Slovakia:
Shareholders and grey eminence – be aware

Piercing the corporate veil when the responsible company bodies disregarded legitimate creditors' interests and did not take reasonable steps to avoid insolvency or at least to take immediate steps to minimise the losses for creditors was impossible in Slovakia. The lack of legal measures to avoid and penalise such situations required an adequate reaction from the lawmakers. Happily, the responses are coming.

Extension of liability in case of bankruptcy

The recent amendment to the Slovak Commercial Code introduces a new liability of controlling entities – shareholders and/or other parent entities – for the insolvency of the controlled company if the shareholder contributes to the controlled company's insolvency and causes the creditor's claims not to be duly satisfied. There are two basic requirements for the establishment of the liability:

- Firstly, the controlling entity's actions must result into insolvency of the controlled company. In contrast to the liability of managing directors, standards for the behaviour of controlling entities are lower since they are *ex lege* not obliged to act with professional care.
- Secondly, the actions of the controlling entity must have significantly contributed to the insolvency of the controlled entity but they need not be the primary or the sole reason for the insolvency. However, there must be a causal relationship between the influence of the controlling entity's acts and the insolvency of the controlled entity.

The insolvency of the controlled entity is presumed if the insolvency proceedings could not be opened or were stopped due to the lack of assets. A welcome aspect of this new regulation is that it creates an additional legal basis for creditors to claim damages besides the general rules under the civil code. Moreover, the creditors will no more be dependent on the insolvency practitioner ("IP") who may bring actions only within pending insolvency proceedings.

To minimise the possibility of hiding from the liability for harmful conduct, the law also extended the liability for damages to persons who factually exercise the function of a statutory body without a formal appointment – so-called *de facto directors*. Those grey eminencies can be held liable in the same way as the statutory body. This means that those persons are not ultimately covered by the protective shield of a corporate entity anymore.

Shareholders and grey eminencies held liable for such damage may discharge themselves from liability only if they prove that they were acting informed and in good faith that their actions were in favour of the controlled company.

Stricter rules on liability for damages in case of bankruptcy

Laws on holding the statutory body accountable for insolvency are not new in Slovakia. However, the laws must be very precise or the application of these legal measures may turn ineffective.

In case of indebtedness of the company the managing director/liquidator/legal representative of the company is obliged to file for insolvency (Section 11 (2) of the Act 7/2005 Coll. on bankruptcy and restructuring ("Bankruptcy Act")).

To set up stricter rules concerning the statutory body (that is, the obligation to avoid insolvency and to act on time in case of insolvency), the legislator has introduced already several years ago a fixed contractual penalty established by virtue of law between the bankrupt company and its statutory body in the amount of €12,500. This contractual penalty cannot be waived, limited or excluded by any contract including articles of association or deeds of foundation. The person entitled to enforce the penalty is the IP. The IP may enforce the penalty individually against each of the persons who are required to file the bankruptcy petition, regardless whether acting individually or jointly.

After being previously removed from the Bankruptcy Act, its recent amendment re-established unlimited liability for damages caused by not filing the petition for insolvency on time. If the person who was required to file a bankruptcy petition on behalf of the debtor fails to file for insolvency timely, he/she will be liable to the creditors for the damage which arose as a consequence thereof, unless he/she proves to have acted with professional care. The liable person is given the opportunity to prove that even the timely filing of the bankruptcy petition would not lead to a better satisfaction of the creditor. Since it is a direct claim for damages to creditors, it will not be claimed by the IP but directly by the creditors. Unless proved otherwise, the damage suffered by the creditor is deemed to equal the value of the unsatisfied claim of the creditor.

Conclusion

The stricter rules on shareholders and persons acting on behalf of the company supported by the rules' precise application should help satisfying the creditors' claims. However, the creditors must also keep an eye on the actions of the IP and make sure that he/she is taking all the steps necessary to protect their interests. Besides that, the creditors can go after the liable persons on their own. ■

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