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On the latest judicial practice relating to capital decrease

Numerous questions had already arisen in connection with capital decrease under the effect of the Act on Business Associations, on which the legislator did not give answers upon the entry into force of the new Civil Code. Thus, it remained among others unclear when a communication must be published twice in connection with the capital decrease or when the creditor protection proceedings must be conducted. The recent judicial practice answers numerous related questions; however, it also raises some new issues which have remained unaddressed.

As it is well-known, the transactions in connection with capital decrease can be classified according to their reasons, thus the capital decrease can be voluntarily or mandatory. Otherwise capital decrease may be aimed at divestment, loss settlement or increasing other components of equity according to its purpose.

Having regard to its process, first of all, the member's meeting of the company must decide on the capital decrease then – in case of typical capital decrease – the publication of communications in connection with capital decrease follows in the Official Company Gazette, which also means to conduct the necessary creditor protection proceedings at the same time. At the end of the process, the member's meeting states the effectiveness of the capital decrease (or its failure) and following the closure of the effective creditor protection proceedings may also be followed by the registration proceedings of the company.

It meant decades of problems of the application of law whether the double publication, conducting the creditor protection proceedings as well as holding the second member's meeting are necessary in all cases of capital decrease. The court answered a part of the questions in the legal case disclosed under BDT2016.3432. According to the disclosed decision, the company is required to publish a communication twice in the Official Company Gazette in case of mandatory capital decrease, but the communication does not need to include the invitation for the creditors.

The court justified its decision that the communication on capital decrease must include the content of the decision on capital decrease under the Subsection 3:203 (2) of Act V of 2013 on the Civil Code (hereinafter: Ptk.) as well as - if the creditors of the company may have a claim for security – also the invitation for the creditors of the company. Point d of Subsection 3:204 (1) of the Civil Code (Ptk.) excludes in the mandatory cases of capital decrease that the holders of the claims submitted prior to

the first publication of the communication on the initial capital decrease may request the company to provide for securities. According to the standpoint of the court, the joint interpretation of these two rules means that albeit creditors must be notified of the capital decrease by double publication in the Official Company Gazette, but as creditors may not otherwise receive securities under the provisions of the law, thus the creditor protection proceedings do not need to be conducted, namely the creditors may not claim securities.

However, beyond this, the court also formed the applicable law with its decision. Namely, the company may decide on the amendment to the Articles of Association of the Company to reflect the decrease of capital under Subsection 3:206 (1) of the new Civil Code (Ptk.) if no creditors' claim was submitted within the deadline set for the submitting of creditor's claim or the company has fulfilled the claims of creditors for granting adequate securities. As, however – according to the standpoint of the Court – conducting the creditor protection proceedings is unnecessary in case of mandatory capital decrease following the aforementioned logic, thus it is unnecessary to wait for the second communication to amend the Articles of Association of the Company (or as a result thereof the submitted creditors' claims) therefore any amendment to the Articles of Association of the Company can be decided on at the first member's meeting.

Two very essential statements can be made in connection with the conclusion drawn by the court. On the one hand, the court made every-day legal practice simpler with its decision, considering that there is no need - and is otherwise completely unnecessary as stated above –to hold a second member's meeting in case of mandatory capital decrease. On the other hand, we refer to that the decision of the court forms the written law considering that by logically interpreting the text of the law, it softens the statutory regulation otherwise strictly applied, and makes possible with its decision that the articles of association of the company may be amended contra legem at the first member's meeting.

However, the decision of the court raised new practical questions. We do not consider the conclusion impossible that the interpretation of the law of the court applies not only to the case of mandatory capital decrease but also all the cases when the creditor protection proceedings do not need to be conducted [Section 302 (1) of the Civil Code] since in case of all events of capital decrease, there is no point in waiting for the creditors' claims submitted as a result of double communication to amend the Articles of Association of the Company (the relevant creditors may not request security), thus the articles of association can be already amended at the first members' meeting in all these cases – we emphasise that as contra legem according to the logical conclusions drawn under the decision of the court.

If our conclusion above is correct then the statement may hardly be qualified as wrong that the articles of association can be amended already at the first members' meeting under the condition that otherwise the creditor protection proceedings are successfully closed, namely the creditor has not submitted any claim or received an adequate security or they could not have otherwise requested any security.

If our final conclusion is correct (which does not harm either creditor's claim or any protected interests specified in Subsection 3:4 (3) of the Civil Code) then the members do not need to meet in the future and to hold a second member's meeting– which is really burdensome in many cases. In this context, please note that this regulatory intention can all the more so be rendered probable since Subsection 3:309 (4) of the Civil Code provides for companies limited by shares that it must be also decided on the amendment to the Charter becoming necessary due to capital decrease simultaneously with the decision to be made on the decrease of the registered capital; such decision of the general meeting will become effective if the conditions for the decrease of the registered capital are fulfilled. The different regulation for two company forms does not appear either r reasonable or justifiable.

We hope that the judicial practice will continue to remain on the ground of rationality and reasonable legal interpretation, and will qualify our above conclusions as applicable, thereby simplifying the capital decrease procedures but also adequately protecting creditors 'claims.