

Personal liabilities in a corporate context

In the amendment to the Act on Bankruptcy and Restructuring¹ No. 348/2011 Coll. (“Amendment”), important changes have been made to bankruptcy law that regulates those areas which in practice have proven to be problematic or ineffective. This article demonstrates the need to deepen legal and economic supervision by statutory bodies, their members, liquidators of companies, and statutory representatives of companies resulting from the new legal regulations regarding bankruptcy proceedings, which came into force as of January 1, 2013.

One of the important changes brought about by the Amendment is the change in definition of excessive indebtedness. Debtors who are obliged to keep accounts pursuant to special legislation², and who owe payments to more than one creditor, shall be deemed to suffer from excessive indebtedness as long as the balance of their liabilities is higher than the value of their assets.

The definition of “excessive indebtedness” has changed from the perspective of understanding the value of liabilities with which the value of the debtor’s property is compared. In the previous legal regulation, the value of property was compared only with the debtor’s liabilities that were due for payment; under the new legal regulation the value of all liabilities of a company must be taken into consideration.

The amended Act on Bankruptcy and Restructuring allows, in addition to determining the value of the property and liabilities by means of bookkeeping, also an expert opinion to be sought that takes precedence over the bookkeeping. This amended Act stipulates that when valuing property and liabilities also the expected results of further administration of property, or potential results of further

operation of an enterprise, will be taken into consideration if it can be reasonably presumed, given all circumstances of the case, that it will be possible to continue administration of property or operation of an enterprise.

The value of a company’s liabilities, which is used to determine whether the debtor is in a state of “excessive indebtedness”, shall include neither the value of liabilities that are connected with the subordinated liability, nor the value of liabilities that would be satisfied in bankruptcy as subordinated receivables.

The Amendment brought about a change to the fact that the debtor is no longer obliged to file a bankruptcy petition in both forms of financial distress, but only in excessive indebtedness.

The Amendment results in fundamental changes to the regulation of personal responsibility of statutory bodies and of other persons mentioned above for late filing of a bankruptcy petition. A person in breach of the obligation to file a bankruptcy petition in a timely manner will become obliged, upon bankruptcy declaration, to pay to the bankruptcy estate the sum corresponding to the amount of the debtor’s registered

capital, recorded in the relevant registry at the time when it breached the obligation to file a bankruptcy petition in a timely manner, however, not more than double the minimum statutory amount of registered capital of a company as stipulated by law.

The statutory body that has neglected its obligation becomes obliged, automatically as of the moment of bankruptcy declaration, to pay to the bankruptcy estate the stated sum, regardless of whether as a result of its conduct a company’s creditors have incurred a loss.

The statutory body or a member of the statutory body that proves that (i) it did not breach its obligation to file a bankruptcy petition in a timely manner, or proves that (ii) it acted with professional care, shall be released from responsibility under the Act on Bankruptcy and Restructuring.

The threat of this sanction for statutory bodies and other specified persons shall last for four years because the bankruptcy trustee is obliged to review, retrospectively for the period of four years prior to the bankruptcy proceeding, whether the receivable mentioned above, and due from the statutory body or other person has arisen or not.

The legislator also considered the situations that occur in cases of legal entities whose statutory bodies have more than one member and the individual members are not authorized to act individually. In such a case individual members shall be released from the personal liability provided that (i) they prove that due to lack of cooperation of those members with whom they act jointly, they could not have fulfilled the obligation to file a bankruptcy petition; and also that (ii) they have notified the commercial registry – by making a filing in the collection of deeds – that the debtor was in excessive indebtedness immediately after they learned or could have learned about the breach of this obligation.

All of the above-mentioned changes introduced by the Amendment should force statutory bodies to monitor, in more detail, the economic development of companies as well as other facts that may have a direct impact on the development of financial structure of a company.



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¹ Act No. 7/2005 Coll., on Bankruptcy and Restructuring, as amended.
² Act No. 431/2002 Coll., on Accounting, as amended.