Executive summary

With effect from 1 January 2016, the Amendment to the Slovakian Commercial Code introduces the concept of “company in crisis.”

A company is considered “in crisis” if it is:

- Bankrupt (i.e., insolvent or in default)

Or

- Under the threat of bankruptcy (i.e., the share of its equity and liabilities is less than the statutory limit which will gradually change as follows: (i) in 2016 the ratio will be 4:100 (ii) in 2017 it will be 6:100 and (iii) in 2018 and subsequently the ratio of 8:100 is to be applied)

Detailed discussion

Institutions subject to new law

The law concerned will apply to limited liability companies, joint-stock companies and limited partnerships whose general partner is not an individual.

However, it will not apply to banks, e-money institutions, insurance, reinsurance, health insurance or management companies, securities dealers, stock exchanges and the Central Securities Depository as well as public companies and limited partnerships whose general partner is an individual.
Obligations of the governing body
If a company is in crisis, stricter requirements for action by the governing body are to be applied. The governing body of a company which concludes, or could have concluded in light of all circumstances, that a company is in crisis, will be obliged – as required by necessary and professional reasonable diligence principles – to take all measures that would otherwise be taken by another reasonably diligent person in a similar position in order to overcome the crisis. The Amendment does not set forth the specific steps that the governing body is obliged to take in this situation. It will depend on the specific facts and circumstances as well as interpretation which will ultimately result from the practical application of the concept.

Related party payments to provide funds
With regard to the company in crisis, the Amendment introduces the term (literal translation) “payments substituting for own resources.” These payments represent:
- Loans or comparable performance
- Provided to a company in crisis (or prior to a crisis, if their maturity was deferred or extended during the crisis)
- By a related person

Personal scope
The Amendment also stipulates which related person’s payments are considered as those “substituting for own resources.” This mainly represents payments provided by members of corporate bodies, procurists and shareholders holding at least 5% in the company’s registered capital or its voting rights, silent partners, related persons or parties acting on behalf of such persons.

In order to avoid crises financing by “shell” companies, the Amendment introduces a rebuttable presumption, according to which it is expected that the lender is considered to be related person in cases where it is impossible to identify the beneficial owner.

Temporal scope
In terms of timing, the payment would be deemed to be “substituting for own resources,” if at the time of its provision, the existence of a company in crisis resulted from the company’s accounting. If the accounting was not properly kept, the expected state, which would have occurred if the accounting had been kept properly, will be decisive.

Substantive scope
The Amendment also contains a negative definition of payments “substituting for own resources,” under which such performance will, for example, be the provision of property, rights or other assets to a company for no consideration, or one-time short-term loan.

Ban on repayment of contributions
Repayment of contributions “substituted for own resources” is not permitted provided that a company is in crisis or, as a consequence of the above, could be brought into a crisis. If nevertheless there is breach of this ban, the value of illegitimately returned payments must be returned to a company. Moreover, members of the governing body will be jointly and severally liable for returns of the value of such payments. Accordingly, if, for example, a partner provides a loan to a company in crisis, it will not be possible to return such funds to the partner until the crisis, plus its threat, comes to an end. However, if the company repaid the loan, its governing body members would be liable in person for breaching the ban to repay the loan and would have to return paid-up funds to the company.

Governing body members should keep in mind that the return of payments “substituted for own resources” could be as well performed by means of mutual set-off with the related person, execution or realization of the pledge with the same effect.

Security of an obligation to replace own resources
A specific approach should be applied to the security of an obligation towards the creditor by a guarantee, pledge or other form of security. The creditor, in the case of security of an obligation replacing own resources, may call for its repayment directly from this security without the need for asking the company in crisis for the repayment first. On the other hand, the securing persons are not allowed to enforce the compensation towards the company in crisis during the crisis. Moreover, if the company in crisis fulfils its secured obligation towards the creditor, it is obliged to request the securing person for compensation in the value of a guarantee or other form of security.
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