



Anti-Crisis Shield – the most important changes in bankruptcy and restructuring law

Who is not covered by Shield?

- » The provisions of the Anti-Crisis Shield do not apply to businesses which:
 - > have been declared bankrupt; or
 - > are the subject of ongoing restructuring proceedings
- » The support granted under Shield 2.0 is suspended for businesses:
 - > which have filed for bankruptcy,
 - > in respect of whom a creditor has filed for a declaration of bankruptcy,
 - > which have applied for the opening of any of the available restructuring proceedings,
 - > in respect of whom a creditor has applied for the opening of remediation proceedings,
- » This means that **all entities which fulfil any of the above criteria are not eligible to receive any support under the Anti-Crisis Shield**. This also applies to entities against which creditors have filed applications (for bankruptcy or remediation). This appears to be controversial because applications for a declaration of bankruptcy submitted by creditors are frequently of a quasi-enforcement nature, or are intended to exert pressure on the debtor to make payments, and they are often submitted without any actual grounds to declare bankruptcy.

Suspension of the deadline to file an application for the declaration of bankruptcy

- » This applies to companies where the grounds for a declaration of bankruptcy occurred during the state of epidemic threat or state of epidemic declared in connection with COVID-19, and the state of insolvency was caused by COVID-19. In our opinion, these conditions are imprecise (it may be difficult to prove exactly when the grounds for declaring bankruptcy occurred) and too narrow (typically the grounds for bankruptcy will not arise “because of” COVID-19, but rather as a result of restrictions and instruments introduced in connection with COVID-19).
- » Admittedly, the legislature has proposed a presumption that, if the state of insolvency arose during either the state of epidemic threat or the state of epidemic declared in connection with COVID-19, it was caused by COVID-19. However, it should be noted that this is a rebuttable presumption, so it seems entirely reasonable to clarify the above provision.
- » **“The time limit to submit an application for a declaration of bankruptcy, [...] does not begin, and where it has begun, it is interrupted. Following this period, this time limit begins anew.”** This means that, once the states of epidemic threat or the state of epidemic is revoked, entrepreneurs who have become insolvent as a result of COVID-19 will have **30 days** to file an application for a declaration of bankruptcy. At the same time, no procedures or instruments have been simplified to relieve the insolvency departments of Polish courts. In our experience, the process of preparing a bankruptcy application requires considerable work on the debtor’s part, including the debtor’s finance and accounting departments, and is time-consuming. Moreover, even before the declaration of the state of epidemic threat, bankruptcy proceedings in Poland took far too long and tended to be protracted. **Without systemic changes aimed at simplifying and accelerating bankruptcy proceedings, including at the filing stage, bankruptcy courts will be overloaded with bankruptcy applications and will suffer backlogs for many months, and entrepreneurs**

who have become insolvent as a result of the state of epidemic will likely have to wait for months for bankruptcy proceedings to begin.

- However, at the same time the legislature does not propose to block the possibility of filing an application for declaration of bankruptcy during the states of epidemic threat or epidemic declared in connection with COVID-19. **Therefore, it seems that preparing an application for declaration of bankruptcy should not be delayed until after the states of epidemic threat or epidemic have been revoked**, especially if the management board is aware that losses suffered as a result of COVID-19 will not be recoverable within a short period time (30 days) after the end of the states of epidemic threat or epidemic.
- At the same time, no decision has been taken (as adopted in Spain, for example) to suspend the ability of a debtor's creditors to file applications to have it declared bankrupt, either during the state of epidemic threat or the state of epidemic in connection with COVID-19, or for an appropriate period after they are revoked. This means that board members should continue to monitor the company's overall financial situation and its situation with regards to individual creditors, as otherwise an application filed by a creditor may frustrate their recovery plans and prevent them from benefiting from the measure provided for in Anti-Crisis Shield, including those postponing the deadlines for filing an application for declaration of bankruptcy. It is also worth noting that the support provided by Anti-Crisis Shield is not available to, among others, businesses against whom a creditor has already filed an application for declaration of bankruptcy, which, in extreme cases, may lead to the abuse of this provision in hostile relations between contractors.

Extension of other deadlines related to filing an application for the declaration of bankruptcy

- Anti-Crisis Shield addresses the issue of the liability of management board members for failing to file a bankruptcy application within the statutory deadline very briefly. The legislature merely points out that the *"time limits, for the calculation of which the filing date of an application for declaration of bankruptcy is relevant, are extended by the number of days between the filing date of an application for declaration of bankruptcy and the last day on which said application should be filed in accordance with Art. 21(1) or, respectively, Article 21(2a) of the Bankruptcy Law, without taking into account [particular provisions of Shield]"*. The above regulation appears to refer, among others, to the deadlines concerning the recognition of the debtor's legal actions performed prior to the bankruptcy as ineffective, and, indirectly, to the issue of the liability of management board members for the failure to file an application for declaration of bankruptcy on time.
- This provision is relatively convoluted, but it most likely should be understood to mean that, for example, as regards the liability of management board members for the late submission of an application for declaration of bankruptcy, such a deadline will be extended by the period during which it was objectively impossible to submit said application on account of the state of epidemic. However, the best solution would undoubtedly have been to state this in clear and unambiguous terms, since the current proposal does not do so.

Expansion of the catalogue of urgent cases

- Shield 3.0 expands the catalogue of urgent cases to include not only cases for the consideration of a restructuring petition, but also those matters conducted following the commencement of restructuring proceedings, as well as cases for the consideration of a petition for declaration or bankruptcy and matters conducted following a declaration of bankruptcy.
- This amendment is made concurrently with other amendments aimed at resuming the operation of the courts, and to resume the running of court deadlines. At the same time, bankruptcy and restructuring courts continue to be significantly overburdened, which may in practice mean that the inclusion of the abovementioned matters in the catalogue of urgent cases may not significantly accelerate their consideration.

WKB's experts are at your disposal.

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Recommendations

- ▶▶ Ongoing monitoring of the company's financial situation;
- ▶▶ Negotiating agreements with key creditors (extending payment deadlines, etc.);
- ▶▶ Considering one of the court-based restructuring procedures;
- ▶▶ Not delaying the preparation of an application for declaration of bankruptcy until the last possible moment.