

Creditors*

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1. Introduction

The corporate form drives investment and innovation, but it also shifts part of the risk onto persons outside the company. Creditors lend on the promise that they will be repaid, yet they cannot monitor all choice managers make, and they cannot hedge every risk created by limited liability or a sudden turn toward insolvency. Company law is built around that tension. Its basic aim is to let businesses take risks but put guardrails in place so that insiders cannot drain value at the expense of those who supplied goods, services, labour, or money in reliance on the company's commitments. It also begins from a practical insight: "creditors" are not one group. A bank with collateral and a negotiated covenant package is not in the same position as a small supplier extending trade credit, or a tort victim who never chose to deal with the firm at all. Rules that ignore such differences tend to protect the powerful and leave the vulnerable exposed.

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Before trouble appears, the law tries to keep assets inside the company and to reduce the information gap between insiders and outsiders. Capital maintenance rules¹ and solvency tests limit distributions that would hollow out the firm (dividends, share buybacks, redemptions, or disguised transfers to insiders) when those payments would render the company unable to pay its debts as they fall due or leave it with liabilities exceeding its assets. Some systems still tie such restrictions to legal capital; many now rely on solvency tests framed in plain terms: do the numbers balance on the balance sheet, and can the company meet bills when they come due? To make those tests meaningful, companies must report honestly and on time. Proper accounts, independent audits, and (where securities are listed) continuous disclosure help outsiders price the risk they are taking. Private ordering sits alongside public rules. Lenders use covenants to limit leverage or require early warnings when ratios slip; they take security over assets and register those interests so that priority is clear; sellers use retention-of-title clauses to avoid becoming unpaid unsecured creditors when a buyer collapses. Each of these devices works only if the market can see them, which is why registries and notice systems matter.

Limited liability remains a core promise of company law. It encourages people to invest by capping their loss at the amount they put in. However, that promise is not a licence to abuse the corporate form. Courts can and do disregard separate legal personality in narrow, fact-specific situations in which the company is used as a façade to evade obligations, assets are commingled so thoroughly that the entity has no real life of its own, or under-capitalisation is tied to sharp practice and the shifting of foreseeable losses onto others. “Veil-piercing” is not routine – and should not be; if it were, businesses would struggle to plan. Nevertheless, its very existence disciplines behaviour at the margins, reminding controllers that the corporate veil is a shield, not a sword. As shown,

‘the benefit of limited liability is not granted on an unrestricted basis but is instead tied to certain requirements, at least in theory, corresponding to interests of shareholders and creditors in relation to the existence and creditworthiness of the enterprise, which prevent the complete externalisation of risks, of speculation on the part of the shareholders, or from influential shareholders at the costs of others. If this fundamental consensus is violated, the legal system may pierce the corporate veil for the benefit of the creditors and reach through to the personal assets of responsible shareholders.’²

As the company moves toward insolvency, the law asks directors to switch focus. When continuing to trade would plainly worsen the position of creditors as a group, directors cannot use the excuse that shareholders would prefer ‘one last roll of the

1 See Chapter 2 on corporate finances of the present book.

2 Roth and Kindler, 2013, pp. 66–67.

dice'. Many systems require directors in this period to take creditor interests seriously and to act to preserve value rather than burn it. As it was stated,

'the directors do not have the right to gamble with the creditors' money. This does not mean that directors must sit on their hands or refrain from seeking to take the company forward; their only obligation is to refrain from taking action that cannot be calculated overall to be in the interests of the creditors. The degree of financial instability and the degree of risk are interrelated and the latter must be determined by the former.'³

Wrongful trading rules capture situations in which managers continue to incur debts when there is no reasonable prospect of avoiding insolvency and fail to take all sensible steps to limit the fallout. Fraudulent trading goes further to deal with conduct carried on with an intent to cheat creditors. The consequences are personal: contribution orders to make good the shortfall; disqualification from board service; fines; and, in extreme cases, criminal liability. These rules are tough but are not meant to punish good-faith rescue attempts. Where directors inform themselves properly, take advice, and pursue credible restructuring that offers creditors better recoveries than an immediate collapse, many jurisdictions protect those efforts through variants of the business-judgment principle or explicit safe harbours. Delay is what the law fears most at this stage: late disclosure and wishful thinking tend to deepen the deficit and shrink the pot for everyone.

When formal insolvency proceedings begin, creditor protection becomes a collective project. A stay on individual enforcement stops the scramble for assets and prevents the first mover from grabbing value at the expense of others. An insolvency practitioner (liquidator, administrator, or the debtor in possession, depending on the system) takes the helm under court or creditor supervision. From that point, priority rules determine who gets paid and in what order. Secured creditors are paid from their collateral; certain preferential claims, like employee wages or specified taxes, may come next; unsecured creditors share what remains; subordinated claims and, finally, shareholders stand at the back of the queue. This ordering is not an abstract exercise, because it shapes behaviour long before any filing, as parties know where they stand if "the music stops". The law also looks backward to undo transactions that drained value in the run-up to insolvency. Preferences that favour a select creditor at the last minute, under-value transfers that put assets out of reach, and fraudulent conveyances can be set aside so that value returns to the pool for all.

Modern systems do more than liquidate. They aim to rescue viable businesses when that produces better outcomes for creditors and communities. For this reason, statutes increasingly provide tools that let a court approve a plan even if some creditor classes vote against it, provided that the plan is fair in substance and procedure. New money can be prioritised so that fresh lenders fund a turnaround. Clauses that would

3 Keay, 2007, p. 212.

automatically terminate essential contracts on insolvency are sometimes restricted so that a struggling firm does not lose the very services it needs to survive. None of this is about favouring debtors for their own sake. It is about recognising that a going concern is often worth more than the sum of its parts and that an orderly restructuring can increase what creditors ultimately receive.

Group structures and cross-border operations add another tier. Credit sits at different levels of the group, and creditors of an operating subsidiary usually have first call on the subsidiary's assets, leaving parent-level creditors structurally behind. Courts are cautious about collapsing entities into one pool, but some systems allow limited consolidation where records are hopelessly entangled or separateness has been ignored in practice. Cross-border cases raise questions about which court has the lead role, how judgments are recognised elsewhere, and how to coordinate parallel proceedings. Frameworks that focus on the company's centre of main interests and promote cooperation between courts aim to reduce value-destroying conflict and duplicate costs.

If the law protects creditors insufficiently, insiders have room to shift losses onto those least able to avoid them, especially tort creditors and small suppliers. If the law protects creditors too much, entrepreneurs become cautious, finance becomes more expensive, and some projects that would have created jobs and value never get off the ground. Company law governs that space by combining mandatory rules (needed to protect the weak and to keep the system honest) with contractual freedom for professional parties who can look after themselves. The result is not a perfect shield – and cannot be – but provides a framework that aims to keep the risk where it belongs, encourage timely action when trouble looms, and deliver a fair, collective resolution when failure can no longer be avoided. The sections that follow trace how different jurisdictions draw these lines in practice, maintain the asset base and information flow in ordinary times, expect directors to behave when distress approaches, and run collective processes that maximise value and distribute it according to clear, publicly known rules.

2. The Czech Republic

2.1. Creditor Protection Rules

Limited liability companies (LLCs) and joint-stock companies (JSCs) make a significant contribution to business development. Their form enables significantly more people to go into business than otherwise. As the primary creators of the company, the shareholders are in principle protected against the failure of the company's business, to which they would have been fully exposed if they had gone into business on their own. Business corporations, by virtue of the concept of asset separation and legal autonomy, allow the shareholders to limit the business risk of the business corporation to the loss of the share (loss of investment). Asset segregation and legal autonomy mean that the shareholders do not have to pay the debts of the business

corporation. Therefore, the company's risk of business failure is borne entirely by its creditors. Large voluntary creditors are able to secure their position by means of the law of obligations, often by making the company's loans or long-term business contracts with small companies conditional on the security of directors in the form of a guarantee and that of the shareholders. However, small and involuntary creditors do not have this option to protect their own position. For this reason, the seemingly zero liability for failure must be balanced by mechanisms to protect creditors. These are designed to prevent the misuse of the company for dishonest purposes and reckless management of the company.⁴

Creditor protection instruments can be classified into obligation, insolvency, and company protection instruments.

Obligation instruments that apply generally and not only to business companies include means of securing debts (pledge, guarantee, etc.), consolidation of debts (contractual penalty, etc.), regulation of relative ineffectiveness, and special cases of protection of the weaker party, as well as the system of tort law.⁵

Company and insolvency instruments are to some extent intertwined. Some company rules are linked to bankruptcy, while some are not.

The general protection of creditors in insolvency law in the event of a debtor's insolvency, regardless of whether the debtor is a company, is ensured by the obligation of the debtor in its capacity as an entrepreneur to timeously initiate insolvency proceedings if it is insolvent. According to Section 98(1) of Act no. 182/2006 Sb., the Insolvency Act (*insolvenční zákon*), a debtor who is a legal person or a natural person (entrepreneur) is obliged to file an insolvency petition without undue delay after he became aware or, with due diligence, should have become aware of his insolvency. The obligation to file an insolvency petition in due time applies to managing directors of the legal person, or to the liquidator if the legal person is in liquidation, or to the guardian (Section 98(3), Insolvency Act). The debtor and the persons who are obliged to file the insolvency petition on their behalf are also subject to the obligation to compensate for the damage caused by the late filing of the petition.

The breach of the obligation to file a petition timeously for the commencement of insolvency proceedings is connected with the obligation to compensate the creditor for the damage incurred as a result. According to Section 99(1) of the Insolvency Act, the debtor and, as a rule, the managing directors or the liquidator are liable to the creditor for the damage caused to the creditor by the breach of the obligation to file an insolvency petition timeously.⁶ The act defines the damage as the difference between the amount of the claim established in the insolvency proceedings and the amount received by the creditor in the insolvency proceedings in satisfaction of that claim

4 Pokorná et al., 2022, p. 150.

5 Ibid., p. 151.

6 There is no consensus on whether the liability is subjective, where fault is required, even if presumed, or strict liability with the possibility of exoneration. The courts have long been inclined to hold that it is a subjective liability (judgment of the Supreme Court case No. 29 Cdo 2356/2016). Other opinions are also noted in the doctrine (Sprinz et al., 2023, marg. 14).

(Section 99(2), Insolvency Act).⁷ The debtor and the managing directors or the liquidator may be exempted from liability for damage or other injury if they prove:

- a) that the breach of the obligation to file an insolvency petition did not affect the extent of the amount intended to satisfy the claim filed by the creditor in the insolvency proceedings; or
- b) that they have failed to perform that duty by reason of facts which arose independently of their will and which they could not have avoided even if they had made every effort which could reasonably be required of them (Section 99(3), Insolvency Act).

The threat of potentially overwhelming civil liability of the managing directors seeks to minimise the period between the actual bankruptcy and the opening of formal insolvency proceedings. In practice, however, this threat has not yet been seen to work sufficiently. Significantly, the right to compensation arises for a specific creditor and is not a benefit that managing directors are obliged to provide to the estate (unlike the replenishment of liabilities under Section 66, Business Corporations Act (BCA); see below). The right to compensation is conditional on the creditor's claim being filed in the insolvency proceedings and can be decided only at the end of the insolvency proceedings after the final satisfaction rate has been established.

The protection of creditors in insolvency proceedings, which is based on the principle of proportional and equal satisfaction, is also provided *ultima ratio* through criminal law. Act no. 40/2009 Sb., the Criminal Code, provides for the criminal offences of damaging a creditor (Section 222, Criminal Code), favouring a creditor (Section 223, Criminal Code), causing bankruptcy (Section 224, Criminal Code), breach of duty in insolvency proceedings (Section 225, Criminal Code), and insolvency fraud (Section 226, Criminal Code)

2.2. Company Creditor Protection Tools

Company creditor protection tools can be classified according to different aspects. A useful classification is that of J. Šilhan, who distinguishes between direct and indirect protection instruments according to whether creditors can be satisfied from a substitute source.⁸ Direct protection instruments, protective rules in the strict sense, include guarantees. Indirect instruments of creditor protection, protective rules in the broader sense, include rules relating to the segregation of company assets and their protection from shareholders.⁹ These follow a fundamental principle of company law, namely, that a shareholder cannot be preferred to a creditor in the queue for the company's assets.

⁷ Richter interprets this rule as an assumption. The case law on the application of the rule on the liability of managing directors for damage caused by late filing of an insolvency petition is not yet sufficiently settled (Richter, 2017, Chapter 4.4).

⁸ Pokorná et al., 2022, p. 152.

⁹ The division of creditor protection rules into a broader and narrower sense is also used by Černá et al., 2021, pp. 225, 228.

Among the company rules designed to protect creditors is the fundamental duty of directors to perform due care, which is at the heart of company law because the proper functioning of the company and thus the protection of its creditors depends on it (the background is discussed in detail in Chapter 5).

Czech company law also recognises a number of rules governing the disposal of company assets, which are aimed at creditor protection.

The first worth mentioning is the solvency test (Section 40(3), BCA), which the managing board must apply whenever it decides to pay out profits or other funds. This holds for the payments of a dividend and a settlement share (e.g. on the withdrawal or expulsion of a shareholder from an LLC) or for a reduction of share capital. In any such decision, the managing board must assess, based on sufficient evidence, whether the payment to the shareholder would lead to the company's bankruptcy. If the board concludes that the payment could worsen the economic situation of the company to such an extent that bankruptcy could occur, then a prohibition on making the payment to the shareholder should be enforced. The same test must be applied by the managing board when considering financial assistance or when an employee acquires shares on preferential terms.

Section 40(5) of the BCA expressly prohibits the provision of gratuitous benefits to shareholders. This prohibition could be inferred even without express provision. The provision of gratuitous benefits is in principle contrary to a fundamental principle of company law, according to which a shareholder may only receive benefits from the company which the company law provides for and only if the prescribed manner is followed, otherwise it is a violation of the prohibition on the return of contributions (Section 16, BCA). Thus, the prohibition on gratuitous benefits can be seen as a manifestation of the prohibition on the return of contributions. The provision of gratuitous consideration is then nothing more than an evasion of the rules on the distribution of profits or other resources. Thus, Section 40(5) of the BCA can also be viewed in the opposite way, namely, as identifying cases in which the provision of a gratuitous benefit to a shareholder is not contrary to the rules on the distribution of profits or other own resources.

Pursuant to Section 40(5) of the BCA, a company may provide a shareholder or a person close to the shareholder with

- a) the usual occasional gifts,
- b) a donation made in a reasonable amount for a public benefit purpose,
- c) performance in compliance with a moral obligation or considerations of decency; or
- d) a benefit provided by a company under the act.

Violation of the rule would create an obligation by the managing directors who participated in the provision of gratuitous benefits to compensate the company for the damage caused. At the same time, a breach of the rule would create an obligation by the shareholder or person close to them to return the unjustified benefit as gratuitous

gratification. J. Dědič and J. Lasák suggest that breaching the rule does not invalidate the juridical act.¹⁰

The usual nature of occasional gifts must be considered from the perspective of the company, not from the perspective of family and close relationships. The usual occasional gifts include souvenirs and promotional items, and free participation in events organised by the company for customers or business partners, such as attending a concert or theatre performance.¹¹ Thus, custom should be treated as a standard gratuitous benefit provided by a company in similar cases to anyone in a certain position, the position of the shareholder not being the decisive criterion.

When assessing a case of donating for a public-benefit purpose, it is necessary to assess the specific circumstances of the case in the context of the company's overall approach to making donations for public benefit purposes. The inclusion of this case in the list of permissible gratuitous transactions should be seen in the sense that the shareholder or a person close to him should not be burdened by being a shareholder and should not exclude the company from the circle of donors. However, this must not be a case of favouring one shareholder at the expense of another. In other words, if a company makes regular donations of certain amounts to certain public purposes, there is no reason to prohibit it from doing so simply because the donor is a shareholder (e.g. organising a public collection) or is in a close relationship with them, if the circumstances are otherwise similar to other cases in which neither the shareholder nor a person close to him is involved. In our view, if this were an isolated case, the conditions for this exception would not be met.

Compliance under a moral obligation or considerations of decency depends entirely on the particular circumstances of the case and the assessment of the case as justifiable.

An advantage under a benefit provided by a company may be, for example, an advantage provided in connection with the conversion of a company.

The rules governing the fair creation and maintenance of capital, which also serve to protect creditors, are discussed in detail in Chapter 3.

As far as liability is concerned, in the case of a JSC, the shareholders are not liable for the company's debts. In the case of an LLC, the shareholders are jointly and severally liable to the extent of the aggregate outstanding contributions. Once the contribution obligation has been fulfilled, which is almost always the case, and this fact is entered in the Commercial Register, their liability obligation ceases.

In both companies, liability for the debts of the company after its dissolution is enforced if the liquidation balance has been distributed among the shareholders. Then, each shareholder is liable for the debts of the dissolved company that were not paid before its dissolution up to the amount of their share of the liquidation balance.

The rule enshrined in Section 159(3) of the Czech Civil Code also serves to protect creditors. It can be applied even outside the bankruptcy of the company. According

¹⁰ Lasák et al., 2021, p. 277.

¹¹ Ibid., p. 278.

to this rule, directors are liable for the debts of the company to the extent that they have failed to reimburse the company for the damage caused by their breach of the duty to perform their duties with due care. The condition is that the creditor cannot enforce the debt against the company. This rule is more of an incentive. It is intended to induce a director to compensate for the damage to the company and thus avoid liability to creditors. The widespread use of the rule is hampered by significant information asymmetry on the part of the creditor (in most cases, the creditor does not know anything about the damage caused by the director).¹²

Section 71(3) of the BCA gives creditors a tool to “break through” the corporate shield of a company and, by reason of liability, seek to enforce a debt against an influential person who is actually behind certain harmful conduct.

Under Section 71(1) of the BCA, anyone who, by means of their influence in a company (an “influential person”), substantially influences the conduct of the company (an “influenced person”) to its detriment, shall indemnify the influenced person for that detriment unless they prove that they could reasonably have believed in good faith that they were acting knowledgeably and in the defensible interests of the influenced person. Under Section 71(3) of the BCA, the influential person is liable to the creditors of the influenced person for the performance of those debts which the influenced person is unable to pay to them in whole or in part as a result of the influence under subsection (1). An influential person does not have to be just a shareholder, but in principle it can be anyone. The liability of an influential person for the debts of a company can be considered as the Czech concept of the piercing the corporate veil doctrine.¹³

This rule can be enforced in a group of companies (*ovládaná skupina*), that is, one that is not subject to unified management and therefore, does not reach the quality of a group of companies named concern (*koncern*). We distinguish two kinds of concerns, disclosed and undisclosed. A disclosed concern is a concern whose companies have declared their affiliation to the concern on their websites. An undisclosed concern is one in which the companies have not done so. The law provides for two privileges in the case of a disclosed concern: (a) the right of the parent company to give instructions to the subsidiary’s business management and (b) in principle, exemption from the influential person liability regime.

Finally, it is not impossible that the liability of an influential person also falls on the controlling person in a disclosed concern. Even a parent company in a concern may be in the position of an influential person and may be subject to liability under Section 71(3) of the BCA if any of the following situations arise:

- a) It is an undisclosed concern. An undisclosed concern means a concern that has not published a concern declaration on its website pursuant to Section 79(3) of the BCA. An undisclosed concern is subject to influential person liability without more.

¹² Pokorná et al., 2022, p. 160.

¹³ Štenglová et al., 2023, p. 193; Lokajíček, 2016, p. 135.

- b) Although the controlling and the controlled companies have published a concern declaration, there is no material concern because the group of companies is not subject to a unified management (Section 72(1), in relation to Section 79, BCA).
- c) The controlled company is insolvent (Section 72(3), BCA).
- d) The exercise of influence is not carried out in the interest of the concern (Section 72(1), BCA).
- e) The controlled company has not received adequate compensation for the harm caused as a result of the unified management (Section 72(2), BCA).

Problematically, the creditor must bear the burden of alleging and proving that a person is an influential person under Section 71(1) of the BCA, exercised influence in a qualified manner, and that this resulted in a limitation on the company's ability to pay the creditor, resulting in liability for debts that the company failed to pay to the creditor.

If a managing director is disqualified by a court order under Section 63 of the BCA from office for a specified period of time, they are prohibited from office as a managing director for a specified period of time in all business corporations, unless the court specifically exempts a particular business corporation from the prohibition. If such a person violates the prohibition imposed, in particular, by acting as a *de facto* or shadow director, they shall be unlimitedly liable for the debts of the business corporation in whose management they participate. Liability for debts shall be unlimited. Thus, it is sufficient for the creditor to allege and prove that a person has been disqualified from office by a court decision, that they held the office *de facto* or covertly during the period of disqualification and that their claim arose during the period of disqualification.

Particularly powerful instruments for the protection of creditors in the event of a company's insolvency are the institution of liability top-up and clawback (Section 66, BCA).¹⁴

Both institutions have in common their sole application to (former) managing directors, *de facto* and shadow directors, and, if the managing director is a legal person, to the natural person who is its representative. Therefore, they do not apply to members of controlling bodies, such as the supervisory board. Both institutions have the following common features:

- a) They can only be used in the event of bankruptcy.
 - b) They are decided by the insolvency court solely on the insolvency administrator's motion.
 - c) The condition is that the person on whom the obligation is to be imposed has contributed to the insolvency of the company by breaching his obligations.
- Thus, the rules are aimed at protecting creditors only if managing directors

¹⁴ This relatively new regulation was added to the Business Corporations Act with effect from 2021. Therefore, case law has not yet developed. For the wording of the rule, see Chapter 5.

or persons equal to them (the de facto and shadow manager) have failed in the performance of their duties, and not at protecting creditors in the event of bankruptcy which occurred independently of the breach of duties of the managing directors, or despite the fact that they performed their duties properly. This is because a managing director is liable for the proper performance of their duties, not for the result.

- d) It is a kind of sanction for breach of the duty to perform the function properly.

The institutions have the following differences. The replenishment of liabilities is linked to the declaration of bankruptcy, while clawback is also applicable in other bankruptcy resolution methods (reorganisation). This may motivate members of the statutory body to seek reorganisation.¹⁵ The replenishment of liabilities may be used regardless of whether the insolvency proceedings were initiated at the request of the debtor or the creditor. By contrast, the insolvency court can rule on a clawback only if it is a creditor's insolvency petition. Therefore, additional sanctions are imposed for the debtor's failure to file a petition or to provide an incentive to file an insolvency petition on time.¹⁶ The insolvency court must decide on the clawback, although it has discretion whether to claim the recovery of the benefit for a maximum period of 2 years prior to the opening of the insolvency proceedings or for a shorter period. Regarding the addition of liabilities, the obligation of the insolvency court is not so strictly worded, with the law using the term "may". However, if the conditions laid down by law are met, it is not conceivable that the court would not decide on the addition of liabilities, as this would deny protection to creditors.

3. Croatia

3.1. *Creditor Protection Rules*

It is possible to summarise the traditions of creditor protection in JSCs and LLCs as a capital-oriented and a solvency-oriented system, respectively.¹⁷ In the first system, which is based on German law, the interests of shareholders may not prevail over the protection of their creditors. As creditors have much more limited means of protecting their interests than shareholders, the provisions of the CA place creditors in a more privileged position than shareholders.¹⁸ According to this approach, which is accepted in most countries of the continental legal circle, and also in the Republic

¹⁵ Pokorná et al., 2022, p. 157.

¹⁶ Ibid., p. 157.

¹⁷ For more on this, see Höfer, 2016, p. 405.

¹⁸ This is the so-called *stakeholder approach*. For more information, see Ivkošić, 2020, pp. 110 et seq.

of Croatia, the category of share capital,¹⁹ that is, the principles of entering and maintaining capital, are a counterweight to the privilege of non-responsibility for the company's obligations, and share capital must not fall below the minimum set by law. Creditor protection through these principles is the main support of the entire system, both for JSCs and LLCs.²⁰ Accounting regulations are adapted to this concept and are worded in such a way that the presentation of the value of income and assets is as credible as possible.²¹ The share capital is protected by a harmonised system of rules, starting with the prohibition of taking over share contributions below nominal value, professional audit and judicial supervision in the case of contributions of movables, real estate and rights to the company, rules on the prohibition of returning shares, profit sharing, illegal income, loans replacing capital, among other requirements.

The rules that protect the company's share capital and assets have been criticised, both from the point of view of company law and from the accounting point of view, as being rigid and out of touch with the needs of modern business.²² It is emphasised that the fixed share capital does not provide creditors with a certain amount of protection against, for example, bad business decisions by the company, and that the capital protection threshold does not need to be aligned with the company's individual business risk. Financial reporting rules promote timely creditor protection, and their informational function weakens the financial basis of traditional rules on capital contribution and maintenance.²³ Critics of the conventional "German system" of capital input and maintenance argue that it should be abandoned in favour of a solvency-based system of capital protection. However, the emphasis on financial reporting and the requirement that national accounting law be fully subject to the requirements of International Financial Reporting Standards creates a legal vacuum, manifesting as a significant difference in the calculation of the fair value of the company's assets, which has a direct impact on both the company's creditworthiness and the protection of its creditors. Despite two decades of external "pressure", the Federal Republic of Germany has retained the category of share capital in JSCs and LLCs in its legal system, and consistently protects the principles of capital input and

19 In Germany, the share capital of the JSC (German: *Grundkapital*) is designated differently from that of the LLC (German: *Stammkapital*), and in the doctrine, is also designated as *gezeichnetes Kapital*. In countries that adopt the *common-law* system, share capital is designated as *legal capital*, *stated capital*, and *subscribed capital*.

20 Protection of creditors through the principle of capital preservation is a leading principle of German company law. For more on this, see Bezzenger, 2005, p. 72.

21 Ibid.

22 The traditional rules on the entry and maintenance of capital were established by the Second Directive 77/91/EEC of 13 December 1976, with further amendments from 2002 and 2006. The rules have been subjected to criticism, both by the institutions of the European Union and by international business and banking circles. For more on this, see Merkt, 2004, p. 1409.

23 In addition to resistance from the point of view of the Company Law, the traditional rules on the entry and maintenance of share capital also experience strong resistance from the accounting positions or trade balance point of view. The International Accounting Standards (IAS Regulation) determine how to prepare annual financial reports according to the requirements of the International Financial Reporting Standards.

capital maintenance; most countries of the Central European legal circle follow the correct model in this regard.²⁴ Such an attitude certainly facilitated the conclusion of the Expert Group for Company Law that the functioning of the common market does not require abolishing the share capital category, and nor is it necessary to prescribe it as mandatory.²⁵

LLCs and JSCs have inherited the continental European tradition of preventive protection of the company's capital base.²⁶ It serves to protect creditors, which, together with the protection of minority shareholders, is at the core of the rights of capital companies.²⁷ Counterweighing the fact that in corporations, the members are in principle not liable for the company's obligations, based on the contribution in share capital, the company may dispose of the assets it needs for the organisation of the company and its appearance on the market.²⁸ Coercive rules protecting the company's own capital serve to protect creditors. The company's own capital (net or g assets), which consists of the share capital, company reserves, retained earnings, and annual surplus, serves primarily to cover losses.²⁹ If the value of the total assets falls as a result of the company's loss, the debt capital remains unaffected and the position and claims of the creditors remain unchanged. However, if the company makes a profit in the assets of the balance sheet, the assets of the company increase, and in the liabilities, the same amount is attributed to own capital. A contribution to the company (own capital) and a loan (external capital) are legally different types of capital. Based on the legal transaction with the company, the creditor has a binding legal demand for some action or payment, and for the use of other people's money, the

24 The reporting subject to the provisions on the preparation of annual reports from the German Commercial Code (German: *Handelsgesetzbuch*) is more conservative than the rules of the International Accounting Standards, resulting in a difference of up to 30% in the estimated fair value of the company's assets. Merkt, 2004. p. 1049. In the Republic of Croatia, commercial balance sheet law is governed by the Accounting Act, Official Gazette Nos. 78/15, 134/15, 120/16, 116/18, CA, Croatian Financial Reporting Standards (HSFI) and IFRS.

25 High Level Group of Company Law Experts, 2002, p. 82.

26 For more on this, see Goette and Fleischer, 2018, § 5 rbr. 27.

27 In German jurisprudence, it is emphasised that 'in the law of the capital company, the strict implementation of the principle of entry and maintenance of nominal capital is particularly important' (German: *Nennkapital*; BGH, 24.10.1988- II ZR 176/88, BGHZ, 28/88, p. 77), as 'the core of the rights of a limited liability company that must be ensured unconditionally' (BGH, 14.3.1977-II ZR 156/77, BGHZ, 68, p. 191). For that part of comparative German law, see Lieder, 2018, p. 1116.

28 In the German doctrine, the company's own capital is given picturesque names, such as the zone of resistance against overindebtedness (German: *Pufferzone der Überschuldung*) or the company's property reserve (German: *Betriebsvermögensreserve*). For more on this, see Goette and Fleischer, 2018, note 20, § 5 rbr. 27.

29 Instead of own capital (German: *Eigenkapital*), one can talk about the company's net or pure assets (German: *Reinvermögen*, *Nettovermögen*), and in the literature, these terms are used synonymously. Net or pure assets are the difference between assets and liabilities, provisions, and deferred payment of costs and income of the future period, as well as capital reserves and reserves for own share contributions if the company must have them. See Bezzenberger, 2005, p. 14.

company pays interest, which in principle does not depend on whether the company is operating at a profit or loss.³⁰ The shareholders, as investors or providers of own capital to the company, are included among those remaining after the company meets the creditors' demands (i.e. pays the debts). Their claims cannot be legally equated with those of the creditors against the company. If a company fails to pay a debt to a creditor and the creditor loses his capital and interest, this is a violation of rights. If the company gets into difficulties because of bad business decisions and loses its own assets contributed by its members, this is an entrepreneurial risk inherent in the membership of a corporation. Unlike shareholders, creditors should be shielded from the company's entrepreneurial risk. If the company has adequate capital in its operations for its financial needs, and if the ratio of internal to external capital is healthy, creditors should not be harmed. Conversely, if the company's operations are predominantly financed by other people's (external) capital and there are liquidity and/or solvency problems, creditors' claims may remain unsatisfied.

3.2. Specific Rules Applicable in the Vicinity of Insolvency

The management board is obliged to convene general meeting immediately if it finds that the company has lost assets equivalent to half of its share capital.³¹ The purpose of such an obligation is twofold. Before the reasons for bankruptcy appear, the shareholders are warned of the crisis so that they can take appropriate measures to remedy it, such as increasing the company's share capital or changing or ceasing certain business activities. The company's creditors are indirectly protected in this way. The shareholders are not obliged to make additional investments in the company to eliminate the loss. In addition to the obligation of the directors to convene a general meeting and inform the shareholders of the loss, they are also obliged to inform the shareholders of the state of the company, its capabilities, and prospects for recovery, in accordance with the diligence of an orderly and conscientious businessman in the management of the company's affairs. The company loses half of its share capital when the company's net assets (assets minus liabilities) do not cover half the share capital of the company, as determined in the statute. Valuation rules from the company's financial statements are relevant for determining the company's net assets.³² First, the net assets are valued as if the enterprise were going into liquidation. Only in the case of a negative forecast for the continuation of the business should the assets be valued as if the company were being liquidated. Hidden reserves may be considered to

30 Ibid., p. 78. The company member, as an investor or provider of own capital to the company, is entitled to what is left (German: *Residuum*) after the company fulfils the creditors' demands, that is, pays the debts, and cannot be legally equated with the claim that the creditors have against the company.

31 The obligation is stipulated in the provisions of Article 442, paragraph 2 of the CA and Article 10, Section 1, paragraph 3 of the Act on Financial Operations and Pre-bankruptcy Settlement, Official Gazette No. 108/12, 144/12, 112/13, 71/15, 78/15, 114/22.

32 See Barbić, 2010, p. 458.

the extent that they are disclosed in the financial statements.³³ The loss to the company in the amount of half the share capital does not have to be disclosed in the financial reports. In keeping with the attention of an orderly and conscientious businessman in managing the affairs of the company, the members of the board are obliged, in accordance with the diligence of an orderly and conscientious businessman in the management of the company's affairs, to organise the company in such a way that they have a constant insight into its financial and economic situation and to ensure that financial reports are prepared during the financial year, that is, extraordinary financial reports that will review the company's financial situation. The obligation to convene an assembly ends if a proposal to open bankruptcy proceedings is submitted or if all members of the company, who are aware of the actual situation, refuse to hold the assembly.

As soon as serious economic difficulties occur in the business of the company, the members of the board are obliged to check whether the company is over-indebted or unable to pay. The level of scrutiny of over-indebtedness will depend on the extent and depth of the crisis. When it becomes clear that the crisis is serious, orderly and conscientious board members should determine the company's asset status and predict whether and for how long it will be insolvent. Board members have a duty to provide accurate and comprehensive information to shareholders about the company's prospects for recovery. If the shareholders take no decision at all on whether to rescue the company, they are obliged to take such a decision themselves with the care of a proper and conscientious businessman. If they decide on a rescue that had no chance of success from the outset, or if they propose the opening of bankruptcy proceedings prematurely because there were objective circumstances for saving the company, a positive assessment of the company's ability to continue as a going concern requires the will or presumed will of the shareholders for the company to continue as a going concern and for the company to be highly likely to meet its obligations in the future period. The forecast cannot be based on the thoughts and hopes of the board members, but their rescue plan, which includes the assets, finances and income of the company, must be acceptable to an expert.³⁴ The board members forecasts is covered by the rule of free business judgment. To overcome over-indebtedness, additional capital investment in the company is sometimes necessary, whether it is internal or external financing of the company. The rescue of a company works only in the future, and thus, cannot undo the harmful consequences that occurred as a result of bad business decisions. If the management submitted a proposal to open bankruptcy proceedings

33 The value of the shares is not taken into account when determining the assets of the company. A company member's loan that replaces the company's capital must be placed on the liability side of the balance sheet, as in the financial statements. This does not apply if the member of the company undertakes not to collect the claim until the net assets of the company, including the member's loan, are greater than half of the share capital (*pactum de non petendo*).

34 See Lutter and Hommelhoff, 2023, § 43 rbr. 29.

too quickly (i.e. before it tried to rehabilitate the company), it would be liable to the company for damages according to the provisions of Article 252, paragraphs 1 and 2 and Article 430 of the CA, because she violated the obligation to run the company with the attention of an orderly and conscientious businessman. In addition to protecting the interests of the company and its shareholders, creditors, employees and the public interest, the time limit for rescuing the company also benefits the members of the board of directors, as their decisions to rescue the company are implemented *ex ante* according to the circumstances that existed at the time the decision was taken. The time limit for initiating bankruptcy proceedings runs from the date on which the members of the board of directors should have become aware of the company's over-indebtedness or insolvency.³⁵ The management's board obligation to request the opening of bankruptcy proceedings is mandatory, and therefore, the members management's board cannot be released from it by agreement with individual shareholders or creditors.

3.3. Limited Liability and Veil-Piercing

Like any other legal entity, a company is liable for its obligations with all its assets. There are no exceptions to the above rule on a company's liability for obligations. The company is not liable for its obligations with its share capital, because the company's liability extends to all the company's assets, not only those created by the contributions with which the share capital was created. Article 10 of the CA defines in detail how its members are liable for the obligations of the company. Unlike members of a general or limited partnership, shareholders in JSC and LLC are generally not liable for the company's debts.³⁶

Article 10, paragraph 3 of the CA provides an exception to this principle. For the sake of legal certainty, it has been established that a person who, as a member of a

³⁵ Article 110, paragraph 2, Bankruptcy Act.

³⁶ Members of a general partnership are liable for the company's obligations personally, jointly, and severally with their entire assets (Article 10, paragraph 1, CA). The general partners in a limited partnership are also liable in the same way (Article 10, paragraph 1, CA). The limited partners, if they have paid the contribution to which they committed themselves in the memorandum of association, are not liable for the company's obligations (Article 10, paragraph 2, CA). When the limited partner's contribution is not paid in full, his liability toward the company's creditors is direct and joint with the members of the company who are personally liable (general partners), up to the amount of the contribution determined by the partnership agreement, less the part paid by the limited partner (Article 143, paragraphs 1 and 2, CA). Creditors of a limited partnership are given special protection in the event that none of the general partners of the company is a natural person, a JSC, or a limited partnership with at least one general partner who is a natural person (Article 143, paragraph 7, CA). Then, the limited partners are considered not to have paid their contribution to the company. In other words, they are always liable for the obligations of the company to creditors up to the amount of their share, jointly with the general partners of the company, so that the illusion is created that their share has not been paid, even when it has been. This, in fact, increases the assets with which the creditor may be satisfied by the amount of the limited partner's contribution. For details, see Petrović and Ceronja, 2019, pp. 54 et seq.; Jurić, 2019, pp. 59 et seq.

company, abuses the fact that he is not liable for the company's obligations, cannot rely on the fact that he is not legally liable for those obligations. This is a case in which the legal personality or the wall of legal subjectivity of a company is breached. This ignores or does not consider that a company is a separate legal entity, distinct from its members. Thus, the protection of the company's creditors takes precedence over the fundamental rule that the members of a company are not liable for its obligations.

There are various ways of abusing the fact that shareholders are not liable for the company's obligations, and Article 10.4 of the CA, for example, defines when an abuse is deemed to have occurred: a) if a shareholder uses the company to achieve a goal that is otherwise prohibited; b) if a shareholder uses the company to damage creditors; c) if a shareholder, contrary to the law, manages the company's property as if it were his own; or d) if a shareholder reduces the company's assets for his own benefit or for the benefit of another person, even though he knew or should have known that the company would not be able to meet its obligations.

A common abuse is for the sole member of LLC to create the appearance of legal identity between himself and the company through his actions. Such an appearance is created vis-à-vis third parties, for example, when a member acts as the company's representative and this is not made sufficiently clear, but it appears that he is taking legal action and concluding legal transactions in his own name and on his own account. Equally, the semblance of legal identity arises if there is a mix-up, that is, if there is not a sufficiently obvious demarcation between the assets of the company and its members. The question of the responsibility of a company member for the obligations of the corporation can also be raised when the company has more than one member. It is not important in what way the fact that a member of the company is not liable for the company's obligations is abused, but rather, it is important to establish objectively that there has been an abuse. The broad wording of the provision of the CA provides maximum protection to the creditors of the corporation against the actions of shareholders who abuse their principled non-responsibility for the company's obligations.

Piercing the corporate veil usually arises in cases in which the company is undercapitalised, in relations between parent companies and subsidiaries, and in mixing of company assets by shareholders.³⁷

3.4. Legal Protection of Creditors in Case of Insolvency

The purpose of bankruptcy proceedings is to remove from economic and legal circulation a legal entity that is unable to carry out its economic activity in an economically justifiable manner. If the company is unable to perform its function properly and there are sufficient funds available to satisfy creditors voluntarily and through enforcement proceedings, creditors try to collect as quickly as possible according to the principle of priority, as there is a risk that no one would be able to realise

37 Examples include the High Commercial Court of Croatia, 2003, Pž-1522/03, Pž-1760/02, 2004, Pž-6369/03.

their claims. To avoid this race to the bottom, a bankruptcy procedure is set up in which the principle of first in time is replaced by the principle of equality.³⁸ The two basic grounds for bankruptcy provided for by the Bankruptcy Act³⁹ are insolvency and over-indebtedness. According to the general definition in Article 6, paragraph 1 of the Bankruptcy Act, the debtor is insolvent if he is no longer able to meet his financial obligations as they fall due. According to the general definition in Article 6, paragraph 1 of the Bankruptcy Act, the debtor is insolvent if he is no longer able to meet his financial obligations as they fall due. In doing so, it is assumed that the debtor is unable to pay if, in the register of the order of basis for payment maintained by the Financial Agency, outstanding obligations have been recorded for a period longer than 60 days, and which, based on valid grounds for collection, should have been collected without the debtor's further consent of any of his accounts (i.e. if he has not paid three consecutive wages due to the worker according to the employment contract or another act). The debtor must prove the payment of the debt with a public document, a notarised document, or a certificate from the Financial Agency. The company's inability to pay must be objective and therefore, it is not sufficient that the debtor does not want to pay the due obligations, although it could do so according to the available means. The fact that the debtor has settled or can settle all or part of the claims of some creditors does not mean that it is solvent.⁴⁰

Based on the provisions of Article 7, paragraphs 1 and 2 of the Bankruptcy Act, The debtor is over-indebted if its liabilities are greater than its assets, unless, according to certain circumstances, such as the development programme, the available sources of funds, the nature of the assets and/or insurance, it can be reasonably assumed that in the continuation of business it will properly discharge its obligations as they fall due.

The members of the board of directors may not make any payments to the shareholders, creditors or third parties after the reason for the company's bankruptcy has been declared. The legal provisions on the prohibition of payments oblige the members of the board of directors to repay to the company the amounts that they

38 Creditors register their claims and compete for a collective and proportional settlement from the debtor's property; in other words, a collective mechanism as a general execution replaces the individual rights to enforcement that the creditors had before bankruptcy was initiated. For more about this, see Vuković and Bodul, 2012, p. 634.

39 Bankruptcy Act, Official Gazette, No. 71/15, 104/17, 36/22.

40 According to the provisions of Article 6, paragraphs 4 and 5 of the Bankruptcy Act, the existence of the company's inability to pay is proven by a certificate from the Financial Agency, which, at the request of the creditor, is obliged to issue a certificate without delay; otherwise it is liable for the damage the creditor suffers as a result. Non-payment of three consecutive salaries is proven by calculating the unpaid salary.

have paid to anyone after the reason for opening the bankruptcy.⁴¹ The purpose of the legal ban on payments after the grounds for opening bankruptcy proceedings against the company have been established is to preserve the company's assets in the interests of all creditors and to prevent one creditor from being satisfied at the expense of other creditors. It serves to treat all creditors equally. In doing so, a distinction should be made between compensation because of payments made after the onset of bankruptcy grounds and compensation for damage caused by the delay in submitting a proposal for opening bankruptcy proceedings. That it is a request for compensation of impermissible payments *sui generis* and not a request for compensation of damages follows from the text of the provisions of Article 469 of the CA, which does not refer to compensation for damage, but to payment to the company for the amounts that were paid after the reason for opening bankruptcy proceedings against the company. The company may demand compensation from the members of the management board for the amounts that were illegally paid after the emergence of bankruptcy reasons. The amount of the request is determined by deducting from the paid amounts the compensation received by the company for the payment made. The eligibility of individual payments is assessed *ex ante*, that is, at the time the payment is made. The ban on payments applies from the date on which the grounds for opening bankruptcy proceedings against the company are established. Once the company has been declared bankrupt, the insolvency administrator may bring an action in the bankruptcy proceedings to recover unlawful payments from the board of directors. In addition to the company itself, pursuant to Article 252, paragraph 5 of the CA, the company's creditors have the right to claim compensation for unlawful payments.⁴²

Upon the opening of bankruptcy proceedings, the rights of the bankrupt debtor to manage and dispose of the assets forming part of the bankruptcy estate, as well as the rights of the bankrupt debtor's bodies, the bankrupt debtor's procurator, representative, and attorney are transferred to the insolvency administrator.⁴³ The insolvency administrator is obliged to draw up a list of all the debtor's creditors that he has learned about from the books and business documents of the bankrupt debtor

41 Article 252, paragraph 3 of the CA stipulates that the members of the management board are particularly liable for damages if they make payments after the occurrence of bankruptcy reasons. Article 469 of the CA prescribes the appropriate application of Article 430 of the CA, which refers to the application of Article 252 of the CA. The obligation to pay compensation that was made after the occurrence of bankruptcy grounds depends on the compensation for damages due to the delay in submitting the proposal for opening bankruptcy proceedings, and thus, it is only an individual item of the total damages that occurred owing to the delay in opening bankruptcy proceedings. This is an obligation and is an integral part of the general responsibility of the members of the board for the damage caused to the company as a result of their actions. See Schmidt, 2004, p. 663.

42 After falling into bankruptcy, the creditor's claim can be realised by the bankruptcy trustee by acting as a plaintiff on behalf of the bankrupt debtor and requesting payment into the bankruptcy estate of the company.

43 Article 159, Bankruptcy Act.

or from the declaration of their claims. Filing a claim is an act of will on the part of the creditors, by which they unequivocally announce their participation in the bankruptcy proceedings and the distribution of the bankruptcy estate.⁴⁴ The filing of the creditor's claim is examined by the bankruptcy judge at the examination hearing, after which the court compiles a table of examined claims.⁴⁵ Settlement of bankruptcy creditors can begin after the general examination hearing, and is carried out according to the inflow of cash.⁴⁶

4. Hungary

4.1. *Piercing the Corporate Veil*

The 2013 Hungarian Civil Code, basing the JSC and LLC regimes on the idea of limited liability, has explicit rules on piercing the corporate veil, continuing similar rules from the previous legislation. According to § 3:2. (2), if a legal person's member or founder has abused their limited liability, and as a result, unpaid creditor claims remain upon the termination of the legal entity (in our case, company) without a legal successor, the member or founder is fully liable for these debts.⁴⁷ This text is a special application of the general prohibition of abuse of rights (§ 1:5, Civil Code). To pierce the corporate veil, specific conditions are needed.

From a conceptual standpoint, the principal difficulty in the Hungarian framework concerns the normative characterisation of §3:2(2) of the Civil Code: is veil-piercing a sanction-like residual-debt liability attaching to all unsatisfied claims upon dissolution without legal successor, or is it a fault-based compensatory regime that requires proof of causation and quantification of loss? This ambiguity permeates later Sections (4.1.3–4.1.5) and affects the allocation of the burden of proof, the scope of defence, and contribution among wrongdoers. A careful exposition, therefore, should make explicit (I) the cumulative gateways (abuse, termination without successor, unsatisfied claims); (II) the standard of proof (civil balance of probabilities); and (III) the remedial metric (all unpaid debts vs. proven asset shortfall).

4.1.1. *Who is liable?*

The focus of this section is on whether liability falls on the member of an LLC (Kft.) or the shareholder of and company limited by shares (Rt.). It is irrelevant whether the member or shareholder holds a majority or minority interest in the company.

Nonetheless, veil-piercing analysis must reckon with group realities. Where the member/shareholder is a parent company or a controlling affiliate, indications of

44 Based on Article 257, paragraph 1 of the Bankruptcy Act, the claim is submitted to the insolvency administrator on the prescribed form.

45 Article 264, Bankruptcy Act.

46 Article 273, paragraphs 1 and 2, Bankruptcy Act.

47 For details, see Mohai, 2022, pp. 21–28.

abuse include: (I) centralised cash-pooling without arm's-length safeguards,⁴⁸ (II) systematic extraction of value (intragroup loans on non-market terms, upstream guarantees without compensation), and (III) policy imposition that externalises risk onto the controlled entity. The more the parent's group policy directly dictates the debtor's perilous course, the easier it is to attribute abuse of separateness to the controller for piercing the corporate veil purposes, without collapsing the distinct personhood of affiliates.

4.1.2. What is the basis of liability?

The basis of liability lies in unlawful actions that constitute an abuse of limited liability. Legislation does not currently provide an enumerative list of specific instances that would qualify as such abuse. Instead, it deliberately delegates the task of defining the scope of such cases to judicial practice. Although the omission of a detailed list from prior regulations might suggest otherwise, examples remain relevant and serve as guiding precedents. For this reason, we can state that the liability of the members (shareholders) may be established particularly if they treated the assets of the company as their own, and reduced the company's assets for their own benefit or the benefit of others in such a way that they knew, or should have known with the exercise of generally expected diligence, that this would result in the company being unable to fulfil its obligations to third parties.

Therefore, we can articulate non-exhaustive factors that courts weigh when assessing abuse of limited liability: (a) systematic commingling of personal and corporate assets; (b) asset siphoning or value-destroying dividends/related-party transfers at a time of looming illiquidity; (c) deliberate under-capitalisation given the foreseeable risk profile; (d) use of the entity as a liability shield to perpetrate legal wrongs; and (e) non-observance of corporate separateness (books, decisions, intra-group pricing).

Judicial practice has clarified that participating in the adoption of a resolution that later proves economically flawed does not, in itself, amount to an abuse of limited liability.⁴⁹ In other words, such a scenario does not automatically constitute abuse; additional elements must be present to establish liability. For instance, liability may arise if the member acted deliberately or, in cases of gross negligence, should have been aware that the resolution would lead to consequences, such as the company's assets diminishing to the detriment of creditors, rendering the company incapable of fulfilling its obligations.

4.1.3. The Need for Actual Damage to Creditors

Abuse in this context does not require a separate illegality; it is enough that conduct violates good faith/abuse-of-right principles (§1:5, Civil Code) and misuses limited

48 This refers to replicating the discipline of dealing with an unrelated, economically self-interested party.

49 BH2012. 124. I.

liability (§3:2, Civil Code). However, the mere fact of abuse is insufficient to establish liability. Actual harm must have occurred to the company's creditors, for personal liability of members or shareholders to be invoked. As long as no damage exists on the part of the creditors, personal liability does not arise, even if abuse has occurred. For instance, if the company fulfils its obligations toward the creditor, the legal framework governing liability need not be applied.

The disputable issue is whether "actual harm" is a prerequisite in the tort sense or not. Under §3:2(2) of the Civil Code, the existence of unpaid claims at dissolution functions as the relevant harm proxy. Requiring proof of individualised loss beyond the residual-debt condition risks collapsing the veil-piercing remedy into a conventional delict claim and undermines its deterrent function. A more coherent reading is that, once abuse is established and the entity has been dissolved without successor, the creditor's non-satisfaction supplies the actionable detriment.

4.1.4. Liability is Contingent upon the Dissolution of the Company Without Legal Succession

Liability can only be enforced if the company ceases to exist without a legal successor. Judicial practice has correctly established that lawsuits brought prematurely – such as claims by creditors against shareholders on grounds that they abused their limited liability to the detriment of creditors – must be dismissed (BH2011. 72). The relevant liability rule applies exclusively to the former members (or shareholders) of companies that no longer exist.

4.1.5. Consequences of Liability

The legal consequence of liability is that, following the dissolution of the company without a legal successor, members or shareholders bear unlimited liability for the unsatisfied claims of creditors that remain after dissolution. The subject of the debate is whether a member who abuses their limited liability should bear responsibility for all debts as a sanction,⁵⁰ or whether the legislation is regulating a classic case of tort liability. In the latter interpretation, the unlawful act consists of the abuse of the absence of liability, and the extent of compensation is determined by the amount of damage causally linked to the unlawful act. In our view, the second interpretation is correct.⁵¹

If §3:2(2) is read as sanction-based full liability, several corollaries follow: (I) liability is joint and several among abusing members/founders; (II) causation relates to the abuse–termination–non-payment nexus rather than to the quantum of each creditor's specific loss; (III) the liable person may pursue contribution against

50 This is a rigid, very textual interpretation, because the law states that if a member/founder abuses limited liability or the legal-person form, and the company is terminated without a legal successor, the member/founder is 'subject to full liability for the legal person's debts that remain unpaid'. This reads as sanction-like, full (unlimited) liability for all unsatisfied debts, not merely damages measured by a causation analysis.

51 Veress, 2024a, pp. 4–5.

co-wrongdoers internally; and (IV) set-off against claims of the debtor's estate should be tightly confined to preserve *pari passu*. By contrast, on a compensatory reading, the defendant may contest the quantum of shortfall by showing that non-payment would have occurred irrespective of the impugned conduct (adequate causation). Given the structurally informational advantage of controllers, a rebuttable presumption of causal contribution upon proof of abuse and dissolution would be normatively justified.

4.2. Specific Rules Applicable in the Area of Insolvency

If a company ceases to exist without a legal successor, the Hungarian Civil Code allows creditors to seek compensation for unmet claims directly from the company's executive officers (§ 3:118, Civil Code). The law specifically applies when an executive officer fails to consider creditors' interests after the company enters a situation where insolvency is imminent. This liability is governed by the rules for extracontractual damages.

The duty-shift in §3:118 of the Civil Code presupposes objective foreseeability of non-payment at maturity (a cash-flow-oriented test tempered by balance-sheet signals). Relevant markers include: serial roll-over of overdue trade debt, persistent negative operating cash flow, covenant breaches, and regulatory non-filings. Directors are not insurers of success; nonetheless, once these markers materialise, they must turn from shareholder-wealth maximisation to loss-minimisation for the general body of creditors.

The legal framework ensures accountability for decisions made by executives in the critical period when financial stability is at risk. The provision recognises that insolvency represents a radical shift in corporate governance priorities. Normally, executive officers are expected to act in the best interests of the company. However, once the threat of insolvency becomes apparent, their responsibilities turn toward protecting the interests of creditors. Failure to adapt to this shift – whether by continuing risky financial practices, mismanaging company resources, or disregarding signs of financial collapse – can result in personal liability for the damages caused to creditors.

As stated above, liability in this context is based on tort law (extra-contractual) principles, meaning the executives may be held accountable for harm caused by their actions or omissions, in the absence of a direct contractual relationship with the creditors. The regulation ensures that creditors are not left entirely without recourse when a company dissolves and its assets prove insufficient to cover outstanding claims.

Importantly, this rule does not apply when a company undergoes termination through voluntary liquidation. In such cases, a separate regulatory framework governs the responsibilities of executive officers and the treatment of creditors' claims. In general, under voluntary liquidation, all claims of external creditors are satisfied, and therefore, the executive officers' liability exists only on a contractual basis toward the company.

The Hungarian articulation of managerial liability near insolvency should be understood as qualified deference to informed, good-faith decisions that rationally aim at value-preserving restructuring. Deference recedes where the decision (I) prefers insiders, (II) exacerbates the deficit without a credible turnaround pathway, or (III) breaches procedural duties (information-gathering, documentation, and timely escalation to the supreme body).

4.3. Legal Protection of Creditors in Case of Insolvency

The Hungarian Insolvency Act no. XLIX of 1991 has detailed rules on managerial liability in case of insolvency (33/A. §).

The essence of the current Hungarian regulation is discussed in the following sections.

4.3.1. Who is liable?

Primarily, those who served as executives of the company during the 3 years preceding the commencement of liquidation are liable. Judicial practice has established that liability based on executive responsibility can be enforced not only against current executives of the company but also against former executives.⁵² An individual qualifies as an executive of a company if they exercised a decisive influence over the decision-making processes of the company (shadow director). In the context of shadow directors, the Hungarian Supreme Court has examined the liability of a bank-appointed trustee and, through them, the bank itself as a “shadow director”. According to the Supreme Court, if the creditor and its agents effectively took control of the debtor’s management as shadow directors and directed the business in such a manner that the debtor became unable to repay its debts or used the assets for purposes other than the debtor’s reorganisation, this could form the basis for a claim for damages, provided such conduct is established.⁵³

If multiple parties jointly cause harm, their liability is joint and several. The corporate law does not recognise the concept of a nominal executive; therefore, an executive who does not actively participate in the operations of the company is also liable for damages caused to creditors.⁵⁴

4.3.2. What is the basis of liability?

Liability arises if, following the onset of a situation threatening insolvency, the executive failed to perform their duties with due consideration for the creditors’ interests, and, as a causal result, the assets of the company diminished, or the full satisfaction of creditors’ claims was frustrated for other reasons.

The onset of a situation threatening insolvency refers to the point at which the executives of the company either foresaw or, with the level of care expected of

52 BDT2013. 2897.

53 Gfv.X.30.150/2011/3.

54 BDT2010. 2282. II.

someone in their position, should have foreseen that the company would not be able to meet its obligations as they fell due.

If, prior to the commencement of liquidation, an executive negligently or improperly failed to fulfil the statutory obligation to deposit and publish the company's annual financial statements (or consolidated (group) financial statements) or failed to comply with the preparation, document, asset transfer, or reporting obligations stipulated by the Hungarian Insolvency Act, they must demonstrate that no situation threatening insolvency arose during their tenure or, if such a situation did arise, that they took creditors' interests into account in performing their executive duties.

Activities that disregard creditors' interests include the failure to comply with statutory obligations to prevent environmental damage, halt ongoing damage, or undertake remediation. Such failures may result in the full satisfaction of creditors' claims being jeopardised.

An impressive body of case law has provided substantive interpretation of these legal norms. For instance, if an executive of a company facing a situation threatening insolvency uses the company's liquid assets to satisfy a member's claims, prioritising these over other existing, due, and subsequently unpaid debts, this conduct contravenes creditors' interests. Such behaviour can serve as sufficient grounds to establish the executive's liability under Section 33/A(1) of the Hungarian Insolvency Act.⁵⁵

The Supreme Court has further argued that an executive can only subsequently be exempted from liability if they can demonstrate that the repayment of the member's loan occurred when the debtor was still able to meet its obligations to external creditors. Under civil law, loans from members are treated equivalently to loans from external creditors. However, when a company repays a loan to a member, it must be considered that the member typically has greater insight into the debtor's operations and financial status. Therefore, after the onset of a situation threatening insolvency, the member must also bear responsibility for the continuation of the company's activities, which the executive must take into account. If the executive makes a payment to a member, they are liable to the creditors of the company that is subsequently placed under liquidation.⁵⁶

The fact that a business decision made by an executive after the onset of a situation threatening insolvency later proves to have been mistaken does not, in itself, establish liability under Section 33/A of the Hungarian Insolvency Act. Liability arises only when the specific decision involves additional factual elements, such as fraudulent collusion among the parties to the transaction to serve their own economic interests or to circumvent creditors, or when the transaction violates explicit legal provisions. Liability may also be established if the decision involves unreasonable or foreseeably unachievable transactions, made with a fundamentally flawed assessment of the company's position or market environment.⁵⁷

55 BDT2024. 4844.

56 Gfv.VII.30.193/2013/8.

57 BDT2016. 3499. I.

In a situation threatening insolvency, the primacy of creditor interests is violated by loans, intended to finance a borrower's project, which bring no benefit to the debtor, offer no prospect of recovery for creditors, and serve only the indirect personal interests of the debtor and the borrower's private owner.⁵⁸ The executive of a company under liquidation can be held liable if, after the issuance of a liquidation order, they fail to account for incoming funds, thereby reducing the debtor's assets.⁵⁹ Liability is also established if an executive facilitates the assumption of a company debt by another party, knowing the new debtor cannot repay it, resulting in the debt becoming uncollectible after the new debtor's liquidation.⁶⁰ Furthermore, if an executive explicitly waives repayment of a loan previously provided to a third party without taking any action to collect it, this waiver establishes liability for the resulting loss of assets equal to the waived amount.⁶¹

In assessing the liability of an executive, the critical factor is not the specific harm incurred by an individual creditor or whether the debtor's assets can satisfy their claim. Instead, the focus is on the extent to which the executive's failure to act in accordance with creditor interests, considering the claims of all creditors, caused a reduction in the debtor's assets. Therefore, the decisive factor is not what specific claim the plaintiff creditor holds in the liquidation process. If, however, the actual asset reduction of the debtor exceeds the amount claimed, the court is required only to establish liability for the asset reduction corresponding to the claimed amount.⁶²

To summarise the lawful conduct expected of an executive during a corporate crisis, the following considerations are essential: to convene the supreme decision-making body, inform it of the situation, and urge it to either finance the debtor or initiate liquidation proceedings (executives themselves are not authorised to initiate liquidation); and to refrain from actions that would further deplete the debtor's assets or exacerbate creditors' losses. The Hungarian Supreme Court has clarified that 'if an executive proposes a resolution to the members, but the members reject the proposal and adopt a different resolution, the executive officer – in their capacity as such – bears no liability for the outcome'.⁶³

Asset-reduction findings under §33/A must be coordinated with avoidance remedies so as to prevent double counting. Where a challenged transaction is successfully unwound and value re-enters the estate, the residual shortfall attributable to managerial breach should be net of claw-back recoveries. Conversely, unsuccessful avoidance (e.g. owing to transferee of good faith) may still be grounds for managerial liability if the original decision violated creditor-regard duties.

58 BDT2016. 3436.

59 BDT2010. 2376.

60 BDT2021. 4302.

61 BDT2021. 4289.

62 BDT2014. 3241.

63 Gfv.VII.30.081/2013/6.

4.3.3. *Who can request a finding of liability and when?*

A creditor or the liquidator, acting on behalf of the debtor during the liquidation process, may file a lawsuit requesting the court to establish liability. Note that this is a declaratory action, meaning its purpose is solely to determine liability; it does not result in a directly enforceable court judgment. In its decision, the court may determine that, following the onset of a situation threatening insolvency, the defendant failed to perform their executive duties with due regard for the creditors' interests, causing the debtor's assets to decrease by a specified amount. The statement of claim must reflect this by specifying the exact amount of the asset reduction in the petition itself, as merely referencing it in the factual part of the claim is insufficient. The court is bound by the petition's terms.

The liquidator is required to inform the creditors about the circumstances and details of the liability and the initiation of the lawsuit. If the claim is filed by a creditor, the court will notify the liquidator by sending them a copy of the claim. The number of lawsuits cannot be artificially increased; the court will reject a claim if a liability action regarding the same executive's identical actions has already been initiated, has been conclusively adjudicated, or is still pending with a first-instance judgment expected soon.

Both the liquidator, acting on behalf of the debtor, and the creditors are entitled to initiate a liability action. When such a lawsuit is filed, it is pursued in the interest of the collective body of creditors. This declaratory action forms the foundation for all creditors to subsequently initiate individual enforcement proceedings or claims for damages. Therefore, if an intervenor requests to join the proceedings based on their individual creditor position, this does not conflict with the plaintiff's interest, which is brought on behalf of all creditors.⁶⁴ In the declaratory action, the court quantifies the extent of the asset reduction caused by the executive's actions.

The liquidator's statutory notification duty reflects the collective character of §33/A claims; courts should police duplicative litigation by applying a *litis pendens*/issue-preclusion filter. Intervening creditors do not subvert collectivity; rather, they enhance procedural economy and ensure that the declaratory quantum mirrors the true estate deficit.

4.3.4. *What are the grounds for exemption from liability?*

An executive is exempt from liability if they can prove that, following the onset of a situation threatening insolvency, they did not take on business risks that were unreasonable given the debtor's financial situation. Additionally, they must have taken all actions that could reasonably be expected of someone in their position to prevent or mitigate creditor losses and initiated measures by the company's supreme (decision-making) body to address the situation.

Per a contrario, no exemption applies if the executive undertook unreasonable business risks relative to the debtor's financial position, failed to take all reasonable

64 BDT2023. 4721.

measures to prevent or mitigate creditor losses, or did not initiate actions by the supreme body. If these omissions caused a decrease in the company's assets, liability cannot be avoided.

To give directors *ex-ante* guidance, we should crystalise a safe-harbour for actions that (I) are duly documented, (II) rest on professional advice proportionate to the risk, (III) do not prefer insiders, and (IV) are realistically capable of loss minimisation (e.g. bridge financing conditional on credible restructuring milestones). The safe-harbour would not immunise conduct tainted by selective payments to insiders or opaque value transfers.

4.3.5. *What tools does the law provide to ensure compensation for damages?*

As noted earlier, the declaratory action establishes liability, but the actual enforcement of compensation occurs in a subsequent phase. To prevent the executive from concealing their assets during this period, the Hungarian Insolvency Act regulates the provision of security to satisfy creditors' claims.

In a motion requesting the provision of security, the applicant must substantiate the circumstances that justify the necessity of security. The security must take the form of a monetary deposit paid into a deposit account at the court's economic office.

The court evaluates such motions on an expedited basis. Any decision on the provision of security may be appealed, and the appeal must also be decided expeditiously, within a maximum of 15 days.

The statement of claim, the notice regarding the right to intervene, the motion for security, and any decisions issued during the proceedings must also be sent to any majority-influencing member of the debtor (in the case of a single-member company, the member; or in the case of a Hungarian branch of a foreign company, the foreign parent company) who held a majority influence at the time of the claim's submission or during the period following the onset of insolvency risk. If the security cannot be recovered from the executive, the aforementioned member or foreign parent company is liable as a guarantor. However, the foreign parent company cannot satisfy its guarantor obligations using assets allocated to its Hungarian branch.

If the court ultimately dismisses the claim with finality, and no liability proceedings are pending against the same executive for other actions at the conclusion of the liquidation, the court must refund the security *ex officio* within 15 days.

The security mechanism and the majority-influence guarantor rule respond to acute risks of asset flight and judgment proofing. Their justified stringency is tempered by procedural safeguards (reasoned motion, expedited appeal, and automatic refund upon dismissal). From a policy perspective, these tools should be coupled with asset disclosure orders and freezing injunctions calibrated to the declaratory quantum to prevent over-deterrence.

4.3.6. *How is liability enforced?*

After the declaratory action is concluded and the executive's liability is established, it is necessary to await the publication of the final decision closing the liquidation

process in the official gazette, *Cégközlöny*. Once this publication occurs, any creditor may file a lawsuit requesting the court to order the former executive of the debtor to pay the creditor's registered but unpaid claim from the liquidation process, up to the amount of the financial loss caused and determined in the declaratory action.

According to judicial practice, in the enforcement action (*marasztalási per*) following the establishment of the executive's liability, the only issue to be examined is whether the combined amount of the creditor claims not satisfied from the debtor's assets, and which are subject to the enforcement action, exceeds the amount determined in the declaratory action. If so, the court may order payment up to the amount established in the declaratory action, allocated proportionally among the creditors based on their unsatisfied claims (BDT2016. 3467).

The Supreme Court has clarified that

'the lawsuit does not seek to enforce the totality of unsatisfied creditor claims against the executive but rather the amount that constitutes the asset reduction resulting from the defendant's misconduct at the debtor company. This asset reduction is the consequence of failed economic decisions following the executive's omission.'⁶⁵

Furthermore, in case law it was established that in the enforcement action following the declaratory judgment, neither the legal basis nor the amount of creditor claims registered by the liquidator may be disputed.⁶⁶

If multiple creditors initiate enforcement actions, the court consolidates the cases and, in the event of a favourable ruling for the creditors, orders proportional satisfaction of creditor claims without applying the usual rules of payment priority. Any security provided must also be distributed proportionally among the creditors' claims.

The next important issue refers to qualified majority shareholders' special liability.⁶⁷ According to Section 3:324(1) of the Civil Code, a qualified majority exists if a member of a limited liability company or a limited liability company limited by shares – either directly or indirectly – holds at least three-quarters of the votes. Naturally, single-member companies also fall within this category. Thus, majority ownership in itself does not trigger the possibility of this special liability (for majority or minority owners, there is a need for more, i.e. the abuse of limited liability, as discussed above). The legal and judicial frameworks provide a detailed examination of the responsibility and accountability of qualified majority members/shareholders in cases where their business decisions lead to the dissolution or insolvency of a company without a legal successor. These frameworks aim to hold qualified majority stakeholders accountable for harmful business practices that jeopardise creditors' rights and the economic stability of the company.

65 Gfv.X.30.047/2011/3.

66 BDT2021. 4405.

67 Ibid., pp. 5–7.

Under §3:324(3) of the Civil Code, a specific liability mechanism is established for situations in which a company ceases to exist without a legal successor. This provision imposes responsibility on the member holding a qualified majority if the dissolution is a direct consequence of their detrimental business practices. The liability applies to unpaid claims and can be enforced through creditor action. This provision explicitly excludes cases where dissolution occurs through voluntary liquidation. The term “detrimental business practices” is not limited to specific (isolated) actions but encompasses a series of decisions or policies that are economically unjustifiable, risky, or negligent, leading to the financial collapse of the company.

In parallel, Hungarian Insolvency Act §63(2) addresses the liability of qualified majority members in insolvency proceedings. It provides that in cases involving companies under the influence of a qualified majority, sole proprietorships, or single-member companies, the qualified majority member or sole shareholder bears unlimited liability for any debts that cannot be satisfied using the company’s assets. The liability arises when the court determines that the qualified majority member’s sustained and detrimental business practices have contributed to the financial distress or insolvency of the company. Unlike the Civil Code, this provision explicitly refers to “sustained” detrimental business practices, emphasising a pattern of behaviour rather than isolated actions.

The legal threshold for determining detrimental business practices involves an assessment of whether the qualified majority member’s actions, omissions, or policies were consistent with the principles of sound and economically reasonable management. According to judicial interpretations, detrimental business practices generally include decisions that are economically unfeasible, involve undue risk, or lack sufficient diligence in their implementation. For instance, failure to ensure adequate financial support for the company’s operations, neglect in maintaining liquidity for critical obligations, or the diversion of company resources for personal or related-party benefit are cited as indicative examples. Courts also recognise that detrimental business practices may arise from both active decisions and passive omissions, such as failing to address evident financial or operational issues, or intentionally allowing the company to accumulate debts without a viable plan for repayment.

Judicial practice further elaborates on the causative link between detrimental business practices and the company’s insolvency or dissolution. It is insufficient for creditors to establish that a company failed or was mismanaged; they must demonstrate that the qualified majority member’s specific conduct directly caused or significantly contributed to the financial harm. Courts have emphasised that detrimental business practices must align with a sustained pattern of behaviour that undermines the company’s economic interests, violates prudent management principles, and directly results in financial losses or creditor harm. Examples include maintaining contracts unfavourable to the company but beneficial to the qualified majority member, systematically diverting company assets, or prioritising personal financial interests over corporate sustainability.

While the majority shareholder's liability is significant, judicial practice also draws a clear distinction between mere inefficiency or lack of profitability in company operations and actionable detrimental business practices. For example, isolated errors in judgment or occasional lapses in financial prudence do not meet the threshold for liability. Additionally, courts have clarified that failing to comply with certain statutory requirements, such as restoring the company's equity to meet legal capital adequacy standards, does not automatically constitute detrimental business practices unless such failure is part of a broader, harmful strategy.

The judicial approach to successive qualified majority members indicates that their liability is not joint and several. Instead, each qualified majority member is responsible only for their actions during their period of influence. This approach reflects the principle that liability for detrimental business practices must be individually assessed based on the specific conduct of the qualified majority member. Furthermore, courts have applied these principles to companies with public functions or those linked to government projects, affirming that the same standards of accountability apply irrespective of the company's nature or purpose.

A particularly contentious issue involves the characterisation of these provisions as either a liability for damages or a broader obligation to provide recourse. Judicial interpretations lean toward recognising these provisions as a *sui generis* form of delictual liability. Under this framework, the qualified majority member assumes a compensatory obligation to cover creditors' claims that cannot be satisfied through the company's assets. This obligation does not require the creditor to prove direct causation in every instance but rather focuses on the existence of detrimental business practices and their broader impact on the company's financial viability. The liability is effectively sanction-based, with the qualified majority member compelled to use personal assets to fulfil creditors' claims when the company's resources are inadequate.

Finally, the courts have articulated that detrimental business practices involve not just individual creditor actions or selective payments but broader strategies aimed at the systemic depletion of the company's resources. These strategies may include asset stripping, maintaining unfavourable contractual relationships, and directing benefits to other entities under the qualified majority member's influence while neglecting the financial health of the controlled company. Courts have emphasised that isolated contractual disputes or preferential treatment of certain creditors do not constitute detrimental business practices unless they are part of a sustained, intentional strategy to harm the company or its creditors.

A combined interpretation of the Civil Code and the Hungarian Insolvency Act highlights the Hungarian legal system's approach to the principle of limited liability and the need for accountability. Qualified majority members with qualified majority influence are held to a high standard of care, particularly in managing the company's affairs in a manner consistent with economic prudence and creditor protection.

The final question, which is particularly relevant from a creditor protection perspective, concerns how Hungarian law regulates the order of satisfaction of creditor

claims in cases of insolvency (liquidation). The satisfaction of creditors is conducted within strictly regulated frameworks, as stipulated in Section 57 of the Hungarian Insolvency Act. The debts of the debtor company are settled from the assets subject to liquidation in a specified order of priority. Below, I provide an outline of the steps involved in the order of satisfaction.

a) *Liquidation costs*

At the top of the hierarchy, liquidation costs must be covered, as they are essential for the proper execution of the liquidation procedure in compliance with legal requirements. These costs include wages and wage-related benefits owed to employees of the debtor, as well as reasonable economic costs arising after the commencement of liquidation, such as asset preservation, environmental damage remediation, and addressing the consequences of unauthorised activities. Additionally, costs related to the sale of the debtor's assets and the enforcement of claims are included, along with the remuneration of the liquidator. These costs are granted priority under the law, because they ensure the smooth progression of the procedure.

b) *Secured claims*

In the second rank are secured claims, which are satisfied exclusively from the proceeds of the sale of the pledged asset, net of value-added tax. If multiple security interests encumber the same asset, the satisfaction order follows the rules outlined in Sections 5:118–5:122 of the Civil Code. The proceeds from the pledged asset are primarily allocated to the claims of secured creditors, ensuring their rights are fulfilled in accordance with the legal provisions.

c) *Maintenance and life annuities*

The third category includes maintenance obligations and life annuities. These debts encompass obligations owed to beneficiaries for the entirety of their lives, such as child support, life annuities, or compensation annuities. These claims receive particular protection, as they provide social security for the beneficiaries.

d) *Claims arising from non-business activities of individuals*

This category includes claims arising from non-economic activities of individuals, such as those deriving from defective performance, compensation, or moral damages. Additionally, claims by small and micro-enterprises, agricultural primary producers, and certain claims of cooperative credit institutions are included here. These claims are prioritised to support socially and economically vulnerable groups.

e) *Social security contributions and public charges*

The fifth rank includes debts associated with public charges, such as social security contributions, including the social contribution tax, tax obligations, and other public dues enforceable as taxes. It also covers the repayment obligations of European Union and other international subsidies. The law provides a specific sub-order for the satisfaction of these claims, ensuring that higher-priority claims within this group are addressed first.

f) *Other claims*

This broad category includes all claims not falling into the previous classifications. Typical examples are claims arising from regular commercial transactions. These claims are satisfied only after the higher-priority claims have been settled.

g) *Late payment interests, penalties, and fines*

Claims in this category rank seventh, reflecting their low priority as per the statutory framework. This group includes late payment interest, surcharges, and any fines imposed. Such claims are treated as subordinate to other financial obligations because they are not directly related to the debtor's core business activities.

h) *Claims connected to the debtor's stakeholders*

At the lowest level are claims related to the debtor's stakeholders, such as loans provided by the debtor's majority shareholders, executive officers, or their close relatives. These claims, such as shareholder loans, are satisfied only if all other creditors' claims have been fulfilled.

The statutory cascade balances procedure-sustaining costs (a) and property-based entitlements (b) against socially sensitive claims (c–e), before reaching residual contract creditors (f) and *penalties/insider* claims (g–h). Two corollaries merit emphasis: first, secured creditors bear the realisation risk of their collateral but not the estate-wide deficit; second, stakeholder loans occupy the last stair (thus, owners cannot re-label their at-risk investment as “debt” to jump the queue and make outside creditors bear the losses). Pro-rata distribution within each class vindicates formal equality, while the overall ordering reflects substantive policy choices about risk-bearing in corporate failure.

If the available assets are insufficient to fully satisfy a specific category, the creditors within that category are compensated proportionally. For example, if multiple creditors in a category have valid claims that exceed the available funds, each receives a proportional share based on their claim size. The strict prioritisation of creditor claims serves the principles of legal certainty and fairness. Hungarian insolvency law reflects a deliberate ranking of creditor interests, granting stronger protections to certain creditors over others. This ensures that the assets of an insolvent company are distributed equitably while considering social and economic priorities.

5. Poland

The concept of “creditor” is one of the key terms of civil law. A creditor is a party to a legal obligation relationship, and is the one toward whom the other party to this relationship is obliged to perform the undertaking. A contractual legal relationship is a legal relationship *inter partes*, in principle – without a creditor there can be no relationship of obligation, because such a relationship cannot be unilateral, and

the creditor is one of the parties to this relationship – an exception to this rule was adopted precisely in connection with the need to ensure protection of creditors of companies.

For capital companies, the circle of their creditors can be defined very broadly, and the legal position of individual groups of creditors (the principles of their protection) are not the same. The basic category of creditors of companies is so-called contractual creditors, or contractors of companies who conclude agreements that form the basis for possible claims. These are voluntary creditors, that is, they become creditors of the company by deciding to conclude a contract with it, and generally, civil law creditors are treated the same way, regardless of the source of the liability (contract, tort).⁶⁸ In Polish law, there are many tools for the protection of creditors of capital companies, chief among them instruments serving all creditors (not only creditors of capital companies). This is primarily an *actio pauliana*, a claim that a creditor may make against the debtor's counterparty if the debtor's performance of a specific juridical act has led to his insolvency or helped worsen its state of insolvency. In this case, therefore, the company's creditor would seek to invalidate a legal transaction performed by the company with a third party, as a result of which the company became insolvent (or became insolvent to a greater extent). Another instrument is security proceedings (Articles 730 et seq., Code of Civil Procedure). By submitting an application for precautionary measures, the creditor may prevent the debtor from disposing of a specific asset, which would later prevent him from satisfying himself from the debtor's assets. Protection of creditors is introduced by bankruptcy law⁶⁹ and restructuring law,⁷⁰ where a number of provisions render juridical acts of the bankrupt ineffective in relation to the bankruptcy estate if they prevent or hinder the attainment of the objective of the bankruptcy proceedings (e.g. Articles 84, 123, 125, 127, 128, 128a, 129 et seq., Bankruptcy Law; Articles 248, 304 et seq., Restructuring Law).

The regulations concerning an LLC contain a regulation requiring the management board to immediately convene a shareholders' meeting in order to adopt a resolution regarding the continued existence of the company. If the balance sheet prepared by the management board shows a loss exceeding the sum of supplementary and reserve capital and half of the share capital (Article 233 § 1, Commercial Companies Code – CCC), this provision is intended to protect the interest of the company and the interest of the company's shareholders and creditors.⁷¹ Convening a shareholders' meeting pursuant to Article 233 of the CCC does not free the management board from the obligation to file a bankruptcy petition in accordance with the requirements of the Bankruptcy Law. Pursuant to Article 10 of this law, bankruptcy is declared in relation to a debtor who has become insolvent. The concept of insolvency is described in

68 Osajda, 2017, pp. 8–19.

69 Bankruptcy Law of 28 February 2003 (Journal of Laws No. 60, item 535).

70 Restructuring Law of 15 May 2015 (Journal of Laws of 2015, item 978).

71 Szumański, 2005, p. 650.

Article 11 of the law. A debtor is considered insolvent, particularly if it has lost the ability to perform its due pecuniary obligations (Article 11(1), Bankruptcy Law). It is presumed that the debtor has lost the ability to perform his due pecuniary obligations if the delay in the performance of pecuniary obligations exceeds 3 months (Article 11(1a), Bankruptcy Law). A debtor who is a legal person is also insolvent if its pecuniary obligations exceed the value of its assets, and this situation persists for a period exceeding 24 months (Article 11(2), Bankruptcy Law). Therefore, if there are grounds justifying filing a bankruptcy petition, the management board is obliged to file it, regardless of whether the obligation under Article 233 of the CCC has been fulfilled. A management board that fails to file a bankruptcy petition on time exposes itself to both criminal liability (Article 586, CCC) and civil liability (Article 21(3), Bankruptcy Law; Articles 293 and 299, CCC). A similar regulation is contained in the regulations concerning JSCs, in accordance with Article 397 of the CCC, if the balance sheet prepared by the management board shows a loss exceeding the sum of supplementary and reserve capital and one-third of the share capital, the management board is obliged to immediately convene a general meeting to adopt a resolution regarding the continued existence of the company. Similarly, a breach by the management board of the obligation to file a bankruptcy petition justifies criminal liability of management board members under Article 586 of the CCC, as well as liability for damages toward a JSC under Article 483 § 1 of the CCC. In addition, the management board is liable to creditors under the provisions of the Bankruptcy Law.

The Criminal Code also contains provisions penalising actions that may harm creditors. Such a provision is, such as Article 300 of the Criminal Code,⁷² which describes the act of not satisfying the creditor's claims by stipulating that whoever, in the event of imminent insolvency or bankruptcy, frustrates or depletes the satisfaction of his creditor by removing it, concealing, disposing of, donating, destroying, actually or apparently encumbering or damaging his assets, shall be punished with imprisonment for up to 3 years. More severe penalties are imposed on a person who frustrates the enforcement of a decision of a court or other authority, or causes damage to several creditors. If the aggrieved party is not the State Treasury, the prosecution of the offence specified in § 1 shall take place at the request of the aggrieved party. The crime of apparent bankruptcy (tactical bankruptcy) typified in Article 301 of the Criminal Code on the basis of paragraph 1 of this provision is also punishable who, being a debtor of several creditors, prevents or limits the satisfaction of their receivables by creating a new business unit based on the law and transferring its assets to it, is subject to imprisonment from 3 months to 5 years. The same penalty applies to anyone who, being a debtor of several creditors, causes his bankruptcy or insolvency. A debtor of several creditors who recklessly causes his bankruptcy or insolvency, in particular, by squandering assets, incurring liabilities, or concluding transactions clearly contrary to the principles of management, is subject to a fine, restriction of liberty, or imprisonment for up to 2 years (Article 301, paragraph 3, Criminal Code).

72 Criminal Code of 6 June 1997 (Journal of Laws No. 88, item 553).

From a criminological point of view, it can be assumed that part of the bankruptcy results from the deliberate action of the perpetrator, who is focused on the desire to remove assets, so as to protect himself in any way against possible failure at later stages of activity.⁷³ Similarly, punishable acts include favouritism toward creditors (i.e. paying only some creditors in the event of imminent insolvency or bankruptcy) and bribery in the form of granting or promising financial benefits for acting to the detriment of other creditors in connection with bankruptcy proceedings or aimed at preventing bankruptcy (Article 302, Criminal Code).

Because capital companies have legal personality, the rule is that they are liable only from their own assets, and the possibility of satisfying from other assets is exceptional. One of the basic provisions that introduces such liability is Article 21 of the Bankruptcy Law. Under paragraph 1, the debtor is required, no later than 30 days from the date on which the grounds for bankruptcy arose, to file a bankruptcy petition with the court.

Paragraph 2 provides that if the debtor is a legal person or another organisational unit without legal personality to which a separate law confers legal capacity, the obligation referred to in paragraph 1 shall be incumbent on anyone who, under the law, articles of association or articles of association, has the right to manage the debtor's affairs and to represent him, alone or jointly with other persons. These persons are liable for damage caused by failure to apply on time, unless they are not at fault. These persons may be released from liability, particularly if they prove that restructuring proceedings have been opened in time or that the arrangement has been approved in the procedure for the approval of the arrangement.

The obligation to file a bankruptcy petition for the debtor does not apply to so-called *shadow directors*, that is, persons who manage the debtor's assets. These persons may respond under the general principles of civil law. Article 422 of the Civil Code provides that not only the person who directly caused the damage is liable for the damage, but also the person who persuaded or helped another person to cause the damage, as well as the person who knowingly benefited from the damage caused to the other. In addition to liability under Article 21(3) of the Bankruptcy Law, the following further cases of liability can be indicated, which refers to the state of insolvency and the issue of bankruptcy: Articles 299, 300(132) of the CCC and 586 of the CCC, Article 31 of the Act on the Social Insurance System,⁷⁴ Article 116 of the Tax Ordinance.⁷⁵ Article 116 of the Tax Ordinance concerns tax claims, stipulating first of all that for tax arrears of an LLC, an LLC in organisation, a simple JSC, a simple JSC in an organisation, a JSC or a JSC in an organisation, members of its management board are jointly and severally liable with all their assets, if the execution against the company's assets turned out to be ineffective in whole or in part, and the member of the management board did not prove that a bankruptcy petition was filed in due time or restructuring proceedings

73 Pawluczuk-Bućko, 2022, p. 69.

74 Act on the social insurance system of 13 October 1998 (Journal of Laws No. 137, item 887).

75 Tax Ordinance of 29 August 1997 (Journal of Laws No. 137, item 926); Strzelczyk, 2001, p. 648.

were opened at that time, or that the failure to file a bankruptcy petition was without his fault. Article 31 of the Act on the Social Insurance System also applies to public law receivables, because the provisions of the Tax Ordinance apply accordingly to the liability of third parties, including members of the management board of capital companies, for receivables from contributions to the Social Insurance Institution resulting from the decision on the transfer of liability.⁷⁶

Further tools to protect creditors are included in the CCC. Pursuant to Article 586 of the CCC, whoever, being a member of the company's management board or liquidator, does not file a petition for bankruptcy of a commercial company despite the conditions justifying the bankruptcy of the company being created according to the regulations, is subject to a fine, restriction of liberty or imprisonment for up to 1 year.

One of the most important provisions concerning the liability of a member of the management board in an LLC is Article 299 of the CCC. Article 299 § 1 provides that if enforcement against the company proves ineffective, the members of the management board are jointly and severally liable for its obligations. A member of the management board may be released from the liability referred to in Article 299 § 1 of the CCC if he proves that a bankruptcy petition was filed in due time or a decision on opening of restructuring proceedings or approval of the arrangement in the proceedings for the approval of the arrangement, or that the failure to file a bankruptcy petition was not his fault, or that despite the failure to file a bankruptcy petition and the failure to issue a decision to open restructuring proceedings or the failure to approve the arrangement in the proceedings for the approval of the arrangement, the creditor did not suffer any damage.

Pursuant to Article 299 § 3 of the CCC, the analysed provision does not violate the provisions establishing further liability of members of the management board. This applies in particular to the provisions of the Civil Code and the provisions on the principles of liability in the event of damage, but also to Article 21 paragraph 3 of the Bankruptcy Law or Article 116 of the Tax Ordinance. The choice of the legal basis of the claim, therefore, depends largely on the facts cited in the grounds of the claim.⁷⁷ Article 300(132) of the CCC is similarly structured, regulates the liability of members of the management board (or board of directors) of a simple JSC for the company's obligations in the event that execution against its assets turned out to be ineffective. If enforcement against the company proves ineffective, the members of the management board are jointly and severally liable for its obligations. The liability provided for in Article 300(132) of the CCC is personal (persons liable with all their personal property), unlimited, subsidiary (arises only when the execution against the company's assets proves ineffective), and joint and several.

The provisions on simple JSCs contain a regulation on civil liability, which applies to members of bodies. Pursuant to Article 300(123) of the CCC, if the members of the

⁷⁶ Charkiewicz and Chilimoniuk, 2022, pp. 9–10.

⁷⁷ Tomczak, 2018, p. 39.

management board intentionally or negligently provided false data in the statement referred to in Article 300(12) § 3 point 3 or Article 300 (107) § 2 point 3, they are liable to the company's creditors jointly and severally with the company for 3 years from the date of registration of the company or registration of the issue of new shares. Article 300(123) of the CCC regulates the liability of members of the management body of a simple JSC for providing false data in statements confirming the payment of the required contributions. The provision's aim is to ensure that the company is given the property provided for as initial capital in the articles of association or with the property that should be contributed to cover the new shares in accordance with the resolution on the issue of shares or agreements on the subscription of shares. At the same time, the commented provision aims to ensure compliance of the information disclosed in the register on the amount of share capital with the value of property contributed to the company to cover shares, performing a protective function against creditors of a simple JSC.

The introduction of a new type of capital company into legal circulation on 1 July 2021: a simple JSC, entailed the codification of the business judgment rule. The rule of business judgment of the situation, appearing in the US doctrine of company law at the beginning of the 19th century, makes it possible to free members of the governing bodies of capital companies from liability for the consequences of unsuccessful economic decisions, as long as they acted loyally to the company when making them, and the decisions were within the limits of justified business risk and were supported by appropriate information and analysis.

Linking responsibility with the correctness and reliability of the decision-making process and the duty of loyalty to the company is a positive response to the postulates formulated by both representatives of the doctrine and managers directly interested in reducing risk exposure. According to Article 300(125) § 1 of the CCC, a member of the supervisory body is liable to the company for damage resulting from non-performance or improper performance of his duties, including failure to exercise due diligence resulting from the professional nature of his activity or failure to maintain loyalty to the company, unless he is not at fault. Under Article 300(125) § 2, a member of the authority does not violate the duty of care if, acting loyally to the company, he acts within the limits of justified economic risk, including on the basis of information, analyses and opinions that should, in the circumstances, be considered when making a careful assessment.⁷⁸

Pursuant to Article 300(127) § 1 of the CCC, if the company does not bring an action for compensation for damage caused to it by a member of the body or shareholder within 1 year of the date of disclosure of the act causing the damage, each shareholder may file an action for compensation for damage caused to the company. Article 300 (127) of the CCC governs the institution known as *actio pro socio*. It consists in granting simple JSC shareholders standing to bring an action for compensation for damage caused to a simple JSC in the event of failure to pursue a claim for damages by the

78 Przybyła and Kucinoglu, 2023, p. 62.

injured company itself, a similar regulation is contained in the regulations concerning an LLC and a JSC (cf. Articles 295 and 486, CCC). At the request of the defendant, made at the first procedural step, the court may order the lodging of a security to cover the damage threatened to the defendant. The amount and type of security is determined by the court at its discretion. If the deposit is not lodged within the time limit set by the court, the claim is dismissed. On bail, the defendant has priority over all the plaintiff's creditors. If the action proves to be unfounded and the claimant acted in bad faith or was grossly negligent in bringing it, he is obliged to compensate for the damage caused to the defendant.

Article 300(132) of the CCC regulates the liability of members of the management board (or board of directors) of a simple JSC for the obligations of the company of the execution against its assets turns out to be ineffective. Pursuant to Article 300(134) of the CCC, the provisions of Chapter 6 of the CCC do not affect the rights of shareholders of a simple JSC and third parties to seek compensation for damage on general principles. This provision, as well as the regulation of Article 300 of the CCC relating to an LLC in this respect, and similarly to the regulation of Article 490 of the CCC relating to a JSC in this matter (which uses the term "other person" instead of the phrase "third party"), provides in a simple JSC for the principle of cumulation of rights to seek damages, in particular, claims due to shareholders as well as third parties (it can be assumed that they are primarily this company's creditors), on the basis of the regulations of Title III, Section Ia, Chapter 6 of the CCC, with claims based on the general principles provided for in the Civil Code.

In the case of a JSC, there is no equivalent of Article 299 of the CCC (LLC) or 300(132) of the CCC (simple JSC). However, members of the management board of a JSC may still be liable for damage on general principles, that is, on the basis of the provisions of the Civil Code, and more specifically Article 415 of the Civil Code, according to which a person who, by his culpable action, caused damage to another person, is obliged to redress it, moreover, they are also affected by the abovementioned Article 21 paragraph 3 of the Bankruptcy Law. Moreover, pursuant to Article 483 § 1 of the CCC, a member of the management board, supervisory board and liquidator of a JSC is liable to the company for damage caused by an act or omission contrary to the law or the provisions of the company's articles of association, unless he is not at fault. However, that person does not infringe the duty of care resulting from the professional nature of his activity if, acting loyally to the company, he acts within the limits of reasonable economic risk, including on the basis of information, analyses and opinions that should be considered in the circumstances when making a careful assessment (paragraph 3). This provision introduces the principle of business judgment rule based on a JSC. Originally, the provisions concerning the business judgment rule were introduced only for members of the governing bodies of a simple JSC (Article 300(125), CCC). The principle of business assessment is a manifestation of the recognition that business decisions are often made in conditions of uncertainty or

risk.⁷⁹ Pursuant to Article 486(1) of the CCC, if the company does not file an action for compensation for the damage caused to it within 1 year of the date of disclosure of the act causing the damage, any shareholder or person who is served by a different title to participate in profits or division of property may file a lawsuit for compensation for damage caused to the company. At the request of the defendant, made at the first procedural step, the court may order the lodging of a security to cover the damage threatened to the defendant. The amount and type of security is determined by the court at its discretion. If the deposit is not lodged within the time limit set by the court, the claim is dismissed.

Article 479 of the CCC provides that if members of the management board intentionally or negligently provided false data in the statement referred to in Article 320 § 1 items 3 and 4 of the CCC or in Article 441 § 2 item 5 of the CCC, they are liable to the company's creditors jointly and severally with the company for 3 years from the date of registration of the company or registration of the share capital increase. The liability introduced in Article 479 of the CCC is coupled with the fact of providing false data in:

- a) a statement of all members of the management board, which is submitted when the company is registered with the register, that the payments for shares and in-kind contributions required by the statute have been made in accordance with the law (Article 320 § 1 item 3, CCC);
- b) a statement of all members of the management board, which is submitted when the company is registered with the register, that the contribution of contributions to the company is ensured in accordance with the provisions of the articles of association before the deadline specified in Article 309 § 3 of the CCC – if the statutes provide for covering the share capital with in-kind contributions after registration (Article 320 § 1 point 4, CCC);
- c) a statement of all members of the management board, which is submitted when submitting an increase in the share capital to the registry court, that contributions to shares have been made, and if contributions in kind are to take place after the registration of the capital increase, that the transfer of these contributions to the company is ensured within the time limit specified in the resolution on the share capital increase (Article 441 § 2 point 5, CCC).

Article 479 of the CCC introduces a sanction in the form of liability of management board members in the event of submitting false data in statements related to making contributions. This sanction is motivated by the need to ensure the reality of the contributions made to the company's share capital. This is dictated by the interest of the company itself, which, because of measurable contributions, has the property instruments necessary to conduct business activity and the company's creditors, who gain a chance to satisfy their claims against the company.

79 Bolesta-Kukuła, 2003, p. 137.

The principle of functioning of capital companies is the lack of personal liability of shareholders for liabilities incurred by the company. This principle is expressed directly in Article 151 § 4 of the CCC in the case of an LLC, which provides that shareholders are not liable for the company's obligations, in Article 300(1) § 4 of the CCC in the case of a simple JSC and in Article 301 § 5 of the CCC in the case of a JSC, similarly stipulating that shareholders are not liable for the company's obligations. However, this principle, both in normative practice and in case law and doctrine, also allows the liability of the shareholder for the obligations in question. It should be emphasised that on the basis of legal transactions separate from the articles of association (e.g. for granting a surety or guarantee or establishing a mortgage or pledge), a shareholder is liable, like any other person performing these activities with the company's creditors.⁸⁰

However, this principle is not unconditional and the personal liability of the shareholders is not always excluded. Considering the need to protect creditors against the effects of shareholders' actions, the legislation allowed for certain situations in which shareholders may be held personally liable. These exceptions include: Article 13 § 2 of the CCC – a shareholder who has not made a contribution to the company in whole or in part declared by him before entering the company in the relevant register; Article 175 § 1 of the CCC – a shareholder who has made a contribution in kind (applicable to the situation of both making a contribution in kind before the registration of the company, but also after the registration of the company, may be held liable, when the company's share capital is increased) with an overstated value in relation to the transferable value of the contribution, he is obliged to compensate the company for the missing value; and Article 292 of the CCC – the shareholder is also liable in the event of damage during the formation of the company, if his action was unlawful and culpable.

At this point, in the context of piercing the corporate veil, it is also worth mentioning the provisions of the holding law, which provide for the so-called qualified relationship of dominance and dependence, enabling the parent company to exercise uniform management over its subsidiaries mainly by issuing binding instructions to its subsidiaries. If the subsidiary has suffered damage owing to the execution of a binding instruction, the parent company shall be liable to its creditors of the subsidiary for compensation for the damage caused, unless it is not at fault. In conclusion, the legislation abandoned the introduction of the concept of piercing liability. Instead, a different, although essentially similar in effect to the piercing of the corporate veil, concept of the parent company's liability for damages toward the subsidiary's creditors in a situation where the damage arose owing to the subsidiary's compliance with the parent company's binding instructions was introduced. The most important mechanism for the protection of the subsidiary's creditors is the regime of the parent company's liability for damage caused to the subsidiary's creditor specified in Article 2114 § 1 of the CCC. This provision, clearly modelled on Article 299 § 1 of the CCC,

80 Gurgul, 2010, p. 1146.

directly concerns liability for damage caused to the creditor – in contrast to Article 299 § 1 of the CCC, which is shaped in a manner similar to the model of guarantee liability for the company’s debt.⁸¹ If enforcement against a subsidiary participating in a group of companies is unsuccessful, the parent company shall be liable for the damage caused to the creditor of the subsidiary, unless it is not at fault or the damage did not arise as a result of the subsidiary’s execution of a binding instruction. The parent company may release itself from liability by showing that it is not at fault or that the damage did not arise because of the subsidiary’s execution of a binding instruction. The presumption also covers the amount of damage corresponding to the amount of the outstanding claim. The amendment also added point 9 to Article 20(2) of the Bankruptcy Law, which authorises the parent company to file a petition for declaration of bankruptcy of a subsidiary, which will allow the parent company in certain situations to release itself from liability for damage caused to the creditor of the subsidiary by demonstrating the absence of fault.

According to the justification for the amendment, the legislation departed from accepting the liability of the piercing parent company because, in its opinion, the introduction of the discussed concept would contribute to the violation of the fundamental principle of capital companies law under Articles 151 § 4 and 301 § 5 of the CCC.

6. Romania

6.1. *Creditor Protection Rules*

The Romanian Companies Act creates a specific procedural tool for creditors which allows them to seek the help of the courts in necessary (Articles 61–62).⁸²

Creditors harmed by decisions of the company’s associates regarding amendments to the articles of incorporation may file an opposition request with the court. This request aims to compel, as appropriate, the company or its members to compensate for the damages caused. Decisions also include resolutions adopted by the statutory bodies of the company, and the term “members” encompasses shareholders unless the context indicates otherwise.

Judicial practice regards opposition as a mechanism for protecting third parties from corporate acts that infringe upon their rights and interests. Opposition serves as a legal means through which third parties can seek redress for damages resulting from a corporate decision, such as the amendment of the articles of incorporation. For instance, the Bucharest Court of Appeal⁸³ has affirmed that opposition is a tool to secure compensation rather than annul or amend the resolution of the general meeting of associates.

⁸¹ Michalak, 2022, p. 747.

⁸² Piperea, 2014, pp. 228–232.

⁸³ Bucharest Court of Appeal, 6th Commercial Section, Decision No. 1376/2010.

Opposition seeks not to invalidate or alter the resolution of the general meeting but only to ensure that damages caused to specific groups, such as social creditors and other affected individuals, are remedied. For example, in a decision by the Ploiești Court of Appeal⁸⁴, the court highlighted that the appellant must demonstrate the nature of the damage caused, such as through the alteration of the company's name or its area of activity.

The opposition must be filed within 30 days of the publication of the associates' resolution or the amending additional act in the Official Gazette of Romania, Part IV, unless a different deadline is stipulated by law. In the case of LLCs, where resolutions are not subject to publication, the deadline begins from the date the resolution becomes known. The opposition is submitted to the trade registry office, which records it within 3 days and forwards it to the competent court. The opposition is adjudicated in the council chamber with the parties being summoned, and the ruling is subject only to appeal.

Specific provisions also apply in the context of voluntary liquidation. During this procedure, liquidators cannot distribute any sums to associates from the liquidation proceeds until the company's creditors have been fully paid. In this context, creditors may also file opposition against the liquidators' decisions.

Other rules of creditor protection are related to capital maintenance, capital reduction, fusions, divisions etc.

6.2. Piercing the Corporate Veil

The Romanian Companies Act (Article 237/1 introduced in 2007) implements the corporate veil piercing doctrine.⁸⁵ Practically, at a more general level, Article 193(2) of the Romanian Civil Code sets a substantive limit on the opposability of legal personality: the corporate form may not be invoked against a good-faith third party where doing so would conceal fraud, constitute an abuse of rights, or offend public order. In such circumstances, courts may disregard the separate personality *pro hac vice* (via inopposability, recharacterisation, or veil-piercing) so that liability and remedies reach the real actors, subject to proof of the illicit purpose and proportionality. Thus, the rule operationalises *fraus omnia corrumpit* and prevents the legal form from being weaponised against legitimate interests.

Typical patterns include asset "phoenixing"⁸⁶ to frustrate creditors, deliberate under-capitalisation coupled with commingled accounts, chains of interposed nominees to evade transparency or conflict-of-interest rules, and sham related-party

84 Ploiești Court of Appeal, 2nd Civil Section, Administrative and Fiscal Litigation, Decision No. 2359/2011.

85 Ibid., pp. 801–809.

86 Phoenixing is an abusive practice whereby controllers transfer a company's business or assets to a new related entity for little or no value, leaving the original insolvent and creditors unpaid while continuing essentially the same business. The term alludes to the mythical phoenix that rises from its ashes – here, a new company reborn from the collapsed one to evade liabilities.

transactions that strip value from the company. The operative test asks whether there is an artificial arrangement lacking economic substance, deployed under controlling influence to mask or facilitate wrongdoing, with a causal link between invoking legal personality and the harm, and whether the counterparty acted in good faith; if so, proportional disregard of the entity's separateness is warranted.

Of course, the limited liability principle is a cornerstone of modern corporate law, designed to encourage entrepreneurship and investment. When, during the operation of a company, a shareholder is liable for its obligations within the limits of their contribution to the share capital, their liability remains limited to this contribution, even in the event of the company's dissolution and, where applicable, liquidation. The principle of limited liability shields shareholders from personal responsibility beyond their investment in the company. While this encourages business risk-taking, it can be abused to evade responsibility, particularly in cases of insolvency or dissolution. Shareholders may exploit this limitation to defraud creditors, raising concerns about the adequacy of safeguards against such behaviour.

However, a shareholder who, to the detriment of creditors, abuses the limited nature of their liability and the separate legal personality of the company becomes fully liable for the unpaid obligations of the dissolved or liquidated company.⁸⁷ This concept aligns with "piercing the corporate veil", a legal mechanism whereby courts disregard the company's separate legal personality. This occurs when shareholders act in bad faith, treating the company as an extension of themselves. This liability is an *ex-post-facto* remedy. The problem lies in the subjective nature of proving abuse and fraud, often requiring substantial evidence of intent or negligence, which is challenging and time-consuming for creditors, and therefore, is not widely used in practice.

Under the Romanian Companies act, the shareholder's liability becomes unlimited, particularly when they handle the company's assets as if they were their own or reduce the company's assets for personal benefit or for the benefit of third parties, knowing or having reason to know that, as a result, the company is no longer able to fulfil its obligations.

6.3. Specific Rules Applicable in the Area of Insolvency

The Romanian Companies Act introduced Specific rules in 2022.⁸⁸ Executive officers are typically required to act in the company's best interest, balancing short-term and long-term goals for profitability, growth, and stability. When a company faces financial distress, the focus shifts beyond the immediate interests of the company to include those of stakeholders most vulnerable to insolvency, such as creditors, employees, and shareholders. This shift underscores the managers' fiduciary obligations during crises, recognising the broader impact of potential insolvency. The new

⁸⁷ The legal text uses only the term member of the company, but it would be a misinterpretation to limit the applicability of this doctrine only to LLCs, and to exclude JSCs – more specifically, to exclude the shareholders of JSCs abusing their limited liability.

⁸⁸ Act No. 216/2022.

legal text introduces the concept of heightened managerial responsibility during periods of financial difficulty and establishes a dual-layered framework for liability.

When the company faces financial difficulty, managers/directors must consider at least the following:

- a) the interests of creditors, shareholders, and other stakeholders;
- b) the need to take reasonable and appropriate measures to avoid insolvency and minimise the losses suffered by creditors, employees, shareholders, and other stakeholders; and
- c) the need to avoid adopting, either intentionally or through gross negligence, any conduct that threatens the viability of the enterprise.

Stakeholders include creditors (owed debts), shareholders (owners of equity), employees (dependent on salaries and pensions), and other parties affected by the company's survival, such as suppliers and customers. In financial distress, stakeholder interests often conflict. For example, creditors may prioritise debt repayment, while shareholders may push for risky strategies to recover their equity value. Managers have a complicated task to act under these high standards. Managers are expected to adopt proactive measures to stabilise the company's financial health. Examples include restructuring operations, renegotiating debt terms, or seeking additional financing. However, if avoiding insolvency is not possible, they must file for insolvency to make these rules to govern to company's fate. Managers must not engage in actions that worsen the company's financial condition, such a fraudulent conveyance of assets or entering high-risk contracts that could jeopardise the company's remaining viability. Managers also have a duty to ensure that decisions taken during distress do not irreversibly harm the company's ability to recover or restructure. Certainly, managers are placed in a morally and legally complex position.

Violation of these obligations gives rise to liability. However, if the company does not enter insolvency proceedings, the violation of these obligations may give rise to liability toward the company itself (managers are accountable to the company for any breach of duty under company law). If the company enters insolvency, the violation of these obligations triggers liability under the conditions imposed by insolvency legislation, as discussed below. Meanwhile, if insolvency is inevitable, managers must act to reduce the impact on stakeholders – for example, by ensuring creditors recover as much as possible through orderly liquidation, maintaining transparent communication with employees, and very importantly, avoiding asset-stripping or preferential treatment that undermines creditor recovery.

Other pre-insolvency rules can be identified in the Romanian Insolvency Act no. 85/2014, which has rules on prevention of insolvency as well. Romanian insolvency law has undergone significant development to address financial distress more effectively, particularly following the 2008 economic crisis. Before 2009, Romanian law lacked mechanisms to prevent insolvency, which led to a sharp rise in insolvency cases during the crisis. The introduction of legal tools like the *preventive concordat* and *ad hoc mandate* in 2009 represented an important shift in approach, focusing on

pre-emptive measures beside reactive insolvency proceedings. These mechanisms were further refined in subsequent reforms, aiming to rescue struggling companies, preserve jobs, and ensure creditors are paid through structured settlements outside formal insolvency processes.

A key preventative measure was the *ad hoc mandate*, which allowed debtors to initiate confidential negotiations with one or more creditors under the guidance of an ad hoc manager appointed by the court. This process sought to create agreements on debt restructuring, forgiveness, or rescheduling, enabling the debtor to overcome financial difficulties. Creditors were central to this framework, as their participation and consent were needed for the success of the negotiations. The ad-hoc manager acted as a mediator, proposing measures that balanced the interests of both the debtor and the creditors. However, this mechanism faced challenges, particularly when debtors failed to cooperate fully or creditors were unwilling to compromise. In 2022, the ad-hoc mandate was replaced by a restructuring procedure aligned with European Union directives, which introduced broader frameworks for company rescue and creditor involvement.⁸⁹

The introduction of early warning mechanisms in Romanian law in 2022 marked another significant step toward insolvency prevention. These mechanisms aim to detect financial difficulties at an early stage, enabling timely intervention to avoid insolvency. Creditors benefit directly from these tools, as they provide an opportunity to assess risks and take protective measures, such as renegotiating payment terms or initiating recovery efforts before the debtor's situation deteriorates further. The early-warning system also empowers the tax authorities to notify debtors about missed payments or potential financial risks, creating additional safeguards for creditors by promoting transparency and proactive management of financial challenges.

The preventative measures are primarily aimed at legal entities that are experiencing financial difficulties but are not yet insolvent. In such cases, the debtor remains capable of meeting their obligations but faces declining economic viability. The law's focus on this phase allows creditors to be involved in structured negotiations and restructuring efforts, thereby increasing their chances of recovering debts without the need for formal insolvency proceedings. However, strict conditions apply to these preventative measures. For example, debtors who have completed a preventative procedure cannot initiate another for 12 months, ensuring that creditors' interests are not jeopardised by repeated delays or abuses of the system.

The role of creditors in these preventative mechanisms differs from their role in formal insolvency proceedings. While insolvency typically involves collective actions, preventative measures emphasise individual negotiations. Creditors are directly engaged in discussions with the debtor or through a restructuring manager, who mediates disputes and oversees the development of restructuring agreements. In cases in which collective decision-making is required, creditor meetings may be convened to approve plans that affect the interests of all involved parties.

89 Veress, 2024b, pp. 245–250.

These negotiations allow creditors to influence decisions about debt restructuring, asset sales, or other measures designed to restore the debtor's financial stability.

The preventative framework provides a range of restructuring tools, including operational reorganisations, changes to the debtor's asset or liability structure, and capital modifications. These tools aim to align the need for debtor rehabilitation with the protection of creditor rights. Creditors are given the opportunity to vote on restructuring plans, and their approval is required for the plans to be implemented. When unanimous agreement is not achieved, the restructuring manager may seek court approval to enforce the plan, provided it meets legal requirements and garners sufficient support from affected creditors under the condition of applicable law.⁹⁰

6.4. Legal Protection of Creditors in Case of Insolvency

6.4.1. Overview

As the insolvency procedure as a whole is essentially a desperate attempt to protect creditors, it is obviously impossible to comprehensively present the entire procedure in this section of the chapter. However, three key areas must be examined. First, the debtor's fraudulent transactions aimed at asset diversion and other transactions that unlawfully reduced the debtor's assets must be scrutinised. Second, in cases in which the insolvent company's assets are insufficient to cover its debts, it is crucial to explore how the responsible managers can be held accountable. Third, the preferences of creditors regarding conditions in the insolvency rules in Romania are explored.

6.4.2. Fraudulent transactions

The insolvency of a debtor may arise from fraudulent transactions intended to favour certain creditors over others before the insolvency proceedings, contrary to the collective nature of the process.⁹¹ Additionally, certain assets may be removed from the company's assets before insolvency to shield them (fraudulent conveyance). This makes it crucial to investigate the debtor's past actions. As insolvency approaches, there is an increased tendency for the debtor's members or certain creditors to improve their position at the expense of others, necessitating mechanisms that allow

90 Only creditors whose claims are affected by the restructuring plan are eligible to vote. Claims are grouped into separate categories, such as priority claims, wage claims, essential creditor claims, budgetary claims, and other claims, each voting independently. A category is deemed to have approved the plan if an absolute majority of its claims' value votes in favour. For debtors with annual revenues below 500,000 euros (EUR), categorising claims is optional, and the plan is approved if the absolute majority of affected claims supports it. After voting concludes, the debtor must file a confirmation request with the court within 3 days of finalising the voting record. A court may reject the confirmation of a restructuring agreement only on legal grounds. For the agreement to be valid, it must be approved by an absolute majority of creditors within each claims category. However, the court may approve the agreement if at least 30% of all affected claims vote in favour, provided either a majority of claim categories, including priority claims, or at least one category likely to receive payment in bankruptcy, also approves it.

91 For a monographically conducted research on the topic, see Moțu, 2015.

for easier sanctioning of fraudulent transactions compared to the general rules of civil law.

Under the Romanian Insolvency Act, the sanction for such transactions is more severe than in general civil law, where fraudulent transactions are voidable. By contrast, the Insolvency Law applies the stricter sanction of nullity.

The basis for nullity lies in the fraudulent, immoral, or illegal purpose of the transaction.⁹² In the Romanian civil law system, a transaction's purpose (*causa*) is an essential element of its validity. This purpose answers why the parties entered into the transaction, what obligations they undertook, and what interests motivated their actions. The purpose reflects the inner intent driving the transaction, providing insight into not only the psychological aspect but also its economic function. Consent and purpose together form the contractual will (*voluntas*). The goal of an annulment action is to restore the debtor's assets for the benefit of all creditors, including the property that was fraudulently conveyed. Therefore, this action is specific to insolvency proceedings with distinct characteristics; for example, it is not open to any interested person, there are timeframes in which it can be filed, and the specificities of the procedure render this tool closer to actions seeking voidability of a contract.

To clarify the debtor's financial situation and protect creditors, the Romanian Insolvency Act grants insolvency administrators and liquidators tools to restore legality. They can file lawsuits before the bankruptcy judge (Articles 117 et seq., Romanian Insolvency Act) to:⁹³

- a) Annul fraudulent transactions that harmed creditors' interests, executed within the 2 years preceding the proceedings. Such actions could include asset transfers or other arrangements designed to obscure or reduce the debtor's available resources.
- b) Annul gratuitous transactions made within 2 years before the proceedings (with exceptions for humanitarian donations). The purpose of this rule is to prevent the debtor from depleting their assets without receiving anything of value in return, thereby undermining the potential recovery for creditors. By excluding humanitarian donations, the act recognises the social importance of charitable contributions.
- c) Annul transactions where the debtor's performance significantly exceeded the consideration received, executed within 6 months before the proceedings. Such transactions may include selling assets far below market value or providing services without fair compensation. This provision ensures that creditors are not disadvantaged by inequitable dealings.
- d) Annul any transaction executed within 2 years before the proceedings, where all parties involved aimed to evade creditor enforcement or otherwise violate creditors' rights.

92 As established in Constitutional Court Decisions 2002/106, 2005/416, and 2005/608.

93 Turcu, 2015, pp. 314–320; Veress, 2024b, pp. 245–257.

- e) Annul payments or property transfers made within 6 months before the proceedings to favour one creditor over others, resulting in reduced recovery for other creditors in the event of bankruptcy. This ensures equitable treatment of creditors and discourages preferential treatment that disrupts the orderly distribution of the debtor's estate.
- f) Annul preferential security interests or liens created in favour of a general creditor within 6 months before the proceedings. These actions, if left unchecked, could unfairly enhance the position of specific creditors at the expense of the broader creditor pool.
- g) Annul payments for debts not yet due, executed within 6 months before the proceedings. Such payments, if annulled, help preserve the assets of the debtor for equitable distribution and prevent preferential treatment of certain creditors over others.
- h) Annul payments or obligations undertaken within 2 years before the proceedings, with the intent to conceal or delay the insolvency. This provision targets deliberate efforts to obscure the true financial state of the debtor.

These annulment provisions collectively aim to ensure fairness in insolvency proceedings, prevent abuse of legal and financial processes, and maximise the value of the debtor's estate for the benefit of all creditors.

A different path is the problem of transactions with specific parties closely connected to the debtor. The annulment of transactions executed within 2 years before the proceedings may also be requested if they harmed creditors and were conducted with closely connected persons. Therefore, it is possible to seek the annulment of the following types of transactions.

- a) *Transactions with members holding at least 20% of the company's capital or voting rights in an LLC*
Members with significant influence in an LLC can potentially engage in transactions that favour their own interests over those of creditors. If such transactions harm creditors' rights, they can be annulled. This ensures that individuals with substantial control over the company cannot exploit their position to the detriment of the broader creditor pool.
- b) *Transactions with shareholders holding at least 20% of the capital or voting rights in a JSC*
Shareholders with significant stakes in a JSC are similarly scrutinised. Their ability to influence company decisions makes it critical to evaluate transactions that could benefit them disproportionately or otherwise disadvantage creditors. Annulment provisions deter such practices, maintaining fairness in the distribution of assets during insolvency.
- c) *Transactions with executive officers, directors, or supervisory board members*
High-level company officials, including executives and board members, often possess decision-making authority and access to confidential information. This position of power could be abused to execute transactions that shield

assets, prioritise certain creditors, or enrich themselves. The annulment mechanism ensures these parties cannot act in self-interest at the expense of creditor recovery.

- d) *Transactions with persons exercising control over the debtor or its activities*
Control over a debtor's operations provides an opportunity for individuals or entities to manipulate transactions in ways that could compromise creditor rights. This includes indirect control through influence or dominant power, emphasising the need to evaluate and potentially annul any harmful transactions involving such parties.
- e) *Transactions involving co-owners of jointly owned property*
Co-ownership can lead to complex legal and financial arrangements. Transactions involving co-owners may sometimes be designed to obscure the true value or disposition of shared assets, disadvantaging creditors.
- f) *Transactions with spouses or relatives up to the fourth degree of relatedness*
Family members are often involved in transactions that might not be at arm's length, raising concerns about preferential treatment or collusion. By including relatives up to the fourth degree, the act casts a wide net to ensure that familial ties do not undermine the equitable treatment of creditors.

Article 119 of the Romanian Insolvency Act provides a safeguard against indiscriminate annulments by exempting transactions conducted in the ordinary course of the debtor's business.⁹⁴ This provision recognises that routine business activities are necessary for maintaining operations and should not automatically be considered suspect. For a transaction to qualify as "ordinary", it must align with the typical practices and commercial needs of the debtor's business.

To ensure expediency, the law sets strict deadlines for filing annulment actions. These must be initiated by the insolvency administrator or liquidator within 1 year of preparing the report on the causes of insolvency, and no later than 16 months from the start of proceedings (Article 118, Romanian Insolvency Act). Judicial practice has deemed these deadlines preclusive⁹⁵. If the insolvency administrator or liquidator fails to act, the creditors' committee (or creditors' meeting, if no committee exists) may file such actions. The creditors' committee (or creditors' meeting) have secondary rights to initiate such actions, conditioned to the inaction of the insolvency administrator or liquidator. Individual creditor does not have standing in such actions.

The Constitutional Court of Romania dealt several times with the constitutionality of the rules on fraudulent transactions. The Insolvency Law equips the practitioner with a targeted avoidance action to unwind fraudulent juridical acts concluded during the "suspect period", grounded in the maxim *fraus omnia corrumpit*. The legislative aim is restorative: to reconstitute the debtor's patrimony so that all creditors bear the risk of insolvency proportionally. Constitutional challenges argued that such

94 Cărpenaru, 2019, p. 745.

95 E.g., Bucharest Court of Appeal, Decision No. V/2161 of 2005.

avoidance endangers transactional security and infringes the property rights of the debtor and transferees. The Constitutional Court has consistently rejected these objections, distinguishing the insolvency avoidance action from the classical *actio pauliana*: standing lies with the court-appointed administrator or liquidator acting for the collective, and the challenged acts are those tainted by bad faith to the detriment of creditors.⁹⁶ Questions about whether a particular act was fraudulent or parties acted in good faith are matters of judicial application, not constitutional validity.⁹⁷

Doctrinally, nullity in this context flows from the illicit cause of the transaction: where the parties' (or at least the debtor's) purpose was to defraud creditors, the act lacks a lawful cause and cannot produce effects under the Civil Code's general validity rules.⁹⁸ Thus, Article 117 of the Romanian Insolvency Act is procedural in character: it does not invent a new ground of nullity but supplies a special action with calibrated conditions (look-back windows, standing, burdens) to operationalise a general civil-law sanction against fraud.

6.4.3. *Liability of Executive Officers*

Articles 169–173 of the Romanian Insolvency Act regulate a special case of liability in which the official managers of a debtor (e.g. executives or members of supervisory or auditing bodies) or shadow managers (e.g. majority shareholders who participate in management beyond the powers of the general meeting and treat official managers as mere executors of their own decisions) are held personally liable for the debts of the insolvent debtor.⁹⁹

A key issue in insolvency law is ensuring that the managers who caused or failed to avoid the state of insolvency, or who benefited from it, can be held accountable. Judicial practice has established that a manager can be held liable even if they performed their duties without compensation. The Insolvency Law governs a specific case of civil liability, which does not exclude the possibility of sanctioning acts that fall under criminal law.

When filing a lawsuit (or even afterward) to prevent the responsible person from disposing of their personal assets, the protective measures provided by the Code of Civil Procedure can be initiated.

Under the Romanian Insolvency Act, if the insolvency is caused by a manager or another person (shadow manager), the bankruptcy judge can order them to cover the debts of the insolvent entity, in whole or in part, from their personal assets. Previously, there was debate over the punitive nature of this rule, particularly regarding the extent to which a manager must cover the debtor's liabilities if their actions justified such liability. In some cases, courts required managers to pay the entirety of the debtor's debts. The law now clearly stipulates that causation must exist between

96 Constitutional Court of Romania, No. 748/2006.

97 Constitutional Court of Romania, No. 849/2006.

98 Constitutional Court of Romania, No. 106/2002.

99 Veress, 2024b, pp. 261–263.

the manager's actions and the damages. A manager cannot be held liable for debts unrelated to their actions and is only responsible for the harm caused to creditors.

Damages are defined as the reduction of the insolvent debtor's assets (which serve as collateral for creditors' claims) and the resulting inability to fulfil creditors' claims.

The request for establishing liability must be made by the insolvency administrator or liquidator to the bankruptcy judge. This liability is not toward the company but toward creditors, applying exclusively within insolvency proceedings. It is a critical tool for creditor protection, as corporate assets are often insufficient to cover claims. By holding managers accountable, creditors may recover their claims or at least part of them.

If the insolvency administrator or liquidator does not initiate such a claim, the chair of the creditors' committee may act based on a resolution of the creditors' meeting. A creditor holding more than 50% of the claims can also independently initiate a lawsuit.

Liability is established if the individual's actions contributed to insolvency through such acts as:¹⁰⁰

- a) Using the company's assets or credit for personal or third-party benefit (e.g. using the company's bank card for personal expenses, purchasing building materials for a privately owned property, or paying personal legal fees with company funds).
- b) Engaging in production, commercial, or service transactions under the guise of the company but for personal benefit.
- c) Ordering activities that clearly led to insolvency.
- d) Maintaining fictitious accounting records, hiding documents, or failing to comply with legal accounting standards.
- e) Diverting or concealing company assets, or artificially inflating liabilities.
- f) Using harmful methods to obtain funds, delaying the declaration of insolvency.
- g) Preferring certain creditors over others shortly before insolvency by ordering payments that disadvantage other creditors.
- h) Any other deliberate act leading to insolvency, with the law allowing courts to address actions not explicitly listed.

If the person responsible for insolvency is a limited liability partner, shareholder, or member of a limited partnership, liability pierces the corporate veil, extending to personal assets.

If multiple individuals are responsible (e.g. members of a collective management body), liability is joint and several if their terms or actions coincide with the insolvency. Managers are not liable if they rejected decisions leading to insolvency or abstained from participation, provided they formally recorded their dissent in meeting minutes.

100 Turcu, 2015, pp. 473–488.

Enforcement against responsible individuals falls under the jurisdiction of court bailiffs, following civil procedure codes. Recovered amounts are distributed according to the consolidated claims table prepared during insolvency proceedings.

The statute of limitations for liability claims is 3 years from the identification (or possible identification) of the responsible person, but no earlier than 2 years from the start of insolvency proceedings. Funds recovered are used for business restructuring or debt payment in the case of bankruptcy.¹⁰¹ A significant corporate law sanction is that individuals found liable under the Romanian Insolvency Act are prohibited from holding managerial positions in companies for 10 years.

6.4.4. Payments to Creditors from the Estate of the Insolvent Company

The last problem to be treated is the position of creditors from the perspective of payments in the context of the insolvency proceedings. The distribution of funds to creditors adheres to specific rules under the insolvency framework. When the assets sold also served as collateral, the proceeds are first allocated to cover the costs of the sale. Then, claims from priority creditors that arose during the reorganisation process, including accrued interest, are settled. Next, the full principal amount owed to priority creditors, along with any associated interest, is paid. If the proceeds from the sale of the collateralised assets are insufficient to cover the secured claim, the remaining balance becomes an unsecured claim with a lower priority. Conversely, if the proceeds exceed the secured claims, the surplus is incorporated into the debtor's general estate. Secured creditors may also participate in distributions made prior to the sale of the collateralised assets.

The distribution of payments is governed by a hierarchy set out in the Insolvency Law.¹⁰² First, procedural costs, including the fees of administrators or liquidators, are covered. Next, claims arising from financing provided to the debtor with creditor consent during the observation period are paid, followed by employment-related claims. Claims incurred after the commencement of the insolvency proceedings are settled next, followed by budgetary claims. General claims, such as those resulting from bank loans, the delivery of goods, and leases, are addressed thereafter, along with other general claims. Claims arising from loans made by shareholders holding at least 10% of the company's capital or voting rights are subordinated and paid subsequently. Lastly, claims arising from gratuitous transactions are addressed.

Available funds are used to fully satisfy the claims in a higher-ranking category before moving on to the next category. Within the same category, if the available funds are insufficient for full repayment, the claims are satisfied proportionally based on their respective amounts. If the debtor's estate cannot cover certain categories of claims, the creditors in those categories bear the loss of the unpaid amounts. This hierarchical order reflects policy priorities, such as giving employment-related and

101 Cărpénaru, 2019, p. 784.

102 Ibid., pp. 775–777.

budgetary claims precedence over general claims arising from the debtor's economic activities.

Historically, there was uncertainty regarding the application of this hierarchy for cases in which collateralised assets were sold. Some courts incorrectly prioritised the costs of the insolvency proceedings, including administrator or liquidator fees, over secured creditors' claims. The law currently provides a compromise by granting administrators or liquidators priority for their fees – but only proportionally to the value of the collateralised assets relative to the total estate value. This adjustment discourages secured creditors from initiating insolvency proceedings, as significant portions of the collateral's value may be consumed by procedural costs, exceeding those incurred in standard enforcement actions.

Judicial practice has also grappled with the ranking of shareholder loans and other claims from shareholders. In general, shareholder loans are treated as general claims unless the shareholder holds at least 10% of the company's capital or voting rights, in which case they are subordinated.¹⁰³ Claims secured by collateral are treated as guaranteed claims, even if provided by shareholders with significant equity stakes, unless the collateral agreement is successfully challenged and invalidated. Contracts with shareholders unrelated to loans are categorised as general claims. Unpaid dividends, while debated, are often treated as shareholder loans and subordinated claims. However, unpaid shareholder loans, despite their subordinated status, grant the shareholder the right to initiate insolvency proceedings.¹⁰⁴

Finally, the assignment of a claim does not alter its original ranking. This principle ensures consistency in the treatment of claims regardless of ownership changes, as confirmed in judicial decisions.¹⁰⁵

7. Serbia

7.1. *Creditor Protection Rules*

There are three main categories of creditor protection rules in Serbia: I) rules on the protection of capital and finances of the company, II) rules regarding different disclosure obligations imposed to the companies aiming to enable prospective creditors to assess the risk of payment of their potential claims, and to inform current creditors about the certainty of paying off existing claims, and III) rules granting specific, concrete rights, and/or powers to the creditors in a strictly defined situation which *per se* puts them in an unfavourable position.¹⁰⁶ The common trait of the first set of rules is the imposition of certain mandatory standards of conduct in different stages of the company's formation and operation, which oblige the company's shareholders

103 Cluj-Napoca Court of Appeals, Decision No. 544/2017.

104 Cluj-Napoca Court of Appeals, Decision No. 588/2015.

105 Cluj-Napoca Court of Appeals, Decision No. 1623/2015.

106 On the instruments of creditor protection, see Jevremović–Petrović, 2011, pp. 244–252; Jevremović–Petrović, 2012, pp. 150–151.

and management. These rules have already been discussed in previous chapters, most notably in Chapter 4. As a reminder, we recall some of those rules: legal capital rules, rules on distributions to the shareholders, rules on contributions to the legal capital, evaluation of in-kind contributions, prohibition of financial assistance, etc. The second category of creditor protection rules is mostly relevant for listed JSCs, considering their ability to reach investors at the largest possible scale and gather necessary capital from the public in general. These rules are part of capital markets law, and as such they are beyond the scope of this book. This chapter analyses the third category of rules. The creditors' rights triggered on specific occasions in Serbian company law may be classified as follows:

- a) rules on the creditors' protection in case of capital reduction;
- b) rules on creditors' rights once the company conducts status change, change of legal form and once it concludes an agreement on control and management;
- c) creditor protection during the liquidation of a solvent company;
- d) specific rules applicable in the vicinity of insolvency; and
- e) piercing the corporate veil.

In this section, we analyse the first three groups of rules mentioned in this paragraph, while the last two groups will be part of separate sections.

The Serbian system of creditor protection in case of capital reduction is based on two companies' obligations established to enhance transparency and two specific creditors' rights introduced to strengthen their position if the company's status deteriorates. The company is obliged to publish the resolution on reducing the company's share capital in the register for a continuous period of 3 months starting from the day of registration of that resolution.¹⁰⁷ Additionally, the company must send a written notice to creditors known to the company whose individual claims amount to at least 2,000,000 dinars (RSD) on the day of registration of the resolution on the reduction of the share capital no later than 30 days after the registration of that resolution.¹⁰⁸ Creditors, meanwhile, have the right to require the company to secure their claims until the expiration of the period of publication of the resolution on the reduction of the share capital, provided that, irrespective of the maturity date, these claims were created before the expiration of the time limit of 30 days from the day of publication of the resolution.¹⁰⁹ The CA introduces another mechanism of creditor protection when the company, upon the request to secure the creditor's claim(s), neither secures it nor settles the claim, and the settlement of their claims is jeopardised by the reduction in the share capital in question. In this situation, a creditor may file a lawsuit to establish adequate security. The court will establish such security, taking particular care of whether the demanded security is necessary to protect the creditors bearing in mind

107 Articles 147a and 319, Section 1, CA.

108 Article 147a, Section 2, CA.

109 Article 147a, Section 3, CA.

the assets of the company.¹¹⁰ The creditors, whose claims are *per se* not jeopardised, are not entitled to demand the security of their claims (creditors whose claims belong to the first or second rank of payment priority in the insolvency proceedings, and already secured creditors).¹¹¹ Besides the depicted exception, which applies only to the creditors' right to file a lawsuit to establish a security interest, the CA recognises another exception with a far broader scope of application. Generally speaking, the CA's rules on creditor protection in case of capital reduction (two companies' obligations and two creditors' rights) are entirely not applicable when the capital reduction does not result in an actual diminution of companies' net assets (e.g. annulment of own shares which the company has acquired without compensation and for which the contributions were fully paid) or when the company reduces the capital in order to pay creditors' claims (e.g. reduction due to covering companies' losses).¹¹²

Serbian law confers to creditors specific rights once the company conducts significant structural changes that result either in the change of legal form or the change of its status (merger, acquisition, division, and separation). In both cases, the company is obliged to individually notify known creditors whose claims are higher than 2 000 000 RSD about the change of legal form or status change no later than 30 days prior to the day of the general meeting at which the relevant decision is made. The notification must contain the main information about the planned change (participants in the status change, objectives and conditions for the change, reasons for choosing another legal form, etc.). In case of a status change because of more significant consequences that arise from such change, the CA predicts some additional rules aiming to enhance creditor protection. The company is obliged to publish, in addition to personal notification of known creditors, the draft agreement on status change, that is, draft division plan on its internet page, as well as to deliver it to the Business Registers Agency (BRA; *Agencija za privredne registre*) for publication on the internet page of that register no later than 60 days prior to the day of holding the general meeting at which the decision on status change is to be made.¹¹³ The adoption of such a resolution at the general meeting triggers the emergence of creditors' right to enhanced protection. This right entails one of the following measures: I) the securement of the creditor's claim, II) change of the contract terms or termination of the contract, III) separate management of the assets of the transferring company until the settlement of the claim, and IV) taking any other actions and measures which place the creditor in a position which is not less favourable than the position he enjoyed prior to the status change.¹¹⁴ The right to enhanced protection is subject to four conditions: I) the claim ensued prior to the registration of the status change; II) the financial standing of the companies participating in the status change is such that the implementation of the status change compromises the satisfaction of her claim, and therefore, the

110 Article 147a, Section 4, CA.

111 Article 147a, Section 6, CA.

112 Article 147b, Section 1, CA.

113 Article 495, Section 1, CA.

114 Article 509, CA.

provision of such protection is necessary for placing the creditor in a position which is not less favourable than the position he enjoyed prior to the status change; III) creditors claims are not yet secured and they do not belong to the first or second rank of payment priority in the insolvency proceedings; and IV) the creditor must submit a request for enhanced protection not later than 30 days from the day of publication of the notification on the status change by the company (her debtor).¹¹⁵ A creditor who, within 15 days of the date of filing a motion for the provision of protection, is not provided with the relevant protection, is entitled to file an action against its debtor with the competent court seeking the provision of relevant protection.¹¹⁶ The right to enhanced protection also applies to the bondholders and other holders of debt financial instruments, including convertible bonds and warrants.¹¹⁷

Serbian company law recognises agreements on control and management, which result in the creation of a group of companies based on their contractual relations. In this contract, a company grants the management and conduct of business operations to another company.¹¹⁸ The directors of a control company, after concluding the agreement, acquire significant powers regarding the controlled company, most notably the right to impose mandatory instructions to their management.¹¹⁹ This influence obviously has considerable impact on the creditors' rights, because the settlement of their claims becomes dependent on the decisions of the control company – a party with whom they did not enter a contractual relationship. For that reason, the CA prescribes specific liability of the control company toward creditors of the controlled company upon the termination of the agreement on control and management. In other words, creditors are entitled to submit a written request for adequate protection of their claims incurred before the registration of the termination of the agreement on control and management.¹²⁰ The creditor does not have to provide proof of the decreased possibility to settle his claim with the controlled company. It is only necessary to submit the request within 6 months of the termination of the agreement on control and management (unless the claim is already sufficiently secured by separate means or owing to its ranking in the potential insolvency proceedings).¹²¹

The CA contains rules for the voluntary (by the resolution of the general meeting) and compulsory (automatic) dissolution of solvent companies. Such dissolution occurs entirely out-of-court, while the liquidator is most often the company's former director (in any case, a person appointed by the company in liquidation).¹²² The CA's rules on the liquidation of dissolved companies, not surprisingly, pay particular attention to the interests of creditors. The very basic principle applicable in liquidation is that

115 Article 510, CA.

116 Article 511, Section 1, CA.

117 Article 512, CA.

118 Article 554, Section 1, CA.

119 Article 557, Section 1, CA.

120 Article 566, Section 1, CA.

121 Article 566, Section 2, CA.

122 Article 529, Section 1, CA.

any payments to the shareholders (the liquidation surplus) may be made only after creditors' claims are fully settled. Those claims may be settled only if the creditors timeously file their claims under the threat of being precluded to settle if they fail to make the requested filing. With that in mind, the CA prescribes that a notification on initiation of liquidation must be published for 90 days on the internet page of the BRA and it particularly includes the invitation to creditors to file their claims, as well as a warning on the consequences of late filing or utter failure to file (loss of the right to settle the claim).¹²³ In addition, the company is requested to individually inform the known creditors about the initiation of the liquidation.¹²⁴

Creditors' rights are protected even after the liquidation of the company. The CA differentiates the rules applicable to liquidation as a result of voluntary and mandatory dissolution. As regards voluntary dissolution, shareholders are jointly and severally liable for the obligations of the company even after its extinction (de-registration), up to the amount received from the liquidation surplus, and for 3 years after the extinction.¹²⁵ In the case of mandatory dissolution, the CA provides a far stricter rule that effectively unfolds in a specific instance of "statutory" veil piercing. For that reason, this rule is addressed separately below.

7.2. Specific Rules Applicable in the Area of Insolvency

Serbian law does not contain, from a comparative law perspective, any of the main legal mechanisms used to address specific legal issues inherent in the vicinity of insolvency (change in the regime of directors' duties of care and loyalty, references to the concept of "wrongful trading", or the duty to file for bankruptcy once the company is insolvent). The absence of specific legal rules may create additional legal uncertainty in this, from a business perspective, which operates on an already hazy stage. Despite this, two remarks are needed to fully describe the Serbian legal framework on this issue.

First, Serbian law may have an unintended and indirect solution for the problems imminent in the vicinity of insolvency. That solution entails a different interpretation of the standard of directors' duty of care in this stage of business operation.¹²⁶ In other words, the standard of the duty of care anyhow requires its construal on a case-by-case basis, depending, among other factors, on the current status of a company. Because the economic and financial status in the vicinity of insolvency is substantially changed, and owing to a lack of indicators what is the interest of a company, courts may apply different interpretations to the standard of care in different stages of its operation. For instance, they may apply a progressive approach, meaning that the importance of creditors' interest gradually increases as the company's financial conditions deteriorate.¹²⁷

123 Article 533, Section 1, CA.

124 Article 534, CA.

125 Article 545, Sections 2 and 3, CA.

126 Mihajlović, 2019, pp. 211–212.

127 Ibid.

Second, modelled upon Article 58 of Directive (EU) 2017/1132, the CA recognises the obligation to convene an extraordinary general meeting, both in LLCs and JSCs, once a company suffers serious loss.¹²⁸ According to the CA, such loss exists when the company's net assets fall below 50% of the company's legal capital. The extraordinary meeting in question clearly has a preventive effect.¹²⁹ Moreover, the law requires concrete action from the shareholders. The outcome of the meeting must be either a proposal of a resolution on the dissolution of the company or a proposal of a decision on other measures.

7.3. Limited Liability and Veil-Piercing

The principle of limited liability is the cornerstone of the Serbian company law of LLCs and JSCs. It has been accepted as the main shield from shareholders' personal liability for companies' debts. This principle has been restricted by the well-known rules on veil-piercing that are present in Serbia since the inception of the development of modern company law rules. Serbian rules on veil piercing are scarce, and they are found in only one provision of CA. However, this does not present an obstacle but rather testifies to the principle-based approach of the Serbian legislation to veil piercing. Very few rules leave room for a creative and broad interpretation of the statutory principle among the myriad of possible situations. The rule on veil piercing has several elements, as discussed in this section:

- a) the addressees of the rule,
- b) the essence (content) of the rule, and
- c) the consequences of its application.

Serbian legislation precisely defines the circle of persons to whom the rule of veil piercing may be applied. It comes as no surprise that the rules apply to the shareholders who are generally not personally liable for the company's debt, that is, to the shareholders of LLCs and JSCs (as well as to the limited partners in limited partnerships). Even though the law neither makes a difference between majority and minority shareholders nor between controlling and non-controlling shareholders, from a practical point of view, there seems to be little doubt that the veil may be more easily shifted in its part that shields the former.¹³⁰ Minority shareholders have fewer possibilities to abusively act toward creditors owing to their limited influence on the company's business operations.

The essence of the rule is very straightforward – the shareholders are prohibited from abusing rules on their limited liability. In other words, if they commit such abuse, they may become personally liable for the company's debt. After the general clause, the CA prescribes several situations that are to be considered the most prominent cases of abuse. The veil is shifted if a shareholder:

128 Article 371, Section 2, CA.

129 Radović, 2009, pp. 307–310.

130 Vasiljević et al., 2020, p. 94.

- a) uses the company to achieve a goal that is otherwise forbidden to him,
- b) uses the company's assets or disposes of them as if they were his own,
- c) uses the company or its assets to damage the company's creditors, or
- d) reduces the company's assets to obtain personal gain or gain for third parties, although the person in the breach was aware or had to be aware that the company would not be able to fulfil its obligations.¹³¹

This list of examples should represent no more than that. The list is not exhaustive, and the general clause may encompass other cases that are not on the list on the basis of a case-by-case approach. Serbian courts tended to understand the reasons and rationale for veil piercing in the context of the criminal law concept of fraud.¹³² The legal theory, however, deems this understanding as flawed, as piercing the veil originated from the civil law concepts of good faith and prohibition of abuse of one's rights. Some recent case law follows this academic understanding when asserting that mentioned civil law principles are to be applied in finding whether the shareholder abused the rule on limited liability.¹³³

The main consequence of veil piercing is the shareholder's personal liability. Several remarks deserve special consideration in this regard. First, this consequence ensues only after bringing an action against the shareholder who abused the limited liability.¹³⁴ The action has to be filed within 6 months of the date of finding out about the abuse (subjective time limit), and no later than 5 years from the day of abuse (objective time limit).¹³⁵ Second, the action is to be filed against the particular shareholder who committed abuse. There is no universal veil piercing applicable to all company's shareholders. Third, each creditor must individually file a lawsuit to demand the settlement of the claim. There is no automatic application of veil piercing for all company's creditors. Fourth, the CA does not make a difference as regards the basis of the claim. The right to file a lawsuit for veil piercing belongs to any creditor, notwithstanding neither when the claim arose nor whether it was due when the abuse occurred. If the creditor's claim was not due at the moment the creditor found out about the abuse, the 6-month deadline starts running as of the day the claim becomes due.¹³⁶

Despite its broad and open formulations, suited to the application in different cases, Serbian rules on veil piercing are rarely applicable. Lawsuits for veil piercing are sparse, although the practical situations in which shareholders abuse the limited liability, especially before the company's insolvency, are not uncommon. The exact reasons for the failure of these important rules could not be easily determined.

131 Article 18, Section 2, CA.

132 Vasiljević et al., 2020, p. 131.

133 Judge of the Commercial Appellate Court, Prev. 4749/20, 14 January 2021.

134 Marjanski and Dudás, 2020, p. 137.

135 Article 18, Section 3, CA.

136 Article 18, Section 4, CA.

Perhaps because of the insufficient application of rules on “traditional” veil piercing, the CA introduced a specific case of veil piercing pertaining to the controlling shareholder of a company liquidated upon compulsory dissolution. In general, compulsory dissolution of a solvent company is conducted once the company no longer fulfils some of the statutory requirements for its formation and existence.¹³⁷ In such a case, the controlling shareholder is jointly and severally liable without limits for the company’s obligations 3 years after the de-registration.¹³⁸ Two main features of this provision are as follows: I) it applies only to the controlling shareholder and II) it applies under the operation of law. Both features have invoked some criticism in the legal scholarship, questioning even its constitutionality, because it deviates from the well-known assumption about the exclusion of the limited liability, namely, abuse of such liability. Here, the creditors do not have to file a specific lawsuit to prove the abuse if it appears that they have claims against the de-registered company. It is sufficient, according to the case law, that a creditor can enforce her claim against a company only with the statement from the BRA confirming the de-registration of a company owing to compulsory dissolution.¹³⁹

7.4. Legal Protection of Creditors in Case of Insolvency

The legal protection of creditors in case of insolvency is subject to the special Insolvency Act. Serbian law recognises two types of insolvency proceedings: liquidation and reorganisation. Liquidation comprehends creditor satisfaction from the value of the debtor’s whole assets, and/or from the value of the debtor as a legal entity.¹⁴⁰ Reorganisation comprehends creditor satisfaction accomplished in the manner and under the conditions contained in the plan of reorganisation by redefining relations between the debtor and the creditor, or changing the debtor’s legal status, or in another manner provided by the plan.¹⁴¹ The common feature of both proceedings is their main goal. Insolvency proceedings in Serbia aim to ensure the most favourable collective settlement of creditors by achieving the highest possible value of the debtor or its assets.¹⁴² The objectives of insolvency proceedings testify that Serbian insolvency law is creditor-oriented. In principle, there is no room for the achievement of other social or economic goals in insolvency proceedings but the protection of creditors. This is equally true even in the reorganisation with a preventive character (initiated owing to the debtor’s imminent insolvency). Besides the objectives, many provisions of the Insolvency Act expectedly showcase the legislation’s endeavour to protect creditors.

137 Article 546, CA.

138 Article 548, Section 3, CA.

139 Position of the of the Supreme Court of Cassation of the Republic of Serbia, Civil Section from 16 March 2021..

140 Article 1, Section 3, IA.

141 Article 1, Section 4, IA.

142 Article 2, IA.

The creditor-oriented focus is clearly visible in the way how the insolvency law principles are defined and structured. A basic insolvency law principle is the collective settlement of creditors: insolvency proceedings should ensure the collective and proportional settlement of creditors under the law.¹⁴³ This principle is closely related to the principle of universality, which implies that in insolvency proceedings the whole assets of the debtor, acquired before the commencement of the proceedings and during these proceedings, serve the purpose of creditors' settlement.¹⁴⁴ The focus of insolvency proceedings on the protection of creditors is also reflected in the principle of creditor autonomy, which paves the way for the significant participation of creditors in the proceedings. The creditors' participation may be achieved either through participation in the bodies formed in the insolvency proceedings or by exercising their individual rights as parties to the proceedings.¹⁴⁵ Regarding the latter, the creditors may have an active role from the very beginning of the proceedings, as they are entitled to initiate the opening of the proceedings. When it comes to the opening of the proceedings, Serbian insolvency law uses a combination of balance sheet and cash flow tests as the relevant commencement standards.¹⁴⁶

Regarding the creditors' role in the bodies formed upon the commencement of insolvency proceedings, there are two bodies whose members are exclusively the creditors: the creditors meeting, and the creditors committee. In case of less than five creditors, all the creditors will be merged into one common body of creditors with the powers assigned by the law to both bodies.

The creditors meeting is comprised of all creditors but secured creditors. The meeting has some substantial competencies that crucially influence the course and outcome of the proceedings. First, it is for the creditors meeting to decide whether the insolvency proceedings will be conducted as a liquidation or reorganisation.¹⁴⁷ Therefore, as a matter of principle, it is up to the creditors to rule whether the debtor deserves a second chance. The meeting also has a decisive role in the appointment of the insolvency representative. Even though the primary power to appoint the representative belongs to the court, he may not be finally elected without the consent of the creditors' meeting. If the meeting does not provide such consent, it must at the same time propose the dismissal of the representative and the appointment of the new one.¹⁴⁸ After the appointment, the creditors meeting oversees the insolvency representative, while the creditors committee may initiate her dismissal (the final decision on dismissal is to be made by the court). The creditor's right to vote at the meeting depends on the proportion of the amount of her claim.

143 Article 3, IA.

144 Radović, 2020, p. 30.

145 Ibid., p. 33.

146 Article 11, Section 2, IA.

147 Article 36, Section 4, IA.

148 Article 35, Section 5, IA.

The creditors committee is elected by the creditors meeting. The creditors committee includes a representative of secured creditors.¹⁴⁹ It consists of no more than seven creditors, and their number in any case must be odd. Contrary to the meeting, the voting is organised according to the principle of one creditor – one vote. The creditors committee has significant powers that affect the course of the proceedings and the implementation of powers of the insolvency representative. For instance, the creditors committee's consent is necessary for certain actions of the insolvency representative (e.g. the sale of the debtor as a legal entity, and actions of exceptional importance).

Another important principle of the insolvency proceedings is the principle of equal treatment of creditors. The equal treatment of creditors allows all creditors to settle according to the same insolvency quota, and receive a certain amount according to that quota. This principle applies in the context of the priority rankings established by the Insolvency Act, that is, equal treatment implies its application only compared to the creditors who are part of the same priority ranking. Furthermore, the Serbian insolvency law provides, as a matter of principle, that a secured creditor has the right to be paid before any other creditors out of the proceeds of its collateral. The list of priority rankings starts with the costs of the proceedings and the obligations of the insolvency estate. Afterward, the law prioritises the employees, then the public revenues, and finally the unsecured creditors. The Insolvency Act recognises as well a group of subordinated creditors, consisting of the parties related to the debtor for the claims arising from the loan agreements they concluded with the debtor in the last 2 years before the opening of the insolvency proceedings.¹⁵⁰

Nevertheless, several other measures aim to protect creditors and the bankruptcy estate during the insolvency proceedings. These measures apply as early as during the preliminary proceedings until the closure of the proceedings. They aim to protect the insolvency estate and to enhance its value through many measures and obligations imposed on the insolvency representative, or specific rights attached to the creditors' bodies or individual creditors.

8. Slovenia

8.1. Creditor Protection Rules

8.1.1. Limited Liability Companies

As compensation for the lack of personal liability of the shareholders, the *Zakon o gospodarskih družbah* (ZGD-1; The Companies Act of Slovenia) provides some rules regarding the minimum amount and the maintenance of the share capital. The maintenance of the share capital is ensured by the prohibition of paying out the assets

149 Article 38a, IA.

150 Article 54, IA.

which cover the subscribed capital (Article 495, ZGD-1), special rules regarding loans to the LLC instead of own assets (Article 498, ZGD-1), and the prohibition of repayment of a loan prior to the commencement of bankruptcy or compulsory settlement (Article 499, ZGD-1).¹⁵¹

8.1.2. Joint-Stock Companies

In the case of a JSC, just like in an LLC, the principle of capital maintenance with a prohibition on the return of contributions applies.¹⁵²

8.2. Specific Rules Applicable in the Area of Insolvency

8.2.1. Limited Liability Companies

The current regulation of corporate law in the ZGD-1 and insolvency law in the *Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju* (ZFPPIPP; The Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) does not contain specific rules that apply in the event of the likelihood of the insolvency. During the period before the onset of company insolvency, certain general rules regarding the financial operations of companies and other legal entities, as stipulated in Chapter 2 of the ZFPPIPP, apply. These fundamental rules apply not only to commercial companies but also, by analogy, to entrepreneurs, institutions, public institutions, cooperatives, and public funds (Article 27(1), ZFPPIPP). A company must manage its resources and investments in a way that it is capable of fulfilling all its due obligations at any given time (Article 31(1), ZFPPIPP). The company must establish and implement a policy for regular liquidity management to manage liquidity risk, which is approved by the management and includes:

- a) planning expected known and potential cash outflows and sufficient cash inflows for them, taking into account the normal course of business and potential liquidity crisis situations,
- b) regular monitoring and management of liquidity, and
- c) identification of appropriate measures to prevent or eliminate the causes of illiquidity and the definition of other options for addressing them (Article 31(1), ZFPPIPP).

The company must also ensure that it always has sufficient long-term sources of financing in relation to the scope and types of operations it conducts, as well as the risks to which it is exposed in performing them (Article 32(1), ZFPPIPP). Monitoring capital adequacy, in accordance with the ZFPPIPP and the rules of business and

151 Ivanjko et al., 2009, p. 899. The relevant rules are presented in the chapter of the capital maintenance, Chapter III, C, I.

152 The relevant rules are presented in the chapter on rules for the capital maintenance, Chapter III.

financial practice, is one of the fundamental tasks of the management (Articles 28(1), 32(2), ZFPPIPP).

It is worth noting that a proposal to amend the ZFPPIPP (hereafter, ZFPPIPP-H proposal) is currently in the legislative process.¹⁵³ The proposal will, among other things, implement the EU Directive on Restructuring and Insolvency.¹⁵⁴ With the adoption of the ZFPPIPP-H proposal, the institution of the likelihood of insolvency would be introduced into Slovenian insolvency law. Likelihood of insolvency would refer to a situation where it is probable that the debtor will become insolvent within 1 year (Article 6, ZFPPIPP-H proposal). According to the new Article 33a of the ZFPPIPP (Article 16, ZFPPIPP-H proposal), the management and other bodies of the company must constantly monitor developments that could jeopardise the company's continued existence. If they identify such developments, they must take appropriate countermeasures and immediately report to supervisory bodies. If the measures to be taken are not within the competence of or fully within the competence of the management, the management must make efforts and undertake all activities to have them addressed by supervisory or other competent bodies (Article 33a(1), ZFPPIPP-H proposal). In the event of likelihood of insolvency, the management and other bodies of the company must:

- a) avoid actions that would result in unequal treatment of creditors who are in an equal position with respect to the company, unless such actions are taken to prevent insolvency;
- b) take into account the interests of creditors, shareholders, and other stakeholders in their decision-making; and
- c) avoid actions that endanger or reduce the assets of the company or otherwise jeopardise the company's ability to survive (Article 33a(1), ZFPPIPP-H proposal).

8.2.2. Joint-Stock Companies

The current regulation of corporate law in the ZGD-1 and insolvency law in the ZFPPIPP does not contain specific rules that apply in the event of the likelihood of the insolvency. During the period before the onset of company insolvency, certain general rules regarding the financial operations of companies and other legal entities apply, as stipulated in Chapter 2 of the ZFPPIPP. These rules apply to all forms of commercial companies (Article 27(1), ZFPPIPP), and thus, they apply equally to a JSC as well as to an LLC (see Chapter VII., B., I).

¹⁵³ *Zakon o spremembah in dopolnitvah Zakona o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju* (Law on Amendments and Additions to the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act).

¹⁵⁴ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt, and amending Directive (EU) 2017/1132.

8.3. *Limited Liability and Veil-Piercing*

8.3.1. *Limited Liability Companies*

Commercial companies, as legal entities, are liable for their obligations with all their assets (Article 7(1), ZGD-1). The law specifies when and how shareholders are also liable, in addition to the company (Article 7(2), ZGD-1). An LLC falls under the category of capital companies, characterised by the fact that shareholders are not personally liable for the company's obligations. Therefore, the ZGD-1 stipulates that shareholders of an LLC are not liable for the company's obligations (Article 472, ZGD-1).

Even though shareholders of an LLC are not personally liable for the company's obligations, Part I of the ZGD-1, which covers general provisions of the company law, regulates the doctrine of piercing the corporate veil. Shareholders of an LLC are liable for the company's obligations if:

- a) they have abused the company as a legal entity to achieve a goal that is prohibited for them as individuals;
- b) they have abused the company as a legal entity to harm their own or its creditors;
- c) they have acted contrary to the law by treating the assets of the company as their own personal assets; or
- d) they have diminished the assets of the company for their own benefit or the benefit of another person, knowing or having the obligation to know that the company will not be able to fulfil its obligations to third parties (Article 8(1), ZGD-1).

The doctrine of piercing the corporate veil applies only to the company's obligations toward its creditors, and it is not possible to enforce claims of the company against its shareholders.¹⁵⁵

Because piercing the corporate veil is an exception to the fundamental rule of corporate law that shareholders are not liable for the obligations of the (capital) company, the exception should be narrowly interpreted.¹⁵⁶ A typical example in practice whereby the doctrine of piercing the corporate veil comes into play is when shareholders treat the assets of the company as their own personal assets or transfer the company's assets into their personal ownership.¹⁵⁷

The condition for invoking the doctrine of piercing the corporate veil in relation to a shareholder is the existence of a proven and matured claim. The ZGD-1 does not require the company to be insolvent or that bankruptcy proceedings are initiated to assert a claim against shareholders. The literature emphasises that the purpose of the doctrine of piercing the corporate veil is not based on the insolvency of the company,

¹⁵⁵ Zabel, 2006, p. 161.

¹⁵⁶ Judgment of the Higher Court in Ljubljana, No. VSL I Cp 296/2022, 15 March 2022.

¹⁵⁷ Decision of the Supreme Court of the Republic of Slovenia, No. II Ips 186/99, 1 December 1999.

but rather on the abuse of the legal entity. An interpretation that makes insolvency or even the initiation of bankruptcy proceedings a prerequisite for invoking the doctrine of piercing the corporate veil would not be in line with the purpose and rationale of the doctrine. Therefore, the literature accepts the view that if there are grounds for piercing the corporate veil, creditors can assert a claim against shareholders even if the company has not fulfilled its obligations or is unwilling to do so.¹⁵⁸

8.3.2. Joint-Stock Companies

A JSC is a capital company in which shareholders are not liable for the company's obligations (Article 168(3), ZGD-1). An exception to this rule is the doctrine of piercing the corporate veil, which is regulated in Part I of the ZGD-1 under the general provisions applicable to all types of commercial companies. Therefore, shareholders are liable for the obligations of a JSC under the same conditions as shareholders in an LLC (see Chapter VII., C., I).

8.4. Legal Protection of Creditors in Case of Insolvency

8.4.1. Limited Liability Companies

The protection of creditors in the event of a company's insolvency is regulated in the ZFPPIPP. This law governs the financial operations of legal entities, insolvency proceedings for legal and natural persons, and procedures for compulsory dissolution of legal entities (Article 1, ZFPPIPP). Although the ZFPPIPP is the main source of legal protection for creditors in case of a company's insolvency, the ZGD-1 also contains some specific rules in this regard. Regarding the maintenance of the capital of an LLC,¹⁵⁹ the ZGD-1 stipulates that a shareholder who, during the period when shareholders, as prudent entrepreneurs, should have provided the company with own capital, instead granted a loan to the company, cannot enforce a claim for loan repayment against the company in bankruptcy or compulsory settlement proceedings. Such a loan is considered as part of the company's assets in bankruptcy or compulsory settlement proceedings (Article 498(1), ZGD-1). If, during the aforementioned period, a third party granted a loan to the company instead of the shareholders providing own capital, and the shareholder provided collateral for the loan or guaranteed it as a guarantor, the third party can only claim payment of the difference that it did not receive or would not have received from the collateral or guarantee (Article 498(2), ZGD-1). If the company repaid the loan in the last year before the initiation of bankruptcy or compulsory settlement, the shareholder who granted the loan or the shareholder who provided collateral or acted as a guarantor must compensate the company for the repaid loan amount. The shareholder's obligation exists only up to the amount of the loan or the amount for which the shareholder assumed the guarantee, or up to the value of the collateral upon loan repayment. The shareholder is exempt from

¹⁵⁸ Zabel, 2006, pp. 161, 162.

¹⁵⁹ For more on the capital maintenance rules in an LLC, see Chapter 3.

this obligation if the items given to the creditor as collateral are made available to the company for repayment (Article 499(1), ZGD-1).

Regarding a claim for damages that can be asserted against members of the management or supervisory body for their breach of the duty of due care and responsible conduct in performing their duties in the event of a company's bankruptcy, such a claim can also be pursued by the company's creditors (see Chapters VI, D, and VI, F, II).

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9. Slovakia

9.1. Creditor Protection Rules

Creditor protection has been one of the most discussed topics in Slovak corporate discourse lately. It is undeniable that in the normal course of business, the interests of shareholders are protected first, and corporate laws only exceptionally regulate protection mechanisms and claims in favour of creditors. The situation differs when the company runs into financial problems and distress. Then, the interests of creditors take precedence over those of shareholders. The Slovak Commercial Code contains a number of special provisions regulating the protection mechanisms for creditors, which apply in cases of mandatory creation and maintenance of the share capital, reduction and increase of the share capital, the process of changing a legal form, mergers of companies, disqualification of board members, and returning payments

to shareholders. As the protective rules apply to both LLCs and JSCs (as well as simple JSCs), we discuss them further in general and point out only the specificities for each corporate form. The board members' or shareholders' liability regime is governed by the provisions of the Commercial Code. In addition to the Commercial Code, the creditors' protection rules in the event of imminent insolvency (*hrozba úpadku*) or insolvency (*úpadok*) of a company are provided for in Act No. 7/2005 on Bankruptcy and Restructuring.

9.1.1. Share Capital Regulation and Protection of Creditors

Legal provisions governing the share capital changes are aimed at protecting the company's creditors interests. If the share capital is reduced, the Commercial Code formulates the right of unsecured creditors of LLCs and JSCs to have their outstanding claims secured.¹⁶⁰

Further protective mechanisms are stipulated in the JSC legal framework. If a JSC makes unlawful payments to shareholders in connection with a reduction of the share capital, the members of the board of directors are liable as guarantors to the company's creditors for the satisfaction of their unsecured claims if they cannot be satisfied from the company's assets. With the payment of the management board member, the creditor's claim against the JSC ceases and the board member should have a recourse right against the shareholder who received the unlawful payment as the primary debtor of the company.¹⁶¹

Similarly, the managing directors of any capital company are obliged to give notice to all known creditors of the company about the change of corporate form, publish such a notice twice and issue adequate security. If, following the change of corporate form, there is lower registered share capital than prior to the change of corporate form, the managing directors are liable jointly and severally toward the company's creditors whose debts receivable from the company have not been secured.¹⁶²

Creditor protection rules are also formulated in the event of an increase of the company's share capital, if the board of directors makes a false statement of the amount of contributions paid up. In this case, two types of liabilities arise. On the one hand, the managing directors are liable to the company for ensuring the payment of the shareholders' contributions. On the other hand, they are also directly liable to creditors for the company's debts up to the difference between the share capital actually paid up and the amount stated by the board of directors in the statement of the amount of contributions paid up.¹⁶³

160 Sections 215(6) and 147, CC.

161 Csach, 2019, p. 222.

162 Section 69b(8) in connection with Section 215(6), CC.

163 Ovečková et al., 2022, p. 1645.

9.1.2. *Protection of Creditors in Corporate Mergers*

The massive practice of fraudulent mergers, primarily aimed at avoiding the repayment of debts and weakening the position of creditors resulted in stricter regulation of the conditions for corporate mergers in 2017. The new Act No. 309/2023 on Transformation of Companies and Cooperatives currently stipulates that managing directors must refrain from actions aimed at a merger, division, or conversion of the company, or its cross-border equivalents, if it can reasonably be expected that the successor company would be in a state of insolvency or the imminent insolvency, or if the dividing company would become insolvent or be in the vicinity of insolvency. This also applies if the effects of the declaration of bankruptcy, restructuring proceedings, liquidation, or dissolution apply to a company participating in such a corporate transformation.¹⁶⁴ If the managing directors breach their duties and carry out acts aimed at merging the company, although the legal conditions for doing so are not met, they are directly liable to the creditors for damages caused to them by the breach of this duty.¹⁶⁵

9.1.3. *Creditors' Claims Against the Acts of Disqualified Board Members*

Creditor protection is also ensured in the case of actions by persons who have been disqualified from serving as corporate board members (disqualified board members). With effect from 1 January 2016, the Slovak legislation contains Section 13a of the Commercial Code, according to which a disqualified person who acted on behalf of the company after his disqualification and before the disqualification was registered in the Commercial Register shall be liable for the company's debts to its creditors. Thus, this rule protects the company as well as third parties. This sanction in the form of a guarantee is reinforced by the exclusion of recourse of a managing director against the company. Because of the mandatory nature of the provision, the abovementioned rule cannot be modified, even if the consent of a third party is provided.¹⁶⁶

9.1.4. *Other Creditors' Protection Rules*

The Slovak legislation also contains other mechanisms to prevent shareholders from taking out the company's assets to the detriment of creditors. These include the prohibition on repayment of contributions, strict conditions for the distribution of profits, the prohibition on the acquisition of own shares, and the obligation to create a reserve fund.¹⁶⁷ The protection rules include those governing the concept of a company in crisis (*spoločnosť v kríze*), which we discuss below.

A special feature of the Slovak legislation is the so-called creditor's derivative action. If a company has suffered damage as a result of a breach of duty by a board member, the creditor may enforce a claim for damages against the board member

164 Section 6, Act No. 309/2023 on Transformation of Companies and Cooperatives and on Amendments and Supplements to Other Acts.

165 Mrázová et al., 2021, p. 162.

166 Ovečková et al., 2022, p. 192.

167 For the rules on the maintenance of share capital, see Chapter 2.

by bringing an action directly against the company's board member. In practice, however, such an action is rarely brought because the creditors have a strict burden of proof. Creditors must not only prove that the company has a claim for damages against the board member, but also that their claim against the company exists and that it is impossible to satisfy it from the company's assets.¹⁶⁸ The impossibility of satisfaction is of an objective nature owing to a lack of company assets rather than a subjective reluctance by the company to fulfil its obligations toward its creditors. Creditors' claims against board members do not expire if the company enters into a settlement agreement with board members or waives its claims for damages.¹⁶⁹ In bankruptcy proceedings, the creditor's claims against the management board members are exercised by the bankruptcy trustee.

9.2. Specific Rules Applicable in the Area of Insolvency

The amendment to the Commercial Code, which entered into force on 1 January 2016, has expressly stipulated the situations in which a company does not have sufficient capital and is in crisis. The concept of the company in crisis applies to LLCs, JSCs, and simple JSCs, but not to specially regulated entities, such as banks, insurance companies, and stock exchanges. The Slovak regulation on this matter has been highly influenced by the Austrian definition of a company in crisis and German legislation. A crisis is the financial situation of a company when it is insolvent or at risk of becoming insolvent (imminent insolvency).¹⁷⁰ A company is also in crisis if its equity-to-debt ratio is less than 8:100. The aim of the later regulation is to protect creditors in a period when the company is not yet insolvent, but its economic indicators are not pointing in a positive direction. The company's accounting records are used to determine this ratio.

Section 4 of the Bankruptcy and Restructuring Act provides that a company is at the stage of imminent insolvency if it can reasonably be expected to become insolvent within 12 calendar months. The company, as a debtor, is obliged to prevent insolvency. If insolvency is imminent, the company must act proactively and take appropriate and reasonable measures without undue delay to avert it and overcome the crisis. Informing creditors about the crisis is part of the management board's professional duty of care.¹⁷¹ Members of the management board are obliged to take into consideration the common interests of creditors, take measures to overcome the distress situation and, if they do not have sufficient expertise and experience, seek expert advice to assess whether the company is at imminent risk of becoming insolvent and what measures should be taken to avoid it.¹⁷² The Bankruptcy and Restructuring Act does not specify what particular steps should be taken to achieve the economic recovery of a company. However, it is possible to consider convening a general meeting at which solutions

¹⁶⁸ Patakyová et al., 2021, p. 679.

¹⁶⁹ Ibid., p. 680.

¹⁷⁰ Section 67a(1), CC.

¹⁷¹ Ovečková et al., 2022, p. 652.

¹⁷² Section 4a, Act on Bankruptcy and Restructuring.

would be presented, such as an increase of the share capital or other capital funds, a change in the business strategy that would adjust the equity-to-debt ratio so that the company could overcome the crisis, or further steps in order to reach an agreement with creditors to resolve the insolvency in the form of an informal restructuring.¹⁷³

A company in imminent insolvency can resolve it through preventive procedures regulated by Act No. 111/2022 on the resolution of imminent insolvency, the result of the implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Effective from 17 July 2022, these preventive tools comprise public preventive restructuring and non-public preventive restructuring. The preventive procedures should become an effective tool for timely resolution of the debtor's unfavourable financial situation, allowing them to continue their operations, maintain their viability, and avoid insolvency. It aims to maximise the total value for creditors compared to the outcomes of the bankruptcy proceedings.

If the company is already insolvent, the special rules of Bankruptcy and Restructuring Act apply. The act distinguishes two insolvency situations: when the company has excessive debt (*platobne neschopná*); and when it is over-indebted (*predĺžená*). A legal entity is considered insolvent if it is unable to fulfil at least two pecuniary obligations to more than one creditor within 90 days after the due date. To assess the debtor's solvency, all claims that originally belonged to only one creditor during the 90 days preceding the filing of the bankruptcy petition are considered as one claim.¹⁷⁴ A company is over-indebted if it has more than one creditor and the value of its debts exceeds the value of its assets (negative equity). These debts do not include subordinated debts and debts to related parties. However, the expected results of the continued management of the assets and the expected results of the continued operation of the business are taken into account.¹⁷⁵

9.2.1. *Requalification of Related Creditors' Loans to Equity*

During a company's crisis, two significant changes take place. Besides the above-mentioned extended duties of management board members during crisis, the rules on equity substitution apply. If the company is at risk of becoming insolvent, the Slovak legislation encourages the shareholders to resolve the imminent insolvency primarily by increasing the share capital and not by granting a loan to the company, because as creditors, they could demand early repayment from the company. This is achieved in such a way that a payment made to the company in the form of a loan by the related creditors is requalified by means of a legal fiction to equity and thus

173 Mrázová et al., 2021, p. 175; Ovečková, Csach, and Žitňanská, 2020, p. 121.

174 Section 3(2), Act on Bankruptcy and Restructuring.

175 Mrázová et al., 2021, p. 172.

subject to a different repayment regime. Hence, loans or similar payments made by shareholders or other related creditors specified by law, to the company during the crisis are temporarily requalified as the company's equity until the crisis is over. The temporary prohibition on the repayment of these loans applies.

For a particular loan to be requalified as equity, several conditions must be met. First, the payment must be in the form of a loan or other payment in cash or in kind that the related creditor expects to be repaid. The related creditor is a person who fulfils the characteristics specified by law, in particular, it can be a shareholder, a member of the management board, a member of the supervisory board, a silent partner or another related party.¹⁷⁶ Moreover, the payment must be made to the company in crisis and the creditor must know or should have known about this fact, as the information about the crisis is apparent, for example, from the company's annual or extraordinary financial statements. The law explicitly provides for exceptions to the requalification of loans as equity. These include, in particular, payments made to a company during a crisis to overcome the crisis as part of a restructuring plan, a short-term loan, a supplier loan with deferred repayment, or payments made to the company gratuitously.¹⁷⁷

9.2.2. *Prohibition on Repayment of Requalified Loans*

The Slovak legislation not only sets out the conditions for requalification of loans to equity if the payment was made during the company's crisis, but also clearly formulates the consequences thereof. A requalified loan cannot be repaid to the person who made the payment in a time of crisis or if the company would be in crisis as a result of the repayment of the payment in question together with related charges (e.g. default interest) and contractual penalties.¹⁷⁸ There are no time limits set for the repayment during this period. This means that a loan granted by a shareholder to the company becomes a loan with deferred repayment for as long as the company is in crisis, so that the company does not default.¹⁷⁹ Prohibited methods of repayment include set-off, realisation of a pledge by sale of the pledged assets, enforcement, or any similar method of repayment of such payments.¹⁸⁰

9.2.3. *Consequences of a Breach of the Prohibition on Repayment of Requalified Loans*

If a requalified loan is unlawfully repaid, the person who receives the payment is obliged to return the value of the payment to the company. The members of the management board are obliged to recover the unlawfully repaid payment. Those members who were in office at the time when the payment was repaid in breach of the prohibition on repayment are jointly and severally liable for returning it to the company. In addition, they are liable jointly with former members of the management board

176 Section 67c(2), CC.

177 Section 67e, CC.

178 Section 67f(1), CC.

179 Patakyová et al., 2021, p. 517.

180 Section 67f(2), CC.

who were in office during the period in which the company did not claim returning the payment and who, having regard to all the circumstances, knew or could reasonably have known of this obligation.¹⁸¹ This liability also applies to any subsequent members of the management board who are in office at the time when the claim for returning the unlawful repayment exists. The essential difference in the liability of these persons lies in the possibility of exemption from liability. While the members of the management board who were in office at the time of the unlawful repayment cannot be exempted from their liability, subsequent members of the management board can be exempted if they prove that they did not know or could not have known of the obligation to make the claim.¹⁸²

The statutory guarantee of the management directors is a form of security for the company's primary claim for returning a payment unlawfully repaid to a related party; thus, the managing directors are guarantors toward the company itself as well as toward external creditors. If external creditors claim liability against the management board, the management board is obliged to pay exclusively to the company. The liability to the company's external creditors is extinguished by returning the unlawful repayment to the company.¹⁸³

9.2.4. Security Provided by Related Creditors

The Slovak legislation also provides for a situation in which a related party does not grant a credit (loan) to the company during a crisis, but instead secures the company's debt to an external creditor by a guarantee, a pledge or other security that can be used to satisfy the external creditor. The external creditor can then claim payment of the debt directly from the party providing the security (the related party guarantor) without having to make a written demand on the debtor company to repay the debt.¹⁸⁴ Such a legal concept, in principle, overrides the principle of subsidiarity of security, because a claim can be asserted directly against a shareholder or other related creditor who provided the security in question, irrespective of its assertion against the company as the primary debtor.¹⁸⁵

In addition, if a company has repaid a debt secured by a shareholder directly to an external creditor (while the security was provided during the company's crisis), the company is entitled to demand compensation from the shareholder (as the related party) for the repayment of the secured debt. The management board of the company is obliged to comply with such a demand without undue delay. Thus, the shareholder is obliged to compensate the company for the value of the security in the form of a payment in cash or in kind.

181 Ibid.

182 Ovečková et al., 2022, p. 672.

183 Csach, 2019, p. 222.

184 Section 67g, CC.

185 Ovečková et al., 2022, p. 674.

9.3. *Limited Liability and Veil-Piercing*

The Slovak Commercial Code regulates the shareholder's liability for the company's debts during the company's existence and after the company's dissolution. Shareholders of an LLC are liable for the company's debts only up to the amount of their unpaid contribution. The extent of shareholders' liability is determined as the difference between the registered amount of the contribution paid up by the shareholder and the total amount of the shareholder's contribution.¹⁸⁶ After the winding up of the company, the shareholders are liable for the company's debts up to the amount of their share in the liquidation surplus.

The general concept of piercing the corporate veil, which is applied in foreign jurisdictions, is not generally regulated in Slovak law and has not been established by case law. As of 1 January 2018, there has been a slight change in this respect, when the Slovak legislation provided for a special concept for piercing the corporate veil by introducing external liability of the controlling entity (majority shareholder) for damages caused to the creditors of the controlled entity (the company) as a result of causing the company's insolvency.¹⁸⁷ This particular Slovak concept was inspired partly by German case law on the destructive interference of a shareholder in a company and partly by Czech legislation.

Pursuant to Section 66a (1) of the Commercial Code, a controlled entity is a company in which a certain person has a majority of the voting rights based on the number of shares in the company to which a majority of the voting rights are attached, or based on a voting agreement, regardless of the validity or invalidity of such an agreement. Hence, factual control suffices.

The Commercial Code explicitly formulates the conditions under which a creditor may have claims directly against a shareholder as a controlling entity. The burden of proof lies on the claimant – the creditor. Therefore, it is burdensome for the creditors, who are not aware of the internal circumstances of the company, to bear the burden of proof. For the controlling person – the shareholder – to be directly liable for damages to creditors, several conditions must be met.

First, the external liability toward the creditor must be linked to the actions of the controlling person that have significantly contributed to the company's insolvency. In other words, the controlling person must have actively contributed to the company's insolvency. These acts may include instructions given by the general meeting to the members of the management board, actions of the controlling person relating to the business strategy or *vis-à-vis* third parties.

The second requirement for the liability claims against the controlling person is the insolvency of the controlled person, or the presumption of insolvency, for instance, where bankruptcy is not declared for lack of assets. The causal link between the controlling person's actions that have contributed significantly to the insolvency of the controlled company and the insolvency of the company must be proven. Moreover,

¹⁸⁶ Patakyová et al., 2022, p. 506.

¹⁸⁷ Section 66aa, CC.

the creditor must have suffered damages as a result of the company's insolvency. There is also a rebuttable presumption as to the estimated amount of damages. In the absence of proof of a different amount, the creditor's estimated amount of damages is the amount of the creditor's unsatisfied claims after the suspension of bankruptcy proceedings.¹⁸⁸

The controlling person is freed from its liability if it is proven that it acted in an informed manner and in good faith in accordance with the interests of the controlled company. The grounds for exemption are formulated differently in this case than in the case of the management board's liability for damages. Some scholars point out that the current legislation is deficient as the controlling shareholder cannot exempt himself from his liability by invoking the interests of the group and the mechanism of compensation for negative interference.¹⁸⁹

Furthermore, if the controlling person directly carries out activities that fall within the powers of the management board, he shall also be liable as the *de facto* director.¹⁹⁰ In this situation, the controlling shareholder has the same responsibility as a member of the management board and the same liability associated with breaching the statutory duty of care and duty of loyalty.

9.4. Legal Protection of Creditors in Case of Insolvency

As already stated, a company is obliged to monitor, control and evaluate its financial situation on an ongoing basis and to take appropriate measures to avoid its insolvency. The worse the economic situation of the company, the more frequently the management board should monitor its economic situation. The longer the debtor waits to file a petition for bankruptcy, the more difficult it is to recover the debtor's assets for subsequent distribution to the debtor's creditors in accordance with the *pari passu* principle. The company as debtor and its management board are obliged to file a petition for bankruptcy within 30 days of becoming objectively aware, or from the date when they could have become aware, of the company's insolvency. As already mentioned, the Act on Bankruptcy and Restructuring distinguishes two insolvency situations. Insolvency (*platobná neschopnosť*) is related to the debtor's ability to pay their monetary debts as they become due, and is tested through the liquidity test (cash flow test). Problems with liquidity are generally easier to identify externally. The second form of insolvency – over-indebtedness (*predĺženie*) – is typically tested through the balance sheet test, which compares the value of the entrepreneur's assets against the amount of their debts. In case the obliged persons fail to duly file bankruptcy petition, they can face several civil and criminal law consequences. The bankruptcy law stipulates two legal consequences for the member of the management board: (I) liability for damage caused to the company's creditors and (II) duty to pay a contractual penalty pursuant to Section 11 (2) of the Bankruptcy and Restructuring Act. Aiming to prevent

188 Section 66aa(4), CC.

189 Ovečková et al., 2022, p. 605.

190 Ibid., p. 571.

the threat of satisfying creditors, criminal liability under the Slovak Criminal Code may also be triggered by the failure to file a bankruptcy petition in time.¹⁹¹

9.4.1. Liability for Damages Caused by a Breach of the Duty to Duly File a Petition for Bankruptcy

In force from 1 January 2018, the Bankruptcy and Restructuring Act also provides for the special liability of the management board members (and other persons authorised by law to file a petition for bankruptcy) for damages directly caused to creditors as a result of failure to comply with the duty to duly file a petition for bankruptcy. Pursuant to Section 11a of the Bankruptcy and Restructuring Act, liability for damages affects only those persons obliged to file a petition for bankruptcy on behalf of the debtor company, not the company itself. The liability also arises when there is not even a declaration of bankruptcy owing to the company's prior removal from the Business Register or when the proceedings are discontinued because of insufficient assets.

According to Section 11a of the Bankruptcy and Restructuring Act, the creditor's damage is the difference between the amount the creditor received based on the distribution of assets and the amount the creditor would have received if the bankruptcy petition had been duly filed.¹⁹² However, determining the amount of such damage can be extremely difficult in practice. Apparently for this reason, the legislation has provided for a rebuttable presumption of the amount of damage in Section 11a(3) of the Bankruptcy and Restructuring Act. This section sets the amount of the damage equal to the creditor's claim that has not been satisfied after the insolvency proceedings were discontinued or set aside owing to insufficient debtor's assets, or the enforcement proceedings were closed because of insufficient debtor's assets. The burden of proof as to the amount of damage caused is thus shifted to the obliged person (in practice, mostly a member of the management board). As this is a rebuttable presumption, the creditor can prove a different amount of damage. The creditors must not only prove that they have suffered damage, but also that their claim was duly filed.

Liability for damages also comes into consideration if the bankruptcy petition was filed by another person and it is proved that the management board failed to fulfil its duty to file for bankruptcy. The Slovak bankruptcy regulation stipulates a limitation period of 1 year for the exercise of the creditor's right to claim damages. In addition to liability for damages, the person obliged to file a petition for bankruptcy is disqualified from holding office as such a court's decision also qualifies as the disqualification decision.

A person obliged to file a petition for bankruptcy on behalf of a company may be exempted from liability if it is proven that the person (a) acted with professional due care, (b) was appointed as a member of the management board during the insolvency for the purpose of overcoming the bankruptcy and filed a petition for bankruptcy without undue delay thereafter, or (c) instructed the trustee to prepare a restructuring

¹⁹¹ Section 242(1), CC.

¹⁹² Ďurica, 2019, p. 87.

report and filed a petition for restructuring, on the basis of which the court authorised the restructuring.¹⁹³

9.4.2. *Duty to Pay a Contractual Penalty to the Company*

Breach of the duty to file a bankruptcy petition on time is sanctioned by a contractual penalty stipulated by law. The bankruptcy law sets forth the obligation of a management board member (or other person obliged to file a bankruptcy petition) to pay a legal contractual penalty equal to half of the lowest value of the share capital of a JSC. Because the minimum share capital is currently 25,000 euro (EUR), half of this amount (i.e. 12,500 EUR), constitutes the board member's penalty for unduly filing the bankruptcy petition. In the case of larger companies, this sanction is disproportionately low, and the actual damage caused by the management board in the event of a failure to file a petition for bankruptcy in a timely manner is often much greater.¹⁹⁴ Because the creditor of the claim is the company itself, it is the company that is entitled to recover it from the members of the management board. Any agreement between the company and management board members that limits or excludes the payment of the penalty is prohibited. The company may not waive its claim to payment of the contractual penalty or enter into a settlement agreement in respect of that claim. Where the actual damage is higher than the contractual penalty, the creditor's right to claim actual damages exceeding the contractual penalty is not affected. The court's decision on a contractual penalty is also the decision on the disqualification of the corporate board member.

9.4.3. *Transaction Avoidance in Bankruptcy*

In financial distress, the company may transfer its assets to third parties, or the company's creditors, upon being informed of the imminent insolvency of the company and can attempt to recover their claims before the actual bankruptcy proceedings. However, as bankruptcy law is based on the principle of proportional satisfaction of creditors (*pari passu* principle), fraudulent transfer actions seek to avoid certain pre-bankruptcy transactions so that the value of such transactions can be recovered and redistributed to the company's creditors. Thus, the main purpose of such a protection mechanism for creditors is to achieve a higher degree of satisfaction of the creditors' claims against the company that performed the fraudulent acts prior to the bankruptcy proceedings. The specific prerequisites for the voidability of juridical acts in bankruptcy proceedings include (I) the declaration of bankruptcy; (II) the existence of a juridical act performed by the debtor (the company) concerning the company's assets; and (III) the deprivation of the claim of one of the bankruptcy creditors, that is, the creditors who lodged their claims in bankruptcy.

A bankruptcy creditor is deprived of his claim if the claim cannot be satisfied from the company's assets. Depriving juridical acts are mainly gratuitous juridical

193 Section 74a(5), Act on Bankruptcy and Restructuring.

194 Mrázová et al., 2021, p. 183.

acts without an adequate consideration, by which the company has provided a performance of a higher value than the usual price that the company received or would receive on the basis thereof.¹⁹⁵ A juridical act without adequate consideration is voidable if it caused the company's insolvency or was performed during the company's insolvency. In general, only juridical acts without adequate consideration which were performed within 1 year prior to the opening of bankruptcy proceedings are voidable. If a juridical act was performed without an adequate consideration in favour of a party related to the debtor company, it is voidable if performed within the 3 years prior to the start of bankruptcy proceedings.

Another specific type of transactions which are voidable are preferences.¹⁹⁶ It is a juridical act by which a company has paid, in whole or in part, a pecuniary claim otherwise payable only after the declaration of bankruptcy, has secured a debt later than the date on which it arose, has agreed to modify or substitute a debt to its detriment, or has otherwise unjustifiably favoured some of the company's creditors over other company's creditors. Similarly, where a company has wholly or partly waived its right, has wholly or partly discharged a debt of its debtor, has agreed to modify its right to its detriment or has otherwise unreasonably disadvantaged itself to the detriment of its creditors, such juridical acts are also voidable if they caused the company's insolvency or were performed during the company's insolvency.¹⁹⁷ Preferential juridical acts performed within the year prior to the opening of bankruptcy proceedings may be successfully avoided. For related party preference transactions, the period of 3 years applies.

Additionally, the law recognises the so-called depriving juridical act in a narrower sense. It is a juridical act performed by the debtor with the intention of depriving his creditors of their claims, and this intention was or should have been known to the other party.¹⁹⁸ However, only depriving juridical acts performed within the 5 years prior to the opening of bankruptcy proceedings are voidable.

The right to avoid a juridical act may be exercised by the trustee or the creditor, the latter only if he has requested the trustee to avoid the juridical act and the trustee has not complied with the request within a reasonable time. The right to avoid a juridical act may be exercised by *actio pauliana* or against the obliged person in writing and must be exercised within a mandatory period, otherwise it lapses.

If the court decides that a juridical act is null and void, it is declared *vis-à-vis* all the bankruptcy creditors. Thus, the bankruptcy trustee is entitled to enter the property acquired by such a null-and-void act in the bankruptcy estate inventory. The trustee or the creditor may demand that the obliged person provide monetary compensation in the bankruptcy estate for the property, right or other property value which he has acquired from the voidable juridical act.

195 Section 58, Act on Bankruptcy and Restructuring.

196 Section 59, Act on Bankruptcy and Restructuring.

197 Dolný, 2021, p. 27.

198 Ibid., p. 42.

The protection of creditors, who have the right to satisfy their claims in a manner consistent with the principles of bankruptcy and restructuring proceedings, is also ensured by criminal law. Act No. 300/2005, the Criminal Code includes two property offenses, which focus on a situation in which the satisfaction of the creditor is even partially thwarted. This includes the criminal offense of harm done to a creditor (Section 239, Criminal Code) and the criminal offense of preferential treatment of a creditor (§ 240, Criminal Code).

10. Conclusions

Across the eight systems surveyed, creditor protection in limited liability and JSCs converges on a mixed architecture that couples *ex-ante* capital-maintenance/protection disciplines, analysed in detail in Chapter 2, with *ex-post* insolvency controls and targeted personal liabilities. The equilibrium each jurisdiction creates between these pillars varies, but some common threads are evident: limited liability for equity is preserved as the default, yet ring-fenced by tests on distributions; avoidance powers in collective proceedings; and calibrated pathways to reach insiders (directors, dominant shareholders, shadow controllers) when conduct, timing, or structure places creditors at abnormal risk.

The classic capital-maintenance model remains most programmatic in Croatia and, in a different doctrinal register, Poland and Slovenia. Croatia defends a capital-oriented paradigm in which fixed share capital and its maintenance are the principal counterweight to shareholders' non-responsibility, notwithstanding sustained criticism that static thresholds poorly track firm-specific risk. Poland preserves robust maintenance rules while grafting modern governance tools, such as the business-judgment rule for board members, thereby seeking to discipline payout and formation-stage misstatements without unsettling informed risk-taking. Slovenia reinforces the prohibition on return of contributions with a general statutory veil-piercing clause applicable across company forms, allowing courts to look past form where shareholders appropriate corporate assets or externalise losses. By contrast, the Czech Republic combines traditional maintenance with a pervasive solvency test: distributions, financial assistance, and analogous value outflows are screened against the company's ability to avoid bankruptcy on the evidentiary record before the managing body; gratuitous benefits to shareholders are narrowly carved out and, if misapplied, unwound through managerial liability and restitutionary duties.

Pre-insolvency governance duties, those that operate "in the vicinity of insolvency", show meaningful divergence but also clear signs of Europeanisation. Croatia and Poland require the board to convene the owners when accumulated losses erode stipulated fractions of capital, a signalling device meant to mobilise remedial equity or strategic retrenchment. Romania's 2022 reform pushes further by articulating an explicit duty to consider creditor and stakeholder interests and to adopt reasonable loss-minimising measures once financial difficulty emerges, with breach feeding

either corporate claims *ex ante* or insolvency-based liability *ex post*. Hungary and Slovakia refine the moment of duty-shift with statutory markers: Hungarian law centres on the objectively foreseeable inability to pay and reorients managerial obligations toward creditor-regard; Slovakia's "company in crisis" regime operationalises both a liquidity horizon and a balance-sheet ratio, hardwiring early-warning obligations and, crucially, re-characterising related-party finance to prevent debt-equity substitution when equity support would be the norm. Serbia stands out for not codifying a duty-shift; nonetheless, its requirement to convene an extraordinary meeting upon serious loss functions as a pre-insolvency checkpoint, and courts can recalibrate the standard of care contextually as distress deepens.

The most potent outer perimeter of creditor protection lies in insolvency law. All systems embrace *pari passu* within creditor classes and empower an estate representative to attack pre-petition transactions that skew equality or deplete the common pool. Romania's catalogue is exacting: gratuitous acts, undervalue transfers, late-stage preferences, premature payments of unmatured debts, and collusive arrangements within 2 years (with shorter windows for certain categories) are voidable, subject to an "ordinary course of business" safe harbour. Slovakia's avoidance regime maps a similar terrain with calibrated look-back periods, distinguishing undervalue acts, preferences, and intentional creditor-defeating transactions, and also allows a creditor to act if the trustee stands idle after being asked to proceed. Hungary integrates avoidance with managerial liability by insisting that any asset-reduction quantum used to ground personal liability be net of claw-back recoveries, thereby avoiding double counting. These tools are complemented in multiple systems by criminal prohibitions on frustrating enforcement, tactical bankruptcy, and preferential payments close to insolvency (visible most explicitly in Czech and Polish criminal codes and mirrored in Slovak law), underscoring the public interest in the integrity of collective proceedings.

Personal exposure of managers for late filing or loss-exacerbating conduct is the shared workhorse of creditor protection, but it is structured differently. Czech law couples a duty on the debtor's officers to file "without undue delay" upon insolvency with a creditor-specific damages action pegged to the delta between the admitted claim and the dividend received; separately, in formal insolvency, courts may order replenishment of liabilities or claw-back from former and *de facto* directors who contributed to failure, with proceeds augmenting the estate for the benefit of all creditors. Poland's architecture layers civil, administrative, and criminal levers: a short, mandatory filing window in the Bankruptcy Law; joint and several exposure of LLC and simple JSC managers when enforcement against the company proves ineffective unless statutory defences are met; and specialised rules, including tax and social-security regimes, which pierce managerial shields when public claims go unpaid. Hungary's two-step mechanism initially crystallises liability through a declaratory judgment quantifying the asset shortfall attributable to breach after the onset of insolvency risk; only once liquidation closes do creditors pursue proportional money judgments up to that amount, with interim security and a guarantor backstop

against majority influencers to prevent judgment-proofing. Slovakia couples a creditor damages action for late filing, assisted by a rebuttable presumption pegged to the unsatisfied claim, with a statutory penalty owed to the company and automatic managerial disqualification, and it gives teeth to the “company in crisis” regime through director guaranties to recoup unlawful repayments of requalified insider loans. Serbia and Slovenia both allow creditors to leverage corporate claims where the estate or company fails to act, and Serbia’s insolvency law reinforces equal treatment with prohibitions on payments after the bankruptcy trigger has arisen, enforceable by the administrator and, in certain configurations, by individual creditors.

Veil-piercing and group-law analogues provide a heterogeneous picture of how far each system will go to reach behind the entity when corporate separateness is instrumentalised against creditors. Romania, Slovenia, Croatia, and Serbia codify general veil-piercing standards that focus on abuse of legal personality, asset commingling, or deliberate depletion in the shadow of foreseeable non-payment. In many cases, the law additionally disables repeat offenders from holding managerial positions (for a decade in the case of Romania) once liability is judicially established. The Czech Republic’s “influential person” regime is a functional veil-piercing device: anyone who substantially influences the company’s conduct to its detriment faces both a duty to indemnify the company and a secondary, creditor-facing liability when influence causes non-payment. The system has important carve-outs for properly disclosed and genuinely unified groups and with targeted exceptions where disclosure is absent, unified management is a sham, or insolvency or uncompensated harm intervenes. Poland’s recent holding-law reform takes a different path: instead of general veil-piercing, it imposes parent-company damages liability to the subsidiary’s creditors where loss flows from binding instructions, and, when enforcement fails, presumes damage equal to the unpaid claim unless the parent disproves fault or causation, functionally convergent with veil-piercing while preserving the formal logic of group instructions. Hungary layers two vectors: a general abuse-of-limited-liability clause activated on dissolution without successor when unpaid claims remain, and a special liability for qualified majority owners whose sustained detrimental practices precipitate failure; both regimes are calibrated by causation and proportionality, but allow joint and several exposure among wrongdoers and *post-hoc* contribution claims. Slovakia, long an outlier without a general veil-piercing doctrine, now recognises external liability of the controlling shareholder where its conduct significantly contributes to insolvency, with a rebuttable presumption of loss measured by the unsatisfied claim after proceedings stall or terminate for lack of assets.

Insider finance is a recurring fault line, and the systems have moved decisively to align incentives. Slovakia’s requalification of related-party loans to equity during crisis, paired with a moratorium on repayment and restitutionary and guaranty-style obligations for directors who permit breach, is the most explicit anti-arbitrage device. Slovenia’s rules analogously subordinate shareholder loans by treating them as equity substitutes in bankruptcy or compulsory settlement and claw back repayments made in the twilight period. Poland’s hierarchy pushes shareholder loans down

the waterfall when the lender holds a significant stake, and Romania subordinates loans from 10% of shareholders while preserving secured status where collateral was properly created, thereby curbing last-minute relabelling of risk capital while respecting reliance interests of bona fide secured creditors. Hungary and Serbia both treat insider repayments in the vicinity of insolvency with particular suspicion, allowing them to ground managerial exposure where they prefer insiders over general creditors without a credible turnaround rationale.

Two persistent implementation challenges are evident across the region. The first is information asymmetry: many creditor-facing liabilities either require proof of causal contribution to insolvency or hinge on a creditor's ability to show abuse, influence, or asset diversion that is often opaque to outsiders. Jurisdictions have responded by reallocating some burdens – through presumptions of damage in Slovakia and Hungary, through per se subordination or recharacterisation of insider finance in Slovakia and Slovenia, and through procedural devices that centralise standing in an insolvency administrator but allow creditor substitution when the fiduciary fails to act, as in Romania and Slovakia. The second implementation challenge concerns timing: late filings, twilight repayments, and value-destructive gambles are difficult to police if the legal trigger points are either too nebulous or too rigid. Here the trend is toward objective or semi-objective markers, from the Czech Republic's solvency test for distributions, through Hungary's and Romania's articulation of creditor-regard duties once non-payment looms, to Slovakia's defined "crisis" thresholds; even Serbia's absence of a codified duty-shift is offset by hard triggers to convene owners on serious loss and by strong post-trigger payment prohibitions in insolvency.

The eight systems reflect a maturing Central- and Eastern-European creditor-protection ecosystem that is converging on a hybrid model: capital rules that discipline ordinary-course payouts; early-warning and duty-shift frameworks keyed to cash-flow realities; strong avoidance powers to restore the estate; targeted civil, administrative, and criminal liabilities to individual decision-makers and controlling actors; and anti-subordination regimes that neutralise insider opportunism when equity support is warranted. Differences remain, in the locus of standing, in the breadth of veil-piercing, in the precision of pre-insolvency duties, and in remedial metrics, but the functional equivalence is striking. Each system recognises that limited liability is a means, not an end: it catalyses enterprise only when matched by credible mechanisms ensuring that, at the point at which business risk metamorphoses into creditor harm, those who controlled the risk cannot externalise the loss with impunity.

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