THE NEW APPROACH IN THE REGULATION OF NOMINAL CAPITAL IN COMPANY LAW: FUNDAMENTAL CHANGES OR DEADLOCK?

ANDRÁS SZEGEDI
Department of Commercial, Land and Labour Law, Széchenyi István University, Győr

Key Words: company law, nominal capital, limited liability, registration of companies, competition

RÉSUMÉ

It is believed that the regulation of nominal capital plays a major role in company law, fulfilling various functions and thus serving the common good. Basically there are two types of business/commercial companies. The first group is characterized by the unlimited liability of the partners for the debts of the company. The second group can be distinguished from the first with respect to the liability of the partners for in this group the partners (members, shareholders) are not liable for the debts of the company. This is the point where we reach the core of the traditional concept of nominal capital regulation. Regulations usually consider important, as a quid pro quo for the limited liabilty of the partners, to state mandatory rules on nominal capital minimums of a substantial amount. The basic idea behind this regulation is that in theis case creditors are deprived of the possibility to seek satisfaction for their claims against the members of the company, the sole basis for satisfying their claims being the company assets.

The basic reasoning for the necessity of nominal capital-minimums is creditor-protection. According to this concept, the larger minimum on nominal capital is set forth in our codes, the larger level of protection creditors can enjoy. It is believed by some that the regulation of nominal capital minimums plays a filter-role: filters promoters and only the capable, the economically potent is allowed to proceed and set up a company and at the same time enjoy limited liability. In this sense, nominal capital is the redemption-price of limited liability.

Following the 2004 accession of ten new member-states to the European Union, a new chapter of economic competition has started, which has been enhanced after the latest expansion-round. Prior to the accession of the former socialist block, a considerable competition also existed to draw foreign investments and efforts were made in the then-

candidate countries to make themselves more attractive for foreign capital than the others. In the 1990's candidates had many means to reach their goals, basically offering considerable tax allowances or even tax-exemptions to spur up economic growth and thus contribute to the economic transition and closing-up. In the EU the above means are no longer disposable, there is only a limited arsenal to benefit from, for only techniques in full conformity with European law are allowed. This results in the new chapter of rivalism, the competition of member states. In this competition company law has started to play an incresing role. The age of tax-allowances seems to have passed. Company law has to promote investements and supply as much level of freedom for promoters and partners as possible. At the same time, a modal shift in EU policy on company law has been realised: creditor-protection has lost considerable ground in favour of the preferential treatment of small- and medium sized enterprises. This new situation rises the value of competition law regulation: the more competitive a company law is, the more competitive the country's economy can be.

Following from the aforementioned, in recent years the outlines of a new trend could be examined: moving further from what we defined as the traditional approach towards nominal capital. What we can observe is that more and more legislations change their viewpoint on nominal capital and to a little extent handle the old approach on nominal capital minimum regulations as barriers to market entry and obstacles to run small or medium sized enterprises. This matter has not been dealt with independently and isolated from other important rules affectring SME's market position. Changes were usually carried out hand in hand with an overall simplification of both substantial and procedural rules.

We believe that the basic goal of company law is to draw up an equilibrium between the rightful expectations of creditor-protection and the promotion of freedom concerning the establishment and operation of companies. However, we strongly feel that the basic goals of creditor-protection can be reached through traditional means of civil law, basically contract law and the arsenal company law employs is not necessary adequate to supply the same level of protection. In this sense, company law can not guarantee anything but a rather limited success in creditor protection. rules of creditor-protection, if not serving their real purposes, can be considered considerable barriers to market entry for SME's and can be treated as anticompetitive measures. Anticompetitive in the sense of the competitiveness of companies and in the sense of anticompetitiveness of company law. That is why we support the idea of the reduction of nominal capital limits in company law. We are of course aware of the fact

that this measure in itself is not able to supply competitive advantages, but can play a major role even in a symbolic way. However, we urge reforms be carried out completely and steadily and thus modernise company law.