CREDITORS PROTECTION DURING CORPORATE CRISIS UNDER SLOVAK LAW

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Abstract: This article focuses on protection of creditors during corporate crisis under Slovak legislation with regard to responsibilities of company´s governing bodies, especially towards company´s creditors. The article marks new institutes of creditor´s protection in the light of new Slovak regulation of corporate crisis.

Keywords: creditor´s protection/ creditor´s rights, corporate crisis, guarantee for performing the duty/ liability of company´s governing bodies

1 Conflicts of interests

Separation of centralized corporate governance from shareholders is one of the fundamental features of stock corporations. In the interest of efficiency, strategies of business and corporate governance must be withdrawn from a large group of shareholders, often varying in composition and structure, and transferred to a small group of persons. The small governance group must be granted a substantial leeway in discretionary authority in performing their tasks. The core of the problem is how to make these persons bear responsibility for such authority without impeding the performance of their tasks.[1] Opportunism may be quite a natural part of human conduct, but the persons managing the company are not free to make decisions in order to maximize their own assets[2]. The key solution of the issue, therefore, is to inspire/motivate/encourage the managers (*agents*)[3] to act in the interests of the shareholders (the *principal*) rather than in the interests of their own. The Principal-agent problem may be expediently dealt with through fiduciary duties[4] specified in general legal definitions. Under Slovakian law, the general definition is constructed as the „duty of reasonable professional skill and due care". The managers of the company must use such degree of skill, effort and care as a reasonable person would use in similar circumstances.[5] One of motivating factors for the managers/officers of the company in performing their duties in relation to the management of company assets is responsibility/accountability as an inherent component of good corporate governance.

The main aim of corporate governance in general is to create a balance between all those related in some way to the corporation/company, such as shareholders, members of governing and supervisory bodies, managers in broader sense, stakeholders and employees.[6] The aim should not be limited just to shareholder and stakeholder values, but generally, to overall social welfare. The creditors, employees and customers may enter into contractual relations with a company only upon the prospects of financially favorable results[7]; the corporate transactions must be beneficial for all participating entities.

At certain stage of the company development, however, the creditors' interests become more prominent than the shareholder's interests, especially during the company's economic imbalance, when the company is in crisis. Due to the principle of limited liability, however, the shareholders are undoubtedly in a more advantageous position than the external creditors. When economic health of the company is shaking and the future of the company is uncertain, some legal measures are taken to counterbalance the advantages of shareholders over those of external creditors. The incoming mechanisms cause changes in the nature or quality of the obligations. Here a question arises: what care and/or skills must be provided by the governing bodies to the company suffering from ill health, together with the question of responsibility for such unsound conditions of the company under their management towards the company and the creditors.

Slovak law-givers tried to cope with the negative impact of bankruptcy and restructuring on creditors and to strengthen responsibility in business/entrepreneurial activities by introducing the term of corporate crisis[8]. It is a new legal term in Slovakia introduced by Act 87/ 2015 Z. z., amending Act 513/1991 Zb., the Commercial Code, amending also other laws (hereinafter the „Amendment"). The significance of the term of corporate crisis as an instrument mitigating the impact of bankruptcy or restructuring on creditors rests in transforming external finance provided by the shareholders or related creditors at the time of corporate crisis to substitute equity finance.

From the language used in the provisions of the Amendment defining the term substitute equity financing (literal translation from Slovak: "payments substituting own resources") and the term corporate crisis it may be presumed that the Slovak legislator was inspired by Austrian Act No. 92/2003 on equity substitution[9] (*Eigenkapitalersatz–Gesetz - EKEG*). The importance of the Austrian EKEG consists in the elimination of differences between the interests of shareholders granting loans to the company and the external creditors.[10] As stated in the Austrian professional publications, substitute equity financing (*Eigenkapitalersatzrecht*) developed from the decisions of German courts, later it was adopted also by the Austrian legal theory and after 1991 also by OGH (*Oberster Gerichtshof*).the Supreme Court[11] In the decisions of German courts, re-qualification of external to equity financing was originally connected with the ban on *venire contra factum propirium*: where a shareholder grants a loan to the company, otherwise the company will become insolvent, it would be conflicting to require repayment of the loan before the crisis is over. In its later decisions, BGH (*Bundesgerichtshof*), the Federal Court of Justice, pointed out to shareholders' responsibility for proper company financing (*ordnungsgemäße Unternehmens-finanzierung*). When the company is in crisis, the shareholder is not obligated to make additional payment to complement the missing capital. However, if the shareholder chooses to provide financial assistance, such shareholder will not be relieved of his/her responsibility where the shareholder has decided, by debiting the creditors, on a less risky looking form of funding instead of a capital contribution/investment that has been objectively offered. In case of functional requalification of external sources provided by a shareholder to equity/own sources, the shareholder must be responsible for the financial consequences. (*Finanzierungsfolgenverantwortung*). Consequently, the idea of responsibility for financial consequences is in literature more precisely specified as a

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[1] DAVIES P.: Corporate Governance s. 59, Konferenz zu Binnenmarkt und Gesellschaftsrecht, 15. - 16.12.1997, davailable at http://ec.europa.eu/internal_market/company/docs/otherdocs/actes_de.pdf

[2] HAVEL B.: Obchodní korporace ve světle promén: Variace na neuzavřené téma správy obchodních korporací, 1. Vydanie. Praha: Auditorium, 2010, p. 107

[3] Under Slovak law the term "statutory body", a body acting on behalf of the company as provided by law, the articles of associations, bylaws or rules of the company - whether one person/an executive/a director or a group of persons – the board of directors/management board . In this paper, the term manager(s) will be used in general, and in the part commenting on the statutory regulation in Slovakia, the term "statutory body" is used, or, when discussing the duties of its members the term "members of the statutory body" is used

[4] In specialized literature fiduciary duties are used in two different senses, in the Anglo/American narrow sense, fiduciary duties include primarily the duty of loyalty, without the duty of care (both are then included in „the general duties"),. In the other sense fiduciary duties include the duty of care, and the duty of loyalty, too. (see e.g.. BLACK, B.S. The Principal Fiduciary Duties of Boards of Directors, available at www.oecd.org/dataoecd/50/53/1872746.pdf, HAVEL B. Judikatura, Obchodněprávní revue. vol. 4, no.. 4 (2012). ISSN 1213-5313, p. 124, LASÁK J. Ve jménu korporace: derivativní žaloby vůči členům statutárního orgánu, Obchodnoprávní revue. vol.. 2, no. 3/2010. ISSN 1213-5313, p. 74. In this paper, the broader sense of fiduciary duties is implied .

[5] CLARK, R.,C.: Firemní právo. Victoria Publishing a. s., 1992, p. 173

[6] ČERNÁ S. in HURYCHOVÁ, K. BORSÍK, D. (eds) Corporate Governance, 1. Vydanie. Praha: Wolters Kluwers, 2015. p. 11

[7] KRAAKMAN, R. et al.: The Anatomy of Corporate Law. Oxford: OUP, 2004 (2009), ISBN 978-0-19-9565 84 – 9, p. 28.

[8] http://www.epi.sk/dovodova-sprava/dovodova-sprava-k-zakonu-c-87-2015-Z-z.htm

[9] Bundesgesetz über Eigenkapital ersetzende Gesellschafterleistungen

[10] KALSS in Kalss/Nowotny/Schauer, Österreichisches Gesellschaftsrecht (2008), Wien: MANZ´sche Verlags- und Universitätsbuchhandlung GmbH, 2008, p. 862

[11] Nowotny in Kalss/Nowotny/Schauer, Österreichisches Gesellschaftsrecht (2008), Wien: MANZ´sche Verlags- und Universitätsbuchhandlung GmbH, 2008, p. 1137

protection of creditors which is linked with substitute equity financing.[12]

2 Company in crisis and substitute equity financing

Pursuant to current law, corporate crisis does not apply to all forms of business entities. Under the Commercial Code, a company in crisis applies to limited liability companies, joint-stock companies and limited partnership if the general partner is not an individual, and, following January 1, 2017, also private limited company (literal translation of the Slovak term jednoduchá spoločnosť na akcie: simple stock company). As laid down in § 67i (2) of the Commercial Code, the concept of company in crisis will not be relevant for any bank, electronic money institution, insurance company, reinsurance company, health insurance company, (asset) management company, securities dealer, stock exchange, or central securities depository, because these institutions are subject to special rules governing company equity and surveillance procedures, as described in the explanatory report.

The state of crisis denotes bankruptcy or threat of bankruptcy; in case of threat of bankruptcy, crisis is determined with mathematical precision of equity: external financing ratio. Pursuant to Act 7/2005 Z. z. governing bankruptcy and a restructuring (Bankruptcy and Restructuring Act), bankruptcy occurs through over-indebtedness or insolvency. The state of crisis is defined through the following three alternative criteria:

- Insolvency occurring under § 3 (2) of Act 7/2005 Z. z. on bankruptcy and restructuring
- over-indebtedness occurring under § 3 (3) of Act 7/2005 Z. z. on bankruptcy and restructuring
- qualified equity-external financing ratio under § 67a (2) of the Commercial Code (equity/liabilities ratio being less than eight to one hundred, such ratio will first be used in 2018; the ratio in 2016 was four to one hundred, and the ratio is six to one hundred in 2017).

A loan or similar financing granted to the company at the time when the company is in crisis (§ 67c (1) of the Commercial Code) or before its crisis, the maturity date of which has been deferred or extended, may be considered substitute equity financing. Similar financing should be considered in line with its economic purpose. The notion of similar financing should include all agreements, according to which the company's settlement/performance will not be made concurrently with funding provided by a person specified in § 67c (2) of the Commercial Code, but later. It is not important whether this relates to performance of monetary obligations or provision of any comparable financing (e.g. borrowings).

According to Slovak statutory regulation financing to be qualifies as substitute equity financing must meet the following cumulative criteria:

1. *the nature of financing* (loan, borrowings and similar funding),
2. *timing* (financing was provided at the time when the company was in crisis; this applies equally to financing granted to the company before the crisis, the maturity date of which has been deferred or extended),
3. *personal scope* (financing was provided by a person specified in § 67c (2) and (4) of the Commercial Code (in the text referred to also as "related creditors"),
4. *the conditions of accounting, knowledge or presumed knowledge of the state of accounting* (the crisis resulting from the last regular or extraordinary balance sheet report, or it would be resulting so should the balance sheet report be made on time, or if the person providing financing knew, or could know, with regard to all circumstances, that the crisis might occur as shown in the current balance sheet).

De facto this means that transforming external financing to equity financing will (temporarily) limit the range of potential creditors whose claims would otherwise, outside the corporate crisis, have been settled. Such segregation of a certain group of creditors is connected with the creditors' relations to the company, primarily their ability to influence the company, to control or to decide on the fate of the company. Pursuant to § 67c of the Commercial Code these persons are not only shareholders. According to § 67c (2) of the Commercial Code such related person may be a member of the statutory body, an employee with a direct managing/executive authority within a statutory body, an authorized agent, the head of a branch, a member of the supervisory board, anyone holding a direct or indirect ownership interest representing at least 5% of the registered capital or having voting rights in the company or anyone able to influence the management of the company comparable to control corresponding with such ownership interest, a silent partner, or any person closely related with any person mentioned earlier, and anyone acting on behalf of all these persons. The law has introduced a rebuttable presumption, according to which it is presumed that the lender is considered a related person/party specified in § 67c (2) of the Commercial Code where it is not possible to identify the final beneficial owner. In terms with the explanatory report, at the time of crisis, in case of financing by a shell company, the burden of proof reverses. The importance of introducing the concept of company in crisis/corporate crisis and that of substitute equity financing into Slovak legislation lies primarily in the protection of the so called *unrelated creditors*.

For the purposes of assessing the relatedness, special rules governing collective investments, non-investment funds, old age pension saving schemes, and debentures are not taken into account.

The essence of the new law on substitute equity financing resources is set in § 67f of the Commercial Code laying down the ban to repay the funds plus interest and other charges, and the contractual penalty in case the company is in crisis, or in case the company would be in crisis in consequence thereof. In addition, according to these provisions during crisis, the time limits set for repayment do not run, and thus the company will not be in default

One of the sanctions for the breach of the said duty in relation to related creditors is the secondary duty to repay the respective value. Rightly, the legislator has not omitted any situations in which repayment occurred by setting-off, encashment of the security, execution, or in similar way.

The law does not exclude repayment claims in case of restructuring or bankruptcy; here the claim is to be made by an application. This represents a rule of insolvency law which is also included in the Commercial Code.

In case of bankruptcy, equity substitution claims will be granted by related persons/parties (§ 9 of the Bankruptcy and Restructuring Act), and, pursuant to § 95 (3) of the Bankruptcy and Restructuring Act, but the will be settled only after the other claims have been satisfied. The creditors of these debts have no voting rights in bankruptcy and restructuring, and they cannot be elected to the committee of creditors (§ 35 (4) and § 126 (3) of the Bankruptcy and Restructuring Act).[13]

3 Special responsibilities/ duties of the statutory body during corporate crisis towards the company and unrelated creditors

3.1 Duty of care

Together with the concept of corporate crisis the Commercial Code Amendment has also provided for special duties/responsibilities of the statutory body (§ 67b of the

[12] RAISER T., Veil R.: Recht der Kapitalgesellschaften, 4. Vydanie, München: Verlag Franz Vahlen, 2006, p. 588

[13] ĎURICA, M. Zákon o konkurze a reštrukturalizácii. Komentár. 2. vydanie. Bratislava: C. H. Beck, 2015, p. 15

Commercial Code). These responsibilities apply only to the companies that may be in crisis (limited liability companies, joint-stock companies, limited partnership, provided that its general partner is not an individual, and following January 1, 2017 also private limited company/simple stock company). Under § 67b of the Commercial Code, the statutory body, that has found, or, having regard to all circumstances, could have found that the company was in crisis, must do everything possible, as may be required in line with the principle of reasonable professional skill and due care, from a reasonable and prudent person to avert similar situation. As stated in the explanatory report to the Amendment[14], these special duties/responsibilities arising from the crisis situation are expected to avert the crisis and to see that the measures taken be effective.

It is a fact that defining crisis as a concrete form of threat of bankruptcy is a new idea, but the duty to monitor the situation concerning assets and liabilities was laid down already by the Bankruptcy and Restructuring Act so that a possible threat of bankruptcy could be recognized early and measures could be taken to avert it. This duty applied to all entities required to keep accounting according to a special law, i.e. not only the companies that may be in crisis. Such duty to prevent bankruptcy in line with the Bankruptcy and Restructuring Act would thus cover also the qualified external – equity financing ratio set forth in § 67a of the Commercial Code. The special duty/responsibility would also arise from the general clause of "reasonable professional skill and due care"(§ 135a and § 194 of the Commercial Code), the implicit part of which is also the duty of loyalty of a member of a statutory body in relation to the shareholders and the company. When considering the goal and purpose of the company - *overall social welfare, an* unsound company drifting towards dissolution is not consistent with this aim.

In case of a breach of the special duty under § 67b of the Commercial Code as a result of which damage is caused to the company, the claims against statutory bodies of limited liability company will be considered in line with § 135a of the Commercial Code, or in line with § 194 of the Commercial Code in case of a joint company or a simple stock company (following January 1, 2017). The grounds for relief from responsibility may arise from the *business judgment rule* [15] or from the resolution of the general meeting, provided it is not contrary to statute or the articles of association and bylaws of the company. In case of a breach of special duty occurring in a limited partnership, the claims against general partner(s) will be considered under § 373 et conseq. of the Commercial Code providing for compensation for damage, with the grounds for relief from responsibility being the "circumstances excluding liability" under § 374 of the Commercial Code.

3.2 Ban on repayment of substitute equity financing to related creditors

The above grounds for relief from responsibility do not apply in case of liability arising under § 67f the Commercial Code. Liability of statutory bodies arises in case of a breach of the ban on repayment of substitute equity financing to related creditors. The members of statutory bodies acting contrary to this ban are jointly and severally liable to repay the funds to the company. Liability arises also in case of the members of statutory bodies who have not acted in breach of the ban, but failed to claim the repayment, although, with regard to all circumstances, they knew or may have known of the duty of the related creditors' duty to repay the financing. The grounds for relief from responsibility that may exclude liability of members of the statutory body may arise in case they claimed the repayment or that, with regard to all circumstances, they could not have known of the related creditor's duty to repay. To satisfy the grounds for such relief a mere notice requiring repayment will not be sufficient, instead, taking actual steps for its enforcement, such as filing a court action requiring the repayment will be necessary.

Liability (§ 67 of Commercial Code) arises towards the company and also towards the company (unrelated) creditors.

Where, contrary to the ban under § 67f (1) of the Commercial Code, substitute equity funding has been repaid to a person who fails return the funds within a reasonable time limit upon a notice of the company (§ 306 of the Commercial Code), the Company has the right to claim compensation from a member of the company governing body that has such liability. A member of the statutory body who has fulfilled the obligation of repayment for the obligated person, may claim recourse payment against such person.

Liability of a member of the statutory body towards creditors is not an instance of liability for the company's obligations, but liability for repayment of substitute equity financing. Therefore, the creditors have no right to claim compensation of their receivables against the company but they may claim repayment of financing in favor of the company. Thus, this is a special form of extinction of liability against creditors which becomes extinct upon repayment of financing to the company. As this has not been explicitly included either in the legal construction or in the explanatory report of the amended law, it may be implied that the purpose of such regulation of liability against creditors is to secure enforceability of repayment of such financing also in case of a passive company or inactive members of its statutory bodies.

3.3 Duty to file a petition seeking declaration of bankruptcy

The crisis may be provisional, but it may not be overcome either as a result of adopting insufficient and/or inadequate measures, or as a result of unfavorable market development. The statutory regulation of the concept of crisis in the Commercial Code is connected with the regulation contained in the Bankruptcy and Restructuring Act. Not considering the effects of the Commercial Code, where the company is over-indebted, the debtor company (or the persons mandatorily obligated to act so on behalf of the debtor) must file the petition to declare bankruptcy (§ 11 (2) of the Bankruptcy and Restructuring Act) not later than thirty days after learning of such over-indebtedness, or not later than thirty days within which the debtor taking due professional care could have learnt of such over-indebtedness.

Despite the fact that the amount of the company debt is decisive when considering both the threat of bankruptcy under the Commercial Code or over-indebtedness under the Bankruptcy and Restructuring Act, the relevant amounts of the debt will not be the same when considering threat of bankruptcy under the Commercial Code as in the case of over-indebtedness under the Bankruptcy and Restructuring Act. For the purpose of considering over-indebtedness, certain forms of debts are not counted in, including the company debts meeting the criteria of substitute equity financing (§ 3 (3) of the Bankruptcy and Restructuring Act).

In case of breach of the duty to file the petition seeking declaration of bankruptcy on time, the statutory bodies of limited liability companies and of the joint-stock companies will be liable to repay to the company one half of the least amount of registered capital of joint-stock company (EUR 12,500.00). The legal title to this sanction arises from the legal fiction of the contractual penalty agreed between a member of the governing body and the company (§ 11 (2) of the Bankruptcy and Restructuring Act). The oxymoron formulation of contractual penalty as a lawful penalty relates to the presumed legislative intent to enable application of such „legal contractual penalty" also outside bankruptcy proceedings. In such case, also the

[14] http://www.epi.sk/dovodova-sprava/dovodova-sprava-k-zakonu-c-87-2015-Z-z.htm
[15] Under the business judgment rule, responsibility of the statutory body is excluded subject to the condition that in making a business decision based upon the relevant information, the statutory body may reasonably believe to have acted for the benefit of the company. In contrast with the troubling doctrine (of the duty of care), just mentioning the business judgment rule evokes smiles of relief in faces of the company managers/directors. (CLARK, R.,C.: Firemní právo. Victoria Publishing a. s., 1992, p. 173).

shareholders may seek such contractual penalty on behalf of the company (§ 122, § 182 of the Commercial Code).

Liability for damage of members of statutory bodies of companies other than a limited liability company and a joint-stock company, i.e. in case of a partnership, a limited partnership and a cooperative towards the company/cooperative, is governed, in case of late filing bankruptcy petition seeking declaration of bankruptcy, pursuant to § 374 of the Commercial Code. Liability for damage of members of statutory bodies towards creditors in case of late petition seeking declaration of bankruptcy, arises in agreement with § 420 of the Civil Code, with the form of the company/cooperative being relevant.

4 Special creditor´s rights arising from the company´s obligations secured by related persons

The concept of crisis has affected also the position of company creditors whose claims are secured (by guaranty/liability, pledge or another security) of related persons defined in § 67c (2) of the Commercial Code (in the Slovak text of § 67g of the Commercial Code such related persons are termed the persons „obligated due to the pledge/security“). Such secured obligations take effect as substitution of equity financing, allowing the company, shaken by crisis, to obtain a loan or similar funding from third persons, even though such secured loan or funding is not subject to the regime of substitute equity financing. The economic result of secured obligations of the company by the obligated persons correspond with the assignment of substitute equity financing[16], when, as a result of a recourse for payment, the person obligated and liable as a result of the security gets into position of a creditor of the company.

In case of the company obligations secured by related persons, the creditor has the right, when the company is in crisis, to be satisfied from the security of the obligated person without making a claim first against the company (§ 67g (1) of the Commercial Code); such creditor’s right cannot be excluded by an agreement (a cogent provision of law representing represents an exception from the subsidiarity principle of the concept/institute of security). In case of a creditor who, at the time of the existence of the obligation (a loan or similar funding), learnt or could have learnt about the crisis of the company from the last published accounting statement, such creditor is limited in his option to have his claim satisfied/settled between the company and the obligated person by satisfying the claim only to the extent of the difference between the amount of debt and the value of security. This limitation concerns the situation when the company is in crisis or the situation leading to declaration of bankruptcy or re-structuring (§ 67h of the Commercial Code).

In the event that the creditor decides to seek payment at the time when company is in crisis, the company has the right to require the obligated to perform/pay directly to such creditor (§ 67g (2) of the Commercial Code). The amount of payment will be constrained to the amount of security. In the event that the company pays to the creditor, the company must require the obligated person to compensate the company up to the amount of security (§ 67g (3) of the Commercial code). The obligated person may be released of his obligation to compensate by transferring to the company free of any charge the property/assets serving as security.

5 Conclusion

Members of governing bodies of unsound companies tend to make risky decisions, choosing more risky investments and expecting superior recovery of investment, which may, however, be economically unsuccessful and may lead to bankruptcy. In indebted companies, the conflict of interests between the shareholders and the creditors becomes more prominent because any possible risk of dangerous investments is on creditor’s account. On the other hand, shareholders and members of governing bodies of indebted companies tend to act in accord reducing the conflict of interest between them, because both sides may opt for excessive risks, from which, in case of success, higher profits may result.[17] By this amendment, the Slovak law-givers extended the obligations of members of governing bodies/statutory bodies, in an attempt to bring harmony between the position of unrelated creditors towards shareholders and members of governing bodies as related creditors. With respect to statutory limitation of the extent of satisfying the claims of unrelated creditors from the company assets in case of the creditor’s potential knowledge of the state of accounting, the new law imposes stricter requirements as for the more prudent conduct of unrelated creditors providing loans or similar funding.

[16] Nowotny in Kalss/Nowotny/Schauer, Österreichisches Gesellschaftsrecht (2008), Wien: MANZ´sche Verlags- und Universitätsbuchhandlung GmbH, 2008, p. 1148

[17] Hučka, M., Malý, M., Okruhlica F. Správa společností, Praha: Kernberg Publishing, 2007, p. 64

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