20th April 2018, Toruń

Mr Mirosław Klepacki

President of the Managing Board of Apator S.A.

Ostaszewo 57 C

87-148 Łysomice

With reference to: History of operations on the shares of Apator S.A.

PETITION

The object of this petition is urgent request by the shareholder to be submitted the explanations by the Issuer in the mode of Art. 428 §6 of the Companies Code relating to the "History of operations on shares" of Apator S.A. starting from 14th January 1993, showing **the changes in the equity, the number of nominal shares, conversions and redemption of shares.**

As the result of the carried out analysis of the said history, which is accessible at the official site of Apator S.A. http://www.apator.com/pl/relacje-inwestorskie/apator-na-gpw/historia-operacji-na-akcjach, on 14th January 1993 the Company published the first information on the entry to the commercial register.

On 27th July 2006 the District Court in Toruń issued the decision on the change of the capital structure of the Company which resulted from the division of each share of the value of 1.10 PLN to 11 shares of the value of 0.10 (split of shares 1:11). As the result of the carried out division of shares, the number of shares of the Company remaining at the disposal of the dependent company Apator Service Sp. z o.o. Ltd. Co. amounted to 6,600,000 shares.

Following further information I would like to draw attention to the entry published by the Company on 12th July 2012, quote:

"On 12th July 2012 the District Court in Toruń Economic Division VII of the National Court Register registered lowering of 2,000,000 bearers instruments. Therefore, the initial capital amounts to 3,310,702.80 PLN and is divided into 33,107,028 shares, of which":

- 7,774,492 registered shares, privileged as to voting in the ratio 1 : 4
- 25,332,536 bearers instruments

The above shares gave the right to perform **56,430,504** votes at the general assembly.

* * *

As results from the published above history of operations on the shares of Apator S.A., the District Court in Toruń Economic Division VII of the National Court Register registered lowering of 2,000,000 of bearers instruments. The redemption of shares should be interpreted as cost category from the operation carried out on shares.

As of now, I can find no official report of the company relating to the redemption of 1,000,000 of own shares on the Internet site of the Issuer www.apator.com .

From the arithmetic operations it results directly that 1,000,000 of own shares are missing and there is no information where currently the missing shares are located, what happened to 1,000,000 own shares?

Facts

- 6,600,000 of shares being at the disposal of dependent company Apator Mining Sp. Z o.o. Ltd. Co. after split 1:11
- 2,000,000 of shares redeemed on 12th July 2012 and lowering of capital
- **4,600,000** - this number of shares should be noted on the account of the dependent company Apator Mining after redemption of 2,000,000 of shares

The Issuer states different number of shares being at the disposal of dependent company, i.e. (3,600,000), to be read: *main shareholders*, which is contrary to the facts - in the attachment link as above:

http://www.apator.com/pl/relacje-inwestorskie/apator-na-gpw/akcjonariat/glowni-akcjonariusze

Therefore, with reference to the above I address the Managing Board of the Company Apator S.A. to urgently answer the questions.

1. Please provide written explanation of the situation relating to the redemption of 1,000,000 of own shares missing in the balance.
2. What is their current localisation?
3. What reasons decided to carry out the transaction to sell the shares for the sake of Apator S.A. which were recognized as own shares? (in the attachment "Description of the capital structure of Apator S.A. since 2003" - **exemplary chronology of transactions**).
4. Publication of 100% of the text of **PETITION** of the shareholder in the ESPI system on the Company's website www.apator.com in the form of current report.
5. What are the intentions of the Managing Board to lead the capital structure of Apator S.A. to the condition of being compliant with the law (leading to transparency, compensation for the shareholders as a result of harming thereof)?

I am waiting for the reply in the final deadline and my further steps are dependant upon that answer.

With best regards

Attachments:

1. History of operations on the shares of Apator S.A. (Link: as above in the text of the petition, page 1)
2. Main shareholders of Apator S.A. (Issuer)
3. Description of the capital structure of Apator S.A. since 2010
4. file

Supplementary literature:

1. Hostile takeover of the joint stock company part 1 - part 5
2. file

The Company is bound by the provisions of the Act on the Protection of Personal Data (Journal of Laws 2016, item 922 as amended)

History of operations on the shares of Apator S.A.

Currently, the initial capital amounts to **3,310,702.80 PLN** and is divided into **33,107,028** shares, of which:

- **7.437.002** of registered shares, privileged as to voting in the ratio **1: 4**
- **25.670.026** bearers instruments

The above shares give the right to perform **55.418.034** votes at the general assembly.

All the bearers instruments are introduced into the stock exchange turnover in the system of continuous quoting.

Codes of shares:	Privileged shares	-	**PLAPATR00026;**
	Bearers instruments	-	**PLAPATR00018**

Changes in the initial capital, number of shares and their nominal value, conversions, redemption of shares.

Apator S.A. Company was registered in the commercial register on 14th January 1993. The initial capital of the Company amounted to **2,200,055 PLN** and was divided into **30,770** registered privileged shares of A series of the nominal value of **71.50** PLN. On 20th April 1996 the General Assembly carried out split of shares at the ratio **1:65**. At the same time, General Assembly, authorized the Managing Board to one-off change of **600,015** privileged registered shares into common bearers instruments.

With reference to the above, the initial capital, after registering of changes, was divided into **1,400,035** of registered shares, privileged (as to voting at the ratio of 1:4) of **A series**, of nominal value of **1.10** PLN each and **600,015** common bearers instruments of **A series** of nominal value of **1.10** PLN each. At the break of January and February 1997 the Company published public offer of the sale of **600,015** bearers instruments of **A series** and subscription for **800,000** of bearers instruments of **B series** (new issue) at the price of **20 PLN** per a share. As the result of the carried out actions the initial capital got increased up to the amount of **3,080,055 PLN** and was divided into **2,800,050** shares of the nominal value of **1.10 PLN** each, i.e.:

- **1,400,035** of registered shares of A series
- **600,015** of bearers instruments of A series
- **800,000** of bearers instruments of B series

On 24th April 1997 **1,400,015** bearers instruments debuted on the parallel market of the Warsaw Stock Exchange S.A. and their price amounted to **37.50** PLN. Since 1st January 1999 the shareholders having the privileged registered shares of A series may change the registered shares into bearers instruments and then introduce them to stock exchange turnover. Conversions of shares in 1999 were carried out every month and they related to the following amounts:

- February - 27,363

- March - 69,796
- April - 19,777
- May - 7,109
- June - 7,992
- July - 18,466
- August - 20,761
- September - 12,232
- October - 7,436

In total, in 1999 **190,932** shares were changed and therefore, with reference to the above at the end of that year there were **1,590,947** shares in the stock exchange turnover.

Since 2000, shares conversions have been carried out once in a quarter and they relate to the following amounts reported by the shareholders:

- January - 84,824
- April - 94,528
- July - 42,358
- October - 5,820

As on 31st December 2000 the initial capital of the Company was divided into:

- **981.573** registered shares, privileged as to voting in the ratio 1: 4
- 1.818.477 common bearers instruments

The above shares gave the right to perform **5.744.769** votes at the general assembly. Shares conversions in 2001:

- January - 8,523 shares
- April - 16,161 shares
- July - 27,264 shares
- October - 5,231 shares

As on 31st December 2001 the initial capital of the Company was divided into:

- 924.394 registered shares, privileged as to voting in the ratio 1: 4
- 1.875.656 common bearers instruments

The above shares gave the right to perform **5.588.925** votes at the general assembly. Shares conversions in 2002:

- January - 31,858 shares
- April - 25,935 shares
- July - 6,597
- October -46,963 shares

On 12th December 2002 the District Court in Toruń Economic Division VII of the National Court Register registered redemption of **300.000** bearers instruments. Therefore, with reference to the above, the initial capital as on 31st December 2002 amounted to **2.750.055 PLN** and was divided into **2.500.050** shares, of which:

- 813.041 of registered shares privileged as to voting in the ratio 1: 4
- 1.687.009 common bearers instruments.

The above shares gave the right to perform **4.939.173** votes at the general assembly. Shares conversions in 2003:

- January - 11,650 shares
- April - 6,974 shares
- July -14,248 shares
- October - 22,923 shares

On 30th September 2003 the District Court in Toruń, Economic Division VII of the National Court Register registered the increase of the initial capital by issue of **869,500** bearers instruments of **C series**. Therefore, with reference to the above, as on 30th September 2003 the initial capital amounted to **3,706,505 PLN** and was divided into **3,369,550** shares of which:

- 794.417 of registered shares privileged as to voting in the ratio 1: 4
- 2.575.133 common bearers instruments

The above shares gave the right to perform **5.752.801** votes at the general assembly. As on 31st December 2003 the initial capital (having taken into account the shares conversion) amounted to **3.706.505 PLN** and was divided into **3.369.550** shares, of which:

- 757.246 of registered shares privileged as to voting in the ratio 1: 4
- 2.612.304 common bearers instruments

Shares conversions in 2004:

- January - 6,478 shares
- April - 8,307 shares
- July - 2,870 shares
- October - 1,093 shares

On 7th September 2004 the District Court in Toruń Economic Division VII of the National Court Register registered lowering of the initial capital by redemption of **161.050** bearers instruments of nominal value of **1.10 PLN** each. As on 31st December 2004 the initial capital amounted to **3.529.350 PLN** and was divided into **3.208.500** shares, of which:

- 738.498 of registered shares privileged as to voting in the ratio 1: 4
- 2.470.022 common bearers instruments

The above shares gave the right to perform 5.423.994 votes at the general assembly. Shares conversions in 2005:

- January - 1,093 shares
- April - 530 shares
- July - 764 shares

Starting from Quarter III of 2005 the conversions are carried out once a year, in January. Additional date of conversion may be determined at the request of the shareholders if they report at least **10,000** shares to be changed. As on 31st December 2005 the initial capital (having taken into account the shares conversion) amounted to **3.529.350 PLN** and was divided into **3.208.500** shares, of which:

- 729.244 of registered shares privileged as to voting in the ratio 1: 4
- 2.479.256 common bearers instruments

The above shares gave the right to perform **5.396.232** votes at the general assembly. In January 2006 **7,131** shares were changed. After this conversion the initial capital amounts to **3.529.350 PLN** and is divided into **3.208.500** shares, of which:

- 722.113 of registered shares privileged as to voting in the ratio 1: 4
- 2.486.387 common bearers instruments

The above shares gave the right to perform 5.374.839 votes at the general assembly. All the bearers instruments are introduced into the stock exchange turnover.

On 12th June 2006 General Assembly of Shareholders decided to carry out split of shares. On 27th July 2006 the District Court registered the division of shares and on 21st August 2006 Central Securities Depository of Poland (KDPW) carried out the division of shares. With reference to the above, since 21st August of this year the shares, after the division, are quoted on the Stock Exchange. Nominal value of one share amounts to **0.10 PLN**.

Shares conversions in 2007:

- January - 29,062 shares
- April - 47,971 shares
- June - 35,871 shares

Shares conversions in 2008:

- January - 23,910 shares

Shares conversions in 2009:

- January - 9,680 shares

On 13th November 2009 the District Court in Toruń Economic Division VII of the National Court Register registered the redemption of **186,472** bearers instruments. With reference to the above, as on 31st December 2009, the initial capital amounted to **3,510,702.80** PLN and was divided into **35,107,028,** of which:

- 7.796.749 of registered shares privileged as to voting in the ratio 1: 4
- 27.310.279 common bearers instruments

The above shares gave the right to perform **58.497.275** votes at the general assembly. In January 2010 **1,111** shares were changed. After this conversion the initial capital amounts to: **3.510.702,80 PLN** and is divided into **35.107.028** shares, of which:

- 7.795.638 of registered shares privileged as to voting in the ratio 1: 4
- 27.311.390 common bearers instruments

The above shares gave the right to perform **58.493.942** votes at the general assembly. In January

2011 **21,146** shares were changed. After this conversion the initial capital amounted to 3.510.702,80 PLN and was divided into **35.107.028** shares, of which:

- 7.774.492 of registered shares privileged as to voting in the ratio 1: 4
- 27.332.536 bearers instruments

The above shares gave the right to perform **58.430.504** votes at the general assembly.

On 12th July 2012 the District Court in Toruń Economic Division VII of the National Court Register registered lowering of 2,000,000 bearers instruments. Therefore, with reference to the above, the initial capital amounts to **3,310,702.80 PLN** and is divided into **33,107,028** shares, of which:

- 7.774.492 of registered shares privileged as to voting in the ratio 1: 4
- 25.332.536 bearers instruments

The above shares gave the right to perform **56,430,504** votes at the general assembly.

In January 2013 **20,362** shares were changed. After this conversion the initial capital amounts to: **3.310.702,80** PLN and is divided into **33.107.028** shares, of which:

- 7.754.130 of registered shares privileged as to voting in the ratio 1: 4
- 25.352.898 common bearers instruments

The above shares gave the right to perform **56.369.418** votes at the general assembly.

In January 2014 **30,000** shares were changed. After this conversion the initial capital amounts to: **3.310.702,80** PLN and is divided into **33.107.028** shares, of which:

- 7.724.130 of registered shares privileged as to voting in the ratio 1: 4
- 25.382.898 common bearers instruments

The above shares give the right to perform **56.279.418** votes at the general assembly. All the bearers instruments are introduced into the stock exchange turnover in the system of continuous quoting.

In January 2015 **163,519** shares were changed. After this conversion the initial capital amounts to: **3.310.702,80 PLN** and is divided into **33.107.028** shares, of which:

- 7.560.611 of registered shares privileged as to voting in the ratio 1: 4
- 25.546.417 common bearers instruments

The above shares give the right to perform **55.788.861** votes at the general assembly. All the bearers instruments are introduced into the stock exchange turnover in the system of continuous quoting.

In January 2016 **30,030** shares were changed. After this conversion the initial capital amounts to: **3.310.702,80 PLN** and is divided into **33.107.028** shares, of which:

The above shares give the right to perform 55.698.771 votes at the general assembly. All the

bearers instruments are introduced into the stock exchange turnover in the system of continuous quoting.

In January 2017 **92,380** shares were changed. After this conversion the initial capital amounts to: **3,310,702.80 PLN** and is divided into **33.107.028** shares, of which:

- 7.438.201 of registered shares privileged as to voting in the ratio 1: 4
- 25.668.827 common bearers instruments

The above shares give the right to perform **55.421.631** votes at the general assembly. All the bearers instruments are introduced into the stock exchange turnover in the system of continuous quoting.

In January 2018 **1,199** shares were changed. After this conversion the initial capital amounts to: **3,310,702.80 PLN** and is divided into **33.107.028** shares, of which:

- 7.437.002 of registered shares privileged as to voting in the ratio 1: 4
- 25.670.026 common bearers instruments

The above shares give the right to perform **55.418.034** votes at the general assembly. All the bearers instruments are introduced into the stock exchange turnover in the system of continuous quoting.

- 7.530.581 of registered shares privileged as to voting in the ratio 1: 4
- 25.576.447 common bearers instruments

Main Shareholders

The Shareholders holding at least 5% of the total number of votes at the general assembly.

Name and surname/Name of the company	registered shares	bearers instruments	total of shares	number of shares	share in capital	share in votes
Mariusz Lewicki	1,187,376	935,624	2,123,000	5,685,128	6.41%	10.26%
Tadeusz Sosgórnik	993,102	907,401	1,900,503	4,879,809	5.74%	8.80%
Danuta Guzowska	954,214	566,065	1,520,279	4,382,921	4.59%	7.91%
Zbigniew Jaworski	760,848	610,152	1,371,000	3,653,544	4.14%	6.59%
Apator Mining sp. z o.o.*	0	3,600,000	3,600,000	3,600,000	10.87%	6.50%
Janusz Marzygliński	818,092	119,485	937,577	3,391,853	2.83%	6.12%
Kazimierz and Zdzisława Piotrowscy (jointly)	674,774	159,181	833,955	2,858,277	2.52%	5.16%
Total	5,388,406	6,897,908	12,286,314	28 451 532	37,11%	51.34%

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http://www.apator.com/pl/relacje-inwestorskie/apator-na-gpw/akcjonariat/glowni-akcjonariusze

Description of the capital structure of Apator S.A. since 2001

Since 2001, the Managing Board of Apator S.A. has included the company - Apator Service Sp. z o.o. Ltd Co. in the list of the shareholders authorized to participate in the General Assembly of the Shareholder (WZA) (starting from 1st September 2004 Apator Service Sp z o.o. changed its name into Apator Mining Sp. z o.o. Ltd Co. (referred to hereinafter: Apator Mining, company dependent on the Issuer) which fulfils the criteria of unit dependent upon Apator S.A., in accordance with Art. 4 subparagraph 15 in conjunction with subparagraph 14 letter a of the 29th July 2005 Act on Public Offer and the conditions to introduce the financial instruments into the organized system of turnover and on public companies (Journal of Laws No. 184, item 1539 as amended), i.e. Apator holds 100% of shares in the dependent company.

Since the day the shares of Apator S.A. have been purchased by the dependent company it receives the right to participate in the General Assembly of the Shareholders and carries out the right to dividend. The shares were purchased by the dependent company before the 15th September 2000 Act - Companies Code entered into force (Journal of Laws No. 94, item 1037, as amended) (Companies Code), so under the governance of the repealed provisions of the Regulation by the President of the Republic of Poland of 27th June 1934, Commercial Code. Dependent company purchased 600,000 shares of the Issuer as listed below:

Exemplary chronology of transactions:

- Purchase of 280,000 own shares on 30th March 2000 - current report RB29/2000 archive
- Purchase of 320,000 own shares on 3rd July 2000 - current report RB 65/2000, archive
- Purchase of 203,642 of own shares before 29th December 2000 - current report RB87/2000 archive
- Purchase of 103,642 of own shares for the sake of Apator S.A. on 6th February 2002
- Current report RB19/2002 of 11th February 2002
- Purchase of 100,000 of own shares for the sake of Apator S.A. on 2nd October 2002 - current report RB86/2002

On 27th July 2006 the District Court in Toruń issued the decision on the change of the capital structure of the Company which resulted from the division of each share of the value of 1.10 PLN to 11 shares of the value of 0.10 (split of shares 1: 11) As the result of the carried out division of shares the number of shares of the Company remaining at the disposal of the dependent company Apator Service Sp. Z o.o. Ltd. Co. amounted to 6,600,000 of own shares of the Issuer. On 12th July 2012 the District Court in Toruń registered the redemption of 2,000,000 shares

The shares purchased before 1st January 2001, irrespective of the fact, whether, at the moment of purchase they could be recognized as “own shares”, should have been subjected to the analysis based on the provisions of the Companies Code to verify if they make up own shares under the governance of the currently binding provisions. Article 612 and Article 628 of the Companies Code, among others, speak for the above interpretation and they constitute that the provisions of the Companies Code are to be applied to legal relations in the scope of the commercial companies existing on the day the Companies Code entered into force (unless the transitional provisions of the Companies Code state otherwise) and in case of doubts whether the hitherto provisions or the provisions of the Companies Code are to be applied the provisions of Companies Code are to be applied. Having analysed the opinions of the jurisprudence with reference to the intertemporal law the principle of “acquired rights” has a restricted application. In accordance with Art. 363 § 4

sentence 2 and § 5 of the Companies Code, the shares should be finally redeemed at latest within two years from entering into force of the provisions of the Companies Code. By the same, since 2003 Apator S.A. has applied towards its own shares the policy that makes up a comfortable manner of strengthening the majority shareholding of the dominant company carrying out the control in the company and having a decisive influence on the composition of the Managing Board.

However, it does not raise any doubts that the situation of the shareholding in Apator is not transparent, which should be a priority in the public company. It is not correct taking into account business point of view, it threatens the certainty of turnover and harms the shareholders.

As it is worth to pay attention to the fact that the redemption of own shares being at the disposal of the dependent company Apator Mining Sp. z o.o. at the number of 600,000, which made up about 20% of all shares should have caused starting from 2003:

- increase in the price of share at Stock Exchange by about 20% due to the increase of all economic ratios relating to one share,
- increase of the dividend paid per each share by about 20%,
- increase of the percentage value of vote of each share at the General Assembly of Shareholders,
- redemption of the material value of own shares, whereas the lack of redemption of these shares shall cause the presence of so called “dirty money” in the property of Apator Mining.

In the strategic plans of Apator the phasing out of the remaining business of Apator Mining is foreseen, and the company is to deal with the managing of “illegal” property arising from the shares owned.

The then - 2003 Managing Board of Apator S.A. bears direct responsibility for the presence of these negative, harming the shareholders phenomena. However, due to the permanent character of non-fulfilment of this duty also the persons having their positions in the Supervisory Board of the Issuer since 2003 up to today also bear the responsibility.

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Hostile takeover of the joint stock company: how to protect? Part 1

With every year the number of taken over joint stock companies increases. Among them, a significant number are hostile takeovers, understood as the process aiming at taking over the control over a company against the will of its managing bodies. Thus, it is worth thinking what actions may be taken up by the company when facing hostile takeover so that it is not successful and which of these actions may be most efficient. The regulations which, when introduced into the Statues of a joint stock company may prevent its hostile takeover or at least limit significantly the chance it is successful were analysed in this article.

Shares privileged as to the vote

Firstly, the application of the shares privileged as to the vote should be noticed. The existence of shares of special rights i.e. privileged shares, which should be determined in the Statutes is admitted in Poland. Making the shares privileged as to the vote allows the hitherto shareholders keep a determined position in the company, therefore it may decrease the chances of the "invader" to take over control of the company.

The introduction of voting privileges is aimed at giving to their owners more votes than it results from the per cent of the company's shares they have. From the perspective of protection against hostile takeover, giving of such privileges is worth considering. However, the limitations arising from the Companies Code must not be forgotten. Firstly, only registered shares may be privileged as to vote. Secondly, introduction of voting privileges is impossible in a public company. Thus, it is possible to make the registered shares of a company, which is not a public company privileged with the reservation that one shares may be given not more than two votes.

Voting poison pills

The issue of shares privileged as to votes is quite popular in the United States. Most of all this concerns the so called voting poison pills, which consists of issue of the shares privileged as to vote but this advantage may never be carried out by the taking over company. It may be carried out in two forms. In the first, the so called poison shares are issued by the company preventively to scare away potential attacker. The right of vote cannot be exercised from these shares or one vote is vested to one share until the taker over shows any activity aiming at hostile takeover. Whereas, when the initiating event takes place, the rights to vote vested to one share are duplicated at general assembly. In the second form, the shares privileged as to vote are issued only as a reply to the call of the attacker.

How to protect your business against hostile takeover?

Super voting provisions in Poland?

Under current regulations, making the shares privileged as to vote cannot exceed two votes per a share and is not admitted in a public company. Thus, it would appear that the discussed protective measure, so popular in American practice, is not widely applied in Poland. However, the situation when the shares of public company would be privileged is possible, and furthermore, the privilege

would be at a higher ratio that it results from the provisions of the Companies Code and would amount to even up to five votes per a shares. Making the shares privileged in this manner undoubtedly interferes with the plans of the unit taking over, making it difficult or even impossible to take over the company. It is worth explaining when it is possible to privilege the shares of public company so significantly. It is possible due to the regulations of the Commercial Code which was in force up to 31st December 2000 and foresaw the existence of plural shares, privileged in the manner that one share may be vested not more than five votes in a public company. However, two conditions must be met for the existence of the shares privileged as to votes and in such significant extend: such rights arise before 1st January 2001 and they were not changed. The existence of plural shares has it that the unit intending to take over the company must take into account the purchase of more shares than in the situation when all the shares are equal. It significantly exceeds the cost of the whole operation of taking over, which may effectively discourage the attacker. Shares privileged as to votes make up effective element of the protection against hostile takeover, however, under condition that "invader" has no access thereto.

Limiting of the number of votes vested into one shareholder at the general assembly pursuant to statutes

Another manner to jeopardise the attempts of hostile takeover is limiting of the number of right of vote, which may be used at a general assembly by one shareholder. The provisions of statutes may be flexibly shaped in this scope.

How to limit the number of rights to vote?

There are several manners to determine maximum number of votes being at the disposal of a shareholder. Firstly, maximum number of votes vested to one shareholder may be determined, irrespective of the number of the shares they have and rights of vote incorporated therein - for instance maximum 100 votes at a general assembly for one shareholder. Second possibility is exercising of the right to vote in a proportion to the rights of vote arising from the owned shares - for instance 1/5 of votes from shares owned by a given shareholder. Thirdly, the relativisation of maximum number of right to vote owned by each shareholder in relation to the total number of vote at general assembly is possible; for instance 1/5 of all votes in a company. Finally, the statutes may contain regulation, pursuant to which the shares gathered in one hand give ordinary number of shares up to a certain limit and over this limit only one vote is vested per determined number of shares.

In the Polish law there is a general principle giving each share one vote at a general assembly. Statutes, however, may limit number of votes of a single shareholder. This limitation may be applied in case of a shareholder who has over 1/10 of total of votes in a company, taking into account the shares privileged as to the vote and votes vested thereto as a pledgee or user or pursuant to another legal title. It may refer only to exercising of the right to vote from the shares exceeding the limit of votes determined in the statutes.

It should be noted that each of the above solutions give privileges to minor shareholders which means that they would fulfil much more significant role in the company than results from their share in the initial capital. In the company a system of forces is created that would make it impossible for the majority shareholder to control the company. Thus, the attacker could not take up any resolutions without reaching the consensus with the remaining shareholders - part of the

shares would not be used and the control would be purely illusory.

Placing such regulations in the statutes would be an effective protection against hostile takeover - the attacker would not take over the control over the company even if they purchase 50% of the shares. However, it must be remembered that this would lead to weakening of positions of all majority shareholders - also other that taking over shareholder.

Particular requirements as to adoption by general assembly of resolutions in determined categories of matters

Another, popular protective measure is the application of so called clauses of super majority. These are reservations included in the statutes of the company introducing the requirement of obtaining an appropriate majority of votes at general assembly in a defined category of matters. This involves the matters of strategic significance for the company, for instance appointing and recalling of administrators or change of the statutes.

On the grounds of the regulations in force it is the principle that the resolutions at the general assembly are adopted by the absolute majority of votes. The provisions determine in details the cases when to adopt a resolution a qualified majority - so higher than absolute majority is needed. However, also the statutes of the company may determine such situations - Polish companies have freedom in that scope. What is more, also the requirement of certain quorum to have general assembly may be introduced to the statutes. Thus, a reservation that to adopt a resolution in certain matters presence of determined number of shareholders is required is possible.

Introduction of such regulation into statutes may be an effective measure of protection but also the risk involved therewith should be taken into account, as it may lead to inability to adopt resolutions at general assembly and in consequence to a kind of decisive paralyse in the company. That is why, care should be taken for such statutory provisions not to raise any interpretation doubts and not to adversely influence current functioning of the company.

What should be chosen?

The phenomena of hostile takeover of joint stock companies is increasing causing the problem of protecting joint stock company more actual and serious. What is more, watching the development of the Polish capital market it may be stated that the problem will be still increasing. That is why the reply to the question what we want to achieve and what can we give up to achieve this purpose is necessary. Are we ready to make individual shareholders more privileged? Or maybe we decide to introduce the clauses of super majority or the requirement of determined quorum to have general assembly? Do we dare to weaken the position of the hitherto majority shareholders? These questions are not easy but answering them before taking up of any protective actions may be crucial to protect the property and not to allow for taking over the control over the company by the "invader".

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Hostile takeover of the joint stock company: how to protect? (Part 2)

Facing the present on the market tendency of increasing phenomena of hostile take over of joint stock companies it is worth to think about protective measures that could be used by the company to protect against such threat. Preventive actions which may be taken by the company to scare away potential "invader" - without waiting for the call to sell the shares deserve some attention. Introducing appropriate provisions into the statutes is one of the manners to prevent hostile takeover. This function may be fulfilled by, among others: regulations aiming at the stabilization of the functions of members of the Managing Board.

Obtaining by the attacker majority of votes at general assembly is only the first step of the process of taking over the control of the company. Next move would be the change of the composition of its executive and supervisory bodies into the ones advantageous for the taking over. Up to that moment the result of the whole process of taking over is not certain and there is no guarantee it would end successfully for the attacker. As the Managing Board may take up actions to urge the taking over unit to withdraw from the company or at least actions leading to reaching the compromise in given matters, for instance by exercising of the policy that is contrary to its assumptions. The instruments protecting the positions of the members of the Managing Board and Supervisory Board of the company being the target would prove to be very important then as they may create obstacles in the change of the managing staff or cause this operation be very cost-consuming.

Limiting of possibility to recall the members of the Managing Board and Supervisory Board

Members of the Managing Board of a joint stock company may be appointed for the determined period of time and the tenure of their office may not be longer than five years. It is not possible to appoint in advance one person for several subsequent tenures of office which limits the possibility of stabilization of position of members of Managing Board significantly. Polish legal regulations foresee the principle of recalling of the members of Managing Board at any time, however, certain derogations may be introduced into the statutes consisting in restricting of the possibility of recalling of administrators due to only significant reasons. Significant reasons may relate to fault but need not to. This may be, for instance, taking up of competitive activities or exposing the company to losses. However, complete exclusion of the possibility to recall the members of the Managing Board is not possible and it is not possible to grant chosen shareholders rights to personal participation in the Managing Board or to give special privileges to the shares in that scope. However, undoubtedly, the statutes of the company may include all restrictions of official character, for instance the requirement of obtaining the qualified majority of votes to adopt

resolution on recalling the member of the Managing Board which may also serve as the element hindering recalling of the managing staff of a company.

Hindering of majorisation of Managing Board and Supervisory Board by the persons representing the majority shareholder

The first type of provisions which, when introduced to the statutes, will make that the appointing of new members of the Managing Board would be very difficult are the provisions formulating a very strict criteria for the candidate to become a member of the Managing Board. Making certain requirements for potential administrators will efficiently narrow their number and, by the same, will hinder the attacker fill the positions in the managing staff with the persons supporting thereof and implementing its policy. These may be the requirements of having defined education, experience, determined history in the same company, etc.

How to protect against hostile takeover?

Another type of statutory provisions hindering appointment of new administrators are the provisions giving the right to recall the Managing Board by the unit independent from the majority shareholder. Recalling of the members of the Managing as to the principles lies within the competence of Supervisory Board. Member of the Managing Board may be recalled also by the general assembly which means that majority shareholder shall always have the right to recall the whole Managing Board of the company or individual members thereof. The above may be prevented by introducing into the Statutes of regulations granting the individual right to appoint and recall the members of the Managing Board to a given shareholder or even to a third party. Depriving of the shareholder of such right may prove to be difficult as to achieve that the change of the company's statutes would be needed, as well as obtaining the consent of the shareholder. Introducing of the above solutions certainly would make it that the purpose, i.e. taking over of control over the company would become more difficult for the "invader".

Increasing of costs of operation to replace the members of the Managing Board

Also the solutions aiming at increasing of the costs of carrying out of operation to replace the members of the Managing Board are worth discussing. These are one of the oldest measures of protecting the company against hostile takeover, commonly applied in American practice even since 1980s. They are to serve as the protection of property interest of the members of Managing Board. They may take the form of the claims to pay high damages or severance pay. Introduction of severance pay at significant amounts for dismissed members of the Managing Board, the so called golden parachutes may efficiently scare off the attacker who would not decide to carry out so expensive operation of the taking over of company as, facing the necessity to pay additional costs it would no longer be attractive and profitable. That is why this action became a popular measure to protect against hostile takeover.

However two issues must be taken into account when deciding to use it. Firstly, the whole transaction of takeover is an expensive operation. The payment of severance pay for the dismissed members of the Managing Board may prove to be insignificant cost when compared to costs of the whole operation. Secondly, in jurisprudence and court decisions there is an opinion that granting to the administrators glaringly high severance pay reserved for them in case of the expiration of the mandate is contrary to the principles of social coexistence which, in consequence, in extreme cases, may lead to invalidity of such provisions in the statutes. It is also highlighted that it may be

recognized as acting to the detriment of the company. Whereas, when the advantages of the applying of such solution are concerned the attention must be paid to the fact that usually after carrying out of takeover the attacker seeks the replacement of the managing staff of target company. Facing the perspective of losing the positions the administrator do not always take up decisions which follow the interests of company or its shareholders. Sometimes the wish to keep the post is stronger and while taking up the decisions the management staff is driven by personal reasons (which, by the way, must be assessed as reprehensible and contrary with the principle of neutrality, which the member of the Managing Board should be directed by in their deeds). Protecting of property interests of members of Managing Board has a significant influence on their impartiality towards the takeover and allows to assess the situation and take up decisions separately from personal motives.

Summary

There is a wide catalogue of measures for the company to choose to protect from hostile takeover. Apart from the measures of preventive character there are also the ones which may be applied already after divulging by the attacker their intention to carry out the operation of takeover of the company. However, applying of the first ones - statutory measures of protection against hostile takeover obviously does not exclude using by the company any of the measures of consequential character. Thus, it is worth to place the discussed above regulations in the statutes of the company to scare away potential attacker already at the stage of the preparation to takeover. If, however, the call to sell the shares was carried out the company would be able to use other measures to prevent the attempt of takeover.

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Hostile takeover of the joint stock company: how to protect? (Part 3)

Tempting, but not deprived of the risk measure of the protection of the joint stock company against hostile takeover is the increase of initial capital of the target company. The company threatened by hostile takeover may decide to increase the nominal value of the hitherto shares or issue new ones.

The consequence of such action is the increase of the financial effort which the "invader" must spend to get the majority share in the initial capital of attacked company, and usually also in the rights of vote a general assembly. Thus the costs of takeover become higher than initially. It is so also when the attacker already has the status of the shareholder and avails itself from the pre-emptive right vested thereto. Whereas, when the pre-emptive right is excluded its share in the initial capital of the target company is significantly diluted. The strength of a vote in the company is decreased and, what follows, the influence of its matters will be limited.

The feature that differs this protection measure from the remaining ones is the fact that it may be presented by the management staff of the company as the deed reforming its finances, without any relation to the protection against takeover. The increase of the initial capital may however aim at the increase of the financial liquidity of the company, to capitalize the company or to get the financial resources for the development.

However, it must be remembered that the use of the increase of the initial capital of the company as the protection measure against hostile takeover may involve a certain risk. If the company decided to issue and introduce into the turnover a large number of new shares during the recession or bear market the effect could be reversed than the intended one. The scenario assuming that the demand for the shares would stay at the same level is quite probable.

In such situation, with sudden increase of demand, the price of shares would probably drop and the takeover of control over the company would be cheaper and easier. In consequence, the position of minor shareholders who did not use the pre-emptive right would be weakened as the capital would get diluted. The situation when minor shareholders would preventively sell shares is also possible and this may bring in effect the increase of the liquidity of shares, undermining of structure of their listing and depreciation of their value.

Careless application of this protection measure may lead to a paradox and enable the "invader" carrying out of hostile takeover by decreasing its financial engagement necessary to purchase controlling. The following conclusions should be drawn up from the above comments. The issue of new shares should be carried out so that it could be purchased in whole by the units friendly for the company. Otherwise, it will enable the taking over achieve the majority of them. It is necessary to precisely prepare new issue and also to check the feelings of shareholders and the degree of their faithfulness towards the company. What is more, the manner of application of the indicated protection measure should be chosen properly so that it favours the hitherto shareholders. Then, it would be most efficient.

Foreign measures of protection - poison pills, White Knight

Increase of the initial capital to protect against hostile takeover is widely applied abroad, especially in the United States. The experience of foreign countries indicate that issue of shares with pre-emptive right at privileged price for the shareholders of target company or even the issue of so called gratis shares may prove to be excellent solution. Protective measure called White Knight is very popular in the United States. It consists in granting a friendly partner the authorisation to purchase the shares at preferential conditions. It is also common to conclude all types of agreements pursuant to which, the shares of new issue are acquired by the units which are friendly for the company, for instance daughter companies appearing in the role of the so called White Squire .

Also the institution of poison pill applied widely in the American market is worth noticing. Poison pill in its extreme form consisted in increasing of the initial capital of the company with the reservation of pre-emptive right of new shares, which may be carried out at extremely advantageous conditions. In case of hostile takeover these shares were purchased by target company at previously determined price or were changed into other shares of particular dividend privileges. In effect, the attacker had to pay extremely high costs of transaction which worsened its profitability or even resulted in economic annihilation thereof. The attacker was forced to “swallow poison pill”.

Currently, the notion poison pill refers to each action which aims at increasing the costs of hostile takeover. The purpose of this protection measure is leading to the situation when the takeover of the company becomes so expensive that even if the “invader” has sufficient financial means its success is not sure. The characteristic of poison pills is the fact they are applied only after arising of the so called initializing event, i.e. for instance, after receiving by a given unit a certain share in the initial capital. There are several different forms of poison pills in the United States. They have no application in the Polish circumstances but the institution of the increase of the initial capital could play the role of poison pill to same extend.

Poison pill is very widely applied in the American market

How to increase the initial capital of a joint stock company

The legislator foresaw ordinary and special modes of increasing the initial capital of a company. The first may be carried out in the mode of private, closed or open subscription. Special modes may be carried out in the way of conditional increase of the initial capital and within the limits of target capital. There is also a modification of ordinary mode, i.e. increasing of the initial capital from the resources of the company.

It is always necessary to change the statutes of the company to carry out ordinary increase of the initial capital. To adopt a resolution changing of the statutes with reference to the increase of the initial capital the qualified majority of three fourth of cast votes is required, unless the company’s statutes foresee more stringent conditions. It results from the above, that the entry of the change to the statutes into the register of entrepreneurs is a constitutive element of ordinary increase of initial capital. The change of the statutes should be reported no later than with a lapse of three months from adopting the resolution by general assembly. Failure to keep the term results in impossibility to register the resolution. The condition to increase is also paying for at least nine ninth of the existing capital.

When the manner of carrying out of ordinary increase is concerned it may be carried out in the way of increasing nominal value of the existing shares or by issuing of new shares - which more common. The first manner means that the whole amount of increase remains in the hands of the hitherto shareholders and their share in the total of initial capital may be changed. What is significant, however, there are no changes in the personal composition of the shareholding.

When the company decides to carry out the issue of new shares, i.e. when total number of shares issued by the company increases a change in the personal composition, as well as in the structure of the hitherto shareholding is possible. The above manner of increasing the initial capital is sometimes called "effective" as the company gets the benefits - its property is increased by cash or non-cash contributions brought thereto to cover the increase.

It is worth to discuss the notion of subscription while describing the process of ordinary increase. Subscription is understood as mode of proceeding at carrying out of new issue of shares with reference to ordinary increase of the initial capital. Three types of subscription may be distinguished: private, open and closed.

Private subscription occurs when acquisition of new shares takes place by earlier submitting offer by the company and its acceptance in writing by individually denominated shareholder. Thus, the company concludes contract with future shareholder. The addressees of the offer may be both hitherto shareholders and third persons - from outside of shareholding. Every time when the company decides to apply private subscription it is necessary to exclude the pre-emptive right of the hitherto shareholders. Acquisition of shares takes place in the scope defined in the offer and not proportionally to the share owned in the current initial capital.

Closed subscription consists in offering the shares only to those shareholders who are vested with the pre-emptive right, i.e. priority right to acquire the shares in the increased initial capital. It therefore allows the hitherto shareholders to keep the same share in the initial capital after increasing thereof. The structure of the shareholding and the influence of individual shareholders on company matters are not changed Company's capital is not diluted. The criterion that differs closed subscription from private one is the group of persons the offer is directed to.

Open subscription takes place when the shares are offered by announcement directed to persons who are not vested with the pre-emptive right. Thus, the offer may relate to both shareholders without pre-emptive right and third parties.

Increase of the initial capital from the resources of the company significantly differs from other means. No additional assets arise in the company, no property assets are transferred thereto. The whole procedure comes down to a certain balance operation - changes of entries in the company's liabilities in such a manner that own resources of the company are transferred from one item of the balance, where they were recorded as reserve capitals to the item "initial capital", thus they remain within the property of the company. It is necessary to adopt resolution by general assembly of shareholders and change the statutes. General assembly may devote the resources from retained profits capital or other reserve capitals created from the profit to increase initial capital if there are no limitations (for instance statutory) relating to disposing thereof with that purpose. Furthermore, the amount of these resources may correspond only to this part of retained earning and reserve capitals which could be devoted to the payment of dividend. The shareholders acquire the right - related to the retained earnings and reserve capital - in the increased capital in the proportion in which they participate in the initial capital. The shares do not require acquisition or covering by the purchasing shareholders as the discussed manner of increase has no effective character - the property of the company is not increased.

From the point of view of the protection against hostile takeover the fact the effect of carrying out of such operation is the increase of credit reliability of the company and its capital size is significant. The increase of the initial capital from the resources of the company may turn out to be effective measure of protection as there is a guarantee that the increase shall be carried out irrespectively from the richness of the hitherto shareholders and irrespectively from the amount of the increase. The best solution, aiming at preventing hostile takeover is the increase of nominal value of shares in this mode - then the operation would not have a direct influence on increasing of the liquidity of the shares of target company. Due to the fact that there will be no new issue the possibility to turnover with the pre-emptive rights or the risk they are acquired by the attacker will not take place.

As far as each mode of increase of initial capital is concerned, one of them is the increase within authorised capital. The statutes may grant to the Managing Board for the period not exceeding three years authorisation to increase initial capital within authorised capital. Authorised capital protects company against unsuccessful issue of shares and also allows to obtain the resources for the company from investors in an optimal situation, i.e. when the shares of new issue may reach the highest issue price. The institution of authorised capital allows the company to react quickly and increase the initial capital without the necessity to convene general assembly of shareholders. The initiative and the competence to increase initial capital in this mode belong thus to the Managing Board of the company. It is however subjected to some limitations: it cannot issue privileged shares or give personal rights to the shareholders acquiring issued shares and the increase must not be carried out from own resources of the company. The shares may be issued both in the way of open, closed and private subscription.

The described mode of increasing of initial capital may serve as efficient manner of protection of target company as the operation of increase is relatively easy to be carried out and it depends on the Managing Board only. However, due to limitations mentioned - inability to increase the initial capital from own resources of the company in this mode, carrying out of the whole procedure as a surprise for the attacker, advancing their steps is not really possible - the contributions for the shares need to be collected. However, there is a big chance that the shareholders of the threatened company would willing acquire the shares of new issue due to possible increase of their price. What is more, it is possible for the Managing Board to determine the issue price at relatively low level. This could enable all hitherto shareholders to acquire the shares. It is also worth considering, in case the attacker obtained significant share in the company, excluding or limiting the pre-emptive right and placing the shares of new issue in the hands of friendly unit who would fulfil the role of White Squire.

Second particular type of initial capital increase is conditional increase. It consists in the registering of the increase of the initial capital as abstract value, before acquiring of the shares of new issue. Such increase is a conditional action and it is completed after suspending condition is fulfilled - the shares are acquired by authorised persons. However, the increase of capital in this mode may be applied only in cases strictly determined by the law. The conditional increase of capital must be accompanied by exclusion of pre-emptive right for the hitherto shareholders as the shares must be transferred to persons authorized thereto pursuant to other titles. Due to strict limitations, in the Polish conditions conditional increase of initial capital is not recognized as efficient protection against hostile takeover.

Issue of new shares and pre-emptive right

In case the initial capital is increased by issue of new shares the hitherto shareholders have the pre-

emptive right, i.e. the right to acquire the shares of new issue in ratio to the number of shares already owned. The institution of pre-emptive right may also be used to protect the company against hostile takeover. Although it is rather difficult, it is worth to remember about certain possibilities.

It happens that the exclusion or limiting of pre-emptive right has a purpose. It takes place most of all in the situation of fusion, conversion of claims to the shares of the company or the intention to create the possibility to capitalize by strategic investor. It is worth to pay attention to such procedure in the perspective of the threat of hostile takeover of the company. The exclusion of the pre-emptive right with simultaneous reservation of acquisition of the shares by a different unit may be applied as the measure of protection against hostile takeover and scare away the attacker.

To adopt the resolution on depriving the shareholders of the pre-emptive right, the majority of at least four fifths at general assembly is needed and the exclusion or limiting of the pre-emptive right must be clearly stated in the agenda of the general assembly. The Managing Board must also present written opinion justifying exclusion of pre-emptive right, suggested issue price of shares or the manner of establishing thereof and justification of excluding the pre-emptive right to the general assembly. In reality, adoption of such resolution may prove to be very difficult or even impossible. Prices of the shares of target company threatened with hostile takeover will increase most probably, thus shareholder count for profit. It is little probable that they would vote for depriving them of the pre-emptive right. Also the criterion of the company interest may be difficult; it is easy to rebut the thesis that the protection against hostile takeover lies in the interest thereof. The possibility to appeal from such resolution should also be taken into account. In spite of the described difficulties which target company may be facing, exclusion or limiting the pre-emptive right may serve as the measure of protection against hostile takeover.

Underwriting as the Polish version of poison pill

In the process of protecting the company against hostile takeover it is possible to use underwriting. It may be described as underwriting, i.e. issue performed with the intermediary of another unit, which must fulfil the requirements facing the issuer. Underwriting is based on the assumption that in the resolution on the increase of the initial capital there is a reservation that the shares of new issue shall be acquired in whole by financial institution (underwriter), with the obligation to offer them then to the shareholders to allow them perform their pre-emptive right on conditions determined in this resolution. Therefore, acquisition of shares takes place through the intermediary of underwriter and if the acquisition of all shares by those authorised was not successful they would stay at his disposal. The thing is to make the possibility to use the pre-emptive right dependent on fulfilling the conditions determined in the resolution.

Such condition could be for instance, a determined initializing event. Therefore, with reference to the above two solutions can be applied. Firstly, a regulation is possible, in accordance to which the shareholders could perform their pre-emptive right unless a determined initializing event takes place earlier. The moment the initializing event takes place the possibility to perform the pre-emptive right would be suspended until restoration to previous condition, for instance reduction of the amount of share of one of the shareholders - attacker in the initial capital and the rights of vote at general assembly of target company. Such solution is attractive for the companies in which the share of potential attacker is already high and is still increasing. The company would use the protection of the underwriter - friendly unit who would act in the role of White Squire. The second solution is the one, in accordance with which the pre-emptive right could be performed only after arising of initializing event and up to that moment the possibility to perform pre-emptive right

would be suspended. It is more advantageous for the companies in which the share of the attacker is not big. The shareholders could perform the pre-emptive right vested thereto and this would mean the application of the Polish version of poison pill.

It is also possible to introduce the reservation making dependent the acquisition of shares by way of closed subscription upon a condition. Firstly, the assumption that the shareholders would be able to acquire shares of new issue only after precisely defined initializing event appears is possible. Also this manner would lead to creating of poison pill. Secondly, it may assume that the acquisition of shares of new issue is admissible only for those shareholders whose share in the initial capital and total number of votes at the general assembly did not exceed a defined threshold. Thus, the attacker could not acquire the share of new issue, unless they decided to reduce their share. However, such solution may be easily qualified as breaching the principle of equality of shareholders. If both conditions were introduced the protection measure would be more efficient.

Summary

Increase of the initial capital is not quick or easy procedure. The fact that the intention to increase the initial capital requires the change the company's statutes, so it is made public and this gives the attacker time to prepare appropriate steps is also significant. The fault of all measures of protection relating to the increase of the initial capital of a company is the fact that they create permanent changes in the capital structure of the company. It is especially felt by the companies that are not sure whether they become the object of interest of the attacker and if they are really threatened by hostile takeover. Increase of the initial capital creates wide possibility to take up protection by threatened company. Irrespective of the fact which from the described measures the company would choose all of them have significant faults - the application thereof is time-consuming and it requires taking up of many actions and the results are not certain.

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Hostile takeover of the joint stock company: how to protect? (Part 4)

Thinking about protective measures which are possible to be applied when facing hostile takeover by the company it is worth to consider the decreasing of the number of shares of target company accessible in the turnover. For hostile takeover to be effective it is necessary that appropriate number of shares of the company to be the object of the attack is accessible in the market. Appropriate, meaning the amount that would be enough to obtain majority of votes at general assembly.

The chances of hostile takeover are the higher the higher is liquidity of the shares of target company. That is why, the companies threatened by takeover often take up actions aiming at limiting the accessibility of their shares or seek the situation when the shares are owned by the units which would not for sure agree to conditions defined in the call. This may be achieved following three manners: by purchasing of the shares of target company, by redemption of the shares of target company and by creating of stable base of shareholding.

Purchasing of the shares of target company may be carried out by interested target company itself, by company or other unit bound by the relation of organizational or capital dependence with target company, as well as by the companies "befriended" with target company.

Purchasing of own shares by the company

Purchasing of own shares by the company decreases their general accessibility. It leads to the increase of prices of shares remaining in the turnover and in consequence the takeover becomes more expensive and less profitable for the "invader". On the grounds of the Polish legal regulations, as to the principle, joint stock company cannot purchase own shares, i.e. the shares issued by itself and owned by third parties. However, the provisions foresee the exemptions from the above principle. Art. 362 § 1 of the Companies Code enumerates the cases in which the purchase of own shares by the company is possible. The following situations are interesting from the point of view of protecting the company against hostile takeover. Firstly, purchase of shares to prevent significant loss directly threatening the company, as long as the nominal value of such shares does not exceed 20% of the initial capital of the company. Secondly, purchase of shares with the aim to redeem them and also purchase pursuant to and within the authorisation granted by the general assembly, whereas such authorisation should determine the conditions of purchase, maximum number of shares to be purchased, period of authorisation (which must not exceed five years) and maximum and minimal amount of payment for purchased shares, if they are purchased against payment.

The aim of introducing of the above restrictions is to prevent the situation when the company would become its own shareholder which could lead to subjecting the interests of the company to the interests of the members of Managing Board. The action performed with the breach of the ban to purchase own shares by the company is valid if the shares were given to the company or dependent company. However, the sanction for the breach of such ban is that the company or dependent company cannot perform share rights, most of all the right to vote from such shares.

What is more, such shares should be sold within a year from their purchase. If, however, they were not sold, the Managing Board is obliged to carry out the so called sanctioning redemption of shares, which is done without convening of general assembly and requires only the resolution of the Managing Board in the form of a notarial deed. Furthermore, the Managing Board is subject to penal liability for allowing for the purchase of own shares by the company against the provisions of the law.

How to protect your business against hostile takeover?

As was already mentioned, the purchase of own shares by the company is admitted to prevent the damage directly threatening the company. Due to general clause "loss directly threatening the company" a questions arises how to make the notion of loss more precise, situations in which the loss is significant or the direct nature of the threat. It is assumed that the notion of loss should be interpreted widely. So, it is not only about the material property loss or lost profit, but also all threats of organizational, non-property character, so also all factual legal conditions creating the threat for functioning of the company. Therefore, carrying out of the operation of hostile takeover is also included in the scope of this definition. As far as the directness of the threat is concerned it appears when there is a cause and effect relation between the threat and the loss. Whereas, the assessment whether the loss is serious is not objective. So, its potential dimension should be balanced with the value of protected value to define the proportions between the loss and property condition.

Redemption of shares

Redemption of shares may also be used to protect the company against hostile takeover. As was already mentioned, one of the exemptions to the principle of ban to purchase of own shares by the company is the purchase thereof with the aim to redeem them. Redemption of shares is the activity the effect of which is legal liquidation, i.e. cancellation of some or all shares in the initial capital - against remuneration or without it.

There are <u>three ways to redeem shares</u>, i.e. voluntary redemption, compulsory and automatic redemption, which takes the effect as a consequence of defined events.

Voluntary redemption takes place with the consent of a shareholder. The consent must be expressed at every activity of redemption by purchasing by the company, however, only one redemption may take place in a financial year. While discussing voluntary redemption it is worth to notice that in case of public companies there is an obligation to immediately pay the price for the shares purchased with the aim to redeem them. If the shares are purchased in the mode of announcement of call to subscribe for the sale or exchange of shares, the transaction of purchase of shares included in the subscription made within such call should take place not later than within three working days after the lapse of the term to receive the subscription. Thus, public company has the obligation to pay for the shares nearly simultaneously with the purchase thereof which is very important from the point of view of protection of the company against hostile takeover - it enables quick removal of the shares of threatened company from the market. The main function of voluntary redemption of shares in the context of protection of target company is decreasing of number of shares accessible in the market, and, what follows, the probability of their purchase by the attacker.

Compulsory redemption takes place against the will of the shareholder holding the redeemed shares. In this case earlier purchase of shares by the company does not take place. The premises

and the mode of compulsory redemption must be precisely determined in the statutes of the company. Defining the principles of compulsory redemption the shareholders express their in blanco consent to carry out such operation, which may lead to removing them from the company against their will. That is why compulsory redemption must always be the object of resolution of general assembly. It is the adoption of resolution that leads the shares lose their legal existence. Compulsory redemption always requires payment of the remuneration, equivalent, for corresponding shareholder. The provisions introduce minimal redemption amount - redemption must not be lower that values of net assets falling to one share and presented in the financial statements for the last financial year, decreased by the amount designated for the division between the shareholders.

Compulsory redemption must be distinguished from penalty redemption. The second one appears when the statutes contains the institution foreseeing excluding shareholder from the company by way of redemption of their shares in certain, defined cases, such as, for instance, taking up business which is competitive for the company or acting to the detriment of the company. Redemption of shares is then kind of penalty for the failure to keep certain standards in the company.

Automatic redemption takes place in case a defined event occurs. This event must be indicated in the statutes, it may be, for instance lapse of term. In this case, the resolution is not adopted by general assembly. It allows for a firm reaction of the company for unwanted behaviour. It is worth noticing that thanks to it the majority shareholders do not have the influence on the redemption taking place, there is no possibility to appeal from this measure.

The redemption of shares is carried out due to different reasons. In the context of protecting the company against hostile takeover the following matters are important. Firstly, redemption of shares may be used as a method of preventing unwanted changes of personal composition of the shareholding of the company. Two situations are possible here. First, when the statutes foresees compulsory redemption of shares which could be taken over by third parties in the way of enforcement or inheritance after death of a shareholder - this refers to registered shares only. Second, when the shareholder wants to leave the company but they want to avoid looking for buyer of the shares, redemption is a possibility for them and takes place at their request. Secondly, (compulsory) redemption may also be used as a method of excluding the shareholder from the company. Such possibility is granted by introducing into the statutes of the clause defining the cases in which the shares owned by the shareholder to whom such circumstances relate are redeemed. Redemption of own shares may also serve the companies whose shares are undervalued. Such procedure decreases their accessibility in the market which makes the stock exchange price increase. Redemption of shares may also be used as a manner making it possible to equalize the balance loss because in this way the company lowers its liabilities.

As long as compulsory and automatic redemption of shares are concerned to protect against hostile takeover some limitations must be taken into account. Difficulties relate to the requirement that the statutes foresaw the possibilities of redemption already at the moment the shares are acquired by primary shareholders. The hopes relating to the protection of company against the attacker may be rather placed in the institution of voluntary redemption - with the application thereof there is no dispute between the company and the shareholder. It is worth remembering about limitations relating to the purchase of own shares by the company - their nominal value must not exceed 20% of the value of initial capital, taking into account the nominal value of remaining own shares, which were not sold by the company. Exceeding of this limit may result in possible responsibility of members of the Managing Board and creation of the obligation to sell corresponding number of shares. What is more, redemption of shares purchased with that purpose may take place only once

in a financial year.

Purchase of the shares of company by allied unit

In the situation of a threat of hostile takeover the company, to a certain extend, could also use the so called **protection by self-management**, which is a very popular abroad strategy.

It consists in developing of the holding structure of the company by purchase of its shares by dependent companies. In consequence, the majority shareholders of the target company become the companies over which direct or indirect control is carried out by the company. In such situation target company could control itself (self-management). Polish regulations however, makes even the situation of the purchase of own shares by the company with their purchase by dominant company or dependent company - these units may purchase the shares on the same principles as the company. Also the purchase of own shares of the company by a third party acting for the account of the company was subjected to identical restrictions. When calculating of the share of own shares in the initial capital of the company the value of shares being in the possession of the units mentioned is taken into account. Due to the above regulations, the use of this measure of protection in the Polish conditions is limited and may only be used in such scope as purchase of own shares by the company. The justification of possible use of presented strategy would be only concealing for some time the intentions to protect the company, which could sleep the vigilance of the "invader".

The shares of target company are purchased by allied units. Such actions may be undertaken due to distinct order of the target company or from own initiative. The shares may be purchased preventively, to create stable base of shareholding and prevent hostile takeover in future and also after appearing of the threat of takeover. The effect of such actions should be gathering of share of the threatened company in the hands of friendly units which would make the takeover impossible. Such strategy was created in France, where it was widely applied in 1980s. As far as the character of relations between target company and friendly units is concerned they make take two forms.

These may be relations of strictly economic character, in such situation the functioning of remaining units, being the stakeholders depends on the policy run by one of the companies. Group of companies is then economically subordinated to leading company that is why they are interested in the failure of hostile takeover.

Secondly, the relations being the result of previously concluded contracts are possible. This relates to multi-party agreements concluded between interested companies, potentially threatened by hostile takeover, pursuant to which the companies purchase significant packages of each other shares (cross-shareholding agreements). Usually, minimal number of shares which may be acquired by a party to such agreement is determined and a reservation is introduced that the sale of shares would be possible only against mutual consent. National legislations of individual countries significantly limit the possibility to conclude the described agreements. As far as Polish regulations are concerned in this scope, there is a general principle forbidding the purchase of the own shares by the company, which is not an obstacle for the purchase thereof by units which are dominated by the company and do it for their own account. So, it is possible to purchase the shares of target company by friendly third parties. The allies may buy out the shares of threatened company at its request or on their own initiative. Friendly units may be dependent companies but also natural persons remaining in close relation with the company. If "close relations" do not fulfil the requirement of dependence relation mentioned in Art. 4 § 1 point 4 of Companies Code such unit may purchase the shares of threatened company. However, if the target company is a dominant company the restrictions used in case of the purchase of own shares shall be applied.

In the practice of foreign countries there are significant differences relating to purchasing of the own shares by the company. In the European countries legal regulations limit or even make such actions impossible, contrary to American regulation where there is more freedom in this scope. In consequence, in American practise there appeared many means of protection against hostile takeover and relating to purchasing of the own shares by the company. The restriction mentioned and existing in the Polish legal order have it that these means are not applied in the shape created and presented on American market. In Polish conditions the purchase of own shares to prevent significant loss threatening the company directly should get most attention. The efficiency of such action is however limited due to the number of shares the company may purchase following this manner. As far as preventive purchase with the aim to redeem is concerned carrying out of compulsory and automatic redemption may prove to be efficient, although it brings some procedural difficulties. Irrespective of the fact which protective measure would be chosen by the company it is worth to "strengthen" thereof by placing corresponding regulations of protecting character in the statutes.

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Share, as the right of property character may be subject to disposal. Transferability of shares is one of the most important features of joint stock company as a capital company and basic way the shareholder may leave the company. However, it is admissible to introduce some restrictions of transferability of shares which may turned out to be specially helpful in the context of protecting the company against hostile takeover.

The purpose to introduce them, just like in case of actions aiming at decreasing the number of shares accessible in the turnover is to limit the liquidity of shares. Thanks to the application of suitable procedures, even in the situation when the shareholding is significantly dispersed and willing to accept the conditions of call selling of shares may turn out to be ineffective for the company or at least unprofitable for the selling shareholder.

Three types of limitation of disposing the shares must be distinguished. Firstly, statutes limitation should be noticed. The limitations resulting from off-statutes contracts of the shareholders should be distinguished therefrom. The third category are statutory limitation, whose purpose is to protect the safety of the turnover, the example thereof may be even the ban to dispose with the share before the company was registered into the register. From the point of view of protecting the company against hostile takeover most of attention should be put on two first types of limitations.

Limitations of transferability arising from statutes

It should be underlined at the introduction that disposal is a wider notion than sale. Disposing of the share is made of its sale - understood as the transfer of ownership and other disposals, for instance pledge, making of rights of use thereon, lease. The sale of share consists in transferring of the rights from the share by the shareholder for the sake of a third party who becomes the object of the rights incorporated in the share.

The possibility of introducing the limitations of disposal of shares into the statutes of the company makes up exception from the principle of transferability. Such limitations may refer exclusively to registered shares. What is crucial, they may be in force without time limits as they do not make disposing of the shares impossible. It is necessary to keep caution while introducing the discussed regulations into the statutes. Too strict conditions of disposing the shares may be recognized as contrary to the nature of a joint stock company and good practice. Limitations of transferability arising from statutes must be clear, otherwise it will be ineffective for the company. So, it will not be possible to set up such limitations ad hoc at a general assembly. Even if the resolution by a general assembly introduced an appropriate change of statutes such change would be effective only after it is registered. Bearing in mind the content of absolutely binding Art. 337 § 1 of the Companies Code which states that the shares are transferable and timely or absolute exclusion of their transferability is impossible. The consequence of including contrary solutions in the statutes is their invalidity. What is important, the possibility to introduce the discussed limitation of transferability relates only to registered shares. It is not possible to limit the transferability of bearers instruments based on statutes, which significantly decreases the scope of application of the discussed protection measure - public companies participating in the stock exchange turnover could

not use it, as only bearer instruments whose transferability is not subject to any limitations are introduced into the stock exchange turnover. Limitations of transferability of shares may have different character: disposing of shares may be dependent upon the consent of the company or limited in another way.

How to protect the company against hostile takeover?

The necessity to obtain the consent of the company

The limitation of transferability arising from the code consists in introducing into the statutes of provision imposing the duty to grant the consent by the company to sell the shares. It must be underlined that the discussed limitation refers exclusively to the sale of shares, what follows, it does not include in its scope burdening of shares with limited rights in rem (pledge, use). As to the principle that the consent is granted by the Managing Board. However, the statutes may introduce other provisions and transfer this competence on other body of the company, for instance Supervisory Board or general assembly or even single shareholder, granting them personal rights in this scope. The consent should be granted in writing, under pain of invalidity. If the consent is granted by a body of the company, it is necessary to adopt previous resolution in this matter. However, the adoption of the resolution itself is not equal with expressing the consent or its lack, possible consent is effective only after it is submitted to the addressee (buyer or seller) in such a manner that they were able to become familiar therewith.

In the situation when the company does not give its consent to sell the shares it is obliged to indicate another buyer. Otherwise, the shareholder would become the “prisoner” of the company, which would be contrary not only with the nature of joint stock company but also with the ban to exclude the transferability of shares. The statutes should precisely determine the date of indicating the buyer, price and manner of its determination and date of payment.

In the discussed situation, it is admitted to indicate the company itself as the buyer of the shares, it is possible however, to fulfil the prerequisites justifying and admitting the purchase of own shares by the company - which, by the way, would be extremely advantageous from the point of view of the protection against hostile takeover (using of the institution of purchasing of own shares by the company was already discussed in the article.

The statutes should precisely determine the term to indicate the buyer, however, it must not be longer than two months from reporting to the company of the intention to transfer the shares. If the company does not indicate the buyer after the lapse of the appropriate term the shareholder becomes free. The same relates to the situation when the company did indicate the buyer but they did not decide to buy the shares.

However, the situation in which the shareholder decides to sell the shares without obtaining the required consent causes the ineffectiveness of such action. It must be underlined that the action is valid then but its suspended ineffectiveness is the case. The sale is ineffective both for the company and in relations between the parties. Such action may be subsequently validated - after the consent of the company is obtained.

Other limitations of transferability

The statutes may limit the transferability of shares also in other ways. One of them is formulating of detailed criteria, as to object and subject, which the buyer should fulfil. They may be formulated positively and negatively. Positive should indicate the feature of possible buyer, for instance having

of certain professional qualifications, citizenship, financial resources, membership of a certain group of persons. The condition that is often facing potential shareholders is the ban to run the business that is competitive for the company. However, it is difficult to apply the above to public companies, even if the limitations related only to registered shares, not admitted in public turnover. It is possible, however in family companies or specialized ones. Negative manner of formulating the criteria excludes the possibility to purchase the shares by persons having certain features. The reservation that the buyer of the shares cannot be the unit who, as a result of the planned purchase of shares would reach or exceed the limit of votes at a general assembly or runs business competitive towards company would be very advantageous, from the point of view of protecting the company against hostile takeover.

It must be remembered that all criteria are subject to assessment through the nature of the joint stock company and good practice. They must also be compliant with the principles of the social co-existence and the principles of commercial fairness. They must not be discriminatory towards any groups of units or defined social or economic groups. They must also reflect the purposes of the company arising from statutes and the object of its business - they should be justified.

The limitations must not lead to the situation that the turnover of shares would be impossible in practice, for instance by strongly narrowing of shareholders circle. The penalty for breaching these requirements is strict - invalidity of the provisions of statutes contrary to the mentioned principles.

Disposing of the shares with breaching of the discussed type of limitations results in ineffectiveness towards the company. Thus, it has the same effects as described above disposing of the shares without obtaining of required consent of defined units. The difference between breaching of these two types of limitations is that in this case validation of faulty legal deed is not possible, which is advantageous from the perspective of protecting the company against attacker, as well as the fact that the authorities of the company are released from the duty to look for alternative buyer of the shares.

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