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THE NATURE OF AUTHORIZED CAPITAL AND SOME RULES OF CAPITAL MAINTENANCE

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Annotation. *Nowadays the issues of sufficiency and maintenance of company capital are becoming more relevant in the company law. Company capital maintenance theory incorporates requirements for the company's initial capital, the amount of equity capital, capital sufficiency, rules for the restoration of reduced equity capital, and rules for the distribution of company funds to the shareholders. At the European Community level, the rules for maintaining the capital of public limited liability companies are regulated by the Second Council Directive of 13 December 1976. In Lithuania, the majority of the Second Directive provisions have been integrated into the Law on Companies. However, not a single Lithuanian law scholar has ever analysed the main rules of the capital maintenance concept or its implementation in Lithuanian law. The article provides a structural analysis of the capital sufficiency concept and examines the implementation of this concept in Lithuania.*

Keywords: *authorized capital of a public limited liability company, considerable capital reduction, capital sufficiency, capital maintenance, protection of the rights of the company's creditors, protection of the rights of the company's members.*

Introduction

Recently, with the increase of problems and consequences due to the worldwide economic recession, the issues of sufficiency and maintenance of company capital are becoming more relevant in company law. The company capital maintenance theory incorporates the requirements for the company's initial capital, the amount of its equity capital, capital sufficiency, the rules for restoration of reduced equity capital, and the rules for distribution of company funds to the shareholders.

At the European Community level, the rules for maintaining capital in public limited liability companies were established for the first time in the Second Council Directive of 13 December 1976[1] (hereinafter – the *Second Directive*). The major purpose of the Second Directive is to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies, to coordinate national provisions relating to the formation, maintenance, increase and reduction of their capital. Two principles define the nature of all the provisions of the Second Directive: first, that the capital of a company should be sufficient and subsequently maintained; and second, that the shareholders hold certain rights concerning issues relating to new capital. Thus, the Second Directive is the benchmark for the Member States, defining general guidelines on the rules for capital maintenance. In Lithuania, the majority of the Second Directive provisions have been integrated into the Law on Companies[2] (hereinafter - the Law on Companies).

Until now, Lithuanian legal doctrine has not paid much attention to the analysis of the rules for maintenance of company capital. Furthermore, no studies have ever been published on whether the Law on Companies properly implements the imperative rules for company capital set forth in the Second Directive. Not a single Lithuanian law scholar has ever analyzed the contents or particular elements of the capital maintenance concept. In foreign states, however, particularly those following the continental law tradition, the capital sufficiency institution is considered to be one of the most important in company law. Thus, the author refers mainly to the works of foreign law scholars such as J. Armour, J. Rickford, J. Charkham, B. Cheffins, M. Kahan, D. Wainman and others. In this paper, the author refrains from thoroughly analyzing the contents and problems of the capital sufficiency theory. However, the author intends at the very least to distinguish the contents of the capital sufficiency concept and to examine the implementation of this concept in Lithuania. The author pays particular attention to the methods for

1 Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC), (hereafter - Second Council Directive) [interactive]. [accessed 05-08-2009]. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:17:01:31977L0091:LT:PDF>.

2 Law of the Republic of Lithuania on Companies. *Official Gazette*. 2000, Nr. 64-1914.

restoring equity capital sufficiency, which allow for the stabilization of a company's financial situation[3].

The subject of this study. Laws and legal doctrine of the European Community and the Republic of Lithuania regulating the institution of capital maintenance.

The primary objective of this study – to distinguish three major elements of the institution of capital sufficiency, i.e. requirements for (1) the initial capital of a public limited liability company, (2) the maintenance and restoration of capital sufficiency, and (3) the distribution of funds in a public limited liability company to its shareholders; to analyze practicable methods for the restoration of equity capital sufficiency and whether the capital maintenance rules laid down in the Second Directive are properly implemented in Lithuania. *The aims of this study:*

- to present the mechanism of the capital sufficiency institution and to answer the question of how to choose a practicable method for restoring capital sufficiency;
- to assess whether the provisions of the Second Directive concerning capital formation, maintenance, and distribution are properly implemented in Lithuania.

Research methods. In the article, the author applies systematic analysis, comparative, logical, document analysis and other general methods.

1. The Nature of the Authorized Capital

1.1. The Authorized Capital Requirement

In the widest sense of the meaning, the capital of a company consists of the whole complex of the company's assets. The company's capital is comprised of the equity capital and the borrowed capital. Article 38(1) of the Law on Companies provides that the company's equity capital consists of the amount of paid-up authorized capital, the share premium account, the revaluation reserve, the legal reserve, the reserve for own shares, other reserves, the non-distributed result – the profit/loss[4]. Thus, the company's authorized capital is a part of its equity capital. Article 38(2) of the Law on Companies sets forth that the amount of the authorized capital is equal to the aggregate amount of the nominal values of all shares subscribed for in the company. The shareholders decide upon the number and the nominal value of shares and indicate the same in the statutes of the company.

In the European Community, the requirement for the authorized capital of a public limited liability company was first established in the Second Directive. As noted, one of the objectives of the mentioned Directive was to harmonize the formation of capital in public limited liability companies in the European Community.

3 Cases of reorganization and liquidation of a company are not analysed in the article.

4 Law of the Republic of Lithuania on Companies.

Article 6 of the Second Directive provides that the laws of the Member States require that, in order that a company may be incorporated or obtain authorization to commence business, a minimum capital shall be subscribed the amount of which shall be not less than 25 ,000 European units of account. The original Member States applied very different requirements for the company's authorized capital – from EUR 20,000 to EUR 160,000 (e. g., in France – FRF 100,000, in Germany – DEM 100,000, in Belgium – BEC 1,250,000, in the U.K. and Ireland there were no such requirements, etc.)[5]. It is obvious that considerable differences resulting from such a requirement could have affected the freedom of incorporation and could also distort competition (e. g., a subsidiary would not be incorporated in a Member State the amount of the authorized capital in which exceeds the same in other Member States).

The Law on Companies applicable in Lithuania until 2001 provided for the amount of authorized capital for a public limited liability company equal to LTL 100,000, whereas currently the minimum amount of authorized capital for a public limited liability company is LTL 150,000 (~ EUR 43,450). Interestingly enough, the amount of authorized capital for public limited liability companies in the neighboring Baltic States is similar to the amount set forth in the Law on Companies (e. g., in Latvia ~ EUR 35,570, in Estonia ~ EUR 25,560). The new Member States, in selecting a lower level of authorized capital for companies than that set by most of the European states, have pursued more economic attractiveness for foreign investors; therefore, the amount of authorized capital in those states is inconsiderably higher than the minimum amount provided in the Second Directive. In the meantime, the old Member States generally apply a higher requirement for authorized capital, i.e. in Italy – EUR 120,000, in Germany – EUR 50,000.

1.2. The Functions of Authorized Capital

The functions of authorized capital commonly listed in legal literature, *i.e.* operation of the company, protection of the interests of creditors, and participation in the company's capital, disclose the nature of authorized capital[6].

Authorized capital is the initial budget of a company ensuring the performance of its commercial activities. The minimum authorized capital of a company may not always secure this function since different types of economic activities require different amounts of initial capital[7]. In the author's opinion, this function is only declarative as in practice, the minimum amount of authorized capital set forth in the Law on Companies may not be sufficient for satisfying commercial needs and securing working capital for a public limited liability company. It is assumed that the established financial threshold prevents abuse by eliminating the possibility to incorporate public limited liability companies that do not carry out any real activity. States have employed such measures to control the rate of public limited liability company incorporation and to reduce the

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5 Edwards, V. *Europos Sąjungos bendrovių teisė* [EC Company Law]. Vilnius: Eugrimas, 2002, p. 72.

6 Rickford, J. *Reforming Capital*. Report of the Interdisciplinary Group on Capital Maintenance, p. 929.

7 *Ibid*.

number of those *de jure* existing companies that perform no real economic activity. This conclusion is also confirmed by the first draft of the Second Directive *Exposé des motifs*, stating that the purpose of the minimum capital is to play a deterrent rather than a protective role for the purpose that small undertakings would not choose the form of a public limited liability company[8].

Another function described in legal literature refers to the protection of the company's creditors' rights. It is stated in the preamble of the Second Directive that one of the objectives of this Directive is to ensure minimum equivalent protection for the creditors of public limited liability companies[9]. Article 2(1)(e) of the First Council Directive of 9 March 1968 (the "*First Directive*") requires the submission of data to a public register at least once a year regarding the amount of subscribed capital, where the instrument of constitution or the statutes mention authorized capital, unless any increase in the capital subscribed necessitates an amendment of the statutes[10]. Article 3(g) of the Second Directive sets forth that the information regarding the amount of subscribed capital paid up at the time the company is incorporated or is authorized to commence business must appear in either the statutes or the instrument of incorporation[11]. Article 7(2) of the Law on Companies implementing the above-mentioned provisions of the Directives states that the instrument of incorporation of a company shall indicate *inter alia* the amount of authorized capital in the company, the nominal value of shares, and the share issue price[12]. The requirement for public registration of authorized capital and its sufficiency serves as a certain guarantee to the company's creditors. However, current business practice shows that the majority of creditors, particularly those of financial agencies, demand the provision of real safeguards for the discharge of obligations by the company, such as mortgage of real estate, pledge of shares, surety or guarantee by the parent company, etc. Furthermore, upon incorporation of a company *de facto* there are no obstacles for fulfilling company obligations by tapping into the authorized capital, thereby squandering the initial budget. Thus, we may draw a conclusion that the mentioned provisions of the Community and Lithuanian legislation ensure the availability of information about authorized capital to the creditors. However, it is doubtful whether the authorized capital actually secures the settlement of creditors' claims and factual discharge of obligations by companies.

In the author's opinion, the true function of authorized capital is to express the members' shares in the capital of such companies. The authorized capital provides a possibility to establish limits on the rights of each shareholder (member) in a public limited liability company. That is why authorized capital is divided into shares. The

8 Edwards, V., p. 73.

9 Second Council Directive.

10 First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC) [interactive]. [accessed 05-08-2009]. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:17:01:31968L0151:LT:PDF>.

11 Second Council Directive.

12 Law of the Republic of Lithuania on Companies.

number of shares held grants the right to a proportionate vote in company matters. Thus, not all states indicate the nominal value of a share. The essential thing is the number of shares and their character, *i.e.* what rights a given amount of such shares grants to their owner[13]. E. g., in the U.S., Canada, Japan, and some other states, the nominal value of a portion of a share may not be indicated. In all cases the same rule is observed, i.e. the extent of a shareholder's participation in the company's activities depends on the proportion of his shareholding to the aggregate authorized capital.

In the European Community, shares have nominal or accountable value. Article 8 of the Second Directive directly states that shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par, imposing an exemption to those who place shares in the exercise of their profession[14]. This reference to shares without nominal value was established with regard to the situation in Luxembourg and Belgium. The original proposal of the Second Directive *Exposé des motifs* defined *the accountable par* as a value obtained by dividing nominal capital by the number of shares outstanding[15]. Thus, we may conclude that in the Member States, company shares must have an established value at the moment of incorporation.

Article 9(1) of the Second Directive provides that shares issued for consideration must be paid up at the time of incorporation or authorization to commence business at not less than 25% of their nominal value or, in the absence of a nominal value, their accountable par. When drafting the Second Directive, twenty-five percent was a dominant average in the Member States. The Lithuanian legislation has chosen a more severe model, i.e. under Article 8(4) of the Law on Companies the initial contribution of each incorporator shall be paid in money's worth only and shall be not less than one quarter of the nominal value of the shares subscribed for by the incorporator plus the whole of any premium[16]. However, in any case, the total amount of initial contributions paid may not be less than the minimum authorized capital of the company, i.e. the amount of initial contributions to a public limited liability company may not be less than LTL 150,000. The requirement of full payment is a certain form of protection from fraudulent payment and one of the simplest ways to ensure actual payment by the one who has undertaken to do so.

2. Authorized Capital Sufficiency and Methods for its Restoration

The provisions of the Second Directive and the Law on Companies examined so far set forth requirements for the initial capital of the company, ensuring that public limited liability companies start their operations with sufficient funds. However, as already mentioned, another objective of the Second Directive rules is to ensure the maintenance

13 Cheffins, B. *Company Law*. Oxford: Clarendon Press, 1998, p. 54.

14 Second Council Directive.

15 Edwards, V., p. 73.

16 Law of the Republic of Lithuania on Companies.

of such funds at a particular level and limit the reduction of the subscribed authorized capital.

Article 17 of the Second Directive provides that in the case of a serious loss of subscribed capital, a general meeting of shareholders must be called within a period laid down by state the laws, to consider whether the company should be dissolved or any other measures taken[17]. National laws have to define considerable loss of capital within the meaning of the Second Directive, however, its limits may not exceed half the authorized capital. This rule is derived from German law, although other Member States have also had analogous provisions in their national laws. The above-mentioned figure (half the subscribed capital) reflects a search for a reasonable compromise between different levels[18]. The Lithuanian legislation did not increase the amount of statutory authorized capital that must be continually available at the disposal of the company and opted to reduce the authorized capital by one half. Article 38(3) of the Law on Companies sets forth that if the company's equity capital falls to less than ½ of the authorized capital referred to in the statutes, the board (or manager of the company if the board has not been formed) shall convene a general meeting of shareholders within 3 months after the day on which it learned or should have learned about the existing situation, to chose one of the following courses of action:

- to reduce the authorized capital;
- to cover company losses through additional contributions made by the shareholders;
- to transform the company into a legal person of a different status;
- to liquidate the company[19].

2.1. Reduction of Authorized Capital

The method most commonly applied in practice for the restoration of authorized capital sufficiency is the first of those mentioned above, *i.e.* the authorized capital is reduced down to the level where the company's equity capital amounts to no less than ½ of the authorized capital referred to in the statutes. E. g., if the subscribed authorized capital of a public limited liability company amounts to LTL 350,000, and the amount of equity capital falls to LTL 160,000, the general meeting of shareholders has to reduce the authorized capital by LTL 30,000 thus restoring the proportion between equity capital and ½ of the subscribed authorized capital. The attractiveness of this method for the restoration of authorized capital is obvious due to the minimal financial costs. It is important to note that the Law on Companies provides an exemption, i.e. in the case that authorized capital is reduced for the sole purpose of canceling losses shown on the company's balance sheet, the company may refrain from providing additional safegu-

17 Second Council Directive.

18 Armour, J. *Share Capital and Creditor Protection – Efficient Rules for a Modern Company Law*. 2000, p. 355.

19 The situation existing in the company must be remedied within 6 months after the day on which the board learned or should have learned about the existing situation.

ards for the discharge of obligations to its creditors[20]. However, the reduced authorized capital may not be less than the minimum capital amount set in the Law on Companies. E. g., if in such a case equity capital falls to LTL 70,000, the company would not be able to reduce authorized capital down to LTL 140,000 because such an amount is less than the minimum authorized capital of a public limited liability company set down in the Law on Companies.

2.2. Coverage of Losses by Additional Contributions Made by the Shareholders

Sufficiency of the authorized capital may be restored by additional contributions made by the shareholders in one of the following ways (or a combination thereof):

- by an additional contribution from the shareholders without increasing the authorized capital or issuing new shares;
- by increasing the authorized capital of the company.

In the first case, the company's shareholders just make additional contributions to the company. A general meeting of shareholders establishes the amount of additional contributions, however, the analogous rule that the equity capital of the company should amount to no less than ½ of the subscribed authorized capital is applied. In the example used above (authorized capital – LTL 350,000, equity capital – LTL 160,000), the contribution amount would be LTL 15,000.

Considering the financial costs required, this method is more attractive than additional contributions made by shareholders, in which case the company's authorized capital would be increased. In contrast to the increase of authorized capital, the major disadvantage of this method for restoring capital sufficiency is that the shareholders receive neither new shares nor actual financial benefit. Furthermore, only those shareholders who voted in favor of this option for covering company losses are obliged to pay contributions, while shareholders who did not attend the general meeting or voted against the measure may refrain from paying such contributions. In the author's opinion, such regulation unjustly violates the interests of a particular group of shareholders. E.g., if there are minority shareholders in a company, they may not be interested in covering the losses by additional contributions, while other interested shareholders who paid such contributions and covered the losses would achieve no financial return. Therefore, it can be concluded that this method for covering losses is acceptable for single member companies or companies whose members share a common position on the company's financial matters.

On the basis of the above reasoning, in obtaining additional contributions from the shareholders, an increase of authorized capital would be preferred. As noted, the major advantage of this option is that the shareholders receive shares for their money contributed to the company. However, the amount of minimum investment required is

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20 Article 53(2) of the Law on Companies provides for a general rule that when reducing the authorized capital, the company must provide additional safeguards for the discharge of its obligations to each creditor who so requested.

considerably greater than it is when applying the first option. The cost may be calculated according to the following formula: $I = 5k - 2*Nk$, where I = minimum investment, $5k$ = amount of authorized capital, and Nk = equity capital; in the case of our example, the amount of minimum investments would be equal to LTL 30,000 (*i.e.* LTL 350,000 – 2*LTL 160,000).

It should be pointed out that the Law on Companies allows payment for shares exceeding their nominal value and recording the remaining portion of the price as a surplus of their nominal value, *i.e.* as a share premium. This means that additional contributions by the shareholders may be divided into the nominal value of shares and the share premium, which allows for avoiding additional costs when restoring capital sufficiency. In such a case, the shareholders would have to pay a lesser investments amount, as only a portion of their contributions would be used for payment for the new shares and the increase in authorized capital. In the above example (authorized capital – LTL 350,000, equity capital – LTL 160,000), it would be possible to issue new shares at a nominal value of LTL 10,000, with an established share issue price of LTL 20,000. In such a case, the amount of minimum investments required would be LTL 20,000 (LTL 10,000 for the authorized capital + LTL 10,000 for the share surplus). On the other hand, this method of restoring capital sufficiency has lower financial returns.

Having analyzed all advantages and disadvantages of the mechanisms for restoring capital sufficiency, it may be concluded that the most suitable *ad hoc* method for the restoration of capital can be chosen based on the company's financial rates, shareholders' interests and scheduled investments. It is also of utmost importance to carry out such actions promptly. Under Article 38(4) of the Law on Companies, if a general meeting of shareholders fails to remedy the situation concerning the reduction of capital sufficiency within 6 months after the day on which the board learned or should have learned about the existing situation, the board of the company (or the manager, if the board has not been formed) must, within 2 months after the date of the general meeting of shareholders, apply to the court for a reduction of authorized capital in the amount equivalent to the fall of equity capital below the authorized capital[21] (in the example provided, the capital should be reduced by LTL 190,000).

3. The Distribution of Company Funds

As noted, capital maintenance theory is concerned not only with requirements for a newly formed company's authorized capital and restoration of its sufficiency, but also with requirements for the proper use and distribution of company funds[22]. Capital maintenance rules related to the distribution of capital to the shareholders and the company's rights to acquire own shares are important in the execution of the company's commercial activities[23]. A discussion of the conditions governing the distribution of funds to the

21 Law of the Republic of Lithuania on Companies.

22 Rickford, J., p. 937.

23 Kahan, M. *Legal Capital Rules and Structure of Corporate Law.* Capital Markets Law and company Law. Oxford: OUP, 2002, p. 328.

shareholders is in order. Direct distribution of company funds may be implemented in following ways:

- by paying dividends to the shareholders;
- by acquiring own shares.

Additionally, repayment of company capital may be indirectly implemented by reducing authorized capital. In the case of this particular study, we will only focus on the direct distribution of funds to the shareholders.

3.1. Payment of Dividends

The Second Directive establishes two cumulative conditions for payment of dividends:

- the latest annual accounts of the company must show that the net assets of the company are not, or following such a distribution would not become, lower than the amount of the subscribed capital plus those reserves which may not be distributed;
- the amount distributed to shareholders may not exceed the amount of net profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, minus any losses brought forward and sums placed into a reserve in accordance with the law or the statutes.

Article 60(3) of the Law on Companies, implementing the said provision of the Second Directive, provides for three specific conditions under which the payment of dividends is not permitted:

- the company is insolvent or would become insolvent after the payment of dividends;
- the result of the financial year available for appropriation is negative (losses were incurred);
- the equity capital of the company is lower or after the payment of dividends would become lower than the authorized capital of the company, the legal reserve, the revaluation reserve and the reserve for acquisition of own shares[24].

Thus, the Law on Companies not only implements the rules laid down in the Second Directive, but also frames an additional condition for payment of dividends, i. e. the absence of insolvency. The Law on Bankruptcy defines insolvency as the state of an enterprise when it fails to discharge its obligations (fails to pay debts, to perform prepaid services, etc.), and the overdue liabilities (debts, unfulfilled services, etc.) are in excess of one half of the asset value on the enterprise's balance sheet[25]. The solvency condition differs from the condition of statutory equity capital because in the case of insolvency, the capital gearing ratio is examined. Conversely, the third condition for payment of dividends stipulated in the Law on Companies refers to the relationship between equity capital, authorized capital and statutory reserves.

24 Law of the Republic of Lithuania on Companies.

25 Law of the Republic of Lithuania on Company Bankruptcy. *Official Gazette*. 2001, No. 31-1010.

Until the implementation of the Fourth Directive[26], national laws regulated methods of calculation for net assets, profit and losses of a company. It is acknowledged in the original proposal of the Second Directive *Exposé des motifs* that this provision will not be fully effective until the implementation of the Fourth Directive; however, it was assumed that it is nevertheless beneficial to establish the said principle within the context of guarantees related to capital maintenance[27].

3.2. Acquisition of own Shares

Article 18 of the Second Directive prohibits either direct or indirect subscription (e. g., through a controlled company) for own shares by the company itself[28]. This general prohibition was indisputable as it already existed in all Member States, though not all of them imposed a specific prohibition on indirect acquisition of own shares by the company. Upon subscription for shares despite this prohibition, persons signing the statutes or the instrument of incorporation (in case of primary issue), or the members of administrative or management bodies are liable to pay for the shares subscribed. The Second Directive also stipulates that the laws of a Member State may provide that any such person may be released from his obligation if he proves that no fault is attributable to him personally.

Some Member States have unconditionally prohibited their companies from acquiring own shares, while others have permitted such acquisitions under certain strict conditions. Considering that such acquisitions may sometimes be practicable (e.g., to buy up shares for the stabilization of their prices) and justifiable, provided that such an acquisition does not affect the shareholders' and creditors' interests, the Second Directive does not impose an absolute prohibition on the company concerning acquisitions of own shares. Article 19(1) of the Second Directive sets forth the following conditions to be observed by the Member States where their national laws permit a company to acquire its own shares (directly or indirectly):

- a general meeting of shareholders must authorize such an acquisition;
- the nominal value or the accountable par of the shares acquired by the company or by a person on the company's behalf, may not exceed 10 % of the subscribed capital;
- the acquisitions may not have the effect of reducing the net assets below the amount of subscribed capital plus those reserves which may not be distributed[29].

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26 Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC) [interactive]. [accessed 05-08-2009]. <http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=78&nu_doc=660>.

27 Edwards, V., p. 73.

28 Second Council Directive.

29 Article 20 of the Second Directive establishes additional exemptions allowing the Member States not to apply the requirements of Article 19.

Virtually analogous rules on how a company may exercise its right to acquire own shares are laid down in Article 54 of the Law on Companies[30]. The Law on Companies additionally establishes that a company may purchase own shares if a reserve for own shares is created in the company and the amount thereof is not less than the sum total of the acquisition values of own shares. It is important to note that the reserve for acquisition of own shares must have been formed prior to the intended acquisition, otherwise the own shares acquired must be transferred into the ownership of other persons within 12 months after the acquisition.

Article 22 of the Second Directive sets forth other minimum conditions which should be imposed by the Member States allowing the acquisition and holding of own shares[31]. The right to vote attached to the company's own shares shall in any event be suspended. If such shares are included among the assets shown on the balance sheet, a reserve of the same amount, unavailable for distribution, shall be included among the liabilities. The company's annual accounts should contain the established minimum information about such acquisitions. Article 54(7) of the Law on Companies provides for a general principle virtually reiterating the rules laid down in the Second Directive – having purchased own shares, a company is not entitled to use the property and non-property rights attached to the shares as laid down in this Law[32].

To prevent fraudulent acquisition of own shares, Article 23 of the Second Directive, with certain established exemptions, prohibits companies from advancing funds, making loans, or providing security, with a view to the acquisition of its shares by a third party. Another preventive measure is laid down in Article 24 where acceptance of the company's own shares as security, either by the company itself or through a person acting on the company's behalf, is treated as an acquisition. Article 54(8-10) of the Law on Companies properly implements the said prohibition.

Conclusions

1. Based on the comparative analysis of the Community and Lithuanian laws establishing the requirements for authorized capital of public limited liability companies, we may conclude that the regulation laid down in the Lithuanian legislation concerning authorized capital is adequate, *i.e.* the laws provide for a fairly clear composition of authorized capital, its formation, limits on the amount of equity capital, and detailed regulation of other related issues.

2. The Law on Companies properly implements the methods for restoring sufficiency of equity capital laid down in the Second Directive. Having analyzed the advantages and disadvantages of the mechanisms for the restoration of capital sufficiency, the author concludes that in specific cases, a company should be able to choose the most sui-

30 Law of the Republic of Lithuania on Companies.

31 Second Council Directive.

32 Law of the Republic of Lithuania on Companies.

table method for the restoration of its capital based on its financial rates, shareholders' interests and scheduled investments.

3. The Law on Companies not only implements the two cumulative conditions laid down in the Second Directive for the payment of dividends to the shareholders, but also formulates an additional condition, *i.e.* the Law prohibits the declaration and payment of dividends if the company is insolvent or would become insolvent after the payment of dividends.

4. In Lithuania, like in the majority of the Member States, the law permits acquisitions of own shares but under especially clear and strict regulation. The laws of almost all Member States permitting acquisitions of own shares provide that the company acquiring such shares is not entitled to use the property and non-property rights attached to the shares. The Law on Companies lays down clear and detailed guidance as to the requirements applicable to the acquisitions of own shares, consequences of such acquisitions in contravention of the requirements of the Law on Companies, etc. Based on the analysis above, the author concludes that the present regulation of the procedure for company acquisition of own shares is in conformity with the experience of the European Union.

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ĮSTATINIO KAPITALO ESMĖ IR KAI KURIOS JO PALAIKYMO TAISYKLĖS

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Santrauka. *Pastaruoju metu visame pasaulyje daugėjant ekonominio sunkmečio sukeltų problemų ir padarinių, bendrovių teisėje aktualesni tampa bendrovių kapitalo pakankamumo ir kapitalo palaikymo klausimai. Bendrovės kapitalo palaikymo teorijos turinys yra reikalavimai bendrovės pradiniam kapitalui ir nuosavam bendrovės kapitalo dydžiui, sumažėjusio nuosavo kapitalo atkūrimo taisyklės bei bendrovės lėšų paskirstymo akcininkams taisyklės.*

Europos Bendrijos mastu pirmą kartą akcinių bendrovių kapitalo palaikymo taisykles nustatė 1976 m. gruodžio 13 d. Antroji Tarybos direktyva, kurios paskirtis – užtikrinti minimalią lygiavertę ribotos turtinės atsakomybės akcinių bendrovių akcininkų ir kreditorių apsaugą, suderinti nacionalines nuostatas dėl jų kapitalo kaupimo ir palaikymo, didinimo arba mažinimo. Taigi, Antroji direktyva yra pagrindinis dokumentas, pateikiantis valstybėms narėms bendras bendrovių kapitalo palaikymo taisyklių gaires. Lietuvoje dauguma Antrosios direktyvos nuostatų buvo perkeltos į Akcinių bendrovių įstatymą.

Lietuvos teisės doktrinoje, priešingai negu užsienio valstybėse, bendrovių kapitalo palaikymo taisyklių analizei kol kas nėra skirta daug dėmesio. Be to, Lietuvoje nebuvo nagrinėjama, ar Akcinių bendrovių įstatymas tinkamai įgyvendina Antrosios direktyvos nustatytas imperatyvias bendrovių kapitalo taisykles. Šiame straipsnyje autorė nesiekia išsamiai išdėstyti kapitalo pakankamumo instituto turinį ir problemas, o bando bent jau trumpai apžvelgti kapitalo pakankamumo institutą ir panagrinėti šio instituto įgyvendinimą Lietuvoje.

Autorė dėmesio skiria ir nuosavo kapitalo pakankamumo atkūrimo būdams, kurie leidžia stabilizuoti bendrovės finansinę padėtį.

Autorė prieina prie išvados, kad Lietuvos teisės aktuose įtvirtintas bendrovės kapitalo pakankamumo palaikymo reglamentavimas yra tinkamas: pakankamai aiškiai numatyta įstatinio kapitalo sudėtis, jo formavimas, nuosavo kapitalo dydžio apribojimai ir detaliai reglamentuoti kiti susiję klausimai.

Straipsnyje taip pat atskleidžiami bendrovės nuosavo kapitalo pakankamumo atkūrimo mechanizmai, jų trūkumai ir pranašumai bendrovės finansinių rodiklių bei akcininkų interesų ir bendrovės planuojamų investicijų kontekste. Straipsnyje daroma išvada, kad Akcinių bendrovių įstatymas iš esmės tinkamai įgyvendina Antrosios direktyvos nustatytus bendrovės nuosavo kapitalo pakankamumo atkūrimo būdus.

Reikšminiai žodžiai*: akcinių bendrovių įstatinis kapitalas, žymus kapitalo sumažinimas, kapitalo pakankamumas, kapitalo palaikymas, bendrovės kreditorių teisių palaikymas, bendrovės kreditorių teisių apsauga, bendrovės dalyvių teisių apsauga.*

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