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Transfer of Shares in Municipal Companies in the Current Legal Reality, Following the Entry into Force of the State-owned Property Management Rules Act of 2016

The adoption of the the State-owned Property Management Rules Act of 2016 and the Act implementing the State-owned Property Management Rules Act eliminated the so-called „privatization" in the form that had been known from the 1990s and replaced it with completely different, more succinct and general, rules applicable to the transfer of shares in companies owned by the state and local government units. The adopted changes, primarily aimed at the companies with the state shareholding, to a large extent affected, by appropriate references, also municipal companies.

The author presents and evaluates currently effective legislation on the transfer of shares in municipal companies. He tries to evaluate the appropriateness of the model introduced by the legislator, who made the rules regarding the transfer of shares in state-owned companies applicable accordingly to municipal companies based on a reference in the Act on municipal services. The analyses are framed in a historical context – the rules in force before the effective date of the State Property Management Rules Act of 2016 are a background for the research result.

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1. Introduction

In the second half of 2016, the area of state-owned property management, the supervision of state-owned and partially state-owned companies and their operations, appointments to their supervisory and management boards, remuneration of their officers and similar matters became the focus of Polish law-makers' attention. This major shift was triggered by the adoption of the Act on the rules regulating the remuneration of officers in certain companies[1], i.e. the „new remuneration cap act". Shortly afterwards, on 26/07/2016, the Council of Ministers adopted resolution 90/2016 to

1 OJ 1202.

reform state-owned property management rules, which precipitated a legislative process resulting in, among other things, the State-owned Property Management Rules Act of 16/12/2016[2] and the Act implementing the State-owned Property Management Rules Act of the same day[3]. With the adoption of the new law, the previous Act on the rules of the exercise of the rights of the state to its property 08/08/1996 became ineffective[4]. The primary consequence of the changes was the removal of the State Property division from the catalogue of government administration divisions, the abolishment of the Ministry of State Property[5] and the assumption of the competences regarding the exercise of rights attached to shares in companies owned or partially owned by the state, hitherto vested in the Minister of State Property, by the Prime Minister, who may delegate certain rights to other members of the Cabinet, plenipotentiaries or state legal persons[6]. What is more, the legislator introduced new rules applicable to the management of state-owned assets, established a list of strategic companies owned or partially owned by the state (companies whose shares cannot be transferred), re-organised the supervision and management of state-owned companies and introduced new rules regarding appointments to corporate authorities (supervisory and management boards).

Changes to the rules regarding the operation of companies, apparently aimed at those owned by the state, by way of relevant references significantly affected companies owned by local authorities (municipal companies). The SPMRA implementing legislation amended over 90 acts, including many of key importance for the everyday operations of municipal companies, such as the Municipal Services Act[7], the Anti-Corruption Act[8], the Vetting Act[9],

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2 O J 2259 – hereinafter „SPMRA".

3 O J 2260 – hereinafter „SPMRA implementing legislation".

4 O J 2016.154 as amended.

5 See previous Article 5(19) of the Government Administration Divisions Act of 04.09.1997 (OJ 2018.762 as amended).

6 Article 8(1) SPMRA.

7 The Act of 20/12/1996, O J 2017.827, hereinafter „MSA".

8 The Act of 21/08/1997 restricting public officials' rights to engage in business activity, OJ 2017.1393.

9 The Act of 18/10/2006 on the disclosure of information on documents of state security services from the period 1944-1990 and the contents of such documents, OJ 2017.2186 as amended.

the New Remunerations Cap Act[10] and the Code of Commercial Companies[11]. It is not the first case of a transformation in the municipal economy triggered by a re-organisation at the state level. Unfortunately, it is not uncommon for the legislator to disregard the specificity of municipal companies. What works for large state-owned corporations is not necessarily easily applicable to small companies managed by municipalities.

This is the very situation we are dealing with when it comes to the transfer of shares owned by municipalities. One of the 90 acts amended by the SPMRA implementing legislation is the Commercialisation and Privatisation Act of 30/08/1996[12], renamed by an amendment of December 2016 to the Act on commercialisation and certain employee rights. The new law eliminated the so-called „privatisation" in the form known from the 1990s and replaced it with completely different, more succinct and general rules applicable to the transfer of shares in companies owned by the state and local government units.

The purpose of this paper is to present and evaluate currently effective legislation on the transfer of shares in municipal companies. It is an attempt at the evaluation of the appropriateness of the model introduced by the legislator, who made the rules regarding the transfer of shares in state-owned companies applicable accordingly to municipal companies based on a reference in the Act on municipal services. The analyses are framed in a historical context – the research result is presented against the background of the rules in force before the effective date of the State Property Management Rules Act of 2016.

2. Polish privatisation legislation – a historical outline

The privatisation-related rules made their way into the Polish legal system in 1990, with the Act on the privatisation of state enterprises of 13/07/1990[13]. On 30/08/1996, the act was replaced with a new law – the Act on the commercialisation and privatisation of state enterprises[14], renamed by

10 The Act of 09/06/2016 capping the remuneration of officers managing certain companies OJ 2017.2190.

11 The Act of 15/09/2000, OJ 2017.1577.

12 OJ 118.561.

13 O J 51.298; more on the historic development of privatisation trends globally in: Anne-Marie Weber-Elżanowska, *Wpływ instytucji prawnych rynku kapitałowego na efektywność spółek Skarbu Państwa* (Warszawa: Wydawnictwo C. H. Beck, 2017), 5-11, 47.

14 O J 118.561.

an amendment of 05/12/2002[15] to the Commercialisation and Privatisation Act.[16] This was the act amended by the SPMRA implementing legislation, which once again renamed it to „the Act on commercialisation and certain employee rights". For over 20 years, the Commercialisation and Privatisation Act with certain executive provisions (in particular regulations which lay down the specific procedures applicable to the disposal of state-owned shares of 1997, 2004, 2009 and 2011, as well as the regulations which lay down the rules applicable to the elaboration of pre-privatisation analyses of 1997, 2009 and 2011) provided the legal framework for privatisation in state and municipal economy.

Both the Act on the privatisation of state enterprises (Article 45) and the Commercialisation and Privatisation Act (Article 68) were applicable accordingly to the privatisation of municipal companies[17]. Additionally, Article 20 (and subsequently Article 12(2)) of the Act on municipal services contained a reversed reference to section IV CPA with regard to the transfer of shares in municipal companies. The meaning and importance of both mutual references, as well as a number of other issues that emerge at the intersection of MSA and CPA, have been debated in legal sciences for years[18]. These deliberations, coupled with years of practical application of the law, resulted in an established privatisation practice that made privatisation processes transparent and easily controllable[19]. Most importantly, CPA established (in Article 33) specific procedures applicable to the transfer of shares in state-owned companies. They included, among other options, a public offering, a public

15 Introduced by amendment to the Act amending the Act on the rules of the exercise of the rights of the state to its property, the Act on the commercialisation and privatisation of state enterprises and certain other acts (OJ 240.2055).

16 Hereinafter „CPA"; cf. also Weber-Elżanowska, *Wpływ instytucji*, 48.

17 Furthermore, article 68 CPA mandated that regulations issued on the basis of CPA be applicable accordingly to the privatisation of municipal companies.

18 See e.g. Jakub Jan Zięty, *Ustawa o gospodarce komunalnej. Komentarz* (Warszawa: Wydawnictwo C. H. Beck, 2012), 165, No. 18.

19 So far, the biggest transaction involving a municipal company that was carried out on the basis of CPA was the privatisation of Stołeczne Przedsiębiotstwo Energetyki Cieplnej, a utility company, whose shares were sold for PLN 1.441 bn, while the investor additionally undertook to finance a PLN 1bn investment programme – see the online privatisation chart at: https://bip.warszawa.pl/NR/rdonlyres/39604810-E167-420B-86BD-EA1BB0FAFB3A/1214590/KartaprywatyzacjiSPECaktualizacja14102017.pdf, [accessed: 30.07.2018].

tender, negotiations at public invitation, public auction, or sales in organised trading[20]. Detailed rules and procedures applicable to the transfer of shares were laid down in executive regulations on the detailed rules applicable to the transfer of state-owned shares.

Although an established transparent privatisation practice was already in place, the legislator decided to waive or extensively amend virtually all of the foregoing regulations, including the rules applicable to the transfer of shares in state-owned companies. In fact, we have witnessed a complete revolution, since „privatisation", as previously construed, became history (save for the interim application of certain previous privatisation rules upheld by transitional provisions laid down in Articles 106-208 of the SPMRA implementation legislation).

3. Currently effective legislation

3.1. The transfer of shares in state-owned companies

The legal context following amendments is completely different. As explained in the rationale for the draft SPMRA implementation legislation, the legislator „decided to lay down a new model for the transfer of shares by the state and local government units", while amendments to CPA „result from a comprehensive revision of the concept of the management and transfer of shares owned by the state" introduced by the State Property Management Rules Act.

The renaming of CPA to the Act on commercialisation and certain employee rights is a consequence of the revision of the substantive scope of the act. The definition of „privatisation", which, together with commercialisation, formed one of the two core concepts of the act, was removed from Article 1 CPA. Section IV CPA, previously entitled „Indirect privatisation", was renamed to: „Employees; rights to acquire shares" and eventually contains only provisions concerning those rights (the remaining regulations pertaining to privatisation have been deleted). Section V CPA, „Direct Privatisation", has been repealed in full. And finally, Article 68 CPA which made the provisions of the act and related executive provisions applicable accordingly to the commercialisation and privatisation of municipal enterprises was deleted as well. The authors of the draft motivated their choice by explaining that „provisions concerning such companies will be included in the Municipal Services Act".

20 To read more about these and other procedures cf. e.g. Marek Michalski's comments on the impact of the development of capital market institutions on the enterprise privatisation process „Skarbu Państwa na rynku kapitałowym", [in:] *Spółki z udziałem Skarbu Państwa a Skarb Państwa*, ed. Andrzej Kidyba (Warszawa: Wolters Kluwer, 2015), 129-135, see also Weber-Elżanowska, *Wpływ instytucji*, 76-77.

The State-owned Property Management Rules Act, in its current wording, contains as little as six articles on the transfer of state-owned shares in companies (Article 11-16 SPMRA). They introduce, rather generally, the rules applicable to the disposal of state-owned shares in companies. The legislator seems to have opted for the following philosophy: first of all, it is necessary to select companies of key importance from the perspective of state interests and prevent any transfer of their shares (the legislator established a list of 29 companies falling into this category, which spans in particular corporations from the energy, chemical, fuel, copper, military, railway, banking and insurance sectors). At the same time, however, the disposal of state-owned shares in all other companies should be permitted on terms and conditions adjusted by the Council of Ministers to specific factual circumstances. The legislator opted for a fairly general clause calling for „the need to protect the state property interests", but at the same time granted a fair degree of discretion to the Council of Ministers.

Shares owned by the state may be transferred by the entity authorised to exercise rights attached to shares. The disposal of shares requires an approval by Council of Ministers[21]. However, the act no longer specifies any admissible procedures regarding the transfer of shares and the Council of Ministers is the body selecting the transaction procedure applicable to every specific case. When requesting consent for the transfer of shares, the relevant entity must specify: (1) the buyer selection procedure, including the suggested transfer procedure, (2) in the case of sale or swap – the manner of establishing the price and the payment method or the value and the manner of delivering the mutual performance, (3) the transferee, if selected (4) rationale referring to the economic or social consequences of the disposal of shares, including a discussion of its impact on the protection of state property interests and the protection of interests of employees and other people related to the company. The application for consent to transfer shares must be accompanied by: (1) documents confirming that the state is a shareholder of the company whose shares are being transferred, (2) valuation made using at least two valuation methods, (3) draft share transfer agreement[22]. The same rules apply to the transfer of shares owned by state legal persons. Any transfer of shares in breach of Articles 11-15 SPMRA is invalid[23].

21 Save for the exception referred to in Article 11(3) SPMRA.

22 Save for Article 12(4) SPMRA.

23 More on the current provisions governing the transfer of shares in state-owned companies in: Andrzej Szumański, „Nowe regulacje prawne spółek z udziałem Skarbu Państwa z uwzględnieniem zmian w kodeksie spółek handlowych obowiązujących od 1.01.2017 r." *Przegląd Prawa Handlowego*, No. 3 (2017): 8-9, comment 21-24.

3.2. The transfer of shares in municipal companies

Obviously, the deletion of provisions referring to „privatisation" from CPA and the removal of prior reference to the Municipal Services Act from Article 68 of that Act does not mean that the privatisation of municipal companies has come to an end. The legislator still allows for the disposal of shares in companies owned by local government units, but redefines this process completely. Currently this matter is regulated in a very cursory manner. The Legislator resorted to the referencing technique and condensed all the provisions regarding the transfer of shares in municipal companies in two sections of Article 12 MSA (sections 2 and 3), referring to six articles of SPMRA. Article 12(2) and 12(3) MSA provides that Articles 11-16 SPMRA are applicable accordingly to the transfer of shares in companies referred to in Article 9 (i.e. companies with local government shareholding), specifying that the shares in companies referred to in Article 9 are transferred by the head of the board of the local government unit – the head of the commune (or a mayor of a town). However, the constituting authority of that body must consent to the transfer of shares held by the local government unit.

The cursory nature of this regulation invites justified criticism. Not only does the State Property Management Rules Act seem to cater more to the decision-making needs of the Council of Ministers (regarding state-owned companies) than to the needs of local governments, the technique applied by the legislator to reference SPMRA in MSA triggers a variety of interpretative doubts. What is more, some provisions contain manifest errors.

3.2.1. The need to protect local government units' interests

Abiding by the duty to apply the provisions of the State Property Management Rules Act accordingly, we should assume that the transfer of shares in municipal companies should take place taking account of the need to protect the interests of local government units (Article 11(1) *in fine* SPMRA in conjunction with Article 12(2) MSA). Obviously, this instruction should be viewed as welcome. What does create problems, however, is the fact that the legislator's failure to precisely specify the admissible procedures applicable to the transfer of shares in municipal companies is likely to generate disputes as to whether specific transactions were exercised in the best interest of local government units. The insufficient precision of regulations in this respect may hinder the privatisation processes in municipal economy as a result of local official's fears of being charged with mismanagement.

It is indeed very likely that local governments will continue to rely on the same procedures as stipulated by previously effective (and now repealed) provisions of the commercialisation and privatisation act with executive regulations (in particular as regards the contents of pre-privatisation analyses and the detailed procedure applicable to the disposal of shares). This puts into

question the purposefulness of repealing the rules specifying the privatisation procedures that were hitherto into force.

3.2.2. Shares in joint-stock companies only or shares in both joint-stock and private limited companies („akcje" or „akcje i udziały")?

Article 12(3) in file MSA contains a manifest error. While Article 12(2) and 12(3) *ab initio* MSA refers to the disposal of shares in joint-stock companies (in Polish 'akcje') and private limited companies (in Polish „udziały"), Article 12(3) *in fine* MSA (which mandates obtaining consent of the constituting body of the relevant local government unit to go ahead with the transaction), contains only a reference to shares in joint stock companies, leaving shares private limited companies out. Should we then assume that the consent of the constituting body to carry out transactions is required only when joint-stock companies are sold, and no such requirement applies to shares in private limited companies? A literal interpretation would support this view, leading to highly irrational conclusions. Rather, we should adopt the opposite perspective and assume that the disposal of shares in private limited companies requires consent as well. This follows from a general directive regarding the application of SPMRA to the disposal of shares in municipal companies on *mutatis mutandis* basis, covering shares in both limited liability and joint-stock companies. Certainly, the source of legislator's error is the fact that Articles 11-16 SPMRA contain references to shares in joint-stock companies („akcje") only. However, in the glossary provided in Article 2(2) SPMRA the legislator explains that shares should be construed as shares in joint-stock and limited liability companies. No analogous glossary has been included in the Municipal Services Act, and the legislator probably glossed over this fact while drafting the new content of Article 12(3) in fine MSA.

3.2.3. Obtaining consent for a transaction

The joint reading of Article 12(2)-(3) MSA and Articles 11-16 SPMRA provides that shares in companies owned by local government units are sold by the head of the board of the local government unit – the head of a commune in the case of a commune (mayor in the case of a town) – hereinafter referred to as a „head" for simplicity, having obtained prior consent of the constituting body of that unit, hereinafter referred to – again, for simplicity reasons – as the „commune council"[24]. The application lodged by the

24 Save for Article 11(3) SPMRA, which, applied „accordingly", should be construed as waiving the requirement of consent if the local government unit contributes the shares of a company as a contribution in kind to another company of which that unit or other legal persons of that unit are the sole shareholder (in my view we are not dealing with any municipal legal persons, but only those 'belonging' to that unit; the opposite

head with the commune council to obtain consent for the transfer of shares must specify: (1) the buyer selection procedure, including the proposed share transfer procedure (2) in the case of sale or swap – the price or the manner of establishing price and the payment method or the value and manner of delivering the mutual performance, (3) the transferee, if selected, (4) rationale referring to the economic or social consequences of the disposal of shares, including a discussion of its impact on the protection of the local government unit interests and the protection of interests of employees and other people related to the company. The following documents must be appended to the application for consent for the transfer of shares: (1) documents confirming that the state is a shareholder of the company whose shares are being transferred, (2) valuation made using at least two valuation methods, (3) draft share transfer agreement[25].

The key reason for serious reservations regarding this rule is its incompatibility with the reality of municipal economy[26]. The biggest reservations concern the commune head's duty to present the commune council with a valuation of the shares to be sold, which could undermine the negotiating position of the commune.

It must be emphasized that the specificity of the constitutive bodies of local government units is completely different than the specificity of the Council of Ministers. One of the key differences concerns the rules of transparency. While – pursuant to Article 22 of the Council of Ministers Act of 08.08.1996[27]– the sittings of the Council of Ministers are held behind closed doors, the sittings of the constituting bodies of local government units, as a rule, are fully open to the public (pursuant to Article 11b of the commune government act[28], the openness of commune authorities' operations can be only restricted by relevant acts of law). In consequence, if the rules laid down in Article 12(1) and 12(2) SPMRA were fully applied to the transfer of shares in municipal companies, with the head of the commune requesting the commune council's consent for the disposal of shares in a municipal company, the information sensitive from the perspective of the planned transaction

view – or so it seems – or simply a slightly imprecise interpretation in: Cezary Banasiński, Krzysztof Jaroszyński, *Ustawa o gospodarce komunalnej. Komentarz* (Warszawa: Wolters Kluwer, 2017), 210, comment 2, who write about „municipal [without specifying whose precisely– J.J.] legal persons".

25 Save for the exception referred to in Article 12(4) SPMRA.

26 Cf. Banasiński, Jaroszyński, *Ustawa o gospodarce komunalnej*, 207, comment 2.

27 OJ 2012.292 as amended.

28 The Act of 08/03/1990, OJ 2018.994 as amended.

(including, in particular, the valuation of the shares to be disposed) would be revealed to a virtually unlimited circle of entities. A wide group of people have access to council session materials and hence it is questionable whether the consent procedure concerning the transfer of shares in companies with a state shareholding as stipulated by the legislator would be compatible with the need to protect the interests of local government units. One could hardly assume, however, that council members could be presented with the very same application for consent for the transfer of shares, without an appendix detailing the valuation made applying at least two valuation methods. Furthermore, it is unclear what the legislator intended when drafting Article 12(3) SPMRA[29], which introduces an option to enclose documents confirming information and data contained in the application other than the ones specified in Article 12(2). It seems that the provision does not allow for replacing the valuation with another document, and even if that was the case, such document would have to contain information on the value of the company.

The transaction practice has shown that the seller should not reveal their own valuation of the asset offered for sale to the buyer too early (unless the price is very high). If the buyer learns about the valuation too early, they are very likely to offer a price corresponding or close to that valuation, which is often less than the buyer was initially willing to pay. The valuation obtained by the seller should remain confidential at least until the end of the price negotiations between parties or, potentially, until the disclosure of that valuation to the buyer gives the seller a negotiating advantage. In other words, while it is admissible for the seller to present a valuation of the shares in a state-owned company to the Council of Ministers at a confidential sitting, it is hardly acceptable to disclose such information to a commune council at an open sitting held before the share buyer selection procedure is launched.

To solve this problem, given the need to ensure that local governments benefit from transaction security, we should turn to SPMRA, applied so-called „accordingly". According to one of the possible reasoning lines, when Article (2)(2) SPMRA is applied accordingly to the sales of shares in municipal companies then, taking account of the need to protect the interest of the commune, the valuation of the shares to be sold should not be disclosed to the commune council at all. In this case, the provision would be applied „accordingly" by „not being applied" after all. Alternatively, one could argue that, although to obtain the commune council's consent to go ahead with the transaction the head of the commune must submit all the documents specified in Article 12(1) and 12 (2) SPMRA (including the valuation), some of the

29 Added to SPMRA on 29.03.2019 – on the basis of the Act of 21/02/2019 amending the State Property Management Rules Act and certain other acts (OJ 2019.492).

documents could be submitted to the council once the buyer has been selected and all terms and conditions of the transaction have been agreed.

In fact, based on Article 12(2) MSA in conjunction with Article 12(1) and 12(2) SPMRA, the key task is to determine when the head of commune is required to obtain the council's consent for the disposal of shares in a municipal company – before or after selecting a specific buyer. *Prima facie* it may seem that the consent should be obtained before the buyer is selected, and before the commencement of the transaction procedure specifically. This would follow from Article 12(1) SPMRA, which provides that the application for consent to transfer shares must specify the procedure applicable to the transfer. This in turn would lead us to a conclusion that the consent of the Council of Ministers for the transfer of shares in a company should not be the final step in the transaction procedure (taken after a specific candidate for the buyer has been selected and once the share purchase agreement terms and conditions have been agreed with them), but rather the first one, initiating the entire process.

Nonetheless, when it comes to the transfer of shares in municipal companies, one should support a different interpretation, substantiated by the need to apply the provisions of SPMRA „accordingly", taking account of the need to protect the interests of the treasury of the commune. As a result, the share transfer process concerning shares in municipal communes should involve two separate consents of the commune council. The first consent is given to approve the initiation of a procedure to sell shares in a municipal company. In its consent the commune council should specify the procedure applicable to the disposal of shares in line with Article 12(1)(1) SPMRA in conjunction with Article 12(2) MSA. When requesting the consent, the head of the commune should specify the proposed manner of transfer as referred to in Article 12(1)(1) SPMRA, specifying the proposed manner of disposal, including the description of the buyer selection procedure. At this stage one needs to take account of the regulations applicable to the disposal of shares in municipal companies laid down in the legislation constituting local governments, namely Article 18(2)(9)(g) of the Act on local government at the commune level, which provides that the commune council is exclusively competent to „define the rules regarding the contribution, withdrawal and sales of shares by the head of the commune" and in analogous provisions concerning companies with district and voivodeship shareholding (cf. Article 12(8)(g) of the Act on local government at the district level of 5.06.1998[30] and Article 18(19)(e) of the Act on local government at the voivodeship level of 5.06.1998)[31]. The procedure regarding the transfer of shares in a specific company, as proposed by the head of a commune, should be consistent with the one laid down by

30 OJ 2018.995 as amended.

31 OJ 2018.913 as amended.

the commune council in its resolution on the rules applicable to the sales of shares.[32] If no such resolution has been adopted in a commune so far, the resolution can be adopted together with the resolution granting consent to the institution of the procedure to sell shares in a specific municipal company.

The second consent awarded by the commune council should be the consent to a specific transaction involving the sales of shares in a municipal company. When requesting the consent, the head of the commune should specify the remaining information referred to in Article 12(1) SPMRA and append the remaining documents listed in Article 12(2), with special emphasis on the valuation. This approach is additionally supported by the amended Article 12(1) SPMRA, and item 12(1)(4) in particular. Pursuant to this provision, the application for consent to transfer shares must specify the buyer, if selected. In consequence, we should conclude that a buyer of shares may be selected before the final consent for the transfer of such shares has been granted.

Anyway, it seems that the legislator should have directly stipulated for such a two-step consenting procedure in state-owned companies as well. At the initial stage of the share disposal procedure, the documents referred to in Article 12(1) and 12(2) SPMRA simply cannot be drafted appropriately. Before the procedure starts it is impossible to determine the specific price for the shares or even precisely describe the manner of its calculation (only a range can be given, specifying the expected share purchase price, but this is not what the legislator has stipulated); furthermore, it is difficult to determine economic and social consequences of the transfer, including the impact of a specific transaction on the protection of the state property-related interests and the protection of employees and other people concerned. Such effects can be identified only once the specific terms and conditions of a transaction have been negotiated with the buyer of shares, and not before the commencement of the procedure. The share purchase agreement the submission of which is required under Article 12(2)(3) can be submitted at the initial stage, but the document would not be the final draft, but the starting point for future negotiations. The legislator seems to have intended the final version to be lodged.

3.2.4. Article 15 SPMRA applied accordingly

De lege lata, there are doubts as to what Article 15 SPMRA applied accordingly to municipal practice would entail. Pursuant to this provision, „Articles 11 and 12 apply accordingly to the disposal of shares held by a state legal person". In this context, should the companies owned by local government units willing to sell shares in their subsidiaries also request relevant consent from the units' constitutive bodies? This interpretation should be

32 Cf. Banasiński, Jaroszyński, *Ustawa o gospodarce komunalnej*, 216, comment III.

deemed incorrect, as Article 12(2) MSA provides that SPMRA is applicable accordingly to the „disposal of shares in companies referred to in Article 9", i.e. companies with local government unit's shareholding, rather than subsidiaries of such companies. Importantly, unlike, for instance, in Article 10b MSA, in Article 12(2) MSA the legislator did not extend the applicability of the provision to subsidiaries.

3.2.5. „Privatisation" by increasing share capital

One pertinent question involves the rules of procedure applicable when the circle of shareholders in companies with local government unit shareholding is extended by adding new investors who subscribe for newly issued shares in the increased share capital of such companies rather than being sold existing shares by other shareholders. Such cases have been hotly debated for years. It was only in 2002 when the legislator acknowledge that the shareholding structure can change in this way. In consequence, the amendment of 5/12/2002 extended the definition of privatisation by cases involving "the subscription for shares in the increased share capital of sole-member state-owned companies established as a result of commercialisation by other entities than the state and other state legal persons within the meaning of the Act of 08/08/1996 on the exercise of the rights of the state to its property (Article 1(2)(1) CPA). Nonetheless, the legislator failed to envisage any specific procedure applicable to such cases, opening the provision to a broad range of interpretations. When adopting the act on the state property management rules, the legislator completely forgot (or purposefully disregarded) such ways of extending the shareholding structures, while the sole passage referring to this issue (Article 12(1) MSA), which provides that „the contributions in kind and the subscription for shares [in municipal companies – J.J.] are governed by the Code of Commercial Companies and the Civil Code save for the provisions of the following acts: on local government at the commune level, on local government at the district level, on local government at the voivodeship level and on commercialisation and the rights of certain employees" contributes nothing new at all. The legislator's approach should be viewed as a very unfortunate one. It gives a green light for the transactions in question, but does not define any specific procedure that would apply to them, creating an environment of high uncertainty and a threat of poor transparency of any decisions made[33].

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33 Importantly, Article 14(1a) of the Public-Private Partnership Act of 19/12/2008 (OJ 2019.1145) governs some cases where private investors join companies by taking up their shares, but his provision applies only to undertakings that have a public-private partnership status.

4. Conclusions

The foregoing analysis has shown that the new „privatisation" regulations give rise to a plethora of doubts, especially when it comes to the disposal of shares in municipal companies. First of all, one should challenge the legislative technique applied by the legislator, involving the reference in the Municipal Services Act to the provisions of the state property management rules act, applied „accordingly". Not only are those provisions incompatible with the municipal reality (especially when it comes to the obligation to disclose the valuation at the stage of seeking consent for the transaction), they also contain errors and are excessively general. Although they do allow for flexibility in adapting specific transaction procedures by the constitutive and executive bodies of local government units, excessive flexibility may increase legal uncertainty in this field, hindering the transaction procedures. It will be difficult to answer the questions posed by local decision-makers about the right choice of a procedure in a specific case in order to ensure the transparency of the processes on the one hand, and safeguard the officials from the risk of charges concerning mismanagement. It is very likely that local governments will continue to rely on the same procedures as stipulated by the now repealed provisions of the commercialisation and privatisation act with executive regulations (as regards the contents of pre-privatisation analyses and the detailed procedure applicable to the disposal of shares). In consequence, we are faced we a rather rhetorical question: would not it be better if the legislator had simply upheld the previous provisions in force?

Clearly, the legislator performs periodical reviews of the State Property Management Rules Act, as manifested by the amendments discussed above that came into force on 29/03/2019. However, as I have argued in this paper, such amendments are insufficient and further legislative intervention regarding contested provisions is necessary. One should trust that the legislator would recognize the need to implement such changes and modify the law accordingly in the near future.

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