Duties of Directors of Commercial Companies Facing the Likelihood of Insolvency

Đuro M. Đurić[1], Vladimir M. Jovanović[2], and Stevo Škrbić[3]

[1]Union Nikola Tesla University, Belgrade
Faculty of Business Studies and Law
[2]University of Business Academy, Novi Sad
Faculty of Law for Commerce and Judiciary

[3]Union Nikola Tesla University, Belgrade
Faculty of Business Studies and Law

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Author Note

Đuro M. Đurić https://orcid.org/0000-0002-8101-5508
Vladimir M. Jovanović https://orcid.org/0000-0003-1741-9062
Stevo Škrbić https://orcid.org/0009-0001-9094-7593

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Corresponding author: Đuro M. Đurić
E-mail: djuro.mdjuric@gmail.com

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Abstract

Following the adoption of EU Directive No. 1023/2019 on preventive restructuring frameworks and its implementation into the national legislation of EU Member States, as well as beyond the EU, specific statutory duties have been introduced for directors of commercial companies facing the likelihood of insolvency. In the course of regular business operations, directors owe specific duties to the company and its shareholders. Until recently, special duties towards the company's creditors arose only upon the occurrence of a ground for insolvency. The moment at which such special duties towards creditors arise has now been shifted to the pre-insolvency stage, thereby expanding the scope of responsibilities inherent in responsible corporate governance. In such circumstances, directors of a debtor company primarily owe particular consideration to the interests of creditors, shareholders, and other stakeholders. Furthermore, they are obliged to take appropriate steps to prevent the insolvency of the company. Finally, they must refrain from actions or omissions that, either intentionally or through gross negligence, jeopardize the sustainability of the company's business operations. These duties represent the minimum standard established by the provisions of the Directive, allowing Member States to introduce a broader range of obligations. However, the Directive does not define what constitutes the likelihood of insolvency, nor does it specify the content of the duty of care. Moreover, it fails to clarify which other stakeholders are encompassed by this duty of care. This gives rise to numerous questions, such as the precise moment at which special duties of care arise, the substance of such duties and their potential breach, and the identification of the persons who are beneficiaries of these duties. The aim of this paper is to analyse the newly introduced special duties of directors, the manner and scope of their implementation into national legal systems, and the practical consequences of their application. The research is based on the normative method, complemented by a comparative legal analysis of the implementation of the Directive's provisions, while case studies provide insight into practical application.

Keywords: directors' duties, commercial company, corporate governance, likelihood of insolvency, EU.

Introduction

Article 19 of Chapter 5 of Title II of Directive (EU) No. 1023/2019 on preventive restructuring frameworks (hereinafter: the *Directive*) (EU Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks) lays down the duties of directors of commercial companies in situations where there is a likelihood of insolvency. These provisions establish a minimum standard which EU Member States are required to observe when adopting legislation implementing the Directive into their national legal systems. Directors are required to take into account the interests of creditors, shareholders, and other stakeholders, to take appropriate steps to avoid insolvency, and to refrain from intentional acts or acts of gross negligence that may jeopardize the sustainability of the company's business operations.

Together with early warning tools and access to relevant information, as well as out-of-court and judicial instruments for preventive restructuring and mechanisms facilitating negotiations on a restructuring plan, these duties form a comprehensive legal framework for companies opting to preserve business continuity and safeguard employment through preventive restructuring. The newly introduced duties constitute a significant extension of the responsibilities inherent in responsible corporate governance.

However, the provisions of the Directive do not specify what exactly constitutes the likelihood of insolvency, nor do they clarify the point in time at which such a likelihood arises. Furthermore, the content of the duty of care owed to creditors, shareholders, and other stakeholders remains undefined. Given that the interests of these groups may be conflicting, the question arises as to which interests should take precedence in directors' decision-making. Finally, it is unclear which persons fall within the category of "other stakeholders" to whom directors owe a duty of care.

Such an approach leaves considerable discretion to national legislators to regulate these issues in divergent ways, which may result in uneven legal treatment rather than harmonisation. In all EU Member States, the provisions of the Directive were transposed into national legislation by the end of 2022. Outside the EU, Ukraine has implemented the Directive through amendments to its Insolvency Law adopted in 2024 (Law on Amendments to the Code of Ukraine on Bankruptcy Procedures, No. 3985-IX), while North Macedonia prepared a draft comprehensive Insolvency Law as early as 2021 (North Macedonia, Draft – Insolvency Law, 2021). The Republic of Serbia, by contrast, has not undertaken legislative action in this respect; consequently, all duties of company directors in the pre-insolvency phase are currently grounded in the provisions of the Law on Business Companies. Accordingly, the first part of this paper analyses the concept of the likelihood of insolvency. The second part addresses the notion of the special duties of directors in situations where such a likelihood exists. The third part is devoted to the subjects upon whom these special duties are imposed, while the fourth part examines the beneficiaries of directors' special duties, in particular creditors. Finally, the fifth part discusses the forms of breach of these special duties and the possible legal remedies available to affected stakeholders.

Likelihood of Insolvency

With regard to insolvency and the likelihood of insolvency, Article 2(2) of Directive (EU) No. 1023/2019 on preventive restructuring frameworks does not provide a definition, but instead refers to the provisions of national law. Consequently, depending on the approach adopted by national legislators, the concepts of insolvency and the likelihood of insolvency may be regulated either separately—within legislation governing preventive restructuring and insolvency law—or jointly within a single insolvency statute or commercial code. In this manner, the Directive leaves room for divergent definitions and interpretations of the crucial moment at which the special duties of company directors arise. This may have a negative impact on the harmonisation of directors' duties across EU Member States, and beyond. In this respect, judicial practice will play a particularly important role.

The most commonly recognised grounds for insolvency are persistent inability to pay, imminent inability to pay, and over-indebtedness. This approach is adopted by the German Insolvency Code (Insolvenzordnung 1994). The same insolvency grounds are prescribed by the Serbian Bankruptcy Law (Serbian Bankruptcy Law, 2009). The German Act on the Stabilisation and Restructuring Framework for Enterprises (StaRUG Unternehmensstabilisierungs- und -restrukturierungsgesetz, 2020), which

transposed Directive (EU) No. 1023/2019 into national law, does not define imminent inability to pay. Nevertheless, Section 30 provides, in the context of applying restructuring instruments, that any insolvency debtor is capable of restructuring. The French Commercial Code, in Book VI, Articles L. 620-1 et seq., provides that, for the purposes of judicial safeguard proceedings (*sauvegarde*), a debtor who is not unable to pay must demonstrate that it is facing difficulties which it is unable to overcome (Art. L. 620-1 Code de commerce). For judicial reorganisation proceedings (*redressement judiciaire*), the debtor must be unable to pay, that is, unable to meet its due obligations with its available assets (Art. L. 631-1 Code de commerce). From a legal perspective, insolvency proceedings are initiated when the debtor ceases to meet its obligations, namely when it no longer has sufficient funds to discharge its debts. A cessation of payments occurs when a company is unable to satisfy its due obligations with its available assets.

In practice, the point at which the likelihood of an insolvency ground arises is often referred to as the "twilight zone" (Coverdale, 2022), since the company has not yet become unable to pay, but signs of crisis or financial distress have become apparent. This stage is distinguished from the "zone of darkness", which begins upon the occurrence of a specific insolvency ground. The term also reflects the necessity for directors to balance the interests of stakeholders, with the particular challenge of preserving the company's business operations and avoiding insolvency.

Following the amendments introduced by the Act on the Further Development of Restructuring and Insolvency Law of 22 December 2020 (*Das Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz*), the German Insolvency Code provides that a debtor is deemed to face imminent inability to pay if it is likely that it will be unable to meet its existing monetary obligations as they fall due. As a general rule, a forecast period of 24 months is applied. However, the mere indication that an obligation falls due within a 24-month period is not in itself sufficient to justify the existence of such a ground (§ 18 Insolvenzordnung). Accordingly, it may be concluded that, under this standard, insolvency is likely if signs emerge in the company's operations indicating that, within that period from their occurrence, the company will be unable to discharge its obligations. The Draft Insolvency Law of North Macedonia provides that preventive restructuring proceedings are conducted in order to enable a debtor who is likely to become unable to pay within one year to undertake, on the basis of a financial restructuring agreement concluded with creditors, measures to restructure its liabilities and other financial restructuring measures necessary to overcome the causes of impending insolvency (Art. 3, par. 1 of the Draft Insolvency Law of the Republic of North Macedonia).

With regard to determining the moment at which directors' special duties arise, a significant decision was delivered by the Supreme Court of the United Kingdom in the *Sequana* case. Although it is no longer an EU Member State, the United Kingdom has implemented Directive (EU) No. 1023/2019 into its national legal framework. The Supreme Court held that directors are required to consider the interests of creditors where the company is approaching insolvency, whether on a balance-sheet basis or due to an inability to meet its due obligations as a result of cash-flow insolvency; where the company is on the verge of bankruptcy; where insolvency proceedings or the appointment of an insolvency practitioner are probable; or where a particular transaction would lead the debtor company into one of those states (UK Supreme Court, *Sequana*, 2022).

As the only non-EU country to have implemented the Directive to date, Ukraine has, through the Law on Amendments to the Code of Ukraine on Bankruptcy Procedures and Certain Other Legislative

Acts concerning the implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council and the introduction of preventive restructuring procedures, provided that, upon the occurrence of signs of insolvency or imminent inability to pay, or where the debtor receives a notice from an auditor or accountant, the debtor's management is obliged, no later than 30 days from the receipt of the relevant information, to notify the founders (members or shareholders) of the debtor, the debtor's equity owner, and other governing bodies competent to resolve such matters. The executive body of the debtor—and, in cases prescribed by law, the founders (members or shareholders) and equity owners—is required to take measures to prevent insolvency, including the conclusion of an out-of-court debt settlement, the initiation of preventive restructuring proceedings, the initiation of financial restructuring proceedings, or the adoption of a decision to file a petition with the commercial court for the opening of insolvency proceedings. Failure to implement, or improper implementation of, these measures gives rise to liability on the part of the persons concerned (Ст. 4.3. Закона про внесення змін до Кодексу України з процедур банкрутства).

Once the moment at which special duties arise has occurred, directors are required to act with regard to the interests of creditors; however, those interests do not take precedence until inability to pay (or an insolvency ground) has materialised. Until that point, directors are required to strike a balanced approach between the interests of shareholders and creditors. In other words, the greater the certainty of a company's inability to pay, the greater the weight that must be accorded to the interests of creditors (Coverdale, 2022).

The Concept of Special Duties

The reason why these duties are considered "special" lies in the fact that they relate to the conduct of directors of a company that is in a particular condition. Specifically, the company remains solvent and continues to operate on a *business-as-usual* basis, yet it is facing signs of crisis or has already encountered financial difficulties that may lead to the occurrence of a specific ground for insolvency. These are statutory duties, as they are established by the Directive and have been incorporated into the national legal systems of EU Member States. From a substantive law perspective, these duties do not belong to insolvency law, since the company remains solvent, whereas insolvency rules may only be applied once an authorised person files a petition and the court establishes the existence of an insolvency ground. On the contrary, these duties clearly fall within the scope of company law. Confusion regarding their substantive legal nature may arise from the fact that, in most EU Member States, they are regulated either by insolvency legislation or by special regulations on preventive restructuring (Đurić, Jovanović et al., 2024, p. 56).

The special duties of directors of companies facing the likelihood of insolvency (Art. 19 EU Directive 2019/1023 on preventive restructuring frameworks) include:

– the duty to take into account the interests of creditors, equity holders, and other stakeholders;

– the duty to take steps to avoid insolvency; and

– the duty to refrain from intentional acts or acts of gross negligence that may jeopardise the sustainability of the business.

Since Directive (EU) 2019/1023 on preventive restructuring frameworks does not provide a more precise definition of the duty of care owed by directors to specific categories of stakeholders, it is necessary

to turn to the provisions of national laws in EU Member States, particularly company law and insolvency law regulations. In the absence of clear statutory provisions and standards of conduct, there is no predetermined set of obligations that directors must comply with, nor a clearly defined range of measures they must undertake when insolvency becomes likely.

With regard to the content of these duties, reference may be made to the legal mechanisms established by the Directive. Accordingly, at the first signs of a business crisis or financial distress, company directors should make use of early warning tools and access to information. Without filing a petition with the court, as well as prior thereto, they may approach the company's creditors and other stakeholders in order to initiate negotiations and reach an agreement aimed at resolving the crisis and implementing restructuring. For the purpose of facilitating negotiations and subsequent restructuring, directors may request the court to allow the debtor, that is, the directors themselves, to remain in control of the company (*debtor in possession*) (Art. 5, EU Directive 2019/1023 on preventive restructuring frameworks), or to order a stay of individual or all enforcement actions in support of negotiations on the restructuring plan (moratorium), provided that such a decision does not prejudice the creditors concerned (Art. 5, EU Directive 2019/1023 on preventive restructuring frameworks). As regards the duty to avoid intentional acts or acts of gross negligence that jeopardise business sustainability, its content should not differ from the general duty of care owed by directors to the company under company law. Directors are required to perform their duties conscientiously, with the care of a prudent business person, and in the reasonable belief that they are acting in the best interests of the stakeholders (Radosavljević, Anđelković et al., 2024, p. 362). These are, therefore, fiduciary duties. The standard of the care of a prudent business person refers to the level of care that would be exercised by a reasonably diligent person possessing the knowledge, skills, and experience that may reasonably be expected of a director of a company (Art. 63 of the Serbian Law on Business Companies). Where directors possess specific knowledge, skills, or experience, these should be taken into account when assessing the required standard of care. Furthermore, directors may rely on information and opinions provided by persons competent in the relevant field, whom they reasonably believe to have acted in good faith. If damage arises from their actions, directors who can demonstrate that they acted with due care should not be held liable for the damage caused to stakeholders.

Thus, the German legislator, in the Act on the Stabilisation and Restructuring Framework for Enterprises, which implemented Directive (EU) 2019/1023 and introduced the preventive restructuring framework into German law, provides that directors are obliged to ensure that preventive restructuring proceedings, where insolvency is likely, are conducted by the debtor with the care of a reasonable and diligent manager and in a manner that safeguards the interests of all creditors (§ 43 StaRUG Unternehmensstabilisierungs- und -restrukturierungsgesetz, 2020), or all creditors as a collective.

The purpose of the special duties of directors of companies facing the likelihood of insolvency derives from the definition of preventive restructuring laid down in the Directive, namely, to enable debtors in financial difficulty to prevent the occurrence of an insolvency ground and to ensure the sustainability of their business (Art. 1(1)(a) EU Directive 2019/1023 on preventive restructuring frameworks), and, where possible, to increase the value of the debtor company.

Primarily, the interest of creditors, especially unsecured or ordinary creditors, lies in the company emerging from the crisis without jeopardising either the satisfaction or the amount of satisfaction of their claims. Secured creditors, naturally, enjoy a more favourable position, as their claims are satisfied from the

value of the collateral. Furthermore, if the company enters preventive restructuring proceedings, it is likely that the amount in which the claims of some or all creditors are satisfied will be reduced. Moreover, by introducing the instrument of imposing a restructuring plan on dissenting creditors (*cross-class cram-down*), a number of creditors may become bound by the plan against their will (Art. 11, EU Directive 2019/1023 on preventive restructuring frameworks). Ultimately, the worst outcome for creditors would be insolvency proceedings, in which they would have to settle for proportional satisfaction in accordance with the statutory order of priority. As regards equity holders, their interest likewise lies in the company overcoming its financial difficulties, while ensuring that the size of their equity participation is not reduced through measures altering the capital structure, either within or outside preventive restructuring proceedings. Finally, with respect to other stakeholders, their interests include the preservation of jobs, the regular payment of taxes and contributions, economic stability, and, in general, the sustainable operation of the company. Given the negative connotations associated with the likelihood of insolvency, the Directive allows for confidential proceedings, in which facilitated negotiation or mediation may contribute to the successful conduct and conclusion of negotiations with creditors (Đurić, Jovanović, 2023, p. 449).

Furthermore, directors are obliged to take steps to avoid insolvency. In accordance with the Directive, directors must implement internal measures within the company, make use of early warning tools and access to information, and initiate negotiations with creditors. They may apply to the court for the opening of preventive restructuring proceedings. In order to facilitate negotiations, directors may apply to the court for the debtor to remain in possession of the company (*debtor in possession*) or for the imposition of a stay on individual or all enforcement actions. For the successful completion of the proceedings, directors should strive to prepare an effective restructuring plan capable of securing the support of a sufficient number of stakeholders and court confirmation, containing measures that are feasible and conducive to achieving the restructuring objectives.

Finally, with respect to avoiding intentional acts that jeopardise business sustainability, it is essential that directors act conscientiously in performing their management and representation duties. Where acts of gross negligence are concerned, in addition to good faith, directors must possess sufficient professional knowledge and experience to manage a company in the relevant sector (Radosavljević, Đurić et al., 2024, p. 23). Both preventive and remedial solutions may include professional training of directors, particularly in micro, small, and medium-sized enterprises (Perry, Shikha, 2025). However, this is often associated with costs that such enterprises cannot bear. Without calling into question managerial powers, and in order to ensure oversight of directors' conduct in situations of likely insolvency, the Directive allows courts to appoint a restructuring practitioner. Such a practitioner may be tasked with: (1) assisting the debtor or creditors in drafting the restructuring plan or negotiating its terms; (2) supervising the debtor's activities during negotiations and reporting to the court or administrative authority; and (3) partially taking over the management of the debtor's assets or business during negotiations (Art. 2(1)(12), EU Directive 2019/1023 on preventive restructuring frameworks). Acts committed with ordinary negligence are not addressed by the provisions of the Directive.

The purpose of the special duties of directors is primarily determined by the state in which the debtor company finds itself and by whether judicial proceedings have been initiated. Accordingly, as long as the company remains within the sphere of consensual decision-making and voluntary arrangements, and as long as its management and assets are not subject to mandatory legal rules, directors retain the

ability to express the company's will and to balance the interests of creditors, equity holders, and other stakeholders. This remains possible in preventive restructuring proceedings as regulated by the Directive. Although such proceedings address the likelihood of insolvency and are often regulated by insolvency legislation, they do not constitute insolvency proceedings. Preventive restructuring encompasses measures aimed at reorganising the debtor's business, which may include changes in the composition, conditions, or structure of the debtor's assets and liabilities, or any other part of the capital structure, such as asset sales or the sale of parts of the business, and, where provided for by national law, the sale of the business as a going concern, as well as any necessary operational changes or a combination thereof (Article 2(1)(1), EU Directive 2019/1023 on preventive restructuring frameworks). In this way, the duties of corporate governance have been significantly expanded.

The duty to exercise special care with regard to the interests of creditors, equity holders, and other stakeholders arises when insolvency becomes likely. This phase precedes the stage at which the debtor is threatened with inability to pay or becomes insolvent or over-indebted. Since directors must then take into account a broader range of interests beyond that of the company alone, they are no longer required to adhere strictly to the *business judgment rule*. Rather, this situation calls for a duty to adopt a balanced approach to competing interests. The interest of the company is no longer the exclusive management standard. However, creditors' interests do not yet dominate; they become paramount only upon the opening of insolvency proceedings. Conversely, the interests of equity holders must also be taken into account, since the company remains solvent, meaning that they retain ownership rights over their equity interest and entitlement to profits.

Nevertheless, the interests of the company, creditors, and equity holders are not necessarily divergent. Where directors of a company facing likely insolvency seek to increase profits and preserve the value of the debtor and its business, they do not act to the detriment of creditors' interests. On the contrary, such conduct aims to preserve the assets from which creditors' claims will ultimately be satisfied. In other words, such conduct is consistent with the "*best-interest-of-creditors*" or "*no creditor worse off*" standard. This standard is explicitly introduced by the Directive in the court's assessment of preventive restructuring plans and in the context of imposing plans on dissenting stakeholders through *cross-class cram-down* (Art. 10 and 11, EU Directive 2019/1023 on preventive restructuring frameworks). It also serves the interests of equity holders, as the company may continue operating profitably without diminishing the value of their equity, while remaining capable of meeting its obligations to creditors. For other stakeholders, such as employees, this may result in the preservation of jobs and wage income, unless measures involving workforce reductions are adopted. For the state, territorial autonomy, or local self-government, this may contribute to economic stability, employment levels, tax revenue, and reduced social expenditure. This approach finds its foundation in the 2019 UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide on Insolvency Law 2019).

However, once restructuring proceedings are initiated, or where insolvency grounds of reorganisation or bankruptcy arise, the interests of the aforementioned stakeholders inevitably become conflicting. Insolvency proceedings, bankruptcy, or reorganisation are conducted primarily for the purpose of satisfying creditors' claims.

Holders of Special Duties

Directive (EU) 2019/1023 on preventive restructuring frameworks refers to directors; however, since its provisions apply to all companies, it may be concluded that it addresses the management of companies more broadly, that is, corporate governance. In this respect, reference may be made to Article 61 of the Serbian Law on Business Companies, which is aligned with EU company law.

Depending on the range of legal forms of companies recognised under national company law, the following persons may be identified as holders of the special duty of care towards creditors, equity holders, and other stakeholders in situations where a company is facing the likelihood of insolvency:

– in a general partnership – the partners;

– in a limited partnership – the general partners;

– in a limited liability company – members holding a significant participation in the company's share capital or a member who exercises control over the company;

– in a joint-stock company – shareholders holding a significant participation in the share capital or a controlling shareholder;

– directors, members of the supervisory board, legal representatives, and holders of procuration; and the liquidator.

This list is not exhaustive, as a company may, through its articles of association, authorise other persons to perform management and representation functions, thereby subjecting them to the duty of care towards stakeholders.

In the above-mentioned *Sequana* case, the Supreme Court of the United Kingdom took the position that directors do not owe duties to individual creditors, nor do they directly discharge their duty to act in the interests of the company towards its members; rather, they are required to consider the interests of creditors as a whole (Sheler, Kaplan et al., 2020).

In practice, compliance with special duties of care towards creditors and other stakeholders—and to a lesser extent towards equity holders—poses a significant challenge, particularly for directors of micro, small, and medium-sized enterprises. On the one hand, such directors often lack the necessary market knowledge and experience, especially in the case of start-up companies, as well as the financial resources required to engage professional advisers. In this context, conscientious conduct by directors does not necessarily ensure the successful fulfilment of the prescribed duty of care. Accordingly, appropriate professional training programmes would be of considerable importance. On the other hand, micro, small, and medium-sized enterprises are characterised by a particularly high rate of business failure (Perry, Shikha, 2025).

Comparative law reveals two principal approaches to the concept of directors' duties. On the one hand, there is the approach characteristic of common law systems. Under this approach, where a company operates on a *business-as-usual* basis, that is, where it remains solvent, directors do not owe a special duty of care to creditors (UK Supreme Court, *Sequana*, 2022). Their duty of care (*due regard*) is primarily owed to the interests of the company they manage. In this regard, the case law in the United States has adopted a particularly firm position, as reflected in the *Gheewalla* doctrine (Del. Supr., *Gheewalla*, 2007). Even when a company encounters financial difficulties, the interests of the company remain paramount.

Thus, illiquidity, understood as a temporary inability to pay, does not alter the content of directors' duties (Sheeler, Kaplan et al., 2020). Only when the insolvency of the company becomes inevitable are directors required to give primary consideration to the interests of the debtor's creditors. From the emergence of the first signs of financial distress or crisis until the filing of a petition for the opening of insolvency proceedings and the establishment of an insolvency ground, directors retain full discretion to conduct the company's affairs in a balanced manner, reconciling the interests of the company with the interests of the categories of stakeholders defined by the Directive and national legislation. Naturally, this presupposes that the financial difficulties were known to the stakeholders and that, due to delayed or defective performance of obligations, the stakeholders—acting as creditors of the duty of care—have suffered damage. Directors must ensure that they are regularly informed, maintain up-to-date information flows, and secure timely knowledge of any reduction in cash flow or available assets to a level at which obligations to creditors can no longer be met. Furthermore, directors are required to keep proper records of their decisions and the reasons underlying them, and it is advisable to seek professional advice when making significant decisions (Coverdale, 2022).

On the other hand, in continental European jurisdictions, that is, systems of the *civil law* tradition—particularly in EU Member States and candidate countries—the implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks has shifted the duty of care towards creditors beyond the confines of insolvency law. The focus has thus moved away from the moment of the opening of insolvency proceedings to an earlier stage preceding insolvency, in which a crisis may still be prevented and, consequently, the likelihood of the occurrence of an insolvency ground avoided.

Creditors of the Special Duties

The Directive identifies the following categories as beneficiaries of the special duties owed by directors of a company facing the likelihood of insolvency:

– the company's creditors;

– equity holders of the company; and

– other stakeholders.

As previously noted, these duties are owed to creditors as a collective rather than to individual creditors. This means that, in the event of a breach of directors' duties, any creditor may seek judicial protection; however, when assessing whether a breach has occurred and whether damage has arisen, the court must take into account the interests of creditors as a whole. Accordingly, a decision of the directors that dissatisfies a particular creditor cannot be declared ineffective if it has not been detrimental to the collective interests of creditors.

With respect to equity holders, the Directive adopts a general approach and does not differentiate among them. This category therefore includes, in partnerships, partners, general partners, and limited partners, and in capital companies, members and shareholders. From this it may be inferred that majority and minority equity holders formally enjoy an equal position. From a legal perspective, this conclusion is valid; however, given that the company remains solvent, it is legitimate for majority equity holders to exercise decisive influence through directors acting as the company's management and legal representatives. Minority equity holders are afforded protection under company law. In practice, however,

the interests of the majority equity holder(s) will predominantly prevail. In micro and small enterprises, and in some cases medium-sized enterprises, the role of director is often performed by the equity holders themselves (Đurić, Jovanović, 2024, p. 139), leaving little scope for the practical application of this duty.

Finally, with regard to other stakeholders, this category encompasses all other persons who may be affected by the company's financial difficulties or its insolvency. This includes employees and the state, as well as territorial autonomy or local self-government units. In the case of multinational companies operating across multiple jurisdictions, and in the context of corporate groups, this category may further include subsidiary and parent companies, as well as their associated creditors and equity holders, all of whom may qualify as stakeholders.

Breach of Directors' Special Duties and Legal Protection

Since the Directive does not prescribe specific mechanisms for the enforcement of protection in the event of a breach of special duties, it is necessary to seek answers in the rules of company law and the law of obligations of the relevant national legal system.

The above-mentioned German Act on the Stabilisation and Restructuring Framework for Enterprises provides that, where directors breach their statutory duty of care towards creditors as a whole, they give rise to an obligation of the debtor company to compensate creditors for the damage suffered, up to the amount of the loss incurred. Directors may be relieved of liability if they prove that they are not responsible for the breach of duty. Any decision taken by directors on behalf of and for the account of the debtor company that infringes creditors' interests—such as a waiver of debt or a settlement relating to claims—shall be ineffective to the extent necessary to satisfy creditors' claims. However, this rule does not apply where the company itself was the party obliged to pay compensation and concluded a settlement with its creditors for the purpose of preventing insolvency proceedings in respect of its assets. Likewise, the rule does not apply where the obligation to pay compensation is governed by a reorganisation plan or where an insolvency administrator concludes a settlement while acting on behalf of the creditors entitled to compensation. With regard to the protection of creditors' rights, claims for damages arising from a breach of the duty of care towards creditors' interests are subject to a limitation period of five years, or ten years where, at the time of the breach, the company was listed on a stock exchange (§43 StaRUG Unternehmensstabilisierungs- und -restrukturierungsgesetz, 2020).

What constitutes a breach of the special duties of directors of a company facing the likelihood of insolvency? In general terms, a breach may be identified where directors act without the care of a reasonable and diligent manager (Vasiljević, 2013, p. 194) and without due regard to the protection of the interests of all creditors or other categories of stakeholders identified by the Directive and national law. Further breaches may consist in the failure to take measures to prevent insolvency, particularly where business reports clearly indicate a state of crisis and insolvency is likely. Directors must, in particular, refrain from actions that give rise to conflicts of interest (Lepetić, 2015, p. 241). Other acts jeopardising business sustainability, committed intentionally or as a result of gross negligence, may include the absence of, or failure to maintain, adequate accounting records; the failure to prepare interim balance sheets despite imminent over-indebtedness; delays in filing for preventive restructuring or in initiating insolvency proceedings in cases of over-indebtedness; investing a substantial portion of the debtor company's assets in highly speculative investments; withdrawing assets from the company without providing adequate

consideration; obtaining bank loans or credit by using falsified balance sheets or false information; and the failure to pay social security contributions. In the *Sequana* case, the Supreme Court of the United Kingdom adopted a position contrary to that of the Court of Appeal, holding that where directors take a decision that is unlawful or constitutes a breach of the duty of care towards creditors, such a decision cannot be approved or ratified by the company's members, as this would undermine the company's ability to pay or cause harm to creditors. In the case at hand, the company was operating in the ordinary course of business and distributed profits in the form of dividends from available funds. Thus, even where a company is solvent, directors may, through their actions or omissions, breach these special duties. Consequently, the duty of care towards creditors in situations of likely insolvency constitutes an additional obligation, applicable both when the company is threatened with such inability to pay and when it continues to operate normally and has distributable profits (Coverdale, 2022).

Although this concerns the breach of serious statutory duties of directors, the Directive primarily seeks to provide a second chance to conscientious but unsuccessful debtors through restructuring measures and the preservation of business operations. Particular emphasis is placed on supporting micro, small, and medium-sized enterprises, which typically lack professional management and where the role of director is often performed by the equity holders themselves (Mokal, Davis et al., 2018, p. 68-69). Despite acting in good faith, such directors frequently fail due to a lack of market experience and the burden of financial distress, which is when breaches of special duties towards creditors and other stakeholders most commonly occur. Consequently, breaches of duties towards equity holders tend to become particularly relevant in the context of large corporations.

The protection of creditors, equity holders, and other stakeholders may be pursued through different legal avenues, depending on the category of persons in relation to whom the directors have breached their special duties. Thus, the protection of the interests of creditors and other stakeholders may be sought through contractual claims for damages and through the avoidance of the debtor's legal acts (*actio Pauliana*). The protection of equity holders is further afforded through company law actions for the breach of special duties, including individual actions. In addition, one or more equity holders may bring a derivative action in their own name but on behalf of the company. Beyond compensation for damages or the declaration of decisions or legal transactions as ineffective vis-à-vis the protected category of persons, additional measures may include the disqualification of directors, the appointment of an additional director, or the removal of directors.

Conclusion

By establishing special duties of directors in situations where a company is likely to face insolvency, the Directive has taken an important step towards disciplining corporate management in times of financial distress. These duties are aimed at protecting creditors, equity holders, and other stakeholders, preventing insolvency, and deterring intentional acts or acts of gross negligence that may jeopardise the sustainability of the company's business. A significant number of EU Member States have merely transposed the provisions of the Directive verbatim, without undertaking a more detailed regulation of these duties in national legislation. As a result, the concept and content of these duties, the precise moment of their emergence—namely, the notion of the likelihood of insolvency—and the scope of other stakeholders have often remained insufficiently defined.

The Directive itself only indirectly delineates the framework within which directors are expected to act. Upon becoming aware of the first signs of a business crisis, directors should resort to early warning tools and access to information, and engage with creditors in negotiations aimed at restructuring. For this purpose, upon the request of the company, the court may allow the debtor to remain in possession or order a stay of enforcement actions, in order to support negotiations and further measures directed at reorganising the debtor's business. Such measures may include changes in the composition, conditions, or structure of the debtor's assets and liabilities or other parts of the capital structure, the sale of assets or parts of the business or the business as a going concern, as well as other operational changes or a combination thereof.

In the absence of more specific national provisions, judicial practice will play a crucial role. Shortly before its withdrawal from the European Union, case law in the United Kingdom provided an important interpretation of directors' duties in situations of likely insolvency. In addition, the German legislator, by implementing the Directive through the Act on the Stabilisation and Restructuring Framework for Enterprises, offered further clarification regarding the framework within which courts should interpret these duties, particularly with respect to the timing of their emergence and their substantive content.

While a company remains solvent, breaches of these duties are not precluded. Given that insolvency grounds are typically identified at a relatively late stage, it is all the more important for companies to appoint directors who conscientiously and professionally monitor business operations and potential signs of crisis. In this regard, specialised training or the engagement of professional advisers may prove beneficial. However, this poses a particular challenge for micro, small, and medium-sized enterprises, which often lack the necessary financial resources.

With the emergence of financial difficulties, directors no longer owe duties solely to the company, but also to creditors and other stakeholders as a collective. As long as the company remains solvent, directors retain the authority to adopt a balanced approach towards the interests of the company, creditors, equity holders, and other stakeholders. By breaching these duties, directors cause harm not only to the interests of creditors and other stakeholders, but also to the company itself, which becomes liable for compensation of such damage.

Serbian legislation provides a solid starting point for the recognition of special duties of directors within the provisions of the Law on Business Companies. However, their regulation *de lege ferenda* will likely be addressed either through a dedicated law on preventive restructuring or through amendments to the Law on Business Companies and the Law on Bankruptcy.

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Закон про внесення змін до Кодексу України з процедур банкрутства та деяких інших законодавчих актів України щодо імплементації Директиви Європейського парламенту та Ради Європейського Союзу 2019/1023 та запровадження процедур превентивної реструктуризації, от 19.09.2024 № 3985 – IX [Law of Ukraine amending the Bankruptcy Procedures Code and other legislative acts implementing Directive (EU) 2019/1023 and introducing preventive restructuring procedures] (19 September 2024, No. 3985-IX)

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Dužnosti direktora privrednih društava suočenih s verovatnoćom stečaja

Đuro M. Đurić[1], Vladimir Jovanović[2], Stevo Škrbić[3]

[1]Fakultet za poslovne studije i pravo
Univerzitet Union Nikola Tesla Beograd

[2]Pravni fakultet za privredu i pravosuđe
Univerzitet Privredna akademija Novi Sad

[3]Fakultet za poslovne studije i pravo
Univerzitet Union Nikola Tesla Beograd

Sažetak

Po usvajanju Direktive EU br. 1023/2019 o okvirima preventivnog restrukturiranja i njenim sprovođenjem kroz nacionalna zakonodavstva država članica, kao i van njih, uvedene su za direktore privrednih društava suočenih sa verovatnoćom stečaja posebne zakonske dužnosti. U redovnom poslovanju, direktori imaju posebne dužnosti prema privrednom društvu i vlasnicima kapitala. Donedavno, tek nastupanjem stečajnog razloga rađala se posebna dužnost prema poveriocima društva. Tako se trenutak nastanka posebnih dužnosti prema poveriocima pomera u stanje koje prethodi stečaju i proširuje krug dužnosti odgovorne korporativne uprave. U navedenoj situaciji, direktori privrednog društva dužnika duguju pre svega posebnu pažnju interesima poverilaca, vlasnika kapitala i drugih zainteresovanih lica. Dalje, oni su dužni da preduzmu korake kako bi se sprečio stečaj društva. Najzad, oni su dužni da izbegavaju radnje kojima namerno ili krajnjom nepažnjom ugrožavaju održivost poslovanja društva. Te dužnosti predstavljaju minimum postavljen odredbama Direktive, tako da države članice mogu uvesti širi krug dužnosti. Ipak, Direktiva nije utvrdila šta predstavlja verovatnoća stečaja niti dužnost pažnje. Takođe, nije utvrđeno koja su to druga zainteresovana lica, prema kojima direktori imaju dužnost pažnje. Time se otvaraju brojna pitanja, poput onih kada tačno nastaju posebne dužnosti pažnje, u čemu se sastoji ta dužnost odnosno njena povreda, koja su sve lica poverioci takve dužnosti itd. Cilj ovog rada je da analizira nove, posebne dužnosti direktora, način i obim njihovog uvođenja u nacionalna zakonodavstva i posledice primene u praksi. U radu se polazi od normativnog metoda, zatim se uporednopravnim metodom sagledava sprovođenje odredbi Direktive, a kroz studije slučaja se pruža uvid u praktičnu primenu.

Ključne reči: dužnosti direktora, privredno društvo, korporativna uprava, verovatnoća stečaja, EU.