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Titel | Title

General and Special Creditor Protection in Mergers under EU Law: Legal Principles and Challenges in Reorganising Financially Distressed Companies (with Special Focus on Austrian and Bulgarian Law)

verfasst von | submitted by

Darina Vaseva LL.B. (WU)

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English Abstract:

The thesis analyses the framework of creditor protection under Directive (EU) 2017/1132, as amended by Directive (EU) 2019/2121. It focuses on creditor protection in the context of mergers by addressing two research questions and offering a comparative analysis from the perspective of European, Austrian, and Bulgarian corporate law. The first research question of the thesis examines whether the general creditor protection regime may be applied alongside the special creditor protection rules in restructuring law. This research question is answered in the affirmative, as it could not generally have been the legislator's intention to expose creditors to different levels of risk and afford them different levels of protection in the same economic situation. The second research question of the thesis examines the legal challenges that arise when financially troubled companies are merged into financially sound entities and offers a non-exhaustive catalogue of remedial measures and business justifications. In essence, these types of mergers - although not per se prohibited - are highly problematic and, in most cases, unlawful in the absence of a plausible justification or appropriate remedial measures.

German Abstract:

Die vorliegende Masterarbeit analysiert den Gläubigerschutz nach der Richtlinie (EU) 2017/1132 in der durch die Richtlinie (EU) 2019/2121 geänderten Fassung, insbesondere im Kontext gesellschaftsrechtlicher Verschmelzungen. Dabei werden zwei Forschungsfragen behandelt und aus europäischer, österreichischer und bulgarischer gesellschaftsrechtlicher Perspektive vergleichend untersucht. Die erste Forschungsfrage betrifft das Verhältnis zwischen dem allgemeinen gesellschaftsrechtlichen Gläubigerschutzrecht und dem umgründungsrechtlichen Gläubigerschutz. Untersucht wird insbesondere, ob die allgemeinen kapitalerhaltungsrechtlichen Gläubigerschutzbestimmungen neben den besonderen Gläubigerschutzvorschriften des Umgründungsrechts Anwendung finden können. Diese Forschungsfrage wird bejaht, da es grundsätzlich nicht der Wille des Gesetzgebers gewesen sein kann, Gläubiger in derselben wirtschaftlichen Situation unterschiedlichen Risikoniveaus auszusetzen und ihnen ein unterschiedliches Maß an Schutz zu gewähren. Die zweite Forschungsfrage untersucht die rechtlichen Herausforderungen, die entstehen, wenn finanziell angeschlagene Gesellschaften auf finanziell gesunde Gesellschaften verschmolzen werden. Die Arbeit entwickelt hierzu einen nicht abschließenden Katalog möglicher Abhilfemaßnahmen und wirtschaftlicher Rechtfertigungen. Im Wesentlichen zeigt sich, dass derartige Verschmelzungen - obwohl sie nicht per se unzulässig sind - hoch problematisch und in den meisten Fällen rechtswidrig sind, sofern keine plausible wirtschaftliche Rechtfertigung oder geeignete Abhilfemaßnahmen vorliegen.

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List of Abbreviations

ABGB	Austrian General Civil Code / Allgemeines bürgerliches Gesetzbuch
AktG	Austrian Public Companies Act / Aktiengesetz
Art/s	Article/s
BGN	Bulgarian lev
Cf	Confer / Compare
CJEU	Court of Justice of the European Union
CLD	Company law directive / Directive (EU) 2017/1132, as amended by Directive (EU) 2019/2121
Ed / Eds	Editor / Editors
Edn	Edition
Eg	For example
Et al	And others
Et seqq	Et sequentes / And the following
Etc	Et cetera / And others
EUR	Euro/s
F	And the following one
Ff	And the following ones
FN	Footnote
GmbHG	Limited Liability Companies Act / Gesetz betreffend die Gesellschaften mit beschränkter Haftung
Ie	That is to say

OGH	Austrian Supreme Court of Justice / Der Oberste Gerichtshof
Para/s	Paragraph/s
Rz	Randziffer (*Margin number*)
Subpara	Subparagraph
ЗЗД	Bulgarian Obligations and Contracts Act / Закон за задълженията и договорите

1. Introduction

This thesis analyses the framework of creditor protection under Directive (EU) 2017/1132, as amended by Directive (EU) 2019/2121 (the 'Company Law Directive' or 'CLD').

In particular, the thesis focuses on creditor protection within corporate restructurings and, more specifically, within mergers. This scope of legal examination is valuable for academia, as restructurings are highly common in Europe[1], while comparative analyses of their impact on creditors' position across jurisdictions remain limited.

To obtain a practical perspective on the analysed issues, two European jurisdictions - Austria and Bulgaria – are addressed and examined. These jurisdictions are of particular interest for comparison, as they generally adopt different approaches to creditor protection, which, however, lead to functionally equivalent outcomes.

The largely similar outcomes reached by both the Austrian and Bulgarian legal frameworks confirm the underlying idea of the European directive as a legal act, namely that a directive is binding as to the result to be achieved upon each Member State, while leaving the choice of form and methods to the national authorities.[2]

Against this background, two research questions are posed and subsequently addressed: First, the thesis examines whether the general creditor protection regime, encompassing *inter alia* rules on profit distribution and capital reduction, applies alongside the special creditor protection rules in restructuring law, or whether the latter constitutes an exhaustive regime. The thesis approaches these issues from European, Austrian, and Bulgarian perspectives, and offers a comparative analysis.

The second research question examines the legal challenges that arise when financially troubled companies are merged into financially sound ones, with a particular focus on intragroup mergers. Additionally, the thesis addresses whether and how such companies can be merged without breaching statutory creditor protection rules. In other words, it outlines possible remedial measures and justifications where a (group) merger conflicts with principles of capital maintenance.

To answer these research questions, the thesis adopts the following structure: First, the two

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1 Transaction volumes peaked at around 24,000 after 2020, followed by a moderate decline in subsequent years. See Institute for Mergers, Acquisitions and Alliances (IMAA), 'M&A Statistics' (2026) < https://imaa-institute.org/mergers-and-acquisitions-statistics/ > accessed 11 April 2026.

2 Dorresteijn et al, *European Corporate Law* (4th edn, Wolters Kluwer 2022) Rz 3.08.

creditor protection regimes under the Company Law Directive - general and special - and their implementation in Austrian and Bulgarian law are analysed and compared in Sections 2.1 and 2.2. Thereafter, Section 3 examines the interconnection and co-application of the two creditor protection regimes, providing a European, Austrian, and Bulgarian perspective.

The second research question is addressed in Section 4, where downstream, upstream, and side-stream mergers are examined separately. The remedial measures and business justifications mentioned above may be found in Section 4.5. Lastly, the thesis findings and the answers to the research questions are summarised in Section 5.

Overall, the thesis demonstrates that general and special creditor protection rules may be applied simultaneously where the special merger regime proves insufficient to adequately protect creditors. It further shows that mergers of financially troubled companies into financially sound entities are not per se prohibited; however, as they entail significant risks for creditors, appropriate remedial measures and business justifications must be considered.

2. Creditor Protection in European Union Company Law

The necessity of carefully designed rules for the protection of creditors of limited liability companies is inherent in their nature, namely the limited liability of their shareholders.

In such companies, there is a clear legal separation between the shareholders as natural persons and the company itself, meaning that the former are allowed to remain insulated from the obligations arising from the activity of the latter.[3] Liability is confined to the company's own assets and, as a result, creditors must rely exclusively on these assets for the satisfaction of their claims. In contrast, shareholders bear the company's risks only up to the amount of their capital contribution.[4]

The European legislator began its efforts to counteract this asymmetric risk distribution by introducing creditor protection mechanisms in the First Company Law Directive[5] as early as 1968. While, at the outset of these developments, protection for creditors was considered rather

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3 Andrea Vicari, *European Company Law* (De Gruyter 2021) 1.

4 Artmann/Karollus in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 48 Rz 1 f; Eckert/Schopper/Schmidt in Eckert/Schopper (eds), *AktG-ON Kommentar zum Aktiengesetz* (Manz 2021) § 48 Rz 4.

5 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L65/8.

superficial and limited, creditor protection mechanisms developed significantly over the years, reaching a particularly advanced stage with the provisions of Directive (EU) 2019/2121 (the 'Mobility Directive').[6]

The Mobility Directive amended Directive (EU) 2017/1132 with regard to cross-border mergers, conversions and divisions. It places a strong emphasis on safeguarding the interests of, *inter alia*, creditors, who are particularly vulnerable to potential fraud or abuse in the context of cross-border operations.[7]

Directive (EU) 2017/1132 may be regarded as the 'heart' of European company law, as it consolidates and codifies eight pre-existing company law directives into a single, systematic framework.[8] According to the first recital of the directive, the purpose of the codification was to enhance clarity and rationality.

Against this background, the following subsections examine and analyse the two creditor protection regimes under the Company Law Directive: General creditor protection and special creditor protection.

2.1 General Creditor Protection in the Company Law Directive

As a first step, it should be noted that the general creditor protection provisions apply only to public limited liability companies. These are the companies listed in Annex I to the Company Law Directive. In Austria, public limited liability companies are called '*Aktiengesellschaft*', while in Bulgaria they are referred to as '*акционерно дружество*'.[9] The European Commission (the 'Commission') has explained that the restriction to public limited liability companies was made because they represent the economically most important type of company, because their activities usually cross national boundaries, and also because they are legally the most sophisticated type of company. Nevertheless, according to the Commission, the coordination of public limited liability companies was intended to be a solid basis for the

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6 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions [2019] OJ L 321/1.

7 Clifford Chance LLP, 'Luxembourg Transposes the Mobility Directive' (2025) < https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2025/01/transposition-directive-mobilite.pdf > accessed 4 February 2026.

8 Peter Kindler in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 1 Rz 2 f.

9 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/115, Annex I.

harmonisation of further types of companies.[10]

In light of this, many Member States have extended the CLD's general creditor protection principles for public limited liability companies to other types of companies (eg private limited liability companies, such as the *GmbH* under Austrian law, or the *ООД* under Bulgarian law).[11]

Second, before addressing the central provisions for the purposes of this thesis[12], it is worth briefly referring to certain additional (general) creditor protection mechanisms of a more ancillary nature, yet still important, in order to provide a more complete picture:

Articles 3 and 4 of the CLD list some minimum information concerning a company that must be provided in its internal corporate documents.[13] These disclosure obligations for Annex I companies protect creditors by reducing information asymmetry. Specifically, they enable creditors to identify the debtor correctly, to assess legal and financial risk prior to entering into a business relationship, and to decide whether to contract with the company at all.

Another guarantee for creditors is the requirement for public limited liability companies to have a minimum subscribed capital, set by Article 45 of the CLD at EUR 25,000. Although criticised by some scholars and legal practitioners[14], minimum capital serves as collateral for third parties and signals a certain level of size and reliability to creditors, thereby preventing very small or non-serious businesses from using the public limited liability company form.[15]

What is more, Article 46 of the CLD rules that subscribed capital may be formed only of assets capable of economic assessment and that an undertaking to perform work or supply services may not form part of those assets. This exclusion is also made for the benefit of the company's creditors, as work or the supply of services has little, if any, value for them.

Furthermore, Article 48 of the CLD ensures that, through minimum capital pay-in requirements upon incorporation, the company does not operate as a purely nominal or 'empty'

10 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Foreword to Arts 44-85 Rz 29.

11 See eg § 82 (1) Austrian GmbHG; Articles 150 – 153 of the Bulgarian Commercial Act.

12 See Sections 2.1.1 and 2.1.2.

13 Eg: The type and name of the company; The amount of the subscribed capital; The nominal value of the shares subscribed.

14 Critics argue that the amount is too low to provide genuine creditor protection and note that the minimum capital need only be subscribed, not necessarily fully paid in, meaning that the corresponding funds may not be available to creditors at the outset. See eg: Nicola de Luca, *European Company Law* (2nd edn, Cambridge University Press 2021) 174.

15 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 45 Rz 6 ff.

entity, thereby protecting creditors.

To sum up briefly, the additional general creditor protection rules seek to ensure that companies commence business with a minimum level of transparency and real asset backing.

For the purposes of this thesis, no other general creditor-protection mechanisms are discussed. The following subsection focuses on the provisions on profit distribution, which are of particular relevance for the subsequent analysis of unlawful repayment of capital contributions and the research questions of the thesis as a whole.

2.1.1 Rules on Profit Distribution - Articles 56 et seqq of the CLD

Article 56 of the CLD stipulates the requirements for lawful distributions and constitutes a central provision on capital maintenance.[16] Recital 40 of the CLD states that union provisions are necessary for maintaining the capital, which constitutes the creditors' security, in particular by prohibiting any reduction thereof by distribution to shareholders where the latter are not entitled to it.

In particular, Article 56 (1) provides that, except in cases of a reduction of subscribed capital, no distribution to shareholders may be made if, on the closing date of the last financial year, the company's net assets as shown in its annual accounts are lower than the amount of the subscribed capital plus the reserves that may not be distributed under the law or the company's statutes. The same prohibition applies where a distribution would have the effect of reducing the company's net assets below that threshold.

Furthermore, Article 56 (3) adds an additional threshold to be considered: The amount of a distribution to shareholders may not exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.

Therefore, Article 56 (1) (3) of the CLD subjects distributions to two cumulative limitations: First, a capital-maintenance test, requiring that net assets remain at least equal to the subscribed capital plus undistributable reserves; and second, a profit-availability test, limiting distributions to the amount of distributable profits.[17] The purpose of these distribution limitations

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16 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 56 Rz 1.

17 Andrea Vicari, *European Company Law* (De Gruyter 2021) 53 ff.

is to preserve the company's legal capital, together with any non-distributable reserves, in the interest of creditor protection.[18]

If distributions are made contrary to the principles laid down in Article 56 of the CLD, Article 57 states that shareholders who have benefited from such distributions are obliged to return them to the company. In that case, the company becomes the creditor and beneficiary of the repayment, while the debtor is the shareholder who has directly or indirectly received the unlawful distribution.[19] Importantly, the company must prove that those shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.

There has been a debate as to the extent of negligence required: While some scholars argue that gross negligence is required, others are of the opinion that even slight negligence triggers the obligation under Article 57.[20]

It seems reasonable to stop as early as slight negligence on the part of the receiving shareholders, as Article 57 of the CLD is of a protective nature and shareholders are generally placed in a more favourable position than creditors (due to their limited liability[21]). Thus, in order to balance their positions, even slight negligence should be sufficient to give rise to the company's claim of repayment.

In summary, Articles 56 et seqq of the CLD constitute a core element of the general creditor protection regime and form the foundation for the subsequent analysis of unlawful repayment of capital contributions.

2.1.1.1. Excursus: Distribution, Disguised Distribution, Repayment of Shareholders' Capital Contributions

Article 56 does not provide for a definition of the term 'distribution'. Its paragraph 4 merely states that the term 'distribution' includes - in particular but not exhaustively - the payment of dividends and of interest relating to shares.

However, the purpose of the CLD to effectively maintain the company's legal capital

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[18] Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 56 Rz 3.

[19] Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 57 Rz 5.

[20] Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 57 Rz 7.

[21] See Section 2.

requires a comprehensive approach and a broad, functional notion when defining this term. 'Distribution' generally comprises any transfer of cash or other assets to shareholders that has an effect on the balance sheet.[22]

On the basis of this definition, so-called 'disguised distributions' may also fall within the scope of Article 56 of the CLD.[23] Disguised distributions are distributions which are not labeled as dividend payouts but rather result from related party transactions for no or inadequate consideration, ie transactions concluded with or to be assigned to shareholders that were not concluded at arm's length.[24] An example of such a disguised distribution is the establishment of remuneration for services or other performances provided to the company by shareholders or affiliated persons at an amount exceeding the remuneration applicable in usual business transactions.[25]

Furthermore, the concept of a 'prohibited repayment of shareholders' capital contributions' is very similar to, and largely overlaps with, the notion of a 'disguised distribution'. The repayment of shareholders' contributions may be defined as follows: Any asset-reducing performance by the company to a shareholder that is not covered by a lawful profit distribution or a genuine arm's-length exchange transaction.[26] A disguised distribution is a typical method through which a prohibited repayment of shareholders' capital contributions is effected, meaning that the former describes how the latter is carried out.

The Court of Justice of the European Union ('CJEU' or 'Court') has not dealt extensively with disguised distributions and the prohibited repayment of capital contributions. Nevertheless, a prominent preliminary ruling in this area is the *Alfred Hirmann v Immofinanz AG* judgement from 2013:

In essence, Mr. Hirmann purchased shares in Immofinanz AG on the secondary market on the basis of a prospectus describing the investment as safe and low-risk. He later argued that the prospectus contained misleading information and sought rescission of the share purchase and

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22 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 56 Rz 5 f.

23 Andrea Vicari, *European Company Law* (De Gruyter 2021) 55.

24 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 56 Rz 6.

25 Andrea Vicari, *European Company Law* (De Gruyter 2021) 55.

26 Hans Aicher, 'Verschmelzung und Einlagenrückgewähr bei Auslandsbezug' (2010) 24 Wirtschaftsrechtliche Blätter 535, 537.

repayment of the purchase price.[27]

Immofinanz AG argued that such repayment would amount to a prohibited repayment of shareholders' contributions because, through the repayment of the purchase price, the company's assets would be reduced for the benefit of a shareholder. Therefore, it would infringe the capital-maintenance rules of the Second Council Directive 77/91/EEC (now the CLD).[28]

The CJEU stated, *inter alia*, that capital maintenance rules govern internal company-shareholder relations arising from the memorandum and the articles of association ('Internal instruments'). By contrast, a company's liability towards investors, even if they are shareholders, for irregular conduct at the time of the share purchase derives from the share purchase contract, not from those Internal instruments. [29]

Therefore, the CJEU ruled that a payment made by a company to a shareholder because of the company's irregular conduct does not constitute a distribution of capital within the meaning of Article 15 of Second Council Directive 77/91/EEC (now Article 56 of the CLD) and, consequently, such a payment ought not to be subject to the conditions stated in that article. The Court rejected Immofinanz AG's argument that the repayment of the purchase price constitutes a prohibited repayment of shareholders' contributions.[30]

Although there are some opposing views in the literature[31], this CJEU jurisprudence has been largely accepted by scholars[32]: Capital maintenance and issuer liability are two distinct legal concepts, with the former yielding to the latter. Payments to shareholders on the grounds of issuer liability do not qualify as (disguised) capital distribution or as repayment of shareholders' contributions.

The CJEU's reasoning, as well as the view now prevailing in the literature, appears reasonable. This is because companies should not be safeguarded by law, nor effectively rewarded, for fraudulent behaviour. Allowing capital-maintenance rules to shield issuers in such cases would undermine both investor protection and the deterrent function of issuer liability.

As can be seen, both the CJEU and legal scholarship tend to define what does not constitute

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27 Case C-174/12, *Alfred Hirmann v Immofinanz AG* [2013] ECLI:EU:C:2013:856 paras 16 ff.
28 Case C-174/12, *Alfred Hirmann v Immofinanz AG* [2013] ECLI:EU:C:2013:856 para 20.
29 Case C-174/12, *Alfred Hirmann v Immofinanz AG* [2013] ECLI:EU:C:2013:856 paras 27 - 29.
30 Case C-174/12, *Alfred Hirmann v Immofinanz AG* [2013] ECLI:EU:C:2013:856 paras 32 – 33.
31 Cf. Martin Gelter, 'Risk-Shifting Through Issuer Liability and Corporate Monitoring' (2013) 14 European Business Organization Law Review 497, 500.
32 Cf. Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 57 Rz 21.

a disguised capital distribution or a prohibited repayment of shareholders' contributions, rather than providing clear positive definitions or guidance. This approach may be regarded as of limited assistance and leaves considerable scope for further clarification.

2.1.1.2. Implementation of Art. 56 et seqq of the CLD in Austrian and Bulgarian Law

In Austria, the EU framework on capital maintenance in the context of profit distribution and unlawful repayments of capital contributions is implemented, in general, through §§ 52, 54 and 56 of the Austrian AktG (*Aktiengesetz*). In Bulgaria, these EU law concepts are transposed through Article 247a of the Bulgarian Commercial Act (*Търговски закон*).

Generally, both regimes rely on the same underlying principles of capital maintenance: Distributions are limited to distributable profits and unlawful distributions must be returned unless the shareholder acted in good faith.[33]

Although the Austrian legislator transposed Articles 56 et seqq of the CLD functionally rather than literally, both jurisdictions comply with the Directive's minimum harmonisation requirements. Austrian law even slightly exceeds these requirements by introducing shareholders' external liability (*Außenhaftung*)[34], a concept not developed in the CLD and not known to Article 247a of the Bulgarian Commercial Act.

In this regard, Austrian law may be considered somewhat more creditor-friendly than Bulgarian law. This is because shareholders' external liability extends the consequences of unlawful distributions beyond the company itself, exposing shareholders to liability toward the company's creditors where such distributions have reduced the company's assets.[35]

However, this slight over-implementation does not create a significant difference between the national implementations. It also does not appear problematic in light of the potential tension between corporate autonomy and creditor protection, as it merely adds an additional liability consequence if the rules are violated, but does not restrict distributions more than the CLD already does.

Against this background of almost identical transposition in Austria and in Bulgaria, it can be argued that the concepts of capital maintenance through profit distribution rules and prohibited

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33 Andrea Vicari, *European Company Law* (De Gruyter 2021) 53 ff.

34 Art 56 (1) Austrian AktG (*'The shareholders shall be liable to the creditors for the liabilities of the company to the extent that they have received payments from the company in violation of the provisions of this Federal Act. This shall not apply insofar as they have received amounts in good faith as profit distributions'*).

35 Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 56 Rz 18.

returns of capital have the same functional meaning in both systems. Thus, for future analysis in this thesis, where at least these general creditor protection provisions are concerned, they should be examined within a common analytical framework.

2.1.2 Rules for the Reduction of Capital – Articles 73 et seqq of the CLD

This subsection examines the rules governing the reduction of capital set out in Section 5 of the Company Law Directive, which constitute another central and vital general creditor protection mechanism. For reasons of clarity and focus, this thesis will not analyse Articles 78 - 82 of the CLD (which, in general, refer back to Article 75 of the CLD), but will instead focus on Articles 73 and 75.

At the outset, it should be pointed out that companies reduce their legal capital for a variety of reasons, the most common being to cover accumulated losses, to free locked capital, to create distributable reserves or to make the company more efficient or attractive for future investment.[36]

Article 73 of the CLD states that any reduction in the subscribed capital, except under a court order, shall be subject at least to a decision of the general meeting taken with a special majority of minimum two/thirds.[37] In addition, the decision must be disclosed in a Member State's public register in accordance with the rules of Article 16 of the CLD.[38] The notice convening the meeting shall specify at least the purpose of the reduction and the way in which it is to be carried out.[39]

Turning to Article 75 of the CLD, this provision constitutes one of the central elements of the general creditor protection framework. By and large, it establishes a two-stage system: An initial right to security vis-à-vis the company, followed by a subsidiary right to seek protection from an authority where such security has not been obtained.

At the first stage, Article 75 grants creditors the right to obtain security from the company

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[36] FasterCapital, 'What is Capital Reduction and Why Companies Do It' (2025) < https://fastercapital.com/content/Capital-Reduction--Legal-Aspects-of-Capital-Reduction--A-Comprehensive-Guide.html#What-is-Capital-Reduction-and-Why-Companies-Do-It- > accessed 10 February 2026.

[37] See also Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/85 Art 83.

[38] In general, Article 16 of the CLD provides that each Member State must maintain a public company register with a file for every registered company and assign each company a unique identifier to ensure its unequivocal identification and effective interconnection of company registers across the EU.

[39] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/85 Art 73.

if two requirements are met: First, Article 75 (1) only applies to existing creditors, ie creditors whose claims existed before the decision on the capital reduction was published. Secondly, the respective claims must not have fallen due by the date of that publication.[40] Member States may not set aside such a right unless the creditor has adequate safeguards, or unless such safeguards are not necessary having regard to the assets of the company.[41]

Accordingly, Member States enjoy a considerable margin of discretion in transposing Article 75 (1) and in determining, under national law, the specific conditions governing the exercise of the right to obtain security.[42] Consequently, the rules on creditors' safeguards in case of reduction in the subscribed capital differ greatly across the Member States.[43]

At the second stage, it shall be ensured that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards. However, this right only applies under the condition that the respective creditors can credibly demonstrate that due to the capital reduction the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.[44]

The burden of proof was intentionally imposed on the creditors in order to prevent unnecessary delays in cases where they unduly demand security for their claims. In light of this, the Commission also mentioned that any existing priority rights of creditors, such as those arising from insolvency proceedings, as well as intra-group guarantees granted to them (for example by a parent company), must be taken into account when determining the scope of their legitimate interest in obtaining further safeguards.[45]

Finally, Article 75 (2) of the CLD provides that the capital reduction shall be void, or that no payment may be made for the benefit of shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to. In simpler terms, the CLD blocks the distribution of funds resulting from the reduction, or even deems the capital

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40 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 75 Rz 5.

41 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/85 Art 75 (1).

42 Andrea Vicari, *European Company Law* (De Gruyter 2021) 68.

43 See eg Chapter 20, Section 8 of the Swedish Companies Act (*Aktiebolagslagen*); §§ 224 ff of the German Public Companies Act (*Aktiengesetz*); Art. 2445 of the Italian Civil Code (*Codice Civile italiano*).

44 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/85 Art 75 (1) subpara 2.

45 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 75 Rz 4.

reduction void in some cases.

Hence, it can be argued that creditors are granted a kind of veto (blocking) right in relation to a shareholders' decision to reduce capital (a kind of ex-ante creditor protection).[46] This is because, as explained, one of the main reasons why capital reductions are carried out is to create distributable amounts which can be paid to the company's shareholders after the capital reduction. If creditors can prevent such payments (Article 75 (2) CLD), shareholders' incentives to reduce the company's capital are diminished or even eliminated. Therefore, creditors are given a very strong position in capital reduction scenarios.

This veto right, however, cannot be regarded as excessively restrictive of shareholders' discretion. This is because the very purpose of the existence and maintenance of a company's legal capital is creditor protection.[47] Since a capital reduction constitutes a direct interference with that capital base, the corresponding veto right of creditors is justified.

In summary, the rules on capital reduction under the CLD, especially the distribution restriction provided for in Article 75 (2), are very effective in ensuring the existence and continuance of the company's capital base. They are also one of the core reasons why the general creditor protection regime is considered so reliable and superior in comparison to other creditor protection provisions.[48]

2.1.2.1. Excursus: 'Safe' reduction of capital: When are creditor safeguards not required?

According to Article 76 of the Company Law Directive, Member States are not required to apply the creditor protection mechanism laid down in Article 75 to a reduction of subscribed capital whose purpose is to offset incurred losses (the alternative case provided for in the provision is not relevant here and will not be discussed).[49]

In simpler terms, Article 76 allows Member States to skip creditor-safeguard procedures (Article 75) when a capital reduction does not remove assets from the company, but merely restructures its balance sheet.

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[46] Andrea Vicari, *European Company Law* (De Gruyter 2021) 67 f (*'...a strong position that amounts to a factual veto power'*).

[47] Nicola de Luca, *European Company Law* (2nd edn, Cambridge University Press 2021) 197 ff.

[48] Cf. Section 2.2 et seqq.

[49] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/85 Art 76 (1).

Essentially, Article 76 (2) of the CLD states that national laws shall ensure that the freed-up amounts cannot be paid to shareholders, and that shareholders cannot be released from unpaid contributions. Since no assets leave the company and no profit is distributed to shareholder, creditors are not exposed to additional risk. Thus, they are also not in need of the additional safeguards offered by Article 75 of the CLD.

As to the purpose of Article 76, it aims to make economically desirable restructuring measures possible. The Commission pointed out that its provisions are not intended to avoid the safeguards guaranteed to creditors. Rather, the economic purpose of such capital reduction must be to lay the foundation for a subsequent capital increase to provide the company with the necessary financial resources. Such a capital increase requires that the existing losses are offset by means of a capital reduction.[50]

It is also worth considering that, while Article 76 of the CLD does not regulate corporate restructuring transactions, such as mergers and divisions, it may nevertheless play an important preparatory role for such operations:

Where a company has accumulated significant losses, proceeding directly with a merger may raise concerns under capital maintenance rules. In such cases, the transferring entity may consider first offsetting its losses by means of a capital reduction under Article 76 of the CLD.[51] In doing so, it 'cleans up' its balance sheet without triggering the creditor-protection mechanism under Article 75.

Ultimately, by eliminating accumulated losses beforehand, the transferring entity enters the transaction as a 'healthy' company, thereby reducing the risk that the merger leads to unfair advantages conferred on shareholders by the company and, consequently, to a violation of capital maintenance principles. Thus, Article 76 of the CLD may constitute a preparatory (remedial) measure in merger scenarios where more liabilities than assets are transferred.[52]

2.1.2.2. Implementation of Art. 73 et seqq of the CLD in Austrian and in Bulgarian Law

The rules on capital reduction under the Company Law Directive are transposed into Austrian law in §§ 175 et seqq of the Austrian AktG and into Bulgarian law in Article 202 of the Bulgarian

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50 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 76 Rz 3.

51 See Section 4.5.1.

52 For the development of this line of reasoning, see: Wolfgang Schwarz, 'Das Verbot der Einlagenrückgewähr bei Verschmelzungen' (PhD thesis, University of Vienna 2017) 70; See also Section 4.5.1.

Commercial Act, which, in turn, refers to the provisions applicable to private limited liability companies (*ООД*) in Articles 150–153.

The Austrian transposition is functionally closer to the CLD's requirements and wording: In general, creditors of Austrian companies must assert their right of security within six months from disclosure of the general meeting's decision in the commercial register.[53] Under Austrian law, the capital reduction becomes legally effective upon registration of the general meeting's decision with the commercial register[54], meaning that, legally and theoretically, creditors cannot 'block' the capital reduction.

As in the CLD, the Austrian legislator also stipulates that no payments to shareholders and no release from shareholders' contribution obligations, may take effect until the six-month period have elapsed and creditors who applied within the prescribed time limit have been satisfied or secured.[55]

In contrast to the Austrian legal framework, reducing the share capital of Bulgarian companies is carried out in two steps: First, the decision on the capital reduction should be disclosed and filed with the Bulgarian commercial register. As of filing, a statutory three-month period starts running, in which creditors may disagree with the capital reduction.[56]

Second, the capital reduction becomes legally effective only after the three-month deadline has expired and only if all disagreeing creditors have been secured or their claims have been satisfied.[57] As an additional safeguard, it is stated that payments to the shareholders due to the capital reduction may be made only after the reduction has been registered with the commercial register (ie after becoming legally effective) and after the creditors who have expressed disagreement with the reduction have received security or payment.[58]

Having these two separate steps in mind, it is clear that, under Bulgarian law, the capital reduction does not become legally effective merely by the registration of the shareholders' decision with the commercial register, as it does under Austrian law.[59] In contrast, the capital reduction

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53 § 178 (1) Austrian AktG; Nagele/Lux in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 178 Rz 12 ff.

54 § 177 Austrian AktG.

55 § 178 (2) Austrian AktG.

56 Article 150 of the Bulgarian Commercial Act (*Търговски закон*).

57 Article 151 of the Bulgarian Commercial Act (*Търговски закон*).

58 Article 153 of the Bulgarian Commercial Act (*Търговски закон*).

59 However, this applies only to *AG*s. For *GmbH*s, the capital reduction becomes legally effective only *after* creditors have been satisfied or secured, ie creditors have a 'veto' right – see Völkl in Straube/Ratka/Rauter (eds), *Wiener Kommentar zum GmbH-Gesetz* (Manz 2017) § 55 Rz 14, 36.

taking legal effect is subject to the creditors being satisfied.

Therefore, in a capital reduction scenario, creditors of Bulgarian companies indeed have a 'transaction blocking' mechanism. With this, it can be argued that the Bulgarian legal framework constitutes a genuine ex-ante[60] creditor protection.

Although the Austrian and the Bulgarian provisions seem to be considerably different in terms of the level of creditor protection (ex-post[61] vs. ex-ante protection), this is not the case, as they largely lead to the same outcome and produce the same economic effect.

This is beacause, under Austrian law, creditors' agreement may not be required for the capital reduction to become legally effective (as it is under Bulgarian law), yet still no payments to shareholders or releases from contribution obligations may take effect until creditors have been satisfied or secured (§ 178 (2) Austrian AktG.).

As explained in Section 2.1.2, one of the main reasons to carry out a capital reduction is to create distributable amounts and to free locked capital. If creditors can prevent these amounts from being distributed to shareholders, the economic purpose of the capital reduction largely disappears. In practice, therefore, shareholders have little incentive to proceed with the reduction if creditors oppose it.

For this reason, the effects of creditors exercising their rights under §§ 175 et seqq of the Austrian AktG and Article 202 of the Bulgarian Commercial Act lead to a similar functional outcome. In both systems creditors effectively retain a significant ability to prevent value from being transferred to shareholders.

What is more, both under Austrian and Bulgarian law, and in contrast to the CLD, the right to demand security does not require creditors to prove that their claims are jeopardised by the capital reduction.[62] This is where the national regimes adopt a more creditor-friendly approach than the CLD. This is one more reason why it is not reasonable to claim that Bulgarian law is more creditor-friendly than Austrian law.

In summary, the national regimes transposing Articles 73 et seqq of the CLD are

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60 This is because creditors may prevent the capital reduction from taking legal effect if their claims are not satisfied or not adequately secured.

61 Creditors of Austrian companies cannot prevent the capital reduction from taking legal effect. It becomes legally effective as of filing the shareholders' decision on the capital reduction with the commercial register. Creditors can assert their right of security *after* the capital reduction has become legally effective.

62 Nagele/Lux in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 178 Rz 11; Огнян Герджиков, *Учебник по търговско право, Част I Търговци* (ИК 'Труд и право' 2025) § 47, 47.2.3. / Ognyan Gerdzhikov, *Textbook of Commercial Law, Part I: Traders* (Trud i Pravo 2025) § 47, 47.2.3.

economically similar. For the purposes of the further analysis in this thesis, this implies that no significant divergences should be expected and that examining them within a common analytical framework is reasonable.

2.2 Special Creditor Protection in the Company Law Directive

The Company Law Directive entails, in addition to the general creditor protection provisions, rules that protect creditors in the context of corporate restructurings.

Corporate restructurings are often referred to as extraordinary transactions[63] and typically include mergers, divisions and conversions. As this thesis focuses on domestic and cross-border mergers only, the other two restructuring forms will not be examined. However, it should be noted that many of the rules and provisions governing mergers are also applicable to divisions and conversions. Therefore, the following analysis can largely be implemented, by analogy, to the other types of corporate restructurings.

Domestic mergers have been subject to regulation since Directive (EU) 2017/1132. The latter also entailed certain rules on cross-border mergers, which were, however, significantly amended and expanded by the Mobility Directive (Directive (EU) 2019/2121).

The following subsections aim to provide an overview of the special creditor protection provisions in the context of domestic and cross-border mergers, as well as a brief account of their implementation in Austrian and Bulgarian law. Before turning to this analysis, however, it is necessary to define what constitutes a merger and to outline its main types relevant to this thesis.

2.2.1 Definition of Mergers and Types of Intragroup Mergers

Mergers are extraordinary transactions by which only one company replaces a plurality of companies, and this is done either by forming a new company or by incorporating one or more companies into another company.[64] Thus, in general, there are two main types of mergers: 'merger by acquisition' and 'merger by the formation of a new company':

According to Article 89 of the Company Law Directive, a merger by acquisition occurs when one or more companies are wound up without liquidation and transfer all their assets and liabilities to another (already existing) company in exchange for shares in the acquiring company issued to the shareholders of the acquired company or companies, possibly accompanied by a cash

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63 Andrea Vicari, *European Company Law* (De Gruyter 2021) 235.
64 Andrea Vicari, *European Company Law* (De Gruyter 2021) 237.

payment not exceeding 10% of the nominal value of the shares issued.

Similarly, in accordance with Article 90 of the CLD, a merger by the formation of a new company requires the winding up of several companies without liquidation and the transfer of all their assets and liabilities to a newly incorporated company in exchange for the issue to their shareholders of shares in the new company (and a cash payment, if any).

Mergers may further be distinguished depending on whether they occur within a single Member State or involve companies from different Member States. Accordingly, mergers can be classified as domestic mergers or as cross-border mergers.

The consequences of all types of mergers occur *ipso jure* and simultaneously, meaning that they arise by the mere operation of law[65] and take effect at the same time. Briefly, the consequences are the transfer of all assets and liabilities of the company being acquired to the acquiring company; the shareholders of the company being acquired become shareholders of the acquiring company; and the company being acquired ceases to exist.[66]

Generally, mergers are carried out either for economic or for legal reasons. Economic reasons include, among others, the increase of the economic and research potential of the merging companies, the reduction of costs and the increase of profits, the elimination of a competitor from the market, etc. As to the legal incentives, they include, among others, preserving the assets of a company by avoiding the lengthy liquidation procedure, acquiring rights under conditions of universal succession, etc.[67]

This thesis will focus mainly on mergers by acquisition, as it examines and analyses intragroup mergers, in which usually no new company is incorporated, but rather companies merge into already existing ones. Against this background and for the purposes of Section 4, three types of parent-subsidiary mergers that are relevant for the thesis will be presented:

In an upstream merger scenario, the subsidiary mergers into its parent, whereby the subsidiary ceases to exist and the parent succeeds to its assets, rights, liabilities, and obligations by operation of law.

In contrast, a downstream merger means that the parent company is merged into its

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[65] Jonathan Law (ed), *A Dictionary of Law* (10th edn, OUP 2022).

[66] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/92 Art 105.

[67] Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) / Angel Kalaydzhiev*, Corporate Restructuring of Companies* (Trud i pravo 2019).

subsidiary, whereby the latter continues to exist and the former is wound up.

Last but not least, a side-stream merger occurs when two companies are merged that directly or indirectly have the same shareholder.[68]

2.2.2 Special Creditor Protection in Domestic and Cross-Border Mergers

Mergers, whether domestic or cross-border, involve a wide range of risks for creditors.

Most significantly, mergers inevitably lead to a change of the debtor that - at least where the claim is based on a contractual relationship - was chosen by the creditors. Creditors of the transferring company may, after the merger, be faced with a debtor they did not choose and that may have a poorer reputation or weaker financial standing.[69] Mergers may also be detrimental to the creditors of the acquiring company – for instance, where the transferring company has more liabilities than assets and thereby reduces the capital of the acquiring company.

In the case of cross-border mergers, the risks for creditors seem to be even greater, as they may receive a new debtor who is subject to a different jurisdiction. The acquiring company may be subject to a regime that provides less protection for creditors, for example with respect to minimum share capital or equity capital requirements.[70]

To protect creditors of the merging companies, the European legislator has created special creditor protection rules in the context of domestic and cross-border mergers. As regards domestic mergers, the special rules apply only to Annex I companies, whereas the rules on cross-border mergers also encompass other limited liability companies, including private limited liability companies (Annex II of the CLD).[71]

Article 99 (1) of the Company Law Directive - the creditor protection mechanism for domestic mergers - stipulates that Member States shall provide for an adequate system of protection of the interests of creditors of the merging companies whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

The first subparagraph of Article 99 (2) further clarifies that creditors are entitled to

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[68] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 155.

[69] Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 99 Rz 2.

[70] Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 126b Rz 7.

[71] Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 87 Rz 10 ff; Art 119 Rz 1 ff.

adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already benefit from equivalent safeguards. Moreover, provided that creditors can credibly demonstrate that due to the merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company, they can apply to the appropriate administrative or judicial authority for adequate safeguards.

As to special creditor protection within the context of cross-border mergers, Article 126b of the Company Law Directive continues to safeguard creditors whose claims antedate the disclosure of the common draft terms of the cross-border merger and have not fallen due at the time of such disclosure (a kind of ex-ante protection[72]).

Interestingly, and in contrast to the requirements of Article 99 CLD, each merging company should include creditor safeguards in the common draft terms of the cross-border merger. If creditors are dissatisfied with these safeguards, they may apply, within three months of the disclosure of the common draft terms, to the appropriate administrative or judicial authority for adequate safeguards, provided that they can credibly demonstrate that, due to the cross-border merger, the satisfaction of their claims is at stake and that they have not obtained adequate safeguards from the merging companies. What is more, Member States shall ensure that the safeguards are conditional on the cross-border merger taking effect.

Overall, the special creditor protection regime in merger law reflects the two-stage system[73] comparable to that found in the general creditor protection regime. However, as will be shown in Section 3, the structural design and protective intensity of the two regimes differ significantly, suggesting that the answer to the question of whether the special creditor protection rules supersede and exclude general creditor protection lies rather in the negative.

The wording of both provisions – especially Article 99 – of the Company Law Directive is broadly framed, suggesting that Member States have significant room for interpretation and discretion in implementing the EU provisions.[74] How differently Member States (here, Austria and Bulgaria) have transposed the special creditor protection regimes into their national laws can be seen from the following section.

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72 See Section 3.1.

73 See Section 2.1.2 - First, creditors must assert their claims against the company itself, and only if the company fails to provide adequate safeguards may they apply to a competent authority.

74 Dorresteijn et al, *European Corporate Law* (4th edn, Wolters Kluwer 2022).

2.2.3 Implementation of Art. 99 and 126b of the CLD under Austrian and Bulgarian Law[75]

Article 99 of the CLD is transposed into Austrian law by § 226 of the Austrian AktG. According to this national provision, creditors have the right, within six months from the publication of the registration of the merger in the commercial register, to request security for their claims, provided that they are not yet entitled to satisfaction. In doing so, creditors must make it plausible that their claims are endangered by the merger.

In contrast to the EU provision, § 226 of the Austrian AktG constitutes an ex-post creditor protection mechanism.[76] This is because, under Austrian law, mergers become legally effective as of their publication with the commercial register.[77] Creditors of Austrian companies may request security only after the merger has already become effective. This Austrian rule differs from Article 99 of the CLD, as the latter takes the 'publication of the *draft terms* of merger' as its relevant point in time, implying that the EU rules in the context of domestic mergers may be perceived as slightly more creditor-friendly than their Austrian transposition.

However, this deviation is well founded and can be justified by the strive for legal certainty and the avoidance of opportunistic blocking behaviour. First, if creditor protection were fully ex-ante, creditors could delay the registration and therefore create uncertainty as to whether the merger will take effect. Second, the ex-post mechanism prevents creditors from delaying the transaction, forcing companies into negotiations and increasing transaction costs.

What is more, the Austrian rule meets the minimum requirements of Article 99 of the CLD, ie it does not 'under-implement it'. This is because, although it provides ex-post rather than ex-ante protection, § 226 of the Austrian AktG succeeds in providing an adequate system for the protection of the interests of creditors of the merging companies, as creditors retain the right to request security where the merger endangers their claims.

Moving to the Bulgarian transposition of Article 99 of the CLD, it is significantly different from its Austrian counterpart:

Article 263k of the Bulgarian Commercial Act stipulates that the acquiring company must manage separately the assets transferred from each transforming company for six months after registration of the merger in the commercial register. Moreover, within the six-month period, any

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75 AI has been used to translate the national laws into English (from German and Bulgarian).

76 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 226 AktG Rz 7; Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 226 AktG Rz 3.

77 See § 225a (3) Austrian AktG.

unsecured creditor whose claim arose before the merger has taken legal effect may demand enforcement or security. If the demand is not satisfied, the creditor is entitled to preferential satisfaction from the assets of its (original) debtor and may ask the court to order security through attachment or interdiction.

The separate asset management stipulated by Article 263k offers a significantly high level of security to creditors. This is because it prevents asset dilution after the merger and improves traceability of the assets. In addition, it preserves the economic link between the creditor and the asset base of its original debtor, thereby reducing the risk that the creditor's position is weakened through the merger.[78]

Compared to the Austrian transposition of Article 99, it can be argued that Article 263k of the Bulgarian Commercial Act follows an 'asset-based-protection-approach' rather than a simple 'claim-based-protection-approach'. This is because § 226 of the Austrian AktG protects creditors' claims by allowing them to request security, without giving them the right to target the assets of their original debtor. In contrast, Article 263k separates the assets that originally backed creditors' claims, ie the law protects the asset base behind the claim, not only the claim itself.

Given that Article 263k of the Bulgarian Commercial Act provides such a high level of creditor protection in the context of domestic mergers, one may even question whether it is necessary to consider the application of general creditor protection alongside special creditor protection. However, this issue will be further addressed in Section 3.

As regards the transposition of Article 126b of the Company Law Directive - the special creditor protection regime for cross-border mergers - into Austrian and Bulgarian law, it will be addressed jointly, as it is to a large extent similar in both jurisdictions.

Both § 37 of the Austrian Reorganisation Act (*Umgründungsgesetz*) and Article 265п of the Bulgarian Commercial Act stipulate that creditors dissatisfied with the safeguards offered in the merger plan may request additional security within three months after the disclosure of the merger plan, on the condition that the creditor shows that the merger endangers its claim.

However, the two national provisions have some differences: Article 265п (4) of the Bulgarian Commercial Act provides that the acquiring company with its seat in the Republic of Bulgaria shall manage separately the assets transferred to it from each of the transforming

78 Огнян Герджиков, *Учебник по търговско право, Част I Търговци* (ИК 'Труд и право' 2025) § 67, 67.2. / Ognyan Gerdzhikov, *Textbook of Commercial Law, Part I: Traders* (Trud i Pravo 2025) § 67, 67.2.

companies for a period of six months from the registration of the merger.

In contrast, the Austrian legislator did not adopt this asset-based approach. Nevertheless, it introduced an even more sophisticated creditor protection regime: According to § 37 (3) of the Austrian Reorganisation Act, the pre-merger certificate[79] may be issued only once an additional adequate security has been provided to all creditors dissatisfied with the securities in the merger plan. This blocking effect may, however, arise only in the case of the so-called 'Hinaus-Verschmelzung', ie when the acquiring company is a foreign company (from Austrian perspective).

This blocking effect of creditors exercising their right under § 37 constitutes an extremely high level of creditor protection, as creditors have the opportunity to largely obstruct the merger from becoming legally effective, or at least to delay it. The blocking mechanism resembles the kind of 'veto right' creditors have in the case of capital reduction. Thus, one may plausibly ask whether it is necessary to examine the implications of general creditor protection alongside special creditor protection. This question will be further addressed in Section 3.

To sum up, the significant room for discretion that Member States have when implementing the special creditor protection rules for domestic and cross-border mergers can be clearly seen in the transposition of Articles 99 and 126b of the CLD into Austrian and Bulgarian law.

3. Interconnection between General Creditor Protection and Special Creditor Protection under Directive (EU) 2017/1132, as amended by Directive (EU) 2019/2121

This section addresses the first research question. It begins with a comparative analysis and provides an answer from the perspective of EU law. It then turns to the doctrinal debate at national level, first in Austria and subsequently in Bulgaria. The section concludes with a summary and the author's own position on the first research question.

3.1 Functional Comparison between General Creditor Protection and Special Creditor Protection under the Company Law Directive

At the outset of this analysis, it should be noted that both general and special creditor protection under the Company Law Directive operate (to a certain extent) ex-ante[80], in the sense that creditors

79 See § 45 of the Austrian Reorganisation Act (*Umgründungsgesetz*).
80 Cf Section 2.2.3. § 226 Austrian AktG operates ex-post.

are taken into consideration before the capital reduction or, respectively, the merger takes economic effect.[81]

This is because, under both regimes, the triggering event is 'the publication of the *decision* on the reduction', 'the publication of the *draft terms* of merger', and 'the disclosure of the *common draft terms* of the cross-border merger'. However, although this may seem counterintuitive, the mere fact that both regimes take creditors' interests into account *before* the capital reduction, or the merger takes effect does not mean that they afford an equivalent level of protection.[82]

This can be seen most clearly in the differing consequences of a creditor exercising its rights under Article 75 of the CLD (creditor protection in the context of a capital reduction) and, in contrast, under Articles 99 and 126b of the CLD (creditor protection in the context of mergers).

Generally, a creditor of a company seeking to reduce its capital can prevent the reduction from taking (economic) effect until its claim has been satisfied or adequately secured. Therefore, Article 75 of the CLD constitutes a kind of 'transaction-blocking mechanism'.[83] By stipulating that the capital reduction shall be void or that no payment may be made for the benefit of the shareholders until the creditors have obtained satisfaction, this general creditor protection mechanism makes the capital reduction practically unattractive until the creditors' interests are sufficiently safeguarded.

In contrast, the special creditor protection rules entail no requirement to suspend the merger, if creditors are not taken account of. On the contrary, the merger can proceed while creditor claims are addressed - it is a simultaneous process. In other words, creditors of merging companies do not enjoy anything close to the 'veto right' that exists in the context of capital reduction under the general creditor protection regime.[84]

The opposing view (that a creditor's challenge can block a merger[85]) cannot be supported,

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81 Jelena Lepetić, 'Creditor Protection in Cross-Border Conversions, Mergers and Divisions' (2022) Anali Pravnog Fakulteta u Beogradu 713, 725; Martin Winner, 'Protection of Creditors and Minority Shareholders in Cross-border Transactions' (2019) European Company and Financial Law Review 44, 56.

82 Similarly, Martin Winner, 'Protection of Creditors and Minority Shareholders in Cross-border Transactions' (2019) European Company and Financial Law Review 44, 56 (*'However, this does not necessarily improve the creditors' position'*).

83 Andrea Vicari, *European Company Law* (De Gruyter 2021) 67 f (*'…a strong position that amounts to a factual veto power'*).

84 Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 126b Rz 11.

85 See eg, Jessica Schmidt, 'EU Company Law Package 2018 – Mehr Digitalisierung und Mobilität von Gesellschaften (Teil 1)' (2018) 6 Der Konzern 229, 239.

as the existence of such a challenge is not among the elements to be examined prior to the merger's registration in the respective commercial register.[86] In that sense, it should not be treated as an additional condition for registration, since it is not explicitly provided for in the CLD.

This difference in the consequences of exercising creditors' rights results in creditors of merging companies being placed in a less favourable position than creditors of companies reducing their capital. Thus, it can be argued that the special creditor protection regime is less intrusive and structurally less protective than the general creditor protection regime.[87]

Nevertheless, this imbalance may be justified: Creditors generally do not have a say in the transactions companies conclude in the ordinary course of business, even where such transactions may be disadvantageous to them. They are not entitled to block such transactions; nor should they, as a matter of principle, be entitled to block a merger solely on that basis. In contrast, capital reductions attack directly the capital base, the main purpose of which is to be at the creditors' disposal.[88] Thus, the higher level of protection offered by general creditor protection rules compared to special creditor protection provisions is legitimate and well-founded.

In addition, the wording of Article 75 of the CLD and Article 99 of the CLD contains a subtle distinction which may, however, give rise to a significant misunderstanding of both creditor protection regimes: [89]

The former stipulates that Member States are allowed to set aside the right of creditors to obtain security in the event of a capital reduction, provided that such safeguards are *not necessary having regard to the assets of the company*. The latter provides that creditors of merging companies are entitled to obtain adequate safeguards w*here the financial situation of the merging companies makes such protection necessary*.

A superficial reading might suggest that the reference to the company's 'assets' in Article 75 and to its 'financial situation' in Article 99 conveys a similar economic connotation, thereby creating the impression that creditor protection depends in both cases on financial difficulty of the company. Whereas it is true that both Article 75 and Article 99 of the CLD

[86] Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 126b Rz 11.

[87] For this reasoning, see eg Koppensteiner, 'Verschmelzung und Vermögensbindung' (1999) Wirtschaftsrechtliche Blätter 333, 334 f.

[88] Nicola de Luca, *European Company Law* (2nd edn, Cambridge University Press 2021) 197 ff; Andrea Vicari, *European Company Law* (De Gruyter 2021) 47 ff.

[89] AI tools were used at a preliminary stage to assist in generating the idea for this paragraph and the following paragraphs. The legal reasoning, structure, and final text are the author's own.

condition creditor safeguards on the necessity of protection in light of the company's financial position, it should be noted that the provisions differ in their structural starting point.

Article 75 of the CLD establishes a creditor right *in principle*, and the possibility of denying safeguards constitutes merely an *exception* to this general principle, provided that the company's assets are sufficient. By contrast, the (worsen) financial situation of the merging companies under Article 99 of the CLD is a precondition for the existence of creditors' rights themselves.

In other words, Article 99 of the CLD does not establish a general principle, from which Member States may deviate if the financial situation of the merging companies allows it. On the contrary, creditors' rights under Article 99 may be exercised *only* if their claims are actually at risk considering the financial situation of the companies involved in the merger.[90]

This distinction between Article 75 and Article 99 of the CLD reflects a different regulatory philosophy. It assumes that capital reduction is inherently suspicious, as it constitutes a direct interference with the company's capital base. In contrast, mergers are considered to be neutral, or at least not per se prohibited, unless proven to be risky or contrary to good morals.[91]

Having these conceptual and philosophical differences in mind, it seems logical that the European legislator has made the special creditor protection rules less restrictive than the general creditor provisions. This is reasonable also with regard to the tension between the freedom of establishment and the restrictive nature of creditor protection. It would not be balanced or justifiable to intervene at such a high level in companies' right to establish themselves in their home Member State or abroad.

However, as mergers may conceal risks that are as detrimental to creditors as capital reductions[92], it cannot be assumed that the European legislator intended to leave creditors of merging companies with the comparatively weaker protection provided under Article 99 of the CLD where, in a particular case, the risks are disproportionate.

Thus, it is logical that the general creditor protection provisions, which constitute a higher level of protection for creditors, should be applied subsidiarily, provided that the special creditor

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90 See Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/90 Art 99 para 2 subpara 1; Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 99 Rz 10.

91 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 73.

92 See eg Martin Winner, 'Protection of Creditors and Minority Shareholders in Cross-border Transactions' (2019) European Company and Financial Law Review 44, 49 f.

protection mechanism does not sufficiently take account of creditors' interests in a merger.

What is more, the CJEU has also indicated in its jurisprudence - in *I.G.I. Srl v Maria Grazia Ciceria and Others* - that in an extraordinary transaction scenario (in the judgment, a division; however, an analogy may also be drawn to mergers), even though special rules exist, creditors may still rely on general remedies, such as the *actio pauliana*. The Court supported this reasoning by stating that the CLD provides only a minimum system of protection and, therefore, Member States may also provide for additional protective measures.[93] Since the Court allows the use of the *actio pauliana* alongside the special creditor protection provisions, it can be argued that general creditor protection provisions may also be relied upon.

To conclude, the asymmetry in the level of protection between the two regimes examined in the thesis confirms that the special creditor protection regime cannot be regarded as exhaustive. Rather, it constitutes a minimum layer of protection which should be supplemented, *where necessary*, by the application of general creditor protection provisions in order to ensure an adequate level of creditor protection in merger scenarios.

3.2 Austrian Perspective[94]

The debate on the simultaneous application of both general and special creditor protection regimes to the same case is significantly more advanced in Austria than in other EU jurisdictions, including Bulgaria. The prevailing (and, in fact, more convincing) view in Austrian literature[95] and in the courts' jurisprudence[96] is that the special creditor protection regime is *not* an exhaustive one.

The opposing opinions[97] - that special merger laws suspend general creditor protection

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93 Case C–394/18, *I.G.I. Srl v Maria Grazia Cicenia and Others* [2020] ECLI:EU:C:2020:56 para 67.

94 AI tools were used to assist with translating national legislation into English, helping capture the meaning of the provisions without losing nuance in translation.

95 See eg: Saurer in Doralt/Nowotny/Kalss (eds), *Kommentar zum AktG* (3rd edn, Linde 2021) § 52 AktG Rz 92 f; Saurer, 'Die verbotene Einlagenrückgewähr beim "Downstream-Merger" - Eine Replik zu Aman, "Down Stream Fusion" (1996) RdW 155, 156 f; Friedrich Harrer, 'Haftungsprobleme bei der Umwandlung einer GmbH in eine KG' (2001) 8 Wirtschaftsrechtliche Blätter 342, 343; Koppensteiner, 'Verschmelzung und Vermögensbindung' (1999) Wirtschaftsrechtliche Blätter 333, 334 f.

96 See the landmark decision of the Austrian Supreme Court of Justice (OGH), 6 Ob 4/99b para 3. See also judgments confirming this view, eg OGH 6 Ob 70/03t; OGH 6 Ob 165/04i; OGH 6 Ob 235/07p; OGH 6 Ob 226/09t.

97 See eg: Günther Aman, 'Down Stream Fusion - Verbot der Einlagenrückgewähr, Gläubigerschutz und Minderheitenrechte' (1995) RdW 292, 294 f; Günther Aman, 'Nochmals: Down Stream Fusion – verbotene Einlagenrückgewähr und Gläubigerschutz' (1996) RdW 465, 466; Artmann, 'Das „Ausmaß" der Kommanditeinlage bei errichtender Umwandlung' (1999) GesRZ 26, 29 f; Christian Nowotny, 'Kapitalerhaltung bei Verschmelzungen und Spaltungen, Lehren aus OGH 11.11.1999' (2000) RWZ 97; Szep, 'Umgründungen

provisions - and the arguments supporting them are rather unconvincing:

Some scholars apply the logic of the *lex specialis derogat legi generali* principle.[98] In essence, they argue that both regimes pursue the same objective, namely creditor protection. Mergers already have their own special creditor protection rules which, according to them, sufficiently protect creditors. Therefore, it is not necessary to also apply the general capital maintenance rules, in particular the prohibition of repayment of capital contributions.

Under Austrian law, creditors can demand security only if the merger endangers their claims (§ 226 Austrian AktG). If no creditor endangerment exists, creditors cannot demand security and the purpose of the general creditor protection regime is also not violated. Accordingly, these authors find no need to apply the prohibition of repayment of contributions in addition to the merger-specific creditor protection rules.

This point of view cannot be shared, as the two regimes address different risks. While special creditor protection safeguards creditors against the specific risks connected with restructurings, general creditor protection protects the company's assets and capital on a continuous basis. In other words, the former is risk-specific, whereas the latter is asset- and capital-oriented. Since they address different risks, their objectives also differ, meaning that one regime cannot fulfil the objectives of the other, and vice versa.[99] Thus, the above-mentioned argument ultimately fails.

Moreover, Austrian experts who argue in favour of an exhaustive regime state that mergers are fundamentally different from capital reductions, ie they have a fundamentally different legal nature. Because the transactions are structurally different (a company ceases to exist without going into liquidation vs. a company reduces its share capital), the general creditor protection regime of capital reduction cannot simply be transferred to mergers.[100]

However, the distinct legal nature of the transactions does not in itself justify excluding the application of general capital maintenance rules, as both regimes can lead to the same economic

iZm Personengesellschaften im Lichte jüngster OGH-Rsp zur Kapitalerhaltung' (2001) GmbH-Bulletin 804, 805 f.

98 See eg, Greindl, 'Verbotene Einlagenrückgewähr bei Umgründungen im Konzern' (1999) RdW 762, 765 ff.

99 For a similar argument see: Friedrich Harrer, 'Haftungsprobleme bei der Umwandlung einer GmbH in eine KG' (2001) 8 Wirtschaftsrechtliche Blätter 342, 343 *('§ 226 AktG was designed specifically for merger situations, namely for the union of two previously separate liability pools, and therefore it does not replace broader capital-maintenance protection'*).

100 See eg, Christian Nowotny, 'Kapitalerhaltung bei Verschmelzungen und Spaltungen, Lehren aus OGH 11.11.1999' (2000) RWZ 97.

effect[101] - reduction of the company's asset base.

This would be the case, for instance, when a company with higher share capital merges into a company with lower share capital. Through this process, capital that was bound (*gebundenes Kapital*) in the transferring company may be transformed into free, unbound capital (*ungebundenes Kapital*) in the acquiring company.[102] This capital can subsequently be distributed to the shareholders of the acquiring company, as merger law does not impose the same prohibition on payments to shareholders until creditors have been satisfied as § 178 (2) Austrian AktG does (or Article 75 (2) of the CLD).[103] In such a case, distribution may occur before creditors have had the opportunity to request security, thereby allowing the merger to be economically equivalent to a capital reduction.[104]

There is hardly any justification why creditors should receive less protection in economically identical situations and authors therefore speak of a 'value contradiction' (*Wertungswiderspruch*).[105] This contradiction (inconsistency) is usually attributed to the (only) ex-post protection offered by § 226 of the Austrian AktG[106], which is rightly considered insufficient to safeguard the creditors of merging companies.

Furthermore, some scholars base their argument for an exhaustive interpretation of the special creditor protection rules on the wording of § 224 AktG. According to this view, the fact that only § 224 (2) (1) - which applies solely to side-stream mergers - expressly refers to violations of the prohibition of the return of capital contributions implies that this general creditor protection rule should not apply to other types of mergers, eg to down-stream or up-stream mergers.[107]

However, limiting the application of the prohibition of the return of capital contributions to side-stream mergers is not convincing, as the same risk may also arise in other merger

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101 See eg, Koppensteiner, 'Verschmelzung und Vermögensbindung' (1999) Wirtschaftsrechtliche Blätter 333, 334 f.

102 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 165.

103 Article 75 (2): The laws of the Member States shall also stipulate at least that the reduction shall be void, or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.

104 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 46.

105 Koppensteiner, 'Verschmelzung und Vermögensbindung' (1999) Wirtschaftsrechtliche Blätter 333, 334 f.

106 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 226 AktG Rz 7; Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 226 AktG Rz 3.

107 Günther Aman, 'Down Stream Fusion - Verbot der Einlagenrückgewähr, Gläubigerschutz und Minderheitenrechte', RdW 1995, 292, 294 f; Christian Nowotny, Kapitalerhaltung bei Verschmelzungen und Spaltungen - Lehren aus OGH 11.11.1999, RWZ 2000, 97 FN 3.

constellations - both in down-stream and up-stream mergers.[108] Further analysis in this regard will be provided in Section 4.

At this point, and for reasons of clarity, only a brief example of a downstream merger scenario will be given: If the parent company, which has a negative asset base, merges into its 100 % subsidiary, the subsidiary absorbs the parent's losses, thereby providing a performance to its shareholder that was not at arm's length. If the prohibition of the return of capital contributions were not applicable, companies would have the opportunity to circumvent the rules on profit distribution by using mergers.

It is also worth noting that the Austrian Supreme Court of Justice (*OGH*) very early adopted an approach leading towards a simultaneous application of the general and special creditor protection regimes. In its landmark decision in 1999 - 6 Ob 4/99b, the OGH stated that creditor protection influences the interpretation of all legislative amendments and that its purpose is to protect the share capital as the permanent financial basis of the company and as the main asset available to creditors, preventing it from being reduced through payments to shareholders.[109]

Therefore, the court confirmed that capital maintenance (general creditor protection) is a fundamental principle of company law as a whole. Thus, its objectives should not be circumvented by other provisions or practices. To avoid such circumvention, the general creditor protection regime should be applied in conjunction to the special creditor protection provisions in merger law.

A brief reference should also be made to § 37 of the Austrian Reorganisation Act. As mentioned in Section 2.2.3, in some cases, the creditor's challenge may 'block' or delay the merger, if the creditor had not received adequate safeguards. Thus, it seems logical to ask whether in this case, the special creditor protection regime is indeed sufficient to preserve creditors' interests.

Nevertheless, despite the kind-of 'blocking mechanism' of § 37 (3), special merger laws should still not be exhaustively interpreted. This is because cross-border restructurings are more dangerous to creditors (due to a change in the applicable law, which may lead to the application of a more liberal capital maintenance regime; procedural obstacles to the enforcement of claims abroad; shift of the COMI, resulting in a foreign legal system becoming applicable with regard to

[108] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 88.

[109] OGH 6 Ob 4/99b para 3.

insolvency law[110]), and yet they are protected with less intensity than domestic mergers.

The less intensive protection for cross-border mergers derives from, among others, the freedom of establishment. In general, freedom of establishment takes precedence over creditor protection where an Austrian company is involved.[111] This follows from the Court of Justice of the European Union's jurisprudence, especially from the *Centros*-case[112], according to which the freedom of establishment prevails even where a restructuring measure is carried out solely in order to subject the company to a more liberal company law regime (including a more liberal capital maintenance regime).

Austrian authors also present other reasons why creditors in the context of cross-border mergers are less safeguarded, for example the requirement to prove that creditors are concretely endangered, although the release of bound capital does not necessarily constitute a concrete risk.[113] These reasons will not be further examined at this point.

To sum up, in light of an *argumentum a minore ad maius*, if the special creditor protection rules are not exhaustive in the context of domestic mergers, while cross-border mergers are both more dangerous for creditors and subject to weaker protection, it logically follows that the special creditor protection provisions governing cross-border mergers cannot be regarded as exhaustive either. In simple terms: If something applies in the less problematic situation, it must also apply in the more problematic situation.

In summary, the prevailing opinions in the literature and also the prevailing jurisprudence state that the special creditor protection regime in Austria is not an exhaustive one. These views are also plausible and well-founded.

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110 Hubner, 'Gläubigerschutz bei grenzüberschreitenden Umgründungen nach dem EU-Umgründungsgesetz' (2023) GES 115.

111 Hubner, 'Gläubigerschutz bei grenzüberschreitenden Umgründungen nach dem EU-Umgründungsgesetz' (2023) GES 122.

112 Case 212/97 Centros [1999] ECLI:EU:C:1999:126.

113 For more in this regard, see: Hubner, 'Gläubigerschutz bei grenzüberschreitenden Umgründungen nach dem EU-Umgründungsgesetz' (2023) GES 155 ff.

3.3 Bulgarian Perspective[114]

The Bulgarian legal literature contains only very limited discussion on the simultaneous application of general and special creditor protection rules.[115] A similar observation may be made with regard to the available case law on the matter. However, this apparent doctrinal and jurisprudential limitation finds a solid basis in the text of the Bulgarian Commercial Act itself.

In contrast to the outcome of the Austrian debate, the prevailing view among Bulgarian scholars[116] is that the special creditor protection regime – developed through Articles 263k, 263м, 263н and 265п of the Bulgarian Commercial Act – is of an exhaustive nature.

They support their views primarily through the *lex specialis derogat legi generali* principle, stating that Articles 149 - 153, as well as Articles 199 - 200 of the Bulgarian Commercial Act (rules on capital reduction), are not to be applied in the case of a merger.[117] According to them, the special merger rules entail special protection for creditors, which is sufficient to meet their needs in a merger scenario. However, these positions are typically not accompanied by a detailed justification as to why the special regime is considered sufficient to protect creditors in a merger scenario. Therefore, it is left to legal practitioners alone to identify the reasons and arguments backing these opinions.

The Bulgarian merger law regulates, to a large extent, risk scenarios that are left unregulated and overlooked by the Austrian legislator. For instance, Article 262x of the Bulgarian Commercial Act stipulates that no payments (distributions) may be made to shareholders if the acquiring company's capital is reduced following a merger. What is more, Article 263н provides that shareholders of the merging companies are not released from their obligation to pay capital contributions.

In contrast to Bulgarian law, these rules can be found in Austrian law only in § 178 (2)

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[114] AI tools were used to assist with translating national legislation into English, helping capture the meaning of the provisions without losing nuance in translation.

[115] As also acknowledged in Лиляна Николова 'Особености на защитата на кредиторите при капиталовите търговски дружества' (Автореферат, Варненски свободен университет 2024) 3 / Lilyana Nikolova, 'Specific Features of Creditor Protection in Capital Commercial Companie's (Dissertation summary, Varna Free University 2024) 3.

[116] See eg: Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 154 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 154; Георги Стефанов, *Преобразуване на търговски дружества (*Велико Търново 1993) 153 / Georgi Stefanov, *Corporate Restructuring of Companies* (Veliko Tarnovo 1993) 153.

[117] Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 154 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 154.

AktG, which constitutes a general creditor protection mechanism. As Austrian law does not incorporate such creditor protections within its specific merger provisions, it seems logical that Austrian legal practitioners are willing to rely on them also in merger scenarios.

This appears to be a valid reason why Bulgarian scholars tend to regard special creditor protection provisions as exhaustive. However, at this point, an important clarification should be made:

As mentioned in Section 2.2.3, the separate asset management stipulated by Article 263k of the Bulgarian Commercial Act offers such a high level of protection to creditors that it may raise the question as to whether general creditor protection rules are indeed needed to supplement the special rules for mergers.

Although creditor protection is indeed significantly high, it should be borne in mind that asset segregation does not equal capital maintenance. While Article 263k of the Bulgarian Commercial Act protects the original debtor's assets (because the assets of the transforming company must be managed separately for six months) this rule does not preserve the capital structure after the merger. Furthermore, creditors of Bulgarian companies cannot block the merger, even if they disagree with it (ie the special merger laws under Bulgarian law offer only an ex-post (*последваща*) protection).[118]

The counterargument to the prevailing opinion – namely that, also under Bulgarian law, the special creditor protection regime does not fully exclude the application of general creditor protection rules – is indirectly supported by some Bulgarian legal doctrine. It is argued that creditor protection is achieved through a system of legal rules (*комплекс от норми*)[119], suggesting that creditor protection is multi-layered and cannot be exhaustive at the level of merger law alone. Furthermore, it is expressly acknowledged that, *in addition* to the general system of creditor protection, Member States are required to introduce special rules for mergers. This formulation – *'in addition to'* - suggests that special creditor protection operates alongside, rather than instead of, general creditor protection mechanisms.[120]

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118 Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 69 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 69.

119 Лиляна Николова 'Особености на защитата на кредиторите при капиталовите търговски дружества', (Автореферат, Варненски свободен университет 2024) 5 / Lilyana Nikolova, 'Specific Features of Creditor Protection in Capital Commercial Companie's, Dissertation summary (Varna Free University 2024) 5.

120 Беанета Василева, 'Правна защита на интересите на кредиторите при презгранични вливания и сливания на търговски дружества във вторичното законодателство на Европейския съюз' (Русенски университет

As to courts' jurisprudence, Bulgarian courts have not addressed the examined issue in a thorough manner, as courts in Austria have. In fact, no court decision examining exactly the issue analysed in this thesis' first research question has been found. However, a conclusion may still be drawn from certain Bulgarian court decisions, although they do not directly address the issue:

The Sofia City Court examined a case[121] in which the claimants sought compensation for unjust enrichment under Article 59 of the Bulgarian Obligations and Contracts Act[122], arguing that a company which later merged into the defendant had used part of their land without legal basis. The defendant, as the legal successor of that company, argued that following the merger the claimants were protected only by the special creditor protection mechanism under Article 263k of the Bulgarian Commercial Act. Since they had not asserted their claim within the six-month period under that provision, the defendant maintained that their later claim under Article 59 was barred.

The Sofia City Court found the defendant's arguments unconvincing and stated that Article 263k of the Bulgarian Commercial Act provides *only one* legal possibility among others for securing the claims of creditors of companies in cases of merger. According to the Court, the provision does not preclude the right to seek compensation under Article 59 of the Bulgarian Obligations and Contracts Act where the conditions for such a claim are met.

The case was later appealed before the Bulgarian Supreme Court of Cassation, which remitted it to the Sofia City Court for reconsideration. In its subsequent judgment, the Sofia City Court held, in the context relevant here, that Article 263k of the Bulgarian Commercial Act provides only *additional* protection for creditors.[123]

Although not in the exact context of the special-general creditor protection debate, it can be argued that the Sofia City Court implicitly rejected the view that Article 263k constitutes an exhaustive creditor protection regime. Other provisions may be used in parallel when the protection is not sufficient. By analogy, this reasoning can be transferred to the issue examined in this thesis, suggesting that, *whenever necessary*, general and special creditor protection rules may

2010) 43 / Beaneta Vasileva, 'Legal Protection of Creditors' Interests in Cross-Border Mergers of Commercial Companies under the Secondary Legislation of the European Union' (Ruse University 2010) 43.

121 Решение № 4803 от 25.06.2013 г. на СГС по в. гр. д. № 16311/2011 г. (*Decision No 4803 of 25 June 2013 of the Sofia City Court in appellate civil case No 16311/201*).

122 Чл. 59 ЗЗД: '...Всеки, който се е обогатил без основание за сметка на другиго, дължи да му върне онова, с което се е обогатил, до размера на обедняването.' ('..*Anyone who has been unjustly enriched at the expense of another must return that with which they have been enriched, up to the amount of the impoverishment*').

123 Решение № 2212 от 2.04.2015 г. на СГС по в. гр. д. № 15407/2014 г (*Decision No 2212 of 2 April 2015 of the Sofia City Court in appellate civil case No 15407/2014*).

be applied simultaneously.

To sum up, Bulgarian legal doctrine does not engage with the question of whether special creditor protection rules are exhaustive or non-exhaustive to the same extent as Austrian legal doctrine. This may be explained by the fact that the Bulgarian legislator has addressed some of the issues analysed here before they had the opportunity to arise.

The larger part of Bulgarian scholarship convincingly considers that there is no need to apply the general creditor protection provisions alongside the special merger rules. However, this thesis advocates a more nuanced approach: The general creditor protection provisions should be applied subsidiarily in order to fill potential gaps where the special regime proves insufficient. This view is also supported by certain Bulgarian legal doctrine and, indirectly, by court jurisprudence.

3.4 Conclusion on the First Research Question

The general rules on capital maintenance should apply in conjunction with the special merger rules on creditor protection, whenever the latter does not sufficiently protect creditors. In other words, special creditor protection provisions under EU law are not designed to be exhaustive and to suspend the use of general creditor protection provisions.

In Austria, this is the prevailing view in the literature, and it also had been confirmed by Austrian courts. In contrast, Bulgarian scholarship tends to favour the exhaustive nature of the special creditor protection regime. However, it is suggested that the Austrian solution should also be followed in Bulgaria, where special merger laws prove to be insufficient to safeguard creditors.[124]

In brief, the main argument reasonably supporting the application in conjunction of the two creditor protection regimes is the legislator's intention. Neither the European, nor the Austrian, nor the Bulgarian legislator would have wanted to expose creditors to different levels of risk and to offer them different levels of protection in the same economic situation.

In addition, the simultaneous application of general and special creditor protection regimes can be justified, as it does not imply unlimited creditor protection. Capital maintenance under EU law is not absolute. As illustrated by the *Alfred Hirmann v Immofinanz AG* judgement, analysed

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[124] This is also because, as shown in Sections 2.1.1.2 and 2.1.2.2, both national laws should be examined within a common analytical framework.

in Section 2.1.1.1, not every transaction that merely resembles a prohibited repayment of shareholders' contributions is treated as such, thereby not overprotecting the interests of creditors. In this way, EU law ensures that creditor protection is balanced with other legal interests, including investor protection and freedom of establishment.

In conclusion, the simultaneous use of both creditor protection regimes is both justifiable and reasonable.

4. Legal challenges in Reorganizing Financially Troubled Companies through Mergers

This section addresses the second research question. In essence, it strives to provide an overview of the legal challenges that arise when financially troubled companies, including those within a group, are merged into financially sound entities.

In addition, the section aims to outline possible remedial measures and justifications, should such a (group) merger prove to conflict with principles of capital maintenance. In other words, the section examines how such companies can be merged without breaching statutory creditor protection rules.

At the outset, it is worth noting that it would have been largely meaningless to pose and analyse this second research question if the first research question of the thesis, regarding the simultaneous application of general and special creditor protection regimes, had been answered in the negative. This is because, without the cumulative application of both regimes, the core legal tension addressed in this section would not arise.[125]

Furthermore, this section does not adopt a strict separation between Austrian and Bulgarian law. Instead, both legal systems are analysed within a common analytical framework. This approach appears reasonable and effective, because, as shown[126], general and special creditor protection mechanisms under Austrian and Bulgarian law pursue comparable underlying objectives and have the same functional meaning.

Moreover, as group restructurings are allowed within both legal systems[127], the same

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[125] See similarly, Wolfgang Schwarz, 'Das Verbot der Einlagenrückgewähr bei Verschmelzungen' (PhD thesis, University of Vienna 2017) 27 ff; Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 106 ff.

[126] For the whole reasoning see Sections 2.1.1.2 and 2.1.2.2.

[127] See for Bulgaria: Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 99 f: *'несъщинско вливане'; 'възходящо вливане'; 'низходящо вливане'* / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 99 f; For Austria, among many others, see Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 Rz 21 ff.

challenges may arise to a large extent, regardless of the jurisdiction. Accordingly, the following subsections and examples are developed with reference to both Austrian and Bulgarian law. Where relevant differences arise, these will be explicitly identified and discussed.

At this point, it should be noted that, in the context of mergers and potential violations of general creditor protection rules, the literature generally distinguishes between two relationships: on the one hand, between merger law and rules on profit distribution, and, on the other hand, between merger law and rules on capital reduction.[128] Therefore, following the established doctrinal approach, this section first examines the issue of prohibited repayment of capital contributions in the context of intragroup mergers (subsections 4.2; 4.3; 4.4), and then separately addresses the capital-reducing effects of a merger (subsection 4.6).

4.1 A Preliminary Question: Is a Transfer of Negative Assets Permissible?

There is no general principle in restructuring law prohibiting the transfer of over-indebted companies.[129] However, there remains scope for discussion as to whether the transfer of negative assets is permissible at all under EU law, regardless of whether the merger constitutes a concentration or an intragroup merger, and irrespective of its direction (ie upstream, downstream, etc).

The prevailing view in the Austrian doctrine[130] holds that a merger involving an over-indebted company is permissible, provided that the merged entity (the acquiring company) is capable of covering all liabilities of the transferring company. In this respect, the acquiring company must not be over-indebted or insolvent following and as a result of the merger.

If the acquiring company is nevertheless insolvent following the merger, the resulting risk to creditors is so significant that the merger may be regarded as contrary to public policy (and good morals) and, therefore, void. However, there is no requirement that either the transferring or the acquiring company must have a positive market value *prior* to the merger.

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128 Eg Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 46 ff (for capital reduction) and Rz 77 ff (for prohibited repayment of capital contributions); Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 224 AktG Rz 11 – 13 (for capital reductions) and Rz 14 ff (for prohibited repayment of capital contributions).

129 Eckert/Schopper/Caramanica in Eckert/Schopper (eds), *AktG-ON Kommentar zum Aktiengesetz* (Manz 2021) § 224 Rz 26; Aburumieh et al, *Praxisleitfaden Verschmelzungn* (LexisNexis Verlag 2014) VII. A. Rz 7 and VII. C. Rz 8; Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 152 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 152.

130 See eg Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 69 – 76; Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 224 AktG Rz 10.

A similar functional approach can be observed under Bulgarian law. Bulgarian courts have also dealt with the consequences of mergers in which a merging company has significantly more liabilities than assets.[131] As Bulgarian courts assess such cases in substance, rather than merely declaring the merger void due to the transfer of negative assets, they implicitly acknowledge that such a transfer is not prohibited per se and does not, in itself, render a merger unlawful.[132]

This prevailing point of view in the literature (and also in EU jurisprudence) - that the transfer of negative assets is permissible subject to the solvency of the acquiring company - is also plausible and reasonable. This is because, for creditors, it is decisive that the company which continues to exist is capable of covering their claims. In other words, whether the company ceasing to exist was financially distressed or not is no longer relevant to them. If the company continuing to exist, however, is in financial distress, the merger should be deemed void, as it cannot have been the intention of the (EU) legislature to allow the creation of insolvent entities through restructuring operations.[133]

While for concentration mergers it is rather clear that the issue of prohibited repayment of capital contributions generally does not play a role[134], as the merging entities do not stand in a shareholder-subsidiary relationship, this prohibition plays a crucial role in intragroup mergers:[135]

In an intragroup merger scenario, where a parent company with a negative asset base merges into its subsidiary, it can be (rightfully) argued that the subsidiary assumes the liabilities of the parent company, thereby releasing the parent, as shareholder, from those obligations. The same applies, *mutatis mutandis*, in the 'mirror' case of an upstream merger, where a healthy subsidiary is merged into an over-indebted parent company. However, these transactions will be

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131 See eg Решение № 11194 от 10.11.2025 г. на ВАС по адм. д. № 7477/2025 г., I о / *Decision No 11194 of 10 November 2025 of the Supreme Administrative Court, Administrative Case No 7477/2025, First Division*; Решение № 6300 от 3.11.2017 г. на АдмС - София по адм. д. № 7376/2016 г. / *Decision No 6300 of 3 November 2017, Administrative Court – Sofia, Case No 7376/2016*.

132 For Austrian jurisprudence in this regard, see eg OGH 11.11.1999, 6 Ob 4/99b (where the court stated that negative assets transfer is not permitted). However, Austrian courts have since developed a more flexible approach; see eg OGH 07.11.2007, 6 Ob 235/07p; OLG Wien 18.2.2004, 28 R 409/03b.

133 G. Nowotny, 'Umgründungsrecht wohin? oder Der Hilferuf eines Firmenbuchrichters' (2000) ecolex 117 f; G. Nowotny, 'Die Prüfpflicht des Firmenbuchgerichts in Umgründungs- und Sacheinlagefällen' (2006) NZ 262 f.

134 This argument does not apply in the context of capital reduction rules– see section 4.6– as mergers may also occur between unrelated companies, where one company has a lower capital base than the other. In addition, the term 'generally' is used deliberately, as in a concentration merger the shareholders of the transferring company may receive more shares in the acquiring company than would correspond to a fair exchange ratio. In such circumstances, this may give rise to concerns under the rules on the repayment of capital contributions.

135 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 101 ff.

addressed in detail in the following subsections.

Having in mind all of the above, a 'Four-steps-test' for the future analysis of the second research question may be derived:[136]

As a first step, it should be examined whether the surviving company after the merger is solvent. If it is not, the examination should stop here, as, regardless of whether the merger additionally infringes creditor protection principles or not, it should be deemed void, as it is contrary to public policy and good morals. A concentration merger should also stop at this step, as generally no prohibited repayment of capital contributions is possible (Section 4.1).[137]

As a second step, and provided that the surviving company is not insolvent, it should be examined whether the (intragroup) merger interferes with general creditor protection provisions, especially with the prohibition of repayment of capital contributions, as well as other relevant national rules (Sections 4.2; 4.3; 4.4).

As a third step, and provided that the merger interferes with statutory national provisions and principels, it should be clarified whether a possible justification or remedial measure exists. If this question is answered in the affirmative, although the merger interferes with creditor protection rules, it does not constitute an unlawful infringement (Section 4.5).

The fourth step applies only if the third step is not met, ie if the (intragroup) merger proves to be unjustified and, thus, unlawful. As a fourth step, it should be examined what the legal consequences of such an unlawful merger are (Section 4.7).

4.2 Downstream Merger Involving a Financially Distressed Parent

Downstream mergers involving a financially distressed parent company generally give rise to two distinct layers of legal concern: The first at the level of the acquiring company (**1**), and the second at the level of the shareholders of the transferring company (**2**).[138] These concerns may arise in any jurisdiction in which downstream mergers are not per se prohibited, irrespective of whether the

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136 See similarly, Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 103. However, he does not state this explicitly, nor does he frame it as a 'test'. Moreover, in essence, he suggests that, for intragroup mergers, Step 2 should precede Step 1. This appears unnecessary, as, if the surviving company proves to be insolvent or unable to satisfy its creditors, the merger should in any event be deemed void. Therefore, it makes little sense to first examine whether it interferes with capital maintenance rules.

137 Except in cases where the shareholders of the transferring company receive an excessive number of shares in the acquiring company, exceeding a fair exchange ratio. See FN 137.

138 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 77 ff.

doctrinal framework explicitly distinguishes between them.

For better understanding, this subsection is guided by the following example-case:

Example:

The parent company A holds 70 % of the shares in its subsidiary B. The other 30 % of B's shares are owned by C. A has more liabilities than assets, ie A is over-indebted (apart from B's shares, A's net assets value = EUR – 1,000). B holds no own shares. A merges into B. Following the merger, B remains solvent (First step in the *'Four-steps-test'* is therefore unproblematic). A's shareholder D receives shares in B in exchange for the shares previously held in A, and therefore D becomes a shareholder in B.

(**1**) To start with the first legal challenge of downstream mergers, it should be noted that a disguised distribution, or prohibited repayment of capital contributions, refers to a situation in which a shareholder derives a pecuniary advantage from the company that is not consistent with arm's length terms.[139]

In the discussed example-case, the registration of the merger in the commercial register results in the winding up of A without going into liquidation, the transfer of all of A's assets and liabilities to B, and the issuance of shares in B to A's shareholder D.[140]

Since A is over-indebted, B - as the universal successor to A - which ceases to exist as a result of the merger, assumes its excess of liabilities. B therefore acquires more liabilities than assets. This may be regarded as a benefit conferred by company B on its shareholder A. The transfer of more liabilities than assets cannot be regarded as being at arm's length, as a prudent managing director acting diligently would not assume a net liability position unless it is overcompensated by corresponding benefits arising therefrom (Section 4.5). Generally, such mergers of an over-indebted parent company into a solvent subsidiary are carried out solely *causa societatis*.[141] In other words, assumption of A's liabilities may be regarded as a prohibited repayment of shareholder's capital contribution and is therefore unlawful.[142]

139 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 56 Rz 6; Hans Aicher, 'Verschmelzung und Einlagenrückgewähr bei Auslandsbezug' (2010) 24 Wirtschaftsrechtliche Blätter 535, 537.

140 These are the 'classic' merger consequences. See § 225a (3) Austrian AktG, Art. 263и (3) Bulgarian Commercial Act, Article 89 of the Company Law Directive.

141 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 115.

142 Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 AktG Rz 21 ff.

From an economic perspective, the merger amounts to nothing other than a withdrawal of assets from the subsidiary B for the benefit of the parent A. The same result could be achieved if the parent company were to obtain security from the subsidiary for its liabilities or procure a debt assumption by the subsidiary or, alternatively, a direct distribution of assets to satisfy those liabilities.[143]

The prevailing Austrian scholarship and the Austrian Supreme Court (*OGH*) generally regard such downstream mergers as unlawful, unless justified.[144] Since the special creditor protection rules are not considered exhaustive[145] the rules on prohibited repayment of capital contributions apply, leading to a violation of § 52 AktG (or § 82 GmbHG) and, consequently, to the unlawfulness of the merger. The OGH has further held that a downstream merger is permissible only where the transferred assets do not have a negative market value.[146] This position should, however, be qualified by recognising that such a merger may nevertheless be justified by legitimate business reasons or other remedial measures.

Bulgarian courts have also explicitly acknowledged such cases as disguised profit distributions (*скрито разпределение на печалбата*) - although primarily in the tax law context, rather than in corporate law as in Austria, these cases show the same underlying logic.[147] Also under Bulgarian law, it is not permitted to extract value from the subsidiary for the benefit of the shareholder without adequate consideration or other justification.

In summary regarding the first layer of legal concern, the merger of A into B violates the rules on profit distribution and is unlawful. This is because B bears the net liabilities of A, thereby relieving A of its obligations.

For reasons of clarity and understanding, it should be noted that there would not have been a problem with regard to the general creditor protection rules on profit distribution, had it been B (the subsidiary) that is in financial distress, and not A (ie A is healthy). This is because, provided

[143] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 116 f.

[144] See eg Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 AktG Rz 21; Kalss*, Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 82.

[145] Saurer in Doralt/Nowotny/Kalss (eds), *Kommentar zum AktG* (3rd edn, Linde 2021) § 52 AktG Rz 92 f; Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 AktG Rz 21.

[146] OGH 11.11.1999, 6 Ob 4/99b.

[147] Решение № 5488 от 3.05.2017 г. на ВАС по адм. д. № 12606/2015 г., I о. / Decision No 5488 of 3 May 2017 of the Supreme Administrative Court in Administrative Case No 12606/2015, First Division.

that A merges into B, it is the parent that absorbs its subsidiary's losses, and not vice versa. A provides a benefit to B. The rules on profit distribution, however, safeguard the opposing scenario, in which a company (subsidiary) provides an unfair advantage to its shareholder (parent). This is why the scenario discussed here is compliant with the rules on capital contributions. However, at this point, a reminder of the first step of the 'Four-step test' is required: If the surviving company is over-indebted after the merger, the transaction is also unlawful.

The fact that, in this scenario, the creditors of the transferring (solvent) parent company are equally at risk as the creditors of the solvent subsidiary in the reverse situation does not alter the above conclusion.[148]

(**2**) The second layer of legal concern operates at the level of the shareholders of the transferring company.

According to Article 89 of the Company Law Directive (respectively, Article 263и (2) Bulgarian Commercial Act and §§ 225a (3) (3) in conjunction with 224 Austrian AktG) the shareholders of the transferring company must receive shares in the acquiring (surviving) company in exchange for the shares they previously held in the transferring company. The share exchange ratio determines how many shares the shareholders of the transferring company *fairly* receive in the surviving company.[149]

It is worth noting that, with regard to the issuance of shares to the shareholders of the transferring company, Austrian and Bulgarian law adopt different approaches (which, however, in most cases lead to the same economic result). While the Austrian legislator places emphasis on the *allocation of shares* (*Anteilsgewähr*; and more importantly, on the *omission* of shares allocation in § 224 Austrian AktG)[150], in Bulgaria the regime is premised on the *capital increase* (*увеличение на капитала*).[151]

Under Bulgarian law, shareholders of the transferring company may receive shares either via a capital increase in the acquiring company or via the transfer of own shares[152] of the acquiring

148 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 107.

149 Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 105 Rz 9; Under Bulgarian law, the share exchange ratio (*съотношение на замяна*) is calculated as the difference between the fair value of assets and liabilities.

150 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 1.

151 The focus on the capital increase can also be found in other jurisdictions, such as Germany – §§ 54 and 68 German Transformation Act.

152 For this reason, the example-case stipulates that B holds no own shares,

company. In restructurings scenarios, the capital can be increased only via issuance of new shares.[153] If the share capital is not increased, the shareholders of the transferring company cannot receive shares in the acquiring company.[154]

Thus, it can be argued that *allocation of shares* under Austrian law and *capital increase* under Bulgarian law serve the same functional purpose. For the purposes of the following analysis, although undoubtedly not identical, they will be treated in the same way.

Regarding the level of the shareholders of the transferring company, the following general principle should always be observed: If the transferring company has more liabilities than assets, and thus transfers only negative net assets, its shareholders should receive no shares in the acquiring company.[155]

If the contrary occurs, the fair share exchange ratio would be violated, as shares in an over-indebted company have no positive value.

While under Bulgarian law this general principle may be derived from statutory law itself (from Article 262y (1) of the Bulgarian Commercial Act), the Austrian legislator did not include such a rule either in the Austrian *AktG* or in the Austrian *GmbHG*. It is rather derived from the Austrian Supreme court's jurisprudence[156] and also developed in Austrian legal doctrine.

In general, Article 262y (1) of the Bulgarian Commercial Act stipulates that the capital of the acquiring company shall be increased for the purposes of the merger to the extent necessary to create new shares for the shareholders of the transferring company. The amount of the increase *may not exceed* the net asset value of the assets transferred to the acquiring company. An interpretation of this provision would lead to the conclusion that no new shares should be issued if the company ceasing to exist transfers only negative assets.

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153 Николай Колев, *Търговски дружества. Синтез и коментар на практиката на Върховния съд и Върховния касационен съд* (Труд и право 2021) 841 / Nikolay Kolev, *Commercial Companies: Synthesis and Commentary on the Case Law of the Supreme Court and the Supreme Court of Cassation* (Trud i Pravo 2021) 841.

154 Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 146 f / Angel Kalaydzhiev*, Corporate Restructuring of Companies* (Trud i pravo 2019) 146 f.

155 Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 152 – '*Увеличение на капитала не може да се извършва, ако чистата стойност на имуществото на вливащото се дружества е отрицателна величина'* / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 152 – *'A capital increase may not be carried out where the net asset value of the transferring company is negative'*; Mario Gall in Kalss/Torggler (eds)*, Aktuelle Fragen bei M&A. Beiträge zum 7. Wiener Unternehmensrechtstag* (Manz 2019) 8; Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 83; OGH 11.11.1999, 6 Ob 4/99b.

156 OGH 11.11.1999, 6 Ob 4/99b.

Austrian doctrine reaches the same conclusion through the general creditor protection rules, specifically through the prohibition on the repayment of capital contributions. The shareholders of the transferring company would receive an unfair advantage from the subsidiary as a result of the merger.[157]

This illustrates, to a certain extent, why Bulgarian scholars see no need to resort to general creditor protection rules, in contrast to Austrian doctrine, as the law itself already provides for such a rule.

For the discussed example-case, the application of the general principle implies that A's shareholder D should not receive any shares in B following the merger. This is because, otherwise, a transfer of value (shares in subsidiary B) would be conferred on the shareholder of the parent company without any, or without adequate, consideration.[158]

However, according to the facts of the example-case, D nevertheless receives shares in B, although A transfers only negative assets. This is perceived as disguised profit distribution, as D - as (indirect) shareholder - receives an unfair advantage because of the merger.

Therefore, apart from the first legal concern at the level of the acquiring company (**1**), the example-case additionally constitutes an unlawful merger at the level of the second legal concern (**2**) – shareholders of the transferring company.

Another question is what would happen if the shareholder of the transferring company D did not receive shares in the acquiring company B. In such a case, B would acquire part of its own shares, as prior to the merger A held 70% of the shares in B. Since A ceases to exist as a result of the merger, its shares cannot remain outstanding.

Under Austrian law, according to § 224 (3) of the Austrian AktG, the own shares that the surviving company B receives as a result of the merger should be used, *insofar as necessary*, to compensate the shareholders of the transferring company. However, as explained, where only negative assets are transferred, no compensation is required. Thus, these treasury shares should remain by B.

Under Austrian law, the acquisition of own shares following a restructuring measure and

[157] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 119.

[158] Mario Gall in Kalss/Torggler (eds), *Aktuelle Fragen bei M&A. Beiträge zum 7. Wiener Unternehmensrechtstag* (Manz 2019) 8.

by way of universal succession is permitted pursuant to § 65 (1) (3) Austrian AktG (cf § 65a). Because the transfer of liabilities to a subsidiary resembles an acquisition for consideration (*entgeltlicher Erwerb*), the merger's permissibility is to be assessed in accordance with the rules governing the acquisition of own shares for consideration (§ 65 (2) by analogy). This analogical interpretation leads to the conclusion that the merger is permissible only if the assumed net liabilities can be financed from the acquiring company's freely distributable assets.[159]

In the discussed example-case here, provided that B has sufficient freely distributable assets to cover A's negative value, the merger could be considered lawful. However, B must sell or redeem the self-owned shares within one or three years.[160]

Contrary to Austrian law, Bulgarian law explicitly prohibits the acquisition of own shares by way of universal succession in the context of restructurings (Article 187a (1) (2) of the Bulgarian Commercial Act). This implies that, unlike the scenario under Austrian law, subsidiary B cannot assume its own shares at all.

However, if this nevertheless happens, the shares acquisition is not automatically void. In such scenario, the shares must be transferred within one year from their acquisition. Otherwise, they should be cancelled and the share capital of the acquiring company should be reduced accordingly.[161]

The Bulgarian solution suggests that a merger which leads to an acquisition of own shares is not permitted. It does not take into account the freely distributable funds at the level of the acquiring company, as Austrian law does. This implies that, under Bulgarian law, downstream mergers with financially distressed parent companies are prohibited.

The approaches towards self-owned shares in Austrian and Bulgarian law suggest that both jurisdictions adopt different regulatory philosophies: While the Austrian legislator accepts the

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[159] Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 89.

[160] § 65a *Austrian* AktG.

[161] Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 150 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 150; See also Решение № 364 от 23.05.2007 г. на ВКС по д. № 22/2007 г., II о., ТК, докладчик председателят Марио Бобатинов / Decision No 364 of 23 May 2007, Supreme Court of Cassation, Case No 22/2007, Commercial Division (II Division), reporting judge President Mario Bobatinov: ' *In the case of a merger, the acquiring company cannot acquire its own shares by way of universal succession, due to the explicit statutory prohibition laid down in Article 187a (1) (2) of the Commercial Act. Even if the contrary were to be assumed, namely that no such prohibition exists with regard to the acquiring company, or that the latter has acquired the shares in violation of the prohibition under Article 187a (1) (2), the shares so acquired should have been transferred within one year from the transformation*.'

economic reality and regulates its consequences ex-post, the Bulgarian legislator seeks to prevent such cases from arising, ie adopts an ex-ante approach. Nevertheless, if the situation occurs unlawfully, the Bulgarian legislator still regulates its consequences.

Ultimately, both jurisdictions arrive largely at the same outcome: The acquiring company must dispose of its own shares within a specified time limit.

To close the discussion on downstream mergers involving a financially distressed parent company, the following points should be considered: Regardless of the level at which the examination of the merger's lawfulness is concluded - ie whether at (**1**) the level of the acquiring company, at (**2**) the level of the shareholders of the transferring company, or at the permissibility of holding own shares - such mergers prove to be highly problematic.

It seems reasonable to conclude that downstream mergers in which the parent company transfers more liabilities than assets are unlawful, unless there is a business justification or another remedial measure.

4.2.1 Excursus: Management-Buy-Out Problematic

An often occurring situation in practice, which also involves capital maintenance considerations, is the so-called 'management buy-out', 'special-purpose-vehicle merger' or 'debt push-down merger'.[162] Thus, at this point, this problematic will be briefly discussed.

Example:

D incorporates a so-called holding company A which has no business activity. A takes a loan from its shareholder D in the amount of EUR 1 million, which A uses to acquire company B. A becomes the sole shareholder of company B. Apart from its shareholding in B, A has no other assets; on the liabilities side, A has the loan taken from D. A merges downstream into B. In exchange for its shares in A, D receives 100% of the shares in B.[163]

Following the merger, B assumes all assets and liabilities of A, including the shareholding in itself. The liabilities assumed by A also include those arising from the loan taken from D used to acquire

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[162] See eg Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 87; Mario Gall in Kalss/Torggler (eds), *Aktuelle Fragen bei M&A. Beiträge zum 7. Wiener Unternehmensrechtstag* (Manz 2019) 9.

[163] Based in part on: Решение № 6300 от 3.11.2017 г. на АдмС - София по адм. д. № 7376/2016 г. / *Decision No 6300 of 3 November 2017, Administrative Court – Sofia, Case No 7376/2016*.

the participation in B. As a result of the merger, subsidiary B ultimately finances its own acquisition, which is considered prohibited under both Austrian and Bulgarian law.[164] This self-financed acquisition is doctrinally referred to as a 'debt push-down'.[165] Bulgarian courts have also described this as 'shifting of the debt onto the acquiring company' *('слизане на дълга на приемащото дружество')*.[166]

Ulitmately, scholars come to the conclusion that, in the absence of remedial measures or a business justification (Section 4.5), such a debt push-down merger would be permissible only if the transferred assets have a positive market value, disregarding the value of the shares in the surviving company (B).[167] In other words, if negative assets are transferred, the merger in any event violates capital maintenance principles, unless it is plausibly justified.

4.3 Upstream Merger Involving a Financially Distressed Parent

This subsection does not adopt a strict separation between Austrian and Bulgarian law, ie it does not present separate solutions. This is because both legal systems are based on largely identical rules and principles. Instead, the subsection focuses on the underlying logic of why upstream mergers may also raise issues from a capital maintenance perspective.

The upstream merger scenario is illustrated by the following example-case:

Example:

A is the sole shareholder of B. A is in financial distress and, apart from its participation in B, has only negative assets in the amount of EUR – 1,000. Due to internal considerations within the group, B merges into its shareholder A.

At first glance, the above example seems to be unproblematic with regard to capital maintenance rules and specifically with regard to the principle on prohibited repayment of capital

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164 Although Bulgarian jurisprudence typically approaches the matter primarily from the perspective of tax law, it treats the structure as problematic because subsidiaries assume debt and interest expenses that do not serve their own business activity and that ultimately benefit shareholders. This reflects the same underlying economic concern that Austrian doctrine addresses through capital maintenance rules.

165 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 87.

166 Решение № 6300 от 3.11.2017 г. на АдмС - София по адм. д. № 7376/2016 г**.** / *Decision No 6300 of 3 November 2017, Administrative Court – Sofia, Case No 7376/2016.*

167 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 87; Mario Gall in Kalss/Torggler (eds), *Aktuelle Fragen bei M&A. Beiträge zum 7. Wiener Unternehmensrechtstag* (Manz 2019) 9; Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 115.

contributions.[168] The latter aims to safeguard the company's capital base against diminution through unfair distributions to its shareholders.[169]

In the example-case, there is neither a transfer of liabilities, nor any impermissible benefit conferred on the shareholder, nor does subsidiary B assume the parent company A's debts. Indeed, it seems as if the definition of 'prohibited repayment of capital contributions' or 'disguised distributions' is not met.

What is more, through the merger of the subsidiary into the parent company, only assets already indirectly owned by the parent are transferred to it. In other words, the parent company receives nothing that it did not already possess. Hence, the transaction merely results in an organisational change in the group's legal structure.[170]

The above arguments, supporting the view that upstream mergers involving a financially distressed parent are not problematic in terms of capital maintenance rules, are accurate and logical. It is therefore reasonable that a *direct* application of the rules prohibiting the repayment of shareholders' capital contributions is excluded.[171]

However, this legal challenge requires a more differentiated and nuanced solution. Although indeed no direct application of the rules is suitable, they should be applied indirectly, by analogy[172], as an upstream merger could be structured as a circumvention of the statutory capital maintenance rules within a downstream merger:

The economic outcome of a 100 % downstream or upstream merger is the same. This is because the assets of the merged company remain the same, regardless of whether the parent company is merged into the subsidiary or vice versa. This can already be derived at the level of § 226 Austrian AktG and Article 263k of the Bulgarian Commercial Act – both provisions provide for the same level of protection for the creditors of both the acquiring and the transferring

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[168] See similarly, Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 90: '*In the case of an upstream merger, the requirements for shareholder and creditor protection ultimately correspond to those in the reverse scenario of a downstream merger. However, the justification lies not in the principle of capital maintenance, but in the prohibition of transactions contrary to good morals, aimed at preventing the establishment of an over-indebted company*'.

[169] Hans Aicher, 'Verschmelzung und Einlagenrückgewähr bei Auslandsbezug' (2010) 24 Wirtschaftsrechtliche Blätter 535, 537.

[170] Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 224 AktG Rz 17.

[171] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 145.

[172] Johannes Reich-Rohrwig, *Grundsatzfragen der Kapitalerhaltung* (Manz 2004) 280 ff.

company.[173]

The direction of the merger is determined at the level of the parent company. The parent company is therefore free to achieve the same economic outcome, regardless of which merger direction it chooses. Consequently, by choosing the direction of the merger, the parent company could determine the applicable level of creditor protection, if the capital maintenance rules were to be relevant only in the case of a downstream merger, but not in an upstream merger.[174]

In the discussed example-case, B's positive assets are used to 'rehabilitate' the parent company A. B's assets thus serve to cover A's net liabilities. This may be regarded as a benefit conferred by the company on its shareholder that is relevant under the prohibition of the repayment of capital contributions.

To sum up, following the above considerations, without the adoption of one or more remedical measures or a business justification, an upstream merger of a subsidiary into its over-indebted shareholder is unlawful. This solution follows that for downstream mergers involving a financially distressed parent company and is reasonable.

4.4 Side-stream Merger Involving a Financially Distressed Sister-Company

This section does not include a thorough legal analysis of the two separate regimes under Austrian and Bulgarian law with regard to side-stream mergers. It aims to provide an overview of the main legal challenge that may arise in the context of side-stream mergers, where one of the sister-companies transfers more liabilities then assets.

The section uses the following example-case as a guide:

Example:

A holds 100 % of the shares in both B and C, ie A is the sole shareholder of both companies. B is in financial distress, as it has more liabilities than assets. C is solvent and operational. For group-internal reasons, B is merged into its sister-company C.

Where one of the merging sister-companies has a negative net assets value, the merger constitutes an indirect benefit conferred from the financially sound sister-company (subsidiary) on the

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173 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 138.

174 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 146.

common parent company.

This is because, by the merger, the healthy sister 'rehabilitates' (restores) the unhealthy sister. The parent company thereby avoids having to restructure the over-indebted subsidiary using its own funds.[175]

Generally, it seems that it does not make a difference whether it is the surviving or the ceasing sister-company that is over-indebted. In the discussed example-case, it appears irrelevant whether B merges into C or C into B, as in both situations A does not have to restore the financially distressed company using its own funds.

If the transferring company has a negative net assets value, this is taken over by the acquiring sister-company. Conversely, if the acquiring company has more liabilities than assets, the transfer of positive assets by the other company leads to a compensation of its negative asset base. In other words, liabilities are assumed for the benefit of the common shareholder.[176]

In summary, side-stream mergers between two sister companies having the same direct shareholder, where one sister is financially sound and the other is not, always interfere with capital maintenance principles. This is because the parent company receives an unfair advantage from the healthy sister-company. If no compensatory measures or business justification apply, then the side-stream merger is unlawful.[177]

4.5 Remedial Measures and Business Justification – How to Execute an Intragroup Merger Without Breaching Creditor Protection Rules

This subsection addresses the third step from the 'Four-steps-test'. In particular, where an analysed intragroup merger has proven to interfere with capital maintenance principles (second step from the test; Sections 4.2, 4.3, 4.4), it should also be examined whether a possible justification comes into play and thus makes the merger lawful.

Before setting out a (non-exhaustive) list of possible remedial measures and other business justifications, it is useful to address certain issues at the EU level:

The above-discussed examples of a downstream, upstream and side-stream mergers are

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[175] Saurer in Doralt/Nowotny/Kalss (eds), *Kommentar zum AktG* (3rd edn, Linde 2021) § 52 AktG Rz 53. See also: *'Die Leistung an die Schwestergesellschaft ist wie eine Leistung an den Aktionär zu werten' / 'A benefit conferred on a sister- company is to be treated as a benefit conferred on the shareholder'.*

[176] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 155.

[177] Bauer/Zehetner in Straube/Ratka/Rauter (eds), *Wiener Kommentar zum GmbH-Gesetz* (Manz 2017) § 82 Rz 140; Johannes Reich-Rohrwig, *Grundsatzfragen der Kapitalerhaltung* (Manz 2004) 287 f.

closely related to the so-called 'group interest'. The recognition of the group interest can create a safe harbour for directors of the parent company as well as for directors at subsidiary level because it allows the parent company to issue instructions that may not be primarily in the interest of the subsidiary but nevertheless serve the interest of the group as a whole. It relieves the directors of the subsidiary of the duty to manage the subsidiary as an independent company and protects them from liability for letting the group interest prevail.[178] To put it more plainly, the recognition of the group interest constitutes a justification for certain actions that are detrimental to the subsidiary but reasonable and beneficial at the group (or parent company) level.

A central element of the group interest is the *Rozenblum* doctrine, developed by the French Supreme Court in the *Rozenblum* case.[179] In essence, the facts of the case are very close to those of the example-cases analysed in this thesis - several companies under common control were not linked by a common group policy. Nevertheless, assets were transferred from certain companies to others that were experiencing losses.[180] Thus, both the *Rozenblum* case and the cases analysed in this thesis involve the shifting of value within a group, potentially to the detriment of one entity.

In general, the *Rozenblum* doctrine justifies measures taken against a subsidiary's interests, but in the interest of the group, as long as the following conditions are met: The company forms part of a group; there is a common economic interest in relation to a group policy; the transaction is not inadequate and does not create an imbalance of mutual obligations; and the transaction does not exceed the financial capacity of the company.[181]

At the EU level, there are three prevailing types of models of the regulation of group of companies. First, there is the French model that genuienly recognizes the group interest. Then, there is the German model stipulating, in essence, that the interest of the group can be pursued only under certain conditions, ie justifications are possible. The third model is to rely on presumption that each company has separate legal personality and must always act in its own best interests.[182] Austria and Bulgaria fall rather within the German model, as intragroup mergers involving the transfer of negative assets are not per se prohibited and may, under certain conditions, be justified.[183]

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178 Dorresteijn et al, *European Corporate Law* (4th edn, Wolters Kluwer 2022) Rz 10.61.
179 Rozenblum (Cour de cassation, chambre criminelle, 4 February 1985) Bulletin criminel No 54.
180 Dorresteijn et al, *European Corporate Law* (4th edn, Wolters Kluwer 2022) Rz 10.62.
181 Dorresteijn et al, *European Corporate Law* (4th edn, Wolters Kluwer 2022) Rz 10.62.
182 Gvido Losaks, 'Legal Act for Recognising the Interest of the Group' (2023) 14 Acta Prosperitatis 112.
183 Eckert/Schopper/Caramanica in Eckert/Schopper (eds), *AktG-ON Kommentar zum Aktiengesetz* (Manz 2021)

Therefore, although the Rozenblum doctrine would not be directly applicable to the problems examined in this thesis, it provides a certain framework for what is acceptable and what is not. Moreover, it will be shown that some of the remedial measures and justifications discussed in the subsections below are close to the principles developed by the doctrine.

As discuessed under step two of the 'Four-steps-test', intragroup mergers in which only negative assets are transferred are highly problematic with regard to capital maintenance rules and are generally prohibited if there are no corrective measures or a legitimate business rationale behind the suspicious transaction. For this reason, the following subsections provide ideas on how to structure and organise the merger process so that it is lawful and not subject to rejection upon registration.

At this point, it should be further clarified that the list of remedial measures and business justifications is in no way fully comprehensive, ie it does not list all possible solutions.

4.5.1 Capital reduction

To make an intragroup merger involving a transfer of negative assets value lawful, it may be reasonable to reduce the share capital of the acquiring company before the merger takes legal effect (or in parallel, if the applicable national law allows it[184]). In this way, if the capital reduction is carried out in the amount of the excess liabilities to be assumed, the funds thereby released may be used to cover those liabilities.[185]

In a downstream merger scenario, for instance, provided that the parent transfers only negative assets (liabilities) in the amount of EUR – 1,000 to its subsidiary, the subsidiary can reduce its capital by EUR 1,000 (the parent's negative assets), so that these liabilities can be absorbed by the freely distributable assets.

Generally, the capital reduction should take place at the level of the acquiring (surviving) company, because it is the entity that absorbs the negative assets. In an upstream merger scenario with a financially distressed parent, it should be the parent company that reduces its capital. In side-stream mergers, the surviving subsidiary should reduce its capital.

In this regard, both Austrian and Bulgarian law have some peculiarities. Under Austrian

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§ 224 Rz 26; Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 152 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 152.

[184] See immediately below – Section 4.5.1.

[185] Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 Rz 21/3.

law, the reduction of the share capital of public limited liability companies (*AG*s) is governed by § 178 Austrian AktG. As explained in Section 2.1.2.2, after registration of the capital reduction, no payments and distributions may be made to shareholders within the time limit of six months. This implies that, within six months from the registration of the capital reduction, no freely distributable assets arise.

However, the unfair benefit conferred by the company on its shareholder occurs at the moment at which the merger becomes legally effective, ie upon registration of the merger in the commercial register. If the capital reduction is registered at the same time as the merger, it would be of no help, because freely distributable assets arise only after the six-month period has passed.

Therefore, under Austrian law, if the acquiring company is a public limited company (*AG*), the capital reduction must be carried out sufficiently in advance of the merger so that, at the time of the transfer - which corresponds to the moment when the merger becomes effective - the released funds are also distributable.[186] In practice, this would mean that the decision to reduce the company's capital should be registered at least six months prior to the registration of the merger in the commercial register.

The Bulgarian legislator foresees a different solution to such cases. Article 262x (2) of the Bulgarian Commercial Act stipulates that, if the acquiring company reduces its share capital because of or in relation to the merger, no payments may be made to shareholders and the general creditor protection rules (Article 202 in conjunction with Articles 150 et seqq) do not apply. This is because special creditor protection rules are applicable and, according to scholars, sufficient.[187]

As explained in section 2.1.2.2, the general creditor protection regime in Bulgaria foresees that, in general, a statutory three-month period must elapse before the capital reduction becomes legally effective. Since this rule is not applicable in merger cases, under Bulgarian law, there is no need to register the capital reduction prior to legally effecting the merger (as under Austrian law). This can happen in parallel.

The capital reduction frees assets from legal capital, which may then be used to absorb the transferred negative assets (ie assets can be used within the company). Payments to shareholders, however, are not permitted - this constitutes a special rule protecting creditors in merger scenarios

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[186] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 122.

[187] Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 154 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 154.

and may largely be seen as the equivalent to § 178 (2) of the Austrian AktG.

This difference from Austrian law, which imposes a time restriction on payments to shareholders only within its general creditor protection regime under § 178, but not within its special merger rules, supports the view advanced by certain Bulgarian scholars that the special creditor protection regime is sufficient in itself and therefore exhaustive (Section 3.3).

In summary, it is acknowledged in both legal systems that a capital reduction is a natural response to a merger in which more liabilities than assets are transferred.[188]

4.5.2 Additional Contributions by the Shareholders

In a downstream merger scenario, if the shareholders of the parent company make an additional contribution (a subsidy payment), so that the negative assets of the transferring company are not offset and covered by the subsidiary from its own assets, then the merger would be lawful.[189]

Mutatis mutandis for the cases of upstream and side-stream mergers: In an upstream merger, if the parent's shareholders 'rehabilitate' the parent by making a payment before the merger takes place, then the subsidiary would not be merged into a financially unstable entity in the first place. The same applies in the case of a side-stream merger, where the common parent company makes a subsidy payment to the financially distressed sister-company.

It is submitted in the literature that the additional contribution should be given *before* the merger is registered in the commercial register.[190] In general, this view is reasonable, as the registration of the (unlawful) merger should not be allowed in the first place. In addition, the violation occurs at the moment the merger is registered in the commercial register. From this point onwards, it is already unlawful. Thus, a subsequent shareholder contribution to the already merged entity would generally not make a difference, unless it is accepted that the situation can be remedied at a later stage.

However, it seems that, economically, it does not make a difference whether the over-indebted company is 'rehabilitated' before the merger takes legal effect, or the funds are given to

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188 See also: Решение № 6300 от 3.11.2017 г. на АдмС - София по адм. д. № 7376/2016 г. / *Decision No. 6300 of 3 November 2017 of the Administrative Court – Sofia in administrative case No. 7376/2016*: *'The asset value of the transferring company is a negative amount of (BGN –146,835,264.00), which constitutes grounds for the application of Article 262x (2) of the Commercial Act for the reduction of the capital of the acquiring company, rather than Article 262y (1) for the increase of capital'.*

189 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 79 and Rz 81.

190 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 123.

the acquiring company after the merger. Economically, the surviving company does not cover the transferring company's liabilities from its own assets. Thus, it may be questioned whether the merger should be treated differently in these cases.

4.5.3 Availability of Sufficient Unbound Assets

Provided that the acquiring subsidiary in a downstream merger scenario has sufficiently freely distributable (unbound) assets to cover its shareholder's liabilities, the merger is generally unproblematic and lawful.[191]

This also applies to side-stream mergers, where the merger would still be lawful if the surviving sister-company has sufficient unbound assets to compensate for the other sister's losses. However, at this point, it should be clarified that the availability of sufficient unbound assets as a remedial measure is, by definition, not possible in an upstream merger scenario in which the parent company is in financial difficulties. Thus, this subsection does not apply to the type of upstream mergers discussed in the thesis.

Unlike share capital, freely distributable assets are attributable to the shareholders. If the subsidiary uses these funds to cover the assumed net liabilities instead of distributing them, there is no disadvantage to its assets, as both uses are economically equivalent.[192]

Under Austrian law, there has been a debate as to whether the mere existence of freely distributable funds is sufficient, or whether certain formal steps must be taken, such as passing a formal resolution on the use of those funds. The need to pass a formal resolution is back up by the fact that the mere existence of distributable funds is not sufficient to exclude a violation of the prohibition of repayment of capital contributions; rather, such funds must be properly determined and allocated through the required corporate procedures.[193]

A more nuanced solution is preferred. The merger resolution and related corporate acts should be interpreted as encompassing the necessary steps for releasing and allocating distributable funds, since the approving bodies are presumed to intend a legally valid transaction.[194] In other

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191 Bauer/Zehetner in Straube/Ratka/Rauter (eds), *Wiener Kommentar zum GmbH-Gesetz* (Manz 2017) § 82 Rz 139; Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 81.

192 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 123.

193 Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 Rz 21/3.

194 Johannes Reich-Rohrwig, *Grundsatzfragen der Kapitalerhaltung* (Manz 2004) 276; Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 124 f.

words, formal resolution is required but it can be taken implicitly.

This approach is also confirmed and developed by Bulgarian legal doctrine. Under Bulgarian law, certain corporate measures connected to a restructuring, such as capital increases, do not necessarily require separate formal resolutions, as they may be embedded in the transformation decision itself. This supports a more flexible understanding of corporate decision-making in the context of restructuring.[195]

4.5.4 Business Justification

A disadvantageous transaction to the company may be justified by business reasons in the interest of the company, as not every benefit is purely monetary.

Generally, so that business justification exists, the shareholders/the managing director of the company suffering losses would also have concluded such a transaction with a third party. What matters is the relationship between the expected benefit and the expected risk. A violation on capital maintenance rules arises only if, on an ex-ante assessment, the transaction was indefensible. The decisive question is whether the measure can be regarded as an act of prudent and diligent management. However, risks threatening the company's existence must never be assumed.[196]

In Austrian legal doctrine, the following examples are provided as possible business justifications: Synergy potential arising from the merger; avoidance of reputational damage; existence of obligations to offset losses or ongoing liabilities of the acquiring company; preservation of market position or business locations; or the avoidance of a reputationally damaging group insolvency.[197]

Taking the downstream merger example-case from Section 4.2, the merger would still interfere with capital maintenance principles, however it would not infringe them if the subsidiary B accepts to absorb A's losses because A has just taken out a significant loan to establish infrastructure that, once completed, would also benefit B. In such a case, it would not make a difference whether B takes out the loan itself or its shareholder does so. B's managing director,

[195] Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 144 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 144.

[196] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 125 f; Artmann in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 52 Rz 19.

[197] Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 78.

acting with due care, would approve such a measure.

In summary, within a group, a business justification satisfying the arm's length standard should at least be assumed where the insolvency of the financially distressed company would lead to a loss of group advantages that are essential for the surviving company's continued existence.

At this point, and to conclude the discussion on possible justifications, it should be noted that, in the case of a transfer of negative assets within a group and a business justification (Section 4.5.4), no shares may be issued to the transferring company's shareholders. This is not the case, however, for the other remedial measures discussed in Sections 4.5.1, 4.5.2 and 4.5.3, as either the excess liabilities are covered by the shareholders or freely distributable funds at the level of the acquiring company cover those liabilities. Ultimately, in these cases, a share allocation would be permissible.[198]

4.6 Excursus: Merger with Capital Reducing Effect

Mergers which have the same economic effect as a capital reduction can occur in both intragroup merger and concentration merger scenarios.[199] This effect can be seen by the following example-case:

Example:

A and B have no relationship between them, ie they are fully independent entities. A has share capital in the amount of EUR 25,000. B's share capital amounts to EUR 50,000. B merges into A. A does not increase its share capital. After the merger, A makes a divided payment to its shareholders in the amount of EUR 25,000 (which has effectively become freely distributable as a result of the merger).

According to the facts of the case, prior to the merger, B had share capital in the amount of EUR 50,000, which was bound and could not be distributed to B's shareholders. After B merges into A, B ceases to exist and the only company that remains in legal existence is A, whose share capital, however, although it receives B's assets, is not increased and remains at EUR 25,000.

In such cases, it is the difference between EUR 50,000 and EUR 25,000, namely

198 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 126 f.

199 Saurer in Doralt/Nowotny/Kalss (eds), *Kommentar zum AktG* (3rd edn, Linde 2021) § 52 AktG Rz 106; Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 46 ff.

EUR 25,000, that is problematic. The EUR 50,000 represents B's bound, undistributable share capital prior to the merger, which was at the disposal of B's creditors. By contrast, EUR 25,000 is the only share capital that continues to exist following the merger, ie the only share capital at the disposal of A's creditors. However, the pool of A's creditors after the merger comprises not only A's original creditors but also B's creditors.

Prior to the merger, B's share capital in the amount of EUR 50,000 was available to its creditors. Following the merger, B's creditors not only have A's share capital in the significantly lower amount of EUR 25,000 at their disposal, but must also compete with A's 'old' creditors. Therefore, the position of B's creditors is severely worsen by the merger.

Economically, from the perspective of B's creditors, it appears as if B has reduced its share capital, which constitutes their main source of protection, without complying with any creditor protection principles, in particular without limiting payments to shareholders following such a capital reduction. According to the facts of the case, A makes a divided payment to its shareholders in the amount of EUR 25,000.

In general, such mergers with capital-reducing effects are inherently suspicious and problematic. The Bulgarian special creditor protection provision of Article 263k, with its separate asset management for six months, offers a significantly high level of creditor protection, so that the problem discussed here does not seem to be such a pressing issue in Bulgarian legal doctrine.

However, the ex-post and claim-based creditor protection of § 226 of the Austrian AktG seems to be indisputably insufficient to protect creditors' interests, at least when it comes to the difference amount between previously bound and now unbound capital.[200]

Therefore, the safest way to carry out such restructurings would be to take some compensatory measures, such as an obligatory share capital increase at the level of the acquring company.[201] If A's share capital had been increased by EUR 25,000, the problem would not have occurred. However, in some cases, share capital cannot be increased due to a statutory prohibition, eg in the case of upstream mergers.[202]

In such cases, it would be reasonable, *prior* to the merger, to carry out a capital reduction at the level of the transferring company (which has higher share capital than the acquiring

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[200] Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 166.

[201] Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 57.

[202] § 224 (1) (1) Austrian AktG; Article 262y (3) (1) Bulgarian Commercial Act.

company).[203] In this way, the problem is prevented before it arises and creditors are suficiently taken account of. While this is theoretically acceptable, it is of limited practical relevance[204], as both Austrian and Bulgarian law provide for waiting periods that must be observed before payments may be made to shareholders.[205]

In its landmark decision of 1999 (6 Ob 4/99b), the Austrian Supreme Court developed, in addition to capital reduction, other compensatory measures applicable to capital-reducing mergers, which will not be analysed further at this point, as they are of limited practical relevance for Bulgaria.

4.7 Legal Consequences of an Unlawful Merger

This subsection addresses the fourth step of the 'Four-steps test', namely cases in which a merger that interferes with capital maintenance rules cannot be justified.

Pursuant to Article 108 of the Company Law Directive, Member States *do not have to* but may lay down rules regarding the nullity of the merger. This implies that Member States are free to determine that mergers cannot be declared null and void at all.[206]

The main objective of Article 108 of the CLD is to limit the reasons which can lead to the nullity of a merger, since it is virtually impossible to unwind a merger. Furthermore, the limitation of reasons for which a merger may be null and void ensures legal certainty for the companies involved in the merger and the general public. This restrictive approach is justified due to the fact that mergers are reviewed in detail and by independent experts before becoming effective (ex-ante), while, once effective, they benefit from a high degree of legal certainty.[207]

In essence, the only three reasons for which a merger may be declared void are: Either there has been no judicial or administrative preventive supervision of the merger's legality, or it was not drawn up and certified in due legal form, or it is shown that the decision of the general meeting is void or voidable under national law.[208] These restrictions are applicable only to mergers

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203 Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 224 AktG Rz 13; Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 224 AktG Rz 61.

204 Szep in Artmann/Karollus (eds), *Kommentar zum Aktiengesetz* (6th edn, Manz 2018) § 224 AktG Rz 13.

205 See § 178 (2) Austrian AktG; Article 153 Bulgarian Commercial Act.

206 Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 108 Rz 1 and Rz 4.

207 Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 108 Rz 3 ff.

208 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L 169/92 Art 108 (b).

that have already become effective.

Moreover, Member States may further limit - but not extend - the conditions for the nullity of mergers, and the reasons leading to nullity may be remedied, thereby reflecting the idea that mergers should be declared null and void only in very limited cases.[209]

The Austrian and Bulgarian legislators have adopted similar approaches in terms of effects and outcome. For reasons of clarity, it seems reasonable to divide the merger process into two stages – the first stage being 'Before registration in the commercial register' (ie before the merger becomes legally effective) and the second stage being 'After registration in the commercial register'.

Regarding the first stage, both national legal systems foresee strict court control of the merger. Under Austrian law, commercial register courts (*Firmenbuchgerichte*) must examine and analyse the merger very diligently and, if they find that the merger violates statutory provisions and principles, eg the prohibition on repayment of capital contributions, they must refuse to register the merger. Generally, prior to the registration of the merger, defects in the merger process may be invoked without limitation by means of legal action.[210]

Similarly, the purpose of a claim under Article 263o of the Bulgarian Commercial Act is to prevent the merger from being registered in the commercial register, that is, from becoming legally effective.[211] All merging companies, as well as all shareholders of the merging companies, may bring a claim before the competent regional court to establish that, in the course of the merger, one of the exhaustively[212] listed violations has occurred (for example, where the merger agreement is void). On the basis of a final court decision upholding the claim, the registration of the merger shall be refused.[213]

Under Bulgarian law, the claim shall be brought no later than the date of registration of the merger. This implies that, once the merger is registered, even if unlawful, a claim pursuant to

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209 Tobias de Raet in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 108 Rz 4 and Rz 8.

210 Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 230 AktG Rz 7.

211 Николай Колев*, Търговски дружества. Синтез и коментар на практиката на Върховния съд и Върховния касационен съд* (Труд и право 2021) 857 / Nikolay Kolev, *Commercial Companies: Synthesis and Commentary on the Case Law of the Supreme Court and the Supreme Court of Cassation* (Trud i Pravo 2021) 857.

212 Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 227 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 227.

213 Article 263o (4) Bulgarian Commercial Act.

Article 263o can no longer be validly brought.[214]

For the examples discussed in this thesis, the above means that, under both Austrian and Bulgarian law, a violation of general capital maintenance rules would lead to the refusal to register the merger, ie the merger would not come into force in the first place.

Regarding the second stage - 'After registration in the commercial register' – both national legal systems, in general, do not provide for a mechanism allowing a merger to be declared null and void once it has been registered and has become legally effective.

Most significantly, § 230 (2) of the Austrian AktG stipulates that defects in the merger, eg prohibited returns of shareholder capital contributions, do not affect the consequences of a registered merger (ie such a violation does not affect the universal succession, the fact that the transferring company's shareholders become shareholders in the surviving company, etc). To put it more plainly, once the merger is registered and legally effective, there is almost no going back. Thus, Austrian scholars speak about *'Bestandschutz'*, which can be generally translated as an absolute 'validity protection'.[215]

The Bulgarian legislator did not expressly regulate the consequences following the effectiveness of a merger, ie it made use of the option under EU law not to provide for a broad nullity regime for mergers. Therefore, the Bulgarian solution to the discussion problem is the same as the Austrian solution.

For the discussed examples in Sections 4.2, 4.3, 4.4 and 4.6, the above implies that the effects of the merger occur notwithstanding any defects. Once the merger is registered in the commercial register, its legal consequences take effect even if the merger agreement is void, eg due to a violation of the prohibition on the return of capital contributions or other capital maintenance rules.

For the sake of completeness, the following should be briefly noted: If distributions are made contrary to the principles laid down in Article 56 of the CLD, the shareholders who have benefited from such distributions are obliged to return them to the company.[216] The same

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214 Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 235 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 235.

215 Schörghofer in Doralt/Nowotny/Kalss (eds), *Kommentar zum AktG* (3rd edn, Linde 2021) § 230 Rz 4 ff; Kalss, *Verschmelzung – Spaltung – Umwandlung* (3rd edn, Manz 2021) § 230 AktG Rz 11.

216 Jan P. Brosius in Peter Kindler and Jan Lieder (eds), *European Corporate Law: Article-by-Article Commentary* (Nomos; C H Beck; Hart 2021) Art 57 Rz 5.

consequence arises under both Austrian and Bulgarian law. However, as explained above, since the unwinding of the merger is not possible under either national regime, restitution in natura (ie the return of the shares received in the acquiring company) is precluded and is instead converted into a monetary claim.

However, a contradictory situation arises in cases of unlawful, yet nevertheless registered and legally effective mergers. For instance, in a downstream merger scenario with a financially distressed parent, it is the parent company that received the unfair advantage, ie the parent company is the party liable for restitution. However, it ceases to exist, and the result is that the acquiring subsidiary becomes both the creditor and the debtor of the prohibited distribution. The consequence is that the claim is extinguished. However, this is not a satisfactory solution for the acquiring company's creditors.[217]

It is suggested that, in such cases, the parent's shareholders be held liable and satisfy the acquiring company's monetary claim, as they have caused the merger and thereby enabled the unlawful value transfer.[218] This solution is justified because, otherwise, creditors would be left insufficiently protected. Additionally, this indirect liability is justified in light of the fact that mergers cannot be unwound (*Bestandschutz*).

The same problem does not directly arise in upstream merger scenarios, as it is the claimant (the subsidiary) that ceases to exist, rather than the debtor (the parent). However, this does not mean that the claim remains unaffected, as the creditor disappears, leading to its extinction. Consequently, this does not benefit the creditors of the subsidiary. Their position does not improve, since the parent company is already their debtor after the merger.[219] For this reason, it is reasonable to hold the parent's shareholders liable, provided that they triggered the merger and that the merger decision can be attributed to them.

The same logic may be applied to side-stream mergers: Even though the direct claim between the sister companies is extinguished due to the merger, a restitution claim survives and is redirected against the (formerly common) parent company.

To sum up the fourth step of the 'Four-steps test', if the merger is unlawful, the competent

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217 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 129 f.

218 Johannes Reich-Rohrwig, *Grundsatzfragen der Kapitalerhaltung* (Manz 2004) 274 f.

219 Stephan Christoph Pree, 'Der Kapitalerhaltungsgrundsatz bei Umgründungsvorgängen' (PhD thesis, Johannes Kepler Universität Linz 2020) 148.

court must refuse its registration in the commercial register. However, if it is incorrectly registered despite being unlawful, the merger cannot be unwound and its legal consequences nevertheless take effect. Nevertheless, creditors are not left unprotected, as the disadvantaged company has a monetary claim against the indirectly benefiting shareholders.

4.8 Conclusion on the Second Research Question

Mergers involving financially troubled companies are not per se prohibited, as the mere transfer of negative assets is not automatically unlawful, provided that the surviving company remains solvent.[220]

The key legal challenge in this area arises in the context of intragroup mergers, where losses are shifted within the group in a manner that unjustifiably benefits shareholders. Such downstream, upstream, and side-stream mergers are, in most cases, unlawful in the absence of plausible justification or appropriate remedial measures.[221] The same applies to concentration mergers in which a company with higher share capital is merged into a company with lower share capital.[222]

Possible remedial measures include, *inter alia*, capital reductions, additional contributions by the benefiting shareholders, the availability of sufficient unbound assets, and genuine business justification.[223]

Regardless of the doctrinal route by which the unlawfulness is established – whether directly under national law, as in Bulgaria (eg Article 262y (1) of the Bulgarian Commercial Act), or through the application of general creditor protection rules, as in Austria – it may be plausibly argued that intragroup mergers involving the transfer of only negative assets are not permitted unless justified.

Where no business justification applies and no remedial measures are adopted in advance, the registration of such an unlawful merger in the commercial register must be refused. However, if the merger is nevertheless registered, its legal effects take place and the transaction can no longer

220 Eckert/Schopper/Caramanica in Eckert/Schopper (eds), *AktG-ON Kommentar zum Aktiengesetz* (Manz 2021) § 224 Rz 26; Aburumieh et al, *Praxisleitfaden Verschmelzungn* (LexisNexis Verlag 2014) VII. A. Rz 7 and VII. C. Rz 8; Ангел Калайджиев, *Преобразуване на търговски дружества* (ИК 'Труд и право' 2019) 152 / Angel Kalaydzhiev, *Corporate Restructuring of Companies* (Trud i pravo 2019) 152.

221 See Sections 4.2, 4.3 and 4.4.

222 See Section 4.6.

223 See Section 4.5

be unwound. In that case, the creditors of the disadvantaged company are protected through monetary claims against the benefiting shareholders.[224]

5. Summary of Findings

This thesis discusses and analyses creditor protection under the Company Law Directive, with a particular focus on mergers from the perspective of creditors. If the findings of the thesis are to be summarised in two concise statements, they are as follows:

First, the special creditor protection regime under EU law is not designed to be exhaustive, and general creditor protection rules are to be applied in conjunction where necessary. Second, mergers involving financially troubled companies are not per se unlawful, but they carry a significant risk of unlawfulness unless remedial measures are implemented or the transaction can be justified by legitimate business reasons.

As to the first research question of the thesis, which concerns the co-application of special and general creditor protection regimes to the same case, the answer from a European perspective is straightforward. Undoubtedly, the European legislator has not foreseen that the special creditor protection rules are exhaustive. This is because the special creditor protection regime is less intrusive and structurally less protective than the general regime, leaving creditors of merging companies insufficiently protected. This is difficult to justify, as mergers may expose creditors to risks equal to or greater than those arising from capital reductions or profit distributions. The non-exhaustiveness of both regimes may also be derived from the CJEU's jurisprudence, for example from the case *I.G.I. Srl v Maria Grazia Ciceria and Others*.

Unlike in Bulgaria, Austria has seen extensive debate on the simultaneous application of general and special creditor protection regimes, although the issue is now largely settled. Nowadays, the prevailing view in literature and case law is that special merger rules are not exhaustive.

The most convincing arguments supporting this view are that the two regimes address different risks and pursue different objectives, meaning that one regime cannot fulfil the objectives of the other, and *vice versa*. Hence, they cannot exclude each other but should rather complement each other.

Additionally, the two regimes may lead to the same economic effect. It does not make

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[224] See Section 4.7.

sense to afford creditors different levels of protection in identical situations. Thus, the co-application of both regimes appears to be a justified solution to such 'value contradictions' (*Wertungswidersprüche*).

Contrary to Austria, the debate on the simultaneous application of general and special creditor protection regimes has never been explicitly discussed in the Bulgarian legal literature with the same intensity. This may be explained by the fact that the Bulgarian legislator has already addressed some of the questions that Austrian legal practitioners and scholars had to develop through doctrine and case law.

Nevertheless, the prevailing Bulgarian literature suggests a tendency towards viewing the special creditor protection regime as exhaustive. However, Bulgarian case law and legal doctrine also reflect an understanding of creditor protection as a multi-layered system of rules, implying that special merger rules do not operate in isolation. On this basis, this thesis advocates for a more nuanced approach, according to which the co-application of general and special creditor protection regimes is also consistent with the Bulgarian legal framework.

The answer to the first research question (ie in favour of co-application), and the perspectives of European, Austrian, and Bulgarian law, illustrate that what ultimately matters is the outcome, not the doctrinal route by which it is reached. This reflects the underlying logic of directives: They are binding as to the result to be achieved, while leaving it to the Member States to determine how that result is achieved.

In this context, it is decisive that creditors are sufficiently protected. Whether this is achieved through explicit statutory rules, as in Bulgaria, or through the co-application of general principles and analogical reasoning, as in Austria, is of secondary importance. As this thesis has shown, despite these different approaches, both legal systems ultimately arrive at largely the same functional outcome.

As to the second research question, which concerns the legal challenges that arise when companies with more liabilities than assets are merged into healthy entities, the thesis showed that the same conclusion applies in both jurisdictions examined here.

What matters is that shareholders are not unjustifiably benefited from the merger. Both legal systems prevent such outcomes. It is therefore irrelevant whether the issue is addressed through the concept of prohibited repayment of capital contributions, as in Austria, or through specific statutory provisions, as in Bulgaria (for instance, Article 262x), without so explicitly relying on the notion of disguised distributions.

Ultimately, mergers involving financially troubled companies are problematic and, in many cases, unlawful unless supported by a remedial measure or a valid justification. Such measures are necessary for the merger to be registered in the commercial register. However, if an (unlawful) merger is incorrectly registered, its legal effects take full force, leaving creditors of the unlawfully merged companies with (only) monetary claims against the benefiting shareholder. In the examined jurisdictions, no unwinding of the merger is possible.

However, it should be borne in mind that Member States generally enjoy significant discretion when implementing directives. For instance, Article 108 of the Company Law Directive allows Member States to lay down rules on the nullity of mergers. Austria and Bulgaria have both decided that the nullity of a merger, once registered, should not be possible. Other Member States may have taken a different approach. Thus, the fourth step of the 'Four-steps-test' may vary across jurisdictions, potentially significantly affecting the overall assessment.

It would therefore be valuable for future research to undertake a comparative analysis extending beyond the two jurisdictions examined in this thesis. Such an analysis would allow for a better understanding of the broader legal EU landscape.

To conclude with one broader observation, the Company Law Directive ensures an adequate level of creditor protection. However, as directives provide only for a minimum level of protection, creditor protection rules vary significantly across EU jurisdictions. This implies that, in order to achieve full certainty and legal security within the EU, further harmonisation in this regard may be desirable. At the same time, functional equivalence across Member States, as shown in the Austria–Bulgaria comparison, already mitigates divergences across jurisdictions.

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