The Instruments of Protecting Creditors of the Joint Stock Company

Abstract

The aim of submitted thesis is to analyse those instruments of the business corporations law that have a purpose to ensure a certain level of creditor protection in relation to the joint stock company as a typical representative of a capital company. The key characteristic of this form of a business company is a limited (or more precisely de facto excluded) liability of shareholders for its debts and a strict application of a separate ownership principle. On the one hand, this fact leads to its use for important business projects, but on the other hand, it also increases a probability of moral hazard by shareholders in some situations, which is contrary to interests of creditors. This is connected especially with a distribution of sources by a joint stock company to its shareholders. Instruments applied by a business corporations law are able to react to the riskiest situations and they also have a preventative character. Categorization of these instruments is a part of an introduction to this thesis together with a classification of creditors, which form a heterogenous group with different power and particular interests. The attention is also paid to some general instruments as information duties of business companies to third persons or a sanction liability of voted members of legal entity bodies, whose relevancy is lowered due to information deficiency of creditors. The doctrine of piercing the corporate veil (or disregard of separate legal entity) is also analysed as an ultimate instrument that should be used only as a last resort.

From the conceptual point of view, the most important approaches are the system based on legal capital formation and maintenance preferred in the continental Europe (especially in the European Union law) and the system of solvency tests, traditionally used mainly in common law countries. The principal part of the thesis is therefore an analysis of these two major approaches.

Even though the literature describes several functions that may be ensured by a legal capital in order to protect creditors, the analysis concludes that they are not sufficiently fulfilled. From its nature, the legal capital may with regard to its formation create just a limited property cushion in a period immediately following the creation of the joint stock company. It is therefore just one of own sources for financing a joint stock company. Due to the fact that legislation does not require maintenance of a certain level of capital, it is not possible to ensure an adequate level of the economic stability in future like this.

Regarding a principle of capital maintenance, the biggest focus is on a balance sheet test, which however does not present a robust economic indicator enabling a legal capital to create a sufficiently valuable „signal information“. From the related approaches, a stricter application of a ban on contributions return to shareholders requiring adequate market conditions for transactions between a joint stock company and its shareholders is by contrast considered to be beneficial.

On the contrary, solvency tests that form a part of a currently applicable Czech legislation besides a legal capital suitably reflect an assessment of a future economic situation of a joint stock company, which will occur following a distribution to shareholders. At the same time, the essential interest of creditors - to eliminate a risk of insolvency of their debtor - is also emphasized in this way. The ability-to-pay solvency test is determined to be a basic one of described solvency tests, it may be also supplemented by a balance-sheet solvency test. The introduced form of a capital-adequacy solvency test intensifies the effect of this approach as it aims to eliminate a situation, when a joint stock company remains only insignificantly solvent after distribution to shareholders. This shift of statutory body members' duties to a period preceding an insolvency is reflected as a kind of a trend in a foreign legislation. As a result, interests of creditors are considered in situations of fundamental conflicts of interests between them and shareholders. Results of this thesis show that a concept based on capital-adequacy may have an ambition not only to supplement a system of creditor protection using a legal capital, but also to replace it.

Klíčová slova: creditor, joint stock company, limited liability