



CERHA HEMPEL
*Managing Directors' Duties
in Times of Crisis*

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AUSTRIA

WHICH DUTY?	WHAT DOES IT MEAN?	TIMING – WHEN DOES IT APPLY?
<p>Maintenance of solvency</p> <p>Management of business risks</p>	<ul style="list-style-type: none"> • best efforts to preserve company's liquidity and sound financial structure • duty to manage and continuously assess risks, incl. credit risk, market risk, operational risk and liquidity risk (business judgement rule) • specific duty to take known crises into account for liquidity management purposes <ul style="list-style-type: none"> ○ CAVEAT: liquidity support via shareholder loans (to be interpreted broadly, e.g. also including loans granted by other group companies) if a company is in "crisis" may entail equitable subordination resulting in (i) a ban on repayment of such loans during the company's crisis (or in case repayment would cause a crisis); and (ii) subordinated status of such loans in potential subsequent insolvency proceedings ○ COVID-19: unsecured shareholder loans granted and disbursed in the period from 5 April until 30 June 2020 for no more than 120 days are not subject to equity substitution rules/subordination 	<p>Pre-crisis and post-crisis</p> <p>Enhanced scrutiny in respect of known crises</p>
<p>Convening shareholders' meeting</p>	<ul style="list-style-type: none"> • obligation to immediately convene a shareholders' meeting if: <ul style="list-style-type: none"> ○ loss of at least half of the share capital (limited liability companies and stock corporations) ○ equity capital ratio is below 8% <u>and</u> the fictitious debt repayment period (broadly, period within which existing financial debt could be repaid from projected net operating income) exceeds 15 years (limited liability companies only) • ongoing (in-)solvency assessment upon indications of a crisis (e.g. negative equity) 	<p>Crisis on the horizon</p>
<p>Need for reorganisation?</p>	<ul style="list-style-type: none"> • assessment whether company is in need for reorganisation which is presumed if (i) equity capital ratio is below 8%; <u>and</u> (ii) fictitious debt repayment period exceeds 15 years • obligation to file for opening of reorganisation proceedings in case the company is in need for reorganisation • in practice only very few reorganisation proceedings have been opened to date; however, in case of subsequent insolvency proceedings risk of civil liability of up to EUR 100,000 	<p>Crisis on the horizon</p>

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Suspension of non-essential payments

Prohibition of unequal treatment of existing creditors

- **non-essential payments are no longer permitted**
- **permitted payments are limited** and include:
 - **employment-related expenses** such as wages and related social contributions, severance payments etc.
 - regular **operating expenses** to maintain ordinary business (electricity, water, lease, insurance premium etc.)
 - **payment against immediate delivery** and
 - **payments to secured creditors** up to the amount of the secured claim
- general **prohibition of unequal treatment of creditors**
- **COVID-19:** no civil liability of management for payments made during suspension of filing obligation due to over-indebtedness (see below)
- transactions resulting in **preferential treatment of certain creditors** and/or **reduction of value of company's assets** may be challenged/subject to claw-back in hypothetical subsequent insolvency proceedings

Onset of insolvency

Filing for insolvency

Prohibition of unequal treatment of all (unsecured) creditors

- if company is illiquid or over-indebted, obligation of **each director/board member** to (severally) file for insolvency
- **filing period:** without culpable delay upon insolvency, in any case within **60 days**; the filing period may only be used for the purpose of eliminating insolvency by implementation of feasible (i.e. *ex ante* likely to be achieved) restructuring concepts
- **COVID-19:**
 - if insolvency is (also) a result of the COVID-19 pandemic, filing period of **120 days** instead of 60 days
 - **suspension of filing obligation** if company becomes **over-indebted** from 1 March until 30 June 2020; after 30 June 2020 filing obligation within 60 days after 30 June 2020, or 120 days after company became over-indebted, depending on which period ends later

T + 60 days OR 120 days

for over-indebtedness
occurring from 1 March until
30 June 2020:
**T (over-indebtedness)
+ 120 days OR
30 June 2020 + 60 days**

BELARUS

WHICH DUTY?	WHAT DOES IT MEAN?	TIMING – WHEN DOES IT APPLY?
Maintenance of solvency	<ul style="list-style-type: none"> • obligation to ensure continuous solvency of the company. The criteria of solvency under Belarusian law are well-defined as: <ul style="list-style-type: none"> ○ current liquidity ratio and working capital ratio should be equal or exceed the minimum values set by the Government with respect to specific area of economic activity ○ debt/equity ratio should be less than or equal to 1 (1.2 with respect to leasing companies) 	Pre-crisis and post-crisis
Management of business risks	<ul style="list-style-type: none"> • day-to-day risk management • obligation to take measures to prevent insolvency: <ul style="list-style-type: none"> ○ changing the structure and composition of management ○ debt collection ○ attraction of investments ○ debt restructuring ○ reorganisation <p>The above-mentioned list of measures is indicative. The specific measures could be taken at the discretion of the managing director or shareholders (depending on the authority)</p>	Enhanced scrutiny in respect of known crises
Prohibition of dividends distribution	<p>Distribution of dividends by the company is prohibited:</p> <ul style="list-style-type: none"> • if it may lead to insolvency • in case of persistent insolvency 	Formal criteria of insolvency are met or are about to be met

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Filing for insolvency

- if the company is illiquid or over-indebted, obligation of **the managing director or liquidator** to file for insolvency
- **filing period:** without culpable delay upon insolvency, in any case within **1 month**
- in case of failure to file the application within the above-mentioned deadline, the **debtor's managing director or liquidator** could be **subsidiary liable** for all unsettled creditors' claims
- in case of insolvency, **shareholders and/or managers** of the company may face subsidiary liability upon the company's debts. However, they could only be subject to such liability if the insolvency was caused by their intentional culpable acts
- **COVID-19:** The court orders on the subsidiary liability of shareholders and/or managers of the company issued before 25 February 2018 and not enforced before 26 April 2020 may be revised due to the "new circumstances"

T + 1 month

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BULGARIA

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Maintenance of solvency Management of business risks	<ul style="list-style-type: none"> • best efforts to maintain the liquidity and sound financial structure of the company • duty to manage and continuously assess risks, including. credit risk, market risk, operational risk and liquidity risk (business judgement rule) • specific duty to take known crises into account in liquidity management 	Pre-crisis and post-crisis Enhanced review in respect of known crises
Convening shareholders' meeting	<ul style="list-style-type: none"> • obligation to convene a shareholders' meeting if: <ul style="list-style-type: none"> ○ the loss exceeds half of the share capital (joint stock companies) – shareholders' meeting must be held no later than three months after the loss has been established ○ the loss exceeds 1/4 of the share capital or the net value of the assets fall below the share capital (limited liability companies) – shareholders' meeting must be convened immediately • ongoing (in-)solvency assessment upon indications of a crisis (e.g. negative equity) 	Crisis on the horizon
Need for reorganisation?	<ul style="list-style-type: none"> • assessing whether company is in need for reorganisation, which is presumed if losses exceed 1/2 (1/4) of the share capital • obligation to apply for the opening of reorganisation proceedings if the company is in need of reorganisation 	Crisis on the horizon
Suspension of non-essential payments Prohibition of unequal treatment of existing creditors	<ul style="list-style-type: none"> • non-essential payments shall be suspended • general prohibition of unequal treatment of creditors • transactions resulting in preferential treatment of certain creditors and/or reduction of value of company's assets may be challenged/reclaimed in a hypothetical subsequent insolvency proceedings 	Onset of insolvency



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Filing for insolvency

- if company is illiquid or over-indebted, obligation of **each director/board member** to file for insolvency (individually)
- **filing period:** without culpable delay upon insolvency, in any case within **30 days**; the filing period may be used for the purpose of eliminating insolvency by implementation of feasible restructuring concepts
- the registration period is the same if the insolvency is due to the COVID 19 crisis; however, if the obligation to register expired during the state of emergency (13 March - 13 May 2020), the registration period was extended by one month
- civil and criminal liability of directors who do not fulfil the above obligations

T + 30 days

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CZECH REPUBLIC

WHICH DUTY?	WHAT DOES IT MEAN?	TIMING – WHEN DOES IT APPLY?
<p>Maintenance of solvency</p> <p>Management of business risks</p>	<ul style="list-style-type: none"> a managing director is obliged to act in such way that the potential insolvency of the company is avoided and in case there is an immanent insolvency of the company, a managing director is obliged to execute everything within reason required to avert that insolvency failure to do everything reasonably that is required may lead to the managing director's obligation to return any consideration and other benefits received from the company for the past two years 	<p>Pre-crisis</p>
<p>Convening shareholders' meeting</p>	<ul style="list-style-type: none"> the managing director is obliged to convene a general meeting without undue delay after becoming aware of the fact that the company is threatened by bankruptcy and shall propose that the general meeting adopts appropriate measures 	<p>Crisis on the horizon</p>
<p>Need for reorganisation?</p>	<ul style="list-style-type: none"> before submitting a motion for approval of reorganization, managing directors of the company must assess whether the company meets at least one of the criteria set below: <ul style="list-style-type: none"> the company's yearly turnover is at least CZK 50 million (approximately EUR 1.93 million); or the company employs at least 50 employees motion for approval of reorganization may submitted alongside with the insolvency petition or no later than 10 days before the first creditors meeting which is to be held after the decision on the bankruptcy even companies that do not meet the above-stated criteria can undergo a reorganization provided that they submit to the insolvency court, together with the insolvency petition, a so-called pre-agreed reorganization plan approved by a simple majority of both the secured and unsecured creditors computed according to the debtor's accountancy evidence 	<p>Crisis</p>

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Suspension of non-essential payments

Prohibition of unequal treatment of existing creditors

- generally, after the commencement of insolvency proceeding, **non-essential payments** are **not permitted**, however, there are certain payments that may be done even during the insolvency proceedings usually provided they are approved by relevant creditors' bodies or even the insolvency court, e.g.:
 - receivables of the creditors of agreements concluded by a person entitled to dispose with assets (usually an insolvency administrator)
 - reimbursement of cash expenses of persons who have called in an insolvency administrator to assist them
 - receivables of the company's employees (e.g. wages)
 - receivables of the state authorities such as tax office and employment office etc.
- the general rule of insolvency proceedings is that creditors who have the same or similar status under Czech insolvency law should be treated essentially equally

Onset of insolvency

Filing for insolvency

Prohibition of unequal treatment of all (unsecured) creditors

- the managing director is obliged to file an insolvency petition without undue delay following the obtaining of knowledge about the bankruptcy of the company (or the time at which it should have been obtained when acting with due care) and therefore initiate formal insolvency proceedings
- failure to file an insolvency petition in a timely manner will lead to personal liability of the managing directors for damages caused to the creditors
- **COVID-19:**
 - due to the COVID-19 pandemic, the Czech Parliament, *inter alia*, introduced a **temporary tolerance of the managing directors to file an insolvency petition** if their companies became insolvent after 12 March 2020 (i.e. the day the state emergency commenced) as the consequence of the COVID-19 epidemic and related restrictive measures. However, this temporary tolerance is intended to last only for the period of extraordinary measures with an additional six months after such measures expire, but at the latest until the end of 2020 (state emergency ended in May 2020).

Undue delay after becoming aware about the company's bankruptcy

COVID-19 measure

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HUNGARY

WHICH DUTY?	WHAT DOES IT MEAN?	TIMING – WHEN DOES IT APPLY?
<p>Maintaining solvency</p> <p>Management of business risks</p>	<ul style="list-style-type: none"> • best efforts to preserve the company's liquidity and sound financial structure • duty to manage and continuously assess risks, incl. credit risk, market risk, operational risk, and liquidity risk (rule of business judgement) • specific duty to take known crises into account for liquidity management purposes <ul style="list-style-type: none"> ○ CAVEAT: <i>liquidity support via shareholder loans may entail equitable subordination resulting in (i) a ban on the repayment of such loans during the company's crisis (or if such repayments would cause a crisis); and (ii) subordinated status of such loans in any subsequent insolvency proceedings</i> 	<p>Pre-crisis and post-crisis</p> <p>Enhanced scrutiny in respect of known crises</p>
<p>Convening the shareholders' meeting</p>	<ul style="list-style-type: none"> • ongoing (in-)solvency assessment upon observing the signs of a crisis (e.g. negative equity) • obligation to immediately convene a shareholders' meeting if: <ul style="list-style-type: none"> ○ the equity has dropped to half of the share capital (limited liability companies) or to two-thirds of the share capital (joint-stock companies) due to losses; ○ the has equity dropped below the statutory minimum amount; ○ the company is on the brink of insolvency or has stopped making payments to its creditors; or ○ the company's assets do not cover its debts • the shareholders are required to adopt resolutions in order to eliminate the aforementioned circumstances, such as decisions on supplementing the equity or on the dissolution of the company. The resolutions shall be implemented within three months • both before and after the shareholders' meeting (and even if the shareholders' meeting does not decide on filing for bankruptcy or compulsory liquidation procedure), the managing directors have to take all measures within reason to prevent and mitigate the losses of creditors and they must not undertake any business risk that may be considered unreasonable in light of the company's financial position 	<p>Crisis on the horizon</p>

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- **CAVEAT:** non-compliance with these obligations may result in the managing directors becoming personally liable for any unsatisfied claims in subsequent insolvency proceedings

Need for reorganisation?

- assessing whether the company is in **need of reorganisation**
- obligation to **convene the shareholders' meeting** if the company is in need of reorganisation
- only **the shareholders' meeting can decide on filing for bankruptcy** (reorganisation) or compulsory liquidation procedure

Crisis on the horizon

Permitted payments Prohibition of the unequal treatment of existing creditors

- **permitted payments** may include:
 - **employment-related expenses** such as wages and related social contributions, severance payments, etc.
 - regular **operating expenses** to maintain the ordinary course of business (electricity, water, lease, insurance premium, etc.)
 - **payment against immediate delivery** and
 - **payments to secured creditors** up to the amount of the secured claim
- general **prohibition of unequal treatment of creditors**
- transactions resulting in **preferential treatment of creditors** may be challenged/subject to claw-back in hypothetical subsequent insolvency proceedings

Crisis on the horizon

Filing for insolvency

- the application for insolvency can only be filed **upon a decision being adopted by the shareholders' meeting to this effect**
- **accordingly**, no specific obligation or deadline is specified for the managing directors to file for insolvency
- **COVID-19:**
 - until 31 December 2020, creditors can only initiate insolvency proceedings if their claim based on a contract or a final court decision exceeds HUF 400,000 (approx. EUR 1,140) and if the contractual claim is not paid within **75 days** after the final payment deadline specified in the payment reminder (sent by the creditor to the debtor after 20 days of the original contractual payment deadline)

for insolvency petitions filed
after 28 May 2020

ROMANIA

WHICH DUTY?	WHAT DOES IT MEAN?	TIMING – WHEN DOES IT APPLY?
<p>Maintenance of solvency</p> <p>Management of business risks</p>	<ul style="list-style-type: none"> • best efforts to preserve company's liquidity and sound financial structure • duty to manage and continuously assess risks, incl. credit risk, market risk, operational risk and liquidity risk • specific duty to take known crises into account in liquidity management: <ul style="list-style-type: none"> ○ CAVEAT: <i>liquidity support via shareholder loans (to be interpreted broadly, e.g. also including loans granted by other group entities), irrespective the loans were granted when the company in "crisis" or not, will result in equitable subordination of such loans, resulting in a subordinated status in potential subsequent insolvency proceedings/possible claw-back of the repayments, prior to the insolvency</i> • COVID-19: careful consideration and proper documentation and approval of decisions to cease or to continue working under COVID-19 and decisions on unemployment: <ul style="list-style-type: none"> ○ specific safety and healthy regulatory provisions to be observed by companies in the performance of their daily business activities ○ specific legislation (available with respect to the debts owed to Romanian bank lenders) providing that the affected companies must file an application with the banks, to obtain postponement of payment/rescheduling of the loans, providing that certain conditions are met (e.g. no overdue payments by a certain date, cessation of activity due to authorities' decisions, no insolvency at the date of application) ○ other various support measures to prevent companies from becoming insolvent as a result of the COVID-19 pandemic (e.g. state aid, state guarantees, deferral of tax and commercial payments) 	<p>Pre-crisis and post-crisis</p> <p>Enhanced scrutiny in respect of known crises</p>

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Convening shareholders' meeting

- obligation to immediately **convene a shareholders' meeting** if the company's net assets decreased to less than half of the value of the subscribed share capital or less if different provided by the articles of association of the company (joint-stock companies)
- if a capital increase is required or it is feasible, **the management may call a shareholders' meeting** in this respect
- **COVID-19:** temporary, more flexible, special rules for convening and holding a general meeting of shareholders, valid during and some time after the state of emergency

Crisis on the horizon

Obligation to open the insolvency proceedings?

- assessment whether company is **insolvent**, which is presumed when the debtor is unable to pay its debts for more than 60 days
- the threshold of the debt for the opening of bankruptcy proceedings is more than RON 50,000 (about EUR 10,300) for claims other than salaries or 6 average gross salaries for employees

Onset of insolvency (T)

Suspension of non-essential payments

Prohibition of unequal treatment of existing creditors having the same priority ranking

- **payments should be limited**, in order to avoid liability on the basis of unequal treatment of creditors and claw-back bankruptcy
- **payments should be limited to:**
 - **employment-related expenses** such as wages and related social contributions, severance payments etc.
 - regular **operating expenses** to maintain ordinary business (electricity, water, lease, insurance premiums etc.)
 - **regular (scheduled) payments to suppliers** and
 - **tax liabilities**
- the **general prohibition of unequal treatment** of creditors and the general **principle of respect for the ranking of claims**
- certain acts or operations carried out by the debtor by **fraud of the creditors** during the 2 years preceding the opening of the insolvency proceedings **may be subject to cancellation** (e.g. gratuitous acts, acts performed with the intention to decrease the patrimony of the debtor, any transfer of ownership to a creditor to pay a debt, performed within 6 months prior to insolvency, in case the price is less than the amount that could have been obtained in case of bankruptcy, etc.)

Onset of insolvency (T)

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Preparation for restructuring

- preparation of **financial restructuring measures**:
 - description of the reasons of insolvency (description of the financial situation)
 - assessment with regard to a possible out-of-court restructuring and preventive restructuring measures (e.g. capital increase) – if a capital increase is required or it is feasible, the management may convene a shareholders' meeting in this regard
 - possibility to implement certain procedures to agree with creditors on measures to reduce the debtors' financial difficulties (i.e. ad-hoc mandate, preventive agreement (Romanian: *concordat preventiv*))

Prior to filing for insolvency proceedings

Filing for insolvent reorganisation (compulsory settlement)

- the management has to file for reorganisation in case that:
 - the attempts of **share capital increase or out-of-court restructuring fail** and
 - the assessment of the management leads to the conclusion that there is a chance of **success for compulsory settlement**
- the management must apply for compulsory settlement
- the management must file the compulsory settlement claim within 30 days of the start of the insolvency. If the 30-day period is exceeded by more than 6 months, the management can be prosecuted.
- **COVID-19**: the 30-day period has been suspended during the period of the state of emergency/alarm

T + 30 days

Filing for bankruptcy

- the management assessment leads to the conclusion that there are **reduced chances of success of the insolvent reorganisation/compulsory settlement, and any of the out-of-court restructuring or share capital increase attempt have failed**, the management must file for bankruptcy
- the management must file for bankruptcy within 30 days of the start of the insolvency proceedings. If the 30-day period is exceeded by more than 6 months, the management can be prosecuted.
- **COVID-19**: the 30-day period has been suspended for the duration of the state of emergency/alert.

T + 30 days

SLOVAKIA

WHICH DUTY?	WHAT DOES IT MEAN?	TIMING – WHEN DOES IT APPLY?
<p>Maintenance of solvency</p> <p>Management of business risks</p>	<ul style="list-style-type: none"> the statutory body of the company that has determined that the company is in crisis, must act with the necessary professionalism or due diligence and do everything that would be done by a reasonably caring person to overcome such crisis <ul style="list-style-type: none"> the company is in crisis when it is in decline or threatened with decline the company is threatened with bankruptcy if the ratio of capital and liabilities is less than 8 to 100 the provisions of the Commercial Code regarding the company in crisis only apply to the following types of companies: limited liability company, joint stock company, simple joint stock company and limited partnership where the general partner is not a natural person 	<p>Pre-crisis and during the crisis</p>
<p>Filing for bankruptcy</p>	<ul style="list-style-type: none"> if the company is overindebted, the statutory body (or possibly the liquidator or other legal representative) is required to file for bankruptcy on behalf of the company within 30 days of the date on which it has determined that the company is overindebted or could have determined so with due diligence. the law also governs the liability of the statutory body for damages caused due to the bankruptcy, also with regard to third parties in the event of failure to file for a bankruptcy or an unauthorised application for bankruptcy. Further, if the obligation to file for a bankruptcy is breached, it is deemed that a contractual penalty of EUR 12,500 was agreed between the bankrupt company (it applies to the limited liability companies, joint stock companies and simplified joint stock companies) and its statutory body who failed to comply with the obligation to file for bankruptcy. 	<p>30 days from finding out that the company is over-indebted</p>

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- **COVID-19:** companies that filed a motion for temporary protection are not obliged to file for bankruptcy during the time of such protection (effective until 1 October 2020). In business practice, however, the motion for the temporary protection automatically leads to demands from suppliers for advance payments for goods and services.

Information duty towards the shareholders

- in a joint-stock company, the board of directors is obliged to **convene an extraordinary general meeting** after it has determined that the cumulative loss of the company may exceed **one third of the share capital** and must submit a proposal to the general meeting for a resolution. The management board must also **inform the supervisory board** without delay
- even if this is not expressly provided in the Commercial Code, it is assumed that statutory bodies of **other forms of companies have a similar duty to inform their shareholders**

Crisis on the horizon

Payments replacing own resources of the company

- payments that **replace the company's own resources** (i.e. quasi-equity or an equity substitute) **cannot be repaid** if the company is in crisis and there are no deadlines for their repayment during this period
- if the payment replacing the company's own resources is repaid, **each member of the statutory body is liable** for its repayment to the company
- payments replacing the company's own resources may be **loans or other similar payments granted to the company by:**
 - a **member of the statutory body**, employee in the **direct management** of the statutory body, procurator holder, director of the organizational unit, member of the **supervisory board**
 - person who has a direct or indirect **share of at least 5%** in the share capital of the company or **voting rights** in the company or has the possibility to exercise an **influence on the management** of the company which is comparable to the influence corresponding to this share
 - a **silent partner**
 - or **person close to these above mentioned subjects**

During the crisis