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# Shielding Directors

## Navigating Personal Liability in Times of Financial Turmoil and Insolvency

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An expert in business and tax law. He is a dedicated lawyer and successful entrepreneur. He perfectly understands business and its environment. He advises, but above all he looks for solutions. He is entrusted with the legal service of his companies by entrepreneurs included in the rankings of Forbes magazine, as well as ambitious founders of start-ups. Winner of many prestigious awards granted both in Poland and abroad.

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In the tangled world of corporate governance, different jurisdictions put their own distinctive spin on the role of directors in management and overseeing their company’s business, as well as their obligations towards the company, its stakeholders, and for adherence to regulatory requirements.

For directors, a thorough understanding and awareness of their responsibilities is essential to navigate the company's affairs in a manner that safeguards both the company's interests and their own interests. After all, their decisions during financial turmoil could come back to bite them with personal liability and criminal charges.

One rule that transcends borders? Don't keep the ship sailing if it's already sinking.

Sure, each jurisdiction has its own nuances, but avoiding wrongful trading is the unifying factor in upholding trust in our market-driven economy.

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# 1 Deciphering the Role of Directors in Corporate Governance

The term "directors" holds paramount significance in the corporate management, serving as the cornerstone of organizational governance and decision-making processes.

Within the intricate landscape of directorial structures and responsibilities, it is crucial to unravel the complexities and notice differences surrounding the "one-tier" and "two-tier" frameworks.

In both of them directors play crucial role in the management and oversight of business affairs, but the structure and responsibilities of directors can vary depending on the board model in place.

In the one-tier board model, prevalent in common law jurisdictions, executive directors, non-executive directors, and supervisors are amalgamated into a singular authoritative entity known as the Board of Directors. According to the Delaware General Corporation Law, which serves a classic expression of this monistic governance model, the Board of Directors is entrusted with managing the business and affairs of the corporation. While the US corporate landscape typically features a unified board, it's customary to establish a myriad of additional board committees such as the audit committee, risk management committee, and others.

Conversely, the two-tier board model, more prevalent in civil law jurisdictions, entails distinct entities for executive and non-executive directors - the Management Board and the Supervisory Board. In continental systems, there's no differentiation between inside and outside directors; all directors are executives formally designated to the corporate entity known as the Management Board. Non-executives serve on the Supervisory Board and don't partake in managing the company's affairs, what absolves them also of directors' obligations.

In essence, an "executive director" in the one-tier system corresponds to a "member of the management board" in the two-tier system, while a "non-executive director" pertains to a member of the supervisory board.

All subsequent references to company executives, falling under the category of "executive director" in the US system or Management Board in continental Europe, employ the term "director."

As we delve into the intricacies of Polish regulations in the following discussion, it is prudent to address one additional matter.

The Polish term "dyrektor" may sound like the English "director," but it holds a distinct meaning. In Poland, a "dyrektor" is an internal function within an organization to handle affairs. This designation would be more accurately translated as "officer" in English terms. Examples of "dyrektor" in Polish context include the CEO, CFO, and CSO – individuals who hold internal managerial roles within a company. However, without specific powers granted by the board, they lack the authority to represent the company externally. Essentially, they do not bear overall responsibility for the company's situation externally, except in cases of personal fault where they are accountable for their own actions and omissions.

Poland adopted a typical “two tiers” dualistic management system, so term "member of the board" can refer to different positions in Polish law, such as members of the management board, supervisory board, or audit committee. The term "board of directors" itself does not exist. There is also no collegial body composed of executive directors (management board), non-executive directors, and various officers of the company (meaning business directors in Polish terms, e.g., CEO, CFO).

# 2 Possibility of personal responsibility under laws of Poland



The general principle is that the corporate veil protects both board members and shareholders from the negative consequences of management decisions. However, in certain cases, the corporate veil can be lifted, and board members may be held legally responsible for damages caused to the company, shareholders, or even third parties. In Polish law, the legal basis for the liability of board members is defined by various statutes, including the Commercial Companies Code (CCC), Civil Code, Insolvency and Restructuring Law, Tax Ordinance, Public Offering Act, and Labor Code.

With the performance of the function of a member of the management board in a limited liability company, rights, duties, and responsibilities arise from the CCC (Article 291 and 299 of the Code) as well as from other laws, including criminal liability (Article 296 and 296a of the Criminal Code), tax liability (Article 116 of the Tax Ordinance) and liability for social insurance contributions (Article 31 of the Social Insurance System Act). Those provisions we examine in detail below.
I would venture to assert that in Polish law, the possibility of holding directors financially responsible for a company's actions is taken to the point of questioning the very principle of "limited liability" characteristic of capital companies. The director's responsibility under the laws of Poland resembles more the responsibility of unlimited partners in partnerships in the U.S. legal system, rather than the responsibility of executive directors or officers of a company.

An opinion formed in distant legal environments that in practice directors rarely face responsibility leading to personal financial consequences does not align with the stringent standards prevalent in Poland and the reality may come as an unpleasant surprise to directors from a US legal upbringing serving on the boards of Polish companies. In Poland, personal liability of board members is more of a rule from which one can be exempted only in exceptional circumstances.

Poland, unlike the United States, is not known for being a litigious environment. However, it can be observed that the legal environment in Poland is uniquely hospitable to litigations against directors, unlike in the United States.

When it comes to commercial liabilities, pursuing financial responsibility of board members is considered to be a standard phase of a debt recovery process, a natural act of due care on the part of creditors and their representatives. The purpose is not merely to send a strong message to future directors or to make a point in a dispute, but rather pursuing claims against directors is a routine course of action, undertaken without prior consideration of litigation costs and the time value of money.

Situation is even more hostile towards directors in case of tax debts, as Tax Ordinance is interpreted in such a way that it imposes an obligation on the tax authority to conduct proceedings regarding the liability for tax arrears of a LLCs towards all persons who may be held liable for such obligations, that in particular directors personally. To call it a routine course of action would be euphemism, as it is more of a legal necessity of part of tax authorities.

In this complex psychological situation in which business venture managers are grappling with insolvency, Polish law takes a very clear stance. We do not seek to encourage directors to take bold actions trying to save the company and put it back on path of profitability; rather, our law intends to utilize personal assets of directors to repay the debts of the company they manage, prioritizing the protection of creditors over the financial freedom of directors.

In any case, at least there is no need to fear class actions, which are routinely utilized in the United States for securities lawsuits brought by investors against directors. However, such an approach would be highly unconventional in the Polish context, offering little chance of success and presenting significant complexities during the legal process.

This completely shifts the perspective compared to the United States, where such measures are a primary legal risk for directors representing a company facing insolvency. In the Polish context, the real risks are not class actions, but the transfer of obligations arising from the company's debts to its directors personally. This includes debts stemming from the ordinary business operations of the company, as well as tax and social security obligations.

To add some comfort, it can be noted that the costs of legal proceedings are moderate enough that there is little risk of encountering a Can't Afford to Win scenario in practice, where a director would have to discontinue the proceedings and accept responsibility simply because they could not afford to continue the case in court.

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# The legal underpinning for the subsidiary liability of directors regarding a company's debts.

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# 3.1 Civil responsibility for commercial debts

In accordance with Article 299 CCC, if enforcement against the company proves to be ineffective, the members of the management board are jointly and severally liable for its obligations. A member of the management board may be released from liability, as referred to above, if they can demonstrate that a bankruptcy petition was timely filed or a restructuring proceeding was opened at the same time or an arrangement was approved in the proceeding for approval of an arrangement, or that the failure to file a bankruptcy petition was not due to their fault, or that despite not filing a bankruptcy petition and not opening a restructuring proceeding or not approving an arrangement in the proceeding for approval of an arrangement, the creditor did not suffer any damage.

# 3.2 Civil responsibility for commercial debts

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According to Article 116 § 1 of the Tax Ordinance, for tax arrears of a limited liability company, a limited liability company in organization, a simple joint-stock company, a simple joint-stock company in organization, a joint-stock company, or a joint-stock company in organization, the members of its management board are jointly and severally liable with their entire assets if enforcement from the company's assets proves to be wholly or partially ineffective, and the member of the board:

1) has not demonstrated that:

a) a bankruptcy petition was timely filed or a restructuring proceeding was initiated in accordance with the Law on Restructuring of May 15, 2015, or an arrangement was approved in the proceeding for approval of an arrangement as provided in the Law on Restructuring, or

b) the failure to file a bankruptcy petition was not due to their fault;

2) does not identify the company's assets from which enforcement would substantially satisfy the company's tax arrears.

Article 299 CCC  and Article 166 of Tax Ordinance serve as main basis for transferring financial claims from company to directors. Art. 116 of Tax Ordinance is not completely identical to the regulation contained in Art. 299 CCC, however, this does not change the fact that both provisions contain the same exemption condition, which is the timely submission of a bankruptcy petition. Furthermore, the determination of this circumstance must be made by referring to the provisions of the Bankruptcy and Reorganization Law, as neither art. 116 of the Tax Ordinance nor art. 299 of the Commercial Companies Code defines issues related to insolvency and the deadline for filing a bankruptcy petition.

# 4 Key distinctions in directors' financial obligations USA vs Poland

In both the Polish and U.S. systems, the assumption is that a board member is responsible for their own actions - if they are unlawful and intentional. However, in the Polish and American systems, these concepts are given drastically different meanings.

In Poland, the harm of a creditor that will be examined is simply company’s failure to repay its debt, while director’s "fault" in this regard will be the failure to file a bankruptcy petition - which is a fundamental difference compared to the American system. According to Article 299 § 2 CCC, a condition that exempts a member of the company's management board from liability for its unsatisfied obligation is also showing that the creditor did not suffer any damages despite the member of the board not filing a bankruptcy petition. In order to establish the lack of harm under Article 299 § 2 CCC on the side of the unsatisfied creditor of the company, it is necessary to demonstrate that in the bankruptcy proceedings the creditor would not be satisfied, even if the proceedings were initiated earlier [judgment of the Appellate Court in Poznań - Civil Division I of December 16, 2022, I AGa 191/21].

If the condition of fault for actions in the form of failure to file a bankruptcy petition is met, it is essentially irrelevant whether the board member had knowledge of the company's affairs or decisions were made by third parties. The severity of this provision is especially apparent in cases involving directors who have had no involvement in managing the company's affairs at all.

An individual who (without compulsion, threat, or deceit) consented to be appointed to the board of a company with the awareness that they would only play a "figurehead" role, and subsequently agreed to such a state of affairs, bears full responsibility for the activities of the company and the consequences of failed business ventures or actions detrimental to the company, carried out by individuals authorized, with their consent, to manage the company in practice. Consequently, consciously and voluntarily relinquishing actual management of the company to a person outside the board does not exempt the board member from their duties arising from holding a position in that body, nor from liability for their failure to fulfill those duties. One of these duties is monitoring the company's debt to enable the timely submission of a bankruptcy petition or initiation of a composition proceeding, which, in turn, releases them from liability for arrears [Judgment of the Court of Appeal in Krakow - Civil Department I of November 24, 2021, I AGa 139/20].

# 5 Regulations surrounding directors' responsibilities in Poland

There are systems where personal responsibility of director is triggered only if he committed a serious breach of their duty of care which contributed to the company's insolvency. This is not the case of Poland. In our legal system the transfer of financial responsibility to directors is automatic, if directors of insolvent company fail to file for bankruptcy. The purpose of such regulation is to "compel" board members to fulfill their obligations arising from relevant provisions regulating insolvency and restructuring proceedings. As a result, the regulation stipulates that in a situation where board members have timely filed for insolvency or restructuring proceedings, and a tax creditor has not been satisfied, they are still not held accountable for tax arrears.

The liability for the company's obligations arises ex lege towards the creditor in the event of unsuccessful enforcement, when there is no obligational relationship between the creditor and a member of the management board.

Directors will not be exonerated from personal responsibility if a board decision is adopted, or they actions were authorized or ratified by the general meeting of shareholders.

Members of the board are responsible regardless of whether they actually received any financial benefits (for example, in the form of remuneration for serving as a board member or for being in an employment relationship with the company as a result). Even performing this role without remuneration does not exempt from responsibility, as there is no limitation based on the benefits received during the tenure of this position.

The responsibility lies with the individual holding the position of a board member, regardless of the relationship with the company (employment contract, managerial agreement, or maybe pure appointment with not contract of whatsoever nature).

# 6 Quasi-guaranteeing nature of directors obligations

The issue of the character of the board members' responsibility for the company's obligations under Article 299 § 1 of the Commercial Companies Code has long been causing doctrinal doubts in Polish law and leading to significant interpretational discrepancies. Literature and case law highlight a clash of several concepts in this regard. Among the two dominant views, one assumes a compensatory nature, while the other assumes a guaranteeing (or quasi-guaranteeing) nature. Both in doctrine and case law, the essence of the responsibility under Article 299 of the Commercial Companies Code is viewed differently [e.g., judgment of the Assembly of Seven Judges of the Supreme Court - Extraordinary Control and Public Affairs Chamber dated December 13, 2022, I NSNc 433/21].

While in Poland idea that it is a compensatory measure currently prevails, for U.S. standards I would call it rather severe guaranteeing measure with no much room for discussion about personal culpability of director’s actions.

The assertion that US law does not align with the concept of directors potentially bearing quasi-guaranteeing responsibility for their company's debts would be a significant understatement. This notion would be deemed as alarming, and any deliberations on this topic would be unequivocally dismissed as preposterous.

# 7 The“entrapment” of directors in practice

Even if a prospective director acknowledges that serving as a board member in a capital company in Poland entails quasi-guarantee responsibility, they still anticipate that being held accountable will involve a comprehensive investigation by the court to ascertain the validity of the claim against the company. Sadly, this statement lacks any basis in reality.

Let me remind that this will not be a liability based on bringing a lawsuit against a board member (which is also possible under certain circumstances), but rather a transfer of liability onto the board member for obligations previously established in relation to the company. I refer to this mechanism as "director entrapment," as it allows little room for directors to defend themselves against the transfer of responsibility from the company to them personally.

Case law goes so far to state that Art. 299 CCC implies a legal presumption of harm existence on the side of the creditor, the amount of which corresponds to the uncollected debt of the company. This presumption also covers the causal relationship between the harm and the failure of a member of the management board to submit a bankruptcy petition in a timely manner and the culpable act of not submitting the appropriate petition [Resolution of the Supreme Court - Civil Chamber of February 22, 2024, I CSK 6076/22].

In proceedings against a member of the management board, it is impermissible to challenge the company's obligation or raise other allegations aimed at demonstrating the invalidity of the enforcement title issued against the company by the court:

*“In accordance with the provisions of art. 299 § 1 CCC, the condition for holding members of the management board of a limited liability company accountable is the existence of an obligation of the said company, while enforcement against the company must be unsuccessful. The existence of an obligation of a limited liability company is a necessary*

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*condition for bringing a member of the management board to account and constitutes its prerequisite. At the same time, it is accepted that the obligation of the company, which is the basis for the liability of a member of the management board, must be established by an enforcement title issued against the company, such as a final court judgment, a notarial deed in which the debtor submits to enforcement, a copy of the debt register, etc.*” [Postanowienie Sądu Najwyższego - Izba Cywilna z dnia 10 listopada 2022 r. I CSK 1854/22].

Case law differs enforcement title in form of final court judgment, form other enforcement titles like a notarial deed in which the debtor submits to enforcement. In case of other enforcement titles then court judgements it is a certain room for director’s to dispute debt for which responsibility it transferred to him.

It should be emphasized that this risk essentially pertains only to the equivalent of executive directors in a 1-tier monistic system, which refers to members of the collegial management body of the company known as the management board. With regard to the equivalent of non-executive directors, namely members of the supervisory board in a 2-tier system, there is only a remote chance of financial liability. Furthermore, in the case of "directors" understood as "officers," the risk exists only in accordance with general compensation rules with no automatic transfer of financial responsibility. I refer here to distinctions I made in the begging concerning the meaning of word “director”.

The real risk of automatic transfer of liability from the company concerns members of the collegial management body with executive director status in the 1-tier system. The crux of the issue lies in the fact that whether even directors are convinced they have done nothing wrong is not of primary importance, although it likely depends on how "nothing wrong" is defined here. In Polish variation of the continental system, it is enough “wrong” if director does not constantly monitor the financial standing of the company in order to submit a bankruptcy petition on time. Failure to submit a report triggers automatic directors’ liability

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# In Which Circumstances is a Board Member Not Relieved of Liability? Examples from Case Law.

# 8.1 When Ignorance of Polish language Will Not Save You

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*“The circumstance of weak or even lack of knowledge of the Polish language also does not release a member of the board of directors from liability. When consenting to manage the affairs of a company subject to Polish law, a person, reasonably and rationally assessing the matter and considering the basic scope of duties of directors of a limited liability company, should be aware that even in the absence of sufficient knowledge of the Polish language, they are obligated to comply with the rules and legal regulations concerning the management of the company and liability for its obligations. If they do not possess the ability to speak the official language of the country whose legislation governs the company they manage, it may only indicate their lack of prudence or result from the expectation of support from other entities (e.g. translators, company personnel, etc.). From this perspective, invoking a lack of knowledge of the Polish language is, in any case, a subjective circumstance that lies solely on the side of the board member as a factor that could be the basis for not taking on the management of the company in that position” [Supreme Court judgment - Civil Chamber of September 8, 2021, II CSKP 2/21].*

# 8.2 Divided Duties, United Liability

## Why Agreements concerning the division of duties  Can't Shield Directors?

Board members cannot agree to divide responsibility among themselves with effect toward creditors of the company they are managing. Board members cannot evade or limit their liability by entering into an agreement on how to manage the company. Such an agreement is purely internal and cannot prevent creditors of the company from seeking claims from any directors. However, such an agreement can constitute a source of recourse claims between board members.

As the Supreme Court has explained: "*Agreements made pro foro interno, i.e. among members of the board of directors, do not release a board member from liability. Such agreements, even if they take the form of a contract between board members, cannot lead to the exemption of one or some of them from liability towards third parties, nor to the avoidance of actions that are statutory duties of board members and for which the law conditions the release of these entities from liability on the principles defined in art. 299 of the Commercial Companies Code*" [Supreme Court judgment - Civil Chamber of September 8, 2021, II CSKP 2/21].

# 8.3 Health Hazard

## The Surprising Lack of a Clear Link Between Illness and Director Responsibility

The circumstance releasing the member of the board of directors from liability may be the health condition of the board member in a situation where it is of such nature that it prevents this person from managing the company. However, it is not sufficient to indicate that it concerns any illness or health condition deteriorating. The latter should lead to such a change in the health situation that justifies the inability to conduct the company's affairs, and therefore the deterioration is significant, for example as a result of or during a serious illness. These circumstances should be of such a nature that they prevent the board member from functioning normally, and the assessment in this regard should be objective [Supreme Court judgment - Civil Chamber of September 8, 2021, II CSKP 2/21].

# 8.4 Out of Office, Not Off the Hook

## Half Resignations and Legal Liabilities. The liability of an individual who continues to manage the company in practice after formally resigning from the board of directors of the company.

There is also a view in the case law that on a tax standpoint, the responsibility still lies with the member of the management board who has resigned but continues to effectively manage the company's affairs. The intention of the authors is to prevent the practice of appointing "frontmen" to manage the company's affairs.

“*The Supreme Administrative Court has consistently expressed the view, to which the Director of the Tax Chamber correctly refers in the cassation appeal, citing relevant judgments, that when assessing the liability of a third party for tax arrears of companies under Article 116 of the Tax Ordinance, the factual exercise of the functions of a member of the management board should be taken into account. When evaluating the joint liability of a specific individual for the tax arrears of a company they manage, it is crucial to establish whether they were actively involved in the management of the company at the relevant time. The joint liability of a member of the management board for tax arrears is not based solely on holding a formal position, but also on bearing the consequences of their actions or inactions. The actual performance of the duties of a member of the management board in a company, even after formally resigning from the position in that company, results in tax liability for that individual as provided for in Article 116 § 2 of the Tax Ordinance*”[as in: Judgment of the Supreme Administrative Court dated February 2, 2024, III FSK 4114/21]"

The judgment was issued by a court specializing in tax matters, so it cannot be automatically transferred to civil obligations covered by Article 299 of the Commercial Companies Code. Interestingly, the Supreme Administrative Court, while indicating that in case a formally dismissed board member continues to perform duties of a member of the board, also continues to bear responsibility as if they were still a board member, omehow fails to mention that a board member who has not been formally dismissed but has ceased to function in practice would also be liable. The judgement concerning to the liability of a "front man" contradicts this argument and clearly says that front mant who was formally appointed but those not execire rights concerning management of the company, is indeed resposnsible.

# 8.5 The Subsidiary Liability of a Director

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## Who Resigned from Directorship and Ceased to Act as a Director if the Company Received a Tax Decision After His Resignation.

Generally, a director is not responsible for anything that occurs after they have officially resigned and ceased to act in their capacity as a director. However, what is relevant is not the timing of the tax decision delivery, but rather the time frame to which that decision applies.

If tax obligations arose by operation of law during the period in which the appellant was a member of the management board of the company, then even if specific decisions regarding these obligations were delivered to the company after the appellant's tenure in the management board, these decisions are solely declaratory in nature. In other words, they ascertain that the tax obligation in a certain amount arose by operation of law during a specific time period [cf. Ruling of the Supreme Administrative Court dated 25 January 2024, Case No. III FSK 3433/21].

In this situation, it is possible that after the resignation of a particular board member, the company may receive a tax decision relating to a period preceding the resignation. This creates a scenario in which the board member will not have any influence on the company's operations, particularly on whether the company will appeal the decision. Nevertheless, the board member will still bear responsibility in the event that the decision becomes final.

This could potentially be another example of entrapment for directors if a decision is delivered after their resignation, and they no longer have any influence over the company's appeal process.

# 9 The impact of liquidating the company

## on the possibility of transferring liabilities to members of the board.

It is possible to pursue claims against a board member even if the company no longer exists. In such a situation, in regard to civil claims it will be permissible to bring a claim against the board member immediately, without the need to obtain a prior enforcement title against the company.

Just like in the realm of civil liabilities, in tax matters as well, the liquidation of a company does not absolve a member of the management board from liability. In case of tax obligations such scenario is explicitly regulated by provisions of law. According to the provisions of Article 116 of the Tax Ordinance Act dated 29 August 1997, the liquidation of a company does not serve as an exonerating circumstance, i.e., it does not exempt a member of the management board from liability for tax obligations incurred during the company's existence while they were a member of its management board. Adopting a different view could lead to attempts to circumvent tax law by abusing regulations governing the cessation and liquidation of a capital company in order to obtain a tax advantage by releasing board members from liability for the company's tax arrears [cf. Ruling of the Supreme Administrative Court dated 25 January 2024, Case No. III FSK 3663/21].

# 10 The possibility of transferring responsibility

## according to the rules defined in Polish national law to the person managing the branch of a foreign company (or permanent establishment under tax regulations).

If a company is based abroad but conducts business in Poland as a branch, the management's liability can be transferred in a manner specified by Polish regulations, assessing whether the conditions for declaring bankruptcy of the foreign company are met based on Polish laws.

From the aforementioned EU regulations, it follows that in the case of foreign entities, such as the Maltese company under consideration, whose primary center of main activity is located outside of Poland but has a branch in Poland, the determination of the conditions for bankruptcy that justify filing a petition for bankruptcy may be based on national law since it is relevant. Polish regulations can be applied to the branch of the Maltese company, which falls within the jurisdiction of Polish authorities in initiating bankruptcy proceedings [Judgment of the Supreme Administrative Court dated January 19, 2024, Case No. III FSK 580/23].

11

## How does Polish law define the moment of company insolvency and the time frame for filing for bankruptcy?

# 11.1 At what juncture does insolvency necessitate the filing for bankruptcy?

Under laws of Poland, bankruptcy is declared against a debtor who has become insolvent. The debtor is required to submit a petition for bankruptcy to the court no later than thirty days from the date on which the grounds for declaring bankruptcy arose.
The legislator has maintained the existence of two bases for debtor insolvency, which can be referred to as "loss of liquidity" and "excessive indebtedness." The legislator introduced also numerous presumptions, detailed below, related to the construction of insolvency in order to facilitate the submission of bankruptcy petitions.
The debtor is considered insolvent if they have lost the ability to meet their financial obligations as they become due. It is presumed that the debtor has lost the ability to meet their financial obligations as they become due if the delay in meeting such obligations exceeds three months.

The debtor, being a legal entity or an organizational unit without legal personality, to which a separate law grants legal capacity, is considered insolvent also when their monetary obligations exceed the value of their assets, and this situation persists for a period exceeding twenty-four months. The assets mentioned above do not include elements that are not included in the bankruptcy estate. The monetary obligations mentioned above do not include future obligations, including obligations subject to a suspensive condition, as well as obligations towards a partner or shareholder under a loan or other legal transaction with similar effects.

It is presumed that the debtor's monetary obligations exceed the value of his assets if, according to the balance sheet, his liabilities, excluding provisions for liabilities and obligations to related parties, exceed the value of his assets, and this situation persists for a period exceeding twenty-four months.

The court may dismiss a petition for bankruptcy declaration if there is no imminent threat to the debtor's ability to meet his monetary obligations in the near future.

The court will dismiss a bankruptcy petition filed by a creditor if the debtor demonstrates that the claim is entirely disputed and the dispute arose between the parties before the bankruptcy petition was submitted.

The court will dismiss a bankruptcy petition if the assets of the insolvent debtor are insufficient to cover the costs of the proceedings or only cover those costs.

# 11.2 Legal responsibility on part of directors is of formal nature

For the mere declaration of bankruptcy, the cause of the debtor's insolvency and the timing of the submission of the bankruptcy petition are irrelevant. The bankruptcy proceedings are intended to protect the interests of the creditors of the insolvent debtor. However, the circumstances leading to insolvency and the timing of the petition submission are legally significant, albeit under different provisions.

# 11.3 Detailed guidelines from court rulings

## concerning the determination of the timing for filing for bankruptcy

Considering the strict liability associated with the failure to timely file a bankruptcy petition, one would expect guidelines regarding the definition of the commencement of the deadline for filing a bankruptcy petition to be very clear and precise. However, the Supreme Court has provided a series of indications on how to interpret the grounds for bankruptcy declaration. While not denying their validity, it must also be noted that they are formulated in such an unclear manner that even the oracle at Delphi or Nostradamus would not be ashamed of them.

Let us quote just a few of them, which I mention in reference to Izabela Heropolitańska's commentary.

1) A brief halt in debt payments due to temporary difficulties is not grounds for declaring bankruptcy, as insolvency within the meaning of Article 11, paragraph 1 of the Bankruptcy and Reorganization Law can only be considered when a debtor, due to lack of resources, fails to fulfill the majority of their obligations for an extended period of time (ruling of January 19, 2011, V CSK 211/10, Legalis);

2) One cannot adopt the view in a schematic manner that every, even a single, delay automatically triggers insolvency necessitating the submission of a bankruptcy petition (ruling of the Provincial Administrative Court of December 17, 2020, case number III SA/Wa 301/20, Legalis);

3) In accordance with the Supreme Court ruling of January 8, 2013 (case number III KK 117/12, BSN 2013, No. 3), the occurrence of a situation where the debtor ceases to fulfill its due obligations gives rise to the obligation to file a bankruptcy petition with the court, even if the debtor is not in a situation where its assets are insufficient to satisfy its debts. A possible solution for the debtor could be the sale of part of its assets or the assumption of new obligations;

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4) According to the NSA in the ruling of March 6, 2018 (case number II FSK 2173/17, Legalis), insolvency occurs not only when the debtor lacks funds, but also when the debtor fails to meet obligations for other reasons.

In Judgment V CSK 211/10, the Supreme Court displayed a rather dark sense of humor, indicating that a brief pause in debt payments due to temporary difficulties does not constitute sufficient grounds for declaring bankruptcy. In other words, if the difficulties are only temporary, there are no grounds for a bankruptcy declaration, the deadline for submitting a petition does not commence, and there is no risk of shifting personal liability onto board members. However, if the difficulties prove to be only temporary, then the prerequisites for bankruptcy declaration have not yet been met.

Where is the humor in this, you may wonder?

The determination of whether the difficulties were indeed temporary or not can only be made ex post, with the benefit of hindsight, meaning when it is already too late to protect the board from secondary liability by submitting a bankruptcy petition on time. One can speculate that the Supreme Court intended to offer the board a lifeline by providing them with reasoning to avoid filing a bankruptcy petition, yet in reality, the Supreme Court unintentionally gave the drowning a razor blade to cling to - it is understood that a typical board will attempt to defend the company, deluding themselves with hopes that the difficulties are only temporary. Finding justification in Judgment V CSK 211/10 to delay filing a bankruptcy petition. Once the ability to view these difficulties as temporary is exhausted, it will be too late to submit a petition. Why? Because if the difficulties turn out not to be temporary, the deadline for declaring bankruptcy is not calculated from the day the difficulties ceased to be temporary but from the initial day when the debtor stopped meeting obligations.

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**The risk of directors facing criminal liability for actions detrimental to creditors, related to placing a company in insolvency, for other actions and omissions related to the company's bankruptcy.**

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In most jurisdictions, company directors are held responsible for "Antecedent Transactions", among which a number of typical situations can result in director liability:

1) Preference transactions - Directors may incur personal liability for causing loss to creditors if they engage in a transaction that gives a creditor a preferential position over others in an insolvent liquidation (had the preference not taken place).

Polish law explicitly prohibits preferential transactions and imposes criminal sanctions for violating this prohibition.

Those who, in the event of impending insolvency or bankruptcy, unable to satisfy all creditors, pay or secure only some, thereby acting to the detriment of others, are subject to a fine, imprisonment for up to 2 years, or restriction of liberty. The offense under Article 302 § 1 of the Criminal Code consists of partially or completely satisfying a group of creditors to the detriment of others. The effectiveness or ineffectiveness of enforcement proceedings for these obligations and the criteria used by the accused in regulating such obligations (why they decided to give preference to certain creditors) are entirely irrelevant to the existence of this offense [judgment of the Katowice Court of Appeal - II Criminal Department, dated December 2, 2021, case no. II AKa 238/21].

Other types of Antecedent Transactions in different legal systems might include:

2) Transactions at an undervalue – Directors may be required to provide compensation to the company and its creditors for any losses incurred due to the company engaging in a transaction at an undervalue. A transaction at an undervalue occurs when the company either gifts an asset to a third party or receives less than the reasonable market value for it.

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3) Transactions defrauding creditors – Directors may be obligated to compensate the company and its creditors for any losses sustained as a result of assets being transferred with the purpose of placing those assets out of reach of creditors.

In Poland, we have a slightly different concept in this regard. Without explicitly distinguishing "Transactions at an undervalue" and "Transactions defrauding creditors," we have specified four other offenses to the detriment of creditors:

1) In the event of impending insolvency or bankruptcy, anyone who hinders or diminishes the satisfaction of their creditor by removing, concealing, disposing of, giving away, destroying, actually or apparently encumbering, or damaging components of their assets, is subject to a sentence of imprisonment for up to 3 years.

2) In order to obstruct the enforcement of a court judgment or another state authority's decision, anyone who hinders or diminishes the satisfaction of their creditor by removing, concealing, disposing of, giving away, destroying, actually or apparently encumbering, or damaging components of their assets that have been seized or are at risk of seizure, or who removes seizure marks, is subject to a sentence of imprisonment ranging from 3 months to 5 years.

3) A debtor who obstructs or limits the satisfaction of multiple creditors by creating a new business entity based on legal provisions and transferring components of their assets to it, is subject to a sentence of imprisonment ranging from 3 months to 5 years. Additionally, the same penalty applies to a debtor who leads to their own bankruptcy or insolvency while indebted to multiple creditors.

4) A debtor who recklessly leads to their own bankruptcy or insolvency, especially by squandering components of their assets, incurring obligations, or engaging in transactions blatantly contradicting the principles of management, is subject to a fine, restriction of liberty, or imprisonment for up to 2 years.

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