

With respect to the dynamic course of events regarding COVID-19 – commonly known as the coronavirus – we address the threat of insolvency and related liability of the statutory bodies (Directors) and provide a list of practical mitigating steps.

Test the Liquidity of Your Company

The company is bankrupt (*v úpadku*) if it is either insolvent (*platobne neschopná*) or over-indebted (*predlžená*). A debtor or liquidator must file for bankruptcy if a company is over-indebted, under a so-called “balance sheet test”, i.e. when it has at least one creditor and the value of a company’s assets is less than its liabilities – taking into account not only amount due, but also its “contingent and prospective” liabilities. Value of the liabilities and assets is either determined based on accounting or is calculated by an expert, which takes into account also expected revenues from future operation of a debtor. However, certain receivables, e.g. receivables owed to affiliated entities, are not taken into account.

The petition has to be filed with a court within 30 days of the date on which a director/liquidator knew, or ought to have known, that the company is over-indebted when exercising professional care.

A debtor, creditor or liquidator (in case of a dissolution with liquidation) may file for bankruptcy if the debtor is unable to pay more than two of its outstanding debts for more than 30 days, which represents a so-called “cash flow test”.

On March 23, 2020, the Ministry of Justice announced that the new “COVID-19 law” should prolong the period for filing the debtor’s petition to 60 days, but this extended period will apply only if a company becomes over-indebted in the period between March 12, 2020 and April 30, 2020.

Be Aware of the Directors’ Duties

Once the company is bankrupt, its Directors are obliged to file for the company’s bankruptcy within 30 days after the date on which they learned, or ought to have known, about the company’s over-indebtedness if exercising professional care. If they fail to file a petition on time, they are obliged to compensate the creditors for the damage in the amount of creditors’ receivable which remained outstanding after termination or cancellation of the bankruptcy proceedings or after termination of enforcement proceedings due to insufficient assets, if a different amount of damage is not proved. In addition, the Directors will be obliged to pay a contractual penalty in the amount of €12,500.

If a court decides that the Directors breached their obligation to file for bankruptcy and are thus liable for damages, such decision disqualifies each Director from being a member of the statutory body or supervisory body, a head of a branch or a procurist (“disqualified representative”) for a period of three years from the effective date of the decision.

The Directors of the debtor company must provide cooperation and assistance upon request of the bankruptcy trustee. Failure to do so renders a Director liable to a fine of up to €165,000.

Advocate for Temporary Measures

To address negative economic impact of the virus on businesses, the Slovak Ministry of Economy introduced a draft proposal for measures to support the economy in the context of the COVID-19 outbreak.

These should include:

- Provision of zero interest rate loans for enterprises by SZRB and EXIMBANKA
- Postponement of VAT returns and deadlines for payment of VAT upon notification by the taxpayer
- Negotiations with the banking and financial sector on the options for deferring installments of loans, mortgages and leasing without a negative record for the debtor in the register and on the options for deferring interest and principal installments

On March 24, 2020, the New Slovak government announced new measures and the Ministry of Justice proposed the changes that we addressed above. However, more economic measures are about to come from the European Commission that should, *inter alia*, ease the state aid regulations for the member states.



Mitigate the Risks

Extend the Payment Terms

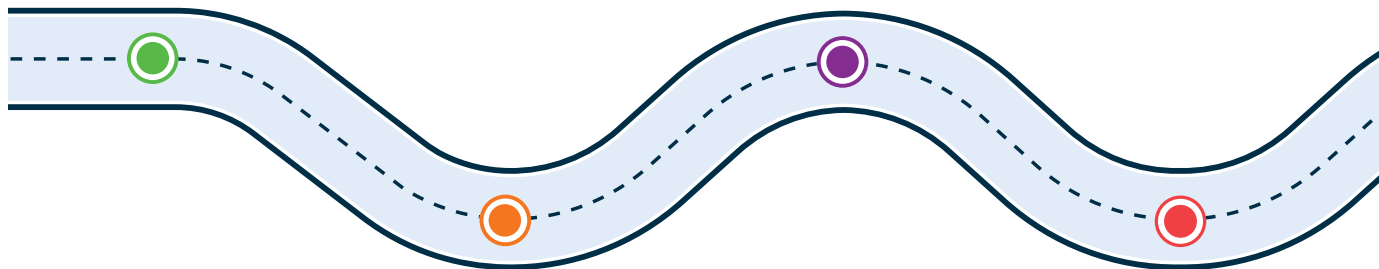
- Maintain good lines of communication on a regular basis with your suppliers, logistics providers and end customers as to what you are doing and the steps you are taking to mitigate the impact of the virus on your business.
- Under the Slovak Commercial Code (implementing the Late Payment Directive), the contractual parties can agree on payment terms longer than 60 days only if it is expressly agreed and such payment terms are not grossly unfair to the creditor. Agreeing on the extended payment terms could be considered as a legitimate tool for maintaining the business and avoiding illiquidity of the company.
- In case of public sector entities, the 30-day period applies, but can be extended up to 60 days maximum.
- Consider also the use of payments in installments, with respect of which the rules above do not apply.

Cover Your Back

- If, ultimately, the economic and social impact of restrictions cause cash flow issues that cannot be managed, Directors should seek professional advice. Keeping records of key decisions will help the Directors should the company not survive and they later have to justify their decisions.
- Instruction of the General Meeting not to file would not release Directors from their liability, but convening the General Meeting and suggesting some appropriate measures as to how to face such a situation would be advisable.
- But as General Meetings taking place in person may be subject to restrictions for public gatherings, voting should take place at a distance, which may be a problem as this form of voting is allowed only for public joint stock companies. This issue has been addressed by the Ministry of Justice and the new COVID-19 law should also allow per rollam voting for the general meeting of all private companies.

Avoid Preferential Treatment of Creditors

- Pre-insolvency transactions of the debtor before the insolvency started may be challenged by the insolvency trustee and found ineffective, if these transactions gave preferential treatment to a certain creditor.
- If a company is in financial difficulties, Directors may be committing a crime if they frustrate the satisfaction of some creditors by giving preferential treatment to others.



Further Updates

This alert reflects our perspective as of March 24, 2020. We will continue to monitor the situation carefully and keep this publication under review. This is to provide you with the very latest guidance on the practical steps to take, given that the situation is an evolving one and the government and public authorities' guidance and advice may well change.

We have also set up a [dedicated resource hub](#) for businesses on the legal, regulatory and commercial implications of COVID-19.

If you would like to discuss any of the issues raised in this advice note, please contact us.

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