

Poland: How to treat the wave of bankruptcy petitions



The COVID-19 pandemic has caused turbulence on world markets. Each of the countries where the virus appeared introduced different restrictions on the rights and freedoms of citizens.

This has translated into a deterioration of the economic situation both at macro and micro level. Many entrepreneurs, due to the specific nature of the industry in which they operate, have noticed a drastic decrease in revenue with fixed costs of doing business. Their ability to settle current liabilities has become worse or has been lost.

Deadline for filing a bankruptcy petition

The existing Bankruptcy Law obliges a Polish entrepreneur who has lost the ability to pay to file a petition for bankruptcy (cash-flow test of insolvency). The deadline for the entrepreneur and a member of the company's management board for filing the application is 30 days from the date of the insolvency. Failure to submit the petition on time may have far-reaching consequences. These consequences include personal property liability for the damage caused to the creditors as a result of the late filing, or on being prohibited from conducting business activity for a period of 1-10 years.

In order to avoid a significant number of bankruptcy petitions filed by entrepreneurs and to protect them from the consequences, the Polish Government has introduced a legal solution under the pending draft law.

Under the Bill, which was adopted on 9 April 2020, where the basis for declaring a debtor insolvent has arisen during the state of the epidemic emergency due to COVID-19, the period for filing an application for bankruptcy does not start immediately, but will restart when the official state of emergency has ended.

At the same time, there is a presumption that a state of insolvency created during an at-risk

or epidemic situation is equivalent to that created by COVID-19. It is also specified that the periods for which the date of filing for bankruptcy is to be calculated are extended by the number of days between the date of filing for bankruptcy and the last date on which the application must be filed (it would apply e.g. to avoidance actions).

The presented legal solution differs from the those introduced so far in other EU countries. The Polish government has not suspended the obligation to file a bankruptcy petition for a predetermined period of time and has indicated that the deadline for filing the petition will not start until the end of the epidemic emergency. This means that after the end of the COVID-19 epidemic, the Polish entrepreneur will have 30 days to file an application to declare bankruptcy.

The simplified restructuring proceedings

The Polish government went a step further and introduced a special protective procedure to prevent bankruptcy of entrepreneurs during the pandemic. The simplified restructuring proceedings are based on the provisions on the arrangement approval proceedings, which we described in *Eurofenix Winter 2019/20 (#78)*. This procedure allows to make an arrangement by way of an independent collection of votes by a majority of two thirds of the value of claims and more than half of the voting creditors.

The arrangement is concluded outside the court under the supervision of a licensed restructuring advisor. Such an arrangement is then approved by the court. A new feature is the moratorium granted to the debtor in the form of an enforcement ban and a ban on terminating some key agreements. This protection takes place automatically, without the participation of the court, on the day of the announcement of the opening of proceedings in the Court

and Commercial Gazette.

If the arrangement proposals provide for a level of repayment not lower than that resulting from the agreement concluded with the debtor or than the level of repayment potentially obtained in bankruptcy proceedings, the arrangement will also cover creditors secured *in rem*, without any separate consent.

During the protection period, the right to administer his own property remains with the debtor; but the consent of the arrangement supervisor is still required for activities exceeding the ordinary management. Creditors are also protected as they may file a motion with the court to set aside the moratorium if it is detrimental to all creditors. The creditors will also be entitled to an additional claim for damages if they prove that the debtor is carrying out the procedure in bad faith.

The protection can only last four months – during this period, the debtor must apply for approval of the arrangement.

The act also introduces restrictions as to the amount of the supervisor's remuneration in the case of small and medium-sized enterprises by using a degressive scale depending on the successful conclusion of the arrangement and on the amount to be awarded to creditors pursuant to the provisions of the arrangement (15% up to the amount of €23,000, 3% on amounts between €3,000 and €113,500 and 1% above €113,500). In the absence of an arrangement, the remuneration will not exceed twice the average monthly remuneration for the third quarter of the preceding year, which currently amounts to about €2,350.

This procedure to a large extent fills the current gaps in the Polish legal system as regards the implementation of Directive 2019/1023 on preventive restructuring frameworks. ■



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