

With respect to the dynamic course of events regarding the coronavirus disease 2019 (COVID-19), commonly known as the “coronavirus”, we address the threat of insolvency of Polish companies and related liability of the statutory bodies (management board members), and provide a list of practical mitigating steps.

Insolvency Test of Your Company

Pursuant to the Polish bankruptcy law, the company is insolvent if:

- It is not able to pay its liabilities when they fall due and if the delay in the payment of liabilities exceeds three months
- It has its liabilities exceeding the value of its assets and such situation continues for more than 24 months

Be Aware of the Management Board’s Duties

- Once the company fulfils the insolvency test, the representative body of the company, i.e. the management board, is obliged to file a bankruptcy petition within 30 days from the day of occurrence of grounds for declaring bankruptcy.
- Failure to do so may result in the management board members being exposed to potential risks of both personal civil and criminal liability.
- Pursuant to the Polish bankruptcy law, the management board members are liable for damage resulting from the non-filing of a bankruptcy petition or a request for institution of restructuring proceedings in due time, unless they are not at fault.
- Additionally, the court may disqualify such persons for a period of one to 10 years, from operating business activity on their own account or as partners in a civil partnership, or from holding certain positions, including as supervisory board members or audit committee members.
- Moreover, if enforcement against the company proves ineffective, the management board members who breached their duty with regard to the bankruptcy petition may be held personally liable for company debts, unless failure to file the petition was not due to their fault or, despite the failure to file for bankruptcy, the company’s creditors did not incur damage.

Mitigate the Risks

1. Extend the Payment Terms

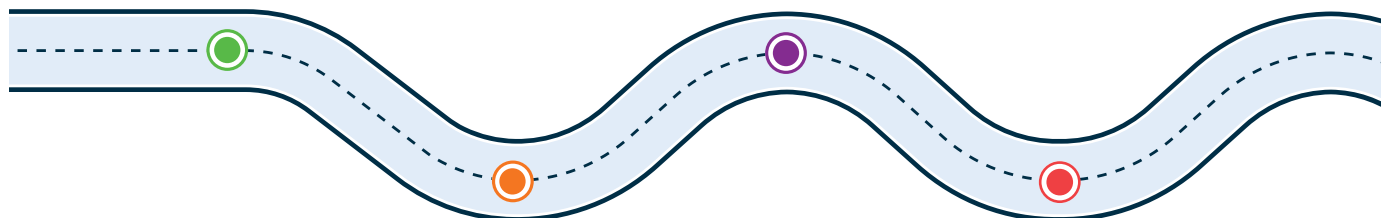
- Maintain good lines of communication on a regular basis with your suppliers, logistics providers, banks and end customers as to what you are doing and the steps you are taking to mitigate the impact of the virus on your business.
- Determine carefully payment terms in the agreements with contractors, having in mind the new regulations, which came into force on 1 January 2020. The provisions modified the payment terms in commercial transactions by shortening the deadlines for payment. Under the new regulations, if the debtor is a public entity (excluding medicinal entities) the payment for the transaction shall be made within a maximum of 30 days. The situation differs in transactions with a large entrepreneur as the debtor and a micro, small or medium entrepreneur as the creditor. In that case, the payment cannot exceed 60 days from the day of delivering the debtor the invoice (the contractual clause specifying a longer period will be invalid). The period may be extended by the parties, provided that such parties’ arrangement is not contradictory to the social and economic purpose of the contract, as well as the principles of social coexistence.
- Consider the use of payments in instalments, with respect of which the rules above apply accordingly.
- Due to the fact that the creditor is entitled to file the bankruptcy petition, check if the company pays its liabilities when they fall due or try to make an arrangement with the creditor in terms of payment or standstill of the creditor’s rights.

2. Cover Your Back and Take Proper Steps

- Holding the position in the management board, carefully and continually analyse the cash flow and balance sheet of the company. If you decide that the insolvency test is satisfied, take proper steps and file the bankruptcy petition in due time.
- If the balance sheet of a limited-liability company or a joint-stock company prepared by the management board shows a loss exceeding the sum of reserve capital and supplementary capital and half of the share capital in a limited-liability company (or one-third of the share capital in a joint-stock company), the management board is required to promptly convene a meeting of shareholders to adopt a resolution on the further existence of the company.
- With regard to the resolution of the further existence of the company, the shareholders shall find a solution of recovery mechanism of insolvency. The recapitalisation through an increase of share capital, debt for equity conversion or taking an internal loan might mitigate potential risk of bankruptcy. Remember that each type of equity contribution is associated with certain tax consequences.
- There is only so much a business can do to mitigate the possible impact of the spread of the virus. If, ultimately, the economic and social impact of restrictions cause cash flow issues that cannot be managed, the management board members must seek professional advice. Keeping records of key decisions will help management board members to release from liability.

3. Avoid Detrimental Actions Towards Creditors

- In order to protect creditors from detrimental actions of companies that cannot pay its liabilities, Polish law recognises a mechanism of *Actio Pauliana*.
- Under Polish law, if, as a result of a debtor’s action to the detriment of creditors, a third party gains a financial benefit, each of the creditors may demand to declare this action ineffective with respect to him/her, if the debtor acted knowingly to the creditors’ detriment, and the third party knew or, having used due care, could have learned of it.
- If a company is in financial difficulties, management board members may be committing a crime if they frustrate the satisfaction of some creditors by giving the preferential treatment to others.



Protection of Polish Entities With Regard to COVID-19

On 18 March 2020, Poland's government announced an economic stimulus package to assist entrepreneurs and employees during the COVID-19 crisis. The package consists of five pillars: employee safety, company financing, health protection, strengthening the financial system and a public investment program. The measures proposed include, among others, partial coverage by the state of employees' compensation, loan guarantees, leasing financing for transport companies, micro loans up to PLN5,000 granted by state-controlled financial institutions and potentially prolongation of deadlines for social insurance payments. The implementation of this program will require preparation and passage of appropriate legislation. For further details, please [read our article](#).

Further Updates

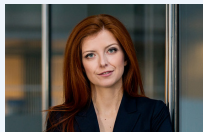
This alert reflects our perspective as of 19 March 2020. We will continue to monitor the situation carefully and keep this advice note under review. This is to provide you with the very latest guidance on the practical steps to take, given that the situation is constantly evolving and the government and public authorities' guidance and advice are likely to change. We have also set up a dedicated [resource hub](#) for businesses on the legal, regulatory and commercial implications of COVID-19.

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