



New risks (not only) for members of the statutory body of a business corporation

The major amendment to the Business Corporations Act with effect from 1 January 2021 will bring much stricter rules on the liability of members of the statutory body. The current conditions of their liability for corporation's debts to creditors will change from a guarantee regime to a direct liability regime. Newly, the direct liability will also apply to other members of top management. The new legislation on the direct liability could, therefore, pose a significant risk to those with management powers.

Members of the statutory body are obliged to act with due diligence. In the event of a breach of this obligation, these persons may be liable for debts of the business corporation to creditors under the current Business Corporations Act legislation [1]. The current conditions of the liability of members of the statutory body for debts of the business corporation towards creditors will change from the guarantee regime to the direct liability regime of members of the statutory body of the business corporation as of 1 January 2021, as follows:

- a) it will be sufficient that a member of the statutory body contributes to the bankruptcy – i.e., for the liability to arise, it will be sufficient that the mistake of a member of the statutory body will be just one of the causes of the bankruptcy of the business corporation;
- b) it will be sufficient that a member of the statutory body breaches any of his / her duties – i.e., newly, the origin of the liability will not be bound only to the breach of the duty to act with due diligence;
- c) in the period from 1 January 2021, insolvency proceedings will be initiated against the business corporation and subsequently, the bankruptcy will be declared on its property – i.e., the direct liability of members of the statutory body will not be established if debt discharge or reorganization of the business corporation is permitted; and
- d) a court decision must be issued in an incidental dispute – i.e., the direct liability of members of the statutory body will not be established by law (ex lege) but by a court decision in proceedings on a so-called action for the replenishment of liabilities, which only the insolvency administrator will be authorized to file.

The direct liability of members of the statutory body will be limited by (i) the difference between the amount of corporation's debts and the size of the insolvent estate and (ii) the court decision in which the court should take into account the degree of misconduct of that member of the statutory body and other circumstances of each case.

New rules of the direct liability will apply not only to members of the statutory body, but also to "any other person who is in fact in the same position as members of the statutory body, even though he / she is not a member of the statutory body, and regardless of his / her relationship to the business corporation". It is therefore possible that new rules of the direct liability under the Business Corporations Act could also apply to top management (such as the CEO or CFO), even if they are not members of the statutory body. The new

legislation on the direct liability could therefore pose a significant risk to those with management powers.

We recommend minimizing potential effects of the direct liability on the personal property of responsible persons by taking appropriate measures, for example by arranging appropriate insurance or updating existing insurance conditions. According to the statement of Michal Pilecký, product specialist in the company RENOMIA, a. s., the insurance conditions will need to be updated so that the insurance coverage applies to the direct liability according to the new Section 66 of the Business Corporations Act and, so the current Section 68 of the Business Corporations Act would no longer apply.

We have extensive experience in the legal area of corporate governance. Therefore, we are able to provide you with legal advice on rules of due diligence, especially with regard to minimizing any direct liability of members of the statutory body and other members of top management and the protection of their personal property.

We also would like to assure you that we have extensive practical experience with insolvency proceedings and incidental disputes, both in terms of creditors and debtors. Thus, we are ready to provide you with comprehensive legal advice regarding this matter. We will be happy to suggest the best solution for further action and provide legal representation in possible incidental disputes (not only) about lawsuits for replenishment of liabilities.

If you have any questions regarding the abovementioned, please do not hesitate to contact us.

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[1] Act no. 90/2012 Coll., on Commercial Companies and Cooperatives (Business Corporations Act)

