WRONGFUL TRADING – THE BALTIC, CEE AND SEE LANDSCAPE

April 2020

COUNTRIES

I. Austria (Binder Grösswang) 4

II. Belarus (Sorainen) 6

III. Bosnia and Herzegovina (Karanovic & Partners) 8

IV. Bulgaria (DGKV) 11

V. Croatia (Karanovic & Partners) 14

VI. Czech Republic (Havel & Partners) 16

VII. Estonia (Sorainen) 18

VIII. Hungary (Oppenheim) 21

IX. Latvia (Sorainen) 22

X. Lithuania (Sorainen) 24

XI. Montenegro (Karanovic & Partners) 26

XII. North Macedonia (Karanovic & Partners) 28

XIII. Poland (DZP) 30

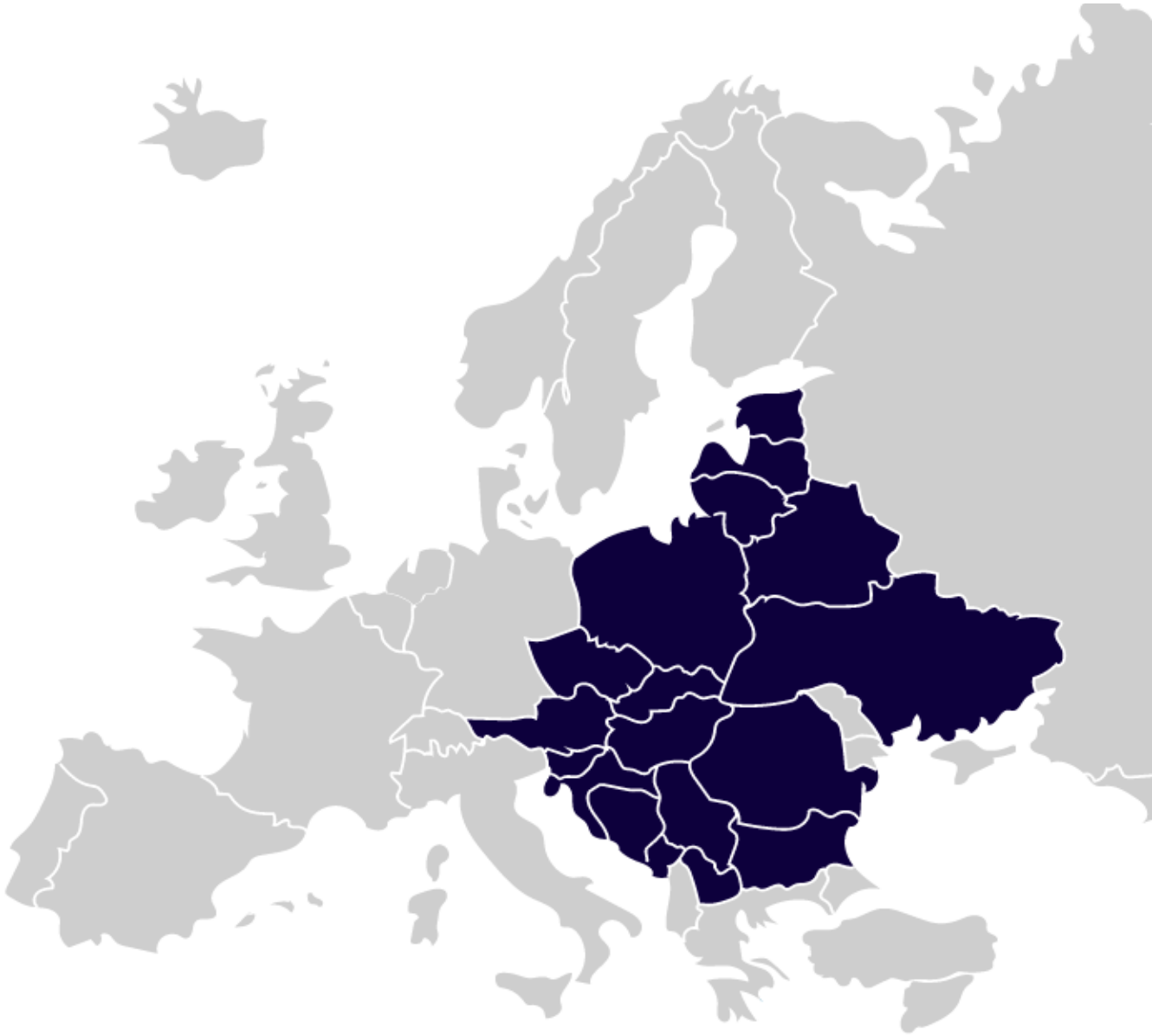
XIV. Romania (Volciuc-Ionescu) 32

XV. Serbia (Karanovic & Partners) 34

XVI. Slovak Republic (Havel & Partners) 36

XVII. Slovenia (Karanovic & Partners) 38

XVIII. Ukraine (Sayenko Kharenko) 39



Wrongful Trading – the Baltic, CEE and SEE Landscape

Generally speaking, wrongful trading is the special form of liability where a director of a company is liable for damages towards the creditors for the mismanagement of an insolvent company.

A special feature of the institution of wrongful trading is, that it may give rise not only to the liability of the director of the company but also to the liability of the director, management, employee of the parent company or even of the grandparent company (so called shadow director).

The pandemic and the related measures taken to restrict social contacts are challenging many businesses. In this summary we would like to draw your attention to the above special aspect of the situation: executives of foreign parent companies can potentially be held liable under the laws of Baltic/CEE/SEE countries for certain acts and decisions relating to their Baltic/CEE/SEE subsidiaries.

If the restriction on the free movement of private individuals continues region-wise for a longer term, then director, boards and executives must get prepared for temporary and significant – in some sectors even dramatical – changes in the business environment. Directors, boards and executives should also be prepared for making quick decisions in such situation. However, it is especially important now to indicate and consider if any of the above persons is entering a territory in which the decision-making process no longer falls under the rules of “business as usual” from legal point of view.

The below offices from the Baltic/CEE/SEE countries prepared a short – and in our view – concise and helpful summary on the topic covering these important region of Europe.

We have set up a team dedicated to handling the above issues and situations so that we can promptly give accurate and targeted answers to your questions as they arise. Our insolvency specialists are happy to help you with questions regarding the Baltic States and Belarus. Additionally we have formed a special COVID-19 task force which is at your disposal to help you for any COVID-19 related business critical questions.

I. AUSTRIA[1]

Authors / contacts: Andreas Hable and Hermann Beurle

1) The principal rule of the liability of the directors[2]:

Directors of an Austrian private limited company (GmbH) may become personally liable for violating their duties. Some of the directors' duties are specifically determined by statutory law, others may derive from general principles such as the general duty of care.

Since directors owe their duties primarily to the company, they are in principle only liable towards the company. However, in limited cases, the directors may also be liable towards other persons. For example, directors may be directly liable towards third parties for breaching laws having the purpose to protect them (Schutzgesetze), e.g. creditor protection laws.

2) Special liability regime for directors in threatening insolvency:

When a company is threatening insolvency, the directors do not only have to act in the best interest of the company but in addition also in the best interest of the company's creditors. Therefore, in the event of threatening insolvency, the directors may in particular be obliged to (i) file for reorganisation of the company, if necessary, (ii) file for insolvency without undue delay, but no later than within 60/120 days[3] after the relevant criteria are met, (iii) refrain from making payments to the company's creditors (if there is a risk that not all of them may be satisfied), and (iv) refrain from entering into new payment obligations.

3) When will a threatening insolvency situation occur?

A threatening insolvency situation is given if there is a substantial risk that in the near future the company will either be unable to pay its debts when due or overindebted (for further details, please refer to section 7 below).

4) What are the legal consequences if the director breaches the special duty described in section 2?

The director may become personally liable for damages occurred. In certain circumstances non-compliance may also be a criminal offence.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, however, only in very limited and exceptional cases.

For example, the company's shareholders may become personally liable if (i) they qualify as shadow director (faktischer Geschäftsführer) and do not file for insolvency, (ii) formally instruct the directors not to file for insolvency or otherwise work towards the omission of an insolvency filing, (iii) the directors of the company are incapable of acting and the shareholders fail to file for insolvency, or (iv) the funds of the company have been comingled with the funds of the shareholders (Vermögensvermischung). However, the shareholders are generally not obliged to actively instruct the directors to file for insolvency.

Furthermore, the members of the supervisory board (if any) must meet certain obligations and assist the directors, if insolvency is threatening. If they fail to do so, they may also become personally liable.

6) Who is a shadow director?

A shadow director (*faktischer Geschäftsführer)* is a person who - without being formally appointed

[1] Please note that the following answers refer to Austrian private limited companies (*GmbH*) only and not to any other type of companies established under Austrian law. Furthermore, please note that the Austrian legislator is currently dealing with the COVID-19 pandemic and publishes amendments to the law on a regular basis, including amendments to Austrian insolvency laws. The answers consider all amendments made until and including 6 April 2020.

[2] „Director(s)" refers to the managing director(s) (*Geschäftsführer*) of an Austrian private limited company (*GmbH*).

[3] The 60 days period is extended to 120 days in exceptional case, for example in case the company is unable to satisfy its creditors due to the COVID-19 pandemic. In addition, please note that pursuant to the 4. COVID-19-Act, the debtor is not obliged to file for insolvency because of over-indebtedness occurring in the period from 1 March 2020 to 30 June 2020.

as director - manages the business of the company both internally and externally by replacing the directors of the company in a comprehensive manner. For classification as shadow director, however, it is not sufficient that a shareholder frequently makes use of his right to instruct the company's management. Also, shareholders who are permanently and intensively involved in the business of the company, but who do not act internally or externally on behalf of the company, do in principle not classify as shadow directors. Therefore, a person would qualify as shadow director only under specific circumstances.

7) How to determine if the company is in a threating insolvency?

In principle a threatening insolvency may be determined by asking the following two questions.

First, it should be asked whether there is a risk that in the near future the company will be unable to pay its debts when due (i.e. liquidity test) and if yes, whether it is likely that the company cannot obtain the necessary means to pay its debts on a short notice (e.g. by taking up a loan).

Second, it should be asked whether there is a risk that in the near future the company will be over-indebted (i.e. balance sheet test) and if yes, whether it is likely that the over-indebtedness cannot be eliminated within a foreseeable period (negative Fortbestehensprognose).

If one of the two above-mentioned scenarios is given, the company is threatening insolvency.

8) Summary

In case insolvency is threatening, the directors of an Austrian private limited company must act not only in the best interest of the company but also in the best interest of its creditors. They must comply with certain special duties and may become personally liable if they fail to do so. Therefore, the directors of an Austrian private limited company should regularly examine whether the company might be threatening insolvency. In very limited and exceptional cases the company's shareholders or other persons may also become personally liable towards unsatisfied creditors of the company. This should be considered on a case-by-case basis.

II. BELARUS

Author / contact: Maria Rodich

1) The principal rule of the liability of the directors[4]:

Generally, members of the company's management bodies are liable towards the company for damages incurred by the company due to their intentional actions. The liability of senior officers employed by the company is also regulated by Belarusian labour law, which requires the employees to reimburse real damages caused by failure to duly perform their job duties.

2) Special liability regime for directors in threatening insolvency:

Belarusian bankruptcy legislation does not have a concept of wrongful trading. Belarusian concept of concealing or deepening insolvency can be reverted to as an analogue to wrongful trading.

3) When will a threatening insolvency situation occur?

According to Belarusian law, if repayment of debt to one or several creditors entails the company's inability to repay the debts to other creditors, senior officers of the company, entitled by the articles of association, have to file an application for the insolvency of the company within one month from the date this inability emerged.

Should the senior officer fail to do the filing, his or her further actions may be qualified as concealment of insolvency or as deepening of insolvency.

4) What are the legal consequences if the director breaches the special duty described in section 2?

If the senior officer does not file an application for insolvency within the specified period he or she may be subject to:
- joint and several subsidiary liability for the debts of the company;
- criminal liability for concealment or deepening of insolvency.

The type and extent of the senior manager's liability will differ on the case by case basis.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, this liability is also applicable to shareholders of the company, accountants of the company and any other persons that actually impacted the decision making process in the company – for instance, the so-called shadow directors of the company.

6) Who is a shadow director?

Belarusian law does not contain the legal definition of a shadow director. However, for the purposes of insolvency a shareholder or any other person which de facto gives orders to the senior officers of the company and has a dominant influence on the company's decisions can be qualified as a shadow director

7) How to determine if the company is in a threating insolvency?

To determine if the company is in a threating insolvency one usually tracks the following key accountancy solvency ratios: Debt to Assets Ratio (calculated by dividing total debt of a company by its total assets), Debt to Equity Ratio (the ratio of total liabilities of a business to its shareholders' equity), Debt to Capital Ratio (measures the proportion of

[4] Directors (in Belarusian: руководитель) under Belarusian law are natural persons, who perform management of the company. The director is only a sole management body.

interest-bearing debt to the sum of interest-bearing debt and shareholders' equity). The first ratio (Debt to Assets Ratio) is a ratio which measures debt level of a company as a percentage of its total assets and indicates of a company's financial risk, the risk that the company's total assets may not be sufficient to pay off its debts and interest thereon. Since not being able to pay off debts and interest payments may result in a business being wound up.

8) Summary

Though the concept of wrongful trading is unknown to Belarusian law, Belarusian legal regulations set liability for senior officers for failure to timely file for bankruptcy and concealment or deepening of insolvency. Shareholders, accountants and other persons who de facto influence the company's decisions may be brought to criminal liability and subsidiary liability for the debts of the company. In order to avoid the risks of such liability it is strongly recommended to take due control over company's solvency ratios by constantly monitoring balance sheets of the company.

III. BOSNIA AND HERZEGOVINA

karanovic/partners

Authors / contacts: Nihad Sijerčić and Alexander Poels

As an introductory note, we emphasize that the state of Bosnia and Herzegovina (BH) consists of two entities - the Federation of Bosnia and Herzegovina (FBH) and Republika Srpska (FBH) where different legal regimes apply. In cases where the applicable law regulates a certain matter identically we have given a unified answer for BH, and in all other cases we have given a separate answer for FBH and RS.

1) The principal rule of the liability of the directors[5]:

According to the Bosnian corporate law, the basic principle concerning the activity of the directors (members of the managing board or the managing director) is that they shall perform their duties in the interests of the company. If the director does not comply with this duty, she/he will be liable towards the company and the shareholders for any damage incurred by the company or the shareholders.

There are two basic types of liability of the directors of companies in BH for breach of their duties towards the company and/or breach of the law: (i) civil law liability; and (ii) liability for the offences.

Civil liability - The director has the duty to perform his/her function in good faith, exercising the care of a good business person and in the reasonable belief that he/she is acting in the best interests of the company (duty of care). If the director breaches the duty of care, civil liability exists for damages sustained by the company and the shareholders (in RS), caused by such breach. Consequence of the civil liability is the right to compensation of damages to the company or to the shareholders (in RS).

When performing their duties, the directors should rely on information and opinions received from persons (competent for a certain field) who they believe is reliable and competent (i.e. who acted in such case in good faith). If the director acts in accordance with the foregoing when making a business judgment, he/she will not be liable for damage caused to the company that may arise from the exercise of such judgment.

For the damage sustained by the company, a lawsuit can be filed against the director by the company or by any shareholder (in RS: holding at least 5%) of on behalf of the company. For the damage sustained by the shareholders, a shareholder can file a lawsuit. On the other hand, the BH legislation does not recognize the direct civil liability of the director towards third persons.

Offenses may be commercial and criminal. Commercial offenses are less serious violations of the applicable regulations provided for by various regulations while criminal acts are more serious violations of the applicable regulations.

2) Special liability regime for directors in threatening insolvency:

In BH, there is no special liability regime for directors in threatening insolvency, so that the general liability principles described above under section 1 apply during threatening insolvency as well.

Although the BH legislation does not explicitly prescribe special liability regime for directors (members of the management board) in threatening insolvency, directors should be very careful if the company's business starts to deteriorate, even before the company reaches a stage of threatening insolvency. This is because, under the RS and FBH Criminal Code, a director could be subject to imprisonment if she/he commits the criminal act of "causing bankruptcy" of a company by (i) suspending the collection of claims with the aim of reducing future bankruptcy estate, (ii) spending excessively or dispossessing the assets into a dime,

[5] We use the term "directors" (in Bosnian: *direktor*) for those persons who represent the company and are registered as such in the court registry of companies. Are considered to be directors under BH laws:
- members of the management (in Bosnian: "*uprava*"), which includes the director and (in FBH only) executive directors (in Bosnian: direktor/izvršni direktor) of a limited liability company („d.o.o.")
- members of the management (in Bosnian: "*uprava*"), which includes the director and executive directors (in Bosnian: direktor/izvršni direktor) of a joint stock company („a.d." in Rs, "d.d." in FBH)
- shareholders (in Bosnian: "član") in a unlimited company („d.n.o." in FBH, "o.d." in RS)
- shareholders (in Bosnian: "*komplementar*") in a limited partnership (in Bosnian: "k.d.").

(iii) assuming disproportionate obligations, (iv) making deals with entities unable to pay, (vi) missing the time to collect claims or otherwise diminishing the company property. Such persons shall be punished by imprisonment for a term ranging between six months and five years (applicable for FBH) or a term ranging between one to five years (applicable for RS).

This criminal act can be committed even unintentionally (a) if the wrongdoer was aware that the bankruptcy could be caused by his/her acts, but she/he lightly believed it would not occur or that she/he would be able to prevent it, or (b) if she/he was not aware that she/he could cause the bankruptcy but she/he should have been aware having in mind all the circumstances and her/his background.

Even if the company does not go bankrupt, the directors could be criminally liable for the criminal act of "damaging creditors" if she/he was aware that the company has become insolvent (i.e. unable to pay debts) and she/he either (i) repays the debt or otherwise places a creditor in a more favourable position and thereby significantly damages other creditor (when she/he could be exposed to imprisonment up to one year in FBH and between six months and three years in RS), or (ii) with intent to defraud or damage the creditor, admits a false claim, enters into a fraudulent contract, or damages the creditor with another fraudulent act (when she/he could be exposed to imprisonment between six months and five years in FBH and between one and five years in RS).

3) When will a threatening insolvency situation occur?

The threatening insolvency occurs when the company predicts that it will not be able to meet its due payment obligations (only the company can file a petition for insolvency due to threatening insolvency). The company is considered insolvent if it cannot settle due financial obligations for a continuous period of 30 days (applicable in FBH) i.e., if it cannot settle due financial obligations for a period of continuous period 60 days or the company's account has been blocked for consecutive 60 days (applicable in RS).

4) What are the legal consequences if the director breaches the special duty described in section 2?

If the company director breaches the duty of care the same rules as described in section 1 would be applicable, i.e. the director would be liable to the company for the damages caused. Also, the director could be found guilty for committing the criminal acts described in the section 3.

5) Does this wrongful trading liability apply to persons other than the directors?

The wrongful trading, as a special form of liability where a director of a company is liable for damages towards the creditors for the mismanagement of an insolvent company or similar instruments by which the management of the company could be directly responsible to creditors if the company is near or in insolvency is not recognised by the BH legislation. As noted above, the BH laws recognize the duty of care that applies to the persons listed under section 2.

6) Who is a shadow director?

The BH legislation does not recognise shadow director as institution of the law so shadow directors are not usually sanctioned or liable for the management of the company. Of course, if the person acting as the shadow director commits some criminal offence related to the company, such person will be sanctioned but not as shadow director.

7) How to determine if the company is in a threating insolvency?

There is no test to determine the threatening insolvency. Since only the company can initiate insolvency proceedings based on threatening insolvency, it is up to company to determine if the insolvency reasons as described in the section 3 will occur in the upcoming period.

8) Summary

Even though the institute of wrongful trading does not exist in BH laws, the directors could be criminally liable for causing the bankruptcy of the company or for damaging the creditors, even if they were not acting with fraudulent intent. Such liability can arise during a period when the company is in threatening insolvency (likely to be unable to

pay its debts as they become due) but also before that period if the company later goes bankrupt or if the creditors are prejudiced because of the director's actions. For such reason, the directors should closely monitor the company's liquidity and indebtedness and should be very careful when the company's financial standing starts to deteriorate. In addition, effects similar to the wrongful trading liability may arise in liquidation proceedings in which the director of the company is appointed as the liquidation manager. In such case, the director, as the liquidation manager, is liable towards the creditors for breach of the rules of the liquidation proceedings with its own property.

In the normal course of the company, when the company is not in state of threatening insolvency, the directors and other persons having special duty toward the company will be liable in case they cause any damage to the company and if such damage is caused intentionally of in gross negligence.

As the institute of shadow director is not recognised under BH laws, those persons who in other legal systems would be qualified as shadow directors do in principle not bear special liability in a threatening insolvency of the company.

IV. BULGARIA

Author / contact: Nikolai Gouginski

1) The principal rule of the liability of the directors[6]:

Under the Bulgarian Law on Commerce (the "**Law on Commerce**") the director is obliged to manage in good faith the company by observing the applicable law and the decisions, taken by the general meeting of the shareholders of the company, respectively the sole shareholder. Further, the director is under a general prohibition to perform commercial activity or deals or be appointed in the governing bodies of legal entities, which have similar business activity as the company (i.e. prohibition on competing with the company).

The liability of the director towards the company and its shareholders may be invoked on the following grounds:

- civil liability for damages, resulting from breach of the obligations under the Law on Commerce;
- contractual liability for breach of the terms of the management contract (if such is in place), which may include also an obligation for payment of contractual penalties;

The liability of the director towards third parties may be invoked in the following special cases:

- civil liability to the company's creditors for the damages caused, upon failure to timely initiate insolvency proceedings as required by the law;
- liability under the Bulgarian Tax and Insurance Procedure Code (the "**Tax Code**") for unpaid taxes and mandatory social security contributions of the company;

criminal liability upon specific cases, set forth in the Bulgarian Criminal Code (the "**Criminal Code**"), including, among others, failure to initiate insolvency proceedings within 30 days as of the company stopping payments.

2) Special liability regime for directors in threatening insolvency:

Under the Law on Commerce a debtor company that has become unable to pay its debts or over-indebted, has to file for insolvency within 30 days. The application for initiation of insolvency proceedings should be filed by the management body of the company (such as the general manager of a limited liability company) or the company's legal representative (such as the executive director of a joint stock company), or an unlimited liability shareholder (for example, in a limited partnership). In addition, a procurator (if such is appointed) of the debtor company has to inform the company of the status of inability to pay debts/ over-indebtedness within 7 days. Upon failure to perform their notification obligations, the persons referred to in the preceding sentences are jointly and severally liable to the company's creditors for any damages, resulting from the delayed or lacking application for insolvency.

In addition, the Tax Code provides for a number of cases triggering the liability of directors of a company (such as managing director, member of the management body and a procurator) for unpaid obligations of the company for taxes and mandatory social security contributions. Such liability is extended also to majority shareholders, when the respective actions triggering the liability, are performed upon resolution of such majority shareholders.

Further, the Criminal Code provides for a number of cases, in which the persons who manage and represent the company, may be subject to criminal liability for performing certain actions, or admitting

[6] We have used the term "director" for those persons who are members of the management body or legal representatives of a Bulgarian company, such as (i) general manager (in Bulgarian: "управител") of a limited liability company („ЕООД"), (ii) a member of the board of directors (in Bulgarian: „съвет на директорите") or the management board (in Bulgarian: „управителен съвет") of a joint stock company („АД") and (iii) an executive director (in Bulgarian: „изпълнителен директор") of a joint stock company („АД").

the performance of certain actions, of the company after initiation of the insolvency proceedings or where as a result of such actions, the company became insolvent and damages for the creditors have occurred.

3) When will a threatening insolvency situation occur?

In general, a threatening insolvency situation is deemed to occur when the debtor company is unable to pay its debts or becomes over-indebted.

A company is considered unable to pay its debts, when the company is unable to pay a due and payable: (i) monetary obligation arising out of or relating to a commercial transaction, (ii) public obligation to the state or the municipalities, related to the company's commercial activity, (iii) obligation relating to private state receivables, or (iv) obligation for payment of labour remunerations to at least 1/3rd of the company's employees, delayed for more than two months. Failure of the company to announce in the Bulgarian Commercial Register its annual financial statements for the last 3 years is also grounds for initiation of insolvency proceedings.

A company is considered over-indebted when its property is not sufficient to cover its monetary obligations.

In case a prior stabilization procedure has been initiated, an imminent threat of insolvency shall be deemed present when the company, with a view to the forthcoming maturity of its cash obligations within the 6-month period after the date of filing the application for stabilization, finds itself unable to pay due cash debts in relation to a commercial deal or public obligation, or may stop payments.

4) What are the legal consequences if the director breaches the special duty described in section 2?

If the directors described in Section 2 above breach their special duty to file for insolvency of the company as required by the law, these officers will be jointly and severally liable (with their personal property) towards the company's creditors for the damages caused.

In addition to the civil liability for damages, the persons who manage and represent the company are subject to criminal liability under the Criminal Code, if they fail to initiate insolvency proceedings within 30 days as of the date on which the company stops payments. Such liability may result in imprisonment of up to 3 years and a fine of up to BGN 5,000 (appr. Euro 1,500). It is worthy to mention that if the court establishes in the course of the insolvency proceedings that the date of the company becoming insolvent is earlier than the one claimed by the applicant in the insolvency proceedings, the court is entitled to notify the prosecution office to start investigation under the Criminal Code.

Further, the Criminal Code provides for a number of cases, in which the persons who manage and represent the company, may be subject to criminal liability for performing certain actions, or admitting the performance of certain actions, by the company after initiation of the insolvency proceedings or where as a result of such actions, the company became insolvent and damages for the creditors have occurred. In such cases, the criminal liability may result in imprisonment of between 3 and 15 years in especially grave cases, where the damages caused to the creditors are significant.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, the wrongful trading liability may apply in certain cases to persons other than the directors of the company. Please see for details Section 6 below.

6) Who is a shadow director?

A shadow director is not a legally defined term and the concept of a shadow director is not specifically regulated under Bulgarian law.

Nevertheless, the Tax Code regulates a number of cases in which certain types of persons, other than directors of the company discussed in Section 2 above, may be held liable for unpaid public obligations of the company (including specifically in the case of threatening insolvency).

Pursuant to the Tax Code majority shareholders, as well as in certain cases minority shareholders, may be held liable for unpaid obligations of the company for taxes and mandatory social security contributions, if they transfer in bad faith shares owned by them in the capital of the company, while being aware that the company is over-indebted or unable to pay its debts.

In addition, the Tax Code provides that persons who have acted in secret cooperation with the insolvent company are jointly and severally liable with the insolvent company for unpaid obligations of the latter for taxes and mandatary social security contributions. Further, the owners of the capital of the insolvent company, including the shareholders, that have received secret distribution of the company's profit, are liable for the unpaid obligations of the company for taxes and mandatory social security contributions.

7) How to determine if the company is in a threating insolvency?

Please see our response to Question 3 above for details how to determine if the company is in a threatening insolvency.

Upon application for insolvency, the court would appoint an expert to analyse the liquidity coefficients of the company in order to determine whether it has become insolvent.

8) Summary

In general, under Bulgarian law directors of a company would be personally liable towards the company's creditors for the damages caused, if they have not complied with the obligation to file for insolvency as required. In addition, directors may be subject to criminal liability for performing certain actions (or admitting the performance of such actions) after initiation of insolvency proceedings in respect of the company, or as a result of which actions the company became insolvent and damages to the creditors have occurred.

A shadow director is not a legally defined term and the concept of a shadow director is not specifically regulated under Bulgarian law. Still, the Tax Code provides for a number of cases in which not only directors of the company, but also other persons, such as majority shareholders, minority shareholders or generally persons who acted in secret cooperation with the company, may be held liable for unpaid obligations of the company for taxes and mandatory social security contributions, if such other persons have acted in bad faith and have divested or decreased the value of the company's assets.

Therefore, we suggest a careful and considered action, regular cash flow monitoring and sensitive treatment of decision-making in cases when the Bulgarian subsidiary faces or may face liquidity turbulence or payment difficulties.

V. CROATIA

karanovic/partners

Author / contact: Alexander Poels

1) The principal rule of the liability of the directors[7]:

Generally, the director needs to act in the company's best interests. The director's actions are deemed to be lawful if (s)he may assume that (s)he acts in the company's interests and for the company`s benefit. Pursuant to the Croatian Companies Act, the director is presumed to be liable for his/her actions in court procedures. Damage claims against the director may be filed by the company. However, the company's creditors may also file a damage claim, provided that: (i) they may not settle their claims against the company; and (ii) the director acted with gross negligence.

2) Special liability regime for directors in threatening insolvency:

There is no special liability regime in Croatia *per se* in a threatening insolvency. However, once the company's bank accounts are blocked due to non-settled enforcement orders, the company (and therefore its managing director) must not conduct assignation, assignment or other clearing transaction, nor it may conduct cash payments.

3) When will a threatening insolvency situation occur?

Generally, a threatening insolvency occurs when it is likely that the company may not settle its outstanding obligations upon becoming due.

4) What are the legal consequences if the director breaches the special duty described in section 2?

Should the company undertake cash payments, assignation, assignment or other clearing transaction while its bank accounts are blocked due to non-settled enforcement orders:

a) such action may be deemed as null and void, as contrary to the compulsory provisions of the Croatian law;
b) a fine may be payable by the company up to HRK 500,000 (approx. EUR 66,000);
c) a fine may be payable by the managing director up to HRK 500,000 (approx. EUR 6,600).

The company's (i.e. director's) actions undertaken in case of a threatened insolvency may be subject to annulment claims, provided that the insolvency procedure is commenced with regard to the company, if certain conditions from the Croatian Insolvency Act are met.

In addition to the above, the managing director may be liable for breaching rules of trading during a threatening insolvency, pursuant to the principal rule of the managing director's liability (as mentioned under response 1).

5) Does this wrongful trading liability apply to persons other than the directors?

No.

6) Who is a shadow director?

Croatian law does not recognize the institute of a shadow director.

7) How to determine if the company is in a threating insolvency?

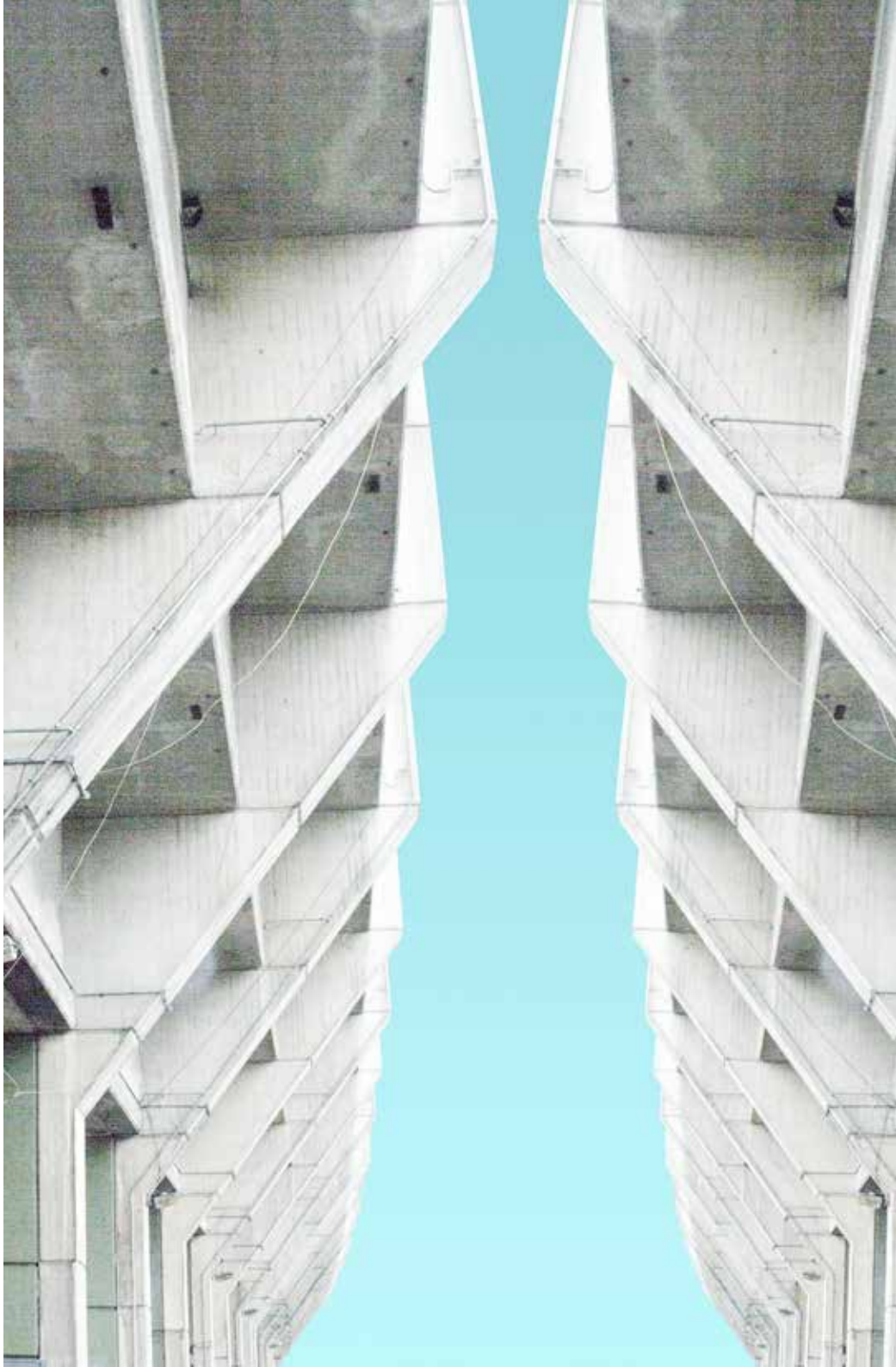
As mentioned, a threatening insolvency occurs when it is likely that the company may not settle its outstanding obligations upon becoming due. Croatian law presumes a threatening insolvency when: (i) the company's bank accounts are blocked due to non-settled enforcement orders; (ii) the company does not settle workers' wages within 30 days as of becoming due; or (iii) the company does not settle taxes or social contributions payable to workers' wages within 30 days as of becoming due.

[7] Directors (in Croatian: "direktor" or "član uprave") are company officials liable for wrongful trading, by virtue of law authorised to represent:
- public or private joint stock companies ("d.d.") and
- limited liability companies ("d.o.o.").

The same rules on wrongful trading apply accordingly for partners (in Croatian: "članovi") in general partnerships ("j.t.d.") and limited partnerships ("k.d.").

8) Summary

Croatian law does not recognize institute of shadow director nor does it provide for special liability regime for directors in a threatening insolvency. As such, those persons who would in other legal systems be qualified as shadow directors of the company in principle do not bear any liability in a threatening insolvency of the company. To the director of the company, certain restrictions however apply in terms of: (i) general rules for liability of the director; (ii) special regime for the company once its bank accounts have been blocked due to non-settled enforcement orders.



VI. CZECH REPUBLIC

HAVEL & PARTNERS
CONNECTED THROUGH SUCCESS

Author / contact: Robert Nešpůrek

1) The principal rule of the liability of the directors[8]:

The member of the executive body of the company must perform his/her office with due managerial care, i.e. with necessary loyalty, required knowledge and diligence. When adopting a decision, the member of the executive body of the company has to collect all of the information that is / might be necessary to adopt a qualified decision. Under the Czech law, the emphasis is laid on the decision-making process itself, rather than the result of the decision of member of the executive body of the company (i.e. the business judgment rule). Therefore, the member of the executive body of the company should adopt a decision on a basis of complete and relevant information and ideally keep track of the decision-making process. If the member of the executive body of the company does not comply with his/her duty to act with due managerial care, he/she will be liable towards the company for any damage incurred by the company. The member of the executive body of the company is not generally liable towards third parties unless the damage is caused wilfully.

2) Special liability regime for directors in threatening insolvency:

The member of the executive body of the company on behalf of the company has a duty to report threatening insolvency to the insolvency court (to file an insolvency proposal against the company). Should someone else (e.g. a creditor of company) do so before the member of the executive body of the company does, the members of the company's bodies might be called upon by insolvency administrator to return any remuneration they have received from the company – this going back 2 years since the effectiveness of the court resolution declaring the company bankrupt, if they knew or should have known of threatening insolvency and in a breach of due managerial care did not do everything necessary and reasonably foreseeable to avert the bankruptcy.

Moreover, after it declares the company bankrupt, the insolvency court can resolve that the member of the executive body of the company guarantees the fulfilment of obligations of the company towards its creditors if he/she knew or should have known of threatening insolvency and in breach of due managerial care did not do everything necessary and reasonably foreseeable to avert the bankruptcy.

The above mentioned rules apply also for the former member of the executive body of the company and former members of the company's bodies, if their actions or omissions contributed to the company's insolvency.

3) When will a threatening insolvency situation occur?

When, considering all of the circumstances, it can be reasonably assumed that the debtor will not be able to pay major part of his / her monetary liabilities properly and on time.

4) What are the legal consequences if the director breaches the special duty described in section 2?

In addition to the return of the remuneration and guarantee of the fulfilment of the obligations of the company, as described in section 2, the member of the executive body of the company might be also disqualified from his/her office and be liable for damages caused to the creditors of the company by not filing the debtor insolvency proposal. Such damages will be calculated (for each creditor) as the difference between the creditor's receivable it will have registered in the insolvency proceedings and the payment it will actually receive on this receivable from the insolvency estate.

Further, failure to timely file the insolvency proposal will usually lead to some of the company's creditors benefitting from the situation (as they may have received full payments from the debtor who was already in a bankruptcy situation, but has not filed the insolvency proposal yet). This is not desirable. All creditors of a bankrupt company should be treated equally in insolvency proceedings, and receive generally the same portions of their receivables from the insolvency estate. Payments made to

[8] A member of an executive body (in Czech: člen statutárního orgánu) is a general expression for the executive director of the limited liability company (s.r.o.), member of the board of directors of the joint-stock company (a.s.), general partner in the limited partnership (k.s.) and partner (shareholder) in the general partnership (v.o.s.).

some creditors in a situation like this could lead to a criminal liability arising on the side of member of the executive body of the company.

5) Does this wrongful trading liability apply to persons other than the directors?

In a broader context, anyone who uses his or her influence in a business corporation (the "influential entity") to influence, in a decisive and significant manner, the behaviour of a business corporation (the "influenced entity") to the damage of the same shall compensate such damage, unless he/she proves that he/she could have in good faith and reasonably assumed, in his/her influencing actions, to be acting on an informed basis and in a justifiable interest of the influenced entity. The influential entity shall be liable towards the creditors of the influenced entity for the payment of the debts which cannot be partially or fully paid to them by the influenced entity as a result of the influence of the influential entity.

6) Who is a shadow director?

The current Czech regulation currently does not expressly recognise the legal institute of *shadow director.* However, with effectiveness as of 1 January 2021 the Czech law will newly define a shadow director as *"a person who is effectively in the position of a member of an elected company's body, even if he/she is not a member."*

7) How to determine if the company is in a threating insolvency?

There are two insolvency tests which the member of the executive body is obliged to carry out basically continuously:

(i) Cash flow test – whether the company is able to fulfil its obligations as they become payable, thus whether the liquid assets of the company are sufficient to pay up the payable debts. The company is insolvent for this reason if it has multiple creditors and receivables towards them which are at least 30 days overdue and is unable to repay them. Under the insolvency act it is presumed the company is unable to repay the debts if any of the following applies: (i) it has stopped to pay a substantial part of its debts, (ii) the debts are overdue for more than 3 months, or (iii) it is not possible to enforce a claim against the company by a single creditor in standard enforcement proceedings.

(ii) Balance sheet test – measures the value of the company's assets against its liabilities.

8) Summary

Generally, the member of the executive body of the company is solely responsible and liable for the decision – making alone as to whether or not he/she is obliged by law to file a debtor insolvency proposal on behalf of the company. The member of the executive body of the company will be liable for damages caused to the creditors if he/she fails to timely file the insolvency proposal, and could even incur criminal liability if some of the creditors are substantially damaged by his/her actions or omissions compared to the situation in which the insolvency proposal would have been timely and properly filed. The position of the member of the executive body of the company will be slightly improved if he/she can prove that they were installed into the position of the member of the executive body of the company as a crisis manager in an already difficult situation for the company.

In some cases, when influential person's influence causes damage to the company, this person guarantees the fulfilment of those debts of the influenced person, which cannot be paid in result from the influence.

VII. ESTONIA

Authors / contacts: Mari Karja and Karmel Einberg

1) The principal rule of the liability of the directors[9]:

The general rule of liability for a member of a management board (i.e. a director) is that a director must perform his or her duties with due diligence according to Estonian Commercial Code (ECC) § 187 (1), § 315 (1).
More specifically, the director must perform his or her obligations arising from law or the articles of association with the diligence normally expected from a member of a management body and must be loyal to the legal person according to Estonian General Part of the Civil Code Act (CCA) § 35.

Diligence that is normally expected from a member of management body is determined on case-by-case basis depending of knowledge, skill and characteristics of a specific director by the courts of law. The actions of a director are compared to the actions of a diligent director who is performing his or her tasks under similar circumstances.

2) Special liability regime for directors in threatening insolvency:

Under the circumstances of threatening insolvency the general rule of performing one's duties with due diligence still applies, however the management board member must adapt his or her actions accordingly to the economic state of the company.

This means mainly two things: 1) the management board member must consider submitting bankruptcy declaration, and the potential damage to the company and to its creditors caused by the omission of bankruptcy declaration; 2) the management board member must consider whether or not there is a cause to refrain from making payments on behalf of the company, and the potential damage to the company and its creditors caused by making the named payments according to ECC § 180 (5), § 306 (3).

The first and foremost obligation in case of insolvency is submitting bankruptcy declaration in orderly time. The second most important obligation is to withhold making payments on behalf of the company.

The law specifically prohibits making payments by the management board members on behalf of the company when the insolvency has become evident according to ECC § 180 (5), § 306 (31).

The law does not provide an exhaustive list of prohibited payments. This generally means that prohibited are payments satisfying the claims of some creditors, and therefore, not leaving enough assets to satisfy the claims of other creditors, resulting in the unequal treatment of creditors.

Payments to shareholders are also prohibited if the company's net assets are less than or would be less than the total of share capital and the reserves which pursuant to law or the articles of association shall not be paid out to shareholders according to ECC § 157 (3).

[9] In Estonia the principal liability lies with the members of management board. Private limited companies and public limited companies are represented and managed by the management board according to the Estonian Commercial Code (ECC) § 180 (1) and § 306 (1). The management board may have one member (a manager) or several members, stipulated by the ECC § 180 (2). Some private limited companies may have a supervisory board as well, for public limited companies having a supervisory board is compulsory, according to the ECC § 180 (4) and § 316 (1). The supervisory board shall plan the activities of a company, organise the management of a company and supervise the activities of the management board, ECC § 316 (1). If a company has a supervisory board the management board must adhere to the lawful orders of the supervisory board, according to ECC § 180 (4) and § 306 (2). Therefore, in certain cases the question about the liability of the supervisory board might arise.

3) When will a threatening insolvency situation occur?

If the net assets of a company are less than one-half of the share capital, or less than the minimum amount of share capital provided by law[10], the shareholders shall decide on:

a) a reduction or increase of share capital on the condition that the net assets would thereby form at least one-half of the share capital and at least the minimum amount of share capital; or
b) the implementation of other measures as a result of which the net assets of the company would form at least one-half of the minimum share capital provided by law; or
c) dissolution, merger, division or transformation of the company; or
d) submission of a bankruptcy petition. – According to § 176 and § 301 of ECC.

Insolvency is deemed as a state of a company in which the company is unable to satisfy the claims of the creditors and such inability, due to debtor's financial situation, is not temporary according to the Estonian Bankruptcy Act (EBA) § 1 (2). Also if the assets of the debtor are insufficient for covering the obligations thereof and due to the debtor's financial situation, such insufficiency is not temporary according to the EBA § 1 (3).

In order to objectively determine, whether a company is in a threatening insolvency, multiple factors must be considered – in addition to analysing net assets, other accounting data and prosperity of the business plan must be considered.

[10] The minimum amount of share capital for private limited companies are 2,500 EUR, according to § 136 of ECC. The minimum amount of share capital for public limited companies are 25,000 EUR, according to § 222 of ECC.

If a company is insolvent and the insolvency, due to the company's economic situation, is not temporary, the management board shall promptly but not later than within twenty days after the date on which the insolvency became evident, submit the bankruptcy petition of the company to a court. After insolvency has become evident, the members of the management board shall no longer make payments on behalf of the company, except in the case where making the payments in the situation of insolvency conforms to the due diligence requirements, according to ECC § 180 (5) and § 306 (3).

If a company is clearly permanently insolvent, the members of the management board are obligated to submit a bankruptcy notice according to CCA § 36.

If the threatening insolvency is of temporary nature, the insolvency is usually surmountable. The distinction of temporary and permanent insolvency is, however, complex. Certain aspects must be taken into account, such as the volatility of market, flaws in the management of the company, the insolvency of the company's own debtors, or other factors causing the company to fail to perform its obligations. Therefore, recognising a threatening insolvency lies with the obligations of the managing director. Moreover, a diligent director must recognise a threat of insolvency and act accordingly.

With regard to prohibition of payments, a question arises at what point does the prohibition take effect? The prohibition takes effect with certainty in case the insolvency is permanent.

4) What are the legal consequences if the director breaches the special duty described in section 2?

In case the director breaches the aforementioned prohibition and damage is incurred by the creditors, the director shall compensate to the company for any payments made behalf of the company after the insolvency of the company became evident and which, under the specific circumstances were not in line with the principle of due diligence according to ECC § 180 (5), § 187 and § 306 (3), § 315. In case of management board, i.e multiple directors, the directors will jointly and severally compensate.

With regard to payments made to shareholders, upon receipt of a dividend, a claim for return of the payment can be submitted by the creditor of the company if the assets of the company are not sufficient to satisfy the claims of the creditor. In such case the shareholder must return the dividend according to ECC § 158 (1), (3).

The damage from prohibited payments is mainly caused by untimely bankruptcy declaration by the managing board. In such case the creditors and the bankruptcy trustee can submit a civil law action against the member of managing board for the omission of submitting a timely bankruptcy declaration according to the ECC § 180 (5), § 306 (31).

The management board's obligation to submit a timely bankruptcy declaration is set out to hold creditors harmless from kinds of damage: 1) a timely bankruptcy declaration protects the assets of the company and therefore secures the claims of the creditors, 2) a timely bankruptcy declaration secures that an insolvent company does not engage in economic activities and acquiring obligations.

During insolvency proceedings a trustee can apply on behalf of the creditors that the court revoke the transactions of the company which were concluded or performed by the company before the declaration of bankruptcy and which damaged the interests of the creditors according to the EBA § 109-114.

5) Does this wrongful trading liability apply to persons other than the directors?

This liability applies to first and foremost to the members of the management board. Certain liability lies also with the members of supervisory board. Similarly to the management board, the supervisory board must perform its duties with due diligence. Therefore, if a company has supervisory board, that fails to detect a prohibited payment by the management board or approves a prohibited transaction, the supervisory board is jointly and severally liable for the damage incurred by the creditors according to ECC § 327.

Additionally, a "shadow director" is liable for damaging private limited company by influencing activity of private limited company according to ECC § 167.

This liability does not apply to the employees of the company, the employees are only liable to their employer or to the company, but the tasks and the liability of an employee does not extend to creditors outside of the company.

6) Who is a shadow director?

The law does not stipulate a definition of a shadow director. Even though a concept of shadow director is not defined, the law does stipulate the liability of a person who, by misusing his or her influence, influences a member of the management board or supervisory board to act contrary to the interests of the company. This person is liable to compensate any damage incurred to the company. In the event the management board or supervisory board member breaches his or her obligations, he or she is jointly and severally liable with this (shadow) person. A claim against this (shadow) person ca be submitted by the company or by creditors. In the case of declaration of bankruptcy of a private limited company, only a trustee in bankruptcy may file a claim on behalf of the private limited company according to ECC § 167 (5).

7) How to determine if the company is in a threating insolvency?

Same answer as under question No 3.

8) Summary

The creditors have multiple legal remedies for protecting their claims with insolvent companies, before and during bankruptcy proceedings. Creditors can submit claims for damage against the management board or supervisory board member for carrying out prohibited payments, also against persons influencing management board or supervisory board members to such actions.

In addition, creditors can submit a claim for compensation in case of an untimely bankruptcy declaration. During bankruptcy proceedings the legal remedy for creditors is revoking transactions of the company which were concluded or performed by the company before the declaration of bankruptcy and which damaged the interests of the creditors.

VIII. HUNGARY

Author / contact: Mihály Barcza

1) The principal rule of the liability of the directors[11]:

According to the Hungarian corporate law, the basic principle concerning the activity of the senior officers (members of the managing board or the managing director) is that they shall perform their duties giving priority to the interests of the company. If the senior officer does not comply with this duty she/he will be liable towards the company for any damage incurred by the company. The senior officer shall be liable towards 3rd parties only if the damage is caused wilfully.

2) Special liability regime for directors in threatening insolvency:

When a company is in a threatening insolvency situation, the general obligation of the senior officers' shift and from then on they will have to consider the interests of the creditors as well.

3) When will a threatening insolvency situation occur?

According to Hungarian law, threatening insolvency situation is deemed to exist if and when the senior officers have foreseen or with due care that can be expected from a person in their position should have foreseen that the company would not be able to pay its debts when due.

4) What are the legal consequences if the director breaches the special duty described in section 2?

If the senior officer disregards the interests of the creditors (wrongful trading) and the company goes into liquidation, then the managing director may be held liable towards the creditors for those debts that are not satisfied in the liquidation procedure.

[11] In Hungarian we use „directors" for those persons who can be liable by virtue of law for wrongful trading. Directors (in Hungarian: vezető tisztségviselők") under Hungarian law are:
managing director (in Hungarian: ügyvezető) of a limited liability company („Kft"), unlimited („Kkt") or limited partnership („Bt")
members of the board of directors/directorate (igazgatóság) of the private („Zrt") and/or public („Nyrt") company limited by shares.
in very certain cases – depending on their pouvoirs - the members of the supervisory board of a 4 mentioned company forms.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, it is applicable not only to the senior officers, but on the so-called shadow directors as well.

6) Who is a shadow director?

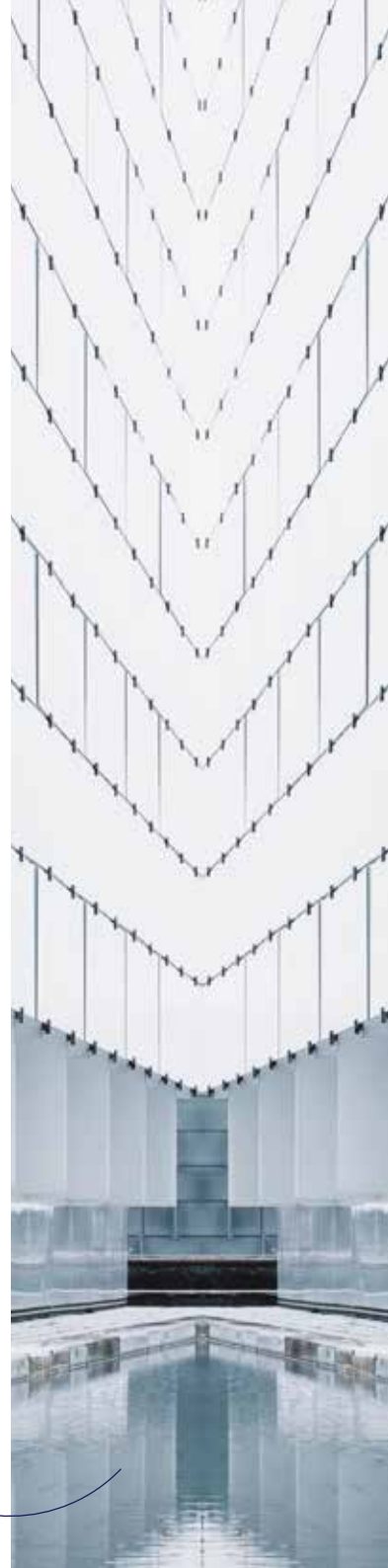
Under Hungarian law, a shadow director as a general rule is a person / entity having dominant influence on the company's decision making processes. Such as the senior officers of the parent company, or, subject to corporate governance rules, even indirect owners and their senior officers. In case of joint venture operations the senior officers of the entities having joint control may also qualify as shadow directors.

7) How to determine if the company is in a threating insolvency?

The threatening insolvency situation under Hungarian law is determined and shall be examined by using liquidity test and NOT by the basis of the assets or equity of the company (balance sheet test).

8) Summary

Wrongful trading is an adopted concept under Hungarian law, by which the shadow director – which is defined broadly – may be liable towards the unsatisfied creditors, if the company was liquidated. The senior officers of a mother company are likely to qualify as shadow directors. Due to the relatively new nature of the wrongful trading concept, settled case law cannot be presented in all aspects of this regime. However, consistent court practice is being developed in Hungary on threatening insolvency, with special regard to when threatening insolvency occurs. The published Court decisions indicate a case by case approach. We suggest therefore a careful and considered action, regular cash flow monitoring and sensitive treatment of decision-making in each cases if the Hungarian subsidiary faces or may face liquidity turbulence or payment difficulties.



IX. LATVIA

Authors / contacts: Edvīns Draba and Raivo Raudzeps

1) The principal rule of the liability of the directors[12]:

The principal rule according to the Latvian Commercial Law is that a director (or directors) must act as decent and careful manager in the interests of the company. A director (or directors) is liable for losses that he/she has produced to the company, unless he/she can prove that he/she acted as a diligent and careful manager. Several directors have joint liability. At the same time, the liability directors is assessed, taking into account the division of roles within the board and the tenure of each director. Even a slight carelessness may lead to the liability. A member (or members) of the management board is liable to third parties (creditors) if the company itself (in insolvency - an insolvency administrator on behalf of the company) fails to bring a claim.

2) Special liability regime for directors in threatening insolvency:

Director (or directors) must take care about safeguarding the assets for the creditors as well as timely apply for insolvency of the company. Additionally, both director (or directors) and any other responsible representative must be able to transfer the books and assets of the company to the insolvency administrator, should insolvency proceedings of the company be started. The director (or directors) who are management board members are jointly liable for losses caused to the company in case they fail to transfer the books to the insolvency administrator, or, if the condition of the books does not allow to obtain a clear understanding of the company's transactions and assets in the three years prior to the commencement of insolvency proceedings. The Insolvency Law contains a presumption that the losses are in the amount of the accepted principal claims of the creditors.

3) When will a threatening insolvency situation occur?

The Insolvency Law of Latvia does not contain specific provisions related to threatening insolvency. Pursuant to the Insolvency Law, the directors of the company must file for insolvency in case the company has not fulfilled its debt liabilities due for more than two months. In addition, liquidators of a company in liquidation must file for insolvency in case the company lacks assets to satisfy all substantiated creditors' claims in the course of liquidation and, the directors of a company undergoing legal protection proceedings (restructuring proceedings) must file for insolvency in case the company cannot settle liabilities provided in plan of measures of the legal protection proceedings.

4) What are the legal consequences if the director breaches the special duty described in section 2?

The insolvency administrator on behalf of an insolvent company can claim compensation of losses. As mentioned above, in case of failure to transfer the books of the company to the insolvency administrator the Insolvency Law contains a presumption that the losses are in the amount of the accepted principal claims of the creditors.

5) Does this wrongful trading liability apply to persons other than the directors?

The liability for losses may apply to any person who wilfully influences director, supervisory board, procurator or authorised person to act against the interests of the company.

6) Who is a shadow director?

The law does not stipulate a definition of a shadow director. Any person who wilfully influences member of the management board, supervisory board, procurator or authorised person to act against the interests of the company may be considered as a "shadow director" for the purpose of claiming losses, except if such person votes at the shareholder's meeting or legitimately exercises its influence according to the Law on Group of Companies.

[12] Directors under Latvian law are: Members of the management board (in Latvian: valdes locekļi) of a limited liability company („SIA"), members (in Latvian: biedri) in an unlimited partnership („PS") or limited partnership („KS") members of the management board (valdes locekļi) of a joint stock company („AS")., in certain cases – the members of the supervisory board (in Latvian: padomes locekļi) of SIA or AS.

7) How to determine if the company is in a threating insolvency?

Any of the circumstances that are described in response to question No 3 will indicate that the company is in a threatening insolvency.

8) Summary

A director is presumed to know if and when the company is in a threatening insolvency state therefore he or she must be able to substantiate any decision and action thus demonstrating that he or she is acting as a diligent and careful manager, or else he or she may be liable for losses either to the company or its creditors. The shareholders or any other persons must not influence a director, procurator or any authorised person to act against the interests of the company or else they may become liable for arisen losses. We suggest therefore a careful and considered action, regular cash flow monitoring and sensitive treatment of decision-making in each cases if the Latvian subsidiary faces or may face liquidity turbulence or payment difficulties.

X. LITHUANIA

Authors / contacts: Kazimieras Karpickis and Greta Kubiliūnaitė

1) The principal rule of the liability of the directors[13]:

The general rule of liability for a director (sole managing body) is that the director must act in good faith and reasonable manner in respect of the legal person according to Civil Code of Republic of Lithuania § 2.87(1).

A member of a managing body of a legal person (including director) who fails to perform or performs improperly his duties specified in legal acts or incorporation documents must compensate all damage incurred by the legal person except as otherwise provided by law or incorporation documents.

Diligence that is normally expected from a director is determined on case-by-case basis. According to court practice, directors are treated as persons who are subject to higher standards of care and diligence than ordinary persons subject to the duty of care (bonus pater familias).

2) Special liability regime for directors in threatening insolvency:

In case of threatening insolvency obligation to act in good faith and reasonable manner in respect of the legal person does not change, i.e. it still applies. Moreover circumstances of threatening insolvency also create obligation to act in favour of creditors of the legal person.

Therefore in such situation director is obliged to 1) immediately initiate insolvency proceedings of the legal person (bankruptcy or restructuring (if it is possible to restructure the legal person); 2) safeguarding the assets of the legal person so that it could be used to fulfil obligations to the creditors to the greatest extent possible; 3) carry activities of the legal person in a way that benefits creditors, i.e. increases the chances of fulfilling obligations to the creditors to the fullest extent possible.

[13] Director (in Lithuania: "direktorius") under Lithuanian laws is only a sole management body (general manager): director of a limited liability company („UAB"), public company („AB"), general partnership („TUB"), personal enterprise (individuali įmonė), limited liability partnership (Mažoji bendrija) or limited partnership („KUB"). Also general manager may be a member of management board, but the management board and its members (except when member thereof is general manager) cannot act as general manager and fulfil duties of this sole management body.

3) When will a threatening insolvency situation occur?

Law on Insolvency of Legal Persons of the Republic of Lithuania does not contain specific provisions related to threatening insolvency.

According to Law on Insolvency of Legal Persons of the Republic of Lithuania a director is obliged to initiate insolvency proceedings when legal person becomes insolvent, i.e. 1) the legal person is unable to fulfil its property obligations, including financial obligations, in time or 2) the obligations of the legal person exceed the value of its assets.

The same obligation is applied to the liquidator of the legal person.

4) What are the legal consequences if the director breaches the special duty described in section 2?

In case of breach of indicated duties, the insolvency administrator on behalf of an insolvent legal person or creditors thereof can claim compensation of losses caused by non-performance or improper performance of such obligations, for an example, compensate the increase in claims which arose from the moment when the legal person became insolvent and director was obliged to initiate insolvency proceedings until the moment when such a procedure was initiated.

Obligation to submit a timely bankruptcy declaration is set out to hold creditors harmless from kinds of damage: 1) a timely bankruptcy declaration protects the assets of the company and therefore secures the claims of the creditors, 2) a timely bankruptcy declaration secures that an insolvent company does not engage in economic activities and does not acquire obligations from creditors.

Moreover the court has the right to restrict the right of the director (from 1 to 5 years) to be appointed and hold the position of the director of a public and / or private legal person, or to be a member of a collegial management body.

5) Does this wrongful trading liability apply to persons other than the directors?

This liability applies first and foremost to the director. The court may also apply it to the members of the management board and/or the shadow directors as well.

This liability does not apply to the employees of the company, except if they are shadow directors.

6) Who is a shadow director?

The law does not stipulate a definition of a shadow director. Nevertheless, according to the court practice, the criteria for recognizing a person as a shadow director, i.e. person who has not been officially appointed as the director of the company, are: 1) performance of the management function (including giving mandatory instructions to formally appointed management bodies); 2) indicated management is of a permanent nature – shadow director systematically performs actions that are characteristic to the director of the legal person according to the laws and the founding documents.

7) How to determine if the company is in a threating insolvency?

Any of the circumstances that are described in response to question No 3 will indicate that the company is in a threatening insolvency.

To objectively determine, whether a company is in threatening insolvency, multiple factors must be considered. Also, certain aspects must be taken into accounts, such as the volatility of the market, flaws in the management of the company, the insolvency of the company's debtors, or other factors causing the company to fail to perform its obligations.

8) Summary

Law on Insolvency of Legal Persons of the Republic of Lithuania does not contain specific provisions related to threatening insolvency.

In case of threatening insolvency obligation to act in good faith and reasonable manner in respect of the legal person does not change, i.e. it still applies. Moreover circumstances of threatening insolvency also create obligation to act in favour of creditors of the legal person.

In case of breach of this obligation, the insolvency administrator on behalf of an insolvent legal person or creditors thereof can claim compensation of losses caused by non-performance or improper performance of such obligations, for an example, compensate the increase in claims which arose from the moment when the legal person became insolvent and the director was obliged to initiate insolvency proceedings until the moment when such a procedure was initiated.

A shadow director may also be liable for a breach of this duty.

XI. MONTENEGRO

karanovic/partners

Authors / contacts: Milena Rončević Pejović and Alexander Poels

1) The principal rule of the liability of the directors[14]:

Montenegrin legislation contains certain rules with regard to the liability of directors. First, the Company Law of Montenegro ("MNE Company Law") recognizes the directors as the persons different to the members of the Board of Directors (except in cases of one-member companies or some specific companies, such as e.g. banks). The director, as well as any other person holding managerial responsibility of the company shall be obliged to act with a due care and with the reasonable assurance that it acts in the best interest of the company. With that respect, the director shall not be liable to the company for errors in the exercise of ordinary business judgment if (s)he acted with due care and in compliance with rules of the professional conduct. However, the director's liability can be subject to determination before the competent courts, since the director can be sued by either the company itself or its shareholders, in case of irregularities in management or operations of the company or in case of certain occurrences explicitly prescribed by the law (illegal actions of the company, discrimination of the minor shareholders, harm to the shareholders' individual rights, fraudulent activities over the minor shareholders etc.).

2) Special liability regime for directors in threatening insolvency:

MNE Company Law does not foresee any special liability regime for directors in threatening insolvency. However, and with respect to the Insolvency Law of Montenegro ("MNE Insolvency Law"), certain rules regarding the liability of the authorised officers of the company have been established. Specifically, since the authorised officers of the company have the obligation to deliver all required documents to the bankruptcy judge and bankruptcy administrator related to the financial and audit operations, failing to do so could impose the requests for damage reimbursement from creditors towards such creditors. In addition, the MNE Insolvency Law imposes certain rules, which tend to provide specific type of protection for the creditors of the company. Those rules relate to the challenging of legal actions of the company, conducted prior to the opening of the bankruptcy proceedings. In case of such activities conducted by the responsible persons in the company, those persons could face the criminal liability (e.g. intentionally damaging certain creditors by enabling some other creditors favourable position, conclusion of the false agreement, admission to the false receivable etc.), besides already mentioned damage reimbursement claims.

3) When will a threatening insolvency situation occur?

The MNE Insolvency Law foresees specific terms for initiating the enforcement proceedings. Those reasons relate to: i) permanent inability to pay; ii) indebtedness. Specifically, while the "*indebtedness*" reason represents the case when the obligations of the company exceed its assets, the "*inability to pay*" reason exists when the debtor is unable to pay its monetary obligations within 45 days of the due date of the obligation and if it has completely suspended payment for a period of 30 days continuously. In order not to shed any doubt over the interpretation of existence of this bankruptcy reason, the MNE Insolvency Law assumes the existence of this bankruptcy reason in case when the proposal for initiating of bankruptcy proceedings has been filed by the creditor which could not collect its receivable towards the company in the enforcement proceedings lasting at least 45 days, by any of the means of enforcement. In that line, any enforcement proceedings initiated against the company which last for at least 45 days and which did not result in the collection of the creditor's receivables could be deemed as the ones threatening the occurrence of insolvency situation.

4) What are the legal consequences if the director breaches the special duty described in section 2?

As described in more details in section 2, even though the term "*senior officer*" is not recognized in Montenegrin legislation, certain breaches made

[14] Are considered to be directors (in Montenegrin:"direktori") under Montenegrin law:
- managing director (in Montenegrin:"izvršni direktor") of a limited liability company („DOO"), partner (in Montenegrin: "ortak") of an unlimited („OD") or general partner (in Montenegrin: "komplementar") of a limited partnership („KD")
- members of the board of directors/directorate of the private („AD") and/or public („AD") company limited by shares.

by the authorised officers of the company during or before the initiation of bankruptcy proceedings could possibly result in their civil (damage reimbursement claims) or even criminal liabilities.

5) Does this wrongful trading liability apply to persons other than the directors?

Since the term "*senior officer*" is not defined in Montenegrin legislation, the aforementioned rules should be applied towards the authorised officers/ responsible persons in the company. Before the court, it is usual that those persons would be either the executive directors or the members of the Board of Directors of the company, however, the interested party could be allowed to prove before the court that some other persons could be determined as the ones responsible and authorised for the company.

6) Who is a shadow director?

Montenegrin legislation does not recognise the term "*shadow director*".

7) How to determine if the company is in a threating insolvency?

There are no specific rules that should be followed as those that strictly determine whether the company is facing potential insolvency proceedings. For that purpose, it is advisable for the creditors to closely monitor the official available data on the standings of the company, especially:

- the financial statements of the Company, which can be significant indicator on the financial stability of the company;
- the monthly report published by the Central bank of Montenegro regarding the list of the companies whose accounts have been blocked; specifically, this report is published at the beginning of each month, and it declares the debt amount, as well as the days for which the accounts have been blocked;

in that line, this report could represent the strong indicator on the company's failure to meet its respective obligations and consequently the indicator to the potential existence of the "*inability to pay*" as the bankruptcy reason.

8) Summary

The Montenegrin legislation recognizes certain rules for establishing the liability of directors and of members of the Board of Directors. The director, as well as any other person holding managerial responsibility of the company, shall be obliged to act with a due care and with the reasonable assurance that it acts in the best interest of the company, while certain actions contrary to those rules could impose the damage reimbursement claims. In addition, certain activities conducted prior or during the initiation of bankruptcy proceedings in order to have certain negative impact on some creditors could affect both civil and criminal liabilities of the responsible person in the company. There are certain mechanisms available for monitoring the financial condition of each company, but those are mostly related to the publicly available data (such as financial statements and report of the Central bank of Montenegro). However, as Montenegrin law does not recognize the institute of shadow director, special liability in a threatening insolvency will in principle not arise to anyone else than the directors or the members of the Board of Directors of the company.

XII. NORTH MACEDONIA

karanovic/partners

Authors / contacts: Veton Qoku and Alexander Poels

As a general note, please be informed that at the moment of writing North Macedonia is currently in a state of emergency. As such the Government can enact decrees with the force of laws. Under one such adopted Governmental decree, the initiation of bankruptcy or instituting a preliminary bankruptcy procedure has been suspended for the duration of the state of emergency, as well as for three months following the end of the state of emergency. All commenced procedures for preliminary bankruptcy procedures and initiation of bankruptcy have also been suspended for the duration of the state of emergency, as well as for three months following the end of the state of emergency.

1) The principal rule of the liability of the directors[15]:

According to Macedonian corporate law, the basic principles concerning director's standard of care include: (i) due care; (ii) reporting any affairs and actions involving personal interest; (iii) avoiding conflict of interest; (iv) keeping business secrets; (v) adhering to competition ban. Managing directors are obliged to act in the best interests of the company. As a general rule, directors are personally and unlimitedly (and jointly and severally if more than one director) responsible to the company and/or to third parties for managing the company contrary to Macedonian laws and for non-compliance with the articles of association.

2) Special liability regime for directors in threatening insolvency:

There is no special liability regime with respect to directors in a threatening insolvency phase. Macedonia legislation does however criminalize certain potential actions of directors with respect to the threatening insolvency phase, such as: (i) intentionally causing bankruptcy; (ii) causing bankruptcy by negligent work. In addition, directors are personally and unlimitedly (and jointly and severally if more than one director) liable for the damages caused to the creditors, if they do not submit a proposal for opening a bankruptcy procedure, even though they knew or had to know about the insolvency of the company.

3) When will a threatening insolvency situation occur?

It will be considered that a debtor is insolvent (and thus a bankruptcy procedure may be initiated), if in a period of 45 days they are unable to pay a due debt from any of their bank accounts (i.e. their bank accounts are blocked for a minimum of 45 days). The director(s) is/are obliged to submit a proposal for opening a bankruptcy procedure no later than 21 days of that day.

4) What are the legal consequences if the director breaches the special duty described in section 2?

The legal consequences if the director breaches the duties described in section 2 include (i) up to five years of imprisonment and (ii) personal and unlimited (and joint and several if more than one director) liability for the damages.

5) Does this wrongful trading liability apply to persons other than the directors?

The mentioned criminal charges may potentially apply to any entity/person. The damage liability

[15] Are considered to be directors (in Macedonian: управител(и)) under Macedonian law:
- Manager(s) (in Macedonian: управител(и)) in a general partnership (in Macedonian: јавно трговско друштво);
- General partners (in Macedonian: комплементари) in a limited partnership (in Macedonian: командитно друштво);
- Manager(s) (in Macedonian: управител(и)) in a limited liability company (in Macedonian: друштво со ограничена одговорност);
- Members of the board of directors (in Macedonian: одбор на директори), especially executive members of the board of directors (in Macedonian: извршни членови на одбор на директори) in a one-tier management system, i.e. members of the management board (in Macedonian: управен одбор) or manager (in Macedonian: управител) in a two-tier management system of a joint-stock company (in Macedonian: акционерско друштво);
- General partners (in Macedonian: комплементари) in a limited partnership with stocks (in Macedonian: командитно друштво со акции), who can transfer the management of the company to manager(s) (in Macedonian: управител(и));
- In exceptional cases the members of the supervisory body of a company, if any.

stated above apply generally to persons and bodies authorized to manage, represent and supervise companies.

6) Who is a shadow director?

Piercing the corporate veil is very rarely accepted and used as a legal concept in Macedonian law and practice. Macedonian corporate law provides the following situations in which shareholders of companies are personally, unlimitedly, jointly and severally responsible for the obligations of the company:

(i) they have abused the company in order to achieve goals that are prohibited for them as individuals;
(ii) they have abused the company in order to damage creditors;
(iii) they manage the property of the company as their own property, contrary to the law, or
(iv) they have reduced the property of the company in their favour or in favour of any other person, while they knew or had to know that the company is not able to fulfil its obligations towards third parties.

7) How to determine if the company is in a threating insolvency?

The general rule for determining insolvency in North Macedonia is a minimum of 45 days with blocked bank accounts. This can be proven by a certificate issued by the Central Registry of the Republic of North Macedonia.

8) Summary

Wrongful trading as a special form of liability where a director of a company is liable for damages towards the creditors for the mismanagement of an insolvent company is not recognized as an institute in Macedonian legislation, as such. However, both management and shareholders do have liability towards creditors in case mismanagement of a company. Such liabilities could include both criminal and civil (damage) liability. Thus, under very extreme and unlikely circumstances, it could possibly be argued that shareholders of a company could de facto be qualified as shadow directors and held liable in a threatening insolvency, provided that it is proven that they intentionally abused the company or managed the property of the company contrary to the law.

XIII. POLAND

DZP
more than law

Author / contact: Michał Cecerko

1) The principal rule of the liability of the directors[16]:

When directors performing their duties, they should use due care that is expected of model persons in their position and act in the interest of the managed company. If a director breaches this duty and his or her actions are additionally contrary to the law or the articles of association, he or she will be liable towards the company for the damage caused. As a general rule, directors are not liable to third parties for the company's actions.

2) Special liability regime for directors in threatening insolvency:

In the event of threatened insolvency, directors do not have any special duties. They have the right but not the obligation to file for the opening of restructuring proceedings. Also, in the event of threatened insolvency, directors should not act to the detriment of the creditors, e.g. remove or encumber their assets and repay or secure only part of the creditors.

In the case of the company's insolvency, directors are obliged to file for bankruptcy within 30 days of the situation occurring. If director fail to file for bankruptcy in due time they could be held liable for the company's debts and criminally liable.

3) When will a threatening insolvency situation occur?

The debtor is threatened by insolvency when its economic situation indicates that he may shortly become insolvent. This status is examined by the court on a case-by-case basis by the restructuring court.

4) What are the legal consequences if the director breaches the special duty described in section 2?

As stated in point 2), directors do not have any special duties when threatened insolvency occurs but they must not act to the detriment of the company's creditors. However, if the successful restructuring proceedings could be conducted towards company and directors decide not to conduct the proceedings, they could be held liable for damage done to the managed company.

If a director breaches his duty to refrain from acting to the detriment of the creditors, he may be criminally liable and is also responsible for damage caused to creditors by their acts. Also, if he fails to file for bankruptcy in due time, he will be jointly and severally liable for the company's obligations if the creditors are not satisfied. director of an insolvent company who do not file for bankruptcy in due time could also be held liable for the company's unpaid taxes. Such situation can also lead to the criminal liability of the director.

In special court proceedings such directors could also be deprived for a certain period of the general right to manage or conduct the business of the company.

5) Does this wrongful trading liability apply to persons other than the directors?

As a general rule, the wrongful trading liability does not apply to persons other than directors because other persons are not obliged to file for bankruptcy. However, the so-called shadow directors may in some cases be criminally liable, e.g. when they act or support the actions to the detriment of the company's creditors or have significantly contributed to the failure to file for bankruptcy within the 30 days period.

[16] For this document the term "director" will mean a person or governing body of the legal person or a partner who are entitled to represent the legal person and in consequence is obliged to file for bankruptcy.
For partnerships the term director will mean a partner entitled to represent the partnership such as: registered partnership ("sp.j." and its partner "wspólnik"), professional partnership ("sp.p." and its partner "partner"), limited partnership ("sp.k." and its partner "komplementariusz") and limited joint-stock partnership ("S.K.A." and its partner "komplementariusz").
For legal persons, i.e. limited liability company ("sp. z o.o."), joint- stock company ("S.A."), simple joint-stock company ("P.S.A.") the director will mean the member of the management board ("członek zarządu").
Please note that the partners in partnership who are entitled to represent the partnership are usually subsidiary liable for the debts of the partnership ex lege, so cases regarding their wrongful trading are extremely rare in practice.

Such actions of shadow directors can result in their liability for damage done to creditors or in the shadow directors or directors being deprived of the general right to manage or conduct business for a certain period of time pursuant to a court decision (see point 4).

6) Who is a shadow director?

Under Polish law, a so-called shadow director is a person who actually manages a debtor's enterprise and in fact conducts the debtor's affairs. These could be, for example, directors of the parent company.

7) How to determine if the company is in a threating insolvency?

The threat of insolvency is a situation that occurs shortly before permanent insolvency. In Polish law, there are no legal presumptions that would help to determine whether "shortly" occurs so the assessment is not always obvious and should be done on a case-by-case basis. Threatened insolvency should be examined both by using the liquidity test and the over-indebtedness test.

8) Summary

Under Polish law, there are no special duties for directors in threatened insolvency. However, in some cases, directors may still be liable for damage suffered by the company or the creditors. Directors could also be liable for the company's debts in the event of failure to file for bankruptcy in due time. Therefore, we recommend a careful analysis of the company's financial situation and examination if the company will be able to pay all the due liabilities in a 30-day period.

However, in some cases, shadow directors may be responsible criminally for their unlawful actions to the detriment of creditors, for supporting such actions or for damage done to creditors. Shadow directors can be deprived of the right to run a business for a certain period if they had contributed to the failure to file for bankruptcy in due time.

XIV. ROMANIA

Author / contact: Sabin Volciuc-Ionescu

1) The principal rule of the liability of the directors[17]:

Under Romanian companies' law, senior officers (director(s) (in Romanian, administrator(i)) and/or the members of the management bodies (in Romanian, membri ai organelor de conducere), as applicable) have a general duty of loyalty towards the company and shall exercise their powers in an honest and faithful manner. All their duties have to be fulfilled in compliance with the high standards set out for a prudent and diligent competent director and senior officers cannot act in their own interest to the detriment of the company. If the senior officers take their decisions based on reasonable information, in good faith, trusting that they act in the interest of the company, they will not be held liable for damages suffered by the company, but shall not be exempted from liability in case of fraud or gross negligence. The senior officers' civil liability may be held both (i) towards the company and its shareholders and (ii) towards third parties (including creditors of a Romanian insolvent company) and there are also certain cases where there may be criminal liability for the senior officers.

2) Special liability regime for directors in threatening insolvency:

Romanian law sets out additional liability of senior officers in case they trigger the company's insolvency (including by paying certain creditors to the detriment of others one month before the occurrence of the insolvency situation) – for the actual damage caused.

3) When will a threatening insolvency situation occur?

The threatening insolvency situation is regulated under Romanian law in the form of imminent insolvency, which occurs when it is determined that the company will not be able to pay its certain, liquid and payable debts at their (future) due date(s) with the money available to it at such date(s). The minimum amount of such debts should be at least RON 40,000 (approximately EUR 8,200).

4) What are the legal consequences if the director breaches the special duty described in section 2?

In general, if the senior officers perform unlawful actions contributing to the company's insolvency, they can be held liable towards the creditors in the insolvency procedure. Romanian law expressly provides the cases that may entail the personal liability of the senior officers to cover the creditors' claims which are registered in the insolvency procedure. Further, the senior officers who were held liable for contributing to the company's insolvency will have a 10-year period interdiction to be appointed manager in a Romanian company.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, it is applicable not only to the senior officers, but also to any other person to which the company's insolvency may be imputed. This category includes the shareholders, accountants, department heads and also the shadow directors (de facto directors).

6) Who is a shadow director?

A shadow director is not defined under Romanian law, however there is case law referring to this concept. If the company is in fact managed by a person other than the official registered one, the shadow director shall be held liable. Senior officers of the parent company may be liable for company's insolvency if it is proved that they managed the company in fact.

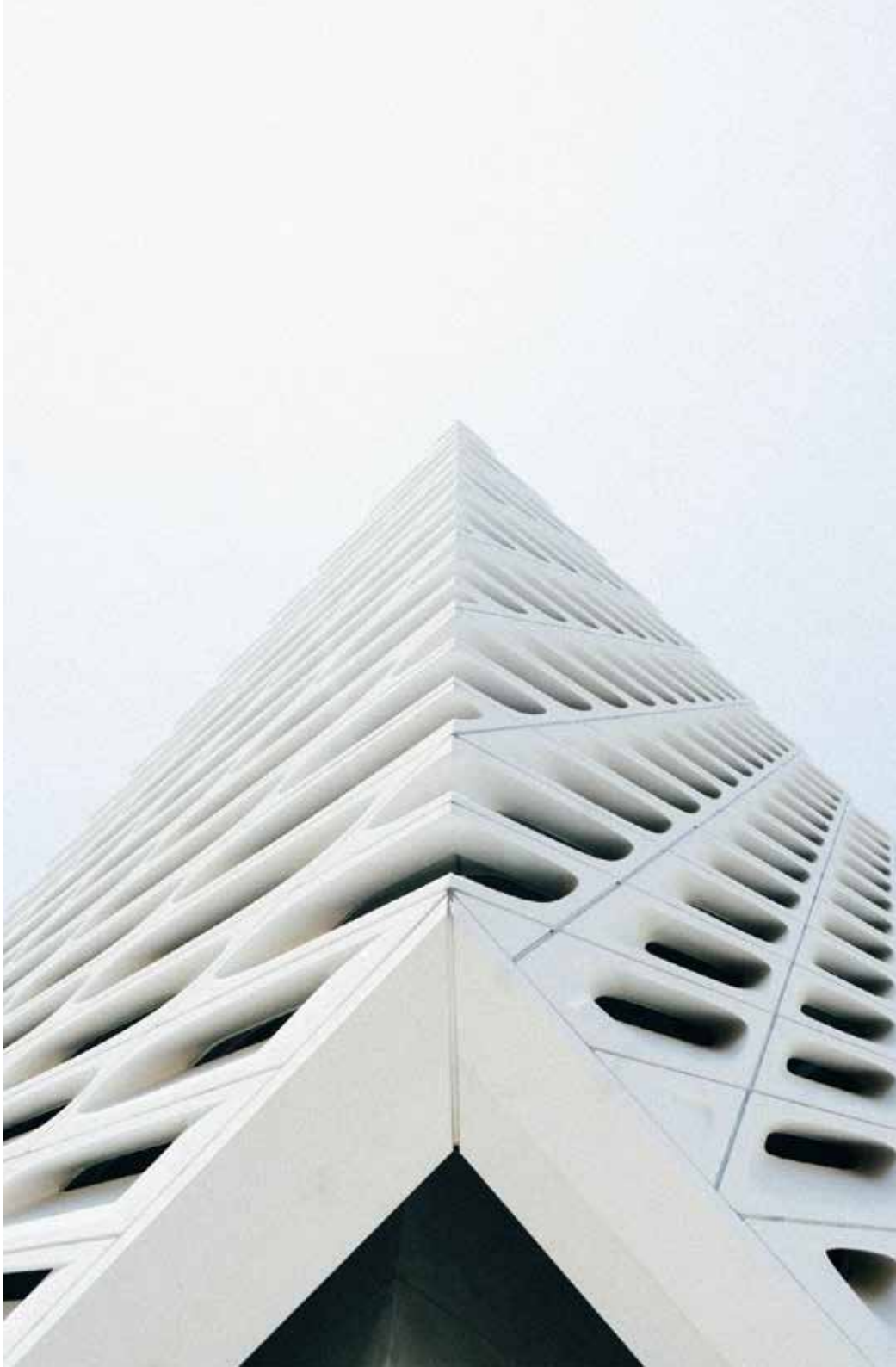
[17] Under Romanian law, directors include: director (in Romanian: administrator) of a limited liability company („SRL") and of joint stock company („S.A."), members of the board of directors/ or executive board (in Romanian: membri consiliu de administratie / directorat) of a joint stock company („S.A.") and, in certain cases, the members of the supervisory board (in Romanian: membri consiliu de supraveghere) of a joint stock company („S.A.").

7) How to determine if the company is in a threating insolvency?

The state of insolvency is to be determined based on the liquidity test – the company would be in threatening insolvency if it can be determined that it does not have sufficient funds available to pay its certain, liquid and payable debts at their due dates. The assets or equity of the company are not considered when determining the state of threatening insolvency.

8) Summary

In case of wrongful trading under Romanian law leading to the insolvency of a Romanian company, both directors and de facto directors (shadow directors) may be held liable towards the company and its creditors. Even if there is only limited case law on this matter, the possibility of senior officers of the parent company being held liable for the insolvency of the subsidiary should definitely be considered. We recommend a regular cash flow monitoring and care in the decision-making process if the Romanian subsidiary faces or may face liquidity turbulence or payment difficulties in this period.



XV. SERBIA

karanovic/partners

Authors / contacts: Miloš Jakovljević and Alexander Poels

1) The principal rule of the liability of the directors[18]:

According to the Serbian corporate law, the basic principle concerning the activity of the directors (members of the managing board) is that they shall perform their duties in the interests of the company. If the director does not comply with this duty, she/he will be liable towards the company and the shareholders for any damage incurred by the company or the shareholders. The director shall be liable towards 3rd parties (i) if she/he causes the damage wilfully, or (ii) if she/he fails to notify the shareholders of the company that the company's assets have significantly and permanently deteriorated between the end of the financial year and regular annual meeting (although she/he knew of such deterioration) and the company's shareholders consequently fail to retain adequate portion of the company's earnings needed for fixing such deterioration issues.

2) Special liability regime for directors in threatening insolvency:

Serbian law does not explicitly prescribe a special liability regime for directors in a threatening insolvency, but directors should be very careful if the company's business starts to deteriorate, even before the company reaches a stage of threatening insolvency. This is because under the Serbian criminal law a director could be subject to imprisonment (from six months to five years) if she/he commits the criminal act "causing of bankruptcy" of a company by (i) irrational spending of assets or their misappropriation, (ii) excessive borrowing, (iii) assuming disproportionate obligations, (iv) frivolous conclusion of contracts with persons unable to pay, (v) failure to timely pursue claims, (vi) destruction or concealment of assets, or (vii) other activities that are not in accordance with bona-fide conduct. This criminal act may be committed even unintentionally (a) if the wrongdoer was aware that the bankruptcy could be caused by its acts, but she/he lightly believed it would not occur or that she/he would be able to prevent it, or (b) if she/he was not aware that she/he could cause the bankruptcy but she/he should have been aware having in mind all the circumstances and her/his background.

Although the bankruptcy administrator is obliged to make the criminal charges if she/he discovers such wrongdoings, the criminal charges and prosecution for "causing of bankruptcy" happens very rarely in practice.

Even if the company does not go bankrupt, the directors could be criminally liable for the criminal act of "damaging of creditors" if she/he was aware that the company has become insolvent (i.e. unable to pay debts) and she/he either (i) repays the debt or otherwise places a creditor in a more favourable position and thereby significantly damages the other creditor (when she/he could be exposed to imprisonment between three months and three years), or (ii) with intent to defraud or damage the creditor, admits a false claim, enters into a fraudulent contract, or damages the creditor with another fraudulent act (when she/he could be exposed to imprisonment between three months and five years). The criminal act set out in item (i) could be committed unintentionally, i.e. it is not necessary for the director to act with fraudulent intent to harm the other creditors. The bankruptcy administrator is obliged to make criminal charges if she/he discovers the criminal act set out in item (ii) but is not obliged to make such charges for the criminal act set out in item (i), although she/he can do so. In any case, the bankruptcy administrators rarely file such criminal charges and these criminal acts are rarely prosecuted.

3) When will a threatening insolvency situation occur?

Under the Serbian insolvency law, a threatening insolvency situation exists when it is likely that the company will not be able to pay its debts as they become due.

[18] For the purpose of this publication, term "director" undertakes the following:
- Director (In Serbian "direktor") of a limited liability company („DOO"),
- Representative (in Serbian "zastupnik") of an unlimited company („OD")
- General partner (in Serbian "komplementar") of limited partnership („KD")
- members of the board of directors/ members of the executive board of the private („AD) and/or public („AD") company limited by shares.

4) What are the legal consequences if the director breaches the special duty described in section 2?

As stated above, in Serbia there is no special duty for directors in threatening insolvency. On the other hand, if the director is found guilty for committing the criminal act of "causing of bankruptcy" or "damaging of creditors", she/he could be subject (i) to imprisonment, (ii) to return to damaged persons (including to creditors) all proceeds she/he gained from crime, (iii) to pay the damages to damaged parties (including to creditors) if she/he acted wilfully, and (iv) to pay the damages to the company and its shareholders even if she/he acted unintentionally.

5) Does this wrongful trading liability apply to persons other than the directors?

The principle of wrongful trading is not explicitly recognized in Serbia. With regard to the criminal acts of "causing of bankruptcy" or "damaging of creditors", a person aiding and abetting the principal wrongdoer could be subject to the same punishment as the principal wrongdoer. A principal wrongdoer would normally be a director of the bankrupt company and the persons aiding or abetting could among other include other managers of the company, the shareholders or the shareholders's management.

6) Who is a shadow director?

Serbian law does not explicitly recognize the "shadow director" concept. However, a person unofficially directing the business of the company could also be liable for the criminal act of "causing of bankruptcy" either as principal wrongdoer or more likely as an aiding or abetting person.

7) How to determine if the company is in a threating insolvency?

The threatening insolvency situation under Serbian law is determined by using the liquidity test, i.e. by making projections of the expected cash flow and due dates of the liabilities. However, the Serbian company could be subject to bankruptcy not only when it has liquidity issues but also when it is over-indebted (i.e. when its liabilities exceed its assets). Having in mind potential (wide) liability for causing the bankruptcy, the directors should regularly monitor both the liquidity and indebtedness of the company as in case of bankruptcy their actions which preceded the bankruptcy could be subject to scrutiny and could trigger their criminal liability.

8) Summary

The concept of wrongful trading is not explicitly recognized under the Serbian laws. The directors are principally liable to the company and its shareholders, where the liability to the company's creditors can exist if the damage is caused wilfully. However, under certain circumstances, the directors could be criminally liable for causing the bankruptcy of the company or for damaging the creditors, even if they were not acting with fraudulent intent. Such liability can exist during a period when the company is in threatening insolvency (likely to be unable to pay its debts as they become due) but also before that period if the company later goes bankrupt or if the creditors are damaged as a result of the director's actions. For such reason, the directors should closely monitor the company's liquidity and indebtedness and should be very careful when the company's financial standing starts to deteriorate. The institute of shadow director is not recognized under Serbian law; nonetheless, a person unofficially directing the business of the company could also be liable for the criminal act of "causing of bankruptcy" either as principal wrongdoer or more likely as an aiding or abetting person.

XVI. SLOVAK REPUBLIC

Authors / contacts: Václav Audes and Robert Nešpůrek

1) The principal rule of the liability of the directors[19]:

The director must perform his/her office with due care, i.e. with necessary loyalty, required knowledge and diligence and in line with the interest of the company and all of its shareholders. When adopting a decision, the director has to collect relevant and complete information that is/might be necessary to adopt a qualified decision. Under Slovak law, the emphasis is laid on the decision-making process itself, rather than the result of the director's decision (i.e. the business judgment rule).

In general, the members of the statutory body are jointly and severally liable for any damage incurred by the company. The director is not generally liable towards third parties, but third parties may make the claims of the company for its own account against the director if the company is not able to satisfy its claims. The director may be exempt from his/her liability, when he/she proves that he/she has discharged his/her duties with due care and acted in good faith for the benefit of the company.

2) Special liability regime for directors in threatening insolvency:

The statutory body of a company that has found out, or with regard to all circumstances should have found out, that such company is in crisis, is obliged in accordance with the requirements of professional care to do everything that any other reasonably careful person would do in a similar situation to overcome such crisis. He/she is obliged to take appropriate and reasonable measures to avert the bankruptcy without undue delay.

In case the company is heavily indebted, the director is obliged to file a petition in bankruptcy against the company with the insolvency court. In other cases (if the company is insolvent or in a threating bankruptcy) there is the possibility, but not the obligation, to file an insolvency proposal against the company. Please note that the creditor of the company is entitled to file an insolvency proposal against the company, but only if the company is insolvent. For specification of all kinds of insolvency situations please see section 3.

If the director does not file an insolvency proposal against the company, he/she shall be liable for damage caused to the debtor's creditors by breaching the obligation. Unless a different amount of damage will be calculated, it shall be deemed that the creditor incurred damage to the extent to which their receivables were not satisfied.

3) When will a threatening insolvency situation occur?

Under Slovak Law, there are specific kinds of insolvency, collectively referred to as a crisis. The company is in crisis if it is (i) bankrupt or (ii) in a threating bankruptcy.

The company is bankrupt if it is (i) insolvent or (ii) heavily indebted. The company is insolvent if it is unable to fulfil at least two monetary obligations to more than one creditor 30 days after their maturity date. A heavily indebted company is a company that has more than one creditor and the value of their obligations exceeds the value of their assets. So in general, considering all the circumstances, it can be reasonably assumed that the debtor will not be able to pay a major part of his/her monetary liabilities properly and on time.

The company is in a threating bankruptcy if the ratio of its own assets to its liabilities is less than 8 to 100.

4) What are the legal consequences if the director breaches the special duty described in section 2?

If the statutory body does not file a petition in bankruptcy against the company on time, a fine in the amount of EUR 12,500 shall be imposed to the

[19] In compliance with Slovak Corporate Law "the director" means generally the member of statutory body (in Slovak: "člen štatutárneho *orgánu*") who is:
the shareholder of the unlimited company (v.o.s.); the general partner (in Slovak: "*komplementár*") of the limited partnership (k.s.);
the executive director (in Slovak: "*konateľ*") of the limited liability company (s.r.o.);
the member of board of directors (in Slovak: "člen *predstavenstva*") of the joint stock company (a.s.), single joint stock company (j.s.a.) or cooperative (družstvo);
in very certain cases – depending on their power - the member of the supervisory board of the mentioned companies too.

each member of the statutory body. This applies only to the statutory body of a limited liability company, joint stock company or single joint stock company. The director might also be disqualified from his/her office for a period of three years. So he/she will therefore be prohibited to perform a position as a member of statutory body or supervisory board in companies or cooperatives.

Also if performance replacing a company's own resources was returned during the time when the company was in crises, the members of the statutory body who held office at the time performance was provided in breach of the prohibition shall be jointly and severally liable for its return.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, it does to the shadow director in a limited range.

In a broader context, the controlling person shall be liable to the creditors of the controlled person for damage caused by the bankruptcy of the controlled person, provided that the controlling person's conduct considerably contributed to the bankruptcy of the controlled person. The controlling person shall be released from such liability if they prove that they acted in an informed manner and in good faith that they were acting for the benefit of the controlled person.

6) Who is a shadow director?

In accordance with Slovak Law, a shadow director is a person who exercises the powers of the statutory body or member of the statutory body in actual fact without having been appointed or designated to perform such position. Such a person is particularly obliged to act with due care in accordance with the interests of the company and all shareholders/members. When breaching such obligations, he/she shall hold the same liability as the director.

7) How to determine if the company is in a threating insolvency?

There are two insolvency tests which the director is obliged to carry out basically continuously:

(i) Cash flow test – whether the company is able to fulfil its obligations as they become payable, thus whether the liquid assets of the company are sufficient to pay up the payable debts.
(ii) Balance sheet test – measures the value of the company's assets against its liabilities.

8) Summary

Generally, the director is solely responsible and liable for the decision – making it alone as to whether or not he/she is obliged by law to file a debtor insolvency proposal (petition in bankruptcy) on behalf of the company. The director (i) will be liable for damages caused to the creditors, (ii) has an obligation to pay the fine and also (iii) could even incur criminal liability, if he/she fails to timely file the insolvency proposal.

XVII. SLOVENIA

karanovic/partners

Authors / contacts: Živa Nučič and Alexander Poels

1) The principal rule of the liability of the directors[20]:

Under Slovenian legislation, directors (or members of the supervisory body) have to act with the diligence of a conscientious and honest businessperson and safeguard the trade secrets of the company. In addition, when managing a company's operations, the management shall act with the professional due diligence of the corporate finance profession, thus endeavouring to ensure that the company is at all times liquid and solvent. If they fail to do so they are jointly and severally liable to the company for damage arising from the breach of their duties unless they can demonstrate that they fulfilled their duties honestly and conscientiously or with the professional due diligence of the corporate finance and corporate governance profession.

2) Special liability regime for directors in threatening insolvency:

The management shall provide for the regular monitoring and checking of whether the company has attained capital adequacy. Slovenian legal doctrine is not familiar with "threatening insolvency" or any other similar time period before insolvency itself, however, if insolvency does occur, directors (or members of the supervisory body) are not liable only to their company but to creditors as well. They are prohibited from performing certain actions that would decrease the assets of the company and are liable to creditors for any violation of such prohibition as well as for the correct and timely performance of measures and procedures as set out in the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (Insolvency Act).

3) When will a threatening insolvency situation occur?

As mentioned Slovenian legal doctrine is not familiar with "threatening insolvency situation". Under Slovenian legislation insolvency is considered to occur, and evidence to the contrary is not allowed, when insolvency of the company could have been determined by the management if directors acted with the professional due diligence of the corporate finance and corporate governance profession.

4) What are the legal consequences if the director breaches the special duty described in section 2?

Creditors can hold directors liable for any damages incurred by creditors due to a failure to achieve a full payment during bankruptcy proceedings.

5) Does this wrongful trading liability apply to persons other than the directors?

Yes, wrongful trading liability applies not only to directors but also to members of the supervisory board, and the so-called shadow directors.

6) Who is a shadow director?

A shadow director is any third person (either a natural person or a legal entity) who uses its influence to induce the members of the management or supervisory bodies, the procurator or proxy to act to the detriment of the company or its shareholders. Thus, under Slovenian law a parent company or its representatives (members of management or supervisory body) can be considered as shadow directors if they fail to fulfil their obligations regarding give instructions to the controlled (subsidiary) company with due care and diligence.

[20] In Slovenian law, the management shall comprise bodies or persons who are authorised to manage the company's operations. For the purpose of this publication, the term "director" is used for a member of the management. Under Slovenian law, the following persons are considered to be directors (in Slovenian: poslovodje):
- managers (in Slovenian: poslovodje) of a limited liability company („družba z omejeno odgovornostjo"),
- members of the management board (in Slovenian: člani uprave) or members of the board of directors (in Slovenian: člani upravnega odbora) or executive directors (in Slovenian: izvršni direktorji), if appointed in a company with one-tier board structure, of a public limited company („delniška družba"),
- shareholders of an unlimited company („družba z neomejeno odgovornostjo") and third parties in the event of a transfer of management entitlement,
- general partners (in Slovenian: komplementarji) of a limited partnership („komanditna družba") and third parties in the event of a transfer of management entitlement.

7) How to determine if the company is in a threating insolvency?

As Slovenian legal doctrine is not familiar with “threatening insolvency” only occurrence of the insolvency itself is regulated in applicable laws. It is presumed that a company is insolvent if it is continuously insolvent (within a longer period of time the company is not able to settle all its liabilities falling due within such a period of time) or becomes insolvent (the value of the companies’ assets amount to less than the sum of its obligations).

8) Summary

While Slovenian legislation is not familiar with the concept of “threatening insolvency”, it strictly prohibits all wrongful trading and holds all responsible persons liable to creditors, if creditors incur any financial loss due to such trading in later insolvency proceedings. Depending on the factual circumstances of each case, shadow directors such as parent companies and their representatives could be considered as responsible and therefore held liable. Additionally, as Slovenian legislation presumes that insolvency of a company has occurred if conditions determined by the Insolvency Act are fulfilled, directors and members of the supervisory board of all companies, but with particular focus on the companies which are facing financial difficulties, should ensure regular checks of their company’s liquidity and solvency. Not being aware of the company’s insolvency (if, acting diligently, the management could have established such situation of the company) is not a legally valid excuse for evading liability towards creditors in later insolvency proceedings. Slovenian law does recognize the institute of shadow director and vests special wrongful trading liability also on shadow directors.

XVIII. UKRAINE

Authors / contacts: Vladimir Sayenko and Olexander Droug

1) The principal rule of the liability of the directors[21]:

Ukrainian law establishes a broad rule that any officer of a company shall act in the interests of such company, in good faith and reasonable, as well as not exceed his/her authority. Breach of these obligations may result in joint and several liability of the relevant officers for any damages caused to a company. Ukrainian law also entitles minority shareholders to file derivative lawsuits on behalf of a company against officers to recover damages caused to a company.

2) Special liability regime for directors in threatening insolvency:

Ukrainian law does not contain any express requirement that directors must act in the interest of creditors. However, Ukrainian insolvency laws impose certain obligations on a managing director in a threatening insolvency situation and provide for liability for non-compliance with such obligations.

3) When will a threatening insolvency situation occur?

A threatening insolvency situation occurs when it becomes apparent that a payment by a company to one or several of its creditors will result in impossibility to make payment in full to other creditors. In case of a threatening insolvency situation, a company is obliged to file for bankruptcy to the competent Ukrainian court within one month.

4) What are the legal consequences if the director breaches the special duty described in section 2?

If a managing director does not comply with obligation to file for bankruptcy within one month after a threatening insolvency situation occurs, then this managing director will be jointly and severally liable for any claims of creditors that are not satisfied in the liquidation proceedings. This rule is relatively new under Ukrainian law.

Apart from the liability for failing to timely file for bankruptcy, directors may also be held liable if the court establishes that a company became bankrupt due to their fault. The liquidator may file a claim against directors with a view to recover the difference between the value of company's assets and all creditors' claims. Generally, such claim may be filed at the liquidation stage of the bankruptcy proceedings after all company's assets are sold and the proceeds of sale are not sufficient to make payments to all creditors.

5) Does this wrongful trading liability apply to persons other than the directors?

The liability for failure to timely file for bankruptcy applies only to a managing director of a company having authority to make such filing on behalf of a company.

However, liability for causing bankruptcy of a company applies not only to the directors, but also to founders (participants, shareholders) of a company, as well as to "other persons who have the right to give mandatory instructions to a company or can otherwise determine the actions of a company". The principal pre-requisite for liability is that a company should have become bankrupt due to the fault of these persons.

6) Who is a shadow director?

Ukrainian law does not have a concept of "shadow director" as such. However, as mentioned in section 5 above, a wide range of persons could potentially be held liable for company's unsatisfied debts if a company became bankrupt due to their fault.

These persons may include direct shareholders (both individuals and companies), as well as any persons "who have the right to give mandatory instructions to a company" or "can otherwise determine the actions of a company".

[21] Ukrainian law distinguishes between liability of a managing director ("kerivnyk") and the remaining company's senior officers only in part of a specific obligation imposed on the company's managing director to file for bankruptcy within one month in case of a threatening insolvency situation. Where used in plural form in this report, the term "directors" under Ukrainian law covers company's managing director, as well as other senior officers in accordance with company's by-laws (e.g. members of the executive board, supervisory board, revisions commission etc.)

It follows from the above that liability risks depend on specific actions of such persons that could have caused bankruptcy of a company, rather than on formal relationship of such persons with a company.

Accordingly, directors of parent companies, their employees, indirect owners, ultimate beneficial owners and other persons exercising control on the company's decisions could potentially be liable to creditors.

7) How to determine if the company is in a threating insolvency?

As mentioned is section 2 above, a threatening insolvency situation occurs when it becomes apparent that a payment by a company to one or several of its creditors will result in impossibility to make payment in full to other creditors.

8) Summary

Ukrainian law does not define such terms as "wrongful trading" and "shadow director". At the same time, these concepts are indirectly reflected in Ukrainian law through a number of legal rules establishing liability of company's managing director for untimely filing for bankruptcy, as well as liability of company's directors, founders (participants, shareholders), and any other persons exercising control on company's decisions, for causing bankruptcy. Ukrainian law does not provide for an exhaustive and formalised list of persons who may be liable for causing bankruptcy of a company. Therefore, materiality of liability risks for any particular person will largely depend on specific actions and/or decisions, which are deemed to have caused bankruptcy. Accordingly, it would be prudent to assess all decisions taken in respect of a Ukrainian subsidiary during the current crisis and in a situation of any potential threat of insolvency through the prism of their impact on financial standing of a company vis-à-vis its creditors.