

Legal risks for managers carrying out a corporate restructuring process

BY WOJCIECH WANDZEL

Often, investors have to restructure the companies they own, and Poland is by no means an exception in this regard. The process entails taking action on the part of previous or new managers. However, Polish law presents legal risks to members of the management board and each manager participating in the administration of a company ought to be familiar with these risks. This article will present the most pertinent legal risks in terms of criminal, fiscal and civil liability faced by members of management boards of companies subject to restructuring.

Article 296 of the Criminal Code deals with criminal liability of board members. The Act penalises the activities of board members who, either by malfeasance or the non-fulfilment of duties, causes substantial damage to property. The offence risks a penalty of up to 10 years imprisonment, depending on the extent of the culpability and the extent of the damage caused to the company. In fact, the regulation covers a range of conduct and behaviours which can, in short, be defined as acting in contradiction to the principle of the rational management of a company's assets. It is important to highlight the exceptionally broad definition of potential breaches of Article 296 of the Criminal Code. This provision is expected to be amended, restricting the scope of conduct that could be defined as an offence, although this is yet to occur.

The Code of Commercial Companies (CCC) also contains criminal provisions which can provide the basis for criminal liability of board members. Article 585 of the CCC provides for the sanction of up to five years imprisonment and a fine for actions detrimental to the company. In turn, Article 586 of the CCC penalises the failure to file a motion for the declaration of bankruptcy, pertinent in times of financial crisis, despite the existence of the basis for filing of such a motion, stipulating the penalty in the form of imprisonment and a fine. Furthermore, Article 588 of the CCC stipulates the penalty of six months imprisonment for allowing a company to acquire its own shares.

Apart from these criminal regulations, there is a special act in force in Poland called the Fiscal Criminal Code which penalises taxpayers' actions and nonfeasance which exposures fiscal authorities to fiscal depletion. The issue here is the violation of fiscal duties in the scope of the VAT, CIT, and an excise as well as the violation of customs duties and the principles of transactions on goods and services with other countries. The Fiscal Criminal Code stipulates high fines and the penalty of imprisonment for violation of the above-mentioned duties. Since a fiscal depletion is formally perpetrated by a company, and thus a legal person, the Fiscal Criminal Code introduces a mechanism of liability of natural persons who attend to the business activity and operations of a legal person (Article 9.3). In the case of a commercial company, this means that members of the board face fiscal criminal liability since they must "attend to the company's business activity and operations".

In turn, as regards strictly fiscal liability, Article 116.1 of the Tax Ordinance Act stipulates joint and several liability of the board members for the company's tax obligations. However, this liability can be implemented only when the premises provided for in the Tax Ordinance Act referred to above have been met. Therefore, the liability of a board member rises when: (i) execution of tax duties from the company's assets proves ineffective; (ii) a board member has failed to demonstrate that the motion for the declaration of bankruptcy has been filed in a due time; and (iii) a board member does not indicate assets of the company the execution from which shall render the satisfaction of the tax arrears in a significant part. At the same time, it should be explained that under Article 116.2 of the Tax Ordinance Act, the liability of a board member extends to tax arrears on the grounds of the obligations which happened to arise during their term as a board member. This is of relevance insofar as the quoted provision excludes the liability of newly appointed board members for tax arrears arising during the term of their predecessors.

As regards civil law liability, Polish law contains special regulations pertaining to board members' liability. First, board members are held liable for damages inflicted upon the company managed by them as a result of actions or nonfeasance contradictory to the law or articles of association (in the case of a joint-stock company – Article 483.1 of the CCC, and in the case of a limited liability company – Article 293.1 CCC). It can, therefore, be stated that the scope of actions which qualify as an action or nonfeasance non-compliant with the law or with articles of association is very broad which, when combined with the obligation of professional (increased) diligence, generates a substantial legal risk for board members. Second, pertaining solely to a limited liability company, under Article 299 of the CCC, board members are held liable for obligations of the company managed by them towards the company's creditors should the execution from the company's assets prove ineffective. However, a board member can be released from this liability if they demonstrate that a motion for the declaration of bankruptcy was filed at the adequate time or that they were not culpable for the failure to file such a motion or, relatively, that despite not having filed the motion for the declaration of bankruptcy, the company's creditor suffered no damage.

Hence, on the basis of the legal regulations on the liability of board members outlined above, the scope of managers' liability entails substantial legal risks which need to be taken into account, particularly in the restructuring processes. ■

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