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Reconciling the European Registered Capital Regime with a Modern Corporate Reorganization Law: Experience from the Czech Insolvency Law Reform

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Reconciling the European Registered Capital Regime with a Modern Corporate Reorganization Law: Experience from the Czech Insolvency Law Reform

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Abstrakt:
In this article, I deal with the apparent conflict between certain provisions of the Second Company Law Directive, in particular its Article 25 regulating increases of the share capital of European joint-stock companies, and basic logic of non-liquidation insolvency proceedings, usually referred to as reorganization. Using the ECJ case law on the Directive, I conclude that although on its face the Directive seems to presents a serious obstacle for national legislators wishing to provide their companies with economically sound reorganization law, that appearance is incorrect and the Directive's rules on changes of share capital do not present an insurmountable hurdle to the adoption of rational corporate insolvency law.
As a side note, I also mention the Prospectus Directive and its disclosure requirements. The results of that review turn out less up-beat and I conclude by suggesting that the European legislator revisits and amends that Directive so that it does not present an unnecessary administrative burden on reorganizing European companies.

Keywords: bankruptcy, insolvency, reorganization, registered share capital, European company law, Second Company Law Directive, Czech law, absolute priority, pre-emptive rights, Prospectus Directive

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Introduction

Insolvency changes the capital structure of a corporation dramatically: shareholders' equity is wiped out and the residual interest "moves" to creditors, who stand ahead of shareholders in the queue for the company's assets.[1]

This simple economic logic is, however, often not easily reconciled with legal rules governing the life (and, metaphorically, also the death) of corporations. In particular, with regard to European joint-stock companies (the plc's, AG's, SA's and equivalents), the Second Company Law Directive (Directive 77/91/EEC, as amended) is completely oblivious of the aforementioned economic change and its implications for the financing and governance of the insolvent joint-stock corporation.

Any European legislator wishing to provide its market with an insolvency law reflecting basic economic logic of the corporation's capital structure will therefore face a dilemma of whether one can be Europe-compliant and make sense at the same time.[2] The Czech Parliament, when approving the new Czech Insolvency Act (the "**IA**"),[3] was no exception. The lessons learnt in that process might well help other jurisdiction in and out of the EU - I will therefore try to briefly summarise them in this paper.

The main areas of conflict between the logic of corporate insolvency and European corporate law are essentially three: (i) the regime of the registered share capital and changes thereof; (ii) the pre-emptive rights of current shareholders; and (iii) the (related) problem with disclosure under the Prospectus Directive (Directive 2003/71/EC). I will discuss them in that order, with a short conclusion at the end of the paper.

[1] Of course, in non-trivial capital structures involving numerous layers of debt and potentially hybrid claims, working out who exactly the residual interest moves to is one of the most difficult issues in any market-based insolvency process, it is however not one with which I will deal with here (see e.g. LoPucki, L.M., The Myth of the Residual Owner: An Empirical Study, UCLA School of Law, Law & Econ Research Paper No. 3-11 (2003)).

[2] The (Euro)sceptic might insist that this dilemma is by no means exclusive to the area of corporate insolvency.

[3] Act 182/2006 Coll., in force since 1 January 2008. An English translation of the Act (in its original 2006 version) is available in "The Act on Insolvency and Its Resolution," Aleš Čeněk, Plzeň, 2006, ISBN 80-86898-88-9.

1. The registered share capital and changes thereof

Historically, the first conflict has not been a big issue in Europe. In traditional European bankruptcy law where liquidation of the company's assets and distribution of the proceeds among the creditors was basically the only option, the rules on changes of registered capital (or, indeed, any other rules of corporate law) did not matter much. After the bankruptcy dividend was paid out to creditors, the company died its sad death by being struck off the commercial register, and none of the rules of the Second Company Law Directive ever came in play.

However, as soon as one starts to think in terms of non-liquidation proceedings (termed usually "reorganization" after the US model),[4] the picture changes quite dramatically. Here, the insolvent company's assets traditionally remain in the left-hand side of the original balance sheet while the right-hand side is reconstructed such that the balance sheet gets "back in balance".[5] At bottom, given that assets stay where they are, the ways in which the balance sheet can be fixed are not that numerous, really. One can either reduce (or reschedule or do something else with) the debt, or inject new equity. One can of course do both at the same time by swapping debt for equity, which is done frequently when insolvent (or near insolvent) companies are recapitalised.[6] In any jurisdiction that follows the concept of a fixed registered share capital (such as the Czech Republic)[7], issuance of new shares by definition means a change (an increase) of the registered capital.

1.1 Increase of the registered share capital

And this is where the problem starts. For under Article 25 of the Second Company Law Directive, any increase in [the share] capital must be decided upon by the general meeting (i.e. the shareholders), the directive making no exception for insolvent companies. This, however, is inconsistent with the economic logic of insolvency: giving shareholders of an insolvent company (i.e. investors whose interest in the company has been erased in economic terms) the right to decide about its new capital structure amounts (or at least may amount) to giving them a veto over the reorganization proceedings.

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[4] The most recent self-contained treatment that I am aware of is Warren, E., Chapter 11: Reorganizing American Businesses (Essentials), Aspen Publishers, New York, 2008.

[5] History may of course prove me wrong but for now, I assume that the trend of the past 10 to 15 years in which U.S. market practice essentially turned Chapter 11 into liquidation proceedings conducted by a "private trustee" (the chief restructuring officer) on behalf of the main creditors (see e.g. Baird, D.G., Rasmussen, R.K., The End of Bankruptcy, University of Chicago, The Law School, John M. Olin Law & Economics Working Paper No. 173 (2002); Baird, D.G., Rasmussen, R.K., Chapter 11 at Twilight, University of Chicago, The Law School, John M. Olin Law & Economics Working Paper No. 201 (2003)) will reverse itself as the result of the dramatic drop in the supply of credit available to private equity and other buyers that we have been observing since the beginning of the financial crisis in summer 2007 and that is likely to continue for some time in the future, if not forever. In an environment in which buyers cannot raise funding quickly and cheaply, "traditional" non-liquidation proceedings (such as Chapter 11 in its original shape prior to the market metamorphosis) regain their importance in preserving the value of productive assets in times of crisis.

[6] In Czech corporate law, this would mechanically be achieved by the company issuing the new shares to creditors "for cash" with the creditors setting their obligation to pay the issue price off against the debts owing to them from the company. (S. 59(8) of the Czech Commercial Code, Act 513/1991, as amended).

[7] S. 154(1) and S. 202 ff. of the Czech Commercial Code.

Such veto can be very valuable in the shareholders' hands because it can be used to extract value from senior claimants (creditors) by way of hold-up.

Mindful of this logic, the Czech Insolvency Act provides that in insolvency proceedings, the decision-making powers of the general meeting are suspended during reorganization proceedings (S. 333(1) IA). Those powers are vested in the trustee, who is initially appointed by the insolvency court and may later, when claims filed in the proceedings are verified, be replaced by creditors' vote (S. 25 and 29 IA).[8] The one-off decision on the new capital structure will likely not be made by the trustee but rather decided upon as part of the reorganization plan (S. 341(1) IA), which must, in principle, be approved by all creditor classes (S. 347 IA).

The question is whether this solution, economically sound as it may be, complies with the Second Company Law Directive or not.

I believe that there are two principal reasons to think that it does.

Firstly, under S. 335 IA, shareholders are treated as creditors in reorganization, with the right to vote on the reorganization plan (including a plan involving the increase of share capital) in a separate class (S. 337(2)(b) IA). In their class, they vote by a 2/3 majority of capital and a simple majority of members, the former requirement being consistent with the majority requirement of Article 40 of the Second Company Law Directive. Hence, if the shareholder class votes for the plan, Article 25 can be said to have been substantively complied with, even though, as a matter of form, the shareholder congregation was not called a "general meeting" but rather a class vote in a creditors' meeting.

The more interesting situation would arise if the shareholder class voted against the plan. In such case, under the IA, the Czech bankruptcy court could still approve the plan (subject to other conditions) if at least one of the creditor classes senior to the shareholders that is not getting the full present value of its claims under the plan[9] voted for the plan.

Again, this is arguably a sound rule, but what of Article 25?

Well, owing mainly to Greece, Article 25 has been tested in the ECJ a number of times.[10] On my reading, these judgments actually support the conclusion that an *increase of registered capital and the*

[8] The one exception is the right to elect the directors, which the shareholders retain (S. 333(2) IA). The logic behind this slightly odd provision is to serve as the "carrot" that should entice directors to commence proceedings timely rather than hold out until the last moment out of fear of being replaced by the creditors. The "stick" is directors' liability to creditors for late filing (timeliness is measured against both the cash-flow and the balance sheet test of insolvency, S. 3 IA) where the damages are presumed to equal to the creditors' shortfall suffered in the insolvency proceedings (S. 99(2) IA).

[9] That there will be at least one such "impaired" class is almost self-evident given that the company must be insolvent or at least threatened by insolvency to be able to commence insolvency proceedings in the first place (S. 1(a) and 3 IA).

[10] See e.g. ECJ judgments C-367/96, Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE) of 12 May 1998; C-441/93, Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others of 12 March 1996 ("**Pafitis**"); C-381/89, Syndesmos Melon tis Eleftheras Evangelikis Ekklissias and others v Greek State and others of 24 March 1992 ("**Syndesmos Melon**"); C-134/91 a C-135/91, Kerafina-Keramische-und Finanz Holding AG and Vioktimatiki AEVE v

issuance of new shares without the approval of the company's shareholders do not violate Article 25 if effected inside insolvency proceedings. This is because the ECJ, holding against various Greek governmental agencies who attempted to recapitalize Greek companies through governmental action without shareholders approval, rightly described those attempts as "ordinary reorganization measures" (Pafitis, at 57 and 58), "straightforward rationalization measure[s]" (Syndesmos Melon, at 27 and 28) or "straightforward rejuvenation measure[s]" (Karella, at 30). In Pafitis, the ECJ expressly distinguished these measures from "execution […] or liquidation measure[s]"(at 58). In all of the cited decisions, the ECJ admitted that the Second Company Law Directive does not prevent the taking of execution and liquidation measures, putting the company in a regime of forced liquidation for the protection of the rights of its creditors (Pafitis at 57; Syndesmos Melon at 27; Karella at 30). According to the ECJ, the Directive shall apply for as long as the company's members and its normal organs were not stripped of their powers, i.e. *for as long as the company exists in its own structures* (Syndesmos Melon at 27 and 28; Karella at 30, emphasis added).

I think that the last test is the key to the present analysis. Although, viewed through the terminology of modern insolvency law, the ECJ referred to the relevant proceeding bit inaptly as "execution […] or liquidation measure[s]" taken for the protection of creditors' rights, there can be no doubt, in my opinion, that what it really had in mind are insolvency proceedings.

Applying the ECJ's criteria in the context of Czech insolvency law, I find it quite compelling to conclude that a company declared insolvent and put into reorganization proceedings by a court under the IA no longer exists in its own structures. Its shareholders were stripped off their decision-making powers; the board stays in place but not under the powers conferred by corporate law but rather as an agent of the company in its capacity as the debtor-in-possession (S. 2(g) IA). The board is in fact in the position of the insolvency trustee (S. 36 and 330(1) IA) and exercises its rights for the benefit of the creditors, under the supervision of the trustee, the creditors' committee and the court. Whether and in what form the company will exist in the future is decided by the creditors or the court, not the shareholders.

It follows from the above, I think, that Article 25 can not and does not apply to companies in formal insolvency proceedings as defined in current European law in the European Insolvency Regulation (Regulation (EC) 1346/2000, Annex A). This in spite of the fact that the Second Company Law Directive does not expressly state so - perhaps because at the time it was drafted, no one in the then-EEC could imagine a different type of insolvency proceedings than straightforward liquidation and because the drafters dealing with the subsequent amendments of the Directive (most recently and most notably through Directive 2006/68/EC whose implementation in the Czech Republic was still pending as of the time of writing) were busy enough fixing all the other antiquities and inefficiencies of the Directive.

1.2 Decrease of the registered share capital

So far, I have only discussed instances when, typically in return for the cancellation of debt, the reorganized company issues new shares and hence increases its registered share capital.

Hellenic Republic and Organismos Oikonomikis Anasygkrotissis Epicheirisseon AE of 12 November 1992; C-19/90 a C 20-90, Marina Karella and Nicolas Karellas v Minister for Industry, Energy and Technology and Organismos Anasygkrotiseos Epicheiriseon AE of 30 May 1991 ("**Karella**").

However, reorganization proceedings may also bring about situations involving the reduction of the registered share capital. Apart from instances where this is undertaken through consensus of all classes, including the shareholders, there may be situations in which the reduction of the current share capital is a necessity dictated by the logic of insolvency law. Most notably, such need may arise where the reorganization plan is to be approved by the court over the objection of a creditor class, a process casually referred to as the *cram-down*.[11]

The economic driver behind this is usually referred to as the *absolute priority rule*, in other words, the basic principle that the ranking of investors' claims on the company's assets (or, in other words, the relative value of those claims) as it follows from non-insolvency law must be observed inside insolvency as well, unless a different rule is dictated by the very nature of the insolvency proceedings.[12] Applied in our context, the absolute priority rule requires that where a reorganization plan is to be approved by a court over the objection of a class that is not receiving the full present value of its claims, the court asked to ***cram-down*** the plan on the objecting class must be satisfied that no class junior to the objecting class is receiving (or keeping) any value under the plan at all.[13] Thus, if a reorganization plan were to be approved by the court over the objection of a class of, say, general or subordinated creditors, the court could only approve the plan if current shareholders are wiped out completely by the plan, i.e. if they are stripped off their shares in the company.[14]

In regimes of fixed registered share capital, such "wiping out" by definition involves (i) reducing the previous registered share capital down to zero and (ii) equipping the company with new registered share capital (in the minimum amount required by the law[15]). Whereas the second limb was the subject of part 1.1 above and will be discussed further in part 2, the first limb, i.e. the reduction of registered share capital will be treated here.

Luckily, reducing the registered share capital inside insolvency proceedings presents a smaller interpretation challenge than increasing it. This is because Article 30 of the Second Company Law Directive that requires a reduction in the registered share capital to be decided upon by the general meeting contains and explicit exemption for reductions conducted "under a court order". Because any reorganization plan under the Czech Insolvency Act (whether or not approved by all classes) must also be approved by the insolvency court to take effect (S. 348, 349 IA), one can simply rely on this "under a court order" exemption. One can therefore safely conclude that European company law allows

[11] See e.g. Warren, E., Westbrook, J.L., The Law of Debtors and Creditors, Text, Cases, and Problems, Aspen Publishers, New York, 2006, p. 655 ff.

[12] This is one of the main insights bestowed on us once and for all by Thomas Jackson in his The Logic and Limits of Bankruptcy Law, Harvard University Press, Cambridge (MA), 1986, reprint Beard Books, Washington, D.C., 2001

[13] Warren, Westbrook, supra under 11, p. 656. The Czech Insolvency Act's rule of absolute priority, drawing heavily on the U.S. model, is contained in S. 348(2) and 349 IA.

[14] Where the objecting class is the shareholder class itself, the court may cram-down the plan on it if at least one class of unsecured creditors is receiving less under the plan than the full present value of the principal amount of their claims and of interest accruing thereon up to the date on which the plan takes effect (S. 349(4) IA).

[15] The Second Company Law Directive currently requires in Article 6 that this amount be not less than Euro 25,000 or equivalent in member state currency.

reductions of registered share capital inside insolvency proceedings otherwise than with the consent of the shareholders provided that such reductions are approved by the insolvency court. Giving the hold-up problem that a different rule would create (see the argument in part 1.1 above), this is a welcome conclusion.

Unfortunately, the enquiry into the Second Company Law Directive's effects within non-liquidation insolvency proceedings does not end quite yet. The remaining topic that must be dealt with is shareholders' pre-emptive rights.

2. The pre-emptive rights of current shareholders

Closely related to Article 25 is Article 29 of the Second Company Law Directive, under which whenever the [share] capital of a joint-stock company is increased by consideration in cash, the shares must be offered on pre-emptive basis to shareholders in proportion to the capital represented by their shares. The Directive provides for several exemptions from this rule (e.g. Articles 29(2) and 41), however, none of them applies to insolvency of the company.

Interestingly, most of the ECJ case law cited above in relation to Article 25 does not help in relation to Article 29 - this is because in the majority of the Greek government's interventions in the capital structures of the distressed companies that lead to the litigation, pre-emptive rights of current shareholders over the newly issued shares were observed. The one exception was the Syndesmos Melon case where the relevant Greek minister decided, under the administrative powers granted by special national legislation, to increase the company's share capital via a debt/equity swap in which the pre-emptive rights of current shareholders would be disapplied. In that case, the ECJ held (Syndesmos Melon, at 33 and 37) that the disapplication of shareholders' pre-emptive rights via governmental action violated Article 29 of the Second Company Law Directive. At the same time, however, the ECJ also observed that that finding does not mean that Community law precludes the Member States from derogating from those provisions *whatever the circumstances* (ditto, at 34, emphasis added). The ECJ went on to cite the express exemptions in Articles 19, 41, 42 and 43 of the Directive by way of example. More importantly, however, in deciding Syndesmos Melon, the ECJ expressly relied on its earlier case law (esp. Karella), reiterating that "*[w]hilst the directive does not preclude the taking of execution measures and, in particular, liquidation measure placing the company under compulsory liquidation in the interests of safeguarding creditors' rights, it nevertheless continues to apply as long as the company's shareholders and normal bodies have not been divested of their powers*" (Syndesmos Melon, at 27, emphasis added).

Once again, I think that this test contains the ultimate answer to the present enquiry. As I have argued in relation to Article 25 of the Second Company Law Directive in part 1.1 above, a company that is being reorganized inside insolvency proceedings such as those under the Czech Insolvency Act is a company whose shareholders and normal bodies *have been divested of their powers*. In the other way the ECJ phrases the same concept, such company *no longer continues within its own structures* (Syndesmos Melon, at 28, emphasis added). I therefore conclude that the Article 29 pre-emptive rights need not be applied by companies in insolvency proceedings under the European Insolvency Regulation.

The above-mentioned argument applies equally to consensual reorganization, i.e. proceedings where the reorganization plan is agreed by all classes, as well as non-consensual reorganization, i.e.

proceedings in which the reorganization plan is being adopted by the court over the objection of a class. In the latter case, however, there are two more arguments that should be mentioned for the sake of completeness. The first is rather technical, the second is more fundamental in its economic logic.

Firstly, where the current registered share capital is being "wiped out" as a pre-condition for the approval of the plan, i.e. the current registered capital is first reduced to zero, the old shareholders' shares actually do not exist as a matter of law at the moment the company's capital is then increased again. Technically speaking, the old shareholders have no shares in the company any longer (although, as a matter of fact, they may of course still hold pieces of paper or electronic entries called "a share") - hence, they are not shareholders and do not enjoy any pre-emptive rights at all.

Secondly, and more fundamentally, the pre-emptive right to subscribe newly issued shares is an option and each option has its value. Since that option pertains to the shareholders under their original investment in the company's shares, keeping it arguably means keeping a valuable claim on the company's assets. However, if the reorganization plan is crammed-down on a class senior to the shareholders that is not getting the full present value of its claim, we know that the absolute priority rule requires that the shareholders receive (and retain) no value in the reorganized capital structure of the company whatsoever. Under this logic, the original shareholders may not be entitled to exercise the pre-emptive rights pertaining to their old shares over any new shares issued by the company under the reorganization plan. If they did, the court could not approve the plan over the objection of another, more senior class.[16]

For the avoidance of doubt - none of the above is meant to suggest that old shareholders may not participate in the new capital structure of the reorganized company *where all senior classes agree with such arrangement*. However, where there is no agreement among all classes and the court is called upon to cram the plan down, my conclusion is that Article 29 of the Second Company Law Directive does not preclude a national insolvency court from approving a reorganization plan under which the old shareholders have no right to acquire newly issued shares on the basis of the pre-emptive rights pertaining to their old shares in the company.

3. Disclosure under the Prospectus Directive

The Prospectus Directive (2003/71/EC) is a measure aimed at harmonising the disclosure requirements upon public offerings or listings of securities within the EU. For that purpose, the Directive contains a EU-wide definition of a public offer (Article 2(1)(d)), as well as a list of exemptions from the obligation to publish a prospectus upon a public offer (Article 4).

Unfortunately, none of the exemptions in Article 4 seems to cover the situation in which securities are offered in non-liquidation insolvency proceedings under a reorganization plan, whether or not there are special disclosure requirements set out in the insolvency legislation and whether or not such disclosures are approved by the insolvency court.[17] This seems weird, especially given that Article 4

[16] This argument is in line with the majority opinion in the U.S. Supreme Court case of Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership 526 U.S. 434 (1999), discussed e.g. in Warren, Westbrook, supra under 11, p. 657 ff.

[17] An example of such exemption can be found in S. 1145 of the U.S. Bankruptcy Code.

contains specific exemptions ***i.a.*** for securities issued in the context of tender offers or mergers, provided that a disclosure document is available in connection with the said transactions containing, in the opinion of the national authority empowered to review such document, information equivalent to that of a prospectus (Article 4(1)(b) and (c)).

In the context of reorganization proceedings under the Czech Insolvency Act, the reorganization plan must be accompanied by a detailed disclosure report approved by the insolvency court (S. 343 IA).[18] Under these circumstances, it seems completely unnecessary to burden the reorganized company with the obligation to produce, and have approved with a different regulator, a separate prospectus.

I therefore suggest that the European legislator amends Article 4 of the Prospectus Directive such that it contains an appropriate exemption for securities issued in connection with insolvency proceedings, similar to the exemptions currently available in Article 4(1)(b) and (c). The fact the such exemption is missing in European legislation dating as recently as from 2003 may serve as a reminder of how long a journey lies ahead of us in Europe before we get accustomed to the idea that corporate insolvency may amount to more than, or indeed something totally different from, the selling of the company's assets and distributing the proceeds to creditors.

4. Conclusion

In this article, I have reviewed the Second Company Law Directive for compatibility with non-liquidation insolvency proceedings and found it wanting in many respects.

On its face, the Directive's Article 25 (and to an extent also Article 29) suggests that European company law simply precludes recapitalization of European joint-stock companies in reorganization proceedings.

Luckily enough, on careful reading, the ECJ case law on the Directive can be used to reach the opposite, economically sensible conclusion. This is what I have primarily tried to do in the article.

The situation with the Prospectus Directive is less satisfactory, I am afraid, as no amount of careful reading will result in a conclusion that the reorganizing company will not be forced to draw up and have approved a prospectus if it makes a public offer of securities as part of the reorganization proceedings. This is result is unfortunate and I suggested that the Directive should be amended such that reorganizing companies are not burdened with double disclosure exercises in instances where they are already making sufficient disclosures under national insolvency law rules.

[18] The structure and the details of the report are prescribed in the Annex to Ministry of Justice Regulation No. 311/2007.

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