



**THE COVID-RELATED
SUSPENSION OF THE
BANKRUPTCY FILING
OBLIGATION IN POLAND
LEVIED AS OF 1 JULY 2023**

LEGAL ALERT

JUNE 2023

- » On 1 July 2023, the government declared that the state of pandemic is to end in the territory of Poland for the first time since 2020.
- » This will result in the expiration of certain regulations which were introduced to protect businesses against the consequences of disruption to economic life triggered by the COVID pandemic.
- » **One of the regulations soon to expire is a suspension of the obligation to file for bankruptcy within 30 days of the date of insolvency provided that the insolvency resulted from the COVID pandemic.**
- » **Consequently, the members of the management boards of Polish companies which became insolvent as a result of the COVID pandemic, and have not made the relevant bankruptcy filing, will be obliged to file for bankruptcy by 30 July 2023. Managers who fail to file for bankruptcy on time risk civil, criminal, tax, and administrative liability.**
- » What should the members of the Polish management boards be aware of and do in light of the above? What practical impact could that have to those conducting business in Poland?

INSOLVENCY TESTS UNDER POLISH LAW

Polish Bankruptcy Law provides for two separate insolvency tests, and thus, a debtor shall be considered insolvent if:

1. they lose the ability to pay its pecuniary liabilities as they fall due (**liquidity insolvency test**);

The liquidity insolvency test is the main test used to assess the insolvency of a debtor. It is applicable to both natural and legal persons.

It is presumed that a debtor has lost the ability pay its pecuniary liabilities as they fall due when the delay in payment of its pecuniary liabilities exceeds three months.

or

2. their pecuniary liabilities exceed the value of their assets for a continued period exceeding twenty-four months (**balance sheet insolvency test**).

The balance sheet insolvency test is applicable only to corporate entities (including companies and partnerships).

The debtor's liabilities are presumed to exceed its assets when its balance sheet liabilities (excluding financial reserves and liabilities due to related entities) exceed the value of the debtor's assets, and such a situation persists for a period exceeding twenty-four months. For the purposes of the balance sheet insolvency test, the debtor's pecuniary liabilities do not include, among others, future liabilities and liabilities towards its partners or shareholders arising from a loan or other legal act with a similar effect executed within 5 preceding years.

INSOLVENCY RELATED OBLIGATIONS OF MANAGERS OF POLISH COMPANIES AND ASSOCIATED LIABILITY

The obligation to file for bankruptcy within a strict deadline

A debtor who is an entrepreneur is obliged to file for bankruptcy no later than **30 (thirty) days from the date on which it became insolvent** (in the case of corporate entities either of the insolvency tests needs to be met).

In the event of an entity being a Polish corporate entity the obligation to file for bankruptcy within the said deadline lies with each of the members of the management board of the company. This is irrespective of whether they are directly engaged in the day-to-day management of the business of a given entity or whether there are any internal divisions of responsibility among the members of the management board of the company.

Unlike in other jurisdictions, Polish law does not leave any room for managers to avoid filing in the event that they reasonably expect that the continuation of the company's business operations will not be detrimental to the creditors or if it can be reasonably presumed that solvency will be restored in the long term.

Liability for the company's debts and liability for damages caused to creditors

Any of the members of the management board of a Polish limited liability company or a simple joint stock company may be personally liable for the company's debts if the enforcement against the company proves ineffective, unless they prove that (i) a bankruptcy filing was made in a timely manner or, alternatively, restructuring proceedings were opened within the applicable deadline (ii) they were not at fault for a late filing or (iii) despite a failure to comply with bankruptcy filing obligations, the creditors of the company suffered no damage.

In addition, a failure to make a timely bankruptcy filing may also trigger liability toward the debtor's creditors for damages. This kind of liability applies to managers of all corporate entities. It is presumed that the extent of the damage suffered by a creditor amounts to the value of the unsatisfied claim of the creditor.

Liability for tax and social security arrears

Moreover, members of a Polish limited liability company, simple joint stock company or a joint stock company may be subject to specific personal liability for the tax and social security arrears of the company that they manage if the enforcement against the company's assets proves to be ineffective in any part. This is unless they prove that: (i) the bankruptcy filing was made in due time or, alternatively, restructuring proceedings were opened at this time, or (ii) they are not at fault for a late filing.

It should be noted that the administrative courts ruling on the liability of managers in respect of public levies are far stricter in their interpretation of the law; favoring the interest of the public authorities who are creditors.

A manager can be discharged from liability if they indicate to the relevant public authorities the company's assets which may be used to enable a successful satisfaction of a preponderant part of public levies, which is extremely rarely possible in practice.

Criminal and quasi-criminal liability for a lack of, or late, bankruptcy filing

WKB Lawyers

Warszawa • pl. Małachowskiego 2 • 00-066 Warszawa • tel. +48 22 201 00 00

Poznań • ul. Paderewskiego 7 • 61-770 Poznań • tel. +48 61 855 32 20

A failure to make a timely bankruptcy filing by a member of the management board may result in criminal liability for said member of the management board and/or a liquidator of a company both under the Commercial Company code and Penal code. In certain circumstances, they could also be liable under the fiscal penal code. Penalties that may be imposed include fines, limitations of liberty, or even imprisonment. However, so far criminal sanctions have not been widely imposed on managers who have violated their bankruptcy-related obligations.

Note that the Polish penal code, additionally, provides for several offenses which may be committed in connection with insolvency. These include things such as fraudulent asset transfers or selective repayment of debts, which should not be neglected by the managers meandering in the times of the company's distress preceding bankruptcy filing.

Moreover, a late filing may trigger quasi-criminal liability. This can consist of a court-imposed prohibition to conduct business activity or to be a member of the management board and/or supervisory board of legal entities for a period of 1 to 10 years.

Shadow directors

Polish law does not recognize the concept of a shadow director. The exception to this is a person who manages the debtor's estate, and who has significantly contributed to a failure to file a bankruptcy petition within the statutory time limit, may be subject to quasi-criminal liability (prohibition to conduct business activity).

COVID BANKRUPTCY FILING SUSPENSION

The outbreak of COVID-19 in 2020 prompted the introduction of specific measures into Polish law to protect business against the severe consequences associated with the pandemic, including a limited bankruptcy filing obligation suspension.

The 30-day bankruptcy filing deadline for debtors whose insolvency arose: (i) during the government announced a state of the epidemic or epidemic threat; and (ii) resulted from COVID-19, was suspended until renouncement of the state of epidemic and epidemic threat in the territory of Poland (when the 30-day filing deadline would restart anew).

The government announced a state of epidemic threat has now been announced to end on 30 June 2023. This means that any members of management boards of Polish companies which became insolvent in the period until the end of June 2023 (apart from those covered by the abovementioned exemption) will have until 30 July 2023 to make their bankruptcy filing and avoid personal liability.

It is hard to determine how many managers have consciously chosen to withhold making the relevant bankruptcy filing. This is due to the general premisses provided which have allowed the postponement of filing. There have been doubts raised as to their application in more complex cases where the COVID pandemic may have not been the only reason for insolvency.

However, given that insolvency occurred during the government-announced state of epidemic or epidemic threat, it is assumed that any insolvency resulted from the COVID pandemic. This creates a window of opportunity to all members of a management board of a Polish company who (consciously or not) did not make the relevant filing within 30 days as of the date of the company's insolvency.

WHAT SHOULD A MEMBER OF A POLISH COMPANY CHECK OR DO TO AVOID PERSONAL LIABILITY?

Firstly, it is recommended that any manager of a Polish Company check if any of the insolvency tests have been fulfilled with respect to the entities that they manage. It is unlikely that a result stemming from the liquidity test goes unnoticed, the fulfilment of the balance sheet test may be easily unnoticed for months or years as it may not be influencing the day-to-day operations of the Polish part of the business. Especially, if the liquidity necessary to continue trading is being provided by the parent entity or there is external financing at the group level. Thus, a thorough examination of the fulfilment of the balance sheet insolvency test based on 24-month data is highly recommended.

Secondly, if it transpires that the insolvency test is satisfied in relation to a given entity, the next step is to investigate a course of action from among the tools available under Polish law. The choice of relevant solution would depend on the debt structure and the liquidity standing of a given entity. However, in general terms, a manager could consider: (i) debt restructuring; (ii) corporate restructuring consisting in voluntary debt-to-equity swap; or (iii) entering into one of 4 available court-supervised restructuring processes.

It should be noted that depending on the circumstances, it may also be advisable for a manager to make a bankruptcy filing in parallel to the implementation of other restructuring options. In particular, if a formal restructuring route is to be pursued, the normal next step would be to make a bankruptcy filing in order to stop the clock in respect of a manager's liability while the restructuring motion is being prepared. Since restructuring processes are prioritized under Polish law, the bankruptcy court would be obliged to rule on the restructuring motion first or together with the bankruptcy motion.

WHEN CONDUCTING BUSINESS IN POLAND WHAT RISKS SHOULD A PERSON BE AWARE OF AND WHAT CAN BE DONE TO MITIGATE AGAINST THEM?

In light of the above, we can expect an increased number of bankruptcy motions being filed with the Polish bankruptcy courts as well as restructuring processes being opened by Polish companies.

Although this is unlikely to cause a massive wave of bankruptcies (as in most cases we may expect the restructuring filings to be made), we recommend increased caution in monitoring the solvency status of Polish business partners as their bankruptcy and/or restructuring may significantly influence their commercial relationships.

Firstly, the debtors in a bankruptcy and/or restructuring process may be deprived of the right to manage the company's estate. The management of the estate would, in that case, be vested upon the court-appointed trustee or administrator. Even if the debtor remains in possession of the estate, all actions going beyond the ordinary course of business would be supervised by a court-appointed supervisor. A supervisor may also be appointed in the interim period between

the relevant filing and the opening of the relevant insolvency-related proceedings. This may influence the debtor's ability to enter binding contracts and/or even terminate them.

Secondly, both within the bankruptcy and the remedial restructuring process, certain acts of the debtor preceding their opening may be found invalid and/or ineffective and the relevant court-appointed authority managing the estate has a right to terminate not fully performed contracts predating the opening of the relevant proceedings.

On the other hand, Polish restructuring law provides that, for the duration of the restructuring process, the other party to the contract cannot, without the consent of the creditors' council (a collective body representing the creditors in the restructuring proceedings), effectively terminate, among others, lease agreements for the real estate where the restructured entity conducts its business, leasing agreements, guarantee agreements, agreements granting licenses to the restructured debtor, and/or **other contracts of fundamental importance to the restructured debtor's business**.

The court-appointed supervisor or administrator should draw up a list of non-terminable agreements falling into the last category within **3 weeks** of the restructuring process commencing, and the other parties to such agreements have no legal means to object to their inclusion in such a list.

This broad category of contracts was added on 1 December 2021, so there is no established practice with respect of them. Therefore, all contracts concluded with debtors undergoing the Polish restructuring process are at risk of becoming interminable for a period of duration of the restructuring proceedings (which often last 2-3 years).

However, given that the abovementioned restrictions on termination of contracts with a restructured debtor as to the fact they apply only as of the date on which the restructuring process is opened, it is possible to take certain actions to mitigate these risks in a period as of the date on which the relevant motion is filed until the actual opening of the proceedings (which often exceeds 6 months).

Therefore, we recommend continuously monitoring submissions made to the central register of debtors. This is where all motions for bankruptcy and restructuring processes with respect to entities with the centre of main interest located in Poland are revealed and publicly accessible.

If you have any questions related to any of the topics above, please contact our Restructuring and Insolvency Team.



KLAUDIA FRATCZAK-
KOSPIN
ATTORNEY-AT-LAW
KLAUDIA.KOSPIN@WKB.PL

WKB Lawyers

Warszawa • pl. Małachowskiego 2 • 00-066 Warszawa • tel. +48 22 201 00 00

Poznań • ul. Paderewskiego 7 • 61-770 Poznań • tel. +48 61 855 32 20