more flexible than the regulation of joint-stock company as far as the internal company's structure and the rights of shareholders are concerned.

### *2. Capital Market Law*

The core of the Polish capital market law is contained in three Acts adopted by the Polish Parliament on the same day, i.e. 29 July 2005. These

[13] The number of registered joint-stock companies in Poland at the end of 2007 amounted to 8,853 (data of GUS). Some kinds of business, such as banking and insurance activities or management of investment funds, may be exclusively run in form of joint-stock company. Both types of capital companies have been used in privatisation process of state-owned enterprises.

[14] See Sołtysiński, S. [in:] Sołtysiński, S./Szajkowski, A./Szwaja, J. *Kodeks handlowy. Komentarz*, Warszawa 1998, t. I., at p. 78; Spyra, M. *Ochrona akcjonariuszy na publicznym rynku papierów wartościowych*, PiP 2/2000, at p. 70.

[15] See, e.g., Szajkowski, A./Tarska, M. [in:] Sołtysiński, S./Szajkowski, A./ Szumański, A./Szwaja, J. *Kodeks spółek handlowych. Komentarz*, Volume II, Warszawa 2005, at p. 80.

are: (1) the *Act on Trading in Financial Instruments*, (2) the *Act on Capital Market Supervision*, and (3) the *Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies*.[16] These three acts[17] are further supplemented by a set of detailed ordinances issued by the Minister of Finance as well as by the regulations of the consolidated (market and prudential) supervisory commission: the Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego* – KNF).

Under the influence of capital market law, the originally unified legal concept of the joint-stock corporation provided for in the company law is slowly but surely being subdivided into two categories: *the public company*, which covers stock corporations listed on the stock exchange, and is subject to a growing number of special regulations contained in the CCC 2000 as well as in the capital market law; and the *non-public company* which is a non-listed corporation not active on the organized capital market. According to the definition provided in the *Act on Public Offering (...) and Public Companies*, the public company is a joint-stock company in which at least one share is dematerialised.[18] Securities put on public offer or admitted to trading on a regulated market, are dematerialised, i.e. they exist only in an non-certificated form from the date of their registration under the registration agreement with the depository for securities, concluded between the issuer and the central depository and settlement institution, the National Depository of Securities (*Krajowy Depozyt Papierów Wartościowych S.A.*) – Art. 5 (3) of the *Act on Trading in Financial Instruments*. Thus, all joint stock companies listed on the Warsaw Stock Exchange (being the only regulated market in Poland) are public companies in the meaning of the law.[19] The *Act on Public Offering (...) and Public Companies* contains many provisions concerning important corporate

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[16] The three acts replaced the Act on Public Trading in Securities of 1997.

[17] Officially published in: Journal of Laws (*Dziennik Ustaw*) No. 183, items: 1537, 1538, 1539 as amended. The English translation of all three Acts is available on the Web page of the Polish Financial Authority <www.knf.gov.pl>.

[18] For justified criticism on this subdivision of joint-stock companies based only on the technical criterion of shares' dematerialisation see Grabowski, K. *Dyrektywa o niektórych prawach akcjonariuszy i jej konsekwencje dla spółek publicznych*, Quarterly for the Entire Commercial, Insolvency and Capital Market Law (HUK) 2008, No. 4, pp. 536 et seq.

[19] Public companies are also companies whose shares are admitted to Alternative Trading System "NewConnect" also organized by the WSE. "NewConnect" is a system of trading with shares of small start-up companies, which is not regulated market in the legal meaning. However, Listing Rules of "NewConnect" require dematerialization of shares as a condition of their admittance to trading in the System. Thus, by virtue of the "NewConnect" listing rules, companies whose shares are listed in the "NewConnect" are public companies in the legal sense.

governance issues in public joint-stock companies, such as disclosure of significant shareholdings, regulation of tender offers (takeover law), specials rights and obligations of shareholders (squeeze-out rights of majority shareholders, sell-out rights for minority shareholders, and rights of minority shareholders to require the appointment of special-purpose auditor). Public companies are also subject to many special regulations of the CCC 2000. The distinction between public and non-public companies has been strengthened as a result of the newest CCC amendment of December 2008 which implemented Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies. The existing dualism of joint-stock corporations has been advanced by further provisions of the CCC 2000 enacted as a consequence of the Directive's implementation. These new and unprecedented provisions include *inter alia* new rules concerning the convocation and organization of the general meeting, e.g. scope of information to be published prior to the general meeting (Art. $402^2$), record date (Art. $406^1$ sec. 1), voting by correspondence (Art. $411^1$), and special regulations on voting by proxy (Art. $412^1$ sec. 2, Art. $412^2$ sec. 2 and 3). These rules only apply to public companies. It has been suggested that a similar development is underway in Germany.[20]

## III. Polish Corporate Governance System as a Closed ("insider-control") System

### *1. General Remarks*

The corporate governance system denotes the entire range of mechanism and arrangements that shape the way in which key decisions are made in large companies.[21] According to the most common typology, there are two types of corporate governance system, the insider-controlled or closed system on the one hand, and the outsider-controlled or market-oriented system, on the other.[22] This typology is based on a set of features and criteria, most importantly: the ownership structure prevailing in the majority of companies, the extent and liquidity of the capital market and its role in financing companies, the existence of markets for corporate control, the

[20] See, e.g. Habersack, M. *Wandlungen des Aktienrechts*, Die Aktiengesellschaft 2009, No. 1–2, at p. 2.

[21] See, e.g., Shleifer, A./Vishny, R.W. *A Survey of Corporate Governance, The Journal of Finance*, No. 2, June 1997, p. 737.

[22] See, e.g. Schmidt, R.H: *Corporate Governance in Germany: An Economic Perspective*, [in:] J.P. Krahnen, J.P./Schmidt R.H. (eds.), *The German Financial System*, Oxford 2004, p. 387.

role of institutional investors, the shareholder or stakeholder-orientation of corporations, and the degree of minority shareholder and investor protection provided for in corporate and capital market law. These criteria suggest that the Polish corporate governance system can be regarded as an example of the insider-controlled system, although some features differentiate it from the German bank- and stakeholder-oriented system.

### 2. Ownership Structure and the Role of Institutional Investors

Empirical evidence clearly indicates that ownership of Polish listed companies remains concentrated.[23] Voting control in listed companies shows a median concentration rate of 39.5%, with a sustainable trend visible over the last decade.[24] Anglo-Saxon style companies, with dispersed ownership and control exercised by managers ("Berle-Means-corporations") do not exist in Poland. This may be attributed to many factors pertaining to the origin of the Warsaw Stock Exchange. Over a long period of time the majority of most significant IPOs came through the disposal of state treasury shares held in companies subject to privatisation. Efforts made to attract individual direct investors (households) proved unsuccessful in the long term as the shares were often accumulated in the hands of one or a few controlling shareholders. Also, shares of privatized companies were concentrated in the hands of managers and other insiders.[25] Anecdotal evidence suggests strong exploitation of the private benefits of control, particularly in early 90s, both by foreign industry investors (tunnelling of resources) and managers of formerly state-owned companies (high managerial remuneration contracts). The state did not perform its monitoring function properly, giving rise to managerial opportunism. Weak competition on the market for products, particularly in the first half of the 90s was also contributing factor. Domestic companies were shielded from competitive pressure from genuinely private or foreign firms, further limiting the disciplining effect of the market.[26]

In 2005 foreign investors held the largest share of ownership in Polish companies (38% of the total amount of listed shares), followed by the public sector (20%), with individual investors (17%), private financial enterprises (17%) and private non-financial companies and organizations

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[23] Tamowicz, P. and Dzierżanowski, M. *Ownership and Control of Polish Listed Corporations*, (October 2002), working paper available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=386822>.

[24] Tamowicz/Dzierżanowski (*supra* note 23), p. 1 and pp. 5–11.

[25] Tamowicz/Dzierżanowski (*supra* note 23), p. 3.

[26] Tamowicz/Dzierżanowski (*supra* note 23), p. 10.

(8%)[27] holding the remainder. Controlling or majority shareholders tended to be either other companies active in the same industry (creating a corporate group), or the founders of a company together with their family members. Despite the progress of privatisation, State Treasury remains a significant shareholder in a number of companies, particularly those regarded as crucial for national security or economy (e.g. oil, gas, mining, but also some banks). Moreover many joint-stock companies are family businesses controlled by their founders. This often leads to a combination of three roles for one person (or group of related entities) – that of founder, blockholder and manager.[28] Financial investors (most often banks, investment funds and pension funds) are the usually second and third biggest blockholders. Financial institutional investors are also key players who impact on the liquidity of the Polish capital market. In the first half of 2008 as much as 41% of the entire turnover of the stock traded on the WSE could be attributed to the activities of financial institutions. This figure is related to the preferred strategy usually adhered to by institutional investors while executing their corporate rights: they are more likely to exit than to vote.[29] In light of this, in 2006, two chambers associating Polish investment funds and pension funds adopted a new Code of Best Practices of Institutional Investors with a view to fostering institutional investor activism.[30] The Code is based upon a concept of the institutional investor as an active and responsible minority shareholder who exercises shareholders' rights (particularly voting rights) in matters significant for the company as well as in all corporate decisions relevant for the institutional investor's clients. Moreover, institutional investors are supposed to play a monitoring role and pursue the observance of high corporate governance standards by the company. In particular, institutional investors who hold at least 5% of the total votes are expected to participate in any general meeting. In cases where this threshold is not met, institutional investors are still supposed to attend the meeting if the agenda includes items of particular significance for the company. Institutional investors should disclose their voting behaviour and policies for the purposes of transparency.

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[27] See FESE, *Share ownership structure in Europe*, February 2007, p. 59 <www.fese.com>.

[28] Tamowicz/Dzierżanowski (*supra* note 23) pp. 7–8; Stroiński (*supra* note 7), at p. 1447.

[29] Until recently one of the most important legal barriers impeding a more active role for institutional investors was the requirement to block shares on the securities account as a legal condition for participation at the general meeting. The requirement was abolished in result of the CCC-reform of 5 December 2008 implementing the Shareholder Rights Directive (2007/36/EC). The reform introduced i.a. the record date into the Polish law (Art. $406^1$ CCC: sixteenth day before the day of the general meeting).

[30] Text of the Code is available at: <www.izfa.pl/pl/index.php?id=10042>.

There are a number of problems stemming from this concentrated ownership structure. These include: conflicts between majority shareholders and minority shareholders, private benefits of control at the expense of the minority (e.g., tunnelling of assets and profits to majority shareholders, payment of hidden dividends), and the unequal treatment of minority shareholders by company organs. Polish corporate practice also addresses cases of abuse of shareholders rights by individual investors, in particular challenging important resolutions of the general meeting in order to blackmail the company or its majority shareholders, resulting in the adoption of legislation aimed at curbing abuse by small shareholders (e.g, Art. 423 sec. 1 and 2).

### 3. *The Polish Capital Market: Structure and Role in Corporate Finance*

The central institution of the Polish capital market is the Warsaw Stock Exchange (WSE) established by the State Treasury in April 1991.[31] The Warsaw Stock Exchange itself is organized as a joint-stock company with 98% of shares held by the State Treasury. In the years 2005–2007 the WSE was the most dynamically growing market in the CEE region, competing for primacy with the Vienna Stock Exchange. It must be stated that the WSE managed to clearly outperform Vienna in terms of IPO's and the total number of companies listed (including foreign ones), as well as with respect to capitalisation and turnover.[32] At the end of the 2007, when WSE peaked in terms of value – the capitalisation of the WSE (EUR 144 billion) represented 51% of the aggregated market value of companies listed on ten exchanges of the new member states.[33] According to the same data, four out of ten (39%) companies listed in new member states were listed in Warsaw, which amounted to a total turnover of 45% of the value of all transactions in EU New Markets. In 2007, at the peak of the bull market the capitalisation of the WSE equalled to 46% of the country's GDP (in 2009 the capitalisation of the WSE fell to 34% of the Polish GDP). In 2007, with 81 IPOs (of which 12 were foreign corporations) WSE ranked

[31] It is worth mentioning that as many as seven stock markets were operating in Poland during the interwar period: in Warszawa, Kraków, Katowice, Lwów (Lviv), Łódź, Poznań and Wilno (Vilnius); for more information see Chłopecki, A./Sobolewski L. [in:] Chłopecki A. et al, *Prawo o publicznym obrocie papierami wartościowymi. Komentarz*, (Act on Public Trading in Securities. Commentary) C.H. Beck, Warszawa 1999, p. 22 et seq., see also Kołacz/Radwan (*supra* note 5).

[32] However, the total capitalization of the CEE Stock Exchange Group (i.e. Vienna Stock Exchange together with Stock Exchanges in Prague, Budapest and Ljubljana, being controlled by Vienna) is higher than the capitalization of WSE.

[33] Warsaw Stock Exchange Annual Report 2007 (downloadable at: <www.gpw.pl/gpw.asp?cel=informacje_gieldowe&k=9&i=/raport_roczny/raport_roczny&sky=1>, p. 32.

second in the whole of Europe, just behind the London Stock Exchange (99 IPOs).[34] In August 2007 an alternative trading platform (unregulated market) for financing and trading start-ups with a high growth potential was launched by the WSE under the name "NewConnect". Low listing costs, simplified admission procedures and lighter disclosure requirements were introduced with intention of allowing companies to raise capital effectively and quickly. In the end of June 2010, 136 companies were listed on the NewConnect system. Criticism of this system however has targeted the low liquidity of this market, the absence of institutional investors and alleged price manipulation.[35]

It must not be forgotten that Poland has traditionally belonged to German legal family, which is characterised by the prevalence of debt financing. Yet with the growing strength of the WSE the role of equity financing has gained in significance. The data from 2005 and 2007 show a remarkable leap in the WSE capitalisation/GDP-ratio from 32% (2005) to 43,7% (2007), while at the same the figure for bank credits declined from 32% to 14,8% of the GDP.[36] These figures have been changing in the course of the recent financial crisis with no exact figures available at the time of drafting of this article.

The dynamic growth of the Polish capital market in the years 2005–2007 should be attributed to the activity of individual private "domestic savers" investing their money mostly in investment funds promising high capital yields surpassing the profits from traditional bank deposits. However, the global financial crisis in the second half of 2008 dramatically revealed the structural weaknesses of the Polish capital market: its low liquidity, dependence on foreign speculative investors and susceptibility to price manipulation. In a couple of months the market capitalization of listed companies shrank by half (despite the principally sound fundaments of the Polish economy), the stock index slumped to pre 2005 levels. The number of IPOs in 2008 fell to only 33 (from 81 in the previous year). The supply of capital diminished dramatically as a consequence of the withdrawal of foreign institutional investors from the Polish market as well as the snowballing outflow of private capital from national investment funds. This effectively stymied the efforts of the WSE to achieve its strategic aim, i.e. to become dominant Central European trading centre. The WSE was

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[34] Warsaw Stock Exchange Annual Report 2007 (previous note), p. 28.

[35] See Kuryłek, W. *Sklep z marzeniami, czyli NewConnect*, "Rzeczpospolita" (Polish daily), Section "Economy and Market", 24 April 2008.

[36] See Słomka-Gołębiowska, A. *Czy banki wypełniają lukę w ładzie korporacyjnym w Polsce,* Quarterly for the Entire Commercial, Insolvency and Capital Market Law (HUK) 2007, No. 1, p. 20; Sobolewski, P./Tymoczko, D. (eds.), *Rozwój systemu finansowego w Polsce w 2007 r.* (study of the Polish National Bank downloadable at: <www.nbp.gov.pl>, p. 6.

outperformed by the Vienna Stock Exchange which grabbed control over two other Stock Exchanges in the region (Budapest and Prague). The main reason for this failure is seen in the fact that WSE is until now 98% owned by the Treasury State. This is about to change very soon. After a failed attempt sell the controlling block to a foreign competitor (European or US stock exchange), a new approach prevailed. This new approach, which is currently in process of implementation, assumes an IPO (scheduled for November 2010) and sale of the majority of stock held by the State via the market. Although 63,8% of total stock will be sold to individual and financial investors, the State has made an attempt to retain control via voting caps. The conformity of these caps with EU Law (golden shares) is controversial. This swift privatisation of the WSE is perceived as a precondition of further (also technological) development of the Exchange and the strengthening of its position in the region. Still, with 383 companies (including 25 foreign companies) listed on the regulated market (June 2010) and 136 companies listed on the NewConnect alternative investment market, the Warsaw Stock Exchange counts as one of the leaders in the Central Eastern Europe and demonstrates a remarkable potential for further growth.

This most recent financial crisis began for Poland in July 2008, and was more a reaction to the world financial crisis than as a result of domestic economic indicators. Strong criticism was made regarding the efficiency of market supervision executed by the Polish Financial Authority (*Komisja Nadzoru Finansowego*, KNF). The KNF was established in 2006 as an integrated supervisory authority over the whole Polish financial market. Prior to this, supervisory powers had been divided between three separate state entities which supervised the financial market according to activity: capital market (KPWiG), insurance and pension funds (KNUiFE) and banking sector (KNB). The consolidation aimed to achieve range of expected benefits: synergy effects, better supervision of financial conglomerates and international patterns (e.g. UK FSA, German BaFin and their Scandinavian counterparts). However, two years after consolidation, KNF's success record is ambiguous. Spectacular cases of market manipulation and insider trading, the perpetrators of which often go unpunished, still happen on the Polish financial market. In addition, the recent currency options crisis that severely affected a substantial number of Polish firms (both listed and non-listed) is attributed to the passivity of the national supervisor.[37] Much remains to be done in order to improve the efficiency of KNF supervision and enforcement.

[37] Czech, M. *Opcja kompromitacja*, Gazeta Wyborcza (Polish daily), 8 March 2008.

### 4. Market for Corporate Control and Takeover Law

Due to the concentrated ownership and control structure prevailing in Polish companies and other structural barriers (e.g. low liquidity of the trade, insufficient number of banks and law firms specialised in takeovers), the market for corporate control plays only a minor role as an element of external corporate governance disciplining managers. According to Tamowicz and Dzierżanowski, only up to 20% of Polish public companies may be subject to hostile takeovers.[38] Takeovers and mergers in most cases have a friendly character. However, from time to time spectacular hostile takeover attempts also take place in Poland.[39]

Takeover regulations in Poland are primarily contained in Chapter 4 ("Material Blocks of Shares in Public Companies") of the Act on Public Offering (...) and Public Companies (further: the Act) and in the CCC.[40] The Act provides for *two kinds of compulsory partial bids* in the event of acquisition of small blocks of shares which increase a shareholder's share in the total vote by more than:

- 10% within a period of less than 60 days – in the case of a shareholder holding less than 33% of the total vote at the company,
- 5% within 12 months – in the case of a shareholder holding 33% or more of the total vote at the company.

These kinds of acquisition may be effected *only* by way of a tender offer to acquire or exchange the given number of shares (Article 72 sec. 1 of the Act). There is also an obligation to make a compulsory partial bid where a shareholder aims to acquire a number of shares that would result in a holding of over 33% of the total vote in a company. Acquisition of shares exceeding this threshold requires a partial bid. The partial bid must address the number of shares conferring the right *to at least 66% of the total vote*, unless the 33% threshold is to be exceeded as a result of a tender offer aimed at acquiring all residual shares of the company (Article 73 s1 of the Act). A *mandatory bid* covering all residual shares of the offeree company is required where a shareholder intends to exceed 66% of the total vote in

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38 Tamowicz/Dzierżanowski (*supra* note 23), p. 15.

39 Most recently (2008) the hostile takeover of the jewellery firm W. Kruk SA (WSE listed company, in which significant shareholders were members of Kruk family) by V&W SA, another public company active in clothing industry striving to broaden and diversify of its activity. The takeover was successful, but the V&W SA was in turn taken over by Mr Kruk acting in concert with other investors. Finally, the friendly two companies, i.e. the bidder and the offeree company, have been merged according to the provisions of the CCC.

40 See, with regard to details, Bobrzyński, M./Oplustil, K./Spyra, M. [in:] Maul, S./Muffat-Jeandet, D./Simon, J. (eds.), *Takeover bids in Europe. The Takeover Directive and its implementation in the Member States*, Freiburg i. Br. 2008, pp. 453 et seq.

that company (Article 87 sec. 1 of the Act). That mandatory bid may also satisfy the terms of Article 5 of the Takeover Directive, as it must cover all residual shares of the offeree company. However, contrary to the requirement of the Directive (Article 5 sec. 3), Polish law does not explicitly define what percentage of voting rights determines control of the company. It may be presumed that this is 66% of the total vote, even though that threshold may be considered too high as the majority shareholder is already in control of the company. Thus, the Polish regulation jeopardises the purpose of Article 5 of the Directive, i.e. to give the minority shareholder the chance to exit the company once a change in control has taken place.[41]

The Act also provides regulations concerning the obligations of management and supervisory board members of the offeree company with regard to takeover bids. It has to be stressed, that the relevant Takeover Directive provisions were only implemented in September 2008. The Polish lawmaker made use of the opt-out from the Directive's duty of neutrality rule (non-frustration, Art. 9 of the Directive) and the breakthrough rule (Art. 11 of the Directive). Public companies subject to Polish law have an option to amend their articles in order to implement one or both of these rules (Art. 80a-80d of the Act).

The CCC provides some important provisions allowing a company's articles to implement "control enhancing mechanisms" which are capable of discouraging takeover attempts.[42] These mechanisms have the following important features:

- *voting caps*: The company's articles may limit voting rights of a shareholder who represents over one-tenth of the aggregate number of votes in the company.[43] This limitation applies only to shares exceeding the limit laid down in the company's articles (Art. 411 sec. 3). The articles may also provide for an accumulative counting of votes held by corporate shareholders remaining in a parent-subsidiary relationship and lay down exact provisions on how these votes shall be reduced (Art. 411 sec. 4);

[41] See also critical remarks by Opalski, A., *Europejskie prawo spółek*, Warszawa 2010, p. 511.

[42] The application and proliferation of various CEMs in Poland has been discussed on a basis of anecdotal evidence in Report on the Proportionality Principle in the European Union, Brussels, 18 May 2007, pp. 109 et seq.

[43] The threshold was lowered from one-fifth to one-tenth of the aggregate number of votes in result of the reform of the CCC of 29 May 2009 r. Accidentally this coincides with the provisions as laid down in the articles of incorporation of PKN Orlen, the Polish leading petroleum company. One could be surprised to see the law being adjusted to the company's articles rather than the other way round.

- *multiple voting rights*: The CCC 2000 abolished the multiple voting rights in public companies which had existed under the previous CCC 1934.[44] However, rights existing before the enactment of CCC (1 January 2001), do not expire and remain governed by the old provisions. Thus, some companies listed on the WSE have preserved their multiple-voting rights (up to 5 votes pro share, i.e. maximal voting privilege according to CC of 1934);
- *shares without voting rights* (known as "numb shares") are allowed without any limitation on their percentage in relation to the total amount of shares (Art. 353). As an exemption to the general rule, under which all privileged shares must be registered shares, shares without voting rights are classed as bearer shares and thus can be traded on the regulated market;
- *personal rights conferred in the company's articles upon an individual shareholder*: These rights may concern, in particular, the authorisation to appoint or remove members of the management board or the supervisory board (Art. 354 sec. 1). The adoption of an amendment of the articles providing for the restriction or removal of these personal rights requires the consent of all shareholders concerned (Art. 415 sec. 3),
- *"golden share" of the State Treasury:* A special Act of Parliament provides the State Treasury with special rights over a number of companies which are considered materially significant for public order and security.[45] These rights include, inter alia, the right to oppose a general shareholder meeting resolution or an action of the management board in specific matters that are essential for the existence and functioning of the company: including the winding-up of the company, the transfer of the company's seat abroad, a change in the company's operations (i.e. the scope or object of business activity) as laid down in the company articles, as well as any disposal, leasing, pledging or creating usufruct on its organized assets.

Thus, Polish company law allows for substantial deviations from the proportionality principle.

[44] In non-listed joint-stock companies one share can carry up to two votes (Art. 352 CCC).

[45] The Act of 3 June 2005 on special rights of the Treasury of State and on their execution in capital companies of material significance for the public order and public security, Journal of Laws (*Dziennik Ustaw*) from 2005, No. 132, pos. 1108 as amended. The list of the companies to which the Act is applicable is laid down by the Council of Ministers in a way of an Ordinance.

## 5. The Notion of Company's Interest and Shareholder Value

The matter of the "company's interest" is perceived as a fundamental determinant of the operation of the company's authorities and is frequently applied as a benchmark in assessing the legality of a given corporate action. Prevailing legal doctrine tends to interpret the notion of company's interest as a "result" or outcome of balancing the interests of persons involved in the company. Interestingly, this includes shareholders as wells as stakeholders (e.g. creditors, employers, suppliers), although, according to leading opinion, the interests of shareholders should play a superior role in defining company interest. This means that the members of the management board and supervisory board cannot give priority to the economic interests of stakeholders before the interests of shareholders as a group. The interests of stakeholders should be respected in so far as they are covered by protective legal provisions (e.g. labour law, insolvency law, consumer law, banking law) and any extension of legal protection stemming from corporate law is generally allowed only if it can be aligned with the interests of shareholders as a group.[46] However, exceptional case-law extends the notion of company interest to accommodate other stakeholders' perspective. This is illustrated by the Appeal Court judgment in Łódź (7 March 1994).[47] This decision, regarding a capital increase for a bank, justified the exclusion of existing shareholders (pre-emption right) to streamline the capital supply and strengthen the financial condition of the bank, which would in turn benefit the interests of bank account holders (depositors). It follows from that rationale that bank account holders might be perceived as stakeholders whose interests contribute to the interpretation of the company's interest as a whole.[48]

This notion of the company interest which, according to the British interpretation, can be described as the "enlightened shareholder value", was reflected in the Corporate Governance Code ("Best Practices Code") of 2005 (no longer in force). According to the first rule of the Code, the basic objective for a company's representatives is to further the interest of the company, i.e. to increase the value of capital invested by its shareholders, with consideration to the rights and interests of constituencies other than shareholders, involved in the functioning of the company, including, in particular, the company's creditors and employees. In addition,

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[46] Opalski, A. *O pojęciu interesu spółki kapitałowej*, Przegląd Prawa Handlowego 2008, No. 11, pp. 16 et seq.

[47] ACr 21/94, published in: Wokanda 1994, No. 11, p. 54.

[48] See Okolski, J./Modrzejewski, J./Gasiński, L. *Natura stosunku korporacyjnego spółki akcyjnej*, PPH 2000, No. 8, p. 11; Okolski, J./Modrzejewski, J./Gasiński, L., *Zasada równego traktowania akcjonariuszy na gruncie k.s.h.*, PPH 2002, No. 10, p. 24; Radwan, A. *Prawo poboru w spółce akcyjnej*, Warszawa 2004, p. 275.

a specific rule contained in the section pertaining to the board's duties recapitulates the overlying role of company's interest by stating that the management board, when establishing the interest of the company, should keep in mind the long term interests of the shareholders, creditors, employees and other entities and persons cooperating with the company, as well as the interests of local community. However, the new Best Practices Code of 2007 repealed this broad definition leaving the determination of company interest up to the managers, commentators and ultimately to the courts.

It should also be mentioned here that Polish law provides for a certain degree of workers' codetermination. Employees in former state-owned enterprises have the right to elect supervisory board members.[49] The reason for allowing for worker codetermination in these companies is to compensate for the previous framework of worker participation in decision-making in state enterprise.[50] Thus, employees retain a limited possibility to influence the determination of the company's interests through their representatives in the company's management organs.

Empirical research into the impact of banks on companies' dealings and decision-making revealed a weak influence of the banks on corporate governance of public companies (for the years 1999–2002).[51] The supervisory boards of almost half of the companies surveyed had at least one bank representative – usually the major creditor of a given company. However, banks are rather reluctant to engage themselves in the decision making process in companies to whom they extend credit, which might be explained by the rational aversion to legal risk associated with a conflict of interests and of violation of the rules prohibiting insider dealing.

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[49] In these companies the employees are entitled to elect two of five members of the supervisory board. Moreover, in companies with average yearly employment of more than 500 employees, they are entitled to elect one member of the management board. With regard to details see Articles 11–16 of the Act of 30 August 1996 on Commercialisation and Privatisation, Journal of Laws (*Dziennik Ustaw*) of 2002, No. 171, item 1397 as amended.

[50] Under the Act on State Enterprises of 1981 (still in force) the *state enterprise* is a *sui generis* legal form (different from the commercial company) with its own organs, one of them being the "workers council" (*rada pracownicza*).

[51] See Słomka-Gołębiowska (*supra* note 40), p. 29.

## IV. Influence of EC law on Polish Company Law

### 1. Impact of Brussels

#### a) First and Second Stage Directives

EC-law has significantly influenced Polish company law. Full harmonisation of the Polish law with the *acquis* requirements was one of the main reasons for the adoption of the new CCC 2000. The overwhelming majority of the EC company law directives have been implemented in the CCC (including the Third, Sixth and Tenth Company Law Directive). EC-directives concerning financial reporting (Fourth and Seventh Directive) were implemented in the Act on Accountancy of 1994 (*ustawa o rachunkowości*). The implementation of the Shareholder Rights Directive (2007/36/EC) required significant amendments to the CCC. Those amendments have been introduced by an Act adopted on 5 December 2008 which came into force on 2 August 2009. The harmonisation of Polish law with the Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts was finally accomplished (with a delay of nearly one year) with the Act of 29 May 2009 regulating the tasks of statutory auditors, their operations and self-government as well as the system of public oversight for the statutory auditors and audit firms.[52]

It must be stressed that, due to the historical affinity of the Polish company law with the German system, the implementation of the First and Second Company Law Directive did not require fundamental changes in the law, as third party protections had already been based on the disclosure of company's documents in the public register. The debate regarding the powers of directors which occurred in Europe in the 60s (*ultra vires* vs. unlimited representation by company organs), did not require any changes to Polish law, the prevailing doctrine (see Art. 9 of the First Directive) was already in force through the pre-existing approach (CC 1934) which gave priority to legal certainty over shareholders' autonomy. Also creditor protection by means of a legal capital regime was deeply rooted in the Polish legal tradition. Yet some changes were needed to fully align national law with *acquis* requirements, these included refining the legal framework for share buy-backs, introducing constraints to the availability of financial assistance, and upgrading the provisions on contributions in kind in the formation process, in the immediate post-incorporation timeframe as well as in case of the capital increase. Moreover an unprecedented power to issue new shares was vested in the board, breaking the "monopoly" of the

[52] Ustawa z 29 May 2009 r. o biegłych rewidentach i ich samorządzie, podmiotach uprawnionych do badania sprawozdań finansowych oraz o nadzorze publicznym, Journal of Laws (*Dziennik Ustaw*) of 2009, No. 77, item. 649.

general meeting on capital increases (authorised capital). The same is true for the Sixth Company Law Directive providing for a new set of rules on spin-offs, previously unknown in the Polish system. It is worth mentioning that many rules designed by the EC-legislator to apply only to joint-stock companies are routinely extended to closed companies as well. This has to do with basic deeply-rooted presumption in Polish doctrine that a closed company and a public company share the same basic features with respect to creditor and minority protection and thus should be governed by a similar legal regime.

Other company law directives did not revolutionise Polish law either. This is explained by the fact that early directives bore a strong German influence, which in turn was to a significant extent "directly", (i.e. without European intermediation) reflected in the Polish pre-war legislation. What is more, later at implementation stage, the adoption of the *acquis* in Poland occurred in part through the direct importation of "prefabricated" modules of German law into the Polish CCC. This approach brought the clear advantage of having new rules in a pre-digested form, i.e. pieces of European legislation fit for transplantation into a legal system characterised by cultural affinity to the "donor". This applies to a wide range of directives, with the most striking example seen in authorised capital (Art. 444–447) almost a copy-and-paste "legal module" from the German *Aktiengesetz* (sec, 202–206). It should be stressed that this is welcomed as a rational strategy of importing public goods at no significant cost, or – putting it in an international context – a unique example of legitimate free-riding with no externalities.[53]

### *b) Third Stage Directives*

A somewhat different assessment is warranted by the impact of third stage directives, including the Takeover Directive (2004/25/EC), the Shareholders' Rights Directive (2007/36/EC) and the Directive 2005/56/EC on cross-border mergers of limited liability companies (Tenth Company Law Directive). The two most recent directives contributed to a far-reaching revision of Polish law. Until the implementation of the Shareholders' Rights Directive Polish law provided a framework quite hostile to the participation of individual investors, including restrictions on proxy voting, blocking of shares in the pre-meeting period, limited minority influence on the GM (General Meeting) agenda, and a very conservative approach to the use of IT and electronic communication with respect to the meeting. Equally conservative approaches could be identified in the field of cross-border restructuring, as Polish law did not allow any form of transnational

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[53] See Radwan (*supra* note 1), p. 7.

mobility for companies. While cross-border merger became available to Polish companies as a result of the ECJ's judgement in the Sevic case[54] and the implementation of the Tenth Directive, seat transfer remains prohibited (Art. 270 No. 2; Art. 459 No. 2 – forcing mandatory dissolution in the case of an attempted seat transfer).

Another peculiarity arose from implementation of the Takeover Directive. From their "rebirth" back in the early 90s, Polish capital market regulations were influenced by the French and Anglo-Saxon model. This resulted in the incorporation of rules into Polish law triggering off mandatory bids for a number of situations, *inter alia* once the acquirer passed the voting threshold of 50%. During the implementation of the takeover directive, a peculiar solution has been adopted by the Polish legislator, namely the acquisition of shares resulting an overstepping of the 33% threshold triggers a partial bid aimed at acquiring at least 66% of the total vote. Once the higher threshold of 66% is passed, another mandatory bid targeting all outstanding shares has to be made, making use of the opt-out from the Directive's duty of neutrality rule (non-frustration, Art. 9 of the Directive) as well as the breakthrough rule (Art. 11 of the Directive).

### *2. Impact of Luxembourg*

The examples given above pertain to the influence of secondary EC legislation. Another dimension needing examination is the potential impact of primary EC-law, i.e. Treaty provisions on the freedom of establishment and capital movement. It is well known that ECJ case-law based on those two fundamental freedoms contributed to a dramatic change in the corporate landscape in Europe giving rise to the phenomenon of regulatory competition (keyword: companies mobility[55]) and dismantling protectionist measures against foreign investors (keyword: golden shares[56]). A consequence thereof was the wave of 'pseudo-foreign companies' proliferating rapidly in countries adhering to strict capital regimes, such as Germany, the Netherlands or Denmark. Taking into account the relative cost of incorporating a company in Poland (among the highest in Europe) one could

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[54] ECJ judgment of 13 December 2005, Case C-411/03 SEVIC System AG ("Sevic"), E.C.R.-I, 10805.

[55] See the Centros decision (ECJ Case C-212/97 (Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, decision of 9 March 1999, E.C.R. I-1459,) the Überseering decision (ECJ Case C-208/00, Überseering B.V. v. Nordic Construction Company Baumanagement GmbH (NCC) and the Inspire Art decision (ECJ Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., decision of 30 September 2003).

[56] See, e.g. ECJ judgments of 4 June 2002 in cases: C-367/99 (Commission vs. Portugal), C-503/99 (Commission v. Belgium), C-98/01 (Commission vs. United Kingdom).

reasonably expect a similar outburst of imported "ltds" in this part of Europe – but, this did not happen.[57] Therefore Poland has not experienced a similar "cohabitation" of domestic and foreign firms that would force a direct confrontation of diverging legal concepts with the result that the impact of the *pro-libertate* ECJ rulings on Polish company law remained rather limited. The recent reduction in the minimum capital requirement (CCC reform of 23 October 2008, see below) resulted more from a European "fashion" than from a sophisticated and coherent law reform. This having been said, some influences of the ECJ "golden-shares" jurisprudence have been reflected both in Polish case law[58] and in the Act on special rights of the Treasury of State, as well as their implementation for capital companies considered of material significance for the public order and public security (3 June 2005).[59]

## V. Foreign Inspirations and their Impact on Polish Company Law – the Polish Experience with Legal Transplants

### 1. The Economics of Lawmaking in a Transforming Economy

Given limited resources, such as human capital and efficient institutions (courts and academia) on the one hand, and growing demand from the business environment for an adequate legal framework – on the other, the import of legal concepts and institutions proved to be the most cost-effective and sometimes the only affordable way of reducing existing discrepancies in legal sophistication in order to address the needs of the transforming economy.[60]

However, a frequent lack of a proper theoretical setting for imported legal tools did result in some negative consequences for the coherence and efficiency of law. For a long time, however, spending scarce resources on the import of legal concepts and know-how as well as on the search for practical and quick solutions to the emerging problems of everyday commercial dealings has yielded a higher marginal utility for the economy as a

[57] Becht, M./Mayer, C./Wagner, H.F. *Where Do Firms Incorporate?*, ECGI Law Working Paper No. 70/2006, p. 30.

[58] See judgment oft the Polish Supreme Court of 30 September 2004 (IV CK 713/03).

[59] The Act of 2005 was replaced by the Act of 18 March 2010 on special rights of the Minister of the Treasury of State as well as on their implementation for capital companies and group of companies in energy, petroleum and gas petrol sector (Journal of Laws of 2010, No. 65, item 404). The right of the Minister to oppose certain business decisions in those companies is no more linked to the shares belonging to the State Treasury.

[60] See Radwan (*supra* note 1), at p. 6.

whole than could reasonably be expected from investing in the methodical build-up of the entire system of business law, starting from its theoretical, i.e. dogmatic and economic foundations.[61] The corresponding opportunity cost included an underdeveloped 'identity' of business law (both in its production and application), which in turn has led to inefficiencies and legal uncertainty. One might rightly be inclined to perceive contemporary Polish business law, and company law in particular, as an aggregate of individual legal provisions united merely by formalistic rules of legal interpretation.[62] In spite of the frequent wholesale import of legal institutions, no formal transplantation methodology has ever been developed in Polish jurisprudence. Given the extent of the legal transplant phenomenon one could reasonably expect quite the opposite, i.e. an increase in scholarship dedicated to conscious and proper borrowing of legal approaches and institutions.

### *2. Sources of foreign inspiration*

Not surprisingly the primary source of inspiration was German corporate law. As stated above, a process of wholesale transplantation took place in the course of aligning Polish law with the *acquis*, where German law played a role of a transmitter. However, it would be too simplistic to claim the current Code resulted from the slavish imitation of German laws. The legislative inspirations include Germany, the Netherlands, Belgium, France, Hungary and Slovenia. Yet the impact of foreign legislation other than that of Germany appears to remain rather limited.

### *3. Case Study: Squeeze-out*

As an example we may refer to squeeze-out provisions – an institution introduced into the Polish CCC a year in advance of Germany. According to the official legislative motives of the CCC 2000, Polish regulation was modelled on the Dutch, French and Belgian laws.[63] On closer investigation the solution found in CCC bears some peculiarities. First, contrary to virtually all foreign counterparts, CCC 2000 limited the scope of application of the squeeze-out rule to non-listed companies (see Art. $418^1$ sec. 8). This is surprising as comparative studies reveal the existence of two models of

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[61] See Radwan (*supra* note 1), p. 7.

[62] Adherence to legal formalism is not limited to the areas of company and commercial law, it also prevails in administrative law cases pertaining to business entities, cf. Galligan, D./Matczak, M. *Strategies of Judicial Review. Exercising Judicial Discretion in Administrative Cases Involving Business Entities*, (2005) Ernst & Young Better Government Paper Series, Warsaw 2005; see also Radwan (*supra* note 1).

[63] See the official legislative motives, Parliamentary Document (Druk Sejmowy) No. 1687 of 4 February 2000, p. 48.

squeeze-out: either covering both listed and non-listed companies or embracing listed companies only. Against this comparative background Polish rules must be assessed as somehow exotic and apparently random. No convincing reasoning to support such an option has ever been put forward. What is more, the decision to proceed with the compulsory acquisition of shares was made subject to the resolution of shareholder meetings – a unique choice internationally – at least until Germany followed suit (see sec. 327a-327f AktG introduced in 2001 by WpÜG – reverse transplant?). It was not until 2005 when a parallel framework was put in place for public (listed) companies – as a result of implementing the Takeover Directive (see Art. 82 *Act on Public Offering (...) and Public Companies*). Under Art. 82 *Act on Public Offering (...) and Public Companies* the threshold entitling a squeeze-out of the minority was raised to 90%, lower than the 95% required by the CCC (95%). Moreover no approval by the general meeting is required under the Act. As a result, a legal dualism exists, where two separate sets of rules govern the squeeze-out procedure in listed and non-listed companies.

### *4. Case Study: Shareholder Loans*

Two other examples of an apparent transplant – this time directly from German law– are the regulation of shareholder loans (Art. 14 sec. 3) and the pre-incorporation entity (company in organization – Art. 11–13). Whereas the latter addressed an issue of undeniable practical significance,[64] the former appeared somehow artificial, as there was neither case law nor legal writing dealing with that issue. This lack of legislative roots rendered the rules on shareholders open to occasional misunderstanding. The underlying idea in Germany was that any capital injection rendered by shareholders to the company in a way other than by means of ordinary capital increase should be converted into subordinated debt. This rationale was somehow lost in the transplant, as the rule tends to be interpreted by its commentators in a quite formal manner. According to the Art. 14 sec. 3 a receivable debt to a shareholder in respect of a loan granted to a company shall be considered a contribution to the company in the case where the company is declared bankrupt within two years from the day of conclusion of the loan agreement. This is being interpreted strictly and formally as encompassing debts stemming from loan agreements only, and not extended to include merchant credit or any other forms of postponed payment.[65] What is more, contrary to the German model, the Polish rules

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[64] See Sołtysiński (*supra* note 3), p. 287 and 291.

[65] See Szumański A. [in:] Sołtysiński, S./.Szajkowski, A/Szumański, A./Szwaja, J. *Kodeks spółek handlowych. Komentarz*, Volume I, Warszawa 2006, pp. 260 et seq.

apply to all shareholders, irrespective of the stake in the company, which disregards the corporate status of insignificant shareholders, who despite their position as members (*de iure*), are *de facto* qualified as outsiders.

### *5. Case Study: Mergers*

Yet another example of accidental transplantation would appear to have been delivered by Art. 509 sec. 3. According to this provision, the resolution approving a merger may not be challenged for objections relating only to the exchange ratio of shares. This wording resembles Sec. 14 para 2 of the German law on transformation (*Umwandlungsgesetz*). But it is not the wording that brings about the suspicion of ill-tuned transplantation. It needs to be pointed out at the regulatory context – while in Germany the rule is supplemented by special appraisal provisions (*Spruchverfahrensgesetz* 2003), there is no such framework in the Polish system. As a result, the transplant has been put in a quite different regulatory context. This missing piece of the puzzle contributes to the worsening of the minority shareholder position; they are left with the vague remedy of seeking redress according to general rules of the Civil Code (see Art. 415 of the Civil Code laying down the general legal basis for tort liability).

### *6. Legal Transplants in Poland – A Summary*

As indicated above, the most important impact on the current Code can be attributed to German law, particularly for joint-stock company law, some of the passages or even entire subchapters bear a striking resemblance to their *Aktiengesetz* prototypes (particularly *genehmigtes Kapital*[66] and *bedingtes Kapital*[67]). However, the German-inspired statutory laws have been to some extent overlapped by legal practice (including forms and covenants) applied by large law firms, the majority of which is either part of a multinational chain or has borrowed Anglo-Saxon *modus operandi* and know-how. Additionally, the attitude of the courts is characterised by the formalistic application of law in a manner much stricter than that of Germany.[68] All this creates an interesting patchwork-system, where the written

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[66] Resembling the Anglo-Saxon *authorized capital*, i.e. the power granted to the board of directors to increase capital by share issuance – see Art. 444 et seq CCC.

[67] The idea is to enable the company to carry out a kind of *conditional capital increase*, where new shares are issued upon the condition that the entitled individuals (e.g. holders of convertible bond or holders or warrants) decide to exercise their conversion or subscription rights see Art. 448 et seq. CCC.

[68] See a survey embracing administrative business law, whose findings however are to a similar extent applicable to commercial and company law cases: Galligan/Matczak (*supra* note 62).

laws are modelled on German legislation, but handled in a different way by judges and attorneys.

A recent (October 2008) development in Polish company law cannot be overlooked. This featured a dramatic reduction of minimum capital requirement from 50 000 Złoty (approx. 11 000 €) to 5000 Złoty (approx. 1100 €) for a limited liability company and from 500 000 Zloty (approx. 110 000 €) to 100 000 Zloty (approx. 22 000 €) for a joint stock company. This reduction occurred as a reaction to a parallel development in Europe. The amendment was accompanied by a package of wide-spread liberalisations of the legal business framework in Poland. However, the recent amendment appears somehow accidental and arbitrary as capital reduction was implemented in isolation from the complex revision of the creditor protection system in Poland, despite the existence of several profound studies in the literature advocating a well thought-through system change.[69]

## VI. Internal Structure and Allocation of Powers in the Polish Limited Liability and Joint Stock Company

### *1. Limited Liability Company*

In a limited liability company there are two obligatory corporate bodies, i.e. the management board and the shareholders meeting. Establishment of a supervisory board is, in principle, not obligatory because right of supervision and inspection over company's affairs is conferred upon each shareholder (Art. 212). The articles of a company may provide for the establishment of a supervisory board or auditors' committee or both these bodies (Art. 213 sec. 1).[70] Whenever one of these bodies has been established, the articles may exclude or restrict individual control by shareholders, which is often the case in larger companies with a relatively large number of shareholders. Furthermore, establishment of the supervisory board is

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[69] Opalski, A. *Kapitał zakładowy: Skuteczny instrument ochrony wierzycieli czy przestarzała koncepcja prawna? Próba porównania modeli ochrony wierzycieli w prawie państw europejskich i Stanów Zjednoczonych,* Kwartalnik Prawa Prywatnego, 2002, No. 2, pp. 435 et seq.; Radwan, A. *Sens i nonsens kapitału zakładowego – przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych* [in:] Cejmer, M./.Napierała, J./ Sójka, T. (eds.), *Instytucje prawne dyrektywy kapitałowej*, Volume II, Kraków 2005, pp. 23 et seq.; Oplustil, K. *Reforma kapitału zakładowego w prawie europejskim i polskim* [in:] *Kodeks spółek handlowych po pięciu latach*, Wrocław 2006, pp. 551 et seq.

[70] In practice if shareholders decide to set up a supervisory body they tend to go for the supervisory board rather than the auditors' committee, so for the sake of simplification we limit our analysis to the supervisory board.

obligatory in companies with more than 25 shareholders, whose share capital exceeds 500,000 PLN (Art. 213 sec. 2). This regulation, already rooted in the Commercial Code of 1934, is a (modified) legal transplant from Austrian law containing a similar provision applicable to limited liability companies who as a matter of their ownership structure and capital equipment, resemble a typical joint-stock company (see sec. 29 (1) No. 1 of the Austrian Act of Limited Liability Company of 1906). The management board must be composed of one or more natural persons and represent the company and manage its affairs. Members of the management board are appointed for a specified or unspecified term by a resolution of shareholders unless the articles of company provide otherwise (Art. 201 sec. 4). In particular, a company's articles may grant any given shareholder a right to appoint one or more directors. Each member of the management board may be dismissed by a resolution of shareholders at any time and without cause. The articles may incorporate other provisions, specifically, to restrict the right to remove a member of the board to important reasons (Art. 203 sec. 2). Removal from the management board does not deprive the dismissed member of the rights resulting from the contractual relationship with the company (e.g. employment or managerial contract, Art. 203 sec. 1).

Whether shareholders of a private limited company may give binding instructions to the management board concerning the management of company's affairs is quite a controversial issue in the Polish legal doctrine. The majority of commentators hold the opinion that giving these instructions is legally possible.[71] This opinion stems firstly from the nature of *spółka z o.o.* which is typically a company with a small number of shareholders personally involved in its activity. Secondly, a statutory basis for this opinion may be found in Art. 207 CCC 2000 according to which the relationship of members of the management board to the company is subject to restrictions determined in the articles of company and, unless otherwise provided in the articles, *in resolutions of shareholders.* This provision indicates that resolutions of shareholders are, in principle, binding for

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[71] Szumański [in:] Sołtysiński et al. (*supra* note 15), pp. 508 et seq.; Opalski, A./ Wiśniewski, A.W. *W sprawie autonomii zarządu spółki z o.o. – polemika*, PPH 2005, No. 1, p. 52. Opposite opinion was presented by Szwaja, J./. Kwaśnicki, R.L *W sprawie wykładni nowego Art. 375$^{1}$, a także Art. 375, Art. 207 oraz Art. 219 § 2 k.s.h.*, PPH 2004, No. 8, p. 32 arguing that – as a general rule –directors are liable for damages inflicted upon company by their own wrongdoing (Art. 293) and therefore they should not be charged if the damage arises from an action undertaken under shareholder instructions. This opinion is unconvincing because each director can challenge the shareholders' resolution if it is considered to be unlawful or detrimental to the company's interest. The directors shall not be liable for the implementation of economically abortive shareholders' decisions.

managers. Thirdly, for limited liability company, the CCC 2000 does not explicitly exclude the power of shareholders to give binding instructions to the directors of a limited company, unlike under the Code's rules pertaining to the joint-stock company (Art. $375^1$, see below), where a literal provision formally immunises directors from the direct influence of shareholders as a group. The practical significance of this controversy is rather limited because of the ability to dismiss a member of the management board at any time without cause. Thus, managers, who do not follow shareholders' instructions, expose themselves to a prompt dismissal from the board. However, managers should not follow instructions which are unlawful or violate the provisions of the company's articles. Each individual manager as well as the management board as a whole has a right to challenge a resolution of shareholders' meeting which infringes on the law or company's articles or which is detrimental to the company's interest. Moreover, in cases determined by the CCC 2000, the management board is obliged to obtain shareholders' approval before implementing certain business operations; *inter alia* a shareholders' resolution is required for disposal or lease or creating usufruct with regard to the business enterprise (understood as a aggregate of organized assets), and for the acquisition and disposal of any immovable property or perpetual usufruct right unless the company's articles provide otherwise (Art. 228).[72] Disposing of a right or incurring an obligation amounting in value to not less than twice of the share capital also requires shareholders' approval unless the articles provide otherwise (Art. 230).[73]

### 2. Joint-stock Company

#### a) Two-Tier Board as the Manifestation of the Path of Dependence

The internal structure of the Polish joint-stock company is traditionally based on the two-tier ("dual") board system of German origin with two obligatory boards – management board and supervisory board. Those two bodies have different tasks and are made up of different persons. The two-tier model was already provided for in the first Polish joint-stock regulation of 1928 as well as in its successor, the Commercial Code of 1934 which was "revived" in 1990 after the political and economic turnabout.[74]

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[72] The consent of shareholders may be granted before the company makes a declaration of intention or thereafter, however, no later than two months from the date when the company made the declaration. Lack of shareholders' approval makes the act performed by the management board a nullity in law. See Art. 17 sec. 1 and 2.

[73] Article 230 last sentence excludes the application of Art. 17 sec. 1. Therefore, the lack of shareholders' resolution does not lead in this case to the performed by the management board nullity of the act in law.

[74] See Radwan (*supra* note 2), p. 1169.

It must be stressed that the Polish regulation was modelled on pertinent German provisions contained in the *Handelsgesetzbuch* of 1897. The full-fledged regulation of two-tier board systems provided for in the *Aktiengesetz* of 1937 had no influence on the Polish legislator at that time. The core legal framework of the CC 1934 pertaining to the dual company structure was (with some modifications) transposed into the CCC 2000. Although the Codification Commission was hesitant whether maintenance of the dual system as the only available governance system was the right regulatory choice vis-à-vis granting shareholders the possibility to opt for an optimum model (be it one-tier or two-tier) to fit particular needs of a given company, at the end the conservative view prevailed.[75] Contrary to the rules applicable to domestic companies, a unitary model is available to European Companies (*Societas Europaea*) with registered office in Poland. This notwithstanding, the two-tier board model is deeply rooted in the Polish legal system and any deviation from that model – even should the law finally allow for choice in corporate self-governance– might encounter reluctance on the side of practitioners caught on the path of dependence.

*b) Management Board*

The management board of Polish joint-stock companies may be composed of one or more members who are appointed and dismissed by the supervisory board unless the company's articles provide otherwise. In particular the articles may grant the general meeting the power to appoint and dismiss members of the management board. Moreover, the right to appoint a specified number of managers may be granted to a specific shareholder as a personal right (Art. 354 sec. 1) or even to a third party. The term of office shall not exceed 5 years, with no restrictions on the position's renewal. (Art. 369 sec. 1). A 'staggered board' (i.e. a partial replacement of board members) may be provided for in the company's articles (Art. 369 sec. 2). In any case and regardless of the manner of appointment, the members of the management board may be dismissed or suspended directly by the general shareholders' meeting (Art. 368 sec. 4). Thus, the shareholders ultimately decide the personal composition of the management board. The position of a member of the management board remains weak vis á vis the shareholders, as any member may in principle be removed at any time and without cause (Art. 370 sec. 1)[76]. Nevertheless, shareholders may strengthen this position in the articles by restricting the possibility of

[75] See Sołtysiński [in:] Grossfeld et al. (*supra* note 5), p. 428.

[76] The dismissal shall not deprive the dismissed member of the right to raise claims related to his or her employment or any other legal relationship concerning the performance of the function of a management board (Art. 370 sec. 1 CCC second sentence).

their dismissal to important reasons (Art. 370 sec. 2). These provisions are frequently adopted by listed companies.

The management board is liable for the managing company's affairs and representing the company vis-à-vis third parties. Where the management board is composed of more than one person, all of its members have the right and duty to jointly conduct the company's affairs unless the articles provide otherwise (Art. 371 sec. 1). This means that all company matters are decided by the entire board by way of a resolution. Exceptions to the collegiality principle are allowed, but only in the articles of the company and not in the internal rules of the board. The articles may provide for an internal division of members' duties and responsibilities with respect to different fields of the company's activity that may be based either on functional or geographical criteria.

The management board is autonomous within the scope of its tasks as determined by law and in the articles. Members of the management board are bound to act in the best interest of the company.[77] A doctrinal and practical controversy concerning the extent of managers' autonomy arose on the ground of regulation of Art. 375, according to which the relationship to the company of members of the management board are subject to the restrictions set forth in the law, the articles, the by-laws of the management board and resolutions of the supervisory board and the general meeting. A new Art. $375^1$ was introduced in 2003. It states explicitly that neither the general meeting nor the supervisory board may give binding instructions to the management board as to the running of the company's affairs. Thus, the allocation of powers among corporate bodies as provided for in the CCC 2000 and the company's articles has to be respected by all company's constituencies who should act accordingly. However, it needs to be emphasised, that the corporate practice of many Polish joint-stock companies (including listed companies) deviates from this statutory pattern. Due to the widespread existing ownership structure dominated by concentrated shareholding in Polish companies, members of the management board are *de facto* strongly dependent on the majority shareholder (usually another legal entity, mostly controlling company or a "head" of a corporate group). Ultimately the directors' role tends to be reduced to implementation of the group strategy defined at the parent company level. This factual dependence is fostered by the liberal rules on directors' removal (Art. 370 sec. 1) discussed above. This opens the Polish lawmaker to criticism for inconsistency: on the one hand the autonomy of management board members is formally provided for in the law, while on the other hand, the law gives shareholders the possibility of removing a director at any time, thus giving shareholders a Damocles sword to hang over

[77] See *supra*, sub VI.2.b.

the managers' fate. The liberal approach to directors' removal was first borrowed by the legislator of the Polish CC 1934 from the German Commercial Code of 1897, but then the paths of development diverged: while in Germany the reform of 1937 (upheld in 1965) brought limitations to the possibility of directors' removal at any time (see sec. 84 (3) *Aktiengesetz*), in Poland the old approach has survived until present day.

### c) General Shareholders' Meeting

The position of shareholders in the company structure under the CCC 2000 reflects the traditional continental approach to the general meeting providing them with a power to decide a long list of issues. That list embraces significant corporate actions and "organic" (structural) changes, such as: changes to the company's articles, mergers, divisions, transformation in another legal form of company or partnership, voluntary dissolution. What is more, shareholders' approval by a qualified majority is also required to effectuate minority squeeze-out from a non-listed company (Art. 418)[78], exclusion of shareholders' pre-emptive rights (Art. 432 sec. 2)[79] and delisting (Art. 91 (4) of the Act of 29 July 2005 on *Public Offering (...) and Public Companies*).[80] The ordinary general meeting is authorized *inter alia* to approve the annual report of the management board and to dispose of financial resources of the company, i.e. about the distribution of profit or coverage the losses (Art. 395 sec. 1). Any instructions by the management board or supervisory board concerning profit distribution are not binding on the shareholders.

A further list of the statutory powers of the general meeting is contained in Art. 393, the wording of which reads as follows: "In addition to other matters identified in this Section or in the company articles, a resolution of the general meeting shall be required for: (1) examination and approval of the management board's report on the company's activities and of financial statements for the preceding financial year, likewise for granting a vote of acceptance to members of company bodies confirming the discharge of their duties; (2) taking decisions in respect of claims for making good on damage suffered through the formation of the company or exercise of management or supervision; (3) transfer or lease of an enterprise or an organized part thereof and establishment of a limited right in rem thereon; (4) acquisition and transfer of an immovable property, perpetual usufruct, or share in immovable property, except where company articles provide otherwise; (5) making an issue of convertible bonds or bonds with

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78 Qualified majority of 95% required.

79 Qualified majority of 80% required.

80 Qualified majority of 80% required.

the priority warrant and an issue of the subscription warrants referred to in Article 453, paragraph 2; (6) acquisition of own shares in the circumstances referred to in Article 362, paragraph 1, subparagraph 2 and authorization for their acquisition in the circumstances referred to in Article 362, paragraph 1, subparagraph 8; (7) conclusion of a contract referred to in Article 7.[81]" This list may be added to in the company's articles. The attention of the comparative corporate lawyer should be particularly drawn to the provisions empowering shareholders with respect to decisions over the business enterprise meaning the entirety of organized corporate assets or a part thereof (Art. 393 No. 3).[82] At first glance, this provision resembles the famous *Holzmüller* doctrine developed and maintained by the German Supreme Federal Court (BGH)[83]. However the seemingly corresponding role of the CCC 2000 has been rather narrowly interpreted by the Polish Supreme Court to exclude share deals (meaning disposal of shares of a subsidiary through which business activity was effectively conducted) outside its scope of application.[84] According to the Court that kind of mediatisation of ownership suffices to remove the shareholders' approval requirement. This judgment may come as a surprise for a lawyer accustomed to the functional approach to the judicial interpretation of law. The Polish Supreme Court in contrast, is rather reluctant to apply law in such a creative manner, preferring instead to give preference to formal interpretation based on the wording of the legal provisions.

As mentioned above, a company's articles may include additional items in the list of matters requiring shareholders' approval so as to allow share-

[81] Such a contract under Art. 7 resembles the German "*Beherrschungs- und Gewinnabführungsvertrag*".

[82] This resolution shall be adopted by a qualified majority of three-fourths of votes, Art. 415 sec. 1 CCC.

[83] In its 1982 *Holzmüller* decision (BGHZ 83 at p. 122), the Federal Supreme Court established that the general meeting of a stock corporation holds an implied power to take managerial decisions which substantially affect shareholders' rights (in that case, the disposal of a business which amounted to 80% of the company's assets). In two recent decisions the Federal Supreme Court clarified the former Holzmueller judgement as follows: (a) the approval of the shareholders meeting shall only be required in exceptional cases which constitute a fundamental structural change equivalent to an amendment to the company's articles of association, (b) the disposal of less than 50% of the assets involved does not trigger the requirement of shareholders' approval, (c) whenever shareholders' approval is required, the resolution must be passed with a qualified majority of 75% (Gelatine – II ZR 154/02, 155/02).

[84] See judgment of the Supreme Court of 23 October 2003 (V CK 411/02, OSNC 2004/12 item 197) – the ruling came out with respect to a limited liability company, but may be equally applied to a joint-stock company, where the powers of general meeting as laid down in the CCC 2000 are nearly identical to those conferred upon the shareholders of a limited company.

holders to adopt a set of tailor-made articles fitting the needs of a particular company and to further curb managerial discretion. However, if the management board infringes on an internal restriction laid down in the articles (e.g. concludes a specific transaction without a prior consent of shareholders), the transaction remains valid vis-à-vis third parties. The violation of the articles by the board entails civil liability of board members to the company (Art. 17 sec. 3).

### *d) Supervisory Board*

The supervisory board is an obligatory body for all joint-stock companies. The board must be composed of at least three members, and in listed companies – of at least five members to be appointed and dismissed by the general meeting (Art. 385 sec. 1). The company articles may provide for a different manner for appointing and dismissing members of the supervisory board (Art. 385 sec. 2). The right to appoint or dismiss a specified number of the members of supervisory board may be conferred upon an individual shareholder (Art. 354 sec. 1), upon a holder of a specified class of registered shares (preference shares, Art. 351) or even upon a third party. The statutory right of employees to elect a specified number of supervisory board members (workers' codetermination) is provided for in the Polish law to a limited extent. This right exists only with respect to companies resulting from the transformation of a former state enterprise[85] and allows the workers to elect two-fifth of the supervisory board members directly.

As a matter of legal policy there is an apparent trade-off between minority protection and employee protection by means of codetermination rights. As Polish law, as a rule, does not provide for workers' participation, minority interests in the board can be accommodated. With regard to the election of supervisory board members, CCC 2000 provides minority shareholders with a right to require that representatives are appointed by way of the "group vote" (Art. 385 sec. 3–9). "Group vote" is a defined election technique enabling minority shareholders to influence the composition of the supervisory board. With regard to its function, the "group vote" resembles what is known as "cumulative voting" provided for in jurisdictions of some US-American states. Yet in fact the "group vote" represents an autonomous development of Polish corporate law already contained in the CC 1934 and retained in a slightly modified way in the CCC

[85] See Articles 12–16 of the Act of 30 August 1996 on Commercialisation and Privatisation, Journal of Laws (*Dziennik Ustaw*) of 2002, No. 171, item 1397 as amended.

2000. At the request of shareholders representing at least *one-fifth*[86] of share capital, members of the supervisory board shall be elected at the next general meeting by a vote in separate groups, even if the articles of the company provide otherwise (Art. 385 sec. 3)[87]. However, holding one-fifth of the share capital might prove insufficient to effectuate the appointment of a given shareholder's representative in the board. The amount of shares allowing for this kind of electing group are determined by dividing the total number of shares represented at a given general meeting by the total number of supervisory board members[88] of that company.[89] Shareholders electing their members by means of a group vote are automatically excluded from the election process outside that group (Art. 385 sec. 5). Thus, the minimum amount of shares required to form an election group is dependent on two variables: the amount of shares represented at a given general meeting, and on the total number of board members. The higher the number of board members, the fewer shares are needed to form an election group. Each election group is entitled to elect as many board members, as the number of times the amount of shares held by that group exceeds the minimum amount determined in the way described above. The groups may also merge with one another in order to elect more members of the supervisory board.[90] The number of groups does not need to match the number of board members to be elected; only one group need be formed (Art. 385 sec. 7). The seats on the board which have not be filled by an electing group shall be filled by way of voting with the participation of all shareholders who did not cast their votes in a separate group (Art. 385 sec. 5). Upon the election of at least one supervisory board member by group vote, the terms of office of all existing members expire automatically (Art. 385 sec. 8). Moreover, the CCC 2000 grants each electing group

[86] The fraction of share capital which is necessary to trigger the whole procedure (20%) is high in comparison to fractions required by law with regard to other minority rights (5% or 10%, see, e.g., Art. 223, 400, 401).

[87] However, where a person appointed by persons (e.g. employees of the company) or an entity specified in a separate Act sits on the supervisory board, only the remaining members thereof shall be subject to election (Art. 385 sec. 4).

[88] Where the company's articles determine only the minimum or the minimum and maximum number of board members, the general meeting should first adopt a resolution determining the precise amount of board members to be elected.

[89] E.g. if the total number of board members under the articles of association is three persons, the minimum threshold enabling the group to elect a board member amounts to 33%, In a board composed of 4 members, the threshold is 25%, where the aforementioned percentages refer not to the whole share capital but to the share capital present or represented at the general meeting.

[90] See for details Szwaja, J [in:] Sołtysiński, S./Szajkowski, A./Szumański, A./Szwaja, J., *Kodeks spółek handlowych. Komentarz*, Volume III, Warszawa 2008, pp. 782 et seq.

an additional, far reaching right to delegate one of the board members elected by that group to individually and permanently perform supervisory tasks (Art. 390 sec. 2). Members so delegated have the right to attend meetings of the management board in an advisory capacity. These minority rights are criticised in Polish legal doctrine,[91] which points out that the participation of minority representatives in the supervisory board may have a negative effect on the corporate governance of the company, endangering the internal consistency of the board and triggering conflicts among its members. The minority, equipped with the right to dispatch their representative to the management board, is capable of disrupting the operational capacity of management and discouraging executive directors from discussing openly company's affairs. Proposals have been made to repeal the relevant provision[92] or to downgrade its nature to a default rule subject to a discretional opt-out in the company's articles.[93]

The main task of the supervisory board is to exercise permanent supervision over the company's activities in all aspects of its business (Art. 382 sec. 1). In fact, the supervisory board does not act permanently but periodically, through meetings which are convened when the need arises, but not less than three times in a financial year (Art. 389 sec. 3). Special duties of the supervisory board include evaluation of management board annual reports (financial reports and reports on the operations of the company) to assess compliance with the financial data, documents and the facts. Supervisory boards should also give an opinion on management board proposals concerning distribution of profits or coverage of losses. In order to perform its duties, the supervisory board may inspect all company documents, request reports and explanations from the management board and employees as well as review assets and liabilities of the company (Art. 382 sec. 3). In principle, the supervisory board shall perform its duties collectively; individual members may however be delegated to perform specific supervisory tasks (Art. 390 sec. 1). The company's articles may extend the powers of the supervisory board, and, in particular, provide for the obligation of the management board to obtain the consent of the supervisory board prior to undertaking the actions specified in the company's articles (Art. 384 sec. 1). Contrary to the regulation provided for in other legal systems (e.g. German law), the supervisory board itself is not entitled to determine a list of corporate actions that should require its prior consent. Should the supervisory board refuse to consent to a specific corporate action, the management

[91] Opalski, A. *Rada nadzorcza w spółce akcyjnej*, Warszawa 2006, p. 91.
[92] Opalski (previous note), p. 514.
[93] Bąk, J./Oplustil, K., *Ius cogens w prawie spółki akcyjnej – analiza prawnoporównawcza*, Quarterly for the Entire Commercial, Insolvency and Capital Market Law (HUK) 2007, No. 2, at p. 184.

board may request the general shareholders' meeting to overrule the supervisory board so as to approve the action notwithstanding the supervisory board's refusal (Art. 384 sec. 2).

Problems and shortcomings of the Polish two-tier governance system[94] correspond with general findings and assessments made with regard to this model in other countries.[95] The list of shortcomings includes *inter alia;* information asymmetry to the disadvantage of the supervisory board and weak information flow between the management board and the supervisory board; insufficient commitment on the part of the supervisory board members with respect to performing their supervisory duties as well as inadequate knowledge and experience needed to assure effective monitoring; and weak communication and insufficient co-operation between the supervisory board and external auditors. Members of the supervisory board have limited independent access to information and need to rely on the management board as a source. This increases the risk of manipulation and filtering of information by the managers. Further aggravating this situation, the CCC 2000 lacks any regulation which would explicitly provide for a management board duty to periodically inform the supervisory board about the entrepreneurial planning and its implementation (see, e.g. sec. 90 (1) German *Aktiengesetz*). Thus, in many cases it is up to the management board to decide when and what information shall be given to the supervisory board. Also strict adherence to the collegiality principle may be detrimental for the efficiency of supervision as it may limit the board's (re)actions and responses to negative developments in the company's affairs. The CCC 2000 does not empower individual supervisory board members to request that managers present certain information or reports be presented to the supervisory board at its next meeting (unlike the German *Aktiengesetz* – see sec. 90 (3) AktG). Another omission is the CCC 2000 silence on board committees and co-operation between supervisory board and external auditors.[96] Thus, one may say, for Polish law, a review similar

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[94] Empirical evidence on the functioning of supervisory boards in Polish joint-stock companies is delivered in the study by Deloitte, PID&Rzeczpospolita, *Współczesna Rada Nadzorcza 2007*, available at: <www.deloitte.com/pl>.

[95] For Germany see: Hopt, K.J. *The German Two-Tier Board: Experience, Theories, Reforms* [in:] Hopt, K.J./Kanda, H./Roe, M.J./Wymeersch E. (eds.) *Comparative Corporate Governance*, Oxford 1998, p. 227 et seq.

[96] Art. 86 of the Act of 29 May 2009 on statutory auditors provides for an obligation to create an audit committee in the supervisory board of companies being the so called "public-interest entities" as well as regulates the tasks of this committee. However, if the supervisory board is composed of no more than 5 members (which is the minimum number of supervisory board members in a public company, Art. 385 sec. 1 CCC) formation of an audit committee is not necessary and its tasks may be vested with the board as a whole. The regulation of Art. 86 of the Act of 29 May 2009 constitutes imple-

to that of the German *Aktiengesetz*reform of 1998 (KonTraG) is needed and still outstanding.

## VII. Directors' Duties

### *1. Standard of Care and Diligence*

CCC 2000 provides the standard of care and due diligence to be applied by corporate officers (members of management board and supervisory board, liquidators) – Art. 293, Art. 483. These persons, while performing their duties, should act with due care appropriate to their professional position.[97] The provision recapitulates the normative contents of Art. 355 sec. 2 Civil Code, setting a higher standard against which the conduct of a company's representative is measured – a raising of the regular benchmark applied to ordinary non-business individuals. Thus, directors are expected to possess knowledge and experience as well as to apply the care of a businessperson as determined by the size and profile of the company.[98] To illustrate this approach, e.g., members of the management board of a large bank or insurance company should have a relatively higher degree of knowledge, prudence and good judgment as compared with the directors of ordinary business corporation. Even mere acceptance of the appointment by person lacking qualifications required to duly perform the duties of the director might be seen as violation of standard of care by the acceptor.[99] According to the case law, the observance of the standard of care includes "the anticipation of the results of planned actions, the fulfilment of all current and legal measures in order to properly fulfil managerial duties as well as the preservation of forethought, diligence and prudence needed to achieve objectives that are in line with the interest of the company".[100]

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mentation of Art. 41 of Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.

[97] The CC 1934 referred to the "care of a diligent merchant" ("*staranność sumiennego kupca*"). This was the Polish equivalent of the German notion of "*Sorgfalt eines ordentlichen Kaufmanns*".

[98] See with regard to details: Okolski, J./Modrzejewski, J./Gasiński, L. *Odpowiedzialność członków zarządu w spółkach kapitałowych – miernik staranności* [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Poznań 2005, p. 496; Cierpiał, R. *Vorstandshaftung in polnischen Kapitalgesellschaften* [in:] Kalss S. (ed.) *Vorstandshaftung in 15 europäischen Ländern*, Wien 2005, p. 662.

[99] Okolski et al. (previous note), p. 501; Dziurzyński, T. [in:] Dziurzyński, T./ Fenichel, Z./Honzatko, M. *Kodeks handlowy. Komentarz*, Łódź 1995, p. 322.

[100] Judgment of the Court of Appeal in Katowice of 5 November 1998, I Aca 322/98. See also judgment of Supreme Court of 17 August 1998, III CRN 77/93.

*2. Duty of Loyalty and Conflicts of Interest*

Polish company law is silent on the duty of loyalty of corporate officers. However, the existence of this duty is generally accepted in jurisprudence as well as in legal doctrine. This general rule with regard to management board members of listed companies was explicitly expressed in the Best Practices Codes of 2002 and 2005. According to the rule No. 35, "a management board member should display full loyalty towards the company and avoid actions which could lead to implementing exclusively their own material interest. If a management board member receives information on the possibility of making an investment or another advantageous transaction concerning the objects of the company, she or he should present such information immediately to the management board for the purpose of considering the possibility of the company taking advantage of it. Such information may be used by a management board member or be passed over to a third party only upon consent of the management board and only when this does not infringe the company's interest."[101] This rule reflects the famous corporate opportunity doctrine developed and practised in the Anglo-Saxon, and German jurisprudence. Unfortunately that rule has been omitted from the current version of Best Practices Code of 2007. According to another provision of the Code of 2005, "in transactions with shareholders and other persons whose interests have impact on the interest of the company, the management board should act with utmost care to ensure that the transactions are at arms' length"[102] (rule No. 34).

The duty of loyalty may be regarded as an immanent element of the fiduciary relationship between the company and its officers. The duty of loyalty correlates to a large extent with the business discretion granted to them. The existence of such a duty may be derived from a number of CCC 2000 regulations providing more detailed duties of management board members. For instance managers are subject to comprehensive statutory non-competition obligation. They may not engage in any competing business or participate in any rival entity, except with consent from the company. This prohibition includes acting as a partner in a partnership or civil partnership, and appointment as a member of the authorities of a rival company. Moreover, the prohibition also applies to participation in a rival company if a member of the management board holds at least ten per cent of shares in the company or has the right to appoint at least one member of the management board of that company (Art. 211 sec. 1, Art. 380 sec. 1)[103]. Unless the company's articles provide otherwise, consent is

[101] Excerpt from the official translation by the Warsaw Stock Exchange.

[102] *Supra*.

[103] With regard to the limited liability company, the same regulation is contained in Art. 211 CCC.

granted by the body empowered to appoint the management board (Art. 211 sec. 2, Art. 380 sec. 2).

In the event of a conflict of interest between the company and a management board member, or the member's spouse, relatives or in-laws within the second degree and persons with whom the member has a personal relationship, the management board member shall abstain from participating in deciding such matters and may request that this be recorded in the minutes (Art. 209, Art. 377). With regard to members of the supervisory board a similar provision is contained in soft law, i.e. in the Best Practices Code of 2007 (part III, No. 4). Moreover, the CCC 2000 provides for special treatment for loans, credit and similar agreements concluded by the company with or for the benefit of, *inter alia*, a member of the management board or supervisory board (Art. 15 sec. 1). Conclusion of such an agreement requires the consent of the shareholders' meeting. Where conclusion of this agreement involves a dependent company and a member of the management board of the dominant company, the consent of the shareholders' meeting of the dominant company is required (Art. 15 sec. 2).

### 3. *Business Judgment Rule*

The business judgment rule as developed by US courts is a presumption ("safe harbour") that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.[104] Unlike in Germany (see sec. 93 (1) *Aktiengesetz*[105]), Polish law does not codify the business judgment rule. Absent a normative ground, it cannot be presumed that the director, while conducting company's affairs, met appropriate standards of a due care and diligence. On the contrary, whenever a suit against the director is filed, the burden of proof in the legal proceedings lies with the defendant, i.e. the incriminated member of the management board or the supervisory board. According to a ruling of the Polish Supreme Court, a reference to an economic risk cannot exculpate the manager, when the damage inflicted upon the company was the result of careless management.[106] On the other hand, Polish doctrine and the courts acknowledge the existence of a large degree of managerial discretion including the power to accept certain level of risk inherent to a given business activity, provided that they observe proper standards of care and

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[104] Aronson v. Lewis, 473A.2d, 805 (at 812) (Del. 1984). See also Bainbridge, S. Corporation Law and Economics, New York 2002, p. 269.

[105] Introduced with the UMAG-reform of 2005.

[106] Judgment of 9 May 2000, IV CKN 117/00.

loyalty towards the company.[107] This view was reflected in rule No. 33 of the Best Practices Code 2002 and 2005: "While making decisions on corporate issues, members of the management board should act within the limits of justified economic risk, i.e. after consideration of all information, analyses and opinions, which, in the reasonable opinion of the management board, should be taken into account in a given case in view of the company's interest"[108]. Unfortunately, this provision has not been transferred to the new Best Practices Code 2007.

### *4. Directors' Liability and Shareholders' Remedies*

The main legal basis for corporate officers' liability may be found in Art. 483 (for joint-stock companies) and 293 (for limited companies). Under this regime a member of the management board, the supervisory board, or a liquidator is liable to the company for any damage inflicted through negligence or an action which is contrary to the provisions of law or the company's articles, unless no fault is attributable to this person. In legal proceedings, the plaintiff (i.e. the company or a shareholder acting on its behalf, see below) has to prove: firstly, the extent of the damage inflicted upon the company, secondly, the contributing behaviour of the corporate officer infringing the law or company's articles, and thirdly, the causal link between the damage and officer's misbehaviour. The burden of proof for the observance of the duty of due care rests with the defendant, i.e. the incriminated officer.[109] Filing a suit against the officer requires prior approval by the shareholders' meeting (Art. 228 No. 2, Art. 393 No. 2). Thus, the decision to litigate is ultimately up to the shareholders as a group. In judicial proceedings against a member of the management board, the company is represented by the supervisory board or by a special attorney appointed by the general meeting (Art. 379 sec. 1). If the company fails to bring an action for redressing damage within one year from the disclosure of the injurious act, each shareholder, or a person otherwise entitled to participate in the profit or in the distribution of company's assets (e.g. holders of bonds giving the right of participation in company profit), may bring a suit on behalf of the company (*actio pro socio*, derivative suit – Art. 486 see also below in this chapter).

Polish law gives preference to a democratic approach to shareholder rights, the legislator consciously rejected the use of quora and thresholds

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[107] See judgment of Supreme Court of 26 January 2000, I PKN 482/99; Okolski et al. (*supra* note 98), p. 503; Okolski, J./Wajda, D. *Odpowiedzialność członków zarządu spółek kapitałowych*, PPH 2007, No. 2, p. 12.

[108] Excerpt from the official translation by the Warsaw Stock Exchange.

[109] See, with regards to details, Szczęsny, R. *Odpowiedzialność odszkodowawcza członków zarządu,* Prawo Spółek, 2007, No. 3, p. 22 et seq.

as means of limitation on the availability of shareholders' remedies. As a consequence, every single shareholder, regardless of share ownership, can challenge a general meeting resolution. The importance of the individual shareholder's action against the resolution is further advanced by the traditional view of shareholder democracy. According to this view, shareholders as "owners" of the company shall have decision-making powers with respect to all important transactions and operations of the company. The consequence of this assumption is the aforementioned long list of powers assigned to the general meeting by mandatory law (*inter alia*. Art. 393). Thus shareholder's involvement in the decision making process does not end with a vote, but extends to include a possible veto attempt (suit). Actions against the resolutions of shareholders' meeting as codified in Polish law are characterised by a certain dualism: an action based on violation of legal provisions (action for nullity – *powództwo o stwierdzenie nieważności*[110] – Art. 252, Art. 425) and an action based on infringement upon shareholders' rights, company articles, company interests or good faith (action for rescission, Polish: *powództwo o uchylenie*[111] – Art. 249, Art. 422). However, the resemblance to their German counterparts may be misleading. The main difference lies with the scope of application. The dividing line between these two sorts of action in Polish law appears controversial. Unlike in Germany, where the availability of the action for nullity (*Nichtigkeitsklage*) is limited to the most severe violations of mandatory law (Sec. 241 *Aktiengesetz*), in Poland, any infringement of legal provisions is grounds for a claim of nullity. One needs to bear in mind that the timeframe for this form of action may be relatively long, unlike the regular action for rescission which has a limited time of application (see Art. 424, Art. 425 sec. 2 and 3). From a policy perspective, the shift in the practical significance from a less severe action (rescission) to the more severe action (nullity) is questionable. In addition to this, legal doctrine and the judicature have acknowledged the existence of the so-called *negotium non existens* or pseudo-resolution. This opens a third way to challenge the resolution based on the rules of civil procedure (Art. 189 Code of Civil Procedure). The overall picture made up by this trinity of legal means is rather obscure, and is further aggravated by a certain ambiguity of case law and opposing views expressed by legal scholars.[112]

Another remedy vested with any individual shareholder is the derivative action (*actio pro socio* – Art. 295 for a limited liability company, Art. 486

[110] German: *Nichtigkeitsklage.*

[111] German: *Anfechtungsklage.*

[112] For review of different opinions in the legal doctrine and case-law see: Spyra, M. [in:] Włodyka, S. (ed.) *Prawo spółek handlowych*, Volume 2B, Warszawa 2007, p. 487 et seq.

for a joint-stock company).[113] This form of action is available if the company fails to bring an action for redressing damage within one year from the disclosure of the injurious act. In this case any shareholder and, in a joint-stock company, any person entitled to participate in profit or in the distribution of assets (e.g. holders of bonds giving the right of participation in company profit), may bring a suit on behalf of the company.[114] Where a derivative action has been brought, those liable to redress the damage may not invoke the resolution of a shareholder meeting acknowledging their fulfilment of duties or a waiver by the company of its claim for damages (Art. 296 and Art. 487). The plaintiff must prove abuse on the part of corporate officer, the damage inflicted and a causal relation between the abuse and the damage to the company.[115] It should be noted that the significance of derivative action in Polish corporate practice is rather minimal. That is due to a couple of reasons, first, the payoff for a suing shareholder is likely to be negative in the majority of cases, second, information asymmetry makes it difficult for the shareholder to effectively bear the burden of proof. There is no favourable cost regime in place to facilitate the use of derivative action nor is there a system of presumptions to mitigate the aforementioned information asymmetry. Therefore, there is a case for reforming the current Polish derivative action regulation in order to improve its efficiency as a means of investor protection.

The efficiency of shareholders' remedies and the conscious pursuit of their overall investment strategy relies heavily on access to information. In this context there seems to be an apparent deficit in the regulatory framework on shareholder's information rights in a limited liability company, namely a shareholder's individual right to control company's affairs (Art. 212) may be excluded if the company establishes a supervisory board or auditors committee (Art. 213 sec. 3). This might lead to the establishment of 'pseudo' board solely to frustrate shareholder access to information.[116] However, the minority in a limited liability company may file a motion to appoint a special purpose auditor (Art. 223). For this motion to

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[113] See the monographic study of Bilewska, K. *Dochodzenie roszczeń spółki kapitałowej w przez jej wspólników (actio pro socio)*, Warszawa 2008.

[114] In order to prevent an abuse of the derivative action, CCC provides that, at the defendant's request, the court may order bail to be provided as a security for damage the defendant stands to suffer (Art. 486 sec. 2). Moreover, where the action has proved groundless and the plaintiff, by bringing the action, acted in ill faith or was flagrantly negligent, the plaintiff shall make good on the damage wrought upon the defendant (Art. 486 sec. 4).

[115] See judgment of Supreme Court of 9 February 2006, V CK 128/05.

[116] See Bilewska, K. *The right to information – a basic shareholder's right*, Quarterly for the Entire Commercial, Insolvency and Capital Market Law (HUK) 2008, No. 4, p. 455.

be effective, a quorum requirement of one-tenth of the share capital needs to be met. A corresponding right is provided for shareholders of public (listed) companies whenever they reach a threshold of 5% of total votes (Art. 84–85 *Act on Public Offering (...) and Public Companies*). It follows, that for a joint-stock, non-listed company there is no such minority right protection, which comes at surprise and might be seen as a regulatory gap.

Another gap, or in fact a conscious omission, which has resulted in a regulatory vacuum is found in addressing the problem of groups of companies. In leaving this problem outside of the CCC 2000, the legislator left the issue up to the courts, but there is no clear line of case law emerging. Although the CCC contains a few provisions referring to the notion of affiliated companies (Art. 4 sec. 1 No. 4, 5, Art. 6, Art. 7), those provisions are effectively silent on minority protection other than some fragmentary information rights limited to the mere existence of the dependency relationship.[117] Currently there is a discussion regarding whether and how to tackle as yet unsolved issues through legislative intervention.[118]

A final word is warranted on the recent act implementing the Shareholders Rights' Directive (2007/36/EC)[119] into the Polish legal system, which brought a selective upgrade of shareholders' rights in non-listed companies along with the transposition of rules mandated by the Directive. This includes the power to effect a convocation of general meeting, the right to put items on the agenda of the forthcoming meeting and the right to table draft resolutions.[120]

## VIII. Corporate Governance Code and Enforcement

### *1. Background and Earlier Developments*

The history of the Corporate Governance Codes ("Best Practices Codes") in Poland began in 2002, when the first version of the Code of "Best Prac-

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[117] Sołtysiński, S./Szumański, A. *Shareholder and Creditor Protection in Company Groups under Polish Law*, EBOR 2 (2001), p. 255; Szumański, A. *Ograniczona regulacja prawa holdingowego (prawa grup spółek) w kodeksie spółek handlowych*, PiP 2001, No. 3, p. 20.

[118] Romanowski, M. *W sprawie potrzeby nowej regulacji prawa grup kapitałowych w Polsce*, PPH 2008, No. 7, p. 4; Romanowski, M. *Wnioski dla prawa polskiego wynikające z uregulowań prawa grup kapitałowych w wybranych systemach prawnych UE, Japonii i USA*, Studia Prawa Prywatnego 2008, No. 2(9), p. 4.

[119] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, Official Journal of the EU of 14 July 2007, L 184/17.

[120] The Act implementing the Shareholders Rights' Directive into the CCC was adopted on 5 December 2008 and comes into force on 3 August 2009.

tices in Public Companies" was adopted by the Supervisory Board of the WSE.[121] This Best Practices Code (as well as its amended version of 2005) was drawn up by the Best Practices Committee, composed of academics, representatives of capital market institutions (e.g. Securities and Exchange Commission, WSE), law firms and business organizations (Polish Confederation of Private Employers). According to the preamble of the Code, "best practices constitute a set of detailed rules of conduct addressed to both authorities of companies and members of such authorities, as well as to majority and minority shareholders. This set of best practices, established for the needs of the Polish capital market, presents core corporate governance standards for a public joint-stock company." Upon consultation with market participants the Best Practices Code was formally adopted by the Supervisory Board of the WSE. At the same time, the "comply or explain"-principle was introduced into the WSE Listing Rules according to which every public company was obliged to declare in its annual statement which rules of the Code were complied with and which were not. In the latter case, the company had to give reasons for non-observance of a given rule. The statement had to be passed to the WSE and to be published. Moreover, companies were obliged to promptly disclose any occurrence which constituted an *ex post* violation of a given rule.

### 2. *The Best Practices Code of 2007*

#### a) *Underlying Idea*

In 2007 the new "Best Practices Code" was drawn up from scratch and (after consultations with market participants) adopted by the Supervisory Board of WSE acting on the basis of the authorization contained in the WSE Listing Rules.[122] Unlike its predecessors of 2002 and 2005, the current Code does not represent the work of a corporate governance expert group, but is a document drawn up within the Warsaw Stock Exchange, without naming its authors.[123] The "Code of Best Practices for WSE Listed Companies" ("*Dobre Praktyki Spółek Notowanych na GPW*") is exclu-

[121] See Sołtysiński (*supra* note 3), p. 302 et seq.

[122] According to sec. 29 (1) WSE Rules, the Exchange Supervisory Board, on application to the Exchange Management Board, may resolve the rules of corporate governance for joint-stock companies that are issuers of shares, convertible bonds or bonds with priority rights admitted to exchange trading. English version of the WSE-Rules is available on the website: <www.gpw.pl/gpw.asp?cel=e_ogieldzie&k=7&i=/regulacje/opis&sky=1>.

[123] English version of the Code as well as another data about corporate governance of Polish companies are available on the website: <www.corp-gov.pgw.pl>.

sively addressed to companies listed on regulated market.[124] According to its preamble, the Code is to enhance the transparency of listed companies, improve the quality of communication between companies and investors, and strengthen the protection of shareholders' rights (including those not regulated by legislation). Burdens outweighing market benefits should not be imposed on listed companies. The Code of Best Practice therefore only addresses those areas where its application may have a positive impact on the market valuation of companies, thus reducing the cost of capital. This approach has been rightly criticised in Polish legal doctrine for being too strongly focused on procedural ("technical") rules of corporate governance and neglecting the introduction and promotion of general guidance (standards of conduct) for shareholders and company organs, such as the loyalty principle, corporate opportunity doctrine or business judgment rule.[125] In May 2010 the Code was reviewed and amended in order to adjust its "soft" regulation to the latest amendments of the CCC as well as to the current trends in corporate governance.

### *b) Structure*

The Code comprises four sections. The rules defined in section I are recommendations which, according to the preamble, "embody trends concerning adequate levels of internal relations within listed companies, as well as their relationship to the business environment". The recommendations address various issues such as the need for a transparent and effective information policy to be pursued by companies (including on-line broadcasts of general meetings over the Internet), directors' remuneration, personal and professional qualifications for supervisory board members. Sections II, III, IV contain sets of Best Practices for management board members, for supervisory board members and for shareholders respectively.

### *c) Rules Pertaining to the Management Board*

The Best Practices for management boards of listed companies open with an extensive list of information and documents to be made available on the company's website which, as of 1 January 2009 shall also be published in English. Another rule obliges the management board to request a prior approval of a significant corporate transactions (agreements) pursued with a related entity from the supervisory board. Particularly important is the

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[124] For small companies listed on the Alternative Trading Market "NewConnect" a simplified version of the "Best Practices Code" was adopted by the WSE Board in December 2008.

[125] See critical review of the new Codes by: Opalski, A. *Nowe Dobre Praktyki w spółkach publicznych*, PPH 2008, No. 3, p. 14.

rule providing for the standard of conduct of a manager in situations in which conflicts of interests have arisen or may arise (notification of a conflict to the management board and refraining from taking part in the discussion and from voting).

### *d) Best Practices of the Supervisory Board*

The Best Practices of supervisory board aim at activating this corporate organ and strengthening its role in internal corporate governance of listed companies. In addition to its responsibilities as laid down in legal provisions, the supervisory board must prepare and present to the ordinary general meeting a brief annual assessment of the company's standing (including evaluation of the internal control system and of the risk management system) as well as a self evaluation report. Moreover, shareholders are given the supervisory board's opinion on issues to be voted on at the general meeting. Most controversies arose from the issue of independent supervisory board members.[126] Under the Best Practices Code 2002 at least half of supervisory board members must be independent members.[127] This far-reaching rule was not compatible with the main feature of Polish corporate governance system, characterised by the prevalence of consolidated ownership where controlling shareholders extend their influence via the supervisory board. Therefore an overwhelming majority of Polish companies declared non-compliance with that rule. As a result, an attempt to transplant the Anglo-Saxon concept of independent directors into the Polish was a partial failure. Thus the amended version of the Code of 2005 provided for a more flexible rule according to which in companies where the majority shareholder holds more than 50% of the total votes, the supervisory board shall consist of at least two independent members. Furthermore, both versions of the Code granted independent members special veto rights with regard to some resolutions of the supervisory board (i.e. resolutions approving related party transactions). In fact, this amendment proved to have only a limited influence on the acceptance of the rule by the companies. Current "Best Practices" require participation of at least two independent members in the supervisory board regardless of the ownership structure of a company. As to the independence criteria, the Code expressly refers to Annex II of the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board. Over

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[126] See Oplustil, K. *Niezależni członkowie rady nadzorczej (administrującej) jako instrument wzmocnienia nadzoru korporacyjnego w spółkach publicznych* [in:] Cejmer, M./Napierała, J./Sójka, T.(eds.), *Europejskie prawo spółek*, Volume III, *Corporate Governance*, WoltersKluwer, Kraków 2006, pp. 363 et seq.

[127] Detailed criteria of independence were to be laid down in company's articles.

and above the criteria as laid down in Annex II, the Code 2007 prescribes two additional requirements: employment in the company or in an associated company as well as an actual and significant relationship with any shareholder who has the right to exercise at least 5% of all votes shall be seen as precluding the independence of that member. Contrary to its predecessor, the current Code does not equip independent board members with a veto right with regard to specific operations.

### *e) Board Committees*

Another controversial corporate governance issue is that of board committees. These committees are not common in the supervisory boards of Polish companies.[128] A plausible explanation for that finding may be seen in the relatively small size of supervisory boards in Polish joint stock companies. According to an empirical study of 2007, supervisory boards in the majority (almost 56%) of companies examined were composed of no more than six members.[129] Due to the amendment of the Code in May 2010, the regulation requiring establishment of at least an audit committee within the supervisory board was abolished, probably because the "hard law" of Art. 86 of the Act of 29 May 2009 deals with the committee, implementing Art. 41 of the 2006/43/EC Directive. The current Code provides for no regulation of board committees and, for the tasks and operations of the board committees, only refers generally to Annex I of the Commission Recommendation mentioned above. The assessment of such a "regulatory abstinence" with respect to one of the most crucial corporate governance issues must be negative. The absence of any material regulation on managers' remuneration deserves criticism as well. The Code only requires that each listed company shall have a remuneration policy with regard to members of the management and supervisory board. For details, the Code refers to the Commission Recommendation 2004/913/EC fostering an appropriate regime for the remuneration of directors of listed companies.

### *f) Enforcement of the Code*

Enforcement of the Code relies on the "comply or explain" principle incorporated into the WSE Listing Rules. Any non-compliance with one or more rules (including recommendations of section I of the Code) must be

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[128] According to an empirical study of structure and functioning of Polish supervisory boards (Deloitte, PID, Rzeczpospolita, *Współczesna Rada Nadzorcza 2007*, *supra* note 93, p. 11), there is no committee in the majority (59%) of examined supervisory boards and audit committee comes up only in one third of the examined boards.

[129] Deloitte, PID, Rzeczpospolita, *Współczesna Rada Nadzorcza 2007* (*supra* note 93) p. 8.

disclosed in the annual corporate governance statement ("corporate governance report", sec 29 (5) WSE Listing Rules). The range and structure of the statement is determined by sec. 91 (5) (4) of the ordinance of the Minister of Finance of 19 February 2009 regarding ad hoc and periodical disclosure duties of the securities issuers.[130] The ordinance provisions are modelled on the European regulation provided for in Art. 46a of the Directive 78/660/EEC. The statement should inform market participants which rules (including recommendations) of the Code were not complied with, and explain the circumstances and reasons for not having applied a given rule, along with explanation of how the company intends to remedy the possible negative impact of non-compliance and what steps it intends to take in order to mitigate the risk of future non-compliance. In addition to the requirements discussed above, listed companies are obliged to perform *ad hoc* reporting on permanent or incidental violation of any of the Codes' rules contained in sections II-IV. The report should be published both on the company's official website and in the manner practised by the company for disseminating its current reports. The publication becomes due as soon as the company realises that a given rule will not be complied with permanently or incidentally (sec. 29 (3) WSE Listing Rules).

Finally it must be stated that the current Polish Best Practices Code of 2007 is not legally binding. Rules of the Code are not even a part of the WSE Listing Rules. "Best Practices" can be regarded as a soft law-instrument aimed at improving corporate governance in companies listed on the WSE. The enforcement of the Code, based on the "comply or explain"-principle anchored in the WSE Listing Rules, is left to market forces, as well as to members of the companies' organs and their shareholders. In theory, compliance or non-compliance with the Best Practices Rules may influence investment decisions made, in particular by institutional investors, and thus effect share price. However, an empirical study from 2005 shows no coherent or statistically important correlation between corporate governance structure and market evaluation of Polish listed companies.[131] Formal sanctions may be imposed in cases of non-observance of the "comply or explain" mechanism, i.e. when a company fails to publish information about the violation of a rule or when it publishes untrue, misleading or incomplete information. Firstly, one of the regulatory penalties provided for in the Listing Rules (reprimand or pecuniary fine) can be imposed on the company by the WSE Management Board or the Exchange Court. Secondly, information about the breach of a given Best Practice rule can at the

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[130] Journal of Laws (*Dziennik Ustaw*) No. 33, item 259.

[131] Aluchna M. et al., *Analiza empiryczna relacji między strukturami nadzoru korporacyjnego (corporate governance) a wskaźnikami ekonomicznymi i wyceną spółek notowanych na GPW*, available (in Polish) on the website: <www.pfcg.org.pl>.

same time constitute price-sensitive insider or current information subject to the *statutory* public disclosure obligation, violation of which is sanctioned with civil and penal liability as provided for in the capital market law. According to Art. 98 (7) of the *Act of 29 July 2005 on Public Offering (...) and Public Companies*, the issuer (i.e. company), as well as the person (e.g. management board member) who prepared or participated in the preparation of inside information are obliged to redress damage caused by public disclosure of untrue information or omission of information unless neither they nor persons for which they are responsible, can be liable for it (reversed *onus probandi* concerning standard of care).

## IX. Conclusions and Outlook

The reform of Polish company law in 2000 took place at the forefront of a major wave of reforms across Europe. Consequently, the new CCC could not take the most recent developments and modernisations into account. This makes the time of the CCC enactment quite unfortunate. Today's structure of CCC remains strongly rooted in the pre-war legislation preserving its major features. The pre-war Code was strongly influenced by the German model of company law, as is the current CCC. Europeanisation of Polish company law was also accomplished by borrowing from German law to a considerable extent. This was a rational step that has contributed to the coherency of the new code, given its Germanic origin. Yet with the progress of recent company law reforms in Europe triggered by the phantom of regulatory competition and based on the achievements of modern corporate finance, the concept of Polish company law is becoming outdated and merits a conceptual reworking.

In recent years following the CCC enactment, the major driving force of company law reform has been EC law resulting from the Company Law Action Plan 2003, particularly the Cross-border Mergers Directive and Shareholders Rights Directive. The current review of the law focuses on the question of whether and how to regulate groups of companies. Another issue is the modernisation of private limited company.