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MASTER THESIS

DETERMINING THE VALUE OF SHARES IN MINORITY SQUEEZE-OUTS: THE CASE OF SLOVENIA

Ljubljana, April 2024 Hana Palčič Vilfan

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TABLE OF CONTENTS

LIST OF TABLES

LIST OF APPENDICES

LIST OF ABBREVIATIONS

AJPES – Slovenian Agency for Public Legal Records and Services
BSA – Book-Entry Securities Act
CA – Slovenian Companies Act
CAL – Court of Appeals in Ljubljana
CCD – Slovenian Central Clearing Depository
EU – European Union
IPO – Initial Public Offering
IVS – International Valuation Standards
PSA – PanSlovenian Shareholders' Association
SAMS – Slovenian Agency for Market Securities
SCA – Slovenian Competition Authority
SCC – Slovenian Constitutional Court
SCS – Supreme Court of Slovenia
TA – Slovenian Takeovers Act

1 INTRODUCTION

Holding shares of a company brings about certain right and obligations for shareholders. In general, a common share gives its holder voting rights, entitlement to dividends, the right to inspect corporate books and records, etc. Naturally, not all shareholders are on equal footing due to the simple fact that the lower the aggregate shareholding, the lower the extent of shareholder's rights. In fact, if a certain shareholder gains a significant share of a company, it can effectively render the voting rights of other minority shareholders ineffective. In other words, minority shareholders can de facto lose their management participation rights. Consequently, in such cases, the only set of rights still truly significant to minority shareholders are the ones connected to their economic prerogatives.

However, even in the scenario where shareholders, due to the significant share of the main shareholder, effectively lose their management participation rights, modern legal orders grant them certain rights and legal actions, which can become a burden for the main shareholder without much added value for the company. For example, in addition to the ancillary rights (e.g., inspection of company's books or the right to be informed), the Slovenian Companies Act (Official Gazette of the Republic of Slovenia, no. 65/09, 33/11, 91/11, 32/12, 57/12, 44/13 – odl. US, 82/13, 55/15, 15/17, 22/19 – ZPosS, 158/20 – ZIntPK-C, 18/21, 18/23 – ZDU-1O and 75/23, from 4 April 2006)[1] (hereinafter the CA) grants minority shareholders holding at least 10% of shares a right to start court proceedings for a removal of a supervisory board member. Furthermore, minority shareholders holding at least 5% of shares have a right to request from the management to convene a general assembly or can bring an action against the general assembly's resolution on the appropriation of distributable profits. The availing of the said rights can present problems for the main shareholder, as it can disturb effective operations and management of a company. In other words, the main shareholder has interests in getting rid of minority shareholders.

In addition to the potentially burdensome behaviour coming from minority shareholders, regulatory framework and strict rules for publically traded companies present a further incentive for the main shareholder to exclude minority shareholders from the company and take it private. Indeed, research shows that going private helps a company to avoid agency costs, to lower the costs of compliance with listing-related reporting, to increase economies of scales and to improve debt to equity ratios (Sedláková et al., 2019, p.105).

Taking the aforementioned into account, it becomes clear, that a majority shareholder, obtaining a significant part of a company, has strong incentives to exclude minority shareholders form that company. Thus, in order to prevent main shareholders from resorting to abusive practices of undermining minority shareholders, it is understandable that modern corporate regulation provides for a legal possibility of excluding minority

[1] In Slovene: Zakon o Gospodarskih družbah (ZGD-1).

shareholders form a company that is structured in a way to simultaneously insure sufficient safeguards and protection of excluded shareholders.

Following this logic, modern corporate legal frameworks recognise a concept of a squeeze-out, which is, in essence, a right of a main shareholder to buy out the remaining shareholders of a company. Admittedly, this concept presents a serious interference with minority shareholders' rights, as it takes away their choice of investment and future participation in the company's profits, yet it is necessary to prevent abusive practices of majority shareholders and consequently to protect economic prerogatives of minority shareholders.

To this extent, for the protection of economic interests of minority shareholders, it is important that there is a system in place that allows them to challenge the price per share originally offered by the main shareholder, enabling them to attain appropriate compensation for shares they are forced to sell. In this regard, not only does the concept of a squeeze-out, its conditions, and procedural rights of minority shareholders, need to be legally regulated, but the economic valuation of a company needs to be carried out in a way that considers the specific conditions of a squeeze-out transaction, striking the right balance between the interests of both parties.

Indeed, striking a right balance between the interests of different stakeholders in a squeeze-out transaction plays a crucial role in cultivating trust in financial markets. This is largely true with regards to the protection of minority shareholders, as some research suggests that laws protecting minority shareholders are associated with stronger financial markets (Afsharipour, 2017, p. 35), which is unsurprising given the possible financial scale of squeeze-out transactions, as well as their political resonance. To give an example, at the moment, judicial proceedings concerning the lawfulness of a squeeze-out transaction and appropriateness of the compensation offered in the biggest Slovenian retail company is pending before the courts, with a potential value of the dispute reaching EUR 130 million. Namely, the PanSlovenian Shareholders' Association (hereinafter PSA), representing the interests of minority shareholders, is arguing for a 5.5 times higher compensation for excluded minority shareholders (VZMD, 2022)) than the one originally offered. In this regard, the balance of power between majority and minority shareholders in Slovenia can be observed through the work of the PSA, that has, throughout their years of representing the interests of minority shareholders, managed to achieve many corrections of the originally offered compensation. Specifically, they state that in the last 17 years they have been able to attain an average of a 122% upward correction of the originally offered price per share (VZMD, 2023).

Given the said, the purpose of this thesis is to investigate how Slovenian legislator strives to balance between the interests of different stakeholders in a squeeze-out context, what is an appropriate price to be offered to minority shareholders, how this price is regulated and how it can be attained using economic principles of valuation. Furthermore, as there usually exists a gap between theory and practice, the practical part of the thesis examines a recent case before the district court in Ljubljana and presents some insights into the application of rules on appropriate compensation in the context of a squeeze-out transaction. In this regard, the thesis attempts to provide some clarity on the following questions:

1) Does Slovenian legal framework on the one hand and the economic rules of valuation on the other, enable the attainment of an appropriate compensation?
2) What circumstances affect the final compensation paid to minority shareholders and where might problems occur?

The thesis is divided into three parts. In the first part the focus is the regulation of the squeeze-out transaction in Slovenian legislation, encompassing both the general rules in the CA, as well as the lex specialis legal framework of the Slovenian Takeovers Act (Official Gazette of Republic of Slovenia, no. 79/06, 67/07 – ZTFI, 1/08, 68/08, 35/11 – ORZPre75, 105/11 – odl. US, 10/12, 38/12, 56/13, 63/13 – ZS-K, 25/14 and 75/15, from 14 July 2006)[2] (hereinafter the TA). As this part of the thesis analyses legislation and academic literature, a descriptive method is used. The second part of the thesis primarily deals with the economic nature of determining appropriate compensation in the context of a squeeze-out transaction. It follows the economic theory and describes the types of value, assumptions, approaches, and methods that are (not) appropriate to use for valuing a company for the purpose of excluding minority shareholders. Last part of the thesis analyses a recent real-life case of a squeeze-out transaction in Slovenia. Thus, using the empirical method (by observing a practical situation) the thesis considers the legal and economic rules that are applied in practice and tries to critically assess whether such rules achieve the goal of striking a balance between the interests of majority and minority shareholders.

2 THE CONCEPT OF A SQUEEZE-OUT IN SLOVENIAN LEGAL ORDER

2.1 The underlying logic behind a squeeze-out transaction

The position of members or partners in a company, including the possibility of their exclusion, depends on the legal form of a company and its articles of association. In private companies, for example, excluding a member from a company is left to the regulation of the partnership agreement. Particularly, Article 501/I CA stipulates that articles of association can provide a possibility of a company member to withdraw or be excluded from the company. If the partnership agreement, however, does not provide for a possibility of a member to be excluded, the same article gives each company member the right to exclude another member with a lawsuit. There is, therefore, always a possibility to exclude certain members of a private company if legal requirements are met.

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[2] In Slovene: Zakon o prevzemih (ZPre-1).

In a joint stock company, the members are called shareholders. Such companies are usually regulated more rigorously than other forms of corporations, as the number of company members is higher and their relationships less personal. In a joint stock company, members can sell their shares without any special procedure, meaning that shareholders have no effective control over the membership in a company, unlike in other forms of corporations, where generally a consent from other company members is required in order to sell a stake to a third party (Halvadžić, 2023, str. 1462). These factors also translate to the exercise of shareholder's powers over managing a company. Namely, shareholders in a joint stock company make their decisions at general meetings with the majority of the votes cast (as a general rule), thus, even if the shareholder does not agree with the decision, it must submit to it. Accordingly, the joint stock company has stricter regulatory frameworks, which is further accentuated if the company is public.

Because of the nature of a joint stock company, where shareholders do not have any special means of controlling the ownership structure, it can happen that one shareholder obtains a significant majority of shares, consequently gathering the controlling interests in the company. In such situations, striking the right balance between preventing abuses of minority shareholders' interests on the one hand, and the facilitation of the efficient takeover market on the other, is a troublesome task for the legislature.

To understand the interplay of interests between minority shareholders and the majority shareholder, it is primarily important to consider that a simple control of a company might not be enough to achieve the most efficient management. Indeed, a majority shareholder has many incentives to, although having control over the company, exclude remaining shareholders and transform a joint stock company to a single-person company, facilitating its management and cutting back on the costs. Namely, governing a single-person company in practice means that every general meeting is a universal general meeting, with no threats of actions of annulment, no counterproposals, no application of any provisions protecting minority shareholders, etc. (Bratina & Jovanovič, 2008, p. 53). With excluding minority shareholders and transforming a company from public to private and/or to a single-person company, a majority shareholder can obtain significant savings associated with meetings, announcements, audits, risks of lawsuits, etc.

Excluding minority shareholders from the company is, in practice, possible through various ways and levels. At the shareholder level, the exclusion of minority shareholders can be carried out using methods that are directly aimed at reducing the value of the share. For example, with reducing the value of dividend payments (Kobe, 2011, p. 3)). Furthermore, at the level of a company, the exclusion of minority shareholders can be carried out using methods that reduce the value of the entire company, which in turn also reduces the value of the minority share. For example, investments in projects that have low returns, but at the same time benefit other companies in the portfolio of the controlling shareholder (Kobe, 2011, p. 3). The controlling shareholder can also try to undermine or exclude minority shareholders by using corporate law concepts. For example, with increasing the share capital of a joint-stock company by issuing new shares without a pre-emptive right or with setting the issue value too high. In such cases, if the main shareholder buys out the new shares, the ownership relationship in the company significantly changes (Goldinskij, 2017, p. 17).

In order for the controlling shareholder not to resort to harmful procedures of undermining the minority shareholders, it is sensible that corporate legal framework provides for a possibility of excluding minority shareholders form a company, where the interests of the latter can be adequately protected. The concept of a squeeze-out is, therefore, a special corporate law instrument granting a right to the main shareholder having an absolute capital share (at least 90% of the company's share capital, according to Slovenian legislation), to exclude the remaining shareholders from the company in exchange for appropriate compensation.

The exclusion of minority shareholders, however, represents a serious interference with their rights. The regulation of the squeeze-out transaction thus requires a careful weighing of the conflicting interests between the main shareholder and minority shareholders. It is widely acknowledged that minority shareholders' interests are primarily of an economic nature (making a profit), whilst the interests of the main shareholder are also linked to the management of the company (Bratina & Jovanovič, 2018, p. 352). To put it another way, because of the ratio of the capital being controlled by the majority shareholder, the legislators consider minority shareholders no longer have any management interests, since they are entirely dependent on choices of the majority shareholder (Prelič, 2008, p. 965). The only interests minority shareholders are left with are of economic nature (i.e., dividend payments or capital gains). Consequently, the regulation of the concept of a squeeze-out aims to protect those economic interests through the notion of appropriate price or compensation that needs to be paid by the main shareholder to the excluded minority shareholders.

In Slovenian legislation, the concept of a squeeze-out is regulated in two different legal regimes. The primary legal framework is provided for in the CA and applies to joint stock companies in general. Additionally, some aspects of squeezing out minority shareholders are also specified in the TA, presenting a lex specialis to the regulation of this concept, applying only to situations after the takeover process. Furthermore, the notion of the squeeze-out transaction is also regulated on the level of the European union (hereinafter the EU), by the Directive 2004/25/EC on takeover bids (Directive 2004/25/EC of the European parliament and the Council of 21 April 2004 on takeover bids, Official Gazette of the European Union, L 142/12). In the following, the thesis presents these legal frameworks, focusing on the rules and principles for determining appropriate compensation to be paid to the excluded shareholders.

2.2 Normative framework of a squeeze-out transaction in Slovenia

2.2.1 General conditions for a squeeze out

Until the adoption of the new CA in 2006, the concept of a squeeze-out was not directly regulated in Slovenian legal order. Excluding minority shareholders was only possible indirectly, through different corporate law instruments (Kocbek, 2007, p. 269). With the entry into force of the CA, a majority shareholder, upon meeting the legal requirements, got the opportunity to force minority shareholders out of the company and to transfer the remaining shares to himself.

More specifically, the concept of a squeeze-out is regulated in chapter 4, section 7 of the CA titled “Special provisions on the treatment of Minority Shareholders”. Already, the placement of this concept in the subchapter regulating the treatment of minority shareholders displays its intentions – providing protection to minority shareholders. The regulated process of excluding minority shareholders can be found in Articles 384 to 388 CA, guiding the relationships between different shareholders and aiming to prevent tensions through achieving an economically feasible solution for everyone (Bratina & Jovanovič, 2018, p. 353).

The right to squeeze-out the remaining shareholders is, however, subject to certain conditions on the side of the majority shareholder. In order for Article 384 CA to apply, the main shareholder needs to hold shares that represent at least 90% of the company’s share capital. Interestingly, the rules for calculating the required majority are designed to facilitate the attainment of the threshold. Namely, although a main shareholder needs to be an individual shareholder (meaning that shares of related shareholders acting in concert with the main shareholder cannot be considered in calculating the required majority), Article 384/II CA referring to statutory provisions on affiliated companies,[3] expressly permits consideration of shares held by the main shareholder’s subsidiaries (Kocbek et al., 2014, p. 533). Moreover, when calculating the required majority, it is important to consider that company’s own shares are deducted from the capital base (Decision of the Court of Appeals in Ljubljana, case no. VSL sodba I Cpg 709/2021, from 24 November 2022).

The CA, as a general legal framework of company law in Slovenia, does not link the right of squeezing out minority shareholders to the condition of obtaining a 90% majority share through the process of a takeover bids. The main shareholder can push the minority shareholders out of the company when he reaches a legally determined percentage of company’s shares, regardless of whether he reaches the specified threshold in the context of the takeover bid or in any other way (Cankar & Kunovar, 2009, p. 33).

[3] Article 528 CA.

However, the majority shareholder cannot just decide to exclude minority shareholders from the company. It needs to follow a procedure prescribed in the CA. Namely, he needs to call for a general meeting where shareholders will need to vote on the proposal to exclude minority shareholders. Of course, the outcome of the vote will always be in favour of the controlling shareholder (given the fact that according to Article 307 CA, a simple majority suffices for such a vote), nevertheless, the obligation to hold a general meeting is not without its purpose, as will be explained in the following.

2.2.2 The process of a squeeze-out

From the perspective of running a company, the decisions are generally made based on time and money. Thus, before the process of excluding minority shareholders begins, the main shareholder needs to evaluate potential profits coming from the sole ownership of the subject company and compare those profits to the costs of successfully executing a squeeze-out transaction. The costs of excluding minority shareholders, however, are not only composed from compensation payment. The main shareholder especially needs to consider additional costs that he will necessarily encounter, such as the costs for the auditor, bank guarantee costs, costs related to the valuation of the company, legal costs, notary costs, and even potential costs of judicial proceedings (Croci et al., 2012, p. 28). Considering all the possible expenses and benefits of the transaction, the main shareholder obtains an answer to the question of whether it is even reasonable to proceed with excluding minority shareholders from the company.

2.2.2.1 Preparatory steps and required documentation

Squeezing out minority shareholders is a process that takes place at the general meeting of the company and needs to be confirmed by the court in a special non-litigation procedure. As the court confirms the legitimacy of the change in ownership of the subject company and thus the exclusion of minority shareholders against their will, the main shareholder needs to provide extensive documentation and follow a rigid procedure.

After assessing the costs of a squeeze-out procedure and deciding to exclude minority shareholders, the main shareholder firstly needs to find a certified auditor that will audit the suitability of cash compensation offered. Indeed, according to Article 386/II CA, the main shareholder must ensure that the appropriateness of cash compensation offered to minority shareholders is examined by one or more auditors. The audit company or an auditor, however, cannot be freely chosen by the main shareholder, but needs to be appointed by the court. Thus, after choosing the auditor, the main shareholder needs to submit a proposal for his court appointment (Kocbek, 2007, p. 270).

Such proposal for the appointment of an auditor must be accompanied with a statement from Slovenian Central Clearing Depository (hereinafter the CCD) showing the subject company’s share register and thus demonstrating the fulfilment of the threshold for squeezing-out minority shareholders (Goldinskij, 2017, p. 25).

After the court issues a decision on the appointment of the auditor, the main shareholder needs to conclude a contract with the appointed auditor to carry out an audit of the suitability of cash compensation (Kozina, 2008, p. 11). An appointed auditor thus examines the cash compensation the main shareholder will offer to minority shareholders and prepares an audit report, which must be included in the assessment of the suitability of cash compensation. The audit report itself and the process of choosing and appointing an auditor is, however, not obligatory, if all minority shareholders submit a notarial statement renouncing their right to the report (Kocbek, 2007, p. 270).

The auditor’s task is to determine the book value of the company deriving from properly prepared and audited financial statements, and to verify the calculations of the compensation based on individual valuation methods. The auditor also needs to give his own assessment of whether the offered cash compensation is in fact appropriate. For the purpose of preparing an audits report, Article 386 CA refers to provisions on the auditor’s role in preparing audits report for mergers. Thus, following the provision of Article 583/V CA, the appointed auditor will examine and asses the methods of valuating a subject company, the reasons for using each method, will give opinions on the relative importance of each method and provide a final assessment of suitability of the cash compensation (Kocbek, 2007, p. 271).

Simultaneously with the process of appointing an auditor, the main shareholder prepares a draft of the written report, which he needs to present on the general meeting, according to Article 386/II CA. In this report, he explains to minority shareholders the assumptions for the transfer of shares and why the amount of cash compensation is appropriate (generally he takes this information from the valuation report of the subject company). The amount of cash compensation is determined by the main shareholder, taking into account the fact that appropriate compensation must reflect a subject company’s financial and profit situation at the moment when the general meeting decides on the exclusion of minority shareholders from the company.

Additionally, according to Article 385/II CA, before the general meeting where the decision on squeezing-out minority shareholders will be taken, the main shareholder needs to submit to the management of the subject company a statement from the bank, assuming liability for the payment of cash compensation (Kocbek, 2007, p. 272). Specifically, the main shareholder needs to conclude an agreement with a bank of his choosing, according to which a bank will be jointly and severally liable for the fulfilment of the main shareholder’s obligation to pay minority shareholders compensation for the acquired shares immediately after the registration of the decision on the transfer (Kozina, 2008, p. 11). The purpose of this obligation is, of course, to protect the minority shareholders in the event the main shareholder does not pay out the compensation after the transfer of shares. It is, however, important to note, as adjudicated by Slovenian Constitutional Court (hereinafter the SCC) in its decision from 1st October 2009 in case no. U-I-165/08-10, Up-1772/08-14, Up-379/09-8, that in the event the court rules on a higher cash compensation that was initially decided by the main shareholder, the bank is not liable for paying the price of additional compensation.

2.2.2.2 The general meeting

After preparing the written report, obtaining an audit report on the suitability of the compensation offer, and assuring a bank statement, the main shareholder can submit to the management of the company a request to convene a general meeting at which the vote to transfer the remaining shares to the majority shareholder will take place. The request to the management must, in addition to the above-mentioned documents (a written report of the main shareholder, an audit report and the bank statement), also include a proposal for a decision on the transfer of minority shareholders' shares (Kozina, 2008, p. 12).

According to Article 286/III CA, prior to the general meeting, minority shareholders must be given the opportunity to inspect the proposed decision on the transfer of shares, together with the company's annual reports for the previous three financial years, the written report of the main shareholder and the audits report. A copy of all these documents has to be provided free of charge to each shareholder at his request.

The general meeting is convened by the management of the company. The convocation of the general meeting needs to comply with requirements of Article 296 CA and needs to be published in an appropriate manner (usually it is published in AJPES - a Slovenian agency for Public Legal Records and Services). At least 30 days must pass from the publication of the notice, until the date of general meeting, in order to provide minority shareholders with enough time to study the documents related to the squeeze-out transaction (Goldinskij, 2017, p. 27).

At the meeting, the main shareholder has the duty of explaining to minority shareholders the proposed decision on the transfer of shares and the method of calculating the amount of compensation. He is also obliged to inform the minority shareholders of any significant changes in the company's assets in the period from drafting of the proposed decision on the transfer of shares to the date of the general meeting. In particular, according to Article 386/V CA, changes that are considered significant are especially the ones that would result in a different compensation.

As the main shareholder holds at least 90% of the voting rights, the decision of the general assembly will necessarily follow the proposal for a decision provided by the main shareholder. The main shareholder will, therefore, achieve the adoption of the resolution on the exclusion of minority shareholders from the company, completing the first part of the squeeze-out process. However, even if the general meeting seems like a mere formality, the explained process of a squeeze-out serves to provide greater transparency for minority shareholders and grants them the possibility to potentially enforce legal remedies (Jeraj, 2009, p. 43).

2.2.2.3 Existing remedies for minority shareholders

Complying with the formal requirements regarding procedure and documentation, the main shareholder has met the conditions for a squeeze-out transaction. Consequently, the minority shareholders have no legitimate interests based on which they could challenge the adopted decision to transfer the remaining shares to the main shareholder. That does, however, not mean that they cannot submit such a request. On the contrary, submitting such request is a known tactic for interrupting and prolonging the registration procedure of the decision, as will be discussed in chapter 1.2.4.1. If on the other hand, the formal conditions for a squeeze-out are not met (the example would be a situation where the main shareholder does not hold enough shares for squeezing out minority shareholders, however he does hold a majority of the votes, which is enough to force a decision on the transfer of remaining shares to him) the minority shareholders will have a valid reason to submit an action for annulment of such decision.

However, according to Article 388/I CA, if minority shareholders opine the compensation offered by the main shareholder is not suitable, or was not offered correctly, they do not have any legal grounds to bring litigation proceedings against the general meeting's decision or to submit an action for annulment. Rather, to remedy such cases, the CA provides for a special non-litigation procedure that minority shareholders can use to challenge the questions in relation to cash compensation offered by the main shareholder. Namely, Article 388/II CA stipulates that if the offered compensation is not appropriate (or not offered correctly), each minority shareholder may propose to the court to determine the appropriate level of compensation. This non-litigation procedure to determine appropriate compensation for minority shareholders has no influence on the registration procedure of a decision on the transfer of shares in the court registry (Kozina, 2008, p. 12).

2.2.2.4 Registration of the decision and transfer of shares

The mere adoption of the decision to transfer the shares to the majority shareholder does not result in squeezing out the minority shareholders. Their exclusion from the company is only possible with a court registration of the decision. Entry of the decision in the court registry has a constitutive effect, both for squeezing out minority shareholders and for transferring their shares to the main shareholder (Kocbek et al., 2009, p. 787). In light of the above, the management of the company has to submit a proposal for the entry in the court registry of the decision on the transfer of remaining shares to the main shareholder, immediately after obtaining a notarized copy of the minutes of the general meeting where the decision was adopted.

After the transfer of shares is registered in the court registry, the CCD can transfer the minority shareholders' shares to the account of the main shareholder. CCD also forwards to the main shareholder a contract for the services in connection with the transfer of shares and informs the main shareholder who are the former minority shareholders entitled to compensation payment (Kozina, 2008, p. 12). After the transfer of the shares to the main shareholder's account, the CCD informs now ex-minority shareholders about the transfer of their shares and requests their account numbers for the purpose of transferring the compensation payment to them. After obtaining the feedback from ex-minority shareholders, the main shareholder (himself or through the bank) arranges for the payment of compensation (Kozina, 2008, p. 12).

The duration of the entire process of squeezing out minority shareholders is approximately 6 to 8 months – that is, if all the stakeholders participate (Goldinskij, 2017, p. 29). After the end of the procedure, the main shareholder becomes a sole owner of the company. However, in order to achieve his goal, that is, easier and more efficient management of the company, he still needs to take additional steps in making the company private and transforming it into a single-person company.

2.2.3 Cash compensation

Because minority shareholders cannot prevent their own exclusion form the company and are thus forced out of the company against their will, protection of their economic interests is of upmost importance. In theory, protection of their economic interests is achieved through the notion of appropriate or fair price (Prelič, 2010, p. 1004), which should guarantee minority shareholders a fair exclusion from the company, without worsening their economic situation. On the other hand, this notion of the fair price must not undermine the feasibility of the option of a squeeze-out transaction for the main shareholder (Cankar & Kunovar, 2009, p. 27). With regulation of the appropriate cash compensation, its process of calculation and determination, the legislator and the judiciary thus need to strike the right balance between the interests of minority shareholders and the ones of the main shareholder.

2.2.3.1 The notion of appropriate compensation in Slovenia

The notion of appropriate compensation is not extensively regulated in legislation. Article 385/I in conjunction with Article 556/II (5) CA only stipulates that the subject company's financial and profit situation (on the day of the decision on the squeeze-out at the general meeting) must be considered when deciding on a compensation for minority shareholders. As confirmed by the Court of Appeals in Ljubljana (hereinafter the CAL) in its decision from 26th August 2014, case no. VSL sklep I Cpg 355/2013, the CA does not provide for any substantive criteria that must be taken into account when determining appropriate compensation, but rather leaves the said question to the finance professionals. The CA thus only contains the basic procedural safeguards in relation to determining cash compensation, however, does not give any methodological instructions regarding its determination.

The logic behind the legislator setting loose criteria for determining the subject company's value lies in allowing for the possibility to find a right balance between protection of the interests of minority shareholders and those of the main shareholder in each specific case, as explained by the Supreme Court of Slovenia (hereinafter the SCS) in its decision from 19th May 2015, case no. VS RS sklep III Ips 69/2013. In the words of the letter, appropriate compensation is a "legal standard, the content of which must be filled in each specific case with the help of methods and standards for assessing the value of the company, taking into account the company's financial and profit situation at the moment when the general meeting decides on the squeeze-out."[4]

The compensation payment is appropriate if it offers an amount that corresponds to the economic value of the participation at the time of the adoption of the decision to exclude minority shareholders from a company. As explained by the SCC in its decision from 1st October 2009, case no. U-I-165/08, Up-1772/08, Up-379/09, full compensation for the exclusion from the company and consequently from the future profits of such company, should in principle enable the minority shareholder to purchase stocks of another joint-stock company, allowing him to exercise corporate rights to a similar extent. This position is further elaborated by the reasoning of SCS in its decision form 25th March 2014, case no. sklep III Ips 116/2011, where the court held that valuation of the share price should also consider any future returns on that share.

Furthermore, in the decision from 26 August 2014, case no. VSL sklep I Cpg 355/2013, the SCS elaborated on the importance of considering all advantages and disadvantages each party obtains in the transaction, when determining the appropriate compensation for minority shareholders, whereby all shareholders must be treated equally. However, the court also highlighted the fact that the concept of a squeeze-out represents an involuntary confiscation of the subject company's shares from minority shareholders, or in other words, a legally permissible expropriation of minority shareholders. Taking the said into account, the court considered it fair that the one who interferes with the rights of others bears a greater risk of correct assessment of appropriate compensation. Following this reasoning, the court decided to take into account an optimistic assessment of the real estate provided by the appraiser employed by the main shareholder, consequently granting a higher compensation payment.

2.2.3.2 Judicial review of appropriate cash compensation

As mentioned, if the cash compensation offered to minority shareholders is not suitable, if it is not offered properly or if it is not offered at all, minority shareholders have, according to Article 388 CA, an option to request its judicial assessment. Article 388/II CA refers to the use of provisions of the CA regulating judicial review of conversion ratios in mergers and acquisitions, which stipulate a non-litigation civil procedure. Consequently, for the judicial review of appropriate compensation, Slovenian Act governing non-litigation proceedings (Non-Contentious Civil Procedure Act, Official Gazette of Republic of

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[4] Translation of the author.

Slovenia, no. 16/19, from 8 March 2019)[5] applies, which in practice means that, unlike in litigation proceedings, the court can establish facts that the participants (the parties to the proceedings) did not state and execute evidence the participants did not propose (Decision of the Court of Appeals in Koper, case no. VSK sodba Cpg 118/2021, from 09 December 2021).

According to Article 605 CA, the request for a judicial review of cash compensation can be filed by any individual shareholder and needs to be submitted within one month from the date of publication of the entry of the decision on the squeeze-out of minority shareholders in the court register (Krajšek Novak, 2007, p. 517).

On of the most important procedural aspects with regards to judicial review of cash compensation is the determination of the subject of review. As mentioned, prior to the general meeting on which the decision on the exclusion of minority shareholders is taken, a court-appointed auditor assesses the amount of cash compensation. Thus, the proposal for judicial review must in substance challenge the auditor's opinion on the appropriateness of the compensation offered by the main shareholder. Consequently, the proposal for judicial review must necessarily state concrete facts asserting that the auditor's assessment of the appropriateness of compensation is incorrect (Krajšek Novak, 2007, p. 520). For example, the proposal of judicial review must contain concrete data about the company's assets, transactions, or market position, the auditor failed to acknowledge, or contain an explanation on why the methods the auditor used are inappropriate or are used incorrectly, etc. If the auditor's opinion is not challenged, the court will have no reason to request the opinion of the settlement board, as the court-appointed auditor is already considered an expert in assessing the appropriateness of compensation (Krajšek Novak, 2007, p. 520).

When a judicial assessment of cash compensation is requested, Article 607/III CA stipulates for the court to publish a notice of the submitted proposal in AJPES. Additionally, the court needs to inform all shareholders of the company (that is the ones who held a subject company's shares at the time of the adoption of a decision on excluding minority shareholders at the general assembly) and invite them to submit their proposal for a judicial review of compensation within one month. Any later proposals for a judicial review will not be admissible, since the court adjudicates on the appropriateness of cash compensation at once and for all minority shareholders (Krajšek Novak, 2007, p. 517).

For the minority shareholders that do not submit their proposal for a judicial review or express their interest in participating in the procedure, Article 608 CA stipulates an appointment of a joint representative (Decision of the Court of Appeals in Ljubljana, case no. VSL sklep I Cpg 41/2023, from 7 February 2023). The purpose of this procedural rule

[5] In Slovene: Zakon o nepravdnem postopku (ZNP-1).

is to ensure the protection of those minority shareholders who did not express interests in participating in a judicial review proceeding, nor did they expressly waive their right to the compensation payment. Particularly, the notion of a representative aims to protect the interests of such shareholders in the proceeding, be it in the event of a possible settlement proposal within the judicial proceeding, or to ensure those shareholders be able to appeal the court's decision (Krajšek Novak, 2007, p. 518). Namely, the court's decision on the appropriate cash compensation, as well as any settlement concluded before the court, is effective for all shareholders, including the ones who did not participate in the court proceedings at all. Therefore, a joint representative is a necessary legal safeguard guarding the interests of inactive minority shareholders. According to Article 608/VII CA, such joint representative is even obliged to continue the procedure of judicial review in the event that the original proposal for the review is withdrawn, if the continuation of the procedure would be favourable for other minority shareholders (Decision of the Court of Appeals in Ljubljana, case no. VSL sklep I Cpg 41/2023, from 7 February 2023).

The court's final decision on the appropriateness of cash compensation for minority shareholders (or the legally confirmed settlement before the settlement board of experts (see chapter 2.2.3.3)), has a contra omnes effect, meaning it affects the company and all its shareholders. Every shareholder has the right to the same compensation payment (in proportion to its share), with the exception of those shareholders who have expressly waived their right to compensation (Krajšek Novak, 2007, p. 519).

As concerns the legal remedies available against the court's decision, according to Article 607/V and VI CA, the parties can appeal against the decision before the Court of appeals, as well as request a revision of the decision before the SCS.

2.2.3.3 The settlement board

Since the judicial review of cash compensation implies decision-taking on a highly specific question mainly concerning the issue of company valuation and corporate accounting, the regulator introduced a possibility to appoint a special professional body. Namely, Article 609 CA sets out a concept of a settlement board with a purpose of helping the court with their expert opinion. The court can obtain an opinion from a settlement board based on its own discretion or following a request of any participant of the judicial review proceedings (Decision of the Court of Appeals in Ljubljana, case no. VSL sklep I Cpg 47/2018, from 5. April 2018).

According to Article 615/II CA, the settlement board consists of qualified experts from the fields of finance, law, audit and accounting. Their function is to help and advise the judge, with their expertise and experience, in deciding on appropriateness of the compensation offered and their position is similar to a specialised jury (Prelič, 2010, p. 1011). To duly perform its function and give a relevant opinion, the settlement board has the right to request explanations from the company and the main shareholder. According to Article

609/VII CA, the company's management must also enable the settlement board to inspect the company's books and documentation. Contrary to the limitations of other experts participating in the judicial proceedings and comparable to the function of a judge, Article 610 CA also grants the settlement board a duty to encourage the participants to resolve the dispute through a settlement (Kocbek, et al., 2014, p. 357).

The court, however, is not bound by the opinion of the settlement board. Rather, their opinion is taken into account by the court with all other evidence. The judge might even appoint another expert to give his opinion on the same question of valuation of the subject company (Decision of the Court of Appeals in Ljubljana, case no. VSL sklep I Cpg 1189/2015, from 13 January 2016). In other words, the principle of discretion in valuation of evidence, as one of the fundamental principles of civil procedure, is applicable also in connection to the opinion of the settlement board.

2.2.4 Registration of the transferred shares

2.2.4.1 The process of registration

The judicial review of appropriateness of the cash compensation does not prevent the process of the squeeze-out to continue. As excluding minority shareholders is a right of the main shareholder, the only legitimate conflict might arise from the question of appropriate cash compensation, which, according to the legislator, should be resolved without delaying or hindering the main process of the transfer of remaining shares to the main shareholder. Thus, even if a minority shareholder submits a proposal for a judicial review of cash compensation, the process of a squeeze-out transaction continues.

The exclusion of minority shareholders from the company is only possible with the registration of this decision in the court registry, which has a constitutive effect, both for squeezing out minority shareholders and for transferring the shares to the main shareholder (Kocbek et al., 2009, p. 787). In light of the above and according to Article 387/I CA, the management of the subject company has to submit the proposal for the entry into the court registry of the decision on the transfer of shares immediately after obtaining a notarized copy of the minutes of the general meeting at which this decision was adopted.

The constitutive effect of the registration of the decision means that the transfer of shares to the main shareholder is done automatically (i.e., ex lege). Such transfer of shares from intangible securities accounts (i.e., trading account) of minority shareholders to the intangible securities account of the main shareholder is carried out by CCD. Thus, for the purpose of the transfer of shares, Book-Entry Securities Act (Official Gazette of Republic of Slovenia, no. 75/15, 74/16 – ORZNVP48, 5/17, 15/18 – odl. US and 43/19, from 25 September 2015) (hereinafter the BSA)[6] is applicable.

[6] In Slovene: Zakon o nematerializiranih vrednostnih papirjih (ZNVP-1).

In order for the CCD to transfer the shares form the accounts of minority shareholders to the account of the main shareholder, the main shareholder concludes an agreement with the CCD. According to Article 23/II BSA, such an agreement is only valid, if the decision on the exclusion of minority shareholders has already been entered into the court registry and if the main shareholder already transferred the sum of cash compensation to the CCD escrow account for minority shareholders (Goldinskij, 2017, p. 35). The purpose of paying the sum of cash compensation to the CCD before the transfer agreement between CCD and the main shareholder can be considered valid, is to ensure that minority shareholders cannot be squeeze-out form the company without the protection of their economic interests.

In light of the above, the main shareholder has to be very proactive in both registering the decision on the transfer of shares as well as in engaging the CCD to carry out the transfer. To this extent, it is important to note that, even though the registered decision on the transfer of shares has a constitutive nature, if the CCD has not yet transferred the shares to the account of the main shareholder, it is de facto still possible for a minority shareholder to dispose of his shares. The legal effects of such disposure will depend, however, on the question of whether the decision has been registered.

Indeed, if the general meeting's decision on the transfer is not yet registered by the court registry, minority shareholders can validly transfer their shares to buyers even after the adoption of the decision on the transfer of shares to the main shareholder. They have this right until the decision is registered (Kocbek et al., 2009, p. 789). After the registration of the decision on the exclusion, if a minority shareholder sells or transfers his shares, such action has no legal significance for the main shareholder (Goldinskij, 2017, p. 36). In practice, for the buyer of a share already belonging to the main shareholder, such agreement with a minority shareholder would mean that he bought only a right to compensation. The buyer, thus, does not obtain any claims against the main shareholder to transfer the share over to him.

2.2.4.2 The registry lock[7]

With the proposal for registration of the decision on excluding minority shareholders from the company, the main shareholder must submit to the court, amongst other documentation, also a signed declaration in accordance with Article 590/II CA, stating that the decision on the transfer of shares has not been challenged before the court or that any such action has already been rejected, dismissed or withdrawn. Indeed, Article 590/III CA stipulates a registry lock, that is, a suspension of registration proceedings pending the final decision on a potential litigation concerning the decision on the transfer of shares (Kocbek et al., 2014, p. 283).

[7] In Slovene: registrska zapora.

Submitting actions of annulment against the adopted resolutions of the general meeting on the exclusion of minority shareholders will not be justified in substance, as mentioned in chapter 2.2.2.3. Yet minority shareholders can still, in theory, start the proceedings before the court and demand the annulment of the decision (Decision of the Court of Appeals in Ljubljana, case no.VSL Sklep I Cpg 182/2021, from 29. September 2021). In other words, the provision of Article 590/II CA gives minority shareholders the means for delaying the registration of the decision on their exclusion. If the registry lock takes effect, no transfer of shares will take place (Kocbek et al., 2014, p. 284).

Such situation naturally causes immense direct and indirect damage to the main shareholder and the company. This notion of the registry lock has its purpose in the context of mergers, for which it is originally intended and where the (in)direct damage to the company will result in lower value of shares for all shareholders, even the ones that are challenging the decision before the court (Goldinskij, 2017, p. 36). However, in the context of the squeeze-out, as the price for compensation must be calculated taking into account the value of the company at the time of the adoption of a decision on the transfer, the registry lock presents a burden only for the main shareholder. The possibility of a registry lock is thus, for the minority shareholders, an opportunity to negotiate higher cash compensation or to intentionally cause damage to the main shareholder (Bratina & Jovanovič, 2008, p. 61). It is thus welcomed that the provisions of Article 590/IV and V CA contain an option for the court not to suspend the registration proceedings and to enter into the registry the decision on the transfer of shares even before the final decision on the claim. However, there must exist significant prevailing interest for a rapid decision on the registration (Decision of the Supreme Court of Slovenia, case no. VS RS sklep III Ips 175/2007, from 30 September 2008).

The assessment of whether such significant prevailing interests exist is done by the court, which, According to Article 590/V CA, takes into account i) the importance of the right allegedly being violation with the decision on the transfer, ii) the probability that the plaintiff will succeed with challenging the decision, and iii) the damage that could occur to the company and the main shareholder as a result of the prolonged registration. Some guidelines on interpretation of Article 590/V CA in the context of a squeeze-out transaction can be found in the decision of the SCS from September 2008 (Decision of the Supreme Court of Slovenia, case no. VS RS sklep III Ips 175/2007, from 30 September 2008). Namely, in this decision, the court recognised that adjudicating on significant prevailing interest for a rapid decision in the context of a squeeze-out transaction, is different from adjudicating on significant interests for a rapid decision in the context of registering a merger of a joint-stock company. It thus annulled the decision of the CAL (that did not recognise significant prevailing interests of the main shareholder stating he failed to prove the amount of damage) and held that when assessing significant prevailing interests for a rapid registration, all the elements from Article 950/V CA need to be taken into account (Kocbek et al., 2014, p. 284). In other words, the lack of one of the elements (in the case at hand the lack of proven damage), cannot automatically deny prevailing interests for a rapid decision.

When assessing the existence of significant interests for a rapid registration, the court must especially take into account the probability that applicants (minority shareholders) will be successful in challenging the decision on the transfer. Namely, as mentioned, the squeeze-out of minority shareholders is a legal right of the main shareholder and it cannot be validly disputed unless the formal requirements are not fulfilled (see subchapter 2.2.2.3). Taking the said into consideration, prevailing interests for a rapid decision on registration of the decision on the transfer of shares are usually very clear. Only in exceptional cases would withholding registration be justified. Such exceptions refer to non-fulfilment of the formal legal conditions for the adoption of the decision, for example, when the main shareholder does not hold 90% of capital share or does not provide a bank guarantee.

3 THE CONCEPT OF A SQUEEZE-OUT IN A TAKEOVER TRANSACTION

In practice, many squeeze-out transactions are enforced in the context of a takeover, that is, when the main shareholder in a relatively short period, in one or more consecutive transactions, acquires a subject company, obtaining at least a 90% majority of the voting rights. In this context, the main shareholder has, as discussed above, the right to exclude the remaining minority shareholders from the company. However, the process of a squeeze-out transaction in the context of a takeover has some specificities, as the TA, representing a lex specialis to the CA, sets out a different legal regime in connection to determining compensation paid to minority shareholders.

Taking the said into account, this chapter firstly provides some general remarks on the takeovers from the economic and legal perspective and later focuses on the differences between legal frameworks of the CA and the TA in the context of determining appropriate cash compensation for minority shareholders.

3.1 Generally about takeovers

In general, we talk about a takeover when a shareholder obtains a percentage of shares in a target company, which allows him to gain effective control in that company. In other words, the target company becomes subordinate to the acquirer (Bertoncelj, 2008, p. 15). In Slovenian legislation, a takeover is defined in Article 7 TA as an action of an acquirer (alone or together with persons acting jointly with it), with which it achieves a takeover threshold. The latter is defined in the second paragraph of the same article as one third of the voting rights in a target company.

The control of a company can be obtained in many different ways (for example through purchasing a target company’s property or assets, by contractual relationship, merging with a company, etc. (Gorše, 2019, p. 6)), however, for the purpose of the thesis, the focus of this chapter will be on takeovers. In this context, takeovers happen with purchasing shares of a target company either on a primary market (initial or secondary public offerings), or on a secondary market (purchase of shares form other shareholders directly or through financial markets) (Berk & DeMarzo, 2019, p. 45).

3.1.1 Economic reasoning for a takeover

There are as many reasons for taking over a target company as there are takeovers themselves, however, one of the most common and attractive reasons are synergies that come with acquiring another company. Synergies present additional value generated by combining two firms, creating opportunities that would not have been available to these firms operating independently (Damodaran, 2005, p. 3). They present economically motivated, shareholder-driven incentives to acquire a company and can take up different forms that can be categorised by economies of scale and scope, vertical integration, expertise, monopoly gains, efficiency gains, tax savings from operating losses, diversification, and earnings growth (Berk & DeMarzo, 2019, p. 1005).

On the other hand, there are also very strong incentives for taking over a company, coming from the management (Berk & DeMarzo, 2019, p. 1010), having nothing to do with synergies. Namely, incentives such as inside information, lower risk of human capital, management compensations, or desire for power. In this regard, motives for takeovers are too often based on personal motivation and self-interests, where CEOs engage in acquisitions to increase their own power and maximize their own utility at the expense of firm value (Fiorentino & Garzella, 2015, p. 1470). The said might be one of the reasons for some studies showing a drop in stock prices of large, publicly traded companies after the announcement of takeover of a subject company (Berk & DeMarzo, 2019, p. 1010).

The reasons and the frequency of takeovers depend on the environment in which the companies operate. Takeovers from strategic partners are more common in industries that are more profitable, while in less profitable industries, unrelated takeovers are more common (Gorše, 2019, p. 11). Furthermore, the frequency of acquisitions also depends on how concentrated the industry is. Namely, in less saturated markets (a large number of small businesses), takeovers and acquisitions are more common than in more saturated markets (Gorše, 2019, p. 11). Lastly, it should be noted that external economic factors, like general investment climate, the availability of loans, share prices, regulatory activities such as interest rates, etc. have a major impact on takeover decisions (Uddin & Boateng, 2011, p. 556).

3.1.2 Effects of takeovers

Takeovers and acquisitions can affect those directly or indirectly linked to them. For the purpose of this thesis, however, takeovers are considered to have the most important effects on shareholders, as they are the only stakeholders directly impacted by takeovers through the changes in the value of shares. Indeed, in practice, acquirers usually look for target firms with low market values compared to its peers (either due to mispricing or mismanagement) and try to make them profitable. Moreover, a mere fact that the company has become a target for an acquisition is usually enough to generate volatility in the stock prices (Dever, 2021). The general rule is that acquisitions tend to drive up the value of a target company's stock, as an acquirer is inevitably forced to pay a premium (Bloomenthal et al., 2022).

However, the effects on the price of shares in the context of a takeover differ depending on the stage of a takeover. Indeed, with the announcement of the acquisition, there is usually an increase in a price of shares, as the market takes into account that the acquirer will be paying a control premium. However, in the last stages of a takeover, where the acquirer already has effective control of the subject company, the remaining shares' value decreases for the discount of control, as well as potential discount for lack of marketability, as will be discussed in chapter 4.1.4.1. Thus, to protect financial interests of the minority shareholders in the takeover process, special legal safeguards, discussed in subchapter 3.3 are put in place.

3.2 About Slovenian legal framework of a takeover

After the economic process of the takeover, i.e., the selection of the target company and the due diligence on the company, the legal process of the takeover begins. The latter is determined by the TA, which regulates conditions, methods and procedures with regards to taking over a company. At the outsets, it is important to note that the legal framework of the TA only applies to certain companies. Namely, according to Article 4 TA, its scope is limited to public companies with shares trading on an organized securities market (stock exchange) or to private companies having at least 250 shareholders or at least EUR 4 million of total capital (Agencija za trg vrednostnih papirjev, 2013, p. 12).

The original TA was adopted in 1997 with the main objective of protecting the investors and for ensuring the integrity of the market. As such, the adoption of the takeover legislation followed the principle of equal treatment of all shareholders, principle of transparency (publication of a mandatory takeover offers after reaching the threshold and disclosure of information), and limitation of certain defence mechanisms (Kocbek, 1997, p. 3). Today, an amendment to the original law is in force, which was adopted in 2006 to implement into Slovenian takeovers legislation the European Directive on takeover bids. The Directive was adopted with an aim to regulate the procedure related to the takeover offer of companies, to further unify the Member states' legislation in this area and thereby protect minority shareholders in takeover situations (Papadopoilos, 2007, p. 525).

In the context of a takeover or an acquisition, it is important to protect minority shareholders and prevent a situation where they find themselves locked in a company controlled by the main shareholder. As mentioned, because minority shareholders de facto lose their management participation rights, it is important that at least their economic interests are protected, especially considering a potential decrease in the value of their shares due to market recognising their lack of control in the company. The takeover offer is thus a legal concept that tries to protect minority shareholders and discourage acquisitions driven by private benefits, by requiring a premium to be paid for such control. In this regard, the TA very precisely regulates the procedure in connection to the takeover offer.

According to Article 24 TA, if an acquirer reaches a takeover threshold, (which is defined as one third of the voting capital) it is obliged to announce its takeover intention within 3 working days. With the publishing of such intention, the takeover of the target company begins.

Between the announcement of the takeover intention and publishing a takeover offer, the acquirer must publish the prospectus, which, according to Article 28 TA, serves a purpose of enabling other shareholders of the target company to decide on whether to accept or reject the takeover offer. Simultaneously with the publication of a prospectus, the acquirer is obliged to send it directly to the Slovenian Agency for Market Securities (hereinafter the SAMS), the target company's management, and the Slovenian competition authority (hereinafter the SCA) and inform them of its takeover intention.

Before the acquirer announces the takeover offer, SAMS must issue a decision based on the prospectus (not)allowing the acquirer to publish the takeover offer. In this context, the SAMS examines whether the formal conditions specified in Article 32 TA are met. In this regard, it is important to note that the SAMS examines the formal requirements for the prospectus, however, is not responsible for its subject matter (Možina, 2015, p. 295). On the other hand, according to Article 29 TA, the people who made or participated in making the prospectus and the ones who knew or should have known that the given data were untrue, are jointly and severally liable also for the damage caused, as long as the assumptions of tort liability are met (Bebler, 2012, p. 8).

When a positive decision on the prospectus is adopted, a mandatory takeover offer is to be made by the acquirer who has reached the takeover threshold. However, with the mandatory takeover offer, the acquirer might not obtain the desired majority, thus it is not uncommon that it continues with purchasing the shares on primary and secondary market. For such events, the takeover legislation also defines additional and final takeover thresholds. Namely, we talk about an additional takeover threshold, when an acquirer obtains further 10% of the voting rights in the target company and is obliged to make another takeover offer. This obligation of additional takeover offers ends when the acquirer obtains a minimum of 75% of all shares with voting rights in a target company – a threshold which is considered a final takeover threshold according to Article 11 TA (Agencija za trg vrednostnih papirjev, 2013, p. 47).

According to Article 14 TA, the subject of the takeover offer are all shares of the target company that the acquirer does not own, meaning that the subject of the offer are ordinary shares, the company’s own shares and preferred shares, insofar as the latter have voting rights (Agencija za trg vrednostnih papirjev, 2013, p. 50).

In the takeover offer, the acquirer can also set a precondition of reaching a specific threshold. In other words, the takeover offer can be made under the condition that the acquirer obtains a certain minimum percentage of shares, together with the securities it already owns. In this case, all agreements with shareholders that decided to sell their shares to the acquirer are concluded with a suspensive condition that occurs when the success threshold is reached and with a termination condition if the success threshold is not reached (Mikrac, 2018, p. 45). However, according to Article 21 TA, in case of a mandatory takeover offer, the acquirer must set a success threshold that exceeds 50% of all shares with voting rights, unless it already has such a share (Agencija za trg vrednostnih papirjev, 2013, p. 71).

The outcome of a takeover offer can be successful or unsuccessful. The decision on the outcome is issued by SAMS and represents the final part of the formal procedure of the takeover offer. Article 53 TA considers an offer to be unsuccessful if SAMS annuls the offer, if the success threshold specified in the offer was not reached, if the acquirer does not deposit the money to the CCD account or, if the acquirer fails to prove that he did not pledge the target company’s securities for the purchase of its shares.

If the takeover offer is successful, the SAMS issues a positive decision, which represents a legal basis for the enforcement of the takeover offer carried out by the CCD. The purpose of conducting the operational part of the takeover through CCD is, similarly to the aforementioned process of a squeeze-out transaction, to ensure greater security for all stakeholders in the process. Namely, CCD acts as a guardian of the process, ensuring the implementation of the principle of simultaneous fulfilment (Agencija za trg vrednostnih papirjev, 2013, p. 16), meaning that it will transfer the intangible securities whenever the acquirer provides the payment, lowering the risk of shareholders not receiving the payment or acquirer not receiving the shares. With the transfer executed through CCD, the acquisition process of the target company is complete.

3.3 Regulation of a squeeze-out in the context of a takeover

3.3.1 European Takeover Directive

The European Directive on takeover bids that came into effect in April 2004 introduced a squeeze-out right for acquirers. In other words, since the adoption (and implementation) of the Directive, after a successful takeover bid the acquirer has the right to require from all the remaining minority shareholders to sell their voting securities for an appropriate or fair price (Mülbert, 2004, p. 711).

Directive, taking into account different legal traditions of Member States, allows two different options to choose from. Either, Article 15(2)(a) of the Directive that permits an acquirer to squeeze out the minority shareholders once it holds securities representing no less than 90% of the capital carrying voting rights and 90% of the voting rights in the target company, or, Article 15(2)(b) of the Directive that allows a squeeze-out where, following acceptance of the bid, the acquirer has acquired securities representing not less than 90% of the target company's capital carrying voting rights and 90% of the voting rights comprised in the bid. Following the example of Germany, Slovenia extended the right of squeezing-out majority shareholder also to the general corporate legislation and consequently introduced this concept for joint stock companies that are not subject to the takeover legislation (Kobe, 2011, p. 44).

In the context of the takeover, a squeeze-out transaction is the final step in the process of purchasing a target company. For the purpose of determining what an appropriate compensation for excluding the remaining shareholders form the company might be, the Directive introduces a presumption of a "fair" (appropriate) price (Kaisanlahti, 2007, p. 501). Namely, the first paragraph of Article 15(5) of the Directive derives the conditions of "fair" compensation offered to remaining shareholders from the price offered in a mandatory bid that preceded the squeeze-out. The Article stipulates that following a mandatory bid, the compensation offered in the bid is presumed to be fair. This presumption of the "fair" price for a squeeze-out does not, however, require the 90% squeeze-out threshold. Such threshold may be exceeded even after the bid, for example, through further acquisitions by private sales (Kaisanlahti, 2007, p. 501).

As already mentioned, the legislator implemented the Directive into Slovenian legal order in 2006 with the adoption of the new TA. In the following chapter, the thesis presents the notion of appropriate price for excluded minority shareholders' shares following a mandatory takeover offer in the framework of Slovenian legal order.

3.3.2 Appropriate compensation in a squeeze-out following a takeover

Considering that there are two different regimes for squeezing out minority shareholders in Slovenia, it is necessary to take a brief look at the regulation in the TA, especially in terms of determining compensation for excluded minority shareholders.

In the context of a takeover, the exclusion of minority shareholders is regulated in Article 68 TA. The first paragraph of this article stipulates that the provisions of the CA regulating the squeeze-out of minority shareholders apply also in the context of a takeover of a target company in which the acquirer has acquired at least a 90% of all shares with voting rights. The acquirer has to obtain such a percentage of share through a successful mandatory takeover offer or through a successful voluntary takeover offer accepted by shareholders of at least 90% of the target company's shares with voting rights, to which this offer referred. Furthermore, Article 68/II TA stipulates that within three months from the announcement of the successful outcome of the offer, the main shareholder can exclude the remaining shareholders form he company, offering them compensation of the same type and in the same amount as for shares in the takeover offer.

Indeed, the aforementioned provision regulates the compensation for minority shareholders in the event of their exclusion from the company within three months of the announcement of the outcome of the takeover offer. If the main shareholder decides to exclude the remaining minority shareholders, he is obliged to pay the same price for their shares as he paid to other shareholders who accepted his offer in the process of a takeover. The purpose of this rule is to enable the remaining shareholders who did not accept the offer to enjoy the same conditions after the takeover as during it. Consequently, the compensation for excluding minority shareholders can, contrary to the general rule in the CA, also be in the form of substitute shares and not only in cash, as Article 16/II TA stipulates that during the takeover bid, an acquirer can offer as payment for shares also other securities.

The most important difference between the regulation of a squeeze-out in the CA and the TA is, however, the presumption of appropriate compensation that is present in the exclusion of minority shareholders in the post-takeover period. Namely, when the squeeze-out transaction is carried out exclusively according to the provisions of the CA, the amount of the compensation is decided autonomously at the discretion of the main shareholder. On the other hand, in the context of a squeeze-out transaction in the post-takeover period, the main shareholder (acquirer) cannot autonomously decide what kind of compensation to offer, since he must offer the minority shareholders the same amount offered in a takeover bid, where he acquired 90% of shares with voting rights.

Taking into account this difference of the basis of determining the compensation offered between the TA and the CA, the question arises of whether minority shareholders excluded from the joint-stock company in the post-takeover period can challenge the suitability of compensation. Namely, although Article 68/II TA alone does not allow for the conclusion that the compensation offered in the post-takeover period is automatically appropriate, taking into account Article 15/V of the Directive on takeover bids, stating that "following a mandatory bid, the compensation offered in the bid shall be considered fair", such presumption of an appropriate compensation has already been recognised both in judicial practice and in theory (Bernard, 2020, p. 25).

Due to the short three-month post-takeover period that directly follows the takeover offer procedure, Article 68/II TA equates the conditions and amount of compensation for the exclusion of minority shareholders with the ones in the takeover offer. This means that the assessment of the suitability of compensation is directly related to the way the price is formed in the takeover offer. Thus, in order to understand the question of why such compensation is considered appropriate and whether minority shareholders excluded in the post-takeover period can challenge the amount of such compensation, it is important to understand how the price is formed in the takeover offer.

The price or the exchange ratio of the takeover offer, which must be the same for all securities of a particular class or type, is determined based on the rule from Article 17/II TA, according to which the offered price must not be lower than the highest price at which the acquirer obtained securities in the period of the last 12 months before the publication of his offer. An additional safeguard mechanism lies in Article 17/III TA, according to which the acquirer is obliged to meet the price offered to shareholders of the target company, if he obtains securities at a higher price than the one in the offer, within one year after the expiry of the deadline for acceptance of a successful takeover offer. The acquirer's freedom to form a takeover price is thus limited with his actions in the pre-takeover period. As such, the price for the purchase of securities in the takeover offer is not based on the economic or accounting valuation of the target company (or its assets), but on the mechanism of supply and demand for the shares of the target company. The appropriate price in the takeover offer thus reflects the transactions with the target company's shares in the last year before the announcement of the takeover offer.

Because the formation of the compensation for excluded minority shareholders is based on the mechanism of supply and demand, for many years Slovenian legal theory and practice recognised the presumption of appropriate compensation, which was in principle non-contestable (Decision of the Court of Appeals in Koper, case no. VSK sklep Cpg 105/2019, from 4 July 2019). It could only be challenged if the acquirer did not offer the excluded minority shareholders the same compensation as offered in the most recent takeover offer (Levovnik, 2014, p. 30), or if the acquirer somehow abused its rights (for example if the acquirer reached the 90% threshold for acceptance of the takeover offer through fraud, coercion, misleading information, inside information, etc. (Decision of the Court of Appeals in Koper, case no. VSK sklep Cpg 105/2019, from 4 July 2019)).

However, in the recent decision of the SCS from 13 June 2023, case no. VS RS sklep III Ips 4/2022, the latter gave some further guidance on the applicability of the presumption of appropriate compensation in the context of the exclusion of minority shareholders in the post-takeover period, seemingly extending the possibility of minority shareholders to challenge the compensation offered to them.

The Court explained that the Directive on the takeover bids in Article 5/II (4) contains an optional provision allowing Member States to authorize their supervisory authorities to adjust the price of the takeover offer under certain circumstances. This option could be exercised, for example, when the maximum price has been set by an agreement between the seller and the buyer, when the market price for the shares of a target company has been subject to manipulation, when the prices in a general or a specific market are affected by extraordinary conditions, etc. However, the Slovenian legislator did not implement the provision with such content into the TA and did thus not authorize the SAMS to adjust the price offered in the takeover offer. Nevertheless, the SCS used the abovementioned provision of the Directive on takeover bids to establish an argument in favour of challenging the presumption of appropriate compensation.

According to the Court, the market mechanism through which a price for the takeover offer is formed is not of negligible importance when considering the appropriateness of the compensation for a squeeze-out transaction in the post-takeover period. The acquirer's success with the mandatory takeover offer generally reflects the appropriateness of the compensation. Nevertheless, the SCS considered it cannot be completely ruled out that the compensation defined in this way is distorted in certain cases and does not necessarily reflect the price that would be formed on the basis of free supply and demand, especially considering that Article 29 TA does not stipulate any responsibility of the SAMS for the correctness of the information in the prospectus. Thus, in the court's view, circumstances like connections between of the acquirer with the sellers, market manipulations with the shares of the target company and other business practices in violation of the regulations on market abuse, can distort the market price of shares of the target company in the pre-takeover period. Consequently, the SCS concluded that the price of the share, which is according to Article 17/II TA considered valid, could potentially be formed on the basis of unsuitable market transactions. Following this reasoning, in the case of alleged and proven irregularities within the market of supply and demand for shares of the target company, the SCS considered that a correction of the price offered to the excluded minority shareholders is possible.

The compensation offered to minority shareholders in the context of a takeover can thus not only be challenged due to formal shortcomings in the framework of the squeeze-out itself but can also be challenged due to deficiencies and irregularities in determining the price for shares in the pre-takeover period. In this context, however, the minority shareholders need to challenge the price in the takeover offer and not the compensation offered to them (Decision of the Supreme Court of Slovenia, case no. VS RS sklep III Ips 4/2022, from 13 June 2023).

4 VALUATING A COMPANY IN THE CONTEXT OF A SQUEEZE-OUT

One of the main challenges concerning a squeeze-out transaction is determining appropriate compensation for minority shareholders. This question is especially relevant when special provisions of the TA concerning the presumption of an appropriate compensation do not apply (that is, in the context of private companies, if the acquirer exceeds the three month period, or if the acquirer reaches a 90% threshold without a takeover offer) and the price per share the main shareholders needs to pay to minority shareholders is determined based on the general rules of the CA.

As mentioned, the CA does not provide for any substantive provisions concerning methodology used when determining appropriate compensation for excluding minority shareholders. The legislation only mentions the notion of appropriate monetary compensation, which is a legal standard that needs to be applied on case-by-case basis taking into consideration accounting and economic rules of value assessment, on the one hand, and the principles of corporate and acquisition law, on the other.

Since valuing a company for the purpose of determining appropriate compensation for minority shareholders first and foremost concerns valuing a company, this chapter presents the basic rules of company valuation, followed by their application in the context of a squeeze-out transaction.

4.1 Basis of value and its components

Before starting a valuation of the company's capital, it is necessary to determine the basis of value, which is defined by the International Valuation Standards (hereinafter the IVS) as the fundamental premises on which the values of a company will be based. The determination of the basis of value is important as it influences the selection of methods of valuation, inputs, and assumptions (International Valuation Standards Council, 2022, p. 8). Determining the basis of value means determining the type of value, the assumptions of value and the level of value. In the following, each of these determinants is explained.

4.1.1 The type of value

The type of value chosen as one of the aspects of the basis of value depends on the very purpose of a valuation. According to the IVS, the type of value can be classified in three main categories. Namely, (1) the type of value that indicates the most likely price that would be achieved in a hypothetical free and open market exchange (market value), (ii) the type of value that indicates the benefits that a person derives from owning an asset (investment value), and (iii) the type of value that indicates the price that would reasonably be agreed upon for the exchange of an asset between two specific parties, where the price is a reflection of their specific advantages or disadvantages (fair value) (Kobe, 2011, p. 10).

More specifically, the market value is the estimated amount for which an asset is exchanged on a specific valuation date between a willing buyer and a willing seller in an arm's length transaction, where neither party is subject to the other's control or dominant influence, and the transaction is treated with fairness and legality (Yao-Te, 2012, p. 2). The concept of market value thus presumes a price negotiated in an open and competitive market where the participants are acting freely. Moreover, market value requires disregarding any value of an asset that might be specific to one purchaser and is thus not available to other parties on the market (Goldinskij, 2017, p. 43). To give an example, in the context of a squeeze-out, considering market value when evaluating a company would mean disregarding any specific advantages that the majority shareholder might get form acquiring the whole company, such as the value of eliminating corporate rules protecting minority shareholders mentioned in the introduction.

Furthermore, the investment value represents the value based on investor's individual requirements and expectations (Praznik, 2011, p. 30). The IVS defines investment value as an entity-specific basis of value, reflecting the circumstances and financial objectives of the entity for which the valuation is being carried out. As such, it is often used for measuring investment performance. This type of value thus reflects the benefits received by a shareholder from holding a company and thus includes consideration of synergies arising from other operations held or controlled by the investor (Salthmarsh, 2017). In the context of a squeeze-out, taking into account investment value of a company would mean considering the value that is own to the majority shareholder and might only be achieved by him.

Lastly, the fair value (or equitable value) is the estimated price for the transfer of an asset between two specific identified parties considering the respective advantages or disadvantages that each will gain from the transaction (Kobe, 2011, p. 11). Although fair value is a broader concept then the market value, the price that is fair between two parties is, in many instances, the price that could be achieved on the market. However, in some cases the assessment of fair value will involve considering elements that have to be disregarded in the assessment of the market value (International Valuation Standards Council, 2022, p. 25). For example, synergies arising from acquisitions as a consequence of combining the interests of the owner are not appropriate to use in the valuation of the market value, however, they might be an appropriate element to consider in determining a fair value (Holtström, 2021, p. 29).

In determining which type of value to use in the context of a squeeze-out the IVS requires considering different rights and obligations inherent to a particular shareholder. (International Valuation Standards Council, 2022, p. 60). To this extent, there exist important differences between a shareholder who sells his share on the capital market and a minority shareholder being subject to a squeeze-out transaction. Namely, for a shareholder that is selling his shares on the market, the value of a share is determined by market conditions of supply and demand, where shares that are marketable and enable control of a company will be in higher demand, whereas the minority shareholder subject to a squeeze-out is not willingly selling his shares nor do his shares enable control of the company (Cankar & Kunovar, 2009, p. 128). Because of those differences, the market value of the sum of minority shares is generally not the same as the market value of the proportion of an entire equity capital of a company.

In addition to the mentioned difference in the willingness to sell their shares between a shareholder on the market and a shareholder subject to a squeeze-out, market value might not be appropriate for other reasons. Firstly, it is important to consider that market value of shares might include discounts for lack of control or lack of marketability, which, as will be explained in chapter 4.2.4, is not appropriate to consider when valuing a company in the context of a squeeze-out transaction (Cankar & Kunovar, 2009, p. 129). Secondly, at least in theory, efficient markets might value shares taking into account plans of a controller (Hamermesh & Wachter, 2009, p. 1021). Meaning that when there are reasons to believe that the controller might use the company to extract private benefits, undermanage the firm, or in other ways seek to gain additional profits while avoiding legal supervision, the market price of the shares would be discounted accordingly (Hamermesh & Wachter, 2009, p. 1021). In such case, considering a market price of a company, the majority shareholder with control would be awarded for abusive and opportunistic behaviour. This is accentuated by the fact that market value allows a majority shareholder to time the squeeze-out transaction, and thus to choose a moment when a market price is lower (Miliutis, 2013, p. 781). Precisely for such reasons, as mentioned in chapter 3.3.2, the SCS extended the grounds for challenging the presumption of appropriate compensation based on the market value from the TA.

On the other hand, investment value, specifically potential synergies, might be suitable to consider in determining the value of a company in the context of a squeeze-out. Although there are some problems with considering investment value (excessive compensation for the expropriated shares might deter efficient takeovers), it seems that EU legislation allows the consideration of synergies created by a takeover when calculating compensation price (Miliutis, 2013, p. 777). Indeed, as the price in a mandatory takeover bid is generally considered as appropriate compensation for a squeeze-out transaction and as such price usually also contains the premium for control, we can assume that, at least in the case of post-mandatory bid squeeze-out transaction, the appropriate compensation for excluding minority shareholders includes some elements of investment value.

From the above, it follows that market value is not always a right proxy for determining appropriate compensation for minority shareholders (as we need to consider possible market manipulations), whilst investment value can be suitable, yet it is a lot harder to determine, as it entails considering synergies only the main shareholder might be aware of.

For determining the value of the company in the context of a squeeze-out transaction, the theory and jurisprudence rather talk about a fair value. The type of value that should be considered when valuing a company from the perspective of minority shareholders needs to take into account advantages and disadvantages, that each of the parties get in the transaction. As the price that is fair in the context of an individual transaction may be different from the price that would be obtainable on the market, fair value should be determined on case-by-case basis taking into account specific legal (the principles of company law) as well as contractual provisions (Cankar & Kunovar, 2009, p. 27).

4.1.2 Premise of value

In addition to determining the type of value, it is often necessary to make one or more assumptions in order to clearly define either the circumstances in which the exchange of assets (a company) at issue takes place or the conditions for such transaction. Indeed, the assumptions can significantly affect the value of an asset (International Valuation Standards Council, 2022, p. 8).

The premise of the highest value or the premise of best use value is an assumption of value from the perspective of a party that would produce the highest value from the asset. The best use must be physically possible, financially feasible, legal and result in the highest value. The premise of the best use may give the same value as the premise of existing use, if the asset is currently being used optimally (International Valuation Standards Council, 2022, p. 28). In the context of a squeeze-out transaction, this premise would encompass, for example, taking into account the highest possible future cash flows (if using a method of discounted cash flow analysis), taking into account a potential restructuring, diversification, synergies, new markets, etc. after the buyer obtains a 100% control of the company.

The going concern value presents a value of a company as a whole, under the assumption that a company will remain in business indefinitely and continue to be profitable. This premise of value also takes into account intangible assets of a company such as required permits, skilled workforce, systems and procedures, etc. (International Valuation Standards Council, 2022, p. 56). The assumption of the existing value is usually the most appropriate, when considering the value for minority shareholders in a squeeze-out transaction (Kobe, 2011, p. 11), as the highest value is practically impossible to determine in practice requiring realisation of numerous presumptions and knowledge of future plans of the acquirer.

The premise of liquidation value describes the value for an asset that could be realised in a liquidation, given a reasonable period to find a purchaser and given that the seller is compelled to sell (Kobe, 2011, p. 11). In applying the premise of liquidation value, it is usually assumed that the company will no longer operate in the future. In the context of the squeeze-out transaction, the assumption of liquidation value should be used if the liquidation value exceeds the existing value. Thus, when assessing the value of a company for the purpose of determining an appropriate price for minority shareholders it is necessary to consider whether the total value of the individually sold assets of a company would exceed their total value as an operating company (Goldinskij, 2017, p. 47).

4.1.3 Level of value

In addition to determining the type of value and the premise of value it is also necessary to determine the level of value, since it is the starting point for deciding on any discounts or premiums. The lowest level of value represents the value for a minority shareholder of a company whose shares are not being traded on an organized market. If we adjust this value for marketability, we get the level of value of the minority owner of a company with shares traded on an organised market. Furthermore, if we adjust the value of the marketable minority share for the premium for financial control, we get the level of value for a controlling owner. The highest level of value represents the level where also synergies are taken into account, meaning the increase of value for the controlling owner also for the strategic control (Kobe, 2011, p. 12).

Before determining the value with using different methods of valuation, the appraiser's task is to decide which level of value he will assess. If the level of value obtained by the valuation method and the level of value needed are not the same, the results obtained must be adjusted with an appropriate premium or discount.

4.1.4 Discounts and premiums

4.1.4.1 Generally about discounts and premiums

The question of the level of value is closely connected to discounts and premiums. When assessing the value of a company, we usually assess the value of the share of the company's capital that is held by a specific shareholder. Such valuation is subject to discounts and premiums, corresponding to different levels of (non)controllability and (non)marketability of the share of a company (Goldinskij, 2017, p. 58).

At the outsets, it is important to distinguish two categories of premiums and discounts. The first category relates to the company that is subject to valuation and does not reflect characteristics of company's holders. To give an example, the premiums and discounts from this first category comprise of discounts due to unresolved ecological problems, existing or imminent litigation, etc. The appraisers usually already incorporate such premiums and discounts into the elements of the assessment methods used as additional percentage points in the discounting factor (Goldinskij, 2017, p. 59). The second category of premiums and discounts relate to the characteristics of shareholders in the company and can be generally divided into premiums for control (discount for lack of control) and premiums for marketability (discount for lack of marketability). They thus reflect characteristics such as shareholders' influence over the company's management and shareholder's opportunities to cash in on his stake (Goldinskij, 2017, p. 59).

When using premiums and discounts, it is necessary to firstly determine the basis of value (Pratt, 2008, str. 390). In other words, whether we are evaluating a strategic value of the company, the value for the controlling owner, the value of the minority owner in a privately held company, etc. (Kosler, 2019, str. 41). The use of premiums and discounts, however, not only depends on the basis of value, but also on the method of valuation. For example, with the discounted cash flow method, the use of premiums and discounts is already incorporated in the calculation in the form of a forecast of free cash flow (Kobe, 2011, p. 18).

As concerns the premium for control, it is important to note that the power to control the company offers potential opportunities to increase its value, consequently increasing the value of the share of the controlling shareholder. The size of the control premium depends on how much the company's value can increase. In the case of a listed company, the control premium can be estimated as a percentage of the change between the price offered in a takeover offer (with the objective of gaining a controlling share), and the market price of the share before the announcement of the public offer (Kosler, 2019, str. 43). Studies estimating the premiums for control show that additional price paid on the market value for the control of a company ranges from 30% to 50% (Kosler, 2019, str. 44).

In contrast to measuring a premium for control, in assessing a discount for lack of control, there is no exact mathematical approach. Rather, the amount of a discount is determined based on empirical data. In this regard, the discount for lack of control generally range between 15% and 40% (Kosler, 2019, str. 46), and will be smaller, (i) if the owner of the share has the right to enforce liquidation, acquisitions or restructuring of the company, (ii) if the owner of the share has control over the supervisory board, and (iii) if the dispersion of other ownership shares is greater (Praznik, 2011, p. 108).

Lastly, discounts for lack of marketability are used when there is no possibility to immediately convert the stake or an investment into monetary assets. Discount for lack of liquidity is applied in case of a majority ownership share or in the context of the entire company, whereas, when it comes to minority share, we usually talk about the lack of marketability (Kosler, 2019, str. 48). The value of discounts for lack of marketability can be obtained from empirical models. To get the value of discounts for lack of marketability, some studies compared prices between restricted shares (shares that cannot be traded on an organized market) and listed shares of the same company. As not all companies have both types of shares, some studies also compared transactions of shares just before the initial public offering (hereinafter: IPO) and transactions just after a company completed the IPO. According to such studies, discounts for lack of marketability range between 40% and 60% (Kosler, 2019, str. 49). The discount for lack of marketability is, furthermore, largely attributed to privately owned companies. The fact that there is no market for private companies' shares where it would be possible to sell and buy shares immediately and without additional costs, significantly increases the risk of cashing out such shares.

4.1.4.2 Discounts and premiums in the context of a squeeze-out

According to the theory, however, applying discounts is not appropriate in the context of a squeeze-out transaction since minority shareholders are not leaving the company voluntarily (Goldinskij, 2017, p. 60). Namely, considering the principle of equal treatment, and the requirement for unimpaired economic position of minority shareholders, the value of a company should comprise of valuing a subject company's equity as a whole, without any discounts. From such a total value, a proportional part of the estimated value then falls to each shareholder, meaning an entire company should be proportionally distributed among all shareholders (Reilly & Rotokowski, 2007, p. 247). For this reason, market value might not be an appropriate proxy to use when determining appropriate compensation for minority shareholders. By squeezing the latter out of a subject company at the market value (that takes into account a discounts for lack of control), a controlling owner would unfairly gain benefits at the expense of minority shareholders due to its controlling position and legal provisions that allow him to impose its will on minority shareholders (Cankar & Kunovar, 2009, p. 129).

Furthermore, the inappropriateness of using discounts in the context of a squeeze-out transaction also comes from the case law of Slovenian courts. For example, in its decision from 19th May 2015, case no. VS RS sklep III Ips 69/2013, the SCS ruled that in determining an appropriate compensation for minority shareholders, a fair value should be assessed on the level of the entire company assuming controlling ownership and full marketability.

The unsuitability of using discounts for lack of control or lack of marketability can furthermore be deducted from the provisions of the TA and the European Directive on takeover bids. As mentioned, there exists a presumption of appropriate compensation when the squeeze-out transaction is carried out within the three-month period after the takeover bid with which the acquirer obtained 90% control of the company. This presumption thus considers that an appropriate compensation for the excluded minority shareholders is the one that includes the premium the acquirer needed to pay, in order to obtain control of a subject company, to previous shareholders that accepted his takeover offer. This logic should also be used when assessing appropriate compensation for a squeeze-out transaction in situations where the TA does not apply.

The second group of discounts are thus inappropriate to use when valuing a company for the purpose of determining appropriate compensation for minority shareholders. Notwithstanding this conclusion, it is important to understand the underlying elements of valuating of a company, as depending on the latter, it might nevertheless, be appropriate to include some premiums and discounts. For example, with valuing a company using the method of discounted cash flows, we can obtain different levels of value – the value of either a controlling or a minority shareholder. The difference between the two values is reflected in the cash flow forecast. Insofar as we proceed with the valuation considering the cash flow available to the minority shareholders, we obtain the value for the minority shareholders as the basic value and vice versa. In this case, it would be appropriate to add back a discount for lack of control (Goldinskij, 2017, p. 62). Moreover, the use of premiums and discounts might also be appropriate when valuing a company using the method of comparable transactions. For example, if we value a private company by comparing similar transactions of companies listed on a stock exchange, as this method would result in a valuation of a company assuming full marketability, a discount for lack of marketability should be applied to get an appropriate value for the private company.

4.2 Methods of valuation

Methods of valuation represent different ways a company can be valued. In the following, the thesis presents some of the recognised approaches and valuation methods and discusses their use when valuing a company in the context of a squeeze-out transaction.

An income approach of value assessment is an approach permitting the appraisers to estimate time-defined, future benefits an asset will bring for the owner, by discounting those benefits to the present value. In doing so, this approach uses a discount rate that is appropriate for the risks associated with the realization of these future benefits. There are two different income approaches, namely (i) the discounted cash flow method based on projections of future cash flows which are adjusted to get the current market value of the company (Berk & DeMarzo, 2019, p. 312) and (ii) the capitalisation of earning method which is the simplest method of business valuation calculated by discounting the subject company's future earnings (Hayes, 2023). Compared to the market approach, the income approach of valuing a company is less dependent on current events in the capital markets (Cankar & Kunovar, 2009, p. 131), and is thus the most frequently used approach when it comes to valuating a company (Goldinskij, 2017, p. 51).

Furthermore, a market approach of value assessment requires from the appraiser to search for comparable sales and carefully analyse and adjust comparable data. This approach deploys financial rations (e.g., price/earnings or enterprise value/equity) of comparable companies in order to determine the value of a subject company (Berk & DeMarzo, 2019, p. 328). Within this approach, we talk about (i) the method of comparing public companies, using valuation metrics from companies that are public and (ii) the method of comparing precedent transactions (CFI, 2023). The market approach of valuing a company is based on market data for comparable assets, thus many consider this approach to be more objective than the income approach (Cankar & Kunovar, 2009, p. 132).

In practice the market approach it often overlooked, as it is considered too simple in comparison to the discounted cash flow method (Bernstrom, 2014, str. 6). Additionally, it is usually very difficult to find companies that are truly comparable to the company subject to valuation. This is especially the case in Slovenian with its underdeveloped capital markets, which renders the market approach less suitable for carrying out a valuation of a company. Furthermore, some authors (Miliutis, 2013, p. 781) write that the method of comparing companies does not take into account the main shareholder's future plans for the target company. Consequently, it might not be the most appropriate approach in the context of a squeeze-out transaction, where the basis of value should be fair value.

Lastly, an asset-based approach of value assessment assumes the value of the asset to be determined by the cost of reproduction or replacement of an asset, reduced by the value of physical, functional or economic deterioration (Young, 2020). Within this approach to valuation, we talk about (i) the method of adjusted book values, representing the value of shareholders' equity of a business as shown on the balance sheet statement, (Martindale & Poole, 2021) and (ii) the method of liquidation value, representing net cash that a business will receive if its assets were to be liquidated and liabilities were paid off (Hayes, 2023). This approach is usually used for estimating the value of holding companies, such as real estate companies, when valuing a company with no goodwill, or when valuing a company that will no longer operate indefinitely (Martindale & Poole, 2021).

As all the mentioned approaches have their shortcomings, a multi-criterion approach might be recommended when calculating appropriate value for excluded minority shareholders. The said technique calculates the price of a subject company by arithmetical or weighted average of different multiples (e.g., market price, value of company's assets, future cash flow analysis). Such approach can be found, for example, in German practice, where appropriate price for minority shareholders is determined by combining the valuation of a target company's discounted cash flow or net present value and market price of a subject company's shares (Miliutis, 2013, p. 784).

5 DETERMINING APPROPRIATE CASH COMPENSATION IN PRACTICE

The practical part of the thesis deals with the analysis of calculating the value of a company for excluded minority shareholders in the judicial proceedings. By way of introduction, it is important to note that court files are, in general, not publicly available. Indeed, to obtain authorisation for accessing a specific court file, a person needs to demonstrate legal interests. In the event authorisation is granted, it is very typical that the reporting judge excludes certain documents from the court file due to reasons of confidentiality, which are ever so common in corporate law disputes. Thus, the following analysis of an example of determining appropriate compensation before Slovenian district court in Ljubljana is limited to information not protected by business secrets.

5.1 Background of the case

In 2018 a minority shareholder (a natural person with Slovenian citizenship) submitted, before the district court in Ljubljana, a proposal for the assessment of the compensation offered for the exclusion of minority shareholders from company A d.d. The counterparty in this case, and thus the main shareholder, was a European company that gradually obtained a 93.71% share capital in the subject company A d.d. The latter was a holding company whose main asset (presenting almost 87% of all accounting assets) was an investment in the shares of company B d.d.

Prior to the submission of the proposal to assess the appropriateness of compensation offered by the majority shareholder, company A d.d. held a general meeting in September of 2017 where a decision on exclusion of minority shareholders was adopted with a 99.76% majority. The adopted decision stipulated that a compensation in the amount of EUR 0.88 per share be paid to minority shareholders. Additionally, on the same general meeting, a decision on a withdrawal of shares from the organised market was adopted. The subject company was thus, prior to the enforcement of the decision, a publicly traded company, yet the TA did not apply, since the main shareholder had not obtained a 90% majority with a takeover offer (it should be reiterated that after obtaining a blocking majority of 75%, the TA does not require the majority shareholder to continue making mandatory takeover offers), but with occasional purchases of shares on the organised market or outside the market, and through recapitalisation of the company by an in-kind payment.

Prior to the exclusion of minority shareholders, the applicant was a holder of 4,931 out of 2,887,299 shares, amounting to 0.17% of the share capital of the company. In its submission, the applicant argued that the cash compensation offered by the majority shareholder was not appropriate as it did not comply with the principle of unimpaired economic position of minority shareholders and was based on inappropriate valuation of the company.

5.2 Valuation of company by a court appointed auditor

As mentioned in chapter 2.2.2.1, with the proposal for the resolution of the general meeting stipulating the exclusion of minority shareholders, the main shareholder needs to submit a valuation of the company (by the appraiser of his choosing) and the compensation offer that had been audited by a court appointed auditor. In the present case, the report of the court appointed auditor confirmed the valuation presented by the main shareholder and the compensation offer of EUR 0.88 to be appropriate.

According to the auditor, the amount of compensation offered was based on the highest price the shares of company A d.d. reached on the Ljubljana Stock Exchange in the past 4 years.

Table 1: Stock prices and transactions for company A d.d.

Year	Transactions	Max price (EUR)	Min price (EUR)	Day of the report (EUR)
2014	110.47	0.21	0.15	
2015	483.68	0.32	0.16	
2016	8,062.49	0.46	0.20	
2017	25,292.21	0.9	0.36	0.88

Source: Own work

The auditor considered the price of EUR 0.88 per share to be appropriate, given that other valuation methods lead to a lower value. Namely, it follows from the auditor's report that in addition to looking at the market value of the shares themselves, the appraiser, when assessing the value of company A d.d., used the asset-based approach. Within this approach, the appraiser used the method of adjusted book value under the "going concern" premise and, on the basis of unaudited accounting statements of company A d.d., calculated the value of the whole (100%) company to be just under EUR 0.5 million. Taking into account 2.9 million shares outstanding, the value of the company using the adjusted book value method under the "going concern" premise amounted to EUR 0.17 per share.

The main part (87%) of the assets of company A d.d. represented its investments in company B d.d. Thus, to calculate appropriate compensation for minority shareholders the valuation of the subsidiary played a crucial role. It follows from the auditor's report that the valuation of the subsidiary, which owned two real estate complexes (with a hotel, a restaurant, a swimming pool, a camping property and a fitness center) was carried out using two different valuation methods, namely, an income approach (using a discounted cash flow method) and the asset-based approach.

The method of discounted cash flows for the subsidiary was based on the projections given to the appraiser by the client (the management of company A d.d.) and taking into account a 11.4 % discount rate. Using this method, the subsidiary was valued at EUR 3.25 million. Considering the financial debts in the amount of EUR 3.63 million and long-term financial investments in the amount of EUR 0.520 million, the value of a whole (100%) of the equity capital of company B d.d. amounted to EUR 144,000.

The asset-based approach for determining the value of the subsidiary mainly depended on the value of two real estate complexes. Within this approach the appraiser assessed the value of both real estate properties using different valuation methods and different presumptions, that is, the premise of "going concern" value, as well as the premise of regular liquidation value.

The first real estate complex was the size of 53,000 m^2 and consisted of unused land, as well as the land used for various different touristic activities. On this land, the facilities for a campsite (water and electricity connections, toilets and bathrooms, reception, etc.) were present, as well as the facilities for various sporting activities (swimming pool, sports hall, etc.). The value of the property was assessed through the capitalization of earnings method, taking into account the differences in utilization of various parts of the land. For example, for the campsite, the appraiser took into account comparable rents for land used for camping activities in Slovenia, for the sports hall, the appraiser used the rents for comparable sports halls in Slovenia etc. The potential earnings from different parts of the land were then added up and discounted to the present value. The second real estate complex of the size of 110 m^2 was also valued using the capitalization method of earnings. Again, the appraiser considered the rent payments the subsidiary could obtain with renting out the premises of the restaurant, taking into account the market conditions in Slovenia. Interestingly, the auditor's report does not mention the final results the appraiser obtained using these valuation methods.

For both real estate complexes, a second valuation method was used. Namely, both real estate complexes were also valued using an asset-based approach under the premise of liquidation. It follows from the auditor's report that considering the liquidation value of both real estate complexes, under different presumptions and conditions (that are not explained in the report) the appraiser calculated a wide range of possible value for company B d.d. Based on the appraisers calculations, depending on different presumptions included in valuation, the price per share of company A d.d. would amount somewhere between EUR 0.44 and EUR 1.03.

Before considering the analysis of the valuation performed by the appraiser and examined by the court appointed auditor, it should be noted that, although the auditor's report was not excluded from the court file, the same could not be said for the underlying assessment report of the appraiser. Presumably, because the appraiser's valuation contains all the specific numbers, accounting statements, calculations, etc., the reporting judge considered it should be safeguarded under confidentiality rules. The following analysis is thus only based on the information contained in the auditor's report, which is, in nature, only a kind of commentary on the valuation approaches and methods used, without unfolding any specific data or calculations. Nevertheless, the thesis tries to critically analyze some of the problems and questions arising from the report, while at the same time acknowledging that the underling calculations, if accessible, could bring more clarity.

5.3 Analysis of valuation

The compensation of minority shareholders as proposed by the main shareholder seems to be based on the market value of shares of company A d.d. Since, according to the auditor, other methods of valuation used, lead to an even lower value of the company, the auditor concluded that the price EUR 0.88 per share, as the price per share on the capital market on the day of the general meeting, is appropriate.

5.3.1 Market value of shares as the basis of compensation offered

Although the auditor's report considers the market value of shares of the company to present an appropriate compensation to excluded minority shareholders, it should be recalled that market value, as the type of value, is not necessarily the most appropriate to consider when valuing a company in the context of a squeeze out. As was discussed in chapter 4.1.1 there are considerable differences between shareholders trading their shares on the market and the ones being forced out of the company. Additionally, it is important not to underestimate the possible manipulations of the price from the side of the majority shareholder (either by activities lowering the market price or by acting in a way to hold the price at a certain level) which might have been the case in this specific instance.

Namely, it stems from the court file that the appraiser, when considering the market value of shares for company A d.d. failed to take into account two different circumstances that might have affected the price of the shares. Firstly, it was pointed out by the applicant (and was not disputed by the main shareholder) that in the year before the proposal to exclude minority shareholders from the company, the main shareholder obtained shares outside Ljubljana stock exchange. In theory, acquiring shares outside the specific organised market is possible, for example, in the event company's shares are traded also on other stock exchanges or if company's shares are simply traded outside the stock exchange. In such cases, the prices per share for transactions that are carried out bypassing the organized market are included into the calculation of the stock exchange price only by estimation as the exact price data is not available to the stock exchange (Valentinčič & Sitar Šuštar, 2023, str. 21). Similarly, the price per share of the off-market transaction for shares of company A d.d. is not mentioned in the present case. The only information that follows form the court file is that the main shareholder acquired as many as 44,686 shares outside the organised market, representing 1.55% of the company's total shares, before the proposal on the squeeze-out. The subject company did not dispute such acquisition of shares, thus it is questionable, why this transaction was not considered by the appraiser. If the compensation offered to minority shareholders was based on the market value of the company's shares, the fact that this off-market transaction was not taken into account only supports the theoretical stance that the market value is generally not appropriate to use in the context of valuing a company for the purpose of a squeeze-out.

Secondly, in its submissions, the applicant also pointed out that the most important transaction of shares of company A d.d. was carried out on the primary market. It follows from the minutes of the general meeting held in the beginning of 2017, that a decision was adopted to recapitalize the company with the in-kind payment from the main shareholder. For the latter contribution to the company's capital in the amount of EUR 1.8 million, company A d.d. issued 1.66 million shares. In other words, in the year before the proposal on the exclusion of minority shareholders, company A d.d. issued new shares for the price of EUR 1.1 per share. Again, a question arises, why this transaction was not even mentioned in the auditor's report, considering the compensation to minority shareholders was based on the market price of the share.

Although the market price per share of the subject company on the day of the adoption of the proposal on general meeting, should, in theory, also reflect the price of secondary public offering, it is important to consider the fact that Ljubljana stock exchange is rather underdeveloped and illiquid (Tomažin, 2016, p. 28) and does not necessarily allow for the formation of a price that would reflect true value of a company. The letter reasoning is yet another concern that should be considered before using the market value as the basis for determining compensation in the context of a squeeze-out transaction.

If the market value was considered appropriate by the appraiser (which is not necessarily incorrect, as some countries, like Germany, actually consider such value as a measure of fair value (Miliutis, 2013, p. 781)), it might be more suitable to use the highest price paid per share in the year before the proposal for a squeeze out. Following the logic of the TA, according to which the price in the takeover offer (which, if successful, is also offered to minority shareholders) must not be lower than the highest price at which the acquirer obtained securities in the period of the last 12 months before the offer, taking into account the price of the secondary offering (at EUR 1.1 per share) would have been more appropriate.

In its report, the auditor justifies the appropriateness of basing the compensation offered to minority shareholders on the market price, with an explanation that other valuation methods lead to a lower value for the company. Thus, in the following the thesis shortly highlights some issues arising from those other methods of valuation.

5.3.2 Appropriate deployment of asset-based and income approach

Considering the use of other methods of valuation, the first question that arises is the use of the unaudited financial statements and the cash flow projections prepared by the main shareholder. Firstly, as concerns the use of unaudited financial statements, it should be noted that as a public company, the subject company has, according to Article 134 of the

Market in Financial Instruments Act (Official Gazette of Republic of Slovenia, no. 77/18, 17/19 – popr., 66/19 and 123/21, from 20 November 2018)[8] an obligation to publish an audited annual report, also containing audited financial statements. Thus, the question arises of why the assessor based its valuation on the unaudited financial statements of the subject company. The most evident answer seems to be the timing of the valuation. Namely, as the appraiser assessed the company's value at the time of the general meeting (September 2017), the audited financial statements for this specific moment in time were not available. Yet, to mitigate for the possibility of manipulated financial statements, it would seem appropriate for the appraiser to, at least, comment on the comparison between last available audited financial statements and the unaudited financial statements that were the basis for the valuation of the company. Such comparison, however, does not seem to have taken place.

Secondly, for the valuation, the appraiser used financial projections prepared by company A d.d., that is, the main shareholder. As rightfully pointed out by the applicant, exclusively using cash flow projections prepared by one of the parties, casts doubt on the credibility of the outcome. Discounted cash flow method is already a method containing numerous elements based on uncertain predictions that could be justified one way or another. To rely only on predictions based on the party that has significant interests in a low valuation of a subject company, does not seem to follow the underlying ideas of fair value. Again, it would be interesting to see, if the appraiser actually compared the predictions of the cash flow provided by the main shareholder with any past results. Unfortunately, such possible comparison does not follow from the auditor's report.

As concerns the valuation of company B d.d., the appraiser valued the two real estate complexes using the capitalisation of earnings method as well as the liquidation method. Concerning the capitalisation of earnings method, a question arises as to why the appraiser took into consideration potentially achievable rents for the different parts of the estate instead of the subsidiary's real revenue. As mentioned, it follows from the auditor's report that to obtain the earnings of the company, the appraiser separately looked at different parts of the real estate complex and tried to determine how much revenue the company were to achieve, if it rented out each of the real estates. More specifically, for the part of the land containing a campsite the appraiser took into account comparable rents for land used for camping activities in Slovenia, for the sports hall, the appraiser used the rents for comparable sports halls in Slovenia, for a restaurant, the appraiser looked at rents for comparable restaurants in Slovenia. This approach only seems to be reasonable, if company B d.d. was already renting out each part of the real estate separately. Still the question remains, why not use real earnings of the company. One possible answer could be that the subsidiary does not operate in its full capacity and the appraiser wished to value a company under the premise of "best use" value. This assumption, however, does not

[8] In Slovene: Zakon o trgu finančnih instrumentov (ZTFI-1).

seem likely, as the appraiser is employed by the party interested in achieving a low valuation of a company. Unfortunately, as the auditor's report does not contain any concrete numbers or calculations in this regard, it is hard to comment on the methods used by the appraiser any further. It is interesting, however, that the auditor's report does not even include the value of the properties obtained using the method of capitalisation of earnings, but only gives a range of the value for company A d.d. that was calculated considering liquidation of its subsidiary (from EUR 0.44 to EUR 1.03).

Considering company A d.d. held 99% of company's B d.d. share capital, the former was de facto the owner of the two properties. Thus, it seems most appropriate for the subsidiary to be valued using the asset-based approach. Namely, as the de facto sole owner of the property, company A d.d. was not only entitled to profits arising from the operations of the two real estates but could also manage the property in any way it seemed appropriate. Taking into account that the touristic complex encompassed 53.000m^2 of land in Slovenian capital city of Ljubljana, some of which (as indirectly follows from one of the submissions of the company A d.d.) is not relevant for the operations of the subsidiary, one does wonder about the potential value of the property that could be achieved, if it were to be divided and sold on the market. Keeping in mind the rule that liquidation value should be considered in the context of a squeeze-out transaction, if it leads to a higher valuation of the subject company, an additional question arises. Namely, should the appraiser have considered not only the liquidation value of the real estate complex, but the liquidation value of a parcelled out real estate complex. Of course, this approach would not only require numerous assumptions with regards to market conditions, but would also encounter difficulties with regards to legal and administrative barriers (such as land law, spatial acts, etc.).

In valuing the subject company, it seen that the appraiser not only used different methods of valuation to later compare them, but mixed different methods of valuation together within, what seemed to be, one approach. This can be seen in the valuation of company B d.d., where the auditor's report talks about the method of capitalisation of earnings, yet within this method the earnings used are determined by the market approach to valuation. Although such approach might present a pragmatic solution to valuation of companies in different situations, it also seems to suggest that all and any valuation techniques are permissible, without any concrete guidelines and rules.

5.4 Alternative assessment of appropriate compensation

Although the valuation report of the appraiser is not publicly available, making it difficult to analyze his calculations or critically assess the underlying presumptions, basis of value and methods used, as company A d.d. was still a publicly traded company in 2017, the annual reports of the company are publicly available. Based on the latter, in the following, the thesis presents an alternative valuation of the company.

Primarily, it should, however, be noted that the accounting statements from the annual report assessed in this part of the thesis are not the same as the ones used by the appraiser. The public annual report was published in April 2018 and was audited, contrary to the accounting statements used by the appraiser that were prepared before September 2017 and were not audited. Thus, there might be some important differences in the underlying data used for the valuation of company A d.d. in this part of the thesis.

5.4.1 Method of adjusted book value

Because company A d.d. is a holding company, the most appropriate approach to use for the valuation is asset-based approach (Praznik, 2011, p. 107). As 87% of the company's assets represent its investment in another company, the first step in the valuation of company A d.d., is determining the value of its subsidiary, that is, company B d.d.

Table 2: Balance sheet of company A d.d. from the annual report (2017)

Assets	**3,113,629 €**	**Liabilities**	**3,113,629 €**
Long term assets	**2,746,505 €**	**Capital**	**3,085,872 €**
Long-term financial investments	2,746,505 €	***Value per share***	***1.05 €***
Current assets	**367,062 €**	**Short term liabilities**	**60,920 €**
Short-term financial investments	293,000 €	Short-term financial liabilities	10,787 €
Short-term receivables	70,795 €	Short term receivables	16,969 €
Cash	3,267 €		

Source: Own work

Looking at the balance sheet of company A d.d. from 2017 (see Table 2), its long-term financial investments amount to EUR 2,746,505 which we can presume is the value of company B d.d. As the book value of company B d.d. amounts to EUR 4,866,253 (the assets of company B d.d. amount to EUR 8,287,405 from which we subtract the liabilities in amount of EUR 3,730,167), we can assume that the value of company B d.d. at EUR 2,746,505, disclosed on the balance sheet of company A d.d., was obtained using a different method of assessment.[9]

However, when valuing a company for the purpose of determining appropriate cash compensation for minority shareholders, we need to consider the liquidation value of a company, in the event such value would yield higher results (Praznik, 2011, p. 99). In the present case, as the most valuable assets of company B d.d. are two real estate properties, the most appropriate approach to valuation would be the asset-based approach, using the liquidation method. When using this method, it is necessary to supplement and adjust the value of different assets and liabilities depending on the specific conditions and

[9] It is further interesting that the value of company B d.d. using a discounted cash flow analysis, as obtained by the appraiser, was considered to be EUR 144,000.

circumstances of the company (Goldinskij, 2017, p. 125). Again, as we can only proceed with publicly available data, the following adjustments are based on very general assumptions.

Table 3: Balance sheet of company B d.d. (2017)

	Liquidation scenario 2 (EUR)	**Liquidation scenario 1 (EUR)**	**Original balance sheet from 31. 12. 2017 (EUR)**
Assets	**11,209,760.80**	**8,761,638.30**	**8,773.187.00**
Long term assets	**10,803,950.00**	**8,287,405.00**	**8,287.405.00**
Tangible fixed asssets	10,776,507.00	8,256,236.00	8,256.236.00
Long-term financial investments	27,443.00	27,443.00	27,443.00
Current assets	**405,625.80**	**474,233.30**	**483,226.00**
Assets for sale	159,652.50	159,652.50	228,075.00
Stock	4,270.70	4,270.70	6,101.00
Short-term financial investments	0.00	0.00	0.00
Short-term receivables	64,461.60	64,461.60	71,624.00
Cash	177,426.00	177,426.00	177,426.00
Liabilities	**11,209,760.80**	**8,693,215.80**	**8,773,187.00**
Capital	**7,479,593.80**	**5,031,471.30**	**4,591,252.00**
Long-term liabilities	**1,148,233.00**	**1,148,233.00**	**1,148,233.00**
Long-term financial liabilities	1,148,233.00	1,148,233.00	1,148,233.00
Short-term liabilities	**2,581,934.00**	**2,581,934.00**	**2,581,934.00**
Short-term financial liabilities	2,431,471.00	2,431,471.00	2,431,471.00
Short term business obligations	150,463.00	150,463.00	150,463.00
Liquidation costs	85,000.00	85,000.00	85,000.00
Liquidation value	**7,394,539.80**	**4,878,048.80**	**4.958.020,00**

Source: Own work

Looking at the long-term assets of company B d.d., they present two real estate complexes with the total area of land amounting to 53.000 m^2. In nature, the land comprises of an outside swimming pool, a hotel, a fitness center, a campsite, and a restaurant. As such, the value of this real estate can vary to a significant extent based on how it is used, as well as how it is sold under the presumption of liquidation. In the first scenario, we can use the value of the real estate properties as provided by the balance sheet of company B d.d. In this scenario, the value of the real estate is EUR 8,287,405. However, considering the information mentioned in the auditor’s report, that is, that most of the land is not being used, and taking into account company A d.d. (as a sole owner) could achieve a more efficient utilization of such land, the value of the real estate is potentially worth a lot more.

Namely, it stems from the consolidated balance sheet that the value of the part of the real estate without buildings is estimated to be worth EUR 3,578,310, whilst the value of the real estate comprising of buildings (hotel, fitness center, swimming pool, and a restaurant) is estimated to be worth EUR 4,326,507. Although the liquidation value of a hotel complex with an outdoors swimming pool and a fitness center would be extremely difficult to reassess (due to the lack of public information and practically inexistent comparable transactions in Slovenian territory), there are some assumptions that we can use to readjust the potential value of the unused land and the land used for the camp site.

Looking at the data from Slovenian Geodetic administration, the size of the land of the campsite together with the size of the unused land is around 3/5 of the total land size owned by company B d.d., which amounts to around 32,000 m^2. In the optimistic scenario, even if the land is not designated as building land, the change is spatial plan could potentially be achieved in the present case. In 2017, the average price of m^2 for building land in Ljubljana was valued at EUR 215. If company B d.d. sold 30,000 m^2 of land for that price, the value of the real estate could amount to almost EUR 6.5 million. Of course, there are many assumptions and conditions present in such a valuation, however, as company A d.d. is a 99% owner of company B d.d., the main shareholder in the present case, could use the real estate however he pleases. If most of the land is unused and the camp site only operates seasonally, bringing in relatively low profits (to recall, the whole value of company B d.d. using a discounted cash flow method was valuated at only EUR 144.000), it would not be unreasonable to consider the value of assets if they were used optimally. Considering that the potential value of unused land under the presumption of liquidation could amount to EUR 6.5, the total value of assets in an optimal scenario would achieve EUR 11,209,760.80

As concerns short-term receivables, which in nature present receivables from customers as well as the receivables from the input tax, since the business world is unpredictable, the book value of receivables was readjusted for 10%. The same logic follows the value of stock, and assets for sale, as in liquidation, they are usually sold with a discount, thus their value was adjusted for 30%. Furthermore, when assessing adjusted book value under the premise of liquidation, we need to take into account the obligations arising from the liquidation procedure. This includes liabilities arising from severance payments to employees due to the termination of the employment contract and liabilities arising from the costs of the liquidation process. Taking into account the average gross salary in 2017, Article 109 of Slovenian Employment Relationships Act (Official Gazette of Republic of Slovenia, no. 21/13, 78/13 – popr., 47/15 – ZZSDT, 33/16 – PZ-F, 52/16, 15/17 – odl. US, 22/19 – ZPosS, 81/19, 203/20 – ZIUPOPDVE, 119/21 – ZČmIS-A, 202/21 – odl. US, 15/22, 54/22 – ZUPŠ-1, 114/23 and 136/23 – ZIUZDS), from 5 March 2013)[10] and the number of employees of company B d.d., the costs of severance payments would amount

[10] In Slovene: Zakon o delovnih razmerjih (ZDR-1).

to around EUR 5,000. More significant liquidation costs, however, arise from the obligations to the liquidator, which we assume would amount to around EUR 80,000.

Taking the said calculations into consideration, the liquidation value of company B d.d. could amount somewhere form EUR 4,866,253 to EUR 7,394,593.3, depending on the value that could be achieved by selling the real estate properties (see Table 3).

If we consider this value of company B d.d. in the balance sheet of the parent company, the value per share of the latter amounts somewhere between EUR 1.78 per share to EUR 2.67 per share (see Table 4). Even in the event we were to consider the value of company B d.d. as presented in the annual report of the parent company (i.e., EUR 2,746,505), the book value per share of company A d.d. world amount to EUR 1.05, which is still higher than the price originally offered to minority shareholders.

Table 4: Balance sheet of company A d.d. (2017)

	Liquidation scenario 2 (EUR)	**Liquidation scenario 1 (EUR)**	**Considering book value of B d.d. (EUR)**	**Original balance sheet of A d.d. (EUR)**
Assets	**7,761,655.80**	**5,245,110.80**	**5,233,314.00**	**3,113,629.00**
Long term assets	**7,394,593.80**	**4,878,048.80**	**4,866,252.00**	**2,746,505.00**
Long-term financial investments	7,394,593.80	4,878,048.80	4,866,252.00	2,746,505.00
Current assets	**367,062.00**	**367,062.00**	**367,062.00**	**367,062.00**
Short-term financial investments	293,000.00	293,000.00	293,000.00	293,000.00
Short-term receivables	70,795.00	70,795.00	70,795.00	70,795.00
Cash	3,267.00	3,267.00	3,267.00	3,267.00
Liabilities	**7,761,655.80**	**5,245,110.80**	**5,233,314.00**	**3,113,629.00**
Capital	**7,700,735.80**	**5,184,190.80**	**5,144,638.00**	**3,024,953.00**
Value per share	***2.67***	***1.80***	***1.78***	***1.05***
Short term liabilities	60,920.00	60,920.00	60,920.00	60,920.00
Short-term financial liabilities	10,787.00	10,787.00	10,787.00	10,787.00
Short term receivables	16,969.00	16,969.00	16,969.00	16,969.00

Source: Own work

The answer as to why the appraiser had obtained a lower value per share even when considering the asset-based approach under the presumption of liquidation (to recall, it follows from the auditor’s report that the value per share was estimated to be somewhere between EUR 0.44 and EUR 1.03), might be in the amount of liabilities. Namely, it follows from the annual report that in 2017 company B d.d. paid off EUR 500,000 of its long-term liabilities. Moreover, the short-term liabilities of the company A d.d. dropped from EUR 1,198,619 in 2016 to only EUR 60,920 in 2017. Thus, if we were to calculate the value of company A d.d. taking into account financial liabilities in the amount from the annual report published in 2017 (for the year 2016), which might still have been relevant when the appraiser was valuing the company, the price per share would amount somewhere between EUR 0.47 to EUR 2.35 (see Table 5).

Table 5: Balance sheet of company A d.d. considering labilities from 2016

	Scenario 2 (EUR)	Scenario 1 (EUR)	Considering book value of B d.d. (EUR)	Original balance sheet of A d.d. (EUR)
Assets	**7,975,078.30**	**4,813,533.30**	**4,825,082.00**	**3,244,325.00**
Long term assets	**7,608,016.30**	**4,446,471.30**	**4,458,020.00**	**2,746,505.00**
Long-term financial investments	7,608,016.30	4,446,471.30	4,458,020.00	2,746,505.00
Current assets	**367,062.00**	**367,062.00**	**367,062.00**	**497,778.00**
Short-term financial investments	293,000.00	293,000.00	293,000.00	412,400.00
Short-term receivables	70,795.00	70,795.00	70,795.00	60,212.00
Cash	3,267.00	3,267.00	3,267.00	25,166.00
Liabilities	**7,975,078.30**	**4,813,533.30**	**4,825,082.00**	**3,244,325.00**
Capital	**6,776,459.30**	**3,614,914.30**	**3,626,463.00**	**1,357,071.00**
Value per share	***2.35***	***1.25***	***1.26***	***0.47***
Short term liabilities	1,198,619.00	1,198,619.00	1,198,619.00	1,887,254.00
Short-term financial liabilities	1,867,687.00	1,867,687.00	1,867,687.00	1,867,687.00
Short term receivables	19,567.00	19,567.00	19,567.00	19,567.00

Source: Own work

5.4.2 Considering premiums and discounts

From the auditor’s report, it follows that the appraiser’s consideration of appropriate compensation was based on the market value per share on the day of the general meeting, since other calculations of the value of the company yield lower results. However, even if we consider the market value of EUR 0.88 per share to be an appropriate basis for determining compensation, the question of applying premiums and discounts arises.

To recall, considering the principle of equal treatment, and the requirement for unimpaired economic position of minority shareholders, the value of a company should comprise of valuing the company’s equity as a whole, without any discounts. Squeezing out minority shareholders at the market value, which in theory already takes into account discounts for lack of marketability and lack of control, a controlling owner unfairly gains benefits at the expense of minority shareholders due to its controlling position and legal provisions that allow him to impose its will on minority shareholders (Cankar & Kunovar, 2009, p. 129). Thus, if using the market value of a share as a benchmark to determine compensation for the excluded minority shareholders, the market price should be readjusted for the discounts already and premiums.

Firstly, a question arsis of whether it would be appropriate to add back (to the market price per share) a discount for lack of control to be paid by the main shareholder to excluded minority shareholders. In other words, since the market already readjusted the value per share for lack of control and since such discount is not appropriate to use in the context of a squeeze-out transaction, if we base the compensation on the market price per share, the discount for lack of control should be added back to the price. Thus, taking into account the possible amount of a discount for lack of control mentioned in chapter 4.1.4, ranging between 15% and 40%, the adjusted market price per share of ERU 0.88 would amount from EUR 1.012 to EUR 1.232.

Considering that Slovenian capital markets are relatively small and inefficient, it is, however, hard to argue that the market price of EUR 0.88 per share already contained any discount for lack of control. As can be observed from Table 1, since 2014 the number of transactions on the share and the price per share has been drastically increasing, regardless of the increase of the controlling share by the main shareholder and negative business performance of company A d.d. (it follows from the publicly available annual reports that in 2014 net profits of company A d.d. amounted to EUR 92.868, in 2015 EUR 444.094, in 2016 EUR -3.120.710, and in 2017 EUR -94.577). Although it is difficult to determine all the factors that affected the market price per share, it seems dishonest to say that the price of EUR 0.88 includes a discount for lack control and should be readjusted in the context of a squeeze-out.

Secondly, as concerns any premiums for control, in would be inappropriate to use them in the present case. To recall, as mentioned in chapter 4.1.4, such premium is defined as an increase in the value of the company due to opportunities the power of control offers, amounting somewhere between 30% and 50%. However, such premiums are not relevant in the present case since the main shareholder already held a controlling share of the company and thus de facto controlled the company years before the decision on exclusion of minority shareholders. Thus, it could not be justified to add such premium for control to the market value per share, as excluding minority shareholders does not give the main shareholder any additional control.

It might be appropriate, however, to consider at least a small % of the control premium in the context of a squeeze-out transaction. Indeed, with squeezing out minority shareholders, the value of the company does increase to some extent, otherwise main shareholders would never have any incentive to squeeze the minority shareholders out of the company. As mentioned in the introduction, the benefits for excluding minority shareholders come from preventing any interference at the level of general assemblies and from enabling the company to transform from public to private (significantly lowering reporting and other legal obligations and thus associated costs). Taking the said into account, it might be appropriate for the appraiser to have considered a small percentage of the premium for control. In this regard, a study on the regulatory costs of being public, performed in the US (Ewens et al., 2021, p. 36) concluded that the present value of regulatory costs, on average, represents 4.1% of the market capitalisation for a medium size company. Thus, considering the mentioned costs for compliance of public companies, the exclusion of minority shareholders does bring the main shareholder certain additional value. In the present case, considering a premium of 4.1%,[11] the offered price per share would increase from EUR 0.88 to EUR 0.9161.

5.5 The outcome of the case

The case at hand does not conclude with a judgement on the appropriate cash compensation. As in most non-litigation proceedings concerning determination of cash compensation for excluded minority shareholders, the case was resolved through a judicial settlement reached with the help of the settlement board. The price agreed upon within the settlement was EUR 1.1 per share (which is a 25% increase from the originally offered compensation). However, as the details of the settlement are considered to be confidential, it is not possible to know how and why the parties agreed on the said price. Nevertheless, it can be derived from the agreed upon compensation that the settlement board opined the price of EUR 0.88 per share was not appropriate.

6 CONCLUSION

In the context of a squeeze-out, striking a right balance between the interests of minority shareholders and facilitation of an efficient takeover market is a difficult task, both for the legislator as well as the judiciary. Although the legal framework granting the right to exclude minority shareholders on the one hand, and stipulating the rules on challenging the compensation price offered on the other, seems to be appropriate, the challenges arise with regards to practically evaluating the appropriateness of such compensation. In this regard, the legislator needs to provide for a rather flexible regulatory framework that enables a judge to assess what is appropriate compensation in each specific case. Indeed, applying too stringent criteria for determining an appropriate price in squeeze-out transactions may reduce the number of value creating takeover transactions, whilst too lenient or even non-existing legislation (as was the case in Slovenia before the adoption of the new CA) might encourage opportunistic behaviour of controlling shareholders, interfering with economic rights and interests of minority shareholders.

The Slovenian regulatory framework on the squeeze-out of minority shareholders does not set out specific rules on how a subject company should be valued. In European legislation and some Slovenian case law, the term “fair price” can be found, suggesting that the type of value, when determining appropriate compensation for the purpose of excluded minority shareholders, should be fair value. However, although the IVS provides for a definition of a fair value (i.e., an estimated price for the transfer of an asset between two specific identified parties considering the respective advantages or disadvantages that each would gain from the transaction), there is no further legal provisions specifically

[11] Although the research has been done in the US market, it could be a benchmark to consider, since public companies in Slovenia also have to comply with stricter reporting and other obligations, and since there are no similar studies that had been performed on Slovenian companies.

determining which methods of calculation, premises or assumptions ought to be used (with the exception of the provisions of the TA, stipulating the presumption market value can be considered "fair" for determining compensation for excluded minority shareholders in the post-takeover period).

Nonetheless, some guidance on this question can be found in the case law of Slovenian courts. For example, the idea that for the purpose of a squeeze-out transaction, a subject company should be valued as a whole, not considering any discounts for lack of control. Yet, as has been argued in chapter 4.1.5, and shown in chapter 5.4.2, there are still circumstances where some type of premium or discount might be appropriate to apply. Thus, even if some rules on valuing a subject company can be found in case law, there always exists room for exceptions or deviations from such rules. Consequently, it is very difficult to claim that there are any predetermined rules concerning the basis of value or methods of valuation that ought to be considered in the context of valuing a company for determining appropriate compensation for excluded minority shareholders.

As there are no definite rules on the use of economic valuation principles and methods, it is relatively easy to obtain a valuation of a company that suits the interests of the party that ordered such valuation. Indeed, in forming a compensation offer, the squeeze-out price largely depends on the bargaining power and organization of minority shareholders as well as their understanding of finance and law. The importance of understanding the concept of a squeeze-out transaction and, to some extent, how appropriate compensation should be determined, could be observed in the analysed case, where only two minority shareholders voted against the resolution on the exclusion of minority shareholders and actively participated in judicial proceedings, which resulted in a higher amount of compensation having to be paid to minority shareholders.

It can further be observed from the analysis of the practical example that, when determining appropriate compensation for minority shareholders, the issue is not the question of which basis of value to use or which method of calculation to deploy. It is rather the question of which information, that is, presumptions and assumptions ought to be considered in the calculation. Indeed, regardless of whether the appraisal considered the market value of shares to be appropriate, or calculated a "fair price" using different calculation methods, the disagreements on the offered price in the case at hand resulted predominantly from the differing presumptions and information (not)considered within valuation approaches used.

Considering the aforementioned, a determination of an appropriate price in the context of a squeeze-out transaction is only possible with the intervention of an independent third party. Indeed, the price that is considered fair in a squeeze-out transaction depends on the parties involved, as each has its own opinion on what information might be appropriate to consider in valuing a subject company. To this extent, the procedural rules concerning the judicial process of ruling on appropriate compensation for minority shareholders, allowing the involvement of a third party, play a key role in determination of the "true" appropriate price. This could be observed in the analysed case, where the settlement board seemed to have provided a conducive environment enabling the parties to both agree on a price of

EUR 1.1 per share. Indeed, with enabling an environment of equal settings (excluding the need for bargaining power and weakening the dominant position of the main shareholder), in which the parties can express, explain, and discuss their views, especially on different information, assumptions and presumptions used in valuing a company, they can achieve an appropriate price that can be considered fair by all. The judicial process of determining appropriate compensation, specifically the option of the settlement board, thus provides a possibility for the parties to reach an agreement in an environment where an independent third person balances their interests.

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APPENDICES

Appendix 1: Summary of the thesis in Slovene language

Magistrska naloga obravnava vprašanje določanja primerne denarne odpravnine v postopku iztisnitve manjšinskih delničarjev iz družbe, s poudarkom na raziskovanju slovenske pravne ureditve ter ekonomskih izhodišč in pravil računanja vrednosti podjetji.

S pravnega vidika institut iztisnitve manjšinskih delničarjev ureja Zakon o gospodarskih družbah (Ur. l. RS št. 42/2006, v nadaljevanju: »ZGD-1«), ki vsebuje splošni pravni okvir postopka iztisnitve ter pravice manjšinskih in večinskih delničarjev. Magistrska naloga podrobneje analizira pravni okvir zakona, s poudarkom na pravnih institutih, ki omogočajo učinkovito iztisnitev manjšinskih delničarjev, ob hkratni zaščiti njihovih ekonomskih interesov. Med pomembnejšimi je tako pravica manjšinskih delničarjev zahtevati sodno presojo primerne denarne odpravnine. Vendar, ker ZGD-1 ne vsebuje konkretnih pravil računanja vrednosti podjetij, pač pa to vprašanje prepušča ustaljenim pravilom stroke, je presoja primernosti denarne odpravnine lahko zapletena. V ta namen ZGD-1 ureja možnost postavitve poravnalnega odbora.

Določeni vidiki iztisnitve manjšinskih delničarjev pa so urejeni tudi v Zakonu o prevzemih (Ur. l. RS 79/2006, v nadaljevanju »ZPre-1«), ki predstavlja lex specialis v razmerju do ZGD-1 in se nanaša na iztisnitve, ki sledijo prevzemu javnega oziroma večjega podjetja. Po ZPre-1 je določanje denarne odpravnine prepuščeno tržnim mehanizmom povpraševanja in ponudbe, zato se vprašanje sodne presoje primernosti denarne odpravnine načeloma ne pojavlja. Kljub temu, magistrska naloga analizira sistem določitve odpravnine po ZPre-1, saj ta predstavlja pomembno izhodišče za utemeljevanje ustreznosti uporabe tržne vrednosti kot osnovne vrednosti pri odločanju o primernosti denarne odpravnine.

Po predstavitvi pravnega okvira so v magistrski nalogi podrobneje opisana tudi ekonomska izhodišča za računanje vrednosti podjetja, kot so podlaga vrednosti, vrsta vrednosti, predpostavke ocenjevanja vrednosti, vprašanje pribitkov in odbitkov ter metode računanja vrednosti podjetja. Naslovljeno je tudi vprašanje kako se ta ekonomska izhodišča odražajo v kontekstu določanja primerne denarne odpravnine za iztisnjene manjšinske delničarje.

Magistrska naloga nenazadnje vsebuje tudi empirični del, kjer je analiziran konkreten primer postopka presoje primernosti denarne odpravnine za manjšinske delničarje, ki je med leti 2018 in 2019 potekal pred okrožnim sodiščem v Ljubljani. Predstavljena so ekonomska izhodišča ter metode računanja vrednosti, ki jih je pooblaščeni ocenjevalec vrednosti uporabil pri presoji primernosti denarne odpravnine ponujene s strani glavnega delničarja. Na podlagi analize primera so nato opisane nekatere nepravilnosti oz. pomanjkljivosti, ki jih je bilo mogoče zaznati v poročilu pooblaščenega ocenjevalca vrednosti, ter predstavljena alternativna analiza vrednosti podjetja ob upoštevanju ekonomskih izhodišč, ki so v teoriji najbolj primerna za uporabo, kadar se določa odpravnina za iztisnjene manjšinske delničarje.